

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 16, 2011, 10:02 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 85511-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LINDY DEER,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

PETITIONER'S ANSWER TO WACDL'S AMICUS CURIAE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>SUMMARY OF ARGUMENT</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. WACDL'S PROPOSED INTERPRETATION OF THE CHILD RAPE STATUTES WOULD CREATE A MENS REA WHERE THIS COURT HAS HELD THAT NONE EXISTS	3
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Chhom, 128 Wn.2d 739,
911 P.2d 1014 (1996)..... 9

State v. Deer, 158 Wn. App. 854,
244 P.3d 965 (2010)..... 2, 12

State v. J.P., 149 Wn.2d 444,
69 P.3d 318 (2003)..... 9

State v. Jacobs, 154 Wn.2d 596,
115 P.3d 281 (2005)..... 9

State v. Knapstad, 107 Wn.2d 346,
729 P.2d 48 (1986)..... 8

State v. Lively, 130 Wn.2d 1,
921 P.2d 1035 (1996)..... 8

State v. Riker, 123 Wn.2d 351,
869 P.2d 43 (1994)..... 12

State v. Saiz, 63 Wn. App. 1,
816 P.2d 92 (1991)..... 6

State v. Stephens, 158 Wn.2d 304,
143 P.3d 817 (2006)..... 6

State v. Swagerty, 60 Wn. App. 830,
810 P.2d 1 (1991)..... 6

Statutes

Washington State:

RCW 9.94A.411 7
RCW 9A.44.010 6
RCW 9A.44.070 10
RCW 9A.44.073 10
RCW 9A.44.076 10
RCW 9A.44.079 10
RCW 9A.44.083 6
RCW 9A.44.086 6
RCW 9A.44.089 6

Other Authorities

Black's Law Dictionary 1177 (8th ed. 2004) 9, 10

A. SUMMARY OF ARGUMENT

Washington courts, including this Court, have universally held that the crime of rape of a child has no element of mens rea. Amicus Curiae WACDL suggests that the term "perpetrator" in the child rape statute should be interpreted in a manner that creates a mens rea element. WACDL's argument should be rejected.

B. STATEMENT OF THE CASE

The State has provided a relatively detailed account of the facts of this case in both the Brief of Respondent and the Supplemental Brief of Petitioner. See Brief of Respondent, at 1-9, and Supplemental Brief of Petitioner, at 1-6. In light of the facts as presented by Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL), however, a brief augmentation of some salient facts is necessary to correct potential inaccuracies.

First, WACDL presents the facts of this case in a matter that seems to imply that it was undisputed that Deer was sleeping on several occasions when she had intercourse with the victim, R.R. See Amicus Curiae Brief, at 2. In light of the record, however, Deer's claim that she was sleeping was incredible, given R.R.'s descriptions of what had occurred when he and Deer had

intercourse, including the manner in which Deer took an active role. See RP (2/11/09-I) 40-42, 46-52, 58-66, 69, 92-95; RP (2/11/09-II) 23, 34. In addition, WACDL suggests that the State relied on R.R.'s testimony that he placed Deer's hand on his penis during one incident of sexual intercourse to establish "sexual contact." Amicus Curiae Brief, at 2. But as the prosecutor made clear in his closing argument, the State was relying on acts of sexual intercourse -- specifically, vaginal intercourse and oral intercourse -- as the factual basis for count I, not the act of R.R. placing Deer's hand on his penis. RP (2/12/09) 47-49.

Further, WACDL repeats the error contained in the Court of Appeals' opinion that "Deer and the State proposed a jury instruction that would have required the State to prove beyond a reasonable doubt that she committed a 'volitional' act." Amicus Curiae Brief, at 2-3 (quoting State v. Deer, 158 Wn. App. 854, 859-60, 244 P.3d 965 (2010)). As noted in the State's supplemental brief, the record shows that the instruction that Deer proposed and that the State agreed to would have required the defense to produce sufficient evidence to raise a reasonable doubt as to whether the acts of sexual intercourse were "volitional." RP (2/11/09-II) 78. In other words, Deer proposed an instruction

that would have allocated the burden of proof to the defense, albeit only to raise a reasonable doubt.

