72409-6

No. 92274-8

72409-6

NO. 72409-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY GOSS,

Appellant.

---

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

The Honorable Laura Inveen, Judge

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# OPENING BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the state to amend the information at the close of the state's case.

2. The Second Amended Information was constitutionally defective because it omitted the essential element of child molestation in the second degree, that the alleged victim was at least twelve years old.

3. There was insufficient evidence that the alleged crime of child molestation in the second degree occurred during the charging period set out in the Second Amended Information or that the complaining witness was at least twelve years old.

4. The trial court erred in not allowing counsel for Mr. Goss to argue the inference, based on evidence admitted 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.

## B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err and deny Mr. Goss his state and federal constitutional rights to notice of the charge against him by allowing the state to amend the information to enlarge the charging period by an entire year, at the close of the evidence and after defense counsel had cross-examined all of the witnesses, where Mr. Goss was prejudiced by the amendment?

2. Did the state's failure to include an essential element of child molestation in the second degree -- that the complaining witness was at least twelve years old -- violate Mr. Goss's state and federal constitutional rights to due process and notice of the charge against him and require that his conviction be reversed and dismissed?

3. Should Mr. Goss's conviction for child molestation in the second degree be reversed and dismissed with prejudice where the state failed to present sufficient evidence that the crime occurred during the charging period or that the complaining witness was twelve years old to establish his guilt beyond a reasonable doubt?

4. Did the trial court err and deny Mr. Goss his state and federal constitutional rights to present a defense, by not permitting him to argue that Mr. Goss gave a voluntary interview to the police at the time of his arrest and the state did not introduce the statement at trial because it was not helpful to the state's case?

## C. STATEMENT OF THE CASE

### 1. Procedural history

The King County Prosecutor's Office originally charged Michael Goss with one count of child molestation in the second degree, alleging that "between or about September 25, 2011 and September 24, 2012, being at least 36 months older than ENF (DOB 09/25/1998), [Mr. Goss]

had sexual contact for the purpose of sexual gratification with ENF (DOB 09//25/1998), who was 13 years old and [he] was not married to and not in a state of registered domestic partnership with ENF (DOB 09/25/1998)." CP 1-5. The prosecution amended the information on the day of trial to include a second count, attempted child molestation in the third degree. CP 32-33.

Over defense objection, the trial court, the Honorable Laura Inveen, permitted the state to file a Second Amended Information at the close of the state's case, shortly before the state rested. 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 and not in a state registered domestic partnership with ENF (DOB 9.25.98)." CP 67-68.

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

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

At sentencing, Judge Inveen denied the defense Motion for Arrest of Judgment and imposed a sentence within the standard range. RP 766; CP 132-142. Mr. Goss timely appealed the conviction. CP 130-131, 147.

**2. Trial testimony**

Defense counsel began his opening statement:

> I'm going to start by talking about a concern I have about this case, and the concern is not what you might think. It is not the charge . . . And it is [not] the evidence in this case. Frankly, it is the evidence which I am looking forward to you hearing – the evidence, the lack of evidence, the inconsistency of the evidence . . . . My concern is that I know. . . .you are going to meet ENF. . . and I know you are going to like her. . . . So my concern is that because you like her, you are going to overlook all of the inconsistencies in her allegations leveled against Mr. Goss.

RP 243-244. As counsel previewed, the defense case consisted of impeaching ENF's allegations through statements she made to her family and recorded statements made to the police and during the defense interview, and impeaching her credibility through the vagueness of the allegations in her trial testimony.

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 sometime in 2010,[2] and Ms. Cuneo

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[2] When asked on cross-examination if she remembered telling Detective Matthews that she met Mr. Goss in March 2010, she responded, "Oh, no, I

moved into Mr. Goss's house in Lake Forest Park, Washington to live with him a few months later. RP 274-275, 299. ENF visited them occasionally from her home in Lake Stevens, Washington which was approximately thirty minutes away. RP 277-280; 337. By June 2013, ENF visited primarily to work around the house to pay Ms. Cuneo back for an airline ticket she purchased for ENF. RP 308-309, 312, 369-371. 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 in Washington and were part of the group attending an extended-family reunion in Port Hadlock, Washington. RP 413. ENF and Ms. Stewart rode with the Randolphs to the reunion from Mr. Goss's home in Lake Forest Park. 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 at her treatment of him since ENF and Mr. Goss had always gotten along well with one another. RP 290, 339, 383. On this day, however, ENF surprised everyone by pointedly telling Mr. Goss to stay away from her and leave her alone and telling her mother

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don't think it was March, I think it was more May, maybe." RP 298.

to lock their car door so he could not open it. RP 340-342, 414-417. At one point she called Mr. Goss "Chester." RP 341, 434.

