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Court of Appeals
Division III
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NO. 36537-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN HARBOUR,
Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The state failed to prove beyond a reasonable doubt that Harbour committed attempted rape of a child.

B. ISSUE PRESENTED ON APPEAL

1. After a series of hostile emails from and between both Harbor and "Kalyee," Harbour agreed to meet "Kaylee" to determine if she was posing as someone else, not to have intercourse. Under those circumstances, did the state fail to prove beyond a reasonable doubt that Harbour intended to have sexual intercourse with a child and that he took a substantial step toward committing sexual intercourse?

C. STATEMENT OF THE CASE

1. Procedural History

Dustin Harbour was charged by information with Attempted Child Rape in the Second Degree (RCW 9A.44.076(1); 9A.28.020(1)). CP 1. A jury found Harbour guilty as charged. CP 103. Harbour timely appeals. CP 123.

2. Substantive Facts

As part of an undercover sting operation, Detective Jeff Bickford posted an ad on the social media application Whisper. RP 21. The add read, "Wish I was older. Everyone my age judges me."

RP 52; Exh. 6. Dustin Harbour responded to the ad and began exchanging messages with Detective Bickford who was pretending to be a thirteen-year-old girl named “Kaylee”. RP 56, 59; Exh. 6, 7. When Harbour requested a picture, “Kaylee” responded that she did not have any pictures on her iPad but could send one via text message. RP 57-58; Exh. 6. “Kaylee” gave Harbour her phone number and they continued the conversation via text messages. Exh. 6, 7. Harbour and “Kaylee” talked about their sexual desires and agreed to meet. Exh. 7. “Kaylee” requested they meet at Albertsons. RP 90; Exh. 7. “Kaylee” also insisted that Harbour bring condoms. Exh. 7.

Instead of meeting and bringing condoms, Harbour did not go and he stopped texting “Kaylee”. RP 91; Exh. 7. “Kaylee” sent several messages, some cursing at Harbour and asking why he did not show. RP 90-91. Exh. 7. Approximately five hours after Harbour stopped texting “Kaylee,” Harbour responded that he did not think “Kaylee” was real and that her picture “seemed fake”. RP 91; Exh. 7.

The conversation continued for another 45 minutes, including several messages about whether “Kaylee” was real. Exh. 7. Harbour asked for a “proof of life” photo and the conversation turned hostile.

RP 119, 181; Exh. 7. Harbour responded “told you your [sic] fake” and when “Kaylee” promised to show up at Albertsons Harbour responded “Bullshit”. RP 95; Exh. 7. Then both Harbour and Kaylee said “Bye”. RP 181; Exh. 7.

Harbour then stated, “You couldn’t handle a dick this big anyways” and “I feel like your [sic] playing.” RP 96, 181; Exh. 7. The conversation continued in a hostile manner. Exh. 7. “Kaylee” told Harbour she was still willing to meet and eventually Harbour agreed to meet at Albertsons. RP 96; Exh. 7. The two continued to exchange messages including a picture of Harbour’s penis. RP 97, 146. After Harbour arrived at Albertons “Kaylee” sent Harbour a text message stating it was “creepy” outside and they decided to meet at “Kaylee’s” aunt’s house. RP 99-100; Exh. 7. Harbour drove to the address “Kaylee” gave him. RP 122. When he arrived, Officer Anna Gasser went outside to waive Harbour in and pretended to be “Kaylee”. RP 122, 126.

When Harbour entered the apartment, Gasser went into the kitchen and Sgt. Harold Whapeles appeared, and arrested and searched Harbour. RP 122, 132-33, 136. Harbour did not have any condoms on his person. RP 137.

At trial, Harbour testified that after he did not go to the first planned meeting, he made statements to “troll” “Kaylee”. RP 181. Harbour explained that “trolling” means “talking shit” as in trying to provoke someone. RP 186. Harbour testified that he was “trolling” because he believed “Kaylee” was a “catfish”. RP 146. He explained that a “catfish” is someone who pretends to be someone else on the internet. RP 143. Harbour believed “Kaylee” may be a catfish because she claimed to live in Kennewick but her cell phone area code was 509. RP 144. Harbour previously lived near Kennewick and did not believe the area code was 509. RP 144.

