NO. 45833-1-II
Cowlitz Co. Cause No. 13-8-00274-7

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

B.J.C.,

Appellant.

BRIEF OF RESPONDENT

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Statement of Facts

The State concurs with B.J.C.'s rendition of the Statement of the Case with the following exceptions and additions:

On August 28, 2013, Kelso Police Department detectives Rich Fletcher and Dave Voelker contacted B.J.C. inside his residence. Report of Proceedings at 12, 14. They arrived in an unmarked police vehicle. RP 12. Both wore civilian clothes with jackets covering their firearms, badges and handcuffs. RP 12-13. Detective Fletcher asked if B.J.C. would speak with them. RP 12. Additionally, Detective Fletcher told B.J.C. he could refuse to speak with the detectives, that he could stop talking at any time and that they were not interested in arresting him that day. RP 12. B.J.C. then agreed to talk with Fletcher and Voelker. RP 12. Neither Detective Voelker, nor Fletcher placed B.J.C. in handcuffs, physically restrained him, or threatened him in any way. RP 13. Initially, during their conversation B.J.C. stepped out of the residence to a balcony area, eventually leading them to a courtyard area, 70-80 feet away. RP 20-21. While in the courtyard neither Fletcher nor Volker physically blocked B.J.C. from returning to his residence. RP 23. The conversation in the courtyard had a casual tone. RP 23. The conversation concluded and B.J.C. returned to his residence. RP 24.

During the trial C.C. testified B.J.C. wanted to have sex with her, she saw his penis, which he eventually put in her mouth as well as kissing her vagina. RP 93-96. Statements of this nature were also made by C.C.

during her forensic interview with Kristen Mendez, which were admitted at trial. RP 150-153, 174, 197.

At the disposition the trial court informed B.J.C. of the requirement he register as a sex offender. RP 299. The court instructed B.J.C. that upon his release from J.R.A., he is required to register in the county of his residence with the sheriff's office, no matter where he is living, within 72 hours. RP 299. Additionally, the court informed him he must register until the requirement is lifted by a court. RP 299-300. Furthermore, the court imposed a standard range disposition on each count of 15 to 36 weeks. RP 298.

IV. ARGUMENT

1. THE INTERVIEW OF B.J.C. DID NOT REQUIRE MIRANDA WARNINGS AS THE RESPONDENT WAS NOT IN CUSTODY AND HIS CONFESSION WAS VOLUNTARY.

In Washington, the protection provided by article 1, section 9 is co-extensive with that provided by the 5th Amendment of the Constitution of the United States. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Miranda warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). The absence

of *Miranda* warnings prior to a custodial interrogation renders the suspect's subsequent confession inadmissible during the State's case in chief. *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990); *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). When a suspect is not subjected to a custodial interrogation, a confession admissible provided it was voluntarily given. Miranda, 384 U.S. at 478; *State v. Broadaway,* 133 Wn.2d 118, 131-32, 942 P.2d 363 (1997). In either case, the burden is on the State to prove by a preponderance of the evidence that the confession was lawfully obtained. *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S.Ct. 515 (1986).

A. B.J.C. was not in custody when he confessed.

A suspect is in custody for the purposes of determining whether *Miranda* warnings are required when "a reasonable person in [the] suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *Heritage*, 152 Wn.2d at 218 (citing *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). In order to make this determination courts employ an objective test examining the totality of the circumstances surrounding the interrogation. *Id.*; *State v. Rosas-Miranda*, 176 Wn.App. 773, 731, 309 P.3d 728 (2013); *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). Consequently, the "subjective views

harbored by either the interrogating officers or the person being questioned are irrelevant." *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2405 (2011) (quoting *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)). "The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning." *Id.* When the suspect is a child, his or her age is properly included in the custody analysis. *Id.* at 2406.

For the case at hand, *Yarborough v. Alvarado* is instructive. 541 U.S. 652, 124 S.Ct. 2140 (2004). There a juvenile suspect was taken to the police station by his parents where he was interrogated about a murder by a police officer for about two hours in a small interview room and was never told he was free to leave. The juvenile suspect's parents asked to be present during the interview but were rebuffed. The juvenile suspect ultimately confessed. In obtaining the confession the interviewing officer did not threaten arrest or prosecution. Moreover, twice toward the end of the interview the interviewing officer asked the juvenile suspect if he wanted to take a break, but each time the suspect declined. The state trial court found that the juvenile suspect was not in custody during the interrogation and the United States Supreme Court in *Alvarado* held that the state court's custody finding was a reasonable application of the Supreme Court's custody standard.

