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Supreme Court No. _____
COA No. 75079-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAETHKE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Raethke was the appellant in Court of Appeals No. 75079-8-I, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

The Court of Appeals affirmed the conviction and sentence for assault with the intent to commit indecent liberties with a sexual motivation finding, which made the offense a "strike" crime. Decision (Appendix A), issued December 26, 2017.

C. ISSUES PRESENTED ON REVIEW

1. Whether the trial court violated Due Process under the Fourteenth Amendment in instructing the defendant's jury with the "truth" definition of proof beyond a reasonable doubt.

2. Whether the conviction and sentence for assault with intent to commit indecent liberties, with the added sexual motivation enhancement that rendered the crime a strike offense, violated Mr. Raethke's Double Jeopardy rights.

3. Whether the trial court violated Due Process and the Sixth Amendment when it imposed the sentence of LWOP.

D. STATEMENT OF THE CASE

Robert Raethke was hiking in a wooded trail area, and he encountered a friendly woman, A.C. Mr. Raethke asked the lady

for a hug, and, as she testified, Mr Raethke was elderly and perhaps innocently needy. The two hugged. Later, the woman was told by a friend to search a database of convicted sexual offenders, where she located Mr. Raethke's photo. She contacted police and claimed, for the first time, that Raethke would not stop hugging her. CP 330-33; 2/24/16RP at 680-91, 715-17, 731-33, 759-60.

As a result of ER 404(b) evidence of past, highly wrongful sexual conduct for which Mr. Raethke was convicted in the early 1980's and as to which he had served his full incarceration time, he was convicted of second degree assault, by commission of this fourth degree assault, with intent to touch the woman for sexual gratification by forcible compulsion (indecent liberties). 7/29/15RP at 205-16; CP 134-48 (404(b) Findings of Fact); 2/24/16RP at 768; 2/26/16RP at 978; CP 82 (Instruction 7).CP 330-31 (information); see RCW 9A.36.021(1)(e); CP 71 (verdict form). CP 330-36; see RCW 9A.94A.030(47), RCW 9.94A.535(3)(f), RCW 9.94A.835.

Mr. Raethke timely appealed. CP 2-13. The Court of Appeals approved of the objected-to jury instruction, rejected the argument that the sexual motivation enhancement violated Double Jeopardy, and rejected his argument that the jury should decide

whether was a "two strikes" offender.

E. ARGUMENT

(1). THE SUPREME COURT MUST HOLD THAT ROBERT RAETHKE'S JURY WAS GIVEN AN ERRONEOUS DEFINITION OF PROOF BEYOND A REASONABLE DOUBT.

a. Supreme Court review is warranted under RAP 13.4(b)(3). Over objection, the trial court gave the jury Instruction 3, defining reasonable doubt under the abiding belief in the "truth" language, and denied the proposed defense jury instruction that instead defined reasonable doubt without the "truth" language. 2/26/16RP at 1004; CP 78 (Instruction 3); CP 112 (Defense proposed instruction). A jury instruction misstating the reasonable doubt standard violates the Due Process protections of the Fourteenth Amendment, and is subject to automatic reversal without any showing of prejudice. Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)); U.S. Const. amend. 14. Review is warranted for this significant constitutional question. RAP 13.4(b)(3).

b. The Washington Courts have held the jury's job is not to find the truth but to determine whether the State proved its case beyond a reasonable doubt. Thus, the jury's role is not to determine if it has a belief in the truth of the criminal charge. State

v. Lindsay, 180 Wn. 2d 423, 437, 326 P.3d 125 (2014); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Instead, the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Lindsay and Emery.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. Castle, 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court therefore directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. That pattern instruction reads in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an

> abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 WPIC 4.01, at 85 (3rd ed. 2008) ("WPIC"). The Court of Appeals relied the Fedorov case to uphold the instruction given here. See State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014); Appendix A (Decision, at pp. 4-5 and n. 3). However, the Fedorov case merely stated, in conclusory fashion without analysis, that the truth language in an argument was different from in an instruction:

> Fedorov relies on State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the "abiding belief" language. He claims this language is similar to the impermissible "speak the truth" remarks made by the State during closing.... Emery found the "speak the truth" argument improper because it misstated the jury's role. Here, read in context, the "belief in the truth" phrase accurately informs the jury its "job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760, 278 P.3d 653. The reasonable doubt instruction accurately stated the law.

