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Mar 25, 2015
Court of Appeals
Division I
State of Washington

NO. 71821-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. PHILLIPS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The predatory offense special allegation statute is reviewed for unconstitutional vagueness in light of the specific facts of the case. First-degree rape of a child is a "predatory offense" when the defendant is a "stranger" to the victim. Seven-year-old L.G. had never before seen, met, or spoken to Phillips prior to his act of dragging her into a public restroom and raping her. Has Phillips failed to demonstrate that the predatory offense special allegation is unconstitutionally vague as applied to his conduct?

2. A statute is unconstitutionally vague if it does not provide standards sufficiently specific to prevent arbitrary enforcement. The predatory offense statute requires the State to prove beyond a reasonable doubt that the defendant was a stranger to victim. Additionally, before filing the special allegation, a prosecutor is required to consider whether sufficient admissible evidence exists to justify a finding that the offense was predatory by a reasonable and objective fact-finder, and must weigh that evidence against the most reasonably foreseeable defense. The prosecutor must also consider, after consulting with the victim, whether filing the special allegation would interfere with the ability to obtain a conviction. Does the predatory offense special allegation provide sufficient guidance to prevent arbitrary enforcement?

3. Statutes authorizing different punishments for the same criminal act do not violate equal protection in the absence of selective or arbitrary enforcement. The party challenging the statute must demonstrate that it is purely arbitrary. While prosecutors have broad discretion to determine when to file criminal charges, they must exercise individualized discretion in each case. In light of the statutory guidelines that inform the prosecutor's decision to file the predatory offense special allegation, and in the absence of any showing that the prosecutor did not appropriately exercise discretion in this case, has Phillips failed to prove that his right to equal protection was violated?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 15, 2011, Appellant Michael Phillips was charged with Rape of a Child in the First Degree, with a special allegation that the crime was a Predatory Offense. CP 1. Prior to trial, the State added a charge of Child Molestation in the First Degree, also alleged to be a Predatory Offense. CP 39-40. On March 21, 2014, a jury convicted Phillips of both crimes, including the special allegations. CP 72-75. The parties agreed that the child molestation charge should be vacated, and the court entered an order to that effect. CP 76.

Prior to sentencing, Phillips moved to dismiss the predatory offense special allegation. He argued that State had failed to exercise discretion when filing it, that the statute is unconstitutionally vague, and that imposition of the enhancement constituted cruel and unusual punishment. CP 6-15. The court denied Phillips's motion. CP 89-92.

Phillips was sentenced on April 11, 2014. CP 77-88; 04/11/14 RP. Due to the predatory offense finding, Phillips received an indeterminate sentence with a minimum of 300 months incarceration, up to a maximum of life. CP 78, 81. Phillips appeals his sentence. CP 98-111.

2. SUBSTANTIVE FACTS

On the evening of August 23, 2010, Manuel Gonzalez, who speaks limited English, took his seven-year-old daughter L.G., and his one-year-old daughter, A.G., to the Goodwill Store in Auburn, Washington. 03/13/14 RP 12-13, 22. While Gonzalez looked at men's belts, L.G. asked if she could go to the toy section, approximately 40 feet away; Gonzalez agreed. 03/13/14 RP 14. After several minutes, Gonzalez went to look for L.G., but could not find her near the toys. 03/13/14 RP 18. After searching for her, Gonzalez finally saw L.G. coming from the bathroom area, crying. 03/13/14 RP 19. L.G. told her father that a man had made her go into the bathroom with him. 03/13/14 RP 20. Gonzalez asked L.G.

if she saw the man as they walked around the store, but L.G. did not. 03/13/14 RP 20-21. Upset, but unsure of what to do, Gonzalez took L.G. home. 03/13/14 RP 22.

When they arrived home, L.G. told her mother that a man at the Goodwill had grabbed her arm and taken her into the bathroom. 03/13/14 RP 73. She told her mother that the man had pulled her into a stall, pulled out his "boy part," licked his fingers, and then licked her vaginal area. 03/13/14 RP 75. L.G. told her mother that the man "squirted something white on her." Id. L.G.'s mother immediately went back to the Goodwill and spoke to the manager, providing L.G.'s description of the man. 03/13/14 RP 81-82. She then took L.G. to the hospital, where a sexual assault examination was performed. 03/13/14 RP 87-89; 03/18/14 RP 93-112, 118-28. Later, L.G. consistently reported to Detective Michelle Vojir and Child Interview Specialist Carolyn Webster what had happened to her at the Goodwill. 03/17/14 RP 88-89; Ex. 37, 43.

