

ORIGINAL

NO. 35164-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENNIS DUNCAN,

Appellant.

FILED
MARCH 22 2007
COURT OF APPEALS
DIVISION II
PORT ORCHARD, WA

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00674-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 22, 2007, Port Orchard, WA *Karla A. Szwantek*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the police properly looked into Duncan's pocket during a *Terry* frisk where Duncan behaved in a furtive manner, twice put his hands in his pockets, and the officer felt a hard object he could not identify in the pocket?

2. Whether, alternatively, Duncan was properly searched incident to arrest for lewd conduct after the police observed him from a public sidewalk through the open door of his van rubbing a buzzing chrome vibrator against his genital area?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dennis Duncan was charged by information filed in Kitsap County Superior Court with possession methamphetamine. CP 1. Duncan moved to suppress the drugs, but his motion was denied after a hearing. CP 26. Following a trial on stipulated facts, the trial court found Duncan guilty as charged. CP 20.

B. FACTS

As Duncan notes, the parties stipulated to the facts set forth in the probable cause statement for purposes of the suppression hearing. The statement may be found at CP 4-5. Duncan accurately quotes that document in his brief. A copy is attached hereto for reference as Appendix A. Duncan

fails to include in his brief, however, the second page of the statement, which included the following pertinent information:

Disposition:

I booked Duncan into the KC jail on the charges of Lewd Conduct and VUCSA. Bail \$6000. Report to the prosecutor for charges. Report to SOG for information.

CP 5.

At trial, Duncan stipulated to the following facts:

- (1) On May 2, 2006, in Kitsap County, Washington, DENNIS JAMES DUNCAN (hereafter referred to as the "Defendant") was contacted in his car, parked on a public roadway in Bremerton, Washington. The roadway has heavy foot and vehicle traffic.
- (2) Police contacted the Defendant after receiving a report of someone possibly living in that car, parked on the roadway.
- (3) When police contacted the Defendant, the passenger side door was open. Officers could see inside, and observed the Defendant holding an electric vibrator near his genital area. The vibrator was buzzing.
- (4) The Defendant saw the officer, and threw the vibrator near the rear of the van. The officer asked the Defendant to show the officer the Defendant's hands. The Defendant immediately placed his hands in his pockets.
- (5) The officer conducted a protective frisk of the Defendant, and felt a hard object in the Defendant's pocket. In looking to see what the item was, the officer saw a baggie of suspected methamphetamine in the Defendant's pocket.
- (6) The suspected methamphetamine is in fact methamphetamine.
- (7) After being read, acknowledging and voluntarily

waiving his *Miranda* warnings, the Defendant admitted the item he was using was a vibrator, and that the substance which appeared to be methamphetamine was methamphetamine, and he knew it was methamphetamine. The Defendant admitted to the officer the last time he used methamphetamine was the day before.

CP 20-21.

III. ARGUMENT

A. THE POLICE PROPERLY LOOKED INTO DUNCAN'S POCKET DURING A *TERRY* FRISK WHERE DUNCAN BEHAVED IN A FURTIVE MANNER, TWICE PUT HIS HANDS IN HIS POCKETS, AND THE OFFICER FELT A HARD OBJECT HE COULD NOT IDENTIFY IN THE POCKET.

Duncan argues that the police did not have sufficient basis under the “plain feel” doctrine to believe the object in Duncan’s pocket was clearly contraband and that therefore had no basis to withdraw the object from his pocket. This claim is without merit because the police did not withdraw the object because it was obvious contraband. To the contrary, based on Duncan’s furtive behavior, when the officer felt a hard, unidentified object in Duncan’s pocket, he was entitled, for officer safety, to look in the pocket to ensure that the object was not a weapon.

