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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Petitioner.

**SUPPLEMENTAL BRIEF OF RESPONDENT –
STATE OF WASHINGTON**

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 ORIGINAL

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ER 801 16

A. ISSUES PRESENTED

1. RCW 9A.44.086, defining second degree child molestation, specifies that the child molested was at least 12 years old and under 14 years old. If the child was younger than 12 years old, the same behavior would be first degree child molestation. Is the lower end of the age bracket for this crime a ceiling that separates it from a higher degree and not an essential element of the crime?

2. The charging language, challenged for the first time on appeal, included facts establishing the allegedly missing element, that the child molested was at least 12. Should this challenge be dismissed because Goss was not prejudiced as a result of any vagueness in the language?

3. Did the trial court properly limit Goss's closing argument by prohibiting a misleading argument that was not supported by the evidence – that the State's failure to admit Goss's statement to police established that Goss's statement tended to prove that he was not guilty?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Michael Ray Goss, was charged by second amended information with child molestation in the second degree, contrary to RCW 9A.44.086; it was alleged that he had sexual contact with

“ENF (DOB 9/25/98), who was less than 14 years old,” between September 25, 2010, and September 25, 2012, when Goss was more than 36 months older than E.F.¹ CP 67. Goss was born in December 1950, so he would have been 60 years old on September 25, 2011. CP 3. Count 2 charged attempted child molestation in the third degree of E.F., occurring between September 25, 2012, and June 23, 2013. CP 67. A jury convicted Goss on Count 1 (child molestation) and acquitted him on Count 2. CP 93-94. The court imposed a standard range determinate sentence of 17 months of confinement. CP 132-42.

The conviction was affirmed by the Court of Appeals. State v. Goss, 189 Wn. App. 571, 358 P.3d 436 (2015). This Court granted review of issues relating to the sufficiency of the charging document and a limitation on the defense closing argument.²

2. SUBSTANTIVE FACTS

E.F. turned 13 years old on September 25, 2011. RP 273, 331.³ She had just begun seventh grade. RP 332, 458, 522.⁴ While E.F. was in

¹ E.F. is referred to by her initials in an effort to protect her privacy.

² This Court denied review of the sufficiency of the evidence issue, and the Court should disregard the argument regarding that issue that appears in Goss’s Supplemental Brief.

³ The Report of Proceedings is in five volumes with the pages consecutively numbered. They are referred to in this brief simply by page number, as RP ____.

⁴ This testimony established that E.F. had just completed ninth grade at the time of the trial, in July 2014. By extrapolation, she began seventh grade in the fall of 2011.

seventh grade, she met defendant Michael Goss, who was the boyfriend of E.F.'s grandmother.⁵ RP 274-75, 464. E.F.'s grandmother was living with Goss, who was retired. RP 274-75, 296.

One day E.F. was alone in the house with Goss. RP 478. She was playing a computer game when Goss called her over to where he was sitting, and she obeyed. RP 477, 481. Goss grabbed E.F.'s arm and pulled her close, then put both hands up under her shirt and inside her bra. RP 480-82. He grabbed her breasts and held his hands on them for 10 or 15 seconds, saying "I like these, do you like these?" RP 481-82. E.F. was in shock; this made her very uncomfortable. RP 482. She responded, "No," and Goss asked, "Why?" RP 482. E.F. simply repeated, "I don't" and threw off Goss's hands. RP 482-83.

E.F. felt "gross" after this contact but she did not disclose it when her grandmother returned home, because she was afraid of what Goss might do. RP 484. She had seen a gun hanging over Goss's bed. RP 484. E.F. did not tell her mother either, explaining she "just felt gross" and took a shower when she got home. RP 486-87.

After that first time Goss touched her breasts, E.F. spent the second semester of seventh grade living with her father in California, and returned

⁵ E.F.'s relatives are referred to by their relationship to her and not by name, in an effort to protect E.F.'s privacy.

to Washington in July 2012. RP 377-78, 461-62, 476, 487-88. When E.F. returned, Goss tried to touch her breasts on other occasions, but was unsuccessful either because E.F. was able to block him with her arms or there was an interruption. RP 474, 487-88, 490-95, 498-500.

