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Court of Appeals
Division I
State of Washington
3/22/2021 4:10 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
3/23/2021
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Supreme Court No. 99592-3
(Court of Appeals No. 80214-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY CONAWAY,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

In *State v. Haggard*, 195 Wn.2d 544, 546, 461 P.3d 1159 (2020), this Court held a dismissed misdemeanor may be included in a defendant's criminal history for sentencing purposes. Four dissenting justices protested that "[w]hen charges are 'dismissed,' they should be treated as *dismissed*." *Id.* at 570 (Gordon McCloud, J., dissenting). "Using an attractive term like 'dismissal' and then defining it out of existence in the fine print misleads every defendant who agrees to plead guilty in exchange for a deferred sentence." *Id.*

While the majority did not agree these policy concerns prohibited the use of dismissed misdemeanors at *sentencing*, it agreed the misdemeanor dismissal statute "does not contain language allowing future *prosecutions* to use a previously dismissed conviction." *Haggard*, 195 Wn.2d at 552 (emphasis added) (citing RCW 3.66.067). Yet here, the State used a prior dismissed misdemeanor in a prosecution against Jeffrey Conaway for felony indecent exposure. The State relied on the definition of "conviction" in the SRA, but this is not a sentencing issue. And the State ignored the fact that the legislature explicitly permits the use of dismissed cases in other contexts, but not in in this context.

This Court should grant review of this important issue of statutory construction and fundamental fairness.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Jeffrey Conaway, petitioner here and appellant below, asks this Court to review the opinion of the Court of Appeals in *State v. Conaway* (No. 80214-3-I, Filed March 1, 2021), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Statutory construction issues of first impression are matters of substantial public interest this court reviews.[1] Indecent exposure is normally a misdemeanor. In order to convict a person of felony indecent exposure, the State must prove the person had "previously been convicted" of indecent exposure. RCW 9A.88.010(2)(c). Here, the State relied on a prior case in which Mr. Conaway pleaded guilty on condition that the conviction would be dismissed if he complied with the terms of a deferred sentence. Mr. Conaway complied, the conviction was dismissed, and the judgment was destroyed. Did the State fail to prove the prior conviction element of felony indecent exposure, because, as a matter of statutory construction, a dismissed misdemeanor does not satisfy the prior conviction element of the crime? RAP 13.4(b)(4).

[1] *See, e.g.*, *Haggard*, 195 Wn.2d at 547-48; *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015); *State v. Peeler*, 183 Wn.2d 169, 349 P.3d 842 (2015); *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015); *State v. K.L.B.*, 180 Wn.2d 735, 328 P.3d 886 (2014); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009).

2. The Court of Appeals ruled Mr. Conaway was required to preserve a challenge to the sufficiency of the evidence in the trial court, and stated that in reviewing the jury's verdict for sufficient evidence, "review is limited to whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions." Are these rulings contrary to the Due Process Clause and binding opinions of this Court and the United States Supreme Court? RAP 13.4(b)(1), (3).

D. STATEMENT OF THE CASE

1. Jeffrey Conaway was convicted of felony indecent exposure after the State alleged a prior dismissed misdemeanor satisfied the prior conviction element of the crime.

Jeffrey Conaway and his partner of 18 years live in Oak Harbor and raised two children together. RP 557, 563. Mr. Conaway has very little criminal history, with convictions for driving with a suspended license in 1999 and using drug paraphernalia in 2006. CP 4. He was also charged with misdemeanor indecent exposure in 2007, but he entered a plea agreement under which the conviction would be dismissed if he complied with all terms of a deferred sentence. CP 48; Ex. 1. Mr. Conaway fully complied, and therefore the conviction was dismissed and the judgment destroyed. Ex. 1; RP 37, 40, 475-76; CP 63.

Approximately 10 years later, a person working at a garage sale accused Mr. Conaway of exposing his penis to her after trying on a pair of pants. RP 366-68, 558. Mr. Conaway was charged with and convicted of felony indecent exposure with sexual motivation, but the Court of Appeals reversed for an ER 404(b) violation. CP 29.

