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Court of Appeals  
Division I  
State of Washington

NO. 73543-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TERRENCE PATRICK ECKHART,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. Whether the State produced sufficient evidence to convict Eckhart of indecent exposure in count 2 when viewing the evidence in the light most favorable to the State.

2. Whether the State produced sufficient evidence to find Eckhart guilty of committing indecent exposure in count 1 with sexual motivation.

3. Whether the trial court erred by admitting hearsay testimony under the certified public records exception.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Terrence Eckhart with two counts of Felony Indecent Exposure based on Eckhart's prior conviction for Attempted Child Molestation in the First Degree.<sup>1</sup> CP 19-20. The State alleged that Eckhart committed both counts with sexual motivation. Id. A jury convicted Eckhart of two counts of indecent exposure, and found that Eckhart committed count 1 with sexual motivation. CP 49-54; 5RP 5, 18.<sup>2</sup> The jury acquitted Eckhart of

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<sup>1</sup> A prior sex offense conviction elevates an indecent exposure conviction from a misdemeanor to a Class C felony. RCW 9A.88.010(2)(c).

<sup>2</sup> The Verbatim Report of Proceedings consists of eight volumes designated as follows: 1RP (11/7/14), 2RP (12/30/14), 3RP (12/31/14), 4RP (1/5/15), 5RP (1/6/15), 6RP (2/13/15), 7RP (3/27/15), and 8RP (5/29/15).

committing count 2 with sexual motivation. CP 52; 5RP 5. The court imposed a standard-range sentence, and granted Eckhart's motion for a stay of sentence pending appeal. 8RP 13-14.

## **2. SUBSTANTIVE FACTS**

In 2009, S.W. moved into her home in North Seattle where she lived alone. 3RP 13-14. S.W. shares a 15-20' wide driveway with Eckhart, his wife, and their two daughters. 3RP 15-16, 42; 4RP 52, 57. Eckhart's side door opens out onto the shared driveway, and is directly across from S.W.'s front porch. 3RP 19; 4RP 52; Ex. 1-3.

Although S.W. was friendly with Eckhart, she felt "[v]ery uncomfortable" around him based on his comments and actions toward her over the years, including him telling her that she was "cute," inviting her over to his house to "drink beers" while his wife was away, bringing her chocolates, and offering her prescription pain killers. 3RP 21-22. S.W. did not confront Eckhart or his wife about her uneasiness. 3RP 22. Rather, she tried to avoid talking to Eckhart "at all costs."<sup>3</sup> 3RP 22.

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<sup>3</sup> S.W. also thought that Eckhart was "annoying" because he talked excessively, and frequently knocked on her door, even when she was obviously home and not answering. 3RP 39-40.

S.W. usually left for work as a teacher around 9:30 a.m. 3RP 13, 18. One morning, S.W. was heading to work when she saw Eckhart standing half naked in his doorway, waving and saying "hi." 3RP 23-24. S.W. quickly responded "hi," got into her car, and left. 3RP 24. The incident later repeated itself, and S.W. again saw Eckhart standing shirtless in his doorway, waving hello and trying to get her attention, as she walked to her car parked in their shared driveway. 3RP 23-24. Both times, S.W. thought that Eckhart's behavior was weird and strange. 3RP 23-24.

In September 2013, Eckhart's disrobing escalated to full nakedness.<sup>4</sup> 3RP 24. S.W. was leaving for work and saw Eckhart standing in his doorway with his door "wide open" and not wearing any clothes. 3RP 24. Eckhart was looking straight ahead. 3RP 25. S.W. saw Eckhart's penis as she tried to get into her car. 3RP 24-25. She could not see whether Eckhart's penis was erect. 3RP 32. S.W. felt "shocked," "shaken up," "nervous and scared." 3RP 25-26. She got into her car without exchanging any words and drove away. 3RP 24-25. S.W. did not confront Eckhart or his wife about the incident, or report it to police, because she hoped that it was "just a fluke." 3RP 26-27. S.W. was worried about Eckhart's

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<sup>4</sup> These facts formed the basis of count 2. CP 19-20.

wife and daughters, and did not want to “stir up trouble for maybe no reason.” 3RP 27.

Although S.W. tried to forget seeing Eckhart naked in his doorway, it happened again. 3RP 27. S.W. was walking to her car on the way to work one morning when she saw Eckhart standing “full frontal” in his doorway staring straight ahead. 3RP 27-30. S.W. saw Eckhart’s penis, and again felt “[c]ompletely shaken up,” nervous, and uncomfortable. 3RP 30. S.W. could not tell if Eckhart’s penis was erect. 3RP 32. Eckhart did not try to shut the door when S.W. looked at him. 3RP 31.

