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36537-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN R. HARBOUR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The State failed to prove beyond a reasonable doubt that defendant, Dustin Harbour, committed attempted rape of a child.

II. ISSUE PRESENTED

Where the State's evidence established Mr. Harbour exchanged dozens of sexually explicit messages with a detective posing as a thirteen-year-old girl, including sexually explicit photographs of the defendant, and drove himself to two different locations in search of the thirteen-year-old, did the State prove beyond a reasonable doubt that Mr. Harbour intended to have sexual intercourse with a child, and took a substantial step toward having sexual intercourse with a child?

III. STATEMENT OF THE CASE

On May 31, 2018, the Missing and Exploited Children Task Force engaged in a sting operation in Spokane, Washington. RP 24, 45. Detective Jeff Bickford was part of that operation, and posted a message on an anonymous social media platform as part of the investigation. RP 46-52. Detective Bickford posed as a 13-year-old girl named "Kaylee."[1] RP 60. Kaylee's initial post was "wish I was older. Everyone my age judges me." Report of Proceedings (RP) at 55. Dustin Harbour messaged Kaylee, and a

[1] References will be to the persona of Kaylee to avoid confusion.

conversation ensued. RP 55. Kaylee informed Mr. Harbour that she was almost 14. RP 56. Mr. Harbour set the tone of the conversation by immediately asking her "what would you do with a man" and then told her "sometimes sex hurts." RP 57. Kaylee said she was in Spokane and gave Mr. Harbour her phone number to continue the conversation through text messages. RP 60.

The next day, Mr. Harbour texted Kaylee and the conversation immediately resumed its sexual overtones. Ex. 7[2] at 1. Mr. Harbour repeatedly asked Kaylee for photographs of herself, told her he would show her a good time, and asked her if she had ever "been with" a man. Ex. 7 at 1-2. He asked her if she wanted to enjoy "it" for longer, and then asked why she would not invite a man over. Ex. 7 at 2. Mr. Harbour began to describe the allegedly large size of his penis. Ex. 7 at 3.

Mr. Harbour eventually said he wouldn't mind "kickin' it" with Kaylee. Ex. 7 at 4. When asked how he liked to "kick it" he responded he liked it when "she is on top" and "doggy." Ex. 7 at 4. He then described several penetrative acts of sexual intercourse he would like to perform on

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[2] Detective Bickford and Mr. Harbour testified extensively to the conversation in this exhibit, including clarifying the common understanding of the sexual terms used. Exhibit 7 is the entirety of the text message conversation between Mr. Harbour and Kaylee. Because there is no dispute as to the meaning of these terms, citations are to the admitted exhibit included in the appellate record. *See, e.g.*, RP 177-78.

Kaylee or have her perform on him. Ex. 7 at 4-6. This conversation continued at length. Ex. 7 at 4-8. At approximately 5:30 p.m. that evening Kaylee arranged to meet Mr. Harbour at a nearby Albertsons store. Ex. 7 at 8.

A half hour later, Kaylee messaged Mr. Harbour to say she had arrived at Albertsons. Ex. 7 at 10. Mr. Harbour did not respond to any of her messages at that time, and only eventually replied at 11:00 p.m. that night, stating that he did not show up because he thought she was not real. Ex. 7 at 10. Kaylee said he could still come over, and Mr. Harbour said it was up to her but that he would enjoy being able to do so. Ex. 7 at 10-11. The conversation again turned to sex. Ex. 7 at 11-12. Kaylee again arranged to meet Mr. Harbour at Albertsons, but he stated he did not trust that she would show up. Ex. 7 at 13-14. Mr. Harbour specifically asked Kaylee for the address of the home she was staying at. Ex. 7 at 12. After some back and forth, Kaylee texted "bye" to Mr. Harbour at 11:23:26. Ex. 7 at 14.

Mr. Harbour reinitiated the conversation only a minute later, claiming she "couldn't handle a dick this big an[y]ways." Ex. 7 at 15. He asked for the Albertsons's address. Ex. 7 at 15. He then point-blank asked her if she was "willing to suck [his] dick," and she responded, asking if he was willing to gratify her. Ex. 7 at 15. Mr. Harbour sent a picture of his

penis 30 seconds later and asked if that answered her question. Ex. 7 at 15. Later, despite the obvious context of his response, he testified he inadvertently sent this picture. RP 146. They agreed to meet at Albertsons. Ex. 7 at 15-16.

Shortly after midnight, Mr. Harbour sent Kaylee a picture of the Albertsons to show he had arrived. Ex. 7 at 17. Kaylee then said she was on her way, but Mr. Harbour convinced her to give him her address to meet her there instead. Ex. 7 at 17-18. Various law enforcement officers working the operation saw Mr. Harbour arrive at the Albertsons and kept him in visual contact as he drove to Kaylee's home. RP 110.

When Mr. Harbour arrived at the address, he had difficulty locating the home's exact location. RP 135. He drove past the driveway at least twice, stopped his vehicle, and flashed his vehicle's headlights several times. RP 135. He maintained contact with Kaylee via text message. Ex. 7 at 18-20.

Trooper Anna Gasser, playing the physical role of Kaylee, went outside the home to help direct Mr. Harbour inside. RP 126. She greeted him at the door, asked him inside, and requested he take his shoes off before locking the door behind him. RP 126. She asked Mr. Harbour if he had

condoms, he patted his back pocket while saying he did.[3] RP 126-27. Trooper Gasser said he could pull out the condoms when they got to the bedroom and began walking toward it. RP 127. As the two walked past a team of officers, the officers arrested Mr. Harbour. RP 127. Mr. Harbour told law enforcement that he was there to make a friend; he claimed that he worked with children and wanted to warn her that what she was doing was dangerous. RP 183. He did not mention any fear of being "jumped" or that he thought he was being "catfished" – his later testimony at trial. RP at 183.

The State charged Mr. Harbour with one count of attempted rape of a child in the second degree and one count of communication with a minor for immoral purposes. CP 1. After a trial, a jury returned guilty verdicts on both counts. CP 93-94. The court entered a judgement of conviction and sentenced Mr. Harbour to the low end of 76.5 months confinement. CP 108. Mr. Harbour timely appeals. CP 123.

IV. ARGUMENT

Mr. Harbour argues the State did not provide sufficient evidence for the charge of attempted child rape in the second degree. He does not challenge his conviction for communication with a minor for immoral purposes. However, viewing the evidence presented in the light most

[3] Mr. Harbour did not have condoms on his person or in his car. RP 137.

favorable to the State, a reasonable jury could find Mr. Harbour guilty of attempted child rape in the second degree.

A. STANDARD OF REVIEW

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Reviewing courts must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

B. SUFFICIENCY OF THE EVIDENCE

To convict a defendant of attempted rape of a child in the second degree, the State must prove beyond a reasonable doubt that the defendant took a substantial step toward having "sexual intercourse 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.44.076(1). 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). "Thus, the essential elements of attempted rape of a child in the second degree are: (1) the intent to have sexual intercourse, and (2) the taking of a substantial step toward the commission of that crime." *State v. Wilson*, 158 Wn. App. 305, 317, 242 P.3d 19 (2010). Sexual intercourse is defined by statute:

> … its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
>
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the

> mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010.

1. Intent.

Mr. Harbour first argues the State did not establish adequate evidence of intent. He points to *State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011), which is distinguishable, as well as his own trial testimony that he did not believe Kaylee was a real person and only wished to verify his belief. These arguments fail.

"[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

Mr. Harbour's words and actions in this case establish his intent to have sexual intercourse with a child. Over a period of several hours, he described several acts of sexual intercourse he intended to engage in with Kaylee. He asked what she had done with a man and promised to show her a good time. He repeatedly claimed he had a large penis and that he could satisfy her. He described his favorite sex position, asked her about oral sex, said he wanted to put a finger in her anus, and then told her that although he wouldn't be able to put his penis in her anus allegedly because of the size, he wouldn't hurt her during normal intercourse because he would "eat [her]

out," (an act he later testified at trial was oral sex) and then "put it in slow." Ex. 7 at 5. After several hours and dozens of messages of graphic, sexual conversation between the two, Mr. Harbour promised Kaylee he would "make her [cum] like [she] never had before." Ex. 7 at 12. Shortly after that, the two again arranged to meet at Albertsons before Mr. Harbour backed out and Kaylee said "bye." Ex. 7 at 14. Mr. Harbour then reinitiated the conversation one minute later. During this last exchange, Mr. Harbour explicitly asked if she would perform oral sex on him, and then when she asked if he would do something for her in return he sent her a photograph of his penis and asked, "[t]hat answer you[?]" Ex. 7 at 15. Shortly after, the two arranged to meet yet again. Mr. Harbour's intent is also manifested by the fact that he went to two pre-arranged locations to meet Kaylee, which also relates to evidence of a substantial step.

In the light most favorable to the State, this conversation demonstrates Mr. Harbour's intent to perform several acts of sexual intercourse with Kaylee. These are promises to perform acts on her, not hypothetical fantasies. The jury was free to reject Mr. Harbour's testimony that attempted to innocently explain the State's evidence and it clearly did so by returning a guilty verdict. This Court must defer to the trier of fact on issues such as credibility and the persuasiveness of the evidence. The State's evidence clearly established Mr. Harbour's intent.

In arguing the State did not present sufficient evidence, Mr. Harbour analogizes this case to *A.M.*, 163 Wn. App. 414. In *A.M.*, the victim testified that A.M.'s penis went into his buttocks but never went inside his body. *Id*. at 417. The trial court found that penetration of the buttocks alone met the statutory definition of sexual intercourse. *Id*. at 418. A.M. argued on appeal that the State's evidence was insufficient because penetration of the buttocks did not meet the statutory definition of sexual intercourse, negating that element. *Id*. at 418-21. The reviewing court agreed after analyzing the ordinary meaning of the term, holding "that penetration of the buttocks, but not the anus, does not meet the ordinary meaning of 'sexual intercourse.'" *Id*. at 421.

In *A.M.* the State also asked that the case be remanded for entry of a conviction for attempted child rape if the court were to rule the evidence insufficient. *Id*. The appellate court noted, "[r]emand for conviction on a lesser offense, on the other hand, is proper 'only if the record discloses that the trier of fact *expressly* found each of the elements of the lesser offense.'" *Id*. at 422 (quoting *Green*, 94 Wn.2d at 235). The appellate court determined the trial court's findings of fact

were inadequate to support remand for the entry of a conviction for attempted child rape, because:

> The trial court made no finding concerning AM's intent. The court made the necessary findings concerning the respective ages of defendant and victim, that they were not married, and that the act occurred in Washington, but the only finding about what actually happened was that AM "put his penis inside [the victim]'s buttocks" and there was "penetration of the buttocks, but not the anus." These findings do not necessarily constitute a finding that AM acted with the objective of having "sexual intercourse." At best, they indicate that AM acted with the objective of placing his penis in between [the victim]'s buttocks, an act which is not sexual intercourse.

Id. at 423. *A.M.* did not analyze the sufficiency of the State's evidence of intent in any way, because that was not the appropriate legal test for whether remand was appropriate. The court analyzed whether the trier of fact below had made an express finding concerning A.M.'s intent. Consequently, it has no bearing on this case, where the State charged Mr. Harbour with attempted child rape in the second degree, presented ample evidence of his intent to have sexual intercourse as defined by statute, and the jury found him guilty.

2. <u>Substantial Step.</u>

Next, Mr. Harbour argues the State's evidence does not establish that he took a substantial step towards the completed crime. He relies on cases that are distinguishable.

"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. An attempt must be more than "[m]ere preparation to commit a crime." *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). "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). 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 Washington Supreme Court adopted the Uniform Model Penal Code's approach to help define a substantial step. *Workman*, 90 Wn.2d at 452; *see* MODEL PENAL CODE § 5.01. Relevant to this case, the Code includes these two guidelines:

> Without negativing 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; ..."

Workman, 90 Wn.2d at 451 n.2 (quoting MODEL PENAL CODE § 5.01).

Under this standard, Mr. Harbour took a substantial step toward the completed crime. After an hours-long conversation in which Mr. Harbour detailed what sexual acts he intended to perform on or with Kaylee, Mr. Harbour left his house to meet with Kaylee at the pre-determined location of Albertsons. He sent a photograph to verify he was there, but Kaylee had not arrived. He then received further direction from Kaylee to drive to her home. He drove to that address, but had trouble finding the exact house. He eventually found it and parked his car. Trooper Gasser came outside and waived him in. He left his vehicle, entered the home, took off his shoes, and Trooper Gasser directed him to a bedroom. He began to walk toward the bedroom and was arrested. Mr. Harbour sought to meet Kaylee at a pre-arranged meeting place, was re-directed to another meeting place, and drove around the location several times before being waved in by someone he thought was his target. Thus, under the Model Penal Code guidelines, Mr. Harbour: (a) searched for the contemplated victim of the crime; and (b) sought to entice the victim to meet him at both Albertsons and her home.

Mr. Harbour also 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. *Id*. at 336. The defendant was arrested when he expressed a desire to buy cocaine. *Id*. He was convicted of attempted possession of cocaine. *Id*. The reviewing court reversed, finding insufficient evidence of a substantial step. *Id*. at 338. The court noted that Mr. Grundy did not approach the officer and only asked for cocaine in response to a question from the officer, reasoning "[t]he parties were still in the negotiation stage." *Id*.

He also cites *Wilson* for the same point, noting that the defendant in *Wilson* agreed to a $300 price for the sexual intercourse he desired, and was caught at the pre-determined meeting location with that amount of money. *Wilson*, 158 Wn. App. at 311. He argues that unlike *Wilson*, Mr. Harbour did not bring condoms so did not take a substantial step.

The facts in this case are distinct from those cases. Condoms are not required for sexual intercourse. Mr. Harbour did not seek to or agree to exchange money, alcohol, condoms, or any other good for sexual intercourse, nor was he required to by Kaylee. He was not charged with sexual exploitation for a fee. He repeatedly pressured Kaylee to perform sexual acts with him, reinitiated the text conversation when it appeared over, and drove to two different pre-determined locations in search of Kaylee.

One of those locations was Kaylee's purported home, where she directed him to enter a bedroom. These facts are strongly corroborative of Mr. Harbour's purpose: to have sexual intercourse with Kaylee, and evidence a substantial step to achieve that result.

V. CONCLUSION

The State presented substantial evidence that Mr. Harbour had the intent to have sexual intercourse with Kaylee and that he took a substantial step toward commission of the crime. The jury necessarily rejected Mr. Harbour's theories that he was either "trolling" Kaylee and investigating whether she was a real person, or only intended to befriend her to counsel her against sexual intercourse with adult strangers. Under the standard of review, this Court should affirm.

Dated this 31 day of July, 2019.

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

STATE OF WASHINGTON, Respondent, v. DUSTIN HARBOUR, Appellant.	NO. 36537-9-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 31, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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