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Court of Appeals
Division I
State of Washington

COA NO. 74469-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DIANA MERRITT,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE CHARGING DOCUMENT IS DEFECTIVE BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

The State contends Merritt was given notice that she was charged within the statute of limitations because the information cites the date of each offense and the statute setting forth the relevant statute of limitations period. Brief of Respondent (BOR) at 9. "Citing the correct statute, however, is not enough." State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010). "[D]efendants should not have to search for the rules or regulations they are accused of violating." State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

Regardless, the face of the information does not show the charges were filed within the statute of limitations period. On its face, the offenses occurred more than five years before the information was filed. Nothing in the information informs Merritt of when the offenses were discovered so as to fall within the alternative three-year limitation period.

The State says the timeliness of the State's filing need not be included in the information because it is an affirmative defense. BOR at 9-10. The State is wrong. The statute of limitations applied to the filing of criminal charges is not treated as an affirmative defense in Washington.

The general rule in *civil cases*, as set forth in CR 8(c),¹ is that an affirmative defense is waived if not pleaded, and the statute of limitations constitutes one such defense. Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 428-29, 886 P.2d 231 (1994).

In contrast, criminal charges brought outside the statute of limitations cannot be prosecuted and are beyond the statutory authority of the court. State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). The statute of limitations for filing criminal charges is not waived unless the waiver is expressly made. Peltier, 181 Wn.2d at 297; In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 809-10, 383 P.3d 454 (2016). The statute of limitations error need not be raised at the trial level and is not even subject to the time bar for collateral attacks. Swagerty, 186 Wn.2d at 808. From this, it is obvious a statute of limitations challenge to the filing of criminal charges is not an affirmative defense that is waived unless affirmatively pleaded. Rather, it is a defense that endures so long as it is not expressly waived.

¹ Civil Rule 8(c) provides: "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitation . . . and any other matter constituting an avoidance or affirmative defense."

The State's citation to State v. Grantham, 174 Wn. App. 399, 404, 299 P.3d 21 (2013) does not help its cause. The statute of limitations for filing a criminal charge was not at issue in that case. Instead, at issue was whether the restitution order was timely entered. Grantham, 174 Wn. App. at 404. The statutory time limit on entering restitution "operates like an ordinary statute of limitations" subject to waiver. Id. (citing State v. Duvall, 86 Wn. App. 871, 875, 940 P.2d 671 (1997)). Grantham is inapposite because it does not involve the statute of limitations for filing criminal charges. Swagerty and Peltier unequivocally show a challenge to the statute of limitations for filing criminal charges is not an affirmative defense.

The State says Merritt cannot show prejudice under the second prong of the test for challenging charging documents. BOR at 9. She doesn't need to. Where the information fails to include a necessary fact, the second prong of prejudice is not reached, and the remedy is reversal. State v. Franks, 105 Wn. App. 950, 958-60, 22 P.3d 269 (2001) (information defective in failing to include the necessary fact of the identity of the defendant as the person charged).

2. THE STATE FAILED TO PROVE THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

The State relies on its claim that a statute of limitations challenge is an affirmative defense that needs to be pleaded and raised at trial. BOR at 11. Swagerty and Peltier demonstrate the statute of limitations error is not an affirmative defense. The defense is not waived unless it is expressly waived. Peltier, 181 Wn.2d at 297; Swagerty, 186 Wn.2d at 808-10. There is no contention, nor could there be, that Merritt expressly waived a challenge to the filing of charges outside the statute of limitations. The State's citation to federal cases on waiver is irrelevant. Washington law controls.

That an offense was committed within the statute of limitations is a necessary fact that the State must prove to sustain a conviction. State v. Dash, 163 Wn. App. 63, 69-71, 259 P.3d 319 (2011), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014); State v. Mehrabian, 175 Wn. App. 678, 696, 308 P.3d 660, review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013) ("If the to-convict instruction permits the jury to convict the defendant based solely on acts committed beyond the statutory limitation period, reversal is required."); State v. Mermis, 105 Wn. App. 738, 741, 752, 20 P.3d 1044 (2001) (reversing where unclear

whether jury found defendant committed theft by an alternative means on a date outside the statute of limitations).

The State contends the statute of limitations period had not expired because the charges were filed within three years of the date of discovering the evidence supporting them, i.e., three years from execution of the search warrant in June 2014. BOR at 12. The State fails to confront Merritt's argument that the charges were not filed within the statute of limitations under the "discovery rule," wherein "actual knowledge of fraud will be inferred for purposes of the statute if the aggrieved party, by the exercise of due diligence, could have discovered it." Shepard v. Holmes, 185 Wn. App. 730, 739-40, 345 P.3d 786 (2014). Under the State's theory, the running of the statutes of limitations is controlled by the whim of the government investigator. Criminal charges could be filed many years or even decades down the road, regardless of whether the investigator exercised due diligence in discovering the criminal offense. "The policy behind statutes of limitations is to protect defendants from unfair decisions caused by stale evidence and to encourage law enforcement officials to promptly investigate crimes." State v. N.S., 98 Wn. App. 910, 912-13, 991 P.2d 133 (2000), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). The statute of limitations is the defendant's primary protection against oppressive delay. State v. Boseck,

45 Wn. App. 62, 66, 723 P.2d 1182 (1986). As argued, the State's interpretation flies in the face of the reason for having a statute of limitations for criminal offenses and leads to absurd consequences. Brief of Appellant at 35-37. It should be rejected.

