

FILED
Court of Appeals
Division III
State of Washington
12/20/2018 3:20 PM

No. 36006-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

YURIY LEONIDOVICH GULCHUK,

Appellant

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

NO. 17-1-00781-5

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF FACTS	1
A. Timeline of procedural history.....	1
B. Substantive facts	4
III. ISSUES	5
IV. ARGUMENT	6
A. The defendant’s guilty plea should bar consideration of whether the evidence was sufficient to find him guilty	6
1. The State assumes that the defendant is appealing Judge Ekstrom’s acceptance of his guilty plea on February 14, 2018	6
2. This Court should decline consideration of the appeal based on RAP 2.5 and general caselaw on the effect of guilty pleas.....	8
B. Based on the facts before the trial court, there was sufficient evidence to accept the defendant’s guilty plea	10
1. Standard on review	10
2. In the light most favorable to the State, the defendant asked to have sex with a 13-year- old girl, repeatedly asked to meet her for this purpose, went to two different locations to try to meet the girl, fled when he saw unmarked police vehicles, and lied about a third person	

hacking his cell phone. That is sufficient for a rational jury to convict	10
a. Standard regarding attempted crimes and substantial step	10
b. The defendant's behavior was strongly corroborative of his intent to have sex with a 13-year-old girl.....	12
C. The \$100 DNA fee and the \$200 filing fee should be stricken.....	16
V. CONCLUSION.....	16

TABLE OF AUTHORITIES

WASHINGTON CASES

In Matter of Hews, 108 Wn.2d 579, 741 P.2d 983 (1987).....8
In re Reise, 146 Wn. App. 772, 192 P.3d 949 (2008).....9
State v. Amos, 147 Wn. App. 217, 195 P.3d 564 (2008)7
State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996).....10
State v. Best, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018)14
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....10
State v. Grundy, 76 Wn. App. 335, 886 P.2d 208 (1994)..... 13-14
State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993)11
State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).....2
State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008)9
State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980).....8
State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006)9
State v. Saas, 118 Wn.2d 37, 820 P.2d 505 (1991).....9
State v. Sivins, 138 Wn. App. 52, 155 P.3d 982 (2007).....13
State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002).....13
State v. Wilson, 158 Wn. App. 305, 242 P.3d 19 (2010)13
State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).....11

WASHINGTON STATUTES

RCW 9.94A.507.....2
RCW 9A.28.020 (3)(a)2
RCW 9A.28.030 (3)(c)2

REGULATIONS AND COURT RULES

CrR 4.2 (d)10
RAP 2.5 (a)8, 17
RAP 2.5.....6

OTHER AUTHORITIES

MODEL PENAL CODE § 5.01 (AM. LAW INST., Proposed Official Draft 1962)11

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Procedurally, this Court should decline to address whether the trial court properly accepted the defendant's guilty plea. He has not moved for withdrawal of his plea and has not claimed any misunderstanding or error in the sentence.
- B. Substantively, there was sufficient evidence for the trial court to accept his plea.
- C. The filing fee and DNA fee should be stricken.

II. STATEMENT OF FACTS

A. Timeline of Procedural history

July 7, 2017: Police post an ad on Craigslist titled, "young looking for older daddy-w4m." The body of the ad states, "I am young looking for older daddy to take care of this young baby girl. Be real. Be nice, your pic gets mine. Let's get lit! I have a daddy fetish and love to take showers, very clean. Let's talk. DDF. STILL LOOKING." CP 104.

The defendant responded to that ad at 4:16 P.M. *Id.*

July 7-9, 2017: The defendant engaged in sexually charged texts with the supposed 13-year-old. CP 105-09. See Appendix A.

July 9, 2017: Date of alleged offense. CP 1.

July 12, 2017: The defendant was charged with Attempted Rape of a Child in the Second Degree, with an alleged offense date of July 9, 2017.

CP 1. This is a class A felony subject to an indeterminate sentence with a maximum of Life. RCW 9A.28.020 (3)(a), RCW 9.94A.507.

October 11, 2017: The defendant files a motion to dismiss the charge under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing there were not sufficient facts to prove the defendant attempted to have sex with a 13-year-old. CP 5-20.

January 17, 2018: The motion is heard and denied by the Honorable Alexander C. Ekstrom. RP 01/17/18 at 16.

February 5, 2018: Judge Ekstrom denies a Motion to Reconsider. CP 42-44.

February 14, 2018: The State files an Amended Information charging Attempted Child Molestation in the Second Degree and Communication with a Minor for Immoral Purposes. CP 48-49. Note that Attempted Child Molestation in the Second Degree is a Class C felony, RCW 9A.28.030 (3)(c) and is not an indeterminate sentence. RCW 9.94A.507.

The defendant pleads guilty to the Amended Information, again before Judge Ekstrom. CP 50-62; RP 02/14/2018 at 3, 9. The defendant's standard range was 23.25 to 30.75 months on Count I, Attempted Child Molestation, and 9-12 months on Count II, Communication with a Minor. CP 79.

Among other things, Judge Ekstrom advised the defendant that he had the right to appeal a determination of guilt after a trial. RP 02/14/18 at 4. He advised the defendant he would lose the right to appeal the question of his guilt. *Id.* at 5. The defendant pleaded guilty to both counts. *Id.* at 9.

The Statement on Plea of Guilty states, “Instead of making a statement, I agree that the court may review the police reports, and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 59.

