NO. 90995-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SERGEY GENSITSKIY,

Respondent/Cross-Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle, Judge

ANSWER TO PETITION FOR REVIEW WITH ADDITIONAL ISSUES FOR REVIEW

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A. IDENTITY OF RESPONDENT/CROSS-PETITIONER

Sergey Gensitskiy, defendant and appellant below, petitions the Court to review the issues identified below and answers the State's Petition.

B. COURT OF APPEALS OPINION

Mr. Gensitskiy seeks review of additional issues from *State v. Gensitskiy*, COA No. 71640-9-I (filed July 7, 2014) (reconsideration denied 10/8/2014), and answers the State's Petition.

C. ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. Does the Privacy Act's prohibition of admitting intercepted telephone communications without the consent of all parties apply if the witness intentionally listened to a conversation on a device knowing it was not intended for him, although he did not initiate the transmission?

2. Is testimony that a parent stroked the inner thigh of a seven-year-old child after putting her to bed, when over the years the ten children in the family often fell asleep in their clothes and their parents changed them into their pajamas and put them to bed, sufficient to prove this contact was of a sexual or intimate part for sexual gratification?

D. STATEMENT OF THE CASE[1]

1. SUBSTANTIVE FACTS

Sergey and Yelena Gensitskiy immigrated from the Ukraine with four children. At the time of trial in 2012 their children were: Svetlana (26), Victor (24), Diana (23), Zhanna (21), David (20), Jennifer (19), Robert (18), CSG (17), Vadim (14), and Samuel (6). RP 196-98, 1092-93.

The family maintains many "old school" customs. They speak Ukrainian and English, eat Russian foods and attend Russian church. RP 387-89. They prohibit drinking, smoking, and sex outside of marriage. They expect respect to elders, humility, hard work, contributions to the household, and church participation. RP 238, 422-24, 486-87, 794-95. They own an adult group home where Yelena, CSG, and Diana lived and cared for the residents. RP 752-53, 1007-08, 1025-26. Sergey lived with the other children on a farm. RP 119, 197-99, 390, 1012-17, 1076-77, 1119.

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[1] These facts are a summary of the relevant facts for purposes of this Petition. A more detailed statement is found in the Brief of Appellant at 3-28.

Sergey and Yelena are not educated professionals. They work very hard. Sergey drove truck at night, farmed, and landscaped. Yelena was a housekeeper for wealthy households until buying the adult group home. The older children cleaned or did landscaping for those households, including the Pattersons. RP 240, 366-72, 1019, 1119-20.

At age 20, wanting more freedom, Diana ran away from home. She secretly lived at the Pattersons while her parents frantically searched for her for weeks. When Randy Patterson insisted Diana tell her parents where she was, she said something he interpreted as her father molested her. Tami Patterson said if it happened to her, it happened to all the other children too. Diana began contacting her siblings to ask if they remembered being molested. In a flurry, Diana and David gathered their younger siblings together and took them all to the Pattersons'. Listening to their older siblings, the younger children began to say they had been abused. Police reports were filed. RP 489-92, 221-24, 247-52, 520-22, 529, 558-76, 664-68, 758-59; CP 146.

The courts ordered the younger children back to their mother's custody, but Diana and CSG continued living with the Pattersons. Diana moved out to live with a boyfriend, then later moved home with her mother. Once away from the Pattersons, she questioned what she had reported and experienced. CSG and the Pattersons called her a traitor. The Pattersons became CSG's foster parents and forbade Diana from talking with her. CSG enjoyed freedoms and luxuries with the Pattersons not available in her family. RP 524-26, 698-701, 793-95.

2. CHARGES

The State charged Sergey Gensitskiy with twelve counts of child molestation and incest against five of his children. It amended charges after all evidence. CP 1-18, 37, 102.

The jury acquitted on Counts 1 and 12, involving David and Robert, and convicted on the remaining counts. CP 78-101. For Counts 2, 6 and 7, the court imposed a maximum sentence of life in prison, with an exceptional minimum term of 250 months per count. CP 102-06.

The Court of Appeals reversed and dismissed Counts 6-11,[2] and remanded for resentencing on the remaining charges. Mr. Gensitskiy remains convicted of Counts 2-5, all involving CSG.

CSG, age 17 at trial, testified before she was 7, her father would put her to bed, remove her pajamas, and rub the insides of her upper thighs on her skin. She did not remember if he touched her vagina. RP 742. The State agrees this evidence was the basis for Count 2. Resp. Br. at 13-17.

CSG testified to other acts after she turned 12. She also claimed she saw their father sexually abuse Jennifer, Zhanna, Svetlana, and Sam. RP 777; CP 145.[3]

A memory expert testified that false memories frequently are created by one person saying, "This happened to me, did it happen to you too?" Or, even more strongly, "I think this happened to you." Positive feedback from others, hearing "that happened to me, too," makes false memories

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[2] Count 7 was reversed and dismissed without prejudice; the remaining counts were dismissed with prejudice. Slip Op. at 14.

