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No. 26683-4-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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CLERK OF SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT OF THE STATE
OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MITEL PATEL,

Petitioner.

PETITION FOR REVIEW

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I. Identity of Petitioner:

Mitel Patel, defendant, asks this court to accept review of the decision designated in Part B of this motion.

II. Decision to be Reviewed:

The decision of the Court of Appeals, Division III, filed December 23, 2008.

III. Issues Presented for Review:

1. Whether sufficient evidence was presented at trial to establish the essential elements of the offense of attempted second degree rape of a child where the State failed to introduce any evidence of the alleged victim's age.

IV. 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. When Mr. Patel arrived at the apartment and knocked on the door, he was immediately placed under arrest. 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.” RP 39-40. Mr. Patel acknowledged that he had engaged in the chat with a person he knew as “kimberlyanne,” but denied that he believed that “kimberlyanne” was only 13 years old. RP 76. Mr. Patel indicated that he did not know how old “kimberlyanne” was, but that he thought she might be 16 or 17 years old. 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.

Following a bench trial, 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; the age of the victim. CP 12; RP 240-248. The trial court denied the motion. RP 253. On appeal, Division III of the Court of Appeals affirmed Mr. Patel’s conviction relying on this court’s decision in *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002). Mr. Patel now seeks review by this court.

V. Argument:

1. This case presents an issue of substantial public interest because the conviction of a person for the crime of attempted rape of a child without any proof of the victim’s age is contrary to the law of this state and the intent of the legislature in making the crime of child rape a strict liability offense.

Discretionary review should be granted because this case presents an issue of substantial public interest that should be decided by this court. The Court of Appeals denied Mr. Patel’s appeal on the ground that this court’s decision in *State v. Townsend* was controlling precedent. *State v. Townsend* was wrongly decided and is in direct conflict with the prior decisions of this court. As a result of the decision in *State v. Townsend*, potentially hundreds, if not thousands, of Washington State citizens have been wrongly charged and convicted of the crime of Attempted Child Rape for engaging in conduct that does not constitute that crime under Washington’s Child Rape statute. In

addition, this court's ruling in *State v. Townsend* is contrary to the intent of the Washington State legislature to provide maximum protection to children from sexual predators by making child rape a strict liability crime that does not require the State to prove that the defendant knew or should have known the age of the victim. In direct conflict with that legislative choice, *State v. Townsend* adopts a rule that requires the State to prove in a prosecution for *attempted* child rape that the defendant knew or should have known the victim's age.

The facts of the present case are similar to the facts of *State v. Townsend*, except that Mr. Patel denied that he ever intended to have sex with a person he believed was only 13 years old. In both cases, the defendant was caught in an internet "sting" operation conducted by Detective Keller of the Spokane Police Department. The sting consists of Detective Keller posing as a female on an internet chat room and inviting persons to meet in person at a pre-arranged location. Detective Keller uses sexually suggestive language and other means to make it appear that at least one purpose of the meeting is to engage in sexual activity with the other person. Detective Keller assumes the identity of a young girl of a particular age. When the person appears at the pre-arranged meeting place, they are immediately arrested and charged with the crime of attempted child rape.

In *Townsend*, the defendant argued that the State failed to present sufficient evidence at trial to establish each of the elements of the offense because the State did not prove the age of the alleged victim. The court upheld *Townsend's* conviction, but did so without actually analyzing the sufficiency of the evidence issue. Instead, the court reconstructed *Townsend's* sufficiency of the evidence argument as a claim of

“impossibility” and concluded that, under Washington’s criminal attempt statute, “impossibility” is not a defense. The court never fully discussed whether that analytical approach was appropriate or legally correct.