March 28, 2018: The defendant was sentenced by the Honorable Bruce A. Spanner on March 28, 2018. RP 03/28/2018 at 13. Both the prosecution and defense asked the Judge to impose a sentence of 30.75 months on Count I and 12 months on Count II, to be served concurrently. *Id.* at 14-15. The Court basically accepted this, although the defendant was sentenced to nine months on Count II. CP 82-83.

The defendant at sentencing said only, “I don’t have much to say. What happened did happen, and I’m asking forgiveness.” RP 03/28/2018 at 15.

April 25, 2018: The defendant filed a Notice of Appeal stating he sought review “of the judgment finding defendant guilty of Attempted Child Molestation in the 2nd degree and Communicating with a Minor for Immoral Purposes entered in Benton County Superior Court.” CP 92.

B. Substantive Facts

The text messages between the defendant and the supposed 13-year-old girl are attached in Appendix A.

Some of the key highlights are: The defendant thought he was texting with a 13-year-old girl. “Im 13, but I am all woman” CP 105. He wanted to have sex with her. Question from undercover officer: “so what are you going to do”? Answer from defendant: “Lick your p—— and wanna see your boobs.” CP 106. “F— you hard . . . F— your tight little p—— so deep and hard and make you squirt and cum.” CP 108.

The defendant wanted to meet her in person. “Where you staying”? “Where you at”? CP 106. “OK I’ll come over. Want you. You want to meet by Richland Fred Meyer? I do want you baby.” CP 107. “Who you live with sweetie? You wanna do In my car?” *Id.* “Can’t wait to see you.” *Id.*

The defendant agreed to meet the supposed 13-year-old. There was a discussion about a “donation.” CP 109. The “girl” stated, “are you going to have a donation. im pretty hungry.....my friend gets 100 to 120 for everything.” *Id.* The defendant responded, “I’ll pay how good you are sweetie.” *Id.* The “girl” and asked for “a bottom line...at least 20 or 30”. *Id.* The defendant did not commit: “I’ll let you know.” *Id.*

The “girl” also asked if he had condoms. He stated, “Yes I do.” *Id.*

“She” gave him instructions to go to a certain location, a car wash in Richland. *Id.*, CP 117. At least two undercover police officers, Officer S.T. Grant and Officer Jeff Muai, surveilled him at the car wash. CP 116-17. The defendant then texted that he was at the car wash across from the “girl’s” apartment. CP 109. The “girl” then sent the defendant a text with her specific apartment address. *Id.* Officers Grant and Muai then followed the defendant into the apartment complex. CP 116-17. He spent several minutes driving around the apartment, then texted “I have bad feelings” and left the complex. CP 109.

The defendant claimed that his phone had been hacked and that he had not sent the texts in Appendix A. *Id.* Prior to sentencing, the defendant changed his story. He admitted that he was texting with the individual but believed the person was over 18 years and that he fled the apartment complex after seeing two undercover police cars. CP 67-68.

III. ISSUES

- A. Should this Court decline to review the issue of the defendant’s guilt because he pleaded guilty, has not moved to withdraw his plea, claims no errors in his sentence, and has not claimed any misunderstanding of the facts?
 1. What decision of the trial court is the defendant appealing?

2. Assuming the defendant is appealing the acceptance of his guilty plea on February 14, 2018, would RAP 2.5 or the guilty plea itself affect consideration of his argument?
- B. Where a defendant engages in sexually charged text messages with a supposed 13-year-old girl, graphically asks to have sex with her, asks her address, goes to that address, but then flees after seeing undercover police cars and lies about another person hacking his cell phone, is there sufficient evidence to convict him of Attempted Child Molestation?
1. What is the standard on review?
 2. Did the facts before the trial court establish that a rational jury could convict the defendant?
- C. Should the \$100 DNA fee be stricken if there is no evidence that the defendant has submitted a DNA sample?

IV. ARGUMENT

- A. **The defendant's guilty plea should bar consideration of whether the evidence was sufficient to find him guilty.**
1. **The State assumes that the defendant is appealing Judge Ekstrom's acceptance of his guilty plea on February 14, 2018.**

Here, the assigned error is: "The evidence was insufficient to convict Appellant of attempted second-degree child molestation." Br. of

Appellant at 1. The argument section of the brief concludes that the State could not prove intent and a “substantial step”, therefore the conviction (for Attempted Child Molestation) cannot stand. *Id.* at 14. That sounds like a challenge to a conviction after a trial. But, the defendant pleaded guilty; he did not go to trial.

Further, a defendant who has pleaded guilty may raise a challenge to the factual basis for his guilty plea but cannot challenge the sufficiency of the evidence. *State v. Amos*, 147 Wn. App. 217, 195 P.3d 564 (2008). *Amos* is also not helpful to the defendant because in *Amos*, the defendant had moved to withdraw his guilty plea; the appeal was from the denial of the motion to withdraw the guilty plea.

The Notice of Appeal is also not helpful in determining the exact decision challenged. It cites “the judgment finding the defendant guilty of Attempted Child Molestation in the 2nd degree and Communicating with a Minor for Immoral Purposes entered in Benton County Superior Court.” CP 92. Is the appeal based not on the acceptance of the defendant’s guilty pleas to these charges before Judge Ekstrom on February 14, 2018, but on the entry of the Judgment and Sentence by Judge Spanner on March 28, 2018?

The defendant’s brief does not contest the conviction for Communication with a Minor for Immoral Purposes, which is not

consistent with the Notice of Appeal. Since the argument in the defendant's brief centers on the sufficiency of the evidence, the State will assume the alleged error is the acceptance of the guilty plea on February 14, 2018.