On remand, the State again sought to convict Mr. Conaway of felony indecent exposure, arguing the docket from the prior dismissed case proved the "prior conviction" element of the crime. CP 61-64; RP 66[2]; *see* RCW 9A.88.010(2)(c). Mr. Conaway moved to exclude the docket because the conviction had been dismissed and there was no judgment and sentence. CP 47-49. Mr. Conaway pleaded guilty in the earlier case because he had been assured the conviction would not be on his record if he complied with all conditions of a deferred sentence. He satisfied his portion of the agreement, and he argued it was unfair for the State to resurrect his dismissed conviction and use it to convict him of a felony. CP 48. The court nevertheless admitted the docket from the prior case, ruling the dismissed conviction counted as a "conviction" for purposes of the prior-conviction element of felony indecent exposure. RP 36-44, 61-63.

[2] This final amended information is not in the court file.

During trial, in addition to eliciting evidence about the current case, the State introduced the docket from the prior case during testimony from a court clerk. RP 469-77; Ex. 1. The clerk testified, "A deferred sentence, a defendant pleads guilty. The sentencing of the charge is deferred for a period of time … And conditions are set." RP 475. She explained, "If all of the conditions are completed at the end of the deferral period, then the guilt – guilty plea is then changed to not guilty and the case is dismissed." RP 475-76. She noted this is what happened in Mr. Conaway's prior case: "It shows 'not guilty' and 'dismissed.'" RP 477.

Although the evidence the State introduced showed "not guilty" and "dismissed," the court instructed the jury: "A 'conviction' includes a defendant's plea of guilty followed by a deferred sentence and dismissal." CP 111; RP 587.

In closing argument, the prosecutor stepped through the elements of felony indecent exposure and stated the proof for element four, "that the defendant had been previously convicted of indecent exposure," was in exhibit number 1, the docket. RP 607. He told the jury, "A conviction includes a defendant's plea of guilty followed by a deferred sentence and dismissal. … and that is a matter of law." RP 608-09.

After expressing some confusion about how it could use the docket from the prior case, the jury returned a guilty verdict. RP 651-57; CP 116.

2. The Court of Appeals affirmed based on the SRA definition of "conviction," even though the issue is not a sentencing issue.

On appeal, Mr. Conaway argued that, as a matter of statutory construction, the 2007 dismissed case does not satisfy the prior conviction element of felony indecent exposure. Therefore, the State presented insufficient evidence as a matter of law to prove the current crime. Br. of Appellant at 1-2, 8-15; Reply Br. of Appellant at 1-14.[3]

Mr. Conaway pointed out that where the legislature intends for prior dismissed cases to count as prior convictions, it explicitly says so. For instance, the statute prohibiting firearm possession for convicted felons specifically includes "a dismissal entered after a period of probation" in the definition of "convicted." RCW 9.41.040 (3); *see State v. Horton*, 195 Wn. App. 202, 221, 380 P.3d 608, 616 (2016) (applying this definition to a prior "withheld adjudication" from Florida).

The State claimed the definition of "conviction" from the Sentencing Reform Act should apply. Br. of Respondent at 9-11. Mr. Conaway explained it was improper to import a definition from the SRA, and cited this Court's recent decision in *Haggard*, 195 Wn.2d at 546. Br. of Appellant at 12-14; Reply Br. of Appellant at 12-13. *Haggard* found

[3] Mr. Conaway also raised other issues for which he does not seek review.

legislative amendments "supported the notion that a dismissed conviction remains an *SRA* conviction." *Id.* at 551 (emphasis added). But the misdemeanor dismissal statute "does not contain language allowing future *prosecutions* to use a previously dismissed conviction." *Id.* at 552 (emphasis added) (citing RCW 3.66.067).

The Court of Appeals nevertheless adopted the State's argument that the SRA definition of "conviction" applies. App. A at 4-6. The court insisted Mr. Conaway ignored the holding of *Haggard*, even though Mr. Conaway described the holding and analysis of *Haggard* in his briefing. App. A at 5; Br. of Appellant at 12-14; Reply Br. of Appellant at 12-13. And the court did not address Mr. Conaway's argument that other felony statutes explicitly included prior dismissed cases in the definition of "convicted," while the indecent exposure statute did not. App. A.

