

NO. 65115-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT JOHNSON, JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Whether the defendant's conviction for attempting to promote commercial sexual abuse of a minor should be affirmed where substantial evidence supports the jury's finding of guilt and where RCW 9A.28.020(2) provides that factual impossibility is not a defense to an attempt to commit a crime.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Roosevelt Johnson, Jr. and Lester Payton were charged with the crime of attempted promoting commercial sexual abuse of a minor. CP 1. Johnson was also charged with an aggravating factor allegation that he committed the crime for purposes of benefitting a criminal street gang. CP 24-25. A jury found Johnson guilty as charged of the underlying crime, and found Payton guilty of the lesser included offense of attempting to promote prostitution in the second degree. CP 63; RP 571-72. Johnson waived his right to a jury as to the aggravating factor. CP 78. The court found that there was not sufficient evidence of the aggravating factor. RP 644. The court sentenced Johnson to a standard range sentence of 45.75 months of confinement. CP 82.

2. FACTS OF THE CRIME.

Roosevelt Johnson, Jr. and his co-defendant, Lester Payton, were arrested as the result of an undercover operation in which two female Seattle Police officers posed as 17-year-old girls at the Westlake Mall. On July 23, 2009, Officers Johnson and Miller were instructed to loiter around the Westlake Mall and look "young and bored." RP 66-68, 273. After several hours, they came into contact with the defendant and Payton. RP 76, 275-76. The defendant introduced himself as "City Red," and the officers told the men that they were cousins. RP 79, 276-77. The defendant asked the officers how old they were, and they responded that they were 17. RP 80-81, 280. The defendant acted surprised but Officer Johnson assured him she was only 17. RP 81. Both officers testified they were not sure Payton heard them tell the defendant their ages. RP 143, 281, 332.

The defendant and Payton began to joke around with the officers and asked if they would like "hang out" for the day. RP 83, 283-84. The officers showed interest but stated that they had no money. RP 83, 287. The defendant and Payton then proposed that the girls could make money working for them. RP 86, 287-89. They explained that the girls could act as prostitutes, which they

referred to as "ho's" and walk the "track" picking up "squares."

RP 92, 289-90. The girls were asked to choose which of them they wanted to work for. RP 94, 292.

Officer Johnson told the defendant she would work for him. RP 95. Officer Morris told Payton she would work for him. RP 95, 302. The defendant then stated that he would call one of his "bitches" and she would show them what to do. RP 96-98, 300. After making a phone call, he reported that she was on a date and could not meet with them. RP 307. The defendant and Payton then instructed the girls to take the 358 bus to Aurora Avenue and to return to them with the money they had earned, but not to come back until they made \$200. RP 101, 310, 313. He assured them that when they returned with the money, he would "take care" of them. RP 99. Payton explained to Officer Morris that he would buy her expensive clothes and purses. RP 310.

After the officers got on the bus, the defendant and Payton were arrested inside the Westlake Mall. RP 101-03, 209, 316. Almost all of the contact between the officers and the defendant and Payton was captured on surveillance video. RP 234-47.

The defendant and Payton both testified and denied suggesting that the officers work for them as prostitutes, and denied discussing their age. RP 381, 394, 424, 428.

C. ARGUMENT.

SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTION BECAUSE FACTUAL IMPOSSIBILITY IS NOT A DEFENSE TO AN ATTEMPT TO COMMIT A CRIME.

Johnson contends that his conviction for attempting to promote commercial sexual abuse of a minor must be dismissed due to insufficient evidence because the officers were not, in fact, minors. His claim should be rejected. Factual impossibility is not a defense to an attempt to commit a crime, as explicitly stated in the attempt statute, RCW 9A.28.020.

RCW 9.68A.101 defines the crime of promoting commercial sexual abuse of a minor. Pursuant to that statute, a person is guilty of that crime if "he or she knowingly advances commercial sexual abuse of a minor or profits from a minor engaged in sexual contact." RCW 9.68A.101(1). The statute defines "advances commercial sexual abuse of a minor," in part, as "engag[ing] in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor."

RCW 9.68A.101(3)(a). The statute also defines "profits from commercial sexual abuse of a minor" as "accept[ing] or receiv[ing] money or other property pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor." RCW 9.68A.101(3)(b).

RCW 9A.28.020 defines criminal attempt. Pursuant to that statute, a person is guilty of an attempt to commit a crime if the person, with the intent to commit a specific crime, does any act that is a substantial step toward commission of the crime. RCW 9A.28.020(1). The attempt statute explicitly rejects legal or factual impossibility as a defense to attempt. The statute states, "If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission." RCW 9A.28.020(2). As the state supreme court explained in State v. Walsh, 123 Wn.2d 741, 870 P.2d 974 (1994):

Traditionally, legal impossibility was a defense to criminal charges while factual impossibility was not. The distinction between the two proved extremely elusive, though, and the Model Penal Code, as well

as most courts, no longer recognize impossibility as a valid defense to crimes of attempt.

Id. at 747.

Because factual impossibility is not a defense to attempt, a defendant who attempts to commit a specific crime is guilty even if the crime could not have been committed under the circumstances. For example, in State v. Roby, 67 Wn. App. 741, 840 P.2d 218 (1992), the defendants were convicted of attempted possession of cocaine when they offered undercover officers money in exchange for cocaine. Of course, the officers had no cocaine to sell and thus it would have been impossible to commit the completed crime. Id. at 747. The defendants challenged the sufficiency of the evidence and the appellate court affirmed the conviction, noting that factual impossibility is not a defense to an attempted crime. Id.

