FSM SUPREME COURT APPELLATE DIVISION

PRESLEY N. BENJAMIN,	)	APPEAL CASE NO. K2-2012
	)	KSC Crim. Case No. 53-12
Appellant,	)	
	)	
vs.	)	
	)	
STATE OF KOSRAE,	)	
	)	
Appellee.	)	
	)	

OPINION

Argued: October 7, 2013
Decided: October 22, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Richard H. Benson, Specially Assigned Justice, FSM Supreme Court*

*retired FSM Supreme Court justice

APPEARANCES:

For the Appellant: Harry A. Seymour, Esq.
Office of the Public Defender
P.O. Box 245
Tofol, Kosrae FM 96944

For the Appellee: Lorrie Johnson-Asher, Esq.
Assistant Attorney General
Office of the Kosrae Attorney General
P.O. Box 870
Tofol, Kosrae FM 96944

* * * *

HEADNOTES

Criminal Law and Procedure; Criminal Law and Procedure – Sentencing

A guilty finding is not a "judgment of conviction" because in order to be a judgment of conviction, the "judgment of conviction" must set forth the plea, the findings, and the adjudication and sentence. Since a "judgment of conviction" must contain the sentence, it can only be entered after the sentence is pronounced. Benjamin v. Kosrae, 19 FSM R. 201, 204-05 n.1 (App. 2013).

Appellate Review – Standard – Criminal Cases – Abuse of Discretion; Criminal Law and Procedure – Sentencing

A criminal sentence may be affirmed when a review of the record reveals that the sentence is appropriate, and, if the trial court based the sentence upon the defendant's background and potential, and the nature of the offense, such an individualized sentencing decision would be entitled to the deference accorded to findings of fact. Benjamin v. Kosrae, 19 FSM R. 201, 205 (App. 2013).

Appellate Review – Standard – Criminal Cases – Abuse of Discretion; Appellate Review – Standard – Criminal Cases – De Novo; Criminal Law and Procedure – Sentencing

The standard of review of a trial court's decision to impose consecutive sentences is de novo review when the issues raised are the questions of law – whether an offense is a lesser included offense of another offense; whether a sentence violates the FSM and Kosrae Constitutions' protections against double jeopardy; and whether the rule of lenity should apply in construing a statute. Otherwise, the review of a judge's decision to impose concurrent or consecutive sentences is generally limited to review for abuse of discretion. Benjamin v. Kosrae, 19 FSM R. 201, 205 (App. 2013).

Criminal Law and Procedure – Sentencing

While a trial judge's failure to inform a criminal defendant of his right to appeal may be harmless error when the defendant has in fact timely appealed, the trial judge's failure at a sentencing hearing to address a criminal defendant personally and ask him if wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment is not harmless error. Benjamin v. Kosrae, 19 FSM R. 201, 206 (App. 2013).

Criminal Law and Procedure – Sentencing

A criminal defendant's right at a sentencing hearing to be personally addressed by the judge and to then make an unsworn statement on his own behalf in an effort to lessen the impending sentence is called the right of allocution. Benjamin v. Kosrae, 19 FSM R. 201, 206 (App. 2013).

Appellate Review – Standard – Criminal Cases – Plain Error; Criminal Law and Procedure – Sentencing

The appellate court may notice plain error when the error affects a criminal defendant's substantial rights, such as his right of allocution. Benjamin v. Kosrae, 19 FSM R. 201, 206-07 & n.2 (App. 2013).

Criminal Law and Procedure – Sentencing

A trial judge's failure to personally address a criminal defendant and offer him an opportunity to allocute is not harmless error and the criminal defendant does not waive that right by failing to object to his lack of opportunity at the sentencing hearing. The right of allocution is a fundamental or substantial right. Benjamin v. Kosrae, 19 FSM R. 201, 207 (App. 2013).