In January of 2011, Katherine Woodard of the Washington State Patrol Crime Laboratory examined L.G.'s shorts, underwear, and the vaginal and skin swabs from L.G.'s physical examination. 03/19/14 RP 114-15, 126, 129-32. Woodard discovered the presence of both saliva and semen on the shorts. 03/19/14 RP 120-22. She discovered the presence of semen and saliva on both the vaginal and skin swabs. 03/19/14 RP

126-27. She discovered saliva and semen on L.G.'s underwear. 03/19/14 RP 132. Woodard was able to obtain a male DNA profile from the semen on L.G.'s shorts, the skin swabs, and the underwear. 03/19/14 RP 124, 128, 132. Ultimately, the DNA was determined to be Phillips's. 03/19/14 RP 136-37.

C. ARGUMENT

1. THE PREDATORY OFFENSE SPECIAL ALLEGATION WAS PROPERLY IMPOSED.

Phillips argues that the predatory offense enhancement statute: (1) violates due process principles of vagueness; and (2) that its imposition violated his right to equal protection of the law. However, because the statute does not implicate First Amendment rights, Phillips cannot challenge it as unconstitutional in all of its applications, and instead must prove that it is vague as applied to the specific facts of his case. Phillips's conduct falls squarely within the bounds of the statute. Moreover, because the statute includes clear standards that protect against arbitrary or discriminatory enforcement, it is not unconstitutionally vague. Finally, the special allegation statute does not confer unfettered prosecutorial discretion, and no equal protection violation occurred in this case.

a. The Predatory Offense Special Allegation Is Not Unconstitutionally Vague.

This Court reviews the constitutionality of a statute *de novo*. State v. Rice, 174 Wn.2d 884, 892, 279 P.3d 849 (2012); State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). Statutes are presumed to be constitutional, and a defendant must prove vagueness beyond a reasonable doubt. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (citing Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

The predatory offense special allegation statute, RCW 9.94A.836, provides:

> (1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.
>
> (2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.

> (3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

The term "predatory" is defined by the Sentencing Reform Act ("SRA") to mean:

> (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the same meaning as defined in RCW 28A.225.010; and (B) "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.

RCW 9.94A.030(38). "'Stranger' means that the victim did not know the offender twenty-four hours before the offense." RCW 9.94A.030(50).

Under the Due Process Clause, a statute is void for vagueness if: (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it; or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004) (citing Douglass, 115 Wn.2d at 178). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

Phillips does not allege that the statute fails to adequately define the conduct to which it applies. Rather, he focuses solely on the second prong of the test for vagueness – whether the statute provides sufficient guidelines for enforcement. Brf. of Appellant at 4-10. The requirement for ascertainable standards of guilt protects against arbitrary, erratic, and discriminatory enforcement. Douglass, 115 Wn.2d at 180. A statute protects against arbitrary enforcement unless it proscribes conduct by resort to terms that are "inherently subjective in the context in which they are used." Id. at 181 (quoting State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988)). The fact that subjective evaluation is required to determine whether the statute has been violated does not render it

unconstitutionally vague; the due process clause prohibits only those statutes that "invite an inordinate amount of police discretion." Id.

Statutes that do not implicate First Amendment rights are examined for vagueness only as applied to the particular facts of the defendant's case. Watson, 160 Wn.2d at 6. In other words, if the statute clearly applies to the defendant's conduct, he may not challenge it as vague when applied to the conduct of others. City of Seattle v. Abercrombie, 85 Wn. App. 393, 400, 945 P.2d 1132 (1997) (citing Haley v. Medical Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)).

The predatory offense special allegation statute does not involve First Amendment rights. Thus, Phillips may not challenge the statute as vague in all of its applications. Watson, 160 Wn.2d at 6. Rather, he bears the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague *as applied to his specific conduct*, "not by examining hypothetical situations at the periphery of the [statute]'s scope." Douglass, 115 Wn.2d at 182-83. Phillips presents no argument or analysis as to how the special allegation statute is vague as applied to his conduct. Thus, this Court should refuse to address his vagueness argument. See State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate court will not address issue unsupported by argument or relevant authority).

