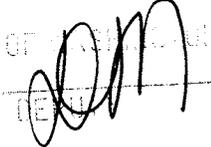


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 38679-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOSEPH H. STEEN,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural history.

The defendant was originally charged by Information on July 1, 2008, with two counts of Indecent Exposure, RCW 9A.88.010. Each count included an allegation that the defendant had been convicted of two prior sex offenses and a further allegation that the conduct was sexually motivated. RCW 9A.88.010(2)(c), RCW 9.94A.535(3)(f). Count 1 of the Information was dismissed prior to trial. (CP 55). The parties stipulated that the defendant had two prior sex offenses, Voyeurism, Grays Harbor County Cause No. 03-1-310-0, and Indecent Exposure with sexual motivation, Grays Harbor County Cause No. 06-1-47-4. (CP 37-54).

The matter was tried to a jury on October 21, 2008. Instructions were submitted to the jury. The record does not reflect what exceptions, if any, the defendant noted to the instructions given by the court. Following deliberation, the jury returned a verdict of guilty with a special verdict that the crime was sexually motivated. (CP 67, 68).

Factual background.

On June 28, 2008, Teresa Jones had traveled to Aberdeen with her son, who was participating in baseball tournament. On this particular afternoon she and her aunt were in their motel room. Her son had gone to the beach with some of the other team members. (RP 53). Ms. Jones had a view across the Wishkah river from her motel room. (RP 54-55). As she looked out the window, she could see a man, later identified as the defendant, standing on the railroad right of way on the opposite side of the river. He was masturbating and exposing himself. (RP 55-56). She could observe the defendant with his hands on his exposed penis. (RP 56-57).

Ms. Jones called the front desk and asked them to contact the police. (RP 57). She went back to the window and observed the defendant who was still present and continuing to masturbate. (RP 58). She stayed at the window until Officer Snodgrass of the Aberdeen Police Department arrived and arrested the defendant. (RP 58-59). Officer Snodgrass approached the defendant who was still on the pilings across the river from the motel room. Snodgrass observed the defendant rubbing his private areas through his shorts. From Snodgrass' observation it appeared to him that the defendant was masturbating himself. (RP 77-78).

The defendant's conduct was also observed by a hotel employee, Katrina Berge. Ms. Berge received the phone call from Teresa Jones. (RP 29-30). Ms. Berge went down to the pool room and looked out the windows. She saw the defendant with his pants down. (RP 32). From

what she saw could see it was apparent to her that he was masturbating.
(RP 32-33).

The defendant testified at trial. He admitted being the individual that the witnesses had seen standing on the railroad pilings. (RP 100-101). He denied that he was masturbating. He did admit that he may have been scratching himself as there were a lot of mosquitoes out on that particular day. (RP 102).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly determined the defendant's sentence range. (Response to Assignment of Error No. 1)

RCW 9A.88.010 (2) provides as follows:

(2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.

(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.

(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in 9.94A.030.

The punishment for the offense breaks down as follows:

RCW 9A.88.010(2)(a):
Misdemeanor - victim over fourteen. No prior conviction under RCW 9A.88.010. No prior sex offense;

RCW 9.94A.88.010(2)(b):
Gross Misdemeanor - No prior convictions
under 9A.88.010. Victim under fourteen
years of age;

RCW 9A.88.010(2)(c):
Class C felony - Prior conviction under
RCW 9A.88.010 or Prior conviction for sex
offense.

The defendant asserts that Indecent Exposure can only be a class C felony if the defendant has a prior conviction for a sex offense. This is incorrect. The offense is a class C felony if the defendant has been "... previously convicted under this section." RCW 9A.88.010(2)(c). Likewise, the age of the victim does not control whether the crime of Indecent Exposure is a class C felony. The crime becomes a felony in a particular case based solely on the defendant's criminal history.

The sentencing reform act establishes the seriousness levels for the various offenses. RCW 9.94A.515 lists the various offenses and their corresponding seriousness levels. Under level IV the statutes lists:

Indecent exposure to person under age
fourteen.
(subsequent sex offense)
(RCW9A.88.010)

This language has remained the same since Indecent Exposure was first listed as a ranked offense. Laws of Washington, 1999, chapter 352, § 3.

