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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY *cm*  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

RASHEED WHITE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 07-1-02558-0

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**Brief of Respondent**

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GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit defendant's statements after determining that they were made voluntarily?

2. Did the trial court properly rule that the State presented sufficient evidence at trial to convict defendant of attempted rape of a child in the second degree where defendant made a substantial step toward engaging in a sexual act with a 13 year-old child?

B. STATEMENT OF THE CASE.

1. Procedure

On May 14, 2007, the Pierce County Prosecutor's Office filed an information in Cause No. 07-1-02558-0, charging RASHEED WHITE, hereinafter "defendant," with one count of attempted rape of a child in the second degree. CP 1. The State amended the information on September 25, 2007, alleging that defendant was on community custody during the commission of the crime. CP 74-75. The matter proceeded to trial before the Honorable Stephanie A. Arend on November 13, 2007. 6RP<sup>1</sup> 3.

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<sup>1</sup> There are seven (7) volumes of the Verbatim Report of Proceedings: 1RP, 8/16/07; 2RP, 10/3/07; 3RP, 10/15/07; 4RP, 10/30/07; 5RP, 11/8/07; 6RP, 11/13/07-11/27/07; 7RP, 1/11/08.

Prior to trial, the trial court held a CrR 3.5 hearing to determine whether defendant had voluntarily waived his *Miranda*<sup>2</sup> rights prior to making several custodial statements to Officer Elizabeth Sekora. 6RP 83-115. At the hearing, Officer Sekora testified that, although she found defendant passed out on a couch in the house where the incident occurred, once she gave defendant time to wake up, he was coherent and responsive. 6RP 89, 95, 98. Officer Sekora arrested defendant, handcuffed him, and led him out of the house. 6RP 89. She and defendant walked 150 yards to her car before she read him his rights. 6RP 90-92. Officer Sekora testified that she asked defendant if he understood his rights, which he said he did, and if he wanted to talk about the incident with her, which he also said he did. 6RP 91. Defendant then told Officer Sekora that he had not met anyone named “Austin”<sup>3</sup> or asked a boy to engage in oral sex. 6RP 93-94. Defendant also told Officer Sekora that he had stopped a girl because of her age after she had begun to perform oral sex on him. 6RP 94-95. Officer Sekora testified that she could clearly understand defendant, that he seemed to understand her, that he was responsive to her questions, and that he never asked her to clarify any of her questions. 6RP 95, 98.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

<sup>3</sup> “Austin” is hereinafter referred to as “A.C.”

Defendant also testified at the 3.5 hearing. Defendant testified that he had drunk “five bottles of Cisco” the morning of May 12, 2007. 6RP 100-01. Defendant testified that he also drank Old English and “mass cans of beer,” and smoked marijuana that day. 6RP 101. Defendant testified that he was sitting on the couch with a beer in his hand when an officer, whom he did not believe was Officer Sekora, arrested him, although he also testified that he was not “snoring asleep,” but he was “out of it.” 6RP 102, 105, 107. Defendant testified that the arresting officer handcuffed him and told him he was under arrest. 6RP 102, 107. Defendant testified that the arresting officer then had him stand up, at which point he drank the rest of his beer after hearing a small child tell him to “beast it,” and then he and the officer walked out of the house. 6RP 102-03, 108. Defendant denied making any statements to the police. 6RP 102-03, 105. Defendant also testified that the arresting officer did not ask him any questions. 6RP 106. The trial court found Officer Sekora’s version of events to be credible, and defendant’s not to be credible. 6RP 112, CP 49-51. The trial court also found that, although defendant was intoxicated, he still understood his rights, and voluntarily waived them before he made statements to the police. 6RP 113-14, CP 49-51.

