

NO. 38229-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL GAFFNEY,

Respondent.

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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00384-0

BRIEF OF APPELLANT

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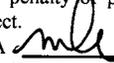
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 27, 2008, Port Orchard, WA 
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Defendant's Knapstad motion to dismiss.
2. The trial court erred in concluding that the statements made by M.P.A. to her mother were not corroborated sufficiently to be admissible under the child hearsay statute.
3. The trial court erred in failing to consider or address the Defendant's confession with respect to how those confessions corroborated M.P.A.'s statement that the Defendant had touched her.
4. The trial court erred in holding that the statements made by M.P.A. to her mother were not admissible as evidence.
5. The trial court erred in following *State v. Dow* and concluding that RCW 10.58.035 only applied to the admissibility of a Defendant's statements and did not modify the corpus delicti rule with respect to how that rule applied to a sufficiency of the evidence or a *Knapstad* analysis.
6. The trial court erred in concluding that under RCW 10.58.035 in order for the statements of the Defendant to be admitted at trial there must be independent, corroborating, and sufficient evidence.

7. The trial court erred in holding that the State was required to demonstrate independent evidence other than the Defendant's confessions in order to overcome a Knapstad motion to dismiss.
8. The trial court erred in concluding there was not sufficient corroborating evidence of the Defendant's statements to show criminal conduct, sexual contact, or an attempt to have sexual contact.
9. The trial court erred in concluding that the State lacked independent evidence to establish the corpus delicti of child molestation in the first degree and attempted child molestation in the first degree.
10. The trial court erred in concluding that absent the Defendant's statements there was insufficient evidence to take this matter to trial.

II. STATEMENT OF ISSUES

1. Whether the trial court erred in holding that M.P.A.'s statement that the Defendant had touched her was not corroborated (and thus not admissible under the child hearsay statute) when the Defendant had admitted to several individuals that he had touched M.P.A.?

2. Whether the trial court erred when it granted the Defendant's *Knapstad* motion when: (1) The trial court erred by finding that the Defendant's confessions were not sufficient to support a conviction without independent proof of the corpus delicti of the crime; and (2) Even under *State v. Dow's* restrictive reading of RCW 10.58.035, the trial court erred in granting the *Knapstad* motion to dismiss the charge of attempted child molestation because the State presented a prima facie case that the Defendant took a substantial step toward the commission of the crime?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Gaffney was charged by amended information filed in Kitsap County Superior Court with first-degree child molestation and attempted first-degree child molestation. CP 128. Prior to trial, the trial court granted the Defendant's motion pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) and dismissed both counts. CP 137, 138-41. This appeal followed.

B. FACTS

On March 26, 2008, Vivian Alpaugh took her children to the Bainbridge Island Aquatic Center for swimming lessons. CP 91-92. Ms. Alpaugh's youngest daughter is four-year-old M.P.A. (who was born on February 22, 2004). CP 80, 91-92. At some point Ms Alpaugh walked with

M.P.A. to the front desk in the lobby of the aquatic center in order to re-register her daughter for swim lessons. CP 92, 106. M.P.A. indicated that she needed to use the restroom, so M.P.A. went into a "dry restroom"¹ located just off the aquatic center lobby. CP 92-93. Ms. Alpaugh then noticed that M.P.A. was "taking a while," and she was surprised that it was taking so long because M.P.A. was usually "in and out." CP 93-95. Ms. Alpaugh also stated that M.P.A. was pretty "self sufficient" with respect to going to the bathroom and that it had been approximately a year since she had had to assist or "wipe" her. CP 109-10.

Ms. Alpaugh then went into the women's restroom and discovered that a man was alone in the women's restroom with M.P.A. CP 93, 95, 97. This man, later identified as the Defendant, was standing over M.P.A. next to the sink and paper towel dispenser. CP 93, 95. M.P.A. was wearing a pink, one-piece, bathing suit and the straps of the suit were down. CP 96. Ms. Alpaugh yelled at the man, "Do you know this is a women's bathroom?" CP 96. The Defendant said, "I know," but didn't move. CP 96. Ms. Alpaugh then said, "get out of here," at which point the Defendant left the restroom and Ms. Alpaugh went to check on her daughter and to ask her if she was okay. CP 96-97. Ms. Alpaugh asked M.P.A. if the Defendant had touched

¹ The term "dry restroom" was explained as a normal restroom as opposed to a locker room that the children use when they are swimming. CP 92-93.

her, and M.P.A. responded by tapping her thigh with her pointer finger and saying, "Here. He touched me here." RP (6/23/08) 11, 19.²

Ms. Alpaugh reported the incident to the aquatic center staff. CP 100-01. Ms. Alpaugh stated that she did not report the incident to the police because she did not have reason to believe that her daughter had been molested and didn't realize that the Defendant had been in the restroom with her daughter the whole time. CP 102.

