NO. 43040-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNIE GERARD BROWN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 11-1-03594-0

Response Brief

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B. STATEMENT OF THE CASE.

1. Procedure

In 2001, the defendant was charged with two counts of rape of a child in the second degree and one count of incest in the first degree under cause number 01-1-03585-3 [not this case]. CP 120. A jury trial commenced on April 17, 2002, during which the defendant failed to appear. CP 120. The court issued a warrant for Brown's arrest. CP 120. The trial proceeded in the defendant's absence, and he was convicted on all three counts. CP 120. However, because he was absent, he could not be sentenced. RP 01-1-03585-3 (09-02-11) p. 2-9; RP 09-06-11, p. 3, ln. 15 to p. 4, ln. 12. [1]

In 2011, after his status aired on the television show America's Most Wanted, Brown was located in St. Louis, Missouri by the Bail Bond

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[1] The transcript of the September 6 arraignment does not contain page numbers. For purposes of reference, the State has referred to the title page as page 1, and counted the remaining pages as numbered consecutively. Neither does the transcript clearly identify which deputy prosecutor appeared at the September 6, 2011 arraignment. The implication is that the court reporter was a temporary fill-in and failed to record the name of the deputy prosecutor, who is only listed as "Male Prosecutor," and the female barrel deputy as "Female Prosecutor." Neither does the scheduling order identify which deputy prosecutor appeared as it is electronically generated with the electronic signature of the female barrel deputy for the State. CP 121. However, notes on the State's file indicate that Mr. Greer appeared on behalf of the State. The State recognizes that this information is not contained in the official record before the court. The State includes that information only because the State does not anticipate that the defense will dispute that fact where it is not material to any issue in the case, but the information does provide background context that is helpful for understanding the origin of some of the confusion occurs later in the case. *See* Appendix A (Declaration of Stephen Trinen).

company and returned to custody in Washington. CP 120; RP 09-06-11, p. 4, ln. 3-6.

On September 2, 2011, Brown appeared in court before the Honorable James Orlando for what was scheduled to be a sentencing on cause number 01-1-03585-3, the rape case. RP 09-02-11, p. 2, ln. 2-8. However, Brown's attorney was not present and the public defender was unprepared to represent him in the sentencing, so the sentencing was rescheduled to a later date. RP 09-02-11, p. 2-10. However, the State also filed a new information under cause number 11-1-03594-0 [this case] charging Brown with one count of bail jumping based upon his failure to appear in cause number 01-1-03585-3 in 2001. RP 09-02-11, p. 10, ln. 7-20; CP 1-2.

The public defender who was representing the defendant on a standby basis noted that he expected the statute of limitations had probably run on the bail jumping as he imagined it [the statute of limitations] was three years. RP 09-02-11, p. 10, ln. 21-24. The court responded,

> "It's probably three years from the time you're found, as opposed to if you are absconding. I think it would seem to toll the statute."

RP 09-02-11, p. 10, ln. 25 to p. 11, ln. 2.

Arraignment on the bail jumping charge in this case [cause number 11-1-03594-0], was held on September 6, 2011, before the Honorable D. Gary Steiner. RP 09-06-11, p. 3, ln. 1-14. In addition to the State's assigned barrel deputy, Mr. Greer appeared on behalf of the State at that hearing, however after that hearing Mr. Greer no longer appeared for the State, with Deputy Prosecuting Attorney Patrick Hammond instead subsequently representing the State. At the arraignment, the defense did not raise an argument regarding the statute of limitations. RP 09-06-11, p. 2-5.

The omnibus order did not indicate that the defense would challenge jurisdiction. CP 122-24.

On December 7, 2011, the case was formally assigned to the Honorable Judge Frank Cuthbertson for trial. CP 131. However, the parties reported to the courtroom to discussed preliminary matters before the court the day before on December 6. 1RP 4-18. On December 6, 2011, the defense filed a memorandum arguing that the filing of the bail jumping charge violated the mandatory joinder rule so that the charge of bail jumping should be dismissed. CP 125-30. The court denied that motion. 1RP 19, ln. 16 to p. 20, ln. 1.

Jury selection was completed on December 7 and a jury empaneled at 2:30 p.m. CP 133-34; 1RP 23, ln. 5-6.

Prior to the start of the second day of trial, the State advised the court that defense counsel had given notice that it wanted to call one Jeffrey Antonio Willis, an inmate in the Pierce County Jail, as a witness to testify that he knew the defendant since the early 1990s and that about three or four years earlier Willis had run into the defendant in Pierce County on occasion, the most recent being 2008. 2RP 14, ln. 13 to p. 14, ln. 5; p. 15, ln. 2-9. The State sought to exclude the Willis's testimony as irrelevant and sought the court's ruling on the matter before proceeding, because if Willis were permitted to testify, the State would want to call a witness from Vancouver Washington to rebut Willis's testimony. 2RP 15, ln. 6 to p. 16, ln. 25.

The defense responded by arguing that Willis's testimony was relevant because, where the information was filed nine years and 110 days after the bail jumping occurred, the State was required to prove at trial why the Statute of Limitations was tolled beyond the general three year time limit. 2RP 17, ln. 11-17. In that context, defense counsel claimed that he raised the issue at Brown's arraignment on September 2, 2011.

