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Court of Appeals
Division II
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No. 52594-1-II

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

STATE OF WASHINGTON, Respondent

v.

GABRIEL GARCIA, Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE JUDGE JAMES J. DIXON

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

Mr. Garcia incorporates the assignment of errors presented in appellant's opening brief.

II. STATEMENT OF FACTS

Mr. Garcia incorporates the statement of facts presented in appellant's opening brief and adds additional facts as necessary for argument.

In the State's response, it quotes Mr. Garcia as saying he brought condoms. (Br. of Resp. at 14). However, the testimony from law enforcement was there were no condoms. 6/19/18 RP 66. Mr. Garcia testified that he did not bring condoms. 6/20/18 RP 411.

III. ARGUMENT IN REPLY

A. The Evidence Is Insufficient To Sustain A Conviction For Attempted Rape of A Child In The First Degree.

Whether conduct constitutes a substantial step is a question of fact. *State v. Billups*, 62 Wn. App. 122, 126, 813 P.2d 149 (1991). To constitute a substantial step, the conduct must go *beyond* mere preparation. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

In its response, the State likens the present case to three cases which unequivocally demonstrate the defendant had gone far beyond mere preparation and had taken substantial steps to complete the crime. (Br. of Resp. at 26-28). The State also cites two unpublished cases, which are of little assistance to this Court. (Br. of Resp. at 28).

It is the *lack* of similarity of facts that should instruct this Court to find the evidence insufficient to sustain the conviction in this case.

The State likens the facts in this case to those in *State v. Wilson*, 158 Wn. App. 305, 242 P.3d 19 (2010). The *Wilson* Court held “in order for conduct to comprise a substantial step, it must be strongly corroborative of the defendant’s criminal purpose.” *Id.* at 316. Unlike Mr. Garcia, the defendant’s actions demonstrated his intent to have “oral and full sex” with the fictitious child. The defendant agreed to a price of 300 dollars and arranged a meeting place. The defendant’s conduct went beyond words. The Court found he took substantial steps toward committing a crime because he not only brought the money to the meeting place, but he also sat in his car for 30 minutes waiting for the rendezvous. *Id.* at 317-318. His intent to commit the crime was made blatant by his actions.

By contrast, here Mr. Garcia specifically wrote in an email that he had no intention of engaging in sexual activity on the day he was arrested. He did not bring condoms, despite the fictitious mother instructing him to bring them. Most importantly and definitively, Mr. Garcia *did not stop at the apartment house*. Rather, at the direction of the lead investigator, the police officer saw Mr. Garcia drive by and conducted a stop. Mr. Garcia never went to the apartment complex door.

The facts in *Townsend*, a 2002 case, also differ from those in the current case. *Townsend*, 147 Wn.2d at 679. As in *Wilson*, the issue was whether the defendant's actions demonstrated intent to commit the charged crime. The Court found Townsend's conduct was "strongly corroborative" of his intent because arrangements were made to meet at a motel, Townsend sent the equivalent of an instant message an hour before they were to meet, again stating his intent to have sex with the fictitious 13 year old. *Id.* at 671. Most importantly, beyond mere words, Townsend went to the motel and knocked on the door of the room where she was supposed to be staying. *Id.* Again, the facts are dissimilar to the current matter: Mr. Garcia's conduct was not strongly corroborative of a criminal purpose. He said he did *not* intend to have sex with the fictitious

child, he did *not* bring condoms, and he did *not* stop at the apartment house.

Finally, the State cites to *Sivins*. *State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007). There, the defendant engaged in graphic sex talk over the internet with someone he thought was 13 years old. He mailed her a vibrator for her birthday. *Id.* at 57. He told her he would have sex and would provide her with pizza and vodka. *Id.* at 65. Beyond the talk and promises, which is insufficient to establish a substantial step toward committing the crime, *Sivins* drove five hours to a motel and booked a room for them. Although items found in the hotel room had been suppressed at a hearing, the trial court told the jury that *Sivins* brought “condoms, lubricant, alcohol, and other items to the room.” *Id.* at 60. The Court relied on those items, *Sivins* act of booking a motel room and waiting in the room as behaviors strongly corroborative of his intent. *Id.* at 64.

Unlike *Sivins*, *Townsend*, and *Wilson*, Mr. Garcia never even parked his car in the apartment complex, and certainly did not go to the trap apartment. Mere preparation to commit a crime is not a substantial step. *Sivins*, 138 Wn. App. At 65. And words, without more, are insufficient to constitute an overt substantial step toward

committing a crime. *State v. Grundy*, 76 Wn. App. 335, 337, 886 P.2d 208 (1994).

