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NO. 50622-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HARRIS,
Appellant.

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

The Honorable Scott A. Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Harris was guilty of attempted rape of a child in the third degree.

2. The evidence was insufficient as a matter of law to prove that Harris made a substantial step toward attempted rape of a child in the third degree.

3. Harris' constitutional right to due process was violated by Officer Givens' failure to adhere to the ICAC Program Operational and Investigative Standards manual.

B. ISSUES PRESENTED ON APPEAL

1. Did the State prove beyond a reasonable doubt that Harris was guilty of attempted rape of a child in the third degree where the state's intended victim was an adult and Harris only agreed to meet for coffee?

2. Was the evidence insufficient as a matter of law to prove that Harris made a substantial step toward attempted rape of a child in the third degree where the state's intended victim was an adult and Harris only agreed to meet for coffee?

3. Was Harris' constitutional right to due process violated by Officer Givens' failure to adhere to the ICAC Program Operational and Investigative Standards manual?

C. STATEMENT OF THE CASE

Joshua Harris was charged by information with Count 1 communication with a minor for immoral purposes, RCW 9.68A.090(2), Count 2 attempted rape of a child in the third degree, RCW 9A.44.079/ 9A.28.020(3)(d) and Count 3 possession of a controlled substance, methamphetamine, RCW 69.50.4013(1). CP 1. The jury convicted Harris of all three counts and the court sentenced Harris to a standard range sentence. RP 519, 526, 541.

This timely appeal follows. CP 331.

Harris responded to the advertisement in the adult section of Craigslist titled, "Skippin skool 2day want 2 chat? – w4m," signaling the person who posted the ad was a woman looking for a male. RP 362, 366. CP 114. However, this ad was posted by Officer Robert Givens, which depicted a fictional character, Julie Vincent. RP 362, 366.

When Vincent told Harris she was 14, he did not terminate the conversation because he only wanted to talk. RP 367; CP 115.

He thought school referred to college and he requested they “keep it civil”. RP 367; CP 115. Harris and Vincent chatted about video games. RP 368-69; CP 116-120. Harris expressed concern that Vincent had posted in casual encounters because she would be approached by perverts and he warned her that the men may post lewd pictures. RP 368; CP 117.

About four hours into the chat, Harris asked for a picture and Givens tried to send a photo of a Vancouver police officer who was over 21. RP 369-70, 372; CP 120. Givens was unable to send the photo because Craigslist had flagged their chat for inappropriate content and removed it. RP 370, 417, 421; CP 120. Craigslist’s policy requires that users be at least 18 years old. RP 417. At that point there was no sexual content in Harris’ emails. RP 419; CP 114-121.

The next morning, Givens initiated contact. RP 421. He suggested they take their chat off Craigslist and he gave Harris a Gmail address and a phone number to text Vincent. RP 370; CP 121. Harris emailed Vincent using his Gmail account and Givens re-sent the photo. RP 370-71; CP 123-24.

Harris and Vincent resumed their conversation via text

messaging. Harris commented that Vincent looked older than 14 and again warned her about the danger of searching for older men on Craigslist. RP 375. After Harris received the photo of the female officer pretending to be Vincent, who is in her twenties, Harris offered to give Vincent a caring older man's attention. RP 375. When Vincent asked what kind of attention, Harris suggested they go somewhere and chat. RP 425. Then Vincent pressed the issue and again asked him to clarify what kind of attention he intended to give her. CP 122-23.

The following exchange took place:

Harris: Were you on cl for older men?

Vincent: o h thank u yur sweet :)

Harris: Because that is dangerous, very. If you want an older, caring mans attention I will gladly give it to you.

Harris: So you stay safe

Harris: A decent comprise [sic]

Vincent: i dont like guyz my age. theyre pretty lame. Wat kind of attention?

Harris: Whatever you wanted

Harris: Skipping school today? I have some time I could

come get you, and go do something or go somewhere and chat.

Vincent: wat kind of attention do u wanna give me? :)

Harris: Well, the want is strong, very. I want to taste you.

CP 125.

Harris then suggested taking drugs together and Vincent again steered the conversation toward the sexual content. CP 125.

Harris: My heart is racing right now lol. I really shouldn't say such things... But goddamn you're fine

Vincent: aww yur so sweet. <3

Harris: Fuck it... Got a proposition for you... I have two types of drugs on me. One weed, og kush, the other euphoric and potent clear. Would you be interested?

