NO. 92214-4
COA NO. 45833-1-II
Cowlitz Co. Cause NO. 13-8-00274-7

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

B.J.C.,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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A. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Lacey L. Lincoln, Deputy Prosecuting Attorney for Ryan Jurvakainen, Cowlitz County Prosecuting Attorney.

B. ISSUES PRESENTED FOR REVIEW

1. Is the decision of the Court of Appeals in conflict with a previous decision of the Supreme Court?

2. Is the decision of the Court of Appeals in conflict with a previous decision of the Court of Appeals?

3. Does the decision of the Court of Appeals involve a significant question of law under the Constitution of the State of Washington or of the Constitution of the United States?

4. Does the petition involve an issue of substantial public interest that should be determined by the Supreme Court?

C. STATEMENT OF THE CASE

For the purposes of the answer to the petition for discretionary review by the Supreme Court of Washington, the State generally concurs with the Statement of the Case set forth by Appellant's counsel. However, the State would also incorporate the Brief of Respondent by reference as well. B.J.C. now asks this court to accept review of the Court of Appeals decision affirming the adjudications for Rape of a Child in the first degree and Child Molestation in the first degree.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

1. The decision of the Court of Appeals is not in conflict with a decision of the United State's Supreme Court.

B.J.C. argues the Court of Appeals, Division II's decision conflicts with two United State's Supreme Court cases. First, it is argued B.J.C.'s confession was not voluntary under the standard laid out in *Application of Gault*, 387 U.S. 1, 875. Ct. 1428 (1967) and *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745 (1993).

The inquiry for determining the voluntariness of a confession is "whether, under the totality of the circumstances, the confession was coerced." *State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997) (citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Thus, "coercive police activity is a necessary predicate to the

finding that a confession is not 'voluntary.'" *State v. Unga*, 165 Wn.2d 95, 196, P.3d 645 (2008) (quoting *Connelly*, 479 U.S. at 167). As a result, absent oppressive police conduct[1] "causally related to the confession, there is simply no basis for concluding" a confession is not voluntary. *Colorado v. Conelley*, 479 U.S. 157, 1075, S.Ct 515 (1986).

In assessing the totality of the circumstances, a court may consider the suspect's physical condition, education, age, mental health, experience, and the conduct of the police to include any "promises or misrepresentations made by the interrogating officers." *Broadaway*, 133 Wn.2d at 132; *Unga*, 165 Wn.2d at 101-03. Promises, misrepresentations, or deception on the part of police to secure a confession, however, does not entail that the confession was not voluntary, because "[t]he question is whether the interrogating officer's statements were so manipulative or coercive that they

[1] E.g., *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) (police officers held gun to the head of wounded confessant to extract confession); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) (16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics); *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (defendant held incommunicado for three days with little food; confession obtained when officers informed defendant that Chief of Police was preparing to admit lynch mob into jail); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep).

deprived the suspect of his ability to make an unconstrained, autonomous decision to confess." *Unga*, 165 Wn.2d at 102 (citation and quotations omitted).

Gault and *Williams* both concern suspects who were taken to a police station or detention facility by police for questioning. *Gault* 387 U.S. at 1431; *Williams* 507 U.S. at 1748. This is a distinct difference from the current case and the statements made as the police did not remove BJC to a police station or detention facility, instead he was questioned while at home. RP 12. Here, there is no evidence, nor even allegations, of oppressive police behavior resulting in a coerced confession by B.J.C.. Detective Fletcher simply questioned B.J.C. about the incident and confronted him when B.J.C.'s version of the events conflicted with the victim's disclosures. RP 24. The interview was in a conversational tone, without raised voices. RP 23. As there was no coercive police activity causing B.J.C. to confess involuntarily, there is no conflict with existing case law.

Second, it is argued B.J.C. should have been found to be in custody during the interview with police officers based upon the standard outlined in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011).

