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Court of Appeals
Division I
State of Washington

NO. 72409-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in allowing an amendment of the charging period on Count 1 to conform to the testimony at trial, when Goss did not assert to the trial court that he believed he was prejudiced by that amendment?

2. Was the charging language constitutionally adequate when: (1) the statutory language that was not included (that the victim was "at least twelve years old") is not an essential element of the offense; and (2) the charging language conveyed facts establishing that allegedly missing element?

3. Was the evidence sufficient to support the jury's conclusion that the molestation occurred during the charging period, which was when the victim was 12 years old?

4. Did the trial court properly exercise its discretion in limiting Goss's closing argument by prohibiting an argument that the State's failure to admit Goss's statement to police supported an inference that the State was withholding evidence favorable to Goss?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Michael Ray Goss, was originally charged with child molestation in the second degree, contrary to RCW 9A.42.030; it was alleged that he had sexual contact with E.F.,[1] who was 13 years old, between September 25, 2011, and September 24, 2012, when Goss was more than 36 months older than E.F. CP 1-5. Goss was born in December 1950, so he would have been 60 years old on September 25, 2011. CP 3.

On January 27, 2014, the State gave notice that it would be adding another count of child molestation in the second degree, by providing a copy of the proposed amended information. CP 21. When the case was assigned out for trial on July 2, 2014, the State moved to amend the information, but changed the additional count to attempted child molestation in the third degree; it alleged that Goss attempted to have sexual contact with E.F., who was 14 years old, between September 25, 2012, and June 23, 2013.

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

CP 32-33; RP 13-14.[2] There was no objection to the amendment and it was permitted. CP 30-31; RP 14.

After the testimony of the victim and her mother[3] and before the State rested, the State moved to amend the charging period in Count 1 to conform to their testimony regarding the time when that incident occurred. RP 657. Goss objected to the amendment "for the record" but offered no argument in opposition. RP 662-63. The court permitted the amendment. RP 663.

On July 10, 2014, the jury convicted Goss on Count 1, child molestation in the second degree, and acquitted him on Count 2. CP 93-94.

Goss filed a motion to arrest judgment, alleging that there was insufficient evidence to support the verdict on Count 1. CP 95. The trial court denied the motion. CP 147.

The court imposed a standard range determinate sentence of 17 months of confinement with additional conditions. CP 132-42.

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[2] 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 __.

[3] 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.

2. SUBSTANTIVE FACTS

E.F. turned 13 years old on September 25, 2011. RP 273, 331. She had just begun seventh grade. RP 332, 458, 522.[4] While E.F. was in seventh grade, she met defendant Michael Goss, who was the boyfriend of E.F.'s grandmother. RP 274-75, 464. E.F.'s grandmother was living with Goss, who was retired. RP 274-75, 296. Goss's home in Lake Forest Park was about a 30-minute drive from E.F.'s home. RP 336, 468.

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.

[4] This testimony established that E.F. had just completed ninth grade at the time of the trial, in July 2014. By extrapolation, she completed seventh grade in June 2012, and would have begun seventh grade in the fall of 2011.

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. RP 476, 487-88. She went to California on January 28, 2012, and returned to Washington in July 2012. RP 377-78, 461-62. 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. Goss never tried to touch E.F. sexually anywhere else on her body. RP 504.

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 TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE SECOND AMENDMENT TO THE INFORMATION.

Goss claims that the trial court abused its discretion in permitting the State to amend the information after the testimony of the victim and her mother. This argument should be rejected. In the trial court, Goss did not claim that the amendment prejudiced him in any way. RP 662-63. Goss has not established that the trial court abused its discretion when it allowed the amendment.

Under the criminal rules, the trial court may allow the State to amend the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced."[5] CrR 2.1(d). A trial court's decision to grant a motion to amend an information is reviewed for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). The defendant has the burden of showing that the amendment prejudiced his

[5] The State's ability to amend is further limited after the State has rested its case. State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). The amendment here was before the State rested, so those limitations are inapplicable.

substantial rights. State v. Clark, 170 Wn. App. 166, 194, 283 P.3d 1116 (2012). The defendant must demonstrate "specific prejudice" resulting from the amendment. State v. James, 108 Wn.2d 483, 486, 489, 739 P.2d 699 (1987).

