Supreme Court No. 94346-0
(Court of Appeals No. 74422-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Petitioner Michael Murray is a brain-injured man who exposed himself to adult women. Expert testimony established that Mr. Murray's dementia impairs his ability to know such immodest behavior can cause affront or alarm. The trial judge accepted that "there is some medical basis for what Mr. Murray's problems are," but imposed an exceptional prison sentence anyway.

Pursuant to RAP 13.4(b)(1), (2) and (3) Mr. Murray asks this Court to accept review of the March 6, 2017 opinion of the Court of Appeals in State v. Murray, 74422-4-I. That decision denied Mr. Murray's challenges to the exceptional sentence imposed against him.

B. ISSUES PRESENTED FOR REVIEW

1. Indecent exposure requires proof of an open and obscene – meaning lewd or lascivious – exposure of one's person. Is indecent exposure an inherently sexual offense, and if so, should review be granted to remind the lower courts that a sentence cannot be aggravated because of facts that inhere in the offense?

2. "[D]isdain for the law," is the "gravamen" of the rapid recidivism aggravating factor. State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010). Following his release from jail, Mr. Murray volunteered for mental health services because he did not want to

reoffend. An expert witness explained that Mr. Murray's medical condition takes away from his ability to comport his behavior to the law.

Should review be granted to guide the lower courts on how to address the "rapid recidivism" aggravator, in particular in a case such as this one, where the allegedly "rapid" recidivist presented a viable diminished capacity defense?

3. The vagueness doctrine applies to sentencing enhancements that alter the permissible mandatory range. Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). The Court of Appeals' decision relies on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), in concluding "rapid recidivism factor is not subject to a void for vagueness challenge." Op. at 12.

Should review be granted to address this apparent constitutional conflict?

4. Mr. Murray faced a standard sentence range of 0-12 months, but was ordered to serve 36 months in prison. The Court of Appeals, like the trial court, acknowledged that his "brain injury very well could have played a role in his lack of inhibition." Op. at 13.

Should review be granted to correct the lower court's conclusion that this sentence was not clearly excessive?

C. STATEMENT OF THE CASE

1. Stroke and ensuing brain damage

On July 3, 2008, first responders rushed Michael Murray to an emergency room. Ex. 12 at 2; RP 500. He was walking irregularly, slurring his speech, and had left body weakness. A CT scan of his brain showed a large hemorrhage. He had suffered a serious stroke. The ensuring brain injury caused problems with concentration, memory, initiation, and executive functioning. Id.

In January of 2015, forensic psychologist Dr. Craig Beaver interviewed and examined Mr. Murray's neuropsychological functioning. Ex. 12; RP 496-99. Mr. Murray reported that he has had a hard time focusing, difficulty with his speech, memory, and "feels that he has poor inhibitory control." Id. at 4. Since the stroke, Mr. Murray "finds himself doing things before he realizes it," without always understanding why things occur. He found this distressing and wanted to address it. Id.

Neurocognitive testing confirmed problems including "obvious inhibitory control issues." Id. at 5-7 (Dr. Beaver diagnosing major vascular neurocognitive disorder, with behavioral disturbance).

"[A]nterior cerebrovascular disease, such as demonstrated by Mr. Murray in his head radiological studies, typically results in individuals having decreased inhibitory control." Id. at 7. The frontal cortex of the

brain that was injured in Mr. Murray, manages "our reasoning, judgment, [and] inhibitory control." RP 502. Mr. Murray's inhibitory control problems were directly caused by the brain damage he suffered: "It's directly related to the dementia that he has involving the frontal cortex." RP 514 (emphasis added). This damage was a "significant contributing factor to the behavioral dyscontrol [Mr. Murray] has exhibited." Id. at 8 (Dr. Beaver referring to 2015 indecent exposure charges).

Dr. Beaver suggested that beta blockers, anti-seizure medication, and anti-depressants could be used to slow impulsive responses, reduce sexual arousal, and also decrease "difficulties with dysregulation or dyscontrol." Id.; RP 516-17. The State presented no contrary expert testimony.

Mr. Murray left jail on February 17, 2015. RP 476-77. A week later he went to the Sound Mental Health clinic for help. Ex. 13 at 3. On March 2, 2015, he returned seeking follow-up care. Ex. 14 at 1 ("Sound Mental health Psych Evaluation"). He provided Dr. Beaver's report and asked for assistance: "I need all the help I can get." Id.; RP 518. Despite Dr. Beaver's recommendations, Mr. Murray had no medications prescribed to him upon his release from custody. Ex. 14 at 2.

