No. 76457-8-I

96002-0

IN THE COURT OF APPEALS - DIVISION ONE
OF THE STATE OF WASHINGTON

KEVIN DALE BEST, Petitioner

v.

STATE OF WASHINGTON, Respondent

PETITION FOR DISCRETIONARY REVIEW

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A. Identity of the Petitioner

The Petitioner is Kevin Best.

B. Decision Below

On April 23, 2018, the Court of Appeals, Division One reversed the trial court's dismissal of Mr. Best's criminal conviction, pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), in an unpublished opinion, No. 76457-8-I (herein after referred to as "the opinion below"). The opinion is included in Appendix 1. A motion for reconsideration was filed, and was denied on May 25, 2018.

Appellant submits this timely motion for discretionary review to the honorable Supreme Court of the State of Washington.

C. Issues Presented for Review

1. When reviewing a *Knapstad* motion on an "attempt" charge, at what point does an encounter transition from the "negotiation stage" to a "substantial step"?

D. Statement of the Case

In December 2015, undercover detectives posted a personal ad on the Craigslist website, soliciting deviant responses in order to initiate sex crime investigations. CP at 78. Posing as a fictional mother of three minor children, the undercover detectives solicited a "close family connection." CP at 255.

Over the following two months, Mr. Best and the fictional mother sporadically exchanged electronic messages: one or both parties sent messages on 16 of the intervening 59 days. CP at 257-59. When the

conversation petered out, the State's undercover agents prodded Mr. Best into reengaging; when Mr. Best stopped responding to the undercover officers, they persistently continued attempting to reengage Mr. Best. *See, e.g.*, CP at 89-90. While some of these messages were sexually graphic and discussed acts related to child molestation, the majority were mundane, focusing on work, travel, and scheduling a time to meet *the mother* for coffee. CP at 86-116. Mr. Best also asked the fictional mother if she was interested in a relationship. CP at 97.

Throughout the exchange, Mr. Best repeatedly stated it was "just fantasy." For example, on February 11, Mr. Best wrote: "[r]emeber, texting is all fantasy so we can say whatever we want righ[t]."CP at 93. Mr. Best had made statements to the undercover officer about molesting his children, which were demonstrated as mere fantasy by the State's subsequent investigation, and Mr. Best actually acted out his fantasies with his consenting adult girlfriend. CP at 79-80, 226-27 at fn. 6 and 7. The undercover agents illegally recorded phone conversations with Mr. Best (which were suppressed by the trial court), and their summaries of the phone calls do not suggest that anyone would have sex with anyone else at this meeting. CP at 118-23. The agent's own characterization of Mr. Best's expressed intention was to "just chill and hang with no expectations." CP at 119.

When Mr. Best arrived at the house, he was greeted by the fictional mother and arrested. He did not bring money, condoms, or any items of a

sexual nature. CP at 71.[1] Mr. Best was eventually charged with three counts of Attempted Rape of a Child, and moved to dismiss all three counts pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). The Honorable Judge Janice E. Ellis granted the motion and dismissed all three charges. The State appealed that decision, and the Court of Appeals, Division I, reversed that ruling and reinstated the charges. Mr. Best now asks this Court to review that decision.

E. ARGUMENT

Review Should be Granted

This case presents an issue necessitating review by the this Court. The opinion below is irreconcilable with several published decisions of this Court and of the Court of Appeals, RAP 13.4(b)(1)-(2), and it addresses a significant question of law under the US and Washington Constitutions regarding sufficiency of the evidence and its proper analysis under *State v. Knapstad*, RAP 13.4(3). As this case demonstrates, the caselaw regarding what constitutes a prima facie case of guilt with regard to the "substantial step" prong of attempt crimes is often murky. There are two concerns: first, that the decision of the Court of Appeals is in conflict with *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), and *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994); and second, that the current standard for determining a "substantial step" is vague and provides little guidance to trial courts.

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[1] The Fictional Mother had stated condom use was a ground rule, as highlighted by the Court of Appeals in the Opinion Below, pg. 2.

Under the theory articulated by the State, a substantial step would be any action that moves toward the stated goal (with no consideration for what constitutes "preparation"); for example, sending a text to ask about a future meeting would be a substantial step according to the State. The Court of Appeals' analysis (having largely adopted the State's arguments) of what constitutes a "substantial step" is entirely unworkable, providing no indication of when preparation ends and the attempt begins: it could be when the individual gets in his car, when he turns the car on, when he follows up on the initial communication, or really any other action the State is willing to proceed on. Unfortunately, the Court's opinion provides no bottom for this slippery slope.