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.[3] RP 349-350, 420-421, 427, 473-474. Mr. Randolph had her repeat these allegations to his wife Jessica and, when they got home again, to her mother Shantell Stewart. RP 354-357, 422, 424-425, 538. Ms. Stewart called the police that night. RP 259, 359, 429. The following day ENF was asked to tell her grandmother, Tammy Cuneo. 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 told her uncle, according to his recorded statement, that once

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[3] Eric Randolph testified that ENT was his shadow when he was in town, and they sometimes talked on the phone or exchanged text messages. RP 411, 448. He stated in a recorded interview that in the summer of 2013, she talked to him about some personal things, but he declined to say what those personal things were. RP 448-449.

Mr. Goss 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 took place in August 2012. RP 450-451. A short time later, according to what ENF told Mr. Randolph, Mr. Goss was going to molest her, but Mr. Randolph was visiting at the time and came down the hall and nothing happened. RP 450-451. Another incident allegedly involved Mr. Goss's coming up behind her and grabbing her; another incident involved him straddling her. RP 442-443. Two of the incidents took place in the computer room. RP 445. According to ENF's statements to Mr. Randolph, during one or more of these incidents, Ms. Cuneo was at work.[4] Once, when she was at home, Mr. Goss moved quickly and pinned her down in a second bedroom. RP 452. In Mr. Randolph's opinion, ENF was never physically capable of thwarting an attempt by Mr. Goss to touch her breasts. RP 456.

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 time he called her in from another room. RP 267-268. The last time anything inappropriate happened was two months earlier in

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[4] 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.

April 2013. RP 267-268.

By the time ENF talked to Det. Matthews, there were not five to seven incidents, but only three – two times where Mr. Goss actually touched her breasts and one where she blocked him from touching her. RP 551, 554. By the time of trial, there were still three incidents, but only one actual touching and two attempts. RP 557.

ENF told Det. Matthews that she decided to tell because her uncle was the first person to ask, and that Mr. Randolph specifically asked her if Mr. Goss had touched her. RP565-566.

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.[5] 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

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[5] 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.

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 fifteens seconds and said, "I like these, do you like these?" RP 476-482. The next incident she remembered happened after she returned from her father's; she thought it was at Thanksgiving. RP 488-489, 557. On that occasion, as she related it, Mr. Goss was sleeping in the back bedroom and all of her young cousins went back to wake him up. RP 487. According to ENF, during this effort to rouse him, Mr. Goss grabbed her, threw her on the bed and tried to put his hands under her shirt. RP 488-490. She held her arms so he couldn't reach under her shirt and started screaming. RP 488. She said that when her mother called out to inquire about what happened, she told her mother that she was just playing. RP 493. ENF's mother recalled a time they were at a family barbecue when she heard ENF scream from the back room, and Ms. Stewart told her to stay in the living room. RP 373. This scream did not make Ms. Stewart want to run back to the room, and she could not recall ENF seeming upset at the time. RP 387-388.

The next incident was when ENF was watching television and Mr. Goss was in the computer room; Ms. Cuneo was asleep in her bed across

the hall from the computer room. RP 498, 557. ENF asked Mr. Goss what he was doing and he grabbed her arms, pulled her to the floor and tried to touch her. RP 499. She was able to lock her arms and prevent him from doing so. RP 499. Nothing happened again after this incident. RP 503.

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. On cross-examination, ENF agreed that in her interview with Det. Matthews on June 24, 2013, she said she had never told anyone before telling her uncle. RP 538, 539, 54-542. Breana Hoke testified 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.

**3. 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. The court indicated that they would wait to see if the statement was offered for impeachment. RP 16.

During the cross examination of Det. Matthews, 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.

