NO. 44034-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SERGEY GENSITSKIY,

Appellant.

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

The Honorable John P. Wulle, Judge

REPLY BRIEF OF APPELLANT

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STATUTES AND OTHER AUTHORITIES

A. STATE'S CONCESSIONS OF ERROR

1. COUNT 6 MUST BE REVERSED AND DISMISSED.

The State concedes there was insufficient evidence as a matter of law to support the conviction in Count 6 of child molestation in the first degree. That count must be reversed and dismissed. AOE 2; Resp. Br. at 17.

2. COUNT 8 MUST BE REVERSED AND DISMISSED.

The State concedes it was improper to amend Count 8 to charge a different crime after it rested its case. That count of incest in the second degree must be reversed and dismissed. AOE 1; Resp. Br. at 9-10.

3. IF COUNT 7 IS VALID, IT IS ONLY A CONVICTION OF CHILD MOLESTATION 2°, NOT CHILD MOLESTATION 1°.

The State disputes appellant's challenges to the validity of Count 7, but it concedes the Judgment and Sentence is inaccurate in finding Mr. Gensitskiy guilty of child molestation in the first degree. It concedes he was convicted at most of child molestation in the second degree, and so at least must be resentenced on this count. AOE 8; Resp. Br. at 8-9.

4. INDETERMINATE SENTENCES ON COUNTS 2 AND 7 ARE INVALID.

The State concedes that the charging periods for Counts 2 and 7 predate the effective date of RCW 9.94A.507, which provides for an indeterminate sentence. If these two counts remain valid after appeal, the court must resentence Mr. Gensitskiy to determinate sentences. AOE 9-10; Resp. Br. at 23-24.

B. STATEMENT OF FACTS IN REPLY

1. THE ALLEGATIONS IN THIS CASE WERE AND ARE FIRMLY DENIED BY MR. GENSITSKIY AND CONTESTED BY FAMILY MEMBERS AND OTHER WITNESSES.

The State begins its Statement of the Case by calling the appellant "an abusive father of ten who dominated and controlled his family through fear." Resp. Br. at 2.

Substantial evidence at trial refuted these accusations. Mr. Gensitskiy testified at trial, as did his wife and a number of his children, that these accusations were untrue. RP 1098-1100, 1111-19, 1052-58, 1072-74, 1090, 846-47, 1063-65, 1075-76, 1082, 1023-24, 1033. These allegations were inconsistent with the children's loving interactions toward their father observed by a

friend who had known this family and visited their home for years. RP 1042-51. Diana's letter to her parents also belies the State's characterization. See App. Br. at 7-8; Ex. 3.

The State claims:

> Gensitskiy does not deny that this touching [of her thighs while she was in bed] occurred while C.S.G. was under twelve. Rather, he relies entirely on the argument that this touching was "innocent" and could not have been for sexual gratification.

Resp. Br. at 13-14. Mr. Gensitskiy did indeed deny any sexual touching of any of his children. He also acknowledged in a family of ten children, he frequently helped put children to bed, tucked them in, and checked on them after they were asleep. This process included changing them into pajamas if they fell asleep in their clothes, an experience any parent has shared. RP 1115-19. Corinna herself testified that this touching occurred to all the children at bedtime. RP 742.

For purposes of appeal, however, appellant may present only legal issues, not factual issues. For this reason, he raises the legal issue that the evidence was insufficient to prove any touching of

his sleeping child was for purposes of sexual gratification.

2. THE STATE AMENDED THE CHARGE IN COUNT 7.

The State oddly claims it did not amend Count 7. "The charge was not amended. Gensitskiy was charged with, and convicted of, child molestation in the second degree." Resp. Br. at 9.

The original Information charged child molestation 2° alleging a charging period of July 16, **1997**-July 15, **2003**, and citing RCW 9A.44.**086**. DSG, the alleged victim, was born July 16, 1989. CP 3-4. Thus the charging period covered a time up until her fourteenth birthday.

The Second Amended Information, CP 13-18, changed the charging period to July 16, **1994**-July 15, **2001**, and cited RCW 9A.44.**083** -- the statute for child molestation in the **first degree**. This charging period began three years earlier than originally charged, and spanned only a time **when DSG was less than age 12**. CP 15-16.