The Court of Appeals also accepted the State's argument that Mr. Conaway could not challenge the sufficiency of the evidence based on statutory construction for the first time on appeal. App. A at 4 n.3. And in reviewing the jury's guilty verdict, the court stated, "Our review is limited to whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions." App. A at 3.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This case presents a statutory construction issue of first impression this Court should address.

This case presents an important statutory construction issue of first impression: whether a prior dismissed misdemeanor constitutes a prior conviction for purposes of proving felony indecent exposure. The opinion below relied on the definition of "conviction" from the SRA, but this is not a sentencing issue.

The indecent exposure statute does not state that a prior dismissed case constitutes a prior conviction. The legislature knows how to include dismissed cases when it wishes to do so; for example, the statute criminalizing firearm possession for convicted felons includes dismissed cases in its definition of the word "convicted." Moreover, the statute permitting certain felony convictions to be dismissed states that such dismissed convictions may be used to support future prosecutions, but the statute providing for dismissal of misdemeanors says no such thing. For these and other reasons, a prior dismissed misdemeanor does not constitute a prior conviction for purposes of proving felony indecent exposure. This Court should grant review to resolve this important issue of statutory construction. RAP 13.4(b)(4).

a. Unlike the firearm possession statute, the indecent exposure statute does not include prior dismissed cases in a definition of prior convictions.

The indecent exposure statute 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." RCW 9A.88.010(1). This crime is a misdemeanor. RCW 9A.88.010(1)(2)(a). However, "[i]ndecent 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).

Mr. Conaway has *not* "previously been convicted under this section[.]" *Id.* He satisfied all terms of the agreement, the conviction was dismissed, and the judgment was destroyed. Ex. 1; RP 37, 40; CP 63. As the court clerk testified, "If all of the conditions are completed at the end of the deferral period, then the guilty plea is then changed to not guilty and the case is dismissed." RP 475-76.

The prosecution insisted the dismissed case satisfied the prior conviction element of the crime, but the indecent exposure statute does not state that a dismissed misdemeanor falls within the definition of "convicted" for purposes of raising a current charge to a felony. RCW

9A.88.010. It provides that the SRA definition of "sex offense" applies, but does not say anything about the definition of "convicted." *Id.*

In contrast, the statute prohibiting firearm possession for convicted felons defines "convicted," and that definition includes "a dismissal entered after a period of probation …." RCW 9.41.040(3); *see Horton*, 195 Wn. App. at 221. Thus, the legislature has shown that when it wishes to count dismissed cases as predicate offenses, it knows how to say so.

The legislature wanted to increase the degree of the crime of unlawful possession of a firearm any time a person had previously been convicted of a "serious offense," RCW 9.41.040 (1)(a), even where there was "a dismissal entered after a period of probation, suspension or deferral of sentence[.]" RCW 9.41.040(3). The legislature did not say the same thing for indecent exposure. RCW 9A.88.010. Accordingly, Mr. Conaway's prior dismissed case does not constitute a predicate offense for the crime of felony indecent exposure. *See State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).

b. Unlike the felony dismissal statute, the misdemeanor dismissal statute does not permit dismissed cases to be used in future prosecutions.

The difference between the felony dismissal statute and the misdemeanor dismissal statute also demonstrates that a prior dismissed

misdemeanor does not constitute a prior conviction in this context. As this Court has noted, the misdemeanor dismissal statute "does not contain language allowing future prosecutions to use a previously dismissed conviction." *Haggard*, 195 Wn.2d at 552; *see* RCW 3.66.067. In contrast, the felony dismissal statute states that prior dismissed convictions may be used "in any subsequent prosecution, for any other offense," and "shall have the same effect as if probation had not been granted, or the information or indictment dismissed." RCW 9.95.240. Thus, it was improper for Mr. Conaway's dismissed misdemeanor to be used in this prosecution for felony indecent exposure.

c. The SRA definition of "conviction" does not apply.