Here, B.J.C. was questioned at his residence by detectives in civilian clothing with their firearms, badges and handcuffs concealed underneath their jackets. RP 12-13. He was informed answering questions was voluntary and he was free to stop the questioning at any time and return inside his residence. RP 12. Moreover, B.J.C. was specifically told he was not under arrest and the officers had no plans on arresting him. RP 12. The detectives did not restrain B.J.C. in any way, whether by physical force or threats. RP 12-13. B.J.C. was not handcuffed. RP 13. Under the totality of the circumstances, a reasonable person in B.J.C.'s position would not have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Consequently, this court should agree with the trial court that B.J.C. was not subjected to custodial interrogation, and as a result, he did not need to be advised of his *Miranda* rights.

B. B.J.C.'s confession was voluntarily made.

The inquiry for determining the voluntariness of a confession is "whether, under the totality of the circumstances, the confession was coerced." *Broadaway*, 133 Wn.2d at 132 (citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 1251, 113 L.Ed.2d 302 (1991)). Thus, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Unga*, 165 Wn.2d at 101 (quoting

Connelly, 479 U.S. at 167). As a result, absent oppressive police conduct[1] "causally related to the confession, there is simply no basis for concluding" a confession is not voluntary. *Conelley*, 479 U.S. at 164.

In assessing the totality of the circumstances, a court may consider the suspect's physical condition, education, age, mental health, experience, and the conduct of the police to include any "promises or misrepresentations made by the interrogating officers." *Broadaway*, 133 Wn.2d at 132; *State v. Unga,* 165 Wn.2d 95, 101-03, 196 P.3d 645 (2008). Promises, misrepresentations, or deception on the part of police to secure a confession, however, does not entail that the confession was not voluntary, because "[t]he question is whether the interrogating officer's statements were so manipulative or coercive that they deprived the suspect of his

[1] E.g., *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) (police officers held gun to the head of wounded confessant to extract confession); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) (16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics); *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (defendant held incommunicado for three days with little food; confession obtained when officers informed defendant that Chief of Police was preparing to admit lynch mob into jail); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep).

unconstrained, autonomous decision to confess." *Unga*, 165 Wn.2d at 102 (citation and quotations omitted).

Here, there is no evidence, nor even allegations, of oppressive police behavior resulting in a coerced confession by B.J.C. Detective Fletcher simply questioned B.J.C. about the incident and confronted him when B.J.C.'s version of the events conflicted with the victim's disclosures. RP 24. The interview was in a conversational tone, without raised voices. RP 23. Because there was no coercive police activity causing B.J.C. to confess this court should find the confession voluntary.

As the confession was voluntary and completed while B.J.C. was not in custody the statements were properly admitted by the trial court.

2. THE FAILURE TO REGISTER AS A SEX OFFENDER STATUTE IS NOT UNCONSTITUTIONAL BECAUSE THE PRIMARY PUPOSE OF RCW 9A.44.130 DOES NOT IMPEDE B.J.C.'S RIGHT TO TRAVEL.

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A reviewing court "will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741

(1998). "If possible, a statute must be interpreted in a manner that upholds its constitutionality." *State v. Halstein*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993) (*following Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992), *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971)).

"A statute is overbroad if it sweeps constitutionally protected free speech within its prohibitions and there is no way to sever its unconstitutional applications. *Lee*, 135 Wn.2d at 387 (*following State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 117 (1993), *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). Where a court finds that a statute is unconstitutional "as applied," the statute cannot be applied again under similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). If a court finds a statute facially unconstitutional, the statue must be struck down. *Id.* However, if there are circumstances in which a statute can be constitutionally applied, a facial challenge must be rejected. *Id.*

If a fundamental right is at issue, the State must have a compelling interest to justify the statute that limits this right. *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). The right to travel is a fundamental right and subject to strict scrutiny. *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.3d.2d 1204 (1958); *City of Seattle v. McConahy*, 86 Wn. App. 557, 571, 937 P.2d 1113, *review denied*, 113 Wn.2d 1018,

948 P.2d 338 (1997). "A state law implicates the right to travel when it *actually* deters such travel and where impeding travel *is its primary objective.*" *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), *review denied*, 173 Wn.2d 1008 (2012) (*emphasis added*).

