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Court of Appeals
Division I
State of Washington

NO. 72454-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS LEAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHAD ALLRED

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Due process does not require suppression of an identification unless there is an impermissibly suggestive police procedure and a substantial likelihood of irreparable misidentification. In this case, the trial court applied the facts to the constitutional framework and reasonably concluded there was no substantial likelihood of irreparable misidentification. Did the trial court properly exercise its discretion in admitting the identifications?

2. The predatory offense special allegation statute is reviewed for unconstitutional vagueness in light of the specific facts of the case. First-degree child molestation is a “predatory offense” when the defendant is a “stranger” to the victim. Eleven-year-old P.K. had never seen Lear prior to his act of forcing her into a public restroom and molesting her. Has Lear failed to demonstrate that the predatory offense special allegation is unconstitutionally vague as applied to his conduct?

3. A statute is unconstitutionally vague if it does not provide standards sufficiently specific to prevent arbitrary enforcement. The predatory offense statute requires the State to prove beyond a reasonable doubt that the defendant was a stranger to the victim. Additionally, before filing the special

allegation, a prosecutor is required to consider whether sufficient admissible evidence exists to justify a finding by a reasonable and objective fact-finder that the offense was predatory, and must weigh that evidence against the most reasonably foreseeable defense. Does the predatory offense special allegation provide sufficient guidance to prevent arbitrary enforcement?

4. Statutes authorizing different punishments for the same criminal act do not violate equal protection in the absence of selective or arbitrary enforcement. The party challenging the statute must demonstrate that it is purely arbitrary. While prosecutors have broad discretion to determine when to file criminal charges, they must exercise individualized discretion in each case. In light of the statutory guidelines that inform the prosecutor's decision to file the predatory offense special allegation, and in the absence of any showing that the prosecutor did not appropriately exercise discretion in this case, has Lear failed to prove that his right to equal protection was violated?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Travis Lear was charged by amended information with one count of child molestation in the first degree, and with a predatory

offense special allegation. CP 158-59. Prior to trial, Lear moved to suppress identifications made by the victim, P.K. and her father, Jeremy K. CP 142-50. The court denied the motion to suppress. CP 239-44. A jury found Lear guilty as charged, and also found that the crime was a predatory offense. CP 195. Lear was sentenced to an indeterminate sentence of 300 months to life incarceration. CP 231.

2. FACTS OF THE CRIME.

On January 30, 2013, eleven-year-old P.K. was visiting the Enumclaw public library with her father, Jeremy K. RP 7/31/14 132, 136-37. After a while, she became hungry and asked her father if she could go to the car to eat an apple. RP 7/31/14 137. He gave her the keys to the car, and P.K. went to the car and sat in the backseat, eating an apple and reading a book. RP 7/31/14 138.

A man later identified as Travis Lear opened the unlocked car door and pulled P.K. out of the car. RP 7/31/14 140. P.K. had never seen Lear before. RP 7/31/14 140; RP 8/4/14 11. Lear told P.K. to come with him or he would kill her. RP 7/31/14 140. P.K. was so frightened she could not scream. RP 7/31/14 141.

Lear directed P.K. back into the library and to the women's restroom, where he instructed her to check and see if anyone was

using the restroom. RP 7/31/14 142, 146. She reported that there was no one in the restroom. RP 7/31/14 146. Lear took P.K. into the restroom, secreted her in one of the stalls and ordered her to take her pants off. RP 7/31/14 148. When she refused to remove her pants, Lear told P.K. that he would let her go if she let him put his hand down her pants. RP 7/31/14 149. Lear then used his hand to touch P.K.'s vaginal area. RP 7/31/14 149, 153. Next he told her to kiss him, and then he kissed her on the mouth. RP 7/31/14 150. Lear's assault on P.K. lasted approximately 3 to 4 minutes, by P.K.'s estimation. RP 7/31/14 150. After kissing P.K., Lear told her to leave the restroom and act as if nothing had happened. RP 8/4/14 14.

