FSM SUPREME COURT APPELLATE DIVISION

COOPER NED a/k/a LARRY NED, Appellant, vs. STATE OF KOSRAE, Appellee.	APPEAL CASE NO. K1-2014 KSC Criminal Case No. 20-13

OPINION

Argued: July 28, 2015
Decided: September 14, 2015

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

APPEARANCES:

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HEADNOTES

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

Appellate review of the sufficiency of the evidence is very limited – only findings that are clearly erroneous can be set aside. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

The standard of review applied to a sufficiency-of-the-evidence challenge in a criminal case is whether, in reviewing the evidence in the light most favorable to the trial court's determinations of fact, there is sufficient evidence to convince a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, that the defendant is guilty beyond a reasonable doubt. Ned v.

Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

A factual finding will not be set aside when there is credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

To be clearly erroneous, a decision must be more than just maybe or probably wrong; it must be wrong with the force of a five-week-old unrefrigerated dead fish. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sentence

In reviewing a trial court's sentencing decision, the standards generally applied in criminal appeals are followed – findings of fact that are supported by credible evidence are upheld but those legal rulings with which the appellate court disagrees are overruled since issues of law are reviewed de novo. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Criminal Law and Procedure – Sexual Offenses

"Sexual penetration" is a statutory element of sexual assault. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

An appellant cannot pass the sufficiency-of-the-evidence test when it is evident that the victim's testimony provided substantial evidence that the trial court found credible and reliable; when the trial judge recited credible, substantial evidence to support the guilty finding; when the trial judge had the opportunity to view the witnesses and the manner of their testimony and chose to believe as credible the victim's testimony, which the judge had the right to believe and accept as true, and to reject the defendant's own testimony. Ned v. Kosrae, 20 FSM R. 147, 152 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sufficiency of Evidence

The prosecution, by proving sexual assault, also proved that the accused annoyed or disturbed the victim and that he caused her bodily harm so that, just as there was sufficient evidence to find him guilty of sexual assault, there was also sufficient evidence to find him guilty of the other lesser offenses. Ned v. Kosrae, 20 FSM R. 147, 153 (App. 2015).

Criminal Law and Procedure

A guilty finding, by itself, is not a conviction. For a document to be a judgment of conviction, it must set forth the plea, the findings, and the adjudication and sentence. Ned v. Kosrae, 20 FSM R. 147, 153 (App. 2015).

Criminal Law and Procedure – Double Jeopardy

The FSM and Kosrae Constitutions prohibit double jeopardy. The purpose of these provisions is 1) to prevent the government from making repeated attempts to convict an individual for the same alleged act; 2) to prevent a second prosecution for the same offense following a conviction or a acquittal; and 3) to prevent multiple punishments for the same offense. Ned v. Kosrae, 20 FSM R. 147, 153 (App. 2015).

Criminal Law and Procedure – Double Jeopardy

The test for determining whether an offense is a lesser-included offense of another is whether the greater offense can be committed without committing the lesser. Ned v. Kosrae, 20 FSM R. 147,

153-54 (App. 2015).

Criminal Law and Procedure – Double Jeopardy

When 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. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

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

An attempt to commit a crime is a lesser included offense that merges with the greater ("target") offense if the attempt is successful. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

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

If the target crime is in fact committed, there can be no conviction for attempt, since the actor's prior conduct is deemed merged in the completed crime. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

Criminal Law and Procedure – Assault and Battery; Criminal Law and Procedure – Double Jeopardy

An assault is a lesser included offense of assault and battery. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

Criminal Law and Procedure – Double Jeopardy

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. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

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

To prove sexual assault, the victim's lack of consent is necessarily pled and proven, which would necessarily also require pleading and proving something that would constitute annoyance and disturbance to the victim. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

Criminal Law and Procedure – Assault and Battery; Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sexual Offenses

Since sexual assault requires intentionally subjecting another person to sexual penetration against the other person's will and assault and battery requires striking, beating, wounding, or otherwise doing bodily harm to another, and since subjecting another person to sexual penetration against the other person's will is one of a number of ways to otherwise do bodily harm to another, assault and battery is a lesser included offense of sexual assault. Ned v. Kosrae, 20 FSM R. 147, 154 (App. 2015).