Harbour further testified that he thought the pictures “Kaylee” sent seemed “fake” and at the time he drove to Albertons and to “Kaylee’s” house his intent was to confirm whether “Kaylee” was a catfish. RP 145, 148. However, if “Kaylee” was a 13-year-old girl he was going to tell her that her behavior was dangerous. RP 183. Harbour also made this statement to Sgt. Scott Streltzoff when Harbour was arrested. RP 159-60. Harbour testified that he inadvertently sent a picture of his penis that was stored on his phone. RP 146.

After trial, the jury convicted Harbour of attempted second

degree rape of a child. CP 103. This timely appeal follows. CP 123.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HARBOUR COMMITTED ATTEMPTED RAPE OF A CHILD

The state failed to prove beyond a reasonable doubt that Harbour committed attempted rape of a child because Harbour did not go to the first planned meeting, he did not believe “Kaylee” was a 13 year old girl, he did not intend to have sexual intercourse with “Kaylee” if she was a 13-year-old girl, and he did not bring any condoms.

In a criminal prosecution, the state must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

This Court must reverse the conviction and dismiss with prejudice if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the

light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

It is well established that attempt consists of two elements: (1) intent and (2) a substantial step. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). (internal citations omitted). Both the substantial step and the intent must be established beyond a reasonable doubt. *Aumick*, 126 Wn.2d at 429-30.

a. <u>The state failed to prove beyond a reasonable doubt the elements of intent</u>

To convict Harbour of attempted rape of a child the state had to prove that Harbour, with intent to commit the crime of rape, took a substantial step toward the commission of that crime. *State v. A.M.*, 163 Wn. App. 414, 423, 260 P.3d 229 (2011) (citing, RCW 9A.28.020(1)). A person commits rape of a child when the person has sexual intercourse with a child. RCW 9A.44.073, .076, and .079. First and second-degree rape of a child are distinguished only by the age of the child and the defendant. RCW 9A.44.073, .076.

The defendant must have the requisite intent to commit rape

at the time he took a substantial step. RCW 9A.28.020(1). The intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse with a child. *State v. Johnson*, 173 Wn. 2d 895, 907, 270 P.3d 591 (2012).

Here, the state had to prove beyond a reasonable doubt that Harbour intended to have sexual intercourse with “Kaylee” when he drove to her apartment. Merely driving to “Kaylee’s” apartment does not prove Harbour’s intent to engage in sexual intercourse because the intent element is separate from the substantial step element and both must be proved beyond a reasonable doubt. *Aumick*, 126 Wn.2d at 429-30.

A.M., 163 Wn. App. at 423 is illustrative. In *A.M.*, the trial court found that A.M. “put his penis inside [R.D.’s] buttocks” and there was “penetration of the buttocks, but not the anus.” *A.M.,* 163 Wn. App. at 423. The Court of Appeals held this finding was insufficient to prove all the elements of an attempt. *A.M.,* 163 Wn. App. at 423.

Penetration of the buttocks alone is not an act of sexual intercourse and does not imply an intent to have sexual intercourse. *A.M.*, 163 Wn. App. at 423. Unlike the completed crime of rape of a child, an attempt requires independent evidence of intent. *A.M.*, 163

Wn. App. at 423. Therefore, A.M.'s conduct alone did not prove he intended to have sexual intercourse with R.D. when he put his penis in R.D.'s buttocks. *A.M.*, 163 Wn. App. at 423.

Analytically applicable here, Harbour's conduct agreeing to meet "Kaylee" is not indicative of an intent to have intercourse any more than penetration of the buttocks is insufficient to prove intent to have intercourse. Rather, the evidence here suggests that Harbour wanted to verify whether Kaylee was posing as someone other than whom she claimed to be. RP 137.

Harbour first declined to meet "Kaylee" then asked for "proof of life" picture. Harbour only agreed to meet after "Kaylee" refused to send a "proof of life" picture, he taunted her, and he called her a "fake". Exh. 7. And when Harbour arrived he did not have the condoms "Kaylee" insisted upon. RP 137.

Even if the jury disbelieved Harbour's testimony that he inadvertently sent a picture of his penis, in the light most favorable to the state the evidence still does not prove Harbour intended to do anything more than "troll" "Kaylee" and investigate whether she was a "catfish".

Accordingly, this Court must reverse and remand for dismissal

with prejudice. *A.M.*, 163 Wn. App. at 426; *State v. Grundy,* 76 Wn. App. 335, 338, 886 P.2d 208 (1994).

b. <u>The state failed to prove beyond a reasonable doubt that Harbour took a substantial step because Harbour's actions did not strongly corroborate an intent to have sexual intercourse with a child</u>

A substantial step is an act that is "strongly corroborative" of the actor's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978); *Johnson*, 173 Wn.2d at 899. The line between preparation and an attempt depends on the facts of each case. *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.2d 633 (1969).

