

APPELLANT'S  
BRIEF  
NO. 34313-4-II  
JAN 13 2006  
COURT OF APPEALS  
221 yn

NO. 34313-4-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

TROY A. GAMBER, JR.,

Appellant,

---

APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable James B. Sawyer II, Judge  
Cause No. 05-1-00374-0

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, indecent exposure, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in accepting Gamber's plea to the charge of indecent exposure where, had the charge been properly dismissed with prejudice, the plea was barred under art. I, section 9 of the Washington State Constitution and the Fifth Amendment of the United States Constitution.
03. The trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to move to dismiss count I, indecent exposure, for insufficient evidence and in allowing Gamber to enter a plea to the charge where it should have been dismissed with prejudice.
04. The trial court erred in imposing a 60-month sentence for Gamber's conviction of indecent exposure.
05. The trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence that exceeded statutory authority.
06. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.

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07. The trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime of conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence as a matter of law to support Gamber's conviction for indecent exposure where Gamber withdrew his stipulation to an element of the offense the State was required to prove beyond a reasonable doubt? [Assignment of Error Nos. 1 and 2].
02. Whether the trial court erred in accepting Gamber's plea to the charge of indecent exposure where, had the charge been properly dismissed with prejudice, the plea was barred under art. I, section 9 of the Washington State Constitution and the Fifth Amendment of the United States Constitution? [Assignment of Error Nos. 1 and 2].
03. Whether the trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to move to dismiss count I, indecent exposure, for insufficient evidence and in allowing Gamber to enter a plea to the charge where it should have been dismissed with prejudice? [Assignment of Error No. 3].
04. Whether the trial court erred in imposing a 60-month sentence for Gamber's conviction of indecent exposure that

exceeded statutory authority?  
[Assignment of Error No. 4].

05. Whether the trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence that exceeded statutory authority?  
[Assignment of Error No. 5].
06. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 6].
07. Whether Gamber was prejudiced by his counsel's failure to object to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime of conviction?  
[Assignment of Error No. 7].

C. STATEMENT OF THE CASE

01. Procedural Facts

Troy A. Gamber (Gamber) was charged by third amended information filed in Mason County Superior Court on October 27, 2005, with indecent exposure (second or subsequent offense and/or prior sex crime), count I, and two counts of assault in the fourth degree (with sexual motivation), counts II and III, contrary to RCWs 9A.88.010 and 9A.36.041(1). [CP 71-73].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on October 27, the

Honorable James B. Sawyer II presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 44].

The jury returned verdicts of guilty of counts II and III, with a special finding that Gamber committed each offense with sexual motivation, and reached no decision on count I, indecent exposure. [CP 35-40]. After the court declared a mistrial on this latter count, Gamber entered a plea to the charge in the fourth amended information [CP 19-28, 32-33; RP 84-90].

Gamber was sentenced within his standard range and timely notice of this appeal followed. [CP 1-18].

02. Substantive Facts

In the early morning of July 5, 2005, Kelly Lund was working as a bartender at the Dew Drop Inn. [RP 28, 39]. Gamber, who had approximately seven drinks, “was laughing and talking with the two men he was with.” [RP 30].

Lund explained that at one point during the evening Gamber wanted a hug.

So I just reached over the bar, you know, just slapped him on the back twice, and then pull away and that’s a hug. Well, I went to pull away, and he held me there and his hand went down my back and under - - into the top of my jeans and he was trying to rub my butt.

[RP 31].

Gamber's hand went under Lund's jeans. [RP 37]. When she told Gamber to stop, he did. After Lund closed the bar, she allowed Gamber to remain "because I wanted him to have a few cups of coffee before he left."

[RP 31-32]. When Lund told Gamber he'd have to leave,

...he wanted another hug, and I just said half a second hug and that you're out of here. so I just, you know, like pat him on the back twice and then pull away. He held onto my right arm in front of him and tried to put it down in his groin area.

Q. And what happened then?

A. I looked down and saw his penis was out in his lap, out of his pants.

Q. And do you remember whether his penis was erect or not?

A. It was.

Q. What did you do at that point?

A. I got mad and insulted and embarrassed. I told him he had to leave right then, and I took him to the door.

Q. Did he say anything to you at that point?

A. He said he thought that's how it was done, and he thought he was doing things right, and he wanted me to help him figure out what was right.

[RP 32].

The court read the following stipulation to the jury:

The parties have entered into a stipulation. I will read the stipulation to you. It is the same as sworn testimony from the witness stand. The plaintiff, State of Washington, by and through its attorney, Rebecca Jones Garcia, deputy prosecuting attorney, and the defendant, by and through his attorney, Ronald Sergi, hereby stipulate as follows: That this defendant, Troy A. Gamber, Jr., has previously been convicted of a sense - - sex offense as defined under RCW 9.94A.030. Dated and signed this date by the deputy prosecutor, Mr. Sergi and Mr. Gambler.

[RP 43-44].

After the State rested, and outside the presence of the jury [RP 44], counsel for Gamber informed the court that Gamber wished to withdraw his signature from the stipulation as to his prior offense.

