NO. 72409-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Appellant.

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

The Honorable Laura Inveen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL EVIDENCE DOES NOT ESTABLISH, AS RESPONDENT'S SUBSTANTIVE FACTS IMPLIES, THAT THE INCIDENT OCCURRED AFTER ENF WAS TWELVE YEARS OLD.

The trial testimony did not establish, as respondent implies, that ENF accused Mr. Goss of touching her breasts at a time when she was at least twelve years old, during the charging period of the crime. Brief of Respondent (BOR) at 4-6.

ENF's grandmother met Mr. Goss in March or May 2010, and her grandmother moved in to live with him a few months later. RP 274-275; 298-299. This evidence established the earliest dates that Mr. Goss and then eleven-year-old ENF might have been together. ENF could not testify definitively when the alleged incident of touching she described in court took place after that. She recalled only that it was around her birthday and before she went to live with her father in California; she could not remember which birthday, how old she was turning or if it was before or after the birthday. RP 591.

The prosecutor explicitly elicited that she did not know if the incident occurred before or after she turned twelve:

> Q. There were a lot of questions about the timing of when these things happened, chronologically; you talked about whether you told Detective Matthews that the first incident happened around your

birthday?

A. Yes.

Q. Is that still accurate? Do you remember it still being around your birthday?

A. Yes.

Q. Do you remember at all which birthday it was or how old you were turning?

A. No.

Q. And your birthday is in September; is that correct?

A. Yes.

RP 591 (emphasis added).

Additionally, as set forth in the Opening Brief of Appellant, ENF gave very different accounts of her alleged interactions with Mr. Gross. She told her family and the police initially that there were five to seven alleged incidents and described five in some detail to them -- then reduced the number to two actual touchings and one attempt to touch her breasts; and finally one touching and two attempts. See Opening Brief of Appellant (AOB) 6-10. Her credibility was impeached in a number of other significant ways. AOB 4-11.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

The state argues that the evidence is sufficient to support the

conviction because ENF testified the incident occurred when she was in the seventh grade when she was twelve, a time within the charging period. BOR 24-27. What respondent omits is that, as set out above, when asked directly and specifically if she could remember "at all" which birthday and how old she was turning on that birthday, ENF said "no" that she could not remember. RP 591. If ENF could not recall how old she was at the time, then the evidence was insufficient. Where the only witness who had knowledge of the alleged incident did not know herself how old she was at the time, the jurors had no basis for deciding her age beyond a reasonable doubt.

It should be noted further, that ENF's testimony was not clear as the prosecutor represented; she testified, in fact, that she was eleven or twelve when she met Mr. Goss. RP 464, 537. Eleven years old is consistent with other evidence. ENF's grandmother began living with Mr. Gross in 2010, and it seems unlikely that a year would have passed without ENF meeting him. RP 520.

Mr. Goss's conviction should be reversed and dismissed for insufficiency of the evidence.

3. THE AMENDED INFORMATION FAILED TO INCLUDE ALL OF THE ESSENTIAL ELEMENTS OF SECOND DEGREE CHILD MOLESTATION.

a. The alleged victim's being at least twelve but less than fourteen is an essential element of the charge against Mr. Goss.

The jury in Mr. Goss's case was instructed that the state had to prove beyond a reasonable doubt that ENF was "at least twelve years old but less than fourteen years old" in order to convict him of child molestation in the second degree. CP 85. The state proposed this instruction. CP 71-72. The jury was also instructed on the definition of child molestation in the second degree which included the statutory language "sexual contact with a child who is at least twelve years old but less than fourteen." CP 84. Thus, the court's instructions to the jury, as requested by the state, unambiguously required the jurors to find that ENF was at least twelve years old in order to convict him as charged.[1] This requirement was separate from and in addition to the charging period for

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[1] Even assuming, without conceding, that the "at least twelve" language was not essential, when the state assumes the burden of proof in instructional language, it bears the burden of proving the element it proposed; the element becomes the law of the case. State v. Hardamon, 29 Wn.2d 182, 188, 186 P.2d 634 (1997); State v. Hobbs, 71 Wn. App. 419, 857 P.2d 73 (1997) (where the court gave a corrected instruction during deliberations deleting an unnecessary venue element, the appellate court held that of the trial court's alternatives of holding the state to its election or granting a mistrial, a mistrial was the proper choice).

the crime. CP 85.

Thus, even though the age range, not just the maximum of fourteen years was an element that the state had to prove at trial, the second amended information failed to inform Mr. Goss that the state had to prove that he had sexual contact with someone who was between the ages of twelve and fourteen, rather than just less than fourteen. CP 67-68. The failure to inform Mr. Goss violated article I, section 22, amendment 10 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, which provide that a person accused of a crime has a right to be informed of the nature and cause of the charge against him so he may prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 434-435, 998 P.2d 296 (2000); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991); Alleyne v. United States, ____ U.S. ____, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Moreover, neither of the cases cited by respondent – State v. Smith, 122 Wn. App. 294, 93 P.3d 208 (2004) or State v. Dodd, 53 Wn. App. 178, 765 P.2d 1337 (1989) -- addressed the sufficiency of a charging document. In Dodd, the issue was whether the defendant could be convicted of a lesser degree of a crime when charged with the greater degree, and the appellate court held that he could properly be convicted of the inferior degree crime.

