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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 OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain Terrence Eckhart's conviction for felony indecent exposure as charged in Count II.

2. The evidence is insufficient to sustain the special allegation of sexual motivation as charged in Count I.

3. In the absence of a valid exception to the hearsay rule, the trial court committed reversible error in allowing the prosecution to use hearsay testimony to link Mr. Eckhart to an alleged prior sex offense, an element of both Count I and II.

B. 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 intentionally made an open and obscene exposure knowing that such conduct was likely to cause reasonable affront or alarm. In support of Count I, the State presented evidence that Terrence Eckhart's neighbor twice saw him standing naked in the doorway as she left her residence for work. Is simply being seen standing naked in one's doorway sufficient to support a criminal conviction for indecent exposure?

2. To convict a defendant of acting with sexual motivation, the State must present evidence of identifiable sexual conduct that is not

inherent to the underlying offense. The complainant waited to contact the police until after she saw Mr. Eckhart a third time (now allegedly making “some kind of hand motion” around his groin) and this incident was charged as Count II. Even if the witness’s equivocal supposition of masturbation is sufficient to uphold that indecent exposure conviction, should the special allegation nevertheless be stricken?

3. State agency public records qualify as an exception to the hearsay rule when duly certified by a custodian of records. Over objection, a police detective testified he saw his municipal agency’s database, which listed Mr. Eckhart’s birthdate as May 6, 1966, and the State relied on this hearsay to link Mr. Eckhart to a prior sex offense conviction. Was it reversible error for the trial court to allow the State to use this hearsay to elevate the instant simple misdemeanor charges to felony level?

C. STATEMENT OF THE CASE

Terrence Eckhart, lived at 1244 NE 102nd Street, in Seattle, with his wife Terry and their two kids. 1/5/15 RP50-52. Mrs. Eckhart works for the Department of Housing and Urban Development and her husband is a roofer. 1/5/15 RP51. Their adult next-door neighbor, S.W., lives alone. 12/31/14 RP13-18. The two houses are close to each other,

with S.W.'s front door facing the street, and the Eckharts' side door oriented toward the side of her home. Ex. 1. The two residences share a driveway. 12/31/14 RP42.

S.W. typically left her home for work around 9:30 a.m. 12/31/14 RP18. She testified that on January 7, 2014, as she walked to her car to go to work, she turned back: "I must have forgotten something. I had to go back in the house." 12/31/14 RP18. S.W. did not remember the morning well; she may have just been taking out the recycling. 12/31/14 RP51. She turned, "looked over and saw" that the Eckharts' "door was wide open" and her neighbor 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 RP18.

There was no eye contact between them. 12/31/14 RP40. She said nothing. 12/31/14 RP35. Mr. Eckhart was not saying anything either. 12/31/14 RP35. S.W. "quickly went back and forth like two times probably, to get to my car, and left." 12/31/14 RP18. Between going to and from her car, she only "glanced" for a few seconds. 12/31/14 RP35, 49.

Not long after saying that she saw Mr. Eckhart standing, S.W. testified that he was sitting, "sitting on the floor without any clothes on

and it looked like there was some motion, hand motion, kind of sprawled position that he was in, but sitting up instead of standing.” 12/31/14 RP33, 43. She was not asked whether there was any light on inside the Eckharts’ home, but did say it was “really hard to remember the details.” 12/31/14 RP33.

She described the movement she said she saw as “some kind of hand motion... around his groin area.” 12/31/14 RP33. The prosecutor asked if she saw anything in Mr. Eckhart’s hand and S.W. said “No.” 12/31/14 RP34. When the prosecutor asked if she saw his penis, she said “Yes.” 12/31/14 RP34. She testified she did not know if his penis was in his hands or not. 12/31/14 RP49, 54. She had only glanced toward the Eckharts’ doorway for a few seconds. 12/31/14 RP31, 49. S.W. said she was “in shock” but did not call the police until the next day. 12/31/14 RP37, 48; 1/5/15 RP10-11.