Defense counsel moved to dismiss the charge following the close of the State’s case. RP 226. Defense counsel argued that the State had presented insufficient evidence at trial for a reasonable jury to convict defendant of attempted child rape in the second degree. RP 226-28. The

prosecutor responded that the evidence showed defendant had made “a number of substantial steps” toward the charged crime. RP 227. The trial court denied defense counsel’s motion, ruling that the evidence, taking in the light most favorable to the State, established that defendant had taken substantial steps towards committing rape of a child in the second degree. RP 229-30.

After hearing the evidence, the jury found defendant guilty of attempted rape of a child in the second degree. 6RP 285, CP 31. The court sentenced defendant to 102 months, to be served in the Department of Corrections. 7RP 18, CP 35-48.

## 2. Facts

On May 12, 2007, A.C., who was 13 years-old at the time, went over to his friend Ricardo Mendoza’s house at about 2 p.m. 6RP 134-35. Although Mendoza was seven years older, A.C. normally went over to his house four times a week. 6RP 133. A.C. started watching television in the living room. 6RP 135. Early in the evening, a man named Vinnie came over to Mendoza’s house, along with his son and defendant. 6RP 136, 138. Vinnie told A.C. that defendant was an old friend of his. 6RP 142. Defendant, who had been drinking that afternoon, continued to drink a 40-ounce alcoholic beverage after he arrived at Mendoza’s house. 6RP 137.

At some point during the evening, Mendoza and Vinnie's son left the house to go to the store. 6RP 138, 159, 184-86. A.C. had moved to Mendoza's mother's room, watching television while sitting on the bed. 6RP 138-41, 186. Defendant walked into the room where A.C. was, and closed the door behind him. 6RP 142. Defendant made his way over to A.C. and grabbed A.C.'s butt through his clothes. 6RP 146-47. Defendant then put his knee on the edge of the bed and pulled out his penis through his pants zipper. 6RP 142, 144, 60-61. Defendant held his penis close to A.C. and told A.C. to "suck it." 6RP 142-43. A.C. replied, "No, I don't go that way." 6RP 143. Defendant then asked A.C. to "give it a little nibble," and A.C. refused again. 6RP 143-44. A.C. asked defendant where Mendoza was, but defendant replied that A.C. should not worry about it and just watch his cartoon. 6RP 144. Defendant eventually returned his penis back inside his pants, although his hand remained in his pants while he continued to talk to A.C. 6RP 144.

Defendant kept his hand in his pants for three minutes while A.C. continued to watch television. 6RP 145. A.C. then tried to leave the room, but defendant punched him in the face. 6RP 145. "What was that for?" A.C. asked defendant. *Id.* Defendant told A.C. to go back on the bed and keep watching television. *Id.* A.C. refused, and tried to leave the room a second time. RP 146. Again, defendant punched A.C. in the face, not allowing A.C. to leave the room. *Id.* This time A.C. acquiesced and

went back to the bed. *Id.* At some point, defendant walked out of the room. 6RP 147. A.C. saw this as his opportunity to escape. *Id.* A.C. opened the window, jumped out of the bedroom, and rushed home, leaving behind his shoes and his bicycle. 6RP 147-48, 187. Mendoza returned to his house a few minutes later, realized A.C. was gone, and asked defendant what happened. 6RP 186-88. Defendant told Mendoza that A.C. had tried to attack him. 6RP 188. Mendoza did not think defendant was being honest because A.C. was not very strong. 6RP 188. Mendoza also thought something was not right because he found A.C.'s shoes in his living room. 6RP 150, 188.

