

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

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
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DIVISION II

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A. ARGUMENT IN REPLY

Joseph Steen challenges the classification of his crime of Indecent Exposure as a Level IV felony under the Sentencing Reform Act of 1981 (“SRA”).¹ He contends that under the “plain meaning” rule of statutory construction, for indecent exposure to carry a seriousness level of four the State must establish both (1) indecent exposure to a person under the age of fourteen and (2) a subsequent sex offense. RCW 9.94A.515. Because the State pled and proved only that Steen had previously been convicted of a sex offense when he committed the instant offense,² and not that Steen had exposed himself to a person under the age of fourteen, Steen’s crime is an unranked felony. Alternatively, the statute is ambiguous, and under the rule of lenity Steen is entitled to have the statute construed in his favor.

In response, the State only fleetingly references principles of statutory construction and then fails to properly apply them. The State does not respond to the legal authority pertaining to

¹ Steen concedes that under the Washington Supreme Court’s recent decision in Personal Restraint of Brooks, __ Wn.2d __, 211 P.3d 1023 (2009), the court was not required to impose a determinate sentence of confinement time plus community custody. Believing his argument regarding the judicial comment on the evidence to be well-presented in his opening brief and that the State’s contentions have added little value to this discussion, Steen provides no further argument on this issue here.

² Based on the jury’s sexual motivation finding, this indecent exposure is classified as a sex offense. RCW 9.94A.030.

expressions of legislative intent cited in Steen's brief. And although the State plainly attempts to construe an ambiguous statute, the State offers no response to Steen's rule of lenity argument. As set forth below, the State's claims must be rejected, and this matter remanded so Steen can be resentenced.

1. IN CLAIMING STEEN'S OFFENSE CARRIES A SERIOUSNESS LEVEL OF FOUR, THE STATE MISAPPLIES PRINCIPLES OF STATUTORY CONSTRUCTION AND READS INTO RCW 9.94A.515 LANGUAGE THAT WAS NEVER ENACTED BY THE LEGISLATURE IN ESTABLISHING THE SERIOUSNESS LEVEL OF CRIMES.

The State contends the trial court's determination that Steen's conviction for Indecent Exposure – Prior Sex Offense carries a seriousness level of four is supported by RCW 9.94A.515. In so claiming, however, the State misapplies principles of statutory construction and reads into the statute language that does not exist.

The State identifies five "categories" of indecent exposure: (1) indecent exposure to a person over the age of fourteen – 'first time offender'; (2) indecent exposure to a person under the age of fourteen – 'first time offender'; (3) indecent exposure – prior violation of RCW 9A.88.010; (4) indecent exposure – prior violation

of RCW 9A.88.010 and victim under the age of fourteen; and (5) indecent exposure – prior sex offense and victim over fourteen. Br. Resp. at 3-4; App. A.³ The State then claims that only the first of these last three is an unranked felony, and asserts that the last two ‘types’ of indecent exposure carry a seriousness level of IV. Br. .Resp. at 5.

Essentially, the State asks this Court to read the statute in the disjunctive. But the State does not cite to any authority for its claim that this is what the Legislature intended. Although the State creatively supplies an attractive grid in support of its proposed reading of the statute, Br. Resp. App. A, the State fails to provide any indication that the Legislature has endorsed the State’s desired construction. Instead, the State reads into the statute language that was never enacted by the Legislature.

The State asserts, “If the Legislature meant to limit level IV ranking to only offenses committed against persons under the age of fourteen, there would have been no reason to add the reference to ‘subsequent sex offense.’” Br. Resp. at 5. But this is not Steen’s argument. Rather, under the plain meaning rule of statutory

³ RCW 9A.88.010(c) provides that indecent exposure is a class C felony if the defendant either has been convicted of a prior violation of the statute or a sex offense. In claiming that Steen disputes this point, the State misreads Steen’s brief. See Br. Resp. at 3; Br. App. at 7.

construction, which requires the court to give effect to all legislative language and construe the statute in conjunction with related provisions,⁴ this Court must conclude that the Legislature intended to classify Indecent Exposure as a level IV felony if the State has proven both that the crime was committed against a child under 14 and that the instant offense is a subsequent sex offense. RCW 9.94A.515. This reading is supported by the language of the statutory provision at issue, which notes as a level four felony, “Indecent Exposure to Person Under Age Fourteen (subsequent sex offense).” Id.

As discussed in Steen’s opening brief, the Legislature has had little difficulty with assigning differing seriousness levels to specific violations of various statutory subsections. See Br. App. at 10-12; State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005) (noting that the Legislature “clearly knows how” to specify and draw distinctions between punishments). The Legislature has demonstrated it is capable of a remarkable degree of specificity in creating these distinctions. The fact that the Legislature did not draw the distinction that the State wishes existed here is a clear

⁴ See State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001); State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

indication that the Legislature did not intend this distinction be made.

Under the plain meaning rule of statutory construction, this Court should conclude that because the State did not plead and prove both that Steen was convicted of Indecent Exposure against a Person under the Age of Fourteen and that he had a prior sex offense, the trial court erred in assigning his crime a seriousness level of four. Steen is entitled to be resentenced.

2. UNDER THE RULE OF LENITY, STEEN IS ENTITLED TO HAVE THE STATUTE CONSTRUED IN HIS FAVOR.

If there is any conclusion to be drawn from the State's attempts to manipulate a particular meaning from RCW 9.94A.515, it is that the statute is ambiguous. Although the State believes it has identified the "appropriate" construction of RCW 9.94A.515, Br. Resp. at 5, the State fails to explain why its efforts at statutory construction are not themselves indicative of ambiguity.

"The rule of lenity provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the defendant." State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). Here, if under the "plain meaning" rule of statutory construction, RCW 9.94A.515 does not compel the

conclusion that Steen's offense is an unranked felony, then the statute is ambiguous. Steen is entitled to have the statute construed in his favor. Steen must be resentenced.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, Joseph Steen respectfully requests this Court conclude that the trial court erroneously classified his crime as carrying a seriousness level of four. Steen's sentence must be reversed and the matter remanded for resentencing.

DATED this 3rd day of September, 2009.

Respectfully submitted:



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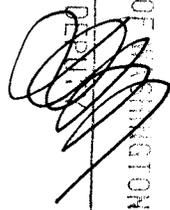
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