

328091-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACOB CUNNINGHAM, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

The Trial Court erred in denying the motion to seal juvenile records because the use of actual force is required to be established by statute to disqualify a record being sealed for a conviction of indecent liberties by forcible compulsion.

II. ISSUE PRESENTED

Did the juvenile court abuse its discretion when it denied the appellant's motion to seal his record for a 2008 juvenile conviction of indecent liberties by forcible compulsion?

III. STATEMENT OF THE CASE

The appellant, Jacob Cunningham, was charged by information in the Spokane County Juvenile Court with rape of a child in the first degree and attempted rape of a child in the first degree for events occurring on April 22, 2008. CP 2. Mr. Cunningham was 13 years old at the time of the event. CP 1. Each offense had a separate victim and both victims were five years old at the time of the offense. CP 1. The appellant entered into a plea agreement with the State. The juvenile court accepted a reduction in charges. The appellant ultimately pleaded guilty in juvenile court on July 10, 2008, to one count of indecent liberties with forcible compulsion and one count of indecent exposure. CP 13, CP 14, CP 18. The appellant stipulated to and the court found the existence of the aggravating circumstance that the victim was particularly vulnerable at the time of

the offense. CP 18. Indecent liberties by forcible compulsion is a class A felony. RCW 9A.44.100(b). The indecent exposure conviction was classified as a gross misdemeanor. RCW 9A.88.010(2)(a).

The appellant was sentenced to a special sex offender disposition alternative. CP 18.

IV. ARGUMENT

A. THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO SEAL HIS JUVENILE CONVICTIONS FOR INDECENT LIBERTIES BY FORCIBLE COMPULSION.

The juvenile court did not abuse its discretion when it denied the appellant's motion to seal his record of a criminal conviction for indecent liberties by forcible compulsion. CP 47. The charge to which he plead guilty, the trial court's disposition order, the statement of plea of guilty, and the affidavit of facts filed in support of the charges clearly establish the appellant used forcible compulsion when committing the crime of indecent liberties. Indeed, the appellant acknowledged in his statement on plea of guilty that the facts as presented in the affidavit of probable cause and the police reports were sufficient to support a finding of guilty. CP 14.

Mr. Cunningham filed a motion and declaration to seal records of a juvenile offender pursuant to former RCW 13.50.010(12)(a). CP 37. That statute provides:

12)(a) The court shall not grant any motion to seal records for class A offenses made pursuant to subsection (11) of this section that is filed on or after July 1, 1997, unless:

(i) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the person has spent five consecutive years in the community without committing any offense or crime that subsequently results in an adjudication or conviction;

(ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;

(iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

(iv) The person is no longer required to register as a sex offender under RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense;

(v) The person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion; and

(vi) Full restitution has been paid.

(b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection (11) of this section unless:

(i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;

(ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;

(iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

(iv) The person is no longer required to register as a sex offender under RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense; and

(v) Full restitution has been paid.

Former RCW 13.50.050 (emphasis added).

On September 23, 2014, the juvenile court denied the appellant's motion to seal the record of his criminal conviction for indecent liberties by forcible compulsion. CP 47. The motion to seal was presented to the juvenile court without oral argument. The court considered the pleadings and the relevant court records when arriving at its decision. CP 47. This appeal timely followed.

Standard of Review

This court reviews a juvenile court's decision to seal or unseal records for abuse of discretion, but if that decision is based on an improper legal rule, the appellate court remands for application of the correct rule. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005); *State v. Richardson*, 177 Wn.2d 351, 357, 302 P.3d 156, (2013); *State, Dept. of Social and Health Services v. Parvin*, 181 Wn. App. 663, 677, 326 P.3d 832 (2014); *State v. Waldon*, 148 Wn. App. 952, 957, 202 P.3d 325 (2009). An abuse of discretion occurs when “no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. DeLeon*, 341 P.3d

315, 328 (Wn. App. Div. 3, 2014). Stated differently, a court also abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). *State v. DeLeon*, 341 P.3d at 328.

On July 10, 2008, and as reflected in the amended information, disposition order, and the statement on plea of guilty, the appellant pleaded guilty to the crime indecent liberties by forcible compulsion. CP 5, CP 14, CP 18.

