No. 30721-2-III

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

ALLEN TREVINO,
Defendant-Appellant.

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

The Honorable Vic Vanderschoor Judge

APPELLANT'S REPLY BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I.
REPLY STATEMENT OF THE CASE

The State misrepresents the facts in this case. Proof of when the alleged sexual acts took place in this case and the victim's age on that date is essential to determining whether or not the conviction in this case can be affirmed. In order to support its argument the State sets out a timeline in the Brief of Respondent [BOR] at pages 1-3. The State says:

> In either 2001 or 2002, the defendant entered into an extended romantic relationship with Ralaunda Ashenbrenner. (CP 55-56). Ralaunda had three daughters. B.J.A. is Ralaunda's oldest daughter, and the victim in this case. (CP 55). The victim in this case has a birthdate of December 13, 1991. (CP 55; RPI 104). Ralaunda moved to Richland, Washington in February of 2002. (CP 55). Despite this, the defendant and Ralaunda's romantic relationship continued. (CP 55). The defendant would visit Ralaunda in Richland. (CP 55). During one of these visits, the defendant read the victim a pornographic story about incest between a brother, sister, and their parents. (CP 55-56). In September of 2003, when the victim was 11 years old, the defendant moved into Ralaunda's residence for a short-time period. (CP 56). At some point in time, identified as "the beginning of sixth grade," the defendant digitally penetrated the victim under the guise of giving her a massage. (RP 113-17). The victim was 11 years old at the start of Sixth Grade, and 12 years old at the end of the school year. (RP 10). The defendant later returned to Portland Oregon. In June of 2004, Ralaunda moved in with the defendant in Portland, Oregon. (RP 56). The defendant sexually assaulted the victim multiple times while living with her. (RP 57). In the most concerning event, he forced her to perform oral sex on him, and then ejaculated in her mouth. (RP 57). Ralaunda later returned to Washington State. (RP 57).

The problem is that CP 55-59, the sole support for this statement, is not from testimony elicited at trial. It is a statement of "facts" in the State's motion in limine filed in advance of trial. This was simply a statement of what the prosecutor expected the trial testimony to be. But it is not under oath. It is hearsay. And, perhaps most importantly, the testimony at trial does not support this statement.

There are several cites to RP 57, which the State represents as trial testimony. However, RP 57 is testimony from the victim's mother describing her relationship with Trevino.

Thus, this Court should disregard these statements in their entirety. The same is true for the State's timeline on BOR at page 9. There is no citation to the record in support of the State's assessment of B.A.'s age at various grades in school.

Finally, in closing the prosecutor argued that the dates could be determined by the jury because "you remember she [B.A.] graduated in 2010 at 18." RP 97. This was a misstatement of the evidence. B.A. testified that she did not graduate from high school. RP 109.

As set forth in Trevino's opening brief, B.A. was not really sure when any of the alleged events happened. In leading questions, the State tried to set up a particular timeline, RP 107-110, but no witnesses ever testified to the dates suggested by the prosecutor. In fact, the prosecutor

did not seek to introduce any school records, leases or other documents to establish where B.A. lived or attended school during the charging period and the victim and her family simply guessed at the various dates/ages.

B.A. testified that she and her mother and sisters moved to Richland "about the middle of fourth grade." 2 RP 105. Previously, they lived in Oregon. She attended fifth grade in Richland. 2 RP 106. She attended 6th grade in Richland and the "first part of seventh grade." 2 RP 106. She attended the "second part" of seventh grade in Portland and then the family returned to Richland when she was in the eighth grade. 2 RP 108. B.A. said that she turned 12 in December of her sixth grade year. *Id.*

She testified that when the family lived on Snow Street, Trevino read her a story about incest between a brother and sister. 2 RP 112. When she was in sixth grade the family lived on Jadwin Street. When she was living there Trevino inserted his finger into her vagina. 2 RP 116. She could not say when precisely this happened, but that it happened "at the beginning of sixth grade." 2 RP 114. On cross-examination, B.A. admitted that she could not really remember when these events happened, but "I tried the best I could." 2 RP 133. In fact, it appears from her testimony that she was very unclear about when the incidents might have occurred. 2 RP 143-145.