(Court): Mr. Gambler, your counsel has indicated that it's your desire to withdraw your signature from the stipulation that's been entered.

(Gamber): Yes, your Honor.

(Court): However, it's also my understanding that the defense counsel, as a tactical decision, wants that stipulation to still be before the jury rather than have the specific nature of the defendant's criminal offense brought to the attention of the jury.

(Def Atty): Correct, Your Honor.

(Court): I'll note your withdrawal of your signature from the stipulation, and we'll white your signature out. Okay?

(Gamber): Thank you, your Honor.

[RP 45].

Gamber rested without presenting evidence. [RP 46].

Once the jury was escorted from the courtroom to commence deliberations, the court had the following colloquy with Gamber and his attorney:

(Court): Mr. Gamber, the stipulation itself doesn't go back to the jury room. And if you remember when I read it, the stipulation recites that it is between the prosecutor and your attorney, and their stipulating that the record shows that you have this prior conviction. And what it does by entering it as a stipulation instead of forcing the prosecution to present the judgment and sentence, is it avoids the specific nature of the offense that you are charged with so that they don't know that the underlying conviction is a rape of a child in the first degree. And it just says, okay, there is a sex offense back there, but they don't get that additional information. That's the purpose for it, and your signature was removed. Okay?

(Def Atty): And to take it one...

(Court): Do you understand? I'm sorry?

(Def Atty): Well, and to take it one step further, Mr. Gamber has been of the belief that because it's a juvenile conviction that it no longer has any effect on his life. Unfortunately...

(Court): That's not true, and you need to come to grab, grabs - - grips, grabs - - to grips with that because that is part of your past, and it remains

party of your past. It does not - - it's not wiped out because you're now an adult. It's just something you have to live with.

[RP 70-71].

D. ARGUMENT

01. AS A MATTER OF LAW, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT GAMBER'S CONVICTION FOR INDECENT EXPOSURE WHERE GAMBER WITHDREW HIS STIPULATION TO AN ELEMENT OF THE OFFENSE THE STATE WAS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

As instructed in this case, one of the elements of indecent exposure the State was required to prove beyond a reasonable doubt was: "That at the time of said offense, the defendant had previously been convicted of a sex offense as defined under RCW 9.94A.030." [Court's Instruction No. 9; CP 52].

A stipulation requires the assent of the State as well as the defendant. State v. Adler, 16 Wn. App. 459, 465, 558 P.2d 817 (1976); State v. Cronin, 142 Wn.2d 568, 585, 14 P.3d 752 (2000). Here, by withdrawing his name from the stipulation, Gamber was objecting to the stipulation and declining to stipulate that he had previously been convicted of the required sex offense, an element the State was required to prove beyond a reasonable doubt. By removing his name from the stipulation, the court ostensibly agreed. Simply, there was no stipulation, and the court's explanation to Gamber of the reason for the stipulation [RP 45] does not cure this. What is more, the jury was never made aware that Gamber had withdrawn his stipulation, as demonstrated by the State's closing argument on this point:

Furthermore, that the defendant has previously been convicted of a sex offense. And the judge read that stipulation to you, so that's, that's not even in

question. The parties agree that that's a fact that's been established. [Emphasis added].

[RP 63].

Yes, it is in question. Given that Gamber was a party to the action, and that he withdrew his stipulation regarding the prior conviction for a sex offense, and that there was no other evidence presented on this element, the State failed to prove the offense of indecent exposure as charged, with the result that the offense should have been dismissed with prejudice as a matter of law.

And given these unique circumstances, i.e., had the case been properly dismissed with prejudice, under art. I, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution, both of which provide that no person should twice be put in jeopardy for the same offense, Gamber's subsequent plea to the offense was barred and should also be reversed and dismissed with prejudice.

02. GAMBER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO MOVE TO DISMISS COUNT I, INDECENT EXPOSURE, FOR INSUFFICIENT EVIDENCE AND IN ALLOWING GAMBER TO ENTER A PLEA TO THE CHARGE WHERE IT SHOULD HAVE BEEN DISMISSED WITH PREJUDICE.

A criminal defendant claiming ineffective

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of invited errors, see State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995).

Assuming arguendo, this court finds that trial counsel waived the issues relating to Gamber's conviction for indecent exposure set forth in the preceding section of this brief, then both elements of ineffective assistance of counsel have been established.<sup>1</sup>

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to dismiss count I, indecent exposure or to prevent Gamber from entering a plea to the charge where it should have been dismissed with prejudice. For the reasons set forth in the preceding section of this brief, had counsel done so, the charge would have been dismissed with prejudice and the court would not have accepted Gamber's plea to the charge.

Second, the prejudice is self evident: but for counsel's failure to so act, Gamber would not have been convicted of indecent exposure for the reasons set forth in the preceding section of this brief.

03. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A 60 MONTH SENTENCE FOR GAMBER'S CONVICTION OF INDECENT EXPOSURE.