2. This Court should decline consideration of the appeal based on RAP 2.5 and general caselaw on the effect of guilty pleas.

Under RAP 2.5 (a) the appellate court may refuse to review any claim of error which was not raised in the trial court. A party may raise a claimed error for the first time on appeal if it is a 1) lack of trial court jurisdiction, 2) failure to establish facts upon which relief can be granted, and 3) manifest error affecting a constitutional right.

The establishment of a factual basis for a plea is not an independent constitutional requirement and is constitutionally significant only insofar as it relates to the defendant's understanding of his plea. *In Matter of Hews*, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987). A challenge to the factual basis to accept the plea does not affect a constitutional right. The defendant's argument should be declined under RAP 2.5 (a).

A guilty plea ordinarily constitutes a waiver by the defendant of his right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Generally, a valid guilty plea bars a collateral attack based on

newly discovered evidence as well as the facts supporting the conviction. *In re Reise*, 146 Wn. App. 772, 782, 192 P.3d 949 (2008). Exceptions may occur if there is a double jeopardy violation, *State v. Knight*, 162 Wn.2d 806, 811, 813, 174 P.3d 1167 (2008), or a miscalculation of the standard sentencing range. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

The defendant's brief cites one case, *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991), for the proposition that an appellate court on review determines whether there is a factual basis for the plea. Br. of Appellant at 6. However, in *Saas*, the appeal was based on a denial of the defendant's motion to withdraw his plea. *Id.* at 38-39. The defendant's appeal should also be rejected because he pleaded guilty with full knowledge that he would not be able to challenge whether the facts determined his guilt. RP 02/14/2018 at 4-5.

It is clear what happened procedurally. The defendant agreed to plead guilty if the prosecution would reduce the charge from a Class A felony with an indeterminate standard range. The prosecution did so, and the defendant pleaded guilty to two Class C sex offense felonies, with a standard range topping out at 30.75 months. The defendant was not confused about the plea bargain and was thoroughly advised of his rights

and the consequences of a guilty plea. He should not be allowed to try to further benefit by claiming some error in taking his plea.

B. Based on the facts before the trial court, there was sufficient evidence to accept the defendant’s guilty plea.

1. Standard on review

CrR 4.2 (d) requires that there must be a factual basis for the plea of guilty. In order to determine that a factual basis exists, the judge need not be convinced beyond a reasonable doubt that the defendant is guilty. It is sufficient for a jury to conclude that the defendant is guilty. *State v. Arnold*, 81 Wn. App. 379, 382, 914 P.2d 762 (1996). Evidence is sufficient to convict, if, after it is viewed in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. In the light most favorable to the State, the defendant asked to have sex with a 13-year-old girl, repeatedly asked to meet her for this purpose, went to two different locations to try to meet the girl, fled when he saw unmarked police vehicles, and lied about a third person hacking his cell phone. That is sufficient for a rational jury to convict.

a. Standard on review regarding attempted crimes and substantial step

There is no bright line rule that can be applied in cases involving “stings” — the use of undercover police officers posing as underage girls

and agreeing to have sex with adult men. “The question of what constitutes a ‘substantial step’ under the particular facts of the case is clearly for the trier of fact.” *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). When preparation ends, and an attempt begins, always depends on the facts of the case. *Id.* at 449-50.

A substantial step need not be an overt act, as long as it is behavior strongly corroborative of the actor’s criminal purpose. *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

Workman adopted the Uniform Model Penal Code’s guidelines for “Conduct that May be Held Substantial Step” under the attempt definition. *See* MODEL PENAL CODE § 5.01 (AM. LAW INST., Proposed Official Draft 1962). That code provides guidelines.

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, search 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;
- ...
- g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Id.

b. The defendant's behavior was strongly corroborative of his intent to have sex with a 13-year-old girl.

To review the evidence before the court prior to the defendant's guilty plea, the defendant responded to a Craigslist advertisement from a "young baby girl" "with a daddy fetish" on the same day it was posted. CP 104. He repeatedly and graphically told her he wanted to have sex with her. CP 106-08. He asked if she was at a hotel, where she was, asked to meet her by a department store, and asked if she "wanna do in my car?" CP 105-07.

He told the "girl" that he had condoms. CP 109. This was not true.

The "girl" directed him to a car wash near her apartment complex. *Id.* When the defendant arrived there, "she" gave him the apartment number. *Id.*

The defendant drove out of the apartment complex, and it is reasonable that he fled because he felt he was being surveilled. *Id.* Indeed, he was. CP 116-17. The defendant later admitted to the pre-sentence investigation (PSI) writer that was the exact reason. CP 68.

The defendant was arrested soon after leaving the apartment complex. CP 109. He claimed that his cell phone had been hacked and that he never responded to a Craigslist ad or sent the text messages to the "girl". CP 111. Of course, that is implausible given that the police tracked

him from the car wash to the apartment complex, and he gave his first name in the texts. The defendant later changed his story to the PSI writer. He dropped the idea that some third party was texting with the “girl”, but now the defendant claimed he believed she was an adult. CP 67.

Each attempted crime case must be reviewed on its own merits. However, generally Washington courts have affirmed convictions for attempted sex crimes with children as a result of an undercover sting operation. The defendants did not come into physical proximity with an actual child, but they did go to a prearranged meeting place after clearly expressing their desire to have sex with a child. *State v. Townsend*, 147 Wn.2d 666, 671, 57 P.3d 255 (2002); *State v. Sivins*, 138 Wn. App. 52, 56-58, 155 P.3d 982 (2007); *State v. Wilson*, 158 Wn. App. 305, 308-11, 242 P.3d 19 (2010).