On June 22, 2013, E.F. finally disclosed the molestation to her family after she was chastised for being rude to Goss as she tried to avoid having any contact with him during a family reunion. RP 339-40, 345-58, 417-21, 506-07. E.F. said she had not wanted to say anything because her grandmother was happy and she did not want her grandmother to be upset with her. RP 431. E.F.'s mother immediately reported the molestation to the police. RP 259-60, 359. E.F. told her grandmother the next day, and her grandmother immediately moved out of Goss's home. RP 292-96.

C. ARGUMENT

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

For the first time on appeal, Goss contends that it is an element of second degree child molestation that the child molested was over the age of 12, and that element must be included in the charging language. As the Court of Appeals concluded, that statutory language is not an element of the crime charged. Goss, 189 Wn. App. at 577-80.

Child molestation, i.e., sexual contact for purposes of sexual gratification with a minor under 16 years of age, is prohibited in this state. The crime is divided into three degrees, depending on the age of the child.⁶ First degree child molestation applies if the child was less than 12 years old at the time of the molestation. RCW 9A.44.083. Second degree child molestation applies if the child was at least 12 but less than 14 years old. RCW 9A.44.086. Third degree child molestation applies if the child was at least 14 but less than 16 years old. RCW 9A.44.089.

The second amended information in this case charged that Goss:

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);

CP 67.

- a. It Is Not An Essential Element That The Victim Was At Least 12 Years Old.

Goss argues that a minimum age of 12 is an essential element of second degree child molestation because a minimum age is specified in the statute. That argument is without merit. This Court has held that only statutory language that defines the threshold of a crime, “whose

⁶ The three statutes are attached as Appendix 1.

specification is necessary to establish the very illegality of the behavior,” comprises an essential element. State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). In the case of child molestation, the lower age is a ceiling, not a threshold, and is not necessary to establish illegality of the behavior.

This Court has repeatedly rejected the claim that simply because language appears in the statutory definition of a crime, that language is an essential element. For example, in State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003), the Court addressed one alternative of the crime of felony violation of a no-contact order, predicated on commission of an assault. That crime is defined in the statutory language as “[a]ny assault that is a violation of an order issued under this chapter ... and that does not amount to assault in the first or second degree.” RCW 26.50.110(4). The Court held that the language “does not amount to assault in the first or second degree” is not an essential element. Ward, 148 Wn.2d at 813.

In Tinker, this Court addressed theft in the third degree, which was statutorily defined at that time as, in part, “theft of property or services which (a) does not exceed [\$250] in value.” Former RCW 9A.56.050(1). The Court held that value was not an essential element of that crime. Tinker, 155 Wn.2d at 222. The Court summarily rejected a claim that a value ceiling must be charged, saying that such a holding would appear to

conflict with abundant case law regarding degrees of the crime as lesser included offenses, “as well as case law rejecting charging requirements that could put a defendant in the ‘awkward position’ of arguing that his conduct amounted to a higher degree of the crime than that charged.” Id. at 224 (citing Ward, 148 Wn.2d at 812-13).

Many other Washington cases are in accord, that the statutory ceiling between a lesser charged crime and a greater crime is not an essential element of the lesser crime. E.g., State v. Leyda, 157 Wn.2d 335, 341-42, 138 P.3d 610 (2006)(as to former second degree identity theft, where the goods obtained were less than \$1500 in value or nothing of value, the value of the goods obtained was not an essential element); State v. Keend, 140 Wn. App. 858, 870-72, 166 P.3d 1268 (2007)(that the assault did not amount to first degree assault is not an element of second degree assault); State v. Feeser, 138 Wn. App. 737, 158 P.3d 616 (2007)(absence of premeditation not an element of intentional second degree murder).