Even if this Court considers Phillips's argument, the predatory offense statute clearly applies to him. Phillips was charged with rape of a child in the first degree and child molestation in the first degree, and was a stranger to the victim, L.G. RCW 9.94A.836; RCW 9.94A.030(38), (50); CP 39-40. Seven-year-old L.G. had never before seen, met, or spoken to Phillips prior to his act of approaching her in the Goodwill store, forcibly dragging her into the men's bathroom, and raping her in the toilet stall. Ex. 37, 43. Because the predatory offense special allegation clearly covers Phillips's conduct,[1] he cannot complain of arbitrary enforcement in other contexts.

Regardless, the predatory offense statute includes clear standards that guard against arbitrary, discriminatory, or ad hoc application. The State must present evidence that the defendant was either a stranger to the victim (as defined by not knowing the defendant twenty-four hours before the crime), that the purpose of victimization was a significant reason the defendant established or promoted a relationship with the victim, or that the defendant was a teacher, counselor, volunteer, etc., at a school, church, or home-based instructional setting. RCW 9.94A.030(38), (50). The State

[1] At sentencing, the judge who presided over the trial and heard all of the evidence, rejected Phillips's suggestion that the State charged the predatory offense allegation because of his uncharged criminal history, stating, "I can tell you why the predatory finding is there, it's for cases like this. I think that there's no other way to describe this case than predatory." 04/11/2014 RP 11, 15.

must prove the defendant's status relative to the victim beyond a reasonable doubt to the trier-of-fact. RCW 9.94A.836(2).

The State's discretion to charge the predatory offense allegation is guided and limited by statute. The prosecutor must consider whether sufficient admissible evidence exists to justify a finding that the offense was predatory by a reasonable and objective fact-finder, and must weigh that evidence against the most reasonably foreseeable defense. RCW 9.94A.836(1). The prosecutor must also consider, after consulting with the victim, whether filing the special allegation would interfere with the ability to obtain a conviction. Id. The operation of these factors prevents arbitrary enforcement of the law.

Indeed, in State v. Halstein, 122 Wn.2d 109, 857 P.2d 270 (1993), the Washington Supreme Court concluded that *nearly-identical* guidelines sufficiently prevent arbitrary enforcement of the sexual motivation special allegation statute. Phillips attempts to distinguish Halstein on the basis that Rice, which concluded that the predatory offense special allegation did not require prosecutors to charge the allegation in every case to which it applied, had not yet been decided. But there is no basis to conclude that

the court's analysis in Halstein depended on a reading of the statute as mandatory versus directory.[2]

Phillips appears to argue that the mere fact that prosecutors have discretion to charge the predatory offense enhancement renders it unconstitutionally vague. However, broad prosecutorial charging discretion "is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." Rice, 174 Wn.2d at 904. Prosecutors have discretion to charge the predatory offense special allegation in an appropriate case:

> [A]lthough the legislature sometimes speaks in mandatory terms when authorizing the filing of certain criminal charges, that language is subject to the legislature's own general and underlying acknowledgment of prosecutorial charging discretion. Here the legislature has directed that the "prosecuting attorney shall file a special allegation of sexual motivation . . . when sufficient admissible evidence exists," but also has acknowledged that for various reasons, the prosecutor still "may decline to prosecute, even though technically sufficient evidence to prosecute exists," RCW 9.94A.411(1). The use of mandatory language in this context can be seen as a legislative expression of priority, meant to guide prosecuting attorneys but always subject to the prosecutor's underlying charging discretion.

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[2] Long before Halstein, the Washington Supreme Court recognized that mandatory charging statutes were unconstitutional. See State v. Rowe, 93 Wn.2d 277, 283, 609 P.2d 1348 (1980) (a prosecutor's mandatory policy for charging the habitual criminal allegation would be unconstitutional). Courts presume the constitutionality of statutes. Id. See also State ex rel. Herron v. Browet, Inc., 103 Wn.2d 215, 219, 691 P.2d 571 (1984) (The court has a duty to construe a statute in a constitutional manner whenever possible). Thus, it is unlikely that Halstein's analysis depended on an unconstitutional interpretation of the sexual motivation statute.