Following these incidents, S.W. started peeking out her blinds and waiting to leave until Eckhart’s door was “closed all the way.” 3RP 28-29. S.W. believed that Eckhart’s behavior was escalating, and that he was waiting for her to leave for work. 3RP 47. At some point, she realized that Eckhart’s exhibitionism only occurred when his wife was not home.<sup>5</sup> 3RP 27. S.W. went into “avoidance mode,” and began parking her car in a different location near the front of her house, so she could “make a run for it . . . and not have to see anything.” 3RP 29. S.W. began thinking that she

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<sup>5</sup> S.W. knew what cars Eckhart and his wife drove, and realized that Eckhart exposed himself to her when his wife’s van was not parked at the house. 3RP 27-28.

should move, and asked friends and family for advice. 3RP 31.

She did not call the police because she was worried about “shaking up” Eckhart’s family situation, and did not know how Eckhart’s wife would respond. 3RP 31-32.

In early January 2014, S.W. walked out of her house one morning and saw Eckhart sitting naked in his doorway making hand motions.<sup>6</sup> 3RP 32-33. Eckhart’s door was “wide open” as he moved his hand “up and down” in his groin area. 3RP 32, 34, 54. S.W. saw Eckhart’s penis, although she could not tell if it was in his hand. 3RP 34, 54. She believed that Eckhart was masturbating. 3RP 18. S.W. returned to her house and looked through the blinds to see if she “was going crazy or if that’s what [she] was really seeing.” 3RP 52. She waited about 10 minutes to leave for work, until she could no longer see Eckhart sitting on the steps motioning with his hand. 3RP 57, 59. Eckhart’s wife’s van was not parked at the house. 3RP 37.

The next morning, S.W. called the police to report the incident, believing things had “gone too far.” 3RP 37; 4RP 10-11, 19. S.W. did not confront Eckhart or his wife about the incident, nor did she tell them that she had reported it to the police. 3RP 38.

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<sup>6</sup> These facts formed the basis of count 1. CP 19.

During motions in limine, the court granted Eckhart's motion to bifurcate the trial, and reserve litigating the issue of whether Eckhart had previously been convicted of a sex offense until after the jury had convicted him of indecent exposure. 2RP 5-8.

To establish that Eckhart had a prior sex offense conviction, the prosecutor elicited testimony from the assigned case detective, Seattle Police Detective Eugene Foster, about Eckhart's date of birth, which appeared on the judgment and sentence for the prior conviction. 4RP 49; Ex. 10 at 9. Foster testified that he learned Eckhart's date of birth by performing a "computer check." 4RP 26-28. When the prosecutor asked Foster to provide Eckhart's date of birth, Eckhart objected, arguing hearsay, lack of personal knowledge, and foundation. 4RP 28. The prosecutor responded that Eckhart's date of birth was being offered only for purposes of identification. 4RP 28. The court sustained Eckhart's objection, and the prosecutor asked to be heard at a later time. 4RP 28.

Subsequently outside the presence of the jury, the prosecutor argued that Foster's testimony was not hearsay because it was being offered for "purposes of identification simply because it's the defendant's date of birth by way of fact." 4RP 35. Additionally, the prosecutor argued that Eckhart's date of birth was

within Foster's personal knowledge because Foster learned it by checking the Seattle Police Department database. 4RP 36. The court rejected the prosecutor's arguments, and suggested that the evidence might be admissible as a public record. 4RP 36. Eckhart again objected, arguing that the State could not lay the proper foundation for the public records exception, and that even if it could, Foster's testimony would violate the best evidence rule. 4RP 37, 39.

The court disagreed, ruling that Foster's proposed testimony "basically" met the requirements of the public records exception and best evidence rule, although it would have been preferable for the State to offer "a certified copy of a record somewhere, that would clearly meet the public record exception." 4RP 39-40. After this exchange, Foster testified that Eckhart's date of birth was May 2, 1966. 4RP 49.