Some differences could probably be found between all four of these cases (the case herein, *Townsend*, *Sivins*, and *Wilson*). However, this is the only case in which the defendant engaged in counter surveillance and lied about someone hacking his cell phone.

The defendant’s reliance on *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994) is misplaced. In *Grundy*, an undercover policeman (UC) was posing as a drug runner in an alley. He approached the defendant and asked what he wanted. The defendant said he “wanted 20...of coke.” *Id.* at

336. The UC asked the defendant if he had the money and the defendant responded, “Let me see it.” The defendant was then arrested. *Id.* The *Grundy* court noted that the UC approached the defendant and began the conversation. The defendant was still negotiating with the UC about a purchase. *Id.* at 338.

That is far different than the case at hand where the defendant, on several occasions, initiated contact where he repeatedly said he wanted to meet the “girl”, where he was directed to two different locations, and where he told the “girl” he had condoms.

It is also noteworthy that the case of *State v. Best*, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018), was reversed on appeal. The defendant, when before the trial court, cited the decision of the Snohomish County Superior Court in that case in his Motion to Reconsider the *Knapstad* motion. The defendant on appeal cites the case in a footnote. Br. of Appellant at 7 n.4. The State will cite the case as a further example of the general caselaw in Washington holding that undercover sting operations involving defendants who engaged in sexually charged text messages with a supposed minor and then show up at predesignated locations are guilty of an attempted crime. The State also cites the case to counter the impression in the record herein that *Best* ended in a dismissal. It is not cited as binding authority and may be

accorded such persuasive value as this Court deems appropriate. A copy of the opinion is attached in Appendix B.

Finally, the defendant is not helped by the guidelines adopted by the Model Penal Code. The defendant did the following:

a) “*searching for ... the contemplated victim of the crime.*”

The defendant asked the “girl” where she was on numerous occasions and took directions in an effort to find her apartment.

b) “enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission.” The defendant asked the “girl” if she wanted it in his vehicle. He also asked if she was at a motel.

c) “reconnoitering the place contemplated for the commission of the crime.” When he pleaded guilty, the trial court knew he basically drove in circles around the apartment complex parking lot. RP 01/17/2018 at 12. It was reasonable to assume he was doing counter surveillance. He later admitted to the PSI writer that he left the apartment complex not for any moral epiphany

or because he had cold feet, but because he saw some undercover police vehicles.

Judge Ekstrom heard the *Knapstad* motion, the motion to reconsider, and the guilty plea. He was well aware of the evidence in the record and there was an adequate basis to believe the defendant was guilty.

C. The \$100 DNA fee and the \$200 filing fee should be stricken.

At the time of sentencing, these fees were mandatory. Based on new legislation, the filing fee is not mandatory, and the DNA fee should be imposed only if the defendant has not provided a sample. The defendant has previously provided a DNA sample. Based on the Order of Indigency, the \$200 filing fee should be stricken. CP 95-96.

V. CONCLUSION

The State is very tempted to give the defendant what he wants. Based on his comments to the PSI writer, the State now has a significantly stronger case against him. So, it is hard not to say, "If Mr. Gulchuk wants to withdraw his plea and face the original charge, bring it on." However, it is more important to treat this case consistently with other defendants seeking to withdraw their guilty pleas.

The defendant bargained for a sentence which was not indeterminate. He should be bound by that. The colloquy on the plea of

guilty was complete. There were no errors in the calculation of the standard range, community custody, or any collateral consequences. The trial court's determination of a basis for a guilty plea is procedural, not constitutional. The defendant pleaded guilty and has never, before this appeal, claimed any error by the trial court. This Court should decline to review the defendant's arguments under RAP 2.5 (a).

In any event, Judge Ekstrom was well aware of the evidence in the record having heard the *Knapstad* motion. He knew the defendant's sexually charged conversation with the "girl", his efforts to meet the "girl", the defendant's probable counter surveillance of the apartment complex and the—with all due respect to the defendant—preposterous story he came up with to explain his behavior. There was a more than sufficient basis to accept the guilty plea.

The defendant is correct about the \$200 filing fee and the \$100 DNA fee. They should be stricken.

RESPECTFULLY SUBMITTED on December 20, 2018.

ANDY MILLER
Prosecutor

Handwritten signatures of Andy Miller and Terry J. Bloor. There are three distinct signatures in black ink.

Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

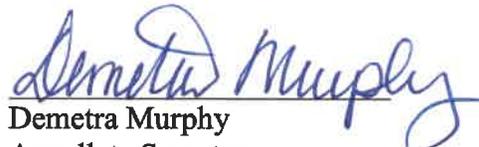
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Christopher Gibson
Nielsen, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122

E-mail service by agreement
was made to the following
parties:
sloanej@nwattorney.net

Signed at Kennewick, Washington on December 20, 2018.


