NO. 90995-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

SERGEY V GENSITSKIY, Respondent

FROM THE COURT OF APPEALS, DIVISION I – NO. 71640-9-I
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01186-1

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

A. IDENTITY OF PETITIONER

The State of Washington seeks asks this Court to accept review of the unpublished decision in Part B of this Petition.

B. DECISION

Petitioner State of Washington seeks review of the Court of Appeals, Division I's unpublished decision filed on July 7, 2014 (Motion to Reconsider denied on October 8, 2014), reversing the conviction in Count 7 and dismissing the charge without prejudice. A copy of the opinion of the Court of Appeals is attached.

C. ISSUES PRESENTED

I. IS IT AN ESSENTIAL ELEMENT OF CHILD MOLESTATION IN THE SECOND DEGREE THAT THE VICTIM IS NOT ONLY LESS THAN FOURTEEN YEARS OLD BUT AT LEAST TWELVE YEARS OLD?

D. STATEMENT OF THE CASE

Gensitskiy was charged with numerous crimes against D.S.G (female)[1] and C.S.G, two of his children. CP 13-18. Gensitskiy was convicted of various acts of child molestation against C.S.G., as well as

[1] The record refers to two different children with the initials D.S.G.; one female and one male.

three counts of incest and one count of child molestation against D.S.G. (female). CP 80-99.

The Second Amended Information, on which Gensitskiy was tried, alleged in Count 7 that Gensitskiy had 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. CP 16.

For the first time on appeal, Gensitskiy claimed that the information charging him with child molestation in the second degree under Count 7 is constitutionally deficient because it states that the victim was under the age of fourteen at the time of the offense (without also stating that the victim was over the age of twelve). He claimed that the child being over the age of twelve is an essential element of child molestation in the second degree. He cited no authority for this claim. The Court of Appeals, Division I, agreed with Gensitskiy and found that the child being over the age of twelve is an essential element of child molestation in the second degree. The Court reversed Gensitskiy's conviction under Count 7 and dismissed the charge without prejudice.

The State seeks review of that part of the Opinion of the Court of Appeals that reversed Gensitskiy's conviction under Count 7 and dismissed the charge without prejudice.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 (b) provides the considerations governing acceptance of review. Review may be granted where:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In this petition, the State asserts that review is appropriate under RAP 13.4(b)(1), (2), (3), and (4).

Gensitskiy complained about the sufficiency of the information for the first time on appeal. The information must therefore be construed liberally, and "the defendant may prevail only if he can show that the unartful charging language actually prejudiced him." *State v. Nonong*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010).

The crime of child molestation, like the crime of rape of a child, is one crime broken into three degrees. It "proscribes but one offense." *c.f. State v. Smith*, 122 Wn.App. 294, 93 P.3d 206 (2004). In *Smith,* the defendant was charged with rape of a child in the third degree, but the jury

was instructed that it could convict the defendant if it found he had sexual intercourse with a minor who was under the age of 16. *Smith* at 298. The evidence established that Smith's victim was 13 at the time of intercourse. Smith argued on appeal that the State was relieved of its burden of proving an essential element of the case, to wit: that the victim was at least fourteen years of age. The Court of Appeals rejected this argument, holding that the State having proved a greater crime does not translate into it *not* having proved the lesser and inferior degree crime with which the defendant was charged. *Smith* at 298-99, citing *State v. Dodd*, 53 Wn.App. 178, 181, 765 P.2d 1337 (1989), and *State v. Foster*, 91 Wn.2d 466, 471-72, 589 P. 2d 789 (1979).

An essential element is "one whose specification is necessary to establish the very illegality of the behavior." *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) citing *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). In this case, sexual contact with a child under the age of fourteen, provided the perpetrator is sufficiently older than the victim, is the illegal act. The age of the victim determines the severity of the crime (under age twelve, age twelve to fourteen, age fourteen to sixteen), but not the illegality of the behavior.

Gensitskiy, citing no case in support of this assignment of error, contends that the crime of child molestation in the second degree contains

a floor and a ceiling—that not only must the victim be under the age of fourteen, she must also be at least twelve years old. The Court of Appeals, also citing no case in support of this novel interpretation of the law, agreed.