State v. Fedorov, 181 Wn. App. 187, 200, 324 P.3d 784, 790 (2014). As can be seen, the Court ruled by merely announcing that one thing is not like the other, when in fact the two things are exactly the same.

In Mr. Raethke's case, the Court of Appeals ignored the fact that the Bennett Court did not comment at all on the bracketed

"belief in the **truth**" language. The cases do, indeed, show the problematic nature of such language. In Emery, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. Emery, 174 Wn.2d at 751. The Court held that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Emery, at 764 n.14.

Regardless of whether the phrase "abiding belief" is proper, the point is that the jury's role is not to determine "the truth." Lindsay, 180 Wn. 2d at 437; Emery, 174 Wn.2d at 760. Thus, the Fourteenth Amendment was violated when the court overruled Mr. Raethke's objection to the instruction's language.

(2). THE CONVICTIONS AND SENTENCE ARE IN VIOLATION OF DOUBLE JEOPARDY.

a. Mr. Raethke is entitled to review. Mr. Raethke's conviction and his POAA sentence violated Double Jeopardy, when a second violation, "sexual motivation" was added to his second degree assault conviction where the conviction was obtained under RCW 9A.36.021(1)(e), and where the underlying crime of intent was indecent liberties. Double Jeopardy challenges may always be raised because of their constitutional nature. RAP 2.5(a)(3); see,

e.g., State v. Tanberg, 121 Wn. App. 134, 137, 87 P.3d 788 (2004); U.S. Const. amend. 5. Review is warranted for this significant constitutional question. RAP 13.4(b)(3).

b. The POAA required that Mr. Raethke's current crime be a second "strike" offense. Mr. Raethke was convicted of second degree assault, defined at RCW 9A.36.021 (as effective July 22, 2011), which provides that the crime can be committed as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (e) With intent to commit a felony, assaults another[.]

RCW 9A.36.021(1)(e). The underlying crime of intent charged was "indecent liberties." CP 330-31 (information); CP 332-37 (affidavit of probable cause); CP 84 (Instruction 9). He was given a POAA sentence because one of the enumerated offenses for "two strikes" purposes is second degree assault if accompanied by a sexual motivation finding. RCW 9.94A.030(37)(b)(i) - (ii).

The definitions of these offenses and special allegations implicate Double Jeopardy concerns. Under RCW 9A.44.100(1)(a), a person is guilty of indecent liberties when he knowingly causes another person to have sexual contact with him

or another by forcible compulsion. For purposes of indecent liberties, " 'sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." (Italics ours.) RCW 9A.44.010(2) (as effective April 10, 2007). And, under RCW 9.94A.030(48), 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."

Mr. Raethke argues this pairing of two functional elements, identical as charged and proved, violated Double Jeopardy. The Double Jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. 5.

c. As charged and proved in Mr. Raethke's case, the sentence-enhancing finding of "sexual motivation" is the functional equivalent of the same element of second degree assault as intent to commit indecent liberties. For the purposes of the jury trial right, in Apprendi and Blakely, the Supreme Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Blakely v.

Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This is true because such facts are elements, even when the fact is labeled a "sentencing factor," or as here with sexual motivation, a "sentence enhancement," by the Legislature. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 482-83; Ring v Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In turn, enhancing facts also operate as elements for purposes of the protection against Double Jeopardy. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In this, his concurring opinion in Sattazahn, Justice Scalia emphasized that there is "no principled reason to distinguish" between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment's Double Jeopardy Clause. 537 U.S. at 111.

