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NO. 63632-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RODNEY G. WILSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	8
1. THERE WAS SUFFICIENT EVIDENCE FOR ANY JURY TO HAVE FOUND THE DEFENDANT GUILTY OF ATTEMPTED RAPE IN THE SECOND DEGREE	8
2. COMMERCIAL SEXUAL ABUSE OF A MINOR IS NOT A SPECIAL CRIME THAT MUST BE CHARGED TO THE EXCLUSION OF RAPE (OR ATTEMPTED) RAPE OF A CHILD IN THE SECOND DEGREE	13
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Batchelder, 442 U.S. 114,
99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)..... 20

Washington State:

City of Kennewick, v. Fountain,
116 Wn.2d 189, 802 P.2d 1371 (1991)..... 20

State v. Aumick, 126 Wn.2d 422,
894 P.2d 1325 (1995)..... 10

State v. Carpenter, 52 Wn. App. 680,
763 P.2d 455 (1988)..... 20

State v. Chase, 134 Wn. App. 792,
142 P.3d 630 (2006), rev. denied,
160 Wn.2d 1022 (2007)..... 18

State v. Chhom, 128 Wn.2d 739,
911 P.2d 1014 (1996)..... 18

State v. Crider, 72 Wn. App. 815,
866 P.2d 75 (1994)..... 18

State v. Goodwin, 150 Wn.2d 774,
83 P.3d 410 (2004)..... 22

State v. Guloy, 104 Wn.2d 412,
705 P.2d 1182 (1985), cert. denied,
475 U.S. 1020 (1986)..... 21

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 20

State v. Myers, 133 Wn.2d 26,
941 P.2d 1102 (1997)..... 9

<u>State v. Nicholson</u> , 77 Wn.2d 415, 463 P.2d 633 (1969).....	10
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	21
<u>State v. Price</u> , 103 Wn. App. 845, 14 P.3d 841 (2000), <u>rev. denied</u> , 143 Wn.2d 1014 (2001).....	11
<u>State v. Roby</u> , 67 Wn. App. 741, 840 P.2d 218 (1992).....	19
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	9
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	19
<u>State v. Shriner</u> , 101 Wn.2d 576, 681 P.2d 237 (1984).....	13, 14
<u>State v. Sivins</u> , 138 Wn. App. 52, 155 P.3d 982 (2007).....	10, 11, 12
<u>State v. Smith</u> , 31 Wn. App. 226, 640 P.2d 25 (1982).....	9
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	9
<u>State v. Townsend</u> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	10
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	10, 11

Statutes

Washington State:

RCW 9.68A 14

RCW 9.68A.011 16

RCW 9.68A.100 15

RCW 9.68A.110 17

RCW 9A.28.020 9, 15, 18

RCW 9A.28.040 19

RCW 9A.44 14

RCW 9A.44.010 17

RCW 9A.44.073 16

RCW 9A.44.076 9, 14, 16

RCW 9A.44.079 16

RCW 69.50.403..... 19

Rules and Regulations

Washington State:

RAP 2.5..... 19, 22

A. ISSUES PRESENTED

The defendant was convicted of one count of attempted rape of a child in the second degree. He raises the following two issues:

1. Could a rational trier of fact have found the defendant guilty of attempted rape of a child in the second degree where he answered a Craigslist ad offering sex for money, agreed in an e-mail exchange to pay \$300 to have sexual intercourse with a 13-year-old girl, agreed on a destination to meet, and drove to that destination for the admitted purpose of having sex with the girl, and where he was then apprehended at the meet location with 300 plus dollars in his pocket?

2. The defendant claims his conviction must be dismissed because he should have been charged with commercial sexual abuse of a minor instead. Is the defendant's claim flawed because the rule requiring a special statute be charged over a general statute only applies where the general statute will be violated in each instance where the special statute has been violated, and that is not the case here?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with attempted rape of a child in the second degree. CP 1. He waived his right to a jury trial and proceeded to trial before the Honorable Judge Chris Washington. CP 4. On March 24, 2009, Judge Washington found the defendant guilty as charged.¹ 2RP 79-80. The defendant received a standard range minimum term sentence of 58.5 months. CP 37-46.