The Court's opinion stands contrary not only to the cases cited by the State above, which were neither discussed nor even mentioned in the opinion, but to the opinion of the Court of Appeals in *State v. Leyda,* 122 Wn.App. 633, 94 P.3d 397 (2004), as well as the Supreme Court opinions in *State v. Leyda,* 157 Wn.2d 335, 138 P.3d 610 (2006), and *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), infra. The State cited apposite authority which held that the gravamen of the offenses of child molestation and rape of child is that the victim fall under a certain age (in this case, fourteen). In *Smith*, supra, in which the defendant was convicted of third degree rape of a child, the defendant argued that the to-convict instruction misstated the law because it told the jury that a person was guilty of rape of a child in the third degree if the perpetrator had intercourse with a person who is "at least twelve years old but less than sixteen years." The defendant argued that because the victim was thirteen years old when he raped her, the instruction relieved the State of its burden of proving that the victim was at least fourteen years old, as proscribed by the statute. In other words, the defendant complained that he was charged

with rape of a child in the third degree when the State actually proved that he committed rape of a child in the second degree, a far more serious offense. To make this argument, the defendant asserted that the victim being at least fourteen years of age was an essential element of rape of a child in the third degree.

The Court of Appeals rejected his argument:

> But, as amended, the definitional instruction and the unchallenged elements instructions did not relieve the State of its burden of proving all essential elements of the crime of rape of a child. K.C.'s testimony, if found credible by the jury, established that Smith committed the crime of rape of a child, and that, in at least two instances, he committed second degree rape of a child rather than third degree rape of a child. *The fact that the victim was younger than the age range in the third degree rape of a child statute does not mean that the defendant did not commit the proscribed act of having sexual intercourse with a child.* See *State v. Dodd,* 53 Wn.App. 178, 181, 765 P.2d 1337 (1989)
>
> In *Dodd,* a jury convicted the defendant of third degree statutory rape even though the victim was actually 13 years old. 53 Wn.App. at 179–80, 765 P.2d 1337. The defendant argued that he reasonably believed that the victim was between 14 and 16 years of age. *Dodd,* 53 Wn.App. at 179–80, 765 P.2d 1337. The *Dodd* court noted that the act was still an illegal act whether the victim was 13 or 14 and that defendant's reasonable mistake as to the victim's age was not a defense, so long as the defendant believed the victim was less than 16 at the time the crime was committed. 53 Wn.App. at 181, 765 P.2d 1337.[1] We agree with *Dodd* that "third degree statutory rape is a crime of inferior degree to second degree statutory rape, as each proscribes but one offense, that of sexual intercourse with one too immature to rationally or legally consent to the act." 53 Wn.App. at 181, 765 P.2d 1337. The evidence established that K.C. was 13

> years old at the time of the June 2000 acts and that Smith committed the proscribed offense, that is, sexual intercourse with a minor under 16 years of age.
>
> Here, the State charged Smith with a lesser offense than that proved by the evidence. While it may well have been precluded from amending the information and have been bound to continue with the lesser charge filed, *it does not follow that proof of the greater charge requires acquittal of the lesser*. To the contrary, proof of a greater necessarily establishes proof of all lesser included offenses. Likewise, a defendant may be convicted of an offense that is an inferior degree to the one charged, provided that the statutes, as here, proscribe but one offense.

Smith, 122 Wn.App. at 298-99 (emphasis added).

In essential elements parlance, "the very illegality of the behavior" for purposes of child molestation in the second degree is sexual contact with a person who is under the age of fourteen, not sexual contact with a person who is under the age of fourteen but at least twelve years old. Under the construction of the statute adopted by the Court of Appeals, child molestation in the second degree is no longer a lesser included offense of child molestation in the first degree. Under the construction of the statute adopted by the Court of Appeals, if the State proves beyond a reasonable doubt that a child was molested when she was under the age of fourteen, but cannot prove whether she was eleven or twelve because the victim simply cannot remember that minor (from her point of view) detail,

then no crime has been committed. None. This is an absurdity the legislature cannot possibly have contemplated.