Duncan relies on *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), in which the United States Supreme Court

extended the plain-view doctrine to contraband discovered by an officer “through the sense of touch during an otherwise lawful search.” *Dickerson*, 508 U.S. at 375. The Court nonetheless ruled that the evidence had to be suppressed in that case because there, “the officer’s continued exploration of respondent’s pocket after having concluded that it contained no weapon was unrelated to ‘[t]he sole justification of the search [under *Terry*:] ... the protection of the police officer and others nearby.’” *Dickerson*, 508 U.S. at 378 (quoting *Terry v. Ohio*, 392 U.S. 1, 29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)) (editing the Court’s).

The police conduct here is not comparable to that in *Dickerson*. The officer did not remove the methamphetamine from Duncan’s pocket after he had determined that there was no weapon there. To the contrary, the officer after having to twice ask Duncan to remove his hands from his pockets, felt a hard unidentified object, which could have been a weapon. He then looked into Duncan’s pocket to see what it was, and thereupon immediately saw a baggie of methamphetamine.

A search pursuant to a *Terry* stop must be justified not only in its inception, but also in its scope. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). A valid weapons frisk is usually limited to a search of the outer clothing to discover weapons that might be used to assault the officer. *Id.* “There are, however, cases where the patdown is inconclusive, *in which*

case reaching into the clothing is the only reasonable course of action for the police officer to follow.” Id.

In *Hudson*, the Supreme Court approved the officer’s reaching into the suspect’s pocket to ascertain whether the object felt could be a weapon. That is exactly what happened here. It remanded the case, however, because the record was unclear as to whether or not the officer determined the cocaine seized was contraband before he determined that no weapons were present. *Hudson*, 124 Wn.2d at 119-20. If the officer had determined there were no weapons, than the continued searching of the pocket would have exceeded the scope of a proper *Terry* frisk. *Id.* If the search was within the scope of *Terry*, the court on remand was also to determine whether the officer, as occurred in *Dickerson*, excessively manipulated the cocaine, such that his determination that it was contraband was not a “plain feel.” *Id.*

Here, unlike in *Hudson*, there is no issue as to whether the officer went beyond the scope of a proper *Terry* frisk. As authorized by *Hudson*, the officer looked into Duncan’s pocket upon feeling a hard object that could have been a weapon. Upon looking into the pocket, the officer immediately saw a bag of methamphetamine, which he then had the right to seize as contraband. The trial court thus properly denied Duncan’s motion to suppress the methamphetamine.

Duncan's reliance on *State v. Rodriguez-Torres*, 77 Wn. App. 687, 691, 893 P.2d 650 (1995), is clearly misplaced. In that case, the officer "admitted that his search was designed to find narcotics" and was thus clearly not within *Terry's* protective frisk. *Rodriguez-Torres*, 77 Wn. App. at 691.

Likewise, *State v. Tzintzu-Jimenez*, 72 Wn. App. 852, 866 P.2d 667 (1994), does not support his claim. In that case the Court concluded that the mere feeling of a plastic baggie in the defendant's pocket did not meet the "immediate recognition" requirement of the plain-feel doctrine. *Tzintzu-Jimenez*, 72 Wn. App. at 856. Since here the officer *saw* the methamphetamine when he properly looked into the pocket to make sure the hard object was not a weapon, *Tzintzu-Jimenez* clearly has no application to Duncan's case.

Finally, Duncan's attempt to analogize his case to *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006), is also unjustified. In that case, the Court concluded that the police, like in this case and in *Hudson*, were justified in going into the defendant's pocket to determine if the hard object they felt could be a weapon. The constitutional problem arose there when, once they determined that the object in question was a cigarette pack, the police further opened the pack. Here of course, no such further search was conducted. Immediately upon looking into Duncan's pocket in an attempt to determine the nature of the hard object, the officer saw the

methamphetamine.

Duncan complains that the trial court never made a finding as to whether the officer suspected that the hard object he felt could have been a weapon. Here, however, he runs afoul of RAP 2.5(b), because Duncan never argued below that the *scope* of the frisk was improper. Instead, in that court he argued only that the police lacked probable cause to arrest Duncan, and thus it was not a proper search incident to arrest,¹ RP 3, and that the police did not have an articulable suspicion of criminal activity, and thus there was no grounds for a *Terry* frisk *at all*. Duncan appears to have abandoned this second contention on appeal.

RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

To establish that the error is “manifest,” an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

[C]onstitutional errors are treated specially under RAP 2.5(a)

¹ See Point B, *infra*.

because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” *i.e.*, it must be “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant “must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record.” *McFarland*, 127 Wn.2d at 334. In assessing actual prejudice, the *McFarland* court noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-

95, 991 P.2d 649 (1999), *aff'd* 145 Wn.2d 352 (2002).

While it is true that the trial court did not make a finding as to whether the officer believed the hard object was a weapon, that is undoubtedly due to the fact that the issue was not presented to it. While it is also true that the probable cause statement does not directly answer that question, it does not refute it either. Duncan asserts that a half-gram of methamphetamine could not be mistaken for a weapon. The record does not show, however, that the half-ounce of methamphetamine was the only item in Duncan's pocket. It is entirely possible that there were other items in his pocket that could have legitimately caused concern, but turned out to be neither dangerous nor contraband and therefore were entirely logically omitted from the probable cause statement.

What is likely is that if Duncan had raised this issue below, the State would not have agreed to rely on the probable cause statement, but would have called the officer to testify to resolve the blank spots in the statement. This is the precise reason this Court does not often consent to reach issues not litigated below: the record is simply inadequate to resolve them. This Court should decline to consider Duncan's claims that lack record support. What record there is shows that the methamphetamine in Duncan's pocket was found during a properly-circumscribed *Terry* protective frisk. His claim should be rejected.

B. DUNCAN WAS PROPERLY SEARCHED INCIDENT TO ARREST FOR LEWD CONDUCT AFTER THE POLICE OBSERVED HIM FROM A PUBLIC SIDEWALK THROUGH THE OPEN DOOR OF HIS VAN TO BE RUBBING A BUZZING CHROME VIBRATOR AGAINST HIS GENITAL AREA.

Even if the trial court was incorrect that the evidence was discovered during a proper *Terry* frisk, the record also supports the conclusion that the methamphetamine was discovered during a search incident to arrest. Although this issue was argued below, the trial court did not address it, since it found a proper *Terry* search.

As Duncan notes, Brief at 9, this Court may affirm on any grounds appearing in the record. Despite this concession, he nevertheless argues that the officer's recovery of the methamphetamine cannot be properly considered to have occurred during a search incident to arrest. He first asserts that Duncan was not searched before a determination of probable cause to arrest him for lewd conduct. Brief at 9. Duncan next asserts that this Court may not make a determination of probable cause because the trial court did not. His third contention is that even if the officer "had probable cause to arrest for lewd conduct, there is no indication in the stipulated facts that Mr. Duncan was actually arrested for lewd conduct." Brief at 10.

This last contention is easily disposed of. The stipulated probable

cause statement specifically stated that Duncan was booked “into the KC jail on the charges of Lewd Conduct.” CP 5. Moreover, Duncan specifically told the court below that he *was* arrested for that offense: “And before taking any statements or identification from him, arrested him for lewd conduct. ... The arrest was, I think, within seconds of their arrival.” RP 5. Having taken that position below, he cannot

Nor does the record support the first contention. The statement of probable cause relates the following observations that the officers made *before* the search:

As we slowly approached the opened side of the van, I observed a subject lying down on a bed in the rear of the van. I then heard what appeared to be a buzzing sound. I then observed the subject holding a chrome object in his right hand. The object was being held near the subjects genital area below his waist.

Recovery of the actual vibrator itself was not necessary to establish probable cause for lewd conduct. That crime is defined as follows:

A person is guilty of lewd conduct if he intentionally performs a lewd act in a public place or at a place and under circumstances where such act could be observed by the public.