When A.C. got back to his house he told his mother what had happened at Mendoza's house. 6RP 149. A.C. then called the police. *Id.* Officer Elizabeth Sekora came to A.C.'s house and talked to A.C. for 20 minutes. 6RP 209-12. A.C. told Officer Sekora that defendant was at Mendoza's residence. 6RP 209-11. A.C. also complained to Officer Sekora that his face was sore. 6RP 212. Officer Sekora noticed that A.C.'s face was red on his right cheek. *Id.* Officer Sekora, along with another officer, went with Mendoza over to Mendoza's house. 6RP 213. When they entered the house they saw a man passed out on the living room couch. *Id.* Officer Sekora presumed that the man was defendant because the man's attire matched the description A.C. had given her, including his black, waist-long jacket and black coat; Mendoza also identified the man as defendant. 6RP 213, 215. Officer Sekora called out

to defendant, prodded him, and kicked him in an attempt to wake him up, to no avail. 6RP 213-14. Mendoza told her defendant's name, which Officer Sekora then shouted at defendant, finally rousing him. 6RP 214.

Officer Sekora allowed defendant time to wake up, as it appeared to her that he had passed out from intoxication. 6RP 214. Officer Sekora arrested defendant, handcuffed him, and walked him out of the house and to her car. 6RP 214-16. Officer Sekora put defendant in the backseat of the car and advised him of his rights. 6RP 216-17. When Officer Sekora asked defendant if he understood those rights, defendant replied that he did. 6RP 217. Officer Sekora then asked defendant if he wished to talk to her about what had happened, and he said that he did. *Id.* Defendant denied that he had asked A.C. to perform oral sex on him, or that he even knew A.C. 6RP 217-18. Defendant said that an underage girl had started to engage in oral sex with him, but he had stopped her because of her age. 6RP 218, 220, 224-26. Defendant was coherent and responsive during this exchange; Officer Sekora could clearly understand everything he was saying. *Id.*

A.C.'s mother, Shonette Scott, and Mendoza also testified for the State. 6RP 163, 175. Following the close of the State's case, defense counsel rested without presenting any witnesses. 6RP 231.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S CUSTODIAL STATEMENTS AFTER DETERMINING THAT THEY WERE MADE VOLUNTARILY.

The State has the burden of showing that a waiver of *Miranda* rights was made knowingly, voluntarily, and intelligently. *State v. Ellison*, 36 Wn. App. 564, 571, 676 P.2d 531 (1984). The voluntariness of such a waiver need not be shown beyond a reasonable doubt, but only by a preponderance of the evidence. *Ellison*, 36 Wn. App. at 571 (citing *State v. Davis*, 34 Wn. App. 546, 550, 662 P.2d 78 (1983); *State v. Gross*, 23 Wn. App. 319, 323, 597 P.2d 894 (1979)). Proof by a preponderance of the evidence involves proof that a proposition is “more probably true than not.” See e.g. *State v. Wilcox*, 92 Wn.2d 610, 613-14, 600 P.2d 561 (1979). The court must look at the totality of the circumstance to determine if the waiver was voluntary, and made with “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *State v. Bradford*, 95 Wn. App. 935, 944, 978 P.2d 534 (1999) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986)).

The influence of alcohol is only relevant when it affects the defendant's ability to understand his rights, or to voluntarily waive those rights. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). The fact that the defendant is under the influence of alcohol is relevant, but not determinative. *Id.* Intoxication alone does not, as a matter of law, render a defendant's custodial statements involuntary, and thus inadmissible. *State v. Turner*, 31 Wn. App 843, 845-46, 644 P.2d 1224 (1982).

In intoxication cases, courts consider the normal and potential side effects of the alcohol and whether those drugs affect decisional capacity or purposeful behavior. *See, e.g. Aten*, 130 Wn.2d at 664. Courts ask whether the defendant seemed intoxicated or confused, and if he seemed to understand who he was talking to and the consequences of his statements. *Aten*, 130 Wn.2d at 650, 664. Whether the defendant followed the conversation and was able to put words and sentences together is a good indicator of his understanding. *Id.* Also important is whether the police tried to exploit the defendant's potentially vulnerable circumstance in order to elicit a confession. *Id.* at 665. But the admissibility of statements made under the influence of intoxicants must be determined on the facts of each case. *State v. Gregory*, 79 Wn.2d 637, 642, 488 P.2d 757 (1971) *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

A defendant also waives his Miranda rights when he selectively responds to police questioning or volunteers information. *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). An appearance of understanding suggests a valid waiver. *State v. Davis*, 34 Wn. App 546, 549, 662 P.2d 78, *review denied*, 100 Wn.2d 1005 (1983).

