No. 30721-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

ALLEN TREVINO,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Vic Vanderschoor, Judge

APPELLANT'S OPENING BRIEF

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1. Trevino is not guilty of rape of a child in the first degree because the alleged victim was more than 12 years old at the time of the alleged crime.

2. Trevino's conviction for communicating with a minor for immoral purposes is barred by the statute of limitations.

3. The trial court had no authority to impose an exceptional sentence.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Is this Court required to reverse Trevino's conviction on Count 1, rape of a child in the first degree, because B.A. was over 12 years old when the offense was committed?

2. Is this Court required to reverse Trevino's conviction for communicating with a minor for immoral purposes because the charge was barred by the applicable statute of limitations?"

3.. Did the trial court lack the authority to impose an exceptional sentence for crimes committed between 2002 and 2004?

III.
STATEMENT OF THE CASE

Allen Robert Trevino was charged with rape of a child in the first degree, child molestation in the first degree and communicating with a minor. All of the acts were alleged to have been committed against B.A. between January 2002 and December 13, 2004. CP 48-49. The State also alleged that "the defendant used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the current offense as provided in RCW 9.94A.535(3)(N)." CP 49. The first degree child rape and first degree child molestation counts were charged "in the alternative." 12/12/11 RP 3.

B.A. was born on December 13, 1991. 2 RP 104.[1] She turned 12 years old on December 13, 2003. She was, therefore, over 12 years old for the final year of the charging period.

B.A.'s grandmother, Lynnell Roberson, testified that in December 2010, she called the police about allegations that B.A. made to her. 2 RP 31.

B.A.'s mother, Ralaunda Ashenbrenner, testified that she and B.A. moved to Benton County and lived on Snow Street in mid-2002. 2 RP 47-

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[1] 1 RP is the volume labeled December 12, 14, 15 and 16, 2011. 2 RP is the volume labeled December 13, 2011. 3 RP is the volume labeled March 2, 2012.

48. At that time she was dating Allen Trevino, who lived in Portland. 2 RP 49. At some point in 2003 Ralaunda and B.S. moved to Jadwin Street in Richland. 2 RP 50. During that time Trevino would visit from Portland during the week and stay with her in her residence. 2 RP 51. She said that Trevino had opportunities to be alone with her girls and that she trusted him. 2 RP 52, 79. The relationship became more serious and, eventually, she and her daughters moved to Portland to live with Trevino. 2 RP 52-54. The relationship did not work out and she and B.A. returned to Benton County. 2 RP 55-56.

B.A. testified that she and her mother and sisters moved to Richland "about the middle of fourth grade." 2 RP 105. Previously they lived in Oregon. She attended fifth grade in Richland. 2 RP 106. She attended 6th grade in Richland and the "first part of seventh grade." 2 RP 106. She attended the "second part" of seventh grade in Portland and then the family returned to Richland when she was in the 8th grade. 2 RP 108. B.A. said that she turned 12 in December of her 6th grade year. 2 RP 108.

She testified that when the family lived on Snow Street Trevino read her a story about incest between a brother and sister. 2 RP 112. When she was in sixth grade the family lived on Jadwin Street. When she was living there Trevino inserted his finger into her vagina. 2 RP 116. She

could not say when precisely this happened but that it happened "at the beginning of sixth grade." 1 RP 114. On cross-examination, B.A. admitted that she could not really remember when these events happened but "I tried the best I could." 2 RP 133. In fact, it appears from her testimony that she was very unclear about when the incidents might have occurred. 2 RP 143-145.

On redirect B.A. said that her mom told her she was in the sixth grade in 2004-2005. And she said that she was very clear that she was in the sixth grade when it happened. 2 RP 154.

B.A. also testified that after the family moved to Portland in 2004, Trevino made her perform oral sex on him. 2 RP 124.

Trevino testified that he did have a relationship with B.A's mother. 2 RP 138. He stated that B.A. and her mother lived with him in Portland from 2003 to 2005. 2 RP 160, 168. He denied all of B.A.'s allegations. He stated that B.A. did not like him. 2 RP 165-66. He also testified that one of B.A.'s boyfriends stole his medical marijuana. 2 RP 172. He said that B.A. accused him of sexual assault after that incident. 2 RP 175.

In closing, the State argued that Trevino was guilty because Trevino put his hands in B.A.'s vagina when she was in "fourth and fifth grade" and "living at the Snow residence." 1 RP 70. The State argued that B.A. knew the dates because she knew that she graduated from high

school in May, 2010. 1 RP 72. She knew that she graduated from high school when she was 18 and "that is how in the case all the dates come through." *Id.* The prosecutor said of her witnesses: "They don't remember the dates." *Id.* Thus, the prosecutor argued that Trevino read the incest story to B.A. when she was in fifth grade. 1 RP 74. The State said that Trevino put his fingers in B.A.'s vagina when she was in sixth grade and lived on Jadwin Street in Richland. 1 RP 98. The prosecutor stated: "The charging period ends when she turns 13." 1 RP 75, 98.

