IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26736-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ROBERT T. WALKER,	)	
	)	**OPINION PUBLISHED**
Appellant.	)	**IN PART**

Korsmo, J. — Robert Walker challenges for the first time on appeal the timeliness of the bail jumping charges filed against him for a seemingly endless string of failures to appear in court. Because the statute of limitations implicates the jurisdiction of the courts, but the prosecution has not had an opportunity to produce evidence on the topic, we remand to the trial court to decide the merits of the argument. We affirm the other two counts that were timely filed.

FACTS

Mr. Walker was charged December 13, 2000, in the Benton County Superior Court with possessing methamphetamine on September 29, 2000. He was arraigned January 5, 2001. A several year odyssey of missed court dates ensued.

Ultimately, by amended information filed September 28, 2006, and second amended information filed June 26, 2007, seven counts of bail jumping were added to the drug possession charge. Counts II and III involved missed court dates in 2001, counts IV and V covered various dates in 2002, Count VI was alleged to have been committed September 19, 2003, Count VII covered a 2004 date, and Count VIII involved the period between December 18, 2006, and January 10, 2007.

The case eventually proceeded to trial in June 2007. The arresting officer was not located and the drug possession count was dismissed at the end of the prosecution's case. Mr. Walker took the stand in his own defense on the bail jumping counts and testified that he missed court because he was incarcerated in other counties or could not read the court dates on his paperwork. In cross-examination, the prosecutor got Mr. Walker to admit that he had no jail records to support his incarceration testimony.

The prosecutor began his closing argument by pointing out that Mr. Walker had successfully delayed the prosecution on the original charge to the point where it had to be

dismissed. There was no objection to the argument.

The jury convicted Mr. Walker on all seven bail jumping charges. After another half year of delay, he was sentenced to concurrent 60-month terms. He then timely appealed to this court.

ANALYSIS

This appeal raises three separate challenges.[1] First, Mr. Walker argues that the five oldest bail jumping counts were barred by the statute of limitations. Next, he contends that the evidence did not support Count VII. Finally, he claims that he was denied a fair trial by prosecutorial misconduct in cross-examination and closing argument. We will address the challenges in the order presented.

Statute of Limitations

The statute of limitations applicable to bail jumping is found in RCW 9A.04.080(1)(h), which states in relevant part that "No other felony may be prosecuted more than three years after its commission." The exception to the statutory limitation

[1] Mr. Walker also filed his *pro se* Statement of Additional Grounds. We have considered the arguments and find them to be meritless; they will not be addressed further other than to make two observations. First, Mr. Walker's CrR 3.3 arguments are largely identical to those recently rejected in another one of his appeals, Court of Appeals (COA) No. 27286-9-III. Second, his arguments based on *State v. Striker*, 87 Wn.2d 870, 557 P.2d 847 (1976), have *never* been applied to post-arraignment delays in getting a case to trial. Even if *Striker* had not been obviated by the 2003 amendments to CrR 3.3, it would not apply to this case.

period is found in RCW 9A.04.080(2):

The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not *usually and publicly resident within this state*.

(Emphasis added.)

The statute of limitations in a criminal case is jurisdictional. *State v. Eppens*, 30 Wn. App. 119, 124, 633 P.2d 92 (1981).[2] Accordingly, a statute of limitations challenge in a criminal case can be raised for the first time on appeal. RAP 2.5(a)(1); *State v. Novotny*, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994).

The question here is whether any time was tolled. Only nine days of tolling would be necessary for Count VI to be timely; 32 months would be necessary for Count II.

Mr. Walker's initial argument on this issue is a contention that the charging documents fail to allege facts that would toll the statute of limitations. The State responds that the statutory requirements for a charging document do not dictate that tolling language be included in a charging document.

We agree that nothing in CrR 2.1 or the statutes governing the sufficiency of charging documents expressly requires that language which would toll a statute of limitations be included therein. RCW 10.37.050, .052, and .054 all state various

[2] Because a criminal statute of limitations is jurisdictional, unlike the statute of limitations in a civil action, it cannot be waived. *State v. Glover*, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979); *see State v. Phelps*, 113 Wn. App. 347, 357, 57 P.3d 624 (2002) (defendant could not agree to extend criminal statute of limitations period).

requirements for a charging document or explain when it is sufficient, and RCW 10.37.056 discusses "defects" that are insufficient to invalidate a charging document. Only section .050 addresses the statute of limitations. It provides that an information is sufficient if it can be understood therefrom that the crime was committed "within the time limited by law for the commencement of an action therefor." RCW 10.37.050(5).