[3] The State did not file charges involving Sam, Svetlana, Zhanna, or Jennifer. CP 1-6, 13-18.

stronger, clearer, more detailed, and completely inseparable from real memories. RP 959-65.

The other Gensitskiy daughters denied any sexual abuse occurred in their home to them or their siblings. Witnesses testified to CSG's good relationship with their father. She would sit on his lap, laugh and joke with him. They never saw her pull away from him. RP 1042-58, 1072-76, 1090, 846-47, 1063-65, 1082.

Through the years, the children occasionally fell asleep in their clothes. Their parents changed them into pajamas and put them to bed in shared bedrooms. RP 1019-23, 1055, 1112-18.

Sergey Gensitskiy testified he never abused or molested any of his children. He never touched his children's genitals while putting them to bed. RP 1098-1100, 1111-19.

3. PRIVACY ACT

In December, 2011, Diana called Randy to ask if CSG could go for coffee. Rather than let CSG go out, Randy invited Diana to their home. After the conversation, Randy's phone rang again. He found Diana inadvertently had redialed him. He overheard Diana talking with Yelena. RP 623-25.

Defense counsel objected, citing the privacy statute. The court admitted the evidence. RP 625-29. Randy testified Diana told her mother she couldn't get CSG out of the house, she didn't think the Pattersons trusted her anymore; and Yelena said they needed to get CSG out of the house to "get her straightened out." RP 630, 1191-94.

E. GROUNDS FOR REVIEW OF ISSUES AND ARGUMENT

1. THE HOLDING THAT INTENTIONALLY LISTENING IN ON A PHONE CALL CLEARLY NOT INTENDED FOR THE LISTENER IS NOT AN "INTERCEPTION" OF A PRIVATE COMMUNICATION UNDER THE PRIVACY ACT CONFLICTS WITH THIS COURT'S OPINIONS AND PRESENTS A SUBSTANTIAL ISSUE OF PUBLIC INTEREST THAT THIS COURT SHOULD DECIDE. RAP 13.4(b)(1), (4)

> [I]t shall be unlawful for any individual ... to intercept ... any:
> (a) Private communication transmitted by telephone [or] ... by any device ... designed to ... transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
> (b) Private conversation, by any device electronic or otherwise designed to ... transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030.

> Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible in any civil or criminal

> case in all courts of general or limited jurisdiction in this state ... .

RCW 9.73.050.

The statute's purpose is to protect privacy and prevent dissemination of illegally obtained information. *State v. Baird*, 83 Wn. App. 477, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997). A defendant has standing to challenge the use of evidence obtained in violation of the act even if he did not participate in the unlawfully intercepted conversation. *State v. Williams*, 94 Wn.2d 531, 534, 617 P.2d 1012 (1980). A civilian violated the statute by listening on a police scanner to his neighbor's cordless telephone conversations; the conversations were inadmissible in court. *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996). A police officer unlawfully intercepted text communications when he looked through a suspect's iPhone, read text messages, and texted back posing as the suspect. All such communications were suppressed. *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014).

In *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789 (2004), this Court reversed a conviction when a witness testified to the defendant's phone

conversation with her daughter. The daughter and defendant did not intend for the mother to listen to their conversation on the phone's base unit.

Here the Court of Appeals held that Randy did not "intercept" the conversation under the meaning of this statute.

> *Christensen* is distinguishable. In *Christensen*, the mother purposefully intercepted her daughter's telephone conversation with her boyfriend in order to assist police with a criminal investigation of the boyfriend. ... The mother intercepted the call by activating the speakerphone function at the base of the cordless phone.

Slip Op. at 13; *Christensen*, 153 Wn.2d at 190-91.

Although Randy Patterson did not initiate the phone call, he recognized that the call was not intended for him.[4] He nonetheless listened on his phone, overheard the private conversation between Diana and her mother -- and then testified at trial to the private conversation he overheard. Intentionally listening in on a private conversation via a device is "interception" for purposes of the Privacy Statute. Testifying to the conversation violates RCW 9.73.050. "Evidence

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[4] He testified that Diana "butt-dialed" him. RP 623-25.

obtained in violation of the act is excluded for any purpose, including impeachment." *Faford*, 128 Wn.2d at 488.

> [T]he Washington statute continues to tip the balance in favor of individual privacy at the expense of law enforcement's ability to obtain information in criminal proceedings.

State v. Kipp, 179 Wn.2d 718, 725, 317 P.3d 1029 (2014). Whether a conversation is private is determined as a matter of law. Here there is no issue the conversation between Diana and her mother was private.

This Court has pending before it another case addressing the Privacy Act: Whether stenographically transcribing a telephone conversation with only one party's consent is an interception within the Act.[5] This case presents an equally important public issue of defining the Act's terms. RAP 13.4(b)(4).

Here Randy Patterson realized he was listening to a conversation not intended for him, i.e., a private phone conversation, yet purposefully

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[5] *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 316 P.3d 1119 (2014), *review granted*, Supreme Court No. 89961-4 (oral argument 9/30/2014).

listened to it on his phone, and divulged it in trial testimony.