Prior to *Townsend*, this court had ruled that the crime of attempted child rape is a strict liability crime in the same manner that the completed crime of child rape is a strict liability crime. *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). In *Chhom*, this court held that the age of the victim was an element of the offense of attempted child rape that must be proved by the State the same as in a prosecution for the completed crime and that the defendant’s subjective belief regarding the age of the victim was irrelevant. *Id.*

The Court of Appeals has reached the same conclusion in the case of *State v. Jackson*, 62 Wn. App. 53, 813 P.2d 156 (1991). There, the court held that attempted Rape of a Child has 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. *Id.*, at 55. The defendant’s subjective belief as to the age of the victim is not a part of the intent element. The intent element is satisfied by showing that the defendant intended to have sexual intercourse with the alleged victim, without any regard to the victim’s age or the defendant’s belief as to the victim’s age. *Id.* Thus, the victim’s age is relevant only to whether the defendant’s actions constitute a substantial step toward the commission of child rape.

In *Townsend*, this court inexplicably did not cite or reference *State v. Chhom* in any way. Nor did the court cite *State v. Jackson*. Instead, the court simply concluded that the defendant was guilty of attempted child rape because he intended to engage in

sexual intercourse with a person he *believed* was only 13 years old. *Townsend*, at 679. That holding is in direct conflict with both *Chhom* and *Jackson*.

The analysis in *Townsend* is flawed because it applies the criminal attempt statute to the crime of child rape as if that crime requires a specific intent to achieve a particular result, i.e., sexual intercourse with a child under the age of consent. But child rape is a strict liability crime. There is no requirement that the defendant act with an evil purpose or intent, unless the act having sexual intercourse is considered to be evil in and of itself. Instead, the child rape statute criminalizes conduct that is otherwise perfectly legal if the state can establish the existence certain facts, the victim's age and the difference in ages between the victim and defendant. When those facts are established, the act is criminal whether or not the defendant knew or had any reason to know of the victim's age of the difference in ages.

This court has previously applied to criminal attempt statute in cases where the attempt is to commit a strict liability offense other than child rape. 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.* In that sense, at least, the degree of theft is a matter of strict

liability. Thus, the court held that the State need only prove that the property or services in fact had a value in excess of \$1,500, regardless of the defendant's knowledge or belief. *State v. Delmarter*, at 637. There is no apparent reason why the foregoing analysis should be any different simply because the attempted offense is a sex offense rather than a property offense.

In addition to being analytically flawed, the decision in *Townsend* is in direct conflict with the clear intent of the legislature in making child rape a strict liability crime. By making child rape a strict liability crime, the legislature made a conscious choice not to require the State to prove the defendant's subjective belief as to the victim's age in order to obtain a conviction. The legislature made that choice because it believed that was the best way to protect children. In many circumstances it may be difficult to prove that the defendant knew or should have known the victim's age. Thus, the legislature adopted a statute that criminalizes the act of sexual intercourse with a child, regardless of whether the actor had any reason to believe the victim was under the age of consent. That the defendant reasonably believed that the victim was old enough to consent to sexual intercourse is an affirmative defense that must be proved by the defendant and is subject to certain limitations. RCW 9A.44.030(2).

Townsend turns the child rape statute on its head by declaring that, in a prosecution for *attempted* child rape, all that matters is the defendant's subjective belief as to the victim's age. Thus, the actual age of the victim becomes irrelevant. But there is no reason to believe that the legislature wanted to provide less protection to children under circumstances that amount to attempted child rape than is provided in cases of a completed rape. That is exactly what *Townsend* does.

Under *Townsend*, the intent element of attempted child rape is the intent to have sexual intercourse with a person *believed* to be under the age of consent. Thus, any person charged with attempted child rape can simply claim as a defense that they did not know the victim's actual age and believed they were old enough to legally consent to sexual intercourse. In real life situations, as opposed to a police orchestrated "sting" operation, such a defense will often be a valid one, since underage children who willingly engage in sexual intercourse with older partners are not likely to reveal their real age, and there may be no objective facts to indicate that the person is in fact under the age of consent. Therefore, *Townsend* undermines the intent of the child rape statute to place the burden of ensuring that one's partner is old enough to consent to sexual intercourse entirely on the adult, not on the child.