The State did not respond to the above arguments Mr. Conaway made, and the Court of Appeals did not address them. Instead the court accepted the State's argument that the definition of "conviction" from the Sentencing Reform Act applies. App. A at 4-6 (citing RCW 9.94A.030(9)). That definition includes "acceptance of a plea of guilty" regardless of subsequent dismissal. RCW 9.94A.030(9); *Haggard*, 195 Wn.2d at 551-52.

But again, while "a dismissed conviction remains an *SRA* conviction," *Haggard*, 195 Wn.2d at 551, the misdemeanor dismissal statute "does not contain language allowing future *prosecutions* to use a

previously dismissed conviction." *Id.* at 552 (emphases added). In other words, a dismissed misdemeanor may be included in a defendant's criminal history for purposes of calculating an offender score, *id.* at 551, but it may not be used in prosecutions for other crimes. *Id.* at 552.

Moreover, the use of the SRA definition here would render other statutory provisions superfluous. There would be no reason for the firearm possession statute and the felony dismissal statute to include the clauses discussed above if the SRA definition of "conviction" applies to the criminal code. *See* RCW 9.95.240; RCW 9.41.040(3). And there would be no reason for the indecent exposure statute to reference the SRA definition of "sex offense" if SRA definitions apply automatically to all terms. *See* RCW 9A.88.010(2)(c). The use of the SRA definition here thus violates the canon of statutory construction that legislative language must not be rendered superfluous. *See State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

For all of these reasons, Mr. Conaway asks this Court to grant review of this statutory construction issue of first impression, and to hold that a prior dismissed misdemeanor may not be used to elevate indecent exposure to a felony.

2. Contrary to the Due Process Clause and binding case law, the Court of Appeals ruled that challenges to the sufficiency of the evidence must be preserved in the trial court and are reviewed only for "substantial evidence."

This Court should also grant review because the Court of Appeals' opinion is contrary to the Due Process Clause and binding case law. The court accepted the State's argument that Mr. Conaway was required to preserve a challenge to the sufficiency of the evidence supporting the jury's verdict, and it stated "review is limited to whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions." App. A at 3-4. These rulings are incorrect and unconstitutional, warranting this Court's review. RAP 13.4(b)(1), (3).

a. A defendant may always challenge the sufficiency of the evidence and the statutory validity of the conviction on appeal.

In its response brief, the State argued Mr. Conaway "waived" his challenge to the sufficiency of the evidence based on statutory construction. Br. of Respondent at 1, 12-13. In his reply brief, Mr. Conaway explained that a defendant may always challenge the sufficiency of the evidence on any or all elements of the crime of which he was convicted. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011). And sufficiency claims often involve questions of statutory construction. *See id.* at 230-32; *see also State v. Larson*, 184 Wn.2d 843,

845-46, 365 P.3d 740 (2015); *State v. Engel*, 166 Wn.2d 572, 576, 576 n.3, 210 P.3d 1007 (2009). Reply Br. of Appellant at 4-5.

The Court of Appeals, however, did not address the State's "waiver" argument by explaining a defendant may always challenge the sufficiency of the evidence to convict, including by challenging the statutory validity of the conviction. Instead, the court averred Mr. Conaway "preserv[ed] the error on appeal" because he "did object to the admission of the docket as evidence of his prior conviction." App. A at 4, n. 3. This implication that a defendant could not otherwise challenge the validity of his conviction is dangerous and warrants this Court's review.

b. This Court has rejected the "substantial evidence" standard because it lowers the burden of proof in violation of due process.

The court also strayed from the law in stating that when evaluating the sufficiency of the evidence to convict, "review is limited to whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions." App. A at 3-4. First, this was a jury trial, not a bench trial, and the standard the Court of Appeals cited has only been cited for bench trials. *See State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014). Second, regardless of identity of the fact-finder, the "substantial evidence" standard improperly lowers the burden of proof, violating due process. U.S. Const. amend. XIV.

