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SUPREME COURT NO. 92775-8

IN THE SUPREME COURT FOR THE  
STATE OF WASHINGTON

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MIGUEL ANGEL ALBARRAN,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COUNTY

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RESPONDENT'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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A. SUPPLEMENTAL STATEMENT OF FACTS

Denise Domke and Miguel Albarran were in an on-again/off-again romantic relationship punctuated by Mr. Albarran's infidelity and Ms. Domke's angry and volatile responses. RP 243, 261, 361, 365. In the spring of 2013, Miguel and Denise were still living together. One morning, Ms. Domke claimed to have observed Mr. Albarran engaged in oral sex with her sleeping 13-year-old daughter. RP 251. The daughter purportedly had no recollection of this occurring and woke to her mom yelling at Mr. Albarran. RP 68-69.

The State initially charged Mr. Albarran with child molestation in the second degree. When he set the case for trial, however, the State amended the Information to add three additional charges. The four charges now included: 1) rape of a child in the second degree, 2) attempted rape of a child in the second degree, and 3) rape in the second degree (incapable of consent prong). CP 21-24. The State also alleged three sentencing aggravators: violation of a position of trust, invasion of the victim's privacy, and a victim less than 15 years old. *Id.*

Prior to the start of trial, defense counsel moved to dismiss the Rape 2 charge as a violation of double jeopardy. The defense cited to this Court's decision in *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009). RP 4-7. The defense argued that it was unfairly prejudicial to have multi-

ple charges for the same act before the jury. RP 5. The State argued that double jeopardy does not arise until there are multiple convictions. The trial court denied the motion. RP 6-7.

The defense again raised double jeopardy after the State rested, explaining that rape in the second degree does not apply in the case of an underage child. RP 332-333 The court denied the motion. RP 335-336. The defense also objected to the jury instructions relating to second-degree rape on the same basis. RP 391-392. The court gave the challenged instruction over defense objection.

The jury returned a guilty verdict on all charged offenses and aggravating factors. At sentencing, defense counsel argued that multiple convictions for the single act of intercourse violated double jeopardy. Further, argued counsel, because rape of a child is the more specific offense, the court must dismiss the rape in the second-degree conviction under the general/specific doctrine. RP 474-77.

The trial court disagreed and sentenced Mr. Albarran on the second-degree rape conviction. Because the victim was under the age of 15, the court imposed a mandatory 25-year minimum sentence based on RCW 9.94A.837. CP 48-62.

On appeal, Mr. Albarran challenged the second degree rape conviction as a violation of the general/specific doctrine. As he did below,

Mr. Albarran relied upon the reasoning in *State v. Hughes, supra*. The State responded that *Hughes* was no longer good law, and even assuming it was, *Hughes* did not support appellant's argument. The State's main argument was that the two statutes are not concurrent.

The court of appeals ruled in favor of Mr. Albarran on this issue. *State v. Albarran*, Slip Op. 46162-5-II at 17-20 (filed December 1, 2015). The court remanded the case to the trial court to vacate the second degree rape conviction and to reinstate the conviction for rape of a child. *Id.* at 20. The State filed an unsuccessful motion to reconsider. This was followed by the State's Petition for Review, which this Court granted.

**B. SUPPLEMENTAL ARGUMENT**

**THE COURT OF APPEALS APPROPRIATELY VACATED  
THE CONVICTION FOR RAPE IN THE SECOND DEGREE.**

**a. The General/Specific Doctrine**

When a specific statute proscribes conduct that is also prohibited by a more general statute, the "general-special" rule requires the State to prosecute only under the more specific statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). The rule gives effect to legislative intent and ensures that charging decisions are consistent with that intent. *State v. Conte*, 159 Wn.2d 797, 803-804, 154 P.3d 194 *cert. denied*, 552 U.S. 992 (2007). Requiring prosecutors to charge under the more specific

statute promotes equal protection of the laws by ensuring that similarly situated defendants are subjected to the same potential punishment. *State v. Cann*, 92 Wn.2d 193, 196, 595 P.2d 912 (1979).

