SUMMARY
April 4, 2024

2024COA32

No. 21CA1144, *People v. Vega Dominguez* — Constitutional Law — Colorado Constitution — Equal Protection; Crimes — Attempted Patronizing a Prostituted Child — Attempted Inducement of Child Prostitution

In this as-applied constitutional challenge, a division of the court of appeals, extending the analysis in *People v. Maloy*, 2020 COA 71, holds as a matter of first impression that the crimes of attempted patronizing a prostituted child and attempted inducement of child prostitution prohibit the same conduct, yet the former carries a much harsher sentence. Consequently, defendant's conviction for the former offense violates his right to equal protection of the laws.

COLORADO COURT OF APPEALS **2024COA32**

Court of Appeals No. 21CA1144
El Paso County District Court No. 20CR27
Honorable Jessica L. Curtis, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Javier Vega Dominguez,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

Announced April 4, 2024

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¶ 1 Defendant, Javier Vega Dominguez, appeals the judgment of conviction entered on jury verdicts finding him guilty of soliciting for child prostitution, sexual exploitation of a child, attempted patronizing a prostituted child, and attempted inducement of child prostitution. Vega Dominguez contends that, as applied to him, the crime of attempted patronizing a prostituted child prohibits the same conduct as attempted inducement of child prostitution, but the former offense carries a much harsher sentence. Accordingly, he asserts, his conviction for the former offense violates his right to equal protection of the laws.

¶ 2 Extending the analysis of another division of this court in *People v. Maloy*, 2020 COA 71, we agree that, under the facts of this case, the conviction for attempted patronizing a prostituted child cannot stand; thus, we vacate the conviction and remand for amendment of the mittimus. Because Vega Dominguez does not demonstrate any other error, however, we affirm the judgment of conviction in all other respects.

I. Background

¶ 3 The jury heard the following evidence.

¶ 4 The victim, fifteen-year-old J.S., went to Walmart with his father. Vega Dominguez approached J.S. in the store and asked J.S. his name, age, and school, and if he had a job. J.S. gave Vega Dominguez a name, which we shall reference only as the initial "A," but did not answer the other questions.[1] Vega Dominguez offered J.S. a job selling pornography and sexual items and propositioned him for sex. Vega Dominguez also asked for J.S.'s phone number, which J.S. declined to give him, but J.S. saved Vega Dominguez's phone number in his phone.

¶ 5 After this interaction, J.S. told his father what had happened and then called the police. The police arrived and took J.S.'s and his father's statements.

¶ 6 The police later initiated an undercover operation. Using the phone number that Vega Dominguez had provided to J.S., a police officer texted Vega Dominguez and identified himself as "A," the fifteen-year-old whom Vega Dominguez had met at Walmart. Over

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[1] J.S. told investigating officers that he gave Vega Dominguez his "second name." Because this name may also reveal the identity of J.S., which we avoid doing in cases involving juveniles, we will adhere to our policy of using only initials when referring to the name J.S. provided. *See* C.A.R. 32(f), 35(h).

the next few days, Vega Dominguez texted "A," asking if "A" wanted to engage in various sexual acts with him, requesting "A" send him naked pictures, and offering to pay "A." After "A" and Vega Dominguez agreed to meet, Vega Dominguez called "A" to clarify where he could find "A." When Vega Dominguez arrived at the arranged location, police arrested him. Police searched Vega Dominguez's car and found lubricant.

¶ 7 Vega Dominguez was charged with and convicted of soliciting for child prostitution, sexual exploitation of a child, attempted patronizing a prostituted child, and attempted inducement of child prostitution. The trial court sentenced Vega Dominguez to six years in the custody of the Department of Corrections (DOC) for soliciting for child prostitution; six years to life pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), *see* §§ 18-1.3-1001 to -1012, C.R.S. 2023, for attempted patronizing a prostituted child; six years in DOC custody for sexual exploitation of a child; and four years in DOC custody for attempted inducement of child prostitution.

II. Standard of Review

¶ 8 Because Vega Dominguez did not preserve either of his contentions on appeal, we will not reverse unless any error was plain. *Hagos v. People*, 2012 CO 63, ¶ 14. Plain error is error that is both "obvious and substantial." *Id.* The latter requirement means that the error must have "so undermine[d] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Caswell v. People*, 2023 CO 50, ¶ 59 (quoting *People v. Rediger*, 2018 CO 32, ¶ 48).