At trial, S.W. claimed she had seen Mr. Eckhart nude in his doorway twice before. 12/31/14 RP24. She did not report this to the police when it happened. 12/31/14 RP27. She was “pretty sure” the first time was back in September 2013. 12/31/14 RP24. She said Mr. Eckhart was standing in his doorway, unclothed, and she saw his penis. 12/31/14 RP25. She said nothing, she did not look back at him as she

was leaving for work, and he was looking straight ahead. 12/31/14
RP25, 41. She did not know if he shut the door or went inside. 12/31/14
RP26. She said she was “shaken up and nervous and scared and feeling
really weird.” 12/31/14 RP26. She said nothing to either of the
Eckharts. 12/31/14 RP26.

She testified that there was “the second time” when she saw Mr.
Eckhart standing unclothed in his doorway. 12/31/14 RP28-29. She did
not look over for more than a few seconds and she did not call the
police. 12/31/14 RP31. That time, she may have been peeking through
her blinds: “I don’t know if I looked through the blinds that day or
not.” 12/31/14 RP29. He said nothing and she said nothing. 12/31/14
RP29, 41. She said she saw his penis and was “shaken up, nervous,
uncomfortable.” 12/31/14 RP 30. When she came out to her car, she
thought he was still in his doorway. 12/31/14 RP31. Neither then, nor
in September, did she see if Mr. Eckhart’s penis was erect. 12/31/13
RP32. Again, she did not talk to the Eckharts about any of this.
12/31/14 RP32.

Following S.W.’s January 8th, 2014, contact with the police, the
King County Prosecuting Attorney’s Office charged Mr. Eckhart with
indecent exposure for the January 7, 2014, incident. CP 1. The

information alleged this to be a felony indecent exposure due to a prior felony sex offense conviction from 1997 and included a special allegation that the conduct was sexually motivated under RCW 9.94A.835. CP 1. When Mr. Eckhart exercised his right to a trial by jury, the State alleged a second count, to have occurred “between September 1, 2013 and December 31, 2013.” CP 19-20.

The jury convicted Mr. Eckhart of both counts, found that Mr. Eckhart had previously been convicted of a sex offense, and found the special sexual motivation allegation for Count I. CP 49-54. The trial court denied a defense motion for a new trial. CP 65-75.

At sentencing, the parties agreed that the “sexual motivation” finding under RCW 9.94A.835 rendered Mr. Eckhart’s current conviction under Count I – originally a simple misdemeanor – a “sex offense” that subjected him to an indeterminate sentence. RCW 9.94A.030(47); .507. The sentencing judge decreed that Mr. Eckhart had served out the minimum term of his sentence during lengthy pretrial confinement on electronic home detention. CP 97-98. The sentencing judge allowed Mr. Eckhart to post an appellate bond and stayed the execution of the sentence pending appeal. 5/29/15 RP13-14.

D. ARGUMENT

1. THE COUNT II CONVICTION 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 State did not present sufficient evidence that Mr. Eckhart made an obscene exposure, nor that he intended to. 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.”¹

In State v. Swanson, 181 Wn.App. 953, 958-63, 327 P.3d 67 (2014), this Court emphasized that in any indecent exposure prosecution, the State has the burden of proving that the defendant intended to make an exposure that is both open and obscene. Swanson drove his car up to an espresso stand and openly masturbated in the driver’s seat as a bikini-clad barista prepared his drink. In closing argument, the prosecutor claimed that the State only had to prove that Swanson intended to make an exposure, but not necessarily that he intended what he did to be open and obscene. Id. at 962-63. On appeal, this Court corrected that mistaken claim: “the State was required to prove not only that Swanson intended to masturbate, but also, that he intended that the masturbation be ‘open and obscene.’” Id. at 962.

¹ 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).

Neither the statute nor the pattern jury instructions define the term obscene, but under common law, “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); accord State v. Vars, 157 Wn.App. 482, 489-90, 237 P.3d 378 (2010).

In Swanson, the evidence undeniably established that defendant’s intent was to make a prohibited open and lewd exposure:

Swanson spoke to the barista... He was masturbating while the barista continued to stand near the window and make his drink. Swanson handed the barista his credit card while his other hand was on his penis. Swanson filled out the receipt and handed it to the barista while he remained exposed... there was no evidence that [he] accidentally or mistakenly drove up to the window.

Swanson, 181 Wn.App. at 967.