During the second phase of the trial, the prosecutor sought to prove that Eckhart had a prior sex offense conviction by introducing a certified copy of the judgment and sentence, which contained Eckhart's name, date of birth, height, weight, race, gender, hair color, eye color, and fingerprints. 5RP 7; Ex. 10 at 9. Other than Eckhart's date of birth, the State did not introduce any

additional evidence confirming that Eckhart matched the identifying information contained in the judgment and sentence. Although Eckhart argued that he did not match the height listed in the judgment and sentence, the jury found that he was the person identified in the document as having been previously convicted of a sex offense. 5RP 11-12, 18.

**C. ARGUMENT**

**1. SUFFICIENT EVIDENCE SUPPORTS ECKHART'S INDECENT EXPOSURE CONVICTION IN COUNT 2.**

Eckhart argues that his felony indecent exposure conviction in count 2 should be reversed because the State failed to prove that he intentionally exposed himself to S.W. in an obscene manner, and that he knew his conduct would likely cause reasonable affront or alarm. Viewing the evidence in the light most favorable to the State, Eckhart's claim fails. Eckhart stood naked in his doorway in broad daylight less than 20 feet away from S.W. Eckhart's intentionally obscene and knowing behavior easily satisfied both elements of indecent exposure.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a

conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person commits indecent exposure if he (1) intentionally makes an open and obscene exposure of his person, (2) knowing that such conduct is likely to cause reasonable affront or alarm. RCW 9A.88.010(1). Although the statute does not define "obscene," the term has been defined in Washington common law as "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. Vars, 157 Wn. App. 482, 490, 237 P.3d 378 (2010) (quoting State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966)). It is sufficient if society, using a common-sense approach, would view the conduct as “indecent and improper.” Id. (citation omitted). The crime is complete when the inappropriate display occurs in another’s presence, regardless of the other person’s response. Id. The other person need not observe the defendant’s private parts for an indecent exposure to have occurred. Id. at 491.

Here, there is substantial evidence from which a rational trier of fact could find that Eckhart intentionally exposed himself to S.W. in an obscene manner, and that he knew his conduct would reasonably cause affront or alarm. Eckhart took off all of his clothes, opened his door “wide,” and positioned himself so that he was facing his shared, 15-20’ wide driveway in broad daylight at a time when he knew S.W. usually left for work. 3RP 24-30. The jury could have reasonably inferred that Eckhart knew when S.W. left for work based on the fact that he had seen her leaving at that same time twice before when he stood shirtless in his doorway, waved, and said “hi” to her. 3RP 13, 18, 23-24.

Significantly, Eckhart did not move during the few seconds that it took S.W. to exit her house, close her front door, presumably lock it, turn, and walk toward him. 3RP 24-31. Rather than shut his door, turn away, or try to cover himself, Eckhart stood still. Id. Although not legally required, S.W. saw Eckhart's penis when she walked to her car. See Vars, 157 Wn. App. at 491 (holding that a witness need not observe the defendant's naked genitalia to prove indecent exposure); 3RP 24-25, 30. Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, there was overwhelming evidence from which the jury could find that Eckhart intentionally exposed himself to S.W. in an "open and obscene" manner.

Nonetheless, Eckhart argues that the State failed to present sufficient evidence of his intent to make an obscene exposure given the lack of evidence that he made an overt sexual gesture, or tried to communicate with S.W., while standing naked in the doorway. Eckhart's claim fails because neither is required to prove indecent exposure.

Eckhart relies on two cases where the defendants' indecent exposure convictions arose out of their masturbating, but neither case suggests, let alone holds that a sexual gesture is required to

prove indecent exposure. State v. Swanson, 181 Wn. App. 953, 967, 327 P.3d 67 (2014); State v. Leach, 53 Wn. App. 322, 766 P.2d 1116 (1989), disapproved of on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 107, 812 P.2d 86 (1991). Indeed, this Court recognized in State v. Vars that the “gravamen” of indecent exposure is “an intentional and ‘obscene exposure’ in the presence of another that offends society’s sense of ‘instinctive modesty, human decency, and common propriety.’” 157 Wn. App. at 491 (quoting Galbreath, 69 Wn.2d at 668).

Here, Eckhart’s decision to disrobe completely, open his door, and remain facing S.W. as she came within 20’ of him in the morning daylight, violates common sense notions of modesty and decency. Eckhart did not waver in displaying his penis to S.W. 3RP 24-31. He did not duck, cover himself, or say a word to suggest that the exposure was accidental. Id. The fact that it happened twice, in exactly the same manner over the course of a few months, confirms that it was not a mistake.