Mr. Murray was fearful of "doing dumb things," meaning, exposing himself. Id. He said that he was "trying very hard to 'do the right

things,'" but has periods of depression and hopelessness lasting days at a time. Id. He said he had no plans to reoffend, but understood from Dr. Beaver's evaluation that his 2008 stroke contributed to his acts of exhibitionism. Id.

Sound Mental Health clinicians noted Dr. Beaver's findings but only diagnosed Mr. Murray with a depressive disorder. Id. at 3. He was given a prescription for an anti-depressant, Mr. Murray agreed to call if he were to develop suicidal ideation and he agreed to come back to the clinic in one month. Id.

On March 4, 2015, he exposed himself to a woman working in an often-visited 24th floor of a downtown building. RP 371, 378, 382, 390-94, 411. When she first saw him in the area, he looked "confused" and had to be redirected to the right bathroom. RP 386.

On March 5, 2015, Mr. Murray exposed his penis in an elevator of a different downtown office building. He was not touching himself; his hands were pulled up inside his sleeves but his penis was just out. RP 452-453. He said nothing, he seemed to be looking straight ahead, and he had no expression on his face. RP 454, 460, 461.

On March 9, 2015, a hair stylist in another downtown building called the police when she saw Mr. Murray masturbating in the hallway. RP 332, 342. (When she saw him earlier, "he just looked confused to

[her]." RP 335-6.) "He had his fly down," and she thought he may have been lost. RP 336. The man had stared at her and was expressionless, "just like stuck." RP 339-40; 424.

There was "a look of surprise" on Mr. Murray's face when the hair stylist and her customer reacted. RP 345, 354, 427. There was "a look of shock on his face" when he was confronted. RP 347.

2. The charges

The State filed three counts of felony indecent exposure, alleging Mr. Murray was in 2010 convicted of indecent liberties, a sex offense under RCW 9A.88.010. CP 3, 17-18. Citing RCW 9.94A.835, the State further alleged that Mr. Murray committed the offenses with sexual motivation. Citing RCW 9.94A.535(3)(t), the State further alleged that the crimes involved the "rapid recidivism" aggravating factor.

3. Earlier incidents admitted under ER 404(b)

Over objection, the trial court gave the State permission to use 2009, 2012, and 2013 incidents of indecent exposure under ER 404(b) to show that Mr. Murray acted with knowledge that his 2015 conduct was likely to cause reasonable affront or alarm and also as evidence that one of the purposes of him committing the 2015 crimes was sexual gratification. RP 4-30, 38-46, 84-93, 609; CP 74.

In the 2009 incident, occurring on a bus, Mr. Murray, told the police he did not know why the woman was upset and he did not know why "he had did it today." RP 575 (sic). In the 2012 incident, Mr. Murray had exposed himself in a public benefits office. RP 631-40. He told the police this was "stupidity." RP 469. In 2013, he exposed himself in a homeless shelter. RP 555-57. He was apologetic. RP 561, 581 ("I'm sorry and it shouldn't have happened.")

4. Expert testimony in support of diminished capacity defense

Dr. Beaver saw Mr. Murray again after his re-arrest, in September of 2015. Ex. 13 ("Forensic Mental Health Examination." He reviewed more records and did more testing. Ex. 13 at 1-2; RP 515-18.

Mr. Murray "[s]till had the inhibitory control issues" and still evidenced a major neurocognitive disorder as before. Id. at 6; RP 518-19. In this follow-up report, Dr. Beaver elaborated on the interplay between Mr. Murray's brain damage and criminal culpability. He testified that since the 2008 stroke, Mr. Murray's "ability to inhibit [exposing] behaviors is significantly diminished." RP 520-21.

Dr. Beaver reported that at the time of the March 2015 events, "Mr. Murray reasonably suffered from a cerebrovascular dementia." Id. This meant, that at the time of the charged offenses, "He has impaired

reasoning and judgment, impaired memory, and of particular note, impaired inhibitory control." Id.

In his report, Dr. Beaver explained:

> As a consequence of Mr. Murray's neurological status at and around the time the events took place, based upon current information, he lacked the capacity of "knowing" his conduct (exposing himself) at that moment in time would likely cause reasonable affront or alarm. His decreased capacity for inhibitory control results in him potentially engaging in a behavior without having a full appreciation, or knowing, of how such conduct would reasonably affront another.

Ex. 13 at 8.

His in-court testimony was largely the same:

> [W]ith his inhibitory control, it's my opinion that at the time that he engaged in those behaviors he was not able to reflect and consciously know what the impact of the behaviors was going to be until after the behaviors had occurred because **he doesn't have that inhibitive or reflective control that we would expect most normal people to have, and he has lost that ability related to his dementia and his cerebral vascular disease.**

RP 522 (emphasis added).