At trial, defendant repeatedly moved the court to require the State to prove to the jury that the Statute of Limitations had tolled. 2RP 14–22; 3RP 33–34. Defendant first raised this issue during trial when he moved the court to include testimony from Jeffrey Antonio Willis—a witness not previously disclosed on defendant's witness list—who he wanted to testify to defendant's whereabouts between the time of his bail jump and arrest.

2RP 14–17. The defense apparently believed that because statutes of limitations are jurisdictional, the State was required to prove that the statute had tolled as a jurisdictional element. 2RP 14–22.[2]

The State replied that it did not believe the question was a factual issue for the jury, but rather that it was a legal issue, and that if the arraignment Judge had ruled on the issue, it was the law of the case. 2RP 17, ln. 20 to p. 18, ln. 2. The State inferred [incorrectly] that the arraignment judge had ruled on the issue because the case had proceeded to jury trial rather than being dismissed. 2RP 18, ln. 8-10.

The court held that Willis was not timely disclosed as a witness, that his testimony was not relevant, and granting the State's motion to exclude the witness from testifying at trial. 2RP 18, ln. 16 to p. 19, ln. 2.

In response, defense counsel asked the court to look at RCW 10.37.100 at that time. 2RP 19, ln. 9-10. The defense argued that the statute requires the State to prove jurisdiction of the charge at trial. 2RP 19, ln. 24-4; RCW 10.37.100. Defense counsel went on to argue that cases clearly establish that the statute of limitations is jurisdiction, and that a statute of limitations challenge may be raised for the first time on appeal. 2RP 20, ln. 1-4.

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[2] Defense counsel incorrectly refers to the Judge at arraignment as the Honorable Judge Felnagle, when in fact it was Judge Orlando, and the State follows in that until defense counsel corrects the name of the judge. *See* 2RP 18, ln. 3-7.

The court responded that Judge Orlando had ruled on the statute of limitation issue. 2RP 20, ln. 5-8. Defense counsel interjected and corrected the court that while Judge Orlando said the statute would be tolled in the event the defendant was absent for the nine plus years, Judge Orlando did not in fact rule on the issue. 2RP 20, ln. 9-14. Defense counsel explained that at the time he did not represent Brown, who had no attorney present, and that he had not even spoken with Brown at that point, so that he was only acting as standby counsel on the underlying charge and that he merely noted that it looked like there was a statute of limitations issue, to which Judge Orlando responded that if the State could show Brown was absent, then there would be tolling. 2RP 21, ln. 12 to p. 22, ln. 1.

The trial court concluded, based on a 1924 case, that the statute applies only to the manner of pleading, and that in any case, there had been a prior ruling on the jurisdictional issue and therefore stood by its decision to preclude Willis from testifying. 2RP 22, ln. 12-23.

After the State rested, Defense counsel advised the court that where the court precluded him from calling Willis as a witness, he wished to call the defendant to testify in order to make an offer of proof on where Brown was living and when, so that there would be a record of that, after which, the defense would rest. 3RP 34, ln. 21-24.

The court allowed the defense to put Brown on the stand in order to make their offer of proof. 3RP 34, ln. 5-14. Brown testified that

between the time of April 23, 2002, and August of 2011, he was living in Puyallup. 3RP 35, ln. 5-7. His exact answer was, "2002, in Puyallup." 3RP 35, ln.8. Brown claimed that he resided with a friend in Puyallup for close to two years, and after that he moved back to Tacoma and stayed there for about three years total 3RP 36, ln. 10-22. Brown claimed that he then moved to Ohio and resided with his Dad for about five months, and then moved to St. Louis Missouri for three years. 3RP 37, ln. 1-13. It was while he was residing in St. Louis that he was arrested on the warrant. 3RP 38, ln. 3-7.

For purposes of its offer of proof, on the issue, the State relied on the previously accepted [but not admitted to the jury] statement of the Metro Bail Bonds motion to recover forfeited bail that had been filed in 01-1-03585-3. CP Exhibit 12.

In order to avoid having the charges on the underlying case put before the jury, and thereby possibly prejudicing them against the defendant, the parties entered a stipulation in which he waived his right to have the jury determine the element that he was charged with a Class A felony on cause number 01-1-03585-3. CP 13; 1RP 5, ln. 3 to p. 10, ln. 11; 2RP 4, ln. 11 to p. 14, ln. 9; 3RP 46, ln. 18 to p. 47, ln. 4.

The defendant submitted multiple sets of selected proposed instructions, each of which contained identical copies of the "to convict" instruction for bail jumping. CP 24-22, 27, 30. The jurisdictional element in each was only geographical, and none included a proposed element or

requirement that the State prove the statute of limitations had not expired. CP 22-24. The court accepted the defendant's "to convict" instruction. 3RP 47, ln. 8-14. Accordingly, the court's instruction did not include any burden relating to the statute of limitations with regard to the jurisdictional element. CP 79. Nor did the defense take exception to the court's instruction. 3RP 47, ln. 25 to p. 51, ln. 11.

