

71563-1

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NO. 71563-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SKAAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Jury unanimity as to alternative means is unnecessary when sufficient evidence supports each means presented to the jury. A person commits the crime of Commercial Sexual Abuse of a Minor when he (a) pays for having engaged in sexual conduct with a minor, (b) agrees to pay to engage in sexual conduct with a minor, or (c) solicits, offers, or requests to engage in sexual conduct with a minor for a fee. A person commits Attempted Commercial Sexual Abuse of a Minor when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime. The evidence established that Kevin Skaar arranged to meet a fictitious 15-year-old girl with intent to pay her \$50 for oral sex, and that he appeared at the meeting location at the designated time with exactly \$50 in his pocket. Is the evidence sufficient to support every means of Attempted Commercial Sexual Abuse of a Minor?

2. The trial court may impose crime-related prohibitions as conditions of community custody. The court here imposed a 10:00 p.m. – 5:00 a.m. curfew as a condition of community custody, but there was no evidence that the crime occurred between

10:00 p.m. and 5:00 a.m. Should this Court remand for the trial court to strike this condition?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Kevin Skaar with one count of Attempted Commercial Sexual Abuse of a Minor. Clerk's Papers (CP) 37-38. Following trial, the jury found him guilty as charged. CP 39. The court imposed a low-end standard-range sentence of 15.75 months in prison, 36 months of community custody, and a statutorily-required fee, which the court used its discretion to reduce by half to \$2,500. CP 43-53.

2. SUBSTANTIVE FACTS

On April 10, 2013, at about 7:00 p.m., Detective Tye Holand of the Seattle Police Department posed as a 15-year-old girl and posted an advertisement on Craigslist.com. 2RP 160.¹ The ad was titled "Spring Break Girl" and said "School girl looking for men who want some fun time\$ with a very hot young thing, 5'1, 105 lbs,

¹ The verbatim report of proceedings consists of four volumes. The State refers to the record as follows: 1RP (1/13/14), 2RP (1/14/14), 3RP (1/15/14), 4RP (2/14/14).

blond long hair. Will do in-call, out-call, and/or vehicle. Must be fine with taboo fun." 2RP 164; Ex. 1.²

Less than 10 minutes later, Skaar responded to the advertisement. 2RP 165-66, 168. Skaar wrote, "I'm interested in some fun times. How much donation\$ are you looking for?" 2RP 167; Ex. 2A. "Donation" is a common term in the prostitution world for the fee paid in exchange for sex. 2RP 168. Acting as the fictitious 15-year-old girl and using the email address "sexxyjen16@gmail.com," Detective Holand replied, "I am 15, fun, outgoing, and very cute. I love doing this, and I'm very discreet. I expect the same. Price depends on what you want to do." 2RP 169; Ex. 2A. The conversation continued over multiple emails:

Skaar: I'm looking for a bj

Sexxyjen16: \$100 for blow job

Skaar: Oh wow. I'll pass i don't have that much.

Sexxyjen16: I feel gernerous [sic], if it's just a blowjob then I will do \$60.00.

Skaar: Where you at?

Sexxyjen16: Seattle area.

² The transcripts in this case are exceptionally poorly done, especially in the first volume. The ad's description was transcribed as including "long, long hair." 2RP 164. The exhibit indicates that the description was actually "blond long hair." Ex. 1.

Ex. 2A; 2RP 166-71. At this point, the conversation paused until the following day when Skaar reinitiated the conversation:

Skaar: Where in Seattle

Sexxyjen16: Are u wanting to meet tonight

Skaar: Yes

Sexxyjen16: OK. What do I [sic] want to do, so I know what to charge

Skaar: Blowjob

Sexxyjen16: Do u want to do it in car?

Skaar: Yes

Sexxyjen16: Can you pick me up in Seattle by the stadiums on 4 the [sic] ave s at about 7.

Skaar: Your down by the stadiums. Nevermind i don't want to drive that far. Im in north everett/marysville, and thought you might be in north seattle.

Sexxyjen16: Oh I can get to north Seattle. Can u pick me up by the mcdonalds by northgate

Skaar: Can you get to lynnwood/mountlake terrace?³

Sexxyjen16: No. My friend can bring me to the mcdonalds

Skaar: Can you send me a pic?

³ The transcript says "Lynnwood/Melanie Terrace." 2RP 174. Skaar actually wrote "lynnwood/mountlake terrace." Ex. 2A.

Sexxyjen16: Here I am I [sic], lime [sic] I said I am 15, fun and cute.⁴

Skaar: I really dont want to drive to northgate. I could meet you at the mountlake terrace park and ride

Sexxyjen16: Its just 5 miles down the freeway. My ride will only take me that far. Sorry

Skaar: Than [sic] maybe another time.

