NO. 44034-2-II

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

STATE OF WASHINGTON, Respondent

v.

SERGEY V GENSITSKIY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01186-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Sergey Gensitskiy is an abusive father of ten who dominated and controlled his family through fear. RP 198, 200-20, 234, 238, 220, 319,

369, 378, 393, 420, 423-24, 753. Gensitskiy disciplined his children by beating them with things such as broomsticks, coat hangers, shoes, belts and his hands. RP 213, 420. He made reference to D.S.G (female) about having guns and knowing how to use them in an effort to keep her in line. RP 423. He behaved sexually inappropriately with most of his ten children, and molested or committed incest with at least two of them. RP 214-17, 285, 324, 439-447, 452, 456, 508, 510, 741-51. Gensitskiy would leave pornography visible on his computer. RP 273. Gensitskiy and his wife, Yelena, made it clear to both D.S.G (female) and C.S.G (female) that they had no right to their bodies, that their bodies belonged to their parents. RP 424, 740. With regard to C.S.G, who was seventeen at the time of trial, Gensitskiy fondled her breasts, genitals and buttocks both over and under her clothing. RP 285, 741. He kissed C.S.G. and forced his tongue in her mouth. RP 285, 748. He inspected her to see how she was developing by forcing her to raise her shirt and bra. RP 742-43. C.S.G was required to leave the door unlocked when she showered so her father could come in and look at her and touch her while she was in the shower. RP 743-44. D.S.G. (female) also recounted being embarrassed by her father looking at her in the shower. RP 510. Sometimes while Gensitskiy would be driving in the car with C.S.G. he would put his hand down her pants

and touch her vagina under her clothes. RP 744. She believed this started when she was 11 or 12. RP 745.

C.S.G. described a couple of incidents of touching that occurred when she was very young, perhaps around or under the age of seven, when her father would remove her pajamas and rub the insides of her upper thighs. RP 742. The rubbing was under her clothing. Id. These were the incidents that gave rise to count 2. CP 13.

When C.S.G. was 15 she left the home and was placed with Randy and Tami Patterson, who were family friends to the children. RP 752. D.S.G. also lived with the Patterson's at one point. RP 597-98.

Gensitskiy was charged with numerous counts of molestation and incest against D.S.G (female) and C.S.G. CP 13-18.[3]

On numerous occasions during the trial the deputy prosecutor impeached witnesses V.S.G and D.S.G. (female) with prior inconsistent statements. During the direct examination of V.S.G., Gensitskiy objected to the method of impeachment the prosecutor was using, complaining that it wasn't clear whether she was impeaching the witness or merely refreshing the witness's memory. RP 396-97. Defense counsel briefly

[3] Gensitskiy was also charged with molestation counts against D.S.G (male), R.S.G. and V.S.G. CP 13-18. He was acquitted of the counts as to D.S.G. (male) and R.S.G. He was convicted of molesting V.S.G. but the State concedes the evidence is insufficient to support that count.

made reference to instructing the jury about the difference between impeachment testimony and refreshed recollection, saying:

> I would propose that if counsel's going to use a document only to refresh a memory, that is fine. But if he's going to deny it after she says that, then I think that we need to somehow inform the jury that there is a distinction there in terms of a jury instruction, given the way that Counsel is proceeding in this matter.

RP 396. However, counsel did not formally propose an instruction and when the trial court asked "Mr. Buckley, anything else for the record?" Defense counsel answered "no." RP 397. Later during V.S.G.'s testimony defense counsel again objected to what he felt was unclear impeachment. RP 408. The trial court overruled the objection. Id. Defense counsel then asked to have the jury removed and told the trial court he wanted the jury "advised" that the statements with which V.S.G was being impeached were not substantive evidence. RP 409. Counsel did not propose a formal instruction at that time or orally suggest language he proposed the trial court to use. RP 409. Rather, counsel said "...I'm going to ask that prior to the next witness, that we be allowed to present the jury instruction as to recantation and this substantive evidence versus non-substantive evidence because clearly this shouldn't be used as substantive evidence." RP 412. He then clarified that he would like instruction given at the end of V.S.G.'s testimony. Id. The court indicated he would look at it when

proposed. Id. However, when V.S.G. finished testifying defense counsel did not request a limiting instruction. RP 416. He didn't even bring it up. Id.