Rice, 174 Wn.2d at 899. Phillips makes no argument on appeal that the prosecutor did not actually exercise its discretion in his case. The predatory offense special allegation provides sufficient guidance to prevent arbitrary enforcement. The fact that the prosecutor is vested with the discretion to decide whether to charge it does not render it unconstitutionally vague.

b. Imposition Of The Predatory Offense Enhancement Did Not Deprive Phillips Of Equal Protection Of The Law.

Phillips argues that imposition of the predatory offense special allegation statute violated his right to equal protection because the statute confers upon the prosecution "unfettered discretion to selectively file the allegation." Brf. of Appellant at 12. However, his argument is premised on the erroneous assertion that the statute lacks guidelines to inform the exercise of prosecutorial discretion. As demonstrated above, the predatory offense statute contains clear guidelines for when a prosecutor can file the special allegation. There is no suggestion in this case that Phillips was subjected to arbitrary enforcement of the law. His equal protection challenge must be rejected.

Both the Fourteenth Amendment and Article I, section 12 require that persons similarly situated with respect to the legitimate purpose of the

law be similarly treated. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). When a statute involves physical liberty interest only, and does not involve a suspect class, it is reviewed under the rational basis test. Id. at 673. The challenged statute will be upheld if it is rationally related to meeting a legitimate state goal. Id. at 673 (citing Coria, 120 Wn.2d at 171-72). The person challenging the statute must demonstrate that it is purely arbitrary. Manussier, 129 Wn.2d at 673. Phillips agrees that that the rational basis test applies here. Brf. of Appellant at 11.

This Court has "recognized that the same crime may be committed in ways warranting harsh or lenient punishment," and that prosecutors have discretion to consider individualized circumstances of a crime to seek an appropriate punishment. State v. Edwards, 17 Wn. App. 355, 361-62, 563 P.2d 212 (1977). Statutes authorizing varying punishment for the same criminal act rest upon the rational distinction between the motives and methods of commission of the crime. State v. Workman, 90 Wn.2d 443, 455-56, 584 P.2d 382 (1978). If "enforcement of criminal statutes is not arbitrary, capricious or based on unjustifiable standards it does not deny equal protection." Id. (citing State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976)). See also State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987) (statutes authorizing different punishments for the same

criminal act do not violate equal protection in the absence of selective or arbitrary enforcement).

Phillips makes no argument that the State did not appropriately exercise its discretion in this case, or that the predatory offense allegation was filed arbitrarily or unjustifiably. He simply asserts, with no support or analysis, that the statute lacks any limitation on prosecutorial discretion, and therefore violates equal protection. However, as discussed above, the predatory offense statute contains clear standards that guide prosecutorial discretion. The mere fact that it applies to a number of different individuals, all of whom have unique access (or are utter strangers) to the child victim, does not present an equal protection problem. The enhanced punishment furthers the legitimate and substantial state goal of punishing and deterring predatory child sexual offenders, i.e., strangers, teachers, counselors, and coaches. Because the statute passes the rational basis test, Phillips's equal protection argument fails.

Phillips also makes a cursory argument that imposition of the predatory offense statute violated his right to equal protection because it provides that the court may not dismiss the allegation except in limited circumstances. However, Phillips cites no support for his claim that equal protection is violated solely by virtue of the fact that increased punishment inevitably follows a finding that the offense was predatory. Because

Phillips has failed to establish that the predatory offense special allegation statute rests on grounds that are wholly irrelevant to the achievement of legitimate state objectives, or that its application to him was purely arbitrary, his sentence must be affirmed.

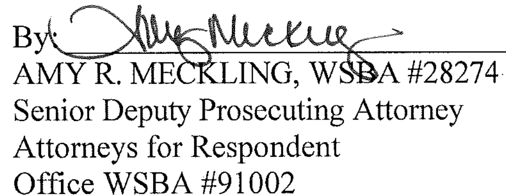
D. CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm Phillips's sentence.

DATED this 25th day of March, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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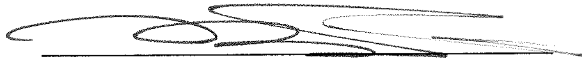
Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Sarah Hrobsky, the attorney for the appellant, at sally@washapp.org containing a copy of the BRIEF OF RESPONDENT, in STATE V. MICHAEL PHILLIPS, Cause No. 71821-5 - I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of March, 2015



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