5. Sentenced to prison

The jury was asked to decide guilt on the three counts of felony indecent exposure and whether the aggravating circumstances of sexual motivation and/or rapid recidivism applied. CP 77-79, 83-87. The rapid recidivism question was framed as follows: "Whether the defendant's [sic] committed the crime shortly after being released from incarceration." CP

85-87. The jury received this definition of sexual motivation: "Sexual motivation means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RP 88.

The diminished capacity instruction did not reach either of the aggravating circumstances. CP 89 (jury instructed "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form knowledge.")

The jury declared Mr. Murray guilty of three counts of felony indecent exposure and found that both the rapid recidivism and sexual motivation aggravating factors applied to each. CP 59-64.

At his sentencing, Mr. Murray apologized for what he had done and begged for help as he had done earlier with the Sound Mental Health providers. 12/10/15 RP11 ("I need counseling or something, I don't need to just be locked up. Locked up's the worst thing because I don't get help being locked up.")

The trial court acknowledged the standard sentencing range for each offense was 0-12 months, accepted that "there is some medical basis for what Mr. Murray's problems are," but sent him to serve three years in prison anyway. 12/10/15 RP11; CP 97-99.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court Should Grant Review To Confirm That Indecent Exposure Is An Inherently Sexual Offense To Which The "Sexual Motivation" Aggravator Cannot Apply.

"[A]n exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted." State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999); State v. Saltz, 137 Wn. App. 576, 583, 154 P.3d 282 (2007); State v. Butler, 75 Wn. App. 47, 53, 876 P.2d 481 (1994).

"Sexual motivation" is a statutory aggravating factor that may support an exceptional sentence. RCW 9.94A.390(2)(f). "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47). "The purpose of 'sexual motivation' as an aggravating factor is to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit the same crimes without sexual motivation." State v. Thomas, 138 Wn.2d at 630, citing State v. Halstien, 122 Wn.2d 109, 124, 857 P.2d 270 (1993).

By statute, the sexual motivation enhancement cannot apply to enumerated sex offenses. The "sexual motivation"

allegation "shall not be applied to sex offenses as defined in RCW 9.94A.030." Id. at 632–33, quoting to RCW 9.94A.127(2)[1] (emphasis in opinion).

Eliminating sex offenses from the class of crimes to which the sexual motivation sentencing enhancement could apply makes sense. Sex offenses are motivated, at least in part, by sexual desire. As such, sexual motivation is already factored into the sex offense sentence. If the enhancement applied, a defendant's sentence would be twice impacted by the same sexual intent. This is prohibited. "[A]n exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted." 138 Wn.2d at 636

On appeal, Mr. Murray argued that the sentencing court's decision to exceed the standard range because of the jury's finding that Mr. Murray's offenses were "sexually motivated" was improper. CP 97; AOB at 20-24; ARB at 3-5. The Court of Appeals disagreed with his assertion that indecent exposure is inherently a sexual offense. Op. at 5-8.

The decision is inconsistent with common law concepts of indecency and obscenity. While neither the statute nor the WPIC's define the term obscene, this Court has made clear that "indecent

[1] RCW 9.94A.835 is the current version of the sexual motivation allegation statutory provision.

or obscene exposure of his person" means "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966) (emphasis added).

When coupled with the phrase "exposure of the person," there is no ambiguity as to what the terms indecent and obscene mean, as they are "common words, of common usage, and enjoy a commonly recognized meaning among people of common intelligence." Id.

The commonly recognized meaning of obscenity of course includes a reference to sexuality, or offensive sexuality to be precise. Obscene material are "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); accord RCW 7.48A.010(2). As the offense of indecent exposure requires proof of an obscene exposure, it follows that indecent exposure is an inherently sexual offense.

The Court of Appeals decision is at odds with the published opinion in State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010). Op. at 7-8. In Steen, the Court of Appeals found that instructing a jury deciding an indecent exposure charge that: "'Obscene exposure' means the exposure of the sexual or intimate parts of one's body for a sexual purpose" was "a neutral and accurate statement of the law." Id. (emphasis added).

While Steen is "not controlling," because the precise issue raised by Mr. Murray was not decided there, the two cases cannot be reconciled as they stand. Op. at 8.

This Court should grant review and instruct the lower courts that sexual motivation cannot be used to aggravate an indecent exposure sentence, because the offense is inherently a sexual one. Granting review will thus eliminate the conflict between: the instant decision and: a) State v. Steen, b) common law defining obscenity, and c) the line of cases holding that facts which inhere in an offense cannot justify increased punishment.