Although Eckhart argues that it “cannot be a crime just to be naked within one’s dwelling, even if a nearby neighbor happened to have caught an unwelcome glimpse,” his claim is refuted by the case law. State v. Chiles, 53 Wn. App. 452, 453, 767 P.2d 597

(1989) (holding that a defendant standing inside his home, displaying his genitals through a second-story window to a passerby on the sidewalk below, committed indecent exposure). Substantial evidence existed from which a jury could find that Eckhart intentionally committed an open and obscene exposure of his person.

Similarly, the State presented sufficient evidence that Eckhart knew his conduct would cause reasonable affront or alarm. Eckhart chose the time and place of his exposure, and his target. As previously discussed, he intentionally took off all his clothes, opened his door, and positioned himself so that he was facing S.W.'s car and their shared driveway at a time when he knew that S.W. usually left for work. 3RP 18, 24-30. The fact that Eckhart waited until his wife was gone to stand nude in his doorway is critical. 3RP 27-28. The jury could reasonably infer from this evidence that Eckhart knew that displaying his penis in broad daylight would cause reasonable affront or alarm to S.W.

Further, Eckhart repeatedly sought out S.W., telling her she was "cute," offering her prescription pain killers, asking her over to "drink beers" while his wife was gone, bringing her chocolates, and repeatedly knocking on her door, even when she was obviously

home and not answering. 3RP 21-22, 40. Although S.W. tried to rebuff his efforts, Eckhart's behavior escalated from twice standing half naked in his doorway and greeting S.W. as she left for work, to standing fully naked in his doorway as she left for work. 3RP 23-24, 39-40. Each time, S.W. got in her car and tried to leave as quickly as possible. 3RP 23-30. The jury could have reasonably inferred that Eckhart knew his conduct would cause S.W. reasonable affront or alarm based on her responses to his repeated, unwanted advances.

Eckhart's argument that the State did not present sufficient evidence to establish that he saw S.W., or was aware of her discomfort is unavailing. Although neither is required to prove the knowledge element of indecent exposure, the jury could have reasonably inferred both. Eckhart exposed himself to S.W. at 9:30 a.m. from a distance of less than 20 feet. 3RP 24-30. Given the time of day and close confines, the jury could have reasonably concluded that Eckhart saw S.W. The fact that Eckhart repeatedly disrobed and positioned himself in his doorway at a time when S.W. usually left for work further supports the inference that he knew S.W. would see him.

The jury also could have reasonably inferred that Eckhart knew that his conduct made S.W. uncomfortable. Given that social norms generally require wearing clothes in public, it is inherently unnerving to see someone who is entirely naked, particularly when it is a next-door neighbor. S.W.'s consistent efforts to avoid engaging Eckhart, ranging from not answering the door, to refusing his varied invitations, to quickly entering her car when confronted by his semi- and full-nakedness, provided the jury with substantial evidence from which to conclude that Eckhart knew that his behavior was likely to cause reasonable affront or alarm on S.W.'s part.

Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, there was sufficient evidence that Eckhart intentionally exposed himself to S.W. in an open and obscene manner by standing naked in his doorway, and that he knew his conduct would likely cause reasonable affront or alarm.

**2. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S SEXUAL MOTIVATION FINDING IN COUNT 1.**

Eckhart argues that the sexual motivation finding should be reversed because the State failed to present evidence of

identifiable sexual conduct that proves he committed indecent exposure for purposes of sexual gratification. Viewing the evidence in the light most favorable to the State, Eckhart's claim fails. Given S.W.'s testimony that Eckhart was masturbating when he exposed himself to her, there was sufficient evidence from which a rational trier of fact could reasonably conclude that Eckhart committed the crime for purposes of sexual gratification.

Under the Sentencing Reform Act of 1981 (SRA), a "sexual motivation" finding is an aggravating circumstance that can increase an offender's sentence. RCW 9.94A.535(3)(f). To support a sexual motivation finding, the jury must find beyond a reasonable doubt that one of the defendant's purposes for committing the crime was sexual gratification. RCW 9.94A.030(48); RCW 9.94A.835(2). The State must present evidence of identifiable conduct by the defendant while committing the offense that proves beyond a reasonable doubt that the defendant committed the crime for purposes of sexual gratification. Vars, 157 Wn. App. at 494.

Here, there can be no question that Eckhart committed indecent exposure in count 1 for purposes of sexual gratification. S.W. testified that she saw Eckhart sitting naked in his "wide open"

doorway masturbating. 3RP 18, 32-33. S.W. saw Eckhart's penis, and his hand moving "up and down" in his groin area. 3RP 32, 34, 54. Eckhart does not dispute that a person masturbates for sexual pleasure. S.W.'s testimony that Eckhart was masturbating provided the jury with substantial evidence to convict him of indecent exposure with sexual motivation.