Lastly, WACDL describes as "dicta" the Court of Appeals' decision that "volition" is an implied element of child rape. Amicus Curiae Brief, at 3. If this were the case, then the State would not be bound by this decision. The suggestion that the Court of Appeals' decision is dicta strains reason.

C. ARGUMENT

1. WACDL'S PROPOSED INTERPRETATION OF THE CHILD RAPE STATUTES WOULD CREATE A MENS REA WHERE THIS COURT HAS HELD THAT NONE EXISTS.

WACDL asserts that in any child rape case, the State bears the burden of proving beyond a reasonable doubt that the defendant is the "perpetrator" and the child is the "victim." WACDL argues that in this case, this means proving beyond a reasonable doubt that Lindy Deer committed acts of sexual intercourse with a child while she was awake and consenting to the acts in question. WACDL further argues that the child is the "perpetrator" of a crime rather than the "victim" of a crime when the child engages in sexual activity with a sleeping or non-consenting person. WACDL asserts that its suggested interpretation of the terms "perpetrator" and

"victim" is necessary to prevent the State from unjustly charging sexual assault victims with child rape or child molestation when their assailants are under the age of 16. See Amicus Curiae Brief, at 4-11.

WACDL's argument is specious. Under the reasoning of WACDL's argument, in a case where a defendant claims that the child encouraged or instigated a consensual act of sexual intercourse -- not an uncommon claim in child sex cases -- WACDL's interpretation of the statute would preclude prosecution of the older person for child rape because there would be no "perpetrator," even though the legislature quite obviously intends for the older person to be prosecuted in such circumstances. For this reason alone, WACDL's statutory interpretation should be rejected. And most importantly, WACDL's argument would bring an element of mens rea into the statute via the term "perpetrator," although Washington courts have universally held that none exists. Accordingly, WACDL's arguments are without merit.

As a preliminary matter, WACDL's argument that its interpretation of the child rape statutes is necessary to prevent the State from charging rape victims with child rape appears to be premised on the notion that the State is arguing that the defenses

of unconsciousness and duress are unavailable to defendants charged with child rape. It further appears that WACDL bases this argument on the State's correct statement of well-settled law that rape of a child is a so-called "strict liability" offense. See Amicus Curiae Brief, at 8-9. In these respects, WACDL misunderstands the State's position.

As is clearly set forth in the State's briefing, the State's position is that when a defendant is charged with the strict liability offense of child rape, the defense of unconsciousness (like duress, or unwitting possession in drug possession cases) is an affirmative defense that the defendant must establish by a preponderance of the evidence. See Supplemental Brief of Petitioner, at 10-12. Accordingly, WACDL's suggestion that its interpretation of the statute is necessary to prevent the State from unjustly convicting crime victims is misguided.¹

In addition, WACDL posits hypothetical scenarios in which the State could charge unwitting persons with child molestation, such as where a child grabs an unsuspecting adult's crotch or breast "on a crowded bus." See Amicus Curiae Brief, at 8-9.

¹ Indeed, in this case the prosecutor argued in closing that if Deer "was incapacitated, she would not be guilty," and if "she was actually forcibly raped by a person, obviously, there could be no criminal liability for it[.]" RP (2/12/09) 50.

These arguments are unavailing for an additional reason. Unlike rape of a child, the crime of child molestation encompasses a mens rea, *i.e.*, that the defendant either had sexual contact with a child or knowingly caused a minor to have sexual contact with a child for the specific purpose of sexual gratification. See RCWs 9A.44.083, 9A.44.086, 9A.44.089, and RCW 9A.44.010; see also State v. Stephens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (although intent is not an element of child molestation, "intent is a component of 'sexual contact'"). In other words, child molestation is not a strict liability offense.² See State v. Saiz, 63 Wn. App. 1, 4, 816 P.2d 92 (1991) (unlike child rape, child molestation is not a strict liability offense because it requires sexual gratification).

