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STATE OF WASHINGTON
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NO. 95115-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIANA MERRITT,

Appellant.

AMENDED SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the information, when liberally construed, adequately informed the defendant that she had been charged within the appropriate statute of limitations period, and whether the defendant had the right to a jury determination of the timely filing of the information.

B. STATEMENT OF THE CASE

As to the detailed facts of Merritt's crimes, the State relies on the Court of Appeals' description, contained within its published opinion in State v. Merritt, 200 Wn. App. 398, 402 P.3d 862 (2017). Distilled to its essence, Merritt's illegal conduct consisted of ten instances of acts of deception, in her capacity as a residential mortgage loan originator, against multiple lenders and borrowers when she knowingly obtained and presented residential real estate appraisals that were prepared by her unlicensed and unqualified boyfriend,¹ but which bore the name and illegally-acquired electronic signature of a licensed appraiser. See Merritt, 200 Wn. App. at 401-03.

¹ White's boyfriend, Douglas White, was charged as a co-defendant, but pleaded guilty to these and numerous other crimes prior to trial.

Merritt was charged by amended information filed on February 20, 2015, with ten counts of mortgage fraud.² CP 48-77. The charging document set forth the facts of each incident, and listed the time frame within which Merritt originated mortgage loans for borrowers through the use of obtaining and presenting fraudulent appraisal reports. The dates of the completed offenses ranged from June 2008 through June 2009. CP 70-77. For each count of mortgage fraud, the State expressly indicated that Merritt's conduct was "contrary to RCW 19.144.080 and RCW 19.144.090...." CP 48-77.

RCW 19.144.080 sets forth the specific types of conduct that constitute criminal acts in the context of the mortgage lending process. RCW 19.144.090(2) provides that "[n]o information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." As the Court of Appeals explained, "The five-year statute of limitations begins to run only when all the elements of the crime have been completed. The three-year statute begins to run only when the State has actually discovered that a defendant has committed the completed crime." Merritt, 200 Wn. App. at 405.

² Merritt was also charged with nine counts of identity theft, but was acquitted of those offenses, and they are not a subject of this appeal.

The possibility of Merritt's involvement in mortgage fraud was discovered in late 2013 and early 2014, when investigators noticed, in the course of examining the banking records of her boyfriend, who was the sole focus of their original investigation, that the pair engaged in multiple financial transactions. Merritt, 200 Wn. App. at 407. Merritt's participation in the specific instances of mortgage fraud that were charged in the February 2015 information was discovered only after investigators executed a search warrant at the home shared by Merritt and her boyfriend in June 2014, and found at least ten loan files that contained fraudulent appraisals. Merritt, 200 Wn. App. at 402, 407.

Merritt waived her right to a jury and proceeded to bench trial. 2RP 3-5.³ By oral ruling, and by written findings of fact and conclusions of law subsequently entered, Merritt was found guilty on all counts of mortgage fraud. 13RP 36-39; CP 465-70.

C. ARGUMENT

The Court of Appeals rejected Merritt's contention that the amended information was constitutionally inadequate because it

³ The verbatim report of proceedings consists of 16 volumes, referred to in this brief as follows: 1RP (8/18/2015); 2RP (8/19/2015); 3RP (8/24/2015); 4RP (9/2/2015); 5RP (9/8/2015); 6RP (9/9/2015); 7RP (9/10/2015); 8RP (9/14/2015); 9RP (9/15/2015); 10RP (9/16/2015); 11RP (9/17/2015); 12RP (9/21/2015); 13RP (9/24/2015); 14RP (10/30/2015); 15RP (12/3/2015); and 16RP (1/22/2016).

failed to list the date that the State discovered her specific acts of mortgage fraud. Merritt, 200 Wn. App. at 404-06. The appellate court concluded that the timely filing of an information within the relevant statutory limitation period is not an element of a crime that must be alleged and proved to the jury. Id.

In her petition for review, Merritt re-asserts her claim that her constitutional right to due process was infringed, and also asserts that the amended information filed against her failed to comport with a Washington statute setting forth the requirements of an adequate information.

Merritt's contentions should be rejected. As to the statutory argument she raises for the first time to this Court, Merritt cannot show that the charging document set forth only claims that were clearly time-barred and now requires dismissal despite her failure to seek a timely solution. With regard to her constitutional argument, although a defendant has the right to have a jury determine facts that establish her guilt beyond a reasonable doubt, she does not have the right to having a jury serve a similar role in determining a court's authority to hear a case and enter judgment on an offense.

1. THE AMENDED INFORMATION DOES NOT VIOLATE RCW 10.37.050.

Merritt begins her petition by asserting that the amended information filed against her was statutorily insufficient because it did not comply with the terms of RCW 10.37.050. That statute provides:

The indictment or information is sufficient if it can be understood therefrom...