Additionally, Eckhart's repeated and escalating interest in S.W. provided the jury with substantial evidence to infer that his actions were sexually motivated. Eckhart masturbated in front of S.W. after a string of inappropriate contacts and overtures, including him telling S.W. that she was "cute," inviting her over to "drink beers" while his wife was away, posing half naked in his doorway, and finally full frontal as S.W. left for work. 3RP 21-30. Given this record, there is substantial evidence from which a rational trier of fact could conclude that Eckhart exposed himself to S.W. for purposes of sexual gratification.

Despite this record, Eckhart argues that the jury's sexual motivation finding should be reversed because "the State produced no evidence of any conduct that was not inherent in the offense of indecent exposure." Appellant's Opening Br. at 16. Masturbation, however, is not inherent in the offense of indecent exposure.

A person could intentionally make an open and obscene exposure of his person, knowing that such conduct would likely cause reasonable affront or alarm, without masturbating. See, e.g., Chiles, 53 Wn. App. at 453 (defendant displaying his genitals from a second-story window); Vars, 157 Wn. App. at 493 (defendant walking around a residential neighborhood while naked).

The cases on which Eckhart relies to advance his argument shed little light here. The first case, State v. Halstien, merely provides an example of what might constitute sufficient evidence of sexual motivation. 122 Wn.2d 109, 129, 857 P.2d 270 (1993) (holding that sufficient evidence existed to convict the defendant of burglary with sexual motivation based on the fact that he stole condoms and a vibrator from the victim's home, but did not take valuable personal property). The second case on which Eckhart relies, State v. Thomas, resolves the legal question of whether felony murder predicated on rape is a "sex offense" under the SRA, thereby precluding the imposition of an exceptional sentence based on sexual motivation. 138 Wn.2d 630, 631, 980 P.2d 1275 (1999). Neither case provides a reason to invalidate the jury's finding here.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, a rational trier of

fact could reasonably conclude from Eckhart's masturbating and prior history with S.W. that he exposed himself to her for purposes of sexual gratification. Eckhart's claim should be rejected.

**3. THE TRIAL COURT ERRONEOUSLY ADMITTED ECKHART'S DATE OF BIRTH AS A CERTIFIED PUBLIC RECORD.**

Eckhart correctly argues that the trial court should have sustained his objection to Foster's testimony about his date of birth as hearsay. The State failed to lay the proper foundation to admit the evidence as a certified public record. Because the erroneously admitted hearsay evidence violated the Confrontation Clause, the proper remedy is a new trial on whether Eckhart was previously convicted of a sex offense.

A trial court's decision to admit or exclude relevant evidence is reviewed for an abuse of discretion, and will not be disturbed on appeal unless it is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

An out-of-court statement offered to prove the truth of the matter asserted is hearsay, and inadmissible unless it falls under a hearsay exception. ER 801(c); ER 802. Certified public records

prepared under seal qualify as an exception to the hearsay rule. RCW 5.44.040<sup>7</sup>; State v. Monson, 113 Wn.2d 833, 837, 784 P.2d 485(1989). Jail booking records, a driver's license, and a state identification card are all examples of public records that are admissible "when certified." See State v. Iverson, 126 Wn. App. 329, 339-40, 108 P.3d 799 (2005) (jail booking records); State v. Mares, 160 Wn. App. 558, 564-65, 248 P.3d 140 (2011) (driver's license); State v. C.N.H., 90 Wn. App. 947, 949, 954 P.2d 1345 (1998) (state identification card).

Here, Foster's testimony about Eckhart's date of birth was hearsay because it was an out-of-court statement offered to prove the truth of the matter asserted, *i.e.*, that Eckhart was born on a certain date. See State v. Duran-Davila, 77 Wn. App. 701, 704, 892 P.2d 1125 (1995) (holding that an officer's testimony about a non-witness's date of birth listed on a booking sheet was "clearly inadmissible hearsay, unless subject to an exception"); 4RP 49.

