

NO. 50094-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL A. CARSON,

Appellant.

Appeal from Pierce County Superior Court
Honorable Gretchen Leanderson
No. 15-1-05048-8

BRIEF OF APPELLANT

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I. INTRODUCTION

Paul A. Carson appeals his conviction of Attempted Rape of a Child First Degree arising out of an internet sting operation in Tacoma that lured him to a bait house. Appellant denied any intent to have sex with a child and insisted it was just role play/fantasy. The trial court erred in denying an entrapment instruction/defense when it relied on outdated law which requires defendants to admit criminal liability before claiming entrapment. The trial court also erred in upholding a conviction for attempt because Appellant never took a substantial step to commit rape. The judgment should be reversed on these two errors. In the alternative, the sentencing court erred in denying a downward departure from the guidelines because the victim in this case was non-existent and fictitious. Appellant was improperly sentenced to a period of incarceration at the same level as defendants who have made an attempted to rape an actual person. The matter should alternatively be remanded for re-sentencing.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying a jury instruction for entrapment.

B. The trial court erred because there was insufficient evidence to establish a conviction for attempted rape of a child in the first degree.

C. The sentencing court erred in denying a downward deviation sentence for Appellant.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether Appellant was required to admit attempted rape to be entitled to an entrapment defense.

B. Whether there was sufficient evidence to support a finding that Appellant had intent or took a substantial step versus mere preparation to have sex with a child.

C. Whether it was manifestly unreasonable for the sentencing court to deny an exceptional sentence downward considering compelling mitigating factors.

IV. STATEMENT OF CASE

Appellant Paul A. Carson was found guilty by a jury on December 19, 2016, of one count of Attempted Rape of a Child in the First Degree. *See* RCW 9A.44.073 and CP 163-165. Appellant is a 60-year old man with no prior criminal history of any kind. *Id.* In a sting operation, the Washington State Patrol posted an advertisement on the internet posing as a mother offering her minor children for sex. VRP 193. Officers engaged in online communication with Appellant until he was eventually persuaded to come to the bait house in Tacoma, where he was arrested. VRP 395. Appellant appeared at the house with condoms in his vehicle, after having driven forty-five minutes from Olympia. VRP 392. Appellant testified that he resided in Olympia and was attending Evergreen State College. VRP 450.

At the trial, both Trooper Rodriguez and Appellant testified about the lengthy communication between them before the arrest:

In response to the ad, defendant communicated: “I am curious about you, age, what you look like, and the ages of those you would like to bring into this dynamic [...] Have you attempted to speak with your kids about this? And then how do you see this all taking place? You have undoubtedly given this some thought; haven’t you? How would you like to see this all unfold?” VRP 232.

When communicating about the minor children, Appellant stated in texts and emails: “I’m kind of hoping that I f**** her.” “There. I’ve said it.” VRP 390. “Ideally, I would want all of you.” VRP 253. “I’m hoping, with your guidance, we can make her a big girl tonight.” VRP 389.

Appellant described himself as a “slut” during testimony. VRP 341. He outlined his involvement with role play and fetish websites and gatherings. VRP 308-309. Both the ad and communications by Trooper Rodriguez made it clear that the mother was not looking for role play, that it “was for real.” VRP 226, 362. Appellant agreed that the communication, from the mother’s perspective, was not for role play (VRP 374), but maintained that it was all part of the fantasy/fetish and that he did not intend to actually have sex with any minor children. VRP 395. Appellant stated that he enjoyed “daddy/daughter” role play and that he had engaged in such conduct with women in the past who pretended to be 12, 13, or 14. VRP 350. Appellant continued to deny any intent to have sex with a child, which became the basis of the court’s decision to deny the entrapment instruction to the jury:

I find that he needed to admit that he intended to have sex with a

child, that he denied that -- the defendant denied the acts. He denied that he intended to have sex with a child. And I do -- there needed to be some testimony and some evidence that that is what his intent was because the crime that's charged is attempted rape of a child, first degree. And that is, you know, having sex with a child, and he has denied that. So, again, the Court is not going to allow the entrapment instruction that was proposed by the defense, and that was the WPIC 18.05.