Accordingly, unlike in this case, the defense of unconsciousness in a child molestation case would be raised to negate the requisite mental state, and the State would retain its burden of proving that mental state. See Supplemental Brief of Petitioner, at 10-11 (discussing how to allocate the burdens of production and persuasion for the defense of unconsciousness

² This explains why this Court has held that voluntary intoxication is a defense to child molestation, whereas it is not a defense to child rape. Stephens, 158 Wn.2d at 310; State v. Swagerty, 60 Wn. App. 830, 832-35, 810 P.2d 1 (1991).

when the crime charged contains a mens rea). It is only in cases of child rape or another crime *lacking* a mental state where the defendant must bear the burden to prove unconsciousness by a preponderance of the evidence.

In any event, WACDL's suggestion that the State will charge sexual assault victims with child sexual abuse crimes if this Court does not interpret the child rape statutes in the manner it urges not only strains credulity, but is contrary to statutory authority as well. Under RCW 9.94A.411, the legislature has clearly stated its expectation that

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.

RCW 9.94A.411(2)(a). Although this statute does not create substantive rights for criminal defendants, it embodies the just and commonsense principle that the State should not charge people with crimes if no reasonable jury would convict them in light of the available evidence and the most plausible defense. The extreme hypothetical scenarios posited by WACDL would never meet these standards, because a person who was actually raped by a person

under 16 could *not* be convicted by a reasonable fact finder, even if that person bore the burden of proving unconsciousness or duress by a preponderance of the evidence. And even if by some stretch of the imagination a hypothetical overzealous Washington prosecutor were to charge someone with child rape in those circumstances, such a charge would not survive a Knapstad³ motion or a so-called "halftime" motion in the trial court,⁴ let alone a sufficiency challenge on appeal.

In sum, WACDL's attempt to support its argument with a "parade of horrors" generates far more heat than light, and should be rejected.

The substance of WACDL's argument regarding the terms "perpetrator" and "victim" should be rejected as well. When read in context, it is apparent that the legislature used these terms in the child rape statutes in order to differentiate between a person who has committed a crime by engaging in sexual intercourse with a child, and the child with whom that person has had sexual

³ See State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁴ See State v. Lively, 130 Wn.2d 1, 18, 921 P.2d 1035 (1996) (noting that a defendant's mid-trial motion to dismiss should be granted if, viewing the evidence in the light most favorable to the State, no rational jury could find that the defendant had not established his or her affirmative defense by a preponderance of the evidence).

intercourse. WACDL overstates the significance of these terms, and this Court should resist WACDL's invitation to imbue them with more meaning than they actually have.

When interpreting a statute, this Court's primary duty is to give effect to the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Words in a statute should be given their ordinary meaning; if the plain meaning of the statute is clear, no further interpretation is necessary. Id. Moreover, this Court must avoid interpreting a statute in a manner that leads to absurd results that the legislature did not intend. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Importantly, this Court has already determined that "the crime of rape of a child contains no mens rea element; it requires no proof of intent." State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

WACDL asserts that Black's Law Dictionary defines a "perpetrator" as "the person who actually commits a crime or delict, or by whose immediate agency it occurs." Amicus Curiae Brief, at 6. Although this may have been true in 1968, more contemporary editions of Black's define "perpetrator" simply as "[a] person who

commits a crime or offense."⁵ BLACK'S LAW DICTIONARY 1177 (8th ed. 2004). By this simple definition, a person is the "perpetrator" of child rape if that person has sexual intercourse with a child. See RCWs 9A.44.073, 9A.44.076, 9A.44.079. The legislature had to use *some* term to describe such persons, and the term "adult" could not be used for the obvious reason that rape of a child can be committed by a minor. This Court should reject WACDL's invitation to ascribe any additional significance to the term "perpetrator," for to do so would be to import an element of mens rea that does not exist in the statute.