Here, with respect to Count II, the State failed to put forth necessary proof of intent for an obscene, lewd, exposure. According to S.W., she saw Mr. Eckhart standing naked in his doorway, twice between September and December of 2013. But, S.W. did not claim that Mr. Eckhart was touching himself on either of these two occasions.

She did not testify that his penis was erect and she did not testify about seeing anything nearby (e.g. pornography, sex toys) that would suggest a sexual purpose. 12/31/14 RP32. Mr. Eckhart remained in his home. He did not make eye contact with S.W. and he did not speak to her. 12/31/14 RP 25, 29, 41. Besides his nakedness, there was nothing sexual about his behavior from which one could possibly infer criminal intent, let alone prove it beyond a reasonable doubt.²

The Count II allegations do not constitute an indecent exposure. E.g., “While masturbating, the man looked directly at [complainant] and her daughter.” State v. Leach, 53 Wn. App. 322, 323, 766 P.2d 1116 (1989) aff’d, 113 Wn.2d 679, 782 P.2d 552 (1989) disapproved of on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). The absence of any overtly sexual gesture, along with the absence of any attempt to communicate with S.W., demonstrates that the State failed to present sufficient evidence of Mr. Eckhart’s intent.

² Nakedness alone is not criminal indecent exposure. For example, our laws govern intentionally open – but not intentionally obscene – exposure that occurs during public urination. E.g. SMC12A.10.100(A) (“A person is guilty of urinating in public if he or she intentionally urinates or defecates in a public place, other than a washroom or toilet room, under circumstances where such act could be observed by any member of the public.”) However, absent intent for the act to be open and obscene, public urination remains punishable as a civil infraction, even if witnessed by a member of the public who takes offense.

Here, unlike what occurred in Swanson, there is no proof that Mr. Eckhart's decision to stand in his doorway was driven by a purpose to be both open and obscene in the exposure of his naked body.

Without more, it cannot be a crime just to be naked, and it certainly cannot be a crime just to be naked within one's dwelling, even if a nearby neighbor happened to have caught an unwelcome glimpse.

c. The State also failed to prove that Mr. Eckhart knew that temporarily standing in his doorway naked was likely to cause reasonable affront or alarm. As discussed above, the State failed to prove Mr. Eckhart intended for his act to be both open and obscene. But, even taking S.W.'s account at face value, reversal of Count II is also required due to the State's failure to prove that at the time of the exposure, Mr. Eckhart knew that what he did was likely to cause reasonable affront or alarm.

In State v. Vars, this Court held that "the witness's observation of the offender's genitalia" is immaterial to guilt for indecent exposure. 157 Wn.App. at 491. However, the obscene exposure must take place "when another is present and the offender knew the exposure likely would cause reasonable alarm." Id. This knowledge element can be established if the facts show that an offender clearly targeted a

particular victim.³ Or, in the absence of such direct evidence, the time and place of the exposure can establish that the offender should have known his conduct was likely to cause alarm. For example, the defendant in State v. Vars,

[o]ver the course of a three hour period... intentionally removed his clothing and walked 15 blocks through a residential neighborhood... When he knew he was being watched, he furtively crouched in roadside bushes, and when officers arrived, he attempted to flee the scene of the crime.

157 Wn.App. at 493.

In contrast, Mr. Eckhart's alleged 'exposure' was limited to standing in his doorway for a few moments. S.W. testified that on the second alleged incident, she may have resorted to spying on him through her blinds. 12/31/14 RP29. While the two homes are close to each other, the evidence presented at trial was consistent with him not realizing S.W. had walked by. The State did not establish that Mr. Eckhart saw S.W. as she walked to her car. S.W. did not say anything to him. 12/31/14 RP26, 32. On these facts, the State did not establish that Mr. Eckhart knew, or should have known, that S.W. was alarmed by his presence, or that her subjective alarm was reasonable.

³ E.g. State v. DuBois, 58 Wn.App. 299, 793 P.2d 439 (1990) (describing adult male purposefully exposing himself to the family's underage babysitter by taking off his clothes, then talking to her while naked, and then again accosting her by standing right by a couch where she was sitting).