See VRP 423

At sentencing, the Court rejected Appellant's request for an exceptional downward deviation from the standard range and sentenced Appellant to a minimum 85 months indeterminate sentence, approximately the midpoint of the standard range. *See* VRP 510.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING A JURY INSTRUCTION FOR ENTRAPMENT

1. LAW

Both the Washington Supreme Court in *Frost (infra)* and the US Supreme Court in *Mathews (infra)* have made it clear that a defendant does not need to admit the crime charged to be entitled to an entrapment defense. These decisions abrogated earlier caselaw to the contrary, and this trial court erred when it relied upon those earlier cases.

The caselaw for entrapment admission in Washington begins with *State v. Draper*, 10 Wn.App. 802, 521 P.2d 53 (1974), which states in relevant part:

The defense of entrapment in an affirmative defense which necessarily assumes that the act charged was committed. *State v. Morgan*, 9 Wash.App. 757, 759, 515 P.2d 829 (1973). The defendant was not entitled to an entrapment instruction since it is well settled by the clear weight of authority that the defense of entrapment is not available to one who denies that he committed the

act charged. *United States v. Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972); *Wilson v. United States*, 409 F.2d 184 (9th Cir. 1969); Annot. 61 A.L.R.2d 677 (1958), 56—63 A.L.R.2d L.C.S. 416 (1967, Supp.1973); 21 Am.Jur.2d Criminal Law s 144, 214 (1965); 25 Am.Jur.2d Drugs, Narcotics, *807 and Poisons s 45, 317 (1966); 1 R. Anderson, Wharton's Criminal Law and Procedure s 132 (1957, Supp.1974); Contra, *People v. Perez*, 62 Cal.2d 769, 44 Cal.Rptr. 326, 401 P.2d 934 (1965); *State v. Fitzgibbon*, 211 Kan. 553, 507 P.2d 313 (1973).

Draper at 806.

It is noteworthy each of the above cases cited to in the last sentence have been abrogated or never required admission by the defendant in the first place.¹ Furthermore, the American Law Review article cited to was superseded by a later article that state: “this rule has come under attack in recent years and has in some instances been discarded.” See § 2[a].

In 1992, the *Draper* decision was clarified by the Washington Court of Appeals in *Galisia*, expanding on what ‘admitting the acts’ charged means:

The State relies on *State v. Matson*, 22 Wash.App. 114, 121, 587 P.2d 540 (1978), for the proposition that “an instruction on entrapment is proper only where the defendant has admitted that the crime took place.” In so stating, however, *Matson* failed to distinguish circumstances where a defendant admits that the activity on which a charge is based took place, from circumstances where a defendant actually admits to committing the crime as charged. In fact, earlier cases refer not to the “crime” charged but to the “act” charged. The distinction between denying that an event occurred and denying that the event resulted in criminal liability is critical in the context of this case. In *Matson*, the defendant claimed that he was unaware of the “sort of transaction” taking place. 22 Wash.App. at 121, 587 P.2d 540. Similarly, in *State v. Draper*, 10 Wash.App. 802, 806, 521 P.2d 53, review denied, 84 Wash.2d 1002 (1974), on which

¹ . *Hendricks* and *Wilson* were overruled by *U.S. v. Demma*, 9th Cir.(Cal.) (1975). 61 A.L.R.2d 677 (1958), was superseded by 5 A.L.R.4th 1,128 (1981) at § 2[a] (supra). In California, *People v. Perez*, in fact states “We disagree with the Attorney General's contention that to invoke the defense of entrapment a defendant must admit committing the criminal acts charged.” at 329, 937. Finally, the *Fitzgibbon* court (Kansas Supreme Court) also agreed with *Perez*. at 318, 559.

the Matson court relied,¹ the defendant consistently denied that the actions on which the charge was based even took place. Matson and Draper thus do not require a defendant to admit either the crime itself or all the elements of a crime before being entitled to an entrapment instruction. It is enough that a defendant admit acts which, if proved, would constitute the crime. Norgard met this threshold by admitting the acts which made him an accomplice to the drug deal.