III. Mens Rea for Soliciting Child Prostitution

¶ 9 Vega Dominguez first contends that the mens rea for the crime of soliciting for child prostitution is "intentionally" and that the trial court erred by instructing the jury that it was "knowingly." As Vega Dominguez acknowledges, divisions of this court are divided on this issue. In *People v. Ross*, 2019 COA 79, ¶ 8, *aff'd on other grounds*, 2021 CO 9, the division concluded that the mens rea for this offense is "intentionally." In *People v. Randolph*, 2023 COA 7, ¶ 21 (*cert. granted* Sept. 25, 2023), the division concluded that the mens rea is "knowingly."

¶ 10 Vega Dominguez urges us to follow *Ross*. We decline to do so. Instead, we consider the division's opinion in *Randolph* to be well reasoned and follow it here.

¶ 11 Alternatively, Vega Dominguez contends that the elemental instruction for the offense of soliciting for child prostitution was erroneous, even under *Randolph*, as it failed to include *any* mens rea. Initially, we note that Vega Dominguez did not clearly raise this argument until his reply brief, and we generally do not address arguments raised for the first time at that stage of briefing. *People v. Dubois*, 216 P.3d 27, 28 (Colo. App. 2007). Nevertheless, we are not convinced that the omission of the mens rea from the elemental instruction was plain error.

¶ 12 Though the elemental instruction did not explicitly instruct the jury that it must find that Vega Dominguez knowingly committed the offense, a different instruction told the jury that "[a] crime is committed when the defendant has committed a voluntary act prohibited by law, together with a culpable state of mind." The instruction continued that "[i]n this *case*, the applicable state of mind is explained below," and then it defined "knowingly." (Emphasis added.) None of the charges Vega Dominguez faced

involved any mental state other than knowingly. A reasonable jury, therefore, would likely have inferred that the knowingly mental state applied to each of the offenses *in the case*, even though not specifically stated in the elemental instruction. Reviewing the instructions de novo, we conclude that they adequately informed the jury of the governing law. *See Garcia v. People*, 2023 CO 30, ¶ 9.

¶ 13 In any event, "an erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). The disputed issue in this case was whether Vega Dominguez engaged in the conduct J.S. said he did, not whether such conduct was knowing (or, for that matter, intentional). If the jury believed that Vega Dominguez engaged in the conduct described (which, given the verdict, it obviously did), no reasonable view of the evidence could support a conclusion that Vega Dominguez acted with mere recklessness or negligence. Any error in omitting the mental state from the elemental instruction, therefore, does not "so undermine[] the fundamental fairness of the trial itself as to cast serious doubt

on the reliability of the judgment of conviction." *Caswell*, ¶ 59 (quoting *Rediger*, ¶ 48).

¶ 14 Thus, we discern no reversible error.

IV. As-Applied Equal Protection Challenge

¶ 15 Vega Dominguez next contends that, as applied to his conduct, his conviction for attempted patronizing a prostituted child violates his right to equal protection of the laws because it prohibits essentially the same conduct, or less culpable conduct, as other child prostitution offenses (specifically, soliciting for child prostitution, pandering, and attempted inducement of child prostitution) while carrying a much harsher sentence. We agree as to attempted inducement of child prostitution.[2]

A. Applicable Law

¶ 16 "Colorado's guarantee of equal protection is violated where two criminal statutes proscribe identical conduct, yet one punishes that conduct more harshly." *Dean v. People*, 2016 CO 14, ¶ 14. "[C]riminal legislation is not," however, "invalidated simply because

[2] Because we reach this conclusion, we need not — and do not — address Vega Dominguez's argument as to soliciting for child prostitution or pandering.

a particular act may violate more than one statutory provision." *Maloy*, ¶ 14 (quoting *People v. Onesimo Romero*, 746 P.2d 534, 537 (Colo. 1987)).

