

63632-4

63632-4

No. 63632-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY G. WILSON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Mr. Wilson committed the crime of attempted rape of a child in the second degree.

2. The trial court erred by concluding the State proved the elements of attempted rape of a child in the second degree beyond a reasonable doubt. Conclusion of Law 2.

3. The trial court erred by concluding the State proved Mr. Wilson did an act that was a substantial step towards the commission of rape of a child in the second degree. Conclusion of Law 2(1).

4. Mr. Wilson was erroneously convicted of attempted rape of a child in the second degree when he should have been charged under the more specific statute of commercial sexual abuse of a minor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of attempted rape of a child in the second degree unless the State proves beyond a reasonable doubt that the defendant intended to have sexual intercourse and that the defendant took a substantial step towards having sexual intercourse with a child between the ages of twelve

and fourteen. Here, the State proved Mr. Wilson communicated via email with a Seattle Police detective pretending to be an adult woman and agreed to pay for sexual intercourse with the fictitious woman and a fictitious thirteen-year-old girl. Mr. Wilson drove to an agreed public location but never left his car and never met the woman. Viewing the evidence in the light most favorable to the State, must Mr. Wilson's conviction for attempted rape of a child in the second degree be dismissed in the absence of proof of a substantial step? (Assignments of Error 1-3).

2. Principles of statutory construction and equal protection require that where a specific statute prohibits conduct, the defendant must be charged under that statute and not under a more general statute. Mr. Wilson was charged and convicted of attempted rape of a child in the second degree, RCW 9A.44.076, but his conduct falls within the more specific statute of commercial sexual abuse of a minor, RCW 9.68A.100(1). Where a person cannot commit commercial sexual abuse of a minor without also committing attempted rape of a child, must Mr. Wilson's conviction be reversed and dismissed because he was improperly charged under the general rather than the specific statute? (Assignment of Error 4).

C. STATEMENT OF THE CASE

Rodney Wilson is the operations coordinator of sleep disorder clinics for the Swedish and Valley General hospital systems. 3/24/09RP 15-16, 27. On August 16, 2007, Mr. Wilson was at the Issaquah clinic testing equipment on himself as part of his repair responsibilities. 3/24/09RP 19-20. During the downtime Mr. Wilson checked his email, looked for supplies on the internet, and checked Craigslist entries. 3/24/09RP 19-20, 30. Mr. Wilson noticed an advertisement which purported to offer a sexual encounter with a 38-year-old woman and her daughter, and he responded out of curiosity. 3/24/09RP 30-31; Ex. 1.

The advertisement had been created by Seattle Police Detective Trent Bergman. 3/23/09RP 26, 31-33. The detective, pretending to be the 38-year-old "Jackie," emailed Mr. Wilson and offered sexual intercourse with "Jackie" and her purported 13-year-old friend. 3/23/09RP 33, 37-39; Ex. 2. Eventually Mr. Wilson agreed to pay \$300 for this service. 3/23/09RP 43; Ex. 2 at 2-3. Mr. Wilson drove as directed by the officer to the parking lot of the Queen Anne Dick's Drive-In. 3/24/09RP 20-21. He did not, however, intend to have sex with anyone that afternoon, as he had an important meeting nearby at 4:30. 3/24/09RP 20-23; 3/23/09RP

76-77. Mr. Wilson only expected to engage in fantasy emails with “Jackie,” and he did not expect a real “Jackie” to find him in the parking lot. 3/24/09RP 23-25.

Seattle police officers arrested Mr. Wilson in the Dick’s parking lot, searched his car, and seized his telephones.

3/23/09RP 55-57, 67-68, 93. Mr. Wilson waived his Miranda rights, spoke with Detective Bergmann, and signed a written statement.

3/23/09RP 57-58, 62-63, 69-72; Ex. 11.

The King County Prosecutor’s Office charged Mr. Wilson with attempted rape of a child in the second degree. CP 1-3. Mr. Wilson waived his constitutional right to a jury trial, and was found guilty by the Honorable Christopher Washington. CP 4, 32-36. The court found that driving to the drive-in parking lot was a substantial step that demonstrated Mr. Wilson’s intent to commit rape of a child in the second degree. Finding of Fact 12; Conclusions of Law 1-2.

The court agreed with the State that Mr. Wilson was not eligible for an alternative sex offender disposition even though a treatment provider found Mr. Wilson could be safely treated in the community. 5/8/09RP 3; 5/21/09RP 6-7. The court sentenced Mr. Wilson to a term of 58.5 months to life in prison, followed by

community custody should he be released.¹ CP 41; 5/21/09RP 12,

14. Mr. Wilson appeals. CP 47-57.

D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WILSON ATTEMPTED TO RAPE A CHILD

a. The State was required to prove beyond a reasonable doubt that Mr. Wilson attempted to commit the crime of rape of a child in the second degree. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.² The critical inquiry on appellate review is whether, after viewing the evidence in the

¹ Although the court ordered 36 to 48 months community custody, 5/21/09RP 12, the Judgment and Sentence states Mr. Wilson will be on community custody for life. CP 41.