See, State v. Galisia, 63 Wn.App. 833, 836–37, 822 P.2d 303, 305-306 (1992). *Galisia* was abrogated on other grounds two years later by *State v. Trujillo*, 75 Wn.App. 913883 P.2d 329 (1994).

In 2007, the Washington Supreme Court in *State v Frost*, in Footnote 4, references the reasoning in *Galisia*:

A similar distinction between admitting the acts on which a charge is based and admitting criminal liability has been drawn by the Court of Appeals in its analysis of the affirmative defense of entrapment. *See State v. Galisia*, 63 Wash.App. 833, 836–37, 822 P.2d 303, review denied, 119 Wash.2d 1003, 832 P.2d 487 (1992). In *Galisia*, the court concluded that while its earlier decisions in *State v. Matson*, 22 Wash.App. 114, 587 P.2d 540 (1978), and *State v. Draper*, 10 Wash.App. 802, 521 P.2d 53 (1974), *may* require a defendant to admit the charged acts, they do not require admission of “the crime itself or all the elements of a crime before being entitled to an entrapment instruction.” *Galisia*, 63 Wash.App. at 837, 822 P.2d 303; see also *Mathews*, 485 U.S. at 62, 108 S.Ct. 883 (holding that “even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment”). (Emphasis added.)

See, State v Frost, 160 Wash.2d 765161 P.3d 361, 367, 776 (2007).

It is noteworthy that the *Frost* court uses the word “may” as above emphasized, implying that any admission was optional. It is also significant that the U.S. Supreme Court case that *Frost* mentions, *Mathews*, does not in fact explicitly require any admission of any ‘acts’ at all. *Mathews* relied

on the age-old proposition that a defendant is entitled to inconsistent defenses:

The Government insists that a defendant should not be allowed both to deny the offense and to rely on the affirmative defense of entrapment. Because entrapment presupposes the commission of a crime, *Russell, supra*, 411 U.S., at 435, 93 S.Ct., at 1644, a jury could not logically conclude that the defendant had both failed to commit the elements of the offense and been entrapped. According to the Government, petitioner is asking to “clai[m] the right to swear that he had no criminal intent and in the same breath to argue that he had one that did not originate with him.” *United States v. Henry*, 749 F.2d 203, 214 (CA5 1984) (en banc) (Gee, J., dissenting).

As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); 4 C. Torcia, *Wharton's Criminal Procedure* § 538, p. 11 (12th ed. 1976) (hereinafter *Wharton*).

[...]

Federal appellate cases also permit the raising of inconsistent defenses. See *Johnson v. United States*, 138 U.S.App.D.C. 174, 179, 426 F.2d 651, 656 (1970). *Mathews v U.S.*, 485 U.S. at 62, 108 S.Ct. 883.

The *Mathews* Court did not explicitly clarify if the entrapment defense is of constitutional dimension or not (and thus controlling in Washington), but contains a citation to an earlier case holding that it is not constitutional:

The Government finally contends that since the entrapment defense is not of “constitutional dimension,” *Russell*, 411 U.S., at 433, 93 S.Ct., at 1643, and that since it is “relatively limited,” *Id.*, at 435, 93 S.Ct., at 1644, Congress would be free to make the entrapment defense available on whatever conditions and to whatever category of defendants it believed appropriate. Congress, of course, has never spoken on the subject, and so the decision is left to the courts. We are simply not persuaded by the Government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to

which no other such defense is subject.

In conclusion, while the *Frost* court mentions that a defendant “may” be required to admit some acts, the *Mathews* court, the 9th Circuit, and the courts in a number of states including California do not require any admission at all. The defendant’s statement in this case should have been sufficient for an entrapment defense.

It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

2. ANALYSIS

Appellant in this matter did in fact admit to most of the elements and constituent actions necessary to forming intent. Appellant did in fact state “I’m kind of hoping that I f*** her”, in his communications with the trooper, admitted to buying condoms, communicating with the individual, and driving to the bait house. (VRP 390) The fact that Appellant denied intent in his testimony should not have deprived him of an entrapment defense.

