No. 82649-8

SANDERS, J. (concurring)—Attempted rape of a child in the second degree is defined by the criminal attempt requirements, RCW 9A.28.020(1), which reference the underlying offense: here, rape of a child in the second degree, RCW 9A.44.076(1). But what specifically are the elements the government must prove to convict an individual of attempted rape of a child in the second degree? This court has already answered this question, twice, with two different answers. *See State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002); *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). We are here to decide which answer, if either, the law compels.

The lead opinion takes a different approach, artfully dancing between the two existing interpretations. Under the lead opinion, the requirements for attempted rape of a child shift depending upon the characteristics of the targeted partner/victim for the sexual intercourse. The lead opinion would hold: (1) when the targeted partner turns out to be an *actual* minor, the State must prove the strict liability element of child rape in the second degree – that the minor is at least 12 but less than 14 years old – to prove attempt (the lead opinion bases this upon *Chhom*, 128 Wn.2d at 743); (2) when the

targeted partner turns out to be a fabricated Internet persona used in a sting operation, the State must prove the defendant *intended* to have sexual intercourse with a minor between 12 and 14 to prove attempt (the lead opinion bases this upon *Townsend*, 147 Wn.2d at 679).

The lead opinion would rewrite the attempted child rape offenses. But it is not the role of the court to rewrite the law; its role is simply to apply it. Nothing in the criminal attempt statute, RCW 9A.28.020(1), or anything it references in the underlying offense statute, RCW 9A.44.076(1), permits the requirements of the offense to change depending upon the identity of the targeted partner. The lead opinion tries to overstep its role as a judicial body and assumes the mantle of the legislature. This court must interpret the law based upon what the law says, not what the lead opinion would like it to say. I instead turn to the language of the relevant statutes.

I. The offense under the relevant statutes

To determine what the elements are for attempted rape of a child in the second degree, we turn to the attempt statute. Attempt crimes are defined by RCW 9A.28.020(1) 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." Thus, there are two elements: intent and a substantial step.

The intent *to commit a specific crime* means the perpetrator intends to bring about the "criminal result" of the crime. *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). The attempt statute thus refers us to the *criminal result* of the underlying offense. The criminal result of the rape of a child in the second degree is "sexual intercourse[1] 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). Thus, the attempt statute criminalizes *the intent* to have sexual intercourse with a minor (who has the characteristics described above) when the perpetrator takes a substantial step to satisfy that intent.

Here, Patel intended to have sexual intercourse with a 13-year-old girl who was not his wife and who was at least 36 months younger than he is. He has satisfied the

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[1] "Sexual intercourse" is defined as:

> (a) ha[ving] its ordinary meaning and occurs upon any penetration, however slight, and
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> (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.

RCW 9A.44.010(1).

intent element of the attempt crime. He satisfied the substantial step element: he drove to the apartment provided by the (supposed) 13-year-old girl to engage in sex, he knocked on the door, asked for the girl by name, and brought five condoms with him.[2] He is guilty of attempted rape of a child in the second degree. *State v. Patel*, noted at 147 Wn. App. 1053, 2008 WL 5377826, at *8-9.[3] These are the elements we set forth in *Townsend*, 147 Wn.2d at 679. They are the elements required by the language of the attempt statute. They are the elements the law requires for *all* charges of attempted rape of a child.[4]

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[2] We did not grant review on the issue of whether Patel's actions constitute a substantial step. It was not raised in the petition for review.

[3] Patel argues this is inconsistent with this court's treatment of attempted theft of property in the first degree, citing *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). At the time that case was decided, theft of property in the first degree required theft of over $1,500 worth of property. *Id.* at 636 (citing former RCW 9A.56.030 (1975)). The defendant was found in the proximity of a cash drawer with approximately $1,800 in it. *Id.* at 636. The defendant argued there was insufficient evidence to establish that he knew there was over $1,500 in the cash drawer so he could not have had the requisite intent to steal over $1,500 required for first degree theft. *Id.* at 637. The five-justice majority did not analyze the issue in depth, but merely concluded the underlying theft charge did not require proof of knowledge of the property value, making no reference to application of the attempt statute. *Id.* The four-justice dissent argued the record was insufficient to infer the defendant specifically intended to take the contents of the cash drawer, rather than the prescription drugs that were also present. *Id.* at 639-40 (Williams, J., dissenting). Neither the majority nor dissent discussed the "criminal result" of theft of property in the first degree; *Delmarter* provides no analysis to assist the inquiry here.

[4] Patel challenges *Townsend* because it leaves a gap in prosecutorial coverage. For instance, a man goes home with a 13-year-old girl, *actually* believing her to be 18 years old. At no point, regardless of the substantial steps he takes toward sexual intercourse, would he be guilty of attempted child rape because he lacked the intent.

The lead opinion agrees that *Townsend* applies to Patel and affirms his conviction, and to that I concur. But the lead opinion does not stop there.