The State must prove every element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court may affirm 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, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

"Substantial evidence" is a lower standard than the *Jackson* sufficiency of the evidence standard. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). Thus, although this Court in *Green* had previously affirmed a conviction under the "substantial evidence" standard, it later overruled its prior decision and reversed the conviction after applying the *Jackson* standard of review for sufficiency of the evidence. *Id.* at 220-22.

This Court again rejected the "substantial evidence" standard in *State v. Vasquez,* 178 Wn.2d 1, 6, 309 P.3d 318 (2013). This Court described it as "the incorrect standard of review" for determining the sufficiency of the evidence "because it does not require proof beyond a reasonable doubt." *Id.* (citing *Green*, 94 Wn.2d at 221-22); *see also State v. Stewart*, 12 Wn. App. 2d 236, 248, 457 P.3d 1213 (2020) (Dwyer, J., concurring) (the lower standard "harms defendants by supplanting the

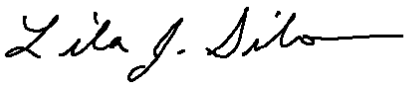
demanding beyond a reasonable doubt standard with the less stringent substantial evidence standard.").

The Court of Appeals' reversion to a standard of review this Court has twice rejected, and which lowers the burden of proof in violation of due process, is an important constitutional issue warranting this Court's review. RAP 13.4(b)(1), (3).

F. CONCLUSION

For the reasons state herein, this Court should grant review of the important statutory construction and due process issues presented.

DATED this 22nd day of March, 2021.



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY DAVID CONAWAY, Appellant.	)	No. 80214-3-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Jeffrey Conaway appeals his conviction for felony indecent exposure, alleging that the State failed to provide sufficient evidence of his prior conviction, that the court improperly commented on the evidence by defining "conviction," and that the court abused its discretion when it responded to the jury inquiry. We affirm.

FACTS

After Jeffrey Conaway exposed his penis to a 17-year-old girl while she was alone at her family's garage sale, the State charged Conaway with felony indecent

Citations and pin cites are based on the Westlaw online version of the cited material.

exposure predicated on a prior conviction for indecent exposure.[1] The predicate offense was a 2006 charge for misdemeanor indecent exposure. Conaway entered a guilty plea on the 2006 charge in exchange for a deferred sentence. After Conaway complied with all of the conditions of the deferred sentence, the court dismissed the 2006 charge.

At trial, the State sought to introduce evidence of Conaway's prior conviction, but discovered that the district court destroyed the files and no longer had a copy of the judgment and sentence. The trial court admitted the 2006 misdemeanor indecent exposure docket, the only available document, as proof of the predicate offense required for the felony indecent exposure charge. The trial court also admitted testimony from witness Erika Miller regarding the incident to prove motive, intent, knowledge, and lack of accident or mistake. The jury convicted Conaway as charged.

Conaway appealed, and this court reversed and remanded for a new trial because the trial court erroneously admitted prejudicial propensity evidence by admitting Miller's testimony.[2] We held that without Miller's testimony, the State lacked evidence to support a guilty verdict on the special allegation of sexual motivation.

On remand, the State dismissed the allegation of sexual motivation and charged Conaway with felony indecent exposure. The State again sought to introduce the docket from the 2006 case in order to prove that a prior conviction existed. RCW 9A.88.010(2)(c). Conaway moved to exclude the docket. The court admitted the

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[1] The State amended the information to include a charge for communication with a minor for immoral purposes. Then, the State amended the information to dismiss this charge and added a special allegation of sexual motivation to the remaining indecent exposure charge.

[2] State v. Conaway, No. 77107-8-I, slip op. at 4 (Wash. Ct. App. Dec. 3, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/771078.PDF.

docket, finding that the dismissed conviction qualified as a conviction for the prior conviction element of felony exposure. The court instructed the jury that to convict the defendant, the State must prove the following elements:

> (1) That on or about June 27, 2016, the defendant made an open and obscene exposure of the defendant's person;
> (2) That the defendant acted intentionally;
> (3) That the defendant knew that such conduct was likely to cause reasonable affront or alarm;
> (4) That the defendant had been previously convicted of indecent exposure; and
> (5) That this act occurred in the State of Washington.