On the fourth day of trial Gensitskiy formally proposed a written instruction which would instruct the jury on the use of out-of-court statements for impeachment. RP 727, Supp. CP 165. The trial court elected to give the proposed instruction at the close of the case when the general instructions would be given, stating:

> 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, okay?

RP 728. The court further stated that if the upcoming witness (C.S.G.) were to be impeached, it would reconsider giving the instruction at that time. RP 729. However, because the witnesses to whom the instruction pertained had already testified, the court concluded "...it makes more sense to me to put it in the packet as a general instruction." RP 729. The court ultimately gave the following instruction at the close of the case, numbered as Instruction 7:

> Evidence has been admitted regarding un-sworn out-of-court statements not made for purposes of medical treatment or diagnosis. This evidence may be considered by

> you only as it relates to the credibility of these witnesses and for no other purpose.

CP 28.

Randy Patterson was permitted to testify about an incident where D.S.G. (female) called his phone and he heard her speaking to her mother, Yelena, about trying to take C.S.G out of his home. RP 630. Mr. Patterson was only permitted to testify about the part of the conversation in which D.S.G. was speaking. RP 630. He heard D.S.G. saying that she was unable to get C.S.G out of the house because it was a school night, and that she (D.S.G) believed that the Patterson's didn't trust her anymore. RP 630. Defense counsel objected because this was "eavesdropping on an electronic-device conversation without permission." He did not specifically cite to the privacy statute or name a specific subsection of the statute he believed applied, nor did he cite any case law to support his claim. RP 627. The trial court overruled the objection in part because "this gentleman did not initiate the phone call, so I don't think it fits in that category." RP 627-28. The prosecutor noted that the statements D.S.G. made were being offered for impeachment, not for their truth. RP 627.

Gensitskiy was convicted of various acts of child molestation against C.S.G., as well as three counts of incest and one count of child molestation

against V.S.G. CP 80-99. This timely appeal followed. CP 122. Gensitskiy challenges sufficiency of the evidence in this appeal only as to counts 2 and 6. In count 2, Gensitskiy was convicted of child molestation in the first degree against C.S.G, and in count 6 he was convicted of child molestation in the first degree against V.S.G. Id., CP 13-13-15. None of the counts committed against D.S.G. (female) are challenged for their sufficiency. See Brief of Appellant.

C. ARGUMENT

I. THE STATE DID NOT AMEND THE CHARGE ON COUNT 7, COUNT 8 MUST BE REVERSED AND DISMISSED, AND THE TRIAL COURT PROPERLY ALLOWED THE AMENDMENT OF THE INFORMATION AFTER THE STATE RESTED ON COUNTS 9, 10 AND 11 WHERE THE AMENDMENT ONLY PERTAINED TO THE DATES OF THE OFFENSES AND WAS DONE TO CONFORM TO THE EVIDENCE.

This issue pertaining to assignment of error is actually three issues thrown into a single section. The State addresses them in turn.

a. *The State did not amend count 7 to a charge of child molestation in the first degree.*

As to count 7, the State attempted to amend this charge from child molestation in the second degree to child molestation in the first degree. It abandoned its request, however, and the charge remained as child

molestation in the second degree. CP 15. The charge was not amended. Gensitskiy was charged with, and convicted of, child molestation in the second degree. CP 15, 90. Although the judgment and sentence reflects that the conviction on count 7 was for child molestation in the first degree, this was a scrivener's error that can be easily corrected on remand. Moreover, to the extent that Gensitskiy's complaint is that the State *over-proved* the charge by showing that some sexual contact occurred before D.S.G. (female) turned twelve, this complaint does not pertain in any way to a claim that the trial court erred in allowing an amendment to the information (which did not actually occur). This claim of error fails but the case must be remanded for resentencing on count 7 so that the judgment and sentence can accurately reflect that the conviction in count 7 was for child molestation in the second degree.

b. *Count 8 must be reversed and dismissed.*

The trial court allowed the State to amend count 8 after it rested its case to a different crime. The charge was amended from child molestation in the second degree to incest in the second degree. CP 10, 16. This was improper, and the State concedes this count must be reversed and dismissed with prejudice. See *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987); *State v. Dallas*, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995)

(remedy upon a finding of improper amendment to a different crime is dismissal with prejudice under the mandatory joinder rule).

c. *The trial court properly allowed the State to amend the information on counts 9, 10 and 11.*

Counts 9, 10 and 11 were incest second degree charges committed against D.S.G. Prior to resting her case, the deputy prosecutor alerted the court and defense counsel that she would be moving to amend the information. RP 727. She was waiting for her staff to prepare a transcript of V.S.G's testimony (because she felt that she might have to dismiss that count) and it unfortunately was not completed before she closed her case. RP 726-27.

