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SUPREME COURT NO. 99961-9

NO. 82080-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SCHLUETZ,

Petitioner.

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

The Honorable Keith C. Harper, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Michael Schluetz, appellant below, asks this Court to review the decision of the Court of Appeals referenced below.

B. COURT OF APPEALS DECISION

Schluetz seeks review of the Court of Appeals decision in State v. Schluetz, No. 82080-0-I (Slip Op. filed June 7, 2021). A copy of the slip opinion is attached as an Appendix .

C. REASONS WHY REVIEW SHOULD BE GRANTED

Two offenses encompass the same criminal conduct if they are committed at the same time and place and involve the same victim and objective criminal intent. Here, it is undisputed that the two offenses were committed at the same time and place and involved no actual victim. The crime of attempted child rape involving a fictitious victim is analogous to a drug crime for which the victim is the public at large. In State v. Garza-Villareal, 123 Wn.2d 42, 864 P.2d 1378 (1993), this Court held that possessing multiple kinds of controlled substances with the intent to deliver involves the same objective criminal intent, regardless of the number of kinds of substances possessed. The Court of Appeals' holding that Schluetz's two convictions for attempt rape did not encompass the same criminal conduct conflicts with Garza-Villareal and presents an issue of substantial public interest, warranting review. RAP 13.4(b)(1), (4).

D. STATEMENT OF THE CASE

In March 2018, the Jefferson County Prosecutor charged Schluetz with two felony counts of attempted second degree child rape, two felony counts of attempted distribution of marijuana to a minor and one gross misdemeanor count of communicating with a minor for immoral purposes. CP 1-3. The prosecution alleged that between March 22, 2018 and March 25, 2018, Schluetz exchanged e-mail and text messages with undercover law enforcement officers who were pretending to be two 13-year old girls seeking sex with older men, went to meet the girls at a Port Hadlock home possessing marijuana to share with the girls, only to be arrested by law enforcement once inside the home. CP 4-12. An amended information filed May 15, 2018, charged the communicating with minor for immoral purposes as a Class C felony instead of a gross misdemeanor. CP 16-18.

A trial was held January 18 through February 1, 2019, before the Honorable Keith C. Harper, Judge. RP 1-796.[1] A jury convicted Schluetz of the two attempted rapes charges and the communicating with a minor for immoral purposes charge but could not reach verdicts on the attempted

[1] There are four consecutively paginated volumes of verbatim report of proceedings for the dates of January 18, 25, 28-31, 2019, February 1, 2019, March 29, 2019, and April 19, 2019.

distribution of marijuana charges. CP 83-87; RP 786-92. A mistrial was declared as to the marijuana charges. RP 796.

Schluetz was sentenced on March 29, 2019. RP 796-821. The court rejected Schluetz's claim that the two attempted rape convictions constituted "same criminal conduct" for purposes of calculating his offender score. CP 111-118; RP 803-13. The court's decision was heavily influenced by the lack of cases holding the "victim" in an attempted rape of a fictitious person is the public at large. RP 813 (the court states, "Part of the problem here is I just don't have any cases or anything else that are cited really to support the defense's argument.").

Therefore, based on an offender score of "6" for each of Schluetz's three convictions (each sex offense conviction counted as 3 offender score points against the other sex offense convictions), the court imposed concurrent terms of 127.5 months for the attempted rapes and 25 months for the communicating conviction. CP 119-35; RP 821-22.

Schluetz subsequently filed a motion to set aside his judgment and sentence, arguing he should be resentenced based on a lower offender score because he was never arraigned on the information amending the communicating charge from a gross misdemeanor to a Class C felony. CP 137-48. That motion was granted, and Schluetz was resentenced on April 19, 2019. CP 154; RP 825-31. Based on a reduced offender score of "3"

for each of the attempted rape convictions, the court imposed concurrent terms of 89.25 months on each and imposed a concurrent 364 days for the communicating convictions. CP 155-70; RP 831. Schluetz appealed. CP 171-87.

On appeal, Schluetz challenged the trial court's decision that his attempted rape conviction do not constitute "same criminal conduct" for purpose of calculating his offender score. Brief of Appellant; Reply Brief of Appellant.