In Smith, the reviewing court considered an agreed instruction misstating the age element as at least twelve but less than sixteen – instead of between fourteen and sixteen -- where the charge was third degree rape of a child. The state amended the information "to reflect [the child's] at the time indicated in her testimony [13], but did not amend the information to charge second degree rape of a child." Smith. 122 Wn.App. at 297. The amended information continued to charge only third degree rape of a child and correctly defined it -- including the provision that the child was between fourteen and sixteen – in the information. Then the parties agreed to define the crime to the jury as "at least twelve years old but less than sixteen ... " Smith, 122 Wn. App. at 296-297. Under these circumstances, the court held that conviction of the greater did not require acquittal of the lesser. Id, at 299.

Most importantly, in Smith, the court held that "Because the age of the victim is a function of the proper penalty and an essential element of the proscribed offense of having sexual intercourse with a minor, we affirm." Id. at 294. The United States Supreme Court rejected this precise distinction between penalty factors and elements of the crime in Alleyne.

Under the United States Constitution, the age range is an element of the crime because it increases the mandatory minimum term. Alleyne v. United States, supra (any fact that increases the mandatory minimum

sentence for a crime is an element of that crime and must be submitted to the jury). At issue in Alleyne, was the enhanced penalty for carrying a firearm in relation to a crime of violence, 18 U.S.C. section 924(c)(1)(A). Like the Washington child molestation statute, which punishes sexual contact with a minor, the enhanced punishment for carrying a firearm in connection with a crime of violence has three different mandatory minimums. If the firearm was carried during the crime the mandatory minimum was five years; if it was brandished, seven years, and if it was discharged, ten years. 18 U.S.C. section 924(c)(1)(A) (i), (ii), and (iii). The Alleyne Court concluded that the core crime and the fact triggering the varying mandatory minimum sentences together constitute a "new, aggravated crime" requiring each element to be submitted to the jury. Alleyne, 133 S.Ct. at 2161.

Here, as in Alleyne, the mandatory minimum for second degree child molestation, where the child is between twelve and fourteen years of age, is greater than for conviction of third degree child molestation. The standard range is fifteen to twenty months rather than from six to twelve months. RCW 9.94A.510 and .515. Child molestation in the first degree, which requires proof of an age less than twelve, RCW 9.44.083, has a standard range of fifty-one to sixty-eight months. RCW 9.94A.510 and .515. The core crime plus the age ranges constituted new crimes, all of the

elements of which had to be proved to a jury. Id.

Alleyne is controlling here: the age requirement is an element of the crime of second degree child molestation because the age element determines the mandatory minimum term and it was not included in the information or in any other notice document. Because the element was omitted, the information was insufficient and Mr. Goss's conviction should be reversed and dismissed for that reason.

b. The missing element cannot be fairly implied from the second amended information.

Respondent agues, in the alternative, that the fact that ENF's date of birth was included in the second amended information gives notice of the age requirement of the second degree child molestation statute. BOR at 18-19. No authority is cited for this proposition that the date of birth of the alleged victim gives notice of the age requirements of the crime. In fact, the information alleged that Mr. 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 . . . ." CP 67-68. This implies that the state need prove only that ENF was less than fourteen. This language cannot be fairly construed, as argued by respondent (BOR 20-21), as giving notice that the

alleged victim must be at least twelve years old; it implies only that ENF had to be less than fourteen. BOR 20-21. State v. Kjorsvik, 117 Wn.2d 93, 105-106, 812 P.2d 86 (1991).[2] Because the element of being at least twelve, as well as under fourteen, neither appears in any form and cannot be fairly construed from the second amended information, the reviewing court "presume[s] prejudice and reverse[s] without reaching the question of prejudice." State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing Kjorsvik, 117 Wn.2d at 105-106).

Prejudice should be presumed in this case and Mr. Goss's conviction reversed and dismissed.

Although respondent also argues that the charging date gave notice of the age element of child molestation in the second degree and faults appellant for citing State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991), for the proposition that the date of the offense is not generally "a material part of the 'criminal charge,'" BOR at 7, respondent cited DeBolt and State v. Clark, 170 Wn. App. 166, 194, 283 P.3d 1118 (2012), for the same proposition in arguing that the trial court properly allowed the state to amend the charging period at the close of its case. BOR 7. ("The

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[2] Kjorsvik, at 105-106, sets out the test for consideration of a challenge to the sufficiency of a charging document for the first time on appeal: 1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language.

charging period usually is not a material element of a crime. Clark, 170 Wn.App. at 194. '[A]mendment of the date is a matter of form rather than substance . . . '"). Neither the date of birth nor the dates of the charging period gave notice of the age element of second degree child molestation.

4. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION AT THE CLOSE OF THE STATE'S CASE.