Alleging that the statute of limitations is tolled when filing an information that appears to be outside the statutory period might avoid an insufficiency argument. This court has twice before considered a similar challenge to charging documents raised initially on appeal and concluded that, in the absence of prejudice to the defendant, the argument failed because the information could be amended to expressly state the tolling period. *State v. Koch*, 38 Wn. App. 457, 461-462, 685 P.2d 656 (1984); *State v. Ansell*, 36 Wn. App. 492, 496, 675 P.2d 614, *review denied*, 101 Wn.2d 1006 (1984). However, that is no guarantee that a trial judge would permit an amendment; and there are some circumstances, such as when the original filing was barred by the statute of limitations, when a court would not be able to permit an amendment. *See State v. Glover*, 25 Wn. App. 58, 60-63, 604 P.2d 1015 (1979). Rather than court these problems, a prosecutor would be well advised to avoid the issue by alleging tolling.

The statute does not assign the burden of establishing whether the statute of

limitations was, or was not, tolled. Citing out-of-state authorities, the prosecution argues that the burden should be on the defendant to allege that he was a state resident in order to show that the tolling provision did not apply, particularly where he repeatedly fled the jurisdiction of the court.[3] However, we believe that the proponent of an exception should bear the burden of proving that the exception exists. That is especially the case where, as here, that exception is critical to the court's jurisdiction. We hold that when a statute of limitations challenge is raised, the State bears the burden of establishing that sufficient time is tolled to permit the matter to proceed.

Despite not having had the opportunity to present evidence on the topic to the trial court, the State does argue that the record reflects that Mr. Walker was incarcerated in neighboring counties and that the time spent in custody outside of Benton County should be tolled. The record also reflects that in 2004 Mr. Walker had to be extradited from Oklahoma.[4] The language of the tolling statute ("not usually and publicly resident within

---

[3] The prosecution also argues that Mr. Walker should not benefit from repeatedly shirking the authority of the trial court. While we agree that Mr. Walker's repeated disappearances perhaps could toll some time periods as in *State v. Clarke*, 86 Wn. App. 447, 936 P.2d 1215 (defendant's pretrial flight tolled ten year limitation of ER 609(b)), *review denied*, 133 Wn.2d 1018 (1997), we do not agree that jurisdictional limits can be tolled in such a manner. That would particularly be the case, as here, where the disregard for the court's authority occurred on a different charge (drug possession) than that on which tolling is sought (bail jumping).

[4] Our commissioner permitted the State to supplement the record on appeal with some documentary evidence including the extradition papers.

this state") has consistently been interpreted to mean that time is tolled only when the accused is living, whether voluntarily or involuntarily, outside Washington. *State v. King*, 113 Wn. App. 243, 293-294, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003); *State v. McDonald*, 100 Wn. App. 828, 831-834, 1 P.3d 1176, 12 P.3d 649 (2000), *cert. denied*, 534 U.S. 820 (2001); *State v. Newcomer*, 48 Wn. App. 83, 91-92, 737 P.2d 1285, *review denied*, 109 Wn.2d 1014 (1987); *Ansell*, 36 Wn. App. at 494-496. The fact that Mr. Walker may have been living involuntarily in a neighboring county's jail cell did not mean that he was "not usually and publicly resident within this state." He was living in Washington. The fact that it was not his usual abode does not make him less a public resident of the state. The period of in-state incarceration did not toll the statute of limitations.

The prosecution concedes that if the time in the other county jails cannot be tolled, then Counts II and III were untimely charged. *See* Br. of Resp't, App. Table 1 n.2. For the reasons that follow, we do not accept that concession, but leave that issue for the trial court.

Appellate courts do not make factual findings. *E.g.*, *Thorndike v. Hesperian Orchards*, *Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959). This court simply is not in a position either to take evidence or to weigh contested evidence and make factual

determinations. Where Mr. Walker lived during the charging period is inherently a factual question. Given the failure of the defense to raise the issue below, there was no opportunity for the parties to present evidence and no opportunity for the trial court to make factual findings. An appellate court need not consider an issue raised for the first time on appeal when the record does not contain sufficient facts to resolve the claim. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Typically, the remedy in such situations is for the defendant to bring a personal restraint petition. *E.g.*, *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159, *review denied*, 117 Wn.2d 1018 (1991).