On redirect, B.A. said her mom told her she was in the sixth grade in 2004-2005. But she had no independent recollection of the precise year or her age at the time. And she said that she was very clear that she was in the sixth grade when it happened. 2 RP 154.

II.
ARGUMENT

A. THERE IS NO COMPETENT EVIDENCE THAT THE VICTIM WAS UNDER THE AGE OF12 AT THE TIME OF THE ALLEGED CRIME

In response to Trevino's argument that the State failed to prove that B.A. was younger than 12, the State makes a confusing and jumbled argument which appears to come down to the following assertion: The State does concede that during a portion of the charging period, B.A. was 13 years old. BOR 4. But, the State then argues that because B.A. was 11 years old during a portion of that period, there is sufficient evidence for a conviction.

There is no dispute that B.A. turned 12 on December 13, 2003. Thus, there is no dispute that for any act that Trevino committed after that date, he would not be guilty of either first degree rape of a child or first degree child molestation. The only remaining issue is this: Did the jury instructions insure that the jury unanimously found beyond a reasonable

doubt one act of penetration and one act of molestation occurred between January 2002 and December 13, 2003?

The answer is no: B.A. testified to different several different acts and there was no clear evidence as to whether any one of the acts took place before December 13, 2003. The State did not elect which of the multiple acts on which it relied for the charge. And the Court did not give a unanimity instruction. Worse yet, based on the prosecutor's closing argument, the jurors could have concluded that so long as any of the acts took place during the charging period and so long as B.A. was under 12 during any part of the charging period, they could find Trevino guilty.

In a case like this, where there is conflicting evidence, the general practice is for the prosecutor to specifically end the charging period for first degree rape and child molestation on the victim's 12th birthday and then charge the lesser included offenses for any act that might have occurred after the victim's 12th birthday. The prosecutor certainly could have done that in this case but she did not to do so.

Here, there simply was insufficient evidence for the jury to find that B.A. was in Washington and under the age of 12 when an act of rape occurred. And, further, the State introduced a number of alleged acts of sexual assault and argued that this was a case about "a 12 year old girl" and did not offer any lesser included offense instructions.

For these reasons this Court should reverse this conviction and remand for dismissal.

B. THE COMMUNICATING WITH A CHILD FOR IMMORAL PURPOSES CHARGE WAS BARRED BY THE STATUTE OF LIMITATIONS

A criminal statute of limitations presents a jurisdictional bar to prosecution. It is not merely a limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused. *State v. N.S.*, 98 Wn. App. 910, 914-15, 991 P.2d 133 (2000) (footnote and internal quotation marks omitted). Because the criminal statute of limitations creates an absolute bar to prosecution, whether the State was barred by the statute of limitations from prosecuting a crime is an issue that may be raised for the first time on appeal. *State v. Dash*, 163 Wn. App. 63, 67, 259 P.3d 319, 320-21 (2011); *State v. Novotny*, 76 Wn. App. 343, 345 n. 1, 884 P.2d 1336 (1994).

The State now appears to argue that the statute of limitations did not run against Trevino because he was not usually and publicly a resident of this State. But, it was the State's burden to demonstrate this exception

and it failed to do so.[1] The State alleged that the act of communication with a minor for immoral purposes supposedly took place in 2002. The statute of limitations runs from date of the commission of the offense. RCW 9.040.080. Even under the State's recitation of the evidence, Trevino lived in Richland with B.A. and her mother until 2004 because he was attending a trucking school in Pasco.

III.
CONCLUSION

All three counts in this case must be dismissed. The State has failed to cite to any actual testimony to support its arguments.

DATED this 15 day of July, 2013.

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Allen Trevino

---

[1] "The policy behind statutes of limitations is to protect defendants from unfair decisions caused by stale evidence ...." *State v. N.S.*, 98 Wn. App. at 912-13. This is certainly of concern in this case. The evidence was so stale that none of the State's witness could recall when the events occurred.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Benton County Prosecutors Office
Benton County Justice Center
7122 West Okanogan Place, Building A
Kennewick, WA 99336

Mr. Allen Trevino #354682
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

15 July 2013
Date

William Hackney