1. **The Court should grant the petition for discretionary review in order to harmonize the "substantial step" test with the "mere preparation" or the "negotiation stage" doctrines.**

In order to be convicted of an "attempt" crime, the defendant must do "any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). This must be more than "mere preparation," a standard dependent upon the facts of the individual case. *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978). It must also proceed past the "negotiation stage" to a point where the negotiations have been concluded. *State v. Grundy*, 76 Wn. App. 335, 337-38, 886 P.2d 208 (1994).

In the Opinion Below, the Court of Appeals' decision is at odds with both the "negotiation stage" and "mere preparation" doctrines. The Court appears to reach the conclusion that when the defendant arrives at an agreed-upon location, he has gone beyond "mere preparation." To support

this conclusion, the Court of Appeals (confusingly) cited *State v. Falco* for the proposition that "the actor might lie in wait on the known route of a particular child after the actor has told another that he wants to have sexual intercourse with that child." 59 Wn. App. 354, 359, 796 P.2d 796, (1990). This citation is confusing as it reverses the roles of the individuals without contemplating that such a reversal may no longer be more than "mere preparation"; the facts of *Falco* showed the defendant induced the victim to come with him into the woods, where he then allegedly attempted intercourse with the victim. In those facts, the preparation has been completed when the defendant has led his victim into the vulnerable situation that would lead to the completion of the crime. In contrast in the present case, the undercover officer was the one to induce Mr. Best to come to the desired location.

In addition, Mr. Best and the undercover officer were still engaged in negotiations as this time. The Court of Appeals attempted to summarily dispose of that argument, and *Grundy*, by highlighting the amount of time Mr. Best had spent speaking with the undercover officer:

> Best spent weeks getting to know Kristi. Once he decided to trust that she genuinely shared his desire for sex with children, he joined her in planning a family style weekend during which she would allow him to exploit her children.[2]

This ignores the fact that during much of that time period, Mr. Best was non-responsive to the undercover officer, and also inserts an artificial break between "negotiation" and "planning," without any support for such an insertion. Mr. Best had conveyed his intentions that nothing would happen

[2] Opinion Below at 7.

on that weekend, and despite being told condoms would be required for any sexual activity, did not arrive at the location with condoms. Upon arriving, Mr. Best was greeted by the 'mother'—the person acting as a gatekeeper. Before Mr. Best could have proceeded into the rooms with the hypothetical children, he would have had to conclude any negotiations with the 'mother.' By ignoring these facts, the Court of Appeals' decision runs contrary to *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), and *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994).

2. The Court should grant the petition for discretionary review in order to create a more workable standard to determining a "substantial step."

The area of jurisprudence concerning "substantial steps" in criminal attempt cases is in dire need of direction—especially in light of new law enforcement tactics such as the drag-net Craigslist stings employed here.[3] As highlighted in the Opinion Below, the major cases in this particular area "do not purport to set forth a bright line for the specific facts necessary to show a substantial step as opposed to mere preparation." Previous cases have often eschewed such a bright line approach: "the question of what constitutes a 'substantial step' under the particular facts of the case is clearly for the trier of fact." *Workman*, 90 Wn.2d at 449. However, it cannot be that "attempt" crimes are categorically-barred from a motion to dismiss pursuant to *Knapstad*; accordingly, more guidance in this area is required.

When ruling on a *Knapstad* motion, the trial court is addressing the

[3] *See, e.g., State v. Solomon*, __ P.3d __, 2018 WL 2418487 (Court of Appeals, Division I, Published Opinion, May 29, 2018).

"substantial step" issue before it makes it to a trier of fact, and the decision is reviewed *de novo*. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.2d 194 (2007) (internal citations omitted). This leads to problematic review: the standard for "substantial step" is malleable-enough to allow a great deal of leeway in a judge's decision, and *de novo* review means that the failure or success of a defendant's *Knapstad* motion relies upon the personal leanings of the last jurist to review the *Knapstad* motion. The standard for determining whether a "substantial step" occurred comes down to the individual interpretation of the facts taken by the judge reviewing the motion—and without a clear standard, does not promote uniformity in the criminal justice system.

Without a clearer standard to analyze whether a "substantial step" took place, the issue becomes too open-ended, which allows for further watering down of the "substantial step" requirement. The current jurisprudence consists of a handful of published cases that do not provide a clear standard to follow—and given the fact-specific nature of the inquiry, do not lend themselves to subsequent factual comparisons with other cases. This leads to a practice where the murkier, more difficult cases—such as Mr. Best's—are swept aside as unpublished opinions, and emboldens the State to further push the needle on what constitutes a substantial step.