There is no question the State amended Count 7. There also is no question that it amended after it had rested its case. In fact, the Court permitted the amendment only after both parties had

rested. RP 1242. There remains a dispute as to the legal effect of these amendments.

3. DEFENSE COUNSEL OBJECTED TO AMENDING COUNT 7 AFTER THE STATE RESTED.

The State is correct that defense counsel did not articulate prejudice from the State's untimely amendments when he was first handed the proposed amended information. Neither he nor the court had reviewed it yet. Appellant's counsel apologizes for citing solely to RP 874-76 (App. Br. at 24).

When the State presented its Second Amended Information on August 8, 2012, however, counsel noted that the defense was based on people's memory, and expanding the charging periods may affect how he would have cross-examined certain witnesses. RP 1124. He repeated his objection to the amendment the following day, after all instructions were discussed, maintaining that expanding the charging periods was prejudicial. RP 1242-43.

C. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT COUNT 2.

The State agrees this count was based on the accusation that Mr. Gensitskiy rubbed Corinna's

upper inner thigh when he put her to bed before she was 7. The State cites many general cases for the general legal principles of sufficiency of the evidence. Resp. Br. at 13-17.

However, it does not address or distinguish the specific cases appellant cited: State v. R.P., 122 Wn.2d 735, 862 P.2d 127 (1993), and State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). App. Br. at 39-41. These two cases combined demonstrate that a caregiving parent's touch of a child while putting them to bed, other than the "primary erogenous areas," is legally insufficient to demonstrate a purpose of sexual gratification.

For this reason, this Court should reverse and dismiss Count 2.

2. THE COURT ABUSED ITS DISCRETION BY NOT INSTRUCTING THE JURY ON THE LIMITED PURPOSE OF IMPEACHMENT EVIDENCE WHEN IT WAS PRESENTED.

The State acknowledges the trial court "must give a limiting instruction when requested if evidence is admitted for a limited purpose." Resp. Br. at 20, citing State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). The State also acknowledges "it is usually preferable to give a

limiting instruction contemporaneously with the evidence at issue." Resp. Br. at 20. See Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969) (jury can more readily understand and apply limiting instruction if it is given when evidence is introduced). See generally Tegland, 5 Washington Practice: Evidence Law and Practice §§ 105.1-105.4 (5th ed. 2005).

The record of this case proves the harm of not instructing on the limited purpose of impeachment evidence at the time it is presented. As the State now concedes, there was insufficient substantive evidence to support a conviction on Count 6, involving Vadim. Resp. Br. at 17. The jury heard his prior inconsistent statements under ER 615 along with his direct testimony. App. Br. at 16-17, 35-38.

Here even the prosecutor and the judge became confused by what evidence was admissible for which purpose on which counts: while the prosecutor claimed she only had impeachment evidence for Count 6, involving Vadim, she later declined to dismiss the count; and the court refused to dismiss the count, allowed it to go to the jury, and ultimately

entered judgment on the verdict. App. Br. at 16-17. Yet now, even the State concedes there was insufficient substantive evidence to support this count.

The State cites State v. Ramirez, 62 Wn. App. 301, 814 P.2d 227 (1991) -- a case that did not involve impeachment evidence under ER 615 and prior substantive statements under ER 801(1)(a).[1] In Ramirez, the court declined to give an instruction during trial and offered to give a written one at the end -- an offer defense counsel declined, unlike here. The Court of Appeals held defense counsel thus waived his objection. "We therefore treat this case as one in which no limiting instruction was requested." 62 Wn. App. at 305.

Here defense counsel alerted the court to the impending issue before trial began, specifically

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[1] Ramirez was a buy/bust drug operation. The busting officer testified he saw the buying officer approach a man in a peach-colored shirt, who then led him to the defendant where he completed the buy. The defense sought to exclude the observation of the man in the peach-colored shirt; failing exclusion, he requested a limiting instruction that this evidence was "only for the purpose of explaining why Officer Martindale went from one location to another and that it's not been admitted for any other purpose." 62 Wn. App. at 304.

regarding witnesses Diana and Vadim. RP 176-79. The WPICs provide a simple pattern instruction to be given during trial, which every experienced trial judge knows. 11 Wash. Prac. WPIC 4.64 and 4.64.01. Nonetheless, counsel provided a proposed written instruction. RP 613-18. He renewed his motion to instruct the jury during the evidence. The court declined to look at the proposed instruction then. RP 714. He renewed his motion with other witnesses. RP 727-30, 1187-90.

