

FILED
May 27, 2016
Court of Appeals
Division I
State of Washington

NO. 73543-8-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TERRENCE ECKHART,

Appellant.

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

APPELLANT'S REPLY BRIEF

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY.....1

1. GIVEN THE STATE’S CONCESSION OF ERROR, BOTH FELONY INDECENT EXPOSURE CONVICTIONS MUST BE REVERSED AND DISMISSED.....1

 a. Proof of a prior sex offense conviction is an **element** of the charge of felony indecent exposure.....2

 b. Without proof of the necessary element, neither of the felony indecent exposure convictions is supported by sufficient evidence.....5

2. THE FACTUAL DIFFERENCE BETWEEN THE EVIDENCE ON THE TWO COUNTS SHOWS THE STATE FAILED TO PROVE COUNT II AND FAILED TO PROVE SEXUAL MOTIVATION FOR COUNT I.....7

 a. Nudity is not obscenity; count II went unproven.....7

 b. The sexual motivation allegation for count I cannot stand.....9

B. CONCLUSION.....13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012)..... 5

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)..... 4

State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008) 4

State v. Thomas, 138 Wn.2d 630, 980 P.2d 1275 (1999)..... 12

Washington Court of Appeals Decisions

State v. Bache, 146 Wn. App. 897, 193 P.3d 198 (2008)..... 3

State v. Chiles, 53 Wn. App. 452, 767 P.2d 597 (1989) 8

State v. Garcia, 146 Wn.App. 821, 193 P.3d 181 (2008) 5, 7

State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005)..... 6

State v. Mullen, 186 Wn. App. 321, 345 P.3d 26 (2015) 4

State v. Santos, 163 Wn. App. 780, 260 P.3d 982 (2011) 6, 7

State v. Vars, 157 Wn. App. 482, 237 P.3d 378 (2010)..... 8

Statutes

RCW 9A.88.010..... 2, 3, 4, 7

RCW 10.61.003 5

A. ARGUMENT IN REPLY

1. GIVEN THE STATE'S CONCESSION OF ERROR, BOTH FELONY INDECENT EXPOSURE CONVICTIONS MUST BE REVERSED AND DISMISSED.

The appellant's opening brief pointed out that the trial court erred in admitting a judgment and sentence allegedly showing that Terrence Eckhart has a prior sex offense conviction. AOB at 18-27. In its response, the State concedes this error:

Eckhart correctly argues that the trial court should have sustained his objection to [Detective] Foster's testimony about his date of birth as hearsay. The State failed to lay the proper foundation to admit the evidence as a certified public record.

BOR at 19.

Other than Eckhart's name and date of birth, the State did not present any evidence linking Eckhart to the judgment and sentence for the prior sex offense conviction.

BOR at 22.

The fact that Eckhart shared the same first and last name as the person listed on the judgment and sentence is insufficient alone to prove beyond a reasonable doubt that the judgment and sentence pertained to him.

BOR at 22.

a. Proof of a prior sex offense conviction is an **element** of the charge of felony indecent exposure.

The State's concession with respect to the error is well-taken.

However, the State is mistaken as to the remedy that should follow. BOR at 23-24 (suggesting that "the only part of the trial that should be relitigated is the second phase of the trial, specifically whether Eckhart was previously convicted of a sex offense"). This mistake appears to reflect a basic misunderstanding as to the elements of the crime Mr. Eckhart was charged with and convicted of.

The indecent exposure statute sets out three different criminal offenses, each with different elements. In general, indecent exposure is classified as a misdemeanor. RCW 9A.88.010(2)(a). If the State proves an additional element – a victim under the age of fourteen years – such an offense is classified as a gross misdemeanor. RCW 9A.88.010(2)(b). Last, if the State proves a different element yet – a qualifying prior conviction – such a crime is classified as a Class C felony:

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(2)(c).

Without a doubt, the fact of the prior conviction is an element of the Felony Indecent Exposure charge filed against Mr. Eckhart. CP 19-20 (“Amended Information” specifically charging a violation of RCW 9A.88.010(1), (2)(c) in both Count 1 and 2). State v. Bache, 146 Wn. App. 897, 905, 193 P.3d 198 (2008). The State understood this at the time of trial:

The defendant has been charged with Felony Indecent Exposure based on a prior sex offense conviction... of Attempted Child Molestation in the First Degree in the Superior Court of Snohomish County. **In order for the State to establish the elements of the crime charged the State must prove that the defendant was previously convicted of this felony sex offense.**

Supp. CP ___. (“State’s Trial Memorandum” at page 5) (emphasis added). Likewise, the trial court agreed that while the proceeding would be bifurcated, this was a single offense with multiple elements:

So I guess we'll proceed with the idea that we're not going to present that to the jury immediately, then we'll just give them the other elements, and then if they return a finding on those elements, then provide them with the additional element at that point.

12/30/14 RP7.

