

636324

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No. 63632-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY G. WILSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON

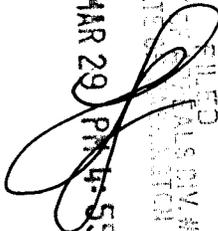


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A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT MR. WILSON
ATTEMPTED TO RAPE A CHILD

Rodney Wilson argues his conviction for attempted rape of a child in the second degree must be reversed and dismissed because the State did not prove intent beyond a reasonable doubt. Brief of Appellant at 5-12. The State responds the trial court's guilty finding was supported by the record. Brief of Respondent at 8-12. An attempt crime requires proof of a substantial step towards committing the underlying offense, and whether or not an act constitutes a substantial step depends upon the facts of the individual case. Brief of Appellant at 7-8; Brief of Respondent at 9-10. At issue here is whether the facts of this case show the substantial step necessary to be guilty of attempt to commit rape of a child.

In order to be found guilty of the attempt to commit a particular crime, the defendant must take a substantial step towards the commission of that crime. RCW 9A.28.020(1). "A substantial step is conduct 'strongly corroborative of the actor's criminal purpose.' Mere preparation to commit a crime is not a substantial step." State v. Sivins, 138 Wn.App. 52, 63, 155 P.3d 982 (2007)

(quoting State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995), and citing State v. Workman, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978)).

In State v. Grundy, 76 Wn.App. 335, 336, 886 P.2d 208 (1994), this Court reversed a conviction for attempted possession of a controlled substance where the defendant and a police officer were negotiating a purchase of cocaine, and the officer arrested the defendant before money was exchanged. This Court reasoned that a substantial step must be more than mere preparation and “[t]he parties were still in the negotiating stage.” Id. at 338. The State does not address Grundy in its response brief, despite its obvious applicability to Mr. Wilson’s case. Here, Mr. Wilson and the undercover officer had completed initial negotiations, but there was no act that constituted a substantial step towards sexual contact. Thus, the State did not prove the required substantial step.

The State cites State v. Nicholson, 77 Wn.2d 415, 463 P.2d 633 (1969) for the agreed proposition that the difference between a substantial step and mere preparation depends upon the facts of the individual case. Brief of Respondent at 10. The facts of that case illustrate the quantum of evidence required to prove a

substantial step is higher than that found in Mr. Wilson's case. The defendant in Nicholson challenged the sufficiency of the evidence to support his convictions for two counts of attempted rape because his penis was not rigid when he forced two girls to disrobe and lie underneath him. Nicholson, 77 Wn.2d at 420. The Nicholson Court found a substantial step because the defendant accosted the two girls on a path in a wooded area, led them to believe he was going to rape them, forced them disrobe and lie down, and then laid on top of them and made movements consistent with a rape. Id. at 420-21. The court held these acts were clearly sufficient to demonstrate the defendant's intent. Id. at 21.

The State relies upon Sivins, where the defendant emailed a 13-year-old character created by the police department. Sivins, 138 Wn.App. at 64. In that case, however, the defendant also drove five hours to see the girl and rented a motel room for two. Id. Here, in contrast, Mr. Wilson arranged over the internet to have a sexual encounter with a fictitious juvenile and drove to a parking lot, but her never saw or spoke to a real person and he never even got out of his car. Mr. Wilson's negotiations do not constitute a substantial step towards rape of a child. The evidence does not

support Mr. Wilson's conviction for attempted rape of a child, and it should be dismissed.

2. MR. WILSON'S CONVICTION MUST BE DISMISSED
BECAUSE HE SHOULD HAVE BEEN CHARGED
WITH THE MORE SPECIFIC STATUTE OF
COMMERCIAL SEXUAL ABUSE OF A MINOR

Mr. Wilson argues the "general-specific" rule of statutory construction required the State to prosecute him for the specific crime of commercial sexual abuse of a minor rather than the general offense of attempted rape of a child. Brief of Appellant at 13-18. The State responds Mr. Wilson may not raise this issue for the first time on appeal. Brief of Respondent at 19-22. This argument must be rejected because Mr. Wilson raised this issue at trial and because it is a constitutional issue that may be raised pursuant to RAP 2.5(a).

a. Mr. Wilson raised the issue in the trial court. In closing argument, defense counsel argued the State had not proven Mr. Wilson had the intent to commit rape of a child in the second degree and that there was no overt act. 3/24/09RP 69-74. He suggested the State should have charged Mr. Wilson with another offense, such as communicating with a minor over the internet or

“commercial exploitation,” citing RCW 9.68A.100. 3/24/09RP 74-

75. Mr. Ward stated:

Would there be other conduct the State could have considered? And I’ve looked at the statute on communicating via the Internet with a minor. That is actually a Class C felony, when you add in the Internet. There may be some liability there.

There is a section just after communication which is 9868(a) [sic], and I think its [.]100 and [.]101, which has to do with commercial exploitation. There may be some sort of liability there, if not directly, that certainly gets so to the idea there’s an immoral purpose to doing something like that, and communication is something that wouldn’t be legal.

Mr. Wilson could have been charged with something like that, which may be an appropriate charge. The charge of attempted rape, however, is, as I’ve explained, inappropriate, and this gentleman is not guilty.