The 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, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." Id. (quoting State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991)). There was no alibi defense in this case and Goss did not claim any prejudice when the State moved to amend the information. RP 662-63. Goss's only objection in the trial court was "for the record"; he did not argue that he was prejudiced in any way. RP 662-63. Because Goss did not identify any potential prejudice, the trial court cannot be found to have abused its discretion in allowing the amendment pursuant to CrR 2.1(d).

Even the claim of prejudice articulated for the first time in this appeal would not be sufficient to establish substantial prejudice if it had been presented in the trial court. On appeal, Goss argues the amendment was prejudicial because his defense was presented entirely via cross-examination, which was complete before the

amendment.[6] This Court in Clark rejected a similar challenge to an amendment to the charging period, where the defendant in the trial court had argued that he was prejudiced because the victim already had testified. 170 Wn. App. at 194. The trial court had allowed the amendment, but stated that if there was an offer of proof as to what the defendant would attempt to elicit that was not done before, the court would allow him to recall the witness. Id. No offer of proof was made, nor was there a request to recall the witness. Id. This Court held that without that proffer or request to recall the witness, the defendant "cannot show substantial prejudice." Id.

Other cases have held that the failure to request a continuance upon amendment of the charges at the beginning of trial results in a presumption that there was no surprise or prejudice. E.g., State v. Schaffer, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), aff'd, 120 Wn.2d 616 (1993); State v. Wilson, 56 Wn. App. 63, 65, 782 P.2d 224 (1989). The failure to articulate any prejudice here, along with the lack of any request to recall any witness, should result in a similar presumption.

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[6] Goss also states that the length the charging period was extended shows substantial prejudice but does not explain what that prejudice would be in this case.

Goss did not identify any prejudice to the trial judge and did not ask to recall any witness. He has not identified any cross-examination that would have been affected by the enlargement of the charging period. Even if the vague claim of prejudice first raised on appeal is considered, he has not established that the trial court's ruling was an abuse of discretion.

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

For the first time on appeal, Goss asserts that the charging language on the charge of child molestation in the second degree was defective. This claim is meritless. Goss contends that it is an element of the crime that the child molested was over the age of twelve, and the failure to include that allegation requires reversal of this conviction. But that statutory language is not an element of the crime charged. Even if it were an element, the charging language included the victim's date of birth, which established that element, so the charging language was sufficient.

A charging document must include all essential elements of a crime, to apprise the accused of the charges and allow preparation of a defense. State v. Kjorsvik, 117 Wn.2d 93, 101-02,

812 P.2d 86 (1991). 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 that document 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.

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.[7] Child molestation in the first degree applies if the child was less than 12 years old at the time of the molestation. RCW 9A.44.083. Child molestation in the second degree applies if the child was at least 12 but less than 14 years old at the time of the molestation. RCW 9A.44.086. Child molestation in the third degree applies if the child was at least 14 but less than 16 years old at the time of the molestation. RCW 9A.44.089.

Count 1 of the second amended information in this case provided:

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[7] The three statutes are attached as Appendix 1.

> That the defendant Michael Ray Goss in King County, Washington, 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);
>
> Contrary to RCW 9A.44.086 and against the peace and dignity of the State of Washington.

CP 67.

a. It Is Not An Essential Element Of Child Molestation In The Second Degree That The Child Victim Was At Least 12 Years Old.

Goss argues that a minimum age of 12 is an essential element of child molestation in the second degree because a minimum age is specified in the statute. That argument is without merit. The Supreme Court has held that only statutory language that defines the threshold of crime, its very illegality, comprises an essential element. Courts of Appeal have specifically rejected Goss's argument in the context of the crime of rape of a child, and their analysis should be followed here.

Two Divisions of the Court of Appeals have rejected Goss's argument in the context of rape of a child. State v. Smith, 122 Wn.

App. 294, 93 P.3d 206 (2004)[8]; State v. Dodd, 53 Wn. App. 178, 765 P.2d 1337 (1989). The crime of rape of a child is analytically indistinguishable from child molestation for purposes of this charging issue; it has the same statutory structure as child molestation. Rape of a child (sexual intercourse with a minor) is divided into three degrees, depending on the age of the child:[9] 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.

