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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37263-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RASHEED WHITE, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying White's motion to suppress his statements to police.
2. The trial court erred by finding that White's statements to police were "made voluntarily and without coercion." (FF #5, CP 50)
3. The trial court erred by finding that White was "not so intoxicated that he was unable to understand the Miranda Rights that were read to him." (FF #7, CP 50)
4. The trial court erred by finding that White's statements were made after a "knowing, voluntary and intelligent waiver of his constitutional rights." (C of L #4, CP 51)
5. The trial court erred by convicting White of attempted rape of a child in the second degree without substantial evidence.
6. The trial court erred by denying White's motion to dismiss for lack of a prima facie case.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by denying White's motion to suppress his statement to police when he was clearly intoxicated at the time?

2. Did the trial court err by convicting White of attempted rape of a child in the second degree when merely propositioning a child, without more, cannot constitute a substantial step toward the crime of rape of a child?

III. STATEMENT OF THE CASE

On May 12, 2007, 13 year old A.C. was watching television at a friend's house when Rasheed White came over with a cousin for a visit. RP 130, 134, 165. During the evening, A.C. went to one of the bedrooms to watch television and his friend, Ricardo Mendoza, went to the store, leaving A.C. and White alone in the house. RP 139.

According to A.C., White entered the room where he was laying on the bed watching television and closed the door behind him. RP 141-2. A.C. said White came over, put his knee on the bed and took out his penis, saying "Suck it." RP 142. A.C. said no. RP 143. A.C. said that White then said: "Give it a little nibble," but A.C. again said no. RP 143.

According to A.C., at some point during this exchange, White touched A.C.'s backside over his clothes—the only time he touched A.C. RP 147.

After A.C. declined White's advances, White put his penis back in his pants. RP 144. White's hand was also in his pants. RP 144.

For a few minutes, White remained where he was while A.C. watched television. RP 145. Eventually, A.C. said got up and tried to leave the room, and then White punched him. RP 145. A.C. asked White why he punched him and White responded, “Just go back on the bed and watch the cartoons,” which he did. RP 145.

After a few more minutes, A.C. again tried to leave the room and again, he says, White punched him. RP 146. Again, A.C. asked why and White said, “Don’t worry about it.” RP 146. A.C. went back to the bed to watch television. RP 146.

When White left the room, A.C. got out the window and went home. RP 147. A.C. told his mother what had happened and they called the police. RP 149.

Meanwhile, Mendoza returned to the house and found White there, but A.C. was gone. RP 186-7. Mendoza said he asked White where A.C. had gone, and White replied that he and A.C. had had a fight and that A.C. was trying to attack him. RP 188. According to Mendoza, White was very intoxicated and only intermittently conscious. RP 201.

Deputy Sekora responded to A.C.’s call and after interviewing him, she went with him to Mendoza’s house. RP 214. They found White passed out on the couch in the living room. RP 189, 201. It took a long

time and repeated efforts to rouse White to consciousness. RP 189, 214.

It was obvious to everyone that White was intoxicated. RP 215.

Sekora arrested White, cuffed him, and placed him in her car. RP 217. According to Sekora, White said he did not know A.C. and had not asked him for oral sex.¹ RP 217.

White was charged with attempted rape of a child in the second degree. CP 1. At the close of the State's evidence, White moved to dismiss the charge for lack of evidence. RP 226. The motion was denied. RP 226. White was convicted as charged. CP 31. He was sentenced to an indeterminate sentence of 102 months to life. CP 40. This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING WHITE'S MOTION TO SUPPRESS WHERE HE WAS CLEARLY TOO INTOXICATED TO MAKE A VOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS.

Prior to trial, a hearing was held to consider whether White's statement to Deputy Sekora should be suppressed. The evidence at that hearing showed that White was clearly very intoxicated when he was arrested. The witnesses testified that White had been drinking all evening

¹ The intoxicated White thought he remembered a "tall girl with brown hair" beginning oral sex, but said he stopped her because she was too young. RP 218, 224.

and was drunk. RP 137-8, 183, 201. White was passed out in a chair when Sekora arrived. RP 89. It took several minutes, repeatedly calling his name, kicking him, to wake White. RP 89. White smelled of alcohol. RP 96.

Directly after waking White from his drunken stupor, Sekora took him to her vehicle, read him his rights, and began to question him. RP 88. This is when she said White made his statement. Sekora believed that White understood his rights. RP 95.

White testified that he had several bottles of alcohol that day and had also smoked Marijuana. RP 101. He had no memory of being read his rights or of making a statement. RP 103.

