

02673-6

02673-6

NO. 62673-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY VARS,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
KING COUNTY

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE ..... 5

E. ARGUMENT ..... 11

    1. MR. VARS'S CONVICTIONS SHOULD BE REVERSED  
    AND DISMISSED WITH PREJUDICE BECAUSE THE  
    STATE FAILED TO PROVE INDECENT EXPOSURE..... 11

        a. Due Process requires the State to prove each element  
        of the offense charged beyond a reasonable doubt. .... 11

        b. The trial court did not find that Mr. Vars exposed his  
        genitalia, as required to convict a defendant of  
        indecent exposure, and the State did not present  
        sufficient evidence to allow the court to make such a  
        finding. .... 12

        c. Because Mr. Vars was in a dark residential area in the  
        middle of the night, the State failed to prove he  
        intentionally made an open exposure knowing that  
        such conduct was likely to cause reasonable affront  
        or alarm ..... 17

        d. Reversal and dismissal is the appropriate remedy. .... 18

    2. THERE WAS NO EVIDENCE OF SEXUAL  
    MOTIVATION, LET ALONE SUFFICIENT EVIDENCE  
    TO PROVE THIS AGGRAVATING FACTOR BEYOND A  
    REASONABLE DOUBT ..... 19

        a. To convict a defendant of acting with sexual  
        motivation, the State must present evidence of  
        identifiable sexual conduct during the course of the  
        offense that is not inherent to the underlying offense  
        for which a defendant is convicted. .... 19

b. Here, the State presented no evidence of sexual conduct and no evidence of any conduct that was not inherent in the offense of indecent exposure. ....	21
3. THE CONVICTIONS FOR TWO COUNTS OF INDECENT EXPOSURE VIOLATE DOUBLE JEOPARDY BECAUSE THE UNIT OF PROSECUTION IS THE EXPOSURE, NOT THE NUMBER OF VIEWERS. ....	23
4. THE TRIAL COURT VIOLATED ER 404 (B) AND ER 403 WHEN IT ADMITTED MR. VARS'S PRIOR INDECENT EXPOSURE CONVICTIONS FOR THE PURPOSE OF PROVING SEXUAL MOTIVATION.....	27
a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. ....	27
b. The trial court erred in admitting evidence of prior indecent exposure convictions to show sexual motivation because they were not relevant to that purpose, were more prejudicial than probative, and if they were probative it was only by allowing a propensity inference.....	30
c. The error was not harmless.....	33
F. CONCLUSION .....	35

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>City of Seattle v. Slack</u> , 113 Wn.2d 850, 784 P.2d 494 (1989).....	11
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	16
<u>State v. Cunningham</u> , 93 Wn.2d 823, 613 P.2d 1139 (1980).....	30
<u>State v. Dennison</u> , 72 Wn.2d 842, 435 P.2d 526 (1967) .....	13, 14
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....	29, 31
<u>State v. Galbreath</u> , 69 Wn.2d 664, 419 P.2d 800 (1966) .....	12, 13
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	29
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	12
<u>State v. Halgren</u> , 137 Wn.2d 340, 971 P.2d 512 (1999)...	20, 21, 30, 31
<u>State v. Halstein</u> , 122 Wn.2d 109, 857 P.2d 270 (1993) .....	20, 22
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	18
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006) .....	23, 24
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	28, 29
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	29
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	passim
<u>State v. Thomas</u> , 138 Wn.2d 630, 980 P.2d 1275 (1999) .....	20, 22
<u>State v. Tvedt</u> , 153 Wn.2d 705, 107 P.3d 728 (2005) .....	23, 24
<u>State v. Varnell</u> , 162 Wn.2d 165, 170 P.3d 24 (2007) .....	24
<u>State v. Westling</u> , 145 Wn.2d 607, 40 P.3d 669 (2002) .....	23, 24

### **Washington Court of Appeals Decisions**

<u>Hansen v. Virginia Mason Medical Center</u> , 113 Wn. App. 199, 53 P.3d 60 (2002).....	13
<u>State v. Brooks</u> , 113 Wn. App. 397, 53 P.3d 1048 (2002).....	25
<u>State v. Eisenshank</u> , 10 Wn. App. 921, 521 P.2d 239 (1974) 24, 25, 26	
<u>State v. Pogue</u> , 104 Wn. App. 981, 17 P.3d 1272 (2001) .....	30
<u>State v. Spruell</u> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	18
<u>State v. Thomas</u> , 35 Wn. App. 598, 668 P.2d 1294 (1983).....	30, 33
<u>State v. Turner</u> , 102 Wn. App. 202, 6 P.3d 1226 (2000) .....	24
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1998) .....	28

### **United States Supreme Court Decisions**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	11
<u>In re Winship</u> , 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	11
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) .....	12
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).....	18

