NO. 96240-5

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERIC KERMIT JACOBSON, PETITIONER

Court of Appeals Cause No. 49887-1-II
Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 15-1-05049-6

Answer to Petition for Review

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A. ISSUES PRESENTED FOR REVIEW.

1. Did the lower court correctly reject defendant's outrageous government conduct claim raised for the first time on appeal, where the court considered the totality of the circumstances and the unique facts of defendant's case as dictated by this Court in ***Lively*** which established that defendant initiated, requested and pursued sexual contact with a child?

2. Did the lower court correctly reject defendant's claims of prosecutorial misconduct and cumulative error, where defendant failed to show prejudicial error and where there was overwhelming evidence against defendant?

3. Did the lower court correctly find that sufficient evidence supported defendant's convictions for attempted rape of a child in the first degree and attempted commercial sexual abuse of a minor, where the evidence established that defendant intended to have sexual intercourse with an 11-year-old child in return for a "a fee," defendant offered a "gift card" as payment, and he took a substantial step by driving to the agreed-upon location with condoms, lubricant and Skittles?

B. STATEMENT OF THE CASE.

A detailed account of the substantive facts and procedural history can be found in the Court of Appeals opinion, ***State v. Jacobson***, No. 49887-1-II (Wash. Ct. App. May 15, 2018) (unpublished), attached to defendant's Petition for Review as Appendix A.

The Court of Appeals issued its opinion on May 15, 2018. The court affirmed defendant's convictions for attempted rape of a child in the first degree and attempted commercial sexual abuse of a minor, finding law enforcement's conduct did not violate due process, defendant failed to prove prosecutorial misconduct or cumulative error, and sufficient evidence supported both of defendant's convictions. The court also affirmed defendant's sentence, finding the trial court did not improperly infringe on defendant's First Amendment rights by prohibiting his use of the Internet and devices with Internet access. The defendant filed a petition for review. This answer follows.

C. ARGUMENT WHY REVIEW IS UNNECESSARY.

1. THE LOWER COURT CORRECTLY REJECTED DEFENDANT'S OUTRAGEOUS GOVERNMENT CONDUCT CLAIM.

To obtain dismissal of a criminal prosecution on the basis of outrageous conduct in violation of due process, the conduct must "shock the universal sense of fairness." ***State v. Lively***, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (citing ***United States v. Russell***, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). Outrageous conduct must be more than mere deception. ***Lively***, 130 Wn.2d at 20. Dismissal is a "rarely used judicial weapon" reserved for only the most egregious circumstances, and "[i]t is not to be invoked each time the government acts deceptively." *Id.*

at 20 (internal citations omitted); ***State v. Rundquist***, 79 Wn. App. 786, 797, 905 P.2d 922 (1995) (internal citations omitted).

"Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity." *Id.* at 20 (citing ***State v. Emerson***, 10 Wn. App. 235, 242, 517 P.2d 245 (1973)). Undercover police tactics are recognized as an essential means to detect unlawful activity. ***State v. Huckaby***, 15 Wn. App. 280, 285-86, 549 P.2d 35 (1976). Thus, the "doctrine of outrageous police conduct must be sparingly applied." ***State v. Markwart***, 182 Wn. App. 335, 349, 329 P.3d 108 (2014) (citing ***Rundquist***, 79 Wn. App. at 793). Whether the State has engaged in outrageous conduct sufficient to bar prosecution is a matter of law the court reviews de novo. ***Lively***, 130 Wn.2d at 19; ***State v. O'Neill***, 91 Wn. App. 978, 990-91, 967 P.2d 985 (1998).

In reviewing a defense of outrageous government conduct, the court evaluates the conduct based on the totality of the circumstances. ***Lively***, 130 Wn.2d at 21. "*Each case must be resolved on its own unique set of facts* and each component of the conduct must be submitted to scrutiny bearing in mind 'proper law enforcement objectives – the prevention of crime and the apprehension of violators.'" *Id.* at 21 (internal

citations omitted) (emphasis added). Factors to consider when determining whether police conduct offends due process include:

> [W]hether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.'

