

NO. 49381-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERI TALBOT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel Stahnke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering Conclusion of Law 2.2 that: “The Defendant took a substantial step toward the commission of the crime of Child Molestation in the Second Degree at approximately 4:00 p.m. on September 24, 2015, by driving to and entering the Starbucks pursuant to an agreement to meet Ellie O’Reilly at that time and location; and furthermore, following the telephone call with Ms. Ellie O’Reilly, the Defendant’s acts exceeded mere preparation.” CP 142.

2. The court erred in entering Conclusion of Law 2.5 that: “The Defendant is guilty of the crime of Attempted Child Molestation in the Second Degree as charged in Count 2 of the Amended Information.” CP 142.

3. There was insufficient evidence to support the conviction for attempted second degree child molestation.

4. The court erred in imposing a community custody condition prohibiting the possession of devices that can access the Internet without the Department of Corrections (DOC) and treatment provider’s approval.

5. The court erred in imposing a community custody condition prohibiting Internet use without the DOC’s and treatment provider’s approval.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to meet the State's burden of proving that appellant committed the crime of attempted second degree child molestation where the State failed to establish appellant either had the criminal intent or that he took a "substantial step" towards committing that crime?

2. Whether the court exceeded its authority and violated appellant's constitutional rights by imposing community custody conditions that ban appellant's possession of any device that can access the Internet and his Internet use without the approval of the DOC and a treatment provider?

B. STATEMENT OF THE CASE

1. Procedural Facts

On September 28, 2015, the Clark County Prosecutor charged Teri Talbot with attempted second degree rape of a child. CP 5. On June 8, 2016, an amended information was filed adding as Count 2 an additional charge of attempted second degree child molestation. CP 63.

Talbot waived his right to a jury. CP 6; RP 57-62, 68.¹ Following a bench trial the court acquitted Talbot of the attempted second degree

¹ The verbatim report of proceedings for May 4, 2016, May 31 2016, June 8, 2016, and June 11, 2016 consists of three volumes sequentially paginated and is cited at RP.

rape of child charge but found him guilty of attempted second degree child molestation. CP 140-177.

Based on an offender score of 0, Talbot was sentenced to a standard range of 11.25 months of total confinement and 12 months of community custody. CP 82-97.

2. Substantive Facts

Detective Robert Givens and Sergeant Joseph Graaff are members of the Vancouver Police Department's Digital Evidence Cyber Crime Unit. RP 79-80, 193. Graaff also manages the local Internet Crimes Against Children Task Force (ICAC). The ICAC is a Department of Justice task force for investigating Internet crimes against children. RP 194. Graaff is Givens's supervisor. RP 203.

In June 2015 Givens attended an ICAC undercover training course. RP 80. Sometime between that June and September 2015 Givens discussed setting up a sting operation with Graaff. RP 113. The purpose of the operation was to "ferret out people who were willing to have to sex with minor children." RP 200. There had never before been a similar sting operation conducted in Clark County. RP 113.

The operation began on September 18, 2015, by Givens posting an advertisement on Craigslist—an online site where people can advertise for goods and services, including sex. RP 95, 121-122. The advertisement

was posted on the site's Casual Encounters page. RP 96. The advertisement read: "Single Mom looking for discreet friend for daughter, no role playing, hopeful for someone kind and gentle she can learn from." Ex. 2 (Findings of Fact and Conclusions of Law, Appendix A, CP 144-45). The advertisement did not mention anything about a minor child. RP 114-115. Adults use the site for adult mother and daughter sexual encounters. RP 121-122.

That same day Talbot responded to the advertisement, and Givens posing as a woman named Ellie O'Reilly² began an email exchange with Talbot. RP 99; Ex. 3 (Findings of Fact and Conclusions of Law, Appendix B, CP 146-48). In his response to the advertisement Talbot wrote that if the advertisement was for real he would teach her anything she wants. *Id.* Givens, writing as "Ellie" the mother, responded that her daughter is young and inexperienced and that she is looking for someone gentle. *Id.* Talbot wrote back that he would love to meet Ellie, and that he was very gentle. *Id.*; RP 116. During this September 18th exchange there was no mention of the daughter's age. RP 116.