The statute must be read to give meaning to all language in RCW 9.94A.515. See State v. Montejano, 147 Wn.App. 696, 196 P.3d 1083 (2008) (a statute must be construed so that no word, clause or sentence is superfluous or insignificant.) In light of the different punishments for the

offense, based on a defendant's prior criminal history, the appropriate reading of RCW 9.94A.515 should be as follows.

Prior violation of RCW 9A.88.010, current victim 14 or older	Unranked
Prior violation of RCW 10.88.010, current victim under 14	Level IV
Prior Sex Offense, any age victim	Level IV

In short, RCW 9.94A.515 should be read to provide that two of the three alternative means of committing the class C felony of Indecent Exposure are level IV offenses. See Appendix A. Indecent Exposure is a level IV offense if either (1) the crime is a class C felony and the victim is under fourteen; or (2) the crime is a class C felony because the defendant has a prior sex offense. 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." This reading of the statute gives meaning to all the language of RCW 9.94A.515.

This assignment of error must be denied.

- 2. The trial court did not exceed its statutory authority by imposition of the term of community custody. (Response to Assignment of Error No. 2)**

The court imposed a sentence of 60 months. (CP 84). Since this is a sex offense, a period of community custody is mandated by WAC 437-20-010. Section 4.2 of the Judgment and Sentence expressly provided that the term of community custody was “for the term of earned early release, if any.” (CP 83). The judgment and sentence specifically referenced RCW 9.94A.728. By this provision, the trial court acknowledged its understanding of the principle that the term of confinement plus the term of community custody could not exceed the maximum term for the offense, 60 months. State v. Linerud, 147 Wn.App. 944, 197 P.3d 1224 (2009); RCW 9.94A.505(5).

The Supreme Court has expressly approved nearly identical language in a Judgment and Sentence which provided that the total term of incarceration and term of community custody could not exceed the statutory maximum. Personal Restraint Petition of Brooks, Washington Supreme Court Docket No. 80704-3 decided July 23, 2009. The court in Brooks held:

Under RCW 9.94A.728(1)(c) persons committed to the custody of the Department of Corrections (DOC) may earn up to one-third of their sentence in early release credits. Here, Brooks had the potential to earn up to a maximum of 40 months of earned early release credits and serve the rest of his sentence in community custody up to the statutory maximum sentence. If Brooks were to earn less than the maximum amount of earned early release credits, the DOC would determine how much time Brooks should serve within the range of community custody imposed by the sentencing court.

Since the provisions of the SRA also apply to the DOC, the amount of community custody assigned by the DOC must comply with RCW 9.94A.505(5) and not exceed the statutory maximum.

Brooks, at 4-5.

The sentence imposed herein does not exceed the statutory maximum. The Department of Corrections will know how much earned early release time the defendant has. The directive of the Judgment and Sentence is that his term of community custody be equal to the term of the defendant's earned early release credits.

Likewise, the sentence imposed here is not indeterminate. As noted by the court in Brooks, supra, RCW 9.94A.030(21) defines the meaning of a determinate sentence. It expressly provides that "the fact that an offender through earned early release can reduce the actual period of confinement shall be affect the classification of the sentence as a determinate sentence." The Supreme Court in Brooks expressly disavowed the holding in Linerud that a sentence as imposed herein was indeterminate. Brooks, supra, at 10-11:

It was the Linerud court's belief that a sentencing court was required to set an exact term of community custody within the range that when added to the term of confinement did not exceed the statutory maximum.

The SRA specifically states that a sentence is not rendered indeterminate by the fact that a defendant may earn early release credits. RCW 9.94A.030(21). Under the current statutory scheme, the exact amount of time to be served can almost never be determined

when the sentence is imposed by the court. The only thing that can be determined at the time of sentencing is the maximum amount of time an offender will serve in confinement and the maximum amount of time the offender may serve in totality... Here the court imposed the sentence that had both a defined range and a determinate maximum. It is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set the amount of community custody to be served within that sentence.

The court in Brooks expressly held that RCW 9.94A.715(1) permits the court to impose a term of community custody equal to earned early release time. This assignment of error must be denied.