Id. at 22 (citations omitted). The focus is on the State's behavior rather than the defendant's predisposition. *Id.* at 22.

Here, petitioner argues that review is warranted, because the Court of Appeals' opinion conflicts with Division One's published opinion in ***State v. Solomon***, 3 Wn. App.2d 895, 419 P.3d 436 (2018). *See* Petition for Review[1] at 1, 4-5. Petitioner's claim is without merit, as ***Solomon*** is distinguishable from the present matter. First, the defendant in ***Solomon*** raised the issue of outrageous government conduct before trial and moved to dismiss the charges against him. 3 Wn. App.2d at 901. The trial court agreed with Solomon, entered specific findings of fact regarding the outrageousness of the undercover detective's conduct, and dismissed the charges. *Id.* at 909-11, 916. The Court of Appeals subsequently reviewed

[1] Hereinafter "Petition."

the trial court's decision under an abuse of discretion standard and found that the trial court did not abuse its discretion in dismissing the charges against Solomon. *Id.* at 910, 916.

The defendant in this case, on the other hand, did not raise the issue of outrageous government conduct before the trial court. He apparently did not find the government's conduct to be outrageous until after he was found guilty by a jury of his peers. Thus, in considering petitioner's claim raised for the first time on appeal, the Court of Appeals reviewed the issue de novo pursuant to ***Lively***. *See* ***State v. Jacobson***, No. 49887-1-II, slip op. at 12 (Wash. Ct. App. May 15, 2018) (unpublished); ***Lively***, 130 Wn.2d at 19. Jacobson's case is therefore procedurally distinguishable from ***Solomon***, as the courts considered their respective records under different standards of review.

Second, the court in ***Solomon*** did *not* find that law enforcement's general undercover use of Craigslist advertisements to locate and prosecute individuals desiring to engage in unlawful sexual conduct with minors constitutes outrageous government conduct. Rather, the court found that given the specific facts of Solomon's case and the findings made by the trial court, the trial court did not abuse its discretion in dismissing the charges. ***Solomon***, 3 Wn. App.2d at 910-16. The trial court in ***Solomon*** was particularly concerned over law enforcement's "persistent

solicitation that overcame Solomon's reluctance to commit the underlying criminal conduct." *Id.* at 912. There, the undercover detective disclosed to the defendant, "I'm almost 15 but waaay advanced," and the defendant responded, "wow, 15…not the best idea sorry I'm not willing to get in trouble…maybe hit me up in 3 years if your still around girl[.]" ***Solomon***, 3 Wn. App.2d at 912. The defendant attempted "seven times" to end the conversation, but "the detective continued to solicit him each of the seven times that he sought to withdraw." *Id.* at 913-14. Additionally, the detective sent Solomon "nearly 100 messages laden with graphic, sexualized language" that the trial court found repugnant, and law enforcement initiated and controlled the criminal activity. *Id.* at 897-98, 914-16. Thus, the trial court's finding of outrageous government conduct was confined to the specific facts of Solomon's case.

Here, in contrast, the lower court in reviewing defendant's claim de novo found that defendant "instigated criminal activity by responding to the ad and requesting sexual contact with a child…[he] initiated discussions about the crime, controlled the extent of the crime, and arranged for the crime to take place…law enforcement did not overcome Jacobson's reluctance with pleas of sympathy or persistent solicitation." ***Jacobson***, slip op. at 14-15. Defendant searched the Casual Encounters section of Craigslist and responded to the fictitious ad that offered "young

family fun." RP 165, 196-97, 553-55; Exh. 1, 2. Defendant inquired about trading pictures and expressed his interest in "some play" with the listed daughters. Exh. 2. He stated his interest in "sensual and intimate physical exploration" and helping the 11-year-old daughter "go all the way." Exh. 2; Exh. 4, at 1, 5. He asked for pictures. Exh. 4, at 1-2. He asked about the "rules" and what he could do sexually. Exh. 4, at 5-7. And, he repeatedly asked how to proceed and where and when to meet for "play time." Exh. 4, at 2-9; Exh. 9. When undercover officer "Kristl" texted that she was "done" with defendant and it was too much hassle, defendant responded by asking about her availability and if he could still come over to meet. Exh. 4, at 12. Unlike in ***Solomon***, defendant was up front about wanting to engage in sexual conduct with a child and continued to pursue that topic.