In light of the above changing caselaw, the trial court’s statement that “I find that he needed to admit that he intended to have sex with a child, [to be entitled to an entrapment instruction]” was a reversible error. (VRP 423) It is a clear mistake that deprived Appellant of a fundamental defense to the crime charged. The State’s memorandum on the issue misled the Court when it stated “the defendant must admit that he intended to have sex with the child.” CP 102.

Appellant was entitled to an entrapment instruction despite denying criminal liability. The trial court made a reversible error denying Appellant of his right to present his theory of the case by depriving him of a fundamental defense and the judgment and sentence should be reversed.

B. THE TRIAL COURT ERRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH A CONVICTION FOR ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE.

1. LAW

RCW 9a.44.073 **Rape of a child in the first degree**, states:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

RCW 9A.28.020 **Criminal attempt**, states:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) 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.

In determining the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). When the sufficiency of the evidence is challenged in a

criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence “admits the truth of the State’s evidence.” *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). It makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

“[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.” *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996); see also *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

“Mere preparation to commit a crime is not a substantial step.” *Townsend*, at 679. In order for conduct to comprise a substantial step, it must be strongly corroborative of the defendant's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). However, any act done in furtherance of the crime constitutes an attempt if it clearly shows the design of the defendant to commit the crime. *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). Whether conduct constitutes a substantial step is a question of fact. *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991).

2. ANALYSIS

Here, the testimony at trial showed that Appellant was entirely “in role.” Although he intended to meet an adult woman for sex, the other aspects of his communication were fantasy and he believed the individual he was communicating with was doing the same. Appellant has no criminal history and testified he had never had sex with a child in the past, which begs the question why he would suddenly try it at age sixty. Except for a few texts and emails that were misrepresented, there was insufficient evidence that Appellant intended to have sex with a child rather than engage in “daddy-daughter” role play with an adult. Insufficient evidence was presented of any steps taken to accomplish sex with a child. Even if the condoms were taken to mean an intent to have sex, they did not constitute a substantial step of sex with a child. At most it was “mere preparation.” The judgment should be reversed.

C. THE SENTENCING COURT ERRED IN DENYING A DOWNWARD DEVIATION SENTENCE FOR APPELLANT.

1. LAW

a) Standard of Review

As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within, as here, the correct standard sentencing range. See, e.g., RAP 2.2(b)(6). However, this prohibition does not bar a party’s right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. See *State v. Mail*,

121 Wn.2d 707, 712, 854 P.2d 1042 (1993). It is well established then that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. See, e.g., *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Moran*, 119 Wn.App. 197, 218, 81 P.3d 122 (2003).

b) Mitigating Factors for Downward Deviations

RCW 9.94A.535 Departures from the guidelines:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.535(1) sets forth a non-exclusive list of examples that a court may consider when granting a downward deviation:

Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

Most relevant to this case are the following factors:

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

...

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was

induced by others to participate in the crime.

Subsection (d) represents the entrapment defense, which as a “failed defense” may still be considered a mitigating factor: The SRA provides certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range. *State v Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192, (1997). *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). *State v. Ha'mim*, 132 Wn.2d 834, 843, 940 P.2d 633 (1997).

2. ANALYSIS

Here, it was manifestly unreasonable and untenable not to grant a downward deviation from the guidelines. Appellant was entrapped by this sting operation. There was no victim in this case. The victim was fictitious and non-existent. Appellant was sentenced to a period of incarceration at the same level as people who have *actually* attempted to rape *real* children, real victims. The State was the initiator in this case, not Appellant. The Trooper urged the immediacy of the need to meet, and it was the Trooper that posted the ad and lured Appellant to make all the statements he did. Appellant did his best to explain the strange world of role play/fantasy meetups and communities, while maintaining he never had or never would intend to have sex with a child. The length of the sentence should be reversed and remanded for re-sentencing.

VI. CONCLUSION

The judgment should be reversed based on the error of excluding the entrapment defense and based on the insufficiency of evidence. In the

alternative, the matter should be remanded for re-sentencing based on a manifestly unreasonable denial of a downward exceptional sentence.

Respectfully submitted this 1st day of September, 2017.

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