Respondent cites State v. Clark, supra, and argues that Mr. Goss cannot show prejudice because he objected only "for the record" and did not ask to recall any witnesses after the state was permitted to amend the information at the close of its case. BOR 7-8. Respondent also cites other authority, such as State v. Schaffer, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), aff'd. 120 Wn.2d 616 (1993), holding that the accused cannot establish prejudice to a late pretrial amendment where the defense did not request a continuance. None of this authority is relevant here.

The state was permitted to amend the information essentially at the close of its case, after essentially all of its witnesses had been presented and cross examined. Mr. Goss's entire defense was presented in cross examination, and it was simply too late to redo that cross examination of all of the state's witnesses. RP 243-244.

The trial court ruled that there was no prejudice, RP 657-622, but given the extensive amendment and the lack of a viable opportunity to re-

examine all of the witnesses, that finding was an abuse of discretion. As noted by the court in State v. Hobbs, 71 Wn .App. at 423, although the defense was granted a chance to reargue after the state was permitted to submit an amended instruction during deliberations, the defense was prejudiced in having no chance to rethink its cross-examination strategy. Mr. Goss's conviction should be reversed if it is not dismissed because of the insufficiency of the evidence or the charging document.

5. THE TRIAL COURT ERRED IN NOT ALLOWING COUNSEL FOR MR. GOSS TO ARGUE, BASED ON THE EVIDENCE ADMITTED AT TRIAL, THAT MR. GOSS HAD PROVIDED A STATEMENT TO THE POLICE AND THE PROSECUTOR CHOSE NOT TO PRESENT THAT EVIDENCE TO THE JURY.

The jury heard, from Detective Matthews, that Mr. Goss participated in a fifty-minute interview at the time of his arrest, after being fully advised of his rights to remain silent and to an attorney. RP 633.

Respondent does not assert, in its responding brief, that Mr. Goss's statement would have been inadmissible if offered by the state or that the state could not have introduced it at trial if it chose to do so. Respondent claims only that the trial court properly ruled that the statement was inadmissible hearsay as to Mr. Goss, and that there "was no evidence presented concerning why Goss's statement was not presented at trial." BOR 29-31.

In light of the state's express concession that the issue is analogous to the right to a missing witness instruction, this implicit concession that the state could have chosen to admit the statement is determinative. BOR 30. A missing witness instruction is appropriate where the witness is peculiarly available to the party who did not call him or her, and the circumstances are such that the party would have called the witness if the testimony were not adverse or damaging. State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011).

The evidence here was peculiarly available to the state; Mr. Goss could not seek the admission of his statement under the hearsay rules, while the state could have offered it at trial. AOB 22-23; BOR 30. The circumstances are such that if the statement had been helpful to the state, the state would have introduced it. In fact, Mr. Goss denied committing the crime during an extended interview with the police, and his denial certainly had a tendency to negate his guilt; this is why it was inadmissible by the defense and not offered by the state. And if there were parts which were not exculpatory, those parts could have been introduced as well. BOR 31.

The issue was not whether the state could have called Mr. Goss as a witness, as respondent claims. BOR 31-32. The issue is whether the defense was entitled to argue that if Mr. Goss's statement was not

damaging to the prosecution, the state would have introduced it at trial. That is certainly the case, and defense counsel was entitled to make that argument.

As set out in Mr. Goss's opening brief, both parties are entitled to the benefits of all the evidence in presenting evidence, AOB 24-25; and those accused of crimes have broad constitutional rights to appear and defend at trial. RP 25-26. The fact that Mr. Goss could not introduce his own exculpatory statement should not have precluded him from arguing inferences from the evidence that he gave a statement and the prosecution elected not to introduce it at trial. His conviction should be reversed.

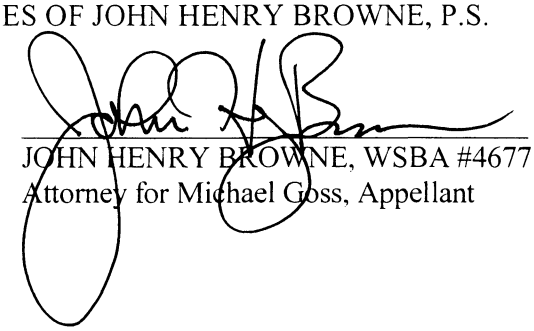
B. CONCLUSION

For all of the above reasons and the reasons set forth in his Opening Brief of Appellant, Mr. Goss's conviction for second degree child molestation should be reversed and dismissed.

DATED this 22 day of April, 2015.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.



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

STATE OF WASHINGTON Respondent, v. MICHAEL RAY GOSS, Appellant.	No. 72409-6-I DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that caused to be served by ABC Legal Messenger Service a copy of the attached "Reply Brief of Appellant" upon the following counsel of record:

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and mailed a copy via U.S. Regular Mail, postage prepaid to appellant:

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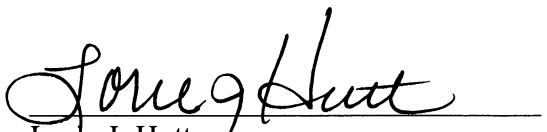
DATED at Seattle, Washington, this 4th day of May, 2015.



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