

81270-5
23946-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT/CROSS-RESPONDENT

v.

RAYMOND C. HUGHES, RESPONDENT/CROSS-APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Kevin M. Korsmo
Deputy Prosecuting Attorney
Attorneys for Appellant/Cross-Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

INTRODUCTORY STATEMENT

Appellant/Cross-Respondent, State of Washington, respectfully submits this reply brief on the one issue presented by the cross appeal.

II.

ISSUE PRESENTED

(1) Are the crimes of second degree rape and second degree child rape the same in law and fact for purposes of double jeopardy analysis?

III.

ARGUMENT

A. SECOND DEGREE RAPE AND SECOND DEGREE CHILD RAPE ARE SEPARATE CRIMES FOR PURPOSES OF THE PROTECTION AGAINST DOUBLE JEOPARDY.

The respondent/cross-appellant contends that the convictions for second degree rape and second degree child rape violate the constitutional protection against Double Jeopardy. The two offenses

are not the same in law and fact, so the trial court did not err in permitting both convictions to stand.

The basic law was set out by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932). That case involved the question of whether the sale of narcotics on one occasion could violate two different statutes. The court ruled that it could:

Each of the offenses created required proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, ... In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Com. 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

284 U.S. at 304 (citation omitted). Specifically, the one sale violated both the original packaging statute (controlled substance must bear a stamp, found in §1 of the Narcotics Act) and the requirement that transfers of controlled substances be made pursuant to a written order form (§2 of the Narcotics Act). Id. at 303-304.

Blockburger, thus, established that double jeopardy was implicated only when multiple charges involved lesser-included offenses. The analysis dealt strictly with the statutory elements of the charged offenses. See Grady v. Corbin, 495 U.S. 508, 109 L. Ed. 2d 548, 561, 110 S. Ct. 2084 (1990). As respondent notes, that view has clarified somewhat over the years in that the analysis must be based on the charged facts rather than merely viewing the statutory elements in the abstract without regard to the factual allegations. In re Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004). However, the Blockburger test remains the governing principle. Id. at 815-816. If the evidence necessary to prove one crime also completely proves the other crime, the two are the same in law and fact for Blockburger purposes. Id. at 820.

The crimes at issue are not the same in law and fact under Blockburger. The second degree child rape statute requires proof of the age of the victim and defendant. RCW 9A.44.076(1). The second degree rape statute, as charged in this case, requires proof that the victim was incapable of consent because of incapacitation. RCW 9A.44.050(1)(b). The fact that both crimes involve the same *actus reus*, one act of sexual intercourse, does not resolve the analysis. If it did, then Blockburger itself was wrongly decided since there was only one act of delivering one controlled substance. Rather, the issue is whether, as Orange acknowledged, proving the one crime

necessary proved the other offense. 152 Wn.2d at 820. It did not. Proving that defendant had sexual intercourse with a disabled person in violation of the second degree rape statute did not establish the critical elements of child rape – the age of the victim and the age differential between the participants. Proving that defendant engaged in sexual intercourse with a child, the essence of child rape, likewise did not prove that the victim was incapable of giving consent so that the crime also amounted to second degree rape. Proof of each crime failed to prove the other offense. Under Blockburger, there was no violation of the Double Jeopardy clause.

Other cases likewise recognize that similar crimes committed by the same act do not therefore satisfy the Blockburger standard. *E.g.*, State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) [single act of intercourse supported convictions for both incest and second degree rape because each offense required proof of element that other crime did not have]; State v. Jones, 71 Wn. App. 798, 825, 863 P.2d 85 (1993), *review denied* 124 Wn.2d 1018 (1994) [child molestation and child rape not same offense under Blockburger]. *Compare* State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) [serial acts of intercourse, even though committed at nearly the same time, constituted separate rapes]. Calle is dispositive in this case – a single act of sexual intercourse can violate multiple statutes without offending the constitution.

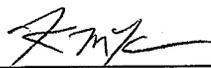
Defendant's argument here essentially conflates the legal and factual prongs of Blockburger into a "same act" analysis – if each crime was proven by the same action, then they are the same. That is incorrect. It is only if the same action proves the entirety of each offense that the Blockburger standard is met. That did not happen here. The one act of intercourse, although common to both crimes, did not fully prove either of them. Each crime required proof that the other did not, and proof of one crime did not prove the other offense. Accordingly, the two crimes are not the same in law and fact. State v. Calle, supra. Double Jeopardy does not require that one be vacated.

IV.

CONCLUSION

For the reasons stated herein and previously, the convictions should be affirmed and the matter remanded for consideration of an exceptional sentence.

Respectfully submitted this 14th day of September, 2005.



Kevin M. Korsmo #12934
Deputy Prosecuting Attorney

Attorney for Appellant/Cross-Respondent