Two Courts of Appeal have rejected Goss’s argument in the context of the analogous crime of rape of a child. State v. Smith, 122 Wn. App. 294, 93 P.3d 206 (2004); State v. Dodd, 53 Wn. App. 178, 765 P.2d

1337 (1989). Rape of a child is analytically indistinguishable from child molestation for purposes of this issue; it has the same statutory structure.⁷

In Smith, the court held that the three degrees of rape of a child proscribe one crime: rape of a child under 16 years old. 122 Wn. App. at 298. Smith was charged with third degree child rape, applicable when the child is at least 14. Id. at 296; RCW 9A.44.079. The child testified that two of the rapes occurred when she was only 13 years old. Id. The jury was instructed that third degree rape of a child is sexual intercourse with a child who is “at least twelve years old but less than sixteen.” Id. at 297. The court held that this instruction did not misstate any essential element of the crime; Smith was properly convicted of third degree child rape on all three counts, although there was no dispute that as to two counts, the victim was only 13 years old. Id. at 298-99. The court observed that the State had charged the defendant with a lesser offense than was proved, but proof of the greater charge did not require acquittal of the lesser. Id.

In Dodd, the court held that the evidence was sufficient to support a conviction of third degree statutory rape (the former title of rape of a child), applicable when the child was at least 14, although the child in that

⁷ Rape of a child is divided into three degrees, depending on the age of the child: first degree if the child was less than 12 years old at the time of the rape; second degree if the child was at least 12 but less than 14; third degree if the child was at least 14 but less than 16. RCW 9A.44.073, 9A.44.076, 9A.44.079.

case was 13 years old at the time of the crime. 53 Wn. App. at 180. The court held that third degree statutory rape was an inferior degree to second degree statutory rape, as they both proscribe just one offense, "sexual intercourse with one too immature to rationally or legally consent." Id. at 181 (citations omitted).

The "at least twelve years old" clause in RCW 9A.44.086 is there to distinguish second degree child molestation from a higher degree, more serious crime: if a child is under 12 years old, the crime committed is first degree child molestation. RCW 9A.44.083. The threshold required to establish each degree of this crime is the higher age: for third degree child molestation, that the child was under 16; for second degree, under 14; and for first degree, under 12. While in theft crimes it is a minimum value that is the threshold of a greater offense, as to child sex offenses it is a maximum age that is the threshold. Just as in Tinker and Ward, only the threshold that establishes a more serious charged offense is an essential element of that offense. The legislature did not intend that a defendant avoid prosecution for child rape or child molestation because the child cannot pinpoint whether he or she was 11 or was 12 at the time of the sexual assault; it is a crime in either event. When it amended these statutes in 1994, it stated: "The legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse...." Laws of 1994,

ch. 271, § 301. As applied to second degree child molestation, requiring the State to prove the victim was at least 12 years old would result in acquittal if the State could not exclude the possibility that the victim was younger than that at the time of the crime. That is an absurd result.

In his petition for review, Goss claims that the relevant Washington precedent has been abrogated by Alleyne v. United States, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Goss is wrong in his assertion that Alleyne holds that “distinctions between the core crime which result in different sentencing ranges are essential elements.” Pet. Rev. at 11-12. The Court in Alleyne repeatedly stated that its holding was limited to facts that “increase” or “aggravate” the penalty. 133 S. Ct. at 2160-63. The Court held: “facts that increase mandatory minimum sentences must be submitted to the jury.” Id. at 2163. This is entirely consistent with Washington precedent. A fact that distinguishes a lesser charged crime from a greater crime that is not charged does not increase the penalty for the lesser crime, so Alleyne is not controlling.

Goss also argues that because the jury instructions defining second degree child molestation and listing its elements required the jury to find that E.F. was over 12 years old at the time of the crime, that became an element of the crime. Pet.Rev. at 12. The State was required to prove this

fact because the jury was instructed that it must,⁸ but the instructions did not retroactively create an error in the charging document. As this Court has articulated the rule, “the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction.” State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (emphasis added).

The lower age referred to in RCW 9A.44.086 is not an essential element of the crime of child molestation in the second degree.

- b. If It Is An Essential Element That The Victim Was At Least 12 Years Old, The Charging Language Sufficiently Alleged That Fact.