Demetra Murphy
Appellate Secretary

Appendices

Appendix A – Text messages between defendant and officer

Appendix B – *State v. Best*, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018)

Appendix A

Text messages between defendant and officer



WASHINGTON STATE PATROL
INVESTIGATIVE SERVICE BUREAU
Probable Cause Statement

Date of Incident: July 9, 2017
WSP Case #: 17-020578
Other Case #:

Reporting Detective(s): Trooper Anthony Califano
Trooper Anna Gasser

Suspect: Yuriy L. Gulchuk **DOB: 04/28/1982**

Charges: RCW 9A.44.076 Rape of a Child 2nd Degree – Attempt
RCW 9.68A.090 Communication with a Minor for Immoral Purposes

Details:

On July 7, 2017, Detective Sergeant Carlos Rodriguez posted an advertisement (ad) on Craigslist in an undercover (UC) capacity. The title of the ad was "young looking for older daddy - w4m." The post ID number for the ad was 6209264877. Below is the ad:

[reply](#)

[prohibited](#) 

Posted about 10 hours ago

[◀ prev](#) [▲](#) [next ▶](#)

★ **young looking for older daddy - w4m (Richland)** 

I am young looking for older daddy to take care of this young baby girl. Be real. Be nice, your pic gets mine. let's get lit! I have a daddy fetish and love to take showers, very clean. let's talk. DDF. STILL LOOKING

- do NOT contact me with unsolicited services or offers

post id: 6209264877

posted: about 10 hours ago

updated: less than a minute from now

[email to friend](#)

[best of](#) 

On July 7, 2017, at approximately 16:16 hours, Gulchuk responded to the ad. Gulchuk was using the following anonymized Craigslist e-mail address:
f6aa3ea5877537f1a3c6cc9b35ac9558@reply.craigslist.org.

0-000000104

17-020578

Trooper Gasser

Page 2

Detective Sergeant Rodriguez continued the conversation with Gulchuk in the UC capacity of a 13year old female child. The following excerpts are from the e-mail conversation that took place between the UC and Gulchuk:

Gulchuk: I'm here

UC: where? lol

Gulchuk: In Kennewick WA. Where you at?

UC: im in RIchland right now i like big trucks. i like big things lol
I am in need of a daddy. I ran away a while ago cuz my mom is a bitch. Just hanging with friends for right now, but just want to have some fun and forget about things. If you want to have some fun with me tell me how and lets chat. I am getting a lot of responses so get me your phone number and we can talk. If you don't like young fun then this isn't for you. Im 13, but I am all woman. And fine AF
[photo of UC female with curly brown hair, wearing a yellow t-shirt, kitty ears, and glasses]

Gulchuk: Text me at 5096286025. I'm 35

UC: that is a wrong number try me at [###-###-####] im anna tell me your name and big trucker so i know its you daddy

Gulchuk: Prove it that you're 13

UC: huh, how.

Gulchuk: You have your school ID?
Are you on hotel?

UC: i dont go to school.
nope wont go to hotels, cops ue hotels are you a cop, you are making me feel like you are

Gulchuk: No I'm not a cop

Gulchuk: Text me
Hey baby
You're not interested? I accidentally deleted your number

Detective Sergeant Rodriguez continued communicating with Gulchuk in the UC capacity of the 13year old female child via text messages. The following are excerpts from the text conversation between Gulchuk and the UC:

Gulchuk: Hey -Sent free from TextNow.com
It's me from Craigslist -Sent free from TextNow.com

Gulchuk: It's me from email -Sent free from TextNow.com

0-000000105

17-020578
Trooper Gasser
Page 3

From Craigslist -Sent free from TextNow.com
Young looking for older daddy -Sent free from TextNow.com

UC: yeah, your name? what did i tell you to text me. I have a million responses.

Gulchuk: I'm Alex -Sent free from TextNow.com
Yes you email me your num -Sent free from TextNow.com

UC: what did we talk about daddy?
truck driver
??

Gulchuk: I'm truck driver but don't drive right now because having surgery -Sent free from TextNow.com

UC: ok, so what do you want to do an dare you bringing your firmed. is it a girl or boy

Gulchuk: Anything you want and no by myself -Sent free from TextNow.com
Where you staying -Sent free from TextNow.com
No I'm not bringing my friend just me -Sent free from TextNow.com
Honey are you busy? -Sent free from TextNow.com

Gulchuk: What you doing -Sent free from TextNow.com

UC: waiting for you daddy. so what are you going to do

Gulchuk: Go nasty on you -Sent free from TextNow.com
Send me your pic -Sent free from TextNow.com
Where you at -Sent free from TextNow.com
What's your name sweetie -Sent free from TextNow.com

UC: how do you wnat to go nasty on me daddy
[picture of UC Trooper posing as 13-year-old female wearing a yellow shirt with bubbles in the photo]

Gulchuk: Lick your pussy and wanna see your boobs -Sent free from TextNow.com
What store -Sent free from TextNow.com
You look like 24 years old -Sent free from TextNow.com
You have a naked pic ? -Sent free from TextNow.com

UC: there is a [business] near here. but i can google for a closer one
you cna take all you want when you get here but you have to give me a donation for them
you cna take all you want when you get here but you have to give me a donation for them

Gulchuk: You drive? -Sent free from TextNow.com

0-000000106

17-020578

Trooper Gasser

Page 4

UC: thaks i guess, but im not. i do get that alot.