This is not to say that persons who knowingly engage in sexually explicit conversations with children via the internet or otherwise are immune from prosecution. *See*, RCW 9.68A.090 (prohibiting communication with a minor or a person *believed to be a minor* for immoral purposes). However, the conduct at issue here simply does not amount to the crime of attempted child rape because the alleged victim was, in fact, a police detective, not a 13 year old girl. It is no answer to say that the alleged victim is a "fictitious" person. Detective Keller is not a fictitious person in any sense of the word. The fact that he pretended to be someone he was not does not make him anymore "fictitious" than anyone else who assumes a false identity.

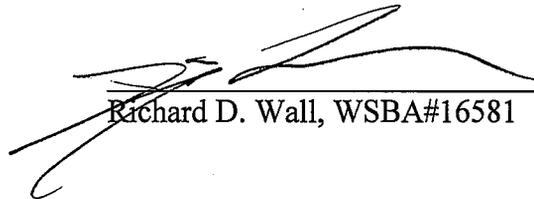
As a result of the *Townsend* decision, an unknown number of persons in this state have been convicted the crime of attempted child rape under circumstances that do not meet the elements of that offense as it is defined by statute. If *Townsend* is not corrected,

then it is safe to assume that many other persons will likely be wrongly convicted in the future under similar circumstances. This court should accept review of this case and correct the error that was made in *Townsend* in order to bring the decisions of this court into conformity with child rape statute, the prior decisions of this court, and the public policy expressed by the state legislature in making child rape a strict liability offense.

VI. Conclusion:

For the foregoing reasons, this court should accept review of the decision below and reverse the decision of the Court of Appeals.

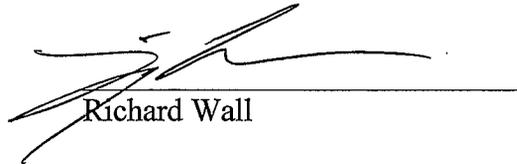
Respectfully submitted this ¹⁶/₁₆ day of January, 2009.


Richard D. Wall, WSBA#16581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of January, 2009, a true and correct copy of the foregoing PETITION FOR REVIEW was delivered via legal messenger to the following:

Mark Lindsey
Spokane County Prosecutor's Office
1100 W. Mallon
Spokane, WA 99260-2043


Richard Wall

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	No. 26683-4-III
)
Respondent,)
) Division Three
v.)
)
MITEL PATEL,) UNPUBLISHED OPINION
)
Appellant.)
)

Kulik, A.C.J.—Mitel Patel challenges his conviction for attempted second degree rape of a child. On appeal, Mr. Patel contends that the trial court erred by: (1) denying his motion to suppress transcripts of his instant messaging conversations with an undercover detective posing as a fictitious 13-year-old girl, and (2) denying his motion to dismiss for failure to prove an essential element of the crime. We affirm Mr. Patel’s conviction for attempted second degree rape of a child.

FACTS

On December 3, 2004, Mitel Patel was charged with attempted second degree rape of a child as the result of an Internet sting operation conducted by the Spokane Police Department’s Sexual Exploitation Unit to catch sexual predators.

As part of the undercover operation, Detective Jerry Keller created the screen name of "kimberleyanne420" and posted a profile on America On Line (AOL), an Internet service provider. Report of Proceedings (RP) (Dec. 5, 2005) at 9. In the corresponding profile, Detective Keller represented himself as a young girl by the name of "Kimberley" who was single and a student at "Garry," a local middle school. RP (Dec. 5, 2005) at 10. Posing as the fictitious girl, Detective Keller engaged in an instant messaging conversation or "chat" with people who contacted that profile using AOL's Instant Messenger program. RP (Dec. 5, 2005) at 8. Instant Messenger is an on-line service that allows users to communicate in real time by sending instant messages through their computers. The chats were automatically recorded by Detective Keller's computer.

