

# WASHINGTON STATE COURT OF APPEALS DIVISION THREE

## CASE SUMMARIES FOR ORAL ARGUMENT

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The following summaries are drawn from briefs and lower court judgments. The summaries have not been reviewed for accuracy by the judges and are intended to provide a general idea of facts and issues presented in the cases. The summaries should not be considered official court documents. Facts and issues presented in these summaries should be checked for accuracy against records and briefs, available from the Court, which provide more specific information.

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**Date of Hearing: Tuesday, March 19, 2013**  
**Location: Spokane, 500 N. Cedar**

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**9:00 a.m.**

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**1) No.: 29920-1-III**

**Case Name: In re the Detention of Jason Muns**

**County: Benton**

**Case Summary:** Jason Muns pleaded guilty to first degree child molestation in 1998. In 2011, a jury found that he is a sexually violent predator (SVP) subject to civil commitment under RCW 71.09.060(1). The statute excludes evidence relevant to availability of treatment options or placement conditions under the community protection program (RCW 71A.12.230) for sex offenders, such as Muns, who also have developmental disabilities. At Muns's SVP trial, the trial court declined to hold a hearing under *Frye v. United States*, 293 F. 1013 (1923), before admitting into evidence the dynamic risk assessment questionnaire used and developed by the State's expert witness to predict Muns's chances of re-offending. Muns challenges this ruling on appeal. He also contends that RCW 71.09.060(1)'s exclusion of evidence relevant to treatment for developmentally disabled sex offenders violates his constitutional rights to equal protection and due process.

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2) **No.: 30380-2-III**

**Case Name: Gregory Rose, et ux v. FMS, Inc., et al**

**County: Stevens**

**Case Summary:** Attorney Robert W. Mitchell, acting pro bono, represented Catherine and Gregory Rose in their lawsuit against FMS, Inc. d/b/a/ Oklahoma FMS, Inc. (a collection agency). The parties contested whether Roses' delinquent account was in default within the meaning of the Washington Collection Agency Act (CAA), chapter 19.16 RCW, or the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., and whether a declaration of default was necessary to trigger application of the CAA. The court determined the Roses were not in default and that the above statutes did not apply. The court summarily dismissed their claims. The court sanctioned Mitchell under CR 11(a) (insufficient inquiry before filing suit), CR 26(g) (discovery violations), and CR 56(g) (affidavits made in bad faith) for \$70,546.44 in attorney fees and costs incurred by FMS. Mitchell appeals.

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3) **No.: 30799-9-III**

**Case Name: Estate of Richard Oberdorfer**

**County: Spokane**

**Case Summary:** Robin Merrill discovered that his late wife Elizabeth's will referenced an inheritance from her father, Richard Oberdorfer, who died several months after Elizabeth. Merrill then informed Oberdorfer's estate of his potential claim to the Oberdorfer Living Trust, of which Elizabeth was a named beneficiary. Asserting that Elizabeth's share had lapsed upon her death, the estate personal representatives and co-trustees (Estate) filed a petition for determination of trust beneficiaries under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Merrill filed an answer that challenged the Estate's proposed trust distribution. Court-ordered mediation at Merrill's request was unsuccessful. The Estate moved for summary judgment. The court granted the motion, and awarded the Estate attorney fees and costs under RCW 11.96A.150(1). Merrill appeals the attorney fee award.

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4) **No.: 30523-6-III**

**Case Name: Dani Fergen, et al v. John D. Sestero, M.D.**

**County: Spokane**

**Case Summary:** In 2004, Paul Fergen discovered a lump in his ankle that Dr. John Sestero tentatively diagnosed as a benign cyst, with negative x-ray results. Pathologists later diagnosed a rare aggressive cancer that originated in Fergen's ankle and metastasized to vital areas of his body. He died in 2007. Fergen's wife Dani sued Dr. Sestero on behalf of his estate and their minor children. Dr. Sestero testified at trial that he considered malignancy in deciding that the lump was most likely a benign cyst. The court gave an "exercise of judgment" instruction over the plaintiff's objection. The jury returned a defense verdict. Ms. Fergen appeals.

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**11:00 a.m.**

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5) **No.: 29238-0-III**

**Case Name: State of Washington v. Armondo Hernandez Gonzalez**

**County: Yakima**

**Case Summary:** Armondo Gonzalez was charged with second degree murder and first degree assault (both while armed with a firearm), and second degree unlawful possession of a firearm, after his gunshots killed a rival gang member and wounded another man. Mid-trial, the court declined a defense request to excuse a juror who told the court he feared for his personal safety for serving on the jury. The court instructed the jury that it must unanimously answer either "yes" or "no" to reach a verdict when deciding whether Gonzalez was armed with a firearm when committing the crimes. Gonzalez was convicted as charged. His sentence includes firearm enhancements. He appeals. The State cross-appeals, contending lesser included manslaughter and second degree assault instructions should not be given in the event of a retrial.

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6) **No.: 30575-9-III**

**Case Name: State of Washington v. Robert Todd Walker**

**County: Benton**

**Case Summary:** A fire broke out in the bedroom at Joe Leckenby's residence while he was present. Robert Walker was seen jumping in and out the bedroom window and throwing something outside before driving away in a vehicle. Investigators found methamphetamine lab evidence in the bedroom and on containers close by in the yard. Walker was charged with manufacturing a controlled substance. An additional bail jumping charge was dropped on the day of trial. Crime lab reports of positive methamphetamine results were admitted without objection, although the test analyst was absent from trial. A county clerk employee testified that Walker failed to appear for three different court dates. The court instructed the jury on accomplice liability over defense objection. The court also answered juror inquiries outside Walker's presence and without conferring with counsel. The jury found Walker guilty as charged. The judge imposed an exceptional sentence by running it consecutive with convictions in another case. Walker appeals.

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7) **No.: 30666-6-III**

**Case Name: City of Yakima v. Julio Mendoza Godoy**

**County: Yakima**

**Case Summary:** Police found Julio Mendoza Godoy intoxicated while sitting in a parked car with its keys in the ignition and the engine running. He was charged in municipal court with being in physical control of a vehicle while under the influence of intoxicating liquor, in violation of RCW 46.61.504(1). It is an affirmative defense to the crime that the person moved the vehicle safely off the roadway prior to police pursuit. RCW 46.61.504(2). The court refused to give Mendoza Godoy's proposed "safely off the roadway" instruction because there was no evidence that he was the person who moved the car. He was convicted as charged. The superior court affirmed the conviction. This court granted discretionary review of the trial court's refusal to instruct on the affirmative defense.

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8) **No.: 30340-3-III**

**Case Name: State of Washington v. Jose Luis Nieves**

**County: Grant**

**Case Summary:** Witnesses reported that Jose Nieves shot at a patrol car driven by an on-duty Soap Lake police officer. Following the shooting, Nieves threatened at gunpoint to harm several witnesses if they reported him. The State charged him with first degree assault, intimidating a public servant, drive-by shooting, unlawful possession of a firearm, three counts of intimidating a witness, five firearm enhancements, a law enforcement victim aggravator, and a special allegation of gang membership. The jury rejected Nieves's alibi defense and found him guilty on all counts, enhancements, and aggravators. The court imposed a 500-month exceptional sentence. Nieves appeals.

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