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COURT OF APPEALS
DIVISION II

NO. 382296-II

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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL GAFFNEY,

Respondent.

RESPONDENT'S BRIEF

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I. COUNTER-STATEMENT OF THE ISSUES

1. Under Washington State law, does a trial court correctly hold that the statement made by child witness M.P.A. was not corroborated when no evidence suggesting that a crime had occurred was presented at the time of the child hearsay hearing.
2. Under Washington State law, does a trial court appropriately deny a motion to dismiss under *State v. Knapstad* when no evidence independent of Mr. Gaffney's alleged statements was shown proving Mr. Gaffney even attempted to commit a crime.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Gaffney was charged with First Degree Child Molestation and Attempted First Degree Child Molestation. CP 128. A Child Hearsay Hearing was conducted on June 23, 2008 before the Honorable Judge Haberly. CP 133. The Court held that M.P.A.'s statement to her mother that Mr. Gaffney touched her thigh by her knee was inadmissible. CP 133-136. The defense subsequently filed a motion to dismiss under *State v. Knapstad*. CP 35-71. A hearing on the motion to dismiss was heard before the Honorable Judge Haberly on July 7, 2008. Judge Haberly granted the *Knapstad* motion to dismiss. CP 137, 138-41. All charges were dismissed and the State has filed an appeal of Judge Haberly's decision regarding the Child Hearsay ruling and Order of Dismissal.

B. STATEMENT OF FACTS

On March 26, 2008, M.P.A. was with her family at the Bainbridge Island Aquatic Center. RP (06/23/2008) 6. M.P.A.'s date of birth is February 22, 2004. *Id.* M.P.A. and her mother were in the lobby of the

Aquatic Center. *Id.* While M.P.A.'s mother, Ms. Alpaugh, made arrangements for swimming lessons for M.P.A., M.P.A. used the restroom located in the lobby of the facility by herself. RP (06/23/2008) 7. M.P.A. was wearing a one piece swimming suit at the time. RP (06/23/2008) 10. After two to three minutes, Ms. Alpaugh went into the restroom to check on M.P.A. RP (06/23/2008) 9. Ms. Alpaugh discovered a man, later identified as Mr. Gaffney, standing next to M.P.A. in the area near the sink. RP (06/23/2008) 9-10, 14. The restroom consisted of two stalls and an area with the sink and paper towel dispenser. RP (06/23/2008) 9-10. Ms. Alpaugh saw that the straps to M.P.A.'s swimming suit were down, but that was typical for her swimming suit. RP (06/23/2008) 10.

Ms. Alpaugh told the man to get out, which he did. RP (06/23/2008) 11. After he left, Ms. Alpaugh asked M.P.A. if the man had touched her. RP (06/23/2008) 11. According to Ms. Alpaugh, M.P.A. answered the question by tapping her thigh by her knee and saying "here". RP (06/23/2008) 11. Ms. Alpaugh believed M.P.A. indicated with the gesture and comment that the man touched her leg. RP (06/23/2008) 11-12. Ms. Alpaugh asked M.P.A. if she had been hurt or if the man had said anything to her. RP (06/23/2008) 12. Ms. Alpaugh testified that M.P.A. did not really respond to the question. *Id.* M.P.A. did not say anything to Ms. Alpaugh suggesting that she had been sexually molested. RP (06/23/2008) 17. M.P.A. did not blurt out any comments but did respond to her mother's questioning. RP (06/23/2008) 19. M.P.A. and

her mother waited in the lobby after their conversation for M.P.A.'s sister. RP (06/23/2008) 18. M.P.A. did not appear to be upset during that time. RP (06/23/2008) 18-19.

Ms. Alpaugh told the staff of the Aquatic Center that a man had been in the women's restroom. RP (06/23/2008) 15. No further action was taken by Ms. Alpaugh or the staff at that time. RP (06/23/2008) 15-16. Ms. Alpaugh did not later report the incident to authorities because at the time of the incident, she did not believe that M.P.A. had been molested. RP (06/23/2008) 17. M.P.A. did not discuss what happened in the bathroom, and Ms. Alpaugh did not discuss it with her. RP (06/23/2008) 17.