² The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article 1, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). The appellate court draws all reasonable inferences in favor of the State. State v. White, 150 Wn.App. 337, 342, 207 P.3d 1278 (2009).

Mr. Wilson was convicted of attempted rape of a child in the second degree. CP 36. The rape of a child in the second degree statute reads:

(1) A person is guilty of rape of a child in the second degree when a 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.

(2) Rape of a child in the second degree is a class A felony.

RCW 9A.44.076. "Sexual intercourse" is defined for purposes of RCW 9A.44 to include, among other things, "any penetration of the vagina . . . however slight" and "any act of sexual contact between persons involving the sex organs of one person and the mouth . . . of another." RCW 9A.44.010(1). Rape of a child has no mens rea

element and requires no proof of intent. State v. Chhom, 128 Wn.2d 739, 740, 743, 911 P.2d 1014 (1996).

Attempt is defined at RCW 9A.28.020 to require intent to commit a crime and commission of an act that is a substantial step towards committing the crime:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1). The statute provides that it is not a defense to an attempt to commit a crime if commission of the crime was factually or legally impossible. RCW 9A.28.020(2).

The elements of attempted rape of a child in the second degree thus are that the defendant (1) with intent to have sexual intercourse, (2) took a substantial step towards having sexual intercourse with a child between the ages of 12 and 14. RCW 9A.28.020(1); RCW 9A.44.076(1).

b. The State did not prove beyond a reasonable doubt that Mr. Wilson took a substantial step towards committing the crime of rape of a child in the second degree. The attempt statute requires both the intent to commit a crime and the taking of a substantial step. RCW 9A.28.020(1). The substantial step must be an overt

act which convincingly demonstrates “a firm purpose to commit a crime.” State v. Workman, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). Thus, to constitute a substantial step, the conduct must be “strongly corroborative of the actor’s criminal purpose.” Id. Whether or not an act constitutes a substantial step depends upon the individual facts of the case. Id. at 449-50. Here, Mr. Wilson’s acts do not rise to the level of a substantial step under the attempt statute.

“Mere preparation to commit a crime is not a substantial step.” State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (citing Workman, 90 Wn.2d at 499-50). In present case, the State showed that Mr. Wilson agreed via email to pay for a sexual encounter over the internet. The person he emailed was a police officer, but the officer pretended to be an adult woman who agreed to provide Mr. Wilson sexual contact with the adult and a teenaged girl. Ex. 1, 2. Mr. Wilson drove to a location suggested by the officer, but he did not get out of his car or meet a woman in the parking lot. Thus, he did not engage in any act that constitutes a substantial step towards sexual intercourse with a minor.

Mr. Wilson’s case is analogous to a case where this Court reversed a conviction for attempted possession of a controlled

substance, State v. Grundy, 76 Wn.App. 335, 886 P.2d 208 (1994). In that case, a police officer posing as a drug dealer approached the defendant and asked him what he wanted. The defendant responded that he wanted “20 of coke” and affirmed that he had the money. The police officer asked to see the defendant’s money and then placed the defendant under arrest when the defendant said he wanted to see “the stuff” first. Grundy, 76 Wn.App. at 336. This Court reversed the conviction for attempted possession, reasoning that the substantial step must be more than mere preparation and “[t]he parties were still in the negotiating stage.” Id. at 338.

Here Mr. Wilson and the undercover officer had completed initial negotiations, but there was no act that constituted a substantial step towards the exchange of money for sexual contact. Thus, as in Grundy, the State did not produce sufficient evidence of an act leading to the consummation of the attempted crime.

A review of the facts of reported cases addressing the sufficiency of the evidence of attempt to commit rape of a child also demonstrates the lack of evidence of a substantial step in Mr. Wilson’s case. Most similar to Mr. Wilson’s case is Sivins, where the defendant established an email relationship with a fictitious 13-year-old “Kaylee,” a character created by a Washington State

University Police intern. State v. Sivins, 138 Wn.App. 52, 155 P.3d 982 (2007). In addition to the email communication, the defendant mailed “Kaylee” a vibrator, spoke to her on the telephone and said he would like to meet her and be “intimate,” and suggested they meet at a motel room for any sexual activity the girl would consent to. Sivins, 138 Wn.App. at 56-57. The defendant then drove five hours to Pullman, checked into a motel room for two, told “Kaylee” he was in town and gave her his room number, and was arrested leaving the room that evening. Id. at 57, 61. This Court found the defendant’s intent was proved by his communications telling the purported victim he wanted to have sex with her and enticing her with promises of vodka and pizza. Id. at 64. The acts of driving to Pullman and obtaining a motel room for two were substantial steps that corroborated that intent. Id.