This general/specific doctrine only applies to concurrent statutes. *Shriner*, 101 Wn.2d at 580. The concurrency test is relatively straightforward: Will the specific statute be violated every time the general statute is violated? If so, the statutes are concurrent. *Id.*

In order to answer this question, the court must look at the elements of both statutes. If the specific statute contains all of the elements of the general statute, the statutes are concurrent. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010). “It is not relevant that the special statute may contain additional elements not contained in the general statute; *i.e.*, notice.” *Shriner*, 101 Wn.2d at 580.

**b. Second degree rape under the incapable of consent prong and rape of a child in the second degree are concurrent statutes.**

There are three statutes of particular significance to the issue presented in this appeal. The first is rape in the second degree, which provides in relevant part that a person is guilty when he has sexual intercourse with another person when “the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” RCW 9A.44.050(1)(b).

The second statute is the definition of mental incapacity, which provides:

“Mental incapacity” is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

RCW 9A.44.010. A person is deemed mentally incapacitated when he or she does not have a “meaningful understanding” of the nature and consequences of sexual intercourse. *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994).

The third relevant statute is rape of a child in the second degree, which provides:

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076.

The court of appeals in the present case examined these three statutes. Relying upon the holding and reasoning of *State v. Hughes*, the court observed that a child is incapable of consent due to his or her age. Thus, every time a defendant commits the crime of child rape in the second degree (specific offense), he necessarily also commits rape in the second degree under the incapacity prong (general offense). *Albarran*, Slip Op. at

17-20. Accordingly, the two statutes were concurrent and the trial court erred in dismissing the specific offense instead of the general.

The State disagrees, and attacks the foundation of the court's opinion: "the rape of a child statute is not concerned at all with consent (or the lack of ability to give it)." *COA Response* at 31. The State says "it is obvious children can understand the nature of sexual intercourse, particularly when they have been subjected to it." *Id.* at 30; *see Petition* at 7-8. According to the State, rape of a child is not based on an inability to consent, but on a policy decision that we do not want children having sex with people a certain age older than the children. *Petition* at 10. The State argues that inability to consent is not an element of child rape; therefore, the statute is not concurrent with rape in the second degree under the incapacity prong. *Id.* at 10, 12; *COA Response* at 30-31.

The State cites no authority for its proposition that the child rape statute is not based on an inability to consent. This is not surprising, as this Court has held the opposite. For instance, in *Christensen v. Royal School District*, 156 Wn.2d 62, 124 P.3d 283 (2005), a teacher had sexually abused a 13-year-old student. In the ensuing civil suit, the defendant school district asserted as an affirmative defense that the girl had voluntarily participated in the sexual relationship with the teacher. *Id.* at 65. The question presented to this Court was whether a child under the age of 16

could have contributory fault assessed against her for participating in the sexual relationship. *Id.* at 64.

In addressing this question, this Court examined the purpose of the related criminal statutes. “The obvious purpose of these criminal statutes is to protect persons who, by virtue of their youth, are too immature to rationally or legally consent.” *Id.* at 68 (emphasis added). Applying this rationale to civil cases, this Court explained, “the notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result.” *Id.* (emphasis added). In finding that contributory fault could not be attributed to the 13 year old girl, this Court stated, “The child, in our view, lacks the capacity to consent to the sexual abuse[.]” *Id.* at 72.

Thus, contrary to the State’s argument in the present case, the child rape statute is premised on the child’s inability to meaningfully consent to the sexual encounter. *See also, State v. Clements*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent); *State v. Heming*, 121 Wn. App. 609, 612, 90 P.3d 62, 64 (2004) (child rape statutes have the “obvious objective” of protecting children who are too immature to rationally consent).

This same inability to meaningfully consent to sex is the crux of rape in the second degree under the incapacity prong. *State v. Ortega-Martinez*, 124 Wn.2d at 711. The mere fact that someone verbally “consents” to sex and understands the mechanics of the act is meaningless “if there is sufficient evidence that the victim was incapable of effective consent.” *State v. Al-Hamdani*, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001).

In *Al-Hamdani*, the victim was a mother and well aware of the nature and consequences of sexual intercourse. On that night, however, she had too much to drink at a bar before having sex with a man she had met. The State filed rape in the second-degree charges under the incapacity prong. An expert for the State testified that a person with a blood alcohol level of .15 “could not appreciate the consequences of his or her actions.” *Id.* at 609. The defense argued that the woman could not have been incapable of consent, because she admitted at trial that she had said “no” to the defendant’s request for oral sex. *Id.* at 608. Nevertheless, the defendant was convicted. In response to his challenge to the sufficiency of the evidence, the court of appeals concluded that a jury could have reasonably found that the victim “was incapable of meaningfully understanding the nature or consequences of sexual intercourse at the time it occurred.” *Id.* at 610.

