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62673-6

NO. 62673-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY VARS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN C. GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A person commits the crime of indecent exposure when, in the presence of another, he intentionally makes an open and obscene exposure of his person. There is no requirement that the person in whose presence the exposure occurs actually see the exposed person. Where the undisputed findings of fact establish that Vars, on two different occasions, exposed himself in the presence of another, could a rational trier of fact conclude that Vars was guilty of indecent exposure?

2. A defendant who intentionally exposes himself must know that his conduct likely will cause reasonable affront or alarm. Where the State introduced Vars's multiple prior convictions for exposing himself, under markedly similar circumstances, did the State meet its burden of proving Vars's knowledge?

3. Evidence of prior crimes is admissible to prove motive. Here, the State alleged that Vars committed the crimes for his sexual gratification. The trial court reviewed a compendium of data from Vars's myriad prior convictions for indecent exposure and determined that Vars is sexually gratified by his "ritualistic patterns of exposures" — a pattern in which Vars engaged during the commission of the current crimes. Did the trial court exercise

proper discretion by admitting the prior crimes evidence as proof of motive?

4. Sufficient evidence exists if, taking the evidence in the light most favorable to the State, any rational trier of fact could have found sexual motivation beyond a reasonable doubt. In this case, Vars engaged in the same ritualistic, deviant behavior that the trial court had determined sexually gratified Vars. Could a rational trier of fact have found that the State proved Vars was sexually motivated to commit the current crimes?

5. Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. Where the evidence involves conduct at different times and places, then the evidence tends to show distinct acts. Here, Vars exposed himself at two different times, at two different locations, and in the presence of two different people. Under the facts of this case, did the trial court properly convict Vars of two counts of indecent exposure?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By Amended Information, the State charged the defendant, Jeffrey Vars, with two counts of felony indecent exposure, contrary

to RCW 9A.88.010.¹ CP 7-8. The State further alleged, pursuant to RCW 9.94A.835, that Vars committed the current crimes with sexual motivation. CP 7-8.

Vars waived his right to a jury trial. CP 9. The case was tried to the bench, the Honorable Steven C. González presiding. The court found Vars guilty as charged and found that Vars had committed the crimes for the purpose of his sexual gratification. CP 196-99.

The court imposed a standard range sentence of 60 months, which included the mandatory 12-month sexual motivation enhancement on each count.² CP 200-10. In addition, the court ordered Vars to undergo a sexual deviancy evaluation and to complete treatment for his deviant behavior. CP 209. Vars timely appeals. CP 211.

¹ The charges were felonies because Vars has prior convictions for statutory rape in the first degree and indecent exposure. RCW 9A.88.010(2)(c); CP 5-8, 44-49, 198 (conclusion of law (hereinafter "conclusion") 6).

² This Court should remand for correction of the judgment and sentence, which should reflect that, as a result of the sexual motivation finding, the 12-month enhancement on each count ". . . shall run consecutively to all other sentencing provisions." RCW 9.94A.533(8)(b).

2. SUBSTANTIVE FACTS

On May 3, 2008, at 2:37 A.M., witness A.C. looked out the bedroom window of his Kirkland townhouse and saw Vars, "completely nude," except for shoes. CP 197 (findings of fact (hereinafter "findings") 1, 2); 3RP 25.³ Concerned, A.C. called the police. CP 197 (finding 2).

Hours later, at 5:19 A.M., and several blocks away, witness D.B. was driving to the Kirkland post office when a naked man (Vars) ran across the street in front of him. 3RP 5; Ex. 9. D.B. said, "It was very scary." 3RP 5; CP 197 (finding 3). Vars wore a ski mask that covered his face. 3RP 7; CP 197 (finding 3). Vars ran in a "real[ly] aggressive sort of way," and he held his hands in a "menacing kind of posture." 3RP 7. D.B. was so scared that he did not want to get out of his car. 3RP 7.

After Vars crossed the street, he crouched down in bushes along the road and watched D.B. turn his car around. CP 197 (finding 3). D.B. stated, "I was scared to death." 3RP 9; CP 197 (finding 3). Vars did not appear to D.B. to have been a "harmless stalker"; Vars struck D.B. "as being somebody that was on his

³ The verbatim report of proceedings consists of five volumes, designated as follows: 1RP (10/24/08); 2RP (11/3/08); 3RP (11/4/08); 4RP (11/13/08); 5RP (11/14/08).

way back from committing some kind of sexual assault." 3RP 9.

D.B. telephoned the police. 3RP 5.

That same morning, at about 6:33 A.M., a police officer spotted Vars walking on another street nude, partially covering his genitals with a garment. CP 197 (finding 4). Vars fled when he saw the police officer. CP 197 (finding 4). Two other police officers saw Vars a few streets away, near a business, naked and squatting against a fence. CP 197 (finding 4).

As the police officers approached Vars, they saw him pull on his pants. CP 197 (finding 5). Vars also wore a dark stocking cap and running shoes. CP 197 (finding 5). Vars's pants had a gaping 10-inch hole extending from the genital region down his left thigh. CP 197 (finding 5). Because Vars was not wearing underwear, the police officers could see Vars's genitals. CP 197 (finding 5).

Vars told the police officers that he had met his friend, "Frederick," earlier in the night and had worked out at 24-Hour Fitness. CP 198 (finding 6). He was unable to provide Frederick's address. CP 198 (finding 6). Vars claimed that he had been looking for a place to defecate. 2RP 70; CP 198 (finding 6). Vars repeatedly denied that he had done anything wrong or that it was

he who had been running around naked. 2RP 70; CP 198 (finding 6).

Meanwhile, dispatch advised the police officers that Vars was a registered sex offender. 2RP 49. The police officers arrested Vars for indecent exposure. CP 198 (finding 7). The arrest occurred approximately 15 blocks from where Vars had parked his car. CP 198 (finding 7); Ex. 9. Vars did not live in the Kirkland area. 2RP 75.

Additional procedural and substantive facts will be discussed in the argument section to which they pertain.