The trial court found that while White was intoxicated, his waiver of his rights was still made voluntarily. RP 114-15, CP 49-51.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights. For due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made. *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Factors considered include a defendant's physical condition, age, mental abilities,

physical experience, and police conduct. *Id.* A defendant's use of drugs or alcohol at the time of a confession are also considered, and may render a confession involuntary. *See State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991). When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

In this case, it could not have been more clear that White was severely intoxicated—he was actually passed out when arrested. Apparently, the trial court felt White had sobered up enough in the moments after he was awakened to understand his legal rights. The only evidence of that in the record is the Deputy's conclusory statement that she believed White understood his rights. The Deputy herself admitted that while she remembered that White was clearly intoxicated, she did not remember any details because she had failed to note them in her report. RP 215. Therefore, her conclusion alone is not sufficient evidence to support the trial court's conclusion.

Looking at the totality of the circumstances here, it seems clear that White was so intoxicated that he was incapable of voluntarily waiving

on proof of a substantial act toward completion of the crime, admitting the tainted evidence could well have tipped the balance for the jury.

Therefore, it cannot be said that the admission of the confession was harmless beyond a reasonable doubt and the conviction should be reversed.

ISSUE 2: THE TRIAL COURT ERRED BY CONVICTING WHITE OF ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE WHEN MERELY PROPOSITIONING A CHILD IS NOT AN OVERT ACT THAT QUALIFIED AS ATTEMPTED CHILD RAPE.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In order to find White guilty of attempted rape of a child in the second degree, the jury had to find that White, with intent to commit attempted rape of a child in the second degree, did an act that was a substantial step toward the commission of that crime. CP 21. The crime of rape of a child in the second degree is committed when a person has sexual intercourse with another person who is at least twelve years old but

less than fourteen years old. CP 24, RCW 9A.44.076. Sexual intercourse is defined as: “any act of sexual contact between persons involving the sex organs of one person and the mouth . . . of another.” CP 25, RCW 9A.44.010. A substantial step is defined as “conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 22. Mere preparation to commit a crime is not a substantial step. *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978). A person’s “conduct is not a substantial step ‘unless it is strongly corroborative of the actor’s criminal purpose.’” *Id.* At 451, *see State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

In this case, White’s only alleged overt sexual act was propositioning A.C. while possibly placing his hand on A.C.’s backside over his clothes.² RP 142, 147. After A.C. said no, White returned his penis to his pants and made no further mention of sexual acts. He may have committed another crime when he punched A.C.,³ but since that assaultive act was not associated with any sexual acts with A.C., there is no evidence that his intent was sexual, nor could this be considered an overt act in support of his attempt conviction. So, the question is whether

² A.C.’s testimony is not clear about when this occurred. RP 147.

³ White was not charged with assault.

propositioning a juvenile, without more, is sufficient overt act to show intent to commit the crime of child rape in the second degree.

In *State v. Sivins*, 138 Wn. App. 52, 64, 155 P.3d 982 (2007), the court found sufficient evidence to support Sivins attempted second degree rape of a child conviction because, viewing the evidence most favorably to the State, the record established that defendant engaged in sexually graphic Internet communications with a police intern he believed to be a 13-year-old girl, he told her that he would have sex with her, he enticed her with promises of vodka and pizza, and defendant drove five hours and then secured a motel room for two. The court held that Sivins' internet propositioning was evidence of intent, but that it was the acts of driving to her town and renting a hotel room that were substantial steps that strongly corroborated his intention to have sexual intercourse with the victim, such that it could support his conviction for attempted rape of a child in the second degree. *Sivins*, 138 Wn. App. at 64.

By contrast, in this case there is only the proposition—evidence of intent, but not an overt act supporting the conviction. The question here is not whether the evidence showed that a crime was committed, but whether White's actions could support a conviction of attempted rape of a child in the second degree.

Mere preparation to commit a crime is not a substantial step. *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978). White may have been prepared to commit the crime, but when A.C. declined, he did not proceed with a substantial step toward its commission. The court should hold that merely propositioning a child, without more, is not a substantial act sufficient to support a conviction for attempted rape of a child in the second degree. To say otherwise would be to say that if a man approached a woman at a bus stop and said to her that he would like to have sex with her, but took no further action when she declined but to continue to stand next to her, would be sufficient to convict him of attempted rape. A mere proposition is not sufficient evidence to support a conviction for attempted rape of a child in the second degree. Therefore, the trial court erred by denying White's motion to dismiss and by convicting him of attempted rape of a child in the second degree. White's conviction should be reversed.

V. CONCLUSION

White's conviction for attempted rape of a child in the second degree should be reversed because the trial court erroneously failed to suppress his statement to police. Further, his conviction is not supported by substantial evidence because merely propositioning a juvenile, without

more, is not sufficient evidence of a substantial step toward committing the crime. The conviction should therefore be reversed.

DATED: July 23, 2008

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CERTIFICATE OF SERVICE

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