Under the current standard, the State can gradually water down the preparation and negotiation requirements: for example, there is nothing in the standard preventing the State from arguing that, in a case similar to Mr. Best's, setting up a time to meet is a substantial step (for those cases where

the defendant does not actually show up to the target location). And there is nothing in the caselaw preventing a judge from agreeing with the State—triggering a slippery-slope with no discernable bottom.

Mr. Best's cases highlights the need for a clearer standard in this area of the law. The major cases in this area do not provide clear guidance to judges on *Knapstad* motions and "substantial step." For example, *Townsend* only squarely addresses whether there can be a substantial step if the alleged victim is actually an undercover cop. *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002). In *Sivins*, the defendant communicated with his intended victim (an undercover officer), purchased a vibrator for his intended victim, discussed with the intended victim his intention to have sex with her (including the day prior to the meeting), and followed up those communications with financial expenditures to acquire a motel room to commence the agreed-upon sexual activities. *State v. Sivins*, 138 Wn. App. 52, 155 P.2d 982 (2007). And in *Wilson*, the defendant negotiated through the 'mother' (an undercover officer) the terms of his sexual encounter with the minor, agreed on a price ($300), and a meeting place. *State v. Wilson*, 158 Wn. App. 305, 309, 242 P.3d 19 (2010). When Mr. Wilson arrived at the meeting place, he had the negotiated amount of cash in his possession, and gave a signed confession stating he "arranged to have sex with a mom and daughter" and that he "was going to pay $300." *Id.* at 311.

These cases are too factually-distinct from Mr. Best's to provide adequate guidance in this area of the law. The lack of a clear standard forces courts to review this particular *Knapstad* issue by analogizing to cases that

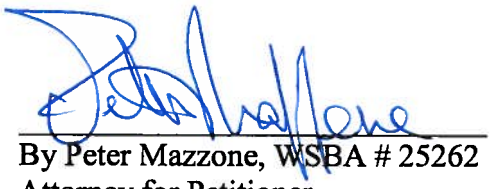
are factually distinct, leaving judges in the unenviable position of trying to "fit a square peg into a round hole." Jurists, and the public, deserve a clearer standard in this area, to prevent *Knapstad* rulings from being based almost entirely on the individual reactions of the judge and not on clear caselaw.

F. CONCLUSION

Mr. Best's case is in conflict with the decision of this court in *State v. Workman*, and is in conflict with the Court of Appeals decision in *State v. Grundy*. In addition, Mr. Best's case presents an issue of public interest that necessitates clearer guidance from this Court. Accordingly, Mr. Best respectfully requests this court GRANT this petition for review.

Respectfully submitted this 19 day of June, 2018.

MAZZONE LAW FIRM, PLLC



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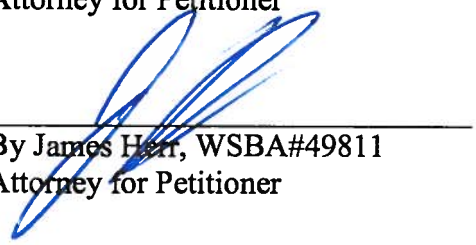

By James Herr, WSBA#49811
Attorney for Petitioner

CERTIFICATE OF SERVICE/PROOF OF FILING

I, Aleshia Johnson, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Petition for Discretionary Review" was filed via Electronic Filing System with the Court of Appeals, Division I, 600 University Street, One Union Square, Seattle, WA 98101-1176 on This 20th Day of June, 2018. And further, that a true and correct copy of the foregoing pleading was served by Seattle Legal Messenger on the following parties on this 20th Day of June, 2018:

Snohomish County Superior Court
Prosecuting Attorney – Seth Fine
3000 Rockefeller Avenue
Everett, WA 98201

Dated: This 20th Day of June, 2018.

Aleshia Johnson
Paralegal

APPENDIX 1

4/23/2018 - Unpublished Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. KEVIN DALE BEST, Respondent.	)	No. 76457-8-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2018

BECKER, J. — Undercover police agents posted a personal advertisement implicitly offering illegal sexual contact with three children. The defendant responded to the advertisement and communicated his intent to accept the offer. The defendant then showed up at the address given and was arrested. Charged with three counts of attempted rape and molestation, the defendant successfully moved for dismissal under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). The basis for the dismissal was that the State had not presented evidence of a substantial step. Because a jury could find that the defendant's conduct went beyond mere preparation to show a clear design to commit the criminal acts, we reverse and remand for trial.