On June 7, 2021, the Court of Appeals affirmed Schluetz's judgment and sentence. Appendix. Relying on its recent decision in State v. Canter, No. 80409-0-I, 2021 WL 2201000, petition for review filed July 1, 2021 (Slip Op. filed June 1, 2021), the Court of Appeals concluded:

> Here, Schluetz intended to engage in sexual acts with two fictitious 13-year-old girls. The mere fact that the girls were fictitious does not convert the crime of second degree attempted rape of a child to a "public at large" crime. Because Schluetz intended to inflict injury on two specific fictitious 13-year-old girls, his two attempt crimes anticipated specific injury on two distinct victims, Mandy and Anna. Schluetz's two crimes do not qualify as same criminal conduct.

Appendix at 6.

E. <u>ARGUMENT</u>

UNDER GARZA-VILLAREAL, SCHLUETZ'S ATTEMPTED CHILD RAPE CONVICTIONS SHOULD CONSTITUTE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

When a person is convicted of two or more offenses, they count as only one crime in the offender score if they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). Two crimes encompass the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a).

Schluetz's two attempted child rape convictions encompassed the same criminal conduct. It is undisputed that the two offenses occurred at the same time and place and involved no particular victim. The Sentencing Reform Act defines a "victim" as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(54) (emphasis added). No person sustained any injury as a result of the crime.

The trial court found the two offenses did not involve the same intent for purposes of the same criminal conduct analysis because they involved two different fictitious victims and because there are no appellate decisions

supporting Schluetz's claim that they do constitute same criminal conduct. RP 811-13. This was error.

The two attempted rapes involved the same victim in that they both involved *no* victim. The crime is analogous to various drug crimes for which the victim is the public at large. See State v. Garza-Villareal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). In Garza-Villareal, the defendant was convicted of one count of possession with intent to deliver cocaine and one count of possession with intent to deliver heroin after police officers searched him and discovered 14 grams of heroin and 30 grams of cocaine on his person. Id. at 44. This Court concluded the two offenses encompassed the same objective criminal intent because the possession of each drug furthered the overall criminal objective of delivering controlled substances in the future. Id. That the two charges involved different drugs did not evidence any difference in intent. Id.

Similarly, here, Schluetz's convictions were for crimes committed in furtherance of the same overall criminal objective of having sexual contact with a 13-year-old child. That the two attempted rape charges involved different fictitious victims did not evidence any difference in objective intent.

Aside from Canter, supra, the law is not well developed regarding what constitutes a "victim" in crimes charged as a result of Net Nanny sting

operations. Canter is the only decision involving Net Nanny sting operation that addresses the "same victim" prong of "same criminal conduct" test. Several other cases address the "same intent" element, but not the "same victim" element. See e.g., State v. Johnson, 12 Wn. App. 2d. 201, 212-13, 460 P.3d 1091 (2020) State v. Borseth, No. 36230-2-II, 2020 WL 2182269, at *7 (unpublished slip op. filed May 5, 2020)[2]; State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016).

The Net Nanny sting operation is intended to incarcerate adults willing to prey on children for sex. RP 358. It accomplishes that whether one, two or ten fictitious children are used for bait. The criminal act is appearing at the undercover house with the intent to engage in sex with children.

Under Canter, an offender caught in a Net Nanny sting operation will have a lower or higher offender score depending on how many fictitious children were used as bait. This gives the Net Nanny operatives the power to determine how severe punishment will be because it dictates that the more fictitious children used as bait the higher the offender score will be. Such unfettered power can be avoided by recognizing the true victim in Net Nanny sting operations is the general public, just like it is for unlawful possession firearm. Schluetz urges this Court grant review here and in Canter in order to

[2] Schluetz cites to this unpublished decision as allowed by GR 14.1(a).

address this significant question of law presented and to determine if Garza-Villareal should control under these circumstances. RAP 13.4(b)(1) & (4).

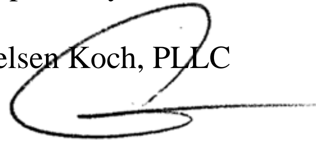
G. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 7th day of July 2021.

Respectfully submitted,

Nielsen Koch, PLLC



CHRISTOPHER GIBSON,
WSBA No. 25097
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. MICHAEL SCHLUETZ, Appellant.	)	No. 82080-0-I UNPUBLISHED OPINION

VERELLEN, J. — Michael Schluetz challenges his sentence, arguing that the trial court abused its discretion by concluding his convictions for two counts of attempted second degree rape of a child did not constitute the same criminal conduct. Because Schluetz attempted to engage in sexual acts with two distinct, fictitious 13-year-old girls, Schluetz fails to establish that the trial court abused its discretion by finding that the two fictitious girls were not the "same victim."

