STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0288

State of Minnesota,
Respondent,

vs.

Brian James Wilkie,
Appellant.

Filed January 28, 2019
Affirmed
Bjorkman, Judge
Dissenting, Cleary, Chief Judge

Steele County District Court
File No. 74-CR-16-2371

Keith M. Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Daniel A. McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Chief Judge; and Worke, Judge.

S Y L L A B U S

A person takes a substantial step toward committing third-degree criminal sexual conduct by arranging via social media to meet a juvenile to engage in sexual penetration, verifying that the juvenile has sexual experience and wants to engage in the act, sending explicit photographs to the juvenile suggestive of the act, negotiating to meet in the

juvenile's unoccupied family home to engage in the act, obtaining directions to the home, following the juvenile's directions to approach the home, and knocking on the front door.

O P I N I O N

BJORKMAN, Judge

Following a bench trial, appellant Brian James Wilkie was convicted of attempted third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.17, subd. 1, .344, subd. 1(b) (2016). He contends that the evidence is not sufficient because it does not establish that he took a substantial step toward committing the crime. We affirm.

FACTS

In a collaborative law-enforcement sting operation involving the Owatonna Police Department and the Minnesota Bureau of Criminal Apprehension (BCA), a special agent from the BCA's predatory crimes unit posted a "decoy" profile of a young male on "Grindr," a social media platform for gay and bisexual men. Wilkie contacted the decoy on November 14, 2016, and the two communicated intermittently online over the course of seven hours.

Wilkie initiated the online conversation by asking, "What are you doing tonight? Want to meet," and "Any pics." The decoy sent a "selfie" photograph depicting the head and torso of a youthful-looking male in a tank-style t-shirt. Wilkie responded, "Any nudes" and "Better pic sweetie," and sent the decoy two close-up photographs, one of an erect penis and the other of an anus with cloudy liquid on it. The decoy responded, "I'm 14… Is that ok?" Wilkie again sent two close-up photographs, one of an anus and the other of a man holding his erect penis. Wilkie asked the decoy if he was "really 14" and if he had

"had sex before," and urged him repeatedly to send "nudes." Wilkie also asked the decoy if he was "horny." When the decoy asked Wilkie what he wanted to do the next day, Wilkie answered "F--k" and "Sex." The decoy answered, "Really!," and Wilkie responded, "Yes Do u." The decoy wrote "cool." Wilkie wrote again, "Do u." The decoy answered, "Sure!," and Wilkie wrote, "Ok Sweet." The two arranged to meet the next day, and the decoy gave Wilkie his cell phone number.

During their exchanges, Wilkie repeatedly expressed concern about getting caught.[1] He emphasized several times that he did not want to get into trouble, asking, "Can I believe you that you are not going to get me in trouble" and "If we meet its not going to be a trap Right bro." Wilkie also stated that he did not want the decoy to get into trouble and that he hated cops.

The next day, Wilkie and the decoy resumed their conversation on Grindr. They arranged a time to meet at the decoy's purported family home, and Wilkie reiterated that he wanted to "have fun." They also used their cell phones to have a live conversation. The decoy eventually sent Wilkie his home address, telling Wilkie that he could meet there because his mother would not be home from work until later. Wilkie again expressed concern about getting in trouble, and the decoy responded that he would make sure his mom would not come home early. When Wilkie texted to indicate he had arrived at the

[1] *Spreigl* evidence revealed that just three days earlier, Wilkie pleaded guilty to a felony prostitution offense based on his December 2015 agreement to pay $150 to have sex with a 17-year-old male. As in this case, Wilkie met the juvenile online, knew the juvenile's age, sought genitalia photos from the juvenile, and arranged to meet the juvenile in person to engage in sexual conduct.

address, the decoy responded, "K. Open doir Door." Wilkie walked up to the home and knocked on the door; police opened the door and arrested him.

