NO. 307212-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

ALLEN ROBERT TREVINO, Appellant

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APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00126-5

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# BRIEF OF RESPONDENT

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3. **DID THE TRIAL COURT PROPERLY IMPOSE AN EXCEPTIONAL SENTENCE?**

## II. STATEMENT OF THE CASE

Robert Allen Trevino was a resident of Portland, Oregon for the entire timeline of this case until his extradition to Washington State. (CP 55, 59). Other than a brief period in 2003, the defendant has never been a resident of Washington State. (CP 56).

In either 2001 or 2002, the defendant entered into an extended romantic relationship with Ralaunda Ashenbrenner. (CP 55-56). Ralaunda had three daughters. B.J.A. is Ralaunda's oldest daughter, and the victim in this case. (CP 55). The victim in this case has a birthdate of December 13, 1991. (CP 55; RP[1] 104). Ralaunda moved to Richland, Washington in February of 2002. (CP 55). Despite this, the defendant

[1] Unless dated, "RP" refers to the December 13, 2011, Verbatim Report of Proceedings.

and Ralaunda's romantic relationship continued. (CP 55). The defendant would visit Ralaunda in Richland. (CP 55). During one of these visits, the defendant read the victim a pornographic story about incest between a brother, sister, and their parents. (CP 55-56).

In September of 2003, when the victim was 11 years old, the defendant moved into Ralaunda's residence for a short-time period. (CP 56). At some point in time, identified as "the beginning of sixth grade," the defendant digitally penetrated the victim under the guise of giving her a massage. (RP 113-17). The victim was 11 years old at the start of Sixth Grade, and 12 years old at the end of the school year. (RP 10). The defendant later returned to Portland Oregon. In June of 2004, Ralaunda moved in with the defendant in Portland, Oregon. (RP 56).

The defendant sexually assaulted the victim multiple times while living with her. (RP 57). In the most concerning event, he forced her to perform oral sex on him, and then ejaculated in her mouth. (RP 57). Ralaunda later returned to Washington State. (RP 57).

On December 3, 2010, Mr. Trevino came to visit Ralaunda. (RP 58). Ralaunda's youngest daughter fled the residence, indicating that she is uncomfortable around Mr. Trevino. (RP 58). At the time, the youngest daughter was 12 years old, a little bit older then B.J.A. was when the defendant sexually assaulted her. (RP 58). B.J.A. elected to disclose the

abuse at that time, first to her boyfriend, then her grandmother, and finally her mother. (RP 58). Ralaunda went to confront the defendant, who fled the area. (RP 58). The Police were contacted, and statements taken. (RP 58). The State elected to charge the defendant, eventually charging him with two counts: Communication with a Minor for Immoral Purposes, and Rape of a Child in the first degree. (CP 48-49).

Mr. Trevino proceeded to trial, and was convicted on both counts, as well as on an aggravating factor that he used his position of trust to facilitate the criminal act. (CP 253). The court imposed an exceptional sentence upward, and sentenced the defendant to 168 Months on Count 1, Rape of a Child in the First Degree. (CP 253-54). His sentence was 21 months above the standard range, which was 111-147 months. (CP 254). The defendant now timely appeals the ruling, alleging three errors.

## III. ARGUMENT

### 1. THE CRIME THE DEFENDANT WAS CONVICTED OF OCCURRED WHEN THE VICTIM WAS 11 YEARS OLD.

RCW 9A.44.073(1) reads:

> A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

The State needed to prove each element of Rape of a Child in the First Degree beyond a reasonable doubt. The defense has alleged that there was insufficient evidence to show that the victim in the case was under the age of 12 when the crime occurred. (App. brief at 6). In arguing the sufficiency question, the defense in fact appears to address two real concerns, only one of which is a real sufficiency challenge. There is the question if the jury instructions accurately informed the jury of the elements of the crime of Rape of a Child in the First Degree, and there is the question if the evidence is sufficient to support a conviction of such.

