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NO. 36006-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

YURIY GULCHUCK,

Appellant.

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

The Honorable Alexander Ekstrom, Judge
The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Appellant of attempted second degree child molestation.

2. The \$200 criminal filing fee and \$100 DNA fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to convict Appellant of attempted second degree child molestation when it shows Appellant engaged in acts constituting negotiations and preparation to commit second degree child molestation but expressly abandoned the plan before taking a substantial step?

2. Under the Supreme Court's recent decision in State v. Ramirez,¹ must the criminal filing fee and DNA fee be stricken?

B. STATEMENT OF THE CASE

The Benton County Prosecutor charged Appellant Yuriy Gulchuk with attempted second degree rape of a child. CP 1-2. The charges arose July 7, 2017, after Gulchuk exchanged electronic messages with undercover officers who were pretending to be a 13-year old girl soliciting older men to have sex, and then partially followed the officers' direction

¹ State v. Ramirez, ___ Wn.2d ___, ___ P.2d ___, 2018 WL 4499761 (September 20, 2018).

to come to the “girl’s” apartment to have sex, but abandon that effort before going to the apartment. There were no actual children involved. CP 3-4.

Pretrial, Gulchuk’s counsel filed a motion to dismiss the charge. CP 5-20. Gulchuk argued the evidence was insufficient to convict because it affirmatively shows he abandon any plan to have sex with the fictitious 13-year old girl before taking a substantial step towards committing that crime. CP 5-20.

The prosecution filed a response. *CP 97-117.*² The prosecution argued the motion should be denied because the act of not only communicating with the fictitious 13-year old girl, but also following her directions to two predetermined locations before abandoning his plan to meet the girl constitutes a substantial step towards committing second degree child rape. Id.

Gulchuk filed a reply to the prosecution’s response. CP 21-29. Gulchuk argued his actions constituted mere “preparation” and not a “substantial step” because he never went to the apartment where the fictitious girl was supposed to be, and he had nothing in his possession

² These are the Clerk’s Papers index numbers counsel anticipate the Benton County Superior Court Clerk to assign to Sub no. 28, Certificate of Counsel in Response to Defense CrR/CrCLJ 8.3(c) *Knapstad* Motion to Dismiss, filed 01/16/18. A supplemental designation of Clerk’s Papers was filed October 16, 2018, designating this document for appeal.

when he was stopped that indicated an intent to engage in sexual activity with anyone. Id.

A hearing on the defense motion was held January 17, 2018, before the Honorable Judge Alexander Ekstrom. 1RP 4-18.³ After reading the briefs and hearing argument from the parties, Judge Ekstrom denied the motion. 1RP 5-17. Although not entirely clear, Judge Ekstrom's oral ruling notes there is clear evidence of Gulchuk's intent to engage in sex with a 13-year old girl. 1RP 15. The issue for the court was whether Gulchuk's decision to disengage and drive away precluded finding the evidence was sufficient to find a "substantial step" towards committing a second degree child rape. 1RP 15-16. In this regard the court held,

But here, I don't believe that an individual not doing some of the things that they said, bringing some of the items that are requested – and here not clearly promised, but just requested – defeats on Knapstad the ability to find a substantial step; nor does, shall we say either cold feet or a concern of discovery under Knapstad defeat substantial step evidence.

1RP 16.

Gulchuk filed a motion to reconsider. CP 30-41. Attached to the motion is a copy of a ruling from another case, State v. Best, Snohomish

³ There are two volumes of verbatim report of proceedings referenced herein as follows: 1RP – 1/17/18; and 2RP – 2/14/18 & 3/28/18.

County No. 16-1-00594-7, in which the court granted a Knapstad motion on similar facts. CP 34-41.

The court denied the motion to reconsider in a written ruling. CP 42-44. The court concluded that whether Gulchuk's actions constituted a "substantial step" under the circumstances was a question for the finder of fact. CP 43.

The prosecution subsequently amended the charges to one count of attempted second degree child molestation and one count of communicating with a minor for immoral purposes. CP 48-49. Gulchuk pled guilty to these charges, agreeing the court could review the police reports to find a factual basis for the pleas. CP 50-62; 2RP 9. The court accepted Gulchuk's pleas. 2RP 9.

At sentencing, Gulchuk was ordered to pay a \$200 criminal filing fee and a \$100 DNA fee. CP 81. Following entry of judgment and sentence, defense counsel moved for an order of indigency because Gulchuk fell below the poverty guidelines under RCW 10.101.010 and federal law. CP 93-94. The trial court found Gulchuk to be indigent and lacking sufficient funds to prosecute an appeal. CP 95-96. Gulchuk appeals. CP 92.

