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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 38629-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Appellant,

vs.

JESSE WILLINGHAM
Respondent

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 08-1-00182-8

OPENING BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Mr. Willingham's absence from the state did not toll the statute of limitations.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

On August 14, 2008, Mr. Willingham was charged with one count of Indecent Liberties which was alleged to have occurred on August 1, 2005. Mr. Willingham moved to dismiss based on the limitation of actions, RCW 9A.04.080(h), in that the three-year limitation for crimes charged had expired. Mr. Willingham was in Utah between June 2, 2008, and June 16, 2008. Was the charge erroneously dismissed because the statute of limitations was tolled while Mr. Willingham was absent from the state? (Assignment of Error # 1).

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On August 14, 2008, the State filed an information charging Mr. Willingham with two counts of Indecent Liberties in violation of RCW 9A.44.100(1)(c) occurring on or about July 1, 2005, and on or about August 1, 2005.

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Mr. Willingham filed a Motion to Dismiss on October 10, 2008, based on the limitation of actions, RCW 9A.04.080(h), in that the three-year limitation for crimes charged had expired.

On October 16, 2008, the State filed an Amended Information alleging only one count, Indecent Liberties on or about August 1, 2005, and that Mr. Willingham was "not usually and publicly resident within this state" from June 2, 2008, through June 16, 2008.

Hearings on the issue of whether the statute of limitations was tolled by Mr. Willingham's absence from the state were held on October 24, 2008, and October 31, 2008. On November 4, 2008, the trial court ruled the statute of limitations was not tolled by Mr. Willingham's absence from the state.

This motion for discretionary review timely followed.

FACTS

On March 2, 2007, a Jefferson County Sheriff's Detective interviewed Mr. Willingham about an alleged sexual assault by Mr. Willingham on his 17-year old, foster daughter, A.R. A.R. was

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determined to have mild mental retardation and developmental delays on or about July 1, 2005.

Based on Mr. Willingham's statement admitting sexual contact with A.R. on or about July 1, 2005, and August 1, 2005, Mr. Willingham was charged with two counts of Indecent Liberties. The information was filed on August 14, 2008.

On October 16, 2008, the State filed an amended information charging only one count of Indecent Liberty occurring on August 1, 2005. As part of that amended motion the State also included fourteen documents showing Mr. Willingham was out of the state from June 2, 2008, through June 16, 2008. These included a Driver Job application, Request for Release of Past Employment Information, Ten Year Driving Experience, Conditional Offer of Employment, Employment Eligibility Verification form, Federal Drug Testing Custody and Control form, Wage Assignment and Agreement for Payroll Deduction, Eagle Atlantic Financial Services, Inc, Loan Policies, Pre-Trip Vehicle Inspection, Road Test, Seven Day Prior form, Employee, Driver, Independent Contractor Sign-Off Sheet, Utah Temporary Commercial License, and C.R. England & Sons, Inc. Apprentice Record; all completed and signed between June 2, 2008, and June 16, 2008. CP 17-34.

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The Trial court's Findings of Fact number 7 said: "On June 16, 2008, the defendant was issued Temporary Utah Commercial License# 177541094 which showed an address of 4701 W. 400 St., West Valley, Utah 84120 which is the defendant's employer." CP 50-52.

ARGUMENT

a. Any absence from the state tolls the statute of limitations.

The statute of limitations on a crime is tolled for any period of time during which the defendant is not "usually and publicly resident within this state." RCW 9A.04.080(2).

Mr. Willingham argued that his short-term absence from the state did not fall within either the spirit or letter of "not usually and publicly resident" in the current statute that tolls the statute of limitations.

RCW 9A.04.080(2) unambiguously tolls the statute of limitations for a crime while a defendant is absent from Washington, regardless of whether the defendant has concealed himself or herself from Washington authorities. *State v. Israel*, 113 Wn.App. 243, 293, 54 P.3d 1218 (2002) quoting *State v. McDonald,* 100

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Wn.App. 828, 832, 1 P.3d 1176 (2000), *cert. denied,* 534 U.S. 820, 122 S.Ct. 52, 151 L.Ed.2d 22 (2001).

In *Israel*, a defendant argued that the trial court should have dismissed his case because the three-year statute of limitations had expired although he lived in California for a period of time that, if tolled, allowed his prosecution within the statute of limitations. His argument was that the statute of limitations should not have tolled while he was in California because he remained in contact with his Washington parole officer and paid restitution, thus subjecting himself continuously to the jurisdiction of the State. The court held, however, that RCW 9A.04.080(2) unambiguously tolls the statute of limitations for a crime while a defendant is absent from Washington, regardless of whether the defendant has concealed himself or herself from Washington authorities. *State v. Israel*, 113 Wn.App. 243, 54 P.3d 1218, reconsideration denied, *review denied* 149 Wn.2d 1013, 69 P.3d 874, *review denied* 149 Wn.2d 1015, 69 P.3d 874, habeas corpus denied 2006 WL 3841802.

Defendant's mere absence from state was sufficient to toll statute of limitations for filing charges against him on basis that defendant was "not usually and publicly resident within this state," though defendant's address within other state was known to

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authorities and defendant was living openly and was available for prosecution at all times. *State v. Ansell*, 36 Wn.App. 492, 675 P.2d 614, *review denied by* 101 Wn.2d 1006.

b. The duration of the absence is immaterial

The evidence shows Mr. Willingham was in Utah for a period of time that, if tolled, allowed his prosecution within the statute of limitations. Mr. Willingham argues that the statute of limitations should not have tolled while he was in Utah because he was only out of state for a short period of time. Mr. Willingham argues that his short absence was analogous to a two-week holiday, or a protracted CLE and unlike the previous cases in Washington where the defendants moved their residence to another state.