Talbot did not contact Givens's "Ellie" character again, so three days later, on September 21st, Givens posing as "Ellie" initiated contact with Talbot by sending him an email. RP 162; Ex. 3 (CP 148). "Ellie"

² The verbatim report of proceedings incorrectly refers to "Ellie" as "Elly."

wrote Talbot that “She is very young”, referring to her daughter, and asked Talbot if that was something he was comfortable with. “Ellie” did not mention her daughter’s age. *Id.*; RP 117. Talbot responded that he was interested and “Ellie” asked Talbot to tell her something about himself, which he did. Ex. 3 (CP 149). He gave his age (59 years old) and some other information and then asked to meet “Ellie” and talk. *Id.* “Ellie” wrote back that she too would like to meet to get to know Talbot better. It was then that “Ellie” finally told Talbot that her daughter will be 13 years old and she is looking for a man who will be patient. *Id.* Talbot’s response, like his earlier communications, was that wanted to talk with “Ellie” in person. “Ellie” told Talbot she (Ellie) wanted to get to know him better because she had a previous bad online experience. Talbot, who was first told that the daughter was 12 years old during this exchange, responded that he could get in trouble so he wanted to protect himself. Ex. 3 (CP 150).

The exchange continued with “Ellie” asking Talbot if he had done this before. Ex. 3 (CP 150). Talbot wrote he had not and he asked why “Ellie” wanted her daughter to “start at this age.” *Id.*; RP 128. “Ellie” answered Talbot’s question by telling him that her daughter knows that she (“Ellie”) watches pornography, her daughter has engaged in sex chats with boys and also watches pornography, and that her daughter has asked

her about sex. Ex. 3 (CP 151); RP 128-129. In response, Talbot again asked to meet "Ellie", and said "then we can go from there." Id. "Ellie" agreed to meet Talbot later but asked him to send her his picture first. Talbot in turn asked "Ellie" to send him her picture. Talbot sent "Ellie" a photograph of himself, and Givens sent Talbot a photograph of a woman who was suppose to be "Ellie." Ex. 3 (CP 152). "Ellie" told Talbot he looked nice and asked if they could chat later the following day. Ex. 3 (CP 153-54). Talbot agreed and sent "Ellie" his telephone number. Id. (CP 154); RP 102.

The following day, September 22nd, "Ellie" again initiated contact with Talbot by sending a text message to Talbot's phone. RP 102; Ex. 5 (Findings of Fact and Conclusions of Law, Appendix C, CP 155-59). Talbot and "Ellie" talked about their work then "Ellie" asked Talbot his plan to give her daughter a good and gentle experience. Ex. 5 (CP 157). As he had done previously when the conversations turned to the daughter, Talbot responded by suggesting that he and "Ellie" meet in a public place. Id. "Ellie" then steered the conversation away from her and told Talbot "this is about my daughter and not me..." but Talbot replies that he is interested in her ("Ellie"). Ex. 5 (CP 157). "Ellie" reiterates this is about her daughter "rite now" and Talbot again expressed his concern that he could get into trouble and that he was leery. Id.

At that point “Ellie” asks Talbot if he would be offended if she asked him to bring a condom. Ex. 5 (CP 157). Talbot responds “yes” and asks “Ellie” if she is part of a sting operation. She assures him she is not. Id. “Ellie” suggested that she take her daughter out of school to meet with Talbot but Talbot insists he wants to meet “Ellie” first. Id. “Ellie” agrees and states, “we can meet somewhere first and if either of us don’t feel 100% ok, we can just walk away.” Ex. 5 (CP 158); RP 141. When “Ellie” then tells Talbot she will text him the next day, Talbot again steers the conversation back to the two of them. He tells “Ellie” that she is good looking and that he will do what she asks but that he would like to get to know her as well. Ex. 5 (CP 159). Talbot also tells “Ellie” that he will be available if she ever wants to “chat” and “I give great massages just saying you might want to think about it.” Ex. 5 (CP 159). “Ellie” responds that when they meet she will tell him about her previous bad online experiences. Id.: RP 140.

Two days later, on September 24th, “Ellie” initiates two contacts with Talbot by text. One late in the morning and the other at about 2:30 p.m. Ex. 5 (CP 159). During the first conversation “Ellie” asked Talbot if he was still willing to help and when her daughter should start her “lessons” with Talbot. Id. Talbot again insists that he wants to meet “Ellie” first and that after they meet he would follow her back to her

apartment “if everything is fine.” Id. Their second conversation was limited to “Ellie” asking Talbot if she could call him and he agrees. Id.