Criminal Law and Procedure – Sentencing

The trial judge, as noted in Kosrae Criminal Procedure Rule 32(a)(1), has the burden to personally address a criminal defendant at the sentencing hearing and to offer him the right to allocute and make an unsworn statement to the court. Benjamin v. Kosrae, 19 FSM R. 201, 207 (App. 2013).

Criminal Law and Procedure – Sentencing

The law is clear that a defendant must be present in person at the time sentence is originally imposed and that he must be afforded the right of allocution. Benjamin v. Kosrae, 19 FSM R. 201, 207 (App. 2013).

Criminal Law and Procedure – Sentencing

When a criminal defendant was not afforded the right of allocution, his sentences will be vacated

and the matter remanded for a new sentencing hearing. Benjamin v. Kosrae, 19 FSM R. 201, 207 (App. 2013).

Criminal Law and Procedure – Sentencing

Considering the seriousness of the sexual abuse charge, it is advisable that a presentence investigation and report be done as required by Kosrae Criminal Procedure Rule 32(c). Benjamin v. Kosrae, 19 FSM R. 201, 207 (App. 2013).

Criminal Law and Procedure – Double Jeopardy

The FSM and Kosrae Constitutions' double jeopardy clauses protect a person from a second prosecution for the same offense after acquittal, from a second prosecution for the same offense after conviction, and from multiple punishments for the same offense. Benjamin v. Kosrae, 19 FSM R. 201, 208 (App. 2013).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Double Jeopardy

When in an information, one count requires proof of identical allegations (facts and elements) as another count, and would thus violate a defendant's double jeopardy protection if he were convicted of both and then punished for both, the proper remedy is not to dismiss before trial some counts based on what might happen since the government will not be denied the right to charge the separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. Benjamin v. Kosrae, 19 FSM R. 201, 208 (App. 2013).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Information

A criminal defendant is not in danger of being subjected to multiple punishments in the same prosecution until the defendant has been found guilty. A pretrial motion raising a double jeopardy claim of multiple punishments is premature because the defendant may be acquitted on one or all of the charges. Thus, multiple charges in an information is not a defect in the information and is not a claim that is required to be made before trial or it will be deemed waived. A defendant's multiple punishment double jeopardy claim is a claim that cannot be raised before trial but may be raised after guilty findings for more than one offense. Benjamin v. Kosrae, 19 FSM R. 201, 208 (App. 2013).

Criminal Law and Procedure – Double Jeopardy

A double jeopardy claim that a person was or will be tried twice for the same offense may be raised (and appealed) at any time. Benjamin v. Kosrae, 19 FSM R. 201, 208 n.4 (App. 2013).

Criminal Law and Procedure – Disturbing the Peace

Although in many jurisdictions (and in the Model Penal Code) disturbing the peace requires a public disturbance or annoyance, in some jurisdictions, such as Kosrae, the statute requires only a private annoyance. Benjamin v. Kosrae, 19 FSM R. 201, 209 (App. 2013).

Criminal Law and Procedure – Double Jeopardy

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Benjamin v. Kosrae, 19 FSM R. 201, 209 (App. 2013).

Criminal Law and Procedure – Double Jeopardy

The test for determining whether an offense is the lesser-included of another is whether the greater offense can be committed without committing the lesser. Benjamin v. Kosrae, 19 FSM R. 201, 209 (App. 2013).

Criminal Law and Procedure – Double Jeopardy

There are two theories under which a particular offense may be determined to be a lesser included offense of a charged offense – the "statutory theory" and the "pleading theory." Under the statutory theory, a crime may be a lesser included offense if its elements are necessarily included in the greater crime, as the greater crime is defined by statute. Under the pleading theory, a crime may be a lesser included offense if the charging document alleges facts the proof of which necessarily includes proof of the elements of the lesser included offense. In effect, under the pleading theory, an offense is an included offense if it is alleged in the information as a means or element of the commission of the higher offense. The pleading theory is the broader theory. Benjamin v. Kosrae, 19 FSM R. 201, 209 (App. 2013).

