

FILED

JUN 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III
No: 29899-0-III

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD BUNCH,

Appellant.

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

THE HONORABLE MICHAEL E COOPER

THE STATE OF WASHINGTON'S RESPONSIVE BRIEF

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Attorney for Respondent

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2 The defendant’s multiple convictions did not constitute the same criminal conduct because while each offense involved the same victim and same time and place, Rape of a Child in the First Degree requires no intent and Child Molestation in the First Degree requires mere “sexual contact” absent the forcible compulsion required to prove the crime of Rape in the First Degree.

3 The court did not err by running the appellant’s indeterminate sentences for Luring, Child Molestation in the First Degree, and Rape of a Child in the First Degree consecutive to his indeterminate sentence for Rape in the First Degree because the Washington Legislature specifically sets out how a court “shall” sentence sex offenders, under RCW 9.94A.507, following a finding of fact by a jury that an offense was “predatory,” while exclusively providing, under RCW 9.94A.535, that the court “may” impose consecutive sentences, without a finding of fact by a jury, based upon “Aggravating Circumstances – *Considered and Imposed by the Court (emphasis added).*”

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A. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1 The court did not err by failing to give a "multiple acts" jury unanimity instruction because this case did not involve multiple acts and multiple incidents committed over a prolonged period of time.

2 The court did not err by failing to give a "separate and distinct acts" jury instruction because it was clear which acts supported each crime.

3 The court did not err by entering a conviction for child molestation in violation of the appellant's right to a unanimous jury verdict because it was clear which act supported the crime compared to other crimes the appellant's committed.

4 The court did not err by entering a conviction for child molestation in violation of double jeopardy because this crime was distinguishable from the other sex offenses the appellant committed against the 9-year-old child.

5 The court did not err by refusing to count any of the appellant's offenses as the "same criminal conduct," for calculation of the appellant's offender score because the court correctly merged the crimes of Rape in the First Degree and Kidnapping in the First Degree but found that the crimes of Rape of a Child in the First Degree, Child Molestation in the First Degree, and Luring did not share the same intent.

6 The court did not err by refusing to impose concurrent sentencing because the court lawfully exercised its discretion to impose consecutive sentences per RCW 9.94A.535 and 9.94A.589.

7 The court did not err by enhancing the appellant's standard sentencing range for Rape in the First Degree to 318 months to life based upon the age of the child and then impose an exceptional, consecutive sentence based on the same factor because in enhancing the appellant's standard sentencing range, the court followed Washington's mandatory sentencing of sex offenders of sex offenders per RCW 9.94A.507, and imposing consecutive sentences, the court properly exercised its discretion, citing an aggravating circumstance per RCW 9.94A.535.

8 The court did not err by imposing an exceptional sentence that was indeterminate.

9 The court did not err by imposing an exceptional sentence based upon a high offender score because RCW 9.94A.535 authorizes the same when it is clear that the appellant's commission of multiple current offenses would result in some of the current offenses going unpunished.

10 The court did not err by failing to enter written findings of fact and conclusions of law to support the exceptional sentence because the Judgment and Sentence contains findings on pages 4 and 5, and the court spent considerable time, on the record, setting out its legal analysis, after reviewing sentencing memorandums, submitted by both sides, and hearing oral argument.

B. STATEMENT OF THE CASE

On July 19, 2008, 9-year-old LJ went to the Japanese Garden, on the campus of Central Washington University, to play with her brother, RJ, 12, and his friend, DK, 10. While looking at water skippers, in a stream that winds through the garden, a shirtless man approached. The man was unknown to the children. The children continued to play, unbothered. The man asked the children their names. He engaged the children in light conversation about what they were doing. Within a few minutes, DK told RJ that he had to go to the bathroom. RJ told DK where the bathroom was located, outside the gardens in the Central Washington University commons building. DK asked RJ to show him where the bathroom was located. RJ agreed. RJ asked his sister, LJ, if she would be ok. She said she would. The strange man also told RJ that he would watch his sister. RP 195-199, 222-230.

After the boys left, the man asked LJ if she would like to see a “bird’s nest” he said he had seen in the corner of the garden. LJ followed and looked up but did not see a bird’s nest. Instantly, the man grabbed LJ by the arm and pulled her to the southwest corner of the garden behind some bushes. LJ followed. However, when she looked up and did not see a bird’s nest, she resisted. She pulled back with all of 40 pounds of her body weight. But she was overpowered by the stranger. She tried yelling for help but found it too hard to breathe. RP 199-200.