At this point Maggi Holbrook, a digital forensic investigator with the Vancouver Police Department, became involved in the operation. She assumed the role of “Ellie.” RP 217-218, 225. At about 3:00 p.m. Holbrook called Talbot as “Ellie.” RP 105. The telephone call was recorded. Id.; Ex. 7.³

Holbrook and Talbot begin the conversation by talking about innocuous subjects, like Talbot’s thwarted vacation plan to go hunting with his son. Ex. 7 (Findings of Fact and Conclusions of Law, Appendix D, CP 161-176⁴). Holbrook eventually broaches the subject of “Ellie’s” fictitious daughter. Talbot tells Holbrook that he has never been with a child before, he is not a pedophile and he does not seek out children. Ex. 7; (CP 165). He tells Holbrook that when he read the advertisement he thought it involved a mother and a daughter who was of “age” and that he needs to be sure about going through with what “Ellie” is asking him to do because if he is wrong he could lose his family, job and life. Ex. 7; (CP 166).

³ Police obtained a warrant authorizing the recording of the telephone call. RP 198.

⁴ Appendix D, attached to the Findings of Fact and Conclusions of Law, is a transcript of the telephone call between Holbrook posing as Ellie and Talbot and was admitted for illustrative purposes as Exhibit 6. RP 220.

Presumably to get Talbot to overcome his reluctance, at that point in the conversation Holbrook tells Talbot that “I love sex” and that she (“Ellie”) wants her daughter to fall in love with that. Ex. 7: (CP 167). Talbot explains that initially he would only talk with the daughter and maybe touch her. Ex.7; (CP 168-169). Holbrook understood Talbot was still reluctant because she tells him “I don’t want you to do anything that you don’t wanna do ‘cause you kinda -- you seem a little hesitant but at the same time, you seem like you’ve got -- you seem like you have the right answers I’m hoping for.” Ex. 7 (CP 170).

Holbrook eventually proposes that she and Talbot meet at a nearby Starbucks to talk. Ex. 7: (CP 170). As he repeatedly had done during every conversation with “Ellie”, Talbot again expresses his desire to have a relationship with “Ellie” by asking if there is a possibility for the two of them (he and “Ellie”). Ex. 7: (CP 171-172). Talbot tells Holbrook “[T]his isn’t about her (the daughter).” *Id.*; RP 145. Holbrook responds that she did not think she could be with someone who had been with her daughter. Ex. 7; (CP 172); RP 145. Nonetheless, Talbot continues to pursue the issue of some kind of involvement with “Ellie.” RP 146-147.

Holbrook then steers the conversation back to the proposed sexual activity with the daughter, and like Givens did earlier, Holbrook tells Talbot that she wants him to use a condom. Ex. 7; (CP 173). Talbot

responds that is a “deal breaker” and he tells her he will not be able to go through with it. Ex. 7; (CP 173-174). Holbrook then mentions lubricant and in response Talbot says he would only talk, feel, touch and “you know, little licking and sucking.” Ex. 7; (CP 174-175); RP 147-148. Earlier in the conversation Talbot told “Ellie” that he had not had sex in years, and Holbrook responds that he is not the only one who hasn’t had sex in a long time “but that’s a story for another day.” Ex. 7; (CP 173, 176). The conversation ends with Holbrook and Talbot agreeing to meet at Starbucks. Ex. 7; (CP 176); RP 106. Given the tone and content of Talbot’s conversations with “Ellie” Holbrook agreed that Talbot’s motive could have been to just meet “Ellie.” RP 235.

At about 3:45 p.m., following the telephone conversation, Holbrook again initiates contact with Talbot. Holbrook sends Talbot a text where she attempts to get Talbot to agree that “we established she (the daughter) is staying home from soccer to start lessons with u rite”? Ex 5 (CP 159). Holbrook also asks Talbot if he would pick up some lubricant. Id. Talbot responds that he has no lubricant and suggests she get some or they get some later. Id. Talbot tells her not to keep her daughter home from soccer because they could do this later in the evening “if everything is OK yes.” Id.

Shortly after 4:00 p.m., police saw Talbot enter the Starbucks where he had agreed to meet "Ellie." RP 106-107, 195. Talbot looked around for a "moment" and then walked out. RP 108, 196. As he walked back to his car Talbot was arrested. When Talbot was told he was under arrest he asked "what for" and when Graaff told Talbot that he knew why he was being arrested Talbot said he had been set up. RP 109, 197.