Several days later, on March 31, an individual named Leslie Allen Nash contacted the Bainbridge Island Police regarding a conversation he had with the Defendant. CP 80-82, 112-118, 121. Mr. Nash spoke with the police on the phone and also gave them a taped statement. CP 112. Mr. Nash has known the Defendant for approximately sixteen years. CP 113.

Mr. Nash stated that the Defendant had called him and had told him that he had molested a 3 or 4-year-old child at the Bainbridge Island pool on March 26. CP 81, 116. The Defendant had initially said he had "been in an accident," so Mr. Nash had asked him if he was ok and if he had been hurt. CP 114. The Defendant then said it had not been that kind of an accident,

² M.P.A. was also interviewed by a child interviewer, but the State conceded that the statements made in that interview were inadmissible at trial under *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) since the child would not be

and Mr. Nash could tell by the tone of his voice that “something was really up.” CP 114.

Mr. Nash said that the Defendant then told him that he had been at the Bainbridge pool and that he saw a little girl go into the women’s restroom and that she was not accompanied by an adult. CP 114. The Defendant told Mr. Nash that he followed this 3 or 4-year-old child into the restroom and had helped the child remove her swimsuit and use the restroom and that he had “touched the child on her bottom.” CP 81. Mr. Nash specifically described that the Defendant stated that he “kissed” the child on “her bottom.” CP 114.

The Defendant also said that he had helped the child get dressed and that the child’s mother had then come into the restroom and confronted him. CP 81, 114. The Defendant also told Mr. Nash that he was afraid that he was going to be arrested. CP 81.

Mr. Nash also explained to the police that he himself had previously been convicted of third degree rape after he had a sexual relationship with a fifteen year old. CP 115. Mr. Nash said that while he was in prison he had participated in sexual deviancy treatment program and that during that time he had learned a lot of things about himself and other people. CP 115. He described that based on his experiences there were a lot of red flags with the

testifying at trial as she was found to be incompetent. See RP (6/23/08) 23.

Defendant such as the fact that he would make inappropriate comments about underage children and that he would go into restrooms to look at kids. CP 115-16. Mr. Nash was also aware that the Defendant kept a folder with various magazine ads and pictures of children in various types of clothes including swimsuits and diapers. CP 117. Mr. Nash also told the police that he believes that the Defendant goes to the pool, in part, to look at children. CP 115.

Based on Mr. Nash's report, the Bainbridge Island Police contacted the staff of the Bainbridge Island Aquatic Center who explained that a mother had reported a male being in the women's restroom with her daughter. CP 81. The police were also able to review a videotape of the incident. CP 81. The tape showed the reception area and the area towards the restrooms. CP 81. The tape further showed Ms. Alpaugh and M.P.A. walking towards the reception desk and then showed M.P.A. walking to the restroom off of the lobby area. CP 81. As M.P.A. approached the restroom, a male entered the lobby and walked directly behind M.P.A. and appeared to enter the restroom with M.P.A. CP 81-82. Ms. Alpaugh is shown standing at the reception desk for approximately three and a half minutes and she is then seen walking to the restroom. CP 81-82. Shortly thereafter the male quickly exits the restroom area leaves the pool through the front entrance. CP 82.

The Bainbridge Police then contacted Ms. Alpaugh about the incident and took a statement from her. CP 82, 106-110. Ms. Alpaugh was also shown a photomontage and she picked the Defendant out of the montage and identified him as the male that had been in the restroom. CP 87.

Bainbridge police arrested the Defendant on April 1, 2008. CP 89. The Defendant was interviewed at the Bainbridge Island Police Department, and the allegations were explained to him. CP 84. The Defendant stated he had gone to the pool to sit in a hot tub and that at one point he had to use the bathroom so he had gone to the men's bathroom near the main entrance. CP 84. He then explained that when he came out of the men's bathroom a woman confronted him and asked him what he was doing. CP 84. The police explained that that they had spoken to several people and that the investigation indicated that he had gone into the women's bathroom with a young girl. CP 84. The Defendant then modified his story and said he saw the little girl go into the women's bathroom and that he had opened the door and saw that she was standing with the top of her bathing suit slightly down. CP 84. He then walked in and grabbed her suit and pulled it all the way down, off the child. CP 84. The Defendant denied touching the child and denied that he assisted her or offered to assist her going to the bathroom. CP 84.