Even taken in the light most favorable to the State, the evidence here is insufficient to prove the elements of the crime beyond a reasonable doubt. Where the evidence is insufficient, the conviction must be reversed and vacated. *State v. Hickman*, 135 Wn.2d 97, 103, 95 P.2d 900 (1998).

B. The State's Argument That The Washington State Patrol Did Not Engage In Outrageous Misconduct Is Unpersuasive.

The State's response brief argues, "...the record made it clear that the government merely infiltrated the already existing world of child sexual exploitation by putting an ad on Craigslist. (Br. of Resp. at 41). This is inaccurate at best. The State Patrol used a vague Craigslist advertisement to attract readers into exchanging lurid emails about child sexual abuse. The scheme, "Net Nanny", used fictitious mothers who wanted to involve others in sexual activity with their fictitious children. Net Nanny operations did not involve real children, and there is no evidence a single missing or exploited child was rescued as a result of these stings.

Without a single identified target, the operation hinged on an individual answering an ad offering some type of adult sexual play,

and law enforcement deliberately steering the conversation to child sexual abuse.

Mr. Garcia had no prior convictions, and there was no substantial evidence he had engaged in some network of child sexual exploitation. Mr. Garcia was lonely and vulnerable, and as a result of this luring activity by the Washington State Patrol, funded by a third-party private organization, Mr. Garcia was convicted of a crime.

The State argues, “[H]ere, the trial court meticulously considered the *Lively* factors in concluding that Garcia had failed to demonstrate outrageous governmental misconduct” (Br. of Resp. at 39). The trial court’s application of *Lively* was incorrect and its denial of his motion to dismiss was error.

First, outrageous conduct is founded on the notion that the conduct of law enforcement officers may be “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain the conviction. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). The focus in this analysis is on the State’s behavior, not an accused’s predisposition to commit an offense. *Id.* at 22. Here, the court’s conclusion that the

overall police motive was to prevent crime and to protect the public is not well-founded.

The State agrees the “MECTF is ‘aimed at finding and recovering sexually exploited children and apprehending child predators.’” (Br. of Resp. at 39). The government conduct is outrageous because the Net Nanny operation did no such thing. Rather, it created opportunity for citizens with no criminal record to respond to a vague ad about adult sexual play and to become ensnared in talking about sexual abuse of children which did not even exist.

Additionally, the State argues the trial court reasoned that dismissal was not appropriate because “no Washington case has applied the doctrine of outrageous conduct to a funding issue.” (Br. of Resp. at 41). The plain language and reading of RCW 13.60.110(4) authorizes only the Washington State Patrol Chief to seek contributions for the missing and exploited children task force. This is a logical restriction and sound policy because, as here, the funds were directly solicited by a detective, who not only directed those funds to his own task force operations, but personally benefited from overtime pay because of those funds.

The disturbing facets of this funding formula also include the private group, OUR, publicized its relationship with the State Patrol, and benefited from even more donations being made. Additionally, the entire Net Nanny scheme was not to designed target specific individuals or ongoing criminal conduct. The government conduct demonstrated a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior.

The crime was initiated and controlled by law enforcement. They used fictitious personas and the fictitious children were given certain ages to raise the crime to, as in this case, a Class A sex offense. The *Lively* factors support a finding in Mr. Garcia's favor.

Finally, the State has relied on RCW 43.43.035 to justify the violation of RCW 13.60.110(4) as if it alters or somehow explains away the restriction the legislature placed on seeking funding. It does not. Under RCW 13.60.110(4) the legislature authorized only the Chief of the Washington State Patrol to seek funding.

The State has not addressed the trial court's reliance on RCW 70.77.250. The trial court wrongly relied on that statute, which explicitly authorizes the Chief to enforce and administer statutes

and duties through the director of fire protection¹. The trial court's conclusion was erroneous, because neither 70.77.250 or 43.43.035 RCW are legal justifications for Detective Rodriguez's seeking and accepting donations from OUR. ("Our Underground Railroad"). The detective clearly violated RCW 13.60.110(4).

C. The States Argument That It Did Not Violate Mr. Garcia's Right To Due Process By Conditioning Its Plea Offer Is Unconvincing.

