

64416-5

64416-5

NO. 64416-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WILLIAMSON,

Appellant.

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

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the court should not address the defendant's constitutional challenge to RCW 10.58.090 because the trial court alternatively held that the defendant's prior indecent exposure was admissible under ER 404(b) and the defendant has not challenged that ruling.

2. Whether the defendant has failed to establish that the legislature's enactment of RCW 10.58.090 violated the separation of powers doctrine.

3. Whether the defendant has waived his challenge to the jury instruction on the sexual motivation special allegation.

4. Whether the trial court properly instructed the jury to be unanimous before returning a "no" finding on the sexual motivation special allegation.

5. Whether the defendant is entitled to be re-sentenced due to an error in calculating his standard range.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On February 27, 2009, the State charged Michael D. Williamson with indecent exposure. CP 1. The crime was elevated

to a felony because Williamson had a conviction for second-degree rape and multiple convictions for indecent exposure. CP 1, 4, 56. The State also alleged that he committed the crime with sexual motivation. CP 1.

Trial occurred in September of 2009. A jury convicted Williamson as charged. CP 48-49. The court imposed the statutory maximum sentence of 60 months. CP 50-53.

2. SUBSTANTIVE FACTS.

On the afternoon of January 28, 2009, Laurie Rowell boarded a bus in downtown Seattle and sat in the back. 4RP 29-31.¹ The bus was nearly empty. 4RP 31. Sometime later, Williamson boarded the bus and sat near her. 4RP 31, 35-36. Rowell noticed that he had newspaper on his lap and that it was moving up and down. 4RP 31-34. She suspected that Williamson was masturbating. 4RP 33. Rowell looked at his face and realized that he had been staring at her. 4RP 33. Williamson then uncovered his lap and displayed an erect penis. 4RP 33. He continued to look at Rowell and

¹ The verbatim report of proceedings consists of 6 volumes designated as follows: 1RP: September 2, 2009; 2RP: September 3, 2009; 3RP: September 8, 2009; 4RP: September 9, 2009; 5RP: September 10, 2009; 6RP: October 23, 2009.

masturbate. 4RP 33. Rowell said "stop it," and Williamson moved to the front of the bus. 4RP 33. Rowell was "freaked out" and stayed on the bus until she was the last passenger left. 4RP 34-35.

After Rowell went home and told her roommate, he encouraged her to report the incident to the police. 4RP 36-37, 55-57. Rowell then saw Williamson's face online and contacted the police. 4RP 37. A detective showed Rowell a photo montage of suspects, and Rowell positively identified Williamson as the man on the bus. 4RP 14-16, 37-38.

A detective also obtained the surveillance video from the bus. 4RP 12-13, 38-41. The video shows Williamson getting on the bus and sitting across from Rowell. 4RP 13. However, the video does not capture his full body after he sat down. 4RP 24.

Two year earlier, Williamson had engaged in remarkably similar behavior. On January 9, 2007, Amy Phan boarded a bus and noticed that Williamson was staring at her. 4RP 60-61. Phan then saw Williamson exposing himself; his zipper was open and his erect penis was outside of his pants. 4RP 62. As Phan stood up to report him to the bus driver, Williamson went in front of her and asked to be let off the bus. 4RP 63-64.

Based upon this incident, Williamson pled guilty to one count of indecent exposure with sexual motivation.² 1RP 41; 4RP 101.

At trial, Williamson testified and admitted that he was the person on the bus who sat near Rowell. 4RP 75. He claimed that he had soiled his pants and caught his foreskin in his zipper. 4RP 76-77, 89. He denied exposing himself, claiming that he could not pull his zipper down. 4RP 76-77, 89, 98. With respect to the 2007 incident, he claimed that he had never seen Amy Phan before. 4R 78.

In rebuttal, the State elicited testimony that when a detective talked to him about the 2009 exposure, Williamson never claimed that his foreskin had been caught in his zipper. 4RP 111. Instead, he suggested that he may have been adjusting his penis inside his clothing due to an erection. 4RP 110-11.