In Smith, Division Two 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. The defendant in that case was charged with child rape in the third degree, which RCW 9A.44.079 defines as applicable when the victim is at least 14. Id. at 296. The child testified that two of the rapes actually occurred when she was only 13 years old. Id. The jury was instructed that rape of a child in the third degree is sexual intercourse with a child who is "at least

[8] This citation in WestLaw correctly indicates that in 2005, review was granted in part (at 153 Wn.2d 1017) but shows no further action. A review of the Supreme Court docket indicates that review was dismissed as improvidently granted on May 6, 2005.

[9] The three statutes are attached as Appendix 2.

twelve years old but less than sixteen." Id. at 297. Division Two held that this instruction did not misstate any essential element of the crime. Id. at 298. The defendant was properly convicted of child rape in the third degree 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. "That the victim was younger than the age range in the third degree rape of a child statute does not mean that the defendant did not commit the proscribed act of having sexual intercourse with a child." Id. at 298 (citing Dodd, 53 Wn. App. at 181).

In Dodd, Division One held that the evidence was sufficient to support a conviction of statutory rape (the former title of rape of a child) in the third degree, which former RCW 9A.44.090 defined as applicable when the victim is at least 14, although the victim in that case was 13 years old at the time of the crime. 53 Wn. App. at 180. The court held that statutory rape in the third degree was an inferior degree to statutory rape in the second degree, as they both proscribe just one offense, "sexual intercourse with one too immature to rationally or legally consent." Id. at 181 (citations

omitted). Its holding established that the defendant was guilty of statutory rape even though the victim was under 14 years old; being 14 or over was not an element of that crime, although it was included in the statutory definition.

An "essential element is one whose specification is necessary to establish the very illegality of the behavior." 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 illegality of the behavior is established by the higher age limit applicable to each degree of the crime: with respect to child molestation in the first degree, it is when the child was "less than 12 years old"; with respect to child molestation in the second degree, it is when the child was "less than 14 years old." RCW 9A.44.083, 9A.44.086.

The Supreme Court has repeatedly rejected the claim that simply because language appears in the statutory definition of a crime, that language is an essential element of the crime. State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006); Tinker, 155 Wn.2d at 222-24; State v. Ward, 148 Wn.2d 803, 812-14, 64 P.3d 640 (2003).

In Ward, 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 under RCW 9A.36.011 or 9A.36.021." 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 of the crime, but serves to explain that all assaults in violation of a no-contact order will be penalized as felonies. Ward, 148 Wn.2d at 813. The court noted that if the statutory language were interpreted to require the State to disprove assault in the first or second degree, that would not advance the legislative purpose of protecting victims of domestic violence from abuse, or penalizing assaultive violations of no-contact orders more severely. Id.

As applied to child molestation (and child rape) in the second degree, 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, but specifying the exact date of an incident of child molestation may be impossible for the young victim. The defendant

should not be able to avoid any responsibility because the State cannot disprove that he committed a more serious crime.

In Tinker, the court addressed theft in the third degree, which was defined in the statutory language 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 Supreme 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).

In Leyda, the court addressed the former statutory definition of identity theft in the second degree: identity theft where the goods obtained were less than $1500 in value or nothing of value was obtained. Former RCW 9.35.020(2)(b).[10] The court held that the value of the goods obtained was not an essential element of the crime that needed to be included in the charging language.

[10] This definition applied at the time of the crimes in Leyda (2002) and at the time of the decision in 2006. Leyda, 157 Wn.2d at 341-42 & n.6.

Leyda, 157 Wn.2d at 341-42. The court held that value need only be specified if there is a minimum value threshold. Id.

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.

The "at least twelve years old" clause in RCW 9A.44.086 is there to distinguish child molestation in the second degree from a higher degree crime: if the child was less than 12 years old, the crime committed was child molestation in the first degree. RCW 9A.44.083. The threshold required to establish each degree of this crime is the higher age: for child molestation in the third degree, 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.

Thus, 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. The State is not required to prove that a victim was at least 12 years old at the time of the molestation in order to obtain a conviction, and is not required to allege that fact in the charging document.

b. If It Is An Essential Element That The Child 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 child molestation in the second degree that the child was at least 12 years old, the charging language in the case at bar adequately alleged that fact by including E.F.'s date of birth, which established that she was at least 12 years old during the charging period. 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 Kjorsvik, supra.