C. ARGUMENT

- 1. A RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT VARS EXPOSED "HIS PERSON," AND THAT HE KNEW SUCH EXPOSURE WAS LIKELY TO CAUSE REASONABLE AFFRONT OR ALARM.**

Vars claims that there was insufficient evidence to convict him of indecent exposure because (1) no one saw his genitals, and (2) the exposures occurred early mornings, on mostly deserted streets of a residential neighborhood, so his exposures were unlikely to affront or alarm anyone. These arguments fail.

The State presented evidence sufficient to prove that, on at least two separate occasions, Vars exposed his genitals in the presence of another person; there is no concomitant requirement that such persons actually witnessed the exposures. The proper inquiry focuses on what Vars *exposed*, not on what anyone *witnessed*.

In addition, Vars has several prior convictions for indecent exposure – of which at least two incidents occurred early mornings, at mostly deserted areas. Consequently, Vars indubitably knows that his conduct affronts or alarms people. This Court should reject Vars's claims and affirm his convictions for felony indecent exposure.

a. Standard Of Review.

An appellate court reviews a sufficiency challenge by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). Such a

challenge "admits the truth of the State's evidence and all reasonable inferences therefrom." State v. Gohl, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). These inferences "must be drawn in favor of the State and most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In a bench trial, unchallenged findings of fact are viewed as verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Review is then limited to determining whether the findings support the conclusions of law." State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). The findings of fact must support each element of the crime beyond a reasonable doubt. Id. (citing State v. Tadeo-Mares, 86 Wn. App. 813, 815-16, 939 P.2d 220 (1997)). Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

b. Vars Exposed His Person.

Vars was convicted of felony indecent exposure under RCW 9A.88.010. The Statute provides in relevant part:

(1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene

exposure of his or her person . . . knowing that such conduct is likely to cause reasonable affront or alarm.

RCW 9A.88.010.⁴

"His person" is not defined by either the specific statute or Chapter 9A.88 generally. Consequently, the term is given its ordinary meaning. See State v. Postema, 46 Wn. App. 512, 515, 731 P.2d 13 (a term that is not defined in a statute will be given its ordinary meaning), rev. denied, 108 Wn.2d 1014 (1987).

Frequently, courts resort to dictionaries to ascertain the ordinary meaning of statutory language. Garrison v. Washington State Nursing Bd., 87 Wn.2d 195, 196, 550 P.2d 7 (1976). The ordinary meaning of one's person is one's body.⁵

The gravamen of the crime is the "lascivious exhibition of those private parts of the person which instinctive modesty, human decency or common propriety require shall be customarily kept

⁴ If the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030, the offense is a felony. RCW 9A.88.010(2)(c). Vars has prior convictions for indecent exposure and statutory rape in the first degree, a sex offense. CP 44-49; CP 198 (conclusion 6).

⁵ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 1686.

covered in the presence of others." State v. Eisenshank, 10 Wn. App. 921, 924, 521 P.2d 239, rev. denied, 84 Wn.2d 1003 (1974).⁶ "Indecent exposure at common law consists of exposure in public of the entire person or of the parts that should not be exhibited." State v. Chiles, 53 Wn. App. 452, 456, 767 P.2d 697 (1989); see also State v. Bauguess, 106 Iowa 107, 76 N.W. 508 (1898) (at common law, it was sufficient to convict of indecent exposure if the exposure was lewd and occurred in a public place).

There is no concomitant requirement that the person in whose presence the exhibition occurs actually see the exposed person. People v. Carbajal, 114 Cal. App. 4th 978, 8 Cal. Rptr. 3d 206 (2003), rev. denied (2004); cf. State v. Turner, 103 Wn. App. 515, 526, 13 P.3d 234 (2000).⁷ It is the offensive exhibition in the presence of another that constitutes the crime of indecent exposure. Eisenshank, 10 Wn. App. at 924. "We hold that the

⁶ Eisenshank was charged under two prior statutes, former RCW 9.79.080(2) and former RCW 9.79.120, each setting forth that it is the indecent or obscene exposure that is the basis of the crime. In 1987, the legislature amended former RCW 9A.88.010 (the "public indecency" statute). The amendment renamed the offense "indecent exposure" and removed the requirement that the exposure occur in a public place. LAWS 1987, CH. 277, § 1; see also State v. Dubois, 58 Wn. App. 299, 793 P.2d 439 (1990) (reviewing the impetus for the amendment and concluding that the offense could be committed in a private location.)

⁷ State v. Turner is discussed at p.12, infra.

crime is completed when the inappropriate exhibition takes place in the presence of another." Id.

In Carbajal, a restaurant employee observed the defendant on two different occasions apparently masturbating at a table. Carbajal, 114 Cal. App. 4th at 981. The first time, "defendant placed his fist inside his shorts and moved his hand up and down for about 5 to 10 minutes." A few weeks later, the defendant engaged in similar conduct, except that he also "ejaculated onto the floor beneath the table." Before leaving the restaurant, the defendant "wiped his hand off with a napkin and threw a newspaper on top of the puddle of semen." The employee did not see the defendant's penis on either occasion; however, she recognized the white substance on the floor as semen. Another restaurant employee also saw the defendant seemingly engaged in masturbation, but she could not tell if the defendant's hand was inside or outside his clothing. Carbajal, 114 Cal. App. 4th at 981.

The California Court of Appeal addressed the question of whether, under California Penal Code, section 314,⁸ a conviction for indecent exposure was valid, where there was no evidence that

⁸ "Every person who willfully and lewdly . . . [e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor."

anyone saw the defendant's naked genitals. Carbajal, 114 Cal. App. 4th at 980. The court reviewed the common law offense, which did not require that the exposure be observed, and determined that, "it was necessary merely that the exposure occur in a public place." Id. at 983 (citing 3 WHARTON'S CRIMINAL LAW (15th ed. 1995) § 308, pp. 196-200, fns omitted). The court then analyzed cases from other jurisdictions and concluded that a conviction for indecent exposure requires evidence that a defendant actually expose his or her genitals in the presence of another person, "but there is no concomitant requirement that such person actually must have seen the defendant's genitals."⁹ Id. at 984-86.