At the time of the Child Hearsay Hearing the parties agreed M.P.A. was not competent and was therefore unavailable as a witness. RP (06/23/2008) 2. The Deputy Prosecuting Attorney asked the Court to approve a stipulation as to that fact. *Id.* The trial court reviewed a transcript of an interview of M.P.A. to determine if the stipulation was acceptable. RP (06/23/2008) 2-3. The Court found significant issues with M.P.A.'s ability to distinguish between truth and lies and with her memory. RP (06/23/2008) 4. The trial court signed an order approving the stipulation declaring M.P.A. incompetent and unavailable. RP (06/23/2008) 4. The State sought to admit the statements M.P.A. made to her mother. RP (06/23/2008) 20. The court found the statements inadmissible based on lack of corroborating evidence. CP 133-136.

The defense presented a motion to dismiss pursuant to *State v. Knapstad*. CP 35. The trial court found that there was not independent proof of a corpus delicti existing and so the court will grant the defense motion on *Knapstad* to dismiss. RP (07/07/2008) 18.

III. ARGUMENT

The admissibility of child hearsay statements is governed by *RCW 9.44.120* which states as follows:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by *RCW 98.04.110*, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the

proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9.44.120

The statute requires a two step analysis to determine the admissibility of child hearsay statements. The court must find that the statement is reliable and the child testifies or the child is unavailable and corroborative evidence of the act is shown to allow the admissibility of the statement.

Child hearsay statements may be admissible under Washington State's child hearsay statute if the statements fall within a "firmly rooted exception" to the hearsay rule or alternatively the statements bear "particularized guarantees of trustworthiness" under the confrontation clause. *State v. CJ*, 148 Wn.2d 672, 603 P.3d 765 (2003). To determine whether hearsay statements which do not fall within a "firmly rooted exception" satisfy the child hearsay statute, the Court uses nine nonexclusive factors. These factors are set forth in the case of *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). The factors are as follows:

- 1) whether there is an apparent motive to lie;
- 2) the general character of the declarant;
- 3) whether more than one person heard the statements;
- 4) whether the statements were made spontaneously;
- 5) the timing of the declaration and the relationship between the declarant and the witness;

- 6) the statement contains no express assertion about past fact;
- 7) cross examination could not show the declarant's lack of knowledge;
- 8) the possibility of the declarant's faulty recollection is remote, and;
- 9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, supra. The child hearsay statute RCW 98.44.120 is not a "firmly rooted exception". *State v. Ryan, supra* at 681. The issue of whether a child is competent at the time the statement is made is a factor which should be considered by the Court in determining if the statement is reliable. *State v. CJ*, 148 Wn.2d 672 at 685, 603 P.3d 765 (2003).

In the case at hand the Court determined that the child's statements were reliable. Mr. Gaffney takes issue with this determination. Specifically, the child had a motive to respond to her mother's angry outburst towards the man in the bathroom, (and therefore could have made the statements to please her mother); Ms. Alpaugh was the only person who heard the statement in the bathroom of the Aquatic Center; the statements were made under questioning and were not spontaneous; the statements later made by the child were inconsistent; the statements made by M.P.A. were made in an immediate response to a leading question posed by her mother; it may be shown through cross

examination that M.P.A. had a lack of knowledge of what happened and/or a faulty recollection based on the inconsistent statements M.P.A. made to others. On balance the factors suggest that the statements made by M.P.A. were not reliable.