When comparing the facts and circumstances surrounding J.D.B.'s questioning to the facts and circumstances presented in B.J.C., a large divergence is present. JDB was questioned for a second time within a week

when "removed from his classroom at school by a uniformed police officer and escorted to a closed-door conference room." J.D.B. 131 S.Ct at 2399. Also, there were four adults present, two officers and two school administrators. *Id.* The officer also warned JDB he may seek a secure custody order if he believed JDB would continue to break into other homes, further explaining, that meant JDB would get sent to juvenile detention before court which then prompted JDB's confession. *Id* at 2400.

In the present case, the detectives questioned B.J.C. near his residence in civilian clothing with their firearms, badges and handcuffs concealed underneath their jackets. RP 12-13. B.J.C. was informed answering questions was voluntary and he was free to stop the questioning at any time and return inside his residence. RP 12. Moreover, B.J.C. was specifically told he was not under arrest and the officers had no plans on arresting him. RP 12. The detectives did not restrain B.J.C. in any way, whether by physical force or threats. RP 12-13. B.J.C. was not handcuffed. RP 13. Finally, B.J.C. led the officers to an area away from their initial contact point at the front door of his residence in which he appeared comfortable to speak. RP 12. B.J.C. took them down the stairs, across the courtyard, to the pool area. RP 12.

While JDB says a juvenile's age that is known or would have been objectively apparent to a reasonable officer can be included in determining

whether or not a juvenile is in custody, it further state it is not determinative, nor even a significant factor in every case. JDB 131 S.Ct at 2406. Here, there are drastic differences between the circumstances, including the location of the questioning, the persons present, the information given to the suspect and the freedom of movement allowed by the officers.

Based on this, there is no conflict between current U.S. Supreme Court case law and the decision of the Court of Appeals, Division II, thus the Court should not grant review on this basis.

2. The decision of the Court of Appeals is not in conflict with another decision of the Court of Appeals.

B.J.C. does not argue there is a conflict with other Court of Appeal decisions at issue in this appeal. Therefore, review should not be granted on this basis.

3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or the Constitution of the United States.

B.J.C. argues there is a significant question of law under the United States or Washington State constitution at issue in this appeal because his right to travel is curtailed as he is required to register as a sex offender.

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 93 P.3d 158 (2004). A reviewing court "will presume that a statute is constitutional and it will make every

presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas*, 147 Wn.2d 410, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741 (1998). "If possible, a statute must be interpreted in a manner that upholds its constitutionality." *State v. Halstein*, 122 Wn.2d 109, 857 P.2d 270 (1993) (*following Tacoma v. Luvene*, 118 Wn.2d 826, 827 P.2d 1374 (1992), *State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971)).

"A statute is overbroad if it sweeps constitutionally protected free speech within its prohibitions and there is no way to sever its unconstitutional applications. *Lee*, 135 Wn.2d at 387 (*following State v. Talley*, 122 Wn.2d 192, 858 P.2d 117 (1993), *City of Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989)). Where a court finds that a statute is unconstitutional "as applied," the statute cannot be applied again under similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004). If a court finds a statute facially unconstitutional, the statue must be struck down. *Id.* However, if there are circumstances in which a statute can be constitutionally applied, a facial challenge must be rejected. *Id.*

If a fundamental right is at issue, the State must have a compelling interest to justify the statute that limits this right. *State v. Schimelpfenig*,

128 Wn. App. 224, 115 P.3d 338 (2005). The right to travel is a fundamental right and subject to strict scrutiny. *Kent v. Dulles,* 357 U.S. 116, 78 S.Ct. 1113, 2 L.3d.2d 1204 (1958); *City of Seattle v. McConahy*, 86 Wn. App. 557, 937 P.2d 1113, *review denied,* 113 Wn.2d 1018, 948 P.2d 338 (1997). "A state law implicates the right to travel when it *actually* deters such travel and where impeding travel *is its primary objective.*" *State v. Enquist*, 163 Wn. App. 41 (2011), *review denied*, 173 Wn.2d 1008 (2012) (*emphasis added*).