The Court of Appeals holding that such eavesdropping by phone is not "interception" within the Privacy Act conflicts with this Court's decisions in *Christensen, Faford, Roden, Williams*, and presents an issue of substantial public interest and importance that this Court should decide. RAP 13.4(b)(1), (4).

2. THE COURT OF APPEALS HOLDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT COUNT 2 CONFLICTS WITH OPINIONS OF THIS COURT AND THE COURT OF APPEALS AND PRESENTS A SIGNIFICANT ISSUE OF CONSTITUTIONAL LAW. RAP 13.4(b)(1), (2), (3).

Count 2 was based on CSG's testimony that Mr. Gensitskiy rubbed her upper inner thigh when he put her to bed before she was 7. Resp. Brief at 13-17. The jury was required to decide each count separately. CP 31.

In *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992), the Court of Appeals reversed a conviction of child molestation where a close family friend known as "Uncle Harry" touched a child's thighs while they were in a truck. It held there was

insufficient evidence of a purpose of sexual gratification.

> Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. ... However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

Powell, 62 Wn. App. at 917 (citations omitted, emphasis added), *quoted with approval* in *State v. Whisenhut*, 96 Wn. App. 18, 23, 980 P.2d 232 (1999). The *Powell* court continued with an excellent contrast of cases in which there was sufficient evidence of sexual gratification:

> *E.g.*, *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) ("The defendant then rubbed the zipper area of the boy's pants for 5 to 10 minutes."); *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence an unrelated male with no caretaking function wiped a 5-year-old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him); *State v. Wilson*, [56 Wn. App. 63, 68, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010 (1990)] (both incidents occurred where they would not be easily observed, and defendant was only partially clothed; victim of second incident was disrobed); *State v. Brown*, 55 Wn. App. 738, 780 P.2d 880 (1989) (multiple incidents including

> one in which defendant had victim operate a "penis enlarger"), *review denied*, 114 Wn.2d 1014 (1990); *State v. Brooks*, 45 Wn. App. 824, 727 P.2d 988 (1986) (whitish liquid found on infant's face, chest, and stomach; stain on infant's rubber booties identified as semen); *In re Adams*, 24 Wn. App. 517, 601 P.2d 995 (1979) (defendant removed victim's pants and was on top of her when discovered).

Powell, 62 Wn. App. at 917.[6]

In *State v. R.P.*,[7] the defendant was convicted of indecent liberties for picking up a girl, hugging her, holding her against her will, and placing a "hickey" or "passion mark" on her neck area with his lips. This Court reversed and dismissed for insufficient evidence of contact with the "sexual or other intimate parts" under RCW 9A.44.010(2).

In the context of a parent of a small child putting many young children to bed over the years, testimony that on occasion the parent stroked the

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[6] *See also: Whisenhut*, 96 Wn. App. at 23-24 (an unrelated 15-year-old on three separate occasions reached behind his seat in the school bus and touched a 5-year-old girl's "genital area, a primary erogenous zone, under her skirt but over her body suit," the touching "was not open to innocent explanation").

[7] 67 Wn. App. 663, 666-67, 838 P.2d 701 (1992), *reversed*, 122 Wn.2d 735, 862 P.2d 127 (1993) and at 736-37 (Andersen, J., dissenting).

inner thigh of a child is constitutionally insufficient to prove sexual contact -- either a purpose for sexual gratification or contact with the child's sexual or other intimate parts.[8] If not, most parents in this State are equally guilty of child molestation and subject to life imprisonment. This Court should grant review of this issue and reverse and dismiss Count 2.

F. ANSWER TO STATE'S PETITION FOR REVIEW

1. RELEVANT FACTS

On July 13, 2011, the State charged Count 7:

> **COUNT 07 - CHILD MOLESTATION IN THE SECOND DEGREE - 9A.44.086**
> ... between July 16, 1997 and July 15, 2003 ... did have sexual contact with D.S.G. dob 7/16/1989, who was less than fourteen (14) years old, and not married to the defendant and the defendant was at least thirty-six months older than the victim; ... .

CP 3-4. The State rested its case on August 6, 2012. RP 821. The following day, the State proposed to amend Count 7 to charge child molestation 1° instead of 2°, and to expand the charging period back to 1994. RP 1069-71. The

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[8] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); U.S. Const., amends. 5, 14; Const., art. I, § 3.

defense objected. RP 1122-26. After all parties rested, the Court granted the State's amendment. RP 1242. It now charged:

> **COUNT 07 - CHILD MOLESTATION IN THE SECOND DEGREE - 9A.44.083**
> ... between **July 16, 1994 and July 15, 2001**, ... did have sexual contact with D.S.G. (female), who was **less than fourteen years old** and not married to the defendant and the defendant was at least **thirty-six** months older than the victim; contrary to Revised Code of Washington **9A.44.083**.