Sexxyjen16: The furthest north I could go is 145th

Skaar: Maybe some other time.

Sexxyjen16: Ok

Skaar: Ok. Let me ask you do you swallow?

Sexxyjen16: Of course

Skaar: How much?

Sexxyjen16: Didn't I say \$60 for just oral sex

Skaar: Oh yeah lol. Where on 145th would we meet?

Sexxyjen16: Kidd valley⁵ 145th and aurora?

Skaar: Theres a park and ride on 5th and 145th. Would that work?

Sexxyjen16: Sure

Skaar: Could you do \$50?

⁴ Again, the transcript contains an error indicating that this email said, "Here I am. Why I said, I'm 15, kind of cute." 2RP 175. Ex. 2A contains the actual email messages.

⁵ Another transcription error mistakes Kidd Valley for "Kid Bally." 2RP 178; Ex. 2A.

Sexxyjen16: For just the blow job?

Skaar: Yeah that's all i wanted

Sexxyjen16: Sure. \$50.00 is OK. By the way how old are u.

Skaar: 18

Sexxyjen16: What kind of car will u be in and what color so I know who u are when I get there

Skaar: Itll be a white kia. When can you meet

Sexxyjen16: How about 7

Skaar: That will work

Sexxyjen16: Do u have a pic

Skaar: No i don't

Sexxyjen16: Take one with ur phone

Skaar: Im driving now and cant really now is it a big issue?

Sexxyjen16: No

Sexxyjen16: Let me know when u get to park and ride

Skaar: Where are u

Sexxyjen16: On way. Where are u

Skaar: On my way. Ill meet you at the entrance how long till your their [sic]

Sexxyjen16: What are u wearing so I know its u

Skaar: Green t shirt

Skaar: When will u be here?

Sexxyjen16: I arrived. Silver tahoe

Skaar: Meet me at the entrance

Ex. 2A; 2RP 171-209.

While Skaar and "Sexxyjen16" corresponded, Detective Holand and several other detectives went to the vicinity of the meeting location that Skaar had proposed. 2RP 181, 184. The surveillance team detectives reported that an unoccupied white Kia was parked near the meeting place and observed Skaar use keys to get inside the car, drive around the block, and re-park closer to the entrance of the Park & Ride. 3RP 202-03, 281-82. Skaar then got out of the car, walked around, looked intently into the Park & Ride from across the street, and eventually walked to the entrance. 3RP 206, 283. He seemed to be typing on his phone, and kept looking around in apparent counter-surveillance efforts to detect law enforcement. 3RP 264, 286-87. Just after Skaar stopped typing on his phone, Detective Holand received another message from the suspect. 3RP 267. When Detective Holand advised that the suspect had indicated that he was at the entrance to the Park & Ride, the surveillance teams observed that Skaar was at the

entrance to the Park & Ride. 3RP 250. No one else was around the entrance at the time. 3RP 271.

Detective Holand instructed the detectives to arrest Skaar. 3RP 251. In a search incident to his arrest, Detective Brundage found in Skaar's pockets exactly \$50, keys, and a smartphone. 3RP 268-69. Skaar gave a recorded interview at the police station.⁶ 3RP 214-16; Ex. 9. Initially claiming complete ignorance, Skaar eventually admitted exchanging the emails with the undercover officer. Ex. 9. Skaar claimed that he never intended to pay for sex with the girl, but simply wanted to find out why she was prostituting herself because he has "a big heart." Ex. 9.

C. ARGUMENT

1. UNANIMITY IS NOT REQUIRED BECAUSE SUFFICIENT EVIDENCE SUPPORTS ALL ALTERNATIVE MEANS OF COMMITTING ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR.

Skaar contends that the trial court violated his constitutional right to a unanimous jury verdict because insufficient evidence supported one of the alternative means considered by the jury and

⁶ The recorded interview was played for the jury, but not transcribed for the record. 3RP 214-16.

the court gave no unanimity instruction. Because the same evidence proved each alternative in this case, the argument fails.

Criminal defendants have a right to a unanimous verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the charged crime can be committed in more than one way, so long as “there is substantial evidence to support each of the alternative means, unanimity of the jury as to the mode of commission is not required.” State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976). If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required. State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014).