When addressing a similarly structured statute, the crime of communication with a minor for immoral purposes, RCW 9.68A.090,

the Supreme Court made it clear that the qualifying prior is an element of the felony version of the offense:

Conversely, a defendant charged with felony communication with a minor for immoral purposes can never be convicted of that crime if the State is unable to prove that the defendant has a prior felony sexual offense conviction. **Roswell's prior felony sexual offense conviction was an element of the crime charged.**

State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008) (emphasis added) (holding that a defendant charged with felony communication with a minor cannot waive his right to a jury trial on the prior conviction element to bifurcate the trial and rejecting the idea that a prior conviction can be treated like an aggravating factor). Accord State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (prior convictions function as an element of the crime of felony violation of a no contact order); State v. Mullen, 186 Wn. App. 321, 336-37, 345 P.3d 26 (2015) (prior convictions an element for the crime of felony DUI).

Here, the State pressed a single offense – Felony Indecent Exposure in violation of RCW 9A.88.010(2)(c) – and the State’s proof on a critical element failed. When the State writes that it failed to link Mr. Eckhart to the judgment and sentence it introduced against him,

the State is conceding that its proof of with respect to an **element** failed as a matter of law. BOR at 22-23.

Consequently, neither of the felony indecent exposure convictions may stand. The State's proof problem is one of insufficient evidence. At most the matter may be remanded with instructions to enter a conviction for a lesser-included offense.¹

b. Without proof of the necessary element, neither of the felony indecent exposure convictions is supported by sufficient evidence.

A criminal defendant may be convicted at trial on the charged offense or "any degree inferior thereto." RCW 10.61.003. "When an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proved at trial." State v. Garcia, 146 Wn.App. 821, 830, 193 P.3d 181 (2008). But, an appellate court cannot remand for resentencing on a lesser included offense where jury was not explicitly instructed on lesser included offense. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012).

¹ To the extent appellant's opening brief contemplated reversal for a new trial as the appropriate remedy, upon further reflection, appellant's counsel realizes this is a sufficiency of the evidence problem. And, there certainly is no authority for the partial new trial remedy the State suggests. BOR at 23-24.

Indeed, in State v. Santos, 163 Wn. App. 780, 785-86, 260 P.3d 982 (2011), this Court reversed a one count felony DUI conviction because the State had failed to sufficiently prove-up qualifying priors. Santos did not challenge the fact that he drove a vehicle while affected by intoxicating liquor. Consequently, this Court “reverse[d] [the] felony DUI conviction and remand[ed] for entry of a conviction and a sentence for gross misdemeanor DUI.” Id.

In State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005), this Court reversed and remanded with directions to dismiss with prejudice a bail jumping conviction, where the State’s documentary evidence was “insufficient to support a finding that the person on trial is the person named in the State's exhibits.” As the State has conceded, its failure of proof with respect to a prior conviction allegedly belonging to Mr. Eckhart is similar.

Mr. Eckhart stands by his assertion that the evidence of indecent exposure charged in Count II was insufficient and that the evidence of sexual motivation as to Count I was insufficient too. AOB at 7-18; infra. However, there are jury verdict forms declaring him guilty of non-felony indecent exposure. CP 49-50. Additionally, supplemental Instruction No. 16 states the jury found” the existence of

those facts and circumstances which are the elements of the crime” of non-felony indecent exposure. CP 58.

As such, in accordance with State v. Garcia and State v. Santos the Court may reverse the Count I felony indecent exposure conviction and remand for entry of a conviction and a sentence for one misdemeanor. Because the sexual motivation allegation charged as to Count I cannot apply to a non-felony indecent exposure, it must be stricken too. With respect to Count II, for which there never was sufficient proof of indecent exposure, let alone felony indecent exposure, the proper remedy is a reversal with instructions to dismiss outright.

2. THE FACTUAL DIFFERENCE BETWEEN THE EVIDENCE ON THE TWO COUNTS SHOWS THE STATE FAILED TO PROVE COUNT II AND FAILED TO PROVE SEXUAL MOTIVATION FOR COUNT I.

a. Nudity is not obscenity; Count II went unproven.

Mr. Eckhart also stands by his arguments that Count 2 was unproven. AOB at 7-13. The State’s response is unpersuasive. BOR at 8-15. A person commits indecent exposure if he (1) intentionally makes an open and obscene exposure of his person, (2) knowing that such conduct is likely to cause reasonable affront or alarm. RCW 9A.88.010(1). The State cites the correct definition of obscenity from

State v. Vars, 157 Wn. App. 482, 490, 237 P.3d 378 (2010), but does not make a compelling argument that Mr. Eckhart made a “lascivious exhibition” of his person. BOR at 9-11. The State may have shown that Mr. Eckhart was naked, but nudity is just not obscenity.²

In fact, there is no evidence that the alleged nudity – even if it was “open” – was **lascivious**. This is why Count II must be reversed and dismissed. It may be true that the statute does not require an overt sexual gesture, but it surely requires more than nudity. Here, in the absence of an allegation of either any communication or masturbation, Mr. Eckhart’s conviction cannot stand. And, it is not for him to prove “that the exposure was accidental.” BOR at 12.³

To be clear, Mr. Eckhart is not asking the Court to find that the State cannot prosecute someone for indecent exposure when they are inside their home. State v. Chiles, 53 Wn. App. 452, 453, 767 P.2d 597 (1989). However, Chiles only established that someone can be prosecuted for public indecency when exposing themselves to the

² This distinction should be beyond debate. “There is no law against being naked.” Seattle Police Department Public Affairs communication, November 14, 2008. (former Chief of Police R. Gil Kerlikowske discussing, in part, “nude bicyclists at the Fremont Solstice Parade.”) <http://spdblotter.seattle.gov/2008/11/14/is-nudity-illegal/> (last accessed May 27, 2016).

