

NO. 37361-1-II

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

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CLERK OF COURT
JAN 10 2008

STATE OF WASHINGTON, Respondent

v.

KENNETH EUGENE HOWE, III, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-01972-3

BRIEF OF RESPONDENT

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PM 10-10-08

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant in his appellate brief. Where additional information is necessary, it will be supplied in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that trial court improperly entered judgment against the defendant for Failing to Register as a Sex Offender because substantial evidence did not support the charge. Specifically, the defendant indicates on page 10 of the brief that he does dispute that the record includes substantial evidence to support a conclusion that the defendant failed to register as required under RCW 9A.44.130. What he does maintain is that there was insufficient evidence to support a conclusion that the defendant was required to register. The claim is that the State failed to prove that the two California convictions underlying the fail to register charges were, in fact, sex offenses under Washington Law.

The State filed an Amended Information (CP 14) charging the defendant with two counts of Failing to Register as a Sex Offender in the alternative. (CP 371 – 372). Count 1 was based on the defendant having previously committed the sex crime of Lewd Acts upon a Child which

required him to register. Count 2, as the alternative, was that he had committed the felony of Fail to Register as Sex Offender in California.

When this matter was brought to trial, the defense did not object to the evidence being produced. Concerning Count 1 which was the Lewd Conduct upon a Child, the Court, on its own, with prompting by the State, performed a comparability test on the elements of the two crimes. The only objection that was ever raised concerning the submission of this evidence to the jury was a discussion about whether or not the parties were going to stipulate to Exhibit No. 4. Exhibit No. 4 were the certified copies of the defendant's records from the California Department of Corrections and Rehabilitation. The defense determined that they were not going to stipulate to the documentation (RP 273). The argument raised was not that they were not comparable, but whether or not all of the information contained in these documents necessarily needed to go to the jury. The defense was concerned about information contained, for example, in the photograph and other information that was attached to the certified copies (RP 274 – 275). The State's position was that they were self authenticating documents and the information was needed to establish foundation. (RP 276). The Court preliminarily decided that the documentation would go in with the State eliminating the word "prison" from the packet (RP 278) the defense asked for additional modification to

the documents (for example), removal of a date that was contained in the documentation as not being prohibitive of anything needing to be proven (RP 279)). The Court did not agree with the defense on that and agreed with the other redactions to allow the documentation to go to the jury. The defense attorney indicated that he believed he had sufficiently made his record at that point. (RP 280).

When this matter then was brought before the jury, the defense objected to the exhibit resting on these objections that had previously been made concerning authentication. (RP 282).

Just prior to the State resting in its case in chief, the State raised the issue of comparability with the Court. It does not appear from the transcript that the defense was objecting to this. (RP 242 – 244). The Court was provided copies of the statutes and documentation from both Washington and California and reviewed the documentation to determine whether or not they were comparable. (RP 244 – 246).

At the same time, the Court was also reviewing the Washington and California statutes dealing with Failing to Register and the documentation that had been supplied by the State. Again, this comparability testing was at the prompting of the Court and the State and did not appear to have been objected to by the defense. (RP 346 – 348). The defense wanted the language from the particular statutes read into the

record. (RP 348 – 349). The State then read into the record the language. (RP 350 – 352). The Court made notice that the documentation supplied from California indicated that the child's age was below 14 at the time of the California activities. (RP 352). The additional language then was read into the record concerning Count 2 and the registration requirements (RP 353 – 356). At no time does the defense make claim that the California statutes are not comparable to Washington's statutes. At the end of all of the discussion, the Court makes the following determination:

The Court: OK. The Court does find comparability as to both of these, and especially considering the ages, that I had to double check. So that will be the Court's finding.

All of the comments of the State have been accepted. All of the exceptions noted for the defense.
-(RP 356, L. 12 – 18).