2. This Court Should Grant Review To Address The Clash Between This Defendant's Viable Diminished Capacity Defense And An Overly Formulaic Application Of The "Rapid Recidivism" Aggravating Factor.

The SRA allows for an exceptional sentence if the State proves, beyond a reasonable doubt, that "[t]he defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.535(3)(t). To prove this "rapid recidivism" aggravating factor, the State must show an "especially short time period between prior incarceration and reoffense." Butler, 75 Wn. App. at 54.

In between release from jail and the charged incidents, Mr. Murray sought professional assistance from Sound Mental Health, specifically so that he would not reoffend. Ex. 13 at 3; Ex. 14 at 1; RP 515-16. At trial, a forensic psychologist explained that Mr. Murray's brain injury (secondary to a stroke) caused real cognitive problems, especially with disinhibition. E.g. RP 520-22; Ex. 13. While the jury rejected the diminished capacity defense as to the charged counts, the law recognizes that a failed mental defense may be grounds for a mitigated sentence. RCW 9.94A.535(1)(e).

Unwilling to recognize the tension between Mr. Murray's brain injury and the allegedly "rapid" recidivism, the Court of Appeals clings to a formulaic application of this aggravator. Op. at 7-10. In the eyes of the intermediate court, Mr. Murray's dementia – and efforts to get help after

release from jail but before any re-offense – are completely irrelevant and meaningless. Op. at 10.

This tribunal should intervene and grant review because the decision is illogical and in conflict with State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) (noting that "[t]he gravamen of the [rapid recidivism] offense is disdain for the law.")

3. Review Should Be Granted Because Aggravating Factors Are Subject To A Vagueness Challenge And The "Rapid Recidivism" Aggravating Factor is Unconstitutionally Vague.

The Due Process Clause of the Fourteenth Amendment requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," is unconstitutional. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine applies to

sentencing enhancements that change the permissible mandatory range. Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015) (striking down a sentencing provision of the Armed Career Criminal Act on vagueness grounds because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" in violation of due process).

The rapid recidivism aggravator lacks ascertainable standards of guilt to protect against arbitrary enforcement. The statute itself provides no guidance apart from the words "shortly after." "Offenses that do not have a mens rea element are generally disfavored," but the aggravator reads just as a disfavored strict liability crime would. State v. Bradshaw, 152 Wn. 2d 528, 536, 98 P.3d 1190 (2004).

The problem with this structure is highlighted by the fact that while Mr. Murray was able to raise a diminished capacity defense with respect to the underlying charge, he could not do so with respect to the aggravator. See CP 89 (jury instructed "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form knowledge.")

The application of the aggravator to Mr. Murray's case, with the uncertainty in deciding whether he offended "shortly after" release was

similarly arbitrary. Accordingly, RCW 9.94A.535(3)(t) is vague as applied to Mr. Murray.

In response to Mr. Murray's arguments, the Court of Appeals relied on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) and ruled that the "rapid recidivism factor is not subject to a void for vagueness challenge." Op. at 12. But in light of Johnson v. United States, Baldwin is no longer good law. This Court should grant review and address this important constitutional question.

4. Review Should Be Granted Because The Sentence Was Clearly Excessive.

Science has "reveal[ed] fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." State v. O'Dell, 183 Wn.2d 680, 692, 358 P.3d 359 (2015) (footnotes omitted). Precisely because juveniles and young adults suffer from deficient – as compared to mature adults – brains, they are deemed less culpable for their conduct. In fact, youthfulness alone may be grounds for a mitigated sentence. Id. As the United States Supreme Court put it, because "the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution

is not as strong with a minor as with an adult." Miller v. Alabama, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012) (internal quotations omitted).

Mr. Murray's injured brain similarly makes him less blameworthy than a healthy and fully-functioning adult. RCW 9.94A.535(1)(e). Like the science about juvenile brain development underlying Miller, O'Dell, etc., Dr. Beaver's opinion about Mr. Murray's brain injury, dementia, and ensuing disinhibition is based in well-established scientific findings.[2]

Whether an exceptional sentence is clearly excessive is reviewed for an abuse of discretion. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The sentencing court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the aggravating factor. State v. Oxborrow, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). Action is excessive if it goes beyond the usual, reasonable, or lawful limit. Id. at 531. "Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." Id.