The man put LJ down on the ground, on her back, and told her to “(s)hut up and be still.” With one hand, he covered the little girl’s mouth. With his other hand, he pulled down LJ’s shorts and panties. He then licked LJ’s vagina before penetrating her with his finger. LJ screamed in pain as she began to bleed. The man then pulled down his pants, and rubbed his penis on her legs as he kissed and licked the little girl about the face. At one point, he inserted his tongue into LJ’s mouth. RP 199-204.

Within a few minutes, RJ and DK returned. RJ looked around for his sister. When he did not find her, he began to call for her. Then he heard something in the bushes. He bolted towards the sound and discovered his sister lying on the ground, naked from the waist down. The man, he had seen earlier, was standing over his sister. He too was naked from the waist down. He told the man to “Get the heck out of here.” RP 222-230.

The man quickly pulled-up his pants and ran out of the north side of the gardens. LJ quickly put her clothes back on, RJ grabbed his sister by the hand, and the two ran out of the gardens, with DK in tow. They took LJ to a house where her parents were attending a barbecue for Japanese exchange students. LJ told her parents and an off-duty police officer who took charge of the situation, rushing LJ to Kittitas Valley Community Hospital where a sexual assault nursing examiner

collected evidence for a rape kit. LJ later told a child forensic interviewer what happened. RP 205-207.

Police immediately searched the surrounding area and established a cordon around the city but were unable to locate the suspect. Three months passed, and the case went cold until the Washington State Crime Lab reported a DNA match between a bucal swab taken from LJ's face and the appellant who was incarcerated in Nevada for similar but unrelated crimes he committed three days later. RJ and DK subsequently identified the appellant from a police photo montage. LJ narrowed the photo montage down to two persons, one of whom was the appellant. RP 206-213.

The State of Washington charged the appellant with Kidnapping in the First Degree, Luring, Rape in the First Degree, Rape of a Child in the First Degree, and Child Molestation in the First Degree. Trial commenced on March 8, 2011.

At trial, the jury heard testimony from LJ, her brother (RJ), their friend (DK), the victim's father and mother, Kevin and Patty Johnson, off-duty detective Darren Higashiyama, Kittitas Valley Community Hospital RN and SANE Pam Clemons, Child Forensic Interviewer Lisa Larrabee, Mr. Bunch's employer Dominic Nicandri of Gordon Trucking, Washington State Crime Lab Forensic Scientist Amy Smith, Mr. Bunch's ex-girlfriend Susan Keene, Verizon Wireless executive Faud Dadabhoy, and Central Washington police officers Brian Pinger, Jeff St. John, Brian Melton, and

Jason Berthon-Koch.

Ms. Smith testified that she developed a DNA profile of an unknown male from a face swab taken from the victim's upper lip, which tested positive for saliva. The forensic scientist testified that using a reference sample taken from the appellant, she was able to match the DNA profile she obtained from the face swab with the appellant's DNA profile. The forensic scientist testified that the statistical probability that the DNA profile, developed from the face swab, matched anybody but the appellant's DNA profile was: 1 in 480 billion. RP 490-493.

On March 11, 2011, the jury found the defendant guilty as charged. In addition, the jury found that the crimes of Rape of a Child in the First Degree and Child Molestation in the First degree were "predatory."

At sentencing, the court found that the appellant's criminal history included two 2009 out of state felony convictions for Lewdness with a Child Under the Age of Fourteen Years and Luring a Child after the appellant sexually assaulted a 13-year-old mentally disabled child on July 22, 2008 for which the appellant was sentenced to consecutive sentences of 10 years to life and 6 to 15 years, respectively. CP 303-338, 343-355.

The court also found that the appellant's criminal history included 2010 convictions, following a jury trial, for Rape in the First Degree, Robbery in the First

Degree, and Kidnapping in the First Degree of a 20-year-old student off a wooded trail on the campus of State Martin's University on April 2, 2008. In that case, the jury also returned special verdicts, finding that the: (1) appellant's conduct, following the commission of each crime, manifested extreme lack of remorse and deliberate cruelty, and (2) crimes of Robbery in the First Degree and Kidnapping in the First Degree were committed with "sexual motivation." For those crimes, Thurston County Judge Anne Hirsch sentenced the appellant to an "exceptional sentence" of 720 months for the crime of Rape in the First Degree and 126 months for the crime of Robbery in the First Degree. At that point, the appellant was calculated to have an offender score of 6 based upon his two Nevada convictions. CP 294-307.