The Defendant also told the police that he suffers from “coprophillia” and explained that “coprophillia is a fascination with poop.” CP 84. The Defendant explained that he has a strong need to touch, feel or play with poop and that it is difficult for him to control this need. CP 84. He also explained that he is fascinated with human bodies, male or female, from infants to elderly. CP 84.

Approximately one month later, in May of 2008, an inmate at the Kitsap County jail named William Blaine Whitehead had contacted his attorney about his desire to tell the police about information he had learned from another inmate. CP 78. Mr. Whitehead was then contacted in an interview room at the jail at the jail and his attorney was present with him. CP 78. Mr. Whitehead explained that he had been in the solitary area of the jail with the Defendant and that the Defendant had talked about what he had done. CP 78. The Defendant told Mr. Whitehead that he had followed a little girl into a bathroom at a swimming pool and helped the girl take off her swimsuit. CP 78. He also said that the little girl got on a toilet and “was moving back and forth and was shaking because she was scared,” and that he held her on the toilet to keep her from falling off of it. CP 78. The Defendant then took a piece of toilet paper which he held “with his index finger and thumb” and wiped the girl. CP 78. Mr. Whitehead stated that the Defendant said he had his middle finger exposed and used it to wipe the girl’s

bottom. CP 78. The Defendant also explained that girl's mother came in and caught him in the bathroom and told him to get out. CP 78.

The Defendant was initially charged with child molestation in the first degree and the information was subsequently amended to include one count of child molestation in the first degree and the alternative charge of one count of attempted child molestation in the first degree. CP 1, 128.

In a pretrial hearing the Defendant sought to exclude M.P.A.'s statement to her mother that the Defendant had touched her thigh. CP 27. The parties stipulated, and the trial court agreed, that four year old M.P.A. was incompetent to testify at trial based on the child's performance in a forensic child interview. CP 34, RP (6/23/08) 2-3. The sole issue, therefore, was the admissibility of M.P.A.'s statement to her mother. The State argued that RCW 9A.44.120 required the court to find two things: (1) that the time content, and circumstances of the statement provided sufficient indicia of reliability; and, (2) that because the child was unavailable as a witness, the trial court must also find corroborative evidence of the act in order to admit the statement. CP 12. The State further pointed out that a confession is direct corroborating evidence and that the State may offer corroboration without having to adhere to the rules of evidence. CP 19.³ As corroboration

³ In support of these arguments the State cited *State v. Frey*, 43 Wn.App. 605, 718 P.2d 846 (1986), and *State C.J.*, 148 Wn.2d 672, 687, 63 P.3d 765 (2003). CP 19.

of M.P.A.'s statement, the State included the observations of Ms. Alpaugh, the actions shown on the videotape of the incident, and the Defendant's statements to the police, Mr. Nash, and Mr. Whitehead. CP 10-11.

At the conclusion of the child hearsay hearing the trial court ruled that M.P.A.'s statement was reliable and that the statement was non-testimonial for purposes of *Crawford*. RP (6/23/08) 39, 41-42. The trial court, however, found that the statement was not corroborated. The trial court noted that M.P.A. only stated that the Defendant touched her thigh and did not make any statement of an act of sexual abuse. RP (6/23/08) 40. The court then cited *State v. C.J.*, 148 Wn.2d 672, 603 P.3d 765 (2003), where there had been a physical exam that showed some evidence of sexual abuse. RP (6/23/08) 41. The trial court then concluded that, "In this case, I don't think we even have any statements that sexual abuse occurred. It could certainly be speculated, but there has to be some corroboration, weak or not." RP (6/23/08) 41. The trial court never addressed the Defendant's admissions.

The trial court later entered written findings of fact and conclusion of law regarding the child hearsay statement of M.P.A. Specifically, the trial court found that the statement M.P.A. made to her mother was "reliable within the meaning of the child hearsay statute," but found that the statement was not sufficiently corroborated to be admissible. CP 135-36.

After the trial court's ruling on the child hearsay issue, the Defendant filed a *Knapstad*⁴ motion to dismiss. CP 72. The State filed a response and a certificate of counsel outlining the State's evidence. CP 72, 77. A hearing was held on the motion, and the Defendant argued that in spite of the recent legislative enactment (RCW 10.58.035), the court had held in *State v. Dow*, 142 Wn. App. 971, 176 P.3d 597 (2008), *review granted*, ___ Wn.2d ___ (Sept 3, 2008) that the State was still required to show evidence independent of the Defendant's confessions in order to satisfy the corpus delicti rule. RP (7/07/08) 9-10. The Defendant then argued that the independent evidence was insufficient to establish the corpus delicti of child molestation in the first degree or attempted child molestation in the first degree. RP (7/07/08) 10-11. The State argued that there was sufficient independent evidence. RP (7/07/08) 13. After a brief recess, the trial court gave its oral ruling:

Okay. I have reread the *Dow* case, 142 Wn. App. 971, and that case holds that RCW 10.58.035 is constitutional, and the Court remanded that case, the *Dow* case, to the Superior Court to hold a *Knapstad* hearing. And it's clear from reading the opinion that whether you call it independent evidence, which was the old corpus rule, or substantial evidence, which is the statutory standard, under either standard there has to be some direct evidence that sexual contact actually occurred without the confession.