In State v. Turner, the defendant claimed, in part, that there was insufficient evidence to support his conviction for obstruction of a law enforcement officer. Turner, 103 Wn. App. at 526. The officer had seen Turner from behind standing and urinating

⁹ The court distinguished its decision in People v. Massicot, 97 Cal. App. 4th 920, 118 Cal. Rptr. 2d 705 (2002). In Massicot, the issue was whether the defendant could be convicted of indecent exposure of his "person" where the evidence established that he bared his buttocks, thighs, chest and shoulders, but not his genitals. The court in Massicot, said that the word "person" means "'an entirely unclothed body, including by necessity the bare genitals. . . .'" Carbajal, 114 Cal. App. 4th at 987 (quoting Massicot, 97 Cal. App. 4th at 924). Consequently, the phrase "or the private parts thereof" means that "'it is unlawful for a person *otherwise clothed*, to expose only [his or her] genitals.'" Carbajal, at 988 (quoting Massicot, 97 Cal. App. 4th at 927) (emphasis and bracketed material in original).

alongside a truck. Id. at 518. Turner claimed that the officer did not have probable cause to arrest him, or a reasonable suspicion sufficient to detain him, at the time of the obstructive behavior. Id. at 526. Division Two of this Court disagreed; the court found that the officer had probable cause to arrest Turner for public indecency based on his observation of Turner "standing with his legs apart, his hands between his legs, and a steady stream of urine."¹⁰ Id. Thus, even though the officer had not seen Turner's exposed genitals, the court nevertheless said that the facts established probable cause to arrest Turner for "an intentional exposure, in an open and obscene manner, of the defendant's person," as required by RCW 9A.88.010. Turner, at 526 & n.3.

The holding in Carbajal and the dicta in Turner make sense because an observer might avert or close her eyes to avoid seeing the exposure, but that does not mean that the exposure did not occur.¹¹ See, e.g., Commonwealth v. Arthur, 420 Mass. 535, 537 n.2, 650 N.E.2d 787 (1995) (allowing that "[t]here may be evidence

¹⁰ The court mistakenly referred to the crime as "public indecency." As stated above, supra n.6, LAWS 1987, CH. 277, § 1, renamed the crime "indecent exposure."

¹¹ For example, a stranger, wearing nothing but a trench coat, accosts a woman and reaches to open his coat. Anticipating that the man is going to "flash" her, the woman might look away. Despite the unwitnessed nudity, the man still would have exposed his person.

sufficient to prove that exposure of genitals occurred, even when a victim has averted his or her eyes."). See also Commonwealth v. DeWalt, 752 A.2d 915, 920, 2000 Pa. Super. 149 (2000) (Tamilia, J., concurring) (legislature did not intend to "require actual 'viewability' of the genitalia, because exposure which 'is likely to cause affront or alarm' is quite possible whether or not the genitalia are actually seen.").¹² Moreover, the rationale is consistent with the Washington cases that have said, "Creation of a sense of shame or other distressing emotion is not an essential element of the crime." E.g., State v. Snedden, 149 Wn.2d 914, 924, 73 P.3d 995 (2003) (citing Eisenshank, 10 Wn. App. at 924).

Finally, some jurisdictions have found that exposed buttocks constituted indecent exposure. See Hart v. Commonwealth, 18 Va. App. 77, 79, 441 S.E.2d 706 (1994) (holding that the term "private parts" in statute prohibiting indecent exposure includes buttocks);¹³ see also State v. Fly, 348 N.C. 556, 501 S.E.2d 656

¹² Cf. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (the crime of unlawful display of a weapon (RCW 9.41.270) prohibits carrying any weapon in a manner, or under circumstances, which warrants alarm for the safety of others — it is unnecessary that the person in whose presence the weapon is displayed actually see the weapon. The statute requires only that the circumstances warrant alarm for the safety of others.).

¹³ Virginia Code, section 18.2-387, provides that "[e]very person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place . . . shall be guilty of a Class 1 misdemeanor."

(1998) (exposing one's buttocks to a person of the opposite sex is indecent exposure as defined by statute);¹⁴ and Tenn. Code Ann., section 39-13-511(B)(1)(A)(i)(a) (one commits indecent exposure if, in a public place, he intentionally exposes his buttocks); but see Duvallon v. District of Columbia, 515 A.2d 724, 726-28 (D.C. 1986).

Certainly buttocks, considered an "intimate part of the anatomy," under Washington law, qualify as "private parts of the person which instinctive modesty" and "common propriety" require shall be covered in the presence of others. Eisenshank, 10 Wn. App. at 924. See, e.g., In re Welfare of Adams, 24 Wn. App. 517, 519-20, 601 P.2d 995 (1979) (prosecution for indecent liberties in which the appellate court stated that, in addition to genitals or breasts, buttocks are considered "sexual or other intimate parts.").

The State presented sufficient evidence that Vars intentionally exposed his person as follows.

According to the undisputed findings of fact, on May 3, 2008, at 2:37 A.M., witness A.C. "observed the defendant walking naked down the street. . . ." CP 197 (findings 1, 2). Because of the

¹⁴ North Carolina General Statute, section 14-190.9 (1993), provides in pertinent part that "[a]ny person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex ... shall be guilty of a ... misdemeanor."

lighting, and because Vars held something (possibly a bundle of clothing) clenched in both hands "around the waist area," A.C. had not clearly seen the genital region. 3RP 26-27. Under cross-examination, A.C. agreed that the bundle would have been covering the man's genitals. 3RP 32. Nevertheless, based on his view of Vars's nude backside, A.C. concluded that Vars was naked. 3RP 27-28.