Although the amendment on count 8 was improper, the amendments on counts 9, 10 and 11 were not improper. The amended information was filed to expand the charging period on those counts to conform to the testimony given by D.S.G. about the dates on which the various incest incidents occurred.

The trial court may permit the State to amend the information at any time before verdict or finding if substantial rights of the defendant are not prejudiced. CrR 2.1 (d). An exception to this rule, compelled by the necessary limitation of this rule by article 1, sec. 22 of the Washington State Constitution, is that the court is prohibited from allowing an

amendment to the information after the State has rested where the amendment is to a different crime or a higher degree of the crime. See *Pelkey*, supra, at 487. The defendant bears the burden of showing prejudice. *State v. Gosser*, 33 Wn.App. 428, 434-35, 656 P.2d 514 (1982). The trial court's decision to allow an amendment to the information is reviewed for abuse of discretion. *State v. Schaffer*, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). An amendment changing or expanding the charging period is generally permitted unless the amendment impairs an alibi defense or the defendant demonstrates prejudice. *State v. DeBolt*, 61 Wn.App. 58, 62, 808 P.2d 794 (1991).

In *DeBolt*, the Court of Appeals held "[t]he rule announced in Pelkey is not applicable to all amendments to informations. It is not applicable, for instance, to amendments which 'merely specif[y] a different manner of committing the crime originally charged.'" *State v. DeBolt*, 61 Wn.App. 58, 61, 808 P.2d 794 (1991), citing *Pelkey* at 490. In that vein, an amendment changing or expanding the charging period is generally permitted unless the amendment impairs an alibi defense or the defendant demonstrates prejudice. *DeBolt* at 62.

Gensitskiy acknowledges that *DeBolt* allows for changes or expansions to the charging period but attempts to distinguish *DeBolt* on the sole basis that the charging period in this case was expanded by a

greater margin than the charging period in *DeBolt.* Gensitskiy's argument is unavailing.

The amendment in this case affected only the counts involving D.S.G (female). The information garnered during D.S.G's testimony which compelled the State to amend the information was subject to cross examination by Gensitskiy. D.S.G. was available to Gensitskiy as a witness in his case-in-chief. Indeed, D.S.G. was largely a witness for Gensitskiy even during the State's case-in-chief. The State formally moved to amend the information after Gensitskiy had called only the first of his eight witnesses, providing him plenty of opportunity to call D.S.G. as a witness. RP 875. The amendment also occurred well in advance of Gensitskiy's expert testifying (who offered testimony on the fallibility of repressed memory). Finally, Gensitskiy was on notice, prior to the amendment of the information, that the State was alleging sexual abuse of D.S.G. dating back to 1997. CP 3. Placed in context of notice to the defendant, the expansion of the charging period is far smaller than portrayed by Gensitskiy in his brief. Gensitskiy's sole argument below about the prejudice he feared he would suffer was as follows:

> Again, our position is that once you close, you're precluded in any way of amending it. And I think the amendments, as I recall it, broadened the one count...And my objection is that any time you broaden the date, you increase the prejudice to the Defendant.

RP 1242-1243.[4] This was not really an argument at all. First, the legal argument counsel made was incorrect. Second, a conclusory argument that any expansion of a charging period is per se prejudicial is not an argument as to how the defendant was specifically prejudiced in the presentation of his defense.