Moreover, under the construction adopted by the Court of Appeals, theft in the second degree could no longer be proven where the State proves beyond a reasonable doubt that the defendant stole property or services in the amount of $6,000. Applying the reasoning adopted in this case, the Court of Appeals would hold that the State must allege the higher crime (theft first degree) or no crime at all. This is so, according to the Court, because a charging document charging theft in the second degree must include the new essential element the property or services did not exceed five thousand dollars in value.

As noted above, Gensitskiy cited no authority for his assertion that "at least twelve years old" is an essential element of child molestation in the second degree. After citing incomplete boilerplate case law on the essential elements rule, the following comprises his sole treatment of this issue:

> The State claimed to be charging child molestation in the second degree. Yet it failed to include the essential statutory element that the victim was "at least twelve years old." RCW 9A.44.086(1). There is no conceivable form or fair construction by which this element can be found in Count 7. The charging period, in fact, ended before D.S.G.'s (female) twelfth birthday. The language of Count

> 7 was constitutionally deficient to charge a crime. That count must be dismissed.

See Brief of Appellant at 44.

In other words, Gensitskiy claimed and the Court of Appeals agreed, without any citation to authority, that it is a settled proposition that "at least twelve years old" is an essential element of child molestation in the first degree. This is so, Gensitskiy and the Court claim, because the words "at least twelve years old" appear in the statute.

But this anemic argument has been rejected several times by this Court as well as the Court of Appeals. In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), this Court addressed the question of whether, in charging and proving felony violation of a no contact order, the State must plead and prove that the assault which gave rise to the charge did not amount to an assault in the first or second degree. The appellant contended that because the statute said that any assault that is a violation of a no contact order "that does not amount to assault in the first or second degree is a class C felony," that the assault not amounting to first or second degree was an essential element which the State must plead and prove. This Court rejected this argument:

> We reiterate that the statutory scheme provides that "[a]ll assault convictions connected to violation of a no-contact order will result in a felony, either through the assault itself

> or through the application of subsection (b) [of RCW 10.99.040(4)]." *State v. Azpitarte*, 140 Wn.2d 138, 142, 995 P.2d 31 (2000).
>
> If we were to interpret the statutory language as requiring the State to disprove assault in the first or second degree as an essential element of felony violation of a no-contact order, the defendant would be placed in the awkward position of arguing that his conduct amounts to a higher degree of assault than what the State has charged. Such an interpretation does not advance the legislature's purpose of assuring victims of domestic violence maximum protection from abuse (RCW 10.99.010), nor does it support the statute's intent to penalize assaultive violations of no-contact orders more severely than non-assaultive violations (former RCW 10.99.040(4)(b) and 10.99.050(2)).

Ward at 812-13.

This Court was unpersuaded that the mere presence of the passage "that does not amount to assault in the first or second degree" in the statute meant that it was an essential element on which the very illegality of the act rests.

Similarly, in the theft context, the Court of Appeals held, in *State v. Leyda*, that value is not an element of identity theft in the second degree or theft in the third degree:

> The references to value in each of these statutes establishes a ceiling above which the offense is elevated to a higher degree, *not a floor that must exist* to support the charge or conviction. Thus, value is not an essential element of either second degree identity theft or third degree theft, and need not be alleged in the charging document or included in jury instructions to convict a defendant of the crimes.

State v. Leyda, 122 Wn.App. 633, 639-40, 94 P.3d 397 (2004) (emphasis added). This Court affirmed this portion of the decision in *Leyda*, citing to its recent decision in *State v. Tinker*, 155 Wn.2d 219, 118 P.3d 885 (2005):

> We recently addressed this issue insofar as it related to a charge of third degree theft. In *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005), we held that value is not an essential element of third degree theft, reasoning that value is only an essential element of the first and second degree theft statutes because these charging statutes explicitly state a "*minimum* value threshold." We are not inclined to depart from the holding we reached in that case and affirm Leyda's third degree theft convictions.

State v. Leyda, 157 Wn.2d 335, 341, 138 P.3d 610 (2006).