2. SUBSTANTIVE FACTS

In August of 2007, Internet Crime Unit Detective Trent Bergmann posted an ad in Craigslist's erotic ads section that read as follows:

Hi. I'm 38 years old and my "daughter" is much much younger. We will take great care of you and fulfill your fantasies but it won't be cheap;) I have to pay the rent after all! Email me for more details and pics.

1RP 26, 31-33; 2RP 49; Exhibit 1. Forty-three year old Rodney Wilson, the defendant, responded to the ad as follows:

I'm interested. How much for the duo? Is she really your daughter? Do you have any pics?

¹ The verbatim report of proceedings is cited as follows: 1RP--3/23/09, 2RP--3/24/09, 3RP--5/8/09, and 4RP 5/21/09.

2RP 20; Exhibit 2. The following e-mail exchange then occurred between Detective Bergmann, posing as a female prostitute, and the defendant:²

Detective Bergmann: Hi babe! My name is Jackie. I'm 38 years old. I have a girl that works for me and her name is Jenny. She is 13 years old, has red hair, and is only 5 feet tall. She's a cute little thing. We can play the mother/daughter fantasy for you.

We are downtown Seattle and you'd have to come here. Price depends on what all you want to do. If still interested let me know. We are in the Queen Ann part of Seattle if you know where that is. If not I can give you directions, just let me know.

Defendant: Yes I'm interested. I don't have very strange tastes, so nothing to exotic. Directions would be very helpful. This isn't some sort of Dateline thing is it? Rod

Bergmann: Ha ha ha. Totally not a Dateline thing.³ And I'm super nervous about you being a cop. I have pics of us. How do I know your not a cop?

I can have Jenny meet you at the Dick's Drive Inn at Seattle. I can look the address up for you. We live across the street in an apartment. Price depends on what all you want to do...more costs more :))

² No punctuation has been added or corrected, no grammar corrected, and no text omitted. The below text is the complete unedited conversation between Detective Bergmann and the defendant.

³ Detective Bergmann testified that Dateline referred to a Dateline NBC television show titled To Catch A Predator. 1RP 42.

Defendant: Sounds like fun. Do you have any pics to show me?

Rod

Defendant: Dicks up on Broadway?

Rod

Defendant: I work at a hospital here in Seattle. I study sleep and wake patterns. I'm certainly no cop. How would \$300 do?

Rod

Detective Bergmann: He we are⁴

Detective Bergmann: In Queen Anne. Do you know the area or do you need me to look up the address?

Detective Bergmann: That will probably work...what all do you want to do...condoms a must right?

Defendant: Not a problem on my end...

Rod

Defendant: I'm gonna need the address

Rod

Detective Bergmann: 500 Queen Anne Ave N in Seattle. What all did you want to do...oral...full sex...position?

Defendant: Yes, that sounds fine. The girl is okay with all this?

Rod

Detective Bergmann: Yes, she ran away from home about a year ago and we need the money. Since your only paying \$300 I want to know what all you want to do and how long you plan on staying. I

⁴ Detective Bergmann sent photos of a woman and his "supposed juvenile."
1RP 43.

don't usually have full sex...I'm usually the "fluffer" while Jenny has the full sex and other stuff.⁵

What all did you want to do...and want to make sure that she will be safe and no pain stuff.

Defendant: Oral and full sex sounds fine. I'm not into pain for anyone. BTW, your pics didn't come through.
Rod

Detective Bergmann: I attached them again, let me know if they don't go through. Do you have Yahoo Instant Message to chat on?

Detective Bergmann: so what's going on?

Defendant: Enroute to you
Rod

Detective Bergmann: Whoa dude what time will you be here? What do you look like so I can find you.

Defendant: What time would you like me there. I'm a large white guy in a little black car.
Rod

Detective Bergmann: Ha ha ha...that's like everyone in Seattle. I'm not going to bang on everyone's car window. Do you have a pic since I sent you one. If you're scared to send a pic then what are you wearing....what kind of car....?