II. Walking the Earth, like Caine in *Kung Fu*

Having resolved the issue on appeal, the lead opinion journeys into the land of hypotheticals, "fixing" the "problems" it foresees. The lead opinion would hold that *Townsend* applies when the intended victim is a fictional persona created by police officers for a sting operation, but does not apply when there is an actual minor victim. Not only is there no statutory basis for the lead opinion to create different elements of the offense depending on the identity of the victim, but the elements adopted for these two other circumstances lack support in the language of the statute and are unworkable.

Actual minor victim

The lead opinion would hold *Chhom*'s definition of attempted child rape applies when there is an actual minor victim. Again, under the attempt statute, a person must

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Thus, if he was prevented from having actual sexual intercourse with the 13-year-old girl by intervening circumstances, he would avoid being guilty of a crime, because he did not commit child rape (although he would have if he could have) and did not have the criminal intent needed to prove attempt.

This "gap" in coverage exists, but is overstated. In the hypothetical situation above, the man's conduct leading up to the prevented sexual intercourse may constitute child molestation. *See* RCW 9A.44.083, .086, .089. Furthermore, the attempt statute sets forth the crime. If the legislature did not intend the gap the statutory language creates, it is the role of the legislature, not the judiciary, to rewrite the statute.

intend the criminal result of the underlying offense. *Chhom* defined the "criminal result" for child rape simply as "sexual intercourse," not necessarily sexual intercourse *with a minor*. 128 Wn.2d at 743. *Chhom* then *added* an additional element to the attempted child rape offense, requiring proof of (1) intent to have sexual intercourse, (2) a substantial step toward having sexual intercourse, and *(3) proof that the intended victim was actually a minor* (of the age and with the characteristics set forth in the underlying child rape statute). The lead opinion would adopt these three elements for situations where there is an actual minor victim. Unfortunately *Chhom* is a misunderstanding of the attempt statute and is unworkable.

The attempt statute sets forth the elements of the crime. It references and incorporates the *criminal result* from the underlying statute. *Chhom* sought to *merge* the attempt statute (RCW 9A.28.020) with the underlying offense (here, RCW 9A.44.076(1))[5] and, in doing so, attempted to graft on the *defenses* and *defense limitations* to child rape set forth in a separate statute (RCW 9A.44.030(2), which contains the "strict liability" aspect of child rape: "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older"[6]).

[5] As the State points out, if an attempt statute merged with the underlying offense – requiring a prosecutor to establish the elements of the completed offense– there would be no purpose or place for an attempt crime. The prosecutor would just charge the defendant with the underlying offense.

[6] One might argue reference to RCW 9A.44.030(2), the defense statute, is irrelevant because RCW 9A.44.076(1), the child rape statute, *itself* sets forth a strict liability offense – since it contains no intent language. This argument is immaterial; even if

But this is not how the statutes are written. First, the attempt statute incorporates only the criminal result from the underlying offense. RCW 9A.28.020(1); *see Dunbar*, 117 Wn.2d at 590. It does not contain any language incorporating a separate statute that limits and sets forth the defenses *to the underlying offense*. Indeed, the attempt statute contains its own subsection limiting the defenses to *attempt* offenses. RCW 9A.28.020(2).

Furthermore, by its express language, the statute setting forth the defenses to child rape that *Chhom* merges with the attempt statute does not apply to the attempt statute. The defense statute reads: "In any prosecution *under this chapter* in which

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RCW 9A.44.076(1) *independently* sets forth a strict liability crime, the attempt statute only incorporates its *criminal result* into the attempt offense. RCW 9A.28.020(1). Nowhere does the attempt statute adopt the strict liability component of rape of a child.

In any event, this argument is misleading and incorrect. There is no question here that rape of a child is a strict liability offense. However, the legislature imposed strict liability by virtue of the defense statute, RCW 9A.44.030(2). As we stressed in *State v. Anderson*, an offense statute's lack of an express provision for an affirmative defense of unwitting conduct or lack of knowledge indicates that intent is an element of the offense. 141 Wn.2d 357, 362-63, 5 P.3d 1247 (2000). Here, RCW 9A.44.076(1) *itself* provides no such defense; it is RCW 9A.44.030(2) that makes clear ignorance and indifference provide no defense.

Additionally, if RCW 9A.44.076 is a strict liability offense independently of RCW 9A.44.030(2), then it renders the defense statute redundant. *See* RCW 9A.44.030(2) ("[I]t is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older . . . ."). We do not interpret statutes to render terms or language redundant. *See, e.g., Berrocal v. Fernandez*, 155 Wn.2d 585, 599-600, 121 P.3d 82 (2005). Thus, RCW 9A.44.030(2) must provide the strict liability component.

the offense or degree of the offense depends on the victim's age . . . ." RCW 9A.44.030(2) (emphasis added). The attempt statute is not under that chapter. *See* RCW 9A.28.020. *Chhom* erred because it failed to recognize that an attempt crime is a distinct crime that incorporates the criminal result of, but does not merge with, the underlying offense.