It is true that the Washington Supreme Court has previously rejected Double Jeopardy challenges to firearm and deadly weapon enhancements where the use of a firearm or deadly weapon is an element of the underlying offense. State v. Kelley,

168 Wn.2d 722, 26 P.3d 773 (2010); State v. Huested, 118 Wn. App. 92, 95-96, 74 P.3d 672 (2003), rev. denied, 151 Wn.2d 1014 (2004).

However, the reasoning of these opinions is no longer persuasive and should not be applied to the sexual motivation finding in this case where the underlying crime is second degree assault with intent to commit indecent liberties. Under Blockburger, when each provision at issue requires proof of an additional fact which the other does not, Double Jeopardy has not been offended by duplicative punishment. Blockburger, 284 U.S. at 304.

d. *Blockburger* is the appropriate Double Jeopardy analysis where Legislative intent is less than clear. There is authority for the proposition that the Legislature has clearly indicated an intent to apply the sexual motivation aggravating factor to Mr. Raethke's crime of second degree assault (simple assault, with "intent to commit indecent liberties"). State v. Thomas, 138 Wn.2d 630, 636-37, 980 P.2d 1275 (1999)).

But Mr. Raethke argues that the Blockburger analysis shows that Double Jeopardy is violated because the sexual motivation enhancement has one element, which is the purpose of sexual gratification, that is also contained in the underlying crime of

assault with intent to commit indecent liberties. AOB, at Part D.2(b) and (c); U.S. Const. amend. 5.

The relevant provisions show that Mr. Raethke was subjected to punishment for the enhancement based on a fact already proved in the underlying crime. AOB, supra (citing RCW 9A.44.100(1)(a) (for purposes of indecent liberties, sexual contact means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party"); RCW 9A.44.010(2); RCW 9.94A.030(48) (for purposes of enhancement, sexual motivation means "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification"); Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not)).

It is true that the Washington courts have rejected Double Jeopardy challenges by stating that the Calle / Blockburger analysis simply does not apply where "cumulative punishment" is imposed in a "single proceeding" and legislative intent is clear, such as regarding firearm enhancements and underlying offenses. See BOR at pp. 5-6 (also citing State v. Calle, 125 Wn.2d 769, 776, 888

P.2d 155 (1995); and State v. Kelley, 168 Wn.2d 72, 77–78, 83, 226 P.3d 773 (2010) (firearm enhancement does not violate Double Jeopardy when applied to underlying crime involving use of a firearm because Legislature intended the enhancement to apply, thus no need to reach Blockburger test)); see also State v. Aguirre, 168 Wn.2d 350, 366–67, 229 P.3d 669 (2010) (Double Jeopardy not offended by weapon enhancements even when being armed with weapon is element of underlying crime).

Other decisions have simply applied the Blockburger test and found no Double Jeopardy violation, for example in a case involving unlawful possession of a firearm and a firearm enhancement requiring that a person be armed. See, e.g., State v. Dunn, 187 Wash.App. 1026, COA Div. 2 No 44572–7–II (2015 WL 2224725) (May 12, 2015) (cited pursuant to GR 14) (citing State v. Calle, at 777 (applying the test: "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.").

Mr. Raethke argues that Blockburger is the appropriate analysis. AOB, at Part D.2(c). The Kelley Court makes clear that

Blockburger should be applied, where there is not Legislative intent for such punishment.

> If, however, such clear legislative intent is absent, then the Blockburger test applies. Id.; see Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

State v. Kelley, at 77. It is true that the Kelley Court concluded that there was clear Legislative intent to apply firearm enhancements to underlying crimes that involve being armed with or using a firearm, under the "Hard Time for Armed Crime" Act of 1995. Kelley, at 78-79 (citing Laws of 1995, ch. 129, § 2). However, the Legislative intent must indeed be clear.

> The assumption underlying the Blockburger rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes; the Blockburger test is a rule of statutory construction applied to discern legislative purpose in the absence of clear indications of contrary legislative intent. [Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983)]. In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. Id.; State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008); State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the Blockburger "same evidence" test to determine whether the crimes are the same in fact and law. Calle, 125 Wn.2d at 777–78, 888 P.2d 155.