In the alternative, even if it is an essential element of second degree child molestation that the child was at least 12 years old, the charging language adequately alleged that fact by including E.F.’s birthdate, which established that she was at least 12 years old during the charging period. CP 67. 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 State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

⁸ State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

A charging document must include all essential elements of a crime, to provide notice of the charges and allow preparation of a defense. Id. at 101-02. 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 it 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. As to the first question, 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). 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).

The Kjorsvik standard refutes Goss's claim that the charging language must identify specific facts as elements or explain their significance in proving the crime. Here, because E.F.'s birthdate was included, her age during the charging period can fairly be inferred. Her birthdate was stated as "9/25/98" and the charging period began September 25, 2010, so E.F. would have been at least 12 years old during the charging period. CP 67. Goss has conceded that the charging

language communicated that the charging period began on E.F.'s twelfth birthday.⁹ App. Br. at 18.

Goss argues that facts included in the information cannot be sufficient notice, citing cases that considered the comparability of foreign crimes for purposes of sentencing.¹⁰ These cases are inapposite. The cases hold that a court determining comparability of a foreign crime that is not legally comparable to a Washington crime cannot consider facts beyond the elements of the crime on the issue of factual comparability unless those facts were found by the trier of fact beyond a reasonable doubt. Lavery, 154 Wn.2d at 257-58; Ortega, 120 Wn. App. at 174. The cases do not purport to address the sufficiency of a charging document challenged for the first time on appeal, nor do they refer to the Kjorsvik analysis.

Because the charging language satisfied the first prong of the Kjorsvik test, to obtain reversal Goss must show that he was actually prejudiced by any vagueness. Kjorsvik, 117 Wn.2d at 106. There is no prejudice where the allegedly missing element is unrelated to the defense

⁹ Goss misplaces his reliance on State v. Courneya, 132 Wn. App. 347, 131 P.3d 343 (2006), for the proposition that the necessity of some calculation renders the notice inadequate. In that case there was no dispute that the charging language was defective—the State unsuccessfully argued that the jury instructions in a prior trial provided adequate notice of the missing elements. Id. at 350-54.

¹⁰ In re Pers. Restraint of Lavery, 154 Wn.2d 249, 119 P.3d 837 (2005); State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), remanded on other grounds, 154 Wn.2d 1031 (2005).

and was included in the jury instructions. State v. Kosewicz, 174 Wn.2d 683, 696, 278 P.3d 184 (2012). That is the case here: Goss's defense did not relate to E.F.'s age at the time of the crime (see RP 717-46 (defense closing)) and the jury instructions required that the jury find that E.F. was over 12 years old: CP 84, 85. In any event, Goss has never 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).

2. THE COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING A DEFENSE ARGUMENT THAT WAS UNSUPPORTED BY THE EVIDENCE AND WOULD MISLEAD THE JURY.

Goss claims that he had a right to argue in closing that the State withheld from the jury Goss's statement to the police because that statement was not helpful to the State. That argument would have been misleading and improperly encouraged speculation based on facts not in evidence. The Court of Appeals correctly held that the ruling prohibiting that argument was not an abuse of discretion. Goss, 189 Wn. App. at 582-83. If the trial court erred, it was harmless error.

A trial court has the authority to restrict closing argument, including argument by the defense. State v. Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Argument “must be restricted to facts in evidence and the applicable law, lest the jury be confused or misled.” Id. The judge has broad discretion to ensure argument does not impede the fair and orderly conduct of trial. Id. at 475. The trial court will be found to have abused its discretion only if no reasonable person would have made that decision. Id. The trial court does not err when it precludes an argument that is not supported by the evidence. Id. at 480.

Goss elicited at trial, on cross-examination of a detective, that after Goss was arrested, the detective advised Goss of his constitutional rights and took a 50-minute recorded statement from him. RP 632-33. Goss indicated that he intended to urge the jury in closing that it should draw a negative inference from the State’s failure to play the recording at trial and conclude that the statement would have weakened the State’s case. RP 672-73. The trial court ruled that it would be improper to argue that the State should have played the recording. Id.

