SUPREME COURT NO. _____
NO. 72406-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Petitioner.

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

The Honorable Laura Inveen, Judge

PETITION FOR REVIEW

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STATUTES, RULES, AND OTHER AUTHORITY

A. IDENTITY OF PETITIONER

Michael Goss asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B if this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published decision of the Court of Appeals in his case filed on August 17, 2015. A copy of the decision is in the Appendix at pages A-1 through A-12.

C. ISSUES PRESENTED FOR REVIEW

1. The crimes of child molestation in the first, second and third degrees have mutually exclusive age elements for the victim – less than twelve years old, at least twelve to less than fourteen years old, and from at least fourteen to less than sixteen years old respectively – which determine the standard range for each crime. As a matter of due process of law and the state and federal constitutional rights to notice of charges, under *Alleyne v. United States*, ____ U.S. ____, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013), is the lower age limit of second degree child molestation an essential element of the crime?

2. Where the complaining witness does not know whether the crime occurred before or after her twelfth birthday is there insufficient evidence to convict of child molestation in the second degree or that the crime occurred in the charging period which begins on her twelfth birthday?

3. Is a defendant denied his state and federal rights to appear and defend at trial where his attorney is not permitted to argue an inference based on evidence presented at trial that he provided a statement to the police at the time of his arrest and the prosecution chose not to present the statement to the jury because it was not helpful to the state's case?

D. STATEMENT OF THE CASE

1. Procedural and trial facts

The state filed a Second Amended Information shortly before resting its case. RP 657-662, 676.[1] The Second Amended Information alleged that Mr. Goss "during an intervening period of time between September 25, 2010 and September 25, 2012, being a least 36 months older than ENF (DOB 9/25/98), had sexual contact for the purpose of sexual gratification with ENF (DOB 9.25.1998), who was less than 14 years old and [he] was not married to . . ." CP 67-68. The information did not allege that NF was at least twelve years old.[2]

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[1] The verbatim report of proceedings is in five consecutively-numbered volumes, and are cited in this brief as RP __.

[2] RCW 9A.44.086, Child Molestation in the Second Degree, provides that:

> (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 and less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

The jury convicted Mr. Goss of the second degree child molestation charge but acquitted him of second charge of attempted molestation. CP 92-93, 94.

As defense counsel set out in his opening statement to the jury, ENF's was inconsistent in the allegations she leveled at Mr. Goss and other aspects of her statements, RP 243-244; the incidents she described in some detail initially, quickly evolved and changed. Her statement that she told a friend Breana after the first alleged incident was contradicted by her friend Breana, who testified at trial. RP 496-496, 525-526, 543, 642-644, 468. Moreover, ENF's behavior towards Mr. Goss on the day she accused him surprised her mother and aunt because she had always gotten along well with him before that day. RP 290, 339, 383.

In June 2013, Michael Goss was engaged to Tammy Cuneo, then 14-year-old ENF's grandmother. RP 272-273, 464. Mr. Goss and Ms. Cuneo had met though the Internet in March or May 2010, and Ms. Cuneo moved into his house a few months later. RP 274-275, 299. ENF visited them occasionally; her home was approximately a thirty minute drive away. RP 277-280; 337.

ENF's mother, Shantell Stewart, was one of Ms. Cuneo's four daughters. RP 272. Another daughter, Jessica, married Eric Randolph. RP 272, 406; 347. The Randolphs lived in Las Vegas, Nevada, but visited

the family in Washington every summer and sometimes on holidays. RP272, 405-409. On June 22, 2012, the Randolphs were visiting and were part of the group attending an extended-family reunion. RP 413. ENF and Ms. Stewart rode with the Randolphs to the reunion. RP 413. On the way home, the two sisters, Shantell Stewart and Jessica Randolph, scolded ENF for being rude and unkind to Mr. Goss. RP 348, 414, 418-420. They were surprised since ENF and Mr. Goss had always gotten along well. RP 290, 339, 383. On this day, however, ENF pointedly told Mr. Goss to stay away from her and told her mother to lock their car door so he could not open it. RP 340-342, 414-417.

