

NO. 43746-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN RYAN CLAPPER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 11-1-01871-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to satisfy his burden to demonstrate that RCW 9A.44.160 is unconstitutionally vague where an ordinary person would interpret the statute as prohibiting sexual intercourse between a correctional officer and an inmate over whom the correctional officer has authority?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2011, the Pierce County Prosecuting Attorney's Office (State) charged Jonathan Ryan Clapper (defendant) with one count of

custodial sexual misconduct in the first degree, RCW 9A.44.160.¹ CP 1. The State originally charged defendant under RCW 9A.44.160, prong (b), and later amended the information to change the prong to RCW 9A.44.160(a). CP 57; RP 5.

Before trial, defendant filed a *Knapstad*² motion, arguing that the State could not prove RCW 9A.44.160 applied to correctional officers such as defendant. 11/2/2011 RP 3–4.³ Defendant also challenged the constitutionality of the statute, claiming that it impermissibly prohibited sexual intercourse between consenting adults. 11/2/2011 RP 22. The court

¹ RCW 9A.44.160 states:

- (1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:
- (a) When:
- (i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and
- (ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonable believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision; or
- (b) When the victim is being detained, under arrest, or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.
- (2) Consent of the victim is not a defense to a prosecution under this section.
- (3) Custodial sexual misconduct in the first degree is a class C felony.

² *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986) (permitting the court to dismiss a criminal charge where the undisputed facts do not establish a prima facie case of guilt).

³ Defendant's *Knapstad* motion was heard by the Honorable Rosanne Buckner, and transcribed separately from the trial and subsequent proceedings. The State will refer to the hearing on defendant's *Knapstad* motion as "11/2/2011 RP" in its brief.

denied the *Knapstad* motion and upheld the statute as constitutional.

11/2/2011 RP 21, 47–48.

Defendant’s jury trial began on January 17, 2012, before the Honorable Ronald E. Culpepper.⁴ RP 4. Before the court empanelled a jury, defendant challenged RCW 9A.44.160 as unconstitutionally vague, arguing again that the statute was ambiguous as to whether it applied to correctional officers. RP 18–19. The court denied the motion and found that the statute was not vague as applied to defendant. RP 72.

After the State rested its case, defendant renewed his objection as to vagueness. RP 242–45. The court denied the motion and found that a reasonable person could conclude that RCW 9A.44.160(b) applied to correctional officers. RP 255. The jury found defendant guilty as charged. CP 74.

At sentencing on March 9, 2012, defendant petitioned the court to reconsider defendant’s argument related to statutory vagueness and filed a motion for a new trial. RP 330; CP 93–109 (Defendant’s motion for a new trial). The court denied the motion, and sentenced defendant to eight months in custody. RP 337; CP 121 (Judgment and sentence, paragraph 4.5). This appeal timely followed on April 9, 2012. CP 135–136.

⁴ The record does not explain why defendant’s *Knapstad* motion was heard by Judge Buckner and trial conducted before Judge Culpepper.

2. Facts

Defendant worked as a correctional officer at the Washington Correction Center for Women in Purdy, Washington. RP 131–32, 144–45, 148. Defendant’s responsibilities as a correctional officer included supervising inmates’ activities (RP 137–38), detaining inmates who engaged each other in fights or performed other serious violations (RP 199), preventing other misdemeanor behavior (RP 196), searching inmates’ living quarters for contraband, and generally maintaining order at the center (RP 204).

Correctional officers such as defendant could initiate the official disciplinary process against inmates by writing up an infraction and issuing the infraction to the center’s sergeant. RP 195. The sergeant would then review the infraction to determine whether to submit it to a disciplinary board, which would conduct a hearing on whether to assess official sanctions on the inmate. RP 195. Correctional officers were required to write up infractions when they observed an inmate commit a major infraction. RP 196.