In her final statement in rebuttal the prosecutor said:

> Don't forget that it's about a 12 year old little girl. It's about a 12 year old little girl that didn't have a sister to run to. It's about a 12 year old little girl that didn't have a grandma two doors down to run to. It's a case about a 12 year old girl that dealt with the cards that she was dealt. And she told. And that is what this case is about, a 12 year old little girl.

In closing the defense argued that there was no corroboration of the dates testified to by B.A. 1 RP 92. He pointed out that precise dates were important because the family moved back and forth across state lines.

The jury found Trevino guilty of first degree rape of a child and communicating with a minor for immoral purposes. CP 202-03. The jury also found that Trevino had abused his position of trust as to B.A. CP

205. The judge subsequently imposed an exceptional sentence of 168 months in prison. 3 RP 11; CP 259-70.

IV.
ARGUMENT

A. TREVINO IS NOT GUILTY OF EITHER FIRST DEGREE RAPE (OR THE ALTERNATIVE CHARGE OF FIRST DEGREE CHILD MOLESTATION) BECAUSE B.A. TURNED 12 ON DECEMBER 13, 2003

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979), *superseded in part on recons. by State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Both first degree rape and first degree child molestation require that the State prove that the victim was less than 12 years old when the crime was committed. *See* RCW 9A.44.073 and RCW 9A.44.083. The jury was properly instructed on this element for both of the alternative charges in this case. CP 178-79.

Trevino is not guilty of either alternative charge. The act relied upon by the State occurred when B.A. was at least 12 or perhaps 13. The State said that this was a case about a 12 year old girl in closing. Moreover, the State's argument was based upon B.A.'s testimony that Trevino put his fingers in her vagina in the fall of 2004, when she was in 6th grade. She was 12 at that time.

The charges must be reversed for dismissal because our Supreme Court has indicated that the remedy of remand for resentencing on a lesser included offense generally is permissible only when the jury has been explicitly instructed on it. *State v. Green*, 94 Wn.2d at 234. In that case, Green was convicted of aggravated murder for killing his eight year old victim in the course of either kidnapping or raping her. *State v. Green*, 91 Wn.2d at 433-35; *State v. Green*, 94 Wn.2d at 216. On reconsideration, our Supreme Court reversed the aggravated murder conviction due to insufficiency of the evidence of kidnapping and verdict form errors and remanded for a new trial on the charge of aggravated murder in the first

degree based on first degree rape or attempted rape. *Green*, 94 Wn.2d at 233. The State sought the imposition of the lesser included offense of first degree murder. *Id.* at 234. The court refused, stating:

> we are persuaded that the statement by the Supreme Court in Green is correct and controlling: remand for resentencing on a lesser included offense is only permissible where the jury is explicitly instructed on the lesser included offense. For the jury to make a finding on a lesser included offense, the jury must have received an instruction as to that offense. *State v. Harris*, 121 Wash.2d 317, 320, 849 P.2d 1216 (1993) ("To find an accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements.").
>
> In the case at hand the jury was not instructed on the subject of a "lesser included offense". In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense.

Id. (alteration in original). The court additionally clarified that,

> [i]n addition, it is clear a case may be remanded for resentencing on a "lesser included offense" only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense.

Id. at 234-35.

Just last year, in *In re Heidari*, 174 Wn.2d 288, 274 P.3d 366 (2012)[2], the Supreme Court reaffirmed that the appellate court could not remand for resentencing on the lesser included offense of attempted child molestation, where the jury was not instructed on the attempt offense. In doing so the Court abrogated *State v. Gilbert*, 68 Wn. App. 379, 842 P.2d 1029 (1993); *State v. Gamble*, 118 Wn. App. 332, 72 P.3d 1139 (2003), *review granted in part*, 152 Wn.2d 1001, 101 P.3d 865 (2004), *affirmed in part*, 154 Wn.2d 457, 114 P.3d 646 (2005); and *State v. Brown*, 50 Wn. App. 873, 751 P.2d 331 (1988). The Court noted that the State can easily avoid the force of the rule by requesting a lesser included offense instruction at trial. *Id.* at 294. And the Court reasoned that jettisoning the rule would be harmful to defendants because where jurors are not asked to decide the defendant's guilt or innocence on a lesser included offense, the

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[2] The Supreme Court was affirming the Court of Appeals. The Court of Appeals had stated:

> We have not been asked to address whether he may be retried on the crime of attempt. But, we note that a reversal for insufficient evidence generally terminates jeopardy and prevents subsequent retrial. See *State v. Linton*, 156 Wash.2d 777, 784, 132 P.3d 127 (2006) ("Acquittal of an offense terminates jeopardy."); *State v. Wright*, 165 Wash.2d 783, 792, 203 P.3d 1027 (2009) ("A reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means 'no rational factfinder could have voted to convict' on the evidence presented." (quoting *Tibbs v. Florida*, 457 U.S. 31, 40-41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)).