In the present matter, B.J.C,'s contention that RCW 9A.44.130 is unconstitutionally overbroad is without merit. B.J.C. cannot demonstrate beyond a reasonable doubt that RCW 9A.44.130 is facially invalid or unconstitutional "as applied." First, despite B.J.C.'s argument, and as previously recognized by the courts, the State does have a compelling interest that justifies the statute. "The statute was enacted to 'assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders.'" *Enquist*, 163 Wn. App. at 51 (*quoting* Laws of 1990 ch. 3, § 401). "Impeding travel *has never* been RCW 9A.44.130's primary goal." *Id.* (*emphasis added*).

Furthermore, the failure to register as a sex offender statute does not contain any provisions that intend the impediment or restriction of travel. Likewise, the statute does not actually prevent B.J.C. from traveling. B.J.C. is not prohibited from moving his residence, nor is he prohibited from moving to a different city, county, or state. "The statute...permits a registrant to travel or move out of the state for work or educational purposes, if he...timely registers with the new state and

notifies the sheriff of the last Washington county in which he registered." *Id.*

B.J.C. claims that he cannot be away from his primary residence for more than three nights. *Appellant's Brief* at 12. This is an unfounded legal conclusion contrary to the prevailing case law. "A residence 'is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.'" *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). B.J.C. can maintain a residence *and* travel to another location. For example, under the above definition of "residence," B.J.C. could travel to Seattle for four weeks as long as he intends on returning to his residence. He is not required to re-register when he goes on vacation. He has no duty to notify law enforcement when he travels. RCW 9A.44.130 requires B.J.C. to register only when he changes his primary residence or ceases to have a fixed residence. B.J.C. fails to provide any evidence that RCW 9A.44.130 restricts his ability to travel.

3. THE TRIAL COURT IMPOSED THE PROPER DISPOSTION FOR A JUVENILE OFFENDER CONVICTED OF RAPE OF A CHILD IN THE FIRST DEGREE AND CHILD MOLESTATION IN THE FIRST DEGREE.

The appellant argues the court exceeded its authority when it sentenced B.J.C. to 30 to 72 weeks to Juvenile Justice and Rehabilitation Administration.

The standard of review for sentencing determinations is whether the court abused its discretion. RCW 13.40.180 states in pertinent part, "where a disposition in a single disposition order is imposed on a youth for two or more offenses, the terms shall run consecutively." The statute limits itself and requires "where the offenses were committed through a single act or omission, or through an act or omission which itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense." *Id.* However, if the crimes were not a single act or omission, "the aggregate of all consecutive terms shall not exceed three hundred percent of the term imposed for the most serious offense." *Id.*

Importantly, "[d]espite differences in terminology, the tests for determining whether the phrases 'same course of conduct' used in the

juvenile justice act and 'same criminal conduct' used in the Sentencing Reform Act are essentially the same." *State v. Contreras*, 124 Wn.2d 74, 748, 880 P.2d 1000 (1994).

A finding that the offenses did not encompass the "same criminal conduct" will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). A court will consider two or more crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *Id.* The absence of any one of the prongs prevents a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts "must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct." *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007).

"The relevant inquiry for the [criminal] intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." *State v. Tili*, 139 Wash.2d 107, 123, 985 P.2d 365 (1999) (citations omitted). This inquiry is a two-step process. *Price*, 103 Wn.App. at 857. "First, we must objectively view each underlying statute

and determine whether the required intents are the same or different for each count. If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count." *Id.*

The objective criminal intent of a defendant can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411. Where crimes are "sequential, not simultaneous or continuous," a defendant is generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1999); *In re Rangel*, 99 Wn.App. 596, 600, 996 P.2d 620 (2000) ("Like the defendant in *Grantham*, Mr. Rangel was able to form a new criminal intent before his second criminal act because his crimes were sequential, not simultaneous or continuous."). On the other hand, a defendant's criminal intent may not have changed when he or she engages in an "unchanging pattern of conduct, coupled with an extremely close time frame" *Tili*, 139 Wash.2d at 125.