That same day, at approximately 5:19 A.M., the defendant crossed a street in front of witness D.B.'s car. The defendant was "naked, wearing a black ski mask over his head and his arms were in the air." CP 197 (findings 1, 3). The headlights on D.B.'s car illuminated Vars's body from the shoulders down, except that D.B. could not see Vars's genital area. 3RP 7, 15. Nonetheless, D.B. determined that Vars was naked, "[b]ecause of the color, shape and texture of his body." 3RP 15. The headlights illuminated Vars's chest and pelvic area, and D.B. had not seen "anything resembling any kind of clothing." 3RP 15.

In addition, Kirkland Police Officer Greg Spak had seen Vars around 6:30 that same morning. Vars had run through the street, his genitals only "partially covered." 2RP 64-65. Two other Kirkland police officers encountered Vars as he fled from Officer

Spak — Vars had been completely naked. 2RP 27-28, 46; CP 197 (finding 4). Even after Vars had donned clothing, his genitals remained exposed. The pants that he put on had a 10-inch hole in the left thigh area. Officer Davidson said that Vars had not worn underwear: "I could see his genitals from [the hole]." 2RP 36; CP 197 (Finding of fact 5).

The trial court correctly concluded that Vars had exposed himself to both A.C. and D.B.¹⁵ CP 198 (conclusions 2, 3). It was mere happenstance – lighting, shadows, or the bundle of clothing that Vars held at waist-level – that had obscured A.C.'s and D.B.'s views of Vars's exposed genitalia. It was reasonable for the trial court to infer from this evidence that Vars had not tried to shield himself with the bundle of clothing, especially in light of D.B.'s testimony (that Vars's arms were up in the air, menacingly). 3RP 7, 12-13, 27. Moreover, it is undisputed that Vars exposed his buttocks to both A.C. and D.B. 3RP 16, 28. Accordingly, this Court should reject this claim.

Vars's reliance on Duvallon v. District of Columbia, 515 A.2d 724, is misplaced. In Duvallon, a woman had engaged in a protest

¹⁵ In his closing argument, defense counsel conceded that there was "reason to think" that the State had met its burden of proving that Vars had exposed himself. 3RP 49.

against a court decision by walking in front of the United States Supreme Court, naked but with a cardboard sign hanging from her neck to below her knees, covering the front of her body but exposing the sides of her breasts and her uncovered buttocks (but not revealing her genitalia). Duvallon, at 725. The court held that she had not made an indecent exposure of her person within the meaning of former D.C. Code, section 22-1112(a), forbidding anyone from making "any . . . indecent exposure of his or her person. . . ." ¹⁶ The court recited the historical developments of the offense of "indecent exposure of one's person" under Maryland and English common law and stated that the term "exposure of the person" meant the exposure of one's private parts or genitals, but not the buttocks. ¹⁷ Duvallon, at 726-28; but see id. at 728-29 & n.1 (Pryor, C.J., dissenting).

¹⁶ The statute is now D.C. Code § 22-1312 (2001).

¹⁷ Even if at common law exposure of a defendant's genitals was required for a conviction, RCW 9A.04.060, "was not intended to transform all common law elements into statutory elements." State v. Mathews, 60 Wn. App. 761, 763 n.2, 807 P.2d 890 (1991), rev. denied, 118 Wn.2d 1030 (1992) (citation omitted). RCW 9A.04.060 provides, "The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense."

First and foremost, Duvalton is inapposite because, contrary to the defendant in Duvalton who had not exposed her genitals, Vars exposed his genitals. Furthermore, as discussed above, under Washington law, buttocks are private parts of the person which "instinctive modesty" require shall be covered in the presence of others.¹⁸ See Eisenshank, 10 Wn. App. at 924. Thus, even if this Court holds that an exposee must witness the actual exposure, the State still met its burden of proof. For this additional reason, Duvalton is inapposite.

In sum, the State presented evidence sufficient to prove beyond a reasonable doubt that Vars exposed his person. And, because there is no concomitant requirement that anyone actually see the defendant's exposed person, this Court should reject Vars's claim.

¹⁸ Besides, Washington's indecent exposure statute cannot prohibit the exposure of only "genitals," because the statute specifically excepts exposure of a woman's breasts (non-genitalia) for the purposes of breastfeeding or expressing breast milk. See RCW 9A.88.010(1). Moreover, if the legislature had wanted to further define, "his or her person," the legislature could have done so. Instead, Washington cases have historically relied upon society's values in determining what act specifically violates a statute such as indecent exposure. See Eisenshank, 10 Wn. App. at 924 ("It is sufficient if the acts are such that the common sense of society would regard the specific act performed as indecent and improper") (citing State v. Moss, 6 Wn.2d 629, 632, 108 P.2d 633 (1940) (in prosecution for indecent liberties of a 9-year-old girl, the court held it was not error to further define "indecent liberties" because it was "self-defining" and the common sense of society would regard the defendant's acts as "indecent and improper"))).

c. Vars Knew That His Conduct Alarmed People.

Vars next challenges the sufficiency of the State's evidence proving that he knew his conduct likely would cause reasonable affront or alarm. Specifically, Vars contends that, because the exposures occurred in the early morning hours, and on mostly deserted residential streets, his conduct was not at a time and place where a "reasonable man . . . knows or should know that his act will be open to the observation of others." Br. of Appellant at 17 (citation omitted). Considering Vars's multiple prior convictions for engaging in precisely the same behavior, this claim is without merit.

As set forth above, an essential element of the crime of indecent exposure is the defendant's knowledge that his conduct is "likely to cause reasonable affront or alarm." RCW 9A.88.010. A person knows or acts knowingly when either he is aware of "facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i).

Under ER 404(b), evidence of other crimes may be admissible to prove knowledge.¹⁹ See, e.g., State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002) (defendant was charged with stealing gasoline from his employer and selling it "under the table" without charging or paying gasoline taxes; defendant's federal tax returns, which showed that he did not report any income from selling gasoline, were admissible to show that the defendant knew that he did not have his employer's permission to take or sell the gasoline), rev. denied, 149 Wn.2d 1014 (2003); State v. Essex, 57 Wn. App. 411, 788 P.2d 589 (1990) (in prosecution for unlawful hunting, evidence of the defendant's prior participation in a questionable hunt in another county was properly admitted to show the defendant's knowledge that he and the other hunters were hunting without proper licenses and tags), overruled on other grounds by State v. Parker, 132 Wn.2d 182 (1997); State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979) (in a prosecution for possession of marijuana, the trial court properly allowed the State to cross-examine the defendant about his previous marijuana

¹⁹ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

use to prove that the defendant knew the substance that he possessed was marijuana) (pre-rule case).