Gulchuk: Oh ok -Sent free from TextNow.com
Donation after sex. Have you had sex before? -Sent free from TextNow.com

UC: this was me last week before i got my braces off
yes

Gulchuk: I'm afraid -Sent free from TextNow.com
I don't want to go to jail having sex with 13 yeas old -Sent free from TextNow.com

UC: what a waste bye then

Gulchuk: Ok -Sent free from TextNow.com
You look beautiful though -Sent free from TextNow.com
Ok I'll come over -Sent free from TextNow.com
Want you -Sent free from TextNow.com
You want to meet by Richland Fred Meyer? -Sent free from TextNow.com
I do want you baby -Sent free from TextNow.com
I guess you're busy and not interested -Sent free from TextNow.com

UC: im not busy, just tryin got get rid of this guy that my firned had over
hello?
he will be gone in about an hour
can you do tomorrow if not tonight

Gulchuk: Ok -Sent free from TextNow.com
Who you live with sweetie -Sent free from TextNow.com
What you gonna do to me -Sent free from TextNow.com
You wanna do In my car? -Sent free from TextNow.com

Gulchuk: Can't wait to see you. What time you go to bed -Sent free from TextNow.com

UC: fell asleep sorry. im going back to bed. try me tomorow ill be up around 11 maybe lol
morning daddy

Gulchuk: Hey baby -Sent free from TextNow.com

UC: Oh sorry l forgot -Sent free from TextNow.com

Gulchuk: Send pictures to Yuriy at sexyprince32@textnow.me

0-000000107



UC: what do you want to with me daddy

Gulchuk: Fuck you hard -Sent free from TextNow.com
Are you virgin? -Sent free from TextNow.com

UC: in some ways. i have played with toys and never done anal.

Gulchuk: Have to had real cock -Sent free from TextNow.com

UC: it was a small one though. what size are you

Gulchuk: Big and fat -Sent free from TextNow.com
How old you we're? -Sent free from TextNow.com

UC: oh kay. um and what you wan to do with the big and fat.
13 daddy,

Gulchuk: Fuck your little tight pussy so deep and hard and make you squirt and cum -Sent free from
TextNow.com
What store close near you -Sent free from TextNow.com
I have six and half inch cock -Sent free from TextNow.com
Baby ill brb -Sent free from TextNow.com
After done working -Sent free from TextNow.com

UC: k there is a [business] and some other storre that is closer. let me know. ther are rules tho ok.
no pain and condoms for sure. no anal unless you pay a lot. never done that.
when are you done working.

Gulchuk: My cock would make you hurt because it's big -Sent free from TextNow.com

UC: oh thats not good then

Gulchuk: I'm kidding -Sent free from TextNow.com
It makes you feel and give you a orgasm -Sent free from TextNow.com
You would love it sweetie -Sent free from TextNow.com

Baby don't worry it would be great -Sent free from TextNow.com
Unless you're not interested -Sent free from TextNow.com

UC: i am daddy, just dont want you to hurt me

Gulchuk: No I'll make you pleasure -Sent free from TextNow.com

UC: are you going to have a donation. im pretty hungry

Gulchuk: What's your offer -Sent free from TextNow.com
Can I see your naked pic? -Sent free from TextNow.com
Donation it's any amount by me -Sent free from TextNow.com

UC: i offer me daddy, you have to offer how long hh or fh
my friend gets 100 to 120 for everything

Gulchuk: I'll pay how good you are sweetie -Sent free from TextNow.com

UC: huh, i need at least a bottom line, so you are good with 120
lmk when daddy i need at least 20 to 30 so I am clean for you.

Gulchuk: I'll let you know -Sent free from TextNow.com

UC: k well i hope I dont already have a playmate by then. im horny

UC: you are not gonna steal me are you?
and you have condoms right? i dont want no baby?

Gulchuk: No I'm not I'm here and car wash accross the apartments -Sent free from TextNow.com
Yes I do -Sent free from TextNow.com

On July 9, 2017 Gulchuk followed the instructions of the UC 13year-old child and drove to a predetermined location in Benton County, WA. Upon his arrival at the given location, surveillance units visually observed him. The UC child then sent Gulchuk the address to the UC residence in Benton County, WA. Surveillance units followed Gulchuk to the UC residence. Gulchuk spent several minutes driving around the UC residence complex before texting the UC "I have bad feelings -Sent free from TextNow.com," and leaving the complex.

Surveillance units followed Gulchuk out of the UC residence complex. When Gulchuk had driven a short distance from the complex surveillance units stopped Gulchuk and took him into custody at 20:47 hours.

During the search incident to arrest nothing of evidentiary value was found on Gulchuk's person. The detectives who took Gulchuk into custody observed a cell phone on the front seat of the vehicle. Gulchuk was advised his Constitutional Rights and agreed to be interviewed by detectives. Gulchuk stated in the interview that his phone had been hacked on the Saturday prior and whoever had hacked his phone had been sending the texts. Although Gulchuk stuck to this story throughout his interview, when Detective

Appendix B

***State v. Best*, No. 76457-8-I, 2018 WL 1907968
(Wash. Ct. App. Apr. 23, 2018)**

We've updated our Privacy Statement. Before you continue, please read our new Privacy Statement and familiarize yourself with the terms.

WESTLAW

3 Wash.App.2d 1032

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

State v. Best

Court of Appeals of Washington, Division 1. | April 23, 2018. | Not Reported in P.3d. | 3 Wash.App.2d 1032 | 2018 WL 1907968 (Approx. 4 pages)

Court of Appeals of Washington,

Division 1.

STATE of Washington, Appellant,

v.

Kevin Dale BEST, Respondent.

No. 76457-8-1

FILED: April 23, 2018

Appeal from Snohomish Superior Court, 16-1-00594-7, Hon. Janice E Ellis, J.

Attorneys and Law Firms

Mary Kathleen Webber, Snohomish County Prosecutors Office, Everett, WA, for Appellant.