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

Since disturbing the peace is willfully committing any act which unreasonably annoys or disturbs another so that she is deprived of peace and quiet, or which provokes a breach of the peace, and since every sexual assault – every intentional subjecting a person to sexual penetration against that person's will – is also the willful commission of an act which unreasonably annoys or disturbs another so that she is deprived of peace and quiet, disturbing the peace is a lesser included offense of sexual assault. Ned v. Kosrae, 20 FSM R. 147, 154-55 (App. 2015).

Criminal Law and Procedure – Double Jeopardy; Criminal Law and Procedure – Sentencing; Criminal Law and Procedure – Sexual Offenses

Since the attempt to commit sexual assault merged into the completed sexual assault; since assault is a lesser included offense of assault and battery; and since assault and battery and disturbing the peace are both lesser included offenses of sexual assault, the convictions for all these lesser offenses must be vacated, and since the maximum sentence for sexual assault as a category two felony is five years, the accused's seven-year sentence, and therefore his convictions, for all offenses must be vacated and the case remanded for re-sentencing on, and thus for a conviction to be entered for, only the greater offense of sexual assault. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015).

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

A trial judge is required to publicly read out his sentence in open court, and if the trial judge fails to do so, he abuses his discretion because this is part of the constitutional right to a public trial. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015).

Criminal Law and Procedure – Sentencing

Courts differ on whether a consolidated sentence is proper. Some courts hold them improper, and even where they are proper, courts take two approaches. Some courts hold that a single sentence may be imposed for all offenses so long as it does not exceed the aggregate of sentences that might have been separately imposed on all the counts consecutively while other courts hold that a consolidated or general sentence, that is, one that does not specify the punishment imposed under separate counts of the information, will not be upheld if it exceeds the maximum term of punishment permissible under any single count. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015).

Criminal Law and Procedure – Sentencing

A seven-year sentence is improper and must be vacated when it exceeds the maximum sentence for the one conviction that the appellate court has affirmed. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015).

Appellate Review – Standard – Criminal Cases – Sentence; Criminal Law and Procedure – Sentencing

The better practice is for the trial court to impose sentence on each count individually and to indicate on the record whether the sentences are to run concurrently or consecutively. Such a sentence facilitates appellate review, and obviates the need for the appellate court to review the entire sentence's propriety in the event any count underlying a general sentence is vacated. Thus, if any part of a conviction is reversed on appeal, the sentence imposed under the valid count would not have to be disturbed. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015).

Appellate Review – In Forma Pauperis; Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure – Public Trial

Although it might be advisable for the trial court to conduct a hearing on motions to stay and for in forma pauperis status, especially if the motions look like they may be denied, it is not part of the constitutional public trial right. Ned v. Kosrae, 20 FSM R. 147, 156 (App. 2015).

Appellate Review – Stay – Criminal Cases

A stay is mandatory only if the defendant is released pending appeal because a sentence of imprisonment must be stayed if an appeal is taken and the defendant is released pending disposition of appeal. Ned v. Kosrae, 20 FSM R. 147, 156 (App. 2015).

Appellate Review – Stay – Criminal Cases

Rule 38(a)(2) does not make a release pending appeal mandatory because the word "and"

requires that both conditions – a pending appeal and a release – exist before a stay must be granted. If an appellant is not released pending appeal, the rule does not entitle him to a stay. Ned v. Kosrae, 20 FSM R. 147, 156 (App. 2015).

Appellate Review – Stay – Criminal Cases

If the appellant is not released and there is no stay the appellant then gets credit for time served while the appeal is pending. If the sentence were stayed but the defendant remained in jail, he would not get credit for time served, which would be inherently unfair. Ned v. Kosrae, 20 FSM R. 147, 156 (App. 2015).

Appellate Review – Stay – Criminal Cases

If the court appealed from refuses to release a criminal defendant pending appeal, or imposes conditions of release, that court must state orally on the record or in writing the reasons for the action taken, and must do so in all future cases. Ned v. Kosrae, 20 FSM R. 147, 156 (App. 2015).

Appellate Review – In Forma Pauperis

The court would be leery of awarding in forma pauperis status to someone who is paying private counsel. Ned v. Kosrae, 20 FSM R. 147, 157 (App. 2015).