Illegal or erroneous sentences may be

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<sup>1</sup> While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). And while a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and “that a defendant cannot agree to punishment in excess of that which the Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where, as here, the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of

what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

The sentencing court imposed a 60-month sentence for Gamber’s conviction of indecent exposure based on the false premises that the offense had a seriousness level of IV and, with an offender score of 10, a standard range of 60 months. [CP 4, 6]. This was wrong: indecent exposure under RCW 9A.88.010 , as charged in this case, is an unranked offense with a standard range sentence of 0 to 12 months. Under RCW 9.94A.515, indecent exposure to person under age fourteen (subsequent sex offense) RCW 9A.88.010 is a level IV offense and carries a standard range sentence of 60 with an offender score of 10. There is no similar provision for indecent exposure where, as here, a person under the age of 14 is not involved.

This court’s goal in statutory interpretation is to identify and give effect to the Legislature’s intent. State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001). Conversely, if the language of a statute is unambiguous, the language of the statute is not

subject to judicial interpretation. Id. Under the rule of lenity, any ambiguity is interpreted to favor the defendant. Id.

This court should remand for resentencing.

04. GAMBER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S IMPOSITION OF A SENTENCE THAT EXCEEDED STATUTORY AUTHORITY.<sup>2</sup>

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's imposition of the incorrect sentence of 60 months discussed in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth in the preceding section of this brief, had counsel objected, the trial court would not have imposed the sentence that exceeded statutory authority.

The prejudice here is self evident: but for counsel's failure to object, the trial court would not have imposed the sentence in excess of what is statutorily permitted.

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<sup>2</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

05. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.<sup>3</sup>

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Gamber to the five-year statutory maximum for indecent exposure, the trial court imposed 36 to 48 months’ community custody. [CP 7]. As this sentence exceeds the statutory maximum sentence of five years imprisonment, See RCW

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<sup>3</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to a collateral attach of a sentence in excess of statutory authority presented earlier in this brief is hereby incorporated by reference.

9A.20.021(1)(c), this court should remand for resentencing within the statutory maximum for indecent exposure, a class C felony.

06. GAMBER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S IMPOSITION OF A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.<sup>4</sup>

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime for which Ague was convicted, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth in the preceding section of this brief, had counsel objected, the trial court would not have imposed a sentence exceeding the statutory maximum.

The prejudice here is self evident: but for counsel's failure to object, the trial court would not have imposed a sentence in excess of what is statutorily permitted.

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<sup>4</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

07. THE TRIAL COURT ERRED IN CALCULATING GAMBER'S OFFENDER SCORE BY INCLUDING ONE POINT BASED ON THE STATE'S CONTENTION THAT GAMBER WAS ON COMMUNITY PLACEMENT AT THE TIME OF THE CURRENT OFFENSE IN VIOLATION OF THE SIXTH AMENDMENT REQUIREMENT THAT A JURY MAKE THE DETERMINATION BEYOND A REASONABLE DOUBT.<sup>5</sup>

Here, the court calculated Gamber's offender score as 10, which included one point based on the State's contention that Gamber was on community placement at the time of the current offense.<sup>6</sup> [CP 3].

A jury, not a judge, must make the factual determination beyond a reasonable doubt whether a defendant was on community placement at the time of his or her crime, since this is not within the narrow "prior conviction" exception set forth in Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Jones, 126 Wn. App.

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<sup>5</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to a collateral attack of a sentence in excess of statutory authority presented earlier in this brief is hereby incorporated by reference.

<sup>6</sup> RCW 9.94A.525(17) provides that a judge will increase a defendant's offender score by one point if the offender was on community placement at the time of the current conviction.

136, 107 P.3d 755, review granted, 124 P.3d 659 (2005); State v.

Hochhalter, 131 Wn. App. 506, 518-24, 128 P.3d 104 (2006).<sup>7</sup>

08. GAMBER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT INCLUDING ONE POINT BASED ON THE STATE'S CONTENTION THAT GAMBER WAS ON COMMUNITY PLACEMENT AT THE TIME OF THE CURRENT OFFENSE IN VIOLATION OF THE SIXTH AMENDMENT REQUIREMENT THAT A JURY MAKE THE DETERMINATION BEYOND A REASONABLE DOUBT.<sup>8</sup>

Assuming *arguendo*, this court finds that trial counsel waived the issue relating to the trial court's including one point for being on community placement,

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth in the preceding section of this brief, had counsel objected, the trial court would not have imposed a sentence based on an incorrect offender score.

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<sup>7</sup> Cf. State v. Giles, (2006 Lexis 830), where Division II, the same court, consisting of two members not on the panel that issued Hochhalter, disagreed with this conclusion, holding that consistent with Division III's decision in State v. Hunt, 128 Wn. App. 535, 541-43, 116 P.3d 450 (2005), a trial court does not violate a defendant's right to a jury trial by adding a point to his offender score because of his community placement status.

<sup>8</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

The prejudice here is self-evident: but for counsel's failure to object, the trial court would not have imposed a sentence based on an incorrect offender score.

E. CONCLUSION

Based on the above, Gamber respectfully requests this court to reverse and dismiss his conviction for indecent exposure and to remand for resentencing consistent with the arguments presented herein.

DATED this 23<sup>rd</sup> day of July 2006.

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