- a. The challenged findings of fact are supported by substantial evidence and should be treated as verities on appeal.

In the present case, defendant challenges two of the trial court's findings of fact:

5. ...[A]ny statements [defendant] made to law enforcement were made voluntarily and without coercion...
7. That defendant was not so intoxicated that he was unable to understand the Miranda Rights that were read to him.

Br. of Appellant at 1 (Assignments of Error #2, #3), CP 49-51 (FOF #5, #7).

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial

evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644.

Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The court entered findings of facts and conclusions of law pertaining to its ruling on defendant's statements to Officer Sekora. CP 49-51. In applying the above law to the case now on appeal, this Court should treat all of the findings of fact as verities. Defendant has assigned error to two findings of fact. Br. of Appellant at 1 (Assignments of Error #2, #3), CP 49-51 (FOF #5, #7). Defendant, however, does not challenge the trial court's other findings that support the findings challenged on appeal. In particular, defendant does not and cannot challenge the trial court's finding<sup>4</sup> that Officer Sekora's testimony was credible and defendant's testimony not credible. CP 49-51 (COL #1, #2). Nor does defendant challenge the trial court's finding that defendant did not slur his speech, appeared to understand Officer Sekora's questions, and was

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<sup>4</sup> The trial court labeled these findings as "conclusions as to admissibility." These are akin to "conclusions of law" and are cited to as such in this brief. Findings of fact labeled as conclusions of law are still treated as findings of fact on appeal. *See State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205, *cert. denied*, *Luther v. Washington*, 127 S. Ct. 440, 166 L.Ed.2d 312 (2006) ("[A] finding of fact denominated as a conclusion of law will be treated as a finding of fact") (*citing Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995)).

responsive in his answers. *Id.* Yet, defendant argues that “[t]he only evidence” supporting the trial court’s conclusion that defendant understood and voluntarily waived his rights was Officer Sekora’s “conclusory statement that she believed [defendant] understood his rights.” Br. of Appellant at 6. This argument is unsupported by the record and completely ignores the trial court’s other findings. In *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact, but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The Court held that under these circumstances, the assignments of error to the findings were without legal consequences and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

*Henderson*, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998). Similarly, because defendant has failed to support his assignment of error to the trial court’s findings of fact with sufficient argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. The findings should be considered as verities on appeal.

Moreover, the trial court's findings are supported by substantial evidence. Officer Sekora testified that, although defendant was passed out and smelled of alcohol when she made contact with him, once defendant was awake he was coherent and seemed to understand their conversation. CP 49-51 (FOF #1, #3, #6), 6RP 89-98. According to Officer Sekora, defendant had no trouble walking out of the house. 6RP 89-90. She did not read defendant his rights, nor did defendant make any statements about the incident, until after they made the 150-yard walk to her police car. CP 49-51 (FOF #4), 6RP 89-90. Officer Sekora testified that defendant replied he understood his rights. CP 49-51 (FOF #7), 6RP 91. Officer Sekora then asked defendant, "Having these rights in mind, do you wish to talk with me now?" *Id.* Defendant said that he did; only then did he give any statements to Officer Sekora about the incident. CP 49-51 (FOF #5, #6, #7); 6RP 91, 93-95.