After waiting for P.K. for a bit, her father went out to the car to find her. RP 8/4/14 93-94. He found the car unoccupied and the keys on the steering wheel. RP 8/4/14 94. He assumed P.K. had gone to use the restroom, so he pulled the car around to the waiting area. RP 8/4/14 96. Suddenly, P.K. "burst" into the backseat, crying and extremely agitated, and told her father that a man took her to the restroom and tried to have sex with her. RP 8/4/14 98. She then pointed to Lear, who was walking away from the library, and stated that he was the man that attacked her. RP 8/4/14 100.

Jeremy K. ran after Lear and tried to confront him about the allegation. RP 8/4/14 104. Lear told Jeremy K. that “that wasn’t me,” that it was “another guy” and claimed that he heard some screaming and had helped P.K. RP 8/4/14 105. Confused, Jeremy K. quickly returned to his daughter in the car and asked her if she was “absolutely sure” that Lear was the man that sexually assaulted her. RP 8/4/14 105. She confirmed that Lear was the attacker. RP 8/4/14 114.

Jeremy K. tried to run after Lear, but Lear ran away, stating “Leave me alone.” RP 8/4/14 115. Jeremy K. called 911. RP 8/4/14 119. The time was 12:32 p.m. RP 8/5/14 94-95.

P.K. described the man who attacked her to the police as follows: a white male, in his late 20s, with an orange or reddish beard, “thick in size” and “not super tall.” RP 8/5/14 103. She told police he was wearing a red coat and carrying a blue and gray backpack. RP 8/5/14 103. Jeremy K. advised the police that the man was wearing a red jacket and jeans. RP 8/5/14 104.

Travis Lear had met with Lillian Wilbur at the Enumclaw police station, two blocks from the Enumclaw public library, from 11:15 to 11:30 a.m. on January 30, 2013. RP 8/5/14 9, 154-56. Lear was wearing a red jacket, blue jeans and carrying a gray

backpack. RP 8/5/14 156. When he left the meeting, Lear stated that he wanted to go the library. RP 8/5/14 156.

P.K. and Jeremy K. were interviewed by Detective Leitl at the Enumclaw police station shortly after the crime. When they described the man who attacked P.K., he told them he suspected who the man was and he may have been in the police station lobby earlier that day. RP 8/5/14 17-19. Detective Leitl had seen Lear in the lobby that morning wearing a red coat and blue jeans and carrying a backpack. RP 8/5/14 19.

Jeremy K. identified a surveillance photograph of Lear from that morning as being the man he encountered outside the library. RP 8/5/14 26-28. Jeremy K. said he was "100 percent" confident of his identification. RP 8/4/14 132; RP 8/5/14 28. The surveillance photo was not shown to P.K. RP 8/4/14 26; RP 8/5/14 28, 63. Detective Leitl testified that he was acting with some urgency and wanted to identify the suspect quickly because of the serious nature of the offense and concern that the suspect might reoffend before he was apprehended. RP 8/5/14 61.

Travis Lear was arrested at his mother's home hours after the incident. RP 8/5/14 114. He was not wearing a red coat and did not have a backpack. RP 8/5/14 115. A search warrant was

served on Lear's apartment near the library on February 5, 2013.

RP 8/5/14 34. The police found a red jacket and blue and gray backpack in the apartment. RP 8/5/14 34-35.

On January 31, 2013, the day after the crime occurred, P.K. and her father returned to the Enumclaw police station where they were separately shown a photographic montage. RP 8/5/14 29-31, 79-81. Both P.K. and her father picked Lear's photograph.

RP 8/5/14 81. P.K. identified Lear at trial as the man that molested her in the library restroom. RP 7/31/14 151. Jeremy K. identified Lear at trial as the man he confronted outside the library.

RP 8/4/14 120.

3. FACTS PERTAINING TO SUPPRESSION MOTION.

The defense moved to suppress all the identifications of Lear—Jeremy K.'s identification of the surveillance photograph, Jeremy K.'s and P.K.'s identifications of Lear from the photographic montage, and Jeremy K.'s and P.K.'s in-court identifications of Lear at trial—as impermissibly suggestive and violating due process.

RP 7/28/14 9-12; CP 142-50.

The facts presented at the suppression motion established that Officer Lobdell first responded to the 911 call at the library, and received descriptions of the suspect from both P.K. and her father.

RP 7/28/14 17-19, 21, 23. P.K described the suspect as “a white male,” “late 20s to 30 years of age,” orange-ish to reddish beard,” “thick in size,” “not very tall,” hair approximately two inches long, wearing a red coat and carrying a blue and gray backpack.

RP 7/28/14 23. Jeremy K. described the suspect as a white male in his 20s, with a beard, wearing a red jacket and jeans.

RP 7/28/14 19, 21.

Detective Leitl accompanied P.K. and her father to the police station, which was two blocks away. RP 7/28/14 40. He interviewed P.K. in the presence of her father due to the fact that she was still very upset about the incident. RP 7/28/14 41-43. The description matched Travis Lear, whom Detective Leitl had seen at the police station shortly before the crime. RP 7/28/14 46. He obtained an image of Lear from that morning from the surveillance system. RP 7/28/14 26-28, 46-49. Detective Leitl told Jeremy K. that a “registered offender” had been in the lobby of the police station earlier that day. Ex. 12. Detective Leitl had Jeremy K. step out of the room so that P.K. would not see, and showed him the surveillance photograph. RP 7/28/14 49-50. Jeremy K. immediately identified the man in the photograph as the same man

he had just confronted outside the library. RP 7/28/14 49.

Jeremy K. said he was "100 percent" certain. RP 7/28/14 51.

P.K. did not see the surveillance photograph. RP 7/28/14 49-50, 66. P.K. was told by her father that the police knew who the man was and were going to arrest him. Ex. 12; RP 7/28/14 61.

Detective Leitl spent a couple of hours constructing a photographic montage by hand. RP 7/28/14 61. Lear's photograph in the montage was different from the surveillance photograph from the day before. Ex. 16, 24. P.K. and her father returned to the police station the next day, and a different officer showed each of them individually the montage of six photos. RP 7/28/14 62, 64; RP 7/19/14 4-12.¹ The officer read them instructions, which stated, "The person who committed the crime may or may not be included," and "You should not feel like you have to make [an] identification." Ex. 11 and 17. Both P.K. and her father identified Lear from the montage. RP 7/29/14 7-11. P.K. stated that she was 85 percent sure. RP 7/29/14 8. Her father stated he was 100 percent positive. RP 7/29/14 11.

¹ Testimony from P.K. and Jeremy K. at trial verified that the photos were shown to them sequentially. RP 8/4/14 45, 132.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE IDENTIFICATIONS OF LEAR.

Lear argues that all of the identifications in this case—the identification of the surveillance photograph by Jeremy K., the photographic montage identifications by P.K. and Jeremy K., and the in-court identifications by P.K. and Jeremy K.—should have been suppressed as being the result of an impermissibly suggestive identification procedure. However, the trial court properly applied the law to the facts and reasonably concluded that the identifications at issue were sufficiently reliable to be admitted at trial. Lear’s due process claim should be rejected.

An out-of-court identification process violates due process if it is so impermissibly suggestive that it gives rise to a likelihood of irreparable misidentification. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). The due process inquiry is a two-step process. First, the defense bears the burden of showing that a procedure was impermissibly suggestive. Id. If the defense fails to meet this burden, the inquiry ends. Id. If the defense meets the burden of showing an impermissibly suggestive procedure, the court undertakes the second step. Id. The court considers, based on the

totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification. Id.

In conducting this second step of the inquiry, the court should consider five reliability factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the amount of time between the crime and the identification. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)). These reliability factors have evolved from three United States Supreme Court cases: Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); and Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). They are often referred to as the Biggers reliability factors. Manson, 432 U.S. at 114; State v. Sanchez, 171 Wn. App. 518, 573-74, 288 P.3d 351 (2012). A trial court's application of this due process inquiry is reviewed for abuse of discretion. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001).

In this case, the trial court properly applied the two-step due process inquiry. The trial court first concluded that showing the single surveillance photograph to Jeremy K. after advising him that the person in the photograph was a “registered offender” who had been in the police station earlier that day was impermissibly suggestive. CP 242. The trial court also found that the photographic montage shown to P.K. and Jeremy K. was not impermissibly suggestive. CP 243.² The trial court then carefully analyzed the Biggers reliability factors and concluded that due process did not require exclusion of any of the identifications.

The trial court did not abuse its discretion in applying the Biggers reliability factors and concluding that Jeremy K.’s identifications of Lear in the surveillance photograph, in the photographic montage and in court were admissible. As the trial court found, Jeremy K. had a good opportunity to view the man whom P.K. pointed out as her attacker. The encounter occurred outside in broad daylight. He had two short conversations with the man from a very short distance. CP 242. Jeremy K. had a high degree of attention when confronting the man who he believed had just assaulted his daughter. CP 242. Indeed, the purpose of the

² Although Lear assigns error to this finding, he makes no argument in his brief as to why the montage was impermissibly suggestive.

confrontation was to try to identify the man. Jeremy K. gave a detailed and accurate description of Lear before identifying him in the surveillance photograph and the montage. CP 242. In the 911 call, he described the suspect as a white male with a pale complexion, in his 20s, with a scruffy beard, wearing a red jacket and jeans and carrying a backpack. RP 7/28/14 19; RP 8/4/14 122-25. Jeremy K. stated that he was absolutely certain of the accuracy of his identifications, which he made without any hesitation. CP 242; RP 7/28/14 49; RP 7/29/15 11. Finally, the identification from the surveillance photograph happened within one to two hours of the crime, and the identification from the photographic montage happened the next day, while the events were very fresh in Jeremy K.'s mind. CP 242; RP 7/28/14 44. The trial court properly exercised its discretion in concluding that there was no likelihood of irreparable misidentification under these circumstances.

The Biggers reliability factors need not be applied to P.K.'s identification of Lear from the photographic montage, because it could not have been tainted by the surveillance photograph shown to her father. She never saw that photograph. Although she was told on January 30 that her father and the police had identified the

man, she had no idea what that man looked like. On January 31, the photographic montage was administered to her separately outside the presence of her father, and she was instructed that the person who assaulted her might not be included. The suggestiveness of the procedure with the surveillance photograph shown to Jeremy K. could not have tainted P.K.'s identification of Lear in the photographic montage.

Nonetheless, the trial court applied the Biggers reliability factors, and reasonably concluded that P.K.'s identifications of Lear in the photographic montage and in court should be admitted. The trial court found that P.K. had a good opportunity to view the man who molested her. The interaction occurred in broad daylight, as he removed her from the car and forced her into the library and the restroom. She had a prolonged face-to-face encounter with the man in close proximity to him. CP 243. P.K. had a high degree of attention during the attack, as she was very fearful and paid close attention to what he was saying and doing. CP 243. P.K. gave a very detailed and accurate description of Lear before identifying him in the montage. CP 243. She told the responding officer that he was a white male, between 20 and 30 years old, with a reddish beard, a thick build, not particularly tall, wearing a red coat and

carrying a blue and gray backpack. RP 7/28/14 23. P.K. stated that she was 85 percent certain of the accuracy of her identification. CP 243; RP 7/29/15 8. Finally, the identification from the photographic montage happened the following day, while P.K.'s memory was fresh. CP 243; RP 7/29/14 5. It should also be noted that P.K.'s and Jeremy K.'s ability to both independently pick the defendant from the photographic montage strongly indicates the reliability of those identifications. The trial court properly exercised its discretion in concluding that there was no likelihood of irreparable misidentification under these circumstances.

Comparison of this case to State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985), which Lear cites, is instructive. In that case, the court found a lineup procedure to be impermissibly suggestive. Id. at 746. The court also found that the reliability factors indicated a substantial likelihood of misidentification. The evidence indicated that the victim viewed the suspect for 2 or 3 minutes at most and did not observe him closely enough to be able to answer whether the man had a mustache. Id. at 747. The victim's initial description of the suspect did not match the defendant: the victim reported that the suspect wore jeans and a short-sleeved shirt, while the defendant was arrested in different

clothing. Id. The victim was initially unable to choose the defendant from a lineup the day after the crime, but tentatively identified him after being told that the defendant had been arrested. Id. The court found a “very substantial likelihood of irreparable misidentification” under those circumstances. But in this case, unlike McDonald, the Biggers factors strongly support the reliability of the identifications.

Lear argues that Washington courts should abandon the current legal framework developed by the United States Supreme Court and adopt a framework similar to that used in New Jersey, as set forth in State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011). However, the Washington Supreme Court has refused to follow the New Jersey court’s lead in this area. State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013) (rejecting a rule requiring an instruction on cross-racial identifications). The framework set forth by the United States Supreme Court and adopted by Washington courts remains binding precedent.

Lear also cites to Brodes v. State, 279 Ga. 435, 614 S.E.2d 766 (2005), a Georgia case that disapproves of using a witness’s level of certainty as an indicator of reliability. But even if level of

certainty were removed from consideration, all of the other Biggers reliability factors cut strongly in favor of admissibility in this case.

In sum, the trial court properly applied the correct legal framework for determining the admissibility of the identifications, and reasonably concluded under the totality of the circumstances that there was no substantial likelihood of irreparable misidentification. The trial court properly exercised its discretion in admitting the identifications of Lear.

2. THE PREDATORY OFFENSE SPECIAL ALLEGATION WAS PROPERLY IMPOSED.

Lear argues that the predatory offense enhancement statute: (1) violates due process principles of vagueness; and (2) that its imposition violated his right to equal protection of the law. However, because the statute does not implicate First Amendment rights, Lear cannot challenge it as unconstitutional in all of its applications, and instead must prove that it is vague as applied to the specific facts of his case. Lear's conduct falls squarely within the bounds of the statute. Moreover, because the statute includes clear standards that protect against arbitrary or discriminatory enforcement, it is not unconstitutionally vague. Finally, the special

allegation statute does not confer unfettered prosecutorial discretion, and no equal protection violation occurred in this case.

a. The Predatory Offense Special Allegation Is Not Unconstitutionally Vague.

Appellate courts review the constitutionality of a statute *de novo*. State v. Rice, 174 Wn.2d 884, 892, 279 P.3d 849 (2012). Statutes are presumed to be constitutional, and a defendant must prove vagueness beyond a reasonable doubt. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

The predatory offense special allegation statute, RCW 9.94A.836, provides:

(1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall

make a finding of fact as to whether the offense was predatory.

(3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

The term "predatory" is defined by the Sentencing Reform Act

("SRA") to mean:

(a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the

same meaning as defined in RCW 28A.225.010; and (B) “teacher, counselor, volunteer, or other person in authority” does not include the parent or legal guardian of the victim.

RCW 9.94A.030(38). “Stranger’ means that the victim did not know the offender twenty-four hours before the offense.”

RCW 9.94A.030(50).

Under the Due Process Clause, a statute is void for vagueness if: (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it; or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

Lear does not allege that the statute fails to adequately define the conduct to which it applies. Rather, he focuses solely on the second prong of the test for vagueness – whether the statute provides sufficient guidelines for enforcement. Requiring ascertainable standards of guilt protects against arbitrary, erratic, and discriminatory enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). A statute does not protect

against arbitrary enforcement if it proscribes conduct by resort to terms that are “inherently subjective in the context in which they are used.” Id. at 181 (quoting State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988)). However, the fact that subjective evaluation is required to determine whether the statute has been violated does not render it unconstitutionally vague; the due process clause prohibits only those statutes that “invite an inordinate amount of police discretion.” Douglass, 115 Wn.2d at 181.

Statutes that do not implicate First Amendment rights are examined for vagueness only as applied to the particular facts of the defendant’s case. State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). In other words, if the statute clearly applies to the defendant’s conduct, he may not challenge it as vague when applied to the conduct of others. City of Seattle v. Abercrombie, 85 Wn. App. 393, 400, 945 P.2d 1132 (1997).

The predatory offense special allegation statute does not involve First Amendment rights. Thus, Lear may not challenge the statute as vague in all of its applications. Watson, 160 Wn.2d at 6. Rather, he bears the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague *as applied to his specific conduct*, “not by examining hypothetical situations at the

periphery of the [statute]'s scope.” Douglass, 115 Wn.2d at 182-83. Lear presents no argument or analysis as to how the special allegation statute is vague as applied to his conduct. Thus, this Court should refuse to address his vagueness argument. See State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate court will not address issue unsupported by argument or relevant authority).

Even if this Court considers Lear’s argument, the predatory offense statute clearly applies to him. Lear was charged with child molestation in the first degree and was a stranger to the victim. Eleven-year-old P.K. had never seen Lear before he took her from her car into the women’s restroom of the library and molested her in the toilet stall. RP 7/31/14 140. Because the predatory offense special allegation clearly covers Lear’s conduct, he cannot complain of arbitrary enforcement in other contexts.

Regardless, the predatory offense statute includes clear standards that guard against arbitrary, discriminatory, or ad hoc application. The State must present evidence that the defendant was either a stranger to the victim (as defined by not knowing the defendant twenty-four hours before the crime), that the purpose of victimization was a significant reason the defendant established or

promoted a relationship with the victim, or that the defendant was a teacher, counselor, volunteer, etc., at a school, church, or home-based instructional setting. RCW 9.94A.030(39), (51). The State must prove the defendant's status relative to the victim beyond a reasonable doubt to the trier-of-fact. RCW 9.94A.836(2).

The State's discretion to charge the predatory offense allegation is guided and limited by statute. The prosecutor must consider whether sufficient admissible evidence exists to justify a finding that the offense was predatory by a reasonable and objective fact-finder, and must weigh that evidence against the most reasonably foreseeable defense. RCW 9.94A.836(1). The prosecutor must also consider, after consulting with the victim, whether filing the special allegation would interfere with the ability to obtain a conviction. Id.

The operation of these factors prevents arbitrary enforcement of the law. The mere fact that subjective evaluation is required to determine whether the statute has been violated does not render it unconstitutionally vague. Douglass, 115 Wn.2d at 181. Indeed, in State v. Halstein, 122 Wn.2d 109, 857 P.2d 270 (1993), the Washington Supreme Court concluded that *nearly-identical* guidelines were sufficient to prevent arbitrary enforcement

of the sexual motivation special allegation statute. Although Lear argues that Rice³ “opened the door to arbitrary, ad hoc, or discriminatory filing of the special allegation,” he fails to offer any explanation for how that is so. Lear attempts to distinguish Halstein on the basis that Rice had not yet been decided when the court concluded that the similarly-worded sexual motivation statute contains ascertainable standards of guilt and is not unconstitutionally vague. But there is no basis to conclude that the court’s analysis in Halstein depended on a reading of the statute as mandatory versus directory.⁴

Lear appears to argue that the mere fact that prosecutors have discretion to charge the predatory offense enhancement renders it unconstitutionally vague. However, broad prosecutorial charging discretion “is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington

³ In State v. Rice, *supra*, 174 Wn.2d at 897, the court held that the predatory offense allegation statute is directory, not mandatory, and does not violate the separation of powers doctrine.

⁴ Long before Halstein, the Washington Supreme Court recognized that mandatory charging statutes were unconstitutional. See State v. Rowe, 93 Wn.2d 277, 283, 609 P.2d 1348 (1980) (a prosecutor’s mandatory policy for charging the habitual criminal allegation would be unconstitutional). Courts presume the constitutionality of statutes. *Id.* See also State ex rel. Herron v. Browet, Inc., 103 Wn.2d 215, 219, 691 P.2d 571 (1984) (Courts have a duty to construe a statute in a constitutional manner whenever possible). Thus, it is unlikely that Halstein’s analysis depended on an unconstitutional interpretation of the sexual motivation statute.