The trial court’s ruling was based on its conclusion that Goss’s statement was inadmissible hearsay and that because jurors did not know the rules of evidence, they did not have information upon which to draw any inference. RP 672-73. The Court of Appeals agreed, holding:

“Because there was no evidence presented to the jury to support the inference Goss sought to argue, the trial court did not abuse its discretion in limiting the argument.” Goss, 189 Wn. App. at 582. There was no evidence before the jury as to why Goss’s statement was not presented. The jury could not have known that Goss was not permitted to offer it. The trial court was correct that no evidence at trial supported an inference that the statement was not helpful to the State.¹¹ The jury was instructed to consider only facts in evidence and that if evidence is ruled inadmissible, “not speculate whether the evidence would have favored one party or the other.” CP 74-77.

Goss could not elicit the content of his statement from the detective because it was inadmissible hearsay. This attempt to establish the content of the statement by inference was an end-run around the hearsay rule and was properly prohibited by the trial court. An out-of-court admission by a party-opponent may be admissible, but self-serving hearsay (a statement that tends to aid a party’s case) is not admissible under that rule. ER 801(d)(2); State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967 (1999). 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

¹¹ Moreover, Goss’s statement was not entirely exculpatory, as he twice requested redaction of parts of his statement if the State did offer it. RP 15, 659.

value of the evidence.” Id. at 825. Faced with the argument that excluding self-serving hearsay violated a defendant’s right to compulsory process, this Court in Finch held that right “does not allow the defendant to escape cross-examination by telling his story out-of-court.” Id.

Goss’s analogy to the right to a missing witness instruction effectively illustrates the flaws in his claim. That instruction informs the jury that it may infer that an absent witness would have testified unfavorably to the party who logically would have called the witness. State v. Reed, 168 Wn. App. 553, 571, 278 P.3d 203 (2012). There are two requirements: (1) the witness is peculiarly available to one party, and (2) the circumstances establish that, as a matter of reasonable probability, the party would not have knowingly failed to call the witness unless the testimony of that witness would be damaging. Id. It is not warranted if the absence of the witness can be satisfactorily explained. Id. at 571-72.

A witness is peculiarly available to one party if the witness is known only to that party or if there is a community of interest between the witness and a party. Id. at 572; see State v. Davis, 73 Wn.2d 271, 278, 438 P.2d 185 (1968) (an officer from the investigating agency, who worked closely with the prosecutor’s office, has a community of interest with the prosecutor), overruled on other grounds in State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012) . One court has noted that to claim that

a person who has been imprisoned has a community of interest with the State is “close to frivolous,” noting such a witness is more likely to show bias in favor of a defendant. State v. McGhee, 57 Wn. App. 457, 463-64, 788 P.2d 603 (1990). It is entirely frivolous to argue that the defendant has a community of interest with the prosecution.

This claim also would fail the second requirement of the missing witness analysis: that as a matter of reasonable probability, the party would not have knowingly failed to call the witness unless the testimony of that witness would be damaging. Assuming some portion of Goss’s statement at the time of his arrest was a denial,¹² the choice not to admit his statement is easily explained by the State’s belief that it was untrue. The lack of reliability of self-serving statements is the reason that a party cannot introduce its own statements as an exception to the hearsay rule. There is a natural reason that the State would not offer a self-serving denial when it would not have the opportunity to cross-examine the declarant (Goss). See Finch, 137 Wn.2d at 824-25 (admission of a defendant’s self-serving hearsay deprives the State of the benefit of testing

¹² 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.

the credibility of the statements and denies the jury an objective basis for weighing the probative value of the evidence).

That the proposed inference is based on speculation is illustrated by the many other circumstances that would result in the same evidence at trial, that a statement was taken and was not admitted. There are many reasons that a recorded interview of a defendant may not be offered at trial: it could be suppressed, incomprehensible after required redactions, or simply irrelevant (e.g., because the defendant invoked his or her right to silence or counsel after advice of rights and general background questions). In a case with codefendants, the State might be required to forego use of the statement in order to avoid severance of the trials. The State would be unable to respond to the inference if argued, regardless of the reason the statement was not admitted in any particular case.