The court, in *State v. Ansell*, examined this argument in detail.

> The statute of limitations, RCW 9A.04.080, is tolled during the time the person charged is "not usually and publicly resident within this State." No Washington case addresses the meaning of this tolling provision. We therefore look to other jurisdictions.
>
> Most courts which have considered this issue have held "not usually and publicly resident" to simply mean "absent", without regard to whether a defendant was concealing himself or fleeing from justice. In a leading case, *People v. Carman,* 385 Ill. 23, 52 N.E.2d 197 (1943) the issue was whether defendant was "not usually and publicly resident" within Illinois

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during the time he was imprisoned in Missouri. The court held any determination of defendant's *legal residence* to be immaterial to his *residence* for purposes of the statute of limitations. It stated the statutory language was "too clear to admit of construction", and to construe the statute to mean *legal residence* "would do violence to all recognized rules of construction". *People v. Carman,* 52 N.E.2d at 199. It therefore gave the words "usually and publicly resident" their ordinary dictionary definitions.

Applying those definitions to the facts, the *Carman* court held defendant was not "usually and publicly resident" at the address he claimed as his legal residence.

...

The court emphasized the statute was based solely upon defendant's absence from the state, voluntary or involuntary. The statute was therefore tolled while defendant was incarcerated elsewhere.

Other courts have agreed that mere absence, regardless of intent to evade justice, is enough to toll a statute of limitation similar to Washington's. *E.g., Grayer v. State,* 234 Ark. 548, 353 S.W.2d 148 (1962); *Scherling v. Superior Court,* 22 Cal.3d 493, 585 P.2d 219, 149 Cal.Rptr. 597 (1978); *State v. Wyman,* 198 Kan. 666, 426 P.2d 26 (1967); *Couture v. Commonwealth,* 338 Mass. 31, 153 N.E.2d 625 (1958); *State v. Williams,* 92 N.H. 377, 31 A.2d 369 (1943); *Traxler v. State,* 96 Okl.Cr. 231, 251 P.2d 815 (1953). Under such a statute, the State does not have a duty to bring extradition proceedings when it learns of defendant's whereabouts. *Kubus v. Swenson,* 242 Minn. 425, 65 N.W.2d 177 (1954).

On the other hand, a few courts have held "absence" to mean "absenting" with an *intent* to conceal one's whereabouts. *E.g., United States v. Beard,* 118 F.Supp. 297 (D.Md.1954); *State v. Clemens,* 40 Mont. 567, 107 P. 896 (1910); *People v. Guariglia,* 187 Misc. 843, 65 N.Y.S.2d 96 (1946), *aff'd,* 272 A.D. 784, 69 N.Y.S.2d 759 (1947).

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> We believe the majority rule is the better reasoned rule. Ansell's mere absence *from* Washington was enough to toll the statute. State v. Ansell, 36 Wn.App. 492, 675 P.2d 614 (1984).

The Washington courts have adopted the majority rule that the words "not usually and publicly resident within this state" are to be given their dictionary meanings. It is clear that Mr. Willingham's absence from the state, for any reason, for any duration, tolls the statute of limitations. The trial court should be reversed.

c. The victim's special condition justifies a liberal interpretation

Mr. Willingham is alleged to have taken indecent liberties with his 17-year old foster daughter who suffered from mild mental retardation and developmental delays.

The law is clear that Mr. Willingham's absence from the state tolls the statute of limitations. In addition, the court should liberally interpret the statute of limitations whenever the victim is inherently prejudiced. RCW 9A.04.080 already allows longer limitations on charging for child rape and for those crimes whose nature is such that they cannot be immediately discovered.

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Here we have a developmentally disabled minor who was under the authority of the accused and faced inordinate difficulties in bringing the violations to light. Although the crime charged was not rape, it bore a striking similarity to child rape in the inherently covert nature of the crime, the subordination of the victim, and the victim's lack of control over her environment.

The court should give the reporting of this mistreatment of a disabled child the same latitude afforded to an actual rape.

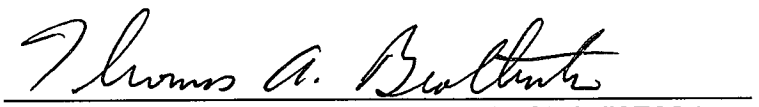
The court should reverse the dismissal of the charge.

CONCLUSION

This court should reverse the Superior Court's order dismissing the charges against Mr. Willingham since the courts have clearly ruled that any absence from the state tolls the statute of limitations.

Respectfully submitted this 17th day of February, 2009

JUELIE DALZELL,
Jefferson County Prosecuting Attorney



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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, vs. JESSE WILLINGHAM, Respondent.	Case No.: 38629-1-II Superior Court No.: 08-1-00182-8 **DECLARATION OF MAILING**

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 25th day of February, 2009, I mailed, postage prepaid, a copy of the State's OPENING BRIEF OF APPELLANT to the following:

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

Dated this 25th day of February, 2009, at Port Townsend, Washington.

Janice N. Chadbourne
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