Consistent with the now-settled jurisprudence that links blameworthiness with brain functioning (and lack thereof), this Court

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[2] Medical literature is replete with documentation of the causal link between brain injury and sexual disinhibition. See AOB at 35.

should grant review and declare that the sentence imposed against the brain-injured Mr. Murray was clearly excessive. See AOB at 33-39.

E. CONCLUSION.

Review should be granted and the important constitutional questions presented by this appeal should be resolved in Mr. Murray's favor.

In the event that Mr. Murray completes the exceptional sentence imposed against him while this petition is pending, review should still be granted because the sentencing questions presented herein are of continuing and substantial public interest and may otherwise evade review.

DATED this 5th day of April 2017

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID MURRAY, Appellant.	)	No. 74422-4-I DIVISION ONE UNPUBLISHED OPINION FILED: March 6, 2017

APPELWICK, J. — Murray was convicted of three counts of indecent exposure. At sentencing, Murray argued that the court should take his brain injury into consideration. The court imposed an exceptional sentence of 36 months incarceration, because the crimes were committed with a sexual motivation and shortly after his release from incarceration. Murray appeals. We affirm.

FACTS

Michael Murray was released from jail on February 17, 2015. In March 2015, Murray exposed himself to multiple people. On March 4, 2015, S.L. was working at a retirement home in Seattle. S.L. noticed Murray looking at her from behind a wall. Then, he moved out from behind the wall, about 20 feet away from S.L. His pants were at about his mid-thigh, and he was looking at S.L. while stroking his penis.

The next day, March 5, C.Y. was returning to work in downtown Seattle after her lunch break. Murray rode the elevator with C.Y. After two other people exited the elevator, C.Y. noticed that Murray's penis was exposed through the zipper of his pants.

A few days later, on March 9, L.S. was working at her hair salon in downtown Seattle. She noticed Murray standing in the hallway multiple times during the day. In the afternoon, L.S. was cutting a female client's hair when the client began screaming. L.S. looked into the hallway and saw Murray with his penis in his hand, masturbating.

Murray was charged with three counts of indecent exposure for these events. The State alleged that one of the purposes for which Murray committed the crimes was for sexual gratification. And, it alleged that Murray committed the offenses shortly after being released from incarceration.

At trial, Murray pursued a diminished capacity defense. Murray argued that cognitive deficits due to a stroke and resulting brain damage prevented him from understanding that his actions were likely to cause reasonable affront or alarm. Murray was convicted as charged. The jury specifically found that both aggravating factors, sexual motivation and rapid recidivism, were met for all three offenses.

The standard sentence range for Murray's offenses was 0-12 months. Due to the jury's findings that Murray committed the offenses with sexual motivation and shortly after being released from incarceration, the State sought an exceptional sentence of 48 months. Murray asked the court for an exceptional

sentence of 365 days on the first two counts, plus a consecutive 120 days on the third count. The purpose of this request was to ensure that Murray would have time to work with the release planning staff prior to his release. At the sentencing hearing, the court concluded,

> Well, I understand that there is some medical basis for what Mr. Murray's problems are, but it's not clear that there is any way to protect the community other than locking him up, and so while I don't think we need to go to quite the extent that the prosecutor's recommending, I do think that a substantial prison sentence is merited.

The court sentenced Murray to 36 months. Murray appeals.

DISCUSSION

Murray challenges the exceptional sentence imposed by the trial court. He contends that neither the sexual motivation nor the rapid recidivism aggravating factors supports the exceptional sentence. Alternatively, he argues that the rapid recidivism factor is unconstitutionally vague. Lastly, Murray argues that even if the aggravating factors technically apply here, the exceptional sentence is clearly excessive given his brain injury.

RCW 9.94A.585(4) dictates this court's review of an exceptional sentence:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

This statute establishes three prongs, each with a different standard of review. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). First, we review under a clearly erroneous standard whether evidence in the record supports the reasons

given by the sentencing judge. Id. Second, we review de novo whether the reasons justify a departure from the sentence range. Id. Third, we review for an abuse of discretion whether the sentence is clearly excessive or too lenient. Id.

I. Invited Error

The State contends that Murray has waived any challenge to the exceptional sentence, because he himself sought an exceptional sentence. At sentencing, Murray stated,

> We're asking for an exceptional sentence, although I don't believe one is actually warranted, but we're asking for one because we want there to be some additional time in the jail so that [Murray] can work with the release planning staff to come up with a release plan that ensures community protection.

Specifically, Murray asked for a 365 day sentence on the first two counts, with 120 consecutive days imposed for count three.

