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No. 72935-7-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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State of Washington, Respondent

v.

Nen Phan, Appellant.

2015 OCT 15 10:11 AM  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Phan raises six assignments of error in his opening brief. The State has responded to all six of these issues, and has recommended that Phan's conviction and sentence be affirmed. Phan believes that all six of the issues he originally raised are valid, and require reversal of his convictions. In this brief, Phan wishes to reply to the State's response to three of the six issues: severance of counts; limitation of cross-examination of the victim; and sufficiency of the evidence on one of the counts. These arguments in reply will be addressed in turn.

## II. ARGUMENT IN REPLY

A. The trial court erred by denying defendant's motion to sever possession of child pornography charges from child rape and molestation charges.

The State argues that joinder of these two groups charges, and denial of Phan's motion to sever charges, was appropriate under the test announced in *State v. Russell*, 125 Wn2d. 24, 882 P.2d 747 (1994). See generally, Brief of Respondent at 10-17. The State's argument is erroneous; the joinder of these charges violated the principles of *State v. Russell*, and the plain meaning of CrR 4.3 and 4.4. Joinder in this case was prejudicial, and ultimately deprived Phan of his right to a fair trial.

Despite Respondent's contention to the contrary, the evidence on

the two different groups of charges was very different in strength. With regard to the rape and molestation charges in the first 11 counts, the State presented the testimony of the three victims, ages 16, 9 and 8. The defendant cross-examined each of the victims, attacking their memories of the events, which were distant in time, and pointing out various motivations for fabrication. The State failed to present any physical evidence to establish an independent basis to corroborate the victims' testimony. Although the jury ultimately convicted the defendant of each of the first eleven counts of the information, these convictions were based only on the testimony of the young victims, each of whom had difficulties remembering precise details and placing them in time.

The evidence supporting the possession of child pornography charges was stronger. The problematic DVD's were found in Mr. Phan's house, near his computer. These possessory offenses are strict liability offenses. In defense of these charges, Mr. Phan maybe could have argued unwitting possession, an affirmative defense. In reality, however, there really was no defense to the child pornography charges, as they did not depend on the credibility of child witnesses like the other charges did. So the strength of the State's evidence on the two groups of counts was quite different.

Second, despite the State's assertion to the contrary, see Brief of

Respondent at 13, Mr. Phan offered different defenses to the two groups of charges. With respect to the child rape and molestation charges, Phan argued that he never engaged in any sexual contact or intercourse with any of the alleged victims, and that his daughters were lying, motivated by their desire to get out from under the thumb of their overly strict and overprotective father.

With respect to the possession of child pornography charges, Phan did not really offer any defense. Thus, the defenses Phan presented in response to the two sets of charges were not the same.

Third, although the jury was instructed to consider each group of counts separately, such instructions are not very effective in this type of case. See, *Sutherby*, 165 Wn.2d at 884 (In this context, there is a recognized danger of prejudice to the defendant even if the jury is instructed to consider the crimes separately”).

Fourth, despite the State’s argument to the contrary, Brief of Respondent at 15, the evidence of the child pornography was not admissible in the child rape and molestation trial. The State places great weight in the idea that this pornography evidence was admissible because AP testified that she watched illegal pornography with her father. This, the court found, made all the child pornography admissible in the child rape trial. See RP 9. However, **no witness was able to establish that**

**AP watched the videos that the State sought to admit.** There was absolutely no evidence to show that the pornography that AP viewed with her father was the same pornography that was seized from the Phan residence and introduced at trial. AP's statement that she watched some pornography with her father at some time in the past did not render all of the pornography evidence discovered in the Phan residence admissible.

Trying this group of charges together was unfair and prejudicial. The child pornography evidence was so graphic that no one could have received a fair trial on a charge of child rape after the jury was exposed to these images. The fact that AP testified that she had watched some unidentified pornography with her father, did not render admissible all of the pornography found in the Phan residence. To allow the trial of these charges to go to the same jury in the same trial was unfairly prejudicial and erroneous.

When this court views the exhibit that was shown to the jury, it will become apparent that the child rape and molestation charges should have been severed from the possession of child pornography charges, and each set of charges should be set for separate trials before separate juries. The trial court's failure to sever these groups of charges deprived Mr. Phan of a fair trial. Accordingly, this court should reverse his convictions and remand the case to the trial court for separate trials on the two groups

of counts.

B. The trial court erred in denying defendant's motion for a *Franks* hearing because the lead detective deliberately misled the magistrate by misstating and omitting material facts from a search warrant application.

Appellant relies on the argument presented in his opening brief on this point.

C. The trial court erred in refusing to excuse a potential juror who had stated that he could not be fair in a case of this nature.

Appellant relies on the argument presented in his opening brief on this point.

D. The trial court erred in restricting defendant's cross-examination of the victim.

Respondent argues that the court appropriately limited Phan's cross-examination of the victim, because Phan was able to present a defense without questioning the victim about whether she was sexually active with her boyfriend. Brief of Respondent at 28. This argument is misplaced.