The reasoning employed by the Court of Appeals in this case, transferred to the theft context, would hold that if a prosecutor charges someone with theft in the second degree, but proves at trial that the actual value of the property or services stolen was $6,000 (rather than an amount not exceeding $5,000), the evidence supporting the conviction for theft in the second degree would be insufficient as a matter of law. This was precisely the argument rejected by the Supreme Court in *Leyda* and *Tinker*.

As is so often the situation in cases of sexual abuse of children, the victim often cannot recall exactly how old he/she was when he/she was raped or molested. The children must therefore use reference points. The following hypothetical illustrates how these facts often play out at trial:

Prosecutor: Do you remember how old you were when your uncle did these things?

Victim: No.

Prosecutor: Can you remember where you were living when it happened?

Victim: I was living in the green house on Mockingbird Lane.

Prosecutor: Do you remember what grade you were in when you were living in the green house on Mockingbird Lane?

Victim: Fifth or sixth grade.

The prosecutor then calls the victim's mother to testify:

Prosecutor: Do you remember how old Jane Doe was when you were living in the green house on Mockingbird Lane?

Mother: We moved there when she was eleven and moved out when she was twelve.

Prosecutor: Do you remember what grade she was in when you lived there?

Mother: Fifth and sixth.

Prosecutor: Was there a specific time period when her uncle would visit you all at that house?

Mother: He came to visit every single weekend we lived there.

Prosecutor: Is it possible that Jane Doe was older than twelve when you lived there?

Mother: No, we moved out right after she finished sixth grade. We lived in a different house when she started middle school. She was twelve when we moved.

Thus, as the above hypothetical illustrates, it is often the case that the State can prove a victim was under a particular age (such as 14) when the abuse occurred, but cannot prove that she was over a particular age. Under the Court of Appeals' holding in this case, the State must either plead and prove first degree child molestation with the child being under the age of twelve (which, under the above hypothetical, the State could not prove), or plead and prove second degree child molestation with the added element that the victim was at least twelve years old (which, under the above hypothetical, the State *also* could not prove). Under the Court's reasoning, there would be no crime at all where the State cannot prove one or the other (age eleven or twelve), even though the State unquestionably proved the victim was under the age of fourteen.

There is no authority to support the Court of Appeals' holding in this case. Indeed, no authority is cited by Gensitskiy or by the Court for this novel holding. The Court of Appeals held, for the first time in Washington, that the State must plead and prove that a child was at least twelve years of age in a prosecution for child molestation (or child rape) in the second degree, and must plead and prove that a child was at least

fourteen years of age in a prosecution for child molestation (or child rape) in the third degree. The Court 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 in *not* a lesser included offense of child rape in the second degree.[2] The Court of Appeals made these holdings with almost no analysis and no citation to authority beyond the plain language of the statute.

This Court should accept review of the decision holding that it is an essential element of child molestation in the second degree that the victim was "at least twelve years of age" at the time of the offense, and should reverse the holding of the Court of Appeals on this issue.

Review in this case is warranted under RAP 13.4(1) and (2) because the decision is in conflict with another decision of the Supreme Court and the Court of Appeals; under RAP 13.4(3) because it involves a significant question of law under the Constitution of the State of Washington and the United States Constitution; and under RAP 13.4(4) because it involves an issue of substantial public interest which should be reviewed by the Supreme Court.

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[2] The same would be true for rape of a child.

F. CONCLUSION

The State respectfully asks this Court to accept review of the decision of the Court of Appeals reversing and dismissing Count 7 with prejudice.

DATED this 5th day of November, 2014.

Respectfully submitted:

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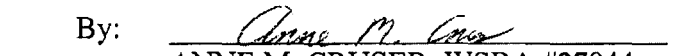
By: 
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APPENDIX

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:

CLARK COUNTY PROSECUTOR

November 05, 2014 - 9:58 AM

Transmittal Letter

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Case Name: State v. Sergey Gensitskiy
Court of Appeals Case Number: 71640-9

Party Respresented: State of Washington
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Trial Court County: ____ - Superior Court # 11-1-01186-1

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