Ms. Stewart and Ms. Randolph got out of the car while they were waiting to board the ferry to come home. RP 418-419. Mr. Randolph stayed behind with ENF, and she told him, when he questioned her, that Mr. Goss had touched her breasts under her shirt and bra in the past. RP 349-350, 420-421, 427, 473-474. Mr. Randolph had her repeat these allegations to his wife and, when they got home, to her mother Shantell. RP 354-357, 422, 424-425, 538. Her mother called the police that night. RP 259, 359, 429. The following day ENF was asked to tell her grandmother. RP 260, 429, 539. Detective Matthews of the Lake Forest Park Police Department then interviewed Mr. Randolph, Ms. Stewart, Ms. Cuneo, and ENF the following day. RP 605-612.

ENF told her family and the officer who first responded to the 911 call that the touching had occurred 5-7 times during the past year. RP 262, 2650267, 507. She described in some detail five different incidents to them. She had told Mr. Randolph, according to his recorded statement, about three or four different incidents including one in which Mr. Goss allegedly chased her down the hall into the bedroom where the computer was and pinned her down and touched her breasts; at that time he said "Do you like these, I like these." RP 439, 441-442. This incident allegedly took place in August 2012. RP 450-451. According to ENF's statements to Mr. Randolph, during one or more of these incidents, Ms. Cuneo was at work.[3]

ENF told the responding officer, late on the evening after the 911 call, that Mr. Goss pinned her on the floor on two occasions; the first of those occasions he called her in from another room. RP 267-268. The last was two months earlier in April 2013. RP 267-268.

By the time ENF talked to Det. Matthews, there were not five to seven incidents, but two or three times where she alleged that Mr. Goss actually touched her breasts and one where she blocked him from touching

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[3] Tammy Cuneo testified that she did not work weekends, the times when ENF visited, and that she did not recall ever going to work and leaving ENF with Mr. Goss. RP 277-278, 280-281. She did not recall leaving ENF with Mr. Goss at any time. RP 280-281, 316-317, 319.

her. RP 551, 554. By the time of trial, there were still three incidents, but only one involved actual touching; two were attempts. RP 557.

ENF testified at trial that she was going to be in the 10th grade in school and that she had lived with her father in California when she was in the 7th grade, from January through June or August. RP 458, 461. She said that she met Mr. Goss while in the 7th grade, the same year that she went to California to live with her father, when she was twelve or even eleven years old.[4] RP 464, 537. She said she visited her grandmother and Mr. Goss on weekends, school breaks and for family events. RP 466. It was her trial testimony that the time Mr. Goss touched her breasts under her shirt was at his house before she went to live with her dad; she was in the front room in front of the computer, which had not yet been moved to the bedroom, and he called her over to the chair where he was sitting. RP 476-478, 519-520. Her grandmother was at work. RP 520. He grabbed her arms, pulled her to him, reached under her shirt, touched her breasts for ten to fifteen seconds and said, "I like these, do you like these?" RP 476-482. In other incidents, ENF testified that she was able to prevent Mr. Goss from touching her. RP 487-489, 449, 503, 557.

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[4] ENF agreed that she told Det. Matthews that she was in California during the 2012 school year, but at trial believed it was in 2011. RP 523-524. Her mother testified that ENF lived with her father when she was in the eighth grade in 2012. RP 260.

ENF testified that she told her best friend Breana over the phone and by text message both after the first incident, and later and in the previous summer. RP 496-497, 527-528, 543. Breana testified, however, that ENF sent her one text message in the summer of 2013, probably July, about the allegations, and Breana advised her to tell someone if it was serious. RP 642-644. Breana never spoke with ENF on the phone about this and never spoke to her earlier. RP 644. She would have remembered. RP 650.

When the prosecutor specifically inquired about the chronology of the allegations ENF was unable to testify about how old she was at the time.

> 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.

Earlier ENF had testified that she did not know if the first incident, the only incident in which there was actual touching, was before or after her birthday. RP 559-560.

2. Mr. Goss's voluntary statement

Prior to trial, the state told the court that it would not be offering Mr. Goss's custodial statement. RP 15. Defense counsel stipulated to the voluntariness of the statement, but indicated that if the statement were played to the jury, it should be redacted to exclude irrelevant portions. RP 15.