Recently this Court upheld another conviction for attempted rape of a child in the second degree in White, supra. There, the defendant was at a friend’s house and approached a thirteen-year-old boy in a bedroom, grabbed the boy’s buttocks through his clothes, placed his penis close to the boy’s face, and demanded the boy perform oral sex. After the boy refused to do as the defendant requested and tried to leave the room, the defendant punched him

in the face. Eventually, however, the defendant left the bedroom and the boy escaped through a window. White, 150 Wn.App. at 339. This Court rejected the defendant's argument that his acts did not constitute a substantial step towards commission of the crime, finding he in fact committed several substantial steps, including entering the bedroom, closing the door, unzipping his pants, leaning over the boy to show him penis, grabbing the boy's buttocks, and demanding oral sex. Id. at 344-45.

Other cases upholding attempted rape convictions also demonstrate the requirement of an act that constitutes a substantial step. In Townsend, for example, the defendant argued he could not take a substantial step because commission of the crime was impossible because he was dealing with a fictitious child created by Spokane police office. The Townsend Court rejected this argument and found ample evidence of a substantial step where the defendant and "Amber" had graphic discussion of sexual topics and the defendant asked "Amber" to meet him at a motel room so they could have sex. Townsend, 147 Wn.2d at 670-71, 679.

Additionally, in Chhom, where the court rejected the defendant's argument that attempted rape of child cannot be charged because the underlying crime lacks a mens rea element, the defendant's

companions grabbed a nine-year-old boy from his bicycle and held the boy while the defendant attempted to force his penis into the boy's mouth. Chhom, 128 Wn.2d at 740.

In all of the cases above, the substantial step involves direct contact with the victim or an action necessary for the commission of the crime, such as renting a motel room. Mr. Wilson's legal action – driving his car to the Dick's drive in and parking – is simply not a substantial step towards the commission of the charged crime.

c. Mr. Wilson's conviction must be reversed and dismissed.

The State did not prove the substantial step necessary to convict Mr. Wilson of attempted rape of a child in the second degree.

When the State fails to prove an essential element of the crime beyond a reasonable doubt, the appellate court must reverse and dismiss the conviction. State v. Devitt, ___ Wn.App. ___, 218 P.3d 647, 659 (2009) (reversing residential burglary conviction due to insufficient evidence of intent to commit a crime). Mr. Wilson's conviction must be reversed and dismissed.

2. IN THE ALTERNATIVE, MR. WILSON'S
CONVICTION FOR ATTEMPTED RAPE OF A CHILD
IN THE SECOND DEGREE MUST BE REVERSED
AND DISMISSED BECAUSE HE COULD ONLY BE
CHARGED WITH THE MORE SPECIFIC STATUTE
OF COMMERCIAL SEXUAL ABUSE OF A MINOR

a. Where a defendant's conduct is proscribed by a general
and a specific statute, the State must charge the specific statute.

When a specific statute proscribes conduct that is also prohibited by a more general statute, the "general-specific" rule of statutory construction requires the State to prosecute only under the more specific statute. State v. Conte, 159 Wn.2d 797, 803-04, 154 P.3d 194, cert. denied, 552 U.S. 992 (2007); State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). The rule is designed to promote equal protection of the laws by subjecting people committing the same misconduct to the same potential punishment. State v. Cann, 92 Wn.2d 193, 196, 595 P.2d 912 (1979). If the State may elect which statute to charge, it may control the degree of punishment for identical criminal elements. Cann, 92 Wn.2d at 196.

The Washington Supreme Court, for example, utilized this principle to vacate a conviction for second degree escape because the defendant's conduct was more properly prosecuted as a failure to return to work release. State v. Danforth, 97 Wn.2d 255, 643

P.2d 882 (1982). The court pointed out that the failure to return to work release statute recognized a valid legislative distinction between the purposeful act of “going over a prison wall” and the situation where a person fails to return to work release when due. Danforth, 97 Wn.2d at 258.

The court further explained the general-specific rule is necessary to give effect to the specific statute which, because it required willfulness, was generally more difficult to prove and therefore would presumably not be charged. Danforth, 97 Wn.2d at 258-59. “This result is an impermissible potential usurpation of the legislative function by the prosecutors.” Id. at 259. Accord, State v. Haley, 39 Wn.App. 164, 169, 692 P.2d 858 (1984) (to grant the prosecutor “unbridled discretion” to charge manslaughter instead of negligent homicide “is to emasculate” the more specific negligent homicide statute).

b. Attempted rape of a child and commercial sexual abuse of a minor are concurrent statutes. In order to determine if the general-specific rule applies, the reviewing court must look at the elements of both statutes and determine if a person can violate the special statute without necessarily violating the general. If so, the statutes are concurrent. Whether the specific statute contains

elements not found in the general statute is irrelevant. Shriner, 101 Wn.2d at 580.