Givens explained that part of his June 2015 training involved avoiding entrapment. He said he was trained to let the subject of the sting operation set the tone, subject matter and pace of the interaction. RP 121-122. Givens also explained the ICAC supports letting the subject of an operation take an "out" meaning giving the person the opportunity to walk away. RP 137, 167. The reason is to make sure the person is not induced to commit a crime. RP 169-170. He admitted the Department had no written protocols governing the type of sting operation conducted in this case but that in hindsight it would have been better if there had been protocols. RP 114.

Graaff agreed that a statement by a police operative to a person that if the person was not 100% sure the person could walk away could be interpreted as an "out" depending on the context. RP 203, 206. Graaff admitted that during an earlier defense interview he might have said police would never use that phrase because it could give the person the

impression that the person had an “out” and he admitted that Talbot in fact walked away from Starbucks. RP 205-207, 214.

Except for Talbot’s initial response to the Craigslist advertisement, police initiated every contact between “Ellie” and Talbot. RP 157. Talbot never asked to speak with “Ellie’s” fictitious daughter or asked for proof a daughter actually existed. RP 135, 187, 231. Talbot never requested a photograph of the daughter. RP 133, 231. Talbot never asked to meet “Ellie” at her home, and he never asked if he could meet the daughter. RP 134. Talbot did not bring any props or other physical evidence of his intent to have sex with the daughter with him to the meeting at Starbucks. RP 189. Moreover, Talbot consistently insisted on meeting “Ellie” first to determine if “everything was fine” and he was “100% sure” before he agreed to any sexual activity with the daughter.

C. ARGUMENTS

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE COURT’S CONCLUSIONS THAT TALBOT COMMITTED THE CRIME OF ATTEMPTED SECOND DEGREE CHILD MOLESTATION.

Due process requires the State to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995);

U.S. Const. amend. XIV; Wash. Const. art. I, § 3. In reviewing a challenge to the sufficiency of the evidence, courts view the evidence and all reasonable inferences in the light most favorable to the prosecution. State v. Powell, 62 Wn. App. 914, 916, 816 P.2d 86 (1991). A conviction must be reversed and the prosecution dismissed if no rational trier of fact could have found all the elements of the crime proven beyond a reasonable doubt. Id.

A person is guilty of attempting 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). The crime of attempted second degree child molestation requires proof that the defendant acted with intent. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012). There must also be sufficient evidence of a substantial step towards the commission of the completed crime to ensure that the State does not punish a person for criminal intent alone. State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) (citing State v. Lewis, 69 Wn.2d 120, 124, 417 P.2d 618 (1966)). “Mere preparation to commit a crime is not a substantial step.” State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (citing State v. Workman, 90 Wn.2d 443, 449-450, 584 P.2d 382 (1978)). A substantial step instead requires evidence of conduct “strongly corroborative of the defendant's criminal purpose.”

Workman, 90 Wn.2d 443 at 451 (*quoting* Model Penal Code § 5.01(1)(c) (Proposed Official Draft, 1962)). Whether conduct constitutes a “substantial step” toward the commission of a crime is a question of fact. Workman, 90 Wn.2d at 449.

Following a bench trial the appellate court on review determines whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. State v. Homan, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014). “Substantial evidence” is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Id. at 106. This Court reviews challenges to a trial court’s conclusions of law de novo. Id.⁵ Further, the sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Talbot’s conviction of attempted second degree child molestation cannot stand unless the State proved beyond a reasonable doubt that he had the intent and took a substantial step toward having “sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.086(1). Here, Talbot contemplated having sexual contact with “Ellie’s” fictitious 12-year-old

⁵ Following the trial the court entered Findings of Fact and Conclusions of Law. CP 140-177. Talbot does not challenge the courts findings of fact.

daughter, whether because he believed it could lead to a relationship with “Ellie” or for some other reason, but the facts do not establish he had the intent to have sexual contact. Even if the evidence established Talbot intended to commit the crime, the facts do not establish Talbot’s conduct crossed that amorphous line between preparation and a substantial step.