The Court of Appeals appropriately evaluated law enforcement's conduct in defendant's case based on the totality of the circumstances and the case's own unique set of facts, as directed by this Court in ***Lively***. Therefore, this case is not in conflict with ***Solomon*** and reviewed is not warranted under RAP 13.4(b)(2). The determination of outrageous government conduct is case and fact specific, and this Court previously provided the appropriate guidance in ***Lively***. Review is not warranted under RAP 13.4(b)(4). However, if review is accepted in this case, then it

should be limited to the above claim of outrageous government conduct. This Court's consideration of the issue would be of assistance to appellate and trial practitioners, as there is limited caselaw in this area and the opinion would help define appropriate undercover law enforcement investigations regarding internet crimes against children.

2. THE LOWER COURT CORRECTLY REJECTED DEFENDANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT AND CUMULATIVE ERROR.

Well settled standards govern review of claimed instances of prosecutorial misconduct. To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and resulted in prejudice in light of the context of the entire record and the circumstances at trial. ***State v. Thorgerson***, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 442-443. When a defendant fails to object to an improper remark, he waives a claim of error unless the remark is "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Id.* at 443 (quoting ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in

prejudice that 'had a substantial likelihood of affecting the jury verdict.'" ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting ***Thorgerson***, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also*, ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). "Accordingly, reviewing courts focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction." ***State v. Smiley***, 195 Wn. App. 185, 195, 379 P.3d 149 (2016) (citing ***Emery***, 174 Wn.2d at 762).

Thus, a properly challenged statement will be reviewed for a "substantial likelihood" that it affected the jury's verdict, while unchallenged statements will be considered only if the error was too egregious for a timely objection to be worthwhile. On appeal, courts review alleged improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); ***Russell***, 125 Wn.2d at 85-86.

The lower court in this case affirmed these standards and correctly applied them to the alleged instances of misconduct in defendant's case. *See* ***Jacobson***, slip op. at 15-16. Defendant contends that this Court should accept review to "clarify how appellate courts should review aggregated prosecutorial misconduct." *See* Petition at 5-6. Defendant then proceeds to reiterate the alleged instances of prosecutorial misconduct raised below. *Id.* at 5-19. The lower court evaluated every instance of claimed prosecutorial misconduct raised by defendant and found three[2] separate instances of nonprejudicial error. Slip op. at 25-26, 30-33. Defendant did not object to the improper statements during trial and failed to show the prosecutor's conduct was flagrant and ill-intentioned. *Id.* The three separate instances – during voir dire, opening, and closing argument – were brief and isolated and defendant failed to show that no instruction could have cured any resulting prejudice. *Id. See, e.g.,* ***Russell***, 125 Wn.2d at 88 ("Even if the remark was error, the prejudicial effect of this isolated statement could have been cured had the defense objected."); ***Emery***, 174 Wn.2d at 762 (reviewing courts should focus more on "whether the resulting prejudice could have been cured."). The lower court's finding that the improper remarks were *isolated* does not mean the court reviewed

[2] The court assumed without deciding that the prosecutor's statements during voir dire about reaching a unanimous verdict were improper. *See* slip op. at 25.

them *in isolation*, as defendant suggests. Rather, the lower court reviewed the statements in the context of the whole argument, the issues in the case, the evidence, and the instructions given to the jury. *See* ***Russell***, 125 Wn.2d at 85-86. *See also*, slip op. at 25 (court considers instructions given to jury), 31 (court considers evidence presented at trial and court's instruction to the jury), 32-33 (court reviews whole argument and evidence addressed in argument, as well as instructions given to jury).