² While the trial court allowed Phan's testimony of the 2007 indecent exposure, the court initially held that the jury would not hear testimony that Williamson was convicted as a result of this incident. 1RP 67-68; 2RP 51. However, because this prior conviction was an element of the current crime, Williamson stipulated that he had a "qualifying predicate offense." 4RP 69; CP 21. Later in the trial, Williamson testified that he had never seen Phan before, and the trial court then allowed the prosecutor to elicit that he had pled guilty to indecent exposure based upon the 2007 incident. 4RP 101.

C. ARGUMENT

Williamson raises three assignments of error. He claims that (1) the trial court improperly admitted evidence of his prior act of indecent exposure, (2) the special verdict instruction for the aggravating circumstance was incorrect, and (3) the court incorrectly determined his offender score. The State addresses these claims in the order in which they allegedly occurred at trial.

1. THE TRIAL COURT PROPERLY ADMITTED WILLIAMSON'S PRIOR INDECENT EXPOSURE CONVICTION.

Williamson challenges his conviction on one basis: he argues that the trial court erred by admitting his prior act of indecent exposure under RCW 10.58.090 because that statute is unconstitutional. However, the trial court alternatively ruled that this evidence was admissible under ER 404(b), and Williamson has not challenged that ruling. Accordingly, the Court may affirm Williamson's conviction without addressing his challenge to RCW 10.58.090. In any event, this Court has previously rejected Williamson's separate of powers challenge to RCW 10.58.090, and he has failed to show that the court's decision was wrong.

a. Relevant Facts.

During pretrial proceedings, the State moved to introduce evidence of Williamson's 2007 indecent exposure. 1RP 54-57; Supp. CP __ (Sub No. 38 at 10-12). The State argued that it was admissible under ER 404(b) as evidence of a common scheme or plan. 1RP 54-57; Supp. CP __ (Sub No. 38 at 10-12).

The trial court questioned whether the prior indecent exposure was also admissible under RCW 10.58.090. 1RP 58-59. Under that statute, in a sex offense case, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. RCW 10.58.090(1). The trial court further noted that the evidence could be admissible under ER 404(b) as evidence of intent because (1) the crime of indecent exposure required that the defendant know that his conduct was likely to cause reasonable affront or alarm, and (2) the State was required to prove that Williamson committed the crime for the purpose of his sexual gratification. 1RP 60-61.

The next day, the trial court ruled that the prior indecent exposure was admissible under RCW 10.58.090. 2RP 47-50. The court further held that the evidence was admissible under ER 404(b) as evidence of a common plan or scheme and to show

intent. 2RP 50-51. "[E]ven if we didn't have RCW 10.58.090, I would admit the prior incident to show a common scheme or plan, and to show intent in this case." Id.

The court subsequently gave an ER 404(b) limiting instruction:

Evidence has been introduced on the subject of a prior act of indecent exposure for which Mr. Williamson is not charged here today. This evidence was being offered by the State for the limited purposes of either showing Mr. Williamson's intent or common scheme or plan. You are not to consider the evidence for any other purpose.

CP 38.

- b. The Court Should Not Address Williamson's Challenge To RCW 10.58.090 Because The Trial Court Also Admitted The Prior Act Evidence Under ER 404(b).

On appeal, Williamson challenges the constitutionality of RCW 10.58.090. He does not assign error to or challenge the court's determination that the evidence was also admissible under ER 404(b). He does not provide any argument concerning ER 404(b). A ruling of the trial court to which no error has been

assigned is not subject to review. Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993). Given that the trial court provided an alternative, unchallenged basis for admitting the evidence of Williamson's 2007 indecent exposure, it is unnecessary for this Court to address his challenge to RCW 10.58.090.

c. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers.

Should this Court choose to address the issue, it should reject Williamson's claim that the legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine. This Court recently rejected this claim in State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), rev. granted, 168 Wn.2d 1036 (2010) and State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), rev. granted, 168 Wn.2d 1036 (2010). This issue is now before the Washington Supreme Court.³

³ The Supreme Court has consolidated Scherner and Gresham for review. As of this date, oral argument has not been scheduled.