### **Decisions of Other Jurisdictions**

<u>Commonwealth v. Quinn</u> , 439 Mass. 492, 789 N.E.2d 138 (Mass. 2003) .....	14
---------------------------------------------------------------------------------	----

<u>Duvallon v. District of Columbia</u> , 515 A.2d 724 (DC Ct. App. 1986) .....	14, 15, 16
<u>Parnigoni v. District of Columbia</u> , 933 A.2d 823 (DC Ct. App. 2007) .....	17
<u>People v. Massicot</u> , 97 Cal. App. 4 <sup>th</sup> 920, 118 Cal. Rptr. 2d 705 (Cal. Ct. App. 2002).....	15
<u>State v. Moore</u> , 194 Or. 232, 241 P.2d 455 (1952) .....	13
<u>United States v. Goodwin</u> , 492 F.2d 1141 (5 <sup>th</sup> Cir. 1974).....	29
<u>Wisneski v. State</u> , 398 Md. 578, 921 A.2d 273 (Md. 2007) .....	17

**Constitutional Provisions**

Const. art. I, § 3.....	11
Const. art. I, § 9.....	23
U.S. Const. amend. V .....	23
U.S. Const. amend. XIV .....	11

**Statutes**

D.C. Code § 22-1112(a) (1981).....	15
RCW 9.94A.030 .....	19
RCW 9.94A.535 .....	19
RCW 9.94A.835 .....	19
RCW 9A.04.060 .....	13
RCW 9A.88.010 .....	12, 26

**Rules**

ER 403 ..... 21, 29  
ER 404 ..... 21, 28, 29, 32

A. SUMMARY OF ARGUMENT

On May 3, 2008 at around 2:00 a.m., Jeffrey Vars drove to Kirkland and parked his car in a residential neighborhood. He removed his clothing and wandered through the area holding his bundle of clothing in front of him, blocking his genitals. It was dark except for street lights, and there were no other pedestrians.

Two people saw Mr. Vars that night – one from the window of his condominium and another from his car when the headlights shone on Mr. Vars as he was crossing the street. Neither viewer saw Mr. Vars's genitals, but both alerted police to his presence.

Following a bench trial, Mr. Vars was convicted of two counts of indecent exposure, both with the special aggravating factor of sexual motivation.

Both convictions should be reversed and dismissed with prejudice for failure to prove genital exposure. The trial court apparently did not realize it was required to find that the genitals were exposed, and therefore did not make such a finding. Nor could it have, because the State did not present sufficient evidence to prove genital exposure beyond a reasonable doubt.

Even if the State had proved indecent exposure, it did not prove sexual motivation. There was no evidence of sexual conduct

whatsoever – no masturbation, semen, condoms, vibrators, sexual language, rape, or any other evidence of sexual gratification. Thus, the sexual motivation findings should be stricken.

Finally, even if the State proved indecent exposure, the two convictions violate double jeopardy. The unit of prosecution for indecent exposure is the exposure, not the number of viewers. The trial court improperly entered two convictions based on the fact that two different witnesses observed Mr. Vars naked on the night in question.

#### **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in omitting from its findings the undisputed facts that neither complainant saw Mr. Vars's genitals and that the first complainant stated this was because Mr. Vars was covering his genitals with a bundle of clothing.

2. The trial court erred in concluding that the State proved indecent exposure as charged in Count 1 beyond a reasonable doubt.

3. The trial court erred in concluding that the State proved indecent exposure as charged in Count 2 beyond a reasonable doubt.

4. The trial court erred in concluding that the State proved sexual motivation on Count 1 beyond a reasonable doubt.

5. The trial court erred in concluding that the State proved sexual motivation on Count 2 beyond a reasonable doubt.

6. The trial court erred in concluding that the act in question constituted two units of prosecution and that convictions on both counts did not violate double jeopardy.

7. The trial court abused its discretion in admitting and considering evidence of Mr. Vars's prior indecent exposure convictions to prove that the current offense was sexually motivated.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of indecent exposure, the State must prove beyond a reasonable doubt that the defendant exposed his genitals. Where neither complainant saw Mr. Vars's genitals, where the first complainant explained that this was because Mr. Vars was holding his bundle of clothing in front of his genitals, and where the trial court did not make any findings regarding genital exposure, should both convictions for indecent exposure be reversed and dismissed with prejudice? (Assignments of Error 1-3)

2. To convict a defendant of indecent exposure, the State must prove beyond a reasonable doubt that the defendant intentionally made an open exposure knowing that such conduct was likely to cause reasonable affront or alarm. Where Mr. Vars walked around naked in a residential area between 2:00 and 5:30 a.m., when it was dark and there were no other pedestrians out, did the State fail to prove indecent exposure on both counts?

(Assignments of Error 2-3)

3. To convict a defendant of acting with sexual motivation, the State must present evidence of identifiable sexual conduct during the course of the offense that is not inherent to the underlying offense for which a defendant is convicted. Where the State presented evidence that Mr. Vars was walking around naked, but did not present evidence of masturbation, sexual language, rape, condoms, vibrators, semen, or any other sexual evidence whatsoever, must the findings of sexual motivation be stricken?

