

62546-2

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No. 62546-2-I

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

STATE OF WASHINGTON,
Respondent,

v.

PATRICK J. ROONEY,
Appellant.

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

The Honorable Steven Gonzales

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Rooney's convictions for rape of a child in the first degree, as charged in Count I and Count II, must be dismissed for violation of his right to equal protection as he should have been charged under the concurrent specific statute of child molestation in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant's constitutional right to equal protection and principles of statutory construction require that where a general statute and a concurrent specific statute prohibit the same conduct, the defendant can be charged under the specific statute only.

Here, Mr. Rooney was charged under the general statute of rape of a child in the first degree rather than the specific statute of child molestation in the first degree. Must this Court reverse his convictions for rape of a child in the first degree for violation of his constitutional right to equal protection?

C. STATEMENT OF THE CASE

Appellant Patrick J. Rooney was charged by a second amended information filed in King County Superior Court with two counts of rape of a child in the first degree, in violation of RCW 9A.44.073, and two counts of child molestation in the first degree,

in violation of RCW 9A.44.083. CP 24-26. All four counts alleged the same charging period, April 1, 2006 through June 16, 2006, and involved the same five-year-old victim, J.B. (dob 04/08/01).

The matter proceeded to trial before a jury, the Honorable Steven Gonzales presiding. The State introduced a written statement made by Mr. Rooney to investigating officers in which he stated he was twenty-eight years old. Ex. 1 at 2. In the statement, Mr. Rooney acknowledged an incident in which he kissed J.B., an incident in which he “rubbed her butt on top of her clothes,” an incident in which he “massaged her hips with my thumbs” and “rubbed her crotch on top of her clothes,” an incident in which he “rubbed her butt,” an incident in which he put his “hand in her pants and rubbed her vagina,” an incident in which he “kissed the top of her vagina and rubbed the top of her vagina with my tounge [sic], and an incident in which he “kissed her vagina.” Ex. 1 at 3. He denied any penetration.

Krystal Bieggar, J.B.’s mother, testified J.B. disclosed that Mr. Rooney touched her chest and buttocks, kissed her chest, rubbed her vagina under her clothes, and “kissed” her vagina with

his tongue. 8/26/08 RP 100-02, 214-15.¹ J.B. did not say that Mr. Rooney penetrated her or touched her with his penis. 8/26/08 RP 217.

Rebecca Wiester, a pediatrician with special training in conducting child interviews, interviewed J.B. and gave her a physical examination. 8/28/08 RP 6, 9-10, 24, 32. According to Dr. Wiester, J.B. stated Mr. Rooney kissed her lips, neck, and chest, and licked her crotch area. 8/28/08 RP 28. J.B. also stated Mr. Rooney touched her crotch with his “peanuts” and “It felt really bad. I was hurting when he did it.” 8/28/08 RP 29. J.B.’s physical exam was normal. 8/28/08 RP 35.

In closing argument, the prosecutor argued the two counts of rape of a child in the first degree were established by J.B.’s statements to Dr. Wiester in which she indicated Mr. Rooney penetrated her vagina with his penis on one occasion and licked her vagina on two occasions. 8/28/08 RP 64. Alternatively, the prosecutor argued the two counts of rape of a child in the first degree were established by Mr. Rooney’s statement regarding two instances of mouth-vagina contact. 8/28/08 RP 71-74. On the other hand, the defense counsel argued the evidence established

¹The Verbatim Report of Proceedings consists of fifteen volumes and will be referred to by date, followed by “RP” and the page number.

child molestation in the first degree only and, therefore, the jury could convict only on those two counts charging that offense.

8/28/08 RP 84-85, 90-91. The jury found Mr. Rooney guilty of two counts of rape of child in the first degree and two counts of child molestation in the first degree, as charged. CP 62-65.

D. ARGUMENT

MR. ROONEY'S CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE, RATHER THAN THE CONCURRENT SPECIFIC OFFENSE OF CHILD MOLESTATION IN THE FIRST DEGREE, VIOLATED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

1. Where a general statute and a specific statute prohibit the same conduct, only the specific statute can be charged. The "concurrent statute" rule of statutory construction provides that when two statutes are concurrent, a criminal defendant's constitutional right to equal protection² dictates only the specific statute may be charged. Busic v. United States, 466 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); State v. Shriner, 101 Wn.2d 576, 581, 681 P.2d 237 (1984). "Statutes are concurrent ... if 'the general statute will be violated in each instance where the special statute has been violated.'" State v. Conte, 159 Wn.2d 797,

²U.S. Const. amend XIV; Wash. Const. art. I, § 12. The state and federal constitutional equal protection clauses are identically construed. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996).

811, 154 P.3d 194 (2007), quoting Shriner, 101 Wn.2d at 580. “It is not relevant that the special statute may contain additional elements not contained in the general statute.” Shriner, 101 Wn.2d at 580. On appeal, the reviewing court must look at the elements of both statutes as charged and prosecuted to determine whether a person can violate the special statute without also necessarily violating the general statute. Shriner, 101 Wn.2d at 579 n.2; State v. Karp, 69 Wn. App. 369, 372, 374, 848 P.2d 1304 (1993).

The purpose of the concurrent statute rule is to protect a defendant’s right to equal protection by restraining prosecutorial discretion and to give effect to legislation.

[The concurrent statute rule] protects the defendant’s constitutional right to equal protection under the law by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements. Furthermore, it ensures that courts do not interpret statutes in such a way as to impliedly repeal existing legislation.

State v. Shelby, 61 Wn. App. 214, 219, 811 P.2d 682 (1991)

(internal citations omitted). Otherwise, when making a charging decision, the State could control the degree of punishment by selecting between two concurrent statutes.