The State then indicates that it's in a position to rest at which time the defense makes its Motion for Directed Verdict. The basis for that Motion for Directed Verdict is as follows:

Mr. Wear (Defense Attorney): Your Honor, at this time we would be moving for a Directed Verdict on behalf of Mr. Howe, taking all of the evidence presented by the State and all inferences determined in their favor, I would nonetheless put forth the position that the State has

failed to prima facie case at this time, and I would therefore move for a Directed Verdict.

-(RP 356, L. 25 – 357, L. 7).

The Court denied the defense motion. (RP 358).

After the jury was excused, the parties prepared instructions for the jury (CP 20). The parties specifically discussed the elements instructions that were being proposed to be given to the jury. The defense was not objecting to the elements that were being provided to the jury. (RP 369). In fact, the defense attorney had made mention previously during this discussion that the position of the defense in this case was that the evidence was insufficient to establish either that he was transient or that he was under the jurisdiction of the Department of Corrections in the State of Washington. (RP 365, L. 1 – 7). The basis of the defense in this case was not the comparability of the felonies in the States of California and Washington, but that he was not transitory or under the jurisdiction of the Department of Corrections.

This is consistent also with the closing argument given by the defense:

Closing Argument by Mr. Wear (Defense Attorney):

I think one of the important exhibits that you're going to get that you need to really pay close attention to, is

Exhibit 3-B. Exhibit 3-B is the offender registration form. It's got two sides to it.

The front end of the form, as you'll be able to see as you have it in the jury room, has biographical information. It has Kevin McVicker's initial and name down here. And it has Mr. Howe's name right here (indicating throughout).

Why is that significant? Well, for one thing, it would seem to indicate that Mr. Howe was attempting to conform to what he was thought to be required to do at that time.

The problem I would suggest that you'll need to look at as you take it in the jury room is not the front page, but the last page. Now, each one of these paragraphs refers to a slightly different status, and – and the paragraphs for the most part talk about different time requirements in terms of when you have to register and under what circumstances you have to register.

And if you'll recall, Officer McVicker I think honestly indicated to you that – that Mr. Howe was apparently given a – a table or a carrel or something when he filled out this form and signed it, and by the – my recall of the testimony – and, or course, it is your recall that's important, your collective memory is what's important here, not my recall.

But my recall of it was that Officer McVicker said that this first page was filled out. There wasn't any indication that before signing that that Mr. Howe read that last portion.

I think Officer McVicker indicated instead that the usual practice or the expectation, perhaps even the direction was that when the second step was to be taken, that is when he was to be fingerprinted and photographed, that this portion here (indicating) might be reviewed by the person registering.

Was it read to him word-for-word? No, it wasn't. Was the specific provision that was applicable to his situation read to him? No, no, it wasn't.

In terms of putting him on notice, giving him knowledge as to what his obligation were, what we heard from Officer McVicker is he had him sign the form, the form had a second side, he sent him off on his way. No

effort, apparently, at that point o point out which of the provisions apply to him, how frequently he needed to report or anything else.

-(RP 401, L.16 – 403, L. 18).

This discussion then concludes with the following defense argument:

I will leave it to you as to whether or not the evidence that you've heard satisfies you, satisfies you that Mr. Howe was a transient on October 30, on the day that he was arrested, and therefore triggering the twenty four hours, within 24 hour reporting obligation. I will leave it to you.

I will also ask you to use your collective memory as to the – whether the evidence proves beyond a reasonable doubt that Mr. Howe knew that he was under the jurisdiction of the Washington Department of Corrections, because that is really the critical jurisdiction we're talking about here.

-(RP 406, L. 4 – 16).

The State submits that this issue now being raised on Appeal was never addressed at the trial court level. No objection was ever made to the trial court concerning the comparability. The Court conducted the necessary comparability test on its own initiative. The defendant never objected on any grounds others that the ones that he argued later to the jury which appeared to be primarily jurisdictional.

A party's failure to object to testimony at trial generally precludes appellate review as to whether that testimony should have been excluded. State v. Perez- Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). A party may assign error in the Appellate Court only on the specific ground given at trial. State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987); State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985). If a specific objection is overruled then the evidence admitted, the appellate court will not reverse on the basis of a different rule that could have been argued but was not. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983).