On December 9, 2011, the jury returned a verdict finding Brown guilty of bail jumping. 3RP 66, ln. 20 to p. 68, ln. 24; CP 84. The defense also filed a memorandum in support of defendant's motion to dismiss re: jurisdiction that they expected to argue at the time of sentencing. 3RP 69, ln. 17-19; CP 67-69.

At the sentencing hearing, held February 3, 2012, the defense moved to dismiss the case for lack of jurisdiction on the basis that the State failed to prove at trial that the statute of limitations tolled and did not expire before the charge was filed. RP 02-03-12, p. 3, ln. 4-16. This was one of several issues the defense raised. RP 02-03-12, p. 3, ln. 4 to p. 5, ln. 6. The court never asked the State to respond to the motion to dismiss for lack of jurisdiction, nor did the court rule on the issue. *See* RP 02-03-12, p. 11, ln. 25 to p. 12, ln. 24. *See generally*, RP 02-03-12, p. 5, ln. 7 to p. 12, ln. 23. The record is silent as to whether that was because the court believed it had already considered and ruled on the issue when it excluded Willis as a witness, or because the court lost track of it in the course of considering the defendant's other sentencing motions. The court

sentenced Brown to 68 months, consecutive to cause number 01-1-03585-3. CP 91.

Brown timely filed a notice of appeal on February 8, 2013. CP 102-113.

This is the State's response to the appellate brief of the defendant.

C. ARGUMENT.

The defense claim on appeal is that where this case was filed nine years after the crime occurred, it was filed beyond the statute of limitations because the State failed to prove that the tolling provision applied to extend the statute of limitation. Relying on Court of Appeals opinions that refer to the statute of limitation as "jurisdictional," the defense position is that because the court lacked jurisdiction to consider the case, it must be dismissed.

The defense position is flawed for a number of reasons.

The issue in this case stems from some confusion between the trial court and the parties as to whether there had been a hearing in front of a different court (at arraignment) to determine whether the statute of limitations had tolled. Further, as the State argues here, the parties' confusion—and at issue here on appeal—stems from RCW 9A.04.080's ambiguity as to how the defense properly raises a challenge to the statute of limitations, and who carries the burden to prove the statute has tolled. The statute is wholly silent on these questions.

1. THE THREE YEAR STATUTE OF LIMITATION APPLICABLE TO BAIL JUMPING UNDER RCW 9A.04.080 DOES NOT RUN WHEN THE DEFENDANT IS NOT USUALLY AND PUBLICLY RESIDENT WITHIN THE STATE

The statute of limitations bars prosecutions of felony bail jumping that occur more than three years after their commission, however, the period of limitation does not run during any time when the person charged is not usually and publicly resident within the state:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
> . . . .
> (h) No other felony may be prosecuted more than three years after is commission; . . . .
> . . . .
> (2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

RCW 9A.04.080(1)(h), (2).[3]

Although the Washington State Supreme Court has not expressly defined what constitutes "usually and publicly resident" within the state, it has clarified that a statute of limitation does not run when a defendant relocates—for any purpose—to another state. *See, e.g.*, ***State v. Willingham***, 169 Wn.2d 192, 194, 234 P.3d 211 (2010) (recognizing that tolling applies when a defendant is incarcerated in another state, the

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[3] The statute proscribes different periods of limitations for specified felonies, and includes a catch-all provision—subsection (1)(h)—for felonies not expressly identified. Bail jumping falls into this latter category.

defendant purposefully leaves the state to avoid authorities, or even when the defendant openly resides in another state and the state knows about his location). However, mere absence from the state is insufficient to toll a statute of limitation. ***Willingham***, 169 Wn.2d. at 194–95 (holding that statute was not tolled where defendant was temporarily absent from the state for two weeks for workplace training). Similarly, where a defendant is in a neighboring count's jail cell did not mean that he was not usually and publicly resident within the state. ***State v. Walker***, 153 Wn. App. 701, 224 P.3d 814 (2009).

The limitation period did not run for the time where a defendant lived in another state, the defendant had not concealed himself in that state, remained in contact with his parole officer, and paid restitution in Washington. ***State v. Israel***, 113 Wn. App. 243, 54 P.3d 1218 (2002), *review denied* 149 Wn.2d 1015, 69 P.3d 874. *See also*, ***State v. King***, 113 Wn. App. 243, 293-94, 54 P.3d 1218 (2002); ***State v. McDonald***, 100 Wn. App. 828, 832-33, 1 P.32 1176 (2000); ***State v. Newcomer***, 48 Wn. App. 83, 91-92, 737 P.2d 1285 (1987). Nor is it necessary that the defendant have the intent to conceal his whereabouts. ***Sate v. Ansell***, 36 Wn. App. 492, 675 P.2d 614 (1984) (holding that the defendant's absence from the state was sufficient to toll the statute of limitations notwithstanding that he lacked an intent to conceal his whereabouts, and even though the

defendant's address within the other state was known to authorities, the defendant was living openly, and he was available for prosecution at all times).

What these cases stand for is that if the defendant abandons his residence in Washington, or takes up residence in another state, the statute of limitations is tolled, while if the defendant still resides in Washington, but temporarily leaves the state, the limitation is not tolled.

