NO. 32696-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JONATHAN KUHLMAN, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00820-7

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

A. Is RCW 9.94A.835 ambiguous? If so, should the enhancement of sexual motivation be stricken and the matter remanded?

B. Should this matter be remanded for the sentencing court to make an individualized inquiry into the defendant's ability to pay Legal Financial Obligations ("LFOs")?

II. STATEMENT OF FACTS

A. NATURE OF THE CASE

The defendant, Jonathan Kuhlman, brought this action to appeal the sentence imposed following his convictions of Rape in the Second Degree, two counts of Distribution of a Controlled Substance to a person under the age of 18 with a sexual motivation enhancement, and Communication With a Minor for Immoral Purposes – Felony. First, the defendant contends the enhancements for sexual motivation should be stricken because RCW 9.94A.835 is ambiguous. Appellant's Brief at 7-10. Secondly, the appellant contends the matter should be remanded for the sentencing court to make an individualized inquiry in the defendant's current and further ability to pay LFOs. *Id.* at 10-14.

B. COURSE OF THE PROCEEDINGS

On May 8, 2014, the defendant was found guilty after a jury trial with:

- Count I: Rape in the Second Degree;
- Count III: Distribution of a Controlled Substance to a person under the age of 18 – with an enhancement of sexual motivation;
- Count IV: Distribution of a Controlled Substance to a person under the age of 18 – with an enhancement of sexual motivation; and
- Count V: Communication with a Minor for Immoral Purposes – Felony.

CP 50, 52-56.

On August 5, 2014, the defendant was sentenced to life on Count I with a minimum term of 210 months; 138 months on Count III; 138 months on Count IV; and 60 months on Count V. CP 63; RP 08/05/2014 at 26-27. On Counts III and IV the defendant was sentenced to 18 months for each enhancement. CP 60, 63. These two enhancements run consecutive to each other for a total of 36 months and run consecutively to all other sentencing provisions. *Id.* at 63. The defendant was sentenced to a minimum terms of 246 months to LIFE. *Id.* The defendant was ordered to pay the following court-imposed costs: filing fee of $200.00; sheriff's service fee of $60.00; jury demand fee of $250.00; witness fees of $146.00; attorney's fees of $700.00; totaling $1,356.00.

III. ARGUMENT

A. RCW 9.94A.835 IS NOT AMBIGUOUS.

A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If a statute is subject to more than one reasonable interpretation, the court should construe the statute to effectuate the legislature's intent. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Only where the legislative intent is not clear from the words of the statute may the court resort to extrinsic aids, such as legislative history. *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).

RCW 9.94A.835 is not ambiguous. Therefore, there is no need to look at legislative intent. The plain meaning of the statute is clear. RCW 9.94A.835 states:

> Special allegation – Sexual Motivation – Procedures.
>
> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.

(3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

RCW 9.94A.030(46) defines what a sex offense is:

"Sex offense" means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;
(ii) A violation of RCW 9A.64.020;
(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;
(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or
(v) A felony violation of RCW 9A.44.132(1) (failure to register) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register) on at least one prior occasion;
(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

> (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

(emphasis added). RCW 9.94A.835 is the statute which defines the procedure required by the State in filing and proving such an allegation. This is in contrast to RCW 9.94A.533(8)(a)-(f) which states the amount of enhancement to the sentence that is given when a sexual motivation allegation is found by judge or jury.

The defendant argues that RCW 9.94A.835 is inconsistent with its own terms because it excludes sex offenses as defined in RCW 9.94A.030, subsections (1) and (2). Appellant's Brief at 9.

RCW 9.94A.835(1), defines how and when a prosecutor can file the special allegation of sexual motivation, specifically stating that this allegation cannot be filed on a sex offense. The defendant argues that since a felony with a sexual motivation is a sex offense, the State cannot file the special allegation. The defendant states, "any felony becomes a 'sex offense' once a prosecutor files a special allegation of sexual motivation." Appellant's Brief at 9. The defendant is mistaken. A felony does not become a sex offense once a prosecutor files the special allegation of sexual motivation. A felony only becomes a sex offense once a *finding of sexual motivation is made*. RCW 9.94A.030(46)(c). For example, Child Molestation in the First Degree is a sex offense. It is a sex

offense when it is charged and continues to be a sex offense throughout the case. In contrast, an Assault in the Second Degree with a special allegation of sexual motivation is not a sex offense until a judge or a jury makes a finding on the special allegation. Once the finding is made, all the consequences of a sex offense conviction and additional jeopardy apply. A jury could find a defendant guilty of Assault in the Second Degree and not guilty of the special allegation.

RCW 9.94A.835(2) defines how the State can prove the special allegation. Specifically, it states that this finding cannot be applied to sex offenses. The defendant argues that this subsection is inconsistent as well because a felony with a sexual motivation is a sex offense, so no finding can be made. Appellant's Brief at 9. As above, the defendant is mistaken for the same reasons. A felony with a sexual motivation allegation is not a sex offense. A felony with a finding of sexual motivation is a sex offense. The plain meaning of the statute is clear. Furthermore, the definition of sex offenses is referenced in 9.94A.533(8)(a)-(f), where the enhancement is allowed only upon a finding of sexual motivation.

B. THIS MATTER SHOULD NOT BE REMANDED FOR AN INDIVIDUALIZED INQUIRY IN THE DEFENDANT'S CURRENT AND FUTURE ABILITY TO PAY LFOs.

The State agrees that *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015), held that a defendant may challenge for the first time on appeal the court imposing costs without making an individualized finding of current and future ability to pay. In *Blazina*, as in the matter before the Court, the sentencing judge did not inquire about the defendant's current and future ability to pay, nor did defense counsel object.

Nonetheless, the matter before the Court is distinguishable to *Blazina*. Pursuant to RCW 9.94A.500, the Department of Corrections was ordered to do a Pre-Sentence Investigation Report[1] ("PSI") on the defendant. This PSI was reviewed by the sentencing judge. RP 08/05/2014 at 24. The PSI indicates the defendant is college-educated, has owned his own business, had a then salary of $80,000.00, and denied receiving public assistance, disability payments, financial assistance from family, and unemployment income. PSI at 9-10. In addition, the PSI writer states: "With his record of self-employment, it does not appear Mr. Kuhlman will have any barriers to obtaining future employment beyond his registration requirements and conditions of supervision." PSI at 9. The interview of the defendant for the PSI was an individualized inquiry. In addition, defense counsel was retained, not court-appointed. *See*

[1] The Pre-Sentence Investigation Report has been designated in this appeal by a Supplemental Designation of Clerk's Papers filed in Benton County Superior Court, and a copy electronically filed in this Court, on June 12, 2015.

"Initial Arraignment" Clerk's Minutes on August 1, 2013.[2] This matter does not need to be remanded.

IV. CONCLUSION

RCW 9.94A.835 is not ambiguous; the plain meaning is clear. A felony with a special allegation of a sexual motivation is not a sex offense until the finding of the allegation is made. The enhancements should not be stricken. Furthermore, this matter does not need to be remanded for the sentencing court to make an individualized inquiry. The PSI was clear that the defendant had no barriers to obtain future employment and the judge read the PSI prior to imposing costs.

RESPECTFULLY SUBMITTED this 12th day of June, 2015.

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[2] The "Initial Arraignment" Clerk's Minutes on August 1, 2013, has been designated in this appeal by the Supplemental Designation of Clerk's Papers referenced in footnote number 1 of this brief.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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☒ E-mail service by agreement was made to the following parties: gaschlaw@msn.com

Signed at Kennewick, Washington on June 12, 2015.

Courtney Sheafer
Appellate Secretary