**4. Second amended information**

The state was permitted to amend the information, over defense objection, because ENF testified that the incident happened when she was in the seventh grade – "that would have been after her 12th birthday . . . so that does affect my alleged charging period for the first incident. . . . it would still be child molestation, second-degree, is [sic] alleged currently it is that she was 13 years old and now there is evidence to suggest that she could have been 12." RP 657.

The prosecutor explained, "I would not be changing the charge, but I do believe I need to accurately reflect what has come out in the testimony as well." RP 657.

## D. ARGUMENT

### 1. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION CHARGING MR. GOSS WITH SECOND DEGREE CHILD MOLESTATION AT THE CLOSE OF THE STATE'S CASE.

At the close of the evidence and shortly before the prosecution rested its case, the trial court allowed the state to amend the information on the second degree child molestation charge to enlarge the charging period. The court found that the amendment was not prejudicial to Mr. Goss. RP 657-662. This was error because Mr. Goss *was* unfairly prejudiced by the amendment. The one-year enlargement of the charging period was significant; it doubled the original charging period. And, as set out by defense counsel in opening statement, the defense case was presented entirely through the cross-examination of the state's witnesses. This cross-examination was complete before the charge was amended.

A defendant has a state and federal constitutional right to be notified of the nature of the charges against him, in Washington through the state's filing of an information. Sixth Amendment, U.S. Const.; Wash. Const. article I, section 22, amend. 10. This right has also been deemed

to be "part and parcel" of the right to due process under Const. article I, section 3 and the Fourteenth Amendment to the United States Constitution. *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001). Therefore, by court rule, a trial court may permit the state to amend the original information before the verdict or finding of guilt, only if the defendant's substantial rights are not prejudiced. CrR 2.1 (d). Moreover, the Washington Supreme Court has limited CrR 2.1(d); amending the information to charge a new crime after the state rests violates the accused's rights under article I, section 22. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987),

As a general rule, however, amending the information to change the charging period is permitted during trial unless changing the dates compromises an alibi defense or the defendant demonstrates specific prejudice. *State v. DeBolt*, 61 Wn. App. 58, 61-63, 808 P.2d 794 (1991); *State v. Fischer*, 40 Wn.App. 506, 510-511, 699 P.2d 249 (1985). The defendant bears the burden of showing prejudice. *State v. Gosser*, 33 Wn. App 428, 435, 656 P.2d 514 (1982). Appellate courts review a trial court's ruling on a motion to amend an information for abuse of discretion. *State v. James*. 108 Wn.2d 483, 490, 739 P.2d 699 (1987).

Here, Mr. Goss meets his burden of showing prejudice because of the substantial enlargement of the charging period and because his defense

was conducted entirely through the cross-examination that took place prior to the amendment. Because the court erred in allowing the state to amend the information to enlarge the charging period and significantly change the factual nature of the allegations, Mr. Goss's conviction for second degree child molestation should be reversed.

### 2. MR. GOSS'S CONVICTION SHOULD BE REVERSED AND DIMSSED BECAUSE THE SECOND AMENDED INFORMATION FAILED TO INCLUDE ALL OF THE ESSENTIAL ELEMENTS OF SECOND DEGREE CHILD MOLESTATION.

Even if the trial court properly allowed the state to amend the information at the close of its case, however, Mr. Goss's conviction should still be reversed and dismissed. The Second Amended Information, which the state was permitted to file, lacked one of the essential elements of the crime of second degree child molestation, that ENF was at least 12 years old at the time of the crime.

The trial court allowed the prosecutor to amend the information to enlarge the charging period to reflect ENF's testimony that the incident on which the charge was based could have taken place much earlier than the then-applicable charging period. RP 657. In amending the information, however, the state alleged only that ENF was less than fourteen years old at the time of the crime; it did not allege that she was at least twelve years old. CP 67-68. Since being at least twelve, as well as being under the age

of fourteen, is an element of the crime, the Second Amended Information failed to allege all of the essential elements of second degree child molestation. Because the failure to allege all of the essential elements in the charging document is constitutional error, prejudice is presumed and Mr. Goss's conviction should be reversed and dismissed.