Criminal Law and Procedure – Disturbing the Peace; Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sexual Offenses

Under the pleading theory, disturbing the peace is not a lesser included offense of sexual abuse when, as pled, to prove sexual abuse, Kosrae had to prove the genital licking and the fingering and that the victim was under 13 and to prove disturbing the peace, Kosrae had to prove the genital licking and that the victim was unreasonably disturbed or annoyed. Thus, the victim's age and the fingering were facts that Kosrae had to prove to obtain a sexual abuse conviction that it did not have to prove to obtain the disturbing the peace conviction. That the victim was unreasonably disturbed or annoyed was a fact that Kosrae had to prove to obtain the disturbing the peace conviction that it did not have to prove for the sexual abuse conviction. Kosrae did not have to prove that the victim was unreasonably disturbed or annoyed to prove sexual abuse. Thus, the greater offense of sexual abuse could have been committed without committing the lesser offense of disturbing the peace. Benjamin v. Kosrae, 19 FSM R. 201, 209-10 (App. 2013).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

Presley N. Benjamin appeals from the sentences imposed on him after he was found guilty in the Kosrae State Court of sexual abuse and disturbing the peace. We vacate those sentences and remand the matter for a new sentencing hearing. Our reasoning follows.

I. BACKGROUND

Around 3:00 a.m., on July 19, 2011, Presley N. Benjamin awakened his eleven-year old female cousin and told her that he was going to send her to find his wife. Instead, he removed her clothing, covered her face with a pillow, and performed cunnilingus on her and put his finger in her vagina.

On April 30, 2012, Kosrae filed a two-count criminal information charging Benjamin with disturbing the peace "by willfully licking the [victim's] pussy" and with sexual abuse "by intentionally having sexual contact to . . . a person who is less than thirteen years of old [sic] by licking and putting his finger into her pussy." Trial was held on August 7, 2012. At the end of trial, the trial judge orally entered his general finding of guilty[1] on both counts.

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[1] Both parties, and maybe the trial court, mistakenly referred to the guilty findings as a "judgment of conviction." It is not a judgment of conviction because in order to be a judgment of conviction, the "judgment of conviction" must "set forth the plea, the findings, and the adjudication and sentence." Kos. Crim. R.

The sentencing hearing was held on August 16, 2012. At that hearing, the trial judge sentenced Benjamin to nine years six months imprisonment (by statute the maximum allowed cannot equal or exceed ten years) on the sexual abuse charge and eight months imprisonment (the maximum allowed by statute) on the disturbing the peace charge. The trial judge ordered that the sentences be served consecutively.

Benjamin timely moved for a reduction of sentence because the prosecution had failed to produce evidence warranting the imposition of the maximum sentence; because imposing consecutive sentences on him violated his constitutional protection against double jeopardy since he was being punished twice for the same act or since, as pled in this case, disturbing the peace was a lesser included offense of sexual abuse; and because the consecutive sentences violated the rule of lenity. On September 20, 2012, the trial court denied the motion. This appeal followed.

II. Issues Presented

Benjamin does not challenge the guilty finding on either count. He only challenges the sentences. Benjamin contends that the Kosrae State Court abused its discretion 1) by imposing the maximum sentence (eight months) for disturbing the peace and nine years, six months (almost the maximum) for sexual abuse when the prosecution did not introduce any evidence to support the harsh sentences imposed; and 2) by sentencing him to serve those sentences consecutively.

III. Standards of Review

We may affirm a criminal sentence when a review of the record reveals that the sentence is appropriate. Malakai v. FSM, 1 FSM Intrm. 338, 338 (App. 1983). If the trial court based the sentence upon the defendant's background and potential, and the nature of the offense, such an individualized sentencing decision would be entitled to the deference accorded to findings of fact. Cheida v. FSM, 9 FSM Intrm. 183, 187 (App. 1999).