BMC 9A.44.070(a)(1).² Lewd acts include:

(2) Public touching, caressing or fondling of the genitals or

² A copy Chapter 9A.44 of the Bremerton Municipal Code is attached for reference as Appendix B.

female breast; or

(4) Public masturbation; or

BMC 9A.44.070(b). “Public” or “public display” means “easily visible from a public thoroughfare.” BMC 9A.44.070(c). Here, the police were able to see Duncan from the sidewalk of a busy street in a commercial area, through the open doors of his van, lying on a bed rubbing a buzzing chrome object against his crotch. At the very least, they had probable cause that he was committing the crime of lewd conduct. This contention is therefore also without merit.

Finally, Duncan utterly fails to offer any authority for his claim that this Court may not make a probable cause determination because the trial court did not. That may be because such a claim is simply unsupported. A trial court’s legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. *In re Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). The only aspect of probable-cause review that cedes discretion to the trial court is where fact-finding on reliability and credibility is required. *Petersen*, 145 Wn.2d at 800. Since the trial court did not hear any testimony below, there were no such determinations to be made. There is thus no impediment to this Court making such a determination in the first instance. This claim should be rejected.

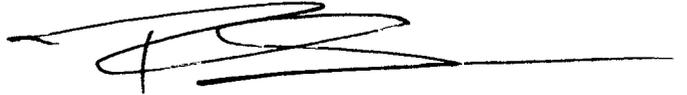
IV. CONCLUSION

For the foregoing reasons, Duncan's conviction and sentence should be affirmed.

DATED March 22, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal line extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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APPENDIX A

Incident / Investigation Report

Bramerton Police Dept

OCA: 806-004451

CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger, PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim

O T H E R S	Code	Name (Last, First, Middle)	Victim of Crime #	Age / DOB	Race	Sex
	Home Address			Home Phone		
	Employer Name/Address			Business Phone		
	Code	Name (Last, First, Middle)	Victim of Crime #	Age / DOB	Race	Sex
I N V O L V E D	Home Address			Home Phone		
	Employer Name/Address			Business Phone		

Information:
 On 5-2-06 at 0811 hrs. CenCom advised of a suspicious vehicle in the 1100 blk of Wycoff Ave under the 11th St overpass. CenCom advised that subjects may be sleeping in the vehicle. This area is residential/commercial with a heavy flow of vehicle/foot traffic. Sgt W Davis and I arrived and observed a tan Dodge van #A508771 parked on the shoulder. As we approached the passenger side of the van, I noticed that the side door was open and facing the sidewalk. I could see that the interior of the van was cluttered with items. I noticed a butane torch commonly used in the smoking of narcotics in the van. As we slowly approached the opened side of the van, I observed a subject lying down on a bed in the rear of the van. I then heard what appeared to be a buzzing sound. I then observed the subject holding a chrome object in his right hand. The object was being held near the subjects genital area below his waist. The object had a long white cord coming from the end of it. We contacted the subject and asked him to step out of his van. The subject then looked at me and turned away throwing the item towards the rear of the van. I asked the subject who then turned back in my direction to show me his hands as he quickly placed them into his jacket. The subject, who I then recognized from prior contacts as Dennis Duncan began moving towards me. Duncan quickly placed his hands back into his jacket. I advised Duncan again to take his hands out of his jacket. Duncan exited the van and was very unsteady. I placed Duncan into the pat down position. I noticed a buldge in Duncan's left front jacket pocket where he placed his hands into his pocket twice. I patted down the outside of the pocket and felt the hard object but could not make out what the object was. Sgt Davis advised that the chrome object was a vibrator. Duncan's conduct clearly violated the BMC Lewd Conduct code 9A44.070 #4. I opened the pocket to look inside and noticed a clear plastic baggie with suspected Methamphetamine inside. Duncan was in possession of a second baggie that was located inside of right front jacket pocket. Baggie #A weighed 0.5 and baggie #B weighed 0.8 grams. The suspected Methamphetamine was NIK tested at the scene and tested positive for Methamphetamine. Duncan was placed in handcuffs which were checked for proper fit and double locked. Duncan was issued his Miranda Warnings from a department issued rights card. Duncan stated that he understood his rights and that he wished to speak to me. Duncan advised that the object he was holding was a vibrator and that the crystal substance he possessed was Methamphetamine. Duncan stated that he last used "yesterday."