(Assignments of Error 4-5)

4. The unit of prosecution for indecent exposure is the exposure, not the number of witnesses. Where Mr. Vars removed his clothing once, but the State charged him with two counts of indecent exposure based on two witnesses who saw him on the

night in question, do the two convictions violate the prohibition on double jeopardy? (Assignment of Error 6)

5. Evidence of prior acts is inadmissible to show action in conformity therewith, and may be introduced only for a purpose where (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its probative value outweighs its potential for prejudice. Did the trial court abuse its discretion by admitting and considering evidence of Mr. Vars's prior convictions for indecent exposure, which were not sexually motivated, to show that he committed the current offense with sexual motivation? (Assignment of Error 7)

D. STATEMENT OF THE CASE

On May 3, 2008 at around 2:00 a.m., Jeffrey Vars drove to Kirkland and parked his car at Odhe Avenue and Kirkland Way. 11/3/08 RP 38-39, 53; pre-trial exs. 3-4; exs. 6-9. He removed his clothing and wandered through the residential neighborhood holding his bundle of clothing in front of him, blocking his genitals from view. 11/3/08 RP 62; 11/4/08 RP 9, 26-27, 32. It was dark except for street lights, and nobody else was outside. 11/4/08 RP 7, 11, 26, 33.

At around 2:30 a.m., Abel Cortez looked out the window of his condominium on Second Avenue and saw a man later identified as Mr. Vars walking swiftly across the sidewalk. 11/4/08 RP 25, 28. He saw that Mr. Vars was wearing shoes, but instead of wearing his clothing he was carrying it in a bundle in front of him. 11/4/04 RP 27. Mr. Cortez could not see Mr. Vars's genitals because he was covering them with his clothing. 11/4/08 RP 27, 32. Mr. Cortez "didn't really feel one way or the other" about the sighting, but called 911 because he "just thought it was inappropriate." 11/24/08 RP 28.

Mr. Vars continued to walk through the neighborhood. At around 5:00 a.m., Dock Brown was driving his car in the same area when he saw a man later identified as Mr. Vars running across the street about 25-30 feet in front of him. 11/4/08 RP 5, 12. It was dark and there were no residential lights on and no other cars out, but Mr. Brown saw Mr. Vars when he crossed the path of his headlights. 11/4/08 RP 7, 10-12. Mr. Brown described Mr. Vars as "naked" except for a ski mask, but, like Mr. Cortez, Mr. Brown could not see Mr. Vars's genitals. 11/4/08 RP 14-15. The two did not make eye contact, and after Mr. Vars reached the other side of the

street, he crouched in some bushes. 11/4/08 RP 7. Mr. Brown called 911 at around 5:20 a.m. 11/3/08 RP 67; 11/4/08 RP 9.

Kirkland police officers apprehended Mr. Vars about an hour later, and although Mr. Vars stated he was merely trying to defecate, there was no evidence of feces. Mr. Vars was eventually charged with two counts of felony indecent exposure, one based on Abel Cortez's sighting and one based on Dock Brown's sighting. CP 7-8.<sup>1</sup> For each count, the State also charged him with committing the crime with sexual motivation, but did not cite any facts to support this allegation. CP 7-8.

During pretrial hearings, the State moved to admit evidence of Mr. Vars's prior convictions. Mr. Vars had prior incidents of indecent exposure during which he had told officers he only had to go to the bathroom. CP 12-13, 16-17, 21-22. The State sought to admit these convictions to show absence of mistake or accident and common scheme or plan. CP 190. And although none of the prior incidents were sexually motivated, the State also sought to introduce them to show that the May 3, 2008, incident was sexually motivated. CP 190.

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<sup>1</sup> The amended information alleged that Mr. Vars "did make an open and obscene exposure of his person to D.B." (count 1) and that he "did make an open and obscene exposure of his person to A.C." (count 2). CP 7-8.

The trial court admitted three prior indecent exposure convictions for all of the purposes for which the State sought to introduce them, including for the purpose of showing sexual motivation. CP 191. In one prior incident, Mr. Vars was convicted of indecent exposure after officers, responding to a citizen call, found Mr. Vars near Interstate 90 wearing no clothing except socks and shoes and carrying a jar of Vaseline. CP 21-22. In another prior incident, Mr. Vars was seen naked in a Texaco parking lot in Renton "making some sort of gestures." CP 16-17. In the third, an individual in North Bend saw Mr. Vars naked, running down the road and jumping into bushes. CP 12-13. In all three, Mr. Vars told responding officers he needed to defecate.