CP 15-16 (emphases added).[9]

The State's belated amendment of Count 7 charged a mishmash. It expanded the charging period by several years, it alleged child molestation in the second degree, cited the statute for child molestation in the first degree, cited dates when DSG was under 12 years old but alleged she was under age 14, and alleged an age difference required for second degree molestation.

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[9] Had the State amended Count 7 to child molestation 1° as it initially represented, RP 1069-71, the Court of Appeals would have reversed and dismissed for charging a different crime, as it did with Count 8. This Second Amended Information also expanded the charging periods for Counts 8-11 all by a number of years. *Compare*: CP 1-6, 7-12, and 13-18. The Court of Appeals held these late amendments to Counts 8-11 required reversal with prejudice. Slip Op. at 4-7. The State does not seek review of that holding.

Defense counsel objected to amending the charging period consistent with a charge of child molestation 1°. RP 1122-26. The trial court was so confused, it entered judgment on child molestation 1°.[10] CP 102-03.

The State now asks this Court to endorse such charging practices. It should decline the request.

2. DIFFERENT DEGREES OF CHILD MOLESTATION ARE NOT LESSER INCLUDED OFFENSES OF EACH OTHER.

The State argues the Court of Appeals

> effectively held, for the first time in Washington, that child molestation in the second degree is *not* a lesser included offense of child molestation in the first degree, and that child molestation in the third degree is *not* a lesser included offense of child rape in the second degree.

Petition at 14. That holding is long the law.

Lesser included offenses and lesser degree offenses are subject to the *Workman* analysis.[11]

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[10] The State conceded this error, Resp. Br. at 8-9. The Court of Appeals did not reach this issue because it vacated the conviction. If this Court reverses that holding, it will need to address this error. CP 93, 103.

[11] RCW 10.61.003; *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Thus felony murder 2° is not included in premeditated murder 1°, although it is a lesser degree of murder. *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d

The various degrees of child molestation fail both *Workman*'s factual and legal prongs: by requiring different ages of the child, they require a different criminal act at a different time; and different age differences between the victim and the perpetrator.[12] Child molestation requires the element of sexual gratification, and so is not a lesser included crime of rape of a child.[13]

RCW 10.61.003 still requires "evidence that the defendant committed only the inferior offense."[14] Here there was no evidence that "only" child molestation 2° occurred. The charging period and jury instructions required sexual contact before Diana's twelfth birthday. CP 15-16, 47.

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432 (1988). Rape 3° is not a lesser included of rape 2°. *State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995), *review denied*, 128 Wn.2d 1009 (1996).

[12] *Compare*: RCW 9A.44.083 (24 months' difference), 9A.44.086 (36 months' difference), and 9A.44.089 (48 months' difference). Appendix C.

[13] *State v. Jones*, 71 W. App. 798, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994); *State v. Saiz*, 63 Wn. App. 1, 816 P.2d 92 (1991). Even attempted child molestation 2° is not a lesser of child molestation 2°. *State v. Heidari*, 174 Wn.2d 288, 294-95, 274 P.3d 366 (2012).

[14] *State v. Roberts*, 142 Wn.2d 471, 524, 14 P.3d 713 (2000); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

a. The Charged Act Could Only Occur at One Specific Time.

A person may only be charged and convicted for a particular criminal act.[15] Lesser included offenses by definition mean one act is charged, the only issue is the severity of that act under the law. The right to a jury trial requires the jury to be unanimous as to what one act occurred.[16]

Unlike the value of a stolen item, the age of a child determines the time of the offense and so the very act that is the offense. Parties may quibble about the value of a stolen item without questioning the act of theft. If the state charges both first and second degree child molestation, it cannot be alleging the same act for both crimes. It is factually impossible to have committed both crimes in one act. The Legislature required this specificity by defining the elements.[17]

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[15] The Constitutions guarantee the right "to demand the nature and cause of the accusation." Const., art. I, §§ 3, 22; U.S. Const., amends. 6, 14.

[16] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); Const., art. I, § 22; U.S. Const., amends. 6, 14.

[17] RCW 9A.44.083, .086, .089.

b. The State May Charge Crimes Without an Age Element if it Cannot Prove the Elements of Child Molestation.

Inability to prove the elements of a specific crime often requires considering other crimes that do not require specific ages.[18] A child may be unable to identify whether penetration occurred, but child molestation still is not a lesser included of child rape.[19]

c. The State's Authorities Are Inapposite.

In *State v. Smith*, 122 Wn. App. 294, 297-99, 93 P.3d 206 (2004), the Court affirmed because a challenged jury instruction (not charging document) was invited error. The dicta on which the State relies conflict with this Court's precedents.[20]

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[18] *E.g.*: incest (RCW 9A.64.020) for certain family members; communication with a minor for immoral purposes (RCW 9.68A.090); indecent liberties if forcible compulsion is involved (RCW 9A.44.100); and varying degrees of assault (RCW Title 9A.36) with special allegations of sexual motivation (RCW 9.94A.835).