State v. Kelley, at 77. Thus for the Kelley Court the "Hard Time for Armed Crime" Act evinced clear Legislative intent. Kelley, at 79. It was clear that the Legislature intended that firearm enhancements be applied to increase punishment for all armed crimes.

But here, applying a sexual motivation enhancement to second degree assault, in this circumstance where the intended felony involves sexual contact, simply punishes the defendant further for the exact same fact, which no Legislative intent clearly authorizes, in contrast to the mandate of the Hard Time for Armed Crime legislation.

Every indication in Washington statutory law is that the sexual motivation enhancement was not conceived as applying to offenses which are for the purpose of sexual contact, such as Mr. Raethke's crime of simple assault with intent to commit indecent liberties. For example, under the principle that an exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted, the Court in Thomas noted,

> 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)).

Further, second degree assault with intent to commit indecent liberties is not an expressly enumerated "sex offense" under RCW 9.94A.030(47). Nevertheless, it is an inherently sexual offense, which is why the sexual motivation enhancement inflicts double punishment. The gravamen of this alternative of second degree assault is the *underlying* purpose, rather than the assault itself, the latter being nothing more than simple, common law assault in the fourth degree by a physical touching of a person without consent, causing offense. RCW 9A.36.021(1)(c); State v. Shelby, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997).

Additionally, in the circumstances of this case, the crime of second degree assault is akin to a sex offense, further showing an absence of clear Legislative intent to add a wholly duplicative sexual motivation enhancement to the crime. RCW 9.94A.030, at .030(46), defines "sex offense" to include "[a] felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135." RCW 9.94A.030(46)(c). A statute that is inconsistent with its own terms is ambiguous. State v. Draxinger, 148 Wn. App. 533, 537, 200 P.3d 251 (2008). Ambiguous statutory authority simply cannot be the "clear" Legislative intent that the Kelley Court described.

The federal courts have recognized that Double Jeopardy can apply in the context of enhancements, and Double Jeopardy likewise applies here. See, e.g., United States v. Cioni, 649 F.3d 276 (4th Cir.2011). Cioni was convicted of accessing a computer without authorization (in violation of 18 U.S.C. § 1030(a)(2)(C). Cioni, at 279-80. The conviction was enhanced to a felony on the theory that her conduct was "in furtherance of" obtaining unauthorized access to communications in electronic storage (a violation of 18 U.S.C. § 2701(a)). Cioni, at 281. This was deemed to violate principles of merger "tantamount to double jeopardy." Cioni, at 282–83 (citing United States v. Santos, 553 U.S. 507, 527, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) (Stevens, J., concurring).

In the absence of an overarching Legislative purpose such as the "Hard Time" Act, clearly showing an intent to add additional punishment for all crimes committed while armed with a firearm, Double Jeopardy is violated where second degree assault is charged under the alternative that a simple assault was committed with intent to commit indecent liberties, and a sexual motivation enhancement is then added.

(3). THE SENTENCE VIOLATES DUE PROCESS.

The trial court violated Mr. Raethke's Due Process and Sixth Amendment rights when it imposed the sentence of Life Without Possibility of Parole absent a jury finding that Mr. Raethke was a Persistent Offender with a prior strike. CP 14-51.

This violated the Due Process clause of the United States Constitution, which ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A defendant has the right to a jury trial on every fact for punishment. Alleyne v. United States, 570 U.S. ___, 133 S.Ct. 2151, 2160-62, 186 L.Ed.2d 314 (2013); Blakely v. Washington, 542 U.S. 296, 300, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Mr. Raethke's sentence must be reversed.