Murray construes this as a request for a downward departure from the standard sentence range, which is 0-12 months. But, the sentences for the three counts would presumptively be served concurrently. RCW 9.94A.589(1)(a). Murray asked that the sentence for count three run consecutively to the other counts. And, Murray clearly stated at sentencing that additional time in jail was warranted to assist Murray with a release plan. This language is not consistent with a request for a downward departure.

Under the invited error doctrine, a defendant may not set up an error at trial and then challenge that error on appeal. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). To determine whether the invited error doctrine applies, courts examine whether the defendant affirmatively assented to the error,

materially contributed to it, or benefited from it. Id. at 154. Courts have applied this doctrine where a defendant urged the court to impose an exceptional sentence and acknowledged the application of an aggravating factor. See State v. Smith, 82 Wn. App. 153, 162-63, 916 P.2d 960 (1996).

But, even though Murray did request an exceptional sentence, he did not acknowledge or admit that either aggravating factor supported the imposition of an exceptional sentence. Rather, Murray explicitly stated that the defense did not believe that an exceptional sentence was actually warranted as punishment. That makes this case different from Smith, where the defendant recognized that the aggravating factor applied. 82 Wn. App. at 162-63. We conclude that neither the invited error doctrine nor waiver bars Murray from challenging the exceptional sentence on appeal.

II. Sexual Motivation

Murray challenges both aggravating factors as insufficient to support the exceptional sentence. First, Murray contends that indecent exposure is an inherently sexual offense, so the sexual motivation aggravating factor cannot apply.

A finding of sexual motivation pursuant to RCW 9.94A.835 is one aggravating factor that can support an exceptional sentence. RCW 9.94A.535(3)(f). RCW 9.94A.835(2) provides that the jury must find a special verdict as to whether the defendant committed the crime with a sexual motivation. It further states, "[t]his finding shall not be applied to sex offenses as defined in RCW 9.94A.030." Id. RCW 9.94A.030(47) specifically names offenses that qualify

as sex offenses. Indecent exposure is not a named sex offense under RCW 9.94A.030(47).

An exceptional sentence may not be based on factors inherent to the offense for which the defendant was convicted. State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999). The sexual motivation aggravating factor serves to hold offenders who commit sexually motivated crimes more culpable than those who commit the same crimes without sexual motivation. Id. Thus, the sexual motivation factor can apply only to offenses that are not inherently sexual. Id.

Murray argues that the crime of indecent exposure is inherently sexual. A person commits indecent exposure "if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm." RCW 9A.88.010(1). The statute does not define "obscene." As such, Washington courts have clarified what constitutes "open and obscene exposure." See, e.g., State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966); State v. Vars, 157 Wn. App. 482, 491, 237 P.3d 378 (2010).

In Galbreath, the defendant argued that the indecent exposure statute was unconstitutionally vague, because the terms "indecent" and "obscene" do not clearly define the proscribed conduct. 69 Wn.2d at 666-67. The court disagreed, noting that these words are common words with commonly understood meanings. Id. at 668. The court noted that this phrase has long meant "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or

common propriety require shall be customarily kept covered in the presence of others." Id.

The Court of Appeals reaffirmed this definition in Vars, where the defendant argued that the State did not prove indecent exposure, since no witnesses observed his naked genitalia. 157 Wn. App. at 489. The court rejected Vars's argument, reasoning, "the gravamen of the crime is an intentional and 'obscene exposure' in the presence of another that offends society's sense of 'instinctive modesty, human decency, and common propriety.' "[1] Id. at 491 (quoting Galbreath, 69 Wn.2d at 668).

Murray relies on State v. Steen, 155 Wn. App. 243, 228 P.3d 1285 (2010) to support his argument. There, the trial court instructed the jury, " ' "Obscene exposure" means the exposure of the sexual or intimate parts of one's body for a sexual purpose.' " Id. at 246-47 (emphasis added). Steen argued that this instruction contained a judicial comment on the evidence. Id. at 246. The Court of Appeals disagreed, ruling that the instruction was a neutral and accurate statement of the law. Id. at 247.

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[1] Murray notes that under Galbreath, a "lascivious" exhibition is one that is sexual in nature. Webster's Dictionary defines "lascivious" as "inclined to lechery; lewd, lustful" or "tending to arouse sexual desire: libidinous, salacious." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1274 (2002) (capitalization omitted). And, the Washington Supreme Court has noted that "lascivious" and "indecent" are synonyms connoting " 'wicked, lustful, unchaste, licentious, or sensual design.' " State v. Queen, 73 Wn.2d 706, 710, 440 P.2d 461 (1968) (quoting Boles v. State, 158 Fla. 220, 221, 27 So. 2d 293 (1946)). But, we note that Washington courts have not interpreted "open and obscene" exposure as requiring sexual gratification. Instead, courts have more generally described indecent exposure as requiring an exhibition that offends a societal sense of modesty, decency, and propriety. See, e.g., Galbreath, 69 Wn.2d at 668; Vars, 157 Wn. App. at 491. We decline to read a sexual purpose into this meaning.