In this case, Kittitas County Superior Court Judge Michael Cooper combined the appellant's adult history and other current offenses, counting the appellant's three prior felony convictions in Thurston County as two sex offenses. Judge Cooper found that the crimes of Rape in the First Degree and Kidnapping in the First Degree merged, and the crime of Robbery in the First Degree with Sexual Motivation counted as the second prior sex offense conviction. The appellant's two prior felony convictions from Nevada counted as one prior sex offense conviction and one nonviolent felony conviction. CP 345.

Therefore, the court found that the appellant's "adult history" included two prior sex offense convictions from Thurston County and one prior sex offense conviction from Nevada, multiplied by 3, per RCW 9.94A.525 (17), for a score of 9. The nonviolent felony conviction for Luring a Child added one point for a total offender score of 10. CP 345.

The appellant's "other current offenses" for each current sex offense (Rape in the First Degree, Rape of a Child in the First Degree, or Child Molestation in the First Degree), necessarily included the other two remaining current sex offenses, multiplied by three, per RCW 9.94A.525 (17), for a total of 6 and the other current nonviolent felony conviction (Luring) for a total of 7. CP 345.

Adding the defendant's adult history and his other current offenses, the court totaled the defendant's total offender score as 17 for the crimes of Rape in the First Degree (which yields a higher offender score than Kidnapping in the First Degree), Rape of a Child in the First Degree, and Child Molestation in the First Degree. CP 345.

The court sentenced the appellant to the minimum term to which it was mandated to sentence him under RCW 9.94A.507. The standard sentencing range for Rape in the First Degree and Rape of a Child in the First Degree, with an offender score of "9 or more," is 240-318 months. RCW 9.94A.510 and

9.94A.515. The appellant's offender score was greater than 9. 318 months or 26.5 years is the maximum of the standard range. 26.5 years is greater than 25 years. Therefore, the court calculated the appellant's sentencing range, for the appellant's two crimes with the highest sentencing ranges, to be the maximum of the minimum or 26.5 years to life for the crimes of Rape in the First Degree and Rape of a Child in the First Degree. CP 346.

The court then exercised its *discretion*, under RCW 9.94A.535 (2)(c), and sentenced the appellant to two consecutive sentences of 26.5 years or a total of 53 years to life, ordering that the appellant's sentences for Luring (12 months), Child Molestation in the First Degree (300 months to life), and Rape of a Child in the First Degree (318 to life) be served concurrently with each other but consecutive to his conviction for Rape of a Child in the First Degree (318 to life). CP 346-347. RP 638-639. In reaching its decision, the court specifically cited RCW 9.94A.535 (2) (c) noting both that "the multiple offenses committed would not be adequately punished unless the court exceeds the standard range," and finding that the consecutive sentences were justified "to reflect that the victim of the crimes was a 9-year-old child," RP 639, CP 346.

This appeal followed. CP 356.

C. ARGUMENT

1. **The defendant was not denied his right to a unanimous jury verdict and/or placed in double jeopardy because the evidence presented was not of several distinct acts committed, over an extended period of time, each one of which could form the basis of one count charged, but a continuum of acts committed against one victim, at one location, within the span of minutes and, even if error was found, no rational trier of fact could have entertained a reasonable doubt that the evidence established the crimes beyond a reasonable doubt when the evidence is evaluated in a common sense manner.**

Petrich arises in cases in which the State is alleging multiple distinct criminal acts, any one of which could serve as evidence for the crime charged. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). Therefore, in order to ensure that all of the jurors reach a unanimous verdict as to one act, committed on one occasion, for one crime charged, the court must instruct the jury:

The State alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant (on any count) of (identify crime), one particular acts of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime). SEE Washington Pattern Jury Instructions 4.25.

To determine whether criminal conduct constitutes one continuing acts, “the facts must be evaluated in a commonsense manner.” If the evidence involves conduct at different times and places, then the evidence tends to show “several distinct acts.” SEE *Petrich* at 571.