On November 30, 2004, at 7:32 am, Mitel Patel, a 26-year-old male initiated an on-line chat with "kimberleyanne420." RP (Dec. 5, 2005) at 10. At that time, Mr. Patel and another individual were living in the home of their roommate, Robert Alderson, who was also Mr. Patel's employer. Using Mr. Alderson's computer and his AOL screen name of "Rob Corey A," Mr. Patel participated in various instant messaging chats that morning. RP (Dec. 5, 2005) at 10. Mr. Patel then responded to the "kimberleyanne420" profile by sending an instant message.

In his initial message, Mr. Patel wrote “HELLO . . . U LIKE OLDER GUYS?” Clerk’s Papers (CP) at 17. Kimberley then asked “how old r u.” CP at 17. Mr. Patel indicated that he was 26 years old. In response, Kimberley stated “wow im 13 but look and act older.” CP at 17. Mr. Patel replied “RIGHT ON” and asked for her picture. CP at 17. Thereafter, Mr. Patel shifted the focus of the conversation to sexual topics, including various forms of sexual intercourse. Immediately after Kimberley described herself, Mr. Patel asked “U EVER HAD SEX?” CP at 17. When she responded affirmatively, Mr. Patel wrote “I WANNA GET ME SOME” and “WHY DON’T U COME OVER . . . IF U WANT TO HAVE SEX.” CP at 17.

At one point during the conversation, Mr. Patel asked about their age difference. He later asked Kimberley how old she looked with her makeup on. As the conversation progressed, Mr. Patel e-mailed a picture of himself to Kimberley.

The messages between Mr. Patel and Kimberley contained graphic discussions about the sexual conduct the two could engage in. Throughout the conversation, Mr. Patel repeatedly invited Kimberley over to his house, and offered to pick her up. He also asked her if she wanted him to come over to her house when her mom went to work. Mr. Patel then asked Kimberley for her address. She replied that she wanted to wait until she knew her mom was leaving for sure before giving it to him, but agreed that they could

meet at her place. Eventually, the conversation was interrupted when Mr. Patel had to go shovel snow. He told Kimberley to leave her phone number and address so that he could call her when he returned.

Detective Keller, under the guise of Kimberley, continued to chat with Mr. Patel when the conversation resumed at 10:47 am. The conversation soon returned to a sexual nature and Mr. Patel reiterated to Kimberley that he was interested in having sex with her. When she expressed concern about becoming pregnant, Mr. Patel volunteered to bring five flavored condoms with him. The second conversation ended while the two waited for Kimberley's fictitious mother to leave for work. At that point, Detective Keller arranged for a surveillance team to be set up at an apartment and moved to that location.

At 12:36 pm, Mr. Patel initiated a third conversation with Kimberley and was provided with directions to the apartment. Kimberley then asked whether "[R]ob" was his real name, to which Mr. Patel replied "no it's Mitel." CP at 22. Another detective videotaped Mr. Patel as he arrived at the complex and proceeded to the apartment where Mr. Patel expected to meet Kimberley. There, Mr. Patel knocked on the door, identified himself as "Mitel" and asked for "Kim." RP (Dec. 5, 2005) at 34. Mr. Patel was then placed under arrest. A search incident to his arrest revealed directions to the apartment

and five flavored condoms in Mr. Patel's pocket.

After his arrest, Mr. Patel was questioned by Detective Keller about the incident. Mr. Patel denied knowing that Kimberley was 13 years old. Detective Keller showed Mr. Patel a six-page transcript of the instant messaging chat between "Rob Corey A" and "kimberleyanne420," which he asked Mr. Patel to review. Mr. Patel acknowledged that he had engaged in the on-line chat and attested to the accuracy of the transcripts by initialing each chat session.