The Court of Appeals also used the words "sufficient evidence," the state must introduce sufficient evidence that

⁴ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

the criminal conduct occurred, so, you know, weighing what is substantial, what is independent, what is sufficient, there still has to be evidence and at least a prima facie basis that the criminal conduct or sexual conduct occurred to base the supposition that criminal conduct did occur.

In this case the court will find that there is not sufficient evidence or substantial evidence that criminal conduct occurred, looking at the evidence in the light most favorable to the nonmoving party, the state. It's speculation that criminal conduct occurred, there was sexual contact inside that bathroom. The evidence most favorable to the state is that Mr. Gaffney followed this little girl into the bathroom, he was directly behind her, he was in there for approximately three minutes. When the mother came in, he was standing next to and over the little girl, and when the mother yelled at him to get out, he ran out, evidence of guilt or something was wrong, but there is not sufficient evidence to show there had been sexual contact. The most the state has is that there was contact, that was Mr. Gaffney touching the little girl's thigh above her knee, and that is not sufficient to support a finding that the corpus delicti requirement has been met by the state.

The statements made by Mr. Gaffney were one to the police officers, one to his friend, Mr. Nash, and one to Blaine Whitehead in the jail, and for purposes of appeal, if the state is going to appeal my findings, the court would find there is evidence corroborating the facts set out in the statement, so it's reliable in that sense, that all of the statements made were consistent with each other, substantially consistent, those statements made by Mr. Gaffney.

The character of the witness reporting the statement. One, by Mr. Blaine Whitehead, while he had a criminal background, he stated he has his standards and limits and he was more of a thief than other things and was appalled at Mr. Gaffney's statements, and so I think there was sufficient evidence in the record here to find that his character was good as to the statements he reported, and he had no motive to lie, and he was the one that summonsed the deputies and the prosecutor and defense attorney to talk to him.

I guess I won't comment on the character of Mr. Gaffney. He was given Miranda rights and he made a statement.

Then as to Mr. Nash, Mr. Nash's statements were reported

to the police in very close proximity to the time that this alleged assault occurred, and the court would find that he identified who he was, and the source of the statements, and would find there is no character deficiencies there I suppose, and I find the reliability factor is met there.

The next factor is whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement, and these were all very close in time, so they show an indicia of reliability.

Relationship between the witness and the defendant. The witness, Mr. Nash, has a personal relationship with Mr. Gaffney as a friend. He had no relationship with Mr. Whitehead or the police officers, but he knew when he made the statements to the police officers that they were police officers. And whether he's sufficiently trustworthy to be admitted, the court would find under the statute 10.58.035, that if the state had proven sufficient evidence of corpus delicti that the criminal conduct occurred, that the court would find these statements admissible as being sufficiently trustworthy and reliable and would have admitted these statements at trial, but reading the *Dow* case, it is the court's conclusion that there has to be some evidence of corpus delicti of the criminal act. That element has not been eliminated by enactment of the statute, but does relax the standards for admitting the defendant's statements, but in this case, as in the *Dow* case, likely, there was not independent proof of a corpus delicti existing, and so the court will grant the defense motion on *Knapstad* to dismiss.

RP (7/07/08) 14-18. The State then asked if the court's ruling applied to both counts (child molestation in the first degree and attempted child molestation in the first degree) and the court replied that it applied to both counts. RP (7/07/08) 18. The court later entered written findings of fact and conclusions of law that essentially mirrored the oral ruling, and the court

also entered a written order of dismissal. CP 137, 138-41. This appeal followed.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN HOLDING THAT M.P.A.'S STATEMENT THAT THE DEFENDANT HAD TOUCHED HER WAS NOT CORROBORATED (AND THUS NOT ADMISSIBLE UNDER THE CHILD HEARSAY STATUTE) BECAUSE THE DEFENDANT HAD ADMITTED TO SEVERAL INDIVIDUALS THAT HE HAD TOUCHED M.P.A.

