

67945-7

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**NO. 67945-7-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**NICANDRO SANCHEZ-CISNEROS,**  
Appellant.

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

The Honorable Dave Needy, Judge

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**RESPONDENT’S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Nicandro Sanchez-Cisneros correctly argues on appeal the misdemeanor charge of Communication with a Minor for Immoral Purposes was charged after the statute of limitations had run. Sanchez-Cisneros did not challenge the statute of limitations below. The record was undeveloped below as to whether Sanchez-Cisneros was usually and publicly resident as required by RCW 9A.04.080(2).

The undersigned prosecutor has spoken with the lead detective, trial prosecutor and reviewed criminal and driving record of Sanchez-Cisneros and determined it appeared he maintained a residence in the State of Washington throughout the period from offense to charging. Therefore, remand for a hearing would likely be fruitless and an unnecessary use of judicial resources.

Therefore this Court should provide the requested relief and remand the case to vacate the conviction and sentence for that charge. Since the standard range for the felony charge at the low end is not affected, the case need not be remanded for sentencing.

## **II. ISSUES**

Where a misdemeanor charge for which the statute of limitations had run is charged along with a felony charge and the defendant is found guilty

of both, should the misdemeanor charge be remanded for a hearing where the factual record was not developed about whether the defendant was usually and publicly resident?

Where the State concedes on appeal the defendant was usually and publicly resident, is remand for a hearing unnecessary?

Where the conviction of the misdemeanor is reversed and the felony sentence is not affected, should the entire case be remanded for resentencing?

### **III. STATEMENT OF THE CASE**

On November 5, 2010, the State charged Nicandro Sanchez-Cisneros with one count of the class A felony of Child Molestation in the First Degree and the gross misdemeanor charge of Communication with a Minor for Immoral Purposes, both alleged to have occurred between January 1, 2004, and December 31, 2005. CP 1-2. Sanchez-Cisneros was alleged to have caused an eight or nine-year-old female child to touch his penis over his clothes. CP 4. A twelve-year-old sister was in the room at the time and Sanchez-Cisneros asked her to take off her pants. CP 4.

Sanchez-Cisneros did not file any motion pertaining to limitation of actions in the trial court.

On September 19, 2011, the case proceeded to trial. 9/19/11 RP 3.<sup>1</sup>

M.C. testified that Nicandro Sanchez Cisneros was a family friend. 9/20/11 RP 60. M.C. liked him. 9/20/11 RP 60. M.C. testified that Sanchez-Cisneros would come over frequently when her parents were there and talked with them. 9/20/11 RP 61. On one occasion, he came over when the parents were not home. 9/20/11 RP 62. M.C. testified that on the one occasion when her parents were not home, Sanchez-Cisneros had come over and followed her and B.C. into the master bedroom. 9/20/11 RP 64. At one point B.C. told M.C. to sit on the legs of Sanchez-Cisneros. 9/20/11 RP 67-8. Sanchez-Cisneros touched M.C. on the top of her clothes in her private area with his hand. 9/20/11 RP 75-6. M.C. moved his hand. 9/20/11 RP 76-7. Then Sanchez-Cisneros took her hand and moved it towards his private area. 9/20/11 RP 77. She moved her hand before he could make her touch him. 9/20/11 RP 77-8. M.C. told another older sister who had been in the kitchen. 9/20/11 RP 70-1. The older sister talked to their parents by phone and then asked Sanchez-Cisneros to leave the apartment. 9/20/11 RP 70-1. M.C. did not see Sanchez-Cisneros again. 9/20/11 RP 78.

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

9/19/12 RP	Trial Day 1
9/20/12 RP	Trial Day 2
9/21/12 RP	Trial Day 3
9/22/12 RP	Trial Day 4
10/27/12 RP	Sentencing.

B.C., M.C.'s younger sister, testified she was present in the bedroom for the incident M.C. described. 9/20/11 RP 106-7, 116-7. Sanchez-Cisneros kept asking B.C. to take off her pants. 9/20/11 RP 113. Sanchez-Cisneros also unbuckled his belt. 9/20/11 RP 116. B.C. saw Sanchez-Cisneros touch M.C. in her private area with his hand and tried to make M.C. touch him in his private area with her hand. 9/20/11 RP 118.