Givens’s Craigslist advertisement neither explicitly nor implicitly indicates the “daughter” was a minor child. It was not until the second communication with “Ellie” on September 21st, that “Ellie” told Talbot her daughter was 12-years old. In subsequent communications Talbot told “Ellie” when he responded to the advertisement he believed that both she and her daughter were of “age” and he questioned why “Ellie” wanted her daughter to have sex at that age. Once “Ellie” finally told Talbot her daughter’s age, Talbot expressed reluctance and repeatedly rejected the attempts of the police operatives to agree to have sexual contact with the fictitious daughter insisting that he was not going to engage in any sexual activity with the daughter until he and “Ellie” met and talked. Moreover, during every conversation between Talbot and “Ellie”, Talbot expressed his desire for a relationship with “Ellie”, and the operatives had to dissuade Talbot and continually steer the conversation back to the fictitious daughter. While at the same time the operatives had “Ellie” go so far as to talk about her own sexual activity telling Talbot that she had

not had sex for a long time, that she watched pornography and loved sex and she wanted her daughter to learn to love sex too, which likely made Talbot believe he had an opportunity for a relationship with her and keeping him interested in continuing the communications.

Police operatives repeatedly attempted to get Talbot to agree to have intercourse with “Ellie’s” fictitious daughter, but Talbot did not take the bait. Talbot eventually told “Ellie” that if he was going to have any sexual contact with her daughter it would only initially involve talking, touching, licking and sucking. He made that statement in response to “Ellie’s” request that he bring lubricants. Significantly however, he never agreed to even engage in that type of sexual contact until he first met with “Ellie” in a public place to talk.

Givens’s attempted to keep Talbot on the hook despite his reluctance by agreeing to have “Ellie” meet him first and assuring him that “she” understood that unless he was convinced that he wanted to engage in sexual activity with her daughter it would not happen—“we can meet somewhere first and if either of us don’t feel 100% ok, we can just walk away.” Ex. 5 (CP 158); RP 141. And, during the September 24th text conversation, just before Holbrook called Talbot, Talbot reiterated that he wanted to meet “Ellie” first and only “if everything is fine” would he agree to go with “Ellie” to her home to teach the fictitious daughter about

sex. Ex. 5 (CP 159). Just prior to the time Talbot and “Ellie” were to meet, “Ellie” sent Talbot another text implying the two had agreed to keep her fictitious daughter home from soccer so he and the daughter could state the “lessons.” But, again Talbot did not take the bait. He told “Ellie” there was no need to keep the daughter from going to soccer because as he told “Ellie” repeatedly he would only start the lessons “if everything is OK” following their meeting. *Id.*

The conversations between “Ellie” and Talbot do not establish that Talbot had the criminal intent to engage in sexual contact with the fictitious daughter. Talbot’s statements that he would be gentle and confine any activity to touching, licking or sucking were all predicated on the outcome of his meeting with “Ellie.” They were statements of what he would be willing to do “if everything was fine” or if he was 100% sure following his meeting with “Ellie.” The evidence shows Talbot contemplated having sexual contact with “Ellie’s” fictitious 12-year-old daughter but had not yet formed the intent to do so.⁶

Even if this Court determines the evidence shows criminal intent, it does not establish he took a “substantial step” towards the commission of the crime. The court concluded that Talbot’s act of going to Starbucks to

⁶ The court’s written findings and conclusions fail to address the intent element. In its oral ruling the court found that Talbot’s telling “Ellie” that if there was going to be any sexual contact with her daughter it would involve touching, licking and sucking was evidence that Talbot had the requisite intent. RP 266-267.

meet with “Ellie” constituted the required “substantial step” of the attempt element. CP 40 (Conclusion of Law 2.2). The court reached that conclusion despite the express understanding that Talbot was unsure he wanted to engage in sexual activity with the daughter and that he did not intend to do so (“we can just walk away”) unless he was convinced to do so following the meeting with “Ellie.” That act was not “strongly corroborative” of the purpose or intent to engage in sexual contact with the fictitious daughter.

In Workman, the Court adopted Model Penal Code’s (MPC) definition of “substantial step.” State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990) (*citing Workman*, 90 Wn.2d at 452). The Court also adopted the MPC’s list of conduct, which, “if strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law” to sustain an attempt conviction. Workman, 90 Wn.2d at 451–52 n. 2 (*quoting* MPC § 5.01(1)(c) (Proposed Official Draft, 1962)). The MPC provides:

(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, 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;
- (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Model Penal Code § 5.01(2) (Proposed Official Draft, 1962).

There was no evidence Talbot engaged in any of the above listed conduct. At most, his going to Starbucks to meet "Ellie" could be reasonably viewed as preparatory to possibly committing the crime of second degree child molestation but mere preparation to commit the crime is not a substantial step towards the commission of the crime. Workman, 90 Wn.2d at 449-450. Talbot and "Ellie" were to meet to determine if both were agreeable with Talbot engaging in any sexual contact with the fictitious daughter, and Talbot made clear only if "everything was fine" or

if “everything was OK” following that meeting would he go to “Ellie’s” home presumably to have sexual contact with the daughter.