Gensitskiy has not claimed specific prejudice from the expansion of the charging period as to the incest counts against D.S.G. The trial court did not abuse its discretion and his claim fails.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN COUNT 2, BUT INSUFFICIENT TO SUSTAIN COUNT 6.

a. *Count 2*

Gensitskiy claims that the evidence is insufficient to sustain the conviction in count 2, child molestation in the first degree against C.S.G., because the evidence is insufficient to prove that he rubbed C.S.G.'s upper inner thighs, underneath her clothing, for the purpose of sexual

[4] In his brief, Gensitskiy claims that at pages 874-876 of the report of proceedings his attorney objected to the amendment of the charging period because it would be "particularly prejudicial to expand the charging period by 16 years when the defense involved the State's witness's ability to remember," and that he would have cross examined the witnesses differently had he known the charging period would be expanded. A review of these pages in the transcript reveals that counsel did not make this argument. If counsel made this argument elsewhere in the record, it has not been cited to by Gensitskiy. Moreover, this argument is wholly nonsensical. Gensitskiy's defense was that the children were either making the allegations up to escape a strict home life or that their memories of the abuse had been implanted by the suggestions of others. The expansion of the charging period as to the incest counts against D.S.G. in no way changed these two defenses.

gratification. Gensitskiy does not deny that this touching occurred while C.S.G. was under twelve. Rather, he relies entirely on the argument that this touching was "innocent" and could not have been for sexual gratification. Gensitskiy's argument is meritless.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

A person commits child molestation in the first degree when that person has sexual contact with a child who is less than 12 years old. RCW

9A.44.083. "Sexual contact" is defined as 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 touching may be made through the clothing of either party and without direct contact between the perpetrator and the victim. *State v. Jackson*, 145 Wn.App. 814, 819, 187 P.3d 321 (2008).

> Contact is "intimate" within the meaning of the statute if 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. Which anatomical areas, apart from genitalia and breast, are "intimate" is a question for the trier of fact.

Jackson at 819, *In re Welfare of Adams*, 24 Wn.App. 517, 520-21, 601 P.2d 995 (1979). The hips, buttocks and lower abdomen have all been held to be "intimate parts" for purposes of the statute. *Adams*, supra, at 520-21. "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." *Adams* at 521. Importantly, the statute defines "sexual contact" as touching for the sexual gratification of either party. Thus, it is immaterial whether a seven year-old such as C.S.G. would be sexually gratified by this touching or deem it salacious. It is enough that it was done for the sexual gratification of Gensitskiy, as the jury found. The weight of authority does not support

Gensitskiy's claim. The evidence was sufficient to find that when Gensitskiy rubbed the upper inner thighs of C.S.G. against her skin for no legitimate reason, he did it for his sexual gratification. This Court should affirm the jury's verdict on Count 2.

b. *Count 6*

The State concedes, after careful review of V.S.G.'s testimony, that the evidence insufficient to sustain the conviction in count VI of child molestation in the first degree because there is insufficient evidence of sexual contact.

III. [3]THE INFORMATION WAS NOT DEFICIENT AS TO COUNT 7.

Gensitskiy claims that an information charging child molestation in the second degree is constitutionally deficient where 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 claims that the child being over the age of twelve is an essential element of child molestation in the second degree. Notably, he cites no authority for this claim. Gensitskiy's claim fails.

As an initial matter, Gensitskiy complains about the sufficiency of the information for the first time on appeal, as he acknowledges. 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 the 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, stating:

> 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 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). Sexual contact with a child under the age of sixteen, 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's claim fails. Should this Court disagree, the remedy for this error is dismissal of the count without prejudice. *State v. Dallas*, 126 Wn.2d 324, 328-29, 892 P.2d 1082 (1995).

IV. THE TRIAL COURT GAVE THE DEFENDANT'S PROPOSED LIMITING INSTRUCTION, AND DID NOT ERR BY GIVING IT AT THE CLOSE OF THE CASE DURING THE GENERAL JURY INSTRUCTIONS.

Gensitskiy complains that the trial court abused its discretion by electing to give his proposed limiting instruction on the use of impeachment evidence at the close of the evidence rather than in between witnesses, when he submitted a formal proposed instruction. See CP 28. The trial court did not abuse its discretion. Discretion is abused when it is

exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court must 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). "Although it is usually preferable to give a limiting instruction contemporaneously with the evidence at issue, it is within a trial court's discretion to choose instead to give a limiting instruction at the close of all of the evidence. Often, for example, deferral of a limiting instruction is necessary in order to allow time for the judge and counsel to draft an appropriately worded instruction." *State v. Ramirez*, 62 Wn.App. 301, 304, 814 P.2d 227 (1991).