(5) That the crime was committed at some time previous to finding of the indictment or filing of the information, and within the time limited by law for the commencement of an action therefor...

Merritt asserts that the State was obligated under this statute to list the dates that it discovered she had committed the charged crimes, and that its failure to do so renders the amended information invalid on its face.

Merritt's argument is too fine, in that she equates her case to those involving charging documents that alleged crimes that were *necessarily* time-barred under their relevant statutory limitation periods. See, e.g., State v. Glover, 25 Wn. App. 58, 604 P.2d 1015 (1979). In Glover, the defendant was charged in April 1978 with having committed felony indecent liberties against a child in January 1975. Glover, 25 Wn. App. at 59-60. At that time, such a

charge could be prosecuted only within three years of the date of the completed offense, or no later than January 1978; appropriately, the information was deemed insufficient and the charge accordingly dismissed. Id. at 61-62.

Here, the dates of Merritt's crimes were set forth, and, in contrast to Glover, the relevant statute of limitations period allowed for their prosecution within five years of that date or three years from their discovery, pursuant to a statutory provision that was itself cited in the charging document.⁴ Prosecution was not definitively time-barred by the time the information was filed. Unlike in Glover, the countdown to the filing of charges here was not triggered by one event alone, so it cannot be said, as it was in Glover, that the information could lead to only one conclusion – that the State failed to file in time.

⁴ It bears noting that mortgage fraud is not the only offense whose limitations period may be triggered by events in addition to the completion of the crime. See, e.g., RCW 9A.04.080(1)(b)(iii)(A), (B) (providing that the crimes of rape in the first and second degree may be prosecuted within ten years of their commission if reported to police within one year of their commission, or prosecuted within three years of their commission if no report was made within the first year; RCW 9A.04.080(1)(e)(allowing for prosecution of crimes including identity theft, theft-by-deception, and leading organized crime within six years of the date of commission or date of discovery, whichever is later); RCW 21.20.400(3) (allowing for prosecution of Securities Act violations within five years of the date of a violation or three years from the date of its discovery, whichever is later).

At worst, the charging document here was somewhat vague, insofar as a plain reading might not allow a reader to conclusively determine whether the prosecution was or was not time-barred. But the remedy for such a situation is not to be found in dismissal. As this Court has noted, if an information states each statutory element of a crime “but is vague as to some other matter significant to the defense, a bill of particulars can correct the defect.” State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991). In such a situation, a defendant is not entitled to challenge the information on appeal if she failed to timely request a bill of particulars. Id. at 843-44, citing, inter alia, State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); see also State v. Ansell, 36 Wn. App. 492, 496, 675 P.2d 614 (1984) (refusing to find reversible prejudice from an information that did not state that the limitations period had been tolled, because other remedies short of dismissal, including amendment, were available). Merritt never requested a bill of particulars as to the date of discovery, and first raised any sort of challenge to the charging document in this regard only after the trial court had rendered its verdict and she moved to arrest judgment.

15RP 90.

This Court should be hesitant to expand the scope of facts that are required in a charging document pursuant to RCW 10.73.050, lest greater confusion be created as to the facts for which the State carries the highest degree of proof at trial. For the reasons discussed infra, and as recognized by the Court of Appeals in its decision, the timely filing of an information is not itself an essential element of a crime.

The charging document here was sufficient to advise a reader that it was filed with the relevant statutory limitation period, and any imprecision could have been cured by a bill of particulars that Merritt failed to seek. Dismissal for a purported violation of RCW 10.73.050 is unwarranted.

2. THE TIMELY FILING OF AN INFORMATION IS NOT AN ESSENTIAL ELEMENT OF A CRIME THAT MUST BE ALLEGED AND PROVED TO A JURY.

In her petition for review, Merritt also appears to contend that, in a criminal case, the State is obligated to plead, and later prove to the jury, its compliance with the relevant statute of limitations in order to establish the defendant's guilt. Petition of Review, at 10-12. She asserts that, at the very least, a defendant has the constitutional right, as a matter of due process, to have a

jury determination of all facts relevant to the legal question of whether a charging document was timely filed.

Merritt's propositions are dubious. A defendant has the due process right to be informed by the charging document of all "essential elements of a crime...in order to afford notice...of the nature and cause of the accusations against" her. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The "essential elements" rule is grounded in the Sixth Amendment, as well as art. 1, sec. 22, of the Washington Constitution. State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (noting also that CrR 2.1(a)(1) requires a charging document to "be a plain, concise, and definite written statement of the essential facts constituting the offense charged").