### A. The charging period is irrelevant in this analysis.

The defendant makes repeated references to the fact that the charging period includes a portion of time when the victim was 12. (App. brief at 7). The State does not dispute that fact. However, it is entirely irrelevant for the purposes of the sufficiency challenge. The question before the Court is whether the to-convict instruction actually instructed the jury as to the requisite elements, or if the time period, which included some time in which the victim was over the age of 12, instructed the jury wrongly. The natural analogy here is *State v. Aho*, 137 Wn.2d 736, 741, 975 P.2d 512 (1999). *Aho* involves a defendant convicted of Child Molestation in the First Degree. *Id.* However, the charging period in *Aho*

incorporated a time period prior to the enactment of the child molestations statute. *Id.* In both cases, the key question is, did the jury find the defendant guilty based upon acts that could not be punished by the statute the prosecution proceeded under? *Id.* In *Aho*, nothing indicated that the court could. The jury was not instructed that any acts prior to July 1, 1988, could not be the basis of a conviction for child molestation. The Jury was instructed:

> [T]o convict Aho on any of the child molestation counts, the State had to prove that he had sexual contact with the victim during a stated time period beginning January 1, 1987, that the victim was under age 12, and that Aho was at least 36 months older than the victim.

*Id.* at 739.

However, the statutes which Aho was charged under did not take effect until July 1, 1988. *Id.* at 741. As a result, the jury was unaware that any incidents that they found committed between January 1, 1987, and July 1, 1988, could not be the basis of their decision. *Id.* With the instructions as they were, there was no way to be sure that the jury had not found Aho guilty based upon acts which could not be charged that way. *Id.* at 744.

This case stands directly opposite from that. Instruction 10, which defined Rape of a Child in the First Degree, informed the jury that the defendant could only be guilty of Rape of a Child in the First Degree if the

victim was under the age of 12. (CP 179). Instruction 16, the to-convict instruction, provided four elements the state must prove before the jury could convict the defendant of Rape of a Child in the first Degree.

> (1) The during the time intervening between January 1, 2002, and the 12th day of December 2004, the defendant had sexual intercourse with [B.J.A.];
> (2) That [B.J.A.] was less than 12 years old at the time of the sexual intercourse and was not married to the defendant;
> (3) That [B.J.A.] was at least twenty-four months younger then the defendant; and
> (4) That this act occurred in the State of Washington

(CP 185).

As a result, in order to convict Mr. Trevino of Rape of a Child in the First Degree, the jury was instructed that it must have occurred within the time period of January 1, 2002, and December 12, 2004, and that it happened when the victim was under the age of 12. The only misinformation given to the jury was that of an additional element of the crime, the time period cited. By adding that wording to the "to-convict" instruction, the State forfeited any opportunity to have the jury find Mr. Trevino guilty, based upon events prior to January 1, 2002. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). However, as long as the instructions advise the jury of all statutorily required elements, and the

State proved the additional elements included in the "to-convict" instruction beyond a reasonable doubt, there is no constitutional error. *Id.*

The defendant highlights certain comments made by the State during closing argument. However, in doing so, they take the comments out of context. The defendant states in his brief, "the State argued that Trevino was guilty because Trevino put his hands in B.A.'s vagina when she was in 'fourth or fifth grade' and 'living at the snow residence.'" (App. brief at 4). That is not at all what was argued by the State. The rape of a child allegation centered around conduct that occurred in 2003, when the victim was 11years old and living at their home on Jadwin, which the State made clear. (RP 71). The passage the defendant cites to refers to the conduct that was the basis of the communication with a minor for immoral purposes allegation. The statement "the charging period ends when she turns 13" was directly followed by arguments showing that the victim was 11 when the event charged occurred, and showing how the jury could be sure of that. (RP 12/15/11, 98-99). Finally, the defendant cites a large portion of text, discussing B.J.A. at age 12. Those arguments related to B.J.A. when she was 12. It was an explanation offered to the jury of B.J.A.'s failure to disclose the abuse for so long, not a request to punish Mr. Trevino for actions that occurred when the victim was 12.