³ The State shifts the focus even further from the appropriate analysis by suggesting the conviction should stand because “social norms generally require wearing clothes in public” and that Mr. Eckhart previously spoke to his neighbor with his shirt off. BOR at 15.

outside world from within their home, but the case does not change the fact that there must be proof of an open and obscene exposure.

Moreover, that opinion says practically nothing about the underlying facts except that there had been “nine complaints” about that defendant’s activities.

b. The sexual motivation allegation for count I cannot stand.

Mr. Eckhart also stands by his arguments that the sexual motivation allegation is not based on facts other than those which sustain the underlying charge itself. AOB at 14-18. The State argues that the alleged masturbation “is not inherent in the offense of indecent exposure.” BOR at 17. But, as explained above, the masturbation alleged to have occurred at the time of Count I is what conceivably makes that last-in-time nakedness obscene and lascivious, unlike what was alleged in Count II. It cannot serve as both proof of the crime and proof of the special allegation. The fact that the jury found this act to have been sexually motivated is inconsequential to the legal analysis of whether the special allegation was in fact proven with evidence that does not inhere in the charge.

While Mr. Eckhart did not challenge the sufficiency of the evidence with respect to the alleged indecent exposure for Count I, it

is important to note that the assertion on appeal that he “masturbated in front of S.W.” rests on an equivocal record. BOR at 17.

Testifying about the Count I incident, S.W. said that Mr. Eckhart was sitting cross-legged on the floor and “it looked like there was some motion, hand motion.” 12/31/14 RP 33. She said this was “Around his groin area.” 12/31/14 RP 34. The prosecutor asked the witness to describe the “motion” and S.W. remained vague: “The motion was some kind of hand motion.” 12/31/14 RP 34.

Given the opportunity to say that she saw Mr. Eckhart masturbating, S.W. did not say that is what she saw. To the contrary, if masturbation is the manual manipulation of the genitals, S.W. did not see Mr. Eckhart doing that:

Q: Where was his hand moving up and down in proximity to his body?

A: Around his groin area.

Q: Did you see if there was anything in his hand?

A: No.

Q: Did you see his penis at that time?

A: Yes.

12/31/14 RP 34

On redirect, the witness again disavowed the idea that she had seen Mr. Eckhart touching himself:

Q: But you're unclear about whether there was a penis in his hand or not?

A: Yes.

12/31/14 RP 54.

Admittedly, when she began testifying, S.W. made the following statement about that January morning: “he was standing there with no clothes on and there was some movement going on, and it looked like he was masturbating to me.” 12/31/14 RP 18. This is what the State now relies on to claim that S.W. “believed that Eckhart was masturbating.” BOR at 5. However, when the witness made that isolated statement, she was not asked to explain it. The later testimony, including cross-examination, shows that upon further reflection, S.W. was not sure she had seen Mr. Eckhart masturbating.

Q: But you also testified on direct examination that you didn't see what was in his hands, is that correct?

A: Yes.

Q: So you also testified that you only saw him for a few seconds, is that correct?

A: Yes.

Q: So is it your testimony that his penis was not in his hands the whole time during that two to three seconds that you saw him?

A: I don't know.

12/31/14 RP 49.

Notably, S.W. also changed her initial assertion that Mr. Eckhart was standing to say that he had been “sitting,” “cross-legged,”

on the floor. Compare 12/31/14 RP 18 with 32-34, 42. This equivocal evidence is not enough upon which to transform a simple misdemeanor into an indeterminate Class C felony.

“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). Even if the Court rejects all other arguments that Mr. Eckhart has raised in this appeal, the sexual motivation finding should be stricken and a remand for a new sentencing to a determinate term be ordered.

B. CONCLUSION

The conceded failure of proof with respect to the alleged prior conviction means that neither felony indecent exposure conviction may stand. Both convictions must be set aside, with only a possible remand for entry of conviction and sentence as to misdemeanor indecent exposure on Count I.

For the alternative arguments made in the opening brief and above, Count II should be reversed and dismissed as should the special allegation attached to Count.

DATED this 27th day of May, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

Mick Woynarowski – WSBA 32801
Washington Appellate Project
Attorneys for Appellant
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711
FAX (206) 587-2710
mick@washapp.org

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73543-8-I
v.)	
)	
TERRENCE ECKHART,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **REPLY 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:

[X] KRISTIN RELYEA, DPA	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
[kristin.relyea@kingcounty.gov]	(X)	AGREED E-SERVICE
KING COUNTY PROSECUTING ATTORNEY		VIA COA PORTAL
APPELLATE UNIT		
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MAY, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710