Vincent: maybe, but tell me bout the other stuff 1st. :)

CP 125.

At Vincent's request, Harris described in detail what kind of sexual attention he wanted to give her. CP 125. When Vincent agreed to meet, Harris asked if she was "messing with" him because "some women get off on playing games." CP 126. Vincent assured him that she was not playing games and the two agreed to

meet at a Starbucks in Vancouver. CP 126. Harris added that they could just chat today and see if Vincent was comfortable going further. RP 379; CP 126.

Givens gave Harris the address of a Starbucks in Vancouver and Harris drove there. RP 386. Once he got inside, Harris sent a text message to Vincent that he had arrived. RP 384, 387; CP 129. Vincent indicated she was still walking there and Harris left. RP 387; CP 129. As soon as Harris stepped outside, Detective Mills arrested him and took him to the Vancouver Police Department West Precinct, where Detective Givens interviewed him. RP 343-44. Harris' vehicle was towed to the Vancouver Police Department. RP 345.

During the interview, Harris stated that he did not think he would have gone through with any sexual act if Vincent had arrived. Exh. 2 at 26. Detective Mills found a condom on the floor outside of the driver's side of Harris' vehicle in the sally port of Vancouver Police Department. RP 347. Harris had a box of condoms in his pocket and methamphetamine in his vehicle. Exh. 2 at 52, 54. Givens admitted the picture of 'Julie Vincent' appeared to depict a person between 14 and 18 years old. RP 423.

a. ICAC Violations

During this investigation, Givens violated the Operational and Investigative Standards Program (ICAC Standards) Manual by setting the tone, pace, and subject matter of the online conversation instead of allowing Harris to set it. CP 172, ICAC Standards at 8.6. Givens deviated from this proper protocol without prosecutorial input. See CP 172, ICAC Standards at 8.6.

Givens used a visual depiction of an adult employee to convince Harris that Vincent was under the age of 18. CP 171. This violated the spirit of ICAC Standards 8.5. Givens also randomly targeted Harris for investigation without assessing the victim risk, jurisdiction, or known offender behavioral characteristics. See CP 169, ICAC Standards at 6.1.

Prior to trial, the Defense moved to dismiss counts I and II for insufficient evidence of a substantial step, and due to the police failure to follow the ICAC Standards. RP 35-36, 51-52. The trial court denied the defense's motion.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HARRIS TOOK A SUBSTANTIAL STEP TOWARD ATTEMPTED RAPE OF A CHILD IN THE THIRD DEGREE.

Harris never believed Julie Vincent was underage. Vincent was actually an adult; and Harris never took a substantial step toward engaging in sex with a minor.

In every criminal case, the State must prove the elements of the crime beyond a reasonable doubt. *State v. Osman*, 192 Wn. App. 355, 369, 366 P.3d 956 (2016). This fundamental right is protected by the due process clause. *Osman*, 192 Wn. App. at 369 (citing *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Attempt crimes do “not depend on the ultimate harm that results or on whether the crime was actually completed.” *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006). Instead, the person must intend to commit a specific crime and take a substantial step toward the commission of that crime. RCW 9A.28.020 (1); *State v. Patel*, 170 Wn.2d 476, 481, 242 P.3d 856 (2010). A person is guilty of rape of a child in the third degree when

the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. RCW 9A.44.079.

“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.” *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

Although it may seem straightforward, the Washington Supreme Court has held the intent required depends upon the intended sexual partner. When the intended partner is a fictional underage character created by the police, the defendant’s intent to have sexual intercourse with the fictional character supports an attempted rape of a child conviction and a factual impossibility is not a defense. *Patel*, 170 Wn. 2d at 485 (“a defendant who attempts to have sex with a person he believes is underage but does not in fact exist may be convicted under *Townsend*”); *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002); *Chhom*, 128 Wn.2d at 743.

However, “a defendant who attempts to have sex with a

person he believes is underage but is actually a real, live, adult, may not be convicted under either case—because the victim actually existed and factual impossibility is not a concern.” *Patel*, 170 Wn. 2d at 485. The Supreme Court discussed the public policy behind this decision in *Patel*. It was not “the intent of the legislature to protect adults who ‘role play’ and pretend to be younger than they actually are.” *Patel*, 170 Wn. 2d at 485 n.11.