Tili and *Grantham* are instructive. Both cases involved multiple rapes of one victim in a very short period of time. In *Grantham*, there was "evidence that Grantham completed the first rape before commencing the second; that after the first and before the second he had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S.

begged him to stop and to take her home; and that Grantham had to use new physical force to obtain sufficient compliance to accomplish the second rape." 84 Wn.App at 859. Based on this evidence, *Grantham* held that the defendant:

> "upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other."

Id. In *Tili*, there was evidence of three separate penetrations occurring over a two minute period. 139 Wn.2d at 119. Consequently, *Tili* concluded that "[i]n contrast to the facts in *Grantham*, Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame -- approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration." *Id.* at 124.

First, there is no dispute that the crimes at issue involved the same victim, and occurred at the same time and place. In dispute, is whether the respondent's objective intent changed. Here, when objectively viewing each of the underlying statutes the required intents are different. Child

molestation requires that the State prove sexual contact, which, in turn, requires showing that the respondent acted with the intent to gratify sexual desires. *State v. Edwards*, 171 Wn.App 379, 389, 294 P.3d 708 (2012) (citing *State v. Stevens*, 158 Wn.2d 304, 309–10, 143 P.3d 817 (2006)). Rape of a child, on the other hand, is a strict liability crime. *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012). Consequently, the statutes at hand do not have the same required intent and each count for which the respondent was found guilty do not have the same required intent. *Price*, 103 Wn.App. at 857 ("First, we must objectively view each underlying statute and determine whether the required intents are the same or different for each count. If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count.") As a result, there cannot be a finding of same criminal conduct and the 150% rule would not apply to the respondent's convictions.

Even when objectively viewing the facts usable at sentencing, however, respondent's objective criminal intent was different with respect to each count. First, there is no evidence that one sex offense depended upon the other or furthered the other. The respondent did not have to engage in molestation of the victim in order rape her or vice versa. Instead, the evidence shows that the respondent performed oral sex on the

victim by lifting her up to his face, that he eventually stopped after she asked him to, that he then sat on the floor of the shower and the victim sat on his lap, which again concluded upon the victim's request that it stop, and that the respondent then stood up before guiding the victim's face to his penis and putting it in her mouth. RP 93-96, 150-153, 174, 197. All this evidence shows that, like the defendant in *Grantham*, respondent had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. Similarly, he chose the latter, here by forming a new criminal intent to commit Rape of a Child in First Degree.

Here, the trial court did not abuse its discretion in treating the child rape and child molestation as different criminal conduct as child rape does not require intent, whereas child molestation requires proof that the sexual contact was made for the purpose of sexual gratification. The respondent presented no evidence to show that his intent was the same. RP 215-232. During the disposition phase the court stated it looked at B.J.C.'s stated intent which was to have sex with the victim, but recognized legally there are different intents required for child rape and child molestation. RP 297-298. The evidence made it manifestly apparent the State was basing each count on different acts. First, in closing arguments, the State discussed the different elements of each count and how they applied to the testimony

given. RP 242-252. Second, the evidence supports both offenses. C.C. testified B.J.C. wanted to have sex with her, she saw his penis, which he eventually put in her mouth as well as kissing her vagina. RP 93-96. Third, the fact-finder clearly articulated there was insufficient evidence to support the first count of Rape of a Child in the first degree, thus demonstrating the court's awareness of the separation of the acts. RP 266. Therefore, it is reasonable a judge acting as the fact-finder would understand each count must be based on a separate and distinct act. Because of these factors the disposition imposed does not violate RCW 13.40.180.

V. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny this appeal. The appellant failed to show the trial court abused its discretion when allowing the confession of the respondent as evidence. Furthermore, the requirement B.J.C. register as a sex offender is

not unconstitutional as his freedom to travel is not restricted. Finally, the disposition imposed is within the correct range as required by the Juvenile Justice Act. The State asks this Court to affirm the convictions.

Respectfully submitted this 5th day of September, 2014.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 5th, 2014.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 05, 2014 - 10:59 AM

Transmittal Letter

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