Essential elements include "only those facts that must be proved beyond a reasonable doubt to convict a defendant of a charged crime." State v. Powell, 167 Wn.2d 672, 683, 223 P.3d 493 (2009). That is, an information must allege those facts that are necessary to establish "the very illegality of the behavior" charged. Zillyette, 178 Wn.2d at 158, quoting State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003).

The gap in logic between Merritt's constitutional claim and this well-established case law is abundantly clear. The facts

surrounding the timing of the State's filing of charges have nothing to do with the question of whether the defendant did or did not commit acts that constitute a crime. A statute of limitations only affects *the authority of a court to sentence a defendant for a crime.* State v. Peltier, 181 Wn.2d 290, 298, 332 P.3d 457 (2014). A statute of limitations does not affect whether a defendant committed the crime, and it is only those factual allegations that must be presented in a charging document and proved beyond a reasonable doubt to a jury. See Osborn v. State, 86 Okla. Crim. App. 259, 260, 194 P.2d 176 (1948) (observing that the "statute of limitations does not negative a single element of the crime with which a defendant may be charged. It does not put in issue the guilt of a defendant," and therefore is not necessary for the prosecution to prove to the jury).

Merritt's reliance, in her petition for review, on State v. Dash, 163 Wn. App. 63, 259 P.3d 319 (2011), and State v. Mermis, 105 Wn. App. 738, 20 P.3d 1044 (2011), is misplaced. In each of those cases, the question of when the statute of limitations period began to run was inextricably tied up in a question that the jury was inherently tasked with deciding: when was the defendant's crime complete, at which point the defendant became fully culpable? See

Dash, 163 Wn. App. at 68 (concerning a to-convict instruction for a single crime of first-degree theft based on a series of transactions constituting a “continuing criminal impulse”); Mermis, 105 Wn. App. at 742-44 (involving a theft based on a “continuing criminal impulse” that began when the defendant obtained possession of a vehicle but, under the State’s theory of the case, was completed only when he later obtained title.)

That is, the jury in each of those cases was not asked to decide a fact for the purpose of determining, per Peltier, whether the court had authority to sentence the defendant. That issue was collaterally connected to the juries’ determination, in Dash and Mermis, of the defendants’ *guilt*, which was only established by the completion of their offenses. Cases such as Dash and Mermis are rare, and should not be the basis of a universal rule of law applicable in all cases.

Here, in contrast, the question of the date of the discovery of Merritt’s actions had nothing to do with her behavior and her culpability. The date of discovery had only to do with the separate and purely legal issue of whether the court maintained the power to enter judgment. In this regard, a jury traditionally plays no role, and

the court has the power to make the factual determinations necessary to render a legal conclusion.

Such gatekeeping functions are commonplace, as when a trial court takes evidence and rules upon a suppression motion pursuant to CrR 3.6 or a motion to dismiss pursuant to CrR 8.3, or decides the validity of no-contact orders that are the basis for a pending criminal action based on the violation of those orders. See State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005) (concerning court orders); see also State v. Jackson, 208 Ariz. 56, 90 P.3d 793 (Ariz. 2004). In Jackson, the Supreme Court of Arizona held that a trial court can consider a motion to dismiss based on an alleged statute of limitations violation as a pretrial matter. Moreover, the state supreme court held that this determination is subject to a preponderance-of-evidence standard, and observed that a degree of proof lower than proof beyond a reasonable doubt applies even to constitutional issues raised pretrial, and noted that a defendant has no constitutional right to being timely charged, merely a statutory one. Jackson, 208 Ariz. at 63, citing State v. Timoteo, 87 Hawai'i 108, 113, 952 P.2d 865 (Haw. 1997) (noting that the protection of a statute of limitations does not constitute a fundamental constitutional right, but is a

“mere statutory act of grace that the sovereign state has conferred in order to limit its right to prosecute criminal offenders.”).

Under the circumstances, it is dubious to suggest that Merritt has the right to a jury determination, based on the highest possible standard of proof, of facts that relate to a question that has nothing whatsoever to do with her guilt, and which concerns only the statutory scope of a court’s authority. Her claim that such facts must therefore be alleged in an information and proved to a jury’s satisfaction beyond a reasonable doubt should be rejected.

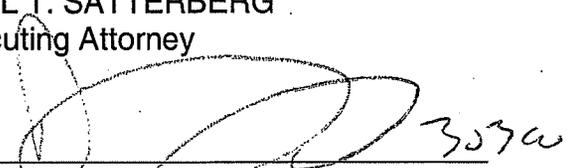
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Merritt’s convictions and the trial court’s judgment and sentence.

DATED this 28th day of March, 2018.

RESPECTFULLY submitted,

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