If after the first alleged incident S.W. had chosen to talk to her neighbors, or write them a note, letting Mr. Eckhart know she was displeased with having seen him naked, and then he again disrobed, the State's case would have been stronger. Accord Vars 157 Wn.App. at 493 (noting that Vars' knowledge was established, in part, through three prior convictions admitted "under ER 404(b) to prove that he knew his conduct was likely to cause alarm.") But, in the absence of evidence that Mr. Eckhart knew that S.W. saw him naked, in the absence of evidence that he was spending any significant time standing in his doorway naked, and in the absence of any indication that he had prior knowledge that this was unwelcome behavior, the conviction for Count II 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. Eckhart committed the offense 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 is dismissal of Count II with prejudice.

2. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE SEXUAL MOTIVATION ALLEGATION.

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. The State's evidence regarding the third alleged incident was arguably stronger. S.W. testified that on January 7, 2014, she saw Mr. Eckhart's hand in the vicinity of his groin and despite not getting a good look, she presumed him to have been touching his genitalia. 12/31/14 RP18. But, while this difference in proof means that the evidence for the underlying Count I conviction is legally sufficient, it also confirms that the sexual motivation special allegation attached to that count was not proven.

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 the potential for 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.

Critically, “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,” not prior treatment nor prior history. State v. Halgren, 137 Wn.2d 340, 351, 971 P.2d 512 (1999).

b. Here, the State presented no evidence of any conduct that was not inherent in the offense of indecent exposure. As discussed above, it is the intentional obscene, lewd, or sexualized exposure of one’s person that renders the act of public nudity a crime. Here, the State’s evidence with respect to Mr. Eckhart’s alleged intent to commit an open and obscene exposure on January 7, 2014 was the very same evidence it relied on to argue sexual motivation.

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, but 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 the 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.

This record does not reveal evidence of sexual motivation other than that which the State argued was the evidence necessary to sustain the underlying Count I conviction.⁴ In accordance with Halstein and Thomas, this Court should strike the sexual motivation finding and remand for a new sentencing to a determinate term.

⁴ For example, in rebuttal, all that the State could point to as arguments for why Mr. Eckhart's alleged actions were sexually motivated was "the escalation of these events and the way that they happened." 1/5/14 RP102.

3. BECAUSE THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE HEARSAY EVIDENCE TO TIE MR. ECKHART TO A 1997 PRIOR, BOTH CONVICTIONS SHOULD BE REVERSED.

a. Hearsay is inadmissible, absent an exception to the hearsay rule. “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 802. ER 803 identifies certain exceptions to the hearsay rule.

RCW 5.44.040 provides for admissibility of certain certified copies of public records as an exception to the hearsay rule if the document is duly certified and under seal. State v. Smith, 66 Wn. App. 825, 826-27, 832 P.2d 1366 (1992) citing State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989).

[N]ot every public record is automatically admissible under the statute... In order to be admissible, a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report.

Monson, at 839 (emphasis added), citing Steel v. Johnson, 9 Wn.2d 347, 358, 115 P.2d 145 (1941). see also State v. C.N.H., 90 Wn. App. 947, 950, 954 P.2d 1345 (1998) (certified copy of defendant’s state-issued identification card properly admitted to establish her age).

The statute, titled “Certified copies of public records as evidence,” reads:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

RCW 5.44.040 (emphasis added).

Admission of evidence under a hearsay exception is reviewed for abuse of discretion. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Nevertheless, the application of exceptions to the prohibition on hearsay in criminal proceedings requires “strict compliance.” State v. Neal, 144 Wn.2d 600, 610, 30 P.3d 1255 (2001) (holding trial court abused its discretion in admitting a certified copy of an expert’s laboratory report in lieu of live testimony

where the certificate did not precisely meet the requirements of CrR 6.13(b)); Accord Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 451, 191 P.3d 879 (2008) (reversing trial court’s application of the public records exception, where the admitted document contained “a residue of ‘judgment’ or ‘opinion’” as opposed to only facts).

b. The trial court should have sustained Mr. Eckhart’s objections to Detective Foster’s hearsay testimony. To link Mr. Eckhart to an alleged sex offense conviction, the State wanted to put on testimony as to his date of birth. CP 62, Ex. 10. When the prosecutor first asked Detective Foster to say what Mr. Eckhart’s date of birth was, defense objected as to hearsay, and the trial court sustained the objection. 1/5/15 RP27-28. Outside the presence of the jury, the prosecutor explained he wanted to introduce this information for “identification” but the trial court understood it to be hearsay. 1/5/15 RP35.