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403.⁴ This statute was patterned after Federal Rules of Evidence 413, 414 and 415 and federal cases interpreting the rules.

Williamson argues that this statute violates the separation of powers doctrine. A separation of powers violation occurs when the activity of one branch threatens the independence or integrity of another branch or invades the prerogatives of the other. Here, the legislature has authority to create rules of evidence, and its action in this area does not invade the prerogatives of the judiciary. Williamson's claim that the statute irreconcilably conflicts with ER 404(b) overlooks the fact that the evidence rule contains a non-exclusive list of exceptions, and that the statute simply provides another exception to that rule. Given that the statute leaves the

⁴ RCW 10.58.090(1) provides, "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403."

ultimate decision whether to admit evidence under RCW 10.58.090 to the trial court's discretion, the legislature's action hardly threatens the independence or integrity of the judiciary.

The Washington State Constitution does not contain a formal separation of powers clause. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Instead, the division of the government into different branches has been presumed to give rise to the separation of powers doctrine. Id. at 135. "The doctrine of separation of powers serves mainly to ensure that the *fundamental functions* of each branch remain inviolate." City of Spokane v. County of Spokane, 158 Wn.2d 661, 680, 146 P.3d 893 (2006) (emphasis in original). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). To determine whether a particular action violates separation of powers, the court looks not to whether two branches of government engage in coinciding activities, but whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).

By enacting RCW 10.58.090, the legislature did not invade a fundamental function of the judiciary. Both the court and the legislature have authority to enact rules of evidence. Fircrest, 158 Wn.2d at 394; State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940). The Washington Supreme Court has acknowledged that the adoption of the rules of evidence is a legislatively delegated power of the judiciary. Fircrest, 158 Wn.2d at 394. Historically, the legislature and the courts have shared the responsibility for enacting rules of evidence; representatives of both the legislature and the judiciary drafted the current rules of evidence. 5 K. Tegland, *Washington Practice, Evidence Law and Practice*, at V-IX (2nd ed. 1982). Currently, numerous statutes supplement the Rules of Evidence on various issues.⁵ Several existing statutes govern evidence and testimony in sex offense cases.⁶ Accordingly, the legislature's enactment of RCW 10.58.090 is consistent with its history of involvement with evidentiary matters.

⁵ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

⁶ RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

Williamson insists that the statute conflicts with ER 404(b). However, when considering a separation of powers challenge to a statute, the Washington Supreme Court has repeatedly held that "apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible." State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984). The inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule. City of Spokane, 158 Wn.2d at 679.

It is not difficult to harmonize ER 404(b) with RCW 10.58.090 and give effect to both. While ER 404(b) generally prohibits evidence of a defendant's prior bad acts, it contains a list of exceptions. The list of exceptions is not exclusive and many are creatures of common law.⁷ One of the well-settled common law exceptions to ER 404(b), lustful disposition, allows for the admission of the same type of evidence as in RCW 10.58.090. Under the lustful disposition exception, evidence of a defendant's prior sexual misconduct against the same victim is admissible in

⁷ State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (discussing the "res gestae" exception to ER 404(b)); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996) ("The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive.").

order to show the defendant's lustful disposition toward that victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). Given that ER 404(b)'s prohibition against prior bad acts evidence is not absolute and the court's recognition of numerous exceptions to the rule, the court can harmonize the statute as creating another exception to the rule. The statute and rule do not irreconcilably conflict.

Finally, RCW 10.58.090 is not a mandatory rule of admission, and leaves the determination whether to admit such evidence to the trial court as a discretionary decision. The statute directs the court to consider a variety of factors in deciding whether, under ER 403, the probative value of the evidence is outweighed by the danger of unfair prejudice. Given that the judiciary retains the final say on whether such evidence is admitted, the existence of RCW 10.58.090 does not threaten the independence or integrity of the courts. As this Court noted when rejecting the claim that the legislature's enactment of RCW 10.58.090 violated the separation of powers:

In sum, RCW 10.58.090 evidences the legislature's intent that evidence of sexual offenses may be admissible, subject to the modified ER 403 balancing

test. But the legislation also leaves the ultimate decision on admissibility to the trial courts based on the facts of the cases before them. This is consistent with past legislative amendments to the rules of evidence and does not infringe on a core function of the judiciary.