This case involved the often-confusing purpose for which prior inconsistent statements are admitted. The trial lasted nine days, with twelve counts against five children. The State presented prior statements of witnesses for impeachment and substantive evidence throughout the trial. In this setting, it was an abuse of discretion not to give contemporaneous limiting instructions, as requested.

If learned trial counsel and an experienced trial judge cannot distinguish what evidence was admitted for which purpose, it was impossible for a jury to do so when it finally received the limiting instruction at the close of the case. There is no

way to know whether the jury's verdicts were based on substantive evidence or impeachment evidence.

This abuse of discretion requires reversal of all the counts: Counts 7-11, which involved Diana, because the State presented her prior statements under both rules of evidence without distinguishing for the jury; and Counts 2-5 involving Corinna, because much of Diana's testimony and prior statements overlapped and intersected with Corinna's version of events. See App. Br. at 13-15.

3. THE COURT ERRED BY PERMITTING THE STATE TO AMEND THE CHARGES AFTER BOTH PARTIES RESTED TO EXPAND THE CHARGING PERIODS FROM A FEW RECENT MONTHS TO MANY YEARS.

Only after both parties had rested did the court grant the State's motion to amend. When trial began, when the State rested, and when the defense presented its entire case, Mr. Gensitskiy was on trial for Counts 9, 10, and 11 -- incest 2° against Diana during four months of 2010, the summer before she moved out, when she was 20-21. CP 1-6.

Diana did not specify dates in any substantive evidence. She specifically testified she did not remember ever saying sexual contact had occurred as

recently as the summer of 2010. RP 452-53. The State presented no other evidence that it had.

Thus when the State rested, and when the defense presented its case, there was no evidence to support Counts 9, 10, and 11 as charged. In contrast, two other charges, Counts 7 and 8, encompassed the allegations of earlier years. This enormous expansion of these charging periods essentially allowed the State to add three more counts of childhood sexual abuse. The State offers no case that permits such a huge expansion of the charges after the trial was completed.

In State v. DeBolt, 61 Wn. App. 58, 61, 808 P.2d 794 (1991), the Court of Appeals concluded the charging period "is usually not a material element" of the charge. But this is not the "usual" case. In DeBolt, the amendment only expanded the period by a few months, well within the range of the original charge, to conform to the specific testimony that the crime occurred the same time as a special television show.

The specific prejudice here was permitting the jury to consider allegations that did not fall within the crimes charged during the trial.

Allowing the State to amend the charges after all evidence was completed to encompass a period of more than sixteen years violated any concept of notice of the charges for trial -- the most basic premise of due process. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

4. THE SECOND AMENDED INFORMATION DID NOT CHARGE A CRIME IN COUNT 7.

The State argues appellant cited no authority to support his claim that Count 7 did not include every element of the charged crime. Resp. Br. at 17. Appellant cited case law, see App. Br. at 43-44; and he cited the statute that sets out the essential elements of the crime:

> **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 ... 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.

(Emphasis added.) See also WPIC 44.23.

Yet the facts alleged in the Second Amended Information alleged only facts that would support child molestation in the first degree, occurring

before Diana's 12th birthday, as required by the statute cited in the charge, RCW 9A.44.083.

> Failure to allege each element means that 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).

a. Prejudice

The State argues appellant must show specific prejudice from the insufficient charge. Resp. Br. at 17-18. The law does not require this showing.

> If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the questions of prejudice.

State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); App. Br. at 43-44.

Nonetheless, this record shows prejudice by the confusion the insufficient charge created in the instructions and ultimately in the judgment and sentence. The learned trial judge himself could not tell what crime was charged, or what crime the jury returned a verdict on. If the judge cannot tell from an information what crime is charged, the charging document fails to provide adequate notice to the defendant of the crime charged.

b. State v. Smith is About Jury Instructions, Not Charging Documents.