Prior to seeing the photo, Harris chatted with Vincent about video games and warned her of the danger of looking for men on Craigslist. CP 114-120. The conversation only turned sexual after Officer Givens showed Harris the picture of an adult woman. CP 126. When Officer Givens asked why the conversation turned sexual, Harris responded, “Ah, I seen her picture.” Exh. 2 at 27. After seeing the picture, Harris told Vincent she did not look 14 and asked “Are you messing with me?” RP 375, 377; CP 126. Harris intended to meet with the woman in the photo, who was an adult in her twenties. RP 423. Harris never believed that Vincent was 14 years old and so stated in his communications with her. RP 375; CP 126. The only evidence regarding Harris’ thought on Vincent’s age was his disbelief.

Patel and *Townsend* both dealt strictly with a fictional character created by the police. The character existed solely in the minds of the investigative officers and the defendants. Importantly, neither *Patel* nor *Townsend* were given a picture of their intended sexual partners. But here, Vincent did not exist solely in the minds of Harris and the investigating officer. Although the character “Julie Vincent” was fictional, the woman in the picture was a real adult. If Harris intended to have sexual intercourse with the woman in the picture, she was an adult, not a fictional girl he was chatting with online.

The public policy set forth in *Patel*, does not protect role playing adults because the legislature did not intent to punish adults attempting to engage in consensual sexual encounters. *Patel*, 170 Wn. 2d at 485 n.11 *Patel* applies to Harris’ case because even though the police were the posers, Harris’ intent was to meet with the adult woman in the photo. *Patel*, 170 Wn. 2d at 485 n.11.

The circumstances here are also distinguished from another attempted rape of a child case, *State v. Wilson*, 158 Wn. App. 305, 309, n. 2, 242 P.3d 19 (2010). In *Wilson*, the defendant was shown a photo that was digitally altered to depict a juvenile. *Wilson*, 158

Wn. App. at 309, n. 2. The opinion does not specify whether the picture was of a real adult person as it was here. On this fact, Wilson cannot apply to Harris' case, because the image the police sent depicted an unaltered picture of an adult.

At best, Harris agreed to meet with an adult woman to talk and get to know one another. CP 126. Viewing the evidence in the light most favorable to the State, the State failed to prove beyond a reasonable doubt, that Harris attempted to have sexual contact with a minor. Rather, the result he intended to accomplish – to have sex with the woman in the photo – was not a crime.

a. The State Failed to Prove That Harris Took A Substantial Step Toward Attempted Rape in the Third Degree

Harris agreed to meet Vincent in a public place where they could not have sex and when Vincent was not there he left. Harris was at the Starbucks to meet the woman depicted in the photograph who is in fact an adult.

When determining whether there is sufficient evidence to support a substantial step, this Court reviews the evidence in the light most favorable to the State. The evidence is sufficient if any rational trier of fact could have found the elements of the crime

beyond a reasonable doubt. *Townsend*, 147 Wn.2d at 679; *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).

Mere preparation to commit a crime does not amount to a substantial step sufficient to establish an attempt unless the person's conduct is “strongly corroborative of the actor's criminal purpose.” *Townsend*, 105 Wn. App. at 631–32, (citing *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978) (quoting Model Penal Code § 5.01(2))); see *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

A substantial step in an attempted rape of a child case may include “enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission[]” where the intended victim is not in fact an adult. *Townsend*, 105 Wn. App. at 631–32, quoting *Workman*, 90 Wn.2d at 451-52, n.2 (quoting Model Penal Code § 5.01(2)(b)).

Townsend took a substantial step when he discussed sexual topics with Amber, who was a **fictional** character, made arrangements to meet Amber at a motel room, confirmed his intent to have sex with her both the night before and one hour before their planned meeting, and he went to the motel at the appointed time

and asked for Amber. *Townsend*, 147 Wn.2d at 670-71. Similarly, Patel took a substantial step when he had a sexually explicit conversation with a **fictional** character online, he agreed to meet the girl at her apartment for sex, he arrived at the apartment, and he knocked on the door. *Patel*, 170 Wn.2d at 478.

When Vincent first told Harris she was 14, Harris did not terminate the conversation because he only wanted to chat and he requested they “keep it civil.” Harris even warned her of the danger of trying to meet men on Craigslist. The conversation did not turn sexual until Givens sent Harris a picture of an adult woman.

Here, unlike *Townsend* and *Patel*, Harris did not entice Vincent to go to a place to have sex. Rather, Harris and Vincent agreed to meet in a Starbucks to talk and did not meet in a hotel to have sex. Also, the photograph of the person identified as Vincent is a real adult. If Harris ultimately hoped to have consensual sex with this person as alleged by the State, Harris could not be guilty of the crime charged because the woman depicted is in fact an adult.