Under the first prong of the Kjorsvik test, 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); State v. Pineda-Pineda, 154 Wn. App.

653, 670, 226 P.3d 164 (2010). 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) (citing Kjorsvik, 117 Wn.2d at 109). This permits the court to "fairly infer the apparent missing element from the charging document's language." Goodman, 150 Wn.2d at 788 (citing Kjorsvik, 117 Wn.2d at 104).

As Kjorsvik illustrates, the information need not identify an element and "give notice of its significance in proving the crime," as Goss contends. App. Br. at 18. In Kjorsvik, the information did not explicitly state the "intent to steal" element of robbery but the court inferred it based on the allegation that Kjorsvik took money against the will of the shopkeeper by use of force, while displaying a deadly weapon. 117 Wn.2d at 110-11. Nothing in the information in Kjorsvik informed the defendant of the significance of the intent to steal, as it was not even explicitly mentioned.

Because E.F.'s birthdate was included in the information here, her age during the charging period can fairly be inferred. CP 67. Her birthdate was stated as "9/25/98" and the charging period began on "September 25, 2010." CP 67. E.F. would have been at least 12 years old during the charging period.

Goss concedes that the charging language communicates that the charging period began on E.F.'s twelfth birthday, but argues that because a calculation is required, that notice is insufficient, citing State v. Courneya, 132 Wn. App. 347, 131 P.3d 343 (2006). App. Br. at 18. However, in that case the State conceded that the charging document was defective and argued that the jury instructions in the original trial provided adequate notice of the missing elements for purposes of a conviction after a second trial. Courneya, 132 Wn. App. at 350-54. In contrast, the information in this case included facts establishing that the victim was at least 12 years old at the time of the crime, the element that Goss contends is missing.

Goss also asserts that the charging period cannot be considered in determining whether the essential elements have been alleged, but Goss cites no authority for that proposition. He does precede that claim with the assertion that "the date of the offense has been deemed to be a 'matter of form rather than substance'...," citing State v. DeBolt, supra. App. Br. at 18. But that quotation is taken out of context. The complete text makes it clear that the holding is inapposite here. The court in DeBolt said:

> Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant.

61 Wn. App. at 61-62 (emphasis added).

Because the information in this case satisfied the first prong of the Kjorsvik standard, to obtain reversal Goss must show that he was actually prejudiced by any vagueness in the language used. Kjorsvik, 117 Wn.2d at 106. Goss's defense did not relate to whether E.F. was over or under the age of 12 at the time of the crime, but whether the molestation occurred. See RP 717-46 (defense closing). The jury instructions defining child molestation in the second degree and listing the elements of that crime required that the jury find that E.F. was over 12 years old at the time of the crime. CP 84, 85. There is no prejudice where the allegedly missing element is unrelated to the defense and was included in the jury instructions. State v. Kosewicz, 174 Wn.2d 683, 696, 278 P.3d 184 (2012).

In any event, Goss has not 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). Because the first prong of the Kjorsvik standard is satisfied by the inclusion of E.F.'s birthdate, this challenge to the sufficiency of the charging document should be rejected on this basis as well.

3. THE JURY'S GUILTY VERDICT WAS SUPPORTED BY THE EVIDENCE.

Goss claims that the evidence at trial was not sufficient to support his conviction because there was insufficient evidence that the molestation occurred after the start of the charging period, which began on September 25, 2010, E.F.'s twelfth birthday. He does not dispute the proof of any element except the date of the offense. The same argument was presented by Goss in a motion for arrest of judgment. CP 95-99. The trial court rejected this claim when it denied Goss's motion for arrest of judgment, concluding that there was sufficient evidence to support the guilty verdict. CP 147. This court should affirm that conclusion.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). All reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). The trier of fact is the sole arbiter of credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may rely on circumstantial evidence alone, and circumstantial evidence is as trustworthy as direct evidence. State v. Gosby, 85 Wn.2d 758, 765-67, 539 P.2d 680 (1975). Thus, the appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In this appeal, the parties agree that there is only one incident of Goss touching E.F.'s breasts upon which this conviction could be based. Goss disputes the sufficiency of the evidence that it occurred during the charging period, but the testimony of E.F. clearly established that it did occur during the charging period.

