

FILED
Court of Appeals
Division II
State of Washington
6/5/2020 12:43 PM

NO. 53548-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SCHLUETZ,

Appellant.

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

The Honorable Keith C. Harper, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
IN ARGUING SCHLUETZ’S OFFENSES DO NOT CONSTITUTE “SAME CRIMINAL CONDUCT,” THE PROSECUTION CONFLATES OBJECTIVE INTENT WITH SUBJECTIVE INTENT AND OFFERS AN UNREALSONABLE TEST FOR WHAT CONSTITUTES A “VICTIM.”	1
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Borseth</u> No. 36230-2-II, 2020 WL 2182269 at *7 (unpublished slip op. filed May 5, 2020).....	3
<u>State v. Chenoweth</u> 185 Wn.2d 218, 370 P.3d 6 (2016)	3
<u>State v. Johnson</u> 12 Wn. App. 2d. 201, 460 P.3d 1091 (2020)	3
<u>State v. Phuong</u> 174 Wn. App. 494, 299 P.3d 37 (2013).....	1
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
GR 14.1	3
RCW 9.94A.530	4
RCW 9.94A.589	1, 2
RCW 9A.28.020	2

A. ARGUMENT IN REPLY

IN ARGUING SCHLUETZ'S OFFENSES DO NOT CONSTITUTE "SAME CRIMINAL CONDUCT," THE PROSECUTION CONFLATES OBJECTIVE INTENT WITH SUBJECTIVE INTENT AND OFFERS AN UNREALSONABLE TEST FOR WHAT CONSTITUTES A "VICTIM."

On appeal, Schluetz challenges the trial court's conclusion that his two attempted rape convictions do not constitute "same criminal conduct" for purposes of calculating his offender score. Brief of Appellant (BOA) at 4-7. "Same criminal conduct" are crimes that involve the same intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a).

In response, the prosecution first concedes Schluetz's attempted rapes "were committed at the same time and place." Brief of Respondent (BOR) at 5. This Court should accept the concession.

Next the prosecution acknowledges the "same intent" prong of the analysis looks not to the particular *mens rea* of the crime, but instead the "objective criminal purpose in committing the crime." BOR at 5 (citing State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013)). Despite this acknowledgement, the prosecution argues Schluetz attempted rapes involved different intents because he "intended to have sexual intercourse with two distinct children, one aged twelve and one aged eight." BOR at 6. This claim is wrong for several reasons.

First, the fictitious victims in Schluetz's case are two virtually indistinguishable 13-year old girls, not eight and twelve years old. CP 4-12.

Secondly, despite acknowledging the 'objective criminal purpose' standard for 'intent,' the prosecution emphasizes Schluetz's specific *subjective* intent, claiming he "intended to have sexual intercourse with two distinct children," BOR at 6-8. Because the analysis under RCW 9.94A.589(1)(a) involves objective rather than subjective intent, the prosecution's argument misses the mark and should be disregarded.

Finally, the prosecution fails to acknowledge what actually occurred and when Schluetz actually committed the attempted rapes. A criminal attempt is committed when a person, "with intent to commit a specific crime, . . . does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Here, the single act constituting the two attempted rapes was Schluetz showing up at the law enforcement undercover home in Port Hadlock on March 25, 2018. CP 4-12; RP 282-88, 291-93, 427-28, 491. Showing up was the "substantial step." Schluetz's intent at that moment, when objectively viewed, was to have sex with two underage girls. There is nothing to suggest he planned to first have sex either girl before the other. He simply intended to have sex with two 13-year old girls he had never met.

This analysis shows Schluetz's attempted rapes occurred simultaneously; they were completed as soon as he showed up at the undercover house. It also shows Schluetz's objective intent was identical for each offense; to have sex with 13 year old girls. The only remaining issue is whether the offenses involved the same victim.

Schluetz concedes the law is not well developed regarding what constitutes a "victim" in crimes charged as a result of Net Nanny sting operations. Counsel could find no published or unpublished cases involving Net Nanny sting operation that address the "same victim" prong of "same criminal conduct" test. There are several that address the "same intent" element, but not the "same victim" element. See e.g., State v. Johnson, 12 Wn. App. 2d. 201, 212-13, 460 P.3d 1091 (2020) State v. Borseth, No. 36230-2-II, 2020 WL 2182269, at *7 (unpublished slip op. filed May 5, 2020)¹; State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016).

As a result of the lack of authority, in the opening brief Schluetz analogizes from a case involving unlawful firearm possession to argue that the "victim" in the Net Nanny sting operation cases is the general public. BOA at 7. Schluetz recognizes this case is not directly on point. Nonetheless, it does support a conclusion that the "victim" of crimes arising from Net Nanny sting

¹ Schluetz cites to this unpublished decision as allowed by GR 14.1(a).

operation is the general public. Just as there are no specific victim when someone unlawfully possesses a firearm, there are no specific victims to an attempted sex crime arising from Net Nanny sting operations. Schluetz urges this Court to conclude in a published decision that the victim in sex offenses arising from Net Nanny sting operation is the general public.

The prosecution notes the lack of authority for the proposition that crimes against fictitious victims renders the “general public” the victim. BOR at 4, 6. But it then asserts:

Defense argues that it is the public at large that is the victim of an attempt to rape a fictitious child. That is not the law in the State of Washington. Where a defendant intends to have sexual intercourse with two fictitious underage persons and takes a substantial step to accomplish it, two crimes have been committed. Where two victims exist, two crimes exist, as is clearly contemplated by RCW 9.94A.530

BOR at 6.

Ironically, the prosecution fails to cite authority for its claim that two fictitious victims means two separate crimes with two different victims. RCW 9.94A.530 provides no such support. Also ironic is the phrase “Where two victims exist, two crimes exist, . . .” Here there were no specific victims because no actual 13-year old girls were employed by the Net Nanny sting operation used to lure Schluetz to Port Hadlock.

The Net Nanny sting operation is intended to incarcerate adults willing to prey on children for sex. RP 358. It accomplishes that whether one, two or

ten fictitious underage girls are used for bait. The criminal act is appearing at the undercover house with the intent to engage in sex with underage girls.

Under the prosecution's theory of "victim," an offender caught by a Net Nanny sting operation will have a lower or higher offender score depending on how many fictitious underage girls were used as bait. This gives the Net Nanny operatives the power to determine how severe punishment will be because it dictates that the more fictitious underage girls used as bait the higher the offender score will be. Such unfettered power can be avoided by recognizing the true victim in Net Nanny sting operations is the general public, just like it is for unlawful possession firearm. Schluetz urges this Court to make that holding here.

B. CONCLUSION

For the reason stated here and in the opening brief, Schluetz asks this Court to reverse and remand for resentencing based on an offender score of zero.

DATED this 4th of June, 2020,

Respectfully submitted,

NIELSEN KOCH, PLLC.


CHRISTOPHER H. GIBSON, WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

NIELSEN KOCH P.L.L.C.

June 05, 2020 - 12:43 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53548-3
Appellate Court Case Title: State of Washington, Respondent v. Michael Schluetz, Appellant
Superior Court Case Number: 18-1-00074-8

The following documents have been uploaded:

- 535483_Briefs_20200605124331D2512017_7507.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 53548-3-II.pdf

A copy of the uploaded files will be sent to:

- jstmarie@co.jefferson.wa.us

Comments:

Copy mailed to: Michael Schluetz 948479 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA 99001-

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20200605124331D2512017