Criminal Law and Procedure – Sentencing

The use of consolidated sentences should be avoided. Ned v. Kosrae, 20 FSM R. 147, 157 (App. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

Cooper a/k/a Larry Ned appeals his Kosrae State Court convictions and that court's denial of a stay of his sentence pending appeal and a denial of his request to proceed *in forma pauperis* on appeal. We affirm the trial court finding that Ned was guilty of sexual assault. We vacate his other convictions and remand the matter for re-sentencing on the sexual assault charge. Our reasons follow.

I. BACKGROUND

On February 11, 2013, the State of Kosrae filed a criminal information charging that on or about 11:45 p.m., January 7, 2013, defendant Cooper a/k/a Larry Ned, committed the offenses of Disturbing the Peace (Kos. S.C. § 13.503); Sexual Assault (Kos. S.C. § 13.311); Assault and Battery (Kos. S.C. § 13.302); and Assault (Kos. S.C. § 13.302), when he laid on top of his niece by marriage, and annoyed her and disturbed her and inserted his finger into and around her vagina, and also used his elbow to strike her or to do her bodily harm. On September 10, 2013, Kosrae filed an amended information adding a charge of Attempt (Kos. S.C. § 13.202) to commit sexual assault.

Ned went to trial on October 11, 2013. He was found guilty of all charges and on October 18, 2013, was sentenced to seven years in jail. A written judgment of conviction was entered on January 31, 2014. Ned filed a notice of appeal on February 6, 2014, and requested a transcript at the *in forma pauperis* rate. Ned moved for a stay pending appeal. On July 2, 2014, the trial court, by written order, denied the stay and *in forma pauperis* status, and on July 16, 2014, denied a motion to reconsider that denial.

II. Issues Presented

Ned contends that the Kosrae State Court erred because 1) there was insufficient evidence to find him guilty of the felony of sexual assault; 2) there was insufficient evidence to find him guilty of the misdemeanors of disturbing the peace, assault and battery, assault, and attempt; 3) it sentenced him for lesser included offenses to sexual assault; 4) it violated his due process rights; 5) it imposed a sentence that violated the statute; 6) it imposed an excessive sentence constituting cruel and unusual punishment; 7) it denied him his right to a stay of his sentence by denying his motion for a stay without a hearing; 8) it denied his motion for *in forma pauperis* status; and 9) it abused its discretion.

III. Standard of Review

Our review of the sufficiency of the evidence is very limited – only findings that are clearly erroneous can be set aside. Cholymay v. FSM, 17 FSM R. 11, 23 (App. 2010). The standard of review we apply to a sufficiency-of-the-evidence challenge in a criminal case is whether, in reviewing the evidence in the light most favorable to the trial court's determinations of fact, there is sufficient evidence to convince a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, that the defendant is guilty beyond a reasonable doubt. Tulensru v. Kosrae, 15 FSM R. 122, 125 (App. 2007). We will not set aside a factual finding when there is credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. Cholymay, 17 FSM R. at 23; Palik v. Kosrae, 8 FSM R. 509, 516 (App. 1998). To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must strike us as wrong with the force of a five-week-old unrefrigerated dead fish. Smith v. Nimea, 19 FSM R. 163, 173 (App. 2013).

In reviewing a trial court's sentencing decision, we follow the standards generally applied in criminal appeals – we uphold findings of fact that are supported by credible evidence but overrule those legal rulings with which we disagree. Tammed v. FSM, 4 FSM R. 266, 274 (App. 1990). We review issues of law de novo. Phillip v. Kosrae, 15 FSM R. 116, 119 (App. 2007).

IV. Analysis

A. *Sufficiency of the Evidence*

1. *For the Sexual Assault Charge*

Ned contends that there was insufficient evidence presented to the trial court for it to find him guilty beyond a reasonable doubt of the offense of sexual assault. In particular, he asserts that the state failed to prove all of the offense's elements because there was insufficient evidence to prove that he penetrated the victim's vagina with his finger. "Sexual penetration" is a statutory element of sexual assault and the method of penetration pled was by his finger. He bases his claim on the fact that the victim's testimony that his finger penetrated her vagina was uncorroborated by physical evidence or other witness testimony and because the victim's written statement said that Ned had tried to penetrate her with his index finger. He thus concludes that the trial court's findings must be clearly erroneous.

