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2016 MAR 15 11:11 AM
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No. 65115-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT RAFELO JOHNSON, JR.,

Appellant.

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

The Honorable Ronald Kessler

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Roosevelt Johnson was approached by two undercover Seattle police officers acting as minors. Based upon statements he made to the officers, he was charged with attempted promoting commercial sexual abuse of a minor. Under a recent decision of the Washington Supreme Court, *State v. Patel*, where there is an actual victim that is an adult acting as a minor, there is no crime for an attempted sex offense involving a minor. Mr. Johnson requests this Court find he did not commit the charged offense because the victims were adult police officers acting as minors, and reverse his conviction.

B. ASSIGNMENTS OF ERROR

1. The jury's verdict that Mr. Johnson was guilty of attempted promoting commercial sexual abuse of a minor is not supported by substantial evidence.

2. The State failed to prove there was an actual underage victim.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Due process requires the State prove every element of the offense beyond a reasonable doubt. Attempted promoting commercial sexual abuse of a minor requires the State prove the

victim was less than 18 years of age. Where the actual “victim” is acting the role of someone who is underage but is in reality an adult, the defendant is not guilty of the offense. Where the State proved the “victims” were adult undercover Seattle police officers acting as underage girls, is Mr. Johnson entitled to reversal of his conviction with instructions to dismiss where he was not guilty of the crime?

D. STATEMENT OF THE CASE

At approximately 4 p.m. on June 23, 2009, members of the Seattle Police vice unit conducted an undercover prostitution sting in the area of Westlake Park in Seattle because of recent complaints. RP 66-68, 180. Seattle Police Officers Azrielle Johnson and Jennifer Morris were deployed as decoys and instructed to behave like 17 year old girls. RP 68, 185.¹ The two officers were instructed to loiter in the area of the Westlake Mall and appear naïve and gullible. RP 185. The goal of the sting was to see if anyone approached the officers and attempted to recruit them to work as prostitutes. RP 273.

After several hours, the officers were approached by Roosevelt Johnson and Lester Payton as the officers walked

¹ Officer Morris was 28 years old. RP 320. It was never stated how old Officer Johnson was other than over 21 years.

towards the McDonalds on Pine Street and Second Avenue. RP 77. Mr. Payton asked the officers how old they were and each answered they were 17 years old. RP 81, 280. The men flirted with the women and ultimately, the subject of working as prostitutes for money was broached by Mr. Johnson and Mr. Payton. RP 83-86, 284-87. The officers feigned interest and further discussions occurred including where the officers would work and how much they would charge. RP 89-96, 299-310. The officers were then instructed to take a public bus to Aurora Avenue in North Seattle and not return until they had made \$200 or more, which they were instructed to give to the men. RP 101, 310-13.

The officers gave a predetermined sign to surveilling officers, who ordered uniformed officers to arrest Mr. Johnson and Mr. Payton. RP 192. Mr. Johnson and Mr. Payton were charged with attempted promoting commercial sexual abuse of a minor. CP 53. At the conclusion of the State's presentation of the evidence, Mr. Johnson moved to dismiss the charges because, among other reasons, he was charged with a crime that could not be completed because the officers were not minors. RP 374-75. The court denied the motion. RP 375. Mr. Johnson subsequently objected to

the court's refusal to instruct on legal and factual impossibility. RP 484-88.

During jury deliberations, the jury sent the court a note asking:

Do the defendants have to believe that the officers were 17 in order to convict on the "minor" charge or do they just have to be told that they are 17?

CP 61. The court referred the jury to its instruction regarding knowledge. CP 62. Subsequently, the jury found Mr. Johnson guilty as charged. CP 63.

E. ARGUMENT

THE VERDICT WAS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE AS THERE WAS NO
PROOF OF AN ACTUAL UNDERAGE VICTIM

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of the insufficiency of

the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Johnson was convicted of attempted promoting commercial sexual abuse of a minor. An attempted crime involves two elements: the intent to commit a specific crime and taking a substantial step toward its commission. RCW 9A.28.020(1); *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). A person is guilty of promoting commercial sexual abuse of a minor if he knowingly advances the commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct. RCW 9.68A.101. Among other things, a person “advances commercial sexual abuse of a minor” if he or she engages in any conduct “designed to institute, aid, cause, assist, or facilitate an act or enterprise of

commercial sexual abuse of a minor.” *Id.* A “minor” is a person under 18 years of age. RCW 9.68A.011.