Engaging negotiations with undercover police to commit a crime is not a “substantial step.” See State v. Grundy, 76 Wn. App. 335, 886 P.2d 208 (1994) (negotiations with an undercover officer posing as a drug dealer over the purchase of drugs held not a “substantial step” toward possession of a controlled substance where defendant insisted on seeing the drugs first before giving the officer any money for the drugs). Here, Talbot’s refused to meet the daughter for the purpose of engaging in sexual activity with her until he was satisfied it was what he wanted to do based on his meeting with “Ellie” and the outcome of their discussion. This was akin to a meeting to negotiate the possible commission of the crime, and if the negotiation failed and things were not “fine” it was expressly understood that Talbot could “walk away.” Viewed in a light most favorable to the State, Talbot’s act of going to the meeting cannot be reasonably construed as even a negotiation towards committing the crime. At most the purpose of the meeting was to engage in a negotiation and can only be logically viewed as a preparatory step towards the commission of the crime.

Whether conduct constitutes a “substantial step” toward the commission of a crime is a question of fact. Workman, 90 Wn .2d at 449.

Because it is a factual question, a comparison between this case and others where courts have found the evidence sufficient to support a conviction for attempt to commit a sex crime where police have conducted similar sting operations shows the evidence in this case fails to establish Talbot intended to commit child molestation or that his showing up for the meeting with “Ellie” constituted a “substantial step” towards committing that crime.

In Townsend, for example, a police detective suspected that Townsend was attempting to use his computer to arrange sexual liaisons with young girls. The detective initiated a sting operation by setting up an email account where he posed as a fictitious 13-year-old girl named Amber. Townsend, 147 Wn.2d at 670. Townsend and the detective, posing as Amber, exchanged sexually graphic emails. Townsend eventually arranged with the fictitious Amber to meet her at a motel room. The night before the scheduled meeting, Townsend sent Amber a message stating that “he wanted to have sex with [her]” the following day. An hour before the arranged meeting, Townsend sent Amber another message indicating that “he still wanted to have sex” with her. Townsend went to the motel, knocked on the door of the room that he believed Amber was in and after asking to see Amber he was arrested by the detective. Townsend later admitted that he left his apartment intending to have sex with Amber,

who he believed was thirteen. Id. at 671. On these facts the Court concluded Townsend intended to have sex with a 13-year-old girl and he took a substantial step towards committing the crime of second degree rape of a child. Id. at 680.

In State v. Sivins, 138 Wn. App. 52, 155 P.3d 982 (2007), as part of a sting operation a police intern created an online profile of a fictitious 13-year-old girl named Kaylee. The intern waited in a teen chat room until contacted by Sivins. Kaylee told Sivins she was just 13 years old. 138 Wn. App. at 56. Sivins and Kaylee discussed her favorite alcoholic drink, vodka, that she had given her boyfriend oral sex, and she told Sivins she was a virgin. In a later conversation Kaylee told Sivins that she had had a birthday and the next day Sivins sent an email informing Kaylee that he had purchased a vibrator for her birthday, which he then mailed to her. Sivins eventually sent Kaylee an email suggesting they meet in a local motel room and that he would have sex with her there if she wanted. Id. at 57. Sivins was arrested when he showed up at the motel.

Sivins was convicted of attempted second degree rape of child. The Sivins court found that by engaging in prolonged sexually graphic Internet communications with a police intern he believed to be a 13-year-old girl, telling her that he would have sex with her if she wanted, and enticing her with promises of vodka and pizza, established Sivins's intent

to engage in sexual intercourse with a 13-year-old girl. It further found that by driving five hours to where he believed Kaylee was located, and then securing a motel room for two that Sivins took a “substantial step” towards the commission of the crime. The court concluded that Sivins’s Internet communications were evidence of his intent, and his subsequent travel and motel rental was a substantial step that corroborated his intent. Sivins, 138 Wn.App. at 64.

