

62546-2

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NO. 62546-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PATRICK J. ROONEY,

Appellant.

2009 DEC 17 PM 4:41  
COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

The defendant was convicted of two counts of rape of a child in the first degree for having "sexual intercourse" with a five-year-old girl. The defendant contends that his convictions must be dismissed because, he asserts, the legislature intended child molestation in the first degree, a crime that requires proof of "sexual contact" with a victim, to be a more specific crime than rape of a child in the first degree. Should this Court reject the defendant's assertion that child molestation in the first degree is a more specific crime than rape of a child in the first degree?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On June 21, 2006, the defendant was charged with two counts of rape of a child in the first degree (hereinafter also referred to as ROC 1), and two counts of child molestation in the first degree (hereinafter also referred to as CM 1). CP 1-5. On November 20, 2007, the defendant was allowed to plead guilty, by way of a negotiated plea, to one count of ROC 1 and one count of CM 1. CP 21-22; CP \_\_\_\_, sub # 122. However, prior to sentencing, the defendant moved to withdraw his plea of guilty, claiming he was

misinformed about the consequences of his plea. CP \_\_\_\_, sub # 141. On April 11, 2008, the court allowed the defendant to withdraw his plea of guilty. CP 23. The defendant then proceeded to trial on the original four charges. CP 24-26. A jury convicted the defendant as charged. CP 62-65.

At sentencing, the defendant agreed to his offender score and imposition of sentencing on all four charges. CP 91-97. The court imposed a standard range minimum term sentence of 260 months, with a maximum term of life. CP 107-17.

## **2. SUBSTANTIVE FACTS**

The issue raised on appeal is primarily a purely legal issue. Minimal facts are necessary to resolve the issue raised.

All four counts were for sexual acts committed by the twenty-eight-year-old on a five-year-old girl over a two month period in 2006. See CP 1-5. The five-year-old girl disclosed to her mother that the defendant had touched her vagina with his tongue, kissed her chest, rubbed her vagina under her clothing. 8/26/08 RP<sup>1</sup>. 100-02, 214-15. The girl disclosed to a pediatric specialist that the

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<sup>1</sup> Consistent with the defense brief, the 15 volume verbatim report of proceedings shall be cited by date, followed by RP and the page number.

defendant had licked her crotch and touched her vagina with his "peanuts." 8/28/08 RP 29. The defendant made a statement to the police in which he admitted committing various acts including rubbing the girls crotch over her clothing once, kissing her vagina, rubbing her bottom, and rubbing her vagina with his tongue. See Ex.1. The jury's verdict was based on individual separate and distinct acts. CP 81-82, 86-87.

**C. ARGUMENT**

**1. CHILD MOLESTATION IN THE FIRST DEGREE IS NOT A SPECIAL CRIME THAT MUST BE CHARGED TO THE EXCLUSION OF RAPE OF A CHILD IN THE FIRST DEGREE.**

For the first time on appeal, the defendant contends that child molestation in the first degree and rape of a child in the first degree are concurrent offenses, i.e., that the statutes punish the exact same conduct, and that the legislature intended child molestation in the first degree to be a special statute that must be charged to the exclusion of the general statute of rape of a child in the first degree. Not only is the defendant barred from raising this issue for the first time on appeal, the defendant's assertion is

incorrect. Committing a violation of the child molestation statute does not always result in a violation of the child rape statute, and therefore the rule requiring application of the special statute to the exclusion of the general statute does not apply.

As a rule of statutory construction, i.e., determining legislative intent, "where 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." State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). This rule applies only where "the general statute will be violated in each instance where the special statute has been violated." Shriner, 101 Wn.2d at 580. Worded another way, if it is "not possible to commit the special crime without also committing the general crime," then the rule applies. Shriner, at 583. Such is not the case here.

RCW 9A.44.073, the Rape of a Child in the First Degree statute, provides in pertinent part that:

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.

RCW 9A.44.073(1).

"Sexual intercourse" is defined as follows:

"Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1).

RCW 9A.44.083, the Child Molestation in the First Degree statute, provides in pertinent part that:

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.

RCW 9A.44.083(1).

"Sexual contact" is defined as follows:

(2) "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.

RCW 9A.44.010(2).

