No. 72913-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAREN MORALES,

Appellant.

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

APPELLANT'S SUPPLEMENTAL ANSWER

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A. SUPPLEMENTAL ANSWER

Under State v. Goss, this Court may reverse and remand with instructions to impose a sentence for child molestation in the second degree.

Appellant Daren Morales reiterates his position that the sentence for child molestation in the first degree imposed against him cannot stand because it is not supported by a jury verdict. "The right of trial by jury shall remain inviolate...." Art. I, Sec. 21. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. VI. "The term 'inviolate' connotes deserving of the highest protection." Davis v. Cox, 183 Wn.2d 269, 288-89, 351 P.3d 862 (2015) quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

"[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). The trial court should not have relied on CrR 7.8 to change the verdict. The sentence for child molestation in the first degree was illegal and must be vacated.

This supplemental filing addresses the Court's request that Mr. Morales answer whether in light of State v. Goss, No. 93374-8, slip op. at 5 (Wash. Aug. 18, 2016), there is insufficient evidence to convict him of child molestation in the second degree.

Child molestation in the second degree is defined as sexual contact with another who is under 14 years old but more than 12 years old by someone who is at least three years older than that child. RCW 9A.44.086. Previously, Mr. Morales argued that because complainant G.C. was just less than twelve years old even at the conclusion of the charging period, there was insufficient evidence to sustain a violation of RCW 9A.44.086. AOB at 25-26.

State v. Goss undoubtedly impacts this analysis. Goss argued

> that the charging document [in his case] was fatally defective because it did not allege the victim was at least 12 years old as required… by the second degree child molestation statute, RCW 9A.44.086; due process; the Sixth Amendment to the United States Constitution; and Alleyne v. United States, —— U.S. ——, 133 S.Ct. 2151, 2161, 186 L.Ed.2d 314 (2013).

Goss at 2.

Goss further argued "that the low end of the age range is an essential element of the crime that must be charged and proved and that the three degrees of child molestation are analytically separate crimes,

not greater or lesser degrees of each other." Id. at 3. Taking a position analogous to what Mr. Morales has argued to date in his appeal, at oral argument, Goss contended that "a defendant charged with second degree child molestation would be necessarily acquitted if the victim testified at trial she was less than 12." Id. at 3. However, the Supreme Court found that position "untenable both as a matter of statutory construction and constitutional law." Id.

Goss lost. The unanimous Supreme Court "agree[d] with the State that the lower limit of the age range is not an element of child molestation under either Washington law or the federal constitution." Id. at 2. The Supreme Court explained that the "lower age limit (unlike the highest) is not a fact whose specification is necessary to establish the very illegality of the behavior charged." Id. at 4 (emphasis added) (internal citations omitted). In this respect, the Supreme Court favored this Court's reasoning: "That E.F. may have been younger than the lower age specified in the second degree child molestation statute does not mean that Goss did not commit sexual molestation." State v. Goss, 189 Wn. App. 571, 577–78, 358 P.3d 436 (2015), review granted in part, 185 Wn.2d 1001, 366 P.3d 1243 (2016), and aff'd, 92274-8, 2016 WL 4401905 (Wash. Aug. 18, 2016).

Likewise, the Supreme Court found that "the lower age limit does not need to be treated as an element under the [Sixth Amendment] line of cases," because it "is not a fact that will increase the penalty the defendant faces." Id. at 5.

Mr. Morales accepts that under the new authority of State v. Goss, this Court may reverse and remand with instructions to sentence him for child molestation in the second degree. However, he maintains that the error with respect to the expert witness requires reversal for a new trial. No matter how the Court resolves this appeal, the conviction and sentence for child molestation in the first degree must be vacated.

B. CONCLUSION

For the reasons stated herein and in prior briefing, Mr. Morales requests this Court reverse and remand for a new trial, reverse and dismiss his conviction, or grant any other remedy it sees fit, including the entry of a standard range sentence on child molestation in the second degree pursuant to State v. Goss.

DATED this 8th day of September, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **SUPPLEMENTAL ANSWER OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONALD PORTER, DPA [paoappellateunitmail@kingcounty.gov] [donald.porter@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( )	U.S. MAIL
	( )	HAND DELIVERY
	(X)	AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF SEPTEMBER, 2016.

X_____

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