It is clear that both child rape and rape in the second degree under the incapacity prong are concerned with the inability to meaningfully consent to sex. In some cases a victim may be unable to consent because alcohol has reduced her ability to fully understand and appreciate what she is agreeing to. *See State v. Al-Hamdani*, 109 Wn. App. 599, 610, 36 P.3d 1103, 1108 (2001). In other cases, it is the lack of age and maturity that makes a person incapable of appreciating the nature and consequences of the sex act. *See State v. Clements*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent.). As the *Hughes* Court recognized, in either event, the inability to consent is at the heart of the crimes. *Hughes*, 166 Wn.2d at 683.

The State's claim that inability to consent is not an implied element of child rape is not new. In fact, this Court rejected an almost identical argument in *State v. Hughes, supra*. In *Hughes*, the State charged the defendant with two counts of rape resulting from one act of sexual intercourse with a twelve-year-old girl who suffered from cerebral palsy. As in the present case, the prosecutor in *Hughes* charged the defendant with rape of a child in the second degree and rape in the second degree. The Rape 2 charge was based on the victim's inability to consent by reason of physical helplessness or mental incapacity. *Hughes*, 166 Wn.2d at 678-679. Mr.

Hughes pled guilty to both offenses, but raised a double jeopardy violation at the time of sentencing. The court of appeals affirmed both convictions and this Court accepted review.

This Court applied the “same evidence” rule to the relevant statutes. *Id.* at 682. “Under the same evidence rule, if each offense contains elements not contained in the other offense, the offenses are different and multiple convictions can stand.” *State v. Jackman*, 156 Wn.2d 736, 747, 132 P.3d 136 (2006). The child rape statute contains an age element not included within the general second degree rape statute. Thus, the dispositive issue in *Hughes* was whether rape in the second degree contained an element not included within the child rape statute.

The State in *Hughes* claimed that the two offenses were not legally the same because child rape did not require proof that the victim was incapable of consent. *Hughes*, at 682. The State argued, “proving that the defendant engaged in sexual conduct with a child did not prove that the victim was incapable of giving consent sufficient to satisfy the elements for second degree rape. In sum, . . . proof of one crime fails to prove the other.” *Id.* at 683 (emphasis added).

This Court disagreed, finding that “both statutes protect individuals who are unable to consent by reason of their status.” *Id.* Writing for a near unanimous court, Justice Johnson explained: “Although the elements of

the crimes facially differ, both statutes require proof of nonconsent because of the victim's status." *Id.* at 684 (emphasis added).

The State in the current case argues the court of appeals' reliance upon *Hughes* was misplaced because *Hughes* was a double jeopardy case, rather than a general/specific case. This argument fails. The "same evidence" test is very similar to the test for concurrent statutes. Under either, the Court must examine the statutory elements of both offenses, and determine whether there was an element in the rape offense not contained in the child rape offense. *Hughes* performed that test, and found both statutes rested upon a lack of consent, making the statutes the same under the law. *Hughes*, at 684. The court of appeals' reliance upon *Hughes* was appropriate.

The State now argues that the court of appeals' ruling is inconsistent with *Hughes* because the *Hughes* court did not dismiss a charge, but instead remanded the case to the trial court for determination of which charge should be dismissed. *Petition* at 12. The appellant in that case had not raised a general/specific claim and the parties did not even address the issue of which conviction must be dismissed. *See Hughes*, 166 Wn.2d at fn. 13 ("In their briefing, the parties did not give us any guidance about which conviction to vacate.") Courts generally do not decide issues not raised or that have been inadequately briefed. *See e.g., CRST Van Expedit-*

*ed, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1653 (2016) (Refusing to address an issue where a party’s “failure to articulate its preclusion theory before the eleventh hour has resulted in inadequate briefing on the issue.”). The general specific issue is now properly before this Court.