Early in July 2008, defendant walked in on two inmates, Lesley Reed and Rachel Lambert, who were trying to steal hygiene items from a locked canteen cart in the laundry room. RP 146–48, 227. Ms. Reed and Ms. Lambert worked in the facility’s laundry and decided to steal from the carts because the carts were regularly placed in the laundry room for storage. RP 135–36, 227. Upon being discovered by defendant, they

immediately stopped their attempts to break into the cart and pleaded with defendant not to report their behavior. RP 149, 228. Both women thought that defendant was going to write up an infraction, which they believed would result in isolation, or the forfeiture of schooling privileges and their positions in the laundry. RP 142, 149, 228. Defendant agreed not to report the incident if they returned whatever they had taken from the cart. RP 150, 232–33.

Ms. Reed saw defendant again when the center held a family fun event on July 20, 2008. RP 151. She saw him while he was counting inmates after a fire drill, RP 152. After the drill, Ms. Reed changed her clothes and went to work with Ms. Lambert at the laundry in a minimum security portion of the center. RP 152–53, 235. Ms. Lambert had also seen defendant earlier that day, who had told her, “You and Lesley [Reed] are two beautiful women; you’re lucky I don’t bribe you.” RP 234.

Ms. Lambert and Ms. Reed worked together in the laundry until Ms. Lambert left to deliver some laundry to a different unit. RP 153–54. While Ms. Lambert was gone, defendant entered the laundry and approached Ms. Reed. RP 154. He stood behind Ms. Reed without saying anything and started touching her breasts and kissing her neck. RP 155. He turned her to face him, unzipped his pants, and told her that she “was going to give him a blow job.” RP 156. He then forced her to give him oral sex, pushing her head back and forth on his penis. RP 156. Defendant

ejaculated into Ms. Reed's mouth and then left. RP 157. He returned briefly to order her not to tell anybody, including Ms. Lambert. RP 157.

Ms. Lambert returned to find Ms. Reed upset, agitated, and crying in the laundry. RP 237. Ms. Reed told Ms. Lambert what had occurred, but did not inform other authorities because she feared defendant's retaliation regarding the canteen incident earlier that month. RP 157–58. Ms. Reed eventually informed the Department of Corrections about the incident by submitting a handwritten statement. RP 158.

C. ARGUMENT.⁵

1. DEFENDANT FAILS TO SATISFY HIS BURDEN IN PROVING THAT RCW 9A.44.160 IS UNCONSTITUTIONALLY VAGUE BECAUSE AN ORDINARY PERSON WOULD INTERPRET THE STATUTE TO APPLY TO CORRECTIONAL OFFICERS.

The courts presume a statute is constitutional when a defendant challenges it as unconstitutionally vague. *State v. Russell*, 69 Wn. App. 237, 245, 848 P.2d 743 (1993). The defendant has the burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague.

State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993); *City of*

⁵ Defendant raises in passing a concern with the unanimity jury instruction offered below. See Brief of Appellant at 10 (“As a preliminary matter . . . No unanimity instruction was given and Mr. Clapper’s request for one was denied.”). However, defendant does not assign error to the issue. “It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

Spokane v. Douglass, 115 Wn.2d 171, 178-179, 795 P.2d 693 (1990).

The defendant must demonstrate that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

Douglass, 115 Wn.2d 171, 178-179.

The presumption of the statute's constitutionality should be overcome only in exceptional cases. *State v. Evans*, 164 Wn. App. 629, 638, 265 P.3d 179 (2011). "A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Id.* (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). Neither is a statute automatically unconstitutionally vague if some of its terms are undefined. *Douglass*, 115 Wn.2d at 180. Rather, the court should afford the statute's language a meaningful, sensible, and practical interpretation. *Id.*; see also *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008) ("When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary."). The court considers any ambiguous language within the context of the statute as a whole. See *Evans*, 164 Wn. App. at 638-39.

The court does not test the statute for vagueness "by examining hypothetical situations at the periphery of the ordinance's scope," but instead by inspecting the conduct of the party who is challenging the

statute. *Douglass*, 115 Wn.2d at 182–83; *see also Russell*, 69 Wn. App. at 245; *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (“If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case.”).