Defendant: (Plain Text Attachment)⁶

⁵ Detective Bergmann explained that the "fluffer" "gets the male erect, the other person finishes the sex act." 1RP 45.

⁶ The defendant took a photo of himself in his car and sent the photo attached to this e-mail. 1RP 49, 120, 122; Exhibit 3.

Detective Bergmann: okay got it....what time do you think you will be here...my apartment is across the street from Dick's. i can actually see the parking lot from my window and will look for you.

Defendant: I'm actually here already.
Rod

Detective Bergmann: shit dude im not even dressed....gimmie 20 min....the house looks like total crap....fuck im yelling at jenny to get dressed....im looking out the window i dont see ur car....what kind of car is it...are u in the parking lot?

Defendant: I'm in a black Nissan 200sx. Don't worry about getting dressed or straightening up. You just gonna get undressed again anyway. My time is a little limited
Rod

Defendant: Are you there?
Rod

Exhibit 2; 1RP 41-51.

The defendant's last e-mail was received by Detective Bergmann at 3:59 in the afternoon. 1RP 54. The detective and other officers arrived at Dick's Drive-In at 4:17. 1RP 54. They observed the defendant sitting in his car, backed into a parking stall, in his black Nissan as described. 1RP 55.

The defendant was placed under arrest and read his Miranda warnings. 1RP 56-57. The defendant's iPhone, that he had used to send all the messages, was sitting on the front seat.

1RP 59, 67. In a search incident to arrest, officers found \$330 in the defendant's pants pocket. 1RP 108. The defendant confessed to officers at the scene that he had intended to have oral and full sex with a 13-year-old for \$300. 1RP 67; 2RP 12. He would later provide a written statement agreeing to the same. 1RP 72-73; Exhibit 11.

At trial, the defense was that, although the defendant testified he "found it intriguing," he was not actually planning on meeting with the prostitute and juvenile that day. 2RP 24-25. He claimed that he signed the written confession that stated otherwise only because he "was trying to be as cooperative as I could with the police." 2RP 49. While he admitted to agreeing to pay \$300 to have sex with a 13-year-old girl, and agreeing on where to meet, the defendant professed that he was at Dick's Drive-In for the sole reason that he was killing time before a scheduled meeting down on the waterfront. 2RP 21, 32-35, 37-39. As for the 300 plus dollars in his pocket, he asserted it was just a "coincidence." 2RP 21, 32-35, 37-39. Still, on cross, the defendant admitted that he has a habit of browsing erotic ads and that he has met with persons posting the ads on multiple occasions. 2RP 49-50. He

also admitted that he knew if he had followed through with his agreement, he would have been committing an illegal act. 2RP 51.

In finding the defendant guilty as charged, Judge Washington stated that he did not find the defendant's testimony credible. Judge Washington stated that he did not believe the defendant "just happened" to go to Dick's Drive-In, nor that he confessed to a crime he did not commit solely to cooperate with the police. 2RP 79-80.

Additional facts are included in the sections they belong.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FOR ANY JURY TO HAVE FOUND THE DEFENDANT GUILTY OF ATTEMPTED RAPE IN THE SECOND DEGREE.

The defendant argues that, even though he confessed to the crime, and even though the evidence must be viewed in the light most favorable to the State, the evidence presented at trial was insufficient for any rational trier of fact to have found that he committed an act that showed he intended to have sex with a 13-year-old girl. Specifically, the defendant claims that he committed no act that strongly corroborated his intent to commit the

crime. This argument should be rejected. The evidence in this case was overwhelming.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt, but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence." State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

As charged and presented here, the jury was required to find that the defendant attempted to, and did intend to, have sexual intercourse with a 13-year-old girl who was not his wife. CP 1; RCW 9A.28.020; RCW 9A.44.076. In order to be found guilty of an

attempt to commit a crime, a defendant must take a substantial step toward commission of that crime. RCW 9A.28.020; State v. Sivins, 138 Wn. App. 52, 63, 155 P.3d 982 (2007). A "substantial step" is conduct "strongly corroborative of the actor's criminal purpose." Sivins, 138 Wn. App. at 63 (citing State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)).