[19] *Jones, supra; Saiz, supra.*

[20] *Roberts, supra; Fernandez-Medina, supra.*

For theft, the Legislature separately defined "value" by default as not exceeding $250.[21] It made no such default age for child molestation.

The child molestation statutes serve a different purpose than the theft and violating court orders statutes. They determine when sexual acts are legal or illegal. A child having contact with another child under age 12, if not more than 24 months older, has not committed a crime. A teenager having intercourse with someone 12 or 13 has not committed a crime if she is not more than 36 months older. These ages are the very essence of defining these crimes, and so are essential elements that must be charged.

G. CONCLUSION

This Court should grant review of the two issues sought here and deny the State's Petition.

DATED this 2d day of December, 2014.

LENELL NUSSBAUM, WSBA No. 11140

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[21] "Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars." RCW 9A.56.010(21)(e); *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005); *State v. Leyda*, 157 Wn.2d 335, 138 P.3d 610 (2006).

APPENDICES

A *State v. Gensitskiy*,
Court of Appeals No. 71640-9-I
(Slip Op. 7/7/2014),
(reconsideration denied 10/8/2014)

B Constitutional Provisions

C Statutory Provisions

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SERGEY V. GENSITSKIY, Appellant.	)	No. 71640-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 7, 2014

SCHINDLER, J. — Sergey V. Gensitskiy appeals the jury convictions on two counts of child molestation in the first degree, two counts of child molestation in the second degree, two counts of child molestation in the third degree, and four counts of incest in the second degree. We affirm in part, reverse in part, and remand for resentencing.

FACTS

On August 30, 2011, the State charged Sergey V. Gensitskiy by amended information with 12 counts of child molestation and incest. Count 1 charged Gensitskiy with child molestation in the first degree of D.G., alleging that between October 3, 1995 and October 2, 1997, Gensitskiy had sexual contact with D.G. when D.G. was less than 12-years-old.[1] Count 2 charged Gensitskiy with child molestation in the first degree of

[1] The information refers to two victims as D.S.G. For purposes of clarity, we refer to the victim in Count 1 as D.G.

C.S.G., alleging Gensitskiy had sexual contact with C.S.G. between March 1, 2001 and February 28, 2007 when C.S.G. was less than 12-years-old. Count 3 charged child molestation in the second degree of C.S.G., alleging Gensitskiy had sexual contact with C.S.G. between March 1, 2007 and March 28, 2009 when C.S.G. was at least 12-years-old but less than 14-years-old. Counts 4 and 5 charged Gensitskiy with child molestation in the third degree of C.S.G. that occurred between March 1, 2009 and October 1, 2010 when C.S.G. was at least 14-years-old but less than 16-years-old. Count 6 charged Gensitskiy with child molestation in the first degree of V.S.G. between November 28, 2006 and November 27, 2009 when V.S.G. was less than 12-years-old. Counts 7 and 8 charged Gensitskiy with child molestation in the second degree of D.S.G., alleging that on two separate and distinct occasions, Gensitskiy had sexual contact with D.S.G. between July 16, 1997 and July 15, 2003 when D.S.G. "was less than fourteen (14) years old." Counts 9, 10, and 11 charged Gensitskiy with incest in the second degree of D.S.G. between June 1, 2010 and September 30, 2010. Count 12 charged Gensitskiy with child molestation in the second degree of R.S.G. between October 24, 2005 and October 23, 2007 when R.S.G. was at least 12-years-old but less than 14-years-old. The State also alleged as aggravating factors that Gensitskiy used his position of trust or confidence to facilitate the commission of the offenses under RCW 9.94A.535(3)(n), and that certain offenses were part of an ongoing pattern of sexual abuse of the same victim under RCW 9.94A.535(3)(g). Gensitskiy entered a plea of not guilty.

The eight-day jury trial began on July 31, 2012. A number of witnesses testified, including D.G., V.S.G., D.S.G., C.S.G., R.S.G., lead detective Barry Folsom, and the foster parents of C.S.G., Randy and Tami Patterson. Gensitskiy testified and denied the allegations of child molestation and incest.

The jury found Gensitskiy not guilty of child molestation in the first degree of D.G. as charged in Count 1, and not guilty of child molestation in the second degree of R.S.G. as charged in Count 12. The jury found Gensitskiy guilty of child molestation in the first degree of C.S.G. and V.S.G., Count 2 and Count 6; child molestation in the second degree of C.S.G. and D.S.G., Count 3 and Count 7; two counts of child molestation in the third degree of C.S.G., Count 4 and Count 5; and four counts of incest in the second degree of D.S.G., Counts 8, 9, 10, and 11. By special verdict, the jury found Gensitskiy used his position of trust to facilitate the commission of the current offenses under RCW 9.94A.535(3)(n), and certain offenses were part of an ongoing pattern of sexual abuse of the same victim under RCW 9.94A.535(3)(g).

ANALYSIS

Essential Element of the Crime: Count 7

Gensitskiy challenges his conviction of molestation in the second degree of D.S.G., Count 7, on the grounds that the information did not allege an essential element of the crime. We agree.

