NO. 92274-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Petitioner.

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

The Honorable Laura Inveen, Judge

REPLY TO CROSS-PETITION FOR REVIEW

JOHN HENRY BROWNE
Attorney for Petitioner

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A. IDENTITY OF REPLYING PARTY

Michael Goss filed a timely petition to this Court seeking review of the decision in State v. Goss, No. 72409-6-I, filed August 17, 2015, in which he was the appellant. He is responding to the state's issues on cross-petition in this reply.

B. ISSUES PRESENTED FOR REVIEW

Petitioner raises three issues in his petition for review, all of constitutional magnitude: (1) whether the lower age limit of second degree child molestation is an essential element of that crime which must be alleged in the charging document, (2) whether there was sufficient evidence to convict Mr. Goss of second degree child molestation and (3) whether the defense is entitled to argue an inference based on evidence presented at trial that he provided a statement to the police at the time of his arrest and the prosecution chose not to present the statement to the jury because it was not helpful to the state's case.

Respondent relies primarily on its briefing in the Court of Appeals as an answer to the issues raised in the petition, but argues that if review is granted on issues (1) or (3), this Court should also consider, for issue (1), whether the charging language "conveyed facts establishing [the] missing element," and, for issue (3), whether "any error in precluding the argument [that the state would have presented Mr. Goss's statement if it had been

favorable to the state] was harmless.

C. ARGUMENT WHY THE STATE'S ISSUES ARE WITHOUT MERIT

1. THE FACT THAT THE INFORMATION INCLUDED THE DATE OF BIRTH OF THE ALLEGED VICTIM DID NOT GIVE NOTICE THAT THE STATE HAD TO PROVE THAT SHE WAS AT LEAST TWELVE YEARS OLD.

Respondent asks that if review is granted on the issue of whether proof that the victim is at least twelve years old is an essential element of child molestation in the second degree, this Court should also accept review of the issue of whether "the charging language [in Mr. Goss's case] conveyed facts establishing the allegedly missing element." Answer at 3.

Under RAP 13.7(b), this Court may decide an issue on alternative grounds which would support the Court of Appeals decision, or remand it to the Court of Appeals for consideration of the alternative grounds. The alternative grounds proposed by respondent, however, are without merit.

While the Second Amended Information includes ENF's birthdate and the dates of the charging period, making it possible for a person to calculate that the charging period started on her twelfth birthday, nothing in the information requires such a calculation or gives notice of its significance in proving the crime. The possibility of this calculation does not constitute language notifying Mr. Goss of the essential element of the

crime. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (the charging document must include some notice of the missing element). See Opening Brief of Appellant at 17.

The fact that the alleged victim's age might factually satisfy a statutory element is not equivalent to having an age limit specified as an essential element of the crime. In State v. Ortega, 120 Wn. App. 165, 168, 172, 84 P.3d 935 (2005), for example, this Court held that a 1991 Texas conviction for second degree indecency with a child, which criminalized contact with a child under the age of seventeen, was not comparable to a Washington strike offense which required the child to be under the age of twelve. In reaching this holding, the court reasoned that even if the child in the Texas case had claimed to be eleven, Ortega would have had no incentive to challenge and prove that the child was actually twelve at the time of the contact. Id.; In re Personal Restraint of Lavery, 154 Wn.2d 249, 257, 119 P.3d 837 (2005).

Even liberally construed, the fact that the information included ENF's date of birth did not give notice of the element that the state had to prove that she was at least twelve years old at the time of the alleged crime.

2. AT TRIAL DETECTIVE MATTHEWS TESTIFIED THAT HE READ MR. GOSS HIS RIGHTS, MADE SURE MR. GOSS UNDERSTOOD THEM AND TOOK "A 50-MINUTE RECORDED STATEMENT" ABOUT THE ALLEGATIONS FROM MR. GOSS; DEFENSE COUNSEL SHOULD HAVE BEEN ABLE TO ARGUE INFERENCES FROM THIS EVIDENCE PRESENTED AT TRIAL.

Respondent implicitly and explicitly concedes in its answer that the trial court erred in ruling *that because Mr. Goss's statement was inadmissible hearsay*, the defense could not argue the inference that the state would have introduced it if it had been helpful to the state. Answer at 8. Respondent says only that 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." Answer at 8-9. Respondent, in fact, explicitly concedes that an admission of a party opponent is admissible under ER 801(d)(2). Answer at 9.

Respondent is wrong, however, in asserting that there was no evidence at trial which supported the inference that Mr. Goss's statement was not helpful to the state. Evidence *was* introduced at trial that a 50-minute statement was given to the arresting officer after the advisement of

rights. RP 632-633. From these facts and the state's decision not to present the statement to the jury, it can be logically inferred that Mr. Goss's statements were not helpful to the state. And this is what the defense sought to argue, nothing more. RP 671-672.

Respondent offers reasons, together with legal authority, explaining why a *defendant* cannot offer his "self-serving" out-of-court statements at trial and why the prosecution does not have to offer them if it chooses not to. Answer at 8-19. Neither of these explanations is relevant to the issue raised in the petition for review. Mr. Goss is not arguing either that he should have been able to introduce his statements or that the state should have had to.

As an alternative, the state asks this Court to accept review of the issue of whether the error was harmless. Answer at 2, 10-11. As noted above, under RAP 13.7(b), this Court may decide an alternative grounds which would support the Court of Appeals decision. If this Court reaches the issue, however, it should be decided under a test which recognizes the constitutional rights at issue, and not under State v. Frazier, 55 Wn. App. 404, 212-213, 777 P.2d 27 (1989), which applied an abuse of discretion standard to a missing witness inference where the witness's testimony would have been "unimportant" or "cumulative." The error in denying Mr. Goss his state and federal constitutional rights to present a defense

should not be deemed harmless unless this Court is convinced beyond a reasonable doubt that the jury would have reached the same result if counsel had been able to make the precluded argument. State v. Easter. 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The error in Mr. Goss's case was not harmless under either test. The jury must have had some doubts about the state's evidence and the credibility of its witnesses; it acquitted Mr. Goss of one of the two counts charged against him. There were many reasons to doubt. The jury might well have reached a different result if defense counsel had been allowed to argue that Mr. Goss had given a statement to the police and that it must not have been helpful to the state because it was not introduced at trial.

D. CONCLUSION

Appellant respectfully submits that review should be granted on the issues raised in his Petition for Review, and his conviction should be reversed and dismissed or, at the least, remanded for retrial.

DATED this 23 day of October, 2015.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

JOHN HENRY BROWNE, WSBA #4677
Attorney for Michael Ray Goss

CERTIFICATE OF SERVICE

I certify that on this 23rd day of October, 2015, I caused a true and correct copy of the REPLY TO CROSS-PETITION FOR REVIEW to be served on Respondent and Petitioner via first class mail.

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Renee J. Scott 10/23/15

NAME DATE at Seattle, WA

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Clerk of the Court:

Attached is the Reply to Cross-Petition for Review in *State v Michael Ray Goss* – Case No. 92274-8, filed by defense counsel John Henry Browne, WSBA #4677, on behalf of Mr. Goss.

Thank you.

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