Where preparation ceases and an attempt begins is a question dependent upon the facts of the particular case, there being no rigid formula to aid in the determination. State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). Mere preparation to commit a crime is not a substantial step. State v. Workman, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978). However, "where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt." Nicholson, 77 Wn.2d at 420.

The defendant claims there was no substantial step here. This argument should be rejected. The defendant answered an ad for sex with a minor, he admitted doing so, and admitted that he intended to have sex with the 13-year-old.⁷ The defendant agreed

⁷ Legal and factual impossibility are not defenses to attempted crimes. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

to the specific sex acts he would be provided, a price to procure those sex acts, a time to meet, a location for the sex acts to be performed, and a location to meet. The defendant then drove to the agreed location and communicated that he had arrived at the location and was ready to be met at the location. He provided a photo of himself, described where he would be parked, and described his car. The defendant also had the cash for the transaction on his person. Upon being arrested at the location, the defendant confessed that his intent was to pay \$300 to have sexual intercourse with a 13-year-old girl.

Any one of the above acts clearly shows the design of the defendant to commit the crime. This is all that is required. Sivins, at 64 (citing State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000), rev. denied, 143 Wn.2d 1014 (2001)). For example, merely "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission constitutes a substantial step." Sivins, at 64 (citing Workman, 90 Wn.2d at 451-52 n.2). Although individually each act sufficiently proves the defendant's intent, taken together, the evidence showing the defendant committed an act strongly suggestive of his intent was overwhelming.

In Sivins, a case directly on point, the defendant engaged in sexually graphic Internet communications with a police intern he believed to be a 13-year-old girl. Sivins told the girl that he would have sex with her, if that is what she wanted. Sivins then drove five hours to meet the victim and secured a hotel room for the meeting. The Court of Appeals found that each of "[t]hese were substantial steps that strongly corroborated his intention to have sexual intercourse with Kaylee [the fictitious 13-year-old girl]." Sivins, at 64. While Sivins committed other acts as well, the Court did not need to rely on those acts to find there was sufficient evidence supporting the crime.

The defendant here asserts that simply driving to Dick's Drive-In was not a substantial step. Def. br. at 12. Even were this true, the defendant's argument fails because he did far more than just drive to Dick's Drive-In. The defendant brought the money to pay for the sex with him. He sent a photo of himself and described his person, car and location so that the actions he fully negotiated could actually take place. There can be no question that viewed in the light most favorable to the State, a rational trier of fact could have found the defendant guilty of attempted rape of a child in the second degree.

2. COMMERCIAL SEXUAL ABUSE OF A MINOR IS NOT A SPECIAL CRIME THAT MUST BE CHARGED TO THE EXCLUSION OF RAPE (OR ATTEMPTED) RAPE OF A CHILD IN THE SECOND DEGREE.

The defendant contends that attempted rape of a child in the second degree and commercial sexual abuse of a minor are concurrent offenses, i.e., that the statutes punish the exact same conduct, and therefore the legislature intended commercial sexual abuse of a minor to be a "special" statute that must be charged to the exclusion of the "general" statute of attempted rape of a child in the second degree. The defendant is incorrect. Committing commercial sexual abuse of a minor does not always result in a violation of the child rape statute, or attempt to commit a violation of the child rape statute. Therefore, the rule requiring application of the special statute to the exclusion of the general statute does not apply.

As a rule of statutory construction, i.e., determining legislative intent, "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). This rule applies only where "the general statute will be

violated in each instance where the special statute has been violated." Shriner, 101 Wn.2d at 580. Worded another way, if it is "not possible to commit the special crime without also committing the general crime," the statutes are concurrent and the rule applies. Shriner, at 583. Such is not the case here.

RCW 9A.44.076, the rape of a child in the second degree statute, is contained in chapter 9A.44, titled "sex offenses." In pertinent part, the statute provides that:

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(1).