The State cites State v. Smith, 122 Wn. App. 294, 93 P.3d 206 (2004), to support the sufficiency of its charge of child molestation 2° on Count 7.

In Smith, the challenge on appeal was to a jury instruction, not the charge itself. The Court even observed that the State "may well have been precluded from amending the information." Smith, 122 Wn. App. at 298.

In Smith, defense counsel **agreed** the State could **instruct** on a charge of rape of a child 3° to define the crime as "sexual intercourse with another person who is at least *twelve* years old but less than sixteen years."

> Both parties, as well as the trial court, were aware that the instruction was a "hybrid" of the second and third degree rape of a child definitions.

Smith, 122 Wn. App. at 297. Defense counsel there even helped formulate the instruction. Thus although the Smith court approved the agreed instruction under RCW 10.61.003, it also affirmed as invited error: the defendant was precluded from

challenging the instruction on appeal. Smith, 122 Wn. App. at 299.[2]

c. Smith Conflicts With Supreme Court Precedent.

To the extent Smith affirmed on the merits, the opinion conflicts with the Supreme Court's interpretation of RCW 10.61.003.

> An inferior degree jury instruction is appropriate when, "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; **and (3) there is evidence that the defendant committed only the inferior offense.**"

State v. Roberts, 142 Wn.2d 471, 524, 14 P.3d 713 (2000) (emphasis added); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997).

> Specifically, we have held that the evidence must raise an inference that

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[2] State v. Dodd, 53 Wn App. 178, 765 P.2d 1337 (1989), involved an anomalous issue. Dodd was charged with statutory rape 2° under the former statutes. The evidence was the child was 13, but Dodd argued he reasonably believed her misrepresentations that she was between 14 and 16. The jury convicted him of the "lesser included" offense of statutory rape 3°, the offense Dodd believed he was committing. The Court of Appeals affirmed, holding his "reasonable belief" was not a defense to the charge and permitted this conviction. Former RCW 9A.44.030(2). Compare: RCW 9A.44.030(2). No such defense was presented here.

> ***only*** the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (Court's emphasis).

Here defense counsel objected to amending the charging period consistent with a charge of child molestation 1°, although the State claimed it was still charging child molestation 2°. RP 1122-26. Yet the Information cited the statute for child molestation 1°. The trial court was sufficiently confused regarding what crime was charged that it entered judgment on child molestation 1°. CP 102-03.

The trial court effectively permitted the State to amend the charge to child molestation in the first degree after it had rested its case. There was no evidence that "only" the offense of child molestation in the second degree occurred. In fact, the jury instructions required the jury to find sexual contact occurred before Diana's twelfth birthday. CP 47.[3]

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[3] Diana was born 7/16/89; the charge and the instruction listed a charging period that ended 7/15/2001 -- before her 12th birthday. CP 15-16, 47.

This Court should abide by the Supreme Court's interpretation and reject the dictum in Smith regarding elements. It should hold it was error for the trial court to permit the amendment to Count 7 after the State rested its case -- in fact after the defense rested and the court and parties discussed instructions (RP 1242) -- and the amended information did not charge a crime.

d. Tinker Does Not Support the State's Argument.

The State analogizes the child molestation statutes to the theft statutes. It cites State v. Tinker, 155 Wn.2d 219, 118 P.3d 885 (2005), in which the State charged the crime of theft in the third degree without specifying a value of the property stolen. The comparison is inapposite.

In fact, the Tinker Court held value is an essential element of theft:

> The possibility that stolen property had value less than these thresholds makes value an essential element of these crimes, since the "specification is necessary to establish the very illegality of the behavior."

155 Wn.2d at 222. The theft statutes specifically define "value" for property or services taken when the value cannot otherwise be ascertained, as not

exceeding $250 -- thus within the definition of theft 3°. The Court did not hold that if the State charged theft of an item worth $1,500, it would fall within the definition of theft 3°.

5. TESTIMONY OF A PRIVATE COMMUNICATION OR CONVERSATION TRANSMITTED BY TELEPHONE OR ANY ELECTRONIC DEVICE WITHOUT THE CONSENT OF THE PARTIES TO THE CONVERSATION VIOLATES THE PRIVACY ACT.

a. Prohibition of This Evidence is Mandatory.