Peter Mazzone, Mazzone Law Firm PLLC, Everett, WA, for Respondent.

UNPUBLISHED OPINION

Becker, J.

*1 Undercover police agents posted a personal advertisement implicitly offering illegal sexual contact with three **children**. The defendant responded to the advertisement and communicated his intent to accept the offer. The defendant then showed up at the address given and was arrested. Charged with three counts of **attempted** rape and molestation, the defendant successfully moved for dismissal under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). The basis for the dismissal was that the State had not presented evidence of a **substantial step**. Because a jury could find that the defendant's conduct went beyond mere preparation to show a clear design to commit the criminal acts, we reverse and remand for trial.

Respondent Kevin Best came to the attention of law enforcement officers in December 2015 when he responded to an ad they had posted on an online platform for classified advertising. The ad, posted by an individual named "Kristi," sought a "daddy to take care of her girls." Kristi was in reality a police officer working in a sting operation. She posed as the mother of two girls, ages 11 and 8, and a son age 13. Best and Kristi exchanged sexually explicit e-mails, text messages and phone calls over a period of two months. Best repeatedly expressed a desire to have sexual contact with each of Kristi's **children**. He described the anticipated sexual activity in graphic detail. He also described having sexual relations with his own two daughters. In a phone conversation with an agent who was pretending to be "Lisa," Kristi's 11-year-old daughter, Best talked about having sexual intercourse with her and said, "Don't worry, I'll show some attention to your younger sister too." After this conversation, Best sent Kristi a video of himself masturbating and ejaculating.

Kristi and Best discussed ground rules for sexual activity involving the **children**: Best wanted no "aggression" to be used with his daughters, and Kristi said her rules were "no pain, no anal, condoms." They eventually arranged that Best, without his daughters, would come to Kristi's home in Everett on February 20, 2016, a Saturday. The plan was that he would spend the weekend. Best asked if Kristi allowed her girls to have drinks for play nights. Kristi responded no, but she said gifts would help to "soften them up." Best talked about taking the **children** shopping when he came over.

On the arranged date, Best drove to Kristi's home with his dog. On the way, at Kristi's request, he stopped to buy an iced coffee for Kristi and three chocolate milks for the **children**. When he was almost there, he messaged Kristi to ask if Lisa would meet him at the door. Kristi responded that Lisa was sleeping, and she suggested that Best could wake her up and then "you guys can get it together if that works." Best replied, "Cool."

Best was arrested when he arrived. The State charged him with **attempted** first degree rape of the older sister, **attempted** first degree **child** molestation of the younger sister, and **attempted** second degree rape of the boy.

*2 Best moved to dismiss under Knapstad. The trial court granted the motion and dismissed the charges without prejudice. The State appeals.

An order dismissing charges on a Knapstad motion is reviewed de novo. State v. Conte, 159 Wn.2d 797, 803, 154 P.3d 194, cert. denied, 552 U.S. 992 (2007).

Under Knapstad, a trial court has inherent authority to dismiss a charge when the undisputed facts are insufficient to support a verdict of guilt. Knapstad, 107 Wn.2d at 353. The threshold showing required to survive a Knapstad motion to dismiss is lower than that required for a conviction. State v. Montano, 169 Wn.2d 872, 879, 239 P.3d 360 (2010). When considering a Knapstad motion, the court must determine "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." Knapstad, 107 Wn.2d at 356-57. If so, denial of the motion to dismiss is mandatory. Knapstad, 107 Wn.2d at 356. "When evaluating a Knapstad challenge to the sufficiency of the evidence, the trial court considers the evidence and reasonable inferences therefrom in the light most favorable to the State." State v. Graham, 182 Wn. App. 180, 183, 327 P.3d 717 (2014).

Best was charged with **attempt** crimes. "A person is guilty of an **attempt** 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). A **substantial step** "need not be an overt act, as long as it is behavior strongly corroborative of the actor's criminal purpose." State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). The conduct must go beyond mere preparation. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). "The question of what constitutes a '**substantial step**' under the particular facts of the case is clearly for the trier of fact." State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). "When preparation ends and an **attempt** begins, we have held, always depends on the facts of the particular case." Workman, 90 Wn.2d at 449-50. "Any slight act done in furtherance of a crime constitutes an **attempt** if it clearly shows the design of the individual to commit the crime." State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001).

The trial court determined that the evidence sufficiently showed Best had the intent to commit the specific crimes charged but was insufficient to show that he took a **substantial step**:

The court reviewed all of the proffered facts in a light most favorable to the state. The materials support the state's view that the defendant communicated in detailed and graphic ways a history of exploiting his own **children** and his intent to commit or facilitate various sexually exploitative crimes involving the **children** of the fictitious mother. Thus, the defendant's intent is not at issue in this Knapstad motion. The unanswered legal question is whether the defendant took a **substantial step** toward the commission of any of the charged crimes. I conclude that the defendant's act of driving to the fictitious mother's home and bringing beverages for each member of the fictitious mother's family is insufficient as a matter of law to conclude that the defendant took a **substantial step** toward the commission of any of the charged crimes.

*3 Washington courts have affirmed convictions for **attempted sex** crimes with **children** in several similar cases in which, because the arrest of the defendant occurred as the result of an undercover sting operation, the defendant did not come into physical proximity with an actual **child**. In each case, we rejected the argument that the defendant had not taken a **substantial step**. In each case, like here, the defendant arrived at a motel or other prearranged meeting place after clearly expressing his desire to have **sex** with the **child**. Townsend, 147 Wn.2d at 671; State v. Sivins, 138 Wn. App. 52, 56-58, 155 P.3d 982 (2007); State v. Wilson, 158 Wn. App. 305, 308-11, 242 P.3d 19 (2010).