¶ 17 When evaluating an as-applied equal protection challenge, "we consider whether — under the specific circumstances under which [the defendant] acted — the relevant statutes, or specific subsections of the statutes, punish identical conduct, and whether a reasonable distinction can be drawn between the conduct punished by the two statutes." *Id.* (quoting *People v. Trujillo*, 2015 COA 22, ¶ 21); *accord People v. Tarr*, 2022 COA 23, ¶ 59 (*cert. granted* Mar. 27, 2023); *see People v. Campbell*, 58 P.3d 1080, 1084 (Colo. App. 2002) (noting that "the particular facts, not rigid application of the strict elements test, . . . define[] the equal protection analysis"), *aff'd*, 73 P.3d 11 (Colo. 2003).

¶ 18 "To establish a reasonable distinction between two statutes for purposes of equal protection, the statutory classifications of crimes must be 'based on differences that are real in fact and reasonably related to the general purposes of criminal legislation.'" *Tarr*, ¶ 59 (quoting *People v. Brockelman*, 862 P.2d 1040, 1041 (Colo. App. 1993)). To overcome an equal protection challenge, "the statutory

classification must turn on 'reasonably intelligible standards of criminal culpability,' and any definition of a crime must be 'sufficiently coherent and discrete that a person of average intelligence can reasonably distinguish it from conduct proscribed by other offenses.'" *People v. Griego*, 2018 CO 5, ¶ 36 (quoting *People v. Marcy*, 628 P.2d 69, 80-81 (Colo. 1981)).

B. Analysis

¶ 19 As a threshold matter, we reject the People's argument that we should decline to address Vega Dominguez's unpreserved equal protection argument because we lack a sufficient factual record. The factual record is sufficiently developed, and we therefore exercise our discretion to review Vega Dominguez's as-applied constitutional challenge. *See People v. Allman*, 2012 COA 212, ¶ 15.

¶ 20 Vega Dominguez correctly points out that the crime of attempted patronizing a prostituted child carries with it a harsher penalty than does the crime of attempted inducement of child prostitution. Both crimes are class 4 felonies. § 18-7-406(2), C.R.S. 2023 (patronizing a prostituted child is a class 3 felony); § 18-7-405.5(2), C.R.S. 2023 (inducement of child prostitution is a

class 3 felony); § 18-2-101(4), C.R.S. 2023 (attempt to commit a class 3 felony is a class 4 felony). But only the former is punishable by an indeterminate sentence. *See* § 18-1.3-1004, C.R.S. 2023; § 18-1.3-1003(5)(a), (b), C.R.S. 2023 (establishing indeterminate sentencing for enumerated sex offenses, including patronizing a prostituted child, and attempts to commit such offenses).

¶ 21 And we agree with Vega Dominguez that the statutes proscribe the same conduct under the circumstances here.

¶ 22 Vega Dominguez was charged with and convicted of attempted patronizing a prostituted child. Patronizing a prostituted child criminalizes "[e]ngag[ing] in an act which is prostitution of a child or by a child, as defined in section 18-7-401(6) or (7)[, C.R.S. 2023]." § 18-7-406(1)(a). A person may violate the patronizing statute by having sexual contact with a prostituted child. But such contact is not required to prove a violation. In the case of prostitution *by* a child, the child need only offer or agree to perform certain sexual acts (in exchange for money or other thing of value), with any person not the child's spouse. *See* § 18-7-401(6). In the case of prostitution *of* a child, the defendant need only induce the child (by coercion, threat, or intimidation) to perform or offer or agree to

perform certain sexual acts with a third party, not the defendant. *See* § 18-7-401(7).[3]

¶ 23 The People pursued the attempted patronizing a prostituted child charge because Vega Dominguez texted messages to "A" in which he indicated his desire to have sex with "A" and requested sexual pictures from "A"; he agreed to meet — and drove to meet — "A"; and he brought lubricant to the meeting with "A." In closing argument, as to the attempted patronizing a prostituted child charge, the prosecutor said, "So this goes back to when [Vega Dominguez] was talking with [the police officer] through the text messages and phone conversations here. We could do this, I can pay you money, all of those — all of those statements."[4]

¶ 24 Vega Dominguez was also charged with and convicted of attempted inducement of child prostitution. A person commits inducement of child prostitution if they, "by word or action, other than [by menacing or criminal intimidation], induce[] a child to engage in an act which is prostitution by a child." § 18-7-405.5(1).