The prohibition of the Privacy Act is mandatory. RCW 9.73.050; App. Br. at 46-47. The State does not challenge this standard.

b. The Statute Applies to the Conversation Transmitted by Telephone or Electronic Device.

Without citing authority, the State claims the conversation here is not covered by the Privacy Act, RCW 9.72.030; or at most is covered by RCW 9.72.030(1)(b). Resp. Br. at 21-22.

> **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 ... 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.

The testimony was of a "private communication" ((1)(a)) or "private conversation" ((1)(b)) between Diana and her mother. It was "transmitted by telephone ... or other device between two or more individuals between points within ... the state," RCW 9.73.030(1)(a); it was intercepted "by any device electronic or otherwise designed to ... transmit such conversation," RCW 9.73.030(1)(b). Both sections of the statute cover this evidence.

The State claims the conversation was not "private" because it was broadcast on the telephone. The "broadcast" was inadvertent and unknown. In State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004), the conversation was "broadcast" over the speaker phone -- without the intent or knowledge of the two people speaking. The conversation nonetheless was held to be private.

As in Christensen, where the witness's mother chose to listen in on the call rather than hang up the phone, here Mr. Patterson chose to listen after he realized who was speaking on the phone. As in Christensen, the statements he heard must be excluded.

c. Counsel Preserved the Issue.

> The State claims defense counsel did not specifically cite to the privacy statute or name a specific subsection of the statute he believed applied, nor did he cite any case law to support his claims.

Resp. Br. at 7. Counsel objected promptly when the witness began testifying to overhearing on the telephone a conversation not intended for him. Off the top of his head, he cited a statute prohibiting listening in to private electronic conversations, and suggested RCW 9.74 as the approximate statutory citation. RP 624-26. His objection was sufficient for the trial court to render its own statutory interpretation -- that it was intended to apply to law enforcement. RP 627-28. Nothing more is required to raise the issue.

d. The Error is Not Harmless.

The error is not harmless. There were substantial issues regarding whether Diana and

Corinna were telling the truth when they testified, or had told the truth in earlier statements; whether rejoining her family pressured Diana to change her version of events, or simply helped her regain perspective; whether Corinna had in fact been abused or was using these allegations as a way to leave a traditional family to live with more freedoms and opportunities.

Mr. Patterson testified to the jury he overheard Diana and Yelena talking on the phone. RP 623-24. Although the court did not permit him to repeat what he heard Yelena say, the admission of Diana's statement to Yelena impeached both witnesses. RP 627-28, 630.

The credibility of Diana and Corinna were key factual issues for the counts of conviction. This testimony impugned Diana and her family, suggesting they were trying to improperly influence Corinna. It was extremely damaging in the balance of the evidence. It requires reversal.

D. CONCLUSION

This Court should accept the State's concessions of error and reverse and dismiss with prejudice Counts 6 and 8.

This Court should reverse and dismiss Counts 9-11 for an improper amendment to expand the charging periods from a few recent months to a period of 16 years -- after both parties had rested their evidence.

This Court should reverse and dismiss Count 7 for an improper amendment either to a different crime or to no crime at all, since it did not allege all necessary elements of any one crime.

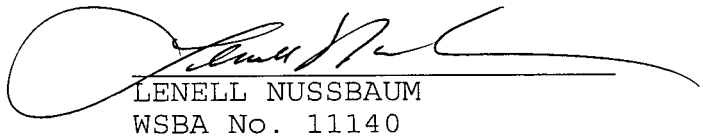
This Court should reverse the remaining convictions for the trial court's failure to timely instruct the jury on the difference between impeachment and substantive evidence, and for admitting evidence obtained from overhearing a private conversation.

To the extent any counts of conviction remain, this Court should remand for resentencing on all remaining counts, require that Count 7 be changed to a conviction for child molestation 2°, limit the Order Prohibiting Contact with Diana to ten years

instead of life, and require a determinate sentence on Counts 2 and 7.

Dated this 29th day of November, 2013.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this date I deposited a copy of the Reply Brief of Appellant into the United States Mail, postage prepaid, addressed to:

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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.

DEC. 2, 2013-SEATTLE, WA
Date and Place

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