NO. 38679-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH STEEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating the seriousness level and standard range for the crime of indecent exposure with a prior sex offense. RCW 9A.88.010(c).

2. The trial court exceeded its sentencing authority under the Sentencing Reform Act of 1981 ("SRA") when it imposed community custody for the period of earned early release after imposing the statutory maximum for Steen's class C felony.

3. Jury instruction 7, which provides:

> "Defendant's person" means the sexual or other intimate parts of the human body.
>
> "Obscene exposure" means the exposure of the sexual or intimate parts of one's body for a sexual purpose.

was a judicial comment on the evidence, contrary to Wash. Const. art. IV, § 16. CP 64.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's authority in felony sentencing is solely that conferred by the Legislature in the SRA. The Legislature has assigned seriousness levels to certain, specified offenses, and has indicated that any crimes not so ranked carry a standard range of 0-12 months confinement. Where the class C felony of indecent

exposure with a prior conviction for a sex offense is not ranked within the SRA, did the trial court err in concluding the offense had a seriousness level of four and imposing a sentence accordingly? (Assignment of Error 1)

2. RCW 9.94A.505 prohibits a court from imposing a sentence in which the term of confinement plus the term of community custody exceeds the statutory maximum sentence for the offense. Further, a sentence imposed under the SRA must be determinate: it must state "with exactitude the number of actual years, months, or days of total confinement . . . of community supervision." Did the trial court exceed its authority under the SRA when it imposed a sentence of confinement for the statutory maximum plus community custody for "the period of earned early release"? (Assignment of Error 2)

3. Judicial comments on the evidence are prohibited by the Washington Constitution. A trial judge comments on the evidence where she either expressly or impliedly conveys to the jury her opinion regarding the merits of the case or instructs the jury that matters of fact have been established as a matter of law. Did the trial court comment on the evidence by directing the jury to

conclude that Steen exposed an intimate part of his person for a sexual purpose? (Assignment of Error 3)

C. STATEMENT OF THE CASE

On June 1, 2008, Katrina Berge was a receptionist at the Guest House, a hotel in Aberdeen, Washington adjacent to the Wishkah river. RP 28. Teresa Jones, a guest on the third floor, contacted Berge to report that across the river on some pilings a man was standing and masturbating. RP 30, 55, 57, 61.[1] Berge investigated the complaint and confirmed that a man with his pants lowered to his mid-thighs was on the pilings and appeared to be masturbating. RP 30. She summoned the police and then checked on the man again. RP 34, 42. On this second occasion, the man appeared to be rubbing himself all over his body. RP 42. Aberdeen police officer John Snodgrass observed the man and also concluded that he appeared to be masturbating. RP 78. The man was identified as appellant Joseph Steen and was subsequently taken into custody. RP 94.

Based on this event, the Grays Harbor Prosecuting Attorney charged Steen with indecent exposure and further alleged Steen had previously been convicted of a sex offense as defined by RCW

[1] Citations are to a single volume of transcripts containing hearings on 9/15/08, 10/8/08, 10/21/08, and 12/15/08.

9.94A.030 and that one of the purposes for which Steen committed the offense was his sexual gratification. CP 1-3.

At a jury trial, Steen admitted he was on the pilings, but denied masturbating. RP 101. He explained that he was trying to brush mosquitoes off of his person. Id. Steen stipulated that he had been convicted of a qualifying offense for purposes of the prior conviction element of the crime. RP 99. A jury convicted Steen as charged and further found by special verdict that the crime was committed for his sexual gratification. CP 67-68.

At sentencing, the State contended that the sexual motivation finding elevated Steen's offense to a sex offense, triggering the tripling provisions of RCW 9.94A.525. RP 137-38. As a consequence, the State contended, Steen's prior convictions for voyeurism and felony indecent exposure should count as three points each. Including Steen's prior felony drug convictions and a point for his community custody status, the State calculated Steen's offender score as 10. RP 138; Supp. CP __ (Sub No. 75 at 5).[2] The State contended that Steen's crime was ranked at a

[2] A supplemental designation of clerk's papers is being filed on July 8, 2009.

seriousness level of four and therefore his standard range exceeded the statutory maximum for the crime.[3]

The court imposed a sentence of 60 months in prison, equivalent to the statutory maximum punishment. CP 83. The court also sentenced Steen to community custody for the period of earned early release. Id. Steen appeals. CP 90.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DETERMINING THE SERIOUSNESS LEVEL FOR STEEN'S CRIME TO BE FOUR INSTEAD OF CONCLUDING THE CRIME WAS AN UNRANKED FELONY.

a. A trial court may not exceed its authority in imposing sentence beyond that which is expressly conferred by the Legislature. The fixing of punishments for criminal offenses is solely a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 718 P.2d 796 (1986). In enacting the SRA, the Legislature created a structured sentencing scheme which cabins but does not eliminate judicial discretion by requiring sentences be imposed within specified guidelines. RCW 9.94A.010.