Mr. Vars waived his right to a jury. At trial, Abel Cortez and Dock Brown testified as described above. In closing, the prosecution argued that Mr. Vars's act was sexually motivated:

It's sexually gratifying to him. And we know this because, when he was arrested by these troopers in April of 2000, although naked with his socks and shoes, he had a jar of Vaseline with him. We know this because, when he was arrested in December of 2000, the citizen, Maria Chapo, referenced seeing the defendant making gestures as he was running through the Texaco parking lot. And we know this because, when he was lurking and approaching and crouching, and then reemerging in this weird interaction with the 2004 victim, Scott Vorhardt, it

also demonstrating his intent and knowledge that he was alarming people, and he was engaging actively in this behavior. ... And we know that he is doing this for his sexual gratification from the jar of Vaseline and from the number of incidents and the planning that takes place in order to pull them off, unsuccessfully pull them off.

11/4/08 RP 38-39.

Mr. Vars's attorney in closing argued that only one count should have been charged, because there was one continuous course of conduct and the unit of prosecution does not depend upon the number of people who witness the alleged exposure.

11/4/08 RP 42. Counsel pointed out that under the State's theory of the unit of prosecution, a streaker at a football game could be charged with 70,000 counts of indecent exposure. 11/4/08 RP 42.

Mr. Vars also argued that there was no evidence of sexual arousal, rebutting the prosecution's theory that repeated nudity alone proves sexual motivation. Mr. Vars noted that if repeated public nudity could constitute evidence of sexual motivation, then the participants in the annual Fremont Solstice parade would be guilty of sexually motivated indecent exposure. 11/4/08 RP 43-44. And as to the fact that Mr. Vars was holding a jar of Vaseline eight years ago, his attorney admitted, "I really don't get the connection." 11/4/08 RP 45.

Finally, Mr. Vars argued that there was insufficient evidence to prove indecent exposure, because Mr. Vars did not intentionally “flash” anybody, did not expose his genitals, and was “going about these activities in a fairly surreptitious manner,” in the dark, when nobody else was out. 11/4/08 RP 45-46.

The Court found Mr. Vars guilty as charged on both counts, concluding:

On May 3, 2008, the defendant made an intentional open and obscene exposure of himself to A.C., knowing that his conduct was likely to cause alarm or affront in Kirkland, Washington.

On May 3, 2008, the defendant made an intentional open and obscene exposure of himself to D.B., knowing that his conduct was likely to cause alarm or affront in Kirkland, Washington.

CP 198.

The court also found the State proved the aggravating factor as to both counts. 11/4/08 RP 51-53; CP 196-99. The sum of the Court’s reasoning as to the aggravating factor was as follows:

The defendant’s exposures to A.C. and D.B. were committed for the purpose of the defendant’s sexual gratification. With respect to sexual gratification the court considered evidence of the defendant’s repeated ritualistic patterns of exposure in residential and urban locations and evidence of the Vaseline jar from the incident in April 2000. The defendant’s conduct was distinct from other non-sexual forms of exposure. The court also considered evidence of the

defendant's flight from officers and the fact that he wore a mask to conceal his identity during the exposures.

CP 198. The court imposed two 12-month enhancements for the sexual motivation findings, and sentenced Mr. Vars to 60 months of total confinement. CP 223-24.

Mr. Vars appeals. CP 211-22.

E. ARGUMENT

1. MR. VARS'S CONVICTIONS SHOULD BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE THE STATE FAILED TO PROVE INDECENT EXPOSURE.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The trial court did not find that Mr. Vars exposed his genitalia, as required to convict a defendant of indecent exposure, and the State did not present sufficient evidence to allow the court to make such a finding. RCW 9A.88.010(1) provides, “A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.”<sup>2</sup> “Indecent or obscene exposure of his person” means “a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others.” State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966) (emphasis added) (affirming conviction where appellant “deliberately and lewdly exposed his genitals” to complainant). “Private parts,” in turn, means genitalia:

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<sup>2</sup> The crime is a Class C felony if the person has previously been convicted of either indecent exposure or a sex offense. RCW 9A.88.010(2)(c).

It [is] not necessary that the term “private parts” be further defined. The term is generally understood as a commonplace designation of the genital procreative organs. ... “It is hornbook law that, whenever and wherever the terms ‘privates’ or ‘private parts’ are used as descriptive of a part of the human body, they refer to the genital organs. Every dictionary so defines them.”

State v. Dennison, 72 Wn.2d 842, 846, 435 P.2d 526 (1967)

(quoting State v. Moore, 194 Or. 232, 240, 241 P.2d 455 (1952)).

So limited, the indecent exposure statute is not unconstitutionally vague. Galbreath, 69 Wn.2d at 668.

Washington’s construction of “exposure of his or her person” to mean genital exposure is consistent with and derived from common law. The Legislature has mandated:

The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the court of this state having jurisdiction of the offense.

RCW 9A.04.060. “The Legislature is presumed to be aware of the common law, and a statute will not be construed in derogation of the common law unless the legislature has clearly expressed that purpose.” Hansen v. Virginia Mason Medical Center, 113 Wn. App. 199, 205, 53 P.3d 60 (2002) (internal citation omitted).