Sanchez-Cisneros testified he was only at the house three times and the parents were always there. 9/21/11 RP 208-9. He denied ever touching the girls sexually. 9/21/11 RP 210.

On September 22, 2011, the jury returned verdicts finding Sanchez-Cisneros guilty of the lesser included offense of Attempted Child Molestation in the First Degree as to count 1. 6/22/11 RP 303-4. The jury also found Sanchez-Cisneros guilty of Communication with a Minor for Immoral Purposes as charged in count 2. 6/22/11 RP 304.

On October 27, 2011, the trial court sentenced Sanchez-Cisneros to the low-end of the standard range on count 1 of Attempted Child Molestation in the First Degree of 38.25 months with community custody for the statutory maximum, and ordered a 364 day sentence on the charge of Communication with a Minor for Immoral Purposes to run concurrent with the felony charge. 10/27/11 RP 312,

On November 14, 2011, Sanchez-Cisneros timely filed a notice of Appeal. CP 89-90.

#### IV. ARGUMENT

##### 1. A defendant raise an issue of the statute of limitations for the first time on appeal.

Nicandro Sanchez-Cisneros challenges his conviction for Communication with a Minor for Immoral Purposes for the first time on appeal on the grounds of the statute of limitations. He is permitted to raise this for the first time on appeal.

The statute of limitations in a criminal case is jurisdictional. State v. Eppens, 30 Wn. App. 119, 124, 633 P.2d 92 (1981). Accordingly, a statute of limitations challenge in a criminal case can be raised for the first time on appeal. RAP 2.5(a)(1); State v. Novotny, 76 Wn. App. 343, 345 n. 1, 884 P.2d 1336 (1994).

State v. Walker, 153 Wn. App. 701, 705, 224 P.3d 814 (2009).

Here charge of Communication with a Minor for Immoral Purposes in count two was a gross misdemeanor. CP 2. “No gross misdemeanor may be prosecuted more than two years after its commission.” RCW 9A.04.080(1)(i). However, the statute of limitations also includes a section which tolls the period of limitations where the person has not resided in the State.

(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

RCW 9A.04.080(2).

The statute of limitations is tolled, however, during any time the person charged is “not usually and publicly resident within this state.” RCW 9A.04.080(2). Tolling occurs during such an absence regardless of whether the defendant was absent for the purpose of avoiding authorities, even when the State knew of the defendant's whereabouts. State v. King, 113 Wash.App. 243, 293–94, 54 P.3d 1218 (2002).

State v. Willingham, 169 Wn. 2d 192, 194, 234 P.3d 211 (2010).

This section of the statute must be evaluated where a defendant has not challenged the statute of limitations below.

**2. Where the factual record pertaining to statute of limitations was not made at the trial court, the proper remedy would be to remand for a hearing.**

Sanchez-Cisneros does not mention the possibility that the tolling provision of RCW 9A.04.080(2) might apply and argues that dismissal is the only proper remedy under RCW 9A.04.080(1)(a). Brief of Appellant at page 5. He fails to recognize that tolling has often been applied to situations where an individual has resided out of state.

Instead, as in all other cases from this state holding that the statute of limitations was tolled, the defendant *relocated* to another state during the tolling period. See Ansell, 36 Wn. App. at 493, 675 P.2d 614 (statute of limitations tolled while defendant resided in Iowa, Colorado, and Alaska); State v. Newcomer, 48 Wn. App. 83, 91–92, 737 P.2d 1285 (1987) (statute tolled while defendant was incarcerated in Oregon); State v. McDonald, 100 Wn. App. 828, 832–33, 1 P.3d 1176 (2000) (statute tolled while defendant resided in New York); King, 113 Wn. App. at 293–94, 54 P.3d 1218 (statute of limitations tolled while defendant resided in California).

State v. Willingham, 169 Wn. 2d 192, 194, 234 P.3d 211 (2010).

The issue remains what remedy should be provided where a defendant did not challenge the statute of limitations below. The Court of Appeals in State v. Walker, 153 Wn. App. 701, 224 P.3d 814 (2009) dealt with that issue. In Walker, a defendant had been charged with seven counts of bail jumping after an initial charge of possession of methamphetamine was charged. Over seven years after charging, the State filed a second amended information that included seven charges of bail jumping. The defendant was convicted of all seven bail jumping counts. The defendant raised the issue of statute of limitations on appeal as to the five oldest bail jumping counts. During the appeal, the State was permitted to supplement the record with extradition paperwork from Oklahoma in 2004. State v. Walker, 153 Wn. App. at 707, 224 P.3d 814 (2009). Rather than dismissing the five counts, the Court of Appeals remanded the case.