Neither party offered the statement at trial. During the cross examination of Det. Matthews, however, defense counsel elicited that he read Mr. Goss his rights at the time of his arrest and made sure that Mr. Goss understood them. RP 632-633. Counsel then elicited that the detective "proceeded to take a 50-minute recorded statement about these allegations from Mr. Goss." RP 633. The court overruled the prosecutor's objection "to this line of questioning." RP 633.

The court, however, granted the state's motion to preclude the defense from arguing that "there is this interview for 50 minutes with Mr. Goss and that wasn't brought [into evidence] by the State." RP 671-672.

The court rejected defense counsel's position that the state did not play the tape because it was not helpful to them. RP 671-672. The court ruled that "it would be improper to argue that the State should have played that tape because it is hearsay." RP 672. The court rejected defense counsel's argument that the fact that the statement was taken was evidence at trial. RP 673.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B) (1), (3) AND (4) BECAUSE THE DECISION OF THE COURT OF APPEALS HOLDING THAT THE STATUTORY REQUIREMENT THAT THE VICTIM BE AT LEAST TWELVE YEARS OLD IS NOT AN ESSENTIAL ELEMENT OF CHILD MOLESTATION IN THE SECOND DEGREE IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT, A CONSTITUTIONAL ISSUE AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE DECIDED BY THIS COURT.

In holding that the element of second degree child molestation that the alleged victim is at least twelve years old need not be charged in the information, the Court of Appeals decision is in conflict with the holding of the United States Supreme Court in *Alleyne v. United States*, ____ U.S. ____, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013). The issue is constitutional and an issue of substantial public importance which should be decided by this Court. Review should be granted for these reasons.

RAP 13.4(b) (1), (3), and (4).

Under article I, section 22, amendment 10 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, a person accused of a crime has a right to be informed of the nature and cause of the charge against him. *State v. McCarty*, 140 Wn.2d 420, 434-435, 998 P.2d 296 (2000). The charging document is constitutionally sufficient to provide notice only if it includes all of the essential elements of the crime charged. *State v. McEnroe*, 181 Wn.2d 375, 389-390, 333 P.3d 402 (2014). Failure to allege any essential element means the information is insufficient to charge a crime and must be dismissed. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

In *Alleyne v. United States*, ____ U.S. ____, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court held that any fact that increases the mandatory minimum sentence for a crime is an essential element of the crime. 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). 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 of violence and the facts 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.

As in *Alleyne*, the mandatory minimum for second degree child molestation, where the child is at least twelve and less than fourteen years of age, is greater than for conviction of third degree child molestation, where the child must be at least fourteen and less than sixteen. 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 of sexual molestation plus the age ranges constitute new *separate* crimes, all of the elements of which have to be proved to a jury. *Id.*

The Court of Appeals held that *Alleyne* does not apply because it "applies to a sentencing enhancement," and because the "omission of the lower age of 12 did not increase his sentence." Slip op. at 5. The court concluded that the "sole purpose of the 'at least twelve' language of the statute is to differentiate the lower degrees from the higher degrees of child molestation." *Id.* This analysis and conclusion ignores the holding of *Alleyene* that a sentencing factor *is a part of the substantive crime* and that the distinctions between the core crime which result in different

sentencing ranges are essential elements that the state must charge and prove to a jury. *Alleyene*, 133 S. Ct. at 2161. As in *Alleyene*, the three different age *ranges* determine the standard ranges for the crime.

The cases cited by the Court of Appeals, Slip op. 6-8, predate the decision in *Alleyene* and, to the degree that they conflict with it, are no longer good law. For example, in *State v. Smith*, 122 Wn. App. 294, 93 P.3d 208 (2004), 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 court held that "[b]ecause the age of the victim is a function of the proper penalty and not 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 distinction between penalty factors and elements of the crime in *Alleyne.*

In fact, the jury, as instructed, had to acquit Mr. Goss unless the state proved beyond a reasonable doubt that ENF was "at least twelve years old but less than fourteen years old." CP 84-85. The state proposed these "to-convict" and definitional instructions. CP 71-72. The information was insufficient to give him notice of the "at least twelve element." Review should be granted on this issue.

2. REVIEW SHOULD BE GRANTED UNDER RCW 13.4(B) (3), AND (4) AND MR. GOSS'S CONVICTION FOR SECOND DEGREE CHILD MOLESTATION SHOULD BE REVERSED AND DISMISSED WITH PREJUDICE AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION. THE ISSUE IS CONSTITUTIONAL AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Court of Appeals found that there was sufficient evidence for the jury to find that ENF was at least twelve years old and that the crime occurred during the charging period which began on her twelfth birthday. Slip op. 9-10. The Court based its finding of sufficient evidence on the fact that ENF testified that she was in the seventh grade at the time, and she remembered the year because it was the year she went to stay with her father in California in January of that year. This holding overlooks the actual trial testimony,

ENF testified that she met Mr. Goss when she was in the seventh grade, when she agreed she was twelve or perhaps eleven. RP 464, 537. Eleven would be consistent with her grandmother's testimony that she moved into Mr. Goss's house several months after meeting him in March or May of 2010. RP 274-275, 299.

Most importantly, when specifically asked about the date of the incident, ENF was unable to recall whether the incident occurred before or

after her birthday or which birthday it was:

> 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.

ENF was the only person who knew when, if ever, inappropriate touching occurred. RP 559-560. If ENF, who was fourteen years old at the time of trial, could not remember the date of the incident, when specifically asked to clarify it, no "rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support" conviction as required by the state and federal constitutions. *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d

628 (1980); see also *State v. Kirwin*, 166 Wn. App. 659, 675, 271 P.3d 310 (2012) (adequate proof of sufficient to convict of a different crime cannot sustain a conviction for the charged crime).

Review should be accepted because the evidence was insufficient to support the conviction for second degree child molestation and insufficient to establish that it occurred during the charging period.

3. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(B) (1), (2), (3) AND (4) BECAUSE THE JURY HEARD EVIDENCE THAT MR. GOSS GAVE A STATEMENT TO THE POLICE AT THE TIME OF ARREST, AND THE REFUSAL TO ALLOW DEFENSE COUNSEL TO ARGUE THE INFERENCE THAT THE STATE DID NOT INTRODUCE THE STATEMENT AT TRIAL BECAUSE IT WAS NOT HELPFUL TO THE PROSECUTION IS CONTRARY TO OTHER REPORTED DECISIONS, IS A CONST-TUTIONAL ISSUE ANDAN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE .

The trial court permitted defense counsel to elicit from Det. 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. The court, however, precluded defense counsel from arguing that "there is this interview for 50 minutes with Mr. Goss and that wasn't brought [into evidence] by the State." RP 671-672. The court rejected defense counsel's position that he should be able to argue that the state did not play the tape because it was not helpful to them. RP 671-672.

The court ruled that "it would be improper to argue that the State should have played that tape because it is hearsay." RP 672. The court rejected defense counsel's argument that the fact that the statement was taken was evidence at trial and he should be permitted to argue inferences from the evidence. RP 673.

The Court of Appeals upheld the trial court on the grounds that Mr. Goss wanted to introduce evidence "that the State knew he was not guilty," that "[a]dmissions of a party opponent are admissible under ER 801(d)(2) only if offered by the party opponent," and that the state "could not have called the defendant to the stand because of the privilege against self-incrimination." Slip op. at 11-12.

Review should be granted under RAP 13.4(b)(1), (2), (3) and (4). The decision of the Court of Appeals is in conflict with decisions of this Court and other Court of Appeals decisions; the issue is constitutional and one of significant public importance which should be decided by this Court.

First, Mr. Goss's attorney did not seek to argue that the state knew Mr. Goss was not guilty. Defense counsel sought to argue only that Mr. Goss provided a lengthy statement to the police after being warned of his privilege against self-incrimination, and that, if the statement had been helpful to the state's case, they would have introduced it at trial. RP 671-

673. This is an accurate inference from the evidence and lack of evidence.

In holding that the inference that the state did not offer Mr. Goss's statement as evidence because it was not helpful to the state's case, the Court of Appeals decision is contrary to reported decisions by this Court and other Court of Appeals decisions. It is the inference allowed when a party elects not to call a witness which is peculiarly available to that party. *State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011). The circumstances need only be such that, as a matter of reasonable probability, the party would have called the witness "unless the witness's testimony would [have been] damaging." *State v. Davis*, 73 Wn.2d 271, 280, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle.* 174 Wn.2d 411, 275 P.2d 1113 (2012).