(4). THE EVIDENCE WAS INSUFFICIENT TO FIND MR. RAETHKE GUILTY OF ASSAULT WITH INTENT TO COMMIT INDECENT LIBERTIES.

a. Review is warranted. A constitutional issue is presented where, after viewing the evidence in the light most favorable to the State, a rational trier of fact could not have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980); U.S. Const.

amend 14. Mr. Raethke's challenge to his conviction presents a constitutional question, and review is warranted. RAP 13.4(b)(3).

b. The evidence was insufficient. Mr. Raethke was convicted of assault in the second degree with the intent to commit indecent liberties. See Part E.2.b, supra. Indecent liberties occurs when an offender "knowingly causes another person to have sexual contact with him or her or another[by] forcible compulsion. RCW 9A.44.100(1)(a). "Sexual contact" is defined 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." RCW 9A.44.010(2). And "[f]orcible compulsion" is defined in part as "physical force which overcomes resistance." RCW 9A.44.010(6).

In this case, the defendant hugged the complainant after asking her if he could do so, when meeting her on the hiking trail. A.C. allowed the hug, because Mr. Raethke reminded her of the "old people" she worked with at a retirement home. 2/24/16RP at 680-81. A.C. claimed that she came to dislike the hug, and shoved Mr. Raethke away, but she admitted that she never said anything to the police about struggling with Mr. Raethke, or pushing him away. 2/24/16RP at 712-13. She stated that Mr. Raethke certainly never tried to drag her off the hiking trial, nor was he carrying any kind of

rope, in dramatic contrast to the old crimes the prosecutor employed to persuade the jury that Mr. Raethke surely had wrongful goals by this friendly hug, which was perhaps misinterpreted – with grave results. 2/24/16RP at 711-12.

Even if Mr. Raethke kissed or tried to kiss A.C.'s neck, this is not indecent liberties. 2/24/16RP at 686; State v. R.P., 122 Wn.2d 735, 736, 862 P.2d 127 (1993) (holding that there was insufficient evidence of sexual contact to sustain conviction for indecent liberties when offender left a "hickey" mark on victim's neck area). Here, the Court of Appeals reasoned that the defendant's conduct showed intent, even if it did not constitute indecent liberties. Appendix A (Decision, at pp. 10-11). But certainly, a hug and a kiss leaving no mark whatsoever does not show intent, simply because the complainant after a moment no longer desired the hug. This does not show intent to commit indecent liberties, but at most fumbling, awkward behavior. An inference of evil purpose should not arise when other reasonable conclusions follow from the circumstances. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The jury may infer from one fact the existence of another essential to guilt, but only if reason and experience support the inference. Tot v. United States, 319 U.S. 463, 467, 63 S. Ct.

1241, 87 L. Ed. 1519 (1943).

In this case, a kiss in the neck area and a brief hug is not the necessary essential proof of the crime, and guilt cannot be supplied by a "pyramiding" of inferences. Bencivenga, 137 Wn.2d at 711; State v. Weaver, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962). Yet such pyramiding is exactly what affirmance here would represent – untenable reasoning that Mr. Raethke committed an assault by touching an intimate area, when he simply did not do so, and reasoning *from that erroneous inference* that he intended some forcible sexual crime. In sum, no rational jury could view this as evidence that Mr. Raethke committed this, a most serious strike offense. His conviction and sentence must be reversed.

F. CONCLUSION

For the reasons argued herein, Mr. Robert Raethke respectfully requests that this Supreme Court accept review, and reverse the judgment of the trial court and reverse his sentence.

DATED this 24th day of January, 2018.

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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** under **Case No. 75079-8-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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Snohomish County Prosecuting Attorney

☐ petitioner

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Date: January 25, 2018

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT RAYMOND RAETHKE, Appellant.	No. 75079-8-I DIVISION ONE UNPUBLISHED OPINION FILED: December 26, 2017

TRICKEY, A.C.J. — Robert Raethke appeals his conviction of second degree assault committed with sexual motivation and his sentence to life without the possibility of parole under the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981, chapter 9.94A RCW. Raethke argues that the trial court erred in instructing the jury on the "abiding belief" definition of proof beyond a reasonable doubt. He next contends that the trial court violated his due process and Sixth Amendment rights when it imposed a sentence of life without the possibility of parole but did not have the jury find the fact of his prior convictions beyond a reasonable doubt. He also argues that his right against double jeopardy was violated when the same fact was used to satisfy an element of his underlying crime and support his sentence under the POAA. Finding no error, we affirm.