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 so he may prepare and mount a defense at trial. *State v. McCarty*, 140 Wn.2d 420, 434-435, 998 P.2d 296 (2000); *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). The charging document is constitutionally sufficient under the state and federal constitutions only if it includes all of the essential element of the crime charged, regardless of whether they are statutory or non-statutory elements. *State v. McEnroe*, ___ Wn.2d ____, 333 P.3d 402, 409 (2014) (citing *State v. Goodman,* 150 Wn.2d 774, 784, 83 P.3d 410 (2004)); *McCarty*, 140 Wn.2d at 425. Failure to allege each element means the information is insufficient to charge a crime and so must be dismissed. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010)..

The reviewing court applies a liberal construction rule for challenges to the information raised for the first time on appeal and

employs a two-prong test: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. *McCarty*, 140 Wn.2d at 425. If the necessary elements are not found or fairly implied, however, the appellate court presumes prejudice and reverses without reaching the second prong. *McCarty*, at 425; *State v. Quismundo,* 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

To satisfy the first prong, the charging document must include actual language which would notify the accused of the essential element at issue. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343 (2006). This language must be part of the charging language. *State v. Franks*, 105 Wn. App. 950, 958-959, 22P.3d 269 (2001) (the defendant's name must be included in the charging language and not just in the caption of the pleading); *State v. Gill*, 103 Wn. App. 435, 442, 13 P.3d 646 (2000) (including an element in another similar charge cannot cure the deficiency of a missing essential element in the challenged charge). Moreover, another source of information or discussion with defense counsel cannot supply an essential element which is not included in the charging language of the information. *State v. Vangerpen*, 125 Wn. App. 782, 788, 888 P.2d 1177 (1995).

RCW 9.A.44.086 states, in pertinent part:

> 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 perpetrator is at least thirty-six months older than the victim. (emphasis added).

The information charging Mr. Goss with child molestation in the second degree alleges only that ENF was "less than 14 years old." It does not specify that she was at least twelve years old. Thus, it omitted an essential element of the crime. Prejudice should be presumed and the charge dismissed.

While the Second Amended Information includes ENF's birthdate and the dates of the charging period, making it possible for a person to calculate that the charging period started on her twelfth birthday, nothing in the information requires such a calculation or gives notice of its significance in proving the crime. The possibility of this calculation does not constitute language notifying Mr. Goss of the essential element of the crime. *Courneya*, at 351.

Moreover, the date of the offense has been deemed to be a "matter of form rather than substance" and generally "not a material part of the 'criminal charge.'" *State v. Debolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991). The charging period cannot be looked for to determine the essential elements of the crime. Thus, all of the necessary elements do not

appear or are not fairly implied in the Second Amended Information in this case, and prejudice must be presumed. *McCarty*, at 425. Mr. Goss's conviction for second degree child molestation should be reversed and dismissed for that reason.

### 3. MR. GOSS'S CONVICTION FOR SECOND DEGREE CHILD MOLESTATION SHOULD BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

Mr. Goss's conviction for second degree child molestation should be reversed and dismissed with prejudice because the state did not present sufficient evidence to establish that ENF was over the age of twelve at the time of the alleged incident or that the incident took place within the charging period. This Court should reach and determine this issue even if it determines that the late amendment was improper or the Second Amended Information was insufficient to charge a crime. *See State v. Kirwin*, 166 Wn. App. 659,67f5, 271 P.3d 310 (2012).

ENF was the only person who knew what, if any, inappropriate touching took place between her and Mr. Goss; almost without exception, all of the other witnesses at trial were repeating in their testimony some version of events that they heard from ENF.[6] And, when the prosecutor

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[6] EHF's mother did testify to hearing her scream at a family gathering, although the details of the events did not match ENF's description– Ms.

questioned ENF specifically to establish when the charged incident took place, she was unable to recall more than that it took place sometime before or after her birthday and before she went to live with her father in California. RP 591.

> 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.

RP 591. The prosecutor, in seeking to amend the information acknowledged this – that ENF testified that the incident happened when she was in the seventh grade – "that would have been after her 12th birthday." RP 657. What the prosecutor did not acknowledge was that ENF was clear that she did not know if the only incident in which there was actual touching was before or after her birthday. RP 559-560.