As with a missing witness instruction, the argument that the defendant's statements were not helpful to the state's case does not involve actually admitting any testimony; and the Court of Appeals decision is contrary to authority that so holds. The argument is simply a proper argument based on the evidence or lack of evidence. *See, e.g., State v. Thomas*. 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (when a defendant does not remain silent and talks to the police, the state may comment on what he does not say); *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978) (same).

Insofar as the Court of Appeals holds that the state could not have introduced the evidence, the decision is in conflict with the rules of evidence and other appellate decisions. Mr. Goss's statement would have been admissible as an admission of a party opponent under ER 801(d)(2), if offered by the state. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 645, 145 P.3d 406 (2006); *State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1977). The state could have offered Mr. Goss's statements as evidence at trial if it chose to do so. The state could have done so without calling Mr. Goss as a witness.

In holding that defense counsel could not argue inferences from the evidence or lack of evidence, the decision of the Court of Appeals is contrary to other decisions. It is well-established that "[i]n closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence relating to the credibility of witnesses." *State v. Thorgerson*, 172 Wn,2d 438, 448, 258 P.3d 43 (2011); *State v. Hoffman*, 116 Wn.2d 51, 84-95, 804 P.2d 577 (1991). Both parties, not just prosecutors, are entitled to the benefit of all of the evidence introduced at trial. *Hector v. Martin*, 51 Wn.2d 707, 710, 321 P.2d 555 (1958); *Byrne v. Courtesy Ford, Inc.*, 108 Wn. App. 683, 691, 32 P.2d 307 (2001).

The issue is constitutional and a matter of substantial public

importance. Because of the fundamental nature of the defendant's trial rights, the U.S. Supreme Court has held that evidentiary rules may not be mechanically applied in a way that compromises the defendant's constitutional rights. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1079 (1967) (a statute preventing a participant in the crime from testifying for the defendant denied that defendant his right to compulsory process); *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (a state hearsay rule prohibiting a party from impeaching his or her own witness precluded the defendant from examining a witness who had confessed to the crime and unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime); *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally burdened the defendant's right to testify at trial); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996) (even where a procedural or evidentiary rule legitimately limits a defendant's right to testify, the court must still determine whether the interests served by the rule justify the limitation of the defendant's constitutional rights), *review denied*, 131 Wn.2d 1012 (1997). Here there was no rule precluding the admission of Mr. Goss's statement by the state nor precluding the defense from arguing inferences from the evidence or lack of evidence. Review

should be granted because the burdening of his right to present a defense to the jury violated Mr. Goss's state and federal constitutional rights.

F. CONCLUSION

Appellant respectfully submits that review should be granted and his conviction should be reversed and dismissed or, at the least, remanded for retrial.

DATED this 2nd day of September, 2015.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

/s *John Henry Browne*
JOHN HENRY BROWNE, WSBA #4677
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL RAY GOSS, Appellant.	)	No. 72409-6-I DIVISION ONE PUBLISHED OPINION FILED: August 17, 2015

TRICKEY, J. — The charging document must include all essential elements of an alleged crime to provide defendants notice of the nature of the allegations so that they can properly prepare their defense. An essential element is one that is necessary to establish the illegality of the behavior.

Here, the second amended information charged the crime of second degree child molestation alleging that the defendant was 36 months older than the victim, who was less than 14 years old and not married to or in a domestic partnership with the defendant. The statute defines the crime as "sexual contact with another who is at least twelve years old but less than fourteen years old."[1] The lower age of the victim is a criterion for establishing the proper penalty and not an essential element of the proscribed offense, child molestation. The information was not deficient.

None of the other errors raised by the defendant have merit. Because there is substantial evidence supporting the conviction, we affirm the judgment and sentence.

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[1] RCW 9A.44.086.

FACTS

The State charged Michael Goss with one count of second degree child molestation alleging that between September 25, 2011 and September 24, 2012, Goss had sexual contact with E.F., who was 13 years old, and further, that at the time, Goss was more than 36 months older than the victim. Before trial, the court granted the State's motion to amend the information, charging an additional count of third degree attempted child molestation. The second count alleged Goss attempted sexual contact with E.F., then 14 years old, between September 25, 2012 and June 23, 2013. Defense did not object to that amendment.