FACTS

On April 30, 2014, A.C. was walking her dog along the Arlington Airport Trail when she encountered Raethke. Raethke told A.C. that she was beautiful and asked for a hug. Raethke grabbed A.C. in a hug and began kissing her on the

neck and cheek. Although A.C. repeatedly shoved Raethke and told him to let her go, Raethke held on for seven to ten seconds. After Raethke let go of her, A.C. told him she was going to call the police and Raethke ran away. Later, A.C told Officer Peter Barrett that she thought she was going to be raped when Raethke was hugging and kissing her.

The State charged Raethke with second degree assault with sexual motivation based on intent to commit indecent liberties by forcible compulsion. The State noted that, if convicted, Raethke would be a persistent offender under the POAA and would be sentenced to life in prison without the possibility of parole.

Prior to trial, the State moved to admit evidence of Raethke's prior convictions of first degree rape and attempted first degree rape, including testimony of his prior victims S.C., K.D., and M.H. The trial court admitted the prior victims' evidence under ER 404(b) on the issue of Raethke's intent to commit indecent liberties and so that the jury could evaluate whether the crime was sexually motivated.

At trial, S.C., M.H., and K.D. testified that Raethke had grabbed them on wooded trails and taken them into the woods to sexually assault them.

The jury found Raethke guilty of assault in the second degree, and found that he committed the crime with sexual motivation.

At Raethke's sentencing, the State offered a certified copy of his prior judgments and convictions for first degree rape and attempted first degree rape. The trial court sentenced Raethke to life without the possibility of parole as a persistent offender under the POAA.

Raethke appeals.

ANALYSIS

Proof Beyond a Reasonable Doubt Instruction

Raethke argues that the trial court erred because its instruction on the beyond a reasonable doubt standard of proof included language about the jury having an "abiding belief in the truth of the charge."[1] The State responds that Washington courts have previously approved of this language. We agree with the State.

Jury instructions "must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The *Washington Pattern Jury Instructions – Criminal* (WPIC) 4.01 provides a model reasonable doubt instruction:

> [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

[1] Clerk's Papers (CP) at 78.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 401 (4th ed. 2016) (WPIC) (boldface omitted) (alterations in original). The Washington Supreme Court has approved of this "abiding belief" instruction, and directed that trial courts must use it to instruct the jury on the government's burden and reasonable doubt. See Bennett, 161 Wn.2d at 308, 317. This court has relied on Bennett to uphold the use of WPIC 4.01, including the optional "abiding belief in the truth" language. State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014).

A challenged jury instruction is reviewed de novo, "'in the context of the instructions as a whole.'" State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) (quoting State v. Benn, 120 Wn.2d 631, 655, 845 P.2d 289 (1993)).

Here, the trial court's reasonable doubt instruction was identical to WPIC 4.01, including the bracketed "abiding belief in the truth of the charge" language.[2] Bennett approved of WPIC 4.01, including the "abiding belief in the truth of the charge" language, and has not been overturned. WPIC 4.01 has not been replaced with a new reasonable doubt instruction. We are bound by Bennett, and conclude that the trial court did not err when it gave the jury a reasonable doubt instruction based on WPIC 4.01.

Raethke argues that this court should specifically disapprove of the optional "abiding truth" language in WPIC 4.01 because several subsequent cases have disapproved of argument characterizing the jury's role as finding or declaring the truth. See State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014); State v.

[2] CP at 78.

Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Berube, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012). None of these cases are persuasive. Each case concerned remarks made by the prosecutor during closing argument telling the jury to speak the truth or search for the truth. None challenged Bennett's direction to use WPIC 4.01 as a reasonable doubt instruction. We reject this argument.[3]

Bench Findings of Prior Convictions

Raethke argues that the trial court violated his due process and Sixth Amendment rights when it sentenced him to life without the possibility of parole under the POAA without a jury finding that he was an offender with a prior strike beyond a reasonable doubt. The State responds that the Washington Supreme Court has already rejected this argument. We agree with the State.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). "[A]ny fact that increases the [mandatory minimum sentence of the crime] is an 'element' that must be submitted to the jury." Alleyne, 133 S. Ct. at 2155. But the fact of a prior conviction does not need to be submitted to a jury and proved beyond a reasonable doubt, even if it may increase the penalty for the crime at issue beyond the statutory maximum. Apprendi v. New Jersey,

[3] This court has previously rejected an analogy to cases involving prosecutorial "speak the truth" comments during closing arguments. See Fedorov, 181 Wn. App. at 200 (rejecting an analogy to Emery, 174 Wn.2d at 760). Raethke does not distinguish the instructions at issue in Fedorov and in the present case. We reject this analogy.

530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); see also Blakely v. Washington, 542 U.S. 296, 308, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that a sentence above the statutory maximum based on the sentencing judge's finding of deliberate cruelty violated the defendant's Sixth Amendment rights, but not questioning Apprendi's exception for prior convictions).

"[F]or the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence." State v.Witherspoon, 180 Wn.2d 875, 892, 329 P.3d 888 (2014). The POAA does not violate state or federal due process by not requiring that a jury must find the existence of prior strike offenses beyond a reasonable doubt. Witherspoon, 180 Wn.2d at 891-92 (discussing Alleyne, 570 U.S. 99, Blakely, 542 U.S. 296, and Apprendi, 530 U.S. 466).

"The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions as predicate strike offenses for purposes of the POAA." Witherspoon, 180 Wn.2d at 893 (citing State v. Knippling, 166 Wn.2d 93, 100, 206 P.3d 332 (2009)). "'The best evidence of a prior conviction is a certified copy of the judgment.'" State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012) (quoting State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

Constitutional issues are questions of law that are reviewed de novo on appeal. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

Here, prior to Raethke's sentencing, the State introduced a certified copy of Raethke's prior judgments convicting him of four counts of first degree rape and one count of attempted first degree rape. At the sentencing hearing, the trial court said that it had received the certified copy of the prior judgments before stating that

it found Raethke to be a persistent offender. Thus, the State met its burden of proving Raethke's previous strike offenses by a preponderance of the evidence. We conclude that trial court did not violate Raethke's due process and Sixth Amendment rights when it did not require the jury to find the existence of his prior convictions beyond a reasonable doubt.

Double Jeopardy

Raethke argues that the trial court erred when it imposed a sentence of life without the possibility of parole because it lacked the statutory authority to consider his present offense a strike crime. The State responds that Raethke was properly sentenced because his single sentence under the POAA does not implicate his right against double jeopardy. We agree with the State.

"No person shall be compelled in any criminal case to . . . be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9; see also State v. Gocken, 127 Wn.2d 95, 102, 896 P.2d 1267 (1995) (noting that the state and federal constitutions' double jeopardy protections are "virtually identical" and are given the same interpretation). The double jeopardy clause protects against a second prosecution for the same offense following an acquittal or a conviction and against multiple punishments for the same offense. Gocken, 127 Wn.2d at 100.

If a defendant has been subjected to a second or cumulative sentence, the reviewing court must determine whether clear legislative intent supports the trial court's imposition of the sentence. State v. Kelley, 168 Wn.2d 72, 76-77, 226 P.3d 773 (2010) (citing Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). Absent such clear legislative intent, the reviewing court must apply

the test laid out in Blockburger v. United States to determine whether there are two offenses at issue or one. 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

"Double jeopardy claims are questions of law that are reviewed de novo." Kelley, 168 Wn.2d at 76.

Here, Raethke's sentence of life without the possibility of parole based on his second strike offense under the POAA does not violate his right against double jeopardy. Raethke was charged with and convicted of assault in the second degree with the intent to commit indecent liberties by forcible compulsion. He had previously been convicted of first degree rape and attempted first degree rape. Thus, his present conviction for assault in the second degree with sexual motivation qualified as a second strike requiring a sentence of life without the possibility of parole under the POAA. RCW 9.94A.030(38)(a)(i),(b)(i); see also RCW 9A.36.021(1)(e).

