

SUPREME COURT NO. 922748
NO. 72406-6-I

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WASHINGTON STATE
SUPREME COURT
h/h

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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES ON REVIEW

1. As a matter of due process and the constitutional right to notice of the charges against one, as interpreted in *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013), is the lower as well as upper age limit of the victim of second degree child molestation an essential element of the crime where child molestation in the first, second and third degrees have mutually exclusive age ranges?

2. Is there sufficient evidence to convict of second degree child molestation where the complaining witness explicitly testified that she does not know if the crime occurred before or after her twelfth birthday where the charging period begins on her twelfth birthday and the victim of second degree child molestation must be at least twelve years old?

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. Overview

The Information (second amended) charging Michael Goss with child molestation in the second degree did not allege the element that the

complaining witness was at least twelve years old; it alleged only that she was less than fourteen years old.¹ ENF's date of birth was noted, but not as a statutory element or as a fact that the state bore the burden of proving:

[Michael 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 . . .”

RP 657-662, 676; CP 67-68.²

The central task for the jury at trial was to evaluate the credibility of ENF's allegations against Mr. Goss in light of the inconsistencies in both her accusations and other aspects of her statements. RP 243-244. In addition to these inconsistencies, family members noted that ENF had always gotten along well with Mr. Goss until the day she first accused him of having touched her inappropriately in the past. RP 290, 339, 383. The jurors must have had doubts about the state's case against Mr. Goss because they acquitted him of a second charge of attempted molestation

¹ 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.

² The verbatim report of proceedings is in five consecutively-numbered volumes, and is cited in this brief as RP ___.

even though they convicted him of the second degree child molestation charge. CP 92-93, 94.

2. Trial facts

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 through the Internet in March or May 2010, and Ms. Cuneo moved into Mr. Goss's house a few months later. RP 274-275, 299. ENF visited them occasionally; she lived with her mother, Shantell Stewart, a thirty-minute drive away. RP 277-280; 337.

Another of Ms. Cuneo's daughters, Jessica, and her husband Eric Randolph were visiting from out of town on June 22, 2013, and were part of the group attending an extended-family reunion. RP272, 405-409, 413, 347. 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.

When Ms. Stewart and Ms. Randolph got out of the car while they were waiting to board the ferry, Mr. Randolph stayed behind with ENF. RP 418-419. ENF told Mr. Randolph, when he questioned her, that Mr. Goss had touched her breasts under her shirt and bra in the past. RP 349-

350, 418-421, 427, 473-474. Mr. Randolph had her repeat these allegations to his wife and, when they got home, to her mother. RP 354-357, 422, 424-425, 538. Ms. Steward called the police. RP 259, 359, 429. The following day ENF was asked to tell her grandmother what she had told others. RP 260, 429, 539. Detective Matthews of the Lake Forest Park Police Department 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, 265-267, 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, one of which allegedly took place the previous August. RP 439, 441-442; 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

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.

last incident was two months earlier in April. 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 her. RP 551, 554. By the time of trial, there were 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.

ENF described only one time at trial when Mr. Goss allegedly actually touched her breasts under her shirt. She said this happened at his house before she went to live with her dad; she was in the front room in front of the computer and he called her over to the chair where he was sitting. RP 476-478, 519-520. Her grandmother was at work. RP 520.

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 8th grade in 2012. RP 260.

He grabbed her arms, pulled her to him, reached under her shirt, and touched her breasts for ten to fifteen seconds. 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.

ENF testified that she told her best friend Breana of the episode over the phone and by text message both after the first incident, and later during 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.

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.

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.

C. ARGUMENT

1. **THE LOWER AGE LIMIT AS WELL AS THE UPPER AGE LIMIT IS AN ESSENTIAL ELEMENT OF THE CHARGE OF SECOND DEGREE CHILD MOLESTATION WHICH MUST BE CHARGED IN THE INFORMATION AS A MATTER OF STATE AND FEDERAL RIGHTS TO DUE PROCESS AND THE RIGHT OF AN ACCUSED TO BE INFORMED OF THE CHARGES AGAINST HIM.**

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 satisfies these

constitutional provisions 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 considered a statute which authorized an enhanced penalty for carrying a firearm in relation to a crime of violence, 18 U.S.C. section 924(c)(1)(A). The penalties were divided into three categories: if the firearm was carried during the crime, the mandatory minimum was five years; if it was brandished during the crime, seven years, and if it was discharged during the crime, 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, and held generally that any fact that increases the mandatory *minimum* sentence for a crime is an essential element of the crime.

[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

Alleyne, at 2161.

As in *Alleyne*, the mandatory minimum -- or bottom of the standard range -- 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 *separate* crimes, all of the elements of which have to be proved to a jury. *Id.*

The Court in *Alleyne* was clear 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. *Alleyne*, 133 S. Ct. at 2161. As in *Alleyne* where the three different acts of carrying, brandishing and firing determined the enhanced sentences for the core crime of violence, the three different age *ranges* determine the standard ranges for the crime of child molestation.

The Court of Appeals held that *Alleyne* does not apply to Mr.