Also, Harris left when Vincent was not at the Starbucks. This is evidence that Harris abandoned his wish to meet with Vincent.

The State also argued the box of condoms and the text message Harris sent while waiting at Starbuck, strongly corroborated his intent to have sexual intercourse with Vincent. RP 39-40, 384, 504-05. However, hoping to have sex with an adult and possessing condoms does not establish beyond a reasonable doubt that Harris took a substantial step toward attempted rape of a child. Exhibit 2 at 52-53.

When viewed in the light most favorable to the State, the evidence fails to establish beyond a reasonable doubt that Harris took a substantial step toward attempted rape of a child. Therefore, this Court must remand for reversal of the conviction.

2. HARRIS' DUE PROCESS RIGHTS WERE VIOLATED BY THE POLICE FAILING TO ADHERE TO ICAC STANDARDS.

a. Violations of the ICAC Standards Manual

Section 6.1 of the ICAC Standards makes it clear the task force is not permitted to target potential offenders at random. CP 169. (Commanders and supervisors are responsible for determining investigative priorities and selecting cases for investigation, which must include an assessment of victim risk, jurisdiction, known offender behavioral characteristics, and the likelihood of securing

the information necessary to pursue each investigation).

Rather, the purpose of the ICAC Task Force Program is to “develop an effective response to technology-facilitated child sexual exploitation and Internet crimes against children.” CP 164. The task forces are “engaged in both proactive and reactive investigations...” CP 165. In other words, the purpose is to prevent or stop a crime, not to instigate one.

The ICAC Standards Manual sets forth guidelines to prevent instigating a crime by requiring officers to allow the investigative target to set the tone, pace, and subject matter of the online conversation. CP 172, ICAC Standards at 8.6. Givens violated this standard by repeatedly steering Harris toward a sexual explanation for his comment that he would give Vincent attention.

Even though it is permissible to use a visual depiction of an adult employee when he or she was under the age of 18, Givens used a picture of an adult woman in her twenties. See CP 171, ICAC Standards at 8.5. This did not accurately reveal Harris’ disposition. Instead, Harris was arrested, convicted, and sentenced for pursuing sexual intercourse with another adult.

Congress mandated compliance with the ICAC Standards

under federal law when it statutorily authorized the ICAC program in 2008. See Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (the "PROTECT Our Children Act"), Pub.L. 110-401, § 1(a), Oct. 13, 2008, 122 Stat. 4229; 42 USC § 17601, et seq. Transferred to 34 U.S.C.A. § 21101 (West 2017).

The Attorney General of the United States must "set forth" national standards regarding the investigation and prosecution of Internet crimes against children. 42 USC § 17614(11), Transferred to 34 U.S.C.A. § 21114 (11) (West 2017). Participating agencies must either establish investigative and prosecution standards, consistent with the established norms, or adopt the U.S. Attorney General's standards, to which each task force shall comply. 42 USC § 17614(7) Transferred to 34 U.S.C.A. § 21114 (7) (West 2017). The Vancouver Police Department adopted the U.S. Attorney General's standards laid out in the ICAC Standards Manual. CP 177.

Because the ICAC Standards are mandated by federal law, the court has a duty to enforce them. *United States v. Caceres*, 440 U.S. 741, 749 (1979). In *Caceres*, the court did not enforce the IRS

regulation because the regulations were a voluntary creation of the agency. *Caceres*, 440 U.S. at 749-50.

Here, unlike in *Caceres*, the ICAC Standards are not a voluntary creation of any agency or any individual task force – they are mandated by Federal law. Therefore, a violation of the ICAC Standards is a violation of due process. The remedy for violation of due process is dismissal of the defendant's conviction. See *State v. Lively*, 130 Wn.2d 1, 27, 921 P.2d 1035 (1996) (Supreme Court reversed the Defendant's conviction because the government conduct violated the principles of due process).

Here, Givens' noncompliance with the ICAC Standards Manual resulted in Harris' arrest and conviction for an act that is not a crime – attempting to have sex with an adult women. This investigation did not support proper law enforcement objectives of preventing internet crimes against children. Nor did it protect any victim. Givens' noncompliance with the ICAC Standards violated the principles of due process. Therefore, Harris' convictions must be reversed. *Lively*, 130 Wn.2d at 27.

b. Police Conduct Violated Due Process

Givens' conduct deprived Harris of his right to due process

because Givens instigated and encouraged participation in a crime instead of preventing one. Whether the State has engaged in outrageous conduct is a matter of law reviewed de novo. *Lively*, 130 Wn.2d at 19 (citations omitted).