C. ARGUMENTS

1. THE EVIDENCE WAS INSUFFICIENT TO FIND GULCHUK TOOK A SUBSTANTIAL STEP TOWARDS COMMITTING 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 guilty plea, the appellate court on review determines whether there is a factual basis for the plea. “[A] factual basis exists if there is sufficient evidence for a jury to conclude that the defendant is guilty.” State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). 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).

Gulchuk’s conviction for attempted second degree child molestation cannot stand unless there was a factual basis to conclude 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, Gulchuk contemplated having sexual contact with a fictitious 13-year old girl. Even if the evidence established Gulchuk intended to commit the crime, the facts do not establish Gulchuk’s conduct crossed that amorphous line between preparation and a substantial step.⁴

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

⁴ Currently pending before the Washington Supreme Court is a petition for review of the unpublished decision in State v. Best, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018), which dealt with an issue similar to that raised by Gulchuk. Petitioner Best argues the Supreme Court should accept review to clarify the murky area of the law regarding “mere preparation” and “substantial step.” The Supreme Court cause number is 96002-0.

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 Gulchuk engaged in any of the above listed conduct. At most, his going to first of two predetermined locations as directed by the fictitious 13-year old girl 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. That Gulchuk ultimately declined to go to the next and final meeting

spot shows that he was initially undecided about committing the contemplated acts, and ultimately decided not to commit those acts, whether it was because he had a moral epiphany or instead out of fear of being caught, the record shows Gulchuk abandon any plan to meet with the fictitious 13-year old girl. At most, Gulchuk engaged in a series of negotiations with the fictitious girl about potentially meeting up to have sex.

Engaging in 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, Gulchuk ultimately declined to take the final step to meet the fictitious 13-year old girl, despite their prior discussion. Those discussions, and Gulchuk following directions to first go to one location, and then another is akin to a meeting to negotiate the possible commission of the crime, and if the negotiation failed Gulchuk could refuse to meet up, which is just what he did. Viewed in a light most favorable to the State, Gulchuk’s act of going to the first location and then the next, but never getting out to approach the apartment cannot be reasonably construed as a substantial

step towards committing the crime. Gulchuk's abandonment of the plan to meet shows he was still in the preparatory stage of committing a 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 Gulchuk took a "substantial step" towards committing second degree child molestations.

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 detective posing as a woman named "Jackie", who 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 Wilson, Townsend, and Sivins, Gulchuk 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, Gulchuk had no money on him when arrested despite the fictitious 13-year old girl stating she wanted a "donation" from him when they met. CP 19. Gulchuk also did not have any condoms in his possession up arrest, despite the girl also stating they were needed. Id. Unlike in Wilson and Townsend, Gulchuk did not admit he intended to have sexual contact with the child. In sum, a comparison between the

evidence in the above cases and this case shows the evidence in this case was insufficient to support Gulchuk's conviction because it fails to show he took a substantial step, and instead shows only mere preparation.

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 Gulchuk attempted to commit second degree child molestation because the State failed to prove 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).

2. THE \$200 FILING FEE AND \$100 DNA FEE MUST BE STRICKEN BASED ON INDIGENCY.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending appeal. Ramirez, WL 4499761 at *3, 6-8.

HB 1783 "amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, at *6 (citing LAWS of 2018, ch.

269, § 6(3)); see also RCW 10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."). Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 also amends RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Gulchuk is indigent under RCW 10.101.010(3). CP 93-96. Because HB 1783 applies prospectively to his case, the sentencing court similarly lacked authority to impose the \$200 filing fee.

The \$100 DNA fee also must be stricken. HB 1783 amends RCW 43.43.7541 to read, "Every sentence imposed for a crime specified in

RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, at *6.

RCW 43.43.754(1)(a) requires collection of a biological sample for purposes of DNA identification analysis from every adult or juvenile convicted of a felony or certain other crimes. Gulchuk has two previous felony convictions. CP 68. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a).

Because Gulchuk's DNA sample was previously collected, the DNA fee in the present case is no longer mandatory under RCW 43.43.754. The fee is discretionary. And, under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The sentencing court lacked authority to impose the \$100 DNA fee.

D. CONCLUSION

This Court should strike the \$200 filing fee and \$100 DNA fee.

DATED this 23rd day of October, 2018.

Respectfully submitted,

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