RCW 9A.44.120 provides that child hearsay may be admitted if the court finds that there are sufficient indicia of reliability and, if the child is unavailable as a witness, that there is corroborative evidence of the act. The trial court erred in concluding that M.P.A.'s statement that the Defendant had touched her was not corroborated

Corroborative evidence need not be conclusive-it need only support a reasonable inference that the acts alleged in the hearsay statements occurred. *State v. Bishop*, 63 Wn. App. 15, 27, 816 P.2d 738 (1991), citing *State v. Swan*, 114 Wn.2d 613, 622, 790 P.2d 610 (1990). In addition, the Washington Supreme Court had specifically held that when a trial court is asked to determine under RCW 9A.44.120 whether there is corroborative evidence of the child's statement, the trial court is not bound by formal evidentiary constraints and that the rules of evidence are inapplicable. *See*,

State v. Jones, 112 Wn.2d 488, 498-99, 772 P.2d 496 (1989); ER 104(a); ER 1101. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *See generally, State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

In the present case the trial court found that there were sufficient indicia of reliability, but held that there was no corroborative evidence of the act. The trial court, however, was presented with numerous facts that corroborated M.P.A.'s statement and supported a reasonable inference that the Defendant had touched her.

First, Ms. Alpaugh found the Defendant standing over M.P.A. in the women's bathroom. CP 93, 95. Second, the videotape demonstrated that the Defendant had followed the victim to the bathroom and suggested that the defendant had been in the bathroom with M.P.A. for several minutes. CP 81-82. In addition, and most importantly, the Defendant himself admitted to the police that he had completely removed M.P.A.'s swimsuit. CP 10. The Defendant also told Mr. Nash that he removed M.P.A.'s swimsuit and that he had touched the child on her bottom and had helped her use the bathroom. CP 11. Finally, the Defendant told Mr. Whitehead that the removed M.P.A.'s

swimsuit, had held her on the toilet so that she would not fall off, and had wiped her. CP 11.

These facts corroborated M.P.A.'s statement that the Defendant had touched her. The trial court, therefore, erred in finding that "In this case, I don't think we even have any statements that sexual abuse occurred." RP (6/23/08) 41. The trial court's finding that there was no corroboration conflicts with the trial court's later statements that it found that the Defendant's confessions were reliable. RP (7/07/08) 14-18.

The trial court appears to have either forgotten about the Defendant's confessions or else the court mistakenly believed that the confessions could not be used to corroborate M.P.A.'s statement, since the trial court failed to address the confessions at all with respect to the child hearsay ruling.

Any questions regarding the use of the confessions to corroborate M.P.A.'s statement is resolved by *State v. Jones* and by RCW 10.58.035. In *Jones*, the Washington Supreme Court specifically held that a trial court's determination regarding corroboration under the child hearsay statement is not limited by formal evidentiary restraints. *Jones*, 112 Wn.2d at 498-99. In addition, the corpus delicti rule and RCW 10.58.035 (even as the statute was interpreted in *State v. Dow*) does not prevent a trial court from considering a Defendant's confession when it is considering corroboration under the child

hearsay statute or other preliminary questions of admissibility.

For all of these reasons the trial court erred when it found that M.P.A.'s statement to her mother that the Defendant had touched her was inadmissible.

B. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S *KNAPSTAD* MOTION.

The trial court erred in granting the Defendant's *Knapstad* motion to dismiss because: (1) the Defendant's confessions were admissible under RCW 10.58.035 and the evidence, including the confessions, were sufficient because a rational fact finder could have found the essential elements of the beyond a reasonable doubt; and, (2) even under *State v. Dow's* restrictive reading of RCW 10.58.035, the trial court erred in granting the *Knapstad* motion to dismiss the charge of attempted child molestation because the State presented a prima facie case that the Defendant took a substantial step toward the commission of the crime

On review, an appellate court is to affirm the trial court's dismissal under *Knapstad* if no rational fact finder could have found the essential elements of the beyond a reasonable doubt. *State v. O'Meara*, 143 Wn. App. 638, 641, 180 P.3d 196 (2008), citing *State v. Wilhelm*, 78 Wn. App. 188, 191, 896 P.2d 105 (1995). To prevail on a motion to dismiss under *Knapstad*,

the defendant must establish that “there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” *O'Meara*, 143 Wn. App. at 642, citing *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). An appellate court reviews a trial court's legal conclusions de novo. *O'Meara*, 143 Wn. App. at 642, citing *State v. Radcliffe*, 139 Wn. App. 214, 219, 159 P.3d 486 (2007).” A trial court's decision to dismiss under *Knapstad* is reviewed de novo, and an appellate court must view the facts and all reasonable inferences in the light most favorable to the State. *O'Meara*, 143 Wn. App. at 642, citing *State v. Missieur*, 140 Wn. App. 181, 184, 165 P.3d 381 (2007).