Through Officer Sekora's testimony, it is evident that defendant gave no indication that he did not understand his rights, or that he did not understand that he was waiving them. CP 49-51 (FOF #5, #7); 6RP 91, 93-95. He was able to walk to Officer Sekora's car some 150 yards away. CP 49-51 (FOF #2), 6RP 89-90. Defendant had no trouble understanding Officer Sekora's questions, responded in kind, and had no trouble speaking to her while he gave his statements. CP 49-51 (FOF #6, #7) 6RP 95, 98. Defendant was also able to deny that he had attempted to have A.C. perform oral sex on him, and instead stated that not only was it

someone else, but that he had stopped this other person from performing the sexual act. 6RP 93-95. Other than the smell of alcohol and defendant's difficulty waking up, Officer Sekora noticed no additional signs defendant was impaired due to intoxication. 6RP 97-98. In fact, the only evidence that defendant did not voluntarily waive his *Miranda* rights is that he was passed out and smelled of alcohol; defendant does not point to any additional factors that would have led either Officer Sekora or the trial court to conclude he was unable to understand and voluntarily waive his rights. CP 49-51 (FOF #1, #3). All of these facts support the trial court's findings that defendant understood his *Miranda* rights, despite his intoxication, and that he made his statements to Officer Sekora voluntarily. CP 49-51 (FOF #5, #7). Thus, the trial court's findings were supported by substantial evidence. All the findings, both challenged and unchallenged, should therefore be treated as verities on appeal.

The present case is similar to *Aten*. *Aten*'s confession took place when she was in a behavioral medicine unit at the hospital, taking both anti-depressants and anti-anxiety medication. *Aten*, 130 Wn.2d at 648-49. *Aten* "had no trouble putting words together, her sentences were complete, and she showed no impairment caused by medicine." *Id.* at 650. The officers also testified that *Aten* "appeared calm and alert, and she did not appear to be under the influence of drugs or intoxicants." *Id.* The Washington Supreme Court held that *Aten*'s confession was properly admitted. *Id.* at 665. The Court held that there "was no evidence that

medication affected [Aten's] decisional capacity.” *Id.* at 664. The Court also held that the officers who took Aten's statements did not exploit her condition in order to obtain those statements. *Id.* at 665.

Likewise, defendant was coherent when talking to Officer Sekora. He was able to understand Officer Sekora's questions, respond to them, and make statements that Officer Sekora understood. Defendant did not exhibit any signs of impairment due to intoxication when he gave his statements. Officer Sekora also did not exploit defendant in his state, instead giving him ample time to wake up and make the long walk to her car before reading him his rights. Therefore, looking at the totality of the circumstances, the court properly ruled that defendant's statements to Officer Sekora were admissible because he understood his *Miranda* rights and voluntarily waived them.

2. THE TRIAL COURT PROPERLY RULED THAT THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL TO CONVICT DEFENDANT OF ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE BECAUSE THE EVIDENCE SHOWED THAT DEFENDANT MADE A SUBSTANTIAL STEP TOWARD ENGAGING IN A SEXUAL ACT WITH A 13 YEAR-OLD CHILD.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001, *review denied*, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.3d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate

their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973); *Nissen v. Obde*, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

In the present case, the trial court instructed the jury that “[a] person commits the crime of attempted rape of a child in the second degree when, with intent to commit the crime, he or she does any act which is a substantial step toward the commission of that crime.” CP 14-30 (Jury Instruction #5). The trial court instructed the jury that a substantial step “is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 49-51 (Jury Instruction #6). The trial court defined rape of a child in the second degree to the jury as having “sexual intercourse with another person who is at least twelve years old but less than fourteen years old and who is not married to the perpetrator and is at least thirty-six months older than the victim.” CP 14-30 (Jury Instruction # 9). The trial court instructed the jury that sexual intercourse “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.” CP 14-30 (Jury Instruction

#10). Defendant did not object to the jury instructions at trial, nor does he challenge any of the jury instructions on appeal, thereby conceding that they were proper and the law of this case. RAP 2.5(a), 10.3(g); *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120 (1986); *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1998).

The trial court properly denied the motion to dismiss as the State presented sufficient evidence for a reasonable jury to convict defendant of attempted rape of a child in the second degree. 6RP 229-30. Defendant challenges this ruling only on the grounds that defendant's conduct was not an "overt act that qualifie[s] as attempted child rape." Br. of Appellant at 8. The State, however, was required to show that defendant took a "substantial step" towards attempting to engage in sexual intercourse with a 13 year-old boy, a crime in and of itself. Defendant, in fact, took several substantial steps towards engaging in this particular criminal conduct. A.C. testified that defendant propositioned him, a fact defendant concedes in his issue statement and throughout his argument. 6RP 142-47; Br. of Appellant at 2 (Issue Statement #2), 8-10. Defendant's proposition occurred in a closed bedroom while A.C. was on the bed. 6RP 142. A.C. testified that defendant approached him with his penis exposed, placed his hand on the boy's backside, and asked A.C. in graphic language to perform oral sex on him, including asking A.C. to "suck it" and "give it a little nibble." 6RP 142-47. After A.C. refused, defendant kept his hand in his pants for three minutes while A.C. went back to watching television.

6RP 145. Going into the room and shutting the door to isolate the victim, propositioning A.C., grabbing the boy's butt, asking the boy directly and graphically to perform oral sex, all qualify as "substantial steps" because they all strongly indicate that defendant had developed the intent to have sexual intercourse with A.C., and that he had moved well beyond mere preparation, and was in the process of attempting to "accomplish the criminal result". *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d (1996).

*Chhom* is instructive. Chhom was charged with first degree attempted rape of a child after he grabbed a nine-year-old boy, dropped his pants, and attempted to force his penis into the boy's mouth. *Chhom*, 128 Wn.2d at 740. The trial court dismissed the first degree attempted rape of a child charge, ruling that the crime of attempted rape of a child does not exist because rape of a child does not have an intent element, and one cannot attempt to commit a nonintent crime. *Id.* at 741. The Washington Supreme Court reversed the trial court, holding that there was an intent element to the rape of a child statute, and therefore one could attempt to commit rape of a child. *Id.* at 744. The Court held, "When coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." *Id.* at 743 (citing *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991)).

In contrast to *Chhom*, defendant argues incorrectly that defendant must have made an overt act<sup>5</sup> in order to have committed attempted rape of a child in the second degree. Br. of Appellant at 9-10. Even though defendant's conduct would qualify as an overt act, the correct standard is "substantial step," not "overt act." CP 14-30 (Jury Instruction #5); *Chhom*, 128 Wn.2d at 742. Defendant also erroneously analogizes the present case to a man asking a woman at a bus stop to have sex with him, arguing that, under the trial court's reasoning, this man would be guilty of attempted rape. Br. of Appellant at 11. This analogy is false and easily distinguishable from the present case. While two consenting adults having sexual intercourse is not a crime, an adult male would be committing a crime if he had sexual intercourse with a 13 year-old boy. Under defendant's hypothetical, the man at the bus stop is not making any substantial steps in order to accomplish a criminal result because there is no criminal result to accomplish; the same cannot be said for defendant. Therefore, because defendant took a substantial step toward having sexual intercourse with a 13 year-old boy, the trial court properly ruled that the

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<sup>5</sup> Black's Law Dictionary defines "overt act" as follows: "An outward act, however innocent in itself, done in furtherance of a conspiracy, treason, or criminal attempt." Black's Law Dictionary (8<sup>th</sup> ed. 2004).

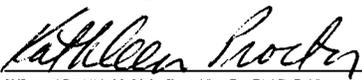
State presented sufficient evidence at trial to convict defendant of attempted rape of a child in the second degree, and a reasonable jury could have convicted defendant of that crime based on the evidence presented at trial.

D. CONCLUSION.

For the foregoing reasons, defendant's conviction and sentence should be affirmed.

DATED: October 14, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

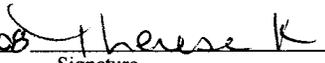
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

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Steven P. Johnson, Jr.  
Rule 9 Legal Intern

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-14-08   
Date Signature