The Steen court reasoned that the jury instruction was an accurate statement of law, because it was based on RCW 9A.44.010(2) and former RCW 9.94A.030(43) (2008), recodified as, RCW 9.94A.030(48) (LAWS OF 2015, ch. 287, § 1). Id. at 247. But, neither statute defines "obscene." RCW 9A.44.010(2) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." And, RCW 9.94A.030(48) defines "sexual motivation" as meaning "that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Since Steen was charged with indecent exposure with sexual motivation, it is unsurprising that the trial court included language relating to sexual motivation in the jury instruction. See 155 Wn. App. at 245. But, Steen did not address a challenge to an exceptional sentence based on the sexual motivation factor. It is not controlling on this point.

Neither the plain language of RCW 4.84.185 nor the case law requires that the indecent or lascivious exhibition of genitalia be for the purpose of sexual gratification. Under Galbreath and Vars, an "open and obscene" exposure requires only a lascivious and indecent display of genitalia. It does not require additional evidence of sexual gratification. Therefore, we conclude that sexual motivation is not inherent in the crime of indecent exposure. The sexual motivation aggravating factor properly supports Murray's exceptional sentence.

III. Rapid Recidivism

Murray argues that he did not commit the crimes "shortly after" being released from incarceration. He suggests that his specific circumstances indicate

that he was attempting to respect and obey the law, so he did not show the disdain for the law necessary to satisfy this aggravating factor.

Under RCW 9.94A.535(3)(t), one factor that can support an exceptional sentence is that "[t]he defendant committed the current offense shortly after being released from incarceration." This factor is premised on the idea that committing a new offense shortly after release from incarceration demonstrates a greater disdain for the law than would usually be the case. State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994); State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010).

Murray argues that because he attempted to get help prior to committing the offenses, he did not demonstrate the necessary disdain for the law. He contends that his visit to Sound Mental Health on March 2, 2015 demonstrates a desire to obey, not disregard, the law. But, the Court of Appeals has made clear that disdain for the law is the justification for this aggravating factor, not an additional element that must be met. State v. Williams, 159 Wn. App. 298, 314, 244 P.3d 1018 (2011). The statutory requirement is simply that the new offense was committed "shortly after" release. Combs, 156 Wn. App. at 506.

Even so, Murray contends that the unique circumstances of his medical condition indicate that he did not commit the offense shortly after incarceration. He relies on Combs, where the court noted that what constitutes a short period of time "will vary with the circumstances of the crime involved." Id. Where an offense may take a long time to plan or occur, the time period constituting "shortly after" incarceration may be longer. Id. at 507. But, Combs did not suggest that what

constitutes a short period of time after incarceration depends on the individual offender. It noted only that the period of time may vary based on the offense.

Here, Murray committed a string of new offenses just weeks after his release. He was released on February 17, and the new offenses occurred on March 4, 5, and 9. Courts have upheld exceptional sentences based on the rapid recidivism factor where the length of time between release and re-offense was greater than three weeks. See, e.g., State v. Saltz, 137 Wn. App. 576, 585-86, 154 P.3d 282 (2007) (offense occurred one month after release); State v. Zigan, 166 Wn. App. 597, 605-06, 270 P.3d 625 (2012) (offense occurred two months after release). We conclude that the rapid recidivism aggravating factor supports Murray's exceptional sentence.

IV. Vagueness

Murray argues that if the rapid recidivism aggravating factor can be applied to the facts of this case, then the factor is unconstitutionally vague. He contends that the statute does not give sufficient notice that a person with brain damage commits an offense shortly after release when he asks for help before reoffending.

We review de novo the constitutionality of a statute. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). The court evaluates vagueness challenges in light of the particular facts of each case, unless the First Amendment is implicated. Id. A statute is unconstitutionally vague "if either it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement." Id.

The State argues that the aggravating factors are not subject to a vagueness challenge due to Washington Supreme Court precedent. It relies on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). Baldwin dealt with a challenge to two sentencing statutes.[2] Id. at 458. The court determined that since the sentencing statutes did not define conduct or allow for arbitrary arrest and prosecution, the due process considerations underlying the void for vagueness doctrine did not apply. Id. at 459.