2. CONTRARY TO THE OPINIONS OF THE COURT OF APPEALS, THE STATUTE OF LIMITATIONS IS NOT A JURISDICTIONAL LIMIT ON THE COURT.

a. The Statute Of Limitation Is A Bar Upon The Authority Of The State To Prosecute The Charge And Is Not Jurisdictional Upon The Court.

"Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution." ***State v. Norman***, 145 Wn.2d 578, 40 P.3d 1161 (2002).

Due process requires the State to prove each essential element beyond a reasonable doubt. ***State v. Hanna***, 123 Wn.2d 704, 710, 871 P.2d 135 (1994) (citing ***In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970)). "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged.*" ***In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970)

(emphasis added). Essential elements pertain to facts essential to a defendant's *guilt*, specifically whether the defendant committed the crime charged. *See* ***State v. Smith***, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (finding that a to-convict instruction must include all of the essential elements of a crime "because it serves as a 'yardstick' by which the jury measures *the evidence to determine guilt or innocence*") (emphasis added)).

"An essential element of a crime is one that must be proven to 'establish the very illegality of the behavior.'" ***State v. Tellez***, 141 Wn. App. 479, 482–83, 170 P.3d 75 (2007) (quoting ***State v. Johnson***, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The element need not be defined in the statute defining the crime in order to be considered essential. *Id.* at 483. However, it is sufficient to charge in the statute's language if it defines the offense with certainty. ***State v. Kjorsvik***, 117 Wn.2d 93, 99, 812 P.2d 86 (1991).

The effect of the statute of limitations in criminal cases imposing a[n absolute] bar to prosecution has been referred to in some court of appeals cases as jurisdictional. *See* ***Walker***, 153 Wn. App. at 705 (citing ***State v. Eppens***, 30 Wn. App. 119, 124, 633 P.2d 92 (1981); ***Ansell***, 36 Wn. App. at 496 (citing ***Eppens***, 30 Wn. App. at 124). *But see* ***State v. Hodgson***, 108 Wn.2d 662, 668, 740 P.2nd 848 (1987) (referring to prosecutions as being time barred [but not referencing jurisdiction] after the expiration of the period designated in the statute of limitation).

In ***Eppens***, the case relied upon in both ***Walker*** and ***Ansell***, the Court of Appeals asserted that the statute of limitations creates an absolute bar to prosecution. ***Eppens***, 30 Wn. App. at 124. The court in ***Eppens*** distinguished between effect of a statute of limitation in criminal cases, where it is an absolute bar to prosecution, from civil cases, where such a statue provides repose and a limitation on remedies. ***Eppens***, 30 Wn. App. at 124. In support of this proposition, the court in ***Eppens*** cited to ***State v. Glover***, as well as two cases, one for the 6th Circuit court of appeals, and another from Idaho. ***Eppens***, 30 Wn. App. at 124 (citing ***State v. Glover***, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979); ***Benes v. United States***, 276 F.2d 99, 108-109 (6th Cir. 1960); ***State v. Steensland***, 33 Idaho 529, 195 P. 1080, 1081 (1921). However, the court in ***Eppens*** did not look to the language of the Washington statute compared to the other states, nor did it consider Washington's prior history of the treatment of statutes of limitation other than ***Glover***.

Indeed, the earliest case the State could find that referred to the criminal statute of limitation as jurisdictional is the Court of Appeals 1979 in ***Glover***, which relies upon cases from other jurisdictions in support of that proposition. *See* ***State v. Glover***, 25 Wn. App. 58, 604 P.2d 1015 (1979) (citing ***Waters v. United States***, 328 F.2d 739 (10th Cir. 1964); ***State v. Fogel***, 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (1972); ***People v. Rehman***, 62 Cla.2d 135, 396 P.2d 913, 41 Cal. Rptr. 457 (1964); ***People v. Kohut***, 30 Ny.2d 183, 282 N.E.2d 312, 331 N.Y.S.2d 416

(1972)). However, the court in ***Glover*** also noted contrary authority. *See* ***Glover***, 25 Wn. App. at 61 (citing ***United States v. Wild***, 551 F.2d 418 (D.C. Cir. 1977).

Ultimately relying upon ***Glover*** for the proposition that the statute of limitations is jurisdictional, in some opinions the Washington Court of Appeals has gone on to assert that a challenge based on the statute of limitations may be raised for the first time on appeal. *See, e.g.*, ***State v. Israel***, 113 Wn. App. 243, 293–94, 54 P.3d 1218 (2002); ***State v. Ansell***, 36 Wn. App. 492, 496, 675 P.2d 614 (1984). However, that standard is relatively recent and repeats the same analytic flaw as ***Glover***.

The State has been unable to find any case by the Washington Supreme Court that treats the statute of limitations as jurisdictional. The Washington Supreme Court has held that a different statute of limitation is not a jurisdictional bar, such that equitable tolling may apply to it. ***In re Bonds***, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) (interpreting RCW 10.73.090). However, that provision may be distinguishable from RCW 9A.04.080 insofar as the former is statutory limit on the defendant for pursuing collateral attacks.

Although Washington courts have not yet considered the issue of whether the statute of limitations is an essential element of the crime, several courts have considered whether the statute of limitations had run in a specific case. Generally, these cases can be separated into three groups: (1) the reviewing court considers whether the trial court in each case had

properly considered the evidence that the defendants were not publicly and usually resident within the state; (2) the reviewing court considers *de novo* whether defendant was usually and publicly resident within the state; or (3) the State concedes error that the statute of limitations had run.