Therefore, we affirm.

FACTS

In March of 2018, Sergeant Carlos Rodriguez administered an undercover operation in Port Hadlock, Jefferson County. The purpose of the operation was to protect children by using social media to identify and arrest individuals who were interested in engaging in sexual acts with minors. Sergeant Rodriguez posted an ad

in the Casual Encounters section of Craigslist, a designated "personal section" for "no strings attached sex."[1]

The ad stated:

> Petite princess here young and fun will not disappoint. W4M I host still looking for the right guys pretty versus guy (an s and m) pretty much bored af. I'm a small framed petite princess I have that Netflix just need some chill [winky face]. I like clean guys that can teach me new things. [H]mu if interested. Me and my gf have the house all to ourselves so come have some fun ddf gifts are welcome p and p. [If] this is still up then I still need a daddy.[2]

Michael Schluetz responded to the ad. Detective John Garden and Detective Kristl Pohl, who were messaging Schluetz as two distinct fictitious 13-year-old girls, Mandy and Anna, engaged in e-mail and text messaging with him. After exchanging a series of messages, Schluetz went to meet Mandy and Anna at a Port Hadlock home, where law enforcement arrested him.

Schluetz was convicted of two counts of attempted second degree rape of a child, one count for each fictitious victim.[3] At sentencing, the trial court rejected Schluetz's argument that his two convictions for attempted second degree rape should be counted as the same criminal conduct for purposes of calculating his offender score. Accordingly, the court sentenced Schluetz on an offender score of three for each attempted rape conviction and imposed concurrent terms of 89.25 months on each count.

Schluetz appeals.

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[1] Report of Proceedings (RP) (Jan. 29, 2019) at 335.

[2] Id. at 336.

[3] Schluetz was also convicted of communicating with a minor for an immoral purpose.

ANALYSIS

Schluetz argues that the trial court abused its discretion by counting his convictions for second degree attempted rape of a child separately toward his offender score because his convictions constituted the same criminal conduct.

When reviewing a sentence under the Sentencing Reform Act of 1981, we "defer to the discretion of the [trial] court and will reverse a [trial] court's determination of 'same criminal conduct' only on a 'clear abuse of discretion or misapplication of law.'"[4] "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a [trial] court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court's discretion."[5] The "same criminal conduct" provision, RCW 9.94A.589(a), provides:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, [t]hat if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.[6]

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[4] State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citing State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)).

[5] State v. Graciano, 176 Wn.2d 531, 537-58, 295 P.3d 219 (2013) (citing State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991)).

[6] (Emphasis added.)

"The [l]egislature intended the phrase 'same criminal conduct' to be construed narrowly."[7] The defendant bears the burden of establishing that all three prongs are met, and if he can do so, then his crimes "are treated as one crime" for purposes of calculating his offender score.[8] But "the absence of any one [prong] prevents a finding of same criminal conduct."[9] "Convictions of crimes involving multiple victims must be treated separately."[10]

It is undisputed that Schluetz intended to engage in sexual acts with two fictitious 13-year-old girls at the same time and place. Therefore, the only remaining inquiry is whether the two fictitious 13-year-old girls were the "same victim."

Here, Schluetz communicated with two different fictitious 13-year-old girls, Mandy and Anna. And Schluetz sought to engage in sexual acts with both Mandy and Anna. Schluetz e-mailed Mandy stating that together the girls would be his "fantasy" and that he wanted both girls as long as both were "naked and involved."[11]

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[7] State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994); see State v. Stockmyer, 136 Wn. App. 212, 219, 148 P.3d 1077 (2006) (holding that because the defendant unlawfully possessed three firearms in three different rooms of the residence the "same place" requirement was not satisfied).

[8] State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994) (citing former RCW 9.94A.400(1)(a) (1990), recodified as RCW 9.94A.589(1)(a) (LAWS OF 2001, ch. 10, § 6)).

[9] Id.

[10] State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); see State v. Ehli, 115 Wn. App. 556, 560-61, 62 P.3d 929 (2003) (multiple counts of depiction of minors engaged in sexually explicit conduct where different items depict different children, each child is considered a separate victim).