The State argues that the court of appeals’ ruling would produce absurd results. *Petition at 8, 9, 13*. Unable to conjure an inequitable result based on the statute at issue in this appeal, the State asks this Court to consider an unlikely hypothetical involving a different child rape statute. In this hypothetical, an 18-year-old boy rapes an intoxicated 15-year-old girl and must be charged with second degree rape because of the age difference requirement for child rape in the third degree, while an hypothetical older person who did the same thing would be charged with child rape in the third degree. The State argues that the older person would receive a windfall under this scenario, thereby creating an equal protection claim. *Id.* But the Child Rape 3 statute is not before this Court, nor is this Court being called upon to determine whether the general/specific doctrine applies to that statute as well.

Moreover, pointing to isolated incidents where the statute might produce an inequitable or harsh result does not justify ignoring the general/specific rule. *See e.g., Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011) (“This canon of construction [of

avoiding absurd results] must be applied sparingly.”) See also, *State v. Cann*, 92 Wn.2d at 195 (“A statute is not rendered unconstitutional by reason of the fact that its application may be uncertain in exceptional cases.”)

The State argued below that “if Albarran is correct, the portion of RCW 9.94A.837<sup>1</sup> which allows this aggravator to be applied to Rape in the Second Degree would be rendered meaningless.” *COA Response* at 32. The court of appeals rejected that argument, pointing out “there are many ways of committing Rape in the Second Degree, only one of which relates to incapacity.” *Slip Op.* at 20, fn 9.

The State characterizes this ruling as meaning the enhancement “applies only to rape in the second degree when committed by forcible compulsion.” *Petition* at 10. The State then criticized the court of appeals because it “engaged in statutory construction, and applied a limiting construction, to an unambiguous statute that is not even under challenge.” *Id.* This is a misrepresentation of the court’s holding; the court of appeals did not interpret the enhancement statute, nor did it make a finding that the enhancement only applied to the forcible compulsion prong. Rather, the court simply held that when the victim is at least 12 years old and less than 14, the State must charge the defendant under the second degree child rape

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<sup>1</sup> RCW 9.94A.837 provides in relevant part, “In a prosecution for rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, the prosecuting attorney shall file a special allegation that the victim of the offense was under fifteen years of age at the time of the offense . . .”

statute rather than the incapacity prong of rape in the second degree. The discussion regarding the enhancement statute was only in response to the State's claim that this interpretation would render the enhancement statute meaningless, with the court of appeals pointing out that the statute still serves a purpose because of the other five means of committing second degree rape.

Persisting with this claim that the court of appeals had placed a "limiting construction" on RCW 9.94A.837, the State asserts that if the legislature had intended for this special allegation to be limited to the forcible compulsion prong of second degree rape, they would have specifically said so in the statute, as they did with the indecent liberties statute. *Petition* at 10-11. This misses the point. The court of appeals did not limit the application of RCW 9.94A.837. *Any* conviction for rape in the second degree where the victim is under 15 years of age is still subject to the 25 year mandatory minimum. That has not changed. The court of appeals decision simply applied the general/specific doctrine to find that a certain category of offenses must be charged as child rape rather than rape in the second degree under the incapacity prong.

Mr. Albarran's case provides a textbook example of why the general/specific doctrine plays an important role in American jurisprudence. In addition to ensuring that the legislature's will is followed, the rule pre-

vents the prosecutor from seeking “varying degrees of punishment when proving identical criminal elements.” *Cann*, 92 Wn.2d at 196. Charged as rape of a child in the second degree, and with no prior offenses, Mr. Albarran faced approximately eight years in prison for his conduct. But when charged instead as rape in the second degree under the inability to consent prong, Mr. Albarran received a mandatory 25 years. Application of the general/specific rule prevents this inequitable outcome.

C. CONCLUSION

For the reasons set forth above, and in the prior briefs submitted on this issue, Miguel Albarran respectfully requests that this Court affirm the court of appeals ruling.

Respectfully submitted: July 1, 2016

  
\_\_\_\_\_  
James R. Dixon, WSBA #18014  
Attorney for Respondent Miguel Albarran

CERTIFICATE OF SERVICE

I, James Dixon, certify that on July 1, 2016, I caused a true and correct copy of this Respondent's Supplement Brief to be served on the following in the manner indicated below:

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James Dixon

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Good Afternoon,

Please find attached the respondent's supplemental brief in the below identified matter.

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Case number:  
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