“The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.” Ortega-Martinez, 124 Wn.2d at 707-08; State v. Ortiz, 80 Wn. App. 746, 749-50, 911 P.2d 411 (1996). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

There are three ways to commit Commercial Sexual Abuse of a Minor: (a) by paying a fee “for having engaged in sexual conduct” with a minor, (b) by agreeing to pay a fee in exchange for engaging in sexual conduct with a minor, or (c) by soliciting, offering, or requesting to engage in sexual conduct with a minor in return for a fee. RCW 9.68A.100(1). The State charged Skaar with Attempted Commercial Sexual Abuse of a Minor without specifying which means Skaar attempted to commit.⁷ Skaar argues that there was insufficient evidence of the first means because that alternative “requires a past sex act,” and none was proven. Brief of Appellant at 4. The argument fails because Skaar was charged with attempt, not the completed offense.

“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.” RCW 9A.28.020(1). The requisite intent is the intent to accomplish the criminal result of the base crime. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). A substantial step is an act that is strongly corroborative of the actor’s criminal purpose. Id. In attempt cases, it

⁷ The State charged this as an attempt, even though the evidence established that Skaar both offered and agreed to pay for sex with a person he believed to be a minor, because there was no actual minor involved. 3RP 311.

makes no difference that the harm that the underlying criminal offense statute addresses did not occur. State v. Luther, 157 Wn.2d 63, 74, 134 P.3d 205 (2006). Thus, “[t]he attempt statute focuses on the actor’s criminal intent, rather than the impossibility of convicting the defendant of the completed crime.” Id. (quoting State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)).

With respect to the first alternative means of committing Commercial Sexual Abuse of a Minor, the criminal result is sexual conduct with a minor in exchange for a fee. Because the State charged Skaar with attempt rather than the completed offense, the State did not need to show that a sex act actually occurred, but only that Skaar *intended* that criminal result and took a substantial step in that direction. See Johnson, 173 Wn.2d at 899; Townsend, 147 Wn.2d at 679.

The evidence established that Skaar arranged to pay \$50 to engage in oral sex with “Sexxyjen16,” a fictitious girl whom he believed to be 15 years old. Skaar negotiated and renegotiated the price for this act and designated the location where he and the girl would meet. Skaar then appeared at that location at the agreed time with exactly \$50 in his pocket. Skaar admits that this evidence establishes that he “intended to pay a minor pursuant to an

understanding that she would then perform a sex act,” and “intended to solicit a minor to engage in a sexual act in return for a fee,” and that “he took a substantial step toward doing so.” Brief of Appellant at 5. The same evidence allows a rational juror to easily conclude that Skaar intended to pay for having engaged in sexual conduct with a minor and that he took a substantial step toward that result.

Because sufficient evidence supports each alternative means of Attempted Commercial Sexual Abuse of a Minor, no unanimity was required. This Court should affirm.

2. THE STATE AGREES THAT THE CURFEW
CONDITION OF COMMUNITY CUSTODY SHOULD
BE STRICKEN.

Skaar contends that the court erred in imposing a 10:00 p.m. – 5:00 a.m. curfew as a condition of community custody. The State agrees that this condition should be stricken from Skaar’s judgment and sentence because it is not crime-related.

Trial courts have authority to impose “crime-related prohibitions” as conditions of community custody. RCW 9.94A.703(3)(f). “Crime-related prohibitions” must “directly relate[] to the circumstances of the crime for which the offender has been convicted[.]” RCW 9.94A.030(10).

There was no evidence that Skaar's criminal conduct occurred between 10:00 p.m. and 5:00 a.m. Only two of the numerous emails Skaar and Detective Holand exchanged were sent during these hours,⁸ and neither of these established details of the proposed transaction (e.g., the sex act to be performed, price, or time and location of the proposed meeting). Agreement on these details occurred in emails sent and received during daytime hours, and the proposed meeting time was 7:00 p.m., well before the curfew imposed. Moreover, since Skaar used a mobile phone to make these arrangements, a curfew limiting his physical movement at night would do little to deter such conduct in the future. Therefore, Skaar is correct that the trial court lacked authority to order a curfew as a condition of his community custody. As a result, Special Condition number 7 on Appendix H of Skaar's judgment and sentence should be stricken.

⁸ At 10:19 p.m. on April 10, Skaar asked "sexxyjen16" where she was located. 2RP 171. At 11:54 p.m. on the same day, "sexxyjen16" responded that she was in the Seattle area. Id.


D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Skaar's conviction for Attempted Commercial Sexual Abuse of a Minor and remand for entry of an order striking the curfew condition.

DATED this 3rd day of December, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Lila Silverstein (lila@washapp.org), the attorney for the appellant, Kevin Skaar, containing a copy of the Brief of Respondent, in State v. Skaar, Cause No. 71563-1-I, in the Court of Appeals, Division I, 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.



Name
Done in Seattle, Washington

2-03-14
Date

2014 FEB 03 11:14 AM
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