JuCR 7.6(b) provides that the taking of a plea of an alleged juvenile offender is governed by CrR 4.2. Pursuant to CrR 4.2, and in the appellant's statement on plea of guilty in juvenile court, he acknowledged under § 4 of that statement that he understood that he was charged under Count I of the amended information with indecent liberties by forcible compulsion by having sexual contact with someone not his spouse. CP 14. Further, the juvenile court made a finding that the appellant fully understood the statement on plea of guilty. CP 14. That the plea was entered knowingly, intelligently, and it was voluntarily made. CP 14. The court found a factual basis for the plea of guilty to indecent liberties by forcible compulsion. CP 14. "[T]he factual basis for the plea may come from any source the trial court finds reliable[.]" *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). A plea statement may be sufficient to establish a factual basis for a guilty plea. *See, In re Personal Restraint of Keene*, 95 Wn.2d 203, 209–12, 622 P.2d 360 (1980).

Ultimately, the court found the appellant guilty as charged in the amended information.

The appellant complains the juvenile court abused its discretion when it denied his motion to seal his conviction for the crime of indecent liberties with forcible compulsion. He argues the court was required to review the facts of the case to determine whether “actual” forcible compulsion was used during commission of the crime. *See*, Appellant’s brief at 7.

This court interprets statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Furthermore, this court avoids interpreting a statute in a manner that leads to an unlikely, strained, or absurd result. *Id.*

The crime of indecent liberties may be committed without forcible compulsion. RCW 9A.44.100.¹ There are a number of alternative means of

¹ (1) A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another:

- (a) By forcible compulsion;
- (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;
- (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

committing the offense. *Id.* The appellant was charged only with and convicted of one alternative - by forcible compulsion.

It is disingenuous for the appellant to argue that he did not use forcible compulsion to commit the crime of indecent liberties when he knowingly,

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

RCW 9A.44.100

intelligently, and voluntarily pleaded guilty to the crime of indecent liberties *by forcible compulsion*. There is no “quasi” or “inconsequential” forcible compulsion. Either the facts of forcible compulsion were present or they were not at the time of the commission of the offense. Requiring a juvenile court to make a factual determination as to whether there was forcible compulsion used at the time of the offense, subsequent to a prior factual determination by a court and a plea of guilty to the same, would lead to an unlikely, strained, or absurd result of the statute.

B. THERE WERE SUFFICIENT FACTS PRESENT TO ESTABLISH THE APPELLANT “ACTUALLY” COMMITTED THE OFFENSE OF INDECENT LIBERTIES WITH FORCIBLE COMPULSION.

If this court accepts appellant’s argument that “actual” forcible compulsion must be established for the offense of indecent liberties by forcible compulsion, notwithstanding his plea of guilty to the same, there were sufficient facts for the juvenile court to deny his motion to seal.²

² The appellant claims the juvenile court did not consider the facts when determining whether “actual” forcible compulsion was used. *See*, Appellant’s brief at 7. To the contrary, the juvenile court made a finding that it reviewed the pleadings and the court record when making its determination. CP 47. The court record contains all of the pleadings and the affidavit of probable cause in support of the charges. Furthermore, Appellant’s claim that had the current statute been in place at the time of the original plea, there would have been no rational basis for him to plead guilty to the charges in the amended information. *See*, Appellant’s brief at 7. This claim is of no consequence as to whether or not the juvenile court abused its discretion when denying his motion to seal.

Forcible compulsion is statutorily defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person.” RCW 9A.44.010(6); *State v. Higgins* 168 Wn. App. 845, 858, 278 P.3d 693 (2012).

At the time of the offenses, the thirteen-old-appellant exposed himself to a five-year-old girl and a five-year-old boy at a church sponsored event. CP 1. He asked the five-year-old girl and boy that they do the same and each complied. CP 1. Appellant had an erection during this time. CP 1. He also asked the five-year-old male victim to touch him and the victim complied. CP 1. The appellant had isolated himself and the child victims from the view of adults during commission of the offenses. CP 1. The appellant told the two children not to tell anyone what he had done. CP. The appellant had exposed himself to the male child victim twice before. CP 1. The juvenile court found the victim was particularly vulnerable at the time of the offense. CP 18.

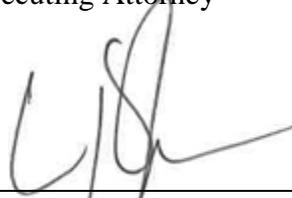
Certainly the five-year-old vulnerable child could have felt threatened by physical injury from the thirteen-year-old appellant when he told him not to tell anyone about his activities. The juvenile court did not abuse its discretion by denying appellant’s motion to seal his record of conviction.

V. CONCLUSION

The juvenile court did not abuse its discretion when it denied appellant's motion to seal his juvenile court conviction. This court should affirm the juvenile court.

Respectfully submitted this 13 day of March, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 13, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Bryan P. Whitaker
whitakerattorney@hotmail.com

and mailed a copy to:

Jacob L. Cunningham
18621 E. Augusta Ave.
Spokane Valley, WA 99016

3/13/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)