The State was required to prove Mr. Johnson had the specific intent to advance the commercial sexual abuse of Officer Johnson and Officer Morris, who portrayed themselves to Mr. Johnson as minors, and took a substantial step toward commission of that offense. RCW 9A.28.020(1); RCW 9.68A.101(1), (3)(a). Mr. Johnson submits that he could not be convicted of the offense as the “victims” were both adults acting the role of minors.

2. The State must prove an actual victim under the age of 18. Where the State uses an adult police officer to play the role of a minor, the defendant cannot be convicted of an attempt to promote commercial sexual abuse of a minor because the victim actually exists and is not a minor. *State v. Patel*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 4491231 at 5, fn. 11 (No. 82649-8, November 10, 2010) (“We do not believe it was the intent of the legislature to protect adults who “role play” and pretend to be younger than they actually are.”). *Patel* involved a conviction for attempted rape of a child where the defendant thought the victim was a 13 year-old girl he had chatted with over an on-line instant messaging service. *Id.* at 1. The “victim” was actually a Spokane

police detective. *Id.* The *Patel* Court sought to reconcile its decisions in *State v. Chhom, supra*, and *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), which *Patel* argued were inconsistent. *Id.*

In *Chhom*, a 16-year-old defendant was charged with attempted rape of a child after he attacked a 9-year-old boy, exposed himself, and tried to force his penis into the boy's mouth. *Id.* at 740. The Supreme Court held that “[w]hen coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.” *Id.* As a consequence, the Court concluded that the State was not required to prove that the defendant intended to have sexual intercourse with a person he knew was underage. *Id.* at 744.

In *Townsend*, the Court determined, on facts very similar to those in *Patel*, that a defendant caught in an Internet sting operation may be convicted of attempted rape of a child even if the alleged victim does not in fact exist. *Townsend*, 147 Wn.2d at 679. *Townsend* argued that there was insufficient evidence to convict him of attempted rape of a child because the intended victim in that case was in fact a police officer posing as a 13-year-old girl named

“Amber.” *Id.* The Supreme Court characterized Townsend's argument as one of factual impossibility, a defense that is expressly disallowed under the attempt statute. *Id.* Without citing *Chhom*, the Court held that it made “ ‘no difference that Mr. Townsend could not have completed the crime because “Amber” did not exist. He is guilty . . . if he *intended* to have sexual intercourse with her.’ ” *Id.* (alteration in original), *quoting State v. Townsend*, 105 Wn.App. 622, 631, 20 P.3d 1027 (2001). In other words, Townsend was guilty because he intended to have sex with someone he *believed* was 13 years old, even though the victim was fictitious and the crime was impossible to complete. *Patel*, 2010 WL 4491231 at 3.

Patel argued *Townsend* was irreconcilable with the decision in *Chhom*, where the Court described attempted rape of a child as a strict liability crime with respect to the victim's age. *Chhom*, 128 Wn.2d at 743. In *Chhom*, the Supreme Court held that where the State can prove the victim was a minor, it was not required to further prove the defendant was aware of that fact before making the attempt. *Id.* Implicitly, proof of the victim's actual age was sufficient. But the Court noted it did not hold that the defendant's belief about the victim's age is irrelevant in all cases:

Age is a component of both rape of a child and attempted rape of a child. While the State is not required to prove the defendant knew of the victim's age where it can prove there was an actual, underage victim, it assumes a greater burden by proving the defendant's specific intent to have sex with a child where the intended victim does not exist. However, *Chhom* involved an actual child where there was no dispute over the victim's age, and *Townsend* involved a fictitious child the defendant believed was underage. Read in context, these two cases are in harmony.

Patel, 2010 WL 4491231 at 4.