Jury instruction 10 stated: "a 'conviction' includes a defendant's plea of guilty followed by a deferred sentence and dismissal."

The jury found Conaway guilty as charged. Conaway appeals.

ANALYSIS

A. Sufficiency of the Evidence

Conaway first argues that we should reverse his conviction because the State failed to provide sufficient evidence of his prior conviction.

The State must prove every element of the charged offense beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 753, 613 P.2d 121 (1980). "To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). Our review is limited to whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions. Homan, 181 Wn.2d at 106. "Substantial evidence is evidence sufficient to

persuade a fair-minded, rational person of the finding's truth." State v. Stewart, 12 Wn. App. 2d 236, 240, 457 P.3d 1213 (2020). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences drawn therefrom. State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019).

"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." RCW 9A.88.010(1). Indecent exposure is a felony if the defendant has previously been convicted of indecent exposure. RCW 9A.88.010(2)(c).

Conaway first argues that because his guilty plea followed by a deferred sentence is not a conviction under the charging statute, the State did not present sufficient evidence of his prior conviction.[3] We review a question of statutory interpretation de novo. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). RCW 9.94A.030(9) defines conviction as an adjudication of guilt, including "a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." A deferred sentence is a "conviction served" for purposes of the Sentencing Reform Act (SRA). State v. Harper, 50 Wn. App. 578, 580, 749 P.2d 722 (1988). Washington case law dictates that a deferred sentence is a conviction.

In State v. Cooper, 176 Wn.2d 678, 685, 294 P.3d 704 (2013), our Supreme Court held that a defendant's deferred convictions in Texas are convictions for the purposes of calculating the defendant's offender score, concluding that "the plain

[3] The State attempts to use the phrase "statutory validity" in State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006), to argue that we are precluded from reaching this argument, but Gray does not concern statutory interpretation. Conaway did object to the admission of the docket as evidence of his prior conviction, thereby preserving the error on appeal.

language of RCW 9.94A.030(9) includes acceptance of a guilty plea as a 'conviction' for offender score and sentencing purposes." The court held that in Washington, a defendant's acceptance of a guilty plea is an adjudication of guilt. In distinguishing Texas law, the court held that after a deferred sentence is vacated, "the conviction may be used only as an element of a crime to determine guilt in a subsequent prosecution." Cooper, 176 Wn.2d at 682.

In State v. Haggard, 195 Wn.2d 544, 551, 461 P.3d 1159 (2020), the Supreme Court rejected the argument that once the defendant's guilty plea was withdrawn and the not guilty plea entered as the result of a deferred sentence, the conviction is dissolved for all purposes. The court held that legislative elements support the conclusion that a dismissed conviction remains an SRA conviction. Haggard, 195 Wn.2d at 551. While Haggard concerned sentencing, the court still held that a deferred sentence and dismissal does not does not invalidate or erase the initial finding of guilt.[4] Haggard, 195 Wn.2d at 553.

Despite Conaway's contention that the court used the term "conviction" improperly because this was not a sentencing issue, the court properly applied the SRA definition to this case. The legislature specifically defined the term conviction. "It is an axiom of statutory interpretation that where the legislature defines a term, we will use that definition." State v. LaPointe, 1 Wn. App. 2d 261, 269, 404 P.3d 610 (2013). The RCW 9.94A.030(9) definition of conviction is used consistently by our courts to establish

[4] Conaway relies on the quote "unlike former RCW 9.95.240, dismissal under RCW 3.66.067 does not contain language allowing future prosecutions to use a previously dismissed conviction." Haggard, 195 Wn.2d at 552. He ignores the analysis where the court specifies that the SRA focuses on the initial finding of guilt and rejected the defendant's argument. Haggard, 195 Wn.2d at 553.

the existence of a prior conviction as an element of a current felony. See State v. Benitez, 175 Wn. App. 116, 123, 302 P.3d 877 (2013) (the court applied the SRA definition of conviction to establish that a defendant's juvenile adjudication is a prior conviction for an indecent exposure charge); LaPointe, 1 Wn. App. 2d at 269 (the court used the SRA definition of conviction to predicate offenses for a vehicle prowling statute).