3/14/09RP 74-75. Thus, the issue was raised below and may be raised on appeal.

b. The charging of a general statute instead of the specific is an issue of constitutional magnitude that may be raised for the first time on appeal. Appellate courts will not normally review issues that a party did not bring to the attention of the trial court, but the appellate rules provide an exception for constitutional issues because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d

492 (1988). In determining whether to review a constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Kirkpatrick, 160 Wn.2d at 879-80; Scott, 110 Wn.2d at 688.

The “general-specific” rule is based upon principles of equal protection. The rule is designed to promote equal protection of the laws by subjecting people committing the same misconduct to the same potential punishment. State v. Cann, 92 Wn.2d 193, 196, 595 P.2d 912 (1979). If the State may elect which statute to charge, it may control the degree of punishment for identical criminal elements. Cann, 92 Wn.2d at 196. Additionally, the rule is necessary to give effect to the more specific statute, which could otherwise be ignored because of the requirement of proving additional elements. State v. Shriner, 101 Wn.2d 576, 582, 681 P.2d 237 (1984); State v. Danforth, 97 Wn.2d 255, 258-59, 643 P.2d 882 (1982).

In Danforth, the Washington Supreme Court held that prisoners who allegedly fail to return to work release could not be charged with escape but instead must be charged with the specific

crime of failing to return to work release. The defendants had not made this argument in the trial court, and their case was certified to the Washington Supreme Court prior to trial to determine a different issue. Danforth, 97 Wn.2d at 256. It was not until after briefing and even oral argument in the Washington Supreme Court that the defendants argued they could not be charged with escape. Id. at 257. The Washington Supreme Court nonetheless addressed the issue and ruled in the defendant's favor. Similarly, this Court addressed a defendant's claim that he was charged under the wrong statute even though he had entered a guilty plea. State v. Farrington, 35 Wn.App. 799, 800-02, 669 P.2d 1275 (1983), rev. denied, 100 Wn.2d 1036 (1984) (holding equal protection not violated because indecent and indecent liberties have different elements). Thus, this Court may address this constitutional issue for the first time on appeal.

A substantial body of Washington law holds that equal protection is violated when the State charges a general statute rather than a specific one. See e.g. State v. Sherman, 98 Wn.2d 53, 60-61, 653 P.2d 612 (1982); Cann, 92 Wn.2d at 196; State v. Ensminger, 77 Wn.2d 535, 536, 463 P.2d 612 (1970); State v. Karp, 69 Wn.App. 369, 371-75, 848 P.2d 1304, rev. denied, 122

Wn.2d 1005 (1993); State v. Shelby, 61 Wn.App. 214, 219, 811 P.2d 682 (1991); State v. Alfonso, 41 Wn.App. 121, 125-26, 702 P.2d 1218 (1985); State v. Jessup, 31 Wn.App. 304, 307-08, 641 P.2d 1185 (1982); State v. Richards, 27 Wn.App. 703, 704-05, 621 P.2d 165 (1980), rev. denied, 95 Wn.2d 1008 (1981).

The State claims “some earlier cases” addressing the “specific-general” rule view it as “an issue of constitutional magnitude” but asserts “these cases have since been overruled.” Brief of Respondent at 20 (citing United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) and Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d 1371 (1991)).¹ The cited cases, however, do not address the “specific-general” rule. In Batchelder, the Court held that the Fourteenth Amendment was not violated because two separate and redundant sentencing statutes authorized different punishments for the same conduct. Batchelder, 442 U.S. at 116, 122-23. The Fountain Court also held equal protection was not violated when the prosecutor has

¹ The State also refers this Court to State v. Carpenter, 52 Wn.App. 680, 682, 683-84, 763 P.2d 455 (1988). In that case, this Court refused to review the giving of instructions on a lesser-included offense of attempted murder in the second degree because the defendant had herself proposed attempted second degree murder instructions and then objected to them on a different ground; the error was thus both unpreserved and invited.

discretion to chose between a criminal and a traffic statute that cover identical conduct, not where one statute is more specific than the other. Fountain, 116 Wn.2d at 192-94. The State has not provided any authority showing Washington cases addressing the “specific-general” rule as an equal protection issue, many decided after Batchelder, have been overruled. See State v. Kirwin, 165 Wn.2d 818, 829-32, 203 P.3d 1044 (2009) (Madsen, J. concurring) (noting line of cases interpreting article I, section 12 not overruled by Batchelder in case addressing conflict between state statute and municipal ordinance); State v. Presba, 131 Wn.2d 47, 54 n.10, 126 P.3d 1280 (2005), rev. denied, 158 Wn.2d 1008 (2006) (declining to reach State’s argument in specific/general case, stating issue not yet decided).

c. Mr. Wilson may raise this argument on appeal. Mr. Wilson may argue he should have been charged with the more specific statute, RCW 9.68A.100, because his lawyer made this argument in the trial court. In the alternative, this Court has discretion to review the issue because it is a manifest error affecting Mr. Wilson’s constitutional right to equal protection of the law. RAP 2.5(a)(3).

B. CONCLUSION

Mr. Wilson's conviction for attempted rape of a child in the second degree must be reversed and dismissed because the State did not prove every element of the crime beyond a reasonable doubt. In the alternative, the conviction must be dismissed because Mr. Wilson should have been charged with the more specific statute of commercial sexual abuse of a minor.

DATED this 29th day of March 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63632-4-I
v.)	
)	
RODNEY WILSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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