Cases where the reviewing court considered whether the trial court in each case had properly considered the evidence that the defendants were not publicly and usually within the state include, ***State v. Willingham***, 169 Wn.2d 192, 195, 234 P.3d 211 (2010) (affirming the trial court's finding that the evidence did not indicate the defendant had changed residences, and thus finding the statute of limitations had run); ***State v. King***, 113 Wn. App. 243, 294, 54 P.3d 1218 (2002) (affirming the trial court's finding that the statute of limitations had tolled where the defendant changed residences to California).

Cases where the reviewing court considered de novo whether the defendant was usually and publicly resident within the state include, ***State v. McDonald***, 100 Wn. App. 828, 832–33, 1 P.3d 1176 (2000) (finding the statute of limitations had tolled while the defendant was absent from the state); ***State v. Newcomer***, 48 Wn. App. 83, 91–92, 737 P.2d 1285 (1987) (finding that the defendant's incarceration in another state tolled the statute of limitations); ***State v. Ansell***, 36 Wn. App. 492, 496, 675 P.2d 614

(1984) (finding that the statute of limitations tolled where the evidence showed defendant lived in several states outside of Washington).

Cases where the State conceded that the statute of limitations had run include, *see, e.g.*, ***State v. Novotny***, 76 Wn. App. 343, 345–47, 884 P.2d 1336 (1994); ***In re Stoudmire***, 141 Wn.2d 342, 354–55, 5 P.3d 1240 (2000).

In some of the cases outlined in groups (1) and (2), there is some confusion as to whether the court is applying a *de novo* or an abuse of discretion standard of review. *See, e.g.*, ***State v. Ansell***, 36 Wn. App. at 496 ("The trial court erred in holding [the statute of limitations] had run because Ansell was at all times available for prosecution.").

Similarly related, though not directly on issue, is the court's opinion in ***State v. Walker***, 153 Wn. App. 701, 705–06, 224 P.3d 814 (2009). Walker alleged his charging information was insufficient under RCW 10.37.050 because the State did not include facts that would toll the statute of limitations. ***Walker***, 153 Wn. App. at 705–06. RCW 10.37.050 requires an indictment or information to state "[t]hat the crime was committed . . . within the time limited by law for the commencement of an action therefore." RCW 10.37.050(5). The court in ***Walker***, however, found that absent any prejudice to the defendant, the argument failed because the State could simply amend the information to expressly state the tolling period. ***Walker***, 153 Wn. App. at 706. This is consistent with

the Supreme Court of the United State's position that jurisdictional grounding is not a constitutional basis for the essential elements rule. ***United States v. Cotton***, 535 U.S. 625, 629–31, 122 S. Ct. 1781 (2002).

In other states, courts have expressly found that it is not necessary for the State at trial to prove that the statute of limitations did not run because it does not pertain to whether the defendant *committed the crime charged*:

> The statute of limitations does not negative a single element of the crime with which a defendant may be charged. *It does not put in issue the guilt of the defendant.* It therefore is not necessary for the prosecution to prove that the defendant was not an inhabitant or usually resident within the state for a period of time which would have tolled the statute of limitations.

Ex parte Washington, 92 Okla. Crim. 337, 340, 223 P.2d 552 (1950) (emphasis added); *see also* ***Proctor v. State***, 967 S.W.2d 840, 844, (Tex. Crim. App. 1998) ("[W]e can see no purpose in treating limitations as an absolute, systemic requirement or prohibition. *For one thing, the statute of limitations has little to do with the truth-finding function of the criminal justice system.*" (emphasis added)).

There is no common law statute of limitations in criminal cases. ***State v. Hodgson***, 108 Wn.2d 662, 667, 740 P.2d 848 (1987). Statutes of limitation are grants of legislative grace whereby the sovereign surrenders its right to prosecute. ***Hodgson***, 108 Wn.2d at 667. As such, a period of limitation that has not yet expired may be extended by statutory

modification without violating the rights of criminals. ***Hodgson***, 108 Wn.2d at 667. However, where the statute has run, and the ability to prosecute the crime has expired, the ability to prosecute cannot thereafter be revived by extending the statute of limitation. ***Hodgson***, 108 Wn.2d at 667.

Indeed, there is a split among jurisdictions as to whether statutes of limitations constitute a jurisdictional bar to prosecution or whether they are an affirmative defense. The federal courts, with the exception of the tenth circuit, have held that it is not jurisdictional, but rather is an affirmative defense that may be waived by a guilty plea. *See* Mungovan, Timothy W. "Criminal Law -- Statute of Limitations: An affirmative defense waived by a guilty plea-- ***Acevedo-Ramos v. United States***, 961 F.2d 305 (1st Cir.), *Cert Denied*, 113 S. Ct. 299 (1992)" 27 Suffolk University Law Review 1108, 1109-10 (1993). The United States Supreme Court has held that a statute of limitation is a defense that must be asserted at trial. Mungovan, 27 Suffolk L. Rev. at 1109-10.