[3] The SRA provides that the standard sentence range for a crime with a seriousness level of four and an offender score of nine or greater is 63 to 84 months confinement. RCW 9.94A.510.

When a trial court exceeds the authority in imposing sentence beyond that which is expressly conferred by the Legislature, the sentence is invalid and resentencing is required. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). "'[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

b. The trial court erroneously concluded Steen's conviction for indecent exposure carried a seriousness level of four whereas the crime in fact is an unranked felony. The Legislature has created seriousness levels for certain enumerated offenses. RCW 9.94A.515. Standard sentence ranges for these offenses are set forth in a grid which correlates the length of a potential sentence to the seriousness level of a crime based on the offender's criminal history. RCW 9.94A.510; RCW 9.94A.525. The standard range is "a legislative determination of the applicable punishment range for the crime as ordinarily committed." State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997).

Crimes not assigned a seriousness level are considered unranked felonies, and the Legislature has provided these offenses should be sentenced as follows:

> If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; ... and ... a term of community custody not to exceed one year[.]

RCW 9.94A.505(2)(b).

According to statute,

> A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.

RCW 9A.88.010(1). Indecent exposure is ordinarily a simple misdemeanor. RCW 9A.88.010(2)(a). Indecent exposure is elevated to a gross misdemeanor if the person exposes himself or herself to a person under fourteen years of age. RCW 9A.88.010(2)(b). Indecent exposure is a class C felony if the person has previously been convicted of a sex offense as defined in 9.94A.030. RCW 9A.88.010(c).

Indecent exposure with a prior conviction for a sex offense is not assigned a seriousness level within the SRA. Instead, the

Legislature has only assigned a seriousness level to a subcategory of this offense. RCW 9.94A.515. The statute specifies a seriousness level of four for "Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)." Id. Because no standard sentence range has been provided for Steen's crime (felony indecent exposure not involving a person under the age of fourteen), Steen's offense is an unranked felony and the standard sentence range is 0-12 months confinement. RCW 9.94A.505(2)(b).

c. The conclusion that Steen's crime of indecent exposure, which did not involve persons under the age of 14, is an unranked felony is consistent with settled principles of statutory construction. If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The reviewing court assumes from the outset "that the Legislature meant what it said in the plain language of the statute." State v. Tran, 117 Wn. App. 126, 131, 69 P.3d 884 (2003). "Courts will not ascribe to the Legislature a vain act, and a statute should, if possible, be construed that no cause, sentence, or word shall be superfluous, void, or

insignificant." State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In presuming that Steen's offense carried a seriousness level of four, the trial court effectively deleted statutory language indicative of the Legislature's intent. The Legislature specified that persons who previously have been convicted of a sex offense who expose themselves to children under the age of fourteen should be punished according to the same seriousness level as individuals convicted of violent offenses such as second-degree assault, second-degree arson, and vehicular assault while under the influence of an intoxicating liquor. The Legislature did not convey this intent with respect to persons with a prior history of sex offenses who do not involve children in their commission of indecent exposure.

This construction of the Legislature's intent makes sense when the various statutory provisions are considered in conjunction with one another.

> Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

State, Dep't. of Ecology, v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

Again, indecent exposure is normally a simple misdemeanor carrying a maximum penalty of 90 days in jail. RCW 9A.88.010(2)(a). Even when persons under the age of 14 are involved, the crime is only elevated to a gross misdemeanor. RCW 9A.88.010(2)(b). It would not make sense for the Legislature to make the punishment for indecent exposure commensurate to that imposed following convictions for Class B felony offenses simply because the person committing the crime has previously been convicted of a sex offense. Rather, it is the conjunction of this circumstance with the commission of the crime against a child which the Legislature sought to punish harshly. RCW 9.94A.515.

In State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005), the Court considered whether 24-month sentence enhancements for specified drug enhancements had to be served consecutively. 154 Wn.2d at 601-02. The Court noted that with respect to certain firearm and deadly weapon enhancements, the Legislature specifically required consecutive sentences. Id. at 603 (citing RCW 9.94A.589). The Court noted, "[T]he legislature clearly knows how to require consecutive application of sentence enhancements and

chose to do so only for firearms and other deadly weapons." 154 Wn.2d at 603. Although it resolved the question in the defendant's favor under the rule of lenity, the Court observed that the use of specific language in one instance and not in another weighed in favor of an intent for concurrent sentences.