Under article I, section 22, amendment 10 of the Washington State Constitution, the accused has a right to be informed of the criminal charge against him so he may prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). The charging document must state all the essential elements of the

crime charged. McCarty, 140 Wn.2d at 425. Failure to allege each element means the information is insufficient to charge a crime and so must be dismissed. State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

We apply a liberal construction rule for challenges to the information raised for the first time on appeal and employ a two-prong test:

> (1) [D]o the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language.

McCarty, 140 Wn.2d at 425. If the necessary elements are not found or fairly implied, we presume prejudice and reverse without reaching the second prong. McCarty, 140 Wn.2d at 425.

RCW 9A.44.086(1) states, in pertinent part:

> A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old.[2]

The information charging Gensitskiy with child molestation in the second degree in Count 7 alleges only that D.S.G was "less than fourteen (14) years old." There is no reading or fair construction of the information that alleges D.S.G. was over the age of 12. Count 7 must be reversed without prejudice. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Second Amended Information

Gensitskiy asserts the court erred in granting the State's motion to amend the information at the end of the trial to charge a different crime for Count 8 and expand the charging period for the three counts of incest in the second degree, Counts 9, 10, and

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[2] Emphasis added.

11, from "between June 1, 2010 and September 30, 2010" to "between July 16, 1994 and October 1, 2010."

We review a trial court's ruling on a motion to amend an information for abuse of discretion. State v. James, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). A defendant has the constitutional right to be notified of the nature of the charges against him. WASH. CONST. art I, § 22, amend. 10. A trial court may permit the State to amend the information at any time before verdict or finding if the defendant's substantial rights are not prejudiced. CrR 2.1(d).

Amending an information to charge a new crime after the State rests violates the defendant's rights under article I, section 22. State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). Gensitskiy asserts amending the information to allege a new crime in Count 8 violates his constitutional rights. The State concedes Count 8 must be dismissed with prejudice. We accept the State's concession.

Gensitskiy contends granting the motion to amend the information to expand the charging period for Counts 9, 10, and 11 from a 4-month period of time in 2010 to a 16-year period of time of July 1994 to October 2010 after cross-examination of the victims and after the defense called its expert witness was prejudicial. As a general rule, amending the charging periods is permitted unless the amendment compromises an alibi defense or the defendant demonstrates specific prejudice. State v. DeBolt, 61 Wn. App. 58, 61-63, 808 P.2d 794 (1991). The defendant bears the burden of showing prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Gensitskiy has met his burden of establishing prejudice.

Before the State called C.S.G. as its second-to-last witness, the prosecutor noted the State "anticipate[d] needing to amend the Information prior to the close of the case based on the testimony of [D.S.G.] and [V.S.G.] However, we're essentially in the process of getting their testimony transcribed so that I can make a decision on that." The prosecutor stated, "I just wanted to put that out there that I'm going to move to amend the Information to conform the evidence. And because I anticipate possibly resting the case this morning, so I just wanted to bring that out there."

The State rested on August 6 and the defense called an expert witness on childhood memory to testify. On August 7, the State moved to amend the information to change the charging period on Counts 9, 10, and 11 from 4 months in 2010 to a 16-year period from 1994 to 2010.[3] The defense attorney objected. The attorney argued, in pertinent part:

> [Our defense] has something to do with memory, as the Court knows, and so when you expand dates and things of that nature, it may affect how I would have or would not have done cross-exam of certain witnesses.
>
> So at this point in time, while thanking Counsel for concurring with my opinion, I still want to have an opportunity to look at the dates.

The court reserved ruling on the motion to amend. At the conclusion of the case on August 9, over the objection of the defense, the court granted the motion to amend the information.

[3] The State also moved to amend the charging period for Count 3 from between March 1, 2007 and March 28, 2009 to between March 1, 2007 and February 28, 2009; amend the charging period for Count 7 from between July 16, 1997 and July 15, 2003 to between July 16, 1994 and July 15, 2001; and amend the charging period for Count 8 and allege the new crime of incest in the second degree. The State proposed amending Count 7 from the crime of child molestation in the second degree to the crime of child molestation in the first degree.

Because Gensitskiy has demonstrated specific prejudice, we conclude the court abused its discretion in granting the motion to amend the information at the end of trial to expand the charging period for Counts 9, 10, and 11. The second amended information expanded the charging period from a few months in 2010 to a span of 16 years, and the court granted the motion to amend after the completion of cross-examination of the State's witnesses and at the end of the case. Counts 9, 10, and 11 must be reversed with prejudice.

Sufficiency of the Evidence

Gensitskiy argues insufficient evidence supports the conviction of child molestation of C.S.G. in the first degree as charged in Count 2 and child molestation of V.S.G. in the first degree as charged in Count 6. Gensitskiy asserts there is no evidence he had sexual contact with either C.S.G. or V.S.G. The State concedes there is insufficient evidence to support the conviction of child molestation of V.S.G. as charged in Count 6. We accept the State's concession that Count 6 must be reversed with prejudice.