The unique facts of this case suggest a different remedy is in order. Whether the five belatedly challenged charges were timely filed is a matter that goes to the jurisdiction of the trial court and is one that we believe should be resolved as soon as possible. If we accepted the concession on two counts and left the remaining charges to the personal restraint process, multiple sentencing hearings might result in both cases. Given that there facially appears to be a likelihood of some success for Mr. Walker (as supported by the State's attempted partial concession), the need for factual determinations by the trial court, and the possible need to resentence[5] Mr. Walker in this case should any of the charges be dismissed, we believe a remand would be the most efficient use of judicial

[5] In the other file of Mr. Walker's referenced earlier, COA No. 27286-9-III, we remanded the case for sentencing. The outcome of this remand may affect the offender score in that action.

resources. RAP 7.3; *See State v. Bliss*, No. 27393-9 (Wash. Ct. App. Nov. 17, 2009) (remanding for a new CrR 3.6 hearing).

Accordingly, we remand the case to the Benton County Superior Court to consider Mr. Walker's statute of limitations challenge to counts II through VI. The trial court shall grant the parties a reasonable time[6] to gather and present evidence on the issue of whether Mr. Walker was not "publicly and usually resident" in Washington during the charging period and enter appropriate findings of fact and conclusions of law, which should be transmitted to this court. If the court dismisses any counts, Mr. Walker should be resentenced and any aggrieved party can file a new appeal from that judgment. If the trial court does not grant any relief, Mr. Walker's counsel can seek permission by motion to brief any challenges to the court's findings and conclusions.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

Sufficiency of the Evidence

Mr. Walker also contends that the evidence was not sufficient to support the conviction for bailing jumping on Count VII. Properly viewed, we believe there was

[6] Since it may take time to obtain more complete extradition records and search old public and private records, we leave the timing to the sound discretion of the trial court.

sufficient evidence to support the verdict.

The standards governing this challenge are well settled. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

Mr. Walker contends that the evidence did not show that he failed to appear in court on December 18, 2006 or that he had knowledge that he was supposed to appear on January 10, 2007. In order to establish this count as charged here, the State had to prove that Mr. Walker, with knowledge of the need to be present, did not appear in court on one of those dates.

The State presented clerk's records showing that Mr. Walker did not appear in court for trial December 18, 2006 on his other files. The record for this case, however, carries no notation about his absence. Mr. Walker testified at trial, however, that he was not present that day.

This evidence was sufficient. An arrest warrant did issue for Mr. Walker's non-

appearance December 18. More fundamentally, he admitted at trial that he was not present. The jury had a sufficient basis for finding that he knew that he was to be at court on December 18, and that he did not appear.

The evidence supported the verdict on Count VII.

Prosecutorial Actions

Mr. Walker also argues that he should receive a new trial because the prosecutor erred in cross examining him about the absence of jail records that would have allegedly supported his story and by referencing Mr. Walker's victory in having the original drug possession charge dismissed. These actions were not challenged below and, to the extent they constituted any error at all, were not so egregious that he is entitled to relief.

The standards for reviewing this type of alleged error also are well settled. If there was no objection to the challenged behavior at trial, relief can be granted only if the error was so egregious that it was beyond cure by the trial judge. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Moreover, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

It is inappropriate for a prosecutor to suggest that the defendant bears any burden of proof. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728-729, 899 P.2d 1294 (1995). However, once a defendant presents evidence, a prosecutor can fairly comment on what was not produced. *State v. Barrow*, 60 Wn. App. 869, 871-873, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991); *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114,

review denied, 115 Wn.2d 1014 (1990).

Applying these standards, we conclude that Mr. Walker has not shown misconduct that deprived him of a fair trial. The cross-examination was proper. Once Mr. Walker testified that he was in jail instead of being at court, he could properly be examined about whether he had any records to back his testimony. There was no error. *Barrow; Contreras.*

The prosecutor's comment that Mr. Walker had obtained a dismissal of the drug count by his dilatory tactics was, perhaps, subject to misinterpretation. The prosecutor appears to be arguing that Mr. Walker knew what he was doing when he skipped court and that the tactic was ultimately successful. There was some relevance to this argument since it went to the defendant's motive for absenting himself from proceedings. The comments would have been improper if they had been interpreted as saying that the defendant needed to be convicted because he had profited from his misbehavior. We do not believe that is the natural interpretation of the remarks. However, any concerns could easily have been addressed by objection and court-ordered clarification. That did not happen. To the extent there was any potential error, it was not so egregious that it was beyond cure. The failure to object waived the challenge.

CONCLUSION

The convictions are affirmed. Counts II through VI are remanded for trial court

determination of the statute of limitations argument.

_____
Korsmo, J.

WE CONCUR:

_____
Kulik, A.C.J.

_____
Sweeney, J.