No. 30256-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

VANCE L. BAKER,

Defendant/Appellant.

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

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A. ARGUMENT

Issue No. 1. The conviction for second degree child molestation (count 2) should be dismissed because the jury did not find the defendant guilty of the crime as charged in the information.

Respondent argues that the incorrect date in the information is insufficient grounds for reversal because even with the wrong dates, the defendant was apprised of the elements of the crime. Respondent's Brief p. 4-5. As stated in Appellant's initial brief, the problem with the defective information is not "merely a problem of notice." See *State v. Goldsmith*, 147 Wn. App. 317, 325, 195 P.3d 98, (2008). The information adequately notified Mr. Baker of the necessary elements of the crimes the State says he committed. The State simply failed to prove those crimes. *Id.*, citing *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

Respondent also argues the defendant failed to show any prejudice because of the technical defect in the information. Respondent's Brief p. 7. However, there is no requirement of showing prejudice when the State fails to prove the crime it charged. See *Goldsmith*, 147 Wn. App. at 324-26, 195 P.3d 98. The State is required to prove the essential elements of the crime it charged. Mr. Baker is not required to show prejudice when the State fails to meet that burden *Id.*

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Issue No. 2. The trial court abused its discretion in excluding evidence of L.L.B. calling the police and falsely reporting burglary and rape when such evidence was relevant to the defense theory of the case.

In her Statement of Facts Respondent states the following:

> [L.L.B.] revealed in testimony that the defendant had characterized the events wrongly throughout the process. L.L.B. never called the police. (RP 180). Rather, she revealed some of the abuse Mr. Baker had subjected her to in the past to a friend named Dillon. (RP 179-80). Dillon contacted the police, apparently mistakenly believing that L.L.B.'s abuse was current, rather than past, and the result of a break-in. (RP 179-81). As a note, the defendant continues to mischaracterize this incident, claiming that L.L.B. admitted to calling the police, and admitted the rape report was false.

Respondent's Brief p. 3-4.

Respondent misstates the testimony as set forth in the record and conveniently ignores other testimony from L.L.B. that corroborate Mr. Baker's version of this incident. The following excerpt of L.L.B.'s testimony reveals which side is mischaracterizing the incident:

RECROSS EXAMINATION [of L.L.B.]

BY MS. PETRA [prosecutor]:

Q Just to understand. Now this is ringing a bell to me. You were instant messaging with your friend Dillon?

A Yes.

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Q And you were talking about the -- talking about the incident with your uncle?

A (Witness nodded head)

THE COURT: Let me indicate. Instead of nodding you need to respond either yes or no. He can't be watching your head. He needs to listen, and get a little closer to the microphone if you would. Thank you. Go ahead.

BY MS. PETRA: (Continuing).

Q Dillon called the police and the police showed up to your house?

A Yes.

Q What is Dillon's last name?

A I can't remember his last name.

Q It was a friend you were instant messaging with?

A Yes.

MS. PETRA: Okay. No more questions.

REDIRECT EXAMINATION

BY MR. HOLT [defense counsel]:

Q You said something -- told Dillon what your uncle had done? Which is it?

A It was part of what he had done but it was not all.

Q Was your uncle trying to break-in that night?

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A No.

Q You were telling Dillon someone was breaking into the house, weren't you?

A I don't remember exactly what I said to him so I couldn't tell you that's what I said or not.

Q And that somebody was going to rape you[—]not your uncle?

A I really don't recall saying that.

MR. HOLT: I have nothing further.

RP 179-81.

The following excerpt from L.L.B.'s testimony reveals that L.L.B. did admit to calling the police, and further admitted the rape report she gave was false:

DIRECT EXAMINATION

BY MR. HOLT:

Q Lisa, do you remember calling the police to your house in February 2008?

A Not very well.

Q But you do remember it?

A Yes, I do.

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Q And you called the police to come to your house because you said that somebody was trying to break-in and rape you?

MS. PETRA: I would ask he ask a direct question like, why did you call the police, Lisa?

BY MR. HOLT: (Continuing).

Q Why did you call the police?

A I can't answer that like with a straight question because a lot of that was a whole blur to me.

Q Nobody was trying to break-in, correct?

A No.

Q And nobody was trying to rape you, were they?

A No.

Q You made those allegations up, correct? That's a simple yes or no?

A No.

THE COURT: She said, no, she didn't make them up.

BY MR. HOLT: (Continuing)

Q Why do you say that?

A It wasn't like I made it up and said this was happening. It was like I said -- I cannot explain the night. It wasn't like I was straight up saying

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calling them come over this is what is happening because to be honest that whole night I barely remember any of it.

Q Is there some reason you can't recall that night? Were you under the influence of any artificial substances?

A Not that I can think of.

Q Was it a false report or was it not? That's a simple questions?

A I don't recall that. I don't remember all the details of the night so it's hard to explain. I just don't remember.

Q Was somebody trying to rape you?

A No.

Q So it was false?

A Okay. Yes.

RP 175-77.

BY MR. HOLT:

Q Police responded to your house, yes or no?

A Yes.

. . .

Q Were you there when the police showed up?

A Yes.

Q Did they take a statement from you?

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A No.

Q They talked to your parents?

A Yes.

Q And your parents talked to you?

A Yes.

Q And were they upset about the police coming because?

A I don't remember a whole lot. They were upset but I don't remember.

Q They believed that you were indicating that the house was being broken into and you were being raped, correct?

A Yes.

RP 178-79.

Contrary to Respondent's assertion that "the defendant continues to mischaracterize this incident," it is clear from the above testimony that L.L.B. (or Dillon on her behalf) called the police and claimed someone was trying to break into her house and rape her. It is undisputed that he police responded and believed they were responding to a rape incident in progress. The police would not have responded or held this belief unless either L.L.B. or Dillon reported the incident.

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Respondent's brief misstates the testimony as set forth in the record. Accordingly, that portion of Respondent's Statement of Facts and the corresponding argument at pages 8-10 should be stricken.

Issue No. 4. The sentencing court did not have the statutory authority to impose a variable term of community custody of 48 months contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Respondent argues a variable term of community custody is appropriate because the court should apply the community custody statutes in effect on the dates of these alleged offenses, 1996 and 2007, respectively. Respondent's Brief p. 24-28. In support of this proposition Respondent cites RCW 9.94A.345, which states: "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

Effective June 8, 2000, the Legislature enacted RCW 9.94A.345, in response to our Supreme Court's decision in *State v. Cruz,* 139 Wash.2d 186, 191-93, 985 P.2d 384 (1999) (holding that juvenile sex offenses that had washed out under the law in effect before a 1990 amendment to the Sentencing Reform Act could not be included in calculation of Cruz' adult

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offender score for his current offense committed in 1994). Laws of 2000, ch. 26 § 2. In an accompanying statutory note, the Legislature wrote:

> This act RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives.

Laws of 2000, ch. 26, § 1. *State v. Smith*, 118 Wash. App. 288, 294-95, 75 P.3d 986, 988 (2003).

The undersigned counsel is unaware of any instance where RCW 9.94A.345 has been extended to apply to the retroactive application of community custody statutes. In fact the accompanying statutory note cited above would seem to disallow such an application. Moreover, our Supreme Court has dictated the opposite interpretation to what Respondent suggests: "Under [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

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Therefore, a finite term of three years community custody in accordance with RCW 9.94A.701(1)(a) is appropriate.

B. CONCLUSION

For the reasons stated herein, and in appellant's opening brief, the conviction for child molestation in the second degree should be reversed or in the alternative, the matter should be remanded for resentencing with instructions to impose a finite term of three years community custody.

Respectfully submitted August 1, 2013,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on August 1, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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