No. 98739-4
COA No. 81364-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL KEEN JR.

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Daniel Keen asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Daniel Keen, Jr.*, No. 81364-1-I (June 8, 2020). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Outrageous government misconduct violates a defendant's right to due process of law and requires dismissal of the charges with prejudice. Is a substantial question under the United States and Washington Constitutions presented, where, in setting up a sting operation, the police specifically choose the age of the fictitious victim at 13 in order to increase the possible sentence, thus requiring the remedy of dismissal be applied to deter the State from committing similar egregious misconduct in the future?

D. STATEMENT OF THE CASE

Washington State Patrol (WSP) Sergeant Carlos Rodriguez, along with other members of the WSP, conducted a "Net Nanny" on-

line sting in Vancouver by posting a Craigslist advertisement in the "Casual Encounters" section. RP 230-32, 237, 267.

> The operation is called Operation Net Nanny. It's an undercover operation where we, through undercover personas, use various different online and social media platforms to chat with individuals who are interested in having sex with kids.

RP 274. The advertisement involved a male looking for another male who was interested in very young men. RP 232-33. The police chose 13 years old as the age of the fictitious young male, acknowledging that the ultimate crime is based upon this age:

> Q. You designed this ad, right?
>
> A. I placed the ad.
>
> Q. Well, you created the ad?
>
> A. Yes.
>
> Q. Designed it?
>
> A. Okay.
>
> Q. Okay. And that's to ultimately design a crime you want a response to.
>
> A. Did you say design a crime?
>
> Q. That's what you're doing when you're fishing for people, aren't you?
>
> A. No.

Q. Well, you picked the age, didn't you?

A. Yes.

Q. Okay. The crime is based on the age, isn't it? It is?

A. That is a part of -- that is one of the steps.

RP 235-36 (WSP Sergeant Rodriguez).

Specifically, the police chose the age of 13 because the individual could then be charged with attempted second degree child rape:

> Q. Okay. Why did the State Patrol use a thirteen-year old versus a fifteen-year old versus a sixteen-year old? Do you know why?
>
> A. Well, it's because of the attempted rape of a child in the second degree.
>
> Q. So, they were designing the crime that way?
>
> A. Yes.
>
> Q. Okay. Pick the age, design the crime?
>
> A. Yes.

RP 271-72 (WSP Trooper Califano).

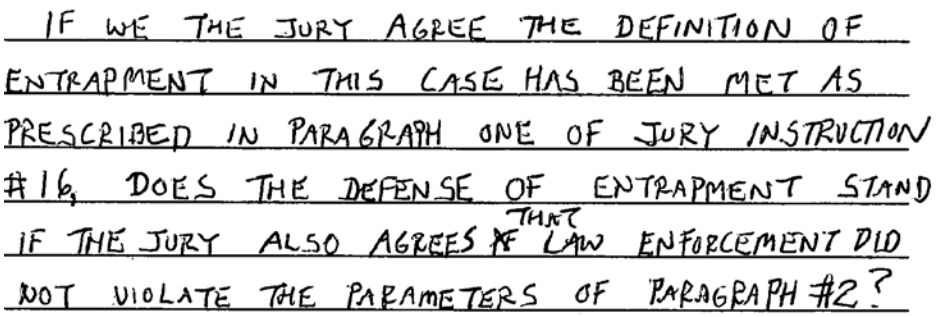
Daniel Keen was one of the people who responded to the advertisement. RP 231. WSP Detective Kristl Pohl engaged in email correspondence with Mr. Keen, posing as a 13 year-old male named "Jake." RP 310, 320. The correspondence became more graphically

sexual in nature. RP 321-26. The correspondence was continued over the next two days via text messaging conducted by WSP Detective Robert Givens, again continuing the ruse of posing as a 13 year-old male. RP 342-43.

On February 18, 2017, the fictitious 13 year-old male and Mr. Keen agreed to meet to engage in a sexual encounter. RP 387-88. Mr. Keen was initially directed to a 7-Eleven. RP 391-92. Shortly thereafter, Mr. Keen was directed to the house in which the WSP was conducting the sting, where he was arrested. RP 248-49, 268. When he was arrested, Mr. Keen was carrying a bag with condoms, personal lubrication, and other items of a sexual nature. RP 249.

Mr. Keen was charged with a count of attempted second degree rape of a child and a count of communication with a minor for immoral purposes. CP 436. Prior to trial, Mr. Keen moved to dismiss the prosecution for a violation of his due process rights based upon the outrageous conduct of the police in purposely selecting the age of the victim at 13 years. CP 12-72. He renewed the motion prior to trial and again following conviction in a motion for a new trial. CP 228-382, 484-87. The trial court denied each of these motions. CP 214-16, 484-87.

Mr. Keen sought, and the trial court agreed to give, a jury instruction on entrapment. CP 464; RP 430. During their deliberations, the jury sent a question to the court:



CP 472.[1] The court had the jury refer to the court's instructions. CP 473. Shortly thereafter, the jury reached its verdict.

Mr. Keen was convicted as charged. CP 474-75. He was sentenced to an indeterminate term of 76.5 months to life on the

[1] The jury instruction on entrapment reads:

> Entrapment is a defense to a charge of attempted rape of child in the second degree if the criminal design originated in the mind of law enforcement officials or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.
>
> The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit the crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense it will be your duty to return a verdict of not guilty as to the charge.

CP 464.

attempted rape of a child count and 12 months on the communication count. CP 492.

The Court of Appeals rejected Mr. Keen's outrageous governmental conduct argument and affirmed his conviction and sentence. Decision at 4-5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The police action of selecting the age of the "victim" to increase the sentence amounted to outrageous governmental misconduct.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects against conduct by state actors "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996), *quoting United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). The conduct "must be so shocking that it violates fundamental fairness." *Russell*, 411 U.S. at 432; *Lively*, 130 Wn.2d at 19-20.

Unlike entrapment, where the focal issue is the predisposition of the defendant to commit the offense, outrageous conduct is focused on the State's behavior. *Lively*, 130 Wn.2d at 19. This form of outrageous conduct is founded on the principle that the conduct of law enforcement

officers may be so outrageous that due process principles would bar the State from invoking judicial processes to obtain a conviction. *Russell,* 411 U.S. at 431-32; *Lively,* 130 Wn.2d at 19. Such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause. *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn.App. 388, 402, 288 P.