As a consequence, the Court in *Patel* noted that both of the positions defined in *Chhom* and *Townsend* furthered the legislature's intent with regard to the child rape and criminal attempt statutes:

Chhom recognized the legislature's intent to protect children by forcing defendants "to assume the risk when they engage in conduct that may be harmful to children" even when they are stopped short of completing the act. *Townsend's* holding adheres to the legislature's directive to preclude legal and factual impossibility as defenses to the criminal attempt statute. RCW 9A.28.020(2). Contrary to *Patel's* assertion, *Townsend* provides significant protection for children by allowing police investigators to take a proactive role in preventing harm before Internet predators can complete their objective.

Id. (citation omitted).

But, more important for Mr. Johnson's purpose here, the *Patel* Court cautioned:

However, we caution that before us in *Townsend* and today is a “victim” who is in fact a fictional underage character created by the police. A defendant who attempts to have sex with a person he believes is an adult but is actually underage can be convicted under *Chhom*. A defendant who attempts to have sex with a person he believes is underage but does not in fact exist may be convicted under *Townsend* - factual impossibility is not a defense. *But a defendant who attempts to have sex with a person he believes is underage but is actually an adult may not be convicted under either case-because the victim actually existed and factual impossibility is not a concern.* Here, there was sufficient evidence to prove that Patel intended to have sex with a 13-year-old girl and took a substantial step toward doing so.

Patel, 2010 WL 4491231 at 4 -5 (emphasis added).

Although *Patel* arises in the area of child rape, the same analysis should hold true for all sex offenses involving a minor where proof of age is determinative. Chapter 9.68A RCW is titled “Sexual Exploitation of Children” and the intent of the Legislature in enacting these offenses is to prevent similar crimes against children as in the child rape or child assault cases. See RCW 9.68.001 (legislative intent). Further, all of the offenses involving children, as does the offense for which Mr. Johnson was convicted, require proof the “victim” is younger than 18 years of age.

In Mr. Johnson’s case the State provided proof of a “victim” he believed to be underage but who actually existed and was

actually an adult. As *Patel* holds, this scenario differs markedly from the traditional police internet “sting,” where the defendant believes the victim is a minor but the victim is in fact entirely fictional. As *Patel* so clearly states, in the latter scenario, the defendant is guilty because factual impossibility is not a defense: in Mr. Johnson’s case, there is no crime as the “victim” actually exists but is an adult despite Mr. Johnson’s belief she was underage. *Patel*, 2010 WL 4491231at 4 -5.

Mr. Johnson repeatedly argued to no avail at trial that he was not guilty of the charged offense because the “victims” were not minors but adult police officers. The jury was troubled by the fact the “victims” were not minors but adults role-playing, as evidenced by their note to the court. *Patel* compels the conclusion argued by counsel at trial that Mr. Johnson was not guilty of the charged offense.

The State failed to prove either a fictional underage victim or an actual underage victim. Under *Patel*, Mr. Johnson is not guilty of a crime. *Id.* Mr. Johnson is entitled to reversal of his conviction.

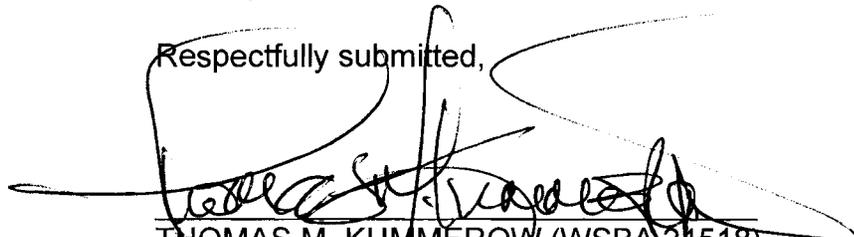
3. This Court must reverse and remand with instructions to dismiss the convictions. Since there was insufficient evidence to support Mr. Johnson's conviction, this Court must reverse the conviction and do so with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

F. CONCLUSION

For the reasons stated, Mr. Johnson requests this Court reverse his conviction with instructions to dismiss.

DATED this 24th day of November 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65115-3-I
v.)	
)	
ROOSEVELT JOHNSON, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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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