E.F., born September 25, 1998, in tenth grade at the time of the trial, testified that Goss, then her grandmother's fiancé, inappropriately touched her on her breasts when she was at Goss's home where her grandmother lived. Goss called her over, grabbed her left arm, and touched her breasts stating, "I like these, do you like these?" The touching lasted about 15 seconds. E.F. was shocked. She told Goss, "No," to which he responded, "Why?" E.F. stated, "I don't," and she threw his hands off her.[2]

E.F. went back to playing on the computer, feeling weird, and wanting to go home. E.F. did not tell her grandmother, or anyone else. She later remembered that the incident had occurred in seventh grade, because it happened before she moved to her father's home in California for second semester in January. Goss only touched her breasts one time.

[2] Report of Proceedings at 483.

E.F. testified to two other incidents in Goss's house where Goss attempted to touch her but was unsuccessful. She recounted that one attempt had occurred at Thanksgiving, but when she screamed, her mother yelled from the other room, enabling E.F. to escape. In the other incident, E.F. managed to raise her arms to block Goss from touching her.

On June 22, 2013, E.F. attended a family reunion. At the reunion, E.F. was rude to Goss any time he approached her. E.F.'s mother, aunt, and uncle all chastised her for her rude behavior. E.F.'s uncle, Eric Randolph, approached E.F. asking her what was going on. E.F. started to cry and told her uncle what had occurred. Later that day, E.F., with her uncle's help, told her mother what had happened. The family informed E.F.'s grandmother the following day. E.F.'s grandmother immediately moved out of Goss's house.

Before the State rested, it moved to amend the charging period in count I to conform to testimony regarding the time frame within which the incident occurred.[3] Over an unspecified objection by defense counsel, the court permitted the amendment, finding there was no prejudice to the defendant.

The jury found Goss guilty of second degree child molestation, but acquitted him on the attempted molestation charge. Goss appeals.

ANALYSIS

Goss contends that the trial court erred in permitting the State to amend the information prior to concluding its case and that the second amended information did not contain all the essential elements of the crime with which he was charged

[3] September 25, 2010 to September 25, 2012.

and convicted. Goss also argues that the evidence was insufficient and the trial court erred in limiting the scope of his closing argument.

Second Amended Information

Goss contends he was prejudiced by the State's amending the information to enlarge the charging period by one year after the State had presented all of its evidence but before the State rested. Under CrR 2.1(d), the court may permit an amendment of information any time before a verdict, if the defendant is not prejudiced. While the rule permits liberal amendment, it is tempered by article I, section 22 of the Washington State Constitution, which requires that the accused be adequately informed of the charge to be met at trial. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

But here, the amendment did not charge any new offenses or add additional child molestation counts. Instead, it merely enlarged the time frame within which the crime was committed. Amendment of the charging period is usually not a material element of a crime and, thus, an "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." State v. DeBolt, 61 Wn. App. 58, 60-62, 808 P.2d 794 (1991) (motion to amend permitted after State had rested and after defendant had testified); see also State v. Allyn, 40 Wn. App. 27, 35, 696 P.2d 45 (1985) (elements of the crime charged remained the same both before and after the change of the date). Goss has not claimed an alibi and he has failed to show any prejudice from the amendment. The trial court did not abuse its discretion in permitting the amendment.

Essential Elements

We review the adequacy of a charging document de novo. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). Goss contends that the second amended information charging him with second degree child molestation is constitutionally deficient because it only alleged that E.F. was less than 14 years old at the time of the crime and did not include the allegation that E.F. was at least 12 years old as stated in the statute.

RCW 9A.44.086(1) provides:

> 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.

The second amended information alleged:

> 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).[4]

The State asserts that the only purpose of the "at least twelve" language of the statute is to differentiate the lower degrees from the higher degrees of child molestation. RCW 9A.44.086(1). That E.F. may have been younger than the lower age specified in the second degree child molestation statute does not mean that Goss did not commit sexual molestation. Several Washington Supreme Court and Court of Appeals decisions support the State's position that statutory language

[4] Clerk's Papers at 67.

differentiating the various degrees of a crime does not necessarily create an additional essential element.

