No. 92274-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Rules and Regulations

Washington State:

A IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Goss, No. 72409-6-I, filed August 17, 2015.

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were not reached by that Court:

1. The Court of Appeals concluded that the charging document was not deficient as to the charge of second degree child molestation because the low end of the age range of the victim (that the victim was "at least twelve years old") is not an essential element of that offense. As an alternative ground to affirm, the State renews its argument that the charging language conveyed facts establishing that allegedly missing element, and because Goss has not alleged any actual prejudice due to any inartfulness in the allegation, this challenge to the charging document fails.

2. The Court of Appeals concluded that the trial court properly exercised its discretion in limiting Goss's closing argument by prohibiting an argument that the State's failure to admit Goss's statement to police supported an inference that the State was withholding evidence favorable to Goss. As an alternative ground to affirm, the State renews its argument that any error in precluding that argument was harmless.

D. STATEMENT OF THE CASE

The defendant, Michael Ray Goss, was convicted of child molestation in the second degree. CP 93, 132. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 2-6.

The Court of Appeals affirmed the conviction in a unanimous opinion. State v. Goss, No. 72409-6-I (Wash. Ct. App. Aug. 17, 2015).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Goss in his petition for review. If review is accepted, the State seeks cross-review of corresponding

issues it raised in the Court of Appeals but that the Court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals, which the State believes are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE CHARGING LANGUAGE INCLUDED ALL ESSENTIAL ELEMENTS OF THE CRIME OF CHILD MOLESTATION IN THE SECOND DEGREE.

The Court of Appeals properly concluded that the charging document was not deficient as to the charge of second degree child molestation because the low end of the age range of the victim (that the victim was "at least twelve years old") is not an essential element of that offense. State v. Goss, slip op. at 5-9. If this Court grants review on this issue, the State cross-petitions to preserve its argument that the charging language conveyed facts establishing that allegedly missing element, and because Goss has not alleged

any actual prejudice due to any inartfulness in the allegation, this challenge to the charging document fails.

A charging document must include all essential elements of a crime, to apprise the accused of the charges and allow preparation of a defense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). When the sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity. Id. at 105. The test is: (1) do the necessary facts appear in any form in the charging document, or can they be found in that document by fair construction; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language, which caused a lack of notice. Id. at 105-06.

The crime of child molestation, i.e., sexual contact for purposes of sexual gratification with a minor under 16 years of age, is divided into three degrees, depending on the age of the child. Child molestation in the first degree applies if the child was less than 12 years old at the time of the molestation. RCW 9A.44.083. Child molestation in the second degree applies if the child was at least 12 but less than 14 years old at the time. RCW 9A.44.086.

Child molestation in the third degree applies if the child was at least 14 but less than 16 years old at the time. RCW 9A.44.089.

Count 1 of the second amended information in this case provided:

> That the defendant Michael Ray Goss in King County, Washington, during an intervening period of time between September 25, 2010 and September 25, 2012, being at least 36 months older than ENF (DOB 9/25/98), had sexual contact for the purpose of sexual gratification with ENF (DOB 9/25/98), who was less than 14 years old and was not married to and not in a state registered domestic partnership with ENF (DOB 9/25/98);
>
> Contrary to RCW 9A.44.086 and against the peace and dignity of the State of Washington.

CP 67.

Even if it is an essential element of child molestation in the second degree that the child was at least 12 years old, the charging language in the case at bar adequately alleged that fact by including E.F.'s date of birth, which established that she was at least 12 years old during the charging period. Because Goss has not alleged any actual prejudice due to any inartfulness in the allegation, this claim fails under the liberal standard of review adopted in Kjorsvik, supra.

Under the first prong of the Kjorsvik test, there must be "some language in the document giving at least some indication of

the missing element." City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992); State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 164 (2010). The charging document is read as a whole, construed based on common sense, and read to include facts that are necessarily implied. State v. Goodman, 150 Wn.2d 774, 788, 83 P.2d 410 (2004) (citing Kjorsvik, 117 Wn.2d at 109). This permits the court to "fairly infer the apparent missing element from the charging document's language." Goodman, 150 Wn.2d at 788 (citing Kjorsvik, 117 Wn.2d at 104).

Because E.F.'s birthdate was included in the information here, her age during the charging period can fairly be inferred. CP 67. Her birthdate was stated as "9/25/98" and the charging period began on "September 25, 2010." CP 67. E.F. would have been at least 12 years old during the charging period. In the Court of Appeals, Goss conceded that the charging language communicated that the charging period began on E.F.'s twelfth birthday. App. Br. at 18.