The defendant may argue different grounds for excluding evidence if the error is manifest and affects a constitutional right. RAP 2.5 (a)(3); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The defendant in our case has not, however, provided a manifest constitutional error analysis in his brief. Nor was this ever even remotely discussed or considered at the trial court level. Case law has indicated that the Court of Appeals should decline to review the issue. RAP 10.3(a)(5); State v. Thomas, 150 Wn.2d at 868 – 869; State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

However, if the Appellate Court does wish to review this, the State believes that there is adequate information here to allow these matters to

go to the jury. The test for sufficiency is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each essential element of the charge beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The defense argues that the California statute which is the basis of Count 1 of the Amended Information and dealt with Lewd Conduct toward a Minor was an offense that required physically touching a child under fourteen years of age in a manner “with intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (Brief of Appellant page 15). The argument in the Appellant Brief appears to be that the statutes are not comparable because the California Lewd Conduct on a Child statute would refer to any part of the body whereas the Washington statutes deal with sexual or other parts of the person.

This issue has recently been addressed in Division I, under State v. Jackson, _____ Wn. App. _____, 187 P.3d 321 (2008). In that case, the defendant was convicted in King County of Second Degree Child Molestation. The claim was that he had had sexual contact with the victim because his ejaculate had landed on the child’s body and therefore constituted “touching” for purposes of the statute.

Division I did discuss the concept that the touching may be made through clothing and also without direct contact between the defendant

and the victim. State v. Brown, 55 Wn. App. 738, 780 P.2d 880 (1989).

Division I also commented on the concept of “intimate” contact.

Contact is “intimate” within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Which anatomical areas, apart from genitalia and breast, are “intimate” is a question for the trier of fact.

-(State v. Jackson, Page 4).

The State submits that the two statutes involved are comparable. The argument that the California statute is much more expansive doesn't seem to apply when reviewed under the analysis of the recent Division I case of State v. Jackson, Supra. In fact, it appears that this is a question primarily left to the finder of fact. In our situation that finder of fact was in the State of California and the determination was made that this constituted a sexual contact. Our Courts would be in agreement with that and thus the statutes are comparable. Also, as previously argued, this matter was never raised at the trial court level nor was the court asked by the defense to look into this in any type of detail or questions raised about it. The definitional terms in California and Washington appear to be, basically, identical. With that in mind, the State has met its burden of showing comparability.

The argument raised in the brief of appellant concerning Count 2, which dealt with failing to register in the State of California, fails if the comparability is found as previously discussed in this section dealing with Lewd Conduct towards a Child. His failing to register in the State of California is based on his conviction for the crime of Lewd Acts upon a Child. It is that sex crime that leads to the Felony of Failing to Register and as such comparability would be established without further discussion. Again, the Court reviewed this comparability and made its determination at the trial court level. Further, as previously argued the defense made no objection to this nor did it even raise this as a potential problem in the case.

As previously indicated, these matters can be raised if there is a manifest error and that that error affects a constitutional right. However, there was no manifest constitutional error analysis done in this case whatsoever. So, not only was it not argued at the time of trial or presented in any way to the trial court, it has not been argued in the appellate system either.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that finding the defendant guilty of Counts 1 and 2 of the Amended Information constituted double jeopardy.

At the time that the parties were discussing the jury instructions with the Court, the prosecution indicated to the parties that Counts 1 and 2 of the Amended Information were alternative chargings. (RP 371 – 372). The parties then entered into a discussion about how Counts 1 and 2, since they are alternatives, would be instructed on and what form, or forms, the jury verdict, or verdicts, would take. (RP 373 – 380).