Here, the trial court characterized Townsend, Sivins, and Wilson as having evidence that the defendant "was prepared and ready to engage in sexual contact with a minor." The court found these cases distinguishable on the basis that showing up at the designated address bringing coffee and chocolate milk "does not clearly show the design of the defendant to commit the crimes with which he is charged."

Townsend, Sivins, and Wilson affirm convictions; they do not purport to set forth a bright line for the specific facts necessary to show a **substantial step** as opposed to mere preparation. Best contends something more is required than merely coming to a prearranged meeting location. He cites no authority to indicate that coming to a prearranged meeting location is insufficient as a matter of law. To the contrary, this court has given the following as an example of conduct amounting to a **substantial step** toward statutory rape: "The actor might lie in wait on the known route of a particular **child** after the actor has told another that he wants to have sexual intercourse with that **child**." State v. Falco, 59 Wn. App. 354, 359, 796 P.2d 796 (1990).

Nor is it essential to prove overt sexual conduct in the **child's** presence. In proving a charge of an **attempt** at committing a **sex** crime against a minor, "the critical focus is on the defendant's criminal intent and not on the fact that no minors were actually subjected to sexual exploitation or abuse." State v. Luther, 157 Wn.2d 63, 74, 134 P.3d 205, cert. denied, 549 U.S. 978 (2006). A reasonable jury "may infer the elements of **attempt** even without evidence of physical contact or an express statement of intent." State v. Leslie Wilson, 1 Wn. App. 2d 73, 85, 404 P.3d 76 (2017).

Best contends he never admitted, agreed, or even suggested that he intended to engage in sexual conduct with the **children** at their first meeting. He emphasizes a communication with Kristi in which he stated that he had "no expectations" for the visit. But Kristi responded, "I do have some expectations or I wouldn't be talking ... to you," to which Best replied, "Haha I feel the same." Considering the record as a whole in the light most favorable to the State, it is reasonable to infer that Best included the "no expectations" statement to shield himself from criminal liability if Kristi turned out to be a law enforcement agent. Similarly, Best's assertion in an e-mail that "I never play when we meet for the first time to be safe" does not have to be taken at face value.

Best suggests that his communications with Kristi were merely fantasy. He sent a message to Kristi that "texting is all fantasy so we can say whatever we want." One of his messages stated, "I like to say everything is a fantasy until I know you're real." In an early message, he told her "until we trust each other for now this is all fantasy and not real:-) what all are you into?" But Kristi responded, "Well I'm not into fantasy," and Best replied, "Yeah me either." Best told Kristi on several occasions that he suspected a sting operation. It is reasonable to infer that Best's references to fantasy were self-serving and disingenuous and that his true intent was to have sexual contact with Kristi's **children** after using gifts to "soften them up."

*4 Best cites State v. Grundy, 76 Wn. App. 335, 886 P.2d 208 (1994). In Grundy, an undercover officer posing as a drug runner approached the defendant and asked him what he wanted. Grundy, 76 Wn. App. at 336. The defendant was arrested when he expressed a desire to buy cocaine. Grundy, 76 Wn. App. at 336. He was convicted of **attempted** possession of cocaine. Grundy, 76 Wn. App. at 336. This court reversed, finding insufficient evidence of a **substantial step**. Grundy, 76 Wn. App. at 338. "The parties were still in the negotiation stage." Grundy, 76 Wn. App. at 338. Best contends he and Kristi similarly were only at "the negotiation stage" about whether the sexual conduct would occur. Grundy is not analogous. Best spent weeks getting to know Kristi. Once he decided to trust that she genuinely shared his desire for **sex with children**, he joined her in planning a family style weekend during which she would allow him to exploit her **children**.

The sexually explicit e-mails, text messages, and telephone calls presented by the State make out a prima facie case that Best specifically intended to have sexual intercourse with the older daughter, to molest the younger daughter, and to cause the 13-year-old son to have **sex** with "everyone." When all inferences are taken in favor of the State, there is evidence of more than mere preparation. Best's arrival on Kristi's doorstep, exactly at the time and place the two of them had agreed on, is evidence clearly showing his design to carry out their plan for a weekend involving sexual contact with the three **children**.

The trial court erred by granting the Knapstad motion. The order of dismissal is reversed, the charges are to be reinstated, and the case is remanded for further proceedings.

WE CONCUR:

Mann, J.

Cox, J.

All Citations

Not Reported in P.3d, 3 Wash.App.2d 1032, 2018 WL 1907968

End of

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

Document



BENTON COUNTY PROSECUTOR'S OFFICE

December 20, 2018 - 3:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36006-7
Appellate Court Case Title: State of Washington v. Yuriy Leonidovich Gulchuk
Superior Court Case Number: 17-1-00781-5

The following documents have been uploaded:

- 360067_Briefs_20181220151953D3721900_7233.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 360067 Gulchuk - Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- andy.miller@co.benton.wa.us
- gibsonc@nwattorney.net
- nielsene@nwattorney.net

Comments:

Sender Name: Demetra Murphy - Email: deme.murphy@co.benton.wa.us

Filing on Behalf of: Terry Jay Bloor - Email: terry.bloor@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20181220151953D3721900