As a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a 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 the enhancement." *Jackson v. Virginia*,

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Stewart remembered a family barbecue and no cousins, RP 373, while ENF recalled it being Thanksgiving and that she was following all of the cousins who had decided to go wake Mr. Goss. RP 487-489.

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).

Here, ENF was clear in her testimony that the relevant alleged incident took place either shortly *before* or after her birthday and the birthday in question could have been her twelfth birthday. Thus, if it took place before her twelfth birthday she would have only been eleven at the time. Since ENF could not confirm that the incident took place before her twelfth birthday there is insufficient evidence that it took place within the charging period or that Mr. Goss had committed second degree child molestation.

Even if the jury believed that ENF was wrong about when she went to live with her father in California, and it was in the eighth grade rather than the seventh, RP 260, ENF could only confirm that the incident occurred *before* she went to California. No evidence was introduced at trial that could exclude the possibility that, if the incident occurred, it occurred a day or more before her twelfth birthday.

Since the state's evidence was insufficient – even when considered most favorably to the state -- to prove beyond a reasonable doubt that the alleged crime took place in the charging period and before ENF was twelve, Mr. Goss's conviction for second degree child molestation should be reversed and dismissed with prejudice.

**4. THE TRIAL COURT ERRED IN NOT ALLOWING COUNSEL FOR MR. GOSS TO ARGUE, BASED ON THE EVIDENCE ADMITTED AT TRIAL, THAT MR. GOSS HAD PROVIDED A STATEMENT TO THE POLICE AT THE TIME OF HIS ARREST AND THE PROSECUTION CHOSE NOT TO PRESENT THE STATEMENT TO THE JURY.**

The trial court permitted defense counsel to elicit from Det. Matthews , over the prosecutor's objection, 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 trial court was wrong on both grounds for its ruling. The argument should have been permitted.

First, the statement was not necessarily hearsay. While Mr. Goss's statement was hearsay if offered by the defense, under ER 801(d)(2), it

would have been admissible as an admission of a party opponent under ER 801(d)(1), 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). In other words, there is no self-serving hearsay rule that excludes otherwise admissible evidence. *State v. Pavlik*, 165 Wn. App. 645, 653, 268 P.3d 986 (2011). The state could have offered Mr. Goss's statements as evidence at trial if it chose to do so. The trial court was incorrect in ruling categorically that it was excludable as hearsay.

Second, defense counsel was not asking that the statement be played. Defense counsel was properly going to make an argument analogous to the argument underlying the right to a missing witness instruction.

A missing witness instruction allows the jury to infer that a witness's testimony would have been unfavorable to the party that could have called, but didn't call the witness at trial. *State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011). This instruction and inference is appropriate where the witness is peculiarly available to the party who did not call him or her as a witness. *Flora*, 160 Wn. App. at 556. And the circumstances must 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). Here, it is no less true that the inference arises from the state's failure to offer the defendant's voluntary, cautioned statement that it would have been damaging to the state's case. Defense counsel should have been permitted to make this argument.

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. It is simply an argument properly 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).

Where, as here, the evidence that Mr. Goss provided a statement was properly admitted evidence at trial, his counsel should have been permitted to argue inferences from that evidence. 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).

Moreover, because of the fundamental nature of the defendant's trial rights, the U.S. Supreme Court has held that evidentiary rules may not be mechanistically 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. The burdening of his right to present a defense to the jury violated his state and federal constitutional rights and should require reversal of his conviction.

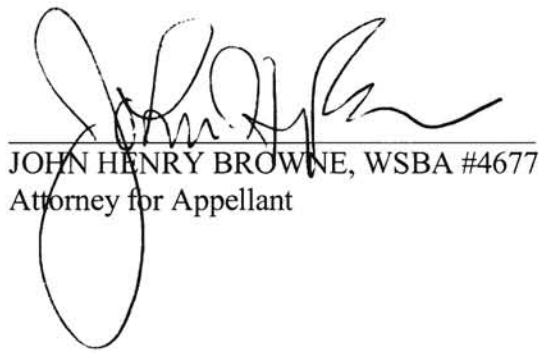
## E. CONCLUSION

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

DATED this 23 day of December, 2014.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.



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

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

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

King County Prosecuting Attorney
Appellate Unit
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Seattle, WA 98104

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

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DATED at Seattle, Washington, this 8th day of January, 2015.

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