Raethke received a sentence of life without the possibility of parole as a persistent offender under the POAA. He did not receive a separate sentence for assault in the second degree. Thus, he has received a single sentence for a single offense. We conclude that Raethke's right against double jeopardy was not implicated in the present case.[4] See Jones v. Thomas, 491 U.S. 376, 382 n.2, 109

[4] Raethke also argues that his right against double jeopardy was violated because the finding of sexual motivation both satisfied an element of his underlying crime and was used as a sentencing enhancement of sexual motivation under the POAA, relying on federal case law. The Washington Supreme Court has previously rejected the argument that using the same fact as both an element of the underlying offense and as an enhancement violates double jeopardy. See Kelley, 168 Wn.2d at 76 (stating that imposing a sentencing enhancement based on the same facts as an element of the underlying crime does not violate double jeopardy, acknowledging Apprendi, 530 U.S. 466, Blakely, 542 U.S. 296, and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.

S. Ct. 2522, 105 L. Ed. 2d 322 (1989). Thus, we need not determine whether Raethke's sentence was supported by clear legislative intent or apply the Blockburger test.

Statement of Additional Grounds

In his statement of additional grounds, Raethke provides a recitation of the facts and argues that there is insufficient evidence to support his conviction of second degree assault with the intent to commit indecent liberties. He contends that the facts would only support a conviction for fourth degree assault. We disagree.

Evidence is sufficient to sustain a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Raethke was convicted of assault in the second degree with the intent to commit indecent liberties. "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . [w]ith intent to commit a felony, assaults another." RCW 9A.36.021(1)(e). Indecent liberties occurs when an offender "knowingly causes another person to have sexual contact with him or her or another: . . . [b]y forcible compulsion" is a class A felony. RCW 9A.44.100(1)(a). "Sexual contact" is defined as "any touching of

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Ed. 2d 556 (2002)). We follow the Washington Supreme Court's precedent and reject Raethke's argument.

the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "Forcible compulsion" is defined in part as "physical force which overcomes resistance." RCW 9A.44.010(6).

Here, A.C. testified that she did not consent to being hugged or kissed by Raethke. A.C. testified that Raethke held her for seven to ten seconds in spite of her attempts to shove him away and her telling him to let her go. A.C. also testified that she thought she was going to be raped when she was being hugged and kissed by Raethke. Raethke's prior victims testified that Raethke's actions in the present case were similar to when he sexually assaulted them.

Viewing this evidence in the light most favorable to the State, the record contains sufficient evidence to sustain Raethke's conviction of second degree assault with the intent to commit indecent liberties. Raethke assaulted A.C. when he hugged and kissed her without her consent, and acted with forcible compulsion when he held on to her despite her physical resistance. There is a reasonable inference from the testimony of A.C. and Raethke's prior victims that Raethke acted with intent to touch A.C.'s "sexual or other intimate parts . . . for the purpose of gratifying" his sexual desire. RCW 9A.44.010(2). Thus, a rational trier of fact could have found the essential elements of Raethke's offense beyond a reasonable doubt. We reject Raethke's argument.

Raethke analogizes to State v. R.P. to argue that his actions were insufficient to constitute indecent liberties. 122 Wn.2d 735, 736, 862 P.2d 127 (1993) (holding that there was insufficient evidence of sexual contact to sustain

conviction of indecent liberties when offender left a "hickey" on victim's neck area). This is unpersuasive. Raethke was convicted of second degree assault with the intent to commit indecent liberties, not indecent liberties itself. The fact that his actions were insufficient to constitute indecent liberties is irrelevant to determining whether he acted with intent to commit indecent liberties. We reject this argument.

Appellate Costs

Raethke asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. But when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Here, the trial court found Raethke did not have an ability to pay legal financial obligations. If the State has evidence indicating that Raethke's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.

Trickey, ACJ

WE CONCUR:

Dwyer, J.

Appelwick, J.