Schnerer, 153 Wn. App. at 648; see also Gresham, 153 Wn. App. at 665-70. The Court should reject Williamson's separation of powers challenge to RCW 10.58.090.

2. THE COURT SHOULD REJECT WILLIAMSON'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Williamson challenges the instruction for the sexual motivation special allegation, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, Williamson did not object to this instruction below, and because the claimed error is not of constitutional magnitude, he has waived this issue on appeal. Even if the issue is not waived, the rule in Bashaw does not apply to the sexual motivation special allegation because, unlike the school bus stop enhancement at issue in that case, the relevant statute expressly requires jury unanimity for a "no" finding.

a. Relevant Facts.

The court provided the jury with special verdict form for the sexual motivation special allegation. The instruction for the special verdict form stated in pertinent part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 39 (Instruction No. 12). This instruction is identical to WPIC 160.00. The trial court asked whether Williamson had any objection to this instruction, and his attorney replied that he did not. 4RP 116-17.

b. Williamson Has Waived Any Challenge To The Special Verdict Instruction.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly

of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Williamson must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by Williamson, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." 169 Wn.2d at 146.

In so holding, the court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by

constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "valued right" to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Williamson does not explain how the issue raised is of constitutional magnitude. He waived his challenge to this instruction by not objecting to it in the trial court.

c. The Special Verdict Instruction Was A Correct Statement Of The Law For The Sexual Motivation Special Allegation.

Even if the issue was not waived, Williamson cannot show that the special verdict instruction was erroneous with respect to the sexual motivation special allegation because the relevant statute requires jury unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,⁸ and the relevant statute is silent as to whether the jury must be unanimous before they may answer "no" to the special verdict. See RCW 69.50.435. In contrast, the statute governing the sexual motivation special allegation requires jury unanimity for any verdict. The sexual motivation special allegation is an exceptional sentence aggravating circumstance. RCW 9.94A.535(3)(f). RCW 9.94A.537(3) states in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must

⁸ Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 894-95.

be unanimous, and by special interrogatory.” By its plain language, RCW 9.94A.537(3) requires jury unanimity to return either a “no” or a “yes” special verdict on an aggravating factor.

Moreover, the Supreme Court defers to the legislature's policy judgment with respect to the exceptional sentence procedures, State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008), and the legislature has made it clear that the policy justification for the common law rule discussed in Bashaw does not apply to aggravating circumstances. As discussed above, the Bashaw court held that the reason that unanimity was not required for a “no” finding was because, in the court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. However, with respect to aggravating circumstances, the legislature has indicated that the imposition of an appropriate exceptional sentence outweighs any concern about judicial economy or costs. When an exceptional sentence is imposed but is subsequently reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating

circumstances alone. RCW 9.94A.537(2).⁹ This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance, the trial court has the discretion to impose a sentence up to the statutory maximum. In contrast, the Supreme Court characterized the school bus zone sentencing enhancement as simply "an additional penalty" imposed upon a defendant "already subject to a penalty on the underlying offense." Bashaw, 169 Wn.2d at 146-47. Bashaw does not apply to aggravating circumstances, such as the sexual motivation special allegation, and the special verdict form accurately stated the law.

d. The Rule In Bashaw Is Contrary To Legislative Intent.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

⁹ In this case, if this Court were to reverse Williamson's exceptional sentence based upon Bashaw, the State would be entitled to again seek an exceptional sentence at a new trial on the aggravating circumstance.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, §§ 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate" preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-

unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. See RCW 10.95.080(2). For all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

3. THE CASE MUST BE REMANDED FOR RE-SENTENCING DUE TO THE ERROR IN DETERMINING WILLIAMSON'S STANDARD RANGE.

Williamson argues that his standard range was incorrectly calculated because felony indecent exposure is an unranked felony if the victim is not under 14 years old. The State concedes that his standard range was incorrectly calculated. Because the record does not clearly indicate that the trial judge would have imposed the same sentence had she been aware of the correct standard range, re-sentencing is necessary.

a. Relevant Facts.