State v. Wilson, 158 Wn.App. 305, 242 P.3d 19 (2010), involved a sting operation most similar to the sting operation in this case because the contact was with a police operative posing as a woman. A detective, posing as a woman named “Jackie”, posted an advertisement on Craigslist saying that she and her young daughter would fulfill a client’s fantasies, “but it won’t be cheap.” 158 Wn.App. at 309. Wilson responded asking “Jackie” the price and if she had any pictures. “Jackie” wrote back that a 13-year-old girl worked for her and that she and the girl could “play the mother/daughter fantasy for you.” Id. Wilson then arranged with “Jackie” to have “oral and full sex” with the 13-year-old for an agreed price of \$300. Id. Wilson agreed to meet the girl in the parking lot of a restaurant and it was agreed she would then take him back to her apartment to have sex. Id. at 310. Wilson drove to the parking lot and waited for approximately 30 minutes until the police arrived and arrested him. In

Wilson's pocket was \$300, the amount he agreed to pay for sex with the girl. Wilson, like the defendant in Townsend, also admitted in his statement to police that he intended to have sex with the girl. Id. at 311.

Wilson was convicted of attempted second degree rape of a child. The Wilson court found the evidence established that Wilson intended to have sexual intercourse with a 13-year-old. The court concluded the facts also showed Wilson took a "substantial step" toward the commission of the crime of rape of a child in the second degree. Wilson, 158 Wn.App. at 320.

Here, unlike in Townsend and Sivins, Talbot did not engage in sexually explicit conversations with a person he believed was a child. Although Talbot had a number of email, text, and phone conversations with "Ellie" he did not initiate those conversations and he never once asked to speak with the fictitious daughter or even ask to see a photograph of her or some other proof she existed. Unlike in Wilson, Townsend, and Sivins, Talbot did not arrange to meet with the fictitious child for the stated purpose of a sexual encounter and then show up at the meeting place. Unlike in Wilson, where Wilson brought the money he agreed to pay in exchange for sex with the girl, Talbot did not bring anything with him to the meeting with "Ellie" that would lead to an inference he intended to have sexual contact with her fictitious daughter. Unlike in

Wilson and Townsend, Talbot did not admit he intended to have sexual contact with the child. And, importantly, unlike in Wilson, Townsend, and Sivins, Talbot and police operatives understood and agreed that Talbot did not intend to have any sexual contact with the fictitious daughter unless Talbot was convinced (“if either of us don’t feel 100% ok, we can just walk away” “if everything is fine” “if everything is OK yes”) to give the girl sex “lessons” following his meeting and discussion with “Ellie” at that meeting.

In sum, a comparison between the evidence in the above cases and this case shows the evidence in this case was insufficient to support Talbot’s conviction. Other than Talbot response to Givens’s initial advertisement, which did not indicate the daughter was a minor, police operatives initiated every subsequent contact with Talbot. RP 157. Talbot would not agree to engage in sexual intercourse despite “Ellie’s” repeated attempts to get him to do so, and he was reluctant to agree to engage in any sexually activity with the fictitious daughter. The statements he made to “Ellie” about what activity he was willing to engage in with the fictitious daughter were qualified by his insistence on meeting “Ellie” first in a public location and he made it clear he would not agree to do what “Ellie” had consistently asked him do---teach her fictitious daughter about sex by engaging in sexual activity with her---unless he was certain

following discussions with “Ellie” at the meeting. RP 175. Even if it is reasonable to infer that Talbot agreed to have sexual activity with the fictitious daughter if he was convinced to do so after his meeting with “Ellie”, and if only because of a misguided belief it would lead to a relationship with “Ellie”, the conversations do not show he had the intent to actually have sexual contact with the daughter.

Further, Talbot’s decision to meet “Ellie” was not a “substantial step” towards the commission of the crime. It was understood that Talbot did not intend to go through with the request to engage in sexual activity with the fictitious daughter unless he was convinced to do so following his meeting with “Ellie.” Showing up for the meeting was at most preparation towards the commission of the crime. It was not conduct “strongly corroborative” of a criminal purpose, even if it is found that his criminal purpose was to engage in sexual activity with the fictitious daughter.

Because the State was required to prove both intent and a “substantial step” the conviction cannot stand if it failed to prove even just one of those two elements. Under the facts in this case the State failed to prove beyond a reasonable doubt that Talbot attempted to commit second degree child molestation because the State failed to prove Talbot either had the criminal intent or that he took a “substantial step” towards committing that crime. Where insufficient evidence supports conviction,

the charges must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). That is Talbot's remedy.