Once the determination of reliability is made, the court moves to apply the corroboration test. If the court finds that the statement is reliable, and if the child is unavailable to testify, the state must satisfy the corroboration requirement of the child hearsay statute before the statements may be used in evidence. The finding of corroborative evidence that supports the hearsay statement is independent of the reliability of the statement, and each action of abuse must be separately corroborated under the statute. *State v. CJ*, 148 Wn.2d 672, 603 P.3d 765 (2003). The corroboration requirement is a creation of the state legislature and is in addition to the constitutional requirement that the statement contain an incidental of reliability. *State v. Frey*, 43 WN.App 605 at 609, 718 P.2d 610.

In the case at hand the trial court correctly found the statements M.P.A. made to her mother inadmissible due to a lack of corroboration. At the time of the Child Hearsay Hearing the State presented one witness, Ms. Alpaugh, in an attempt to establish corroboration. Reference was made to a videotape showing Mr. Gaffney entering the women's restroom at the facility, but it appears that the contents of the videotape was not entered into evidence through testimony as pointed out by Judge Haberly.

RP (06/23/2008) 28. A CD containing video of the facility was admitted as Exhibit No. 2. RP (06/23/2008) 36. The parties agreed that the video showed Mr. Gaffney going into a hallway where the bathrooms were located. RP (06/23/2008) 36. According to the deputy prosecutor, the video does not show Mr. Gaffney walking into a bathroom. *Id.*

Furthermore the comments made by the Prosecutor at the time of the Child Hearsay Hearing indicate that he did not agree with the Court's proposed stipulation that Mr. Gaffney followed M.P.A. into the bathroom.

The exchange was as follows:

The Court: Are you willing to stipulate that video Number 2 shows him following her into the bathroom?

Mr. Rovang: No, it shows him going into the hall where the bathroom doors are.

Mr. Cure: That is correct, your Honor. It shows him following behind her in the hallway where the bathrooms are. You can't actually see him walking into the bathroom.

RP (06/23/2008) 36

Any finding that Mr. Gaffney followed M.P.A. into the bathroom does not appear to be supported by the evidence presented.

The State has assigned error to the trial court's conclusion the statements made by M.P.A. were not corroborated sufficiently to be admissible under the child hearsay statute. *Brief of Appellant*, Page 1. Admissibility of evidence is within the discretion of the trial court and the court's decision will not be reversed absent abuse of discretion. *State v.*

Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997), (citing *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992)). The trial court's decision to deny the admissibility of the statements M.P.A. made to her mother should be affirmed unless the State can establish the existence of a manifest abuse of discretion. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999). An abuse of discretion occurs only when the trial court bases its decision on clearly untenable or manifestly unreasonable grounds or when no reasonable person would take the view adopted by the trial court. *State v. Jamison*, 105 Wn.App. 572, 20 P.3d 1010(2001).

The trial court's oral decision indicates that it carefully considered the evidence presented and the applicable case law. RP (06/23/2008) 37-42. The evidence presented at the Child Hearsay Hearing did not corroborate any abuse had occurred. Ms. Alpaugh did find Mr. Gaffney in the women's restroom standing close to M.P.A. However, Ms. Alpaugh did not see Mr. Gaffney touch M.P.A. M.P.A. reported to her mother that Mr. Gaffney touched her leg. M.P.A. did not report any touching of a sexual nature nor did M.P.A. appear to be upset by what had occurred in the restroom. RP (06/23/2008) 18-19. Ms. Alpaugh did not think at the time that M.P.A. had been harmed. RP (06/23/2008) 17. It appears from the transcript of the Child Hearsay Hearing on June 23, 2008, that the State did not present any testimony or make any arguments regarding Mr. Gaffney's alleged confession to law enforcement or alleged confessions to other individuals regarding the events at issue.