In State v. Tinker, 155 Wn.2d 219, 222, 118 P.3d 885 (2005), our Supreme Court addressed a challenge to the sufficiency of an information alleging third degree theft that did not specify the value of the property taken. The court concluded that property value was not an essential element of the crime of third degree theft, despite language in the statute then at issue that the theft "does not exceed two hundred and fifty dollars in value." Tinker, 155 Wn.2d at 222 (quoting RCW 9A.56.050(1)).

The Tinker court reasoned that the property value was not essential to establish the illegality of theft behavior because such value merely served to distinguish the various degrees of theft and, thus, "taking any item constitutes at least third degree theft." 155 Wn.2d at 222 (emphasis omitted). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior.'" Tinker, 155 Wn.2d at 221 (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)); see also State v. Leyda, 157 Wn.2d 335, 341, 138 P.3d 610 (2006) (the value of goods, services, and credit obtained through identity theft is not an essential element of second degree theft); State v. Feeser, 138 Wn. App. 737, 744, 158 P.3d 616 (2007) (absence of premeditation not an element of second degree murder even though statute's language states "without premeditation").

In State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court was presented with the question of whether failure to include that the assault was

neither first nor second degree in the information charging the defendant with violation of a no contact order under RCW 26.50.110(4) rendered the information insufficient. RCW 26.50.110(4) provided that "'[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 is a class C felony.'" Ward, 148 Wn.2d at 810 (alterations in original) (quoting RCW 26.50.110(4)). The defense argued that that provision was an essential element of the crime. In rejecting the argument, the Supreme Court concluded that the definitional language, "does not amount to assault in the first or second degree," is not an essential element of the crime, but rather elevated no contact violations to a felony when any assault is committed. Ward, 148 Wn.2d at 812.

In State v. Smith, 122 Wn. App. 294, 296, 93 P.3d 206 (2004), this court rejected a similar argument to the one presented here involving a "to-convict" instruction rather than an information. The defendant argued that a "to-convict" instruction for third degree rape of a child was erroneous because it stated the ages of the victim as between 12 and 16, rather than between 14 and 16 years of age. The Smith court held that "the age of the victim is a function of the proper penalty and not an essential element of the proscribed offense of having sexual intercourse with a minor." 122 Wn. App. at 296. In so holding, the Smith court approved and cited the rationale in State v. Dodd, 53 Wn. App. 178, 181, 765 P.2d 1337 (1989), "that 'third degree statutory rape is a crime of inferior degree to second degree statutory rape, as each proscribes but one offense, that of sexual intercourse with one too immature to rationally or legally consent to the act.'" 122

Wn. App. at 298. A "to-convict" instruction, like an amended information, must contain all the essential elements of the crime. State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

To support his position, Goss cites Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), in which the United States Supreme Court held that a fact that increased the mandatory minimum sentence is an element which must be presented to the jury and proven beyond a reasonable doubt. There, the defendant was charged with robbery and using or carrying a firearm. Alleyne, 133 S. Ct. at 2155. The jury found that the defendant had used or carried a firearm, but had not indicated whether he had "brandished" the gun. Alleyne, 133 S. Ct. at 2155-56. If he had brandished a gun, his mandatory minimum sentence would have increased from five to seven years. Alleyne, 133 S. Ct. at 2155-56.

Alleyne is not helpful. First, it applies to sentencing enhancement. Here, Goss was not subjected to a higher sentence. Second, the omission of the lower age of 12 did not increase his sentence. In fact, the crime for which Goss was convicted was a lesser crime than if he had been convicted of child molestation of someone under the age of 12. Adopting Goss's argument would in effect put the defendant in the position of arguing that he was not guilty of second degree child molestation because he was in fact guilty of the greater crime of first degree child molestation.

The sole purpose of the "at least twelve" language of the statute is to differentiate the lower degrees from the higher degrees of child molestation. The

omission of the "at least twelve" language did not add to Goss's burden in any way; nor did it excuse the State from proving beyond a reasonable doubt that Goss, by his conduct, met the essential elements of child molestation in the second degree. The lower age limit is not an essential element of the crime and therefore its omission from the second amended information was not error.