Our standard of review concerning Benjamin's consecutive sentences claim involves de novo review because of the issues raised. Whether an offense is a lesser included offense of another offense is a question of law. State v. Aldrete, 172 P.3d 27, 29 (Kan. 2007). Whether a sentence violates the FSM and Kosrae Constitutions' protections against double jeopardy is also a question of law. Thus, a trial court's decision to impose consecutive sentences is reviewed de novo. *See* State v. Urquidez, 138 P.3d 1177, 1179 (Ariz. Ct. App. 2006). And, since "whether the rule of lenity should apply in construing a statute is a pure question of law," United States v. Ochoa-Colchado, 521 F.3d 1292, 1299 (10th Cir. 2008), the application of the rule of lenity involves interpretation of statutes and the interpretation and application of statutes is a question of law. We review all questions of law de novo. Engichy v. FSM, 15 FSM Intrm. 546, 552 (App. 2008). Otherwise, our review of a judge's decision to impose concurrent or consecutive sentences is generally limited to review for abuse of discretion. *See* United States v. Quintero, 157 F.3d 1038, 1039 (6th Cir. 1998); United States v. Richardson, 87 F.3d 706, 709 (5th Cir. 1996).

32(b)(1). Since a "judgment of conviction" must contain the sentence, it can only be entered after the sentence is pronounced. Neth v. Kosrae, 14 FSM Intrm. 228, 231 (App. 2006). In this case the casual misuse of the term "judgment of conviction" has no effect on the procedure, analysis, or outcome. But counsel and the trial court should be more careful in the term's use because there will be times when it would make a difference or would cause unnecessary confusion since the starting point for certain deadlines is the date of the judgment of conviction.

IV. ANALYSIS

A. *The Sentencing Hearing*

Benjamin assigned certain errors to the sentencing hearing. We therefore carefully reviewed that hearing transcript. At oral argument, we further inquired of the parties whether Benjamin was present at the sentencing hearing and whether the trial judge ever addressed him directly and offered him an opportunity to speak on his own behalf. We are satisfied, based on defense counsel's recollections, that Benjamin was present at his sentencing hearing. We are also certain that the conduct of that hearing was inadequate. The trial judge neglected to do certain things that he is required to do.

Kosrae Criminal Procedure Rule 32(a) provides that:

> (1) Imposing of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.
>
> (2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. . . .

Kos. Crim. R. 32(a). A careful reading of the sentencing hearing transcript reveals that the trial judge did not "address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment" and did not "advise the defendant of the right to appeal." The trial judge did not comply with Rule 32(a)'s clear mandate.

We suppose the failure to comply with Kosrae Criminal Procedure Rule 32(a)(2) and inform Benjamin of his right to appeal may be harmless error since Benjamin has in fact timely appealed.

But the same cannot be said for the trial judge's failure to address Benjamin personally and ask him if "wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment." Kos. Crim. R. 32(a)(1). A criminal defendant's right to be personally addressed by the judge and to then make an unsworn statement on his own behalf "in an effort to lessen the impending sentence" is called the right of allocution. BLACK'S LAW DICTIONARY 88 (9th ed. 2009).

In Green v. United States, 365 U.S. 301, 304, 81 S. Ct. 653, 655, 5 L. Ed. 2d 670, 673 (1961), the U.S. Supreme Court held that under Rule 32, the sentencing court must afford the defendant the opportunity to speak on his own behalf. In United States v. Eads, 480 F.2d 131, 133 (5th Cir. 1973), the court *sua sponte* noticed that the defendant was not given the right of allocution and vacated the sentence and remanded for a new sentencing hearing. Similarly, in Nena v. Kosrae, 14 FSM Intrm. 73, 77-78 (App. 2006), we *sua sponte* noticed under the plain error doctrine[2] that the

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[2] We may notice plain error when the error affects a criminal defendant's substantial rights. Nena v. Kosrae, 14 FSM Intrm. 73, 77 (App. 2006) (when a criminal defendant has failed to raise and preserve an issue, he has generally waived his right to object, but if a plain error that affects the defendant's constitutional rights

defendant's right to a public trial had been violated since he was not present when the guilty finding was pronounced. We then vacated that finding and remanded the case to the trial court and ordered it to set a date for it to orally deliver its general finding and to conduct a new sentencing hearing. *Id.* at 78.