At sentencing, the State calculated Williamson's standard range as 43 to 57 months based upon a seriousness level for the offense of IV and an offender score of 7. 6RP 5; Supp. CP __ (Sub No. 55). In addition, Williamson was subject to an additional 12 months due to the sexual motivation finding, increasing the range he faced to 55 to 69 months. 6RP 5; Supp. CP __ (Sub No. 55). The statutory maximum for the crime was 60 months. 6RP 5.

Williamson agreed that the seriousness level of the crime was IV, but argued that his current offense did not qualify as a sex

offense and therefore his offender score was 4 and that his standard range was 15 to 20 months. 6RP 5-6. With the sexual motivation finding, his range was 27 to 32 months.

The trial judge imposed 60 months confinement and explained that she would impose the same sentence under either proposed standard range. 6RP 18. Assuming the State's standard range calculation was accurate, the judge stated she would impose the 60 month sentence as the maximum standard range sentence possible. Id. Assuming the defense calculation of the standard range was accurate, the court indicated she would impose an exceptional sentence of 60 months based upon the sexual motivation finding. Id.

b. Williamson's Standard Range Was Incorrectly Calculated.

For the first time on appeal, Williamson claims that indecent exposure is an unranked felony and that his standard range was 0 to 12 months. A review of the relevant statutes and a recent decision from Division II supports Williamson's argument.

The indecent exposure statute provides:

(1) 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. The act of breastfeeding or expressing breast milk is not indecent exposure.

(2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.

(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.

(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

RCW 9A.88.010.

The SRA contains a table where the legislature assigns seriousness levels to criminal offenses. Under level IV, the following crime is included: "Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)." RCW 9.94A.515. There is no other listing for indecent exposure. For unranked felonies, the SRA provides that, "the court shall impose a determinate sentence which may include not more than one year of confinement." RCW 9.94A.505(2)(b).

Recently, in State v. Steen, 155 Wn. App. 243, 228 P.3d 1285 (2010), Division II addressed the seriousness level and standard range for felony indecent exposure where the victim was not under the age of 14. In Steen, the defendant was convicted of

felony indecent exposure, but his victim was not under the age of 14. Id. at 245-49. The trial court calculated his offender score based upon a seriousness level of IV. Id. at 247. The Court of Appeals held that this was error because RCW 9.94A.515 listed only the crime of “Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)” as a level IV offense. The court explained:

The statute is unambiguous and its plain language clearly provides that when someone with a prior sex offense commits indecent exposure to a person under age 14, a seriousness level of IV applies. Because Steen's criminal conduct did not include exposure to a person under 14 years of age, the trial court erred and should have sentenced him based on the 0-12 month range for unranked crimes.

Id. at 249.

As in Steen, Williamson was convicted of felony Indecent Exposure based on a prior qualifying conviction, but his conviction did not involve a victim under the age of 14. Under the holding in Steen, Williamson's sentence range for his felony conviction, before the imposition of the sentencing enhancement, should have been calculated as zero to 12 months of confinement. With the sexual motivation finding, his range was 12 to 24 months.

When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for re-sentencing is necessary unless "the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). It is not sufficient that the record "strongly suggests" that the trial court would have applied the same exceptional sentence. State v. Jennings, 106 Wn. App. 532, 544, 24 P.3d 430 (2001).

Here, there was a dispute over the standard range, and the trial judge explained that she would impose the same sentence even if she accepted Williamson's proposed standard range of 27 to 32 months. However, his actual range is even lower than that: it is 12 to 24 months. While comments by the trial judge strongly suggest that she would have imposed the same 60 month sentence if she was aware that Williamson's correct standard range,¹⁰ the record does not "clearly indicate" that she would have done so. Accordingly, remand for re-sentencing is necessary.

¹⁰ See 6RP 12-19.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm
Williamson's convictions and remand for re-sentencing.

DATED this 27th day of September, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL D. WILLIAMSON, Cause No. 64416-5-1, 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.

W Brame
Name
Done in Seattle, Washington

9/28/10
Date