In re Heidari, 159 Wn. App. 601, 609, 248 P.3d 550, 554 (2011), *review granted*, 171 Wn.2d 1027, 257 P.3d 662 (2011) *and aff'd*, 174 Wn. 2d 288, 274 P.3d 366 (2012).

defendant is denied the opportunity of defending against such a charge and might forgo strategies, arguments, and the presentation of evidence relative to that charge. *Id.*

B. THE CHARGE OF COMMUNICATING WITH A CHILD FOR IMMORAL PURPOSES WAS BARRED BY THE STATUTE OF LIMITATIONS

A criminal statute of limitations presents a jurisdictional bar to prosecution. It is not merely a limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused. *State v. N.S.,* 98 Wn. App. 910, 914-15, 991 P.2d 133 (2000) (footnote and internal quotation marks omitted). Because the criminal statute of limitations creates an absolute bar to prosecution, whether the State was barred by the statute of limitations from prosecuting a crime is an issue that may be raised for the first time on appeal. *State v. Dash*, 163 Wn. App. 63, 67, 259 P.3d 319, 320-21 (2011); *State v. Novotny*, 76 Wn. App. 343, 345 n. 1, 884 P.2d 1336 (1994).

RCW 9.68A.090(1) provides that: "Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor." RCW 9A.04.080(i) provides that: "No gross misdemeanor may be prosecuted more than two years after its commission."

In this case, the State alleged that Trevino communicated with B.A. in 2002. 1 RP 2. The limitations period ran no later than December 13, 2004. The charge in this case was not brought until 2011. Thus, the conviction for this gross misdemeanor must be reversed.

C. THE TRIAL COURT HAD NO AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE FOR A CRIME OCCURING BETWEEN 2002 AND 2004

This Court need not reach this issue if it reverses all three counts on the grounds set forth above.

In this case, the State alleged that Trevino's sentence should be enhanced pursuant to RCW 9.94A.535(3)(n). That statute, however, was not enacted until 2005, in response to the invalidation of the prior aggravated sentencing scheme in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004). The legislature responded by amending the SRA to provide for jury determinations of aggravating factors justifying exceptional sentences upward. Laws of 2005, ch. 68; 2005 Final Legislative Report, 59th Wash. Leg., at 289. The amendment had the following effect:

> The list of aggravating factors used to justify an upward departure from the standard sentence range is made exclusive. The aggravating factors list is expanded to include current judicially recognized factors. Four aggravating factors, all based on questions of law, may be

> used to impose a sentence above the standard range without findings of fact by a jury. The remaining twenty-five aggravating factors pose questions of fact that must be submitted to a jury.

2005 Final Legislative Report, at 289.

Because the sentencing scheme in place in 2002-2004 was unconstitutional, no aggravated sentence can be imposed. And the trial courts had no inherent authority to impanel a sentencing jury. *State v. Hughes*, 154 Wn.2d 118, 149-52, 110 P.3d 192 (2005), *abrogated on other grounds, Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Moreover, the new sentencing scheme cannot be applied to Trevino in light of RCW 9.94A.345, which provides that:

> Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

It is true that the Legislature enacted a statute, commonly known as "the *Blakely* fix" in 2007. However, that statute provides that:

> (2) In any case where an exceptional sentence above the standard range *was imposed* and *where a new sentencing hearing is required*, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2) (emphasis added). Thus, it is clear that the statute was intended to provide only for cases that were pending on appeal at the time

Blakely and its progeny were decided. It was not intended to apply to prosecutions, such as this one, that had not yet been commenced. Just this week, Division II concluded that this statute "applies only to resentencing hearings required because of a *Blakely* error but not sentencing following a new trial." *State v. Douglas*, -- Wn. App. --, -- P.2d --, Slip Opinion No. 41133-4-II at 7 (Feb. 26, 2013).

V.
CONCLUSION

All three counts in this case must be dismissed. In the alternative, the exceptional sentence must be stricken and the matter remanded for a standard range sentence.

DATED this 6 day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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