We follow a similar path here. We *sua sponte* notice the trial court's plain error that affected a substantial right of Benjamin's – his right of allocution. We accordingly vacate Benjamin's sentences and remand the case for the trial judge to conduct a new sentencing hearing at which he must address Benjamin and offer him an opportunity to allocute before he is sentenced. We reject the suggestion that the trial judge's failure to personally address Benjamin and offer him an opportunity to allocute is harmless error or that Benjamin waived that right by failing to object to his lack of opportunity at the sentencing hearing. We consider the right of allocution to be a fundamental or substantial right. The trial judge, as noted in Kosrae Criminal Procedure Rule 32(a)(1), has the burden to personally address a criminal defendant at the sentencing hearing and to offer him the right to allocute and make an unsworn statement to the court. Other courts hold a similar view.

"'The law is clear that a defendant must be present in person at the time sentence is originally imposed and that he must be afforded the right of allocution.'" Warrick v. United States, 551 A.2d 1332, 1334 (D.C. 1988) (quoting Wells v. United States, 469 A.2d 1248, 1249 (D.C. 1983)). The Warwick court, holding that a public sentencing and the right of allocution were constitutionally based rights that had to be protected, vacated the sentence and remanded the case to the trial court to resentence the defendant with the defendant present and afforded the right of allocution since he had not been afforded either right for the sentence on appeal. In Schutter v. Soong, 873 P.2d 66, 87 (Haw. 1994), the court held that when a defendant was denied his right to a pre-sentence allocution, a hearing on a motion to reconsider did not cure that defect and the sentence had to be vacated and remanded for a new sentencing hearing.

Accordingly, we vacate both sentences and remand for a new sentencing hearing that complies with Kosrae Criminal Procedure Rule 32(a)(1) and (2). Considering the seriousness of the sexual abuse charge, we consider it advisable that a presentence investigation and report be done as required by Kosrae Criminal Procedure Rule 32(c).[3]

B. *Benjamin's Double Jeopardy and Lesser Included Offense Claims*

Since we hold that Benjamin's sentences must be vacated and the case remanded for a new sentencing hearing, we do not reach the issues concerning the length of the sentences and the rule of lenity that Benjamin has raised about his now vacated sentences. But, since it is an important constitutional issue, we will offer some guidance on the double jeopardy lesser included offense issue.

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has occurred, we may notice that error on our own); Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 477 (App. 1996); Moses v. FSM, 5 FSM Intrm. 156, 161 (App. 1991); *see also* Kinere v. Kosrae, 14 FSM Intrm. 375, 387 (App. 2006).

[3] Kosrae Criminal Procedure Rule 32(c)(1) provides:

> The Probation Officer of the Court shall make a pre sentence investigation and report to the court before the imposition of sentence . . . unless, with permission of the court, the defendant waives a pre sentence investigation and report, or the court finds that there is in the records information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record. . . .

Benjamin contends that the trial court abused its discretion by imposing consecutive sentences because under the facts of this case, disturbing the peace was a lesser included offense of sexual abuse; and therefore it violated his constitutional right against double jeopardy since he was subjected to cumulative or multiple punishments for a single wrongful act.

1. *Whether Benjamin Can Raise Double Jeopardy*

Benjamin contends that the cumulative punishment of consecutive sentences subjects him to double jeopardy. Kosrae contends that, under Kosrae Criminal Rule 12(f), Benjamin has waived this claim.