RCW 9A.44.160 states:

(1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, *the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision;*

RCW 9A.44.160(1) (emphasis added). This statute has not previously been challenged as unconstitutionally vague, and is a matter of first impression for this Court

Defendant argues that the term, “the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision,” is vague as to whether it applies to a correctional officer in defendant’s

position. Brief of Appellant at 10. Specifically, defendant alleges that a correctional officer has no ability to “influence” the conditions of an inmate’s sentence because a correctional officer only initiates the disciplinary process against an inmate, as opposed to having direct authority of determining appropriate sanctions for an inmate. Brief of Appellant at 11–12.

The plain language of the statute is clear that the statute applies to correctional officers in defendant’s position, and an ordinary person would reasonably interpret it to prohibit sexual intercourse between a correctional officer and an inmate over whom the officer has supervisory duties.

The dictionary defines “influence” as “the power or capacity of causing an effect in *indirect or intangible ways*,” or “to affect or alter the conduct, thought, character of by *indirect or intangible means*.” *Webster’s Third New International Dictionary* 1160 (2002) (emphasis added). Thus, the statute at issue prohibits sexual intercourse between an employee of a correctional agency who has “the ability to [cause an effect in indirect or intangible ways on] the terms, conditions, length, or fact of incarceration or correctional supervision.” RCW 9A.44.160(1). Testimony from trial showed that defendant had such ability.

One of defendant’s primary responsibilities was to initiate disciplinary proceedings against inmates by drafting an “infraction” that would be issued to the correctional center’s higher authorities. RP 195.

These infractions in turn would lead to a disciplinary hearing by a separate board, which would ultimately determine an appropriate sanction for the inmate in question. RP 195–201. While defendant did not have direct authority over determining the ultimate sanction, defendant nonetheless could influence the terms of Ms. Reed’s incarceration via “indirect” means by initiating the process.

Moreover, defendant did have direct authority over inmates to separate them during fights, detain and handcuff them, search inmates’ cells, and supervise the inmates’ activities. RP 137–38, 196–99, 204. With these responsibilities, surely an ordinary person would understand and interpret RCW 9A.44.160 to apply to correctional officers in defendant’s position.

Even if the statute were ambiguous, as defendant argues, the court may look to the legislative history to help it construe a statute. *See, e.g., State v. Fisher*, 130 Wn. App. 578, 583, 161 P.3d 1054 (2007) (“Only if the statute is ambiguous, do we resort to aids of construction, such as legislative history.”). Here, the legislative history unambiguously manifests that the legislature enacted RCW 9A.44.160 precisely for the situation at issue here. The 1999 Final Legislative Report on Senate Bill 5234⁶—which was later codified at RCW 9A.44.160—states:

Background: Currently it is not illegal for a prison or jail correctional officer to have consensual sexual relations with

⁶ This report is attached as Appendix A.

a prisoner in his or her custody. There are only 12 states that have not enacted a law forbidding this behavior. While a custodial situation may always raise questions of consent, rape cases against correctional officers are difficult to prosecute. It has been suggested that people who are under arrest or incarcerated are exceptionally vulnerable to sex offenses by persons with supervisory authority.

These situations cost the state money in the civil suits that are filed by prisoners. One correctional institution has paid out \$70,000 for two tort claims involving sexual relations between a prisoner and a correctional officer.

Summary: A new crime of custodial sexual misconduct is created.

1999 Final Legis. Rep. on SB 5234 (codified at RCW 9A.44.160). Given the legislative history above, it is clear that defendant's actions fall squarely within the statute's ambit. Defendant thus fails to demonstrate beyond a reasonable doubt that the statute is vague.

D. CONCLUSION.

This court should affirm defendant's convictions because RCW 9A.44.160 is clear on its face that it applies to defendant. Defendant fails his burden to demonstrate that the statute is unconstitutionally vague beyond a reasonable doubt. Specifically, defendant had the ability to initiate the disciplinary process against Ms. Reed, supervise her activities, detain her, prohibit misdemeanor behavior, or search her cell, all of which evidence defendant's ability to directly or indirectly alter (or "influence) the terms or conditions of Ms. Reed's sentence. Furthermore, the legislative history underlying the statute unquestionably supports the

statute's application in this case. The State respectfully requests this court to uphold RCW 9A.44.160 as constitutional, dismiss defendant's claim, and affirm defendant's judgment and sentence.