[W]here a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only

under that statute. Thus the prosecutor has a basis distinguishing between persons who can be charged under one or the other statute, and is not at liberty to charge under the general statute a person whose conduct brings his offense within the special statute. Under such circumstances, there is no denial of equal protection.

State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). See also, In re Personal Restraint of Taylor, 105 Wn.2d 67, 70, 711 P.2d 345 (1985) (“If there was unfettered prosecutorial discretion, there would be an equal protection issue.”); State v. Hupe, 50 Wn. App. 277, 280, 748 P.2d 263 (1988), overruled on other grounds in State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (rule protects defendant’s constitutional right to equal protection by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements).

In addition, this rule is necessary to give effect to the special statute. Specific statutes include all the elements of the general statute as well as additional elements. If the general statute could be charged rather than the specific statute, the prosecutor would presumably elect to prosecute under the general statute only because it would be easier to prove. State v. Danforth, 97 Wn.2d 255, 259, 643 P.2d 882 (1982). Consequently, the prosecutor could impermissibly usurp the legislative function. Id.

2. Rape of a child in the first degree by sexual contact and child molestation in the first degree are concurrent statutes. The jury was instructed that the two counts of rape of a child in the first degree required proof that Mr. Rooney had sexual intercourse with J.B., J.B. was less than twelve years old at the time and not married to Mr. Rooney, and Mr. Rooney was at least twenty-four months older than J.B.³ CP 81, 82 (Instruction Nos. 12, 13). The jury was instructed that the two counts of child molestation in the first degree required proof that Mr. Rooney had sexual contact with J.B., that J.B. was less than twelve years old at the time and not married to Mr. Rooney, and that Mr. Rooney was at least thirty-six years older than J.B.⁴ CP 86, 87 (Instruction Nos. 17, 18).

³RCW 9A.44.073 provides:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

⁴RCW 9A.44.083 provides:

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

The jury was further provided an instruction that defined “sexual intercourse” to include “sexual contact” and an instruction that defined “sexual contact.”

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another person whether such persons are of the same or opposite sex.

CP 83 (Instruction No. 14).

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

CP 88 (Instruction No. 19).

A comparison of the elements establishes that rape of a child in the first degree and child molestation in the first degree, as charged and prosecuted here, were concurrent offenses. All of the elements required to prove rape of a child in the first degree by sexual contact are also elements that prove child molestation in the first degree by sexual contact. Child molestation in the first degree also required proof of a greater difference in age.⁵ Because child

⁵It may be noted, Washington courts have ruled that child molestation in the first degree is not a lesser included offense of rape of child in the first degree, on the grounds molestation involves sexual contact whereas rape involves sexual intercourse, but only under circumstances where the defendant was not

molestation in the first degree required proof of all the elements of rape of a child in the first degree plus a greater difference in age, child molestation was the more specific offense.

The Washington Supreme Court's decision in Danforth, supra, is instructive. In Danforth, the defendants were convicted of escape in the first degree when they failed to return to a work release center. 97 Wn.2d at 256. The Court reversed their convictions on the grounds that they should have been charged under the more specific statute prohibiting a willful failure to return to a work release program. Id. at 257. The Court's reasoning was three-fold. First, the general statute prohibited escape from a "detention facility," the definition of which included escape from a work release facility, whereas the special statute specifically prohibited escape from a work release facility. Id. at 258. Second, the special statute required willful conduct, a mental intent not required by the general, in recognition of the possibility that unforeseen circumstances such as illness could prevent a person from returning to a work release facility. Id. Third, given that the special statute required proof of a mental intent not required by the

charged with rape by sexual contact. See, e.g., State v. Saiz, 63 Wn. App. 1, 4, 816 P.2d 92 (1991). The issue of whether child molestation is a lesser included offense of rape of a child by sexual contact has not been addressed.

general statute, a prosecutor cannot be allowed to impermissibly usurp the “legislative function” by proceeding under the less demanding general statute. *Id.* at 258-59. So too, here, rape of a child in the first degree prohibited “sexual intercourse,” the definition of which included “sexual contact,” whereas child molestation in the first degree prohibited sexual contact only. CP 83, 88.

Rape of a child in the first degree carries a seriousness level of XII, whereas child molestation in the first degree carries a seriousness level of X, although both offenses are class A felonies. RCW 9.94A.515. Therefore, based on an offender score of ‘9,’ Mr. Rooney faced a standard range sentence of 240-318 months on the rape convictions, but a standard range of 149-198 months on the child molestation convictions only. RCW 9.94A.510.

Here, for the charge of rape, the State relied on evidence of sexual contact. Under these circumstances, rape of child in the first degree and child molestation in the first degree are concurrent statutes.

3. Mr. Rooney’s convictions for rape of child in the first degree must be dismissed. Where statutes are concurrent and the defendant is convicted under a general statute rather than the

specific statute, the proper remedy is dismissal of the conviction. Danforth, 97 Wn.2d at 257-58. Here, Mr. Rooney was convicted of the general statute of rape of a child in the first degree, as charged in Counts I and II, rather than the specific statute of child molestation in the first degree, in violation of his constitutional right to equal protection. Therefore, this Court must reverse Mr. Rooney's convictions for rape of a child in the first degree with instructions to dismiss. Shriner, 101 Wn.2d at 580; Danforth, 97 Wn.2d at 257-58.

E. CONCLUSION

The State improperly charged Mr. Rooney under the general statute, rape of a child in the first degree, rather than the concurrent specific, child molestation in the first degree. For the foregoing reasons, Mr. Rooney respectfully requests this Court to reverse and dismiss his two convictions for rape of a child in the first degree.

DATED this 30th day of October 2009.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 62546-2-I
)	
PATRICK ROONEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SEATTLE, WA 98104		
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