Because the information in this case satisfied the first prong of the Kjorsvik standard, to obtain reversal Goss must show that he was actually prejudiced by any vagueness in the language used. Kjorsvik, 117 Wn.2d at 106. Goss's defense did not relate to

whether E.F. was over or under the age of 12 at the time of the crime, but whether the molestation occurred. See RP 717-46 (defense closing). The jury instructions defining child molestation in the second degree and listing the elements of that crime required that the jury find that E.F. was over 12 years old at the time of the crime. CP 84, 85. There is no prejudice where the allegedly missing element is unrelated to the defense and was included in the jury instructions. State v. Kosewicz, 174 Wn.2d 683, 696, 278 P.3d 184 (2012).

In any event, Goss has not alleged any actual prejudice. When a defendant does not argue that he was actually prejudiced by the charging language, once the first prong of the Kjorsvik standard has been satisfied, the information is deemed constitutionally sufficient. State v. Nonog, 169 Wn.2d 220, 231, 237 P.3d 250 (2010). Because the first prong of the Kjorsvik standard is satisfied by the inclusion of E.F.'s birthdate, this challenge to the sufficiency of the charging document should be rejected on this basis as well.

2. PROHIBITING A DEFENSE ARGUMENT THAT WAS UNSUPPORTED BY THE EVIDENCE AND WOULD MISLEAD THE JURY WAS NOT REVERSIBLE ERROR.

The Court of Appeals properly concluded that the trial court did not err in limiting Goss's closing argument by prohibiting an argument that the State's failure to admit Goss's statement to police supported an inference that the State was withholding evidence favorable to Goss. State v.Goss, slip op. at 10-12. The trial court properly precluded that argument because it was based on facts not in evidence. The argument also would have misled the jury; the State would not have been able to explain its decision without commenting on Goss's choice not to testify at trial. Goss has not established that the ruling was reversible error.

The trial court's ruling in the case at bar was based on its conclusion that Goss's statement was inadmissible hearsay and the jury did not know the rules of evidence, so they did not have information upon which to draw any inference. RP 672-73. The court was correct that there was no evidence presented to the jury that would support the inference that Goss's statement to the police was not helpful to the State. There was no testimony concerning

why Goss's statement was not presented at trial and the jury received no instruction that it could draw any inference from that.

Goss wanted to argue that the jury should infer that his statement could have been introduced by the State, so that he could suggest that his statement was exculpatory without testifying at trial and subjecting himself to cross-examination. Goss could not elicit the content of his statement from the detective because it was inadmissible hearsay, and this end-run around the hearsay rule was properly prohibited by the trial court. An out-of-court admission by a party-opponent, if relevant, may be admissible; however, self-serving hearsay (a statement that tends to aid a party's case) is not admissible under this rule. ER 801(d)(2); State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967 (1999).

In a criminal case, permitting a defendant to admit self-serving hearsay "deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence." Finch, 137 Wn.2d at 825 (citation omitted). When faced with the argument that excluding self-serving hearsay violated a defendant's right to compulsory process, the Supreme Court concluded, "the right to

compulsory process does not allow the defendant to escape cross-examination by telling his story out-of-court." Id.

Without evidence regarding the content of the statement, the jury also could not know whether it was simply of little significance and not worth offering for that reason. Assuming Goss's statement upon arrest included a denial that he molested E.F., as the State's trial brief indicated,[1] the State's choice not to admit his statement is easily explained by the lack of reliability of self-serving statements. It is logical that the State would not offer a self-serving denial when it would not have the opportunity to cross-examine the declarant (Goss). Even an absolute denial by Goss would be of little significance, as a general denial by a person accused of a serious crime has little probative value.

Even if the trial court erred in precluding the argument, the error is reversible only if there is a reasonable probability that it affected the verdict. State v. Frazier, 55 Wn. App. 204, 212, 777 P.2d 27 (1989). Because there was no evidence regarding why the

[1] Portions of Goss's statement are described in the State's trial memorandum. CP 49-50. That summary states that Goss admitted that E.F. often visited his home. He said that he often wrestled with 14-year-old E.F. and would "thump" her chest. He denied fondling E.F.'s breasts but said when he tickled her his hands could have gone upward and touched her chest. Goss also admitted that his daughter had made allegations that he had touched her inappropriately when she was a child, although he denied that had occurred.

State did not offer the statement, the argument would have had very little persuasive value. The State certainly would have been permitted to point out that there was no evidence that the statement was exculpatory and there could be many reasons the State did not offer it. Goss has not established that there is a reasonable probability that the proffered tenuous argument would have affected the verdict, so any error does not warrant reversal.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 6th day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John Henry Browne, the attorney for the appellant, at Law Offices of John Henry Browne, 200 Delmar Building, 108 S. Washington Street, Seattle, WA 98104, containing a copy of the Answer To Petition For Review And Cross-Petition, in STATE V. MICHAEL RAY GOSS, Cause No. 92274-8, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

10-06-15
Date

Done in Seattle, Washington

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Dear Supreme Court Clerk:

Attached for filing in the subject case is the ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION.

Please let me know if you have problems opening the attachment.

Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Donna Wise
Senior Deputy Prosecuting Attorney
Attorney for Respondent