Here, defense counsel repeatedly failed to propose an actual instruction of any kind. Simply asking the judge to give one without proposing one is insufficient. Although the court was free to give an oral instruction without the benefit of a written proposed one, it was incumbent upon defense counsel to at least propose language for the court to use. By the time defense counsel finally proposed a formal instruction both V.S.G and D.S.G. (female) had completed their testimony. As the prosecutor noted, it would have potentially confused the jury to hear such an instruction at the time defense counsel finally proposed it. It made far more sense to include the instruction in the final instructions given at the

close of the case. The trial court did not abuse its considerable discretion by giving the limiting instruction at the close of the case. Gensitskiy's claim fails.

V. THE TRIAL COURT DID NOT ERR IN ALLOWING RANDY PATTERSON TO TESTIFY ABOUT WHAT HE HEARD D.S.G (FEMALE) SAYING TO SOMEONE ELSE WHEN SHE CALLED HIS PHONE.

The trial court did not err in admitting Randy Patterson's testimony about the conversation he overheard between D.S.G. (female) and Yelena Gensitskiy. Gensitskiy appears to claim that Randy Patterson violated the Washington State Privacy Act when he answered his phone and heard D.S.G. (female) speaking on the phone to Yelena. The privacy act provides:

> (1) 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 9.72.030.

The conversation at issue here is not covered by the Privacy Act, and Gensitskiy cites no on-point authority for his claim that it is. First, this conversation was not private. D.S.G. called Patterson and broadcast the call over the telephone. Patterson did not seek to listen to this conversation; he did not do it surreptitiously. He did no more than answer his phone. Second, Patterson did not "intercept" this phone call. The phone call came into his phone.

The lone case Gensitskiy relies on is inapposite. In *State v. Christensen*, 153 Wn.2d 186, 190, 102 P.3d 789 (2004) a mother used the speakerphone function of the family's cordless telephone to surreptitiously listen in on a telephone conversation between her daughter and her daughter's boyfriend. In addition to being factually distinguishable to a fatal degree, *Christensen* concerned a violation of RCW 9.73.030 (1) (a) whereas any violation of the privacy act that could conceivably be deemed to have occurred here would fall under RCW 9.73.030 (1) (b). Gensitskiy failed to adequately brief this claim and this Court may decline to review it. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) ("We do not review assigned errors where arguments for them are not adequately developed in the brief.")

Finally, any error in admitting this testimony was harmless. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Here, this testimony was of minor moment in the overall trial. D.S.G. (female) had been impeached extensively throughout the trial, and this testimony added little to it. The prosecutor made the point through several witnesses that Gensitskiy and his wife, Yelena, had pressured some or all of their children into either not disclosing the abuse or changing their stories. The conversation Randy Patterson overhead (of which only one side--D.S.G.'s--was relayed to the jury) did little to add to the picture that had been adequately painted through all of the testimony. Moreover, this testimony was offered to impeach D.S.G., and not for its truth. Any error in admitting this testimony was plainly harmless.

VI. GENSITSKIY MUST BE RESENTENCED ON COUNTS 2 AND 7.

Gensitskiy asks this Court to reverse his sentence on counts 2 and 7 because he was sentenced under RCW 9.94A.507 whereas the beginning of the charging period for those offenses pre-dates the effective date of RCW 9.94A.507 (formerly RCW 9.94A.712). The State agrees and

concedes this error. *Cf. 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.") Gensitskiy must be resentenced.

D. CONCLUSION

Gensitskiy's convictions on all counts except count 8 should be affirmed. Count 8 must be reversed and dismissed with prejudice. He must be resentenced on counts 2 and 7 to a determinate sentence not under RCW 9.94A.507. The resentencing on count 7 must also correct the scrivener's error which reflects that he was convicted of child molestation in the first degree. It must be corrected to reflect his actual conviction of child molestation in the second degree.

DATED this 9th day of October, 2013.

Respectfully submitted:

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October 09, 2013 - 4:49 PM

Transmittal Letter

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Case Name: State v. Gensitskiy

Court of Appeals Case Number: 44034-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

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