1. The trial court erred by finding that the Defendant's confessions were not sufficient to support a conviction without independent proof of the corpus delicti of the crime.

The trial court below erred in granting the Defendant's *Knapstad* motion because it improperly concluded that the Defendant's confessions could not be considered by the court when it assessed whether the State had made a prima facie case of guilt.

RCW 10.58.035 provides that “where independent proof of the corpus delicti is absent,” the confession may still be admitted if the victim is incompetent and there is evidence that established that the Defendant's confession or statement was trustworthy.

In the present case the trial court held that the victim was incompetent to testify and the trial court held that the Defendant's statements to the police, to Mr. Nash, and to Mr. Whitehead were sufficiently trustworthy to be admitted under RCW 10.58.035. RP (7/07/08) 17. The trial court, however, held that *State v. Dow* prevented the court from considering these statements when it determined whether the State had made a prima facie showing of guilt. RP (7/07/08) 17-18.

The State respectfully asks this Court to find that the trial court's holding was erroneous because *State v. Dow*, 142 Wn. App. 971, 176 P.3d 597 (2008) was wrongly decided. In *Dow*, this court held that RCW 10.58.035 was a valid refinement of the corpus delicti rule, but that the statute addressed only admissibility and did not address sufficiency. *Dow*, 142 Wn. App. at 984.

The *Dow* decision, therefore, essentially holds that the legislature's attempt to modify the corpus delicti rule through RCW 10.58.035 was fruitless since the statute only applies when there is a lack of independent evidence, yet independent evidence is still needed for the evidence at trial to be sufficient. A statute that allows a confession without independent corroboration to be admitted without changing the rule that a confession without independent corroboration will be insufficient at trial essentially accomplishes nothing and renders the statute meaningless.

In addition, the *Dow* decision ignores the legislative intent as it is expressed in the final line of the statute, which provides that the statute does not preclude a defendant from arguing that the evidence is “otherwise insufficient to convict.” RCW 10.58.035(4). The use of the term “otherwise” demonstrates that the legislature’s intention was that a defendant could still argue that the evidence was insufficient for some reason other than a corpus delicti argument, but the use of the term “otherwise” suggests that the legislature fully intended that RCW 10.58.035 precluded a sufficiency argument based on corpus delicti.

Finally, the Washington Supreme Court has recently granted review of the *Dow* decision, thus the State’s argument in the present case that the *Dow* case was wrongly decided will be resolved by the Supreme Court’s decision in the near future.⁵

2. ***Even under State v. Dow’s restrictive reading of RCW 10.58.035, the trial court erred in granting the Knapstad motion to dismiss the charge of attempted child molestation because the State presented a prima facie case that the Defendant took a substantial step toward the commission of the crime.***

⁵ The Washington Supreme Court website indicates that the court granted the petition for review in *State v. Dow* (Court of Appeals number 34802-1-II) on September 3, 2008 (Supreme Court case number 81243-8), http://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.display&year=2008&petition=pr080903 (viewed Oct. 27, 2008).

Even if the *Dow* decision is ultimately affirmed by the Washington Supreme Court, the trial court still erred in granting the Defendant's *Knapstad* motion with respect to the count of attempted child molestation in the first degree because the State presented a prima facie showing that the Defendant took a substantial step towards the commission of this offense even if the court were not to consider the Defendant's confessions.

As outlined above, an appellate court is to affirm the trial court's dismissal under *Knapstad* if no rational fact finder could have found the essential elements of the beyond a reasonable doubt. *O'Meara*, 143 Wn. App. at 641. In addition, an appellate court must view the facts and all reasonable inferences in the light most favorable to the State. *O'Meara*, 143 Wn. App. at 642.

The Washington Supreme Court has previously addressed the issue of sufficiency of the evidence in a case involving a criminal attempt and corpus delicti. In *State v. Smith*, 115 Wn.2d 775, 778, 801 P.2d 975 (1990), a police officer contacted Smith and two other men (one named Daniels and one named Brown) who were in a car found in a park that was closed. One of the men told the officer that he had a weapon in the car, and the three men were then removed from the car and searched for weapons. *Smith*, 115 Wn.2d at 977. A knife was found strapped to Smith's leg and two loaded handguns were found in the car. *Smith*, 115 Wn.2d at 977-78. The three men were then

arrested for violating park rules. *Smith*, 115 Wn.2d at 978. Smith then gave the officers permission to search the car and signed a written consent form. *Smith*, 115 Wn.2d at 978. A search of the car's trunk revealed clothes, a shovel, a pick, a bow and arrows, rope, tarps, several additional weapons and a bag of lime. *Smith*, 115 Wn.2d at 978. Smith was questioned, and an officer stated that it appeared that the men were intending to commit a murder. *Smith*, 115 Wn.2d at 978. Smith responded by stating that the officer was "close," and that Brown had paid him to kill Daniels. *Smith*, 115 Wn.2d at 978.

