

67945-7

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NO. 67945-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICANDRO SANCHEZ-CISNEROS,

Appellant.

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

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's conviction for Communication With A Minor For Immoral Purposes must be vacated because the charge was filed beyond the statute of limitation.

Issue Pertaining to Assignment of Error

The statute of limitation for Communication With A Minor For Immoral Purposes is two years. On November 5, 2010, appellant was charged with committing this offense sometime between January 2004 and December 2005. Must his conviction be vacated?

B. STATEMENT OF THE CASE

The Skagit County Prosecutor's Office charged Nicandro Sanchez-Cisneros with (count 1) Child Molestation in the First Degree and (count 2) Communication With A Minor For Immoral Purposes. CP 1-2. The charges were based on the allegations of M.C. (count 1) and her younger sister, B.C. (count 2). CP 1-2. Both crimes were alleged to have occurred "[o]n or about and between January 1, 2004 and December 31, 2005." CP 1-2. The information was not filed, however, until November 5, 2010. CP 1.

M.C. first came to the attention of law enforcement because of a very serious lie. In June 2010, then fourteen-year-old M.C. told

a school counselor that "Tito," a grown man, had sexual intercourse with her when she was just thirteen. RP 55, 79, 104. Police were called and M.C. admitted that she had lied. She and Tito never had sex. RP 79-80, 104. M.C. could not explain why she had exposed Tito to possible criminal prosecution and a wrongful conviction. RP 79-80.

Sometime thereafter, M.C. told her counselors that Sanchez-Cisneros had touched her inappropriately when she was much younger. RP 73-74. Sanchez-Cisneros knew M.C.'s parents from work and was considered a family friend. He would come by from time to time and visit with M.C., her parents, and her two sisters at their home. They also socialized in other settings. RP 60-62, 173-178, 207-210.

According to M.C., Sanchez-Cisneros stopped by their apartment once when her parents were not home. In the master bedroom, he had M.C. sit on his lap and tried to place his hand in the area of her vagina, over her clothing. She moved his hand away, however. He then attempted to place her hand on his penis, over his clothing, but she moved her hand away, got up, and left the room. RP 62-78.

B.C., who is about a year and a half younger than M.C., testified that she was in the room with M.C. and Sanchez-Cisneros and saw the events M.C. described.¹ RP 55, 107, 113, 117-119. She also testified that just before those events, Sanchez-Cisneros had repeatedly asked her to take off her pants. When she refused, he indicated he would take off his own pants and loosened or removed his belt. He never did remove his pants, however. RP 113, 116-117.

Although the girls testified they told their parents what had happened (a claim their father also made), and M.C. testified she had told counselors over the years, no report was ever filed with law enforcement until 2010. RP 72-73, 102-104, 121-122, 179-180. Sanchez-Cisneros denied ever being alone with the girls and denied their allegations against him. RP 208-210.

Jurors found him guilty in count 1 (regarding M.C.) of the lesser-included crime of Attempted Child Molestation in the First Degree and guilty in count 2 (regarding B.C.) of Communication With A Minor For Immoral Purposes. CP 76. The court imposed a minimum term of 38.25 months on count 1 and a total term of 364

¹ A third sister, who is the oldest, testified she also was home, but was in a different room at the time of the alleged acts. RP 138-148.

days on count 2. CP 79. Sanchez-Cisneros timely filed his Notice of Appeal. CP 89-90.

C. ARGUMENT

THIS COURT MUST VACATE SANCHEZ-CISNEROS' CONVICTION FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES BECAUSE THE CHARGE WAS FILED BEYOND THE STATUTE OF LIMITATION.

A criminal statute of limitation is jurisdictional and absolutely bars prosecution beyond the stated period. State v. Hodgson, 108 Wn.2d 662, 667-68, 740 P.2d 848 (1987), cert. denied, 485 U.S. 938 (1988); State v. Novotny, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994). "An indictment or information which indicates that the offense is barred by the statute of limitation fails to state a public offense." State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979).

Whether the statute of limitation bars a prosecution is a legal question this Court reviews de novo. State v. Cook, 125 Wn. App. 709, 106 P.2d 251, review denied, 155 Wn.2d 1013 (2005). In a criminal case, a violation of the statutory period can be raised for the first time on appeal. State v. Walker, 153 Wn. App. 701, 705, 224 P.3d 814 (2009).

In count 2, Sanchez-Cisneros was charged with Communication With A Minor For Immoral Purposes. CP 2. Although there is a felony variant of this crime, Sanchez-Cisneros was charged and convicted of a gross misdemeanor. CP 2; RCW 9.68A.090(1) (“(1) Except as provided in subsection (2) of this section, a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.”).

RCW 9A.04.080 contains the statute of limitations for Washington crimes. By its express terms, “No gross misdemeanor may be prosecuted more than two years after its commission.” RCW 9A.04.080(1)(i). Because Sanchez-Cisneros was charged with a gross misdemeanor well beyond the two-year period, the appropriate remedy is to vacate his conviction. See In re Stoudmire, 141 Wn.2d 342, 354, 356-357, 5 P.3d 1240 (2000); Novotny, 76 Wn. App. at 346-347.

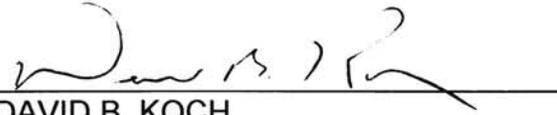
D. CONCLUSION

This Court should vacate Sanchez-Cisneros' conviction in count 2.

DATED this 25th day of April 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH
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DIVISION ONE

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Respondent,)	
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v.)	COA NO. 67945-7-I
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NICANDRO SANCHEZ-CISNEROS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIK PEDERSEN
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- [X] NICANDRO SANCHEZ-CISNEROS
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SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF APRIL 2012.

x 