In this case, pursuant to ER 404(b), the trial court admitted three of Vars's prior indecent exposure convictions as evidence that Vars knew his conduct affronted or alarmed others.²⁰ The court ruled that the similarity of the prior crimes "constitutes evidence of knowledge." CP 191 (conclusion 2.f).

On April 26, 2000, at approximately 4:30 A.M., the police responded to a 911 caller's report of a man, completely nude — except for tennis shoes — spotted on the bike path of the East Channel Bridge, by westbound I-90. CP 84-85. When Vars saw the police officer, he fled. The police officer chased Vars (who was carrying a jar of Vaseline) for about one half of a mile when, according to the officer, "Vars ran out of energy. He fell to the ground crying, saying he didn't want to go to jail." CP 84-85. Vars was arrested for indecent exposure. CP 85.

²⁰ The trial court admitted convictions from: (1) April 26, 2000 (CP 82-94); (2) December 17, 2000 (CP 111-20), and (3) August 10, 2004 (CP 135-57). See also CP 188-92 (trial court's written findings); 3RP 19-22 (argument on admissibility under ER 404(b) and the trial court's oral ruling). The convictions included the dockets, incident reports, offers of proof and "other evidence presented." CP 188. Vars has not challenged the trial court's ruling admitting the prior crimes as proof of knowledge. Vars's challenge is limited to the trial court's decision to admit the prior crimes as evidence of his sexual motivation, as will be discussed later in this brief at section C.2(a), infra.

On December 17, 2000, at about 1:16 A.M., the police responded to a report of a naked man near a dumpster at a Texaco gas station. CP 115. When the police arrived, Vars was naked — except for black shoes and socks. CP 115. The 911 caller reported that she had seen Vars running through the Texaco parking lot toward the dumpster. CP 115. The caller pulled into a gas station across the street and watched, in shock. CP 115. The caller had seen Vars "making some sort of gestures, but could not tell what he was doing." CP 115. She then telephoned the police and continued home. CP 115. The police officer ran Vars's name on the mobile data terminal in his patrol car. CP 115. After he learned that Vars had "numerous arrests for various sex offenses," he arrested Vars and booked him for investigation of felony indecent exposure. CP 115.

In the final incident, on August 10, 2004, at approximately 6:00 P.M., Vars parked his car in a remote area, removed all of his clothing — except for his socks and a pair of sports shoes — walked several hundred yards down a deserted road (to within 100 yards of an apartment complex), where a man who had been walking his dog spotted him. CP 147, 149. According to the witness, when Vars saw him, Vars "jumped off the roadway and

appeared to be lying down next to the road watching [him]."

CP 147. The witness, who had seen a woman drive by, became alarmed that Vars might encounter her or some children, so he called 911. CP 147, 149, 151. When the police officers arrived, Vars fled deeper into the wooded area. The police officers pursued Vars and arrested him for indecent exposure. CP 147.

Notably, one police officer documented Vars's "trademark" as: "Suspect parks vehicle in remote area, leaves clothing in vehicle, and runs naked in area *where other persons would likely see him.*" CP 146 (italics added). In two of the instances, Vars admitted to the arresting police officer that he had multiple prior arrests for engaging in precisely the same conduct. CP 116, 149.

Vars's multiple arrests for indecent exposures that occurred in the evening or early morning hours, and in somewhat remote areas, undoubtedly put Vars on notice that his conduct alarmed others, as the trial court found. CP 198 (conclusion 4). Moreover, in this particular instance, Vars wore a ski mask. CP 197 (finding 3). Any reasonable person should know that if he sheds his clothing, dons a ski mask, and runs around a residential neighborhood for several hours — which increases the odds of being seen — that such conduct is likely to cause reasonable

affront or alarm. D.B. said that when he saw Vars, "I was scared to death." 3RP 9. This Court should reject Vars's claim.

**2. THE TRIAL COURT PROPERLY ADMITTED PRIOR
CRIMES EVIDENCE AS PROOF OF SEXUAL
MOTIVATION.**

Vars claims that the trial court erred by admitting prior crimes evidence as proof of sexual motivation in the instant case because, (1) none of his prior indecent exposure convictions included a sexual motivation finding, and (2) none of the underlying facts established sexual motivation. Br. of Appellant at 31. Vars further contends that, even if the evidence was properly admitted, the State failed to prove sexual motivation beyond a reasonable doubt.²¹ These claims fail.

As a preliminary matter, whether the information that the trial court *considered* militated in favor of admitting Vars's prior convictions is a different question from whether, based on the evidence *actually admitted*, the State proved sexual motivation

²¹ Vars addresses these claims in separate sections of his brief. See Br. of Appellant at 19-23, 27-34. The State has combined the assignments of error because the first issue that this Court must resolve is whether the trial court properly admitted the evidence. Assuming that the trial court exercised proper discretion, as the State believes it did, the Court must then resolve the question of whether the State presented evidence sufficient to prove sexual motivation beyond a reasonable doubt.

beyond a reasonable doubt. Vars cites only to the party's stipulations as support for his contention that "none of the underlying facts show any evidence of sexual motivation." Br. of Appellant at 31 (citing CP 12-13, 16-17, 21-22). Yet, the trial court considered the incident reports, court dockets, judgment and sentences and the State's offer of proof, which collectively established that Vars compulsively and ritualistically exposed himself for sexual gratification. See CP 188-92. Consequently, the trial court exercised proper discretion by admitting Vars's prior convictions as evidence of Vars's motive in the instant case.