Smith then described that Brown had offered him money if he would kill Daniels, and the two had planned for Brown to bring Daniels to a site on Snoqualmie Pass where the murder would occur. When Brown and Smith went to the site, however, there were campers at the predetermined area so Brown and Smith drove back to Seattle and picked up Daniels. *Smith*, 115 Wn.2d at 978. Later, Daniels "freaked out" and said he needed to use the bathroom, so the men pulled into the park. *Smith*, 115 Wn.2d at 978. Smith confessed that he and Daniels had a fight at the park and that Smith had pulled out a knife and was "going to stick him," but the police arriving at the scene interrupted Smith. *Smith*, 115 Wn.2d at 978. Smith also explained that he had 15 \$100 bills in his pocket that Brown had paid to him to kill Daniels. *Smith*, 115 Wn.2d at 978.

Smith was then charged and convicted of attempted first degree murder. *Smith*, 115 Wn.2d at 978. On appeal, the Defendant raised a corpus delicti argument and the State argued in response “that the circumstantial proof of the corpus delicti of attempted first degree murder was sufficient to admit Smith’s confession.” *Smith*, 115 Wn.2d at 978-79. The Court of Appeals found the evidence was insufficient and found nothing in the record that suggested that the money was intended as compensation for an illegal act, apart from Smith’s confession. *Smith*, 115 Wn.2d at 980. Furthermore, the Court of Appeals reasoned that the presence of all the weapons raised a concern, but apart from the confession there was no evidence that murder had been attempted. *Smith*, 115 Wn.2d at 980.

The Supreme Court rejected the Court of Appeals’ reasoning and affirmed the conviction. *Smith*, 115 Wn.2d at 979. The Court noted that to convict Smith of attempted murder, the State was required to prove that Smith: (1) actually intended to take a life; and (2) took a substantial step toward the commission of the act. *Smith*, 115 Wn.2d at 979. The Supreme Court, however, held that the corpus delicti rule did not require that the State prove, absent Smith’s confession, that murder had been attempted. *Smith*, 115 Wn.2d at 980. Rather, “the State must produce evidence of sufficient circumstances which would support a logical and reasonable deduction that a substantial step (strongly corroborative of criminal purpose) had been taken

to criminally end someone's life." *Smith*, 115 Wn.2d at 980. The Supreme Court held that the State presented sufficient evidence because the money, weapons, digging implements and police observations supported a logical and reasonable deduction that a substantial step had been taken. *Smith*, 115 Wn.2d at 980. "This logical and reasonable deduction was all that the State was required to prove in order to allow Smith's confession to be heard." *Smith*, 115 Wn.2d at 980.

With respect to the charge of attempted child molestation in the present case, the State, as in *Smith*, was required to prove that the Defendant took a substantial step toward the commission of the crime. The trial court specifically found that the evidence, viewed in light most favorable to the state, was that the Defendant:

- (1) Followed M.P.A. into the women's bathroom and "was directly behind her, he was in there for approximately three minutes." RP (7/07/08) 15, CP 139.
- (2) When the mother came in, he was "standing next to and over the little girl, and when the mother yelled at him to get out, he ran out, evidence of guilt or something was wrong." RP (7/07/08) 15, CP 139.

The trial court, however, held that this evidence was insufficient to show sexual contact or an attempt to have sexual contact. RP (7/07/08) 15, CP 139.

The trial court's conclusion, however, was erroneous.

First, the trial court either did not consider M.P.A.'s statement that the Defendant had touched her thigh or did not explain why this evidence, viewed in a light most favorable to the State, failed to support the logical and reasonable deduction that that a substantial step had been taken. As outlined above, the trial court erred in excluding this statement, and the trial court should have also considered M.P.A.'s statement when it examined the corpus delicti issue with respect to the attempted child molestation charge which did not require a showing that actual sexual contact had occurred.