Phan attempted to show that the semen that was found AP's sheets might have come from her boyfriend. In order to do this, Phan sought to ask AP about whether she was sexually active with her boyfriend, and

whether they had ever had sex in her bed. If Phan had been able to ask AP about this, it may have proved that the unidentified semen on AP's bed-sheets came from her boyfriend, rather than the defendant. Additionally, AP's desire to conceal the sexual relationship with her boyfriend gave her a motive to fabricate allegations against her father. By preventing Phan from questioning AP about this, the trial court prevented Phan from presenting his defense.

Nor was the error harmless beyond a reasonable doubt as suggested by State. See Brief of Respondent at 29. The state argues that evidence pertaining to whether AP had a sexual relationship with her boyfriend was of no relevance to whether Phan sexually abused her. Brief of Respondent at 29. This is incorrect. Establishing for the jury that AP had a sexual relationship with her boyfriend was relevant because it would have explained the presence of unidentified semen on AP's bed sheets. Respondent argues that cross-examination of AP with regard to her sexual relationship with her boyfriend was unnecessary because "Phan was able to suggest, based on DNA analysis, that the semen found on AP's bed sheets likely belonged to her boyfriend since scientists couldn't match the semen to Phan." Brief of Respondent at 29. However, during trial, the State argued that sperm and semen on AP's bed sheets could have come from the defendant, despite the fact that the defendant had had a

vasectomy. See RP 1159-60. Phan should have been allowed to refute this argument by showing that the semen and sperm likely came from AP's boyfriend when she was having sex with him in her bed. If his cross-examination of AP had been allowed, Phan would have done more than "suggest" the semen and sperm came from the boyfriend, he likely would have proven this point.

Additionally, the sexual nature of AP's relationship with her boyfriend was the primary reason for the huge rift between AP and her father. That this relationship was sexual, and that AP wanted to keep the sexual nature of the relationship hidden, were essential to Phan's defense because they showed AP's bias against her father and her motivation for fabricating false allegations of sexual abuse.

The trial court's limitation of Phan's cross-examination of AP was erroneous, and prevented Phan from presenting his defense. Accordingly, his convictions should be reversed, and the case remanded for retrial.

E. The trial court erred in allowing an employee of the Whatcom County Prosecutor's Office to testify as an expert witness on child sexual abuse.

Appellant relies on the argument presented in his opening brief on this point.

F. The evidence was insufficient to support the jury's verdict of guilty on Count IX because there was no evidence presented as to when that alleged incident took place.

Respondent ignores the indisputable fact that there was no evidence presented at trial that the acts charged in Count IX took place within the charging period set forth in the Information and the "to convict" instructions. Because of this lack of proof as to **when** the incident occurred, the evidence presented was insufficient to convict on this count.

Respondent argues that "time is not a material element of this type of case." Brief of Respondent at 36. Nevertheless, the State is required to prove each element of the offense. When the Information charges a specific date or range of dates, the State must establish that the offense occurred within that range of dates. See, *State v. Hickman*, 135 Wn.2d 97, 101-103, 954 P.2d (1998), *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014).

The testimony at trial, despite respondent's argument to the contrary did not establish when any alleged incidents with AD occurred.

AD's testimony did not establish how old she was at the time the alleged events occurred, and it did not establish when the alleged incidents occurred. See RP 656-666. AD reported to the police that it happened "a long time ago." RP 779. In speaking with her mother, AD was not able to give a time frame at all. RP 673-680.

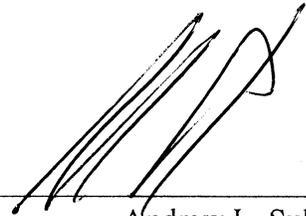
The state's argument that "AD's general testimony that she thought she was 8 or 9 when Phan molested her," Brief of Respondent at 37, is a misstatement of the record. She actually testified that she last spent the night at the Phan residence when she was 8 or 9. RP 656. AD did not testify about, and was not asked about, other previous times she had slept at the Phan residence. AD's testimony that she last slept over at the Phan house when she was 8 or 9 does not establish that that is when the alleged incident of molestation occurred.

In sum, even when the facts are considered in the light most favorable to the State, the evidence is insufficient to establish when the alleged molestation of AD occurred. Because there was no evidence presented that any molestation occurred within the time period charged, Phan's conviction on this count must be reversed.

III. CONCLUSION

For the foregoing reasons, this court should reverse defendant conviction and remand this case to the trial court for a new trial.

Respectfully submitted this 9 day of October 2015.



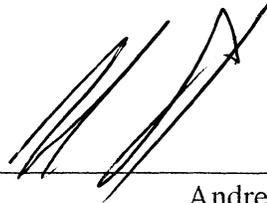
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**PROOF OF SERVICE**

I, Andrew Subin, hereby certify that on the 9 day of OCTOBER 2015, I hand delivered a copy of the foregoing Brief of Appellant to the Whatcom County Prosecuting Attorney at 311 Grand Ave., Bellingham, Washington. On the same date, I also mailed a copy, postage prepaid, to the defendant, NEN PHAN c/o the Washington Department of Corrections, and to the Court of Appeals.

Signed in Bellingham, WA this 9 day of OCTOBER, 2015.



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