Here, the defendant was found guilty of having sexual intercourse with B.J.A between January 1, 2002, and December 12, 2004, when B.J.A was less than 12 years old. That is sufficient to do away with any worries about the charging period. "Juries are presumed to follow the court's instructions absent evidence to the contrary." *State v. Dye*, 170 Wn. App. 340, 348, 283 P.3d 1130 (2012).

### B. There is sufficient evidence to convict Mr. Trevino of the crime of Rape of a Child in the First Degree.

The defendant also appears to assert that the State did not prove that B.J.A. was under the age of 12 during the case. This is contradicted clearly by the testimony given by the State's witnesses. Counsel for the State very clearly set up a time scale for the victim, using her grade in school as point of reference, to avoid the victim becoming confused. (RP 107-09). Testimony on direct clearly established that B.J.A. was in the sixth grade during the 2003-2004 school year. (RP 107-09). B.J.A. started the school year at age 11, and turned 12 during it. The testimony clearly showed that the defendant digitally penetrated B.J.A. before she turned 12. (RP 113). B.J.A. was unable to recall the date exactly, but did recall it was at some point in fall, due to the leaves on the trees being orange. (RP 114).

The defendant asserts that the fall B.J.A. spoke of was the fall of 2004. (App. brief at 7). However, that is not held up by the testimony. B.J.A. was set to graduate in 2010 at the age of 18. (RP 107). As such, B.J.A. would have been in the 12th grade during 2009-2010, and age 17 when she began the school year, and age 18 at the end of the school year as the following chart shows:

| SCHOOL YEAR | GRADE | B.J.A.'s AGE |
|---|---|---|
| 2009-2010 | Grade 12 | 17 turning 18 by end of school year. |
| 2008-2009 | Grade 11 | 16 turning 17 by end of school year. |
| 2007-2008 | Grade 10 | 15 turning 16 by end of school year. |
| 2006-2007 | Grade 9 | 14 turning 15 by end of school year. |
| 2005-2006 | Grade 8 | 13 turning 14 by end of school year. |
| 2004-2005 | Grade 7 | 12 turning 13 by end of school year. |
| 2003-2004 | Grade 6 | 11 turning 12 by end of school year. |
| 2002-2003 | Grade 5 | 10 turning 11 by end of school year. |
| 2001-2002 | Grade 4 | 9 turning 10 by end of school year. |

The testimony elicited by the prosecution clearly shows that the fall of B.J.A.'s 6th grade school year was the fall of 2003, when B.J.A. was 11 years old.

The defense did show that B.J.A. had earlier given a statement to an officer that her sixth-grade year was in 2004-2005. (RP 143).

However, B.J.A. immediately clarified that statement, indicating that it had been a mistake. B.J.A stated, "I wasn't sure when I was in sixth grade," at the time of the interview with Detective Jansens. (RP 143). Re-direct further clarified that the dates of 2004-2005 came from B.J.A's mother, not from the victim. (RP 154).

The timeline the defendant argues for is impossible. B.J.A. testified that they moved to Portland to live with the defendant prior to the beginning of the school year in 2004. (RP 124). As a result, Mr. Trevino could not have sexually assaulted B.J.A. on that date in the residence on Jadwin, because neither the victim, the victim's mother, or the defendant was at that residence in 2004. Ralunda, the victim's mother, testified that they moved into the Jadwin residence in 2003. (RP 50). B.J.A. was absolutely clear that the abuse occurred in the Jadwin residence. (RP 113).

In essence, the defendant's arguments are an attack upon the credibility of the testimony that B.J.A. gave, that the assault occurred in the fall of 2003. However, what weight to give to inconsistent testimony is a question left to the finder of fact. *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) *reversed on other grounds* 170 Wn.2d 117, 240 P.3d 143 (2010). "An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the

sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The State will not address the other case law cited on this issue, as it discusses attempts to seek lesser included offenses. The State has no interest in seeking such. The defendant raped B.J.A. when she was 11 years old, as clearly found by the finder of fact. The fact that earlier confused statements gave a different date is in no way sufficient to overturn that finding.