[11] Clerk's Papers at 8-10.

The trial court relied upon Schluetz's specific actions toward each fictitious victim in finding that Mandy and Anna were not the "same victim." The court stated, the fact that they were fictitious did not "make any difference."[12] The court continued, "[T]he purported victims were two 13-year olds, and that's what [Schluetz] thought he was doing. He thought he was going . . . to meet up with two 13-year olds and engage in sexual acts."[13] Because Schluetz attempted to rape two distinct, fictitious 13-year-old girls, the trial court did not abuse its discretion by finding that the fictitious victims were not the "same victim."

Schluetz argues that because his victims were two officers posing as fictitious 13-year-old girls, the only victim was the "public at large." But Schluetz's argument is not compelling.

Our Supreme Court has held that for some specific crimes only the "public at large" is the victim. Specifically, the court has held that the crimes of unlawful possession of a firearm and possession of a controlled substance are both crimes that "victimize the general public."[14] But in differentiating these crimes, the court in State v. Haddock noted that "all crimes victimize the public in a general sense" but

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[12] RP (Mar. 29, 2019) at 811.

[13] Id. at 812.

[14] State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000) (holding that unlawful possession of a firearm is a "public at large crime"); State v. Maxfield, 125 Wn.2d 378, 399-402, 886 P.2d 123 (1994) (holding that unlawful possession of a controlled substance with intent to manufacture is a "public at large crime"); State v. Garza-Villarreal, 123 Wn.2d 42, 46-48, 864 P.2d 1378 (1993) (holding that unlawful possession of a controlled substance with intent to deliver is a "public at large crime.").

there are also crimes that directly inflict "specific injury on individuals."[15] Attempted rape of a child is not a crime directed toward the "public at large."[16] In State v. Canter, this court recently held that an attempt to molest two fictitious children, an 8-year-old girl and an 11-year-old girl, were not crimes against the public at large.[17] "Because Carter intended to inflict specific injury on two different victims, his crimes do not encompass the same criminal conduct."[18]

Here, Schluetz intended to engage in sexual acts with two fictitious 13-year-old girls. The mere fact that the girls were fictitious does not convert the crime of second degree attempted rape of a child to a "public at large" crime. Because Schluetz intended to inflict injury on two specific fictitious 13-year-old girls, his two attempt crimes anticipated specific injury on two distinct victims, Mandy and Anna. Schluetz's two crimes do not qualify as same criminal conduct.

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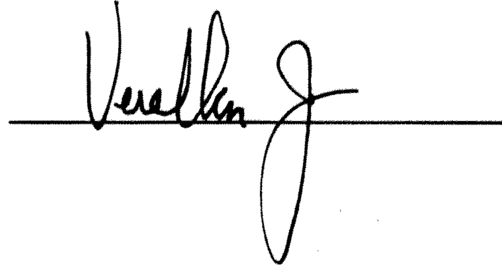
[15] 141 Wn.2d 103, 111, 3 P.3d 733 (2000) (the court noted that if the defendant had been charged with assault rather than unlawful possession of a firearm and possession of stolen firearms "we would be inclined to agree" that the assault victims were the crime victims).

[16] In his opening brief, Schluetz challenges the lack of findings of fact and conclusions of law required by CrR 3.5. But the State notes in its brief that findings of fact and conclusions of law were filed on April 17, 2020. And in his reply brief, Schluetz does not dispute that findings of fact and conclusions of law were filed. In the absence of any such argument or authority related to the belated findings, Schluetz does not establish any basis for relief on appeal of this issue. State v. Moore, 70 Wn. App. 667, 671, 855 P.2d 306 (1993) (failure to file a supplemental brief after belated CrR 3.5 findings and conclusions are entered precludes a defendant from establishing prejudice).

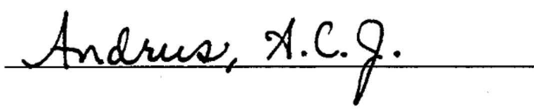
[17] No. 80409-0-I, slip op. at 14-15 (Wash. Ct. App. June 1, 2021), http://www.courts.wa.gov/opinions/pdf/804090.pdf.

[18] Id. at 15.

Therefore, we affirm.



WE CONCUR:



NIELSEN KOCH P.L.L.C.

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