The State would have been unable to fairly respond to the argument in this case. The prosecutor could not explain that the statement was not credible – because the content of the statement was not in evidence, so it would be an impermissible statement of personal opinion as to the defendant's credibility. The prosecutor could not explain that self-serving hearsay is unreliable and should be tested by cross-examination, because that would be an impermissible comment on the right to remain silent at trial. A juror who did not know the discovery rules or evidence

rules might conclude that the State had withheld the recording from the defense, a complete falsehood that the State also would be unable to rebut.

Thus, the argument at issue was based on speculation, not facts in evidence, and would have been misleading. Goss should not be permitted to urge a negative inference from the State's failure to present the defendant's version of events when that argument is gamesmanship. See United States v. Bramble, 680 F.2d 590, 592 (9th Cir. 1982) (defense cannot rely on missing witness rule to argue unfavorable inference against the State in order to avoid cross-examination that would occur if defense called the witness).

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 State did not offer the statement, the argument would have had very little persuasive value. The jury would not be aware that Goss could not offer the statement. The State certainly would have been permitted to point out that there was no evidence that the statement was exculpatory and that there could be many reasons the State did not offer it.

Goss claims that this ruling unconstitutionally burdened his right to present a defense, but he was not limited in the presentation of evidence or

as to a theory of the case. The Supreme Court cases upon which Goss relies involved complete deprivation of the ability to present evidence on a critical issue. E.g. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (precluded from offering evidence that another person repeatedly confessed to murder).¹³ The Court in Chambers held that it was not establishing a new principle of constitutional law, but the exclusion of critical evidence of another man's multiple confessions in that case resulted in a trial that violated traditional, fundamental standards of due process. 410 U.S. at 302. To declare a denial of due process, a court must conclude that the acts complained of were of such quality as necessarily prevented a fair trial. United States v. Valenzuela-Bernal, 458 U.S. 858, 872, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). Goss cites no case that suggests that he has a constitutional right to draw inferences unsupported by the evidence in closing argument.

Goss does not have a right to present his denial of the crimes through a speculative inference in order to avoid cross-examination. The Due Process Clause provides no such weapon. Denial of that speculative inference did not prevent a fair trial. It certainly did not prevent Goss

¹³ See also Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (state evidence rule excluding post-hypnotic testimony prevented defendant from testifying as to critical issues); Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (defendant asserted an insanity defense but could not afford a psychiatrist to support it; court refused to appoint expert).

from presenting his defense by testifying, if he chose. The trial court's denial of argument as to that speculative inference was not an arbitrary application of the rule restricting argument to facts in evidence, and properly prohibited an argument that would mislead the jury.

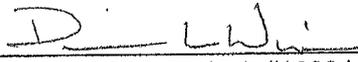
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Goss's conviction and sentence.

DATED this 8TH day of April, 2016.

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

Appendix 1

RCW 9A.44.083 Child molestation in the first degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.086 Child molestation in the second degree

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

RCW 9A.44.089 Child molestation in the third degree

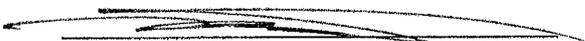
(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, John Henry Browne at johnhenry@jhblawyer.com, containing a copy of the Supplemental Brief of Respondent – State of Washington, 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
Done in Seattle, Washington

04-08-16
Date

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Wise, Donna; 'lorie@jhblawyer.com'; 'johnhenry@jhblawyer.com'; 'colleen@jhblawyer.com'
Subject: RE: State v. Michael Ray Goss/92274-8

Received on 04-08-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [mailto:Bora.Ly@kingcounty.gov]
Sent: Friday, April 08, 2016 9:09 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Wise, Donna <Donna.Wise@kingcounty.gov>; 'lorie@jhblawyer.com' <lorie@jhblawyer.com>; 'johnhenry@jhblawyer.com' <johnhenry@jhblawyer.com>; 'colleen@jhblawyer.com' <colleen@jhblawyer.com>
Subject: State v. Michael Ray Goss/92274-8

Good morning,

Please accept the attached documents (State's Motion for Permission to File Over-Length Brief, and Supplemental Brief of Respondent) for filing in the subject case. Please let me know if you should have problems opening the attachments.

Thank you,

Bora

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For

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