Detective Keller seized the computer used by Mr. Patel and discovered that a portion of the instant message chat was recorded on the computer's hard drive. According to the computer forensic specialist, AOL users can elect to save chats. Police also determined that at some point, the screen name "kimberleyanne420" had been added to "Rob Corey A's" "buddy list." RP (Dec. 5, 2005) at 110.

Procedural History. Prior to trial, Mr. Patel moved to suppress the transcript of the chat, arguing that the recording of the instant messages violated Washington's privacy act, chapter 9.73 RCW. Following an evidentiary hearing, the trial court denied the motion. In its written order, the trial court found that Mr. Patel impliedly consented to the recording of the chats based on his "comments in the chats, the fact that he was using another's business computer, his prior experience with computers and general knowledge

about the nature of computer communications, and other facts from the hearing [which] support the court's finding." CP at 4-5.

Mr. Patel also made an oral motion to dismiss the charge based on *State v. Knapstad*.¹ He asserted that the State could not prove the elements of attempted second degree rape of a child because there was no evidence that the alleged victim in this case was 13 years old at the time of the incident. The trial court denied the motion, finding that it was "procedurally and factually insufficient to support dismissal," but the court allowed defense counsel to supplement the motion so the court could revisit it at a later time. CP at 6.

A bench trial was held on December 5 and 6, 2005. The trial court again denied Mr. Patel's renewed motion to dismiss at the close of the State's case. The trial court found Mr. Patel guilty as charged and later denied Mr. Patel's motion for arrest of judgment.

Mr. Patel was sentenced on March 30, 2006, under the Special Sexual Offender Sentencing Alternative. The trial court imposed a suspended sentence and placed him on community custody. On April 19, 2006, Mr. Patel filed a notice of discretionary review to the Supreme Court. The Supreme Court transferred the appeal to this court.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

ANALYSIS

Privacy Act. Mr. Patel first contends that the trial court erred by denying his motion to suppress the transcript of his instant messaging conversations with Detective Keller. Mr. Patel argues that the recording of these instant messages violated a provision in Washington's privacy act, chapter 9.73 RCW, because he did not impliedly consent to the recording. A trial court's decision to deny a motion to suppress is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

The privacy act prohibits a person from intercepting or recording any "private communication" transmitted by telephone, telegraph, radio, or other device between two or more individuals by any device, electronic or otherwise designed to record and/or transmit the communication, without first obtaining the consent of all the participants in the communication. RCW 9.73.030(1)(a). The privacy act is designed to protect private conversations from governmental intrusion. *State v. Clark*, 129 Wn.2d 211, 232, 916 P.2d 384 (1996). Any information obtained in violation of RCW 9.73.030 is inadmissible

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in any civil or criminal lawsuit. RCW 9.73.050.

The statute does not prohibit recording a private communication if the consent of all participants is obtained. RCW 9.73.030(1)(a). A party to a conversation or communication is deemed to have consented to its recording whenever one party has announced to all other parties in an effective manner that it will be recorded, or when the party otherwise knows that the communication will be recorded. RCW 9.73.030(3); *State v. Townsend*, 147 Wn.2d 666, 675, 57 P.3d 255 (2002). In addition, a party is deemed to have impliedly consented to the recording of electronically transmitted communications, such as e-mail or instant messages, where that party is sufficiently familiar with the technology or program used to transmit the conversation to be on notice that the conversation might be recorded by another party. *Id.* at 675-76.

Mr. Patel relies on *Townsend* for the proposition that an Internet conversation 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. As a result, Mr. Patel maintains that the recording of such conversations by police violates RCW 9.73.030(1)(a) unless the individual expressly or impliedly consents.