Moreover, in this case, Vars engaged in the same behavior that he had previously found sexually gratifying; thus, the State proved sexual motivation beyond a reasonable doubt. This Court should reject these claims.

a. The Prior Crimes Support An Inference Of Sexual Motivation.

Under ER 404(b), evidence of other crimes or acts is inadmissible to show action in conformity therewith. Such evidence may be admissible, however, as proof of motive. ER 404(b). "'Motive' is said to be the moving course, the impulse, the desire

that induces criminal action on part of the accused." State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (quoting BLACK'S LAW DICTIONARY 1014 (6th rev. ed. 1990)). Put another way, motive is what prompts a person to act. Powell, at 261.

Before admitting evidence of a defendant's prior crimes, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudice.²² State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). This Court reviews a trial court's decision to admit prior crimes evidence for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

In this case, the trial court followed the proper procedure and admitted the prior crimes evidence as proof of knowledge, common

²² The trial court limited to three the number of prior crimes that the State could offer as proof of sexual motivation. The court ruled that the prejudicial effect of more than three prior incidents substantially outweighed the probative value. CP 191 (conclusions 2.h, i); 2RP 24; 3RP 22.

scheme or plan,²³ and sexual motivation. 2RP 13-21, 24, 85-88; 3RP 18-22; CP 188-92. Vars challenges the trial court's ruling only as to sexual motivation.

When a defendant is charged with any crime, other than a sex offense, the State may file a special allegation that the crime was sexually motivated. RCW 9.94A.835. "Sexual Motivation" means that one of the purposes of the crime was the defendant's sexual gratification. RCW 9.94A.030(43). "The statute [on sexual motivation] refers to a purpose or motivation to stimulate or gratify sexual desire." State v. Halstien, 122 Wn.2d 109, 120, 857 P.2d 270 (1993) (interpreting the same term as applied in the juvenile justice context).

The purpose of a sexual motivation determination is to hold those offenders who commit sexually motivated crimes, *i.e.*, "crimes that are *not* inherently sexual in nature" but "where the facts nevertheless prove that the crime was undertaken for the purposes of sexual gratification," more culpable than those offenders who commit the *same crimes* without sexual motivation. State v.

²³[C]ommon scheme or plan is established by evidence that the defendant committed 'markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995) (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)).

Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999) (emphasis in original). The statute "punishes a defendant for acting on sexual thoughts in a criminal matter."²⁴ State v. Halgren, 137 Wn.2d 340, 348, 971 P.2d 512 (1999) (citing Halstien, 122 Wn.2d at 123).

Accordingly, the sexual motivation must have been present at the time that the defendant committed the crime. RCW 9.94A.835; State v. Halstien, 65 Wn. App. 845, 850-51, 829 P.2d 1145 (1992), aff'd, 122 Wn.2d 109 (1993).

"Indecent exposure" is neither a "sex offense," nor is it inherently sexual in nature, like rape. See RCW 9.94A.030(42); Thomas, 138 Wn.2d at 636. The crime is facially nonsexual. In other words, a defendant may indecently expose himself for purposes other than his sexual gratification, such as to:

²⁴ When State v. Halstien was decided, in both the Court of Appeals and the Washington Supreme Court, sexual motivation was an aggravating circumstance upon which the trial court could base an exceptional sentence. In 2006, the legislature passed an amendment to RCW 9.94A.533, which added a mandatory sentencing enhancement in cases where there is a finding that the crime was committed with sexual motivation. LAWS OF 2006, CH. 123, § 2. In this case, the State alleged and proved the special enhancement. CP 7-8 (Amended Information); CP 198 (conclusions 1, 7). Vars's counsel mistakenly refers to the special allegation as an aggravating circumstance, rather than as a sentencing enhancement. See, e.g., Br. of Appellant at 33.

(1) urinate,²⁵ (2) make a political statement,²⁶ (3) or "moon" someone.²⁷

In this case, the trial court found that Vars's "ritualistic patterns of exposures" implied a sexual motivation.²⁸ Put another way, Vars repeatedly committed a facially nonsexual crime in a sexual manner.²⁹ The trial court admitted the prior crimes as evidence of sexual motivation based on the following information.

The genesis of Vars's 20-year pattern of behavior is an incident in which Vars drove to a parking lot, removed his pants, and masturbated in his car. CP 24. Vars opened his car door to ejaculate on the sidewalk. CP 24. After Vars realized that "it felt good to have his pants off," he removed the rest of his clothing. CP 24. "Once his clothes were off, [Vars] felt so free that he decided to run through the streets naked." CP 24.

²⁵ See, e.g., Turner, 103 Wn. App. at 526.

²⁶ See, e.g., Duvallon, 515 A.2d at 725.

²⁷ See, e.g., Fly, 501 S.E.2d at 657-59. However, the context in which the exposure occurred will often be dispositive on whether the conduct was criminal. For example, observers of the annual Seattle Fremont Solstice Parade know (presumably) that the participants appear nude; thus, regardless of whether the exposures are open and obscene, they are not done with knowledge that the conduct likely will cause others reasonable affront or alarm.

²⁸ CP 190 (conclusions 2.b - e, g, h); CP 198 (conclusion 7).

²⁹ See, e.g., CP 262-64.

After this first occurrence, Vars exposed himself no fewer than eight times, not including the instant charges.³⁰ In the evening or early morning hours, Vars would park his car in an east King County city, undress — except for his socks and shoes — and leave his clothes under the car's floorboard. Vars would then run naked in the streets; however, when cars passed by, he would hide in wooded or bushy areas.³¹ Before Vars ran naked, he often ejaculated.³² When the police contacted Vars, he would claim that he had been looking for a place to defecate. CP 189 (finding 1.a).

Once, a witness saw Vars, naked, "making some sort of gestures." CP 115. Although the witness had been unable to determine precisely what Vars had been doing, it is reasonable to infer that he had been masturbating. See CP 115. The inference is reasonable given Vars's admission that he often ejaculated after exposing himself and, because during another incident, Vars had carried a jar of Vaseline.³³ CP 84-85, 252; 3RP 18-19.