The Court of Appeals correctly found that defendant waived the above issues on appeal. *See* slip op. at 25-26, 30-33. Defendant does not demonstrate any error in the lower court's waiver analysis, nor does he argue that the remarks were incurable by an instruction to the jury had he timely objected at trial.[3] Accordingly, defendant fails to show a basis for review under RAP 13.4(b).

In his petition for review, defendant goes on to claim, once again, that the prosecutor committed reversible misconduct by arguing that defendant's explanation that "no RP" meant "no real person" was "BS." Petition at 8-10. However, the lower court disagreed with defendant and

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[3] An improper argument intended to inflame the passions of the jury is not per se reversible misconduct as defendant suggests. Petition at 8. *See, e.g.,* ***State v. McKenzie***, 157 Wn.2d 44, 60-61, 134 P.3d 221 (2006) (prosecutor's improper allusions to victim's chastity, intended to inflame the passions of the jury, did not warrant a new trial, as unobjected-to comments were not so flagrant and ill-intentioned that their prejudicial effect could not have been cured by a timely instruction to the jury).

found that the prosecutor permissibly argued that the evidence presented at trial did not support Jacobson's testimony, and the challenged statement was not a comment on defense counsel's role and did not impugn defense counsel's integrity. Slip op. at 35-36. A prosecutor is allowed to argue that the evidence does not support a defense theory. ***Russell***, 125 Wn.2d at 87. The prosecutor's argument here is thus distinguishable from ***State v. Lindsay***, 180 Wn.2d 423, 326 P.3d 125 (2014), on which defendant relies. Defendant does not claim that the lower court erred in finding the challenged statement proper, nor does he argue that the lower court's decision conflicts with a decision of this Court. Thus, review of that issue is unwarranted.

Defendant next claims the lower court failed to find misconduct "where the prosecutor bolstered the task force's actions and vouched for the police witnesses' credibility throughout the trial and in his arguments to the jury." Petition at 10. Defendant again makes the same arguments he raised below, but he fails to identify how the lower court erred in rejecting his arguments and fails to articulate why review is warranted under RAP 13.4(b). Instead, defendant's argument appears to be focused on his general disagreement with the lower court's findings. His subjective disagreement is not a permissible basis for review under RAP 13.4(b). The lower court considered defendant's arguments and correctly rejected them

after determining defendant failed to show improper vouching or bolstering, and the court further noted the puzzling nature of his argument given that such evidence was necessary in reviewing his claim of outrageous government conduct. *See* slip op. at 16-19.

Defendant proceeds to argue the prosecutor committed incurable misconduct during voir dire by educating the jury to the facts of the case. Petition at 13-14. The purpose of voir dire "is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges." ***State v. Tharp***, 42 Wn.2d 494, 499-500, 256 P.2d 482 (1953). The Court of Appeals properly reviewed the challenged statements, which were not objected to during the voir dire process, and determined they were not improper, as the prosecutor's questions did not educate the jury about the *particular* facts of defendant's case, and he did not use those questions to prejudice the jury against defendant. Slip op. at 22-25. Defendant again voices his disagreement with the lower court's analysis but fails to demonstrate (let alone articulate) an appropriate basis for review.

Next, defendant again attempts to argue that the prosecutor committed reversible misconduct during cross-examination. Petition at 16-17. Below, defendant failed to argue *how* the prosecutor's conduct

constituted misconduct and failed to provide any citation to authority. As a result, the lower court declined to consider defendant's argument. *See* slip op. at 34, n. 8. Defendant does not argue or articulate how his failure to properly argue the issue below warrants review by this Court pursuant to RAP 13.4(b).

Finally, defendant erroneously claims the lower court "considered sufficiency of the evidence in holding the cumulative misconduct did not prejudice Jacobson's right to a fair trial." Petition at 20. The lower court did not consider the sufficiency of the evidence in its cumulative error analysis; rather, it recognized that "[t]he totality of the circumstances do not substantially prejudice the defendant where the evidence is *overwhelming* against the defendant." Slip op. at 36 (emphasis added) (citing this Court's opinion in ***In re Pers. Restraint of Cross***, 180 Wn.2d 664, 691, 327 P.3d 660, 678 (2014)). The lower court recognized that the evidence against Jacobson was overwhelming, and "[l]ooking to the errors in the context of the entire record," the defendant failed to meet his burden of showing the accumulation of prejudice that affected the outcome of the trial. Slip op. at 37. The lower court properly applied this Court's directives regarding cumulative error analysis, and therefore review is not warranted under RAP 13.4(b).

Defendant fails to show the lower court's decision regarding his claims of prosecutorial misconduct and cumulative error are in conflict with a decision of this Court or with a published decision of the Court of Appeals. This Court has repeatedly articulated the appropriate standards of review for such claims. As such, this case does not involve a significant question of constitutional law, nor does it involve an issue of substantial public interest that should be determined by this Court. This Court should therefore decline to review the above claims.

3. THE LOWER COURT PROPERLY VIEWED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND FOUND SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. Smith***, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App.

478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).

Here, viewing the evidence in the light most favorable to the State, the lower court correctly found sufficient evidence to support that defendant intended to commit rape of a child in the first degree and commercial sexual abuse of a minor, and he took a substantial step toward the commission of those crimes.

"[A] defendant who intends to have sexual intercourse with a fictitious underage person and takes a substantial step in that direction can be convicted of attempted rape of a child." ***State v. Johnson***, 173 Wn.2d 895, 904, 270 P.3d 591 (2012). *See also*, RCW 9A.28.020(1), (2); RCW 9A.44.073. In this case, defendant engaged in a series of e-mails, text messages, and phone calls with a person from Craigslist whom he believed was an adult mother offering her three young children for sex. *See* Exh. 2, 4, 8, 9. The person posing as the mother was actually Detective Sergeant (Sgt.) Carlos Rodriguez of the Missing and Exploited Children's Task Force. RP 128-36, 163-66. Throughout their conversations, defendant made it clear he was looking to engage in oral and vaginal/penile sex with the fictitious 11-year-old daughter. *See* Exh. 2, 4, 7, 8, 9. Defendant exchanged photos, engaged in explicit communication regarding the

"rules" of sexual intercourse with the child, drove 45 minutes from his home in Enumclaw to meet at the agreed-upon gas station, brought condoms and lubricant for the purpose of engaging in sex, brought Skittles candy as requested, and was arrested en route to the fictitious child's residence. RP 436-41, 592, 619-21, 714, 727, 732, 738-740; Exh. 4.

The lower court correctly found that defendant intended to have sexual intercourse with an 11-year-old child and took a substantial step in that direction. *See* slip op. at 38-40. The court's finding is consistent with ***State v. Townsend***, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (defendant took a substantial step toward rape of a 13–year–old child that he met in an on-line chat room even though the victim was actually a male detective pretending to be a 13–year–old girl); ***State v. Wilson***, 158 Wn. App. 305, 308, 242 P.3d 19 (2010) (defendant took a substantial step toward second degree rape of a child where he exchanged pictures, arranged to have oral sex with a fictitious 13-year-old in exchange for $300, and drove to the agreed upon location with the $300); and ***State v. Sivins***, 138 Wn. App. 52, 64, 155 P.3d 982 (2007) (defendant took a substantial step toward rape of a child when he engaged in sexually graphic internet communications with a fictitious 13-year-old, drove five hours to Pullman, and secured a motel room for two). Because defendant engaged in conduct that went far beyond mere words, this case is distinguishable from ***State v. Grundy***, 76

Wn. App. 335, 336-37, 886 P.2d 208 (1994) (defendant's words, without more, was insufficient to constitute attempted possession of cocaine). Review is therefore unwarranted under RAP 13.4(b)(1) or (2). Additionally, because this Court as well as the Court of Appeals have already addressed sufficiency of the evidence claims in the context of cases involving the attempted rape of a fictitious child, review is unnecessary under RAP 13.4(b)(3) or (4).