The state has cited the case of *State v Jones*, 112 Wn.2d 488, 772 P.2d 496 (1989). for the proposition that the trial court is not bound by the rules of evidence in determining issues of corroboration and therefore the corpus delicti rule does not apply to child hearsay hearings. The case of *State v. Jones, supra*, does clearly indicate that the rules of evidence do not apply to child hearsay hearings. However, in that case the holding of the Court was not that corpus delicti does not apply to child hearsay cases. In the case of *State v. Jones, supra*, the issue was whether the child's statements indicating that the defendant urinated on her were admissible at trial and admissibility of a witness' urolagania experiences with the defendant. The evidence showed in that case the child reported that the defendant urinated on in her chest and in her mouth on two separate occasions. In addition, the child acted out the urination with dolls. *Id* at 498. The court determined that the child had precocious knowledge of the usual practice of urolagania through her words and demonstration and allowed the admissibility of Ms. Stein of her urolagania experiences with the defendant. *Id* at 497-498 The court emphasized that the determination of corroboration is fact specific. *State v. Jones*, 112 Wn.2d at 498.

The facts that suggested collaboration in the *Jones* case are missing from the case at hand. Additionally, the *State v. Jones* case did not address statements made by the defendant as is the case here. It is significant in this case that there was no evidence attributed M.P.A. to

indicate that Mr. Gaffney committed the crime of child molestation and the statements the State is seeking to introduce in violation of corpus delicti.

The evidence available to the trial court at the time of the hearing failed to provide a logical and reasonable inference that Mr. Gaffney committed a crime. The evidence at the time of the hearing did not establish that any sexual abuse occurred. The trial court properly concluded that the statements made by M.P.A. to her mother were not corroborated and were therefore inadmissible at trial.

Even if statements allegedly made by Mr. Gaffney had been brought up, corroboration would not have been shown. Under the corpus delicti rule, and the application of that rule under the case of *State v. Dow*, 142 Wn.App 971, 176 P.3d 597 (2008), review granted, 164 Wn.2d 1007, 195 P.3d 87 (2008). Statements of a defendant alone are insufficient to establish corroboration. Using a defendant's statement to corroborate a hearsay statement is a violation of the corpus delicti rule because a defendant statement is not admissible to prove the corpus delicti of the charge. *State v. Smith*, 115 Wn.2d 775, 780-81, 801 P.2d 975 (1990). The statement made by M.P.A. indicating that Mr. Gaffney touched her leg is consistent with a non-criminal act. The corroboration required by statute is corroboration of the criminal act for which the defendant is charged. *State v. CJ*, 148 Wn.2d 672, 603 P.3d 765 (2003). The Court correctly concluded that the statements made by M.P.A. were not sufficiently corroborated under the evidence presented at the time of

the hearing to be admissible under the child hearsay statute. This issue is discussed in detail in the next section of this brief.

2. THE TRIAL COURT APPROPRIATELY DISMISSING THE CHARGES PURSUANT TO *STATE V. KNAPSTAD* BECAUSE UNDER THE WASHINGTON STATE CONSTITUTION, ARTICLE 1, SECTION 3 AND THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT THE STATE DID NOT PRESENT SUBSTANTIAL EVIDENCE OF GUILT.

Following the child hearsay hearing, defense counsel made a motion to dismiss the charges under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1996). CP 35. A defendant is entitled to judgment in his favor as a matter of law if the evidence seen in the light most favorable to the State is insufficient to prove each and every element of the crime charged. *State v. Knapstad, supra*. The Washington State Supreme Court reviewed the procedures for a motion to dismiss under *State v. Knapstad, supra*, in the case of *State v. Groom*, 133 Wn.2d 679, 947 P. 2d 240 (1997). The procedure as outlined in that case is as follows:

Under *State v. Knapstad*, 107 Wn.2d at 356, 729 P.2d 48, a motion to dismiss should be initiated by a sworn affidavit, "alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." *Id.* Following the filing of the affidavit, "the State can defeat the motion by filing an affidavit which specifically denies the material facts alleged in the defendant's affidavit. If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory." *Id.* However, "if the State does not deny

the undisputed facts or allege other material facts, the court must decide “whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt.” *Id* at 356-57, 729 P.2d at 48. “Since the court is not to rule on factual questions, no findings of fact should be entered.” *Id* at 357, 729 P.2d at 48; *State v. Groom*, 133 Wn.2d at 684.

