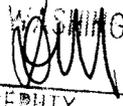


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DIVISION II

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STATE OF WASHINGTON

BY 
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No. 34912-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Steen,

Appellant.

Grays Harbor Superior Court

Cause No. 06-1-00047-4

The Honorable Judge Gordon L. Godfrey

Appellant's Reply Brief

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ARGUMENT

I. RCW 9A.88.010 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT DEFINE THE TERM “OBSCENE” OR THE PHRASE “OPEN AND OBSCENE EXPOSURE.”

Citing *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966).

Respondent argues that the term “obscene” and the phrase “open and obscene exposure” are not unconstitutionally vague.¹ Brief of Respondent, pp. 3-5. But *Galbreath* suggests that context provides clarity:

The words “indecent” and “obscene” are common words, of common usage, and enjoy a commonly recognized meaning among people of common intelligence. Though *such words may have different imputations in varying contexts*, when they are used in the phrase “indecent or obscene exposure of the person” they project a connotation readily understandable... *Particularly would this appear to be so when the exposure condemned refers to behavior in the presence of children of tender years.*

Galbreath, at 668, *emphasis added*.

The statute at issue in *Galbreath* provided that “Every person who takes any indecent liberties with or on the person of any child under the age of 15 years, or makes any indecent or obscene exposure of his person, or of the person of another, whether with or without his or her consent, shall be guilty of a felony...” *Former RCW 9.79.080(2)*.

¹ Respondent also cites *State v. Roberts*, 69 Wn.2d 921, 421 P.2d 1014 (1966). Respondent erroneously cites *Roberts* as a 1996 case. In fact, it was decided the same year as *Galbreath*. In *Roberts*, the Court examined a charge of indecent liberties. The language at issue here was not implicated; *Roberts* is therefore inapposite.

The statutory context here differs from *Galbreath* in three respects. First, the phrase “open and obscene exposure” does not appear in *former* RCW 9.79.080. Second, *former* RCW 9.79.080(2) provided additional context by prohibiting indecent liberties (in addition to indecent or obscene exposure). Third, as the Court noted in *Galbreath*, *former* RCW 9.79.080(2) applied to acts victimizing “children of tender years.” With this additional context, the phrase “indecent or obscene exposure” in the former statute were sufficiently clear to overcome a vagueness challenge.

Another difference lies in the social context. Since 1966, when *Galbreath* was decided, society as a whole has become more “cynical, sophisticated, [and] bohemian.” *Galbreath*, at 668. The past forty years has seen great changes in community standards, brought on by the rise of the internet, cable television, and other nontraditional media. At the same time, there is a greater awareness of the differences in standards espoused by different American subcultures. Thus strict religious communities (whether Christian, Muslim, or other faiths) might condemn women who wear cropped shirts, low-rise jeans, and visible underwear, while the tattooed-and-pierced set might disdain those same women for their adherence to contemporary fashion. Although sharing a dislike of the outfit, one group might conclude that the women were engaged in open and obscene exposure of the person, while the other would not.

It would be easy for the legislature to define what constituted an open and obscene exposure of the person. Forbidden exposure could be limited to the genitals, or it could encompass other, specific body parts as well. Indeed, the legislature took a step in that direction when it declared that “[t]he act of breastfeeding or expressing breast milk is not indecent exposure.” RCW 9A.88.010(1).

By failing to define the phrase “open and obscene exposure,” the legislature left citizens to wonder what acts are criminal. It also vested law enforcement, judges, and juries with unfettered discretion to decide when a person crosses the line from permissible exposure to criminal exposure. Because of this, the law is unconstitutionally vague. Mr. Steen’s conviction must be reversed and the case dismissed.

II. THE INFORMATION WAS DEFICIENT BECAUSE IT FAILED TO NOTIFY MR. STEEN THAT THE PROSECUTION INTENDED TO SEEK AN EXCEPTIONAL SENTENCE.

Respondent next argues that it complied with RCW 9.94A.535 and RCW 9.94A.537 by alleging an aggravating factor, and decries what it sees as Mr. Steen’s “tortured reading of the statute.” Brief of Respondent, p. 7.

But the statute requires more than allegation of an aggravating factor. Instead, RCW 9.94A.537(1) provides that the state “may give notice that it is seeking a sentence above the standard sentencing range.

The notice shall state aggravating circumstances upon which the requested sentence will be based.” Although the first quoted sentence is permissive (“may give notice”), the only sensible interpretation requires notice whenever the state chooses to seek an aggravated sentence. In other words, the decision whether to seek the sentence is optional; the requirement of notice once the decision has been made is not.

Once the decision to seek an exceptional sentence is made, the notice must inform the defendant “that [the state] is seeking a sentence above the standard sentencing range,” and must specify “aggravating circumstances upon which the requested sentence will be based.” RCW 9.94A.537. The notice must be provided “prior to trial or entry of the guilty plea...” RCW 9.94A.537.

Respondent has failed to establish that notice of its intent to seek an aggravated sentence was ever given to Mr. Steen. A review of the record discloses that notice of the state’s intent to seek an aggravated sentence was never provided prior to trial. Because of this, the sentence was imposed in violation of RCW 9.94A.535 and RCW 9.94A.537, and must be vacated.

Respondent suggests that Mr. Steen’s argument will require the prosecutor to request an exceptional sentence in every case where notice is given. *See, e.g.*, Brief of Respondent, p. 8 (“[T]he legislature could not

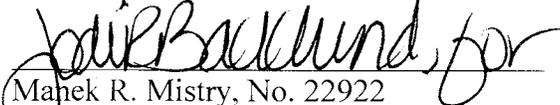
have intended to require the State to give notice that it will, without fail, ask for the imposition of an exceptional sentence.”) This is incorrect. Nothing in the statute requires the state to follow through with a decision to seek an exceptional sentence. If the prosecutor determines that a standard range sentence is appropriate, the prosecutor is free to withdraw the notice prior to trial, or to make a standard range recommendation at sentencing.

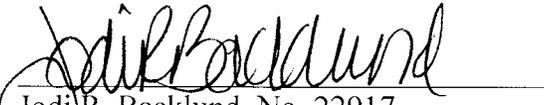
CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the defendant’s exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on December 14, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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Stafford Creek Correction Center
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and to:

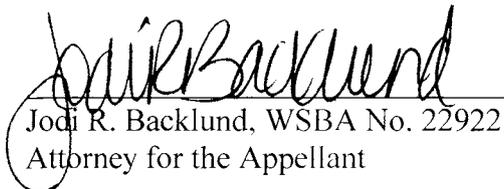
Grays Harbor Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 13, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 14, 2006.


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