The trial court suggested: “Maybe it’s a public records exception you’re looking for then.” 1/5/15 RP36. Defense maintained its objection, on hearsay, foundation, and best evidence grounds. 1/5/15 RP 36-37. Defense counsel noted that the State had provided him with nothing akin to a certified Department of Licensing document. 1/5/15

RP38. The State offered that Detective Foster learned of what he believed to be Mr. Eckhart's date of birth by looking at a Seattle Police Department (SPD) database. 1/5/15 RP37. Defense counsel again explicitly objected: "the detective's testimony that he reviewed a Seattle Police Department database does not meet the requirements of RCW 5.44 or the best evidence rule." 1/5/15 RP39. The trial court overruled the objection: "I think that basically it does." 1/5/15 RP39. Detective Foster returned to the witness stand, testified that Mr. Eckhart's date of birth is May 6, 1966, and he was excused as a witness. 1/5/15 RP49.

In State v. Monson, this Court explained that a Washington State Department of Licensing Certified Copy of a Driver's Record (CCDR) is the benchmark of the correct application of the public records exception to the hearsay rule.

[A] CCDR is a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection. See RCW 46.52.100. Typically, as in this case, it contains neither expressions of opinion nor conclusions requiring the exercise of discretion.

53 Wn. App. at 858.

In contrast, what the State offered here failed to satisfy many of the statutory requirements. First, by its plain language, the statute

excepts from the hearsay rule records and documents held by “departments of the United States” federal government, “of this state” [Washington], “or any other state or territory of the United States.” RCW 5.44.040. The statute does not except – from the hearsay rule – records maintained by departments of municipal corporations such as the City of Seattle. Here, Detective Foster testified about records held by the Department of Police for the City of Seattle, a municipal law enforcement agency created pursuant to article III of the Seattle City Charter. The records are simply not covered by RCW 5.44.040 because the Seattle Police Department (SPD) is not a department of the federal government, this state, any other state or territory of the United States. SPD records may be admissible under some other exception to the hearsay rule, but not under RCW 5.44.040.⁵

Additionally, the State did not establish that SPD had “express statutory authority” to serve as a repository of offenders’ dates of birth, nor did it establish that these records were “retained for the benefit of

⁵ This Court once found no error in the admission of a SPD record of arrests under the public record hearsay exception, but it did so without considering whether the statute, by its plain language, is limited to state, but not municipal, agencies. State v. King, 9 Wn.App. 389, 393, 512 P.2d 771, review denied, 83 Wn.2d 1003 (1973). No subsequent caselaw appears to have addressed this particular issue. At times, police records have been admitted under the business records exception. State v. Bellerouche, 129 Wn. App. 912, 917, 120 P.3d 971 (2005).

the public.” State v. C.N.H., 90 Wn. App. at 950; accord State v. Kelly, 52 Wn.2d 676, 680, 328 P.2d 362 (1958) (holding that prison records meet the public records exception to the hearsay rule in part because the warden has a statutory obligation to maintain a registry of convicts). This too is reason to find that the trial court ruling was error.

Next, the State failed to offer anything that was certified and/or under seal by any “officer[] having by law the custody” of the alleged public records. RCW 5.44.040. This too was error. “Hearsay in public records or reports is admissible if the record or report is certified,” but here it was not. Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 358, 287 P.3d 51 (2012) (holding Employment Security Department letter inadmissible under RCW 5.44.040 partly because it was not an appropriately certified copy).

Lack of authenticity is yet another reason why the trial court erred. “[A]ll parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents.” In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). Below, Mr. Eckhart objected as to both hearsay and foundation. 1/5/115 RP 27, 35-40. Given that the State offered hearsay testimony

not from a custodian of records, or via a certification from one, the objection was well-taken and should have been sustained.