Contrary to the defendant's assertion, these statutes are not concurrent, one can commit a violation of RCW 9A.44.083 (CM 1) without committing a violation of RCW 9A.44.073 (ROC 1). For example, a person who knowingly causes a sixteen-year-old to have sexual contact with a victim less than twelve years old, violates the CM 1 statute, but not the ROC 1 statute. There is no provision in the ROC 1 statute prohibiting the causing of another person to have sexual contact with a victim.

This alone, the single ability to commit an act that violates the CM 1 statute without also violating the ROC 1 statute, defeats the defendant's argument. It is irrelevant that a particular defendant's act may in fact violate both statutes in a particular case. The determinative factor is whether it is possible to commit the special crime without also committing the general crime; "*not* whether in a given instance both crimes are committed by the defendant's particular conduct." State v. Crider, 72 Wn. App. 815, 818, 866 P.2d 75 (1994) (emphasis in original); State v. Chase,

134 Wn. App. 792, 802, 142 P.3d 630 (2006), rev. denied,  
160 Wn.2d 1022 (2007).<sup>2</sup>

Additionally, the defendant's primary argument is flawed because he overlooks or ignores another key difference in the two statutes. The defendant asserts that because ROC 1 prohibits "sexual intercourse," and the definition of sexual intercourse includes "sexual contact," and "sexual contact" is an element of CM 1, then the statutes are concurrent. This argument ignores the fact that the "sexual contact" prohibited by the CM 1 statute is different than the "sexual contact" prohibited by the ROC 1 statute.

The "sexual contact" prohibited by the ROC 1 statute prohibits sexual contact "between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1)(c). Essentially, the ROC 1 statute prohibits oral sex. The CM 1 statute does not contain this limitation upon what constitutes "sexual contact."

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<sup>2</sup> In Chase, this Court rejected the defendant's argument that under the facts of his case, it was impossible for him not to have violated a special and general statute. This Court stated, "[t]hat may be true [that the facts show he violated both statutes], but the question is whether all violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute." Chase, 134 Wn. App. at 802-03.

As applied, this means that a person who touches with his hand the intimate parts of his victim violates the CM 1 statute, but not the ROC 1 statute.<sup>3</sup> In short, the defendant's argument that the CM 1 statute and ROC 1 statute are concurrent, that they punish the same conduct, is incorrect. It is possible to commit what the defendant professes to be the special crime (CM 1) without committing the general crime (ROC 1). Because this is true, the defendant's argument fails. Shriner, at 582-83. The defendant's argument is also not properly before this Court.

## **2. THE ISSUE IS WAIVED.**

The defendant did not raise this issue below. In fact, the defendant submitted a presentence report in which he agreed to the charges and offender score. CP 91-97. This issue is therefore waived.

An appellate court will not review an alleged error not raised at trial unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). "RAP 2.5(a)(3) is not intended to afford criminal defendants

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<sup>3</sup> This assumes that the age of the victim, and the difference in age between the defendant and victim, meet the statutory requirements.

a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In this setting, "manifest" means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Some earlier cases opined that the issue of allowing a person to be charged under a general statute over a specific statute was an issue of constitutional magnitude because providing the prosecutor with unfettered discretion to charge under either statute violated the equal protection clause. These cases have since been overruled. See United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (finding that a prosecutor choosing between concurrent statutes is no different than a prosecutor choosing to charge under similar but not concurrent statutes--this "does not give rise to a violation of the Equal Protection or Due Process Clause"); see also City of Kennewick v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991) (Washington Supreme Court recognizing overruling of equal protection concurrent statute arguments).<sup>4</sup>

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<sup>4</sup> State v. Carpenter, 52 Wn. App. 680, 683-84, 763 P.2d 455 (1988) (claimed error in jury instructions based on current statutes argument not preserved for review because no objection was raised below).

The defendant does not acknowledge his failure to raise this issue below. This Court should hold that the defendant has waived this issue by failing to provide appropriate argument explaining why he can raise this issue under RAP 2.5(a). State v. Goodwin, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 17 day of December, 2009.

Respectfully submitted,

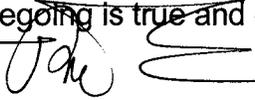
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROONEY, Cause No. 62546-2-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.

  
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Name  
Done in Seattle, Washington

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