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[3] There is no indication in this case that a third party was involved.
[4] The text messages indicate that Vega Dominguez called "A," but "A" did not answer.

In essence, a conviction under this statute requires proof that a defendant, (1) by some word or action, (2) induced a child to perform or to offer or agree to perform an enumerated sexual act, (3) with any person not the child's spouse, (4) in exchange for money or other thing of value. *Maloy*, ¶ 31 (citing §§ 18-7-401(6), -405.5).

¶ 25 In closing argument — immediately after explaining the facts for attempted patronizing a prostituted child — the prosecutor said, "[I]nducement is the elements of the offense here. So this is what he is making a substantial step toward, the inducement. By word or action induced a child to engage in the act of prostitution by a child."

¶ 26 In *Maloy*, the division explained that "[t]he critical facial difference between inducement and patronizing in this context is that inducement requires proof that 'money or other thing of value' was exchanged; patronizing criminalizes that conduct, but it doesn't necessarily require it: again, coercion or a threat or intimidation suffices." *Id.* at ¶ 33. The division concluded that "this potential distinction doesn't convince us that the offenses are different in a way that would defeat Maloy's as-applied equal protection

argument. As noted, in Maloy's case, money was exchanged. Thus, his conduct violated both statutes in precisely the same way." *Id.* at ¶ 34. As a result, the division vacated Maloy's conviction for patronizing. *Id.* at ¶ 67.

¶ 27 The People argue that the division in *Maloy* reached "its conclusion about inducement . . . precisely because of the facts in the case, which are not presented here." But the People concede, and the record supports, that Vega Dominguez took a substantial step toward exchanging money with "A" for sexual acts. This conduct constituted an attempt to violate both statutes in the same way. *See id.*

¶ 28 Nor are the People's other attempts to distinguish *Maloy* persuasive. The People contend that Maloy intended that the victim have sex with other people whereas Vega Dominguez intended to have sex with the victim, and *Maloy*'s holding does not apply to a defendant who engaged in conduct that constitutes prostitution *by* a child. Again, in the case of prostitution by a child, the child need only offer or agree to perform certain sexual acts (in exchange for money or other thing of value), with any person not the child's spouse. *See* § 18-7-401(6). This is the same conduct prohibited by

the offense of inducement of child prostitution. *Maloy*, ¶¶ 30-31 (citing §§ 18-7-401(6), -405.5). Moreover, the focus in *Maloy* was on whether money was exchanged — not with whom the sexual act was to be performed. *Id.* at ¶ 34.

¶ 29 Finally, the People argue that Vega Dominguez was "convicted of taking a substantial step toward engaging in sexual acts with a child for money" and that this conduct goes beyond what is proscribed in the inducement statute. In making this argument, the People ignore that Vega Dominguez was charged with *attempted* inducement of child prostitution. "A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense." § 18-2-101(1). This requirement applied to both the attempted patronizing a prostituted child and attempted inducement of child prostitution charges. In other words, the fact that Vega Dominguez was charged with two inchoate crimes does not impact the equal protection analysis because both require that the prosecution prove Vega Dominguez engaged in conduct constituting a substantial step toward commission of the offense. And, as discussed, under the

circumstances here, both underlying offenses proscribed the same conduct.

¶ 30 We therefore conclude that Vega Dominguez's conviction for attempted patronizing a prostituted child violates his right to equal protection. And this violation was both obvious, in light of *Maloy* (which had been decided before Vega Dominguez's trial), and substantial. It resulted in Vega Dominguez's potential lifetime imprisonment, rather than a determinate sentence. We therefore vacate Vega Dominguez's conviction and sentence for attempted patronizing a prostituted child.[5]

V. Disposition

¶ 31 The conviction for attempted patronizing a prostituted child is vacated, and the case is remanded to the trial court to amend the mittimus. The judgment of conviction is otherwise affirmed.

JUDGE LIPINSKY and JUDGE GROVE concur.

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[5] In light of our conclusion, Vega Dominguez no longer stands convicted of attempted patronizing a prostituted child and no longer has a sentence imposed under SOLSA. Consequently, we do not address his vagueness challenge to that criminal statute or his constitutional challenge to that sentencing statute.