In State v. Descoteaux, 94 Wn.2d 31, 35-36, 614 P.2d 179 (1980) overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982), the Supreme Court reviewed the record from a trial where a work release officer made hearsay assertions about the defendant being detained pursuant to a felony conviction at the time of an alleged escape. The Descoteaux Court noted that the confinement element of the crime of escape is ordinarily proved by documentary evidence and reiterated the general rule that certified copies of a judgment and sentence are the best evidence of the fact of a prior conviction. Id. Such documents “must be certified by the court with the seal of the court annexed.” Id. citing RCW 5.44.010 and State v. Murdock, 91 Wn.2d 336, 588 P.2d 1143 (1979) and State v. O'Dell, 46 Wn.2d 206, 279 P.2d 1087 (1955).

Like at Mr. Eckhart’s trial, the prosecution in Descoteaux sought to present information from a public record through a witness who claimed to have seen it but not through the document itself. This was objectionable under both the best evidence rule and as hearsay:

In seeking to prove a prior conviction, the State must comply with the best evidence rule the best evidence must be produced.

ER 1002-05; State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979); 5 R. Meisenholder, Washington Practice ss 91-96 (1965, Supp.1979). Clearly, the best evidence of defendant's prior conviction is a certified copy of the judgment of conviction. RCW 5.44.010. The State failed to produce this document or make any showing of its unavailability. Under these circumstances, the testimony of the officer as to the contents of the judgment of conviction was an objectionable method of proof... Moreover, the officer's testimony that defendant was incarcerated on two felonies was hearsay. ER 801(c).

Id. at 35-36 (emphasis added).

Unlike Descoteux, Mr. Eckhart made the proper objections and preserved this error. 1/5/15 RP27, 35-40; CP 65-75 (defendant's motion for a new trial).⁶ The trial court should be reversed. See also State v. Davis, 141 Wn.2d 798, 854, 10 P.3d 977 (2000) (noting that RCW 5.44.040 requires a custodian of records' certification and affirming trial court refusal to admit a purported public record because the proponent failed to establish authenticity).

c. Since the error prejudiced Mr. Eckhart, both convictions should be reversed. 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

⁶ In response to Mr. Eckhart's motion for a new trial, the State appears to have taken the position that there was an error, but it was harmless. CP 78-80; 2/13/15 RP2-3.

State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980)). That is the case here.

In Special Verdict Forms C and D, the jury found that at the time of the commission of Counts I and II, Mr. Eckhart had previously been convicted of a sex offense. CP 53-54. This finding was based on the State's argument that a 1997 judgment and sentence for attempted child molestation in the first degree belonged to Mr. Eckhart. CP 62; Ex. 10. The State was able to argue this because the birthdate listed on the first page of the document matched what Detective Foster said the SPD database said was Mr. Eckhart's birthdate. 1/6/15 RP12. All that defense counsel could do was challenge that the document might not refer to Mr. Eckhart because of a height discrepancy. 1/6/15 RP11-12.

The State did not bring in any live witnesses who could tie him to this Snohomish County Superior Court document, be it by conducting a fingerprint comparison or through first-hand knowledge of how those proceedings may have related to Mr. Eckhart on trial. Because the State offered nothing but the date of birth to tie Mr. Eckhart to the document, the error was prejudicial.

“[W]hen criminal liability depends on the accused's being the person to whom a document pertains... the State must do more than

authenticate and admit the document; it also must show beyond a reasonable doubt that the person named therein is the same person on trial.” State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (internal quotations omitted). Because “in many instances men bear identical names... the State cannot do this by showing identity of names alone.” Id. (reversing bail jumping conviction for insufficient evidence). See also State v. Santos, 163 Wn. App. 780, 785-86, 260 P.3d 982 (2011) (reversing felony DUI conviction where State failed to link the defendant to prior conviction documents).

Without the wrongly admitted hearsay, the State would not have been able to prove beyond a reasonable doubt that Mr. Eckhart had previously been convicted of a sex offense. As such, the State would not have been able to prove that what occurred was a felony offense. Both convictions should be reversed.

E. CONCLUSION

This Court should reverse Mr. Eckhart's Count II conviction and the special allegation for Count I because neither is supported by sufficient evidence. In any event, the trial court's erroneous admission of hearsay requires reversal for a new trial.

DATED this 20th day of January, 2016.

Respectfully submitted,

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JANUARY, 2016, 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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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JANUARY, 2016.

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