Many state courts also treat statutes of limitations as a defense that can be waived if not asserted. *See* ***State v. Lusher***, 982 N.E.2d 1290, 2012 Ohio 5526 (2012); ***Dorris v. State***, 360 S.W.3d 260 (2012 [MO]); ***People v. Moore***, 176 Cal.App.4th 687, 97 Cal.Rptr.3d 844 (2009); ***State v. Cook***, 972 A.2d 1059, 157 N.H. 708 (2009); ***Com. v. Corban Corp.***, 909 A.2d 406 (2006 [PA]); ***Cameron v. State***, 224 S.W.3d 559, 94 Ark. App. 58 (2006); ***King v. State***, 17 S.W.3d 7 (2000 [Tex.]); ***State v. Wiemer***, 533

N.W.2d 122, 3 Neb.App. 821 (1995); ***People v. Gwinn***, 627 N.E.2d 699, 255 Ill.App.3d 628 (1994); ***Harmony v. State***, 594 A.2d 1182, 88 Md.App. 306 (1991); ***State v. Pohlhammer***, 254 N.W.2d 478, 78 Wis.2d 516 (1977).

Other States treat it as jurisdictional. ***Lee v. State***, 709 S.E.2d 762, 289 Ga. 95 (2011); ***State v. Loyd***, 696 N.W.2d 860, 269 Neb. 762 (2005); ***Maguire v. State***, 453 So.2d 438 (1984 [Fla.]); ***State v. Thorpe***, 614 S.W.2d 60 (1980 [Tenn.]); ***Proctor v. State***, 915 S.W.2d 490, (1995 [Tex.])

Where there is a significant split of opinion among the States, the reliance in ***Glover*** on two extra-jurisdictional cases without further analysis of the language or the history of the Washington statute is not well considered.

Moreover, in ***Stoudmire***, the Supreme Court held that the sentencing court exceeded its authority where the prosecution was commenced after the period prescribed in the statute of limitation. ***In re Stoudmire***, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). However, in doing so, the court did not hold that the statute of limitation was jurisdictional. ***Stoudmire***, 141 Wn.2d at 355. Instead, the court merely followed the language of the statute of limitation and noted that it "bars prosecution of the charges commenced after the period prescribed in the statute..." ***Stoudmire***, 141 Wn.2d at 355.

The Statute of limitation is not properly jurisdictional, nor does the State bear the burden of proving the limitation does not apply absent the defendant having raised the issue.

b. The plain language of the statute limiting actions does not refer to the jurisdiction of the court, but rather that offenses beyond the period of limitation "shall not be prosecuted."

RCW 9A.04.080 states that "the following offenses shall not be prosecuted..." after the period of limitation has expired. Thus, by the plain language of the statute, it does not limit the jurisdiction of the court, but rather limits the authority of the State to prosecute the crime.

c. The statutes that establishes the jurisdiction of the Superior Court in criminal matters are RCW 2.08.010 and RCW 9A.04.030.

The superior court has jurisdiction in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law. RCW 2.08.010. RCW 9A.04.030 further defines State criminal jurisdiction. Neither statute includes or refers to the statute of limitation. Nor does the statute of limitation refer to RCW 2.08.010 or RCW 9A.04.030. For this reason too, RCW 9A.04.080 is not jurisdictional.

d. Venue is comparably analogous to the statute of limitation, and courts have held that venue is not jurisdictional even though it is guaranteed by the Washington Constitution.

Venue is guaranteed by the Washington Constitution, art. I, sec. 22, which provides that a defendant has the right "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..." ***State v. Dent***, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). Nonetheless, it is a right that may be waived. *See* ***State v. Hickman***, 135 Wn.2d 97, 105, 954 P.2d 900 (1998); ***Dent***, 123 Wn.2d at 479 (citing ***State v. Hardamon***, 29 Wn.2d 182, 188, 186 P.2d 634 (1947)). Additionally, direct evidence of venue is not required and the court may take judicial notice of proper venue and not submit the question to the jury. ***Dent***, 123 Wn.2d at 479. All the more so with the statute of limitation, which is merely a statutory grant and not constitutional.

Nowhere on the record, at least insofar as the State has been able to find, did the trial court hold a hearing, or parties present evidence, to determine whether defendant was "not usually and publicly resident" within the state. Neither party had an opportunity to present evidence on the issue, nor did the court make a ruling. Accordingly, there is no adequate record as to either party's evidence regarding whether the statute of limitations had run.

3. PROPERLY, THE STATUTE OF LIMITATION SHOULD BE AN AFFIRMATIVE DEFENSE WHICH THE DEFENDANT HAS THE BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE.

Although it is not jurisdictional, the statute of limitations can nonetheless deprive the court of authority to hear a case. This is because the statute of limitations works to bar the State of the authority to prosecute the charge. *See* ***In re Stoudmire***, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). However, because the statute of limitations is not jurisdictional, the State does not bear the burden of proving it.

In Washington, only Division III of the Court of Appeals has considered which party carries the burden to prove the defendant was not usually and publicly resident within this state. *See* ***State v. Walker***, 153 Wn. App. 701, 706–07, 224 P.3d 814 (2009). Despite out-of-state authorities that held otherwise, the court—without substantive discussion or reasoning—determined that "the proponent of an exception [to the statute of limitations] should bear the burden of proving that the exception exists." *Id.* However, this Court should adopt the reasoning of other jurisdictions that have placed the burden on the defendant to prove that the statute of limitations has run.