The lower court also correctly determined that sufficient evidence supported defendant's conviction for attempted commercial sexual abuse of a minor upon consideration of the requirements of former RCW 9.68A.100, RCW 9A.28.020(1), and the facts of defendant's case. *See* slip op. at 40-42. During defendant's text message exchange with Kristl, defendant expressed interest in going "all the way" with 11-year-old Lisa. RP 276-79; Exh. 4. Kristl asked defendant if he was okay with "gifts" for Lisa, such as "roses," "gift cards" or minutes for her phone.[4] RP 283-84; Exh. 4. Defendant responded with "Ok" and immediately asked about oral sex. RP 284; Exh 4. Defendant confirmed that "gifts" were "not a problem." RP 297; Exh. 4. Later, Kristl asked defendant if he was "still good with gifts." RP 324; Exh. 4. Defendant responded, "Anything I

[4] "Roses" in this context means money, and "gifts" conveys an expectation of payment. RP 162-63, 284.

brought I would give to you to disperse however you saw fit." *Id.* When asked what he was willing to give, defendant offered a "gift card" "that can be used for any purpose." RP 324-25; Exh. 4. Kristl and defendant followed this exchange by discussing condoms and lubricant, and Kristl confirmed that she would accept defendant's offer of a gift card for "playtime." RP 325-26; Exh. 4. Defendant agreed to provide a "gift" in return for sex with an 11-year-old girl, and he specifically offered a gift card as payment. He subsequently drove 45 minutes to meet at the agreed-upon location and brought condoms and lubricant for the purpose of engaging in sexual intercourse with Lisa.

It is unnecessary for this Court to interpret the term "a fee" as used in former RCW 9.68A.100, as the commercial sexual abuse of a minor statute was amended in 2017. *See* Laws of 2017, ch. 231, § 3. The amendment replaced the term "a fee" with "anything of value." *Id.* Moreover, because the former statute did not define the term "fee," the term is to be given its plain and ordinary meaning as ascertained from a standard English dictionary. ***State v. Fuentes***, 183 Wn.2d 149, 160, 352 P.3d 152 (2015); ***State v. Jones***, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). *See Webster's Third New International Dictionary* 833 (2002) ("fee" defined as "compensation often in the form of a fixed charge…for special and requested exercise of talent or skill). According to its

dictionary definition, "fee" includes but is not limited to a fixed sum of money. However, whether defendant in this case actually agreed to pay or offered a fixed sum of money in exchange for sex with a child need not be determined, because defendant was charged with and convicted of *attempted* commercial sexual abuse of a minor. "[I]t makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur." ***State v. Luther***, 157 Wn.2d 63, 74, 134 P.3d 205 (2006). The lower court properly recognized that defendant's "offer and assent to provide a gift card demonstrated his *intent* to provide a fee in return for engaging in sexual conduct with Lisa." ***Jacobson***, slip op. at 42 (emphasis added). Review of this issue is therefore unnecessary and unwarranted.

Finally, the parties did not contest whether commercial sexual abuse of a minor, RCW 9.68A.100, is an alternative means crime. *See* slip op. at 41. And, the trial court's instruction to the jury required proof that defendant both attempted to solicit, offer, or request to engage in sexual conduct with a minor for a fee and that he attempted to pay or agree to pay a fee in return for sexual conduct with a minor. CP 35-36. *See* former RCW 9.68A.100(b), (c) (2015). The lower court therefore properly looked to whether substantial evidence supported both means. Review is not warranted under RAP 13.4(b)(4), because the issue was not contested

below and because the jury instruction as given in his case required proof that defendant attempted to commit both means.

D. CONCLUSION.

This case was correctly decided by an unpublished decision limited to its facts. For the reasons set forth above, defendant fails to show review is warranted under RAP 13.4(b). However, should this Court be inclined to accept review, then review should be limited to the claim of outrageous government conduct, as there is limited caselaw in this area and the opinion would help define appropriate undercover law enforcement investigations regarding internet crimes against children

DATED: September 26, 2018

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ efile or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/26/18 Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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