At common law, “exposure of his person” meant genital exposure because “person” was a euphemism for “penis”. Duvallon v. District of Columbia, 515 A.2d 724, 727 (DC Ct. App. 1986). In Duvallon, the court surveyed the history of the offense and found, “English common law cases compel the conclusion that indecent exposure was limited to the exposure of genitals.” Id. at 726. In further noting that “American common law cases are in accord with those of England,” the court cited both the Washington Supreme Court’s decision in Dennison and the Oregon Supreme Court’s decision in Moore.

Other states are in accord. The Massachusetts Supreme Court, for example, recognizes that “[t]he exposure of genitalia has been defined by judicial interpretation as an essential element of the offense of indecent exposure.” Commonwealth v. Quinn, 439 Mass. 492, 494, 789 N.E.2d 138 (Mass. 2003). The court collected cases and legislation from multiple states to show that in “[a]lmost all jurisdictions ... the exposure of genitalia is either expressly proscribed in the statute or judicially required for conviction of that offense.” Id. at 499 n.10.

The California Court of Appeals reached the same conclusion in People v. Massicot, 97 Cal. App. 4<sup>th</sup> 920, 118 Cal.

Rptr. 2d 705 (Cal. Ct. App. 2002). Interpreting California's broader statute, which prohibits exposure of the "person or the private parts thereof," the court reversed an indecent exposure conviction for failure to prove the defendant displayed his naked genitals. *Id.* at 922, 924. Before construing the phrase "person or the private parts thereof," the court noted that the word "expose" means "to cause to be visible or open to view." *Id.* at 926 (citing Merriam Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1999) at 410). It then recognized that statutes are presumed to codify common law and "the common law offense of indecent exposure requires display of the genitals." *Id.* at 928. Because the State had not proved genital exposure, the court reversed the defendant's conviction. *Id.* at 922.

The facts of Duvallon are strikingly similar to the facts of Mr. Vars's case. The court in Duvallon interpreted and applied a statute that, like Washington's, prohibits the obscene "exposure of his or her person." Duvallon, 515 A.2d at 725 (citing D.C. Code § 22-1112(a) (1981)). The defendant in Duvallon was completely naked and parading in public in broad daylight, but she placed a cardboard sign around her neck which covered the front of her

body.<sup>3</sup> Id. Witnesses testified that “all they could see was a view of the back (including the buttocks) and sides of the body (including the sides of the breasts); they could not see genitalia or the front of the breasts.” Id. The court concluded that although “Ms. Duvallon’s actions offend individual senses of propriety, modesty and self-respect,” she was not guilty of indecent exposure because even though she was completely naked the observers could not see her genitals. Id. at 725, 728.

Similarly here, although Mr. Vars was naked, he was holding his bundle of clothing in front of his genitals, and neither complainant saw his genitals. The trial court apparently did not realize that it had to find genital exposure, and made no mention of it in its findings. “In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Not only did the trial court not find genital exposure, it could not have found it on the evidence presented. Accordingly, Mr. Vars’s convictions should be reversed and the charges dismissed with prejudice.

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<sup>3</sup> As to time and place, Mr. Vars’s facts are even more benign than those in Duvallon, and present another independent basis for reversal. See subsection (c) below.

c. Because Mr. Vars was in a dark residential area in the middle of the night, the State failed to prove he intentionally made an open exposure knowing that such conduct was likely to cause reasonable affront or alarm. As discussed above, the State failed to prove Mr. Vars exposed his “person,” which alone constitutes a sufficient basis for reversal. But another independent basis for reversal is the State’s failure to prove the remaining portion of the statute – intentional open exposure that would reasonably cause affront or alarm.

“An exposure becomes indecent when the defendant exposes himself at such a time and place, where as a reasonable man he knows or should know his act will be open to the observation of others.” Parnigoni v. District of Columbia, 933 A.2d 823, 826 (DC Ct. App. 2007); Wisneski v. State, 398 Md. 578, 591, 921 A.2d 273 (Md. 2007). In Mr. Vars’s case, the sightings occurred between 2:00 a.m. and 5:30 a.m. on May 3, when it was dark. There were no pedestrians on the street apart from Mr. Vars, and no cars apart from Mr. Brown’s. Mr. Vars was in a residential area – not, for example, in a strip mall or an all-night convenience store. Thus, even if he had exposed his genitalia, he did not do so at a time and place where the act would be reasonably likely to be

observed by others. For this reason, too, the convictions should be reversed.

d. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Vars committed the offenses of which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the errors in this case is dismissal of both charges with prejudice.

This Court need not reach the alternative arguments below.