Mr. Wilson was convicted of attempted rape of a child in the second degree. Because he was charged with attempt and not the completed offense, the court was only required to find that, with intent to have sexual contact with a minor, he took a substantial step towards committing rape of a child in the second degree. RCW 9A.28.020(1); Conclusions of Law 1-2.

The more specific commercial sexual abuse of a minor statute, RCW 9.68A.100, criminalizes patronizing a juvenile prostitute in any form.³ The statute reads:

A person is guilty of commercial sexual abuse of a minor if:

(a) He or she pays or agrees to pay a fee to a minor or third person as compensation for a minor having engaged in sexual conduct with him or her;

(b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or

(c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

RCW 9.68A.100(1). "Sexual conduct" is defined as "sexual intercourse or sexual contact" as defined in RCW 9A.44. RCW

³ The statute, which replaces the former patronizing a juvenile prostitute statute, became effective on July 22, 2007, prior to the date of this offense. Laws of 2007 ch. 368 § 2.

9.68A.100(4). Commercial sexual abuse of a minor is a Class C felony, whereas attempted rape of a child in the first degree is a Class A felony. RCW 9A.28.020(3)(a); RCW 9.68A.100(2). As can be seen, Mr. Wilson's conduct in agreeing with an adult to pay \$300 to have sexual intercourse with a 13-year-old girl is prohibited by RCW 9.68A.100(1)(b).

In fact, every time a person pays or agrees to pay for sexual contact with a minor, he is also guilty of attempted rape of a child. The two statutes are thus concurrent.

The State may argue that the two statutes are not concurrent because of the specific age requirements of rape of a child in the second degree. The various degrees of attempted rape of a child, however, should be irrelevant to this Court's analysis. The child's age is a strict liability element of rape of child; the defendant need not know the child's true age to be guilty. RCW 9A.44.030; Chhom, 128 Wn.2d at 743-44; State v. Abbott, 45 Wn.App. 330, 331-32, 726 P.2d 988, rev. denied, 107 Wn.2d 1027 (1987). Thus, a person could intend to have sexual intercourse with a 17-year-old, but be guilty of attempted rape of a child in the second degree if the child in question was actually 13 years old. Moreover, a person may be convicted of attempted rape of a child between certain

ages even if there is no real child, let alone a child who fits within the correct age category. RCW 9A.28.020(2); Townsend, 147 Wn.2d at 679 (defendant guilty of attempted second degree rape of a child even though “child” was really a police detective); State v. Delmarter, 92 Wn.2d 634, 637, 628 P.2d 99 (1980) (defendant guilty of first degree attempted theft even though did not know value of property he attempted to steal). While attempted statutory rape does have three different degrees, the degrees are based only upon the age of the child - a strict liability element of the crime that the defendant need not know to be guilty of rape of a child or attempted rape of a child. Thus, this Court should find that commercial sexual abuse of a minor is concurrent with attempted statutory rape of a child.

Because the crime of attempt includes only two elements – intent to commit a specific crime and a substantial step towards doing so, attempted rape of a child is always committed when a person is guilty of commercial sexual abuse of a child. The fact that the commercial sexual abuse of a child statute has added elements shows it is a more specific statute.

c. Mr. Wilson's conviction for attempted second degree rape of a child must be dismissed because he should have been prosecuted under the more specific commercial sexual abuse of a minor statute. “[S]ound principles of statutory interpretation and respect for legislative enactments require that the specific statute prevails to the exclusion of the general.” Shriner, 101 Wn.2d at 583. Thus, when concurrent statutes cover a defendant’s conduct, the State must charge the defendant under the more specific statute. Danforth, 97 Wn.2d at 257-58.

Mr. Wilson was convicted under the general statute of attempted rape of a child rather than the more specific statute of commercial sexual abuse of a minor. His conviction must be reversed and dismissed. Shriner, 101 Wn.2d at 580; Danforth, 97 Wn.2d at 257-58.

E. CONCLUSION

Mr. Wilson's conviction for attempted rape of a child in the second degree must be reversed and dismissed because the State did not prove beyond a reasonable doubt that he committed a substantial step toward the offense. In the alternative, the conviction must be reversed and dismissed because Mr. Wilson was charged under a general statute even though his conduct fit with the specific statute of commercial exploitation of minor.

DATED this 31st day of December 2009.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63632-4-I
v.)	
)	
RODNEY WILSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2009.

X _____ 

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