Appellate courts do not make factual findings. *E.g.*, Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959). This court simply is not in a position either to take evidence or to weigh contested evidence and make factual determinations. Where Mr. Walker lived during the charging period is inherently a factual question. **Given the failure of the defense to raise the issue below, there was no opportunity for the parties to present evidence and no opportunity for the trial court to make factual findings. An appellate court need not consider an issue raised for the first time on appeal when**

**the record does not contain sufficient facts to resolve the claim.** State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Typically, the remedy in such situations is for the defendant to bring a personal restraint petition. *E.g.*, State v. Norman, 61 Wn. App. 16, 27–28, 808 P.2d 1159, *review denied*, 117 Wn.2d 1018, 818 P.2d 1099 (1991).

The unique facts of this case suggest a different remedy is in order. Whether the five belatedly challenged charges were timely filed is a matter that goes to the jurisdiction of the trial court and is one that we believe should be resolved as soon as possible. If we accepted the concession on two counts and left the remaining charges to the personal restraint process, multiple sentencing hearings might result in both cases. Given that there facially appears to be a likelihood of some success for Mr. Walker (as supported by the State's attempted partial concession), the need for factual determinations by the trial court, and the possible need to resentence Mr. Walker in this case should any of the charges be dismissed, we believe a remand would be the most efficient use of judicial resources. RAP 7.3; *See State v. Bliss*, 153 Wn. App. 197, 222 P.3d 107 (2009) (remanding for a new CrR 3.6 hearing).

State v. Walker, 153 Wn. App. 701, 708-09, 224 P.3d 814 (2009).

The State contends that Walker stands for the proposition that factual determinations related to a tolling of the statute of limitations should typically be heard by the trial court.

**3. Remand for a hearing is unnecessary in the present case, because the State is not willing to assert in the trial court that the defendant was not usually and publicly resident within the State.**

Although the belated challenge to the statute of limitations in Walker was resolved by remanding the case to the trial court for a hearing, the State contends the proper remedy in the present case should be dismissal.

The State contends that a review of the facts of the present case by the undersigned prosecutor suggest the defendant was a resident in this State throughout the period between the date of the offense and the filing of charges. I have reviewed the citation, infraction, and address history with Washington courts, as well as driver's license information. In addition, I have spoken with the detective who handled the investigation and the trial prosecutor. I have also reviewed the presentence report. Although the defendant's interview in the presentence investigation report indicates that Sanchez-Cisneros was born in Mexico, he came to the United States in 1992. The report indicates he married his current wife in 2000, and they operated a cleaning business in Washington between 2005 and 2010. None of the sources of information suggest that Sanchez-Cisneros was not a resident through the period between the offense beginning in January of 2004, and charging on November 5, 2010.

Given the circumstances, the State concedes that there would be insufficient information to establish that Sanchez-Cisneros was not publicly and usually resident in Washington State between the date of the offense and the filing of charges.

**4. The requested remedy of vacating the misdemeanor should be granted and re-sentencing on the felony charge is not necessary.**

Sanchez-Cisneros requests remand to vacate the conviction for Communication with a Minor for Immoral Purposes. Brief of Appellant at pages 4, 5. The State agrees the remedy is appropriate.

Sanchez-Cisneros does not request a resentencing hearing and in the present case, he was given the low-end of the range on the accompanying felony charge. Since no mitigating factor was found by the trial court and the trial court expressed a desire to impose the low-end of the felony charge and no additional confinement flowed from the misdemeanor due to concurrent time, re-sentencing is unnecessary.

**V. CONCLUSION**

For the foregoing reasons, the State agrees that Nicandro Sanchez-Cisneros' conviction for Communication with a Minor for Immoral Purposes in count 2 should be vacated due to charges filed after the statute of limitations had run.

DATED this 29<sup>th</sup> day of June, 2012.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Nielsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 27<sup>th</sup> day of June, 2012.

  
KAREN R. WALLACE, DECLARANT