2. THERE WAS NO EVIDENCE OF SEXUAL MOTIVATION, LET ALONE SUFFICIENT EVIDENCE TO PROVE THIS AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

a. To convict a defendant of acting with sexual motivation,

the State must present evidence of identifiable sexual conduct during the course of the offense that is not inherent to the underlying offense for which a defendant is convicted. In this case the prosecution made a special allegation that Mr. Vars committed each count of indecent exposure with sexual motivation. CP 7-8.

Under the Sentencing Reform Act ("SRA"):

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.

RCW 9.94A.835(2). "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47). A finding of sexual motivation carries several consequences, including an exceptional sentence above the standard range. RCW 9.94A.535(2)(f).

“The statute requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” State v. Halstein, 122 Wn.2d 109, 120, 857 P.2d 270 (1993) (emphasis added). In other words, “the State must present evidence of some conduct during the course of the offense as proof of the defendant’s sexual purpose.” Id. at 121. Only so construed does the statute survive a vagueness and overbreadth challenge. Id. at 121, 125.

Importantly, “an exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted.” State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999) (emphasis added). “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.” Id. (emphasis in original).

Finally, “the sexual nature of the current offense is the relevant inquiry.” State v. Halgren, 137 Wn.2d 340, 351, 971 P.2d 512 (1999). Neither prior treatment nor prior history is relevant to the sexual motivation determination. Id.

b. Here, the State presented no evidence of sexual conduct and no evidence of any conduct that was not inherent in the offense of indecent exposure. In this case, the State did not even come close to meeting its burden to prove sexual motivation. The only evidence presented of current conduct was that Mr. Vars removed his clothes and wandered through the streets of Kirkland. This conduct is not sexual, and is inherent in the offense of indecent exposure. As discussed above, the complaining witnesses did not even see Mr. Vars's genitals, and the arresting officers who did catch a glimpse of them later stated that there were no signs of sexual arousal. 11/3/08 RP 43, 78.

Contrary to the mandate of Halgren, the court relied on Mr. Vars's history of indecent exposure to find current sexual motivation. (This reliance was also improper under ER 404 (b) and ER 403, as explained below). But even assuming the prior instances of indecent exposure were properly admitted, they provide no support for findings of sexual motivation. The prosecutor argued and the trial court found that Mr. Vars's history of repeated nudity meant he must have committed the current offenses with sexual motivation. But there was no indication that the prior offenses were sexually motivated, and indecent exposure

is not inherently a sexual offense. The court and the prosecutor surmised that the fact that Mr. Vars had a jar of Vaseline during the 2000 incident proved he must have had a sexual purpose in wandering the streets of Kirkland nude in 2008. But the fact that Mr. Vars had a jar of Vaseline during the 2000 offense does not even prove sexual motivation for that crime, let alone for an incident eight years later.

Halstein and Thomas shed light on the type of evidence that must be presented to prove sexual motivation. In Halstein, the defendant broke into a woman's house, took a vibrator and a box of condoms from a nightstand next to the bed where she was sleeping, examined photographs of her, and did not take any of her valuable personal property. Halstein, 122 Wn.2d at 129. An officer testified that he noticed a substance on one of the photographs that appeared to be semen. Id. at 128. In that case, the State presented sufficient evidence to prove that a burglary was sexually motivated. Id. at 129.

In Thomas, the defendant was convicted of felony murder based on three predicate felonies, one of which was first-degree rape and one of which was second-degree rape. Thomas, 138 Wn.2d at 631. The State proved sexual motivation beyond a

reasonable doubt by proving the elements of rape beyond a reasonable doubt. Id. at 631-32.

Unlike in the above cases, here there was absolutely no evidence of sexual conduct occurring during the course of the alleged offenses. There was no evidence of semen, no evidence of masturbation, no evidence of condoms, no evidence of vibrators, no evidence of rape, and no other relevant evidence whatsoever. This Court should therefore strike the sexual motivation findings on both counts.

3. THE CONVICTIONS FOR TWO COUNTS OF INDECENT EXPOSURE VIOLATE DOUBLE JEOPARDY BECAUSE THE UNIT OF PROSECUTION IS THE EXPOSURE, NOT THE NUMBER OF VIEWERS.

Under the double jeopardy provisions of the federal and state constitutions, a defendant may not be convicted more than once under the same criminal statute if only one “unit” of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). The unit of prosecution is designed to protect the accused from overzealous

prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution, i.e., the punishable conduct under the statute, may be an act or a course of conduct. Tvedt, 153 Wn.2d at 710. It is determined by examining the statute's plain language. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); Leyda, 157 Wn.2d at 342; Westling, 145 Wn.2d at 610. If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, the court resolves any ambiguity in favor of the defendant. Tvedt, 153 Wn.2d at 711. This Court reviews the proper unit of prosecution de novo. State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

This Court has already held that the unit of prosecution for indecent exposure is the exposure, not the number of people who witness the exposure. State v. Eisenshank, 10 Wn. App. 921, 923-24, 521 P.2d 239 (1974). "Although the crime may be treated differently because of the age of the 'victim', one crime only is committed whether the act takes place in the presence of one or one hundred persons within the specified age group." Id. at 924.

Eisenshank was correctly decided and the trial court erred in failing to follow it. The logic of the trial court and of the State in this

case is akin to the State's position in State v. Brooks, 113 Wn. App. 397, 400, 53 P.3d 1048 (2002). In Brooks, the State argued that two convictions for burglary were proper where the defendant broke into an apartment and assaulted two people. Id. at 398. But this Court held that only one conviction could stand, noting:

In this case, the State does not assert that Brooks committed two distinct acts of entering or remaining in the apartment. Instead, it analogizes burglary to the crime of robbery, making the number of victims the dispositive issue. According to this view, if one breaks into a building and separately assaults 10 persons inside, 10 counts of first degree burglary have been committed. ... But it is undisputed that he only committed one act of entering the building. His acts support one conviction of first degree burglary.

Brooks, 113 Wn. App. at 400. Similarly here, the State does not assert that Mr. Vars committed two distinct acts of exposure. Rather, he removed his clothing once, and two different people saw him. But if two witnesses could support two counts of indecent exposure, then a naked person marching in a parade or participating in a road race could rack up convictions for every spectator along the route. That is not the law.

The supreme court's recent decision in Sutherby also bolsters this Court's holding in Eisenshank. There, a jury convicted the defendant of 10 counts of child pornography,

because he possessed 10 pictures of minors engaged in sexually explicit conduct. Sutherby, 165 Wn.2d at 874. The trial court reduced the convictions to two counts, on the basis that two different minors were convicted. Id. But the supreme court held only one count could stand, because the proper unit of prosecution was the possession, not the number of photographs or the number of victims. Id. at 875. The supreme court reached this conclusion based on the rule of lenity and the language of the statute – particularly the use of the word “any,” which the Court noted it had repeatedly construed to mean “every” or “all”. Id. at 882.

Just as Sutherby held the unit of prosecution for child pornography was the possession, not the number of victims, the Eisenshank court properly held the unit of prosecution for indecent exposure is the exposure, not the number of viewers. This conclusion is compelled by the rule of lenity and by the legislature’s use of the word “any” in the indecent exposure statute: Under RCW 9A.88.010(1), a person is guilty of indecent exposure “if he intentionally makes any open and obscene exposure of his person.” In sum, this Court in Eisenshank was correct in holding that the unit of prosecution is the exposure.

In this case, there was at most one exposure.<sup>4</sup> The State presented no evidence that Mr. Vars put his clothing back on in between the first and second sightings. In fact, the prosecutor's closing argument supports the view that the two convictions violate double jeopardy: "Two perfect strangers report the same thing, the same description, the same date, close in time and in the same neighborhood." 11/4/08 RP 39. As the State essentially acknowledged, these two counts were one crime (same act, same evening, same neighborhood) simply witnessed by two different people at slightly different times. Accordingly, this case should be remanded for resentencing on a single count of indecent exposure. Sutherby, 165 Wn.2d at 883.

4. THE TRIAL COURT VIOLATED ER 404(B) AND ER 403 WHEN IT ADMITTED MR. VARS'S PRIOR INDECENT EXPOSURE CONVICTIONS FOR THE PURPOSE OF PROVING SEXUAL MOTIVATION.

a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328,

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<sup>4</sup> Mr. Vars's primary argument remains the insufficiency of the evidence for both convictions.

333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b)

provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The “forbidden inference” of propensity to act in conformity with prior acts “is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person’s guilt or innocence.” Wade, 98 Wn. App. at 336.

When the State offers evidence of prior acts, the court must “closely scrutinize” the evidence to determine if (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The evidence is admissible only if it is offered for a proper purpose and passes this two-part test. Id.

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of

showing action in conformity therewith. Otherwise “motive” and “intent” could be used as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5<sup>th</sup> Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. State v. Fisher, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009) (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Id. at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). “[C]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice

is at its highest.” Sutherby, 165 Wn.2d at 886. In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776.

A trial court’s evidentiary rulings are reviewed for abuse of discretion. State v. Pogue, 104 Wn. App. 981, 984, 17 P.3d 1272 (2001). Improper admission of evidence constitutes reversible error if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (citing State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

b. The trial court erred in admitting evidence of prior indecent exposure convictions to show sexual motivation because they were not relevant to that purpose, were more prejudicial than probative, and if they were probative it was only by allowing a propensity inference. Mr. Vars does not challenge the trial court’s admission of prior acts to rebut the defecation defense as to the base crime. But the trial court erred in admitting evidence of prior acts for the purpose of proving sexual motivation, and in using that evidence to find that Mr. Vars committed indecent exposure with sexual motivation. Halgren, 137 Wn.2d at 351 (prior history not relevant to sexual motivation determination; “the sexual nature of

the current offense is the relevant inquiry”); cf. Fisher, 165 Wn.2d at 744-49 (even though evidence of past acts could be used for one purpose, it was reversible error to use it for another, improper, purpose).