In the present matter, B.J.C,'s contention that RCW 9A.44.130 is unconstitutionally overbroad is without merit. B.J.C. cannot demonstrate beyond a reasonable doubt that RCW 9A.44.130 is facially invalid or unconstitutional "as applied." First, despite B.J.C.'s argument, and as previously recognized by the courts, the State does have a compelling interest that justifies the statute. "The statute was enacted to 'assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders.'" *Enquist*, 163 Wn. App. at 51 (*quoting* Laws of 1990 ch. 3, § 401). "Impeding travel *has never* been RCW 9A.44.130's primary goal." *Id.* (*emphasis added*).

Furthermore, the failure to register as a sex offender statute does not contain any provisions that intend the impediment or restriction of travel. Likewise, the statute does not actually prevent B.J.C. from traveling. B.J.C.

is not prohibited from moving his residence, nor is he prohibited from moving to a different city, county, or state. "The statute...permits a registrant to travel or move out of the state for work or educational purposes, if he...timely registers with the new state and notifies the sheriff of the last Washington county in which he registered." *Id.*

B.J.C. claims that he cannot be away from his primary residence for more than three nights. *Appellant's Brief* at 12. This is an unfounded legal conclusion contrary to the prevailing case law. "A residence 'is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.'" *State v. Pickett,* 95 Wn. App. 475, 975 P.2d 584 (1999). B.J.C. can maintain a residence *and* travel to another location. For example, under the above definition of "residence," B.J.C. could travel to Seattle for four weeks as long as he intends on returning to his residence. He is not required to re-register when he goes on vacation. He has no duty to notify law enforcement when he travels. RCW 9A.44.130 requires B.J.C. to register only when he changes his primary residence or ceases to have a fixed residence. B.J.C. fails to provide any evidence that RCW 9A.44.130 restricts his ability to travel.

As there is no significant question of law under either the Washington State Constitution or the United States Constitution, review should not be granted on this basis.

4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

B.J.C. argues his petition involves an issue of substantial public interest that should be determined by the Supreme Court as the trial court violated the 150% rule for juvenile dispositions.

RCW 13.40.180 states in pertinent part, "where a disposition in a single disposition order is imposed on a youth for two or more offenses, the terms shall run consecutively." The statute limits itself and requires "where the offenses were committed through a single act or omission, or through an act or omission which itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense." *Id.* However, if the crimes were not a single act or omission, "the aggregate of all consecutive terms shall not exceed three hundred percent of the term imposed for the most serious offense." *Id.*

Importantly, "[d]espite differences in terminology, the tests for determining whether the phrases 'same course of conduct' used in the

juvenile justice act and 'same criminal conduct' used in the Sentencing Reform Act are essentially the same." *State v. Contreras*, 124 Wn.2d 74, 748, 880 P.2d 1000 (1994).

A finding that the offenses did not encompass the "same criminal conduct" will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). A court will consider two or more crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *Id.* The absence of any one of the prongs prevents a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992). Courts "must narrowly construe RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct." *State v. Price*, 103 Wn.App 845, 14 P.3d 841 (2000); *State v. Wilson*, 136 Wn.App 596, 150 P.3d 144 (2007).

"The relevant inquiry for the [criminal] intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." *State v. Tili*, 139 Wash.2d 107, 985 P.2d 365 (1999) (citations omitted). This inquiry is a two-step process. *Price*, 103 Wn.App. at 857. "First, we must objectively view each underlying statute and determine whether the required intents are the same or different for each

count. If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count." *Id.*

The objective criminal intent of a defendant can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411. Where crimes are "sequential, not simultaneous or continuous," a defendant is generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn.App. 854, 932 P.2d 657 (1999); *In re Rangel*, 99 Wn.App. 596, 996 P.2d 620 (2000) ("Like the defendant in *Grantham*, Mr. Rangel was able to form a new criminal intent before his second criminal act because his crimes were sequential, not simultaneous or continuous."). On the other hand, a defendant's criminal intent may not have changed when he or she engages in an "unchanging pattern of conduct, coupled with an extremely close time frame" *Tili*, 139 Wash.2d at 125.