Similarly, RCW 9.94A.515 is replete with examples of the Legislature differentiating between various subsections of criminal statutes and allocating varying punishments accordingly. For example, the Legislature has assigned Assault in the Third Degree a seriousness level of three except where the assault is committed with a stun gun against a peace officer, in which case the crime carries a seriousness level of four. RCW 9.94A.515 (citing RCW 9A.36.031(1)(h)). The Legislature has assigned differing seriousness levels to the crime of indecent liberties with forcible compulsion versus without forcible compulsion. RCW 9.94A.515 (assigning a seriousness level of ten for violations of RCW 9A.44.100(1)(a) and a seriousness level of seven for violations of RCW 9A.44.100(1)(b) and (c)).

Given the facility that the Legislature has demonstrated with respect to assigning punishment for other offenses, it would be absurd to conclude that the Legislature mistakenly included

superfluous language when it assigned a seriousness level of four to "Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)." According to the "plain meaning" rule of statutory construction, this Court should conclude the crime of indecent exposure set forth in RCW 9A.88.010(2)(c) is an unranked felony. The trial court erred in finding the seriousness level for Steen's offense was four. Steen must be resentenced within a standard range of 0-12 months confinement.

d. To the extent the statute may be ambiguous, the rule of lenity requires this Court construe it in Steen's favor. Although the "plain meaning" rule of statutory construction compels the result advocated here, Steen is entitled to the same remedy even if this Court concludes the statute is ambiguous. When a statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant unless the Legislature expressly indicates a contrary intent. Jacobs, 154 Wn.2d at 601; In re Post-Sentence Review of Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998).

In Jacobs, despite an expressly-stated intent for consecutive sentences with respect to sentence enhancements for weapons, the Supreme Court disagreed that the Legislature's silence

regarding drug sentence enhancements denoted a similar intent. Instead, the Court concluded the Legislature's silence was ambiguous, and, applying the rule of lenity, remanded for resentencing. 154 Wn.2d at 603-04. Here, similarly, if this Court does not agree that the statute's meaning is plain on its face, this Court must apply the rule of lenity and remand so Steen can be sentenced within the range for unranked felonies.

2. IN IMPOSING A SENTENCE OF CONFINEMENT FOR THE STATUTORY MAXIMUM PLUS COMMUNITY CUSTODY FOR "THE PERIOD OF EARNED EARLY RELEASE," THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY UNDER THE SRA.

a. The SRA requires the imposition of a determinate sentence in which the combined terms of confinement and community custody do not exceed the statutory maximum. RCW 9.94A.505(5) provides:

> Except as provided under RCW 9.94A.750(4) and 9.94A.753(4) a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

The plain language of this statute bars a court from imposing a total term of confinement plus community custody which exceeds the statutory maximum for the offense. State v. Zavala-Reynoso, 127

Wn. App. 119, 123, 110 P.3d 827 (2005); see also, State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004); State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166 (1997).

Applying this statute, in State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2009), Division One held the imposition of a determinate sentence plus community custody, where the total exceeded the statutory maximum, was an invalid indeterminate sentence. Id. at 955. This was so despite the trial court's notation on the judgment that "combined maximum of prison time + community custody may note exceed the stat[utory] max[imum] of 60 months." Id. at 947.

In so holding, the Court first noted that the SRA provides no authority for a trial judge to require DOC to calculate an inmate's total time served and ensure it does not exceed the statutory maximum for the offense. Id. at 949. Instead, the sentencing court must "impose a determinate sentence—a sentence that states, with exactitude, the total time of confinement and community supervision." Id. at 949-50 (citing RCW 9.94A.030(18) (emphasis in original)).

Second, the Court observed that a notation on the judgment may be overlooked or, worse, DOC may ignore an offender's rights.

Linerud, 147 Wn. App. at 950-51. The Court concluded "it is better for both the offender and the Department [of Corrections] to have the trial court impose a sentence that is clear to all from the outset." Id. at 951 (quoting State v. Davis, 146 Wn. App. 714, 724, 192 P.3d 29 (2008)). The Court held,

> [W]hen a trial court does not make an initial determination of the sentence and requires the DOC to calculate the inmate's time served and ensure it does not exceed the statutory maximum, the sentence is indeterminate in violation of the Sentencing Reform Act.