The State argues sufficient evidence supports the conviction of child molestation in the first degree of C.S.G. as charged in Count 2. Gensitskiy asserts insufficient evidence supports the conviction because the State failed to prove that he touched C.S.G. for the purpose of sexual gratification.

Sufficient evidence supports a conviction when, viewed in the light most favorable to the State, a rational fact finder could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A claim of insufficiency admits the truth

of the State's evidence and all inferences reasonably drawn from the evidence. Salinas, 119 Wn.2d at 201. We defer to the fact finder on issues of witness credibility and the persuasiveness of evidence. See State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

RCW 9A.44.083(1) defines the crime of child molestation in the first degree and prohibits sexual contact with a person who is under age 12 where the perpetrator is at least 36 months older and not married to the victim. "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "The statute is directed to protecting the parts of the body in close proximity to the primary erogenous areas which a reasonable person could deem private with respect to salacious touching by another." In re Welfare of Adams, 24 Wn. App. 517, 521, 601 P.2d 995 (1979). In determining whether contact is intimate within the meaning of the statute, the question is whether the conduct is of such a nature "that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and, therefore, the touching was improper." Adams, 24 Wn. App. at 521. "Sexual gratification" is not an essential element of first degree child molestation, but clarifies the meaning of the term "sexual contact." State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). A showing of sexual gratification is required "because without that showing[,] the touching may be inadvertent." State v. T.E.H., 91 Wn. App. 908, 916, 960 P.2d 441 (1998).

Gensitskiy relies on State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), to argue insufficient evidence supports finding him guilty of child molestation in the first degree of C.S.G. In Powell, the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. Powell, 62 Wn. App. at 916. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. Powell, 62 Wn. App. at 918. The touching was described as "fleeting" and the evidence of the defendant's purpose was "equivocal." Powell, 62 Wn. App. at 917-18. The court determined that the evidence was insufficient to support the inference that the defendant touched the child for the purpose of sexual gratification. Powell, 62 Wn. App. at 918.

The court in Powell required "additional evidence of sexual gratification" where an adult is a caretaker for a child "in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas." Powell, 62 Wn. App. at 917. The jury may infer sexual gratification from the circumstances of the touching itself where those circumstances are unequivocal and not susceptible to innocent explanation. See State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (defendant's conduct was not susceptible to innocent explanation when he touched the victim's genital area over her clothes on three separate occasions); see also State v. Wilson, 56 Wn. App. 63, 68-69, 782 P.2d 224 (1989); T.E.H., 91 Wn. App. at 916-17.

Here, unlike in Powell, there is sufficient evidence for the jury to find "sexual contact" within the meaning of the statute and "sexual gratification." C.S.G. testified that Gensitskiy put his hands down her pants and touched her breasts, buttocks, and

genitals on numerous occasions. C.S.G. testified that she could recall "a couple incidents" when her father touched her inappropriately when she was "very young." C.S.G. said that when she was under the age of 7, her father would come into her room, take off her pajamas, and rub her "upper thighs" on "the insides of our legs . . . on the skin." C.S.G. testified that after the age of 10, Gensitskiy would enter the bathroom while she was showering and touch her buttocks. C.S.G. stated that starting around the age of 12 or 13, Gensitskiy would touch her breasts "under my clothes" on a weekly basis. Based on this testimony, a rational trier of fact could have found that Gensitskiy touched the intimate parts of C.S.G. for the purpose of gratifying his sexual desire.

Limiting Instruction

Gensitskiy argues the court abused its discretion by waiting to give a limiting instruction regarding the use of impeachment evidence until the end of trial. As a general rule, the court should give a limiting instruction when requested if evidence is admitted for a limited purpose. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). But it is within a trial court's discretion to choose instead to give a limiting instruction at the close of all the evidence. State v. Ramirez, 62 Wn. App. 301, 304-05, 814 P.2d 227 (1991).

On the second day of trial, V.S.G. testified and recanted. V.S.G. testified Gensitskiy never touched him inappropriately. The State relied on an interview transcript to refresh V.S.G.'s memory and impeach his testimony with prior inconsistent statements. Defense counsel objected to the State's use of the transcript for impeachment purposes:

> Your honor, this witness has clearly outlined the fact that what was in the report, he was fabricating, doesn't agree with it. [The transcript] doesn't

> meet the threshold requirements to be used as a document as substantive evidence and, therefore, we are requesting the Court to advise the jury that this conversation is not substantive evidence, it's only for the purpose of impeachment of this witness.

Defense counsel stated that he would like an instruction given at the end of V.S.G.'s testimony. The court indicated it would look at the instruction when proposed. Defense counsel did not request a limiting instruction at the conclusion of V.S.G.'s testimony.

During her testimony on the second and third day of trial, D.S.G. also recanted. The State used transcripts from D.S.G's interviews with Detective Folsom and her prior sworn statement to impeach her testimony with prior inconsistent statements.