In State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), the defendant was convicted of attempted second degree rape of a child. There was no child involved, however, but a police officer posing as a 13-year-old girl online. Id. at 670. Townsend corresponded with the "girl," told her he wanted to have sex with her, made arrangements to meet her at a motel for that purpose and went to the motel at the appointed time, where he was

arrested. Id. at 671. On appeal, he challenged the sufficiency of the evidence, arguing that he could never have completed the crime because the 13-year-old girl was actually a police officer. Id. at 679. The state supreme court rejected this argument because factual impossibility is not a defense to the crime of attempt. Id. The court quoted Division III of this Court with approval, stating, "we agree with the Court of Appeals that '[i]t thus makes 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. (quoting State v. Townsend, 105 Wn. App. 622, 631, 20 P.3d 1027 (2002) (italics in original)).

Similarly, in State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006), the defendant argued that the evidence was insufficient to establish attempted possession of child pornography. The state supreme court affirmed the conviction, stating "If a person attempts to obtain actual child pornography but the crime is not completed because the individual does not in fact receive the images sought or receives images that turn out to be images that are not of actual minors, the individual can nevertheless be convicted of the attempt crime because factual impossibility is not a defense." Id. at 73-74.

Finally, in State v. Patel, ___ Wn.2d ___, 242 P.3d 856 (2010), the defendant was convicted of attempted rape of a child in the second degree. As in Townsend, a police detective posed as a 13-year-old girl online. Id. at 857. Patel agreed to meet the girl at her apartment for sex. Id. at 858. When he arrived at the apartment at the appointed time he was arrested. Id. He asked the court to overrule Townsend and hold that the crime could not be established unless an actual underage victim was involved. Id. The court noted that such a defense was merely a claim of factual impossibility, which has been specifically rejected in RCW 9A.28.020(2). Id. at 860. The court concluded that because Patel intended to have sex with a 13-year-old girl, it did not matter whether he could not have committed the completed crime. Id.

Just like Roby, Townsend, Luther, and Patel, the evidence in this case was sufficient to convict Johnson even though he could not have committed the completed crime because the officers were not, in fact, minors. The test for determining whether a conviction is supported by sufficient evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, viewing

the evidence in the light most favorable to the State, Johnson solicited the officers, whom he believed were 17 years old, to perform acts of prostitution and return the money to him, and gave them explicit instructions to do so. Based on this evidence, a rational trier of fact could conclude beyond a reasonable doubt that Johnson took a substantial step toward committing the crime of promoting commercial sexual abuse of a minor with the intent to commit that crime. As in Townsend, Luther, and Patel, it makes no difference that the officers were not minors, and that the completed crime could not have been committed. To hold otherwise would be to recognize factual impossibility as a defense, even though that defense has been expressly rejected by the legislature in RCW 9A.28.020(b).

The only authority for Johnson's position is dicta in Justice Chambers' plurality opinion in Patel.¹ Although concluding that Patel's conviction should be affirmed even though the person with whom he proposed to have sex turned out to be a police officer

¹ Although all nine justices of the court voted to affirm Patel's conviction, only Justices Alexander, James Johnson and Stephens joined in Justice Chambers' opinion. Patel, 242 P.3d at 862.

rather a 13-year-old girl, Justice Chambers speculated that "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." Patel, 242 P.3d at 861. This statement is wrong, as Justice Madsen points out in her concurrence, in which she was joined by Justice Charles Johnson. In regard to the above statement, Justice Madsen wrote, "This is internally inconsistent and, indeed, undermines the rationale that otherwise supports the lead opinion." Id. at 862 (Madsen, J., concurring). In a separate concurrence, Justice Sanders, joined by Justice Owens and Fairhurst, also took issue with the reasoning of Justice Chambers' opinion, and stated that the court should continue to follow Townsend. Id. at 864-66 (Sanders, J., concurring).

Statements in an opinion that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed. Ass'n of Wash. Bus. v. Dep't of Revenue, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005).

to rely on its dicta, and moreover, was rejected by five members of the court.²

The legislature has determined that factual impossibility is not a defense to an attempt to commit a crime. Johnson's argument on appeal is nothing more than a claim of factual impossibility: he cannot be guilty of attempt because the officers were not minors and thus the completed crime could not have been committed. As such, Johnson's argument fails.

² In Patel, the justices disagreed as to how to interpret the court's earlier decision in State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996), which held that a person can be convicted of attempted rape of a child in the first degree. Chhom involved a 16-year-old who attempted to rape a 9-year-old. Id. at 740. There was no dispute that the defendant knew that the 9-year-old was a child. Nonetheless, dicta in that decision indicated that the only intent required for conviction of attempted rape of a child would be intent to have sexual intercourse, not the intent to have sexual intercourse with a child. Id. at 744. Justice Chambers' plurality opinion agreed with this proposition, stating "A defendant who attempts to have sex with a person he believes is an adult but is actually underage can be convicted under Chhom." Patel, 242 P.3d at 861. Justice Sanders' concurring opinion argues that Chhom is incorrect because it allows for the conviction of someone for attempt who has no intent to commit an act that constitutes a crime. While this ongoing debate is interesting, it has little bearing in this case, because the officers presented themselves as minors, and the jury was instructed that the State was required to prove that the defendants acted knowingly. CP 36, 44, 46, 62. Johnson does not argue on appeal that he attempted to promote the prostitution of a person he believed was an adult, most likely because that would constitute the lesser included offense of attempting to promote prostitution.

D. CONCLUSION.

The conviction should be affirmed.

DATED this 21st day of January, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Roosevelt Johnson, Jr., the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOHNSON, Cause No. 65115-3-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.

W Brame
Name
Done in Seattle, Washington

1/21/11
Date