State Constitution.” Rice, 174 Wn.2d at 904. Prosecutors have discretion to charge the predatory offense special allegation in an appropriate case:

[A]lthough the legislature sometimes speaks in mandatory terms when authorizing the filing of certain criminal charges, that language is subject to the legislature’s own general and underlying acknowledgment of prosecutorial charging discretion. Here the legislature has directed that the “prosecuting attorney shall file a special allegation of sexual motivation . . . when sufficient admissible evidence exists,” but also has acknowledged that for various reasons, the prosecutor still “may decline to prosecute, even though technically sufficient evidence to prosecute exists,” RCW 9.94A.411(1). The use of mandatory language in this context can be seen as a legislative expression of priority, meant to guide prosecuting attorneys but always subject to the prosecutor’s underlying charging discretion.

Rice, 174 Wn.2d at 899. Lear makes no argument on appeal that the prosecutor did not actually exercise its discretion in his case. The predatory offense special allegation provides sufficient guidance to prevent arbitrary enforcement. The fact that the prosecutor is vested with the discretion to decide whether to charge it does not render it unconstitutionally vague.

b. Imposition Of The Predatory Offense
Enhancement Did Not Deprive Lear Of Equal
Protection Of The Law.

Lear argues that imposition of the predatory offense special allegation statute violated his right to equal protection because the statute confers upon the prosecution unfettered discretion to charge the allegation. However, his argument is premised on the erroneous assertion that the statute lacks guidelines to inform the exercise of prosecutorial discretion. As demonstrated above, the predatory offense statute contains clear guidelines for when a prosecutor can file the special allegation. There is no suggestion in this case that Lear was subjected to arbitrary enforcement of the law. His equal protection challenge must be rejected.

Both the Fourteenth Amendment and Article I, section 12 require that persons similarly situated with respect to the legitimate purpose of the law be similarly treated. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). When a statute involves a physical liberty interest only, and does not involve a suspect class, it is reviewed under the rational basis test. Id. at 673. The challenged statute will be upheld if it is rationally related to meeting a legitimate state goal. Id. The person challenging the statute

must demonstrate that it is purely arbitrary. Id. Lear agrees that the rational basis test applies here.

This Court has “recognized that the same crime may be committed in ways warranting harsh or lenient punishment,” and that prosecutors have discretion to consider individualized circumstances of a crime to seek an appropriate punishment. State v. Edwards, 17 Wn. App. 355, 361-62, 563 P.2d 212 (1977). Statutes authorizing varying punishment for the same criminal act rest upon the rational distinction between the motives and methods of commission of the crime. State v. Workman, 90 Wn.2d 443, 455-56, 584 P.2d 382 (1978). If “enforcement of criminal statutes is not arbitrary, capricious or based on unjustifiable standards it does not deny equal protection.” Id. See also State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987) (statutes authorizing different punishments for the same criminal act do not violate equal protection in the absence of selective or arbitrary enforcement).

Lear makes no argument that the State did not appropriately exercise its discretion in this case, or that the predatory offense allegation was filed arbitrarily or unjustifiably. He simply asserts, with no support or analysis, that the statute lacks any limitation on prosecutorial discretion, and therefore violates equal protection.

However, as discussed above, the predatory offense statute contains clear standards that guide prosecutorial discretion. The mere fact that it applies to a number of different individuals, all of whom have either unique access or are utter strangers to the child victim, does not present an equal protection problem. The enhanced punishment furthers the legitimate and substantial state goal of punishing and deterring predatory child sexual offenders. Because the statute passes the rational basis test, Lear's equal protection argument fails.

Lear also makes a cursory argument that imposition of the predatory offense statute violated his right to equal protection because it provides that the court may not dismiss the allegation except in limited circumstances. However, Lear cites no support for his claim that equal protection is violated solely by virtue of the fact that increased punishment inevitably follows a finding that the offense was predatory. Because Lear has failed to establish that the predatory offense special allegation statute rests on grounds that are wholly irrelevant to the achievement of legitimate state objectives, or that its application to him was purely arbitrary, his sentence must be affirmed.

D. CONCLUSION.

Lear's conviction and sentence should be affirmed.

DATED this 24th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jan Trasen, the attorney for the appellant, at Jan@washapp.org, containing a copy of the Brief of Respondent, in State v. Travis Martin Lear, Cause No. 72454-1, 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.

Dated this 24th day of August, 2015.



Name:

Done in Seattle, Washington