Nonetheless, WACDL asserts such meaning should be ascribed because the statute defining the former crime of statutory rape used the term "person" exclusively, and did not mention a "perpetrator" or a "victim." See Amicus Curiae Brief, at 7 (citing former RCW 9A.44.070). Accordingly, WACDL asserts that the legislature intended to create a requirement for the State to prove that the "perpetrator" of child rape acted with some purpose or will to commit that crime. But again, the term "perpetrator" simply means the person who commits a crime, whether that crime has a

⁵ Conversely, a "victim" is defined as "[a] person harmed by a crime, tort, or other wrong." *Id.* at 1598.

mental aspect or not. In cases of child rape, it means an older person who has sexual intercourse with a younger child. Nothing in the statute suggests that the term "perpetrator" signifies legislative intent to allocate the burden of disproving affirmative defenses to the State, particularly when this Court has already recognized the well-settled principle that child rape is a strict liability offense. WACDL offers nothing in the way of legislative history suggesting otherwise.

WACDL also urges this Court to place the burden of disproving unconsciousness and lack of consent on the State because it claims that these defenses are like self-defense. It claims this is true because "[o]nce the defense presents some evidence to negate this *statutory element*, the State must prove it beyond a reasonable doubt." Amicus Curiae Brief, at 10-11 (emphasis supplied). Again, however, this argument has value only if this Court accepts the faulty premise that the term "perpetrator" creates an element of mens rea that can be "negated" by "some evidence" that the defendant engaged in sexual intercourse unwittingly or unwillingly. As such, this argument fails as well.

Finally, WACDL argues a position that has been abandoned by Deer on appeal: that when a defendant claims that the child had

sexual intercourse with the defendant without his or her consent, the State should bear the burden of proving the defendant's consent beyond a reasonable doubt. With respect to this issue, however, the Court of Appeals held correctly that the State has no burden of proving the defendant's consent, and Deer's claim of a lack of consent constitutes a claim of duress. Deer, 158 Wn. App. at 865.⁶ It is well-settled that duress is an affirmative defense that the defendant must establish by a preponderance of the evidence. State v. Riker, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994).

Therefore, WACDL's argument that the State should bear the burden of proving that a defendant consented to an act of intercourse with a child is contrary to existing law. Moreover, requiring the State to prove a defendant's consent would also require the State to prove the defendant's mental state, which would again write a mens rea into a statute that does not contain one.

In sum, WACDL's arguments regarding the terms "perpetrator" and "victim" should be rejected because WACDL's proposed interpretation of these terms would create a mens rea in

⁶ Neither the State nor Deer petitioned for review of this issue, and consequently, this Court did not grant review of this issue.

the child rape statute, thus contravening legislative intent and well-settled Washington precedent. When a strict liability offense like child rape is at issue, the burden of proving unconsciousness should be allocated to the defendant by a preponderance of the evidence, as it is in all cases when the defense raised is duress.

D. CONCLUSION

WACDL's arguments are without merit, and should be rejected.

DATED this 16th day of September, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for the Petitioner
WSBA Office #91002

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 Lila Silverstein, the attorney for the respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer to Amicus Curiae Brief, in STATE V. LINDY DEER, Cause No. 85511-1, in the Supreme Court, 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

9/16/11

Date

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 Lenell Nussbaum, the attorney for WACDL, at 2003 Western Ave., Suite 330, Seattle, WA 98121, containing a copy of the Answer to Amicus Curiae Brief, in STATE V. LINDY DEER, Cause No. 85511-1, in the Supreme Court, 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.

uBramu
Name
Done in Seattle, Washington

9/16/11
Date

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 Sheryl Gordon McCloud, the attorney for WACDL, at 710 Cherry St., Seattle, WA 98104, Seattle, WA 98121, containing a copy of the Answer to Amicus Curiae Brief, in STATE V. LINDY DEER, Cause No. 85511-1, in the Supreme Court, 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

9/16/11

Date