On the fourth day of trial, Gensitskiy proposed a formal jury instruction. The court decided to give the limiting instruction at the close of the case, stating, in pertinent part:

> Because the person that we were concerned about is already past, I don't want to unduly influence one instruction over any of the others. Remember, the final instruction is to take them as a whole, not as an individual instruction. So I'm going to hold this and give it with the rest of the packet.

On this record, the court did not abuse its discretion by waiting until the close of all testimony to give the limiting instruction to the jury.

Privacy Act

Gensitskiy argues Randy Patterson's testimony regarding the conversation he overheard between D.S.G. and her mother violated the Privacy Act, chapter 9.73 RCW. "The act prohibits anyone not operating under a court order from intercepting or recording certain communications without the consent of all parties." State v. Roden,

179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The Privacy Act provides, in pertinent part:

> Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1).

As a general rule, evidence obtained in violation of the Privacy Act is inadmissible. RCW 9.73.050. In order for a violation to occur, "[t]here must have been (1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication." State v. Christensen, 153 Wn.2d 186, 192, 102, P.3d 789 (2004).

After leaving home, C.S.G. lived with family friends Randy and Tami Patterson. Randy testified that in December 2011, D.S.G. called to ask if she could visit with C.S.G and take her out for coffee. Randy told D.S.G. she could come to their house and see C.S.G. but he did not want C.S.G. leaving the house on a school night. D.S.G. hung up but unwittingly redialed Randy. When Randy answered his phone, he overheard D.S.G. speaking with her mother about getting C.S.G. out of the Patterson home, and D.S.G.'s belief that the Pattersons no longer trusted her.

Defense counsel objected on the grounds that this was "eavesdropping on an electronic conversations [sic] without permission." The court overruled the objection, stating that "this gentleman did not initiate the phone call, so I don't think it fits in that category." The prosecutor also noted that the statements D.S.G. made were being offered for impeachment, not for their truth. We agree that because Randy did not "intercept" D.S.G.'s conversation under RCW 9.73.030(1), Randy's testimony did not violate the Privacy Act.

Christensen is distinguishable. In Christensen, the mother purposefully intercepted her daughter's telephone conversation with her boyfriend in order to assist police with a criminal investigation of the boyfriend. Christensen, 153 Wn.2d at 190-91. The mother intercepted the call by activating the speakerphone function at the base of the cordless phone. Christensen, 153 Wn.2d at 190.

Indeterminate Sentence

Gensitskiy argues the indeterminate sentence for child molestation in the first degree of C.S.G., Count 2, violates the constitutional prohibition against ex post facto laws because RCW 9.94A.507 was not in effect for part of the charging period alleged in Count 2.[4] The State concedes Gensitskiy must be resentenced on Count 2 to a determinate sentence. We accept the State's concession. See State v. Parker, 132 Wn.2d 182, 191, 937 P.2d 575 (1997) ("Use of the increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties would violate the ex post facto clause of both the United States and Washington Constitutions."); see also U.S. CONST. art. I, § 9; WASH. CONST. art. I, § 23.

[4] RCW 9.94A.507 was enacted in 2001. LAWS OF 2001, 2nd Spec. Sess., ch. 12, § 303. The effective date was September 1, 2001. The charging period for Count 2 begins March 1, 2001.

We reverse and dismiss with prejudice Counts 6, 8, 9, 10, and 11, dismiss the conviction for Count 7 without prejudice, affirm the remaining convictions, and remand for resentencing.

WE CONCUR:

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

STATE OF WASHINGTON, Respondent, v. SERGEY V. GENSITSKIY, Appellant.	)	No. 71640-9-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent State of Washington filed a motion for reconsideration herein and the appellant filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 8th day of October, 2014.

FOR THE COURT:

Judge

APPENDIX B

UNITED STATES CONSTITUTIONAL PROVISIONS

> "No person shall be ... deprived of life, liberty, or property, without due process of law; ... ."

United States Constitution, Amendment 5.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment 6.

> "... [N]or shall any state deprive any person of life, liberty, or property, without due process of law; ..."

United States Constitution, Amendment 14, § 1.

WASHINGTON CONSTITUTIONAL PROVISIONS

> **Personal Rights.** No person shall be deprived of life, liberty, or property, without due process of law.

Constitution, art. I, § 3.

> **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases ... ; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Constitution, art. I, § 22.

APPENDIX C

STATE STATUTES

RCW 9.73.030. Intercepting, recording, or divulging private communication--Consent required--Exceptions

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9A.44.010. Definitions

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.083. Child molestation in the first degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.086. Child molestation in the second degree

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

RCW 9A.44.089. Child molestation in the third degree

A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

RCW 10.61.003. Degree offenses - Inferior degree - Attempt

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

CERTIFICATE OF MAILING

I hereby certify that on this date I deposited a copy of the Answer to Petition for Review with Additional Issues for Review, into the United States Mail, postage prepaid, addressed to:

Mr. Tony Golik
Ms. Anne Cruser
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, Wa 98666

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

12·2·2014 - SEATTLE, WA
Date and Place

Alexandra Fast
Alexandra Fast