³⁰ CP 190 (conclusion 2); CP 262-64.

³¹ 2RP 14, 19; CP 189 (finding 1.a); CP 252-53.

³² 3RP 18-19; CP 252.

³³ In defense counsel's closing argument, he stated that a jar of Vaseline might be a "topic of humor when there's a couple involved," but he said, ". . . a jar of Vaseline with one person doesn't necessarily give rise to even an inference that they have [it for sexual gratification]." 3RP 45. The State disagrees.

After Vars's 1979 conviction for statutory rape in the first degree,³⁴ he underwent multiple sexual deviancy evaluations and treatment for his deviant behavior. See, e.g., CP 42 (sentencing court reviewed a report from Western State Hospital and made a sexual psychopathy determination); CP 103 (post "Lewd Act" conviction, district court ordered Vars into a 2-year sexual deviancy program); CP 104-05 (Vars complied with treatment; he then relapsed, based on another conviction for the same behavior); CP 132 (after another indecent exposure conviction, district court ordered sexual deviancy treatment); CP 174 (after another indecent exposure conviction, superior court ordered Vars to complete a 12-Step Sex Addiction Recovery program).

In addition, two Washington State Certified Sex Offender Treatment Providers recommended "Behavioral Reconditioning" to help Vars "eliminate his deviant sexual arousal to specific acting out scenarios." CP 175. In other words, as the deputy prosecutor stated in her proffer, Vars is sexually gratified by the "ritual of it all." 2RP 19. Indeed, one of the reasons that sex offenders are treated differently from other offenders under the Sentencing Reform Act is because a sex offender's "compulsive" behavior is likely to continue

³⁴ CP 39.

without treatment. See, e.g., Halgren, 137 Wn.2d at 347 (citing David Boerner, Sentencing in Washington, at 8-2 (1985)).

Here, as a matter of logical probability (based on the absence of any nonsexual motivation), the reasonable inference is that Vars exposes himself for sexual gratification, *i.e.*, he has an untreated compulsion. The trial court stated, "There are actually a number of ways one can expose oneself. We've seen cases of a variety of methods used." 2RP 20. However, in this case, as the trial court said, "There seems to be a very particular pattern" — a pattern that is admissible to show sexual motivation. 2RP 20-21; CP 190 (conclusions 2.b, c, g). Based on the trial court's comprehensive review of Vars's prior crimes and failed attempts at treatment, the court exercised proper discretion in admitting the prior crimes evidence as proof of sexual motivation.

Vars relies on Halgren, a case that is inapposite. The issue in Halgren was what constitutes a sex offense for purposes of the nonstatutory aggravating factor of "future dangerousness," which may support an exceptional sentence only where the defendant's crime is a sexual offense. Halgren, 137 Wn.2d at 346.

In Halgren, the State initially charged the defendant with kidnapping in the second degree alleged to have been committed

with sexual motivation. Halgren, 137 Wn.2d at 343. Pretrial, the State amended the Information to unlawful imprisonment and eliminated the sexual motivation allegation. Id. After a stipulated trial, the court found Halgren guilty of unlawful imprisonment. Id. Pre-sentencing, the court reviewed the community corrections officer's report, which detailed Halgren's sexually deviant history and stated that Halgren was not amenable to treatment. The court imposed an exceptional sentence based upon the nonstatutory aggravating factor of future dangerousness. Id. at 344.

On appeal, Halgren contended that the trial court erred when it imposed an exceptional sentence based on future dangerousness. Id. at 345. The Washington Supreme Court agreed; the court held that, unless an offense is expressly enumerated as a "sex offense," the State must allege and prove "sexual motivation" beyond a reasonable doubt. Halgren, at 349-50.

Significantly, when the Supreme Court decided Halgren, a trial court could decide an aggravating factor by a preponderance of the evidence. Former RCW 9.94A.530. Thus, the court was concerned that a prosecutor could make an end-run around its burden of proving sexual motivation beyond a reasonable doubt, as

required by former RCW 9.94A.127 (now RCW 9.94A.835), by seeking an exceptional sentence and arguing that the offense was sexually motivated. See Halgren, at 350. Post-Blakely, however, the trier of fact must find aggravating factors beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Consequently, the concern in Halgren is no longer viable.

Moreover, the purposes underlying sexual motivation (to punish more severely crimes where the legislature has not already taken into account the sexual nature of the crime) and future dangerousness (which seeks to protect society where the particular defendant is not amenable to treatment) are "entirely different." Thomas, 138 Wn.2d at 637. For this additional reason, Halgren is inapt. This Court should reject Vars's claim.

b. Sufficient Evidence Supports The Special Allegation.

Vars contends that insufficient evidence supports the trial court's finding of sexual motivation. This Court should reject the claim. Considering the evidence in the light most favorable to the

State, a rational trier of fact could have found that Vars exposed himself for sexual gratification.

The elements of a crime may be established by either direct or circumstantial evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Whether or not the circumstantial evidence excludes every reasonable hypothesis consistent with the accused's innocence' is not 'a relevant issue.'" State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541 (1986) (quoting State v. Isom, 18 Wn. App. 62, 66-67, 567 P.2d 246 (1977)). Rather, this Court defers to the trier of fact on the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

The trial court admitted three of Vars's prior crimes to establish sexual motivation in the current case. CP 82-94, 111-20, 135-57, 191 (conclusions 2.h, i). The court had previously concluded that Vars's prior convictions constituted a common scheme or plan — that Vars repeated the same ritual over and over because he found it sexually gratifying. See CP 189-91 (findings 1.a, b; conclusions 2.a, - e, g). Indeed, at the sentencing hearing on the December 17, 2000 conviction for indecent exposure, *Vars asked the court to impose sexual deviancy treatment.* CP 119.