In a totally different chapter, RCW 9.68A, titled "sexual exploitation of children," the legislature provided for the crime of commercial sexual abuse of a minor. The statute provides in pertinent part that:

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

(a) He or she pays a fee to a minor or a 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).

Attempt is defined as follows:

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).

Contrary to the defendant's assertion, these statutes are not concurrent, one can commit commercial sexual abuse of a minor without committing rape or attempted rape of a child in the second degree. The following examples illustrate this point.

--A 50 year old man pays or agrees to pay a 17-year-old female to have sexual intercourse with him.

--A man just short of turning 17-years-old pays or agrees to pay a girl just short of age 14 to have sexual intercourse with him.

--A man of any age pays or agrees to pay his wife, who is less than 16 years old, to have sexual intercourse with him.

In each of the above examples, the perpetrator could be charged with commercial sexual abuse of a minor, but could not be charged with attempted rape of a child in the second degree. In fact, the examples above were chosen because the acts listed would not violate any of the child rape statutes, attempt or otherwise, even if the act of sexual intercourse were completed.

Rape of a child in the first degree requires the victim be less than 12 years old and the perpetrator at least 24 months older than the victim. RCW 9A.44.073. Rape of a child in the second degree requires the victim be at least 12 years old, less than 14 years old, and the perpetrator at least 36 months older than the victim. RCW 9A.44.076. Rape of a child in the third degree requires the victim be at least 14 years old, less than sixteen years old, and the perpetrator at least 48 months older than the victim. RCW 9A.44.079. For all rape of a child statutes, the perpetrator and victim cannot be married.

In the first example above, a 17-year-old is a minor under the law;⁸ however, having sexual intercourse with a minor sixteen years or older is not considered rape of a child. In the second

⁸ For purposes of commercial sexual abuse of a minor, a "minor" is defined as "any person under eighteen years of age." RCW 9.68A.011(4).

example, the age of the victim and the age difference between the perpetrator and the victim is narrow enough so as not to constitute rape of a child. And in the third example, the fact that the perpetrator and victim are married precludes charging of rape of a child.

While there are likely many more examples that can be used to illustrate the differing scope of each statute,⁹ these three examples alone--the ability to commit an act that violates what the defendant claims is the special statute without also violating the rape or attempted rape of a child statute--defeats the defendant's argument. It is irrelevant that a particular defendant's act may in fact violate both statutes in a particular case. The determinative factor is whether it is possible to commit the special crime without also committing the general crime; *not* whether in a given instance

⁹ Another clear difference is the type of sexual act required. All three levels of rape of a child require "sexual intercourse" that by definition includes "its ordinary meaning" and "sexual contact" between the "sex organs of one person and the mouth or anus of another" person, i.e., oral sex. See RCW 9A.44.010(1). Commercial sexual abuse of a minor includes a broader definition of "sexual contact" that includes "any touching of the sexual or other intimate parts of a person done for purposes of gratifying sexual desire of either party." See RCW 9.68A.110(4); RCW 9A.44.010(2). Thus, an agreement to pay a minor to fondle or be fondled would violate the commercial sexual abuse of a minor statute, but the act would not constitute rape of a child.

both crimes are committed by the defendant's particular conduct."

State v. Crider, 72 Wn. App. 815, 818, 866 P.2d 75 (1994)

(emphasis in original); State v. Chase, 134 Wn. App. 792, 802,

142 P.3d 630 (2006) (it is the elements of the statutes that are

compared, not the facts of a particular case), rev. denied,

160 Wn.2d 1022 (2007).¹⁰

Additionally, the defendant's argument is flawed because he ignores the fact that an "attempt" is not a crime. The special-general rule is a rule of legislative intent, did the legislature enact a more specific crime that must be charged over a more general crime. Criminal attempt, along with solicitation, and conspiracy, must be applied to another criminal statute defining a crime before a criminal charge can be filed. A person can be convicted of an attempt only if the State proves the defendant had the intent "to commit a specific crime." RCW 9A.28.020; State v. Chhom, 128 Wn.2d 739, 742-43, 911 P.2d 1014 (1996) (for attempted rape, the perpetrator must have the specific intent to have sexual