Grundy, 76 Wn. App. 335, is legally on point. In *Grundy*, an officer posed as a drug runner, approached the defendant, and asked him what he wanted. *Grundy*, 76 Wn. App at 336. In response, the defendant said he wanted cocaine. *Grundy*, 76 Wn. App. at 337. The officer asked to see the money, but the defendant asked to see the drugs first. *Grundy*, 76 Wn. App. at 336. The defendant was then arrested and charged with attempted possession of cocaine. *Grundy*, 76 Wn. App. at 336.

The court held that although the defendant's "words evidenced an intent to acquire possession of cocaine, they are

insufficient, without more, to constitute the requisite overt act." *Grundy*, 76 Wn. App at 337. The court held that the "parties were still in the negotiation stage." *Grundy*, 76 Wn. App at 338.

To the contrary, in *State v. Wilson*, 158 Wn. App. 305, 308, 317–18, 242 P.3d 19 (2010), a police detective posed online as a 38 year old mother with a 13 year old daughter that would "fulfill your fantasies but it won't be cheap." *Wilson*, 158 Wn. App. at 308. The defendant e-mailed the mother saying he was interested and arranged with her to meet the daughter and then go back to their home to have sex for $300. *Wilson*, 158 Wn. App. At 309.

The defendant went to the meeting location with $300. *Wilson*, 158 Wn. App. at 311. The defendant was then arrested and convicted of attempted second degree child rape. *Wilson*, 158 Wn. App. at 311-12. On appeal, the court held that negotiations had concluded and that the defendant's exchanging of photographs with the mother, obtaining her address, and driving to the agreed location with the money he agreed to pay for sex constituted a substantial step. *Wilson*, 158 Wn. App. at 317-18. Thus, the court affirmed the conviction. *Wilson*, 158 Wn. App.at 320.

Here, unlike *Wilson*, Harbour did not bring condoms as

instructed. Further, Harbour did not go to the first planned meeting and he stopped communicating with “Kaylee.” Exh. 7. Harbour only resumed the conversation after five hours and seven aggressive messages from “Kaylee,” some cursing at Harbour and asking why he stood her up. Exh. 7. When the conversation resumed after a five-hour break, the tone in the messages was noticeably different. Harbour’s messages were more hostile and inquisitive. He even ended the conversation on more than one occasion and sent messages he described as “trolling” to provoke the person on the other end. RP 181. Unlike *Wilson*, Harbour’s actions did not conform to the agreed upon plan.

Instead, Harbour’s actions show he was still in the negotiation stage, even though he drove to the agreed location because there was insufficient proof that Harbour took a substantial step toward committing a crime rather than verifying “Kaylee’s” identity. *Grundy*, 76 Wn. App. at 337. Just like Grundy requested to see the drugs, Harbour requested a “proof of life” picture. RP 119, 181; Exh. 7. Harbour only drove to the meeting place after “Kaylee” refused. The negotiations were not elevated to a substantial step by merely investigating whether “Kaylee” really was a 13 year old girl. *Grundy*,

76 Wn. App at 337-38.

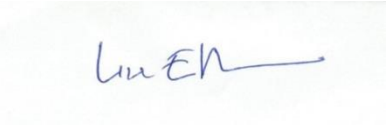
Because an investigation was part of the preliminary negotiation prior to an agreement to have sex, it does not provide proof beyond a reasonable doubt of an intent to have sexual conduct with a child. This Court must reverse and remand for dismissal with prejudice. *A.M.*, 163 Wn. App. at 426; *Grundy*, 76 Wn. App at 338.

E. CONCLUSION

Dustin Harbour respectfully requests that this court reverse his conviction for attempted second degree rape of a child and remand for dismissal with prejudice.

DATED this 7th day of June 2019.

Respectfully submitted,



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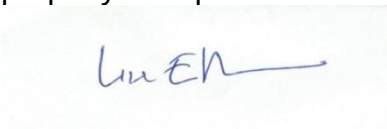
I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAappeals@spokanecounty.org and Dustin Harbour/DOC#411992, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on June 7, 2019. Service was made by electronically to the prosecutor and Dustin Harbour by depositing in the mails of the United States of America, properly stamped and addressed.



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