IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62546-2-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
PATRICK JAMES KELLY ROONEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 3, 2010

SPEARMAN, J.—The first degree child molestation statute, RCW 9A.44.083, is not a specific statute that is concurrent with the first degree rape of a child statute, RCW 9A.44.073. Accordingly, the State did not improperly charge Patrick Rooney under both statutes, and we affirm his convictions.

FACTS

The State charged Patrick Rooney with two counts of rape of a child in the first degree, and two counts of child molestation in the first degree. The jury convicted on all counts. Rooney appeals.

DISCUSSION

Rooney argues that the first degree child molestation statute, RCW 9A.44.083, is a specific statute that is concurrent with what he describes as the "general" statute of first degree rape of a child, RCW 9A.44.073. According to

Rooney, therefore, the State erred by charging him under both statutes, and his convictions for first degree rape of a child must be vacated. We disagree.

"This court reviews issues of statutory construction, including whether statues are concurrent, de novo." State v. Chase, 134 Wn. App. 792, 800, 142 P.3d 630 (2006). When a specific statute is concurrent with a general statute, the accused must be charged solely under the specific statute. Id.; State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Two statutes are not concurrent unless the general statue is violated *every time* the specific statute is violated. Chase, 134 Wn. App. at 800; see also Shriner, 101 Wn.2d at 580 (the factor determining whether statutes are concurrent is if "the general statute will be violated in each instance" when the specific statute is violated).

Rooney was charged with both rape of a child in the first degree and child molestation in the first degree. RCW 9A.44.073 sets forth the elements of first degree rape of a child:

> A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44.083(1) sets forth the elements of first degree child molestation:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

For purposes of these statutes, "sexual intercourse" and "sexual contact" are defined as:

> (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.
> (2) "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.

RCW 9A.44.010.

Rooney contends that "as charged and prosecuted" in his case, the first degree rape of a child and first degree child molestation statutes were concurrent. Specifically, Rooney claims that because the State in this particular case "relied on evidence of sexual contact" for the charge of child rape, there was no way to violate the "general" child rape statute without violating the "specific" child molestation statute.

Rooney misconstrues the concurrent offense doctrine. It is irrelevant whether a defendant's acts in a particular case may violate both statutes. Again, for statutes to be concurrent, the general statute must be violated *every time* the specific statute is violated. Shriner, 101 Wn.2d at 580. For example, in Chase, the defendant argued the State was required to charge him under the theft of rental property statute because, as charged, that statute was concurrent with the general first degree theft statute. Chase, 134 Wn. App. at 795. We rejected the argument, holding that the charges in a particular case bore no bearing on

whether statutes were concurrent:

> Chase argues that under the facts of this case, it was impossible for him to violate the first degree theft of rental property statute without violating the first degree theft statue. That may be true, but the question is whether all violations of the first degree theft of leased property statute are necessary violations of the first degree theft statute. Because they are not, the statutes are not concurrent.

Chase, 134 Wn. App. at 802-03.

Contrary to Rooney's assertion, it is possible to violate the first degree child molestation statute without violating the first degree rape of a child statute. As the State correctly notes in its brief, a person who knowingly causes a sixteen-year-old to have sexual contact with a victim less than twelve years old is guilty of first degree child molestation under RCW 9A.44.083(1). This conduct, however, would not constitute first degree child rape under RCW 9A.44.073. As such, rape of a child in the first degree and child molestation in the first degree are not concurrent offenses, Chase, 134 Wn. App. at 802; State v. Crider, 72 Wn. App. 815, 818, 866 P.2d 75 (1994), and the State did not improperly charge Rooney with both offenses.

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Ellington, J.