On the other hand, “if the criminal conduct occurred in one place during a short period of time between the same aggressor and victim, then the evidence

tends to show one continuing act.” WPIC at 111 citing State v. Handrin, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

If error is found, in a multiple acts case, in the absence of a Petrich instruction, it is harmless error if a rational trier of fact would not have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

Petrich and Kitchen both addressed testimony of one victim, in each case, testifying as to multiple incidents, occurring over a period of a year and a half, any one of which could have supported the specific charges in each case (two counts in Petrich, one count in Kitchen). As the Petrich court noted, “the majority of cases in which this issue will arise” will involve crimes against children alleging multiple incidents of conduct over the course of time. The challenge is that when the prosecutor only charges one crime for the multiple incidents of conduct, it is impossible to know that the jury reached a unanimous verdict as to one of the acts without being instructed that it must reach a unanimous verdict as to which act was proved. SEE Petrich at 572

In this case, the State of Washington introduced evidence that the appellant committed the crimes of: (1) Luring when he used the pretense of “bird’s nest” to lure the 9-year-old child victim to a remote corner of the garden.

(2) Kidnapping in the First Degree when he pulled the child to the remote corner of the garden, forced her to the ground, on her back, pulled her shorts and panties off, and raped her. (3) Rape in the First Degree when he digitally penetrated the child's vagina, causing her to bleed. (4) Child Molestation in the First Degree when he licked the child's vagina and rubbed his penis between her legs, AND (5) Rape of a Child in the First Degree when he digitally penetrated the child's vagina, causing her to bleed.

The State of Washington proved the appellant committed these crimes against the child, a complete stranger, on one day, at one location, as part of a continuum of acts, within a matter of minutes. In addition, the State of Washington presented to the jury evidence that the appellant knew he had to act quickly to complete his crimes because he knew that the child's older brother and his friend would be returning from the bathroom very soon.

Therefore, when evaluated in a common sense manner, it is clear that the jury was not faced with evidence of numerous distinct acts or incidents, leaving it undecided as to which act the jury reached unanimity for each crime charged.

2. The defendant's multiple convictions did not constitute the same criminal conduct because while each offense involved the same victim and same time and place, Rape of a Child in the First Degree requires no intent and Child Molestation in the First Degree requires mere "sexual contact" absent the forcible compulsion required to prove the crime of Rape in the First Degree.

RCW 9.94A.589 provides:

(W)henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by suing all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offense encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exception sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.525 (17) provides that if the present conviction is for a sex offense, it is three points for each prior conviction.

In this case, there is no dispute that the appellant committed all three sex offenses against the same 9-year-old victim at the same time and place. However, each sex offense does not share the same intent. Rape in the First Degree requires that the act of sexual intercourse be by "forcible compulsion," defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself, or in fear of being kidnapped." RCW 9A.44.040, 9A.44.010 (6). Rape of a Child in the First degree requires no intent or any degree of force. RCW 9A.44.073. The crime is predicated upon the act of sexual intercourse and the respective ages of the perpetrator and victim, absent intent or force. Child Molestation in the First Degree requires "sexual contact" but no force. RCW 9A.44.083.

While all of the offenses are “sexual” in nature, the statutory scheme is different and for the obvious reason: There is a clear factual distinction between forcibly raping a *person* versus having “sexual contact” or “sexual intercourse” with a *child*, absent any degree of force.

Therefore, the court correctly found that Rape in the First Degree and Kidnapping in the First Degree should be counted as one current offense because they merged. RP 634. However, the crimes of Rape of a Child in the First Degree and Child Molestation in the First Degree should not be counted as one current offense because they do not share the same criminal intent. RP 637-638.

Therefore, the court counted the crimes of Rape of a Child in the First Degree and Child Molestation in the First Degree as two current sex offense convictions and Luring as one unranked nonviolent felony conviction.

Combining the defendant’s adult history and other current offenses, the court counted the defendant’s three prior felony convictions in Thurston County as two sex offenses. The court counted the crimes of Rape in the First Degree and Kidnapping in the First Degree as one prior sex offense conviction because they constituted the same criminal conduct, just like in the present case, and the crime of Robbery in the First Degree with Sexual Motivation counted as the second prior sex offense conviction. The defendant’s two prior felony convictions in

Washoe County, Nevada counted as one prior sex offense conviction and one nonviolent felony conviction. CP 345.