2. THE COURT ERRED IN IMPOSING UNAUTHORIZED AND UNCONSTITUTIONAL CONDITIONS OF COMMUNITY CUSTODY.

As a condition of community custody the court ordered Talbot not to possess any device capable of accessing the Internet without the approval of DOC, and prohibited Talbot from accessing the Internet without the approval of DOC and his treatment provider. CP 97 (condition 14). The conditions are unauthorized by law and in violation of Talbot's constitutional rights.

A trial court may impose only a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). If the trial court exceeds its sentencing authority, its actions are void. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Reviewing courts apply careful scrutiny when a community custody condition infringes on a fundamental constitutional right. In re

Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). Community custody conditions are generally reviewed for abuse of discretion and may be reversed if manifestly unreasonable. State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010); State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The imposition of an unconstitutional condition is manifestly unreasonable. Valencia, 169 Wn.2d at 792. Unlike statutes enacted by the legislature, community custody conditions are not presumed constitutional. Id. at 792-93.

The condition prohibiting Internet use without approval of the DOC and a treatment provider violates Talbot's rights to freedom of expression under the First Amendment and article I, section 5 of Washington's constitution and is, therefore, manifestly unreasonable. The conditions prohibiting Talbot from possessing any device capable of accessing the Internet and from accessing the Internet without approval are also not sufficiently crime-related.

More and more, modern communication and commerce occurs predominantly by means of the Internet. Most personal telephones today are capable of accessing the Internet. A ban on both possessing a device capable of accessing the Internet and on Internet use is akin to a ban on public speech and participation in the public life of the community. The condition prohibiting all Internet access without DOC's and a treatment

provider's approval is essentially a prior restraint on speech. At best, it is a restriction on the time, manner, and place of his speech. Because the prohibitions are unaccompanied by any standards conditioning the DOC and a treatment provider's approvals they have unfettered discretion to withhold their approval, and could do so for reasons unrelated to Talbot's treatment. Absent the approval of DOC and a treatment provider Talbot will be unable to view news stories of current events, purchase items for delivery, or share his views on the many public forums that the Internet provides, and possibly be unable to use a modern personal telephone to communicate with family and friends. The prohibition on Talbot's participation in the world of the Internet is overbroad in violation of the First Amendment and Article I, Section 5 of the Washington Constitution.

A community custody condition restricting First Amendment rights must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678, 687 (2008). Such conditions must be sensitively imposed. Id. A community custody condition that restricts a significant amount of protected speech is unconstitutionally overbroad. State v. Riles, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998). The conditions here that will likely result in a 12 month total ban on accessing the Internet for any purpose is unconstitutionally overbroad. It

is neither narrowly tailored nor sensitively imposed. It restricts virtually all speech and association via the medium that is becoming the default mode of communication.

In addition to violating Talbot's First Amendment rights, these conditions are void because they are not authorized by statute. Trial courts may impose crime-related prohibitions as a condition of a sentence. RCW 9.94A.703(3)(f). A crime-related prohibition is an order prohibiting conduct that directly relates to the circumstances of the crime. State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). A total ban on Internet use and devices used to access the Internet are not crime related because the ban includes lawful use of the Internet to express opinions on current events or purchase books or groceries and lawful use of a personal telephone to communicate with family and friends. Such conduct has no bearing on the offenses in this case. Because the conditions, as imposed, would also include many lawful uses, the conditions are not statutorily authorized because it is not crime related.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Talbot indigent and entitled to appointment of appellate counsel at public expense. CP 98. If Talbot does not prevail on appeal, he asks that no appellate costs be authorized under Title 14 RAP. Under RCW 10.73.160(1), appellate courts "may require an adult offender

convicted of an offense to pay appellate costs.” (Emphasis added). The word may has a permissive or discretionary meaning. State v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a case-by-case analysis may courts arrive at an LFO order appropriate to the individual defendant’s circumstances. Id. Accordingly, Talbot’s ability to pay must be determined before discretionary costs are imposed. Here, the trial court found Talbot indigent and disabled and likely unable to pay any future financial obligations. CP 85 (2.5). It waived all non-mandatory fees. CP 88 (4.3a). The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Talbot has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

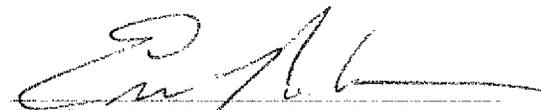
D. CONCLUSION

For the foregoing reasons, Talbot requests this Court reverse his conviction and order the charge dismissed or, alternatively, remand for resentencing.

DATED this 24 day of January 2017.

Respectfully submitted

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