Wilkie was charged with (1) attempted third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.17, subd. 1, .344, subd. 1(b); (2) solicitation of a child through electronic communication to engage in sexual conduct in violation of Minn. Stat. § 609.352, subd. 2a(1) (2016); and (3) distribution of material that describes sexual conduct to a child via electronic communication in violation of Minn. Stat. § 609.352, subd. 2a(3) (2016). Wilkie waived his right to a jury trial, and the district court found him guilty of all three offenses. The district court convicted and sentenced him to 35 months in prison on the third-degree criminal-sexual-conduct offense. Wilkie appeals.

ISSUE

Is the evidence sufficient to prove that Wilkie took a substantial step toward committing third-degree criminal sexual conduct?

ANALYSIS

When considering a sufficiency-of-the-evidence challenge, we carefully review the record "to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). The same standard applies in actions tried to the district court. *State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003). We must assume that the trier of fact "believed the state's witnesses and disbelieved any contradictory evidence." *State v. Webster*, 894 N.W.2d 782, 785 (Minn. 2017).

A person commits third-degree criminal sexual conduct when he engages in "sexual penetration" with a complainant who is "at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant." Minn. Stat. § 609.344, subd. 1(b). "Sexual penetration" is defined to include "sexual intercourse, cunnilingus, fellatio, or anal intercourse; or . . . any intrusion however slight into the genital or anal openings." Minn. Stat. § 609.341, subd. 12 (2016). A person attempts to commit a crime when, with intent, he "does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1.

Conduct that constitutes a substantial step toward the commission of the crime is defined, not in the criminal statues, but in the caselaw. In the seminal case of *State v. Dumas*, the supreme court stated that each case must be decided on its facts and declined to adopt a rule applicable to all cases. 136 N.W. 311, 314 (Minn. 1912). But the *Dumas* court identified general principles courts should consider to determine whether a person's conduct constitutes a substantial step toward commission of a crime:

> It may be stated . . . as a general proposition that to constitute an attempt to commit a crime there must be an intent to commit it, followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be something more than mere preparation, remote from the time and place of the intended crime; but if they are not thus remote, and are done with the specific intent to commit the crime, and directly tend in some substantial degree to accomplish it, they are sufficient to warrant a conviction.

Id. Applying these principles, the *Dumas* court held that the defendant's acts of hiring others to start a fire, purchasing supplies and tools to accomplish this aim, and entering the

building to be burned constituted a substantial step toward committing arson. *Id.*; *cf. United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (recognizing that, under federal law, "whether conduct represents a substantial step toward the commission of the criminal design is . . . a question of degree, necessarily depending on the factual circumstances peculiar to each case" (quotation omitted)).

Wilkie concedes that the evidence is sufficient to prove that he intended to commit third-degree criminal sexual conduct. But he asserts that "none of [his] acts, alone, constituted a substantial step[,] and all of the acts taken together amount to nothing more than mere preparation." And he contrasts other cases involving sexual offenses, arguing the evidence is insufficient here because "there was not physical contact, indecent exposure, attack, or other act tending but failing to accomplish the offense." We begin our analysis by reviewing the caselaw Wilkie cites.

In *State v. Peterson*, the defendant argued that the evidence was insufficient to prove attempted third-degree criminal sexual conduct because his conduct "fell far short of being a substantial step toward" commission of the offense. 262 N.W.2d 706, 707 (Minn. 1978). Peterson encountered two teenagers at 1:30 a.m., threatened to hurt them "if they did not agree to have sexual intercourse with him," chased them, and was apprehended by police as he attempted to grab one of them. *Id.* On these facts, the supreme court summarily rejected Peterson's insufficiency-of-the-evidence argument, concluding that an attempt to commit third-degree criminal sexual conduct "begins with the initial attack . . . and that need not involve a battery or an act of penetration." *Id.*

Peterson relied on *State v. Johnson*, which is also instructive. 67 N.W.2d 639 (Minn. 1954).[2] In *Johnson*, the victim awoke to find a man standing by her bed; the man, who was partially nude, jumped on her, they struggled, she bit him and screamed, and he ran away. *Id*. at 640-41. While cross-examining the victim at trial, defense counsel elicited testimony that Johnson "did not engage in the last proximate acts prior to the consummation of sexual intercourse" because he did not kiss her, touch her private parts, or reach under the bedding to touch her. *Id*. at 642. On appeal, the supreme court rejected the defendant's suggestion that "the absence of the amorous manipulations" in the evidence rendered it insufficient to prove the defendant was guilty of attempted sexual intercourse. The court reiterated that "[t]he attempt . . . does not require the last proximate act prior to the consummation of sexual intercourse[, and a]ny overt act beyond mere preparation and in furtherance of the intent is sufficient." *Id*. at 640.

Finally, in *State v. Meemken*, the defendant made numerous statements about his desire to have sexual contact with a nine-year-old victim, and he touched her upper thigh while he asked if he could do so. 597 N.W.2d 582, 586 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999).[3] We noted that conduct constituting an attempt to commit a sex crime need not be a crime in itself. *Id*. We concluded Meemken's act of touching the

---

[2] *Johnson* involves a more serious criminal-sexual-conduct offense that included the use of force to commit "rape." The use of force is not an element of Wilkie's third-degree criminal-sexual-conduct offense, but *Johnson* is relevant to establish the type of evidence needed to prove an attempt to commit sexual penetration.

[3] The second-degree criminal-sexual-conduct offense in *Meemken* was defined as the act of engaging in sexual contact with a child under the age of 13, with an age difference of more than 36 months between the actor and the child. *Id*. at 586.

child, coupled with his repeated statements of intent to perpetrate a sex act upon the child, was "a substantial step toward the commission of the crime." *Id.* And we specifically rejected the defendant's argument that his conduct was, at most, "mere solicitation" of the child to engage in sexual conduct rather than a substantial step toward actually committing criminal sexual conduct. *Id.*

We acknowledge that the cases upon which Wilkie relies involve physical contact, words delivered in person, or an attack. But we are not convinced that these factual distinctions preclude a determination that Wilkie took a substantial step toward achieving his intended goal—sexual penetration of a juvenile. The advent of social media has abbreviated or eliminated some of the courtship rituals in our society, including how people initiate sexual relationships and arrange for sexual encounters. Actions that historically demonstrated a substantial step toward commission of a sex crime, such as preliminary physical contact, may no longer apply when social media is used to initiate the sexual encounter. But we are persuaded that other actions by a perpetrator in furtherance of a sexual offense may establish that a substantial step was taken. Such is the case here.

The evidence shows that Wilkie orchestrated a sexual encounter with a juvenile through extensive social media contacts and phone conversations; the *only* purpose of their in-person meeting was to consummate the sex act itself—for Wilkie to "f--k" the juvenile. Wilkie concedes that he intended to commit this crime. After exchanging sexually explicit messages and graphic photos, Wilkie arranged to meet with the decoy in private at a particular time and location. Wilkie obtained the decoy's address, drove to the home at the agreed-upon time, confirmed the two would be alone in the home, parked his car, walked

up the steps, and knocked on the door. At that point, the only thing left to take place was sexual penetration. Applying the principles articulated in *Dumas*, we conclude that Wilkie's acts were not remote in time or location from the intended criminal sexual conduct and "directly tend[ed] in some substantial degree to accomplish" the crime. 136 N.W. at 314. As in *Johnson*, we are not persuaded that the absence of more typical "amorous manipulations," such as physical touch or in-person communication, defeats proof of an attempt offense. 67 N.W.2d at 642. And while we held in *Meemken* that the substantial steps leading up to a sexual offense need not be criminal in nature, we observe that Wilkie's conduct in initiating contact and grooming the decoy to engage in sexual penetration were, in themselves, criminal acts. 597 N.W.2d at 586. On this record, we conclude the evidence is sufficient to prove that Wilkie attempted to commit third-degree criminal sexual conduct.

D E C I S I O N

Wilkie's conduct, commencing with a social media contact involving explicit sexual innuendo, leading to an agreement to engage in sexual penetration, and culminating with a knock on the victim's door at an arranged time, is sufficient to prove that Wilkie did more than prepare to commit a crime. These circumstances establish that he took a substantial step toward committing third-degree criminal sexual conduct.

Affirmed.

CLEARY, Chief Judge (dissenting)

I respectfully dissent from the majority's decision to affirm appellant's conviction for attempted third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2016).

A person attempts to commit a crime when, "with intent to commit a crime, [he] does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2016). In explaining that each case depends upon its own particular facts and inferences, the supreme court has stated

> as a general proposition that to constitute an attempt to commit a crime there must be an intent to commit it, *followed by an overt act or acts tending, but failing, to accomplish it*. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be something more than mere preparation . . . .

State v. Dumas, 136 N.W. 311, 314 (Minn. 1912) (emphasis added).

The appellant concedes that there is sufficient evidence to prove his intent to commit the offense. The majority concludes that the totality of the appellant's conduct—exchanging messages and explicit photographs via social media, arranging to meet the decoy to engage in a sexual encounter, arriving at the agreed-upon location, and knocking on the front door—constitutes a substantial step toward committing third-degree criminal sexual conduct. I disagree.

The caselaw illustrating "attempt" in sex-related crimes involves physical contact, words delivered in person, or an attack. In *State v. Peterson*, the supreme court affirmed the defendant's conviction for third-degree criminal sexual conduct where the defendant

chased two teenagers, grabbed them, verbally threatened them, and after they broke free, continued to chase one teenager until police arrived. 262 N.W.2d 706, 707 (Minn. 1978). Similarly, in *State v. Johnson*, the court upheld the defendant's conviction for assault with the intent to commit rape. 67 N.W.2d 639, 643 (Minn. 1954). In that case, the defendant entered the victim's home in the early morning hours, jumped on the victim after she woke up, grabbed her by the shoulders, put his arm across her throat, and held her until she bit him and screamed. *Id.* at 640-41. Finally, in *State v. Meemken*, this court affirmed the defendant's conviction for attempted second-degree criminal sexual conduct where the defendant touched the underage victim on the upper thigh while he asked if he could touch her, and where he previously stated his intent to commit a sexual act upon her. 597 N.W.2d 582, 586 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). These cases, as conceded by the majority, include "an overt act or acts tending, but failing" to accomplish the charged crimes. *Dumas*, 136 N.W. at 314.

In the instant case, the appellant's conduct falls short of this standard, and instead, remains in the realm of "mere preparation." *See id.* The appellant initially exchanged messages and photographs with the decoy on a social media application. After the communications continued, he arranged to meet the decoy at a certain time and location. He arrived at the agreed-upon location and knocked on the front door. While these actions do constitute illegal solicitation of someone the appellant believed to be a minor, they amount to preparation for, not an attempt to commit, the act of third-degree criminal sexual conduct, a crime that involves "sexual penetration." *See* Minn. Stat. § 609.344, subd. 1(b). To hold otherwise is to greatly expand the legal definition of "attempt" in the context of

felonious sexual assault, an expansion the majority concedes when it suggests the "factual distinctions" found in the relevant caselaw do not "preclude" a different determination here.

While I concede that "the advent of social media has abbreviated or eliminated some of the courtship rituals in our society," such technological changes cannot be allowed to eviscerate constitutional protections in an effort to convict suspected sex offenders without sufficient proof of the elements of the crime charged. In this case, a knock on the front door is insufficient to establish that the appellant took a substantial step toward committing a crime that requires sexual penetration.

In holding that his conduct amounts to a substantial step, the majority conflates the appellant's intent to commit the crime—which he has conceded—with his conduct in arriving at the decoy's house and knocking on the front door. In so doing, the majority expands the caselaw and characterizes historically preparatory conduct as an overt act. And while the appellant's conduct was repugnant and illegal, other charges are available to address his predatory behavior, as evidenced by his solicitation convictions under Minn. Stat. § 609.352, subd. 2a(1), and 2a(3) (2016) which more accurately and more specifically address his criminal conduct. I would affirm those convictions and reverse the appellant's conviction for attempted third-degree criminal sexual conduct.