Therefore, the court found that the defendant's "adult history" included two prior sex offense convictions from Thurston County and one prior sex offense conviction from Washoe County, Nevada, multiplied by 3, for a score of 9. The nonviolent felony conviction for Luring a Child added one point for a total offender score of 10. CP 345.

The defendant's "other current offenses" for each current sex offense (Rape in the First Degree, Rape of a Child in the First Degree, or Child Molestation in the First Degree), necessarily included the other two remaining current sex offenses, multiplied by three, for a total of 6 and the other current nonviolent felony conviction (Luring) for a total of 7. CP 345.

Adding the defendant's adult history and his other current offenses, the court correctly tallied the defendant's total offender score as 17 for the crimes of Rape in the First Degree (which yields a higher offender score than Kidnapping in the First Degree), Rape of a Child in the First Degree, and Child Molestation in the First Degree. CP 345.

The appellant cites State v. Dolen, 83 Wn.App. 361, 921 P.2d 590 (1996) and State v. Palmer, 95 Wn.App. 187, 975 P.2d 1038 (1999) to argue that in cases

involving multiple counts of sex offenses, the court should treat the offenses as constituting the “same criminal conduct” for sentencing purposes. However, these cases are easily distinguishable from the current case.

Dolen involved an adult convicted of child rape and child molestation, *in the absence of force*. The court held that the child rape and child molestation were the same criminal conduct, in part, because the child molestation furthered the child rape. However, the decision was rendered in the absence of a record showing whether the jury convicted Dolen of the two crimes based upon a single incident or in separate. Therefore, while the appellant may cite Dolen to argue that two sex offenses committed in the same incident constitute the same criminal conduct, the case cannot be relied upon because it was unknown on what incident(s) the jury unanimously agreed supported each crime charged. SEE Dolen, 83 Wash.App. at 365, 921 P.2d 590. Palmer involved an adult male convicted of repeatedly raping another *adult* (his ex-wife) within a few minutes.

This case is a hybrid of Dolen and Palmer with the appellant being convicted of crimes applicable to the child victim in Dolen and the adult victim in Palmer. In Dolen, the defendant committed his sex offenses against a known 12 to 13 year-old, over the span of a year, in the absence of force. In Palmer, the defendant committed his crimes against his ex-wife, not a 9-year-old child being

forcibly raped by a stranger after going to a public garden to play with her brother.

In this case, the jury convicted the appellant of sex offenses against a child and forcible rape against the same child. The court clearly noted, in its oral findings, that the “dispositive question” was whether the crimes of Rape in the First Degree, Rape of a Child in the First Degree, and Child Molestation in the First Degree “are the same or truly separate offenses and,” while finding that it was “not clear” whether the “legislative intent (was) that they should be punished separately.” RP 636. But the court found that when you look at the elements of each sex offense, the “elements don’t match up,” explaining that child molestation could be committed separately and apart without committing forcible rape *or* child rape. In addition, none of the charges share the same intent. Therefore, the court correctly found that the crimes neither created a double jeopardy issue nor constituted the same course of conduct. RP 637-638.

The foundation of the court’s decision is that while all sex offenses may appear to constitute the same criminal conduct, not all sex offenses share the same intent

3. The court did not err by running the appellant’s indeterminate sentences for Luring, Child Molestation in the First Degree, and Rape of a Child in the First Degree consecutive to his indeterminate sentence for Rape in the First Degree because the Washington Legislature specifically sets out how a court “shall” sentence sex offenders, under RCW 9.94A.507, following a finding of fact by a jury that an offense was “predatory,” while exclusively providing, under RCW 9.94A.535, that the court “may”

impose consecutive sentences, without a finding of fact by a jury, based upon “Aggravating Circumstances – *Considered* and Imposed by the Court (*emphasis added*).”

RCW 9.94A.507 sets out how “sex offenders . . . shall” be sentenced:

(T)he court *shall* impose a sentence to a maximum term and a minimum term (emphasis added). The maximum term shall consist of the statutory maximum sentence for the offense . . . (T)he minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence . . . (However), (i)f the offense that caused the offender to be sentenced under this section was rape of a child in the first degree . . . or child molestation in the first degree, and there has a been a finding that the offense was predatory . . . the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

RCW 9.94A.535 provides that imposition of a consecutive sentence is an exceptional sentence, subject to the limitations set out under RCW 9.94A.589 (SEE Argument under 2.) and may be appealed per RCW 9.94A.585.