¹⁰ In Chase, this Court rejected the defendant's argument that under the facts of his case, it was impossible for him not to have violated a special and general statute. This Court stated, "[t]hat may be true [that the facts show he violated both statutes], but the question is whether all violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute." Chase, 134 Wn. App. at 802-03.

intercourse). It makes no logical sense to compare an anticipatory concept that can be applied to any crime, to a specific crime, as a way of discerning legislative intent. Under such a comparison, a person attempting to commit an elaborate murder could violate multiple statutory provisions in taking the substantial step necessary to be convicted of attempted murder. However, under the defendant's theory, the person attempting the murder could only be charged with whatever lesser statutes were violated, not the crime he was intending to commit.¹¹ This is not the proper application of the rule as it fails to demonstrate legislative intent--the goal of the application of the rule.

Finally, the issue has not been preserved for appeal. This non-constitutional issue has been waived.

An appellate court will not review an alleged error not raised at trial unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). "RAP 2.5(a)(3) is not intended to afford criminal defendants

¹¹ This is not to imply that the rule can never be applied to anticipatory type crimes. The rule is properly applied where the court must determine which of two separate anticipatory statutes apply to a given situation. For example, in State v. Roby, 67 Wn. App. 741, 840 P.2d 218 (1992), the court appropriately applied the rule in order to determine whether the attempt provision encompassed within RCW 69.50.403 or the attempt provision encompassed within RCW 9A.28.040 applied to a specified type of crime--an attempt to commit a violation of the uniform controlled substances act.

a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Some earlier cases opined that the issue of allowing a person to be charged under a general statute over a special statute was an issue of constitutional magnitude because providing the prosecutor with unfettered discretion to charge under either statute violated the equal protection clause. These cases have since been overruled. See United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (finding that a prosecutor choosing between concurrent statutes is no different than a prosecutor choosing to charge under similar but not concurrent statutes--this "does not give rise to a violation of the Equal Protection or Due Process Clause"); City of Kennewick, v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991) (Washington Supreme Court recognizing overruling of equal protection concurrent statute arguments); see also State v. Carpenter, 52 Wn. App. 680, 683-84, 763 P.2d 455 (1988) (claimed error in jury instructions based on current statutes argument not preserved for review because no objection was raised below).

Here, just before closing argument, defense counsel casually touched on the issue, stating,

Well, if you charge attempted rape, and I think the specific crime would be, you know, communicating, or there's also a statute about promoting commercial sex that involves kids. There are a couple of specific statutes that address the sort of conduct we've heard about, here, and I think there's an obligation to charge those statutes versus some umbrella, you know, catch-all.

2RP 59.

Counsel never provided any law, never provided any specifics, and never made a motion to dismiss. The court never ruled on the issue because the issue was never properly raised. Instead, the court appears to have believed counsel was discussing lesser-included instruction issues, stating that "my thought," is that "it may exist as a lesser...[and] could be for [closing] argument."

2RP 60.

The defendant does not acknowledge his failure to raise this issue below. The failure to request a ruling constitutes waiver. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (failure to object bars review); State v. Powell, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995) (a tentative ruling must be raised anew otherwise the issue is considered

waived). This Court should hold that the defendant has waived this issue by failing to provide appropriate argument explaining why he can raise this issue under RAP 2.5(a). State v. Goodwin, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 25 day of February, 2010.

Respectfully submitted,

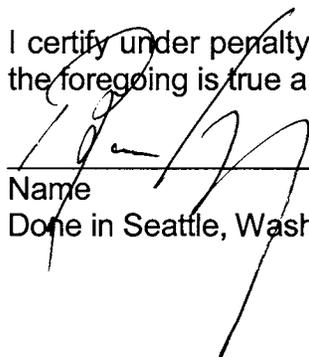
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Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WILSON, Cause No. 63632-4-I, 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.



Name

Done in Seattle, Washington

02-25-10
Date