DATED: NOVEMBER 20, 2012

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Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/29/12 [Signature]
Date Signature

APPENDIX “A”

SSB 5234

Votes on Final Passage:

Senate	41	0
House	94	0

Effective: July 25, 1999

SSB 5234

C 45 L 99

Defining the crime of custodial sexual misconduct.

By Senate Committee on Judiciary (originally sponsored by Senators Long, Horn, Kline, Gardner, McCaslin, Zarelli, Roach, Hargrove, Kohl-Welles, Haugen, Franklin, Stevens, Thibaudeau, Oke, Winsley, Costa and Benton; by request of Department of Corrections).

Senate Committee on Judiciary

House Committee on Criminal Justice & Corrections

Background: Currently it is not illegal for a prison or jail correctional officer to have consensual sexual relations with a prisoner in his or her custody. There are only 12 states that have not enacted a law forbidding this behavior. While a custodial situation may always raise questions of consent, rape cases against correctional officers are difficult to prosecute. It has been suggested that people who are under arrest or incarcerated are exceptionally vulnerable to sex offenses by persons with supervisory authority.

These situations cost the state money in the civil suits that are filed by prisoners. One correctional institution has paid out \$70,000 for two tort claims involving sexual relations between a prisoner and a correctional officer.

Summary: A new crime of custodial sexual misconduct is created. The victim must be a resident of a state, county, or city adult or juvenile correctional facility, or under correctional supervision. The perpetrator must be an employee or contract personnel of a correctional agency and have, or the victim must reasonably believe that the perpetrator has, the ability to influence the victim's incarceration or correctional supervision. Victims who are detained, under arrest, or in the custody of law enforcement are included.

Sexual intercourse is custodial sexual misconduct in the first degree, a class C felony. Sexual contact is custodial sexual misconduct in the second degree, a gross misdemeanor. The terms "sexual intercourse" and "sexual contact" are defined within RCW Chapter 9A.44.

Consent of the victim is not a defense. An affirmative defense is created if the sexual intercourse or sexual contact is the result of forcible compulsion by the other person.

The Department of Corrections is required to investigate an alleged violation for probable cause before reporting it to a prosecuting attorney.

Votes on Final Passage:

Senate	48	0
House	90	0

Effective: July 25, 1999

SB 5253

C 46 L 99

Preventing a registered sex offender from holding a real estate license.

By Senators Benton, Prentice, Winsley, Shin, Deccio, Heavey, Rasmussen, West, T. Sheldon, Hale, Gardner, Rossi and Oke; by request of Department of Licensing.

Senate Committee on Commerce, Trade, Housing & Financial Institutions

House Committee on Commerce & Labor

Background: The Department of Licensing administers the real estate broker and salesperson licensing program. The department administers a test to each license applicant and insures that applicants meet certain admission standards. The department also disciplines brokers and salespersons if the director finds a violation of one of the various grounds for discipline. Once the director finds that an individual violates one of the grounds for discipline, the director may levy a fine, require completion of a course relevant to the violation, or deny, suspend, or revoke the individual's license.

One of the grounds for discipline is commission of a crime involving moral turpitude. Sex offenses are one of the crimes that the department considers in the moral turpitude category of crimes. Persons convicted of sex offenses must register with the sheriff in the county of their residence when released from incarceration. Depending on the level of the crime committed, sex offenders register for life, 15 years, or ten years.

The director's ability to deny a license to someone who has committed a crime of moral turpitude is limited by the general restriction that convictions more than ten years old may not be used as a basis to deny a professional license. As a result, the department cannot deny an application or suspend the license of a registered sex offender who was convicted more than ten years ago.

Summary: The director may suspend, deny, or revoke the license of a sex offender regardless of the date of the offender's conviction.

Votes on Final Passage:

Senate	49	0
House	90	0

Effective: July 25, 1999

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