Ned cannot pass the sufficiency-of-the-evidence test. It is evident that the victim's testimony provided substantial evidence that the trial court found credible and reliable. The trial judge recites credible, substantial evidence to support the guilty finding. J. of Conviction at 1-2 (Jan. 31, 2014). The trial judge had the opportunity to view the witnesses and the manner of their testimony. The trial court chose to believe as credible the victim's testimony, evidence which it had the right to believe and accept as true, and reject the defendant's own testimony. We thus see no basis to rule that the trial

court's findings were clearly erroneous. We therefore affirm the finding that Ned was guilty of sexual assault.

2. *For the Other Charges*

Ned further contends that there was insufficient evidence to find him guilty of disturbing the peace, assault and battery, assault, and attempt. He contends that the charge of assault and battery should have been dismissed because when the victim was asked at a preliminary examination if she had been beaten, stricken, or wounded, she replied in the negative. He further contends that the disturbing the peace charge should have been dismissed because the victim never testified that she had been annoyed or disturbed and it was not corroborated by any physical or testimonial evidence and was contradicted by Ned's own testimony.

He also contends that an assault did not happen because he did not offer or attempt, with force or violence, to strike, beat, or wound the victim and that the victim's testimony to the contrary was not true. Ned therefore concludes that the findings that he was guilty of disturbing the peace, assault and battery, assault, and attempt are clearly erroneous. Ned's basis for this is his contention that the victim's testimony was false while his own testimony was true.

The trial judge believed the victim's testimony over his. The trial judge had the opportunity to observe both the victim and the defendant testifying. The trial judge had the right to believe and accept her testimony as true and reject his as false. Furthermore, as explained below, by proving sexual assault, the prosecution also proved that Ned annoyed or disturbed the victim and that he caused her bodily harm. Thus, just as there was sufficient evidence to find Ned guilty of sexual assault, there was also sufficient evidence to find him guilty of the other lesser offenses. We therefore affirm the trial court guilty findings on those counts.

B. *Conviction and Sentencing*

But a guilty finding, by itself, is not a conviction. For a document to be a judgment of conviction, it must set forth the plea, the findings, and the adjudication and sentence. Benjamin v. Kosrae, 19 FSM R. 201, 204-05 n.1 (App. 2013) (since a "judgment of conviction" must contain the sentence, it can only be entered after the sentence is pronounced). We next address the issue of whether sentences, and thus convictions, should have been entered for the lesser offenses of disturbing the peace, assault and battery, assault, and attempt.

1. *Double Jeopardy and Conviction for Lesser Offenses*

Ned contends that convictions for the lesser offenses should not have been entered because this violates his constitutional protection against double jeopardy since these offenses are lesser included offenses to sexual assault and he was convicted of that greater offense.

The FSM and Kosrae Constitutions prohibit double jeopardy. FSM Const. art. IV, § 7; Kos. Const. art. II, § 1(f). The purpose of these provisions is 1) to prevent the government from making repeated attempts to convict an individual for the same alleged act; 2) to prevent a second prosecution for the same offense following a conviction or a acquittal; and 3) to prevent multiple punishments for the same offense. Kinere v. Kosrae, 14 FSM R. 375, 383 (App. 2006). Ned contends that he was subjected to multiple punishments for the same offense because, in his case, disturbing the peace, assault and battery, assault, and attempt are all lesser included offenses of sexual assault.

The test for determining whether an offense is a lesser-included offense of another is whether

the greater offense can be committed without committing the lesser. Benjamin, 19 FSM R. at 209. "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 R. 503, 523-24 (App. 1984).

An attempt to commit a crime is a lesser included offense that merges with the greater ("target") offense (in this case, sexual assault) if the attempt is successful. 4 CHARLES E. TORCHIA, WHARTON'S CRIMINAL LAW § 694, at 588 (15th ed. 1996). "If the target crime is in fact committed, there can be no conviction for attempt, since the actor's prior conduct is deemed merged in the completed crime." *Id.* Likewise, an assault is a lesser included offense of assault and battery. *See* 2 CHARLES E. TORCHIA, WHARTON'S CRIMINAL LAW § 179, at 418 (15th ed. 1994) ("[a]n assault is an attempt to commit a battery"). These charges are lesser included offenses and convictions cannot be had on them.

In Benjamin v. Kosrae, 19 FSM R. 201, 208-10 (App. 2013), we concluded that under either the "statutory theory" or the "pleading theory" disturbing the peace was not a lesser included offense of sexual abuse because, to prove sexual abuse, annoyance or disturbance or lack of consent did not have to be pled or proven and to prove disturbing the peace, that the victim's age of under 13 did not have to be pled or proven.