After lengthy discussion on this matter, the parties stipulate that Counts 1 and 2 are in the alternative and that there would be only one punishment because these constitute the same criminal conduct. That discussion was as follows:

THE COURT: Are you stipulating that as –
if this were to go to a guilty verdict that there would be
same course of conduct –
MR. HARVEY: Stipulating.
THE COURT: -- which would result in no –
MR. HARVEY: Nothing.
THE COURT: -- additional penalties, no
additional counts, no additional points –
MR. HARVEY: No – no –
THE COURT: -- in the future?
MR. HARVEY: Correct.
THE COURT: That it would come out as
one point even if they convicted on both counts?
MR. HARVEY: And that's what the State's
original position was on the – on the Amended Information.
THE COURT: You're stipulating to that.
MR. HARVEY: Stipulating.
THE COURT: Mr. Wear, does that satisfy
your concern?

MR. WEAR: Yes, it does.
THE COURT: Okay. Then I will give both instructions and I will note for the record that I am going to hold Mr. Harvey to that stipulation.
MR. HARVEY: No problem, Your Honor.
THE COURT: And the Court is now making a finding that if there is a conviction as to both counts, there will be only one point attributed to this felony and there will only be one – same course – a finding that there – it is the same course of conduct, which will lead to only one possible range, that –
MR. HARVEY: Yes.
THE COURT: -- would be if he – they were – he was convicted as to one count only.
MR. HARVEY: Thank you.
THE COURT: Okay?
MR. HARVEY: Yes, Your Honor.
MR. WEAR: Yes, Your Honor.
-(RP 383, L. 6 – 384, L. 18).

Multiple offenses encompass the same criminal conduct if the crimes involve the same objective criminal intent, time and place, and victim. RCW 9.94A.589(1)(a). The Appellate Court will not disturb the trial court's same criminal conduct decision unless the trial court abused its discretion or misapplied the law. State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

Stipulations between the parties are binding. State v. Korum, 157 Wn.2d 614, 649, 141 P.3d 13(2006); State v. Hilyard, 63 Wn. App. 413, 819 P.2d 809 (1991). The Court in our case agreed with the stipulation and, at the time of sentencing, sentenced accordingly finding that this was

the same course of conduct. The State submits that there is no basis for a double jeopardy claim made by the defendant.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The defendant argues that the trial court erred in calculating the defendant's offender score because the State had failed to prove comparability between the California convictions and the Washington statutes. Specifically, the defense objects to a Failure to Appear felony conviction in California which occurred in 2002. The State maintained that this should be characterized as similar to a felony bail jump in the State of Washington. (RP 425 – 426).

The trial court compared the Failure to Appear felony statute from the State of California with the Bail Jump statute in the State of Washington and indicated that he didn't see any difference between the two statutes. (RP 427).

The Court: The FTA Felony versus Bail Jump. Both of them require a court – both require that you appear in court at a certain date and time and you failed – you're being accused for failing to show up at that court on that specific date and time.

-(RP 427, L. 19 – 24).

Where a defendant's criminal history includes out of state convictions, the SRA requires the convictions be classified according to

the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.360(3). To properly classify an out of state conviction according to Washington Law, the sentencing court must compare the elements of the out of state offense with the elements of potentially comparable Washington crimes. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

To establish this, the prosecution presented to the court a large packet of materials designated certified copies of defendant's prior criminal history from California and Clark County. (CP 42). Among the documents in that packet was the complaint from the State of California as it related to the failure to appear on a felony charge. The charge in Count 1 read as follows:

On or about June 27, 2002, the crime of failure to appear on own recognizance, in violation of section 1320(b) of the Penal Code, a felony was committed by Kenneth Howe, who at the time and place last aforesaid was a person who was charged with a commission of a felony, to wit, Unlawful Sexual Intercourse with a Minor, in violation of section 261.5(D) of the Penal Code of the State of California and was released from custody on said defendant's own recognizance, who did willfully and unlawfully fail to appear as required on 6/27/2002 in the Superior Court, in order to evade the process of said court.

The State submits that this matter was reviewed by the trial court and that the elements of the Failure to Appear in the State of California, as

charged, would be the equivalent of a felony Bail Jump in the State of Washington.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 10 day of Oct, 2008.

Respectfully submitted:

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