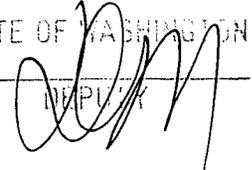


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 40892-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mathew Meacham,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00115-9

The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

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**The sexual motivation findings violated Mr. Meacham’s
Fourteenth Amendment right to due process because the
evidence was insufficient to prove the essential elements of
each aggravating factor beyond a reasonable doubt.3**

CONCLUSION6

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CONSTITUTIONAL PROVISIONS

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RCW 9.94A.8353

ARGUMENT

THE SEXUAL MOTIVATION FINDINGS VIOLATED MR. MEACHAM'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF EACH AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

A sexual motivation finding under RCW 9.94A.835(2) requires “evidence of identifiable conduct by the defendant *while committing the offense* which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” *State v. Halstien*, 122 Wash.2d 109, 121, 857 P.2d 270 (1993) (emphasis added). This interpretation of the statute is constitutionally required to avoid vagueness problems. *Id.*, at 120-121.

In this case, the prosecution did not present sufficient evidence of identifiable conduct by Mr. Meacham while committing the offense. His conduct during the offense included entering a woman's garage on more than one occasion, stealing laundry from her clothes dryer—including socks, shirts, underwear, and bras—returning to disable security equipment, and stealing a garbage bag full of clothing. *See* CP 7-12. These actions, whether considered separately or together, do not prove beyond a reasonable doubt that either offense was committed for the purpose of sexual gratification. *Id.*, at 121.

The prosecution “may focus on [an accused person’s] speech and expressive conduct *both during and before* the burglary to prove his motive was sexual gratification.” *Id.*, at 124-125 (emphasis added). Such evidence provides context for the accused person’s conduct, and is an exception to the rule that sexual motivation can only be established through “identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” *Id.*, at 121.

However, the prosecution did not introduce such evidence in this case. Instead, the state relied at trial on statements made and actions performed *after* the burglaries were committed. In its brief, Respondent continues to rely on Mr. Meacham’s post-crime statements and conduct to establish sexual motivation. Brief of Respondent, pp. 9-10. Specifically, Respondent points to (1) Mr. Meacham’s statement that he was looking for “something female,” and (2) evidence that Mr. Meacham separated stolen underwear from other stolen clothing, and kept some of the underwear beneath his mattress, which Respondent describes as “an intimate location.” Brief of Respondent, pp. 9-10.

Respondent’s reliance on post-crime statements and conduct runs afoul of *Halstien*. *Halstien* requires the state to prove sexual motivation with evidence of identifiable conduct during the commission of the

offense. Under *Halstien*, prosecutors cannot seek enhancement for criminal conduct that does not—by itself or in connection with pre-crime statements and conduct—prove sexual motivation, even when post-crime statements and conduct suggest such motivation was present. *Id.*

The prosecutor’s argument is contrary to the logic of *Halstien*. Mr. Meacham’s conduct while committing the two burglaries did not prove sexual motivation beyond a reasonable doubt.¹ Accordingly, the sexual motivation findings and enhancements must be vacated, and the case remanded for sentencing within the standard range. *See, e.g., State v. Bluehorse*, ___ Wash. App. ___, ___ P.3d ___ (2011).

¹ The state did not introduce evidence of statements or expressive conduct from before or during the burglaries.

CONCLUSION

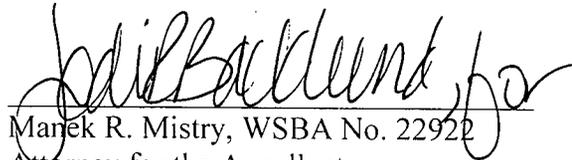
Mr. Meacham's enhancements must be vacated, the sexual motivation findings stricken, and the case remanded for sentencing within the standard range.

Respectfully submitted on March 18, 2011.

BACKLUND AND MISTRY



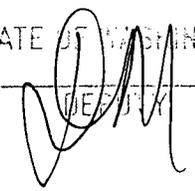
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STATE OF WASHINGTON
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CERTIFICATE OF MAILING

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

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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 March 18, 2011.

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 March 18, 2011.



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