But, Murray contends that after the United States Supreme Court's recent decision in Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), Baldwin is no longer good law. Johnson involved a void for vagueness challenge to the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). Id. at 2555-56. The ACCA increases the prison term to 15 years to life for a person with three or more convictions for a serious drug offense or violent felony. Id. at 2555. The statute defined "violent felony" as a crime that had the use, threatened use, or attempted use of physical force as an element, or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 2555-56 (emphasis added). The Supreme Court determined that the emphasized text, known as the residual clause, was unconstitutionally vague, because it left grave uncertainty about how to estimate the risk posed by a

[2] Specifically, Baldwin challenged former RCW 9.94A.120(2) (2000), which provided that a standard sentence range must be imposed unless the court finds substantial and compelling reasons to justify an exceptional sentence, and former RCW 9.94A.390 (2000), which listed mitigating and aggravating factors that can support an exceptional sentence. Baldwin, 150 Wn.2d at 458-59.

crime. Id. at 2557. This vagueness was demonstrated by the pervasive disagreement amongst courts as to the appropriate inquiry under this clause. Id. at 2560.

Johnson does not require us to determine that Baldwin is no longer good law. The ACCA defined conduct that required a minimum of 15 years in prison. Id. at 2555. RCW 9.94A.535 does not require an exceptional sentence. Instead, the jury must find the alleged factor is satisfied based on the evidence. RCW 9.94A.537(6). Then, the trial court must still decide whether the aggravating factor is a substantial and compelling reason to justify an exceptional sentence. Id. Thus, the reasoning of Baldwin applies: RCW 9.94A.535 does not dictate the penalties associated with criminal conduct or force citizens to guess at the consequences that might occur when one engages in prohibited conduct. See Baldwin, 150 Wn.2d at 459. RCW 9.94A.535's rapid recidivism factor is not subject to a void for vagueness challenge.

V. Clearly Excessive

Lastly, Murray argues that even if the aggravating circumstances technically supported the exceptional sentence, the sentence is clearly excessive in light of his brain injury. He contends that the court should consider his efforts to lessen the risk he posed of reoffending. Additionally, Murray suggests that his case is comparable to the rationales involved in sentencing juveniles differently from adults. He argues that like a juvenile, his impaired brain functioning makes him less culpable than a healthy adult.

This court reviews whether a sentence is clearly excessive for an abuse of discretion. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). The trial court abuses its discretion in setting the length of an exceptional sentence by relying on an impermissible reason or by imposing a sentence that is so long that, in light of the record, it shocks the conscience of the reviewing court. Id. at 395-96. A sentence that shocks the conscience is one that no reasonable person would impose. State v. Knutz, 161 Wn. App. 395, 411, 253 P.3d 437 (2011). We have wide latitude in affirming the length of an exceptional sentence. State v. Halsey, 140 Wn. App. 313, 325, 165 P.3d 409 (2007).

Murray's brain injury very well could have played a role in his lack of inhibition.[3] However, Murray still committed three separate instances of indecent exposure within one week. These three instances were all committed within three weeks of his release from incarceration. All three offenses indicated that Murray was not merely exposing himself in public places. Instead, he waited for opportune moments—when S.L. and C.Y. were alone and when L.S. was with a female client. This conduct suggests intentional predatory behavior, not a failure of inhibition. Considering these facts, the trial court determined that the public needed to be

[3] The State argues that Murray's history of sexually motivated crimes prior to his stroke undercuts his argument that his brain injury contributed to the current offenses. Before his stroke in 2008, Murray was convicted of lewdness and three instances of lewdness involving a child. At sentencing, the State asked the court to consider Murray's long history of sexually motivated offenses, including those that occurred prior to his stroke. Because indecent exposure is an unranked felony, these offenses would not factor into Murray's offender score for sentencing. See RCW 9.94A.515; Steen, 155 Wn. App. at 247-49. It is unclear from the record whether the trial court took these previous convictions into consideration.

protected from Murray, and there was no clear way to do so other than incarceration.

And, while the court imposed an exceptional sentence, it determined that the sentence need not be as long as the State's requested 48 months. Instead, it imposed 36 months. The standard sentence range was 0-12 months. Courts have upheld exceptional sentences that have doubled or more than doubled the standard sentence range. See Halsey, 140 Wn. App. at 325-26.

The trial court's determination that the public needed to be protected from Murray was reasonable, and the 36 month exceptional sentence serves this purpose. The exceptional sentence imposed here does not shock the conscience. Therefore, we uphold Murray's sentence.

We affirm.

Appelwick, J.

WE CONCUR:

Trickey, ACJ

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals Division One** under **Case No. 74422-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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