Sufficiency of the Evidence

Goss argues insufficient evidence supports his conviction of child molestation of E.F. in the second degree.

Sufficient evidence supports a conviction when, viewed in the light most favorable to the State, a rational fact finder could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn from the evidence. Salinas, 119 Wn.2d at 201. This court defers to the fact finder on issues of witness credibility and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990); State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The only incident at issue here is Goss's touching E.F.'s breasts. Goss disputes that it occurred during the charging period, but the evidence presented clearly established that it occurred within the charging period. E.F. testified that she was in seventh grade when the incident occurred. She remembered this because it was the same year that she left to stay with her father in California in January for the second semester of seventh grade. E.F. testified that the touching occurred before she went to California.

That this touching occurred when E.F. was in the seventh grade is supported by testimony from E.F. and her mother, who both testified that E.F. had just completed her ninth grade in July 2014 at the time of the trial. Thus, her seventh grade school year would have been between fall 2011 and spring 2012. E.F. would have been 12 years old when she started seventh grade and turned 13 years old in September 2011. Although the mother testified that E.F. went to visit her father in eighth grade, the jury was free to believe E.F.'s testimony. If believed, the evidence was sufficient to support the charge.

Scope of Closing Argument

During cross-examination, defense counsel asked the investigating police detective whether he had taken a 50 minute recorded statement from Goss regarding the allegations. The State objected to the question but was overruled. The detective verified that he had taken the statement. There was no further testimony about the interview.

Before closing argument, the State moved to prevent defense counsel from arguing that the State did not present any evidence from the recorded interview because it was not helpful to the State's case. The court agreed, stating that the evidence was inadmissible as hearsay since it was not introduced by the State, the party opponent. The court refused to permit the defense to argue that the State should have introduced the recorded interview because it weakened the State's case. The court permitted the defense to argue that the detective conducted an investigation and that investigation included conducting a recorded interview with

the defendant. Any other information regarding that interview was not in evidence and could not be argued. Defense counsel objected to the court's ruling.

A trial court's limitation of the scope of closing argument is reviewed for abuse of discretion. State v. Wooten, 178 Wn.2d 890, 896-97, 312 P.3d 41 (2013). "This court will find that a trial court abused its discretion 'only if no reasonable person would take the view adopted by the trial court.'" State v. Frost, 160 Wn.2d 765, 771, 161 P.3d 361 (2007) (emphasis omitted) (internal quotation marks omitted) (quoting State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000)). The court has stressed that "the trial court should 'in all cases . . . restrict the argument of counsel to the facts in evidence.'" Perez-Cervantes, 141 Wn.2d at 475 (alteration in original) (internal quotation marks omitted) (quoting Sears v. Seattle Consol. St. Ry., 6 Wash. 227, 233, 33 P. 389, 33 P. 1081 (1893)). Otherwise a jury may be confused or misled. Perez-Cervantes, 141 Wn.2d at 474.

Here, the trial court found that the evidence sought to be introduced was inadmissible hearsay that was not in evidence. Because there was no evidence presented to the jury to support the inference Goss sought to argue, the trial court did not abuse its discretion in limiting the argument.

Goss argues that his position is analogous to an argument underlying the right to a missing witness instruction. That doctrine permits a jury to infer that a witness's testimony would have been unfavorable to the party that could have called, but did not call, the witness at trial. State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 1888 (2011). Essentially, Goss sought to introduce evidence that the State knew he was not guilty, arguing that the State did not introduce the evidence

from its interview with him. Admissions of a party opponent are admissible under ER 801(d)(2), only if offered by the party opponent. Further, the defendant was unavailable to the State because it could not have called the defendant to the stand because of his privilege against self-incrimination.

In sum, a defendant does not have a right to present inadmissible evidence. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Under the circumstances here, the court did not abuse its discretion.

Conclusion

The trial court properly permitted the amendment of the information which contained all the essential elements of the crime of second degree child molestation. There was sufficient evidence to sustain the conviction and the trial court did not abuse its discretion in limiting the scope of the defendant's closing argument.

Affirmed.

Trickey, J

WE CONCUR: