

No. 78604-6
COA # 26683-4

82649-8

SUPREME COURT OF THE STATE
OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MITEL PATEL,

Appellant.

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Denying Defendant's Motion to Suppress Verbatim Transcripts of Defendant's Instant Messaging Conversations with Detective Keller.

ISSUE:

Whether the sender of an internet instant message impliedly consents to the recording of that message where the sender uses another person's computer and instant message account and has no familiarity with either the technology used by the account provider or the account provider's privacy policy.

2. The Trial Court Erred by Denying Defendant's Motion to Dismiss for Failure to Prove an Essential Element of the Offense.

ISSUE:

Whether, in a prosecution for the crime of Attempted Second Degree Rape of a Child, the State must prove the actual age of the victim, the difference in ages between the victim and the defendant, and that the victim was not married to the defendant.

II. STATEMENT OF THE CASE

On November 30, 2004, Detective Keller of the Spokane Police Department posted a "profile" on the internet inviting other internet users to "chat" online with him through an instant messaging service. In the profile, Detective Keller represented himself to be a female by the name of "kimberlyanne" who was single and a student at "Garry." The profile did not give any age or date of birth for "kimberlyanne." RP 9-10.

Defendant Mitel Patel awoke at approximately 7:30 a.m. on November 30, 2004. Mr. Patel, who was living with a friend, sat down at his friend's computer and accessed his friend's A.O.L. account to begin instant message communications with other A.O.L. customers using his friend's AOL name of "Rob Corey A." While engaging in on-line "chats," Mr. Patel was also preparing and eating his breakfast. Often several minutes would pass between the receipt of a communication and a response.

Mr. Patel responded to the profile by contacting Detective Keller via instant messaging. At the beginning of the "chat," Mr. Patel indicated that he was 26 years old. In response, Detective Keller stated "wow im 13 but look and act older." CP 17; RP 10-11. Thereafter, Detective Keller continued to "chat" with Mr. Patel off and on from 7:32 a.m. until 12:47 p.m. During that time, Detective Keller continued to represent himself as

a female and engaged in discussions with Mr. Patel regarding sex and sexual conduct, including various forms of sexual intercourse, but did not again mention that "kimberlyanne" was only 13 years old. CP 17-22; RP 10-33. After being invited by Detective Keller to meet in person, Mr. Patel went to an apartment as directed by Detective Keller. CP 22; RP 34. When Mr. Patel arrived at the apartment and knocked on the door, he was immediately placed under arrest. CP RP 34.

Upon being placed under arrest, Mr. Patel was questioned by Detective Keller. Detective Keller showed Mr. Patel six pages of transcriptions of the instant messaging "chat" between Mr. Patel and Detective Keller posing as "kimberlyanne." Mr. Patel acknowledged that he had engaged in the chat with a person he knew as "kimberlyanne" and attested to the accuracy of the verbatim transcripts by initially each portion of the "chat" at the bottom of the page. RP 39-40. The verbatim transcript was later introduced as evidence at trial.

In response to Detective Keller's questioning, Mr. Patel denied that he believed that "kimberlyanne" was only 13 years old. Mr. Patel indicated that he did not know how old "kimberlyanne" was, but that he thought she might be 16 or 17 years old. RP 76. Mr. Patel also denied that he had come to the apartment with the intent of having sexual intercourse with a 13 year old girl. RP 41. Mr. Patel was charged by

Information with Attempted Second Degree Child Rape. The Information stated that Mr. Patel had “committed an act which was a substantial step toward that crime, by attempting Rape of A Child in the Second Degree, being at least thirty-six months older than, and married to the victim, K.S., did engage in sexual intercourse with the victim, who was 13 years old.” CP 1.

At trial, Mr. Patel moved to exclude the verbatim transcripts of the on-line conversation between him and Detective Keller, claiming the recording of the instant messages violated RCW 9.73.030. Following an evidentiary hearing, the trial court denied the motion, ruling that Mr. Patel had impliedly consented to the recording of the on-line “chat.” CP 4-5.

Mr. Patel also moved to dismiss prior to trial pursuant to *State v. Knapstad*, arguing that the State could not prove the elements of Attempted Second Degree Rape of a Child because there was not proof that the alleged victim was 13 years old. The trial court denied the motion stating that it was procedurally and factually insufficient. CP 6-7.

Following a trial to the court, Mr. Patel was found guilty. Mr. Patel then moved for arrest of judgment and dismissal on the grounds that the State had failed to prove an essential element of the offense; i.e., the age of the victim. CP 12; RP 240-248. The trial court denied the motion. RP 253. This appeal followed.

III. STANDARD OF REVIEW

The trial court's rulings on questions of law are reviewed de novo. *State v. Pulfrey*, 154 Wn.2d 517, 522, 111 P.3d 1162 (2005). The application of the law to facts is a mixed question of law and fact that is reviewed de novo. *State v. Posenjak*, 127 W. App. 41, 48, 111 P.3d 1206 (2005).

IV. ARGUMENT

1. The Recording of the Instant Messaging Conversation Between the Defendant and Detective Keller Violated RCW 9.73.030 Because the Defendant did not Impliedly Consent to the Recording.

Under RCW 9.73.030, it is unlawful for any person to intercept or record any private communication transmitted by telephone, telegraph, radio or other device between two or more individuals between two points within or without the state by any device electronic or otherwise without first obtaining the consent of all participants in the communication. RCW 9.73.030(1)(a). Any evidence obtained in violation of RCW 9.73.030(1)(a) is inadmissible in court for any purpose. RCW 9.73.050.

This court has previously held that a conversation via the internet between an individual and a police officer using a false identity is a “private” conversation where the individual manifests a subjective intent that the communication be private. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). Thus, the recording of such a conversation by the police violates RCW 9.73.030(1)(a) unless the individual expressly or impliedly consents. *Id.*, at 675.

A party to a conversation is deemed to have consented to the conversation being recorded when another party to the conversation announces that it will be recorded, or the party otherwise is aware that the conversation would be recorded. *Id.* at 675-76. In addition, a party will be deemed to have impliedly consented where that party is sufficiently familiar with the technology used to conduct the conversation to be on notice that the conversation might be automatically recorded by another party. *Id.* at 678-79.

In *Townsend*, this court concluded that the defendant had impliedly consented to the recording of his ICQ messages to Detective Keller because the defendant was familiar with the technology used by the ICQ software, which allowed users to automatically record ICQ conversations by default. *Id.* at 677-79. The court held that the defendant’s familiarity with the software could be reasonably inferred from the fact that the

defendant had had encouraged Detective Keller to set up an ICQ account so that they could communicate by instant messaging as well as by e-mail.

Here, no evidence was presented at the suppression hearing from which it could be reasonably inferred that Mr. Patel was familiar with the technology used to engage in his internet "chat" with Detective Keller or that Mr. Patel was otherwise aware that his messages to "kimberlyanne" might be recorded. At the time of the alleged offense, Mr. Patel was living with his employer. RP 26 (10-12-2005). His instant messaging conversation with Detective Keller was conducted using his employer's computer and AOL account. RP 27 (10-12-2005). Although Mr. Patel admitted to previously using his friend's AOL account to "chat" on-line with other AOL customers using instant messaging, RP 27 (10-12-2005), no evidence was presented to show that Mr. Patel had set up the AOL account or had any familiarity with the technology used by AOL for instant messaging. On the contrary, Mr. Patel testified that he had no idea whether his internet conversations with other AOL customers could be recorded using the AOL software. RP 30; 32-33 (10-12-2005). He also testified that he did not know whether it was possible to view instant messages that were no longer visible on the computer screen. RP 32 (10-12-2005).

Unlike the situation in *Townsend*, the facts of this case simply do not support a conclusion that Mr. Patel knew or should have known that other AOL instant messaging users, such as Detective Keller, had the ability to record his conversations using the AOL software. Therefore, it cannot be said that Mr. Patel impliedly consented to having his conversation with Detective Keller recorded. The trial court erred by ruling that the recording of the on-line conversation between Mr. Patel and Detective Keller did not violate RCW 9.73.030(1)(2) and by admitting transcripts of those conversations into evidence at trial.

2. Defendant's Conviction Must be Reversed Because the State Failed to Prove the Age of the Alleged Victim, "K.A."

Rape of a Child is defined as having sexual intercourse with another person who is not married to the perpetrator, is at least 36 months younger than the perpetrator, and is under the age consent. RCW 9A.44.073, 076 & 079. The crime of Rape of a Child has no mens rea element. That is, it does not matter what the perpetrator believes the age of the victim to be. All that matters is that the perpetrator actually engage in sexual intercourse with a person who is of the required age, not married to the perpetrator, and at least 36 months younger than the perpetrator.

See, State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

Although the legislature clearly could have made the perpetrator's knowledge or belief as to the victim's age an element of the offense, it did not do so. Thus, the legislature made a conscious choice to impose criminal liability based solely on the actual age of the victim and not on the mental state or intent of the perpetrator.

Criminal attempt is defined as taking a substantial step toward the commission of a crime with the intent to commit that specific crime. RCW 9A.28.020(1). The intent that must be shown to prove criminal attempt is the "intent to accomplish the criminal result." *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Because Rape of a Child is a strict liability crime with no mens rea element, the "criminal result" for purposes of attempt is the act of having sexual intercourse with a person who is actually under the age of consent. *State v. Chhom* at 743. A defendant's knowledge of the victim's age is not an element of attempted rape of a child. *Id.*

To prove an attempted Rape of a Child, the State must prove two elements: (1) that the defendant took a substantial step toward committing second degree child rape, and (2) that the defendant intended to have sexual intercourse. *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991). With regard to the elements of the age of the victim, the victim

not being married to the perpetrator, and the difference in age between victim and perpetrator, Attempted Rape of a Child, like Rape of a Child, is a strict liability offense. The perpetrator's belief as to the victim's age simply does not matter. See, *State v. Chhom* at 743.

In *Chhom*, the defendant, who was sixteen years old, had approached a nine year old boy and grabbed him off of his bicycle. While one of the defendant's companions held the victim, the defendant dropped his pants, exposed his penis, and attempted to force it into the victim's mouth. The defendant was charged with Attempted Rape of a Child in the First Degree. *Chhom* at 740. The parties stipulated that the victim was under the age of 12 at the time of the incident, not married to the defendant, and more than 24 months younger than the defendant. After the State had presented its case, the defendant moved to dismiss on the grounds that Rape of a Child does not contain an element of intent and that, under *State v. Dunbar*, one may not attempt a non-intent crime. *Chhom* at 741.

In *State v. Dunbar*, the court had held that one could not be convicted of attempted first degree murder by creating a grave risk of death because the mens rea element of the underlying offense (manifesting an extreme indifference to human life) did not require that the defendant intend to accomplish the criminal result of death. *State v. Dunbar*, 117

Wn.2d 587, 592-93, 817 P.2d 1360 (1991). The defendant in *Chomm* argued that, since the crime of First Degree Rape of a Child did not include an intent element, it was likewise not possible to be convicted of Attempt First Degree Rape of a Child. *Chhom* at 743. The court rejected that argument, however, holding that the "intent to commit a specific crime" element of the attempt statute was satisfied by a showing that the defendant intended to have sexual intercourse with the victim. *Id.* The court went on to hold that it is not an element of attempted Rape of a Child that the perpetrator know of the victim's age or believe the victim to be under the age of consent. The court explained that, as to all the remaining elements, i.e., the victim's age, the victim not married to the perpetrator, and the difference in age between the victim and perpetrator, the crime of Attempted Rape of a Child is, like Rape of a Child, is a strict liability offense. *Id.*, *citing* *State v. Davis*, 108 N.H 158, 229 A.2d 842, 844 (1967); *State v. Ayer*, 136 N.H. 191, 612 A.2d 923 (1992), and Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW U. L. REV. 857, 889-91 (1994).

The same result has been reached with regard to other crimes that do not contain a mens rea element. For example, in *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980), the defendant was charged with attempted theft in the first degree after he was found crouched behind the

counter in a drug store near a cash drawer that contained approximately \$1,800. The defendant contended that he could not be convicted of attempted first degree theft unless it was shown that he knew the cash drawer contained more than \$1,500. *Id.* at 636-37. The court disagreed, noting that the first degree theft statute, RCW 9A.56.030 does not include as an element that the defendant knows or believes that the property or services taken has a value of more than \$1,500, but only that such property or services actually have a value in excess of \$1,500. *Id.* Thus, the State need only prove that the defendant intended to wrongfully obtain certain property or services and that the property or services in fact had a value in excess of \$1,500. The actual value of the property or services, rather than the defendant's knowledge or belief as to value, is determinative.

In this respect, the crime of first degree theft is a strict liability offense like the crime of rape of a child. The perpetrator's knowledge or belief as to the value of the property is not an element of the offense, nor is it relevant to the issue of guilt. Thus, in a prosecution for first degree theft or attempted first degree theft, the State cannot substitute proof that the defendant believed the property or services wrongfully obtained were worth more than \$1,500 for proof of the actual value of the property or services. Similarly, in a prosecution for rape of a child or attempted rape

of a child, the State cannot substitute proof that the defendant believed the victim to be of a particular age for proof of the victim's actual age.

The foregoing analysis applies only to strict liability offenses and not to crimes that contain a mens rea element. This is because the criminal attempt statute focuses on the actor's criminal intent, rather than on whether the actor could be convicted of the completed crime. *State v. Davidson*, 20 Wn. App. 893, 897-98, 584 P.2d 401 (1978), citing W. LaFave & A. Scott, *Handbook on Criminal Law* § 60, at 438-46 (1972).

The criminal attempt statute provides:

If the conduct in which the person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

RCW 9A.28.020(2)(emphasis added). Under this subsection, the use of the term "otherwise" indicates a legislative intent to criminalize attempts that, if successfully completed, would constitute a crime, even if the actor could not be convicted of the crime because successful completion of the crime was impossible under the circumstances. The purpose of the criminal attempt statute "is to punish [the actor's] culpable intent." *State v. Davidson*, at 898. Thus, where a person acting with *culpable intent* takes a substantial step toward doing an act that constitutes a crime, he is

guilty of attempt, even if he could not be convicted of the completed crime because the factual circumstances under which he acted were different from what he believed them to be. *Id.* On the other hand, the statute does not impose liability where the actor intended to do an act that he mistakenly believed constituted a crime, but which has not been made criminal. *Id.*

As the court in *Davidson* made clear, a person is guilty of criminal attempt *only if he acts with the requisite criminal intent* for the offense and the attempted act would constitute a crime if successfully completed. In the case of possession of stolen property, the requisite criminal intent is defined as to knowingly receive, retain, possess, conceal or dispose of stolen property knowing that it has been stolen and to knowingly “withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). A person who acts with the required mental state and takes substantial step toward acquiring such property is guilty of criminal attempt to possess stolen property. To convict the defendant of a first or second degree attempted possession of stolen property, however, the state would have to prove the actual value of the property the defendant attempted to possess, not simply that the defendant believed the property to have a particular value. *See, e.g., State v. Delmarter, supra; RCW 9A.56.150.*

Where a person is charged with attempted rape of a child, the *culpable intent* required to establish liability for criminal attempt is the intent to accomplish the criminal result of have sexual intercourse with another person. The actor need not act with the intent to have sexual intercourse with a person who is under the age of consent, nor is it necessary for the state to prove that the perpetrator acted with knowledge of the victim's age or in the belief that the person was of a particular age. This is because the legislature has chosen to criminalize only the result and not the subjective intent or belief of the perpetrator. Thus, where a person intends to have sexual intercourse with another and takes a substantial step toward committing that act, he is guilty of attempted rape of a child, if, and only if, that person is in fact under the age of consent.

In this regard, attempted rape of a child is similar to attempted theft or possession of stolen property in the first or second degree. The *culpable intent* necessary to convict a person of attempted theft or possession of stolen property in the third degree is the intent to wrongfully obtain property belonging to another or to knowingly possess property that is stolen, without regard to the value of the property. Once that intent is established, however, no further showing of knowledge or culpable intent is needed to establish liability for attempted first or second degree theft or

possession of stolen property. Instead, the state must prove the actual value of the property wrongfully obtained or possessed.

Here, the State relied solely on this court's decision in *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) for the proposition that it is not necessary to prove the age of the alleged victim in order to prove attempted rape of a child. In *Townsend*, the defendant was charged with Attempted Second Degree Rape of a Child under facts similar to those of the present case. The defendant argued that the State had failed to present sufficient evidence that he took a substantial step toward the commission of the offense because "[h]e could never take a 'substantial step' toward completing the crime with 'Amber' because 'Amber' was in reality Detective Keller." *Id.* at 679. The court rejected that argument by characterizing it as a claim of factual impossibility. *Id.* The court stated that it agreed with the Court of Appeals that "[i]t makes no difference that Mr. Townsend could not have completed the crime because 'Amber' did not exist. He is guilty if he intended to have sexual intercourse with her." *Id.*

The analysis set forth in *Townsend* is problematic for several reasons. First, the court concluded that Mr. Townsend was guilty of attempted second degree rape of a child if he intended to have sexual intercourse with the alleged victim, 'Amber.' However, the court failed to

perform any analysis of the elements of the offense and failed to define the intent necessary to establish liability for attempted rape of a child. Nor did the court cite or otherwise refer to any of its previous decisions defining intent for attempted rape of a child. Instead, the court simply assumed that the intent needed to establish liability for attempted rape of a child is the intent to have sexual intercourse with a person the defendant knows or believes to be under the age of consent. That assumption is in direct conflict with both *Jackson* and *Chhom*, as cited above. It is also in conflict with this court's decision in *State v. Delmarter*.

Second, the *Townsend* court apparently treated 'Amber' as a person distinct from Detective Keller when it said that Townsend was guilty if he intended to have sexual intercourse with "her." In fact, 'Amber' was not a person at all, but merely an assumed name used by Detective Keller. The court failed to provide any explanation as to how Mr. Townsend could be guilty of attempted child rape if he intended to have sexual intercourse with Detective Keller, simply because Detective Keller had assumed a false identity.

The present case presents the same problem. Mr. Patel was charged in the Information with attempting to have sexual intercourse with "K.A." At trial, Detective Keller admitted that he was "K.A." RP 54-55. Thus, Mr. Patel was charged with attempting to have sexual intercourse

with Detective Keller, who was alleged in the information to be 13 years old. Although no evidence was presented at trial to establish Detective Keller's age, it is not disputed the Detective Keller is well over the age of 13.

Third, *Townsend* leads to a result that is contrary to the legislature's intent to criminalize the act of sexual intercourse with a person who is under the age of consent, without regard to the perpetrator's knowledge or belief as to the victim's age. Under *Townsend*, attempted rape of a child requires the intent to have sexual intercourse with a person who is under the age of consent. Thus, where a person attempts to have sexual intercourse with a child, but does not complete the act, the State would have to prove that the perpetrator knew or believed that the victim was underage. That result is in direct conflict with the legislative determination that protecting children from sexual predators is best accomplished by making rape of a child a strict liability offense.

While the vast majority of crimes contain a mens rea element. That is, the actor is guilty of a criminal offense only if his actions are accompanied by an evil or criminal purpose. Thus, the intent needed to establish liability for criminal attempt of such a crime is identical to the intent needed to establish the offense itself, i.e., the actor must intend the "criminal result."

The foregoing does not hold true, however, with regard to strict liability crimes that have no intent or mens rea element. In those cases, the intent needed to establish liability for criminal attempt is nothing more than the intent to perform the act itself, for it is the act itself that has been criminalized, without regard to any evil thought or purpose on the part of the actor.

If the *Townsend* analysis is correct, then *Jackson* and *Chhom* were wrongly decided. In those cases, the court held that the defendants could be found guilty of attempted rape of a child without any proof that they knew of the age of their victims or believed their victims to be of a particular age. In both *Jackson* and *Chhom* this court expressly held that such knowledge or belief was not an element of the offense, but that the actual age of the victim was a necessary element that the state must prove. In contrast, *Townsend*, as interpreted by the State, holds that the actual age of the victim is irrelevant in a prosecution for attempted second degree rape of a child and that the defendant's subjective belief as to the age of the victim is all that matters.

Even the State has not argued, however, that the intent element for attempted rape of a child changes based upon the circumstances of each case or that the attempt statute provides more than one alternative means of proving intent. Therefore, either *Townsend* must be overruled or

Jackson and *Chomm* must be overruled, as must *Delmarter* and all other previous decisions by the courts of this state that have applied the criminal attempt statute to strict liability offenses.

The difficulties posed by *Townsend* are further illustrated by the trial court's ruling in this case. In denying the defendant's motion for arrest of judgment, the trial court ruled that Mr. Patel's subjective belief as to the age of the alleged victim was irrelevant and that Mr. Patel was guilty of attempted Second Degree Child Rape because Detective Keller had stated that "kimberlyanne" was 13 years old, regardless of whether Mr. Patel believed he was conversing with a 13 year old or intended to engage in sexual intercourse with a 13 year old. RP 252. That ruling is in direct conflict with *Townsend*, which expressly relied upon the defendant's subjective belief that the "Amber" was only 13 years old as the basis for finding that he had taken a substantial step toward committing the crime of Second Degree Child Rape. *Townsend*, at 679.

Moreover, under the trial court's interpretation of what constitutes a "substantial step" toward the completion of child rape, a person would be guilty of attempting that crime simply by agreeing to meet with someone for the purpose of having sexual intercourse, even though he or she had no reason to suspect that the other person was underage. It seems highly unlikely that the legislature intended to criminalize that type of

conduct, so long as the actor does not actually attempt to have sex with a child, since the completed act of sexual intercourse with a person of legal age would not constitute a crime.

Ultimately, the crime of attempted child rape can only be committed by conduct that unequivocally demonstrates the intent to actually engage in sexual intercourse with another person. As stated in *Townsend*, only conduct that is “strongly corroborative” of the actor’s criminal intent will constitute a substantial step toward the commission of the offense. *Townsend*, at 679. However, not all acts that are corroborative of a criminal intent will amount to a substantial step. Intent and substantial step are two separate elements that must be independently proved beyond a reasonable doubt. *State v. Aumick*, 126 Wn.2d 422, 429-30, 894 P.2d 1325 (1995). Mere preparation or planning does not amount to a substantial step, even if done with the requisite intent. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). As stated in *United States v. Oviedo*, 525 F.2d 881, (5th Cir. 1976):

[W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant’s conduct as criminal in nature.

Id. at 885.

The act of meeting a stranger for the first time simply does not rise to the level of conduct that is "criminal in nature," even if the circumstances indicate that the actor is primarily motivated by the desire to engage in sexual conduct. Such meetings take place routinely in our society and, as any young male can attest, more often than not fail to lead to actual sexual intercourse for a variety of reasons, including that the one or both of the parties determine that the other is not suitable as a sexual partner. The fact that the meeting may be prefaced by conversations about sex or that one of the persons brings condoms to the meeting does not change the nature of the conduct itself, but merely indicates preparation and planning for the possibility that the meeting will lead to sexual intercourse.

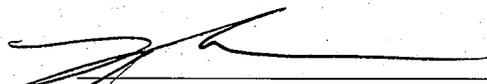
Here, as in *Townsend*, it is simply not possible to conclude from the circumstances that Mr. Patel would have engaged in sexual intercourse with the person he went to meet, regardless of who that person turned out to be. On the one hand, although Mr. Patel most likely would not have engaged in sexual intercourse with Detective Keller, he would not have committed the crime of rape of a child by doing so. On the other hand, if "kimberlyanne" had turned out to be a 13 year old female and Mr. Patel had attempted to have sex with her, he would then have taken a substantial step toward committing child rape, even if he mistakenly believed she was

older. However, it cannot be said, consistent with common sense and logic, that by merely showing up at her door, Mr. Patel attempted to have sexual intercourse with "kimberlyanne" or anyone else.

V. CONCLUSION

Based upon the foregoing, this court should reverse the judgment of the trial court and order that the charges against the defendant be dismissed with prejudice, or in the alternative, remand for retrial and order that the evidence obtained in violation of RCW 9.73.030 be excluded from trial.

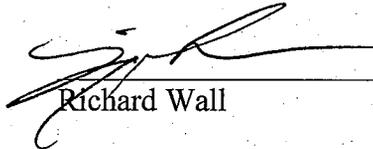
Respectfully submitted this 30th day of January, 2007.


Richard D. Wall, WSBA# 16581
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of January 2007, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was delivered via legal messenger to the following:

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Richard Wall