Respondent Kevin Best came to the attention of law enforcement officers in December 2015 when he responded to an ad they had posted on an online

platform for classified advertising. The ad, posted by an individual named "Kristi," sought a "daddy to take care of her girls." Kristi was in reality a police officer working in a sting operation. She posed as the mother of two girls, ages 11 and 8, and a son age 13. Best and Kristi exchanged sexually explicit e-mails, text messages and phone calls over a period of two months. Best repeatedly expressed a desire to have sexual contact with each of Kristi's children. He described the anticipated sexual activity in graphic detail. He also described having sexual relations with his own two daughters. In a phone conversation with an agent who was pretending to be "Lisa," Kristi's 11-year-old daughter, Best talked about having sexual intercourse with her and said, "Don't worry, I'll show some attention to your younger sister too." After this conversation, Best sent Kristi a video of himself masturbating and ejaculating.

Kristi and Best discussed ground rules for sexual activity involving the children: Best wanted no "aggression" to be used with his daughters, and Kristi said her rules were "no pain, no anal, condoms." They eventually arranged that Best, without his daughters, would come to Kristi's home in Everett on February 20, 2016, a Saturday. The plan was that he would spend the weekend. Best asked if Kristi allowed her girls to have drinks for play nights. Kristi responded no, but she said gifts would help to "soften them up." Best talked about taking the children shopping when he came over.

On the arranged date, Best drove to Kristi's home with his dog. On the way, at Kristi's request, he stopped to buy an iced coffee for Kristi and three chocolate milks for the children. When he was almost there, he messaged Kristi

to ask if Lisa would meet him at the door. Kristi responded that Lisa was sleeping, and she suggested that Best could wake her up and then "you guys can get it together if that works." Best replied, "Cool."

Best was arrested when he arrived. The State charged him with attempted first degree rape of the older sister, attempted first degree child molestation of the younger sister, and attempted second degree rape of the boy.

Best moved to dismiss under Knapstad. The trial court granted the motion and dismissed the charges without prejudice. The State appeals.

An order dismissing charges on a Knapstad motion is reviewed de novo. State v. Conte, 159 Wn.2d 797, 803, 154 P.3d 194, cert. denied, 552 U.S. 992 (2007).

Under Knapstad, a trial court has inherent authority to dismiss a charge when the undisputed facts are insufficient to support a verdict of guilt. Knapstad, 107 Wn.2d at 353. The threshold showing required to survive a Knapstad motion to dismiss is lower than that required for a conviction. State v. Montano, 169 Wn.2d 872, 879, 239 P.3d 360 (2010). When considering a Knapstad motion, the court must determine "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." Knapstad, 107 Wn.2d at 356-57. If so, denial of the motion to dismiss is mandatory. Knapstad, 107 Wn.2d at 356. "When evaluating a Knapstad challenge to the sufficiency of the evidence, the trial court considers the evidence and reasonable inferences therefrom in the light most favorable to the State." State v. Graham, 182 Wn. App. 180, 183, 327 P.3d 717 (2014).

Best was charged with attempt crimes. "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). A substantial step "need not be an overt act, as long as it is behavior strongly corroborative of the actor's criminal purpose." State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). The conduct must go beyond mere preparation. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). "The question of what constitutes a 'substantial step' under the particular facts of the case is clearly for the trier of fact." State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). "When preparation ends and an attempt begins, we have held, always depends on the facts of the particular case." Workman, 90 Wn.2d at 449-50. "Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001).

The trial court determined that the evidence sufficiently showed Best had the intent to commit the specific crimes charged but was insufficient to show that he took a substantial step:

> The court reviewed all of the proffered facts in a light most favorable to the state. The materials support the state's view that the defendant communicated in detailed and graphic ways a history of exploiting his own children and his intent to commit or facilitate various sexually exploitative crimes involving the children of the fictitious mother. Thus, the defendant's intent is not at issue in this Knapstad motion. The unanswered legal question is whether the defendant took a substantial step toward the commission of any of the charged crimes. I conclude that the defendant's act of driving to the fictitious mother's home and bringing beverages for each

> member of the fictitious mother's family is insufficient as a matter of law to conclude that the defendant took a substantial step toward the commission of any of the charged crimes.

Washington courts have affirmed convictions for attempted sex crimes with children in several similar cases in which, because the arrest of the defendant occurred as the result of an undercover sting operation, the defendant did not come into physical proximity with an actual child. In each case, we rejected the argument that the defendant had not taken a substantial step. In each case, like here, the defendant arrived at a motel or other prearranged meeting place after clearly expressing his desire to have sex with the child. Townsend, 147 Wn.2d at 671; State v. Sivins, 138 Wn. App. 52, 56-58, 155 P.3d 982 (2007); State v. Wilson, 158 Wn. App. 305, 308-11, 242 P.3d 19 (2010).