Bremerton Police Dept

Narrative (Continued)

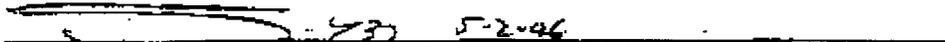
CCA: 206-004451

The two baggies of Methamphetamine were placed into BPD Evidence. Parking enforcement tagged Duncan's vehicles. I transported Duncan to the KC Jail. Duncan is a convicted felon, active DOC with a lengthy criminal history.

Disposition:

I booked Duncan into the KC Jail on the charges of Lewd Conduct and VLCSA. Bail \$6000. Report to the prosecutor for charges. Report to SOG for information.

I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

 5-2-06

(Signature, Date)
(437) DAVIS, MICHAEL

APPENDIX B



Chapter 9A.44 PUBLIC DISTURBANCES

Sections:

9A.44.010 DEFINITIONS.

9A.44.020 DISORDERLY CONDUCT.

9A.44.030 FAILURE TO DISPERSE.

9A.44.040 EXPECTORATING.

9A.44.050 MISCHIEF ON BRIDGES.

9A.44.060 UNLAWFUL BUS CONDUCT.

9A.44.070 LEWD CONDUCT.

9A.44.080 INTRODUCING CONTRABAND IN THE THIRD DEGREE.

9A.44.090 RIOT.

9A.44.100 PEDESTRIAN INTERFERENCE.

9A.44.010 DEFINITIONS.

The following definitions are applicable in BMC 9A.44.020 through 9A.44.080, unless the context otherwise requires:

(a) "Peace" as used in the phrase "public peace" means the tranquility enjoyed by members of a community where good order presides.

(b) "Public place" means an area generally visible to public view and includes streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots and buildings open to the general public, including those that serve food or drink or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.

(c) "Unreasonably disrupts" means to substantially impair the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting he or she knew, or as a reasonable man or woman should have known. (Ord. 4850 §2 (in part), 2003)

9A.44.020 DISORDERLY CONDUCT.

RCW 9A.84.030 is adopted by reference as currently enacted and as hereinafter amended from time to time, and shall be given the same force and effect as if set forth herein in full. (Ord. 4850 §2 (in part), 2003)

9A.44.030 FAILURE TO DISPERSE.

RCW 9A.84.020 is adopted by reference as currently enacted and as hereinafter amended from time to time, and shall be given the same force and effect as if set forth herein in full. (Ord. 4850 §2 (in part), 2003)

9A.44.040 EXPECTORATING.

It is unlawful for a person to expectorate upon the floor, walls or furniture of any public conveyance, public building or any store open to and used by the public. (Ord. 4850 §2 (in part), 2003)

9A.44.050 MISCHIEF ON BRIDGES.

It is unlawful for any person to intentionally:

(a) Throw, drop or otherwise cause any object or missile to be thrown, dropped or released from any portion of any bridge, including the bridges crossing the Port Washington Narrows, commonly known as the Bremerton-Manette and Warren Avenue Bridges; or

(b) Jump, leap or go upon with the intent of jumping or leaping from any portion of any bridge, including the Port Washington Narrows, commonly known as the Bremerton-Manette and Warren Avenue Bridges. (Ord. 4850 §2 (in part), 2003)

9A.44.060 UNLAWFUL BUS CONDUCT.

(a) A person is guilty of unlawful bus conduct if, while on or in a municipal transit vehicle and with knowledge that such conduct is prohibited, he or she:

- (1) Smokes or carries a lighted or smoldering pipe, cigar or cigarette; or
- (2) Discards litter other than in designated receptacles; or
- (3) Plays any radio, recorder, or other sound-producing equipment, except that nothing herein shall prohibit use of such equipment when connected to earphones that limit the sound to the individual listeners or the use of a communication device by an employee of the owner or operator of the municipal transit vehicle; or
- (4) Spits or expectorates; or
- (5) Carries any flammable liquid, explosive, acid, or other article or material likely to cause harm to others, except that nothing herein shall prevent a person from carrying a cigarette, cigar, or pipe lighter or carrying a firearm or ammunition in a way that is not otherwise prohibited by law.

(b) A municipal transit vehicle includes every motor vehicle, street car, train, trolley vehicle, and any other device, which: (1) is capable of being moved within, upon, above or below a public highway; (2) is owned or operated by the Kitsap County Public Transit Authority; and (3) is used for the purpose of carrying passengers, together with incidental baggage and freight on a regular schedule. (Ord. 4850 §2 (in part), 2003)

9A.44.070 LEWD CONDUCT.

(a) (1) A person is guilty of lewd conduct if he intentionally performs a lewd act in a public place or at a place and under circumstances where such act could be observed by the public.

(2) The owner or operator of premises open to the public is guilty of a misdemeanor if he intentionally permits lewd conduct in a public place under his control.

(b) "Lewd act" means:

- (1) Public exposure of one's genitals, buttocks, or any portion of the female breast below the top of the areola; or
- (2) Public touching, caressing or fondling of the genitals or female breast; or

- (3) Public urination or defecation in a place other than a washroom or toilet room; or
- (4) Public masturbation; or
- (5) Public sexual intercourse.

(c) "Public" or "public display" means easily visible from a public thoroughfare or from property of others, or in a public place in manner so obtrusive as to make it difficult for an unwilling person to avoid exposure.

(d) This chapter shall not be construed to prohibit:

- (1) Plays, operas, musicals or other dramatic works which are not obscene;
- (2) Classes, seminars and lectures held for scientific or education purposes;
- (3) Exhibitions or dances which are not obscene. (Ord. 4850 §2 (in part), 2003)

9A.44.080 INTRODUCING CONTRABAND IN THE THIRD DEGREE.

RCW 9A.76.160 is adopted by reference as currently enacted and as hereinafter amended from time to time, and shall be given the same force and effect as if set forth herein in full. (Ord. 4850 §2 (in part), 2003)

9A.44.090 RIOT.

RCW 9A.84.010 is adopted by reference as currently enacted and as hereinafter amended from time to time, and shall be given the same force and effect as if set forth herein in full. (Ord. 4850 §2 (in part), 2003)

9A.44.100 PEDESTRIAN INTERFERENCE.

(a) The following definitions apply in this section:

- (1) "Aggressively beg" means to beg with the intent to intimidate another person into giving money or goods.
- (2) "Intimidate" means to engage in conduct which would make a reasonable person fearful or feel compelled.
- (3) "Beg" means to ask for money or goods as a charity, whether by words, bodily gestures, signs, or other means.
- (4) "Obstruct pedestrian or vehicular traffic" means to walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact. Acts authorized as an exercise of one's constitutional right to picket or to legally protest, and acts authorized by a permit issued pursuant to the Bremerton Municipal Code, shall not constitute obstruction of pedestrian or vehicular traffic.
- (5) "Public place" means an area generally visible to public view and includes alleys, bridges, buildings, driveways, parking lots, parks, plazas, sidewalks and streets open to the general public, including those that serve food or drink or provide entertainment, and the doorways and entrances to buildings or dwellings and grounds enclosing them.

(b) A person is guilty of pedestrian interference if, in a public place, he or she intentionally:

- (1) Obstructs pedestrian or vehicular traffic; or
- (2) Aggressively begs.

(c) Pedestrian interference is a misdemeanor. (Ord. 4930 §1, 2005)