**3. Instruction 7 was not a comment on the evidence.
(Response to Assignment of Error No. 3)**

Article IV, § 16 of the Washington Constitution prohibits the judge from conveying to the jury his or her personal opinion about the evidence in a case:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

A court's statement constitutes a comment on the evidence "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Laine, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A jury instruction that correctly and concisely states the law and is pertinent to the issues raised

in the case does not constitute a comment on the evidence. State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981).

The instructions in the case at hand were an accurate statement of the law. One of the elements that the jury was required to find beyond a reasonable doubt in order to convict was that the defendant made an open and obscene exposure of his person. (CP Instruction No. 4). Although, the Washington Supreme Court has held that the term “obscene exposure of the person” is not unconstitutionally vague and has a traditional and well settled meaning, there is no reason the court cannot give a correct definition of the term. See State v. Galbreath, 69 Wn.2d 664, 419 P.2d 800 (1966). This instruction ensured that the jurors know what type of conduct was prohibited.

The court instructed the jury that “defendant’s person” meant the “sexual or other intimate parts of the human body.” The court further instructed that “obscene exposure” meant the exposure of the “sexual or intimate parts of one’s body for a sexual purpose.” The terms as defined in the instruction mirror the language of RCW 9A.44.010(2) and RCW 9.94A.030(47).

No one is suggesting that this is an improper statement of the law. The judge, in the giving of these instructions, did not express his personal opinion concerning whether this defendant did, in fact, expose himself or make an open and obscene exposure of any intimate part of his body. See State v. Winings, 126 Wn.App. 75, 90, 107 P.3d 141 (2005).

Contrary to the assertions of the defendant, Instruction No. 7 did not even remotely suggest the judge's opinion on a matter of fact. Rather, Instruction No. 7 simply gave the jury the law that they were to apply to the facts presented. There is nothing in this instruction by which the court "signaled" to the jury its view of the evidence in the case.

In short, the court accurately stated the relevant law regarding the issues in this case. This is not a comment on the evidence. See State v. Lampley, 136 Wn.App. 836, 151 P.3d 1001 (2006).

In Lampley, the court instructed the jury that "the value of a written instrument is not affected by the fact that a replacement may have been issued." Not only was this a correct statement of law, but this court held, also, that this instruction did not convey the court's belief or disbelief, of any testimony. The instruction herein, as in Lampley was phrased as a neutral statement of the law which did not convey the court's opinion concerning the facts. That is exactly what happened here. The fact that the judge may define the term "open and obscene exposure of the person" or even the mere mention of a fact in the instructions does not convey the court's opinion. Lampley, 136 Wn.2d at 842-43. The trial court did not commit error.

The record herein does not reflect that defendant excepted to Instruction No. 7. While the defendant may raise this matter for the first time on appeal, this court must find, on the facts of this case, that the

comment, if any, was harmless beyond a reasonable doubt. State v. Levy, 156 Wn.2d 709, 726, 132 P.3d 1076 (2006). This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the conviction and the sentence imposed must be affirmed.

Respectfully Submitted,

By: *Gerald R. Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

APPENDIX A

Criminal History	Age of Victim	Punishment	Seriousness Level
No prior violation of 9A.88.010 or sex offense	14 or older	misdemeanor	
No prior violation of 9A.88.010 or sex offense	under 14	gross misdemeanor	
Prior violation of 9A.88.010	14 or older	class C	unranked
Prior violation of 9A.88.010	under 14	class C	IV
Prior sex offense	14 or older	class C	IV

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

STATE OF WASHINGTON,

Respondent,

No.: 38679-8-II

v.

DECLARATION OF MAILING

JOSEPH H. STEEN,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 31st day of July, 2009, I mailed a copy of the Brief of Respondent to Susan F. Wilk; Attorney for Appellant; Washington Appellate Project; 1511 Third Avenue, Suite 701; Seattle, WA 98101, and Joseph H. Steen 844213; McNeill Island Corrections Center; P. O. Box 881000; Steilacoom, WA 98388, by depositing the same in the United States Mail, postage prepaid.

I 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 and belief.

DATED this 31st day of July, 2009, at Montesano, Washington.

Randi M. Toyra