Because under the plain language of RCW 9.94A.030(9) a deferred sentence is a conviction, the State's proof of this deferred sentence was sufficient to establish the predicate offense element of indecent exposure. The State presented a certified copy of the 2006 docket of Conaway's prior indecent exposure charge, demonstrating that Conaway entered a guilty plea on July 18, 2007. The court entered a judgment and a deferred sentence for 12 months, and then dismissed the charge after Conaway's compliance. In addition, the State presented testimony from Island County District Court Clerk Linda Bass, who certified the docket and explained that the docket appeared typical of when a defendant pleads guilty, receives a deferred sentence, and completes it. The docket and Bass's testimony established that Conaway entered a guilty plea followed by a deferred sentence, therefore, sufficient evidence supported the jury's finding that Conaway was previously convicted of indecent exposure.

B. Jury Instruction

Conaway next argues that jury instruction 10, which instructed the jury that a conviction includes a defendant's plea of guilty followed by a deferred sentence and dismissal, was an improper comment on the evidence by the trial court.

We review a jury instruction de novo, evaluating it in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Judges declare the law for the jury. State v. Boss, 167 Wn.2d 710, 720, 223 P.3d 506 (2009). The judge is prohibited from instructing a jury that matters of fact have been established as a matter of law. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). "Any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A jury instruction is not a comment on the evidence if it is an accurate statement of the law and it is supported by sufficient evidence. State v. Stearns, 61 Wn. App. 224, 231, 810 P.2d 41 (1991).

> Our appellate courts have held that while the existence of a prior conviction is an essential element that must be proved to the jury beyond a reasonable doubt, the question of whether a prior conviction qualifies as a predicate offense for purposes of elevating a crime from a misdemeanor to a felony is a threshold question of law for the court to decide.

State v. Chambers, 157 Wn. App. 465, 477, 237 P.3d 352 (2010).

The court's instruction to the jury was both an accurate statement of the law as well as a threshold question that the court needed to decide. Despite Conaway's contention to the contrary, the definition of conviction includes a deferred sentence as a matter of law. The cases Conaway relies on are not persuasive. See Becker, 132 Wn.2d at 64 (the court erred by classifying the Youth Education Program (YEP) as a school in the jury instructions when whether YEP constituted a school was a contested issue of fact); State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980) (the court misstated the law when it restricted the definition of great bodily harm, therefore, the "court clearly indicated to the jury that the evidence presented at trial was insufficient to

support the theory of self-defense"). Here, the court did not resolve a factual issue, or misstate the law. For these reasons, jury instruction 10 was not an improper judicial comment.

C. Jury Inquiry

Conaway argues finally that the trial court failed to make the law manifestly clear to the jury when responding to the jury inquiry.

During deliberations, the jury asked "When the jury makes a decision on Instruction 7, Element 4 (being yes or no), he was convicted of indecent exposure. Can the jury use this decision as circumstantial evidence?" The trial court instructed the jury to refer to jury instruction 11, the limiting instruction.[5] Conaway contends that the court erred when it did not answer "no," to the inquiry, despite telling the parties that the answer was no.

"Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court." State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). Conaway cannot demonstrate that the court abused its discretion. The court considered whether instructing the jury to refer to the instructions as a whole, to refer to instruction 11 specifically, or to include "no," in the response. Our Supreme Court has held that a trial court does not abuse its discretion by instructing the jury to refer to their instructions rather than providing a yes or no answer. State v. Ng, 110

[5] Instruction 11 states:
Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a certified district court docket and may be considered by you only for the purpose of determining whether the defendant was previously convicted of indecent exposure. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Wn.2d 32, 42, 750 P.2d 632 (1988). The trial court did not abuse its discretion in its response to the jury inquiry.

Affirmed.

Mann, C.J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80214-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 22, 2021
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March 22, 2021 - 4:10 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80214-3
Appellate Court Case Title:	State of Washington, Respondent v. Jeffrey David Conaway, Appellant
Superior Court Case Number:	16-1-00155-7

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