The FSM Constitution's and the Kosrae Constitution's double jeopardy clauses protect a person from a second prosecution for the same offense after acquittal, from a second prosecution for the same offense after conviction, and from multiple punishments for the same offense. Kinere v. Kosrae, 14 FSM Intrm. 375, 383 (App. 2006); Laion v. FSM, 1 FSM Intrm. 503, 523 (App. 1984); Kosrae v. Kinere, 13 FSM Intrm. 230, 239 (Kos. S. Ct. Tr. 2005); Kosrae v. Kilafwakun, 12 FSM Intrm. 590, 593-94 (Kos. S. Ct. Tr. 2004). The double jeopardy claim that Benjamin raises is that he is being punished twice for the same offense since the trial court imposed consecutive sentences.

When in an information, one count requires proof of identical allegations (facts and elements) as another count, and would thus violate a defendant's double jeopardy protection if he were convicted of both and then punished for both, the proper remedy is not to dismiss before trial some counts based on what might happen because the government will not be denied the right to charge the separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. Laion, 1 FSM Intrm. at 529; FSM v. Sorim, 17 FSM Intrm. 515, 523 (Chk. 2011); FSM v. Esefan, 17 FSM Intrm. 389, 396 (Chk. 2011); FSM v. Aliven, 16 FSM Intrm. 520, 531 (Chk. 2009). A criminal defendant is thus not in danger of being subjected to multiple punishments in the same prosecution until the defendant has been found guilty, *see* Zhang Xiaohui v. FSM, 15 FSM Intrm. 162, 167 (App. 2007), and a pretrial motion raising a double jeopardy claim of multiple punishments[4] is premature because the defendant may be acquitted on one or all of the charges. Sorim, 17 FSM Intrm. at 523; Esefan, 17 FSM Intrm. at 396; Aliven, 16 FSM Intrm. at 531. Thus, multiple charges in an information is not a defect in the information and is not a claim that Kosrae Criminal Procedure Rule 12(b)(2) requires be made before trial or it will be deemed waived under Criminal Rule 12(f). Benjamin's multiple punishment double jeopardy claim is a claim that cannot be raised before trial but may be raised after guilty findings for more than one offense. Benjamin can raise this issue.

2. *Whether Disturbing the Peace Is a Lesser Included Offense*

Benjamin contends that under the facts of the case, disturbing the peace is a lesser included offense of sexual abuse and that therefore the sentence for disturbing the peace must be vacated. Kosrae contends that Benjamin is not subjected to multiple punishment for the same offense because Benjamin committed two distinct offenses as one is not a lesser included offense of the other and Benjamin is therefore being punished separately for each.

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[4] This is not to be confused with the double jeopardy claim that a person was or will be tried twice for the same offense which may be raised (and appealed) at any time. *See* Zhang Xiaohui v. FSM, 15 FSM Intrm. 162, 167 (App. 2007) (right not to be tried more than once and the right not to receive multiple convictions and punishments for the same offense are both protected by the double jeopardy clause but they are conceptually distinct rights).

In Kosrae, "[d]isturbing the peace is willfully committing any act which unreasonably annoys or disturbs another so that he is deprived of peace and quiet, or which provokes a breach of the peace." Kos. S.C. § 13.503. Although in many jurisdictions (and in the Model Penal Code) disturbing the peace requires a public disturbance or annoyance, in some jurisdictions, such as Kosrae, the statute requires only a private annoyance. *See* Commonwealth v. Atalig, 2002 MP ¶¶ 30-32, 6 N. Mar. I. 487, 493-94 (2002) (construing similar statute); *see also* Oingerang v. Trust Territory, 2 TTR 385, 388 (Pal. 1963) (same); Medwes v. Trust Territory, 1 TTR 214, 216 (Pal. 1954) (same).

> Sexual abuse is intentionally having sexual contact with another person who is less than thirteen years old or causing the person to have sexual contact with the offender. Sexual contact means any touching of the sexual or other intimate parts of another done with the intent of gratifying the sexual desire of either party.