The statutory misinterpretation in *Chhom* also leads to absurd results. We must avoid such absurdity. *See, e.g., State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010) (a court is bound to interpret the law to avoid absurd results when it can do so without doing violence to the words of the statute). *Chhom* identified the *criminal* result of the rape of a child as "sexual intercourse." But sexual intercourse, by itself, is not a *criminal* result. Nor is the general intent to have sexual intercourse an "intent to commit a specific crime." RCW 9A.28.020(1). Sexual intercourse is only *criminal* when performed with a member of a restricted class: here, with a minor who has the characteristics set forth under the relevant statutes. *See* RCW 9A.44.073, .076, .079.

Under *Chhom*, an individual has committed *all the actions* necessary for attempted child rape by intending to have sexual intercourse and knocking on the door of a woman he believes to be an adult. *See* 128 Wn.2d at 743. But where is the "intent to commit a specific *crime*" as the attempt statute requires? RCW 9A.28.020(1) (emphasis added). It is no crime to intend to have sex and take a substantial step to do so. The *crime* is that the intended partner in the sexual act is a

minor (as characterized under the relevant statute).

Under *Chhom* and the lead opinion, a person is guilty of attempted rape of a child and will be labeled a sex offender under the following circumstances: He meets someone on-line who says she is 25 years old. After a risqué discussion, he intends to have sex with her. Upon invitation, he goes to her home to have sex with this 25-year-old woman. He knocks on the door. A 13-year-old girl, who posed as a 25-year-old woman on-line, answers the door. The man, realizing the truth of the matter for the first time, immediately leaves. Under *Chhom* and the majority, he is guilty of attempted rape of a child: he intended to have sex; took a substantial step by accepting the invitation, travelling there, and knocking on the door; and, unbeknownst to him, the screen name he believed belonged to a 25-year-old was actually that of a 13-year-old girl. Alternatively, under *Townsend*, he has committed no crime, having never had any criminal intent.

One might argue that, just as a person can be guilty of child rape without realizing that his partner was a minor, so too can a person be guilty of attempted child rape without realizing that his *intended* partner is underage. But such a comparison is readily distinguishable; RCW 9A.28.020(1) requires criminal intent for the attempt, whereas RCW 9A.44.020(1) and .030(2) require no such intent. The statutes, on their faces, impose different requirements.

In application, this difference makes an abundance of sense. In a situation

involving the rape of a child, a person would have had firsthand personal contact with the minor up to and upon sexual intercourse, providing an opportunity for his suspicions to be aroused that the individual was not an adult – and fairly shifting onto him the responsibility to confirm otherwise. In a situation involving the attempted rape of a child where, as here, the contact is initiated on-line, the person may not even be in the presence of his intended partner until *after* he has committed the necessary actions for attempted child rape under *Chhom* and the lead opinion. Thus, the lead opinion misinterprets RCW 9A.28.020(1) to put those who seek amorous relationships on-line in peril of attempted child rape charges even where they are neither seeking nor would carry out any sexual contact with a minor.

One might argue that RCW 9A.44.030(2) provides rescue to such hapless Internet users because a defendant can avoid conviction by proving at the time of the offense he reasonably believed the victim was not a minor. But such rescue, if available,[7] is of only partial comfort to the defendant. RCW 9A.44.030(2) provides only a *defense* to the charge, so the Internet user would still be arrested for the crime and then have the opportunity *at trial* to prove his defense to a jury. The jury would have to determine whether the minor telling the defendant on-line she was of age was

[7] By its language, RCW 9A.44.030(2) applies only to prosecution of offenses under chapter 44; therefore, it does not cover attempt crimes, RCW 9A.28.020(1). But since the lead opinion tries to erroneously merge RCW 9A.44.030(2) into the attempt crime, a defendant presumably would be privy to the defenses provided therein.

sufficient for him to "reasonably believe[]" she was of age. Again, the lead opinion would deter adults from noncriminal conduct – seeking amorous relationships *with other adults* on-line – by threatening to label them child rapists.

The language of the attempt statute does not create a strict liability offense, and *Chhom*'s attempt to do so leads to absurd results. I disagree with the lead opinion's reliance on *Chhom* where there is an actual minor involved, instead of uniformly applying *Townsend*.

III. Conclusion

As the saying goes, "if it ain't broke, don't fix it." The statutes here are not broken, and the lead opinion has neither the authority nor the justification to "fix" them. I would continue to follow our decision in *Townsend* and apply the criminal attempt statute as written: *attempted* rape of a child is not a strict liability crime and the government must prove the defendant *intended* to have sexual intercourse with a minor of the age and under the circumstances set forth by the underlying child rape offense. I concur with the lead opinion's application of *Townsend* to the facts here but disagree with its reliance on *Chhom*.

I concur.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst