

FILED
JUL 21 2015

FILED
Jul 10, 2015
Court of Appeals
Division 1
State of Washington

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 91930-5
(Court of Appeals No. 71563-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SKAAR,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
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A. IDENTITY OF PETITIONER AND DECISION BELOW

Kevin Skaar asks this Court to review the opinion of the Court of Appeals in *State v. Skaar*, No. 71563-1-I. A copy is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Whether a new trial is required because the State failed to prove Mr. Skaar attempted to pay a minor with whom he had sex, yet this alternative means of attempted commercial sexual abuse of a minor was presented to the jury and there was no special verdict form.

C. STATEMENT OF THE CASE

Detective Tye Holland of the Seattle Police Department posed as a 15-year-old prostitute and solicited sex on the “casual encounters” section of Craigslist. RP (1/14/14) at 153-69; ex. 2A. Kevin Skaar responded to Detective Holland’s advertisement, and agreed to pay \$50 for oral sex from “Spring Break Girl.” RP (1/14/14) at 166-79; ex. 2A. The two planned to meet at a Park & Ride at 7:00 p.m. Shortly after Mr. Skaar arrived, he was arrested and told that the person with whom he had exchanged e-mail messages was actually a police detective. RP (1/14/14) at 171-84; RP (1/15/14) at 202-12.

Mr. Skaar was charged with and convicted of one count of attempted commercial sexual abuse of a minor. CP 1, 39.

On appeal, he argued that his constitutional right to a unanimous jury was violated because the jury was instructed on all three alternative means of committing the crime, but they were not told they had to unanimously agree as to the means, and there was no special verdict form. Mr. Skaar argued that a new trial was required because insufficient evidence supported one of the alternative means that was presented to the jury. The Court of Appeals assumed the statute consists of three alternative means, but affirmed on the basis that sufficient evidence supported the challenged alternative. Mr. Skaar submits the court erred because its reasoning conflates the different alternative means and renders the first alternative superfluous.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Mr. Skaar's constitutional right to a unanimous jury was violated because there was no unanimity instruction, all three alternative means of committing the crime were presented to the jury, and insufficient evidence supported one of the means.

1. The Washington Constitution guarantees the right to a unanimous jury.

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime.

State v. Green, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980). Where an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). Absent such an instruction, a guilty verdict will be affirmed only if the evidence, viewed in the light most favorable to the State, was sufficient as a matter of law to prove each alternative means presented to the jury beyond a reasonable doubt. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014); *Green*, 94 Wn.2d at 220-21.

2. All three alternative means of attempted commercial sexual abuse were presented to the jury, but there was no unanimity instruction.

The State charged Mr. Skaar with attempted commercial sexual abuse of a minor. CP 1. A person is guilty of commercial sexual abuse of a minor if:

- (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;
- (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
- (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

RCW 9.68A.100(1). A person is guilty of attempt to commit a crime if he intended to commit the crime and took a substantial step toward its commission. RCW 9A.28.020.

The structure, grammar, and content of RCW 9.68A.100 indicate it is an alternative means statute, and both the State and the Court of Appeals assumed the statute set forth three alternative means. Appendix A at 3; *See Owens*, 180 Wn.2d at 96-98 (evaluating grammar of RCW 9A.82.050 and “how varied the actions are” to determine that the trafficking in stolen property statute sets forth two alternative means. The charging document and the jury instructions alleged all three alternative means, and the prosecutor listed all three alternatives in closing argument. CP 1, 84; RP (1/15/14) at 305, 311. However, the jury was not provided with a special verdict form and was not instructed that it had to be unanimous regarding which alternative the State proved. CP 39, 75-93; RP (1/15/14) at 300-09.

3. A new trial is required because the State presented insufficient evidence to support the first alternative means.

Because there was no express jury unanimity regarding the means by which Mr. Skaar was found to have committed the crime, the conviction may be affirmed only if sufficient evidence supported all three alternative means. *Ortega-Martinez*, 124 Wn.2d at 707-08. Contrary to

the Court of Appeals' opinion, reversal is required because insufficient evidence was presented to support the first alternative means.

As shown above, the first alternative means requires a past sex act. RCW 9.68A.100(1). If the State had presented evidence that Mr. Skaar had had sex with a minor and then attempted to give her money as compensation for the act, then it would have proved this alternative. No such evidence was presented. Mr. Skaar does not dispute that the State presented sufficient evidence to prove either of the other two alternatives. The evidence showed that Mr. Skaar intended to pay a minor pursuant to an understanding that she would then perform a sex act, and that he took a substantial step toward doing so. The evidence also showed that Mr. Skaar intended to solicit a minor to engage in a sexual act in return for a fee, and that he took a substantial step toward doing so. But the evidence did not show that Mr. Skaar intended to pay a minor with whom he had already had sex, or that he took a substantial step toward paying said minor.

In rejecting this argument, the Court of Appeals conflated the alternative means of committing the crime. The Court ruled that sufficient evidence of the first alternative means was presented because:

The evidence in this case included multiple e-mails between Skaar and "sexxyjen16," a fictitious 15-year-old girl. In two e-mails, "Sexxyjen16" told Skaar that she was 15 years old. Skaar

negotiated with “Sexxyjen16” and agreed to pay her \$50 to engage in oral sex. Skaar proposed a location and a time to meet her. He appeared at that proposed location at the agreed upon time. Skaar arrived with exactly \$50 in his pocket.