It was reasonable for the trial court to infer sexual motivation in this case because, as discussed above, it is not any one behavior that Vars finds sexually gratifying; rather, it is the ritual, *i.e.*, Vars has a "deviant sexual arousal to specific acting out scenarios." CP 175. As the trial court stated, it is the "defendant's repeated ritualistic patterns of exposures in residential and urban locations" that sexually gratify Vars. CP 198 (conclusion 7).

Here, as in the prior crimes that the trial court admitted, Vars parked, in the early morning hours, in an East King County city. CP 197-98 (findings 1-3, 7). Vars left his car some distance from where he exposed himself. CP 84, 116, 147, 198 (finding 7). He ran naked (except for shoes and a ski mask), through the streets of a residential neighborhood. CP 197 (findings 2, 3). When Vars thought that he had been seen, he crouched down in some bushes along the road. CP 197 (finding 3). Vars fled from the police.³⁵ CP 197 (finding 4). After he was arrested, Vars said that he had taken off his clothes because he needed to defecate. CP 198 (finding 6).

The trial court said that, "[T]he conduct [in this case] is distinct and different from that of other forms of exhibitionism."

³⁵ See State v. Graham, 130 Wn.2d 711, 726, 927 P.2d 240 (1996) (flight and evasive behavior are circumstantial evidence of guilt).

3RP 52. The court looked at Vars's behavior and found that the conduct fit the defendant's "repeated ritualistic patterns of exposures in residential and urban locations. . . ." CP 198 (conclusion 7). "Although it is the closest call in this case," the court found, "that the conduct occurred with sexual motivation." 3RP 52-53. Thus, because all inferences are drawn in favor of the State, and because this Court defers to the trier of fact as to the persuasiveness of the evidence, the Court should affirm Vars's convictions.

3. VARS COMMITTED TWO DISTINCT ACTS OF INDECENT EXPOSURE.

Vars contends that the unit of prosecution for indecent exposure is the act of exposing oneself. He further contends that, because his acts were a continuing course of conduct, only one conviction can lie. The State concedes that the unit of prosecution for indecent exposure is the act of exposing oneself. However, under a common sense evaluation of the facts, the trial court properly found that there were two distinct acts of exposure; hence, there were two convictions.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Similarly, the Washington constitution provides that "No person shall . . . be twice put in jeopardy for the same offense." CONST. art. I, § 9. The state and federal prohibitions against double jeopardy are coextensive; the state provision does not provide broader double jeopardy protection than the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). This Court reviews a determination of a unit of prosecution de novo. State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

When a defendant is charged with violating the same criminal statute multiple times, the proper inquiry is what "unit of prosecution" the legislature intended as the punishable act under the statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel, at 634. Thus, the

question here is what act or course of conduct has the legislature defined as the punishable act for indecent exposure.

The first step in this inquiry is to analyze the criminal statute at issue. Adel, 136 Wn.2d at 635.

As set forth above, indecent exposure is defined as follows:

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.

In interpreting a previous iteration of this statute, Division Two of this Court held that the punishable act or "unit of prosecution" is the inappropriate exposure; the number of observers is immaterial. Eisenshank, 10 Wn. App. at 924 ("We hold that the crime is completed when the inappropriate exhibition takes place in the presence of another") (citing former RCW 9.79.080(2) and former RCW 9.79.120). Thus, the State concedes that it is each instance of exposure that constitutes the unit of prosecution, not the number of witnesses to each exposure.

The second step in a unit of prosecution analysis involves analysis of the factual situation each case presents. State v. Varnell, 162 Wn.2d 165, 170 P.3d 24 (2007). The factual analysis

is necessary "because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." Varnell, 162 Wn.2d at 168.

This step is where Vars's and the State's analysis diverge. Vars contends that his acts constituted a continuing course of conduct. But one continuing offense must be distinguished from two or more distinct acts, each of which could be the basis for a criminal charge. State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). Where evidence involves conduct at different times and places, then the evidence tends to establish distinct acts. State v. Haldran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); Petrich, at 571.

Under a common sense evaluation of the facts, the evidence shows that Vars committed two distinct acts, as the trial court ruled. 3RP 51-52; CP 198 (conclusions 1-3). Vars's exposures to A.C. and D.B. were geographically and temporally distinct. The crimes occurred several blocks, and almost three hours, apart. CP 197 (findings 2, 3); Exs. 6, 9. The trial court ruled that the State had met its burden of establishing two counts or "units of prosecution." The court stated,

[T]he duration of time, the span of time covered here, the opportunity to cease makes it clear that more than one victim would be affected, and that enough time passed to make it more than just one act that can be described in one count. Therefore, I do find the State has met its burden as to two counts.

3RP 51-52. Thus, under a common sense evaluation of the facts, this case clearly demonstrates separate units of prosecution.

Vars's reliance on Eisenshank is misplaced; the case is distinguishable. In that case, the defendant exposed himself once but in the presence of many people. Eisenshank, 10 Wn. App. at 922, 924. But here, as discussed above, Vars exposed himself twice. Accordingly, this Court should reject Vars's claim and affirm his two convictions for indecent exposure.

D. **CONCLUSION**

For the reasons stated above, the State respectfully asks this Court to affirm Vars's convictions for two counts of indecent exposure.

DATED this 28 day of October, 2009.

Respectfully submitted,

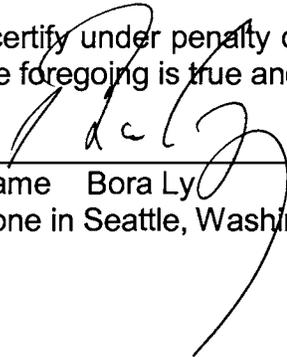
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King County Prosecuting Attorney

By: 
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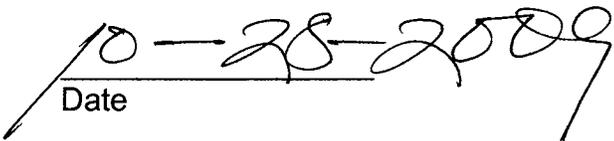
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. JEFFREY LEON VARS, Cause No. 62673-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington



Date

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