Second, even without the addition of M.P.A.'s statement, the evidence still supported a logical and reasonable deduction that a substantial step had been taken. *Smith*, 115 Wn.2d at 980. The Defendant had followed a four-year-old girl into a woman's bathroom. Rather than contacting the girl's mother who was nearby, the Defendant went into the bathroom with the girl. The evidence also showed that the girl was "pretty self sufficient" with respect to using a bathroom and the girl's mother had described that she had not had to wipe her in over a year. Despite these facts, the Defendant remained alone in the women's restroom with M.P.A. for approximately three minutes. The mere fact that a grown male, unknown to the victim, would go into a women's restroom with a four year old girl for three minutes supports a logical and reasonable deduction that the man has made a substantial step toward the commission of child molestation. The fact that the

girl was “self-sufficient” and did not need assistance in using a restroom, as well as the fact that the girl’s mother was very nearby, only further supports this deduction and rebuts any innocent explanation.

Furthermore, the trial court found that when Ms. Alpaugh entered the bathroom the Defendant “was standing next to and over the little girl, and when the mother yelled at him to get out, he ran out, evidence of guilt or something was wrong.” These facts further support a logical and reasonable deduction that the Defendant made a substantial step toward the commission of the crime of child molestation.

In *Smith*, the defendant was found in a place (a park late at night) with the tools necessary for the crime of murder. These facts, coupled with the police observations supported a logical and reasonable deduction that a substantial step had been taken. *Smith*, 115 Wn.2d at 980. In the present case, the Defendant was followed M.P.A. into a restricted location (a women’s bathroom), without making any attempt to locate the child’s mother (who was nearby), and the Defendant remained alone for three minutes with the little girl in the women’s bathroom. These facts support the logical and reasonable deduction that Defendant took a substantial step to the commission of the crime of child molestation.

One further fact of note in the *Smith* decision was that the Court cited the Model Penal Code's section on "attempt" which offered some guidance in determining whether there was sufficient evidence to support a logical and reasonable deduction that a substantial step had been taken. *Smith*, 115 Wn. 2d at 979-80. The Court noted that one of the types of conduct (that were sufficient as a matter of law to demonstrate that a substantial step had been taken) mentioned in the Model Penal Code was possession of materials or tools to be employed in the commission of the crime. *Smith*, 115 Wn.2d at 980, citing Model Penal Code §5.01(2). This same Model Penal Code section lists other types of conduct that would apply to the present case. For instance, the Model Penal Code §5.01(2) also states that the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed.

Model Penal Code §5.01(2). Although the Defendant in the present case was not found with tools associated with his crime (as had been the case in *Smith*), this fact is not surprising since physical tools are not needed for child

molestation. Rather, the main “tool” needed for the crime of child molestation is isolation. The Defendant in the present case obtained this tool when he followed the victim into the women’s restroom and remained alone with her for three minutes. In addition, the Defendant’s actions in the present case satisfy several of the other types of conduct listed in the Model Penal Code, since the evidence (viewed in a light most favorable to the State) showed that the defendant “followed” the victim (as the trial court specifically found) into the *women’s* bathroom.⁶

Thus, even if the trial court was correct that the evidence did not support a logical and reasonable deduction that the Defendant had actual sexual contact with the victim, the evidence nonetheless supports the logical and reasonable deduction that the Defendant took a substantial step to the commission of the crime of child molestation. The trial court, therefore, erred in granting the Defendant’s *Knapstad* motion to dismiss with respect to the charge of attempted child molestation in the first degree.

⁶ This evidence was also corroborative of the Defendant’s intent, as criminal intent may be inferred from conduct from which intent is ‘plainly indicated as a matter of logical probability.’ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Gill*, 103 Wn.App. 435, 443, 13 P.3d 646 (2000). Furthermore, the mere fact that a defendant or a court could come up with an innocent explanation does not preclude a finding that the acts were corroborative of intent. For instance, the facts in *Smith* were still sufficient despite the fact that the defendant could have argued that the tools and weapons found in that case were only going to be used to scare the victim or had some other innocent explanation.

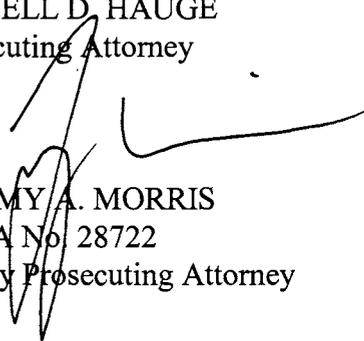
V. CONCLUSION

For the foregoing reasons, the State urges this Court to urges this court to remand the cause for trial and to reverse: (1) the trial court's granting of the Defendant's child hearsay motion; (2) the trial court's granting of the Defendant's *Knapstad* motion; and (3) the trial court's order dismissing the two charged offenses.

DATED October 27, 2008.

Respectfully submitted,

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