Prosecutors have broad discretion whether to enter into plea bargaining, but that discretion may not be exercised in a manner

¹ (1) The chief of the Washington state patrol, through the director of fire protection, shall enforce and administer this chapter.(2) The chief of the Washington state patrol, through the director of fire protection, shall appoint such deputies and employees as may be necessary and required to carry out the provisions of this chapter.(3) The chief of the Washington state patrol, through the director of fire protection, shall adopt those rules relating to fireworks as are necessary for the implementation of this chapter.(4) The chief of the Washington state patrol, through the director of fire protection, shall adopt those rules as are necessary to ensure statewide minimum standards for the enforcement of this chapter. Counties and cities shall comply with these state rules. Any ordinances adopted by a county or city that are more restrictive than state law shall have an effective date no sooner than one year after their adoption. (5) The chief of the Washington state patrol, through the director of fire protection, may exercise the necessary police powers to enforce the criminal provisions of this chapter. This grant of police powers does not prevent any other state agency and city, county, or local government agency having general law enforcement powers from enforcing this chapter within the jurisdiction of the agency and city, county, or local government.(6) The chief of the Washington state patrol, through the director of fire protection, shall adopt rules necessary to enforce the civil penalty provisions for the violations of this chapter. A civil penalty under this subsection may not exceed one thousand dollars per day for each violation and is subject to the procedural requirements under RCW 70.77.252(7) The chief of the Washington state patrol, through the director of fire protection, may investigate or cause to be investigated all fires resulting, or suspected of resulting, from the use of fireworks.

that constitutes a violation of due process rights. In *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003).

The State argues that this case is analogous to *State v. Shelmidine*, 166 Wn. App. 107, 269 P.3d 362 (2012). The argument is misplaced. In *Shelmidine*, the State conditioned a plea offer on the defendant not learning the confidential informant's identity. The Court found defense counsel received extensive significant information about the State's case, the informant's criminal and drug abuse history, the contracts between the informant and law enforcement, and included police reports. The only information withheld was the informant's identity. The Court found there was a legitimate interest in protecting the identity of the informant. *Id.* at 115.

The Court specifically noted: "defense counsel *could have interviewed the investigative officers* and the known eyewitness to the alleged transaction." *Id.* at 113. There was sufficient evidence to reasonably evaluate the evidence and effectively assist the defendant in making an informed decision as to whether to plead guilty. *Id.* at 114.

Here, the only State interest in conditioning the offer was not inconveniencing the State to assist in arranging interviews of the

officers who initiated and directed the Net Nanny scheme. (Br. of Resp. at 35-36). This is not a legitimate State interest. The State cites to an unpublished case for the proposition that the State can condition an offer on defense counsel not interviewing witnesses in sexual assault cases. The case has no legal precedential authority, and the State interest in preventing interviews of sexual assault victims is not transferred to preventing interviews police officers. (Br. of Resp. at 36). They are different.

The State cites to a second unpublished case, *State v. Leonard*, 195 Wn. App. 1011 (2016 WL 3965988) for the proposition that a restriction on *when* an offer must be accepted did not infringe on the right to effective assistance of counsel. (Br. of Resp. at 36). Again, this case has no legal precedential authority, but more importantly, the issue was whether defense counsel had had sufficient time to investigate the matter before the State withdrew its offer.

The Court noted defense counsel had the arresting officer's affidavit of facts, had subpoenaed and received records relating to special police commissions, and was able to obtain a recording of a Crime Check call. Most importantly, "Defense counsel could have also interviewed the arresting officer." *Id.* at *6.

“[A] defendant’s counsel cannot properly evaluate the merits of a plea without evaluating the State’s evidence.” *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). Where counsel has not reasonably evaluated the State’s evidence against the accused the result is ineffective assistance of counsel. *Id.*

There was no legitimate State interest in precluding Mr. Garcia’s attorney from conducting any investigation involved in the Net Nanny scheme. Dismissal must be the remedy.

IV. CONCLUSION

Based upon Mr. Garcia’s argument in his opening brief and in this brief, this Court should reverse his conviction and sentence and remand for further proceedings.

Respectfully submitted this 4th day of March 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on March 4, 2020, I mailed to the following US Postal Service first-class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to Thurston County Prosecuting Attorney at paoappeals@co.thurston.wa.us and to Gabriel Garcia/DOC#408992, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

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Comments:

Correction made to Argument C ("not" added). Please disregard the previously filed reply. My apologies.

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