E.F. testified that she met Goss when she was in the seventh grade and testified four times that the touching occurred during her seventh grade school year. RP 464, 476, 590. E.F. and her mother both testified that E.F. had just completed her ninth grade school year in July 2014, at the time of trial. RP 332, 361, 458, 522. Thus, she would have completed seventh grade two years earlier, in June of 2012. E.F. testified that she was finishing seventh grade in 2012. RP 522. She would have begun the seventh grade in the fall of 2011. Her birthday was September 25, 1998, so she would have turned 13 years old on September 25, 2011. RP 331.

Based on these facts, E.F. was in the seventh grade from September 2011 to June 2012. She was 12 years old at the beginning of the school year and turned 13 in September of 2011. The charging period was from September 25, 2010, to September 25, 2012 (CP 67); because the molestation occurred while she was in seventh grade, it was within the charging period and while she was at least 12 years old.

E.F. also testified that she was in seventh grade the year she went to live with her father in California. RP 461, 464. She testified that she remembered that the touching occurred in seventh

grade specifically because it was before she moved to her father's house in January. RP 475. Her mother confirmed that E.F. went to live with her father from January to July of 2012. RP 377. That corroborated that E.F.'s seventh grade school year was September 2011 to June 2012.

E.F.'s mother caused a good deal of confusion by her testimony that E.F. lived with her father during eighth grade. RP 360. That could not have been true because E.F. was in eighth grade in 2013, but that year E.F. and her mother flew from Washington to California together in February. RP 369-70. Further, the disclosure of the abuse occurred in June 2013, and E.F. was living in Washington at the time. RP 339, 354-58, 370-72, 412, 420-26. Both would have been impossible if E.F. was living with her father in California from January to July of that year.

It is apparent that E.F.'s mother was simply confused in her reverse extrapolation of E.F.'s grade two years earlier, because she also confirmed that E.F. was living with her father from January to July of 2012. RP 361, 377.

The trial prosecutor also apparently was confused by E.F.'s mother's testimony that E.F. had been in eighth grade when she lived with her father. The prosecutor managed to confuse E.F. in

her redirect testimony by making a mathematical error as well. E.F. testified again during redirect examination that she lived with her father in seventh grade; she agreed that the trial was in 2014, and repeated that the summer of 2013 was when she told her family, and the summer before that was 2012, when she was finishing seventh grade. RP 521-22. Then E.F. confirmed she had just finished ninth grade, in 2014. RP 522. The prosecutor's next question was "Go back to 2012, you would have just finished the eighth grade; is that correct?" RP 522. The prosecutor continued, "Okay, and then 2011 you would have just finished seventh grade?" RP 522-23. E.F. agreed to both of these leading questions, although they were arithmetically incorrect and inconsistent with her own prior testimony. RP 522-23. The jury was warranted in understanding that it was the prosecutor's confusion, not E.F.'s, that was illustrated by this exchange.

Goss focuses on E.F.'s testimony that the touching may have occurred before her birthday, but the birthday that occurred during E.F.'s seventh grade year was her 13th birthday (September 25, 2011), so even if the touching occurred before that day, it was within the charging period (September 25, 2010, to September 25, 2012).

Goss quotes the trial prosecutor's assertion concerning his motion to amend, that an incident that occurred when E.F. was in the seventh grade "would have been after her 12th birthday." App. Br. at 20 (citing RP 657). That remark may have been because he thought E.F. might have been in the seventh grade from 2010 to 2011, based on his mathematical error discussed infra. But the prosecutor was accurate to the extent that at the beginning of her seventh grade year, in early September 2011, E.F. would have been 12 years old, not yet 13, so the amendment was necessary to expand the charging period to the weeks before her birthday while she was in seventh grade.

Thus, E.F. was consistent that the molestation occurred while she was in seventh grade, which was the school year beginning in September 2011, and that it occurred before she went to live with her father, which was in January 2012. That time period is within the charging period and during a time when E.F. was 12 and 13 years old. The evidence was sufficient to support the jury's finding on that point and their verdict of guilty.

4. **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 to the jury that the State chose to withhold from the jury Goss's statement to the police because that statement was not helpful to the State. The trial court properly precluded that argument because it was based on facts not in evidence. The argument also would have misled the jury; the State would not have been able to explain its decision without commenting on Goss's choice not to testify at trial. Goss has not established that the ruling was an abuse of discretion. Even if the court erred, it was harmless, as there is no probative value to the inference that Goss denied he molested his girlfriend's young granddaughter.