> 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.

Benjamin, 19 FSM R. at 209 (quoting State v. Rae, 84 P.3d 586, 589 (Idaho Ct. App. 2004)). In Ned's case, the charge was not sexual abuse, the greater offense in Benjamin, but sexual assault. To prove sexual assault, the victim's lack of consent is necessarily pled and proven, which would necessarily also require pleading and proving something that would constitute annoyance and disturbance to the victim.

Under a pleading theory analysis, the lesser offenses are all lesser included offenses of the sexual assault charge in this case. The facts that were alleged and had to be proven for a guilty finding 1) of disturbing the peace – willfully laying on top of the victim and by his actions awakening her and disturbing her; and 2) of assault and battery – using his forearm to push the victim with force and laying on top of her causing pressure that prevented her from moving, were all facts that were alleged and also had to be proven for the sexual assault charge.

Under a statutory theory analysis, the result, although less obvious, is the same.

Sexual assault requires "intentionally subjecting another person to sexual penetration . . . against the other person's will." Kos. S.C. § 11.313. Assault and battery requires "striking, beating, wounding, or otherwise doing bodily harm to another." Kos. S.C. § 11.303. "[S]ubjecting another person to sexual penetration . . . against the other person's will" is one of a number of ways to "otherwise do[] bodily harm to another." Thus assault and battery is a lesser included offense of sexual assault.

"Disturbing 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. Likewise, every sexual assault – every intentional subjecting a person to sexual penetration against that person's will – is also the willful commission of an "act which unreasonably annoys or

disturbs another so that [s]he is deprived of peace and quiet." *Id.*

Since the lesser offenses of which Ned was convicted are lesser included offenses under both the pleading and the statutory theories, we do not need to decide now which theory to adopt.

Thus, since the attempt to commit sexual assault merged into the completed sexual assault; since assault is a lesser included offense of assault and battery; and since assault and battery and disturbing the peace are both lesser included offenses of sexual assault, the convictions for all these lesser offenses must be vacated. Ned received a consolidated or general sentence of seven years. Since the maximum sentence for sexual assault as a category two felony is five years, Ned's sentence, and therefore his convictions, for all offenses must be vacated and the case remanded for re-sentencing on, and thus for a conviction to be entered for, only the greater offense of sexual assault.

2. *Due Process*

Ned contends that his due process rights were violated when the trial judge failed to read in open court what constituted his sentence – what part of his consolidated seven-year sentence was imposed for which crime.

A trial judge is required to publicly read out his sentence in open court, and if the trial judge fails to do so, he abuses his discretion because this is part of the constitutional right to a public trial. Neth v. Kosrae, 14 FSM R. 228, 232 (App. 2006). But the question now before us is whether Ned's due process rights were violated when the trial judge imposed a consolidated or general sentence that did not specify what part of the sentence applied to which conviction.

Courts differ on whether a consolidated sentence is proper. Yinmed v. Yap, 8 FSM Intrm. 95, 102-03 (Yap S. Ct. App. 1997) (holding that consolidated sentences are proper but disfavored in Yap). Some courts hold them improper, and even where they are proper (the majority view in the United States), courts take two approaches. *Id.* at 103. Some courts hold that "a single sentence may be imposed for all offenses so long as it does not exceed the aggregate of sentences that might have been separately imposed on all the counts consecutively." *Id.* Other courts hold that "a consolidated or general sentence, that is, one that does not specify the punishment imposed under separate counts of the [information], will not be upheld if it exceeds the maximum term of punishment permissible under any single count." *Id.*

Under any of the three approaches just mentioned, Ned's seven-year sentence is improper and must be vacated. It exceeds the maximum sentence for the one conviction – sexual assault – that we have affirmed. We therefore do not need to decide now which approach to consolidated sentences to adopt as positive law.

We do agree with the Yinmed court that "the better practice is for the trial . . . court to impose sentence on each count individually" and to "indicate on the record whether the sentences are to run concurrently or consecutively." *Id.* Such a sentence "facilitates appellate review," and "obviates the need" for us to review the entire sentence's propriety "in the event any count underlying a general sentence is vacated." *Id.* Thus, "if any part of a conviction is reversed on appeal, the sentence imposed under the valid count would not have to be disturbed." *Id.*

Since that was not done in this case, we must vacate the entire sentence and remand the matter for re-sentencing on the sexual assault charge. We recommend that in the future that the trial court impose sentence on each count individually and indicate on the record whether the sentences are to run concurrently or consecutively.