Linerud, 147 Wn. App. at 946.[4]

b. The sentence imposed by this court was an indeterminate sentence, contrary to RCW 9.94A.505 and *Linerud*. The sentence imposed here violated RCW 9.94A.505. The court sentenced Steen to serve 60 months, which was the statutory maximum for the crime. CP 83. With respect to community custody, however, the court ordered Steen to be on community custody for the "term of earned early release, if any." Id. The court thus failed to make an initial determination of the sentence and

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[4] Perhaps in acknowledgment of the problem discussed here, ESSB 5288, effective August 1, 2009, amends RCW 9.94A.701 to add:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provide in RCW 9A.20.021.

instead required DOC to calculate Steen's time served plus his earned release time and ensure it did not exceed the statutory maximum. This was improper. RCW 9.94A.505; Linerud, 147 Wn. App. at 946. Thus, even if this Court does not reverse the sentence based on argument 1, supra, the sentence must be reversed and the matter remanded so a determinate sentence can be imposed.

3. JURY INSTRUCTION NO. 7 WAS A JUDICIAL COMMENT ON THE EVIDENCE, CONTRARY TO WASH. CONST. ART. IV, § 16.

The crime of indecent exposure has a straightforward statutory definition. Indecent exposure occurs when the perpetrator "intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm."' RCW 9A.88.010; State v. Snedden, 149 Wn.2d 914, 919, 73 P.3d 995 (2003). The Legislature has provided no further definition of the salient terms of the statute. Likewise, the Washington Pattern Jury Instructions track but do not elaborate on the language of RCW 9A.88.010 in setting forth the definition and elements of indecent exposure. WPIC 47.01; WPIC 47.02.

In this case, however, the court included additional instructions directing the jury's verdict. Jury instruction No. 7, which was proposed by the State, read:

> "Defendant's person" means the sexual or other intimate parts of the human body.
>
> "Obscene exposure" means the exposure of the sexual or intimate parts of one's body for a sexual purpose.

CP 64; Supp. CP __ (Sub No. 56 at 5).

a. Instruction No. 7 was a judicial comment on the evidence. Judicial comments on the evidence are explicitly prohibited by the Washington constitution. Const. art IV, § 16.[5] The Supreme Court has interpreted this section as forbidding a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge's opinion is expressly stated but where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v.

[5] Article IV, section 16 reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). "Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." Levy, 156 Wn.2d at 721. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission "conveys the idea that the fact has been accepted by the court as true." Levy, 156 Wn.2d at 726.

Here, the invented definitions of indecent exposure suggested matters of fact had been established as matters of law and directed the jury's verdict. The instruction thus impermissibly commented on the evidence and violated Const. art. IV, § 16.

b. The judicial comments prejudiced Steen because they relieved the State of its burden of proving that the crime was committed with a sexual motivation. A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. Here, the judicial comment prejudiced Steen.

Although the indecent exposure statute merely requires the defendant know his conduct is likely to cause reasonable affront or

alarm, RCW 9A.88.010(1), the second "definition" signaled to the jury the court's view that Steen had a sexual purpose in exposing himself. This was prejudicial because the State filed a special allegation that Steen committed indecent exposure for his sexual motivation. CP 1. The jury was provided with a special verdict form for purposes of the sexual motivation finding which inquired, "Was one of the purposes the defendant committed the crime of Indecent Exposure for his sexual gratification? [sic]"[6] CP 68.

The instructions therefore created a redundancy: having been told by the court that Steen exposed himself for a sexual purpose, the jury was asked to make the same "finding" a second time. Here, this additional finding was particularly prejudicial: as a consequence of the sexual motivation finding, Steen's prior sex offense convictions counted as three points each. RCW 9.94A.525. This Court should conclude that the judicial comment on the evidence prejudiced Steen, reverse his conviction, and remand for a new trial.

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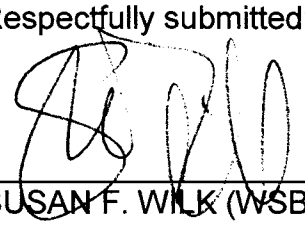
[6] It is unclear on what authority the special verdict form was based. WPIC 190.08, the pattern special verdict form for a sexual motivation finding, asks simply, "Did the defendant _____ commit the crime of _____ with a sexual motivation?"

E. CONCLUSION

For the foregoing reasons, this Court should reverse Steen's conviction and remand for a new trial. If this Court does not reverse Steen's conviction, this Court should conclude that Indecent Exposure is an unranked felony, and reverse his sentence. Finally, the sentence must be reversed because it is indeterminate, contrary to statutory authority.

DATED this 8th day of July, 2009.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 38679-8-II
	)	
JOSEPH STEEN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	GERALD FULLER, DPA GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JOSEPH STEEN 844213 MCNEIL ISLAND CORRECTIONS CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JULY, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711