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 (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct.

2550, 45 L. Ed. 2d 593 (1975)). Rulings restricting argument are reviewed for abuse of discretion. Perez-Cervantes, 141 Wn.2d 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.

The trial court's ruling in the case at bar was based on its conclusion that Goss's statement was inadmissible hearsay and the jury did not know the rules of evidence, so they did not have information upon which to draw any inference. RP 672-73. The court was correct that there was no evidence presented to the jury that would support the inference that Goss's statement to the police was not helpful to the State. There was no testimony concerning why Goss's statement was not presented at trial and the jury received no instruction that it could draw any inference from that. The jury was instructed to consider only facts in evidence. CP 74, 76. The jury could not have known whether some or all of that statement could have been introduced by the State.

Goss wanted to argue that the jury should make that inference so that he could suggest that his statement was exculpatory without testifying at trial and subjecting himself to

cross-examination. He could not elicit the content of his statement from the detective because it was inadmissible hearsay, and this end-run around the hearsay rule was properly prohibited by the trial court. An out-of-court admission by a party-opponent, if relevant, may be admissible even though it is offered for the truth of the matter asserted; however, self-serving hearsay (a statement that tends to aid a party's case) is not admissible under this rule. ER 801(d)(2); State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967 (1999).

In a criminal case, 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 value of the evidence." Finch, 137 Wn.2d at 825 (citation omitted). When faced with the argument that excluding self-serving hearsay violated a defendant's right to compulsory process, the Supreme Court concluded, "the right to compulsory process does not allow the defendant to escape cross-examination by telling his story out-of-court." Id.

Moreover, it appears from the record that 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. The jury

did not hear this either, but it does reinforce the impropriety of arguing the opposite inference to the jury. Without evidence regarding the content of the statement, the jury also could not know whether it was simply of little significance and not worth offering for that reason. Even an absolute denial by Goss would be of little significance, as a denial by a person accused of a serious crime has little probative value.

The State agrees with Goss's claim that his argument is analogous to the "right to a missing witness instruction." App. Br. at 23. Examination of the policy underlying the missing witness instruction and its requirements illustrates that Goss had no legitimate basis to draw the inference he proposed.

A missing witness 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). The instruction is proper only if the witness is peculiarly available to one party and 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. The

instruction 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), overruled on other grounds in State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012) (a law enforcement officer who is a member of the agency that investigated the case on trial and who works closely and continually with the prosecutor's office has a community of interest with the prosecutor). This 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." State v. McGhee, 57 Wn. App. 457, 463-64, 788 P.2d 603 (1990). The court noted that such a witness is more likely to show bias in favor of a defendant. Id. at 464. It is entirely frivolous to argue that the defendant has a community of interest with the State.

In addition, the party against whom the missing witness rule is asserted "is entitled to explain that witness's absence and thereby avoid operation of the inference." Reed, 168 Wn. App. at 573 (citing State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718

(1991)). The State could not call Goss as a witness. Assuming some portion of Goss's statement at the time of his arrest was a denial, as the State's trial memorandum indicates,[11] the choice not to admit his statement is easily explained by the lack of reliability of self-serving statements. That 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).

Thus, the argument at issue was not based on facts in evidence, would have been misleading, and was not warranted based on the circumstances.[12] The missing witness rule, or as Goss claims by analogy, the negative inference drawn from the State's failure to present the defendant's version of events, should not be relied upon when that argument is gamesmanship. See United States v. Bramble, 680 F.2d 590, 592 (9th Cir.

[11] 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.

[12] If this Court concludes that the trial court was not relying on some part of this analysis, its decision nevertheless may be affirmed on any basis that is supported by the record. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

1982)(defense cannot rely on missing witness rule to argue unfavorable inference against the government in order to avoid the cross-examination that would occur if the 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 State certainly would have been permitted to point out that there was no evidence that the statement was exculpatory and there could be many reasons the State did not attempt to offer it. In fairness, if the argument had been made, the State would have been permitted to respond that it had no reason to offer Goss's story without having the opportunity to cross-examine him about the weaknesses in the story.