3. *Whether Sentence Violated the Statute and Was Excessive*

Ned also contends that his sentence violated Kosrae state law and was excessive because it exceeded the five-year maximum sentence for sexual assault, and was thus illegal. Since we hereby vacate the seven-year sentence and remand this case for re-sentencing, we do not need to discuss these points further.

C. *Post-Conviction Motions*

1. *Abuse of Discretion*

Ned contends that the trial court abused its discretion when it denied without hearing Ned's motions for a stay and for *in forma pauperis* status. These motions were post-conviction motions to which the constitutional public trial right does not apply. Although it might have been advisable to conduct a hearing on either or both of these motions, especially if the motions look like they may be denied, it is not part of the constitutional public trial right. The trial court did not necessarily abuse its discretion by not holding hearings on these motions. It did, however, as explained below, abuse its discretion by not putting on the record its reasons for denying a stay pending appeal.

2. *Motion to Stay*

Ned contends that he was denied his right to a stay pending appeal. Ned reads Kosrae Criminal Procedure Rule 38 to mean that a stay pending appeal is mandatory.

Ned misreads the rule. A stay is mandatory only if he is released pending appeal. "A sentence of imprisonment shall be stayed if an appeal is taken *and* the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the FSM Rules of Appellate Procedure." Kos. Crim. R. 38(a)(2) (emphasis added). The rule does not make a release pending appeal mandatory because the word "and" requires that both conditions – a pending appeal and a release – exist before a stay must be granted. If an appellant is not released pending appeal, Rule 38(a)(2) does not entitle him to a stay. That should be evident from the rest of Rule 38(a)(2) which permits the trial court to recommend that the appellant, if not released, be confined in a place from where he can assist in his appeal. *Id.* This makes sense because if the appellant is not released and there is no stay the appellant then gets credit for time served while the appeal is pending. If the sentence were stayed but the defendant remained in jail, he would not get credit for time served, which would be inherently unfair.

But "[i]f the court appealed from refuses release pending appeal, or imposes conditions of release, that court shall state orally on the record or in writing the reasons for the action taken." FSM App. R. 9(b). The trial court does not appear to have put on the record, either orally or in writing, its reasons for denying Ned a stay. It should have. We therefore instruct the trial court to, in all future cases, state on the record its reasons when it denies a stay for a criminal defendant that has appealed and has sought a stay.

3. *In Forma Pauperis*

Ned contends that he should not have been denied the ability to proceed on this appeal on an *in forma pauperis* basis. He contends that the trial court should have accepted his declaration of indigency based on his financial statement. Ned objects that the trial court rejected his financial statement as not truthful without a hearing on the matter.

We do not know what the trial court used to conclude that Ned's financial statement did "not

seem to be truthful," Order Denying Reconsideration at 1 (July 16, 2014), although this would be an adequate ground to deny an application for *in forma pauperis* status. We suggest that a hearing on the issue, while not necessarily required, might be helpful in this case. Ned's counsel says that he hopes to be paid by either the Public Defenders' Office or by his client, but has not been. We would be leery of awarding *in forma pauperis* status to someone who is paying private counsel, which may or may not be the case here.

VI. Conclusion

Accordingly, we affirm the trial court's guilty findings but vacate the convictions for all charges except the sexual assault charge, and we vacate the sentence and remand the matter for Ned to be re-sentenced in open court on the sexual assault charge. We further hold that when denying a stay of a criminal sentence pending appeal, the trial judge must "state orally on the record or in writing the reasons for the action taken." FSM App. R. 9(b). We recommend that the use of consolidated sentences be avoided and suggest that, in this case, a hearing on *in forma pauperis* status might have been helpful.

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FSM SUPREME COURT TRIAL DIVISION

SASAKI L. GEORGE, Plaintiff, vs. CANNEY PALSIS, individually and in his capacity as Directing Attorney for Kosrae MLSC; LEE PLISCOU, in his capacity as the Executive Director of MLSC; and MICRONESIAN LEGAL SERVICES CORPORATION; Defendants.	CIVIL ACTION NO. 2013-2004

ORDER DENYING DISQUALIFICATION

Ready E. Johnny
Associate Justice

Decided: September 14, 2015

APPEARANCES:

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