A trial court may dismiss a criminal charge under *State v. Knapstad*, *supra*, if the State’s pleading and evidence fails to establish prima facie proof of all elements of the charged crime. *State v. Sullivan*, 143 Wn.2d 162, 171 n.32, 19 P.3d 0112 (2001). The trial court’s dismissal of a charge pursuant to a *Knapstad* motion should be upheld if no rational finder of fact could have found beyond a reasonable doubt the essential elements of the crime. *State v. Snedden*, 112 Wn.App. 122, 127, 47 P.3d 184 (2002), *aff’d* 149 Wn.2d 914, 73 P.3d 995 (2003); see also *State v. Olson*, 73 Wn.App. 348, 357 n.6, 869 P.2d 110 (1994) (noting similarity between standards of review for *Knapstad* motion and challenge to sufficient of the evidence).

In the case at hand the state sought to use statements made by Mr. Gaffney to corroborate M.P.A.’s statements. This attempt was a violation of the corpus delicti rule. A defendant’s statement is not admissible to prove the corpus delicti of the charge. *State v. Smith*, 115 Wn.2d 775, 780-781, 801 P.2d 975 (1990). Corpus delicti means the “body of the crime” and must be proved by evidence sufficient to support an inference that there has been a criminal act. *State v. Aten*, 130 Wn.2d

at 655, 927 P.2d 210 (1996) (quoting *1 McCormick on Evidence*, section 145, at 227 (John W. Strong ed., (4th ed. 1992)). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. *State v. Aten*, 120 Wn.2d at 655-56; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The State must present independent evidence to corroborate a defendant's incriminating statements. *State v. Aten*, 130 Wn.2d at 656. In other words, the State must present evidence independent of the incrimination statement that the crime the defendant described in the statement actually occurred.

It is well settled that in determining whether sufficient independent evidence exists under the corpus delicti rule, the court should review the evidence in light most favorable to the State. *State v. Aten*, 130 Wn.2d at 658. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incrimination statement. *Id.* at 656. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved. *Id.* at 656 (quoting *Vangerpen*, 125 Wn.2d at 796).

In addition to corroborating a defendant's incrimination statement, the independent evidence "must be consistent with guilty and inconsistent with a hypothesis of innocence." *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996) (quoting *State v. Lung*, 70 Wn.2d 365, 372, 423 P.2d 72

(1967)). If the independent evidence supports a “reasonable and logical inferences of both criminal agency and noncriminal cause,” it is insufficient to corroborate a defendant’s admission of guilt. *Id.*

The legislature adopted *RCW 10.58.035* to address the admissibility of statements made by a defendant. The statute as set out in full follows:

Statement of defendant - Admissibility

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

2) In determining whether there is substantial independent evidence that the confession, admission or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

- a. Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;
- b. The character of the witness reporting the statement and the number of witnesses to the statement;
- c. Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or
- d. The relationship between the witness and the defendant.

3) Where the court finds that the confession, admission, or other statement of the defendant is

sufficiently trustworthy to be admitted, the Court shall issue a written order setting forth the rationale for admission.

4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict. [2003 c 179 sec. 1]

The recent case of *State v. Dow*, 142 Wn.App. 971, 176 P.3d 597 (2008), review accepted, 164 Wn.2d 1007, 195 P.3d 87 (2008) is on point with the case at hand. That case reviewed the application of *RCW 10.58.035* to facts similar to the present case. Division Two of the Court of Appeals held in that case that *RCW 10.58.035* is a valid refinement of the corpus delicti rule but the statute addressed only admissibility of a defendant's statement, not sufficiency. Significantly, the Court stated:

As the dissent points out, *RCW 10.58.035* does not change our long-standing rule that a confession alone will not support a finding of guilt; to support a conviction, the state must establish a corpus delicti by proof independent of the confession. *State v. Dow*, 142 Wn. App 971 at 984. The concurrent opinion in the *Dow* case also emphasized the need for independent proof to satisfy the corpus delicti rule.