In an apparent effort to create some distance between White and Merritt on the statute of limitations issue, the State writes "Merritt was not prosecuted as an accomplice to White's preparation of fraudulent appraisals." BOR at 12. In relation to the mortgage fraud counts, this is technically accurate. But in relation to the identify theft charges (of which Merritt was acquitted), the trial prosecutor expressly sought to convict Merritt as an accomplice to White. 2RP 94, 1130. Further, for every charge of identity theft and mortgage fraud against Merritt, the State also charged White. CP 48-51, 68-77. In assessing the statute of limitations, Merritt and White cannot be disentangled. Under the discovery rule, if the exercise of due diligence could have discovered the fraud related to one party in the course of investigating the fraud of another party, then the statute of limitations operates as a bar against both. Sherbeck v. Lyman's Estate, 15 Wn. App. 866, 870, 552 P.2d 1076 (1976). There is no way to untether one from the other with respect to when the crimes would have been discovered through due diligence.

The State writes agent Schrank did not suspect Merritt of mortgage fraud until late 2013 when Schrank examined White's bank records. BOR at 12. As with so many other matters, Schrank never explained why it took her so long to examine those bank records. Merritt's opening brief details the many instances in which the investigation dragged on for years without due diligence. The bottom line is this: information that ultimately led to the search of Merritt's and White's residence in June 2014 could have been discovered, through a diligent investigation, much earlier. This means the search itself, which uncovered the evidence that formed the basis for the mortgage fraud counts against White and Merritt, would have occurred much earlier had that diligent investigation been done. The State does not argue the investigation was diligent and satisfied the "discovery rule" for the statute of limitations. The trial court made no such finding. And the evidence does not support such a conclusion. The charges must be reversed because they were filed outside of the statute of limitations period.

3. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE MORTGAGE FRAUD CONVICTIONS BECAUSE THE CLAIMED VIOLATION DOES NOT RISE TO THE LEVEL OF A CRIMINAL ACT UNDER THE STATUTE.

The State claims the evidence is sufficient to convict because the name of the person who did the appraisal is a material term of the lending

process. BOR at 15-18. But in defending the convictions, the State stresses the importance of the appraisal being done by a licensed appraiser. Defense counsel acknowledged the licensed status of an appraiser is a material fact. 1RP 148; CP 297-98.² But the trial court did not find Merritt knew White was an unlicensed appraiser. 1RP 33, 35-36, 146. This means the State did not prove Merritt knowingly used an appraisal report that was done by an unlicensed appraiser. In light of the court's finding, the evidence at most shows Merritt knew White did the appraisal, not Reed. The State insists Merritt's criminal sin was failing to notify any borrower or lender that the person who did the appraisal was not licensed to do so. BOR at 17. The State did not prove she knew White was unlicensed. 1RP 33, 35-36, 146. Merritt could not notify anyone that White was unlicensed when she was unaware of the fact.

Because Merritt knew White as a licensed appraiser and there is no evidence the appraisals contained any inaccurate information regarding the assessed value of the properties at issue,³ the mere fact that the appraisals inaccurately represent the identity of the person who did them does not rise to the level of a material term affecting the lending process. The

² In the "Statement of Facts" section of its brief, the State refers to White as a "former real estate agent," suggesting he held that status while doing appraisal work for Reed. BOR at 3. The evidence shows White was a licensed real estate agent. 2RP 140, 333, 800, 1028; Ex. 276.

³ The court noted this during argument on restitution. 1RP 269.

purpose of the appraisal is to provide an accurate assessment of home value. 2RP 137, 865. The identity of the person who performs the appraisal does not affect that purpose. No evidence was presented that anyone involved in the lending process attached significance to the identity of the appraiser.

The State cites mortgage lender Kiel's testimony that "If fraud were to be uncovered in a file, then the lender would look to the broker to purchase that loan back." 2RP 869. A broker's certification showed Merritt was aware of the Mortgage Broker's Practices Act and that, pursuant to that law, she had a duty to disclose to the borrower all material facts of which she had knowledge. 2RP 485-486, 868; Ex. 208. The question, though, is what constitutes fraud in any given mortgage transaction. These pieces of evidence do not answer the question of whether the misrepresentation of the identity of the appraiser under the circumstances of this case constitutes fraud, i.e., a material misrepresentation.

The State argues a fraudulent appraisal would, upon discovery, permit a lender to immediately place the loan in default and demand immediate repayment of the loan in full, either by the borrower or the loan originator. BOR at 16. But again, the question here is whether fraud occurred at all under the requisite legal standard. No evidence showed,

and no law has been cited, that would allow a lender to place the loan in default because the appraisal, though accurate in assessing property value, was not done by the person whose name appears on the appraisal report. Even assuming discovery that a report was done by an unlicensed appraiser would allow the lender to place the loan in default, Merritt once again points out the State failed to prove she knew White was an unlicensed appraiser. IRP 33, 35-36, 146.

Misrepresentation of the identity of the appraiser is not a material fact in this case. As argued, the evidence is insufficient to support conviction under RCW 19.144.080(1)(a) because the State failed to prove Merritt employed a scheme to deceive or materially mislead a borrower or lender. The evidence is insufficient to support conviction under RCW 19.144.080(1)(b) because the State failed to prove Merritt knowingly made a misrepresentation as to a material fact. There is no material misrepresentation here. Assuming a material misrepresentation, she did not "make" it. Assuming she made it, she did not know it was material. The evidence is insufficient to support conviction under RCW 19.144.080(1)(c) because the State failed to prove Merritt used a material misrepresentation that she intended for others to rely on. The evidence is insufficient to support conviction under RCW 19.144.080(1)(d) because the State, in failing failed to prove a violation of subsections (1)(a), (b) or

(c), necessarily failed to prove Merritt received proceeds that she knew resulted from a violation of (1)(a), (b) or (c).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Merritt requests reversal of the convictions.

DATED this 13th day of April 2017

Respectfully Submitted,

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