Kos. S.C. § 13.312. Sexual abuse is the greater offense. It is classified as a category one felony. Disturbing the peace is classified as a category two misdemeanor.

"'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" Laion v. FSM, 1 FSM Intrm. 503, 523-24 (App. 1984) (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932) and adopting the Blockburger test). The test for determining whether an offense is the lesser-included of another is whether the greater offense can be committed without committing the lesser. *E.g.*, State v. Jackson, 589 P.2d 1309, 1311 (Ariz. 1979).

Kosrae points out that the respective statutes contain entirely different elements and therefore contends that one cannot be the lesser included offense of the other. However, "[t]here are two theories under which a particular offense may be determined to be a lesser included offense of a charged offense" – the "statutory theory" and the "pleading theory." State v. Curtis, 944 P.2d 119, 121 (Idaho 1997).

> Under the statutory theory, a crime may be a lesser included offense if its elements are necessarily included in the greater crime, as the greater crime is defined by statute. Under the pleading theory, a crime may be a lesser included offense if the charging document alleges facts the proof of which necessarily includes proof of the elements of the lesser included offense.

State v. Rae, 84 P.3d 586, 589 (Idaho Ct. App. 2004). In effect, under the pleading theory, "an offense is an included offense if it is alleged in the information as a means or element of the commission of the higher offense." State v. Anderson, 352 P.2d 972, 977 (Idaho 1960). The pleading theory is the broader theory. State v. Sivak, 731 P.2d 192, 206 (Idaho 1986). In Whalen v. United States, 445 U.S. 684, 693-94, 100 S. Ct. 1432, 1439, 63 L. Ed. 2d 715, 725 (1979), the court utilizing the Blockburger test and apparently following the pleading theory, found that a rape conviction merged with a felony murder conviction because "[a] conviction for killing in the course of rape cannot be had without proving all of the elements of the offense of rape," and concluded that, in that case, consecutive sentences could not be imposed for rape and felony murder since the felony murder charge required the proof of the rape it was plainly not a case where each charge required the proof of a fact that the other does not, and that if the matter were not in doubt, the doubt "must be resolved in the favor of lenity."

Benjamin appears to concede, and we agree, that under the statutory theory, disturbing the peace is not a lesser included offense of sexual abuse. But he argues that it is under the pleading

theory. But we do not think that, even under the pleading theory, it is a lesser included offense. As pled, to prove sexual abuse, Kosrae had to prove the licking and the fingering and that the victim was under 13. To prove disturbing the peace, Kosrae had to prove the licking and that the victim was unreasonably disturbed or annoyed. Thus, the victim's age and the fingering were facts that Kosrae had to prove to obtain a sexual abuse conviction that it did not have to prove to obtain the disturbing the peace conviction. That the victim was unreasonably disturbed or annoyed was a fact that Kosrae had to prove to obtain the disturbing the peace conviction that it did not have to prove for the sexual abuse conviction. Kosrae did not have to prove that the victim was unreasonably disturbed or annoyed to prove sexual abuse. Thus, the greater offense of sexual abuse can be committed without committing the lesser offense of disturbing the peace.

V. Conclusion

Accordingly, we vacate Presley N. Benjamin's sentences and remand the matter to the Kosrae State Court for it to conduct a sentencing hearing in compliance with Kosrae Criminal Procedure Rule 32(a) and with the benefit of the presentence investigation required by Kosrae Criminal Procedure Rule 32(c)(1).

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FSM SUPREME COURT APPELLATE DIVISION

WEBSTER GEORGE, Appellant, vs. SEMEON T. SIGRAH, Appellee.	APPEAL CASE NO. K3-2012 KSC Civil Action No. 67-96
WEBSTER GEORGE, Appellant, vs. ERSINA V. GEORGE, Appellee.	APPEAL CASE NO. K4-2012 KSC Civil Action No. 30-96

OPINION

Argued: October 7, 2013
Decided: October 22, 2013