"I concur in the reasoning and the result of the majority. I also agree with the dissent, however, that a conviction cannot stand unless the State establishes a corpus delicti that a crime has occurred, independent from any confession. Thus, the fact that a confession may be admissible under *RCW 10.58.035* does not mean that the confession, standing alone

and regardless of its content, is sufficient for conviction. In this particular case, the correct course is to remand to the trial court for a *Knapstad* hearing, a trial, or any other appropriate proceeding. *State v. Dow*, 142 Wn.App. 971 at 985.

The case of *State v. Dow, supra*, applies to this case. Under that case the State must establish corpus delicti that a crime occurred independent of any statement made by the defendant. The ruling of that case is the correct interpretation of *RCW 10.58.035* and is the rule of law for the case at hand. The trial court appropriately followed the law in effect at the time of the ruling. The Court appropriately did not consider the statements allegedly made by Mr. Gaffney with respect to the issue of corroboration. The requirement of corpus delicti remains in place and the Court correctly required independent, corroboration, and sufficient evidence outside of the alleged statements of Mr. Gaffney. Under the case of *State v. Dow*, these holdings were correct. Therefore, the trial court did not commit error as alleged in the brief of the appellant.

The trial court correctly concluded that the State did not present sufficient independent or substantial evidence or sufficient corroborating evidence to show either an attempt to have sexual contact or actual sexual contact. CP 139. In the case at hand M.P.A.'s statement to her mother was merely that Mr. Gaffney touched her leg. 1 RP 11. That statement is consistent with a non-criminal action. The corroboration required by statute is corroboration which would support a logical and

reasonable inference that abuse occurred. *State v. CJ*, 128 Wn.2d 672, 603 P.3d 765 (2003). The evidence independent of the confession/admissions of Mr. Gaffney did not support an inference that a crime occurred. Mr. Gaffney was charged with Child Molestation in the First Degree. For a conviction of that charge the State must prove that the defendant had sexual contact with the victim. Sexual contact is described by *RCW 98.44.010* as follows:

Sexual contact: means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 98.44.010

The evidence viewed in the light most favorable to the State shows at best that M.P.A. reported to her mother that Mr. Gaffney touched her thigh near her knee. RP 11. The statement was made in response to questioning from her mother. The evidence does not satisfy the definition of sexual contact as defined in *RCW 98.44.010*

The trial court appropriately dismissed the charges because the State failed to provide evidence that a crime had occurred independent of statements Mr. Gaffney allegedly made. The State could not make a prima facia case that the crimes of child molestation, or attempted child molestation occurred. The trial court correctly dismissed the charges in this matter pursuant to *State v. Knapstad, supra*.

The State also argues that the trial court erred in granting the *Knapstad* motion to dismiss because the State presented a prima facia

showing that Mr. Gaffney took a substantial step towards the commission of the crime of attempted child molestation. The evidence presented did not establish a prima facie case for that charge. To prove criminal attempt, the State needs to establish that Mr. Gaffney specifically intended to commit the crime of child molestation and he took a substantial step towards the completion of the offense. See *RCW 9A.25.020(1)*. Mere preparation is not sufficient to show a substantial step towards the commission of an offense. *State v. Jackson*, 62 Wn.App. 53, 56, 813 P.2d 156 (1991). A substantial step must be “a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.” *State v. Grundy*, 76 Wn.App. 335, 337, 886 P.2d 208(1984) (quoting *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.3d 633 (1969)). Conduct is not a substantial step unless the act is strongly corroborative of the actor’s criminal purpose. *State v. Jackson*, 62 Wn.App. 53, 813 P.2d 156 (1991). In determining where preparations for a crime end and where the crime of attempt begins, there is no rigid formula and each case hinges on its own facts and circumstances. *State v. Lewis*, 42 Wn.App. 789, 715 P.2d 137 (1986).

In the case at hand, the trial court’s holding that the evidence in this case was insufficient to show sexual contact or attempted sexual contact was correct. Mr. Gaffney takes issue with trial court’s finding that

he followed M.P.A. into the restroom. The evidence does not support that finding as argued previously in this brief. As identified in defense counsel during the motion to dismiss, the fact that Mr. Gaffney was in the women's restroom is not showing of a substantial step, he could have made a mistake. The evidence presented indicated that Mr. Gaffney was in the bathroom for two to three minutes. RP 9. That is not a significant amount of time. The timing is not indication of a substantial step to commit the crime of child molestation. The finding that Mr. Gaffney ran out of the bathroom after Ms. Alpaugh yelled at him is not proof of a substantial step either. It is not surprising that a person would run away when told to leave through yelling. Even if the Court had considered M.P.A.'s statement that Mr. Gaffney touched her leg by her knee, that fact is not proof of a substantial step. The touch occurred as M.P.A. described on a non-sexual area of the body.

There was no evidence presented to suggest that Mr. Gaffney waited in the lobby for M.P.A. to go into the bathroom. The evidence does not show that he was "lying in wait", sought out or encouraged M.P.A. to enter into the restroom, that he unlawfully entered a structure or enclosure, or that he was waiting in the lobby for an opportunity to commit the charged crime. The evidence presented shows that Mr. Gaffney was in the women's bathroom for a brief period of time and when Ms. Alpaugh told him to leave he did so. None of these actions are indicative of any criminal activity. The facts do not show that Mr. Gaffney specifically

intended to commit the crime of child molestation and that he took a substantial intentional act in furtherance of the crime of child molestation. When Ms. Alpaugh arrived into the bathroom, both Mr. Gaffney and M.P.A. were fully dressed. M.P.A. did not indicate that Mr. Gaffney touched her in a sexual manner, and M.P.A. was not distressed. The evidence presented did not show that Mr. Gaffney entered into the women's restroom with the intent to molest M.P.A.

There are simply not enough facts to logically and reasonably infer that Mr. Gaffney took that action for the specific purpose of molesting M.P.A. Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction, it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). The facts did not establish a prima facie case of either child molestation or attempted child molestation. The trial court did not error in dismissing the charges filed against Mr. Gaffney.

The State has cited the case of *State v. Smith*, 115 Wn.2d 775, 801 P.2d 975 (1990) to support its analysis that the evidence was sufficient in this case to show that Mr. Gaffney took a substantial step towards committing a crime. However, in the case of *State v. Smith, supra*, the Court had an extensive list of suspicious items to consider. The list of facts for consideration in this case is more limited.

IV. CONCLUSION

For the foregoing reasons, the trial court did not error when it determined the statement M.P.A. made to her mother was inadmissible. The Court did not commit error by granting the defense's motion to dismiss. Mr. Gaffney respectfully asks this court to uphold the decisions of the trial court.

Respectively submitted this 15 day of January, 2009.

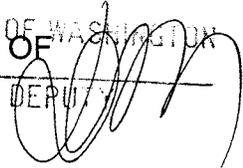

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
WASHINGTON, DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Respondent,

CERTIFICATION OF MAILING

v.

MICHAEL GAFFNEY,

Appellant.

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Respondent in the above-captioned case hand-delivered or mailed as follows:

Original Brief of Respondent Mailed To:

Clerk of Court
Court of Appeals, Division II
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Tacoma, WA 98402

Copy of Brief of Respondent Hand-Delivered To:

Mr. Randall Sutton
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Copy of Brief of Respondent Mailed To:

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DATED this 15th day of January, 2009, at Port Orchard, Washington.

Jeanne L. Hoskinson
JEANNE L. HOSKINSON
Legal Assistant