Tili and *Grantham* are instructive. Both cases involved multiple rapes of one victim in a very short period of time. In *Grantham*, there was "evidence that Grantham completed the first rape before commencing the second; that after the first and before the second he had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S. begged him to stop and to take her home; and that Grantham had to use new physical

force to obtain sufficient compliance to accomplish the second rape." 84 Wn.App at 859. Based on this evidence, *Grantham* held that the defendant:

> "upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other."

Id. In *Tili*, there was evidence of three separate penetrations occurring over a two minute period. 139 Wn.2d at 119. Consequently, *Tili* concluded that "[i]n contrast to the facts in *Grantham*, Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame -- approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration." *Id.* at 124.

First, there is no dispute that the crimes at issue involved the same victim, and occurred at the same time and place. In dispute, is whether the respondent's objective intent changed. Here, when objectively viewing each of the underlying statutes the required intents are different. Child molestation requires that the State prove sexual contact, which, in turn, requires showing that the respondent acted with the intent to gratify sexual

desires. *State v. Edwards*, 171 Wn.App 379, 294 P.3d 708 (2012) (citing *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006)). Rape of a child, on the other hand, is a strict liability crime. *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012). Consequently, the statutes at hand do not have the same required intent and each count for which the respondent was found guilty do not have the same required intent. *Price*, 103 Wn.App. at 857 ("First, we must objectively view each underlying statute and determine whether the required intents are the same or different for each count. If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count.") As a result, there cannot be a finding of same criminal conduct and the 150% rule would not apply to the respondent's convictions.

Even when objectively viewing the facts usable at sentencing, however, respondent's objective criminal intent was different with respect to each count. First, there is no evidence that one sex offense depended upon the other or furthered the other. The respondent did not have to engage in molestation of the victim in order rape her or vice versa. Instead, the evidence shows that the respondent performed oral sex on the victim by lifting her up to his face, that he eventually stopped after she asked him to, that he then sat on the floor of the shower and the victim sat on his lap, which again concluded upon the victim's request that it stop, and that the

respondent then stood up before guiding the victim's face to his penis and putting it in her mouth. RP 93-96, 150-153, 174, 197. All this evidence shows that, like the defendant in *Grantham*, respondent had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. Similarly, he chose the latter, here by forming a new criminal intent to commit Rape of a Child in First Degree.

Here, the trial court did not abuse its discretion in treating the child rape and child molestation as different criminal conduct as child rape does not require intent, whereas child molestation requires proof that the sexual contact was made for the purpose of sexual gratification. The respondent presented no evidence to show that his intent was the same. RP 215-232. During the disposition phase the court stated it looked at B.J.C.'s stated intent which was to have sex with the victim, but recognized legally there are different intents required for child rape and child molestation. RP 297-298. The evidence made it manifestly apparent the State was basing each count on different acts. First, in closing arguments, the State discussed the different elements of each count and how they applied to the testimony given. RP 242-252. Second, the evidence supports both offenses. C.C. testified B.J.C. wanted to have sex with her, she saw his penis, which he eventually put in her mouth as well as kissing her vagina. RP 93-96. Third, the fact-finder clearly articulated there was insufficient evidence to support

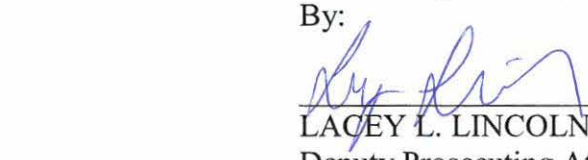
the first count of Rape of a Child in the first degree, thus demonstrating the court's awareness of the separation of the acts. RP 266. Therefore, it is reasonable a judge acting as the fact-finder would understand each count must be based on a separate and distinct act. Because of these factors the disposition imposed does not violate RCW 13.40.180, thus, review should not be granted on this basis.

E. CONCLUSION

For the above reasons, review should not be granted in this case.

Respectfully submitted this 26th day of October, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney
By:



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AMENDED CERTIFICATE OF SERVICE

Hannah Bennett, certifies the Response to Petition for Review, which was originally missing page 11, was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 29th, 2015.

Hannah Bennett