Police conduct violates due process when the conduct shocks the universal sense of fairness. *Lively*, 130 Wn.2d at 19 citing *U.S. v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637 (1973). Such a violation of due process requires reversal of the conviction. *Lively*, 130 Wn.2d at 27.

The defendant need not prove a separate constitutional violation. Instead, the reviewing court evaluates the police conduct based on the “totality of the circumstances.” *Lively*, 130 Wn.2d at 21-22 (citing *United States v. Tobias*, 662 F.2d 381, 387 (1981), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908 (1982)). Each component of the conduct must be scrutinized bearing in mind “proper law enforcement objectives—the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness.” *Lively*, 130 Wn.2d at 21-22 (citing *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y.1978)). When evaluating the totality of the

circumstances, the court considers:

1. whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity
2. whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation;
3. whether the government controls the criminal activity or simply allows for the criminal activity to occur;
4. whether the police motive was to prevent crime or protect the public; and
5. whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

Lively, 130 Wn.2d at 22 (citations for federal law omitted). The ICAC Standards Manual mirror the criteria set forth in *Lively*, for determining if the police violated due process. *Lively*, 130 Wn.2d at 22.

In *Lively*, the defendant met the police informant, Desai, at an AA/NA meeting, where she sought treatment, *Lively* had no criminal history, and she was targeted for a sting operation related to drug sales, prior to any discussion regarding the sale of illegal narcotics. *Lively*, 130 Wn.2d at 24, 27. The Court reversed holding that under these circumstances the police conduct was so outrageous it amounted to a due process violation. *Lively*, 130

Wn.2d at 27.

Here, the police instigated this crime by posting the ad in the adult section of Craigslist, which violated Craigslist rules. When Craigslist discovered this violation, it flagged and removed the conversation. When Givens realized what happened, he suggested the conversation continue in private, sent Harris a photo of an adult woman, and steered the conversation toward sex. Harris went to the adult section of Craigslist, where he reasonably expected to talk with an adult.

When the ad mentioned school, he assumed it was college. When Vincent told him she was 14, he requested they “keep it civil”. And later, after he received the picture, he expressed doubt that she really was 14. It is clear Givens did not infiltrate ongoing criminal activity. Harris was on Craigslist to engage with an adult, not a minor.

In fact, Harris expressed his reluctance to commit a crime when he requested he and Vincent keep the conversation civil. To overcome this reluctance, Givens sent Harris a picture of an adult woman and purported it was Vincent. When the conversation did not turn sexual, Vincent persistently inquired about what kind of

attention Harris would give her. When Harris suggested he and Vincent go somewhere and chat, Vincent stated she wanted to know about “the other stuff 1st” CP 126. Givens pursued Harris in the same manner that the police impermissibly pursued *Lively*. *Lively*, 130 Wn.2d at 27.

Givens controlled the criminal activity by suggesting the conversation continue in private after Craigslist flagged and removed the conversation, by sending a picture of an adult woman, and by choosing the meeting place. Here, similar to *Lively*, Harris was targeted prior to any discussion regarding sexual intercourse with a minor, he had no criminal history involving a sex offense, and every facet of the investigation was a complete fiction that existed only in the mind of the ICAC investigator, Givens. Under *Lively*, and the due process clause, this Court must reverse and remand for dismissal with prejudice.

E. CONCLUSION

Harris intended to meet with the adult woman in the picture Givens provided. Even if Harris hoped to have sexual intercourse with this adult, Harris would not have committed a crime. Therefore, Harris’ conviction for attempted rape of a child in the third degree

must be reversed. Detective Givens also violated the ICAC Standards, which provide due process requirements for ICAC sting operations. Therefore, Harris' conviction of Communicating with a minor for an immoral purpose and rape of a child in the third degree must be reversed.

DATED this 11th day of January 2018.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov and Joshua Harris, 20777 Indian Drive Paris, MI 49338 a true copy of the document to which this certificate is affixed on January 11, 2018. Service was made by electronically to the prosecutor and Joshua Harris by depositing in the mails of the United States of America, properly stamped and addressed.



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