Goss finally argues that evidentiary rules cannot be mechanistically applied in a way that burdens a defendant's constitutional rights, and that prohibiting this argument

unconstitutionally burdened his right to present a defense.[13] He cites no case that suggests that he has a constitutional right to draw a negative inference from the State's decision not to offer Goss's statement. That contention is an unsustainable extension of the cases affirming a defendant's right to present a defense.

The right to present evidence in one's defense is a fundamental element of due process. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). But the defendant's right to present evidence is not unlimited; a defendant has no right to present irrelevant or inadmissible evidence. Id. at 15; Finch, 137 Wn.2d at 824-25; State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). Likewise, Goss did not have the right to present a misleading argument, unsupported by the evidence.

The three United States Supreme Court cases upon which Goss relies involved the complete deprivation of the ability to address a critical issue. See Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)(state evidentiary rule excluding

[13] In this argument, Goss again asserts that no rule precluded admission of the statement by the State. App. Br. at 26. While ER 801(d)(1) does provide that a statement is not hearsay if it is offered against a party that made the statement, that did not happen in this case, so the content of the statement was inadmissible. Moreover, in demanding redactions of the statement if it was offered, RP 15, 659, Goss was asserting that some portion of it was inadmissible if offered by the State.

all post-hypnotic testimony prevented defendant from testifying as to critical issues); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)(defendant was precluded from offering evidence that another person had repeatedly confessed to a murder); Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)(a defendant who asserted an insanity defense could not afford a psychiatrist to support it, and the court refused to appoint any expert). In Chambers, the Court noted that it was not establishing any new principle of constitutional law, but that in that case, the exclusion of "critical evidence" of another man's multiple confessions deprived the defendant of a trial consistent with 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 must be of such quality as necessarily prevents a fair trial." United States v. Valenzuela-Bernal, 458 U.S. 858, 872, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982) (quoting Lisenba v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 2d 166 (1941)).

The one Washington case upon which Goss relies holds that when a legitimate evidentiary rule limits a defendant's right to testify, the court must evaluate whether the interests served by the

rule justify the limitation. State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996). The court noted that even a defendant's right to testify "must sometimes bow to procedural and evidentiary rules that control the presentation of evidence." Id. (citing Rock, 483 U.S. at 55 n.11; and Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994)). But the restrictions imposed by the rules "may not be arbitrary or disproportionate to the purposes they are designed to serve." Id. (citing Rock, 483 U.S. at 56; Stephens, 13 F.3d at 1002).

Goss does not have a right to present his denial of the crimes through an unjustified inference in order to avoid cross-examination. In contrast with the cases on which he relies, Goss does not contend that he was limited in his ability to present evidence, call witnesses, or testify on his own behalf. Goss asks this Court to hold that he had a right to argue an inference that was unsupported by the evidence, in order to assert the content of self-serving hearsay that was not admitted at trial. He has not explained why denial of that tenuous inference prevented a fair trial. It certainly did not prevent him from presenting his defense via his own testimony, if he chose. He has not explained why denial of argument as to that tenuous inference was an arbitrary application

of the evidence rules relating to hearsay, the rule restricting argument to facts in evidence, or the rule allowing the court to limit arguments to avoid misleading the jury. What Goss wanted the officer to do was present his denial of guilt, while being shielded from cross-examination. The due process clause provides no such weapon. Goss was not deprived of his right to present a defense. Goss has not established a violation of his constitutional right to due process.

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, 2015.

Respectfully submitted,

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By: ______________________
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Appendix 1

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.

Appendix 2

Appendix 2

RCW 9A.44.073 Rape of a child in the first degree

(1) 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.

(2) Rape of a child in the first degree is a class A felony.

RCW 9A.44.076 Rape of a child in the second degree

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse 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) Rape of a child in the second degree is a class A felony.

RCW 9A.44.079 Rape of a child in the third degree

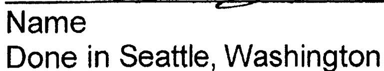
(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Rape of a child in the third degree is a class C felony.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John Henry Browne, the attorney for the appellant, at Law Offices of John Henry Browne, 200 Delmar Building, 108 S. Washington Street, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. MICHAEL RAY GOSS, Cause No. 72409-6-I, in the Court of Appeals, Division I, for 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

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Date