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No. 62546-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK J. ROONEY,

Appellant.

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

The Honorable Steven Gonzales

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE SPECIFIC STATUTE OF CHILD MOLESTATION IN THE FIRST DEGREE IS CONCURRENT WITH THE GENERAL STATUTE OF RAPE OF CHILD IN THE FIRST DEGREE BY SEXUAL CONTACT, AS CHARGED IN THE PRESENT CASE.

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. Statutes are concurrent where the general statute is violated "in each instance where the special statute has been violated." State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); accord State v. Conte, 159 Wn.2d 797, 811, 154 P.3d 194 (2007). It is irrelevant that the special statute includes additional elements not included in the general statute. Shriner, 101 Wn.2d at 580. When a special statute is concurrent with a general statute, a criminal defendant can be charged solely under the specific statute. Id. at 581.

Here, 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. 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. CP 86, 87 (Instruction Nos. 17, 18).

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 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. Because child 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.

Contrary to the State's contention, Mr. Rooney is not arguing the question is limited to the facts, but, rather, is based on a comparison of the statutory elements of the crimes charged. See Br. of Resp. at 7 n.2. This appears to be an issue of first impression. 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 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.

The State erroneously contends the statutes are not concurrent on the grounds child molestation in the first degree could be committed without committing rape of a child in the first degree, if the offenses were charged other than they were charged in the present case. Br. of Resp. at 6. However, a reviewing court is to compare the elements of both statutes as charged in a given case. See Shriner, 101 Wn.2d at 579 n.2.

In State v. Crider, Division Three of this Court determined two subsections of the assault in the third degree statute did not set out concurrent offenses because the subsections included different elements. 72 Wn. App. 815, 818-19, 866 P.2d 75 (1994).

Significantly, the Court did not base its determination on the fact that the statute included additional uncharged alternative means of committing the offense. Thus, the State's reliance on Crider and its argument regarding uncharged alternative means of committing child molestation is inapt. See Br. of Resp. at 6.

Contrary to the State's assertion, this issue is properly before the Court. RAP 2.5(a) authorizes an appellate court to exercise its duty to ensure constitutionally adequate trials by

reviewing manifest constitutional errors raised for the first time on appeal. Under the Washington Constitution, equal protection is violated when two statutes criminalize the same act, but provide differing punishments. Wash. Const. Art. I, sec. 12; State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990). “Equal protection is violated when two statutes declare the same acts to be crimes, but penalize more severely under one statute than the other.” Leech, 114 Wn.2d at 711. “If concurrent offenses exist, the State is constitutionally bound to charge the specific offenses.” Crider, 72 Wn. App. at 818. Therefore, this issue presents a manifest error of constitutional magnitude that is appropriately before this Court.

In City of Kennewick v. Fountain, the Washington Supreme Court addressed an equal protection challenge to a prosecution for aiding and abetting the crime of driving under the influence of alcohol rather than for the civil traffic infraction of knowingly permitting the operation of a vehicle in an illegal manner. 116 Wn.2d 189, 191, 802 P.2d 1371 (1991). The Court ruled there was no violation of equal protection because the two statutes had different burdens of proof, and, therefore, the prosecutor did not have unfettered discretion to charge under either statute. Id. at 193-94. In so ruling, the Court adopted the rationale set forth in

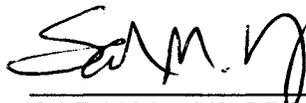
United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), in which the United States Supreme Court ruled the Fourteenth Amendment was not violated where a prosecutor had discretion to charge under different statutes with the same elements but different punishments. Id. at 193-93. In the present case, however, the crime of child molestation in the first degree by sexual contact had the same elements as rape of a child in the first degree by sexual contact, plus the additional element of a greater age differential. Because the relevant statutory elements are not identical, the State's reliance on Fountain and Batchelder is misplaced.

B. CONCLUSION

Based on the foregoing arguments and the arguments set forth in the Brief of Appellant, Mr. Rooney respectfully requests this Court reverse his convictions for rape of a child in the first degree by sexual contact as he should have been charged under the specific statute of child molestation in the first degree.

DATED this 5<sup>th</sup> day of January 2010.

Respectfully submitted,



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Respondent,	)	
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PATRICK ROONEY,	)	
	)	
Appellant.	)	

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