This evidence, viewed in the light most favorable to the State, is sufficient to allow a rational juror to conclude that Skaar intended to pay a fee to a minor as compensation for a minor having engaged in sexual conduct with him and that Skaar took a substantial step toward that result. Thus, sufficient evidence supports the first alternative means, which is the only one challenged by Skaar on appeal.

Appendix A at 5. The Court’s reasoning supports the *second* alternative means, which is that the defendant “pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her.” RCW 9.68.100(1)(b). But the *first* alternative means must mean something different from the second, because otherwise this clause would be superfluous. “[A] court must not interpret a statute in a way that renders any portion meaningless or superfluous.” *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014). Accordingly, the first alternative means must be read to require a past sex act, because this is what distinguishes it from the second alternative means.

The first alternative means should not have been presented to the jury. Because it was presented to the jury without sufficient evidentiary support, and because there is no special verdict form showing the jury

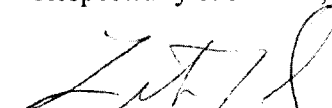
relied on a supported alternative, reversal is required. On remand, only the second and third alternatives may be presented to the jury. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997). Because the Court of Appeals erred in concluding to the contrary, this Court should grant review.

E. CONCLUSION

Kevin Skaar respectfully requests that this Court grant review.

DATED this 10th day of July, 2015.

Respectfully submitted,



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APPENDIX A

Thereafter, the State charged Skaar with one count of attempted commercial sexual abuse of a minor. The case proceeded to a trial. The jury unanimously found Skaar guilty as charged.

Skaar appeals.

UNANIMOUS JURY

Skaar argues that he was deprived of his constitutional right to a unanimous jury. We disagree.

Article I, section 21 of the Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict.¹ "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime."²

"In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required."³ "If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required."⁴

¹ CONST. art. I, § 21.

² State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014) (emphasis omitted).

³ Id.

⁴ Id.

Here, the parties both assert that commercial sexual abuse of a minor is an alternative means crime. We assume, without deciding, that this is true. We also assume that the right to unanimity as to means applies when the defendant is charged with an attempted alternative means crime.

The jury in this case was not instructed that it must be unanimous as to the means by which Skaar committed the crime. Thus, the question we must answer is whether sufficient evidence supported each of the alternative means of committing the crime of attempted commercial sexual abuse of a minor.

“Evidence is sufficient if, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁵

There are three ways for a person to commit Commercial Sexual Abuse of a Minor:

(a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;

(b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or

(c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.^[6]

Skaar does not dispute that sufficient evidence existed to support a finding that he committed attempted commercial sexual abuse of a minor by either of the

⁵ Id. at 99.

⁶ RCW 9.68A.100(1).

latter two means. His only contention is that the State did not present sufficient evidence to support the first means. In particular, Skaar argues that “the first alternative means requires a past sex act.” He asserts that the State was required to present evidence that he “intended to pay a minor with whom he already had sex.”

Skaar is mistaken. Because the State charged Skaar with attempt, not the completed offense, the State was not required to show a past sex act.

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”⁷ “The intent required is the intent to accomplish the criminal result of the base crime.”⁸ “A substantial step is an act that is ‘strongly corroborative’ of the actor’s criminal purpose.”⁹ “[I]t makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur.”¹⁰

Accordingly, to prove that Skaar committed attempted commercial sexual abuse of a minor by the first alternative means, the State had to show only that Skaar (1) intended the criminal result, and (2) took a substantial step toward accomplishing that result.

⁷ RCW 9A.28.020(1).

⁸ State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).

⁹ Id. (quoting State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)).

¹⁰ Luther, 157 Wn.2d at 74.

The evidence in this case included multiple e-mails between Skaar and "Sexxyjen16," a fictitious 15-year-old girl. In two e-mails, "Sexxyjen16" told Skaar that she was 15 years old. Skaar negotiated with "Sexxyjen16" and agreed to pay her \$50 to engage in oral sex. Skaar proposed a location and a time to meet her. He appeared at that proposed location at the agreed upon time. Skaar arrived with exactly \$50 in his pocket.

This evidence, viewed in the light most favorable to the State, is sufficient to allow a rational juror to conclude that Skaar intended to pay a fee to a minor as compensation for a minor having engaged in sexual conduct with him and that Skaar took a substantial step toward that result. Thus, sufficient evidence supports the first alternative means, which is the only one challenged by Skaar on appeal.

In sum, because sufficient evidence supports each of the alternative means, jury unanimity as to means was not required.

COMMUNITY CUSTODY CONDITION

Skaar argued in his briefing that one of his community custody conditions, a curfew condition, should be stricken from the judgment and sentence because it was not crime-related. The State conceded error on this point and agreed that the condition should be stricken. Skaar subsequently moved in this court to permit the trial court to strike the condition from the judgment and sentence. This court granted his request in January. Accordingly, we need not address this argument any further.

STATEMENT OF ADDITIONAL GROUNDS

Skaar raises three claims in his statement of additional grounds. None have merit.

First, Skaar appears to argue that the evidence was not sufficient to show a substantial step. For reasons already discussed, we reject this argument.

Second, Skaar argues that the judge rushed the jury into delivering a verdict. But the record does not support this assertion.

Finally, Skaar asks this court to amend the no-contact order prohibiting him from having contact with minors. Because Skaar does not present any argument that this court can review, we decline to address this claim any further.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Leach, J.

Schindler, J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71563-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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