## 2. THE STATUTE OF LIMITATIONS HAD NOT RAN.

The defendant is entirely correct in all the case law he cites, and the arguments he makes regarding the statute of limitations. However, he fails to recognize the significance of the statutes he provides. He incorrectly cites the locations of the statute of limitations: "(i) No gross misdemeanor may be prosecuted more than two years after its commission." (App. brief at 10). RCW 9A.04.080(1)(i). This incorrect citation is important, because of the section immediately after the quoted portion. Section two reads, "(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state." RCW 9A.04.080(2). All the portions of section (1), including the gross misdemeanor statute of limitation, are suspended whenever the defendant

is not a resident of the State of Washington. (CP 56). As a result, Mr. Trevino's crime was not barred for prosecution.

### 3. THE DEFENDANT'S ARGUMENT RUN AGAINST WELL-SETTLED CASE LAW.

The defendant contends that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2533, 159 L. Ed. 2d 403 (2004) declared the previous exceptional sentence system unconstitutional, and that, as a result, all crimes that occurred prior to *Blakely* cannot not be enhanced via exceptional sentences. (App. brief at 11). The exact arguments the defendant makes were analyzed, and dismissed by the Supreme Court of Washington in *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) and *State v. Parmlee*, 172 Wn. App. 899, 292 P.3d 799 (2013).

> We note that the argument that an unconstitutional statute does not, in some sense, exist, and therefore cannot justify punishment before the legislature remedies the constitutional flaw, has been raised and rejected many times in many courts

*Pillatos*, 159 Wn.2d at 476.

One of his primary arguments is that the 2007 *Blakely* fix only applied to cases in progress when *Blakely* was decided; however, the *Blakely* fix is not relevant. The ordinary procedures for an exceptional sentence apply in this case, as they were drafted in 2005 in response to

*Blakely*. The alterations to RCW 9.94A.537 were retroactive, as they are considered remedial. *Parmlee*, 172 Wn. App. at 916

The court followed the statutory procedures, which have been ruled to be retroactive, without violation of the ex post facto rule. The *Blakely* fix in 2007 was a reaction to *State v. Pillatos*, which ruled that the 2005 amendments only applied to new trials. 2007 Wash. Legis. Serv. Ch. 205 (H.B. 2070). The defendant properly received an exceptional sentence, based upon the jury's findings. *Blakely* did not deprive the State of the power to assign exceptional sentences to individuals who have committed horrific crimes which the standard range does not adequately punish. It simply ensured that if a sentence was enhanced, it was enhanced by the finder of fact that the defendant was entitled to. The defendant had all that the constitution requires. "But as we have said when considering other amendments to the SRA, the key is whether the defendant had *notice* of the punishment at the time of the crime, not whether in some metaphysical sense, a constitutional statute existed at the time of the crime." *State v. Pillatos*, 159 Wn.2d at 475.

The argument that RCW 9.94A.345 bars retroactivity in this respect was specifically addressed and denied.

> In this case, both past and present law allows for exceptional sentencing. The 'law in effect when the current

> offense was committed,' reasonably read, includes the possibility of exceptional sentences, and the change in procedures does not violate the letter or purpose of RCW 9.94A.345."

*Pillatos*, 159 Wn.2d at 473.

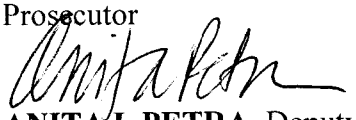
The amendments in 2005 and 2007 to RCW 9.94A.547 were remedial fixes, and may be applied retroactively. It was applied as such here.

## IV. CONCLUSION

The defendant has failed to identify any real issues. The jury found that B.J.A. was under the age of 12, and their judgment as to the credibility of any proposed inconsistencies cannot be disturbed. The statute of limitations does not apply, as the statute tolled for as long as Mr. Trevino was not a resident of Washington State. The court had the power to give the defendant an exceptional sentence. In light of these facts, the State requests that this Court affirm the lower court's ruling.

**RESPECTFULLY SUBMITTED** this 30th day of May 2013.

**ANDY MILLER**
Prosecutor



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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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