Goss's case because *Alleyne* "applies to a sentencing enhancement," and because the "omission of the lower age of 12 did not increase his sentence." *State v. Goss*, 189 Wn. App. 571, 579, 358 P.3d 435 (2015). 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 fact that the different degrees of child molestation determine the standard ranges for each and the degree of punishment the accused person faces. The court's analysis ignored the specific holding of *Alleyne* that the sentencing enhancement plus the underlying crime together become a new substantive crime. *Alleyne*, 133 S. Ct. at 2161.

In *State v. Dyson*, 189 Wn. App. 215, 360 P.3d 25 (2015), the court held that the trial court's finding that the defendant used force or means likely to cause death, which triggered a five-year mandatory minimum term, violated his right to a jury trial under *Alleyne*. The Court noted the futility of determining whether a fact was an essential element based on a distinction between statutory elements and sentencing enhancements:

[L]egislatures and courts seek to distinguish between offenses and sentencing features, with the fact-finding for the crime relegated to a jury and the fact-finding for the punishment assigned to a judge. Under this distinction, a sentencing factor is not an element of the crime. Yet no principled basis exists for treating a fact increasing the term of the imprisonment differently than the facts constituting the base offense. *Alleyne*, 133 S. Ct. 2157. The

end result is the same. As the title to Fyodor Doestoevsky's novel suggests, crime and punishment go together.

Dyson, 189 Wn. App. at 225. Similarly, in *State v. Mullens*, 186 Wn. App. 321, 345 P.3d 26 (2015), the court held that the state was required to prove a prior conviction used to elevate a crime to a felony DUI involved drugs or alcohol because it increased the punishment for DUI from a misdemeanor with a one year maximum to a felony DUI.

Earlier Washington cases, relied on by the Court of Appeals in *Goss* which differentiated between elements of the crime and sentencing factors, 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 particular, the Court in *Alleyne* noted the importance of notice to the accused of the sentence he or she faced upon conviction.

Another [early treatise] explained “the indictment must contain an allegation of every fact which is legally essential to the punishment

to be inflicted.” Bishop § 81, at 51. This rule “enabled [the defendant] to determine the species of offense” with which he was charged “in order that he may prepare his defense accordingly ... and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted.” Archbold 44 (emphasis added). As the Court noted in *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)] “[t]he defendant’s ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.” 530 U.S. at 478.

Alleyne, at 2160.

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 Mr. Goss notice of the “at least twelve element,” an essential element of second degree child molestation under *Alleyne*, and tacitly acknowledged as such by the Court of Appeals in its recognition that the age ranges determined the degree of child molestation. *Goss*, 189 Wn. App. at 579.

In its cross-petition for review, the state has asked this Court to excuse the failure to include the “at least twelve” element, arguing that the charging language adequately conveyed this missing element. This argument is not supported by the relevant authority. For 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 actually notifying Mr. Goss of the essential element of the crime. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (the charging document must include some notice of the missing element).

Moreover, the fact that the alleged victim's age might factually satisfy a statutory element is not equivalent to having an age limit specified as an essential element of the crime. In *State v. Ortega*, 120 Wn. App. 165, 168, 172, 84 P.3d 935 (2005), for example, this Court held that a 1991 Texas conviction for second degree indecency with a child, which criminalized contact with a child under the age of seventeen, was not comparable to a Washington strike offense which required the child to be under the age of twelve. In reaching this holding, the court reasoned that even if the child in the Texas case had claimed to be eleven, Ortega would have had no incentive to challenge and prove that the child was actually twelve at the time of the contact. *Id.*; *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 257, 119 P.3d 837 (2005).

Even liberally construed, the fact that the information included ENF's date of birth did not give notice of the element that the state had to

prove that she was at least twelve years old at the time of the alleged crime. Thus, the language in the Information did not convey the missing element that ENF was at least twelve years old.

2. 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 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. *Goss*, 189 Wn. App. at 581. 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 finding overlooks the fact that, when specifically asked about the date of the incident, ENF was unable to recall whether the incident occurred before or after her September birthday or which birthday it was. 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 sufficient to convict of a different crime cannot sustain a conviction for the charged crime). Because the jury could not be surer of the date of the incident than ENF herself, there was insufficient evidence and Mr. Goss's conviction should be reversed and dismissed.

3. AS A MATTER OF STATE AND FEDERAL CONSTITUTIONAL LAW MR. GOSS WAS ENTITLED TO ARGUE THE INFERENCE THAT THE STATE DID NOT INTRODUCE HIS STATEMENT AT TRIAL BECAUSE IT WAS NOT HELPFUL TO THE PROSECUTION.

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.” *Goss*, at 581.

In fact, 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 or lack of evidence.

It is also the inference allowed when a party elects not to call a witness who 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. 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).

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.

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).

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 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 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 Mr. Goss's state and federal constitutional rights.

The error in Mr. Goss's case was not harmless. The jury must have had doubts about the state's evidence and the credibility of its witnesses; it acquitted Mr. Goss of one of the two counts charged against him. There were many reasons to doubt. The jury might well have reached a different result if defense counsel had been allowed to argue that Mr. Goss had given a statement to the police and that it must not have been helpful to the state because it was not introduced at trial.

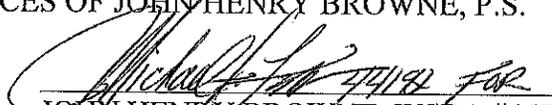
F. CONCLUSION

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

DATED this 30th day of March, 2016.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.


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