As the court recognized in ***Walker***, RCW 9A.04.080(2) is silent about (1) how a defendant challenges a prosecution as barred by a statute

of limitation, and (2) who carries the burden to establish whether the statute has tolled. *See* RCW 9A.04.080. Furthermore, none of the previous opinions that consider challenges to the statutes of limitations discuss the answer to either of those questions.

Unlike the court in ***Walker***, other jurisdictions have placed the burden on the defense to prove the statute of limitations has not tolled *if* the statutory regime permits tolling when the defendant is not resident within the State. *See, e.g.*, ***People v. Knobel***, 94 N.Y.2d 226, 229–30, 701 N.Y.S.2d 695 (1999) (finding that the defendant has the initial burden to show dates on which he was in the state during the relevant period).

> On the other hand, under a statute providing that the limitation does not run when the accused is not an inhabitant of, or usually resident within, the state, the burden is not on the state to show that the accused has not been an inhabitant of, or usually resident in, the state for a period of time which would toll the statute of limitations. Accordingly, a defendant seeking the dismissal of an indictment as time-barred has the burden, where the state alleges that the statute of limitations has been tolled by the defendant's continuous absence outside the state, to show the dates on which he or she was in the state during the relevant period, in order to stop the toll. However, the prosecution bears the burden of proving the accused's purpose in remaining outside the state has been to avoid detection, apprehension, or prosecution, thereby interrupting the statutory prescription as to prosecution.

22A C.J.S. Criminal Law, 943 (2006).

The reason that the defendant should bear the burden of demonstrating that the statue of limitations has expired and is not tolled is that the defendant is the one party that uniquely has access to his residential history. If the burden were on the State, in most instances, the State would not have complete information on the defendant's whereabouts and would be unable to establish the application of the tolling provision. Imposing the burden on the State would have the absurd result of nullifying the tolling provision in the majority of cases. For this reason, the initial burden should be on the defendant to establish the application of the statute of limitation and the lack of tolling by a preponderance of the evidence. If the defendant meets that standard, the burden should then shift to the State, which would have the burden of rebutting the defendant's evidence by a preponderance. Additionally, any hearing on the matter should require that the State be provided the information regarding the defendant's residence with sufficient notice to investigate the claims.

4. THE TRIAL COURT DID NOT ERR WHERE IT DENIED DEFENDANT'S MOTION THAT THE STATE BE REQUIRED TO PROVE TO THE JURY THAT THE JURISDICTIONAL TIME LIMIT DID NOT APPLY.

Because, for the reasons explained above, the statute of limitations is not jurisdictional, the State does not properly have the burden to prove it at trial. For this reason, the trial court properly denied the defendant's

motion to the trial court that the State be required to prove the tolling of the statute of limitations to the jury.

5. THE TRIAL COURT ERRED BY FAILING TO HOLD A HEARING REGARDING THE RUNNING OF THE STATUTE OF LIMITATIONS WHERE THE DEFENDANT RAISED THE ISSUE.

Defendant argues that the State failed its burden to prove that defendant was not usually and publicly resident within the state. Brief of Appellant at 10–16. This argument, however, overlooks that at trial, defendant raised the statute of limitations issue by arguing that the State had to prove tolling as an essential element of the crime. The trial court determined that tolling was not an essential element of the crime and denied defendant's motion. Because the trial court (properly) dismissed the issue on these grounds, it effectively precluded both the State and defendant an opportunity to prove or disprove whether the statute of limitations had tolled. Thus, notwithstanding defendant's assignment of error, the State never had a burden to prove, and subsequently never offered any evidence to prove it.

Even if this Court were to consider the statute of limitations as an essential element of the crime, the evidence should then be reviewed for a sufficiency of the evidence. But this issue has not been raised on appeal, nor is there evidence for this Court to consider because the State—under

the trial court's decision—did not attempt to prove this element at trial. Thus, the proper remedy would be to remand for a retrial.

This issue here is thus more properly framed around whether the trial court properly denied defendant's motion that the State prove tolling as an essential element of the crime. But defendant has not assigned error to the court's ruling on this motion. This Court need not consider issues not raised on appeal. *See* RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.").

Nowhere on the record, at least insofar as the State has been able to find, did the trial court hold a hearing to determine whether the statute of limitations had tolled. The trial court erroneously inferred from the prosecutor and defense counsel's arguments that another court had previously ruled on the issue, and subsequently declined to visit the issue. The trial court thus erred when it failed to hold a hearing to determine whether the statute of limitation had tolled, which effectively denied both the State and defendant an opportunity to prove or disprove whether the statute of limitations had tolled.

6. TO THE EXTENT DEFENDANT IS ENTITLED TO A REMEDY, THE PROPER REMEDY IS LIMITED TO A REMAND FOR A HEARING ON WHETHER THE STATUTE OF LIMITATIONS HAD EXPIRED.

