

NOT DESIGNATED FOR PUBLICATION

No. 99,432

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellant,*

v.

CALEB REXROAT,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Opinion filed November 21, 2008. Affirmed.

*Lois K. Malin*, assistant county attorney, *John P. Wheeler, Jr.*, county attorney, and *Stephen N. Six*, attorney general, for appellant.

*James Pratt*, of Monnat & Spurrier, Chtd., of Wichita, for appellee.

Before McANANY, P.J., GREEN and BUSER, JJ.

*Per Curiam:* The State appeals the district court's dismissal of the charge against Caleb Rexroat of attempted indecent solicitation of a child. The district court ruled that this charge constitutes an impermissible stacking of inchoate crimes and, in any event, there was insufficient evidence presented at the preliminary hearing to support the charge.

This charge arises out of online messages in April 2006 between Rexroat and Detective Brian Ruder, who was posing as a 14-year-old girl in an online "romance" chat room sponsored by Yahoo. Following their exchange of sexually explicit messages, Detective Ruder contacted Rexroat, who admitted to engaging in the conversations and sending a photo over the internet to the person with whom he thought he was chatting. The State charged Rexroat with attempted indecent solicitation of a child in violation of K.S.A. 21-3301 and K.S.A. 21-3510(a)(1).

In later sustaining Rexroat's motion to dismiss, the district court ruled that the crime of "attempted indecent solicitation of a child" involves an impermissible stacking of inchoate offenses in violation of *State v. Sexton*, 232 Kan. 539, 541, 657 P.2d 43 (1983). Besides, the court ruled, there was insufficient evidence to proceed against Rexroat on this charge because "[w]hile Defendant's internet musings with [his intended victim] within the case at bar are morally reprehensible, they simply do not rise to the level of an overt act toward the completed offense."

The State concedes that if K.S.A. 21-3510 (indecent solicitation of a child) is an anticipatory crime, then the charge of attempted indecent solicitation of a child is an impermissible stacking of inchoate offenses. However, the State claims that K.S.A. 21-3510 is not an anticipatory crime, so no stacking of inchoate crimes is involved. It also argues that since federal courts allow prosecution under the theory advanced here, Kansas should too.

Whether K.S.A. 21-3510 is an inchoate crime is an issue of law involving statutory interpretation which we review de novo. Our task is to determine the legislature's intent in enacting the relevant statutes. Because K.S.A. 21-3510 is a criminal statute, we strictly construe it in favor of Rexroat and resolve any reasonable doubt about its meaning in his favor, so long as such a construction is consistent with the legislature's design and intent. *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840 (2008). We turn to the rules of construction only if the legislature's intent is not clearly expressed in the words it employed. See *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007).

We construe statutes so as to reconcile various provisions of an act where possible. *State v. Breedlove*, 285 Kan. 1006, 1015, 179 P.3d 1115 (2008). Further, we assume that the legislature does not intend to enact useless or redundant legislation. *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006). We presume the

legislature knows the legal connotations of the words it uses. So when the legislature uses a legal term of art in a statute, we presume the legislature intended to invoke the legal connotations of the term. See *State Bd. of Nursing v. Ruebke*, 259 Kan. 599, 613, 913 P.2d 142 (1996).

The Kansas Criminal Code, K.S.A. 21-3101 *et seq.*, is divided into three parts: General Provisions (Part I), Prohibited Conduct (Part II), and Classification of Crimes and Sentencing (Part III). Article 33, contained in Part II, is entitled Anticipatory Crimes and contains K.S.A. 21-3301 (Attempt), K.S.A. 21-3302 (Conspiracy), and K.S.A. 21-3303 (Criminal solicitation). Article 35, also contained in Part II, is entitled Sex Offenses and contains K.S.A. 21-3510 (Indecent solicitation of a child). Attempt is an anticipatory crime. The issue is whether indecent solicitation of a child is one, too, in spite of the fact that it is not included with attempt, conspiracy, and criminal solicitation in Article 33.

The charge against Rexroat is a combination of (1) the anticipatory crime of attempt found in K.S.A. 21-3301 and (2) the crime described in K.S.A. 21-3510(a)(1) of indecent solicitation of a child by enticing or soliciting a child between 14 and 16 years of age to commit or to submit to an unlawful sexual act. "Unlawful sexual act" is defined in K.S.A. 21-3501(4) and includes acts of indecent liberties with a child. The unlawful sexual act claimed here is fellatio performed by a 14-year-old girl, an act included within

those constituting indecent liberties with a child pursuant to K.S.A. 21-3503. The issue before us is whether the district court erred in deciding that K.S.A. 21-3510(a)(1), which involves solicitation, when combined with the charge of attempt under K.S.A. 21-3301, is an impermissible stacking of two inchoate or anticipatory crimes.

K.S.A. 21-3110 sets forth various definitions which control "when the words and phrases defined are used in [the Kansas Criminal Code], except when a particular context clearly requires a different meaning." "Solicit" or "solicitation" is defined as "to command, authorize, urge, incite, request, or advise another to commit a crime." K.S.A. 21-3110(21); see *State v. Hill*, 271 Kan. 929, 941, 26 P.3d 1267 (2001), *overruled on other grounds by State v. Voyles*, 284 Kan. 239, 252-53, 160 P.3d 794 (2007).

The State fails to show why K.S.A. 21-3110's definition of solicitation "clearly requires a different meaning" when applied to indecent solicitation of a child. We see no basis upon which to conclude that the legislature, through its clearly expressed statutory language, intended solicitation of a child to be different from solicitation in any other context. Solicitation is specifically identified as an anticipatory crime in our Kansas Criminal Code. K.S.A. 21-3303; *State v. Garrison*, 252 Kan. 929, 936, 850 P.2d 244 (1993); *State v. Hill*, 252 Kan. 637, 644, 847 P.2d 1267 (1993). The legislature is presumed to know that "solicitation" refers to an inchoate crime. *Ruebke*, 259 Kan. at

613. Neither the age of the victim nor the sexual nature of the request changes the fact that the activity criminalized by K.S.A. 21-3510(a)(1) is "enticing" or "soliciting" another to commit or submit to an unlawful sexual act.

In *Sexton*, the court concluded that "one anticipatory crime [*i.e.*, attempt] cannot be stacked or added to another anticipatory crime [*i.e.*, solicitation] in order to arrive at a new crime." 232 Kan. at 541. In deciding where in the criminal code to place indecent solicitation of a child, a crime that relates to sexual misconduct, the legislature chose the article where other sex offenses are collected—Article 35. The fact that K.S.A. 21-3510 is not found in Article 33 where other anticipatory crimes are found does not negate the very nature of the criminal offense of indecent solicitation of a child—the anticipatory crime of soliciting a child to commit or submit to an unlawful sexual act.

This conclusion is buttressed by the principles, noted earlier, that we construe statutes so as to reconcile various provisions of an act where possible and that we assume the legislature does not intend to enact useless or redundant legislation.

K.S.A. 21-3510, the indecent solicitation of a child statute, was enacted in 1969. Our criminal solicitation statute, K.S.A. 21-3303, was not enacted until 1982. Since K.S.A. 21-3510 was enacted before K.S.A. 21-3303, its enactment did not create a

redundancy. The later enactment of K.S.A. 21-3303 in 1982 broadened the scope of criminal solicitation beyond indecent solicitation of a child to engage in an unlawful sexual act to the crime of soliciting any person to commit any felony.

The same cannot be said for the legislature's enactment in 2006 of K.S.A. 21-3523 if the State is correct in contending that attempted indecent solicitation of a child is a viable crime. K.S.A. 21-3523 prohibits "electronic solicitation," which is defined as:

"(a)(1) Enticing or soliciting a person *whom the offender believes to be a child under the age of 16 to commit or submit to an unlawful sexual act;*

.....

"(c) For the purposes of this section, 'communication conducted through the internet or by other electronic means' includes but is not limited to e-mail, *chatroom chats* and text messaging." (Emphasis added.) K.S.A. 21-3523.

K.S.A. 21-3523(a)(1) was not in effect when Rexroat engaged Detective Ruder in the chat room in April 2006. Had it been in effect at the time, the State would not have needed its "attempt" theory since there would be no issue about Detective Ruder's age. The fact that Detective Ruder is over the age of 16 would not have required the State to

resort to the crime of attempt. Rather, under this new statute, the issue would be what Rexroat *believed* his victim's age to be.

If the State could properly have charged Rexroat with attempted indecent solicitation of a child when his victim was actually an adult posing as a 14-year-old child, then the enactment in 2006 of K.S.A. 21-3523(a)(1) was redundant and unnecessary. But we presume the legislature does not enact redundant and meaningless legislation. Our conclusion today, that the State could not properly charge Rexroat with attempted indecent solicitation of a child, permits K.S.A. 21-3510 and K.S.A. 21-3523 to be read in harmony with one another.

Next, we turn to the two prior decisions of our Supreme Court discussed by the State in its brief. The State's reliance on *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005), and *State v. Jones*, 271 Kan. 201, 21 P.3d 569 (2001), is misplaced.

In *Peterman*, the defendant solicited a woman's help in his plan to produce child pornography. The woman feigned agreement and invited Peterman to her home where she told him children would be present. There were no children at the house. The woman called the police. Peterman was arrested when he arrived at the house with sexual paraphernalia in his possession. He was convicted of, among other things,

attempted rape. On appeal, the Supreme Court found ample evidence of the defendant's overt acts toward completion of the crime of statutory rape. *Peterman*, 280 Kan. at 640. Attempt is an anticipatory crime, but rape is not. Thus, the conviction of attempted rape is not the stacking of anticipatory or inchoate crimes.

In *Jones*, a young female police officer, posing as a young girl, was engaged by the defendant over the internet. They arranged to meet for the ultimate purpose of engaging in sex. They met at a shopping mall and then left to go to Jones' car. Jones was arrested outside the mall. Throughout the encounter Jones thought the officer was a 13- or 14-year-old girl. He was convicted of attempted aggravated indecent liberties with a child. Jones argued that he could not be convicted without an actual child victim. The court rejected this argument because under our attempt statute, K.S.A. 21-3301(b), legal and factual impossibility are not defenses. *Jones*, 271 Kan. at 203. Therefore, Jones was properly convicted, though the child victim was fictional. Here again, attempt is an anticipatory crime, but aggravated indecent liberties with a child is not. Thus, the conviction of attempted aggravated indecent liberties with a child is not the stacking of anticipatory or inchoate crimes.

Finally, the State argues that it should be allowed to charge an attempted solicitation since the federal courts recognize this crime. The cases discussed in the

State's brief, *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007), and *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007), involve application of 18 U.S.C. § 2422 (Supp. 2008), which states:

"(b) Whoever, . . . knowingly persuades, induces, entices, or coerces any individual [under] the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so*, shall be fined under this title and imprisoned." (Emphasis added.)

In our case it would have been unnecessary for the State to add the charge of attempt had the underlying crime been defined as in 18 U.S.C. § 2422(b). The crime defined by the federal statute includes an attempt to induce a minor to engage in sex. Thus, in a federal prosecution there is no need to combine the underlying crime with the anticipatory crime of attempt. Kansas has not combined the anticipatory crime of attempt with the underlying crime of indecent solicitation of a child. Thus, the federal cases cited by the State interpreting 18 U.S.C. § 2422 do not apply.

The district court did not err in determining that the charge of attempted indecent solicitation of a child constituted an impermissible stacking of inchoate crimes. This renders moot the State's claim that there was sufficient evidence adduced at the

preliminary hearing to bind Rexroat over for trial on the charge of attempted indecent solicitation of a child.

*Affirmed.*