Not only does Halgren dictate that prior history may not be used to determine sexual motivation, but in this case the prior acts are simply not relevant to show sexual motivation. All were straight indecent exposure convictions; none were felonies with findings of sexual motivation, and none of the underlying facts show any evidence of sexual motivation. CP 12-13, 16-17, 21-22. The State and the trial court repeatedly referenced the fact that Mr. Vars was holding a jar of Vaseline during the 2000 incident, but that information does not support a finding of sexual motivation even for that incident, let alone for an incident eight years later. CP 21-22. Because it is not relevant, it is necessarily more prejudicial than probative.

If, contrary to all evidence, the State was correct in concluding that the prior incidents of indecent exposure were sexually motivated, then the evidence still could not have been used to show sexual motivation in this case because the only way in which the State attempted to use it was for the improper purpose

of showing action in conformity therewith. In closing, the prosecution argued:

It's sexually gratifying to him. And we know this because, when he was arrested by these troopers in April of 2000, although naked with his socks and shoes, he had a jar of Vaseline with him. We know this because, when he was arrested in December of 2000, the citizen, Maria Chapo, referenced seeing the defendant making gestures as he was running through the Texaco parking lot. And we know this because, when he was lurking and approaching and crouching, and then reemerging in this weird interaction with the 2004 victim, Scott Vorhardt, it also demonstrating his intent and knowledge that he was alarming people, and he was engaging actively in this behavior. ... And we know that he is doing this for his sexual gratification from the jar of Vaseline and from the number of incidents and the planning that takes place in order to pull them off, unsuccessfully pull them off.

11/4/08 RP 38-39. In other words, the prosecutor argued that Mr. Vars must have committed sexually motivated indecent exposure in 2008 because he committed indecent exposure in the past. This is forbidden propensity evidence. ER 404(b).

In sum, the trial court erred in admitting and considering evidence of prior indecent exposure convictions to prove that the current incident of indecent exposure was sexually motivated because (1) the prior incidents were not relevant because not sexually motivated themselves, (2) the prior incidents were

substantially more prejudicial than probative, and (3) the prosecutor and court used the prior evidence for the improper purpose of proving action in conformity therewith.

c. The error was not harmless. Improper admission of evidence constitutes reversible error if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Thomas, 35 Wn. App. at 609.

It is reasonably probable that the trial court would not have made the sexual motivation findings absent the improper use of prior acts. The sum of the Court’s reasoning as to the aggravating factor was as follows:

The defendant’s exposures to A.C. and D.B. were committed for the purpose of the defendant’s sexual gratification. With respect to sexual gratification the court considered evidence of the defendant’s repeated ritualistic patterns of exposure in residential and urban locations and evidence of the Vaseline jar from the incident in April 2000. The defendant’s conduct was distinct from other non-sexual forms of exposure. The court also considered evidence of the defendant’s flight from officers and the fact that he wore a mask to conceal his identity during the exposures.

CP 198. Absent discussion of the prior acts (which, as discussed previously, do not show sexual motivation anyway), the only sentence remaining is the last: “The court also considered evidence

of the defendant's flight from officers and the fact that he wore a mask to conceal his identity during the exposures." CP 198. The court does not explain how the flight and the mask show sexual motivation, as opposed to an intent to not get caught engaging in the underlying crime of indecent exposure.

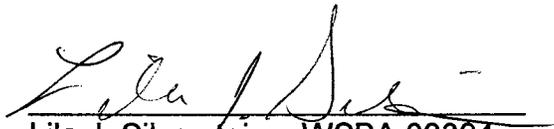
Without the improper consideration of prior acts, it is reasonably probable the court would not have found the offense(s) to have been committed with sexual motivation. Accordingly, the admission of the evidence for this purpose constitutes reversible error.

F. CONCLUSION

For the reasons set forth above this Court should reverse Mr. Vars's convictions and dismiss both charges with prejudice. In the alternative, the Court should dismiss the conviction on one count for a violation of the double jeopardy clause, and should strike the sexual motivation finding for insufficient proof and improper use of prior act evidence.

DATED this 11<sup>th</sup> day of August, 2009.

Respectfully submitted,

  
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Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,                    )  
                                                  )  
                                          Respondent,                    )  
                                                  )  
                                          v.                                    )  
                                                  )  
JEFFREY VARS,                            )  
                                                  )  
                                          Appellant.                            )

NO. 62673-6-I

2009 AUG 11 11:11 AM  
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COURT OF APPEALS  
DIVISION ONE  
CLERK'S OFFICE

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 11<sup>TH</sup> DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> JEFFREY VARS<br>DOC # 297102<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520               | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF AUGUST, 2009.

x  \_\_\_\_\_

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