Defendant argues that his conviction should be reversed because the statute of limitations had run. Brief of Appellant at 10. However, the record lacks sufficient evidence that would permit this Court to consider the question as a matter of law. That is particularly so where the parties were deprived of the opportunity to have a full hearing on the issue and present all relevant evidence. It is also so where issues of credibility are at issue and cannot properly be determined by this Court.

In each of the authorities cited by defendant, except for ***Walker,*** regarding whether defendant was usually and publicly resident within the state, it appears the reviewing courts were presented a record sufficient for review—a record that detailed the trial court's findings regarding the statute of limitations and each parties' evidence—or the State conceded the error. *See* ***In re Stoudmire***, 141 Wn.2d 342, 354–55, 5 P.3d 1240 (2000) (accepting the State's concession of error); ***State v. Willingham***, 169 Wn.2d 192, 193–95, 234 P.3d 211 (2010) (reviewing the record); ***State v. Novotny***, 76 Wn. App. 343, 345, 884 P.2d 1336 (1994) (accepting State's concession of error); ***State v. Israel***, 113 Wn. App. 243, 293–94, 54 P.3d 1218 (2002) (reviewing the record). However, no such record is present

here because the trial court failed to hold a hearing, and neither does the State concede that the statute had run.

While the State disagrees with the ***Walker*** court's analysis regarding its assignment of the burden of proof, the State agrees with the remedy adopted by that court. Similar to the facts here, the record in ***Walker*** was incomplete in terms of either party having the opportunity to prove/disprove whether the statute of limitations had run. *See* ***Walker***, 153 Wn. App. at 708–09. Due to this factual ambiguity in the record, the court held:

> Whether [defendant's charges] were timely filed is a matter that goes to the jurisdiction of the trial court and is one that we believe should be resolved as soon as possible. . . . Given that there facially appears to be a likelihood of some success for Mr. Walker (as supported by the State's attempted partial concession), the need for factual determinations by the trial court, and the possible need to resentence Mr. Walker in this case should any of the charges be dismissed, we believe a remand would be the most efficient use of judicial resources.

Walker, 153 Wn. App. at 708–09.

Given that defendant never raised the issue below, neither party had an opportunity to present evidence regarding defendant's presence or absence within the State during the statute of limitations. Without such a record, it is impossible for this Court to determine whether the statute of limitations had tolled. The record shows the State could have provided evidence on this issue when defendant moved to call Mr. Willis to testify

about his whereabouts after the bail jump—but did not because the court held that the State did not have to prove tolling as an essential element:

> I don't intent to go into [defendant's whereabouts]. I mentioned Mr. Regan [the owner bail bond agency from where defendant received bail] yesterday as a potential witness in case somehow that became relevant, but I don't think it is relevant, and I would ask the Court to exclude Mr. Willis as a potential witness. Mr. Regan is in Vancouver, Washington, so I would need to know as soon as possible whether I need him to be available. . . . The reality is, is that if I have to call this witness, we are either going to have to recess . . . or another deputy prosecutor is going to have to finish this trial for me, because I am not here as of the end of the business day on Friday.

2RP 15–16.

Similar to the court's reasoning in ***Walker***, in consideration of judicial economy, the State would request this Court to remand the issue to the trial court for a hearing. *See also* ***People v. Hollie***, 103 Cal.Rptr.3d 633 (2010) (holding remand hearing required). Were the trial court to determine that the statute of limitations had not tolled, then the State recognizes that defendant's conviction should be reversed. However, if the trial court were to determine that the statute of limitations had tolled, then defendant's conviction should stand—as the hearing has no relevance to the outcome of defendant's jury trial.

D. CONCLUSION.

Because the statute of limitation is not properly jurisdictional upon the court, but rather is a bar to the State's ability to prosecute the charge, it should be treated as a defense to the charge such that the defendant has the burden to establish that the period of limitation was not tolled because Brown did not usually and publicly reside within the state. The only remedy to which the defendant should be entitled is a remand for a hearing before the court to determine whether the statute of limitation expired before the charge was filed, or was tolled until the charge was filed.

DATED: March 18, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.18.13 Therese Kah
Date Signature

Appendix A

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

STATE OF WASHINGTON, Respondent, v. JOHNNIE GERARD BROWN Appellant.	NO. 43040-1-II DECLARATION OF STEPHEN TRINEN

I, STEPHEN TRINEN, declare under penalty of perjury under the laws of the State of Washington, the following is true and correct to the best of my knowledge, recollection and understanding:

1. That I am a Deputy Prosecuting Attorney assigned to the Appellate Unit of the Pierce County Prosecutor's Office.

2. I have reviewed the prosecutor's file from superior court cause number 11-1-03594-0. It contains a notation from September 6, 2011 summarizing that the defendant was arraigned and the amount of bail set. Such notations are ordinarily made at the conclusion of the hearing by the attorney who represented the State in the proceeding.

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

3. I conferred with a legal assistant who is familiar with the handwriting of Deputy Prosecuting Attorney Greg Greer, and she was able to inform me that the writing was Mr. Greer's. Subsequent to that I also spoke with Mr. Greer, who also advised me that the writing was his and that based upon the notation, he believes that he was the male attorney who appeared on behalf of the State at the hearing.

Dated: March 18, 2013

Signed at Tacoma, WA.

Stephen Trinen

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail and or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

_____ _____
Date Signature

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400