In *Townsend*, the defendant was charged with attempted second degree rape of a

child under similar facts. In that case, Detective Keller, acting on a tip that Mr. Townsend was attempting to use his computer to arrange sexual encounters with young girls, set up a sting operation in which he established an e-mail account with the screen name “ambergirl87,” a fictitious 13-year-old girl. *Townsend*, 147 Wn.2d at 670. Mr. Townsend then began corresponding with Detective Keller, under the guise of “Amber,” via e-mail. *Id.*

Then, at Mr. Townsend’s request, Detective Keller set up an “ICQ” account. *Id.* ICQ is an Internet discussion software program that allows users to chat on the Internet in real time. *Id.* at 670-71, 676. By default, the software program automatically recorded the messages Detective Keller received. *Id.* at 671. Mr. Townsend and Amber exchanged messages containing graphic discussions of a sexual nature, including sexual intercourse, and soon after arranged to meet at a motel room. *Id.* Mr. Townsend went to the motel room at the agreed upon time, knocked on the door, and asked to see Amber. *Id.* Mr. Townsend was arrested and later convicted of attempted second degree rape of a child. *Id.*

The primary issue on appeal in *Townsend* was whether Detective Keller violated the privacy act when he saved and printed e-mail and instant messages between Mr. Townsend and the fictitious girl, Amber. *Id.* at 669. In addressing this issue, the court

first determined whether the computer communications fell under the privacy act as “private communications” that had been “recorded by a device.” *Id.* at 673.

The court held that Mr. Townsend’s communications to Amber were private, finding that it was Mr. Townsend’s subjective intention that the messages remain private and that his expectation was reasonable under the circumstances. *Id.* at 674-75. The court reached this conclusion in light of the subject matter of the communications and the fact that Mr. Townsend had specifically asked Amber not to tell anyone about them. *Id.* at 674. The court also concluded that the communications had been recorded by a device, as contemplated by the privacy act, regardless of the fact that they were recorded on the very device (Detective Keller’s computer) that was used to perform the communication itself. *Id.* at 674-75.

After having determined that the private e-mail and instant messages between Mr. Townsend and Amber were subject to the privacy act, the second step in the court’s analysis was to determine whether Mr. Townsend consented to the recording of his private communications. *Id.* at 675. The court held that Mr. Townsend had, in fact, impliedly consented to the recordings, because he was sufficiently familiar with the ICQ technology to be on notice of the software’s privacy policy, which specifically warned users that the recording of ICQ messages by a recipient was a possibility. *Id.* at 676.

In the present case, the State urges this court to find that the instant messaging chats between Mr. Patel and Detective Keller were not private conversations. While the State acknowledges that Mr. Patel did manifest the same subjective belief that the conversations were private as the defendant did in *Townsend*, the State argues that the expectation of privacy was not objectively reasonable considering the fact that Mr. Patel was using a borrowed computer. The State also points out that the computer's owner had set up the computer to record instant messages and, therefore, the computer also recorded the chats. The State contends that it is not objectively reasonable for a guest to have a greater expectation of privacy than his host does. The State warns that if this court were to accept Mr. Patel's argument that the privacy act applies, then his roommate would be civilly and criminally liable under the privacy act because his own computer recorded Mr. Patel's chats with the detective. In the alternative, the State argues that if the communications are subject to the privacy act, this court should find that Mr. Patel impliedly consented to their recording.

Private Communications. Under RCW 9.73.030, the protections of the privacy act apply only to "private" communications or conversations. Whether a conversation is "private," within the meaning of the privacy act, is a question of fact that may be decided as a matter of law where, as here, the facts are not meaningfully in dispute. *State v.*

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Modica, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008).

Significantly, a communication is private only when (1) the parties to the communication manifest a subjective intention that it be private, and (2) where that expectation of privacy is objectively reasonable. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). Because a defendant can easily contend that his or her conversation was intended to be private, the court must look beyond the subjective intentions of the parties to other factors bearing on the reasonableness of their expectation of privacy, including: the duration and subject matter of the communication; the location of the communication and the potential presence of third parties; and the role of the nonconsenting party and his or her relationship to the consenting party. *Clark*, 129 Wn.2d at 225-27. While each of these factors is significant in making a factual determination as to whether a conversation is private, the presence or absence of any single factor is not dispositive. *Id.* at 227.

We accept the State's concession and assume for purposes of our analysis that Mr. Patel subjectively intended that his communications to the fictitious child be private. Consequently, this case turns on whether that expectation was reasonable. On this issue, *Townsend* is not controlling, as two significant facts distinguish this case from *Townsend*.

First, Mr. Patel utilized another person's computer to engage in the communications. Mr. Patel accessed Mr. Alderson's computer which was located in the home office and was also used for Mr. Alderson's business. Mr. Patel then accessed Mr. Alderson's AOL account and AOL screen name to engage in instant messaging communications. Mr. Patel admitted that he did not purchase or set up the AOL account on the computer; rather, Mr. Alderson did.

Second, unlike *Townsend*, here both the host and the receiving computer were recording the instant messaging chats. Mr. Alderson's computer automatically recorded the instant messaging communications as did Detective Keller's computer. Forensic analysis of the hard drive on Mr. Alderson's computer revealed that a portion, if not all, of the instant messaging chats between Mr. Patel and Kimberley were on Mr. Alderson's computer. In light of the testimony that AOL users can elect to save chats, it is reasonable to assume that Mr. Alderson knew that such communications could be recorded and, therefore, consented to the recording.

Additional facts also support the conclusion that Mr. Patel's expectation of privacy was not reasonable. While Mr. Alderson had given Mr. Patel permission to use his computer, there is no evidence that Mr. Patel received, or otherwise relied on, any assurances from Mr. Alderson that his conversations would be private. Mr. Patel was

aware that he was using a business computer and that he shared access to it with Mr. Alderson. The computer was located in a home office, not in Mr. Patel's private living area. Moreover, there is no evidence that Mr. Patel took any precautions to maintain his privacy because he used Mr. Alderson's log-in and screen name. In addition, when Mr. Patel had to leave for a period of time, he asked Kimberley to leave information in a message so that he could see it when he returned. The evidence shows that Mr. Patel willingly used the computer, subject to the software and settings that Mr. Alderson had established.

In conclusion, the instant messaging chats between Mr. Patel and Detective Keller were not private communications within the meaning of the privacy act. Accordingly, the State did not violate the privacy act by recording them. Given this holding, we need not reach the issue of whether Mr. Patel impliedly consented to having the communications recorded. The trial court did not err by admitting the transcripts.

Proof of Age of the Victim. Mr. Patel next argues that the trial court erred by denying his motion to dismiss the charge against him based on *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

Mr. Patel contends that because attempted rape of a child has no mens rea element and is a strict liability crime, a defendant's knowledge or belief as to the victim's age is

not an element of the crime, nor is it relevant to the issue of guilt. Mr. Patel points out that while he was charged with attempting to have sexual intercourse with “K.A.,”² who was alleged to be 13 years old, “K.A.” was in reality Detective Keller. He contends that the State failed to present any evidence at trial establishing the age of the victim, an essential element of the crime. Mr. Patel argues that because attempted rape of a child is a strict liability crime, the State cannot substitute proof that he believed the victim to be of a particular age for proof of the victim’s actual age.

In order to prevail on a *Knapstad* motion, the defendant must show that “there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” *Id.* at 356. A trial court may dismiss a criminal charge if the State fails to establish prima facie proof of all elements of the crime charged. *State v. Sullivan*, 143 Wn.2d 162, 171 n.32, 19 P.3d 1012 (2001). After proceeding to trial, a defendant cannot appeal the denial of a *Knapstad* motion, which is a pretrial challenge to the sufficiency of the evidence. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). Rather, the defendant may challenge the sufficiency of the evidence produced at trial. *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001).

Evidence is sufficient to support a conviction if, when viewed in the light most

² CP at 1.

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*

Rape of a child in the second degree is defined as 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 criminal attempt if, with the intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). The 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 the crime of rape of a child has no mens rea element, the “criminal result” for purposes of the attempt statute is “the intent to have sexual intercourse.” *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). Therefore, to prove an attempted second degree rape of a child, the State must establish

that the defendant took a substantial step toward the commission of the crime with the intent to have sexual intercourse. RCW 9A.44.076(1); RCW 9A.28.020; *see State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991).

The court in *Townsend* expressly addressed this issue under similar facts and found that the evidence was sufficient to support the conviction. *Townsend*, 147 Wn.2d at 679-80. Because the facts relevant to this issue are nearly identical, *Townsend* is controlling. There, Mr. Townsend argued that the State had failed to present sufficient evidence that he took a substantial step toward the commission of the crime of second degree rape 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 Mr. Townsend’s argument that one could not rape a fictitious child, characterizing it as a claim of factual impossibility. *Id.* (quoting *State v. Townsend*, 105 Wn. App. 622, 631, 20 P.3d 1027 (2001)). Citing to RCW 9A.28.020(2), the court noted that by statute, factual impossibility is not a defense to a crime of attempt. *Townsend*, 147 Wn.2d at 679. The court went on to note that the criminal attempt statute focuses on the actor’s criminal intent, rather than the impossibility of convicting the defendant of the completed crime. *Id.* The court concluded:

We agree with the Court of Appeals that “[i]t thus 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. (quoting *Townsend*, 105 Wn. App. at 631). The court ultimately affirmed Mr. Townsend’s conviction, finding that the evidence was sufficient to show he took a substantial step toward committing attempted second degree rape. *Id.* at 680.

Mr. Patel attempts to distinguish his case from *Townsend*, arguing that his claim is not one of factual impossibility. He contends that because the State cannot first establish the elements of the crime, he need not argue a defense. Mr. Patel argues that Detective Keller is not 13 years old. Mr. Patel points out if he had, in fact, engaged in sexual relations with Detective Keller, he would not have committed second degree child rape. Further, arguing that the State must prove the elements of both attempt and second degree child rape, Mr. Patel contends that it failed do so in this case because there is no victim who is, in fact, 13 years old.

Here, the essential elements at issue are (1) the intent to have sexual intercourse and (2) the taking of a substantial step toward doing so. In this case, as in *Townsend*, each defendant engaged in a sexually explicit chat with a person who identified herself as

a 13-year-old girl. Just minutes into the conversation, Mr. Patel asked Kimberley if she wanted to come over to have sex. Throughout the conversations Mr. Patel sent Kimberley explicit messages about specific sexual acts they could engage in and repeatedly asked her if they could meet.

Mr. Patel and Kimberley eventually agreed that he could come over to her apartment. Shortly after receiving directions, Mr. Patel proceeded to her apartment where he knocked on the door, identified himself as “Mitel,” and asked for “Kim.” RP (Dec. 5, 2005) at 34. At that point, Mr. Patel was placed under arrest. A search of Mr. Patel revealed five flavored condoms in his pocket, which he admitting to “grabbing them off the table” before leaving to meet Kimberley. RP (Dec. 6, 2005) at 172. At trial, Mr. Patel testified that he brought the condoms because he was ready to have sex if that developed.

From this evidence, a trier of fact could have found beyond a reasonable doubt that Mr. Patel intended to have sexual intercourse with a 13-year-old girl and that he took a substantial step toward that goal. The evidence was sufficient to support the conviction in *Townsend* under nearly identical facts. Finally, under *Townsend*, it is immaterial that the State could not prove that an actual 13-year-old victim existed because Amber was a fictitious person. *Townsend*, 147 Wn.2d at 679. In conclusion, sufficient evidence

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supported the trial court's bench verdict.

We affirm Mr. Patel's conviction for attempted second degree rape of a child.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.