The trial court abused its discretion when it admitted the evidence under the certified public records exception because the

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<sup>7</sup> RCW 5.44.040 provides in relevant part:

Copies of all records . . . on file in the offices of the various departments . . . of this state . . . when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

State failed to lay the proper foundation for its admission.<sup>8</sup> Foster testified solely that he determined Eckhart's date of birth by performing a "computer check." 4RP 26-28. The State did not present any evidence that Foster was a custodian of the record, or that it was certified under seal. RCW 5.44.040; see State v. Davis, 141 Wn.2d 798, 853-54, 10 P.3d 977 (2000) (recognizing that public records qualify as an exception to the hearsay rule when certified by a custodian of records).

Indeed, the State never produced an actual record, such as the database entry indicating Eckhart's date of birth, in contrast to most cases where the proponent offers a certified copy of a written record or photograph. See, e.g., State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997) (jail booking record); Mares, 160 Wn. App. at 564-65 (driver's license); C.N.H., 90 Wn. App. at 949 (state identification card). The trial court abused its discretion when it admitted Foster's hearsay testimony as a certified public record because the State failed to produce sufficient evidence to satisfy

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<sup>8</sup> Foster's testimony might have been admissible as a business record if the State had laid the proper foundation. See RCW 5.44.020; State v. Iverson, 126 Wn. App. 329, 339, 108 P.3d 799 (2005) (admitting jail records under the business records exception based on officers' testimony that they were familiar with the jail booking system, used it to enter information in their regular course of business, and routinely relied on it); State v. Bellerouche, 129 Wn. App. 912, 917, 120 P.3d 971 (2005) (admitting trespass notice as a business record because it was "filed, kept, and accessed in accordance with the routine recordkeeping procedures" of the police department).

the certification and custodian of record requirements of the exception.

An error admitting evidence is “not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (citations omitted). Here, the outcome of the second phase of the trial would have been materially affected if the trial court had excluded Eckhart’s date of birth as hearsay. Other than Eckhart’s name and date of birth, the State did not present any evidence linking Eckhart to the judgment and sentence for the prior sex offense conviction. For example, the State failed to produce a certified copy of Eckhart’s driver’s license, booking records, or a fingerprint comparison, any of which would have proven that Eckhart matched the identifying information listed in the judgment and sentence. State v. Huber, 129 Wn. App. 499, 503, 119 P.3d 388 (2005).

The fact that Eckhart shared the same first and last name as the person listed on the judgment and sentence is insufficient alone to prove beyond a reasonable doubt that the judgment and sentence pertained to him. Huber, 129 Wn. App. at 502; State v. Harkness, 1 Wn.2d 530, 542-43, 96 P.2d 460 (1939). Further, the

physical identifiers listed in the judgment and sentence, indicating a white male with brown hair and hazel eyes weighing approximately 190 pounds, were too generic to prove beyond a reasonable doubt that Eckhart was the same person convicted of the offense.<sup>9</sup> Ex. 10 at 9. Given the lack of other evidence presented, and the lack of distinctive personal information, there is a reasonable probability that the jury would not have found that Eckhart had previously been convicted of a sex offense if his date of birth been excluded.

Eckhart correctly identifies a new trial as the proper remedy for the prejudicial and erroneous admission of evidence. See State v. Jasper, 174 Wn.2d 96, 120, 271 P.3d 876 (2012) (holding that retrial, rather than dismissal, is the appropriate remedy when evidence is admitted at trial that is later deemed in violation of the Confrontation Clause). To the extent that Eckhart suggests that he should be retried on whether he committed two counts of indecent exposure, he is mistaken. Opening Br. at 27 (“Both convictions should be reversed.”). Given that Eckhart’s trial was bifurcated, and that the State presented sufficient evidence to convict him of two counts of indecent exposure in the first phase of the trial, the

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<sup>9</sup> The jury had the opportunity to visually examine Eckhart when his counsel directed him to stand next to Foster to illustrate the height discrepancy between the person identified in the judgment and sentence as being 6’2” tall, and Eckhart, who appeared to be 5’9” tall. Ex. 10 at 9; 4RP 18-19.

only part of the trial that should be relitigated is the second phase of the trial, specifically whether Eckhart was previously convicted of a sex offense.

**D. CONCLUSION**

For the foregoing reasons, the Court should affirm Eckhart's convictions for two counts of indecent exposure, and reverse and remand for a new trial on whether Eckhart has a prior sex offense conviction.

DATED this 20<sup>th</sup> day of April, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mick Woynarowski, the attorney for the appellant, at mick@washapp.org, containing a copy of the Brief of Respondent, in State v. Terrence Patrick Eckhart, Cause No. 73543-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of April, 2016.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Name:  
Done in Seattle, Washington