RCW 9.94A.535 (2)(c) provides that the court may impose an aggravated exceptional sentence without a finding of fact by a jury if “the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offense going unpunished.”

RCW 9.94A.585 (4) provides, in relevant part, that:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Further, subsection (5) provides:

A review, under this section, shall be made solely upon the record that was before the sentencing court.

In this case, the court sentenced the appellant to the minimum term to which it was mandated to sentence him under RCW 9.94A.507. The standard sentencing range for Rape in the First Degree and Rape of a Child in the First Degree, with an offender score of “9 or more,” is 240-318 months. RCW 9.94A.510 and 9.94A.515. The appellant’s offender score was greater than 9. 318 months is the maximum of the standard range. 26.5 years is greater than 25 years. Therefore, the court correctly sentenced the appellant to the maximum of the minimum, *as mandated*.

The appellant’s argument is that the court erred in sentencing him for the child rape and child molestation consecutive to the forcible rape because the child’s age had already been taken into account in calculating the standard range and high offender score. But this argument is without merit because RCW 9.94A.507 sets out how “sex offenders . . . shall” be sentenced. The court had no discretion and clearly indicated the same on the record, stating that the “standard range” was 318 to life for the forcible rape, 318 to life for the child rape, and 300 to life for the child molestation. RP 638.

While the court, in imposing consecutive sentences of 26.5 years, found

that the consecutive sentences were justified “to reflect that the victim of the crimes was a 9-year-old child,” the court also found, citing RCW 9.94A.535 (2)(c) that “the multiple offenses committed would not be adequately punished unless the court exceeds the standard range.” RP 639, CP 346. This language mirrors the language of the statute which authorizes the court to impose an aggravated exceptional sentence without a finding of fact by a jury if “the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offense going unpunished.” RCW 9.94A.535 (2)(c).

In this case, the appellant committed multiple current offenses. The appellant had an offender score of 17. Therefore, the court logically reasoned not to run the child rape and child molestation consecutive to the sentence for forcible rape of any person would not “reflect” that the victim was a child. RP 639, CP 346.

Clearly, as argued under 2, if child rape and child molestation do not constitute the same course of conduct as forcible rape, then it is logical to impose a consecutive sentence to ensure that the crimes against the child do not go unpunished. To argue otherwise is to say that when a person is convicted of forcible rape, the law does not take into account whether the victim is a child or adult.

The court's rationale is clear. If there is no additional penalty for raping a child, then the law does not distinguish between raping a child and an adult. The punishment for raping an adult will be the same as the punishment for raping a child.

In this case, the appellant, a total stranger, lured a 9-year-old child, to a remote portion of the garden, on the pretense of seeing a bird's nest, and then forcibly raped her until her vagina bled red. The sentencing court had more than sufficient facts in evidence to exercise its discretion to impose a sentence outside the standard sentence range after following the mandatory sentencing.

If anything, an argument could be made that the sentence was too lenient. The State of Washington, in its sentencing recommendation, requested that the court impose *three consecutive sentences* of 318 month, 318 months, and 300 months, respectively, arguing that "short of taking Richard Duane Bunch's life under the law, which obviously is not permitted in this case, the State of Washington is asking this court to take his freedom for life." RP 629, 638.

But the court elected to order that the appellant serve the child rape and child molestation concurrently but consecutive to the forcible rape, imposing 25 years less than the State of Washington requested. In addition, the appellant had already been convicted of similar sex offenses in Thurston County for which he

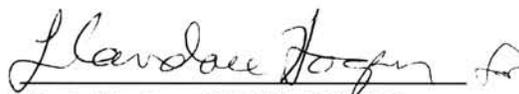
received more time *and* the victim, in that case, was an adult.

Last, even if this court was to find that the court should have reduced the appellant's offender score from 17 to 10, based upon the appellant's argument above, and order that all of appellant's time confinement be served concurrently, the court would not be legally impeded, on remand, from imposing one sentence of 53 years to life, finding under RCW 9.94A.535 (2) (c) that an aggravating circumstance exists because the appellant committed multiple current offenses and his high offender score of 10 would result in some of the current offenses going unpunished – unless an offender score of 10 is not considered a high offender score?

D. CONCLUSION

For these reasons, the appellant's convictions and sentence should stand.

Respectfully submitted June 5, 2012,


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