Here, the trial court characterized Townsend, Sivins, and Wilson as having evidence that the defendant "was prepared and ready to engage in sexual contact with a minor." The court found these cases distinguishable on the basis that showing up at the designated address bringing coffee and chocolate milk "does not clearly show the design of the defendant to commit the crimes with which he is charged."

Townsend, Sivins, and Wilson affirm convictions; they do not purport to set forth a bright line for the specific facts necessary to show a substantial step as opposed to mere preparation. Best contends something more is required than merely coming to a prearranged meeting location. He cites no authority to indicate that coming to a prearranged meeting location is insufficient as a matter of law. To the contrary, this court has given the following as an example of

conduct amounting to a substantial step toward statutory rape: "The actor might lie in wait on the known route of a particular child after the actor has told another that he wants to have sexual intercourse with that child." State v. Falco, 59 Wn. App. 354, 359, 796 P.2d 796 (1990).

Nor is it essential to prove overt sexual conduct in the child's presence. In proving a charge of an attempt at committing a sex crime against a minor, "the critical focus is on the defendant's criminal intent and not on the fact that no minors were actually subjected to sexual exploitation or abuse." State v. Luther, 157 Wn.2d 63, 74, 134 P.3d 205, cert. denied, 549 U.S. 978 (2006). A reasonable jury "may infer the elements of attempt even without evidence of physical contact or an express statement of intent." State v. Leslie Wilson, 1 Wn. App. 2d 73, 85, 404 P.3d 76 (2017).

Best contends he never admitted, agreed, or even suggested that he intended to engage in sexual conduct with the children at their first meeting. He emphasizes a communication with Kristi in which he stated that he had "no expectations" for the visit. But Kristi responded, "I do have some expectations or I wouldn't be talking . . . to you," to which Best replied, "Haha I feel the same." Considering the record as a whole in the light most favorable to the State, it is reasonable to infer that Best included the "no expectations" statement to shield himself from criminal liability if Kristi turned out to be a law enforcement agent. Similarly, Best's assertion in an e-mail that "I never play when we meet for the first time to be safe" does not have to be taken at face value.

Best suggests that his communications with Kristi were merely fantasy. He sent a message to Kristi that "texting is all fantasy so we can say whatever we want." One of his messages stated, "I like to say everything is a fantasy until I know you're real." In an early message, he told her "until we trust each other for now this is all fantasy and not real:-) what all are you into?" But Kristi responded, "Well I'm not into fantasy," and Best replied, "Yeah me either." Best told Kristi on several occasions that he suspected a sting operation. It is reasonable to infer that Best's references to fantasy were self-serving and disingenuous and that his true intent was to have sexual contact with Kristi's children after using gifts to "soften them up."

Best cites State v. Grundy, 76 Wn. App. 335, 886 P.2d 208 (1994). In Grundy, an undercover officer posing as a drug runner approached the defendant and asked him what he wanted. Grundy, 76 Wn. App. at 336. The defendant was arrested when he expressed a desire to buy cocaine. Grundy, 76 Wn. App. at 336. He was convicted of attempted possession of cocaine. Grundy, 76 Wn. App. at 336. This court reversed, finding insufficient evidence of a substantial step. Grundy, 76 Wn. App. at 338. "The parties were still in the negotiation stage." Grundy, 76 Wn. App. at 338. Best contends he and Kristi similarly were only at "the negotiation stage" about whether the sexual conduct would occur. Grundy is not analogous. Best spent weeks getting to know Kristi. Once he decided to trust that she genuinely shared his desire for sex with children, he joined her in planning a family style weekend during which she would allow him to exploit her children.

The sexually explicit e-mails, text messages, and telephone calls presented by the State make out a prima facie case that Best specifically intended to have sexual intercourse with the older daughter, to molest the younger daughter, and to cause the 13-year-old son to have sex with "everyone." When all inferences are taken in favor of the State, there is evidence of more than mere preparation. Best's arrival on Kristi's doorstep, exactly at the time and place the two of them had agreed on, is evidence clearly showing his design to carry out their plan for a weekend involving sexual contact with the three children.

The trial court erred by granting the Knapstad motion. The order of dismissal is reversed, the charges are to be reinstated, and the case is remanded for further proceedings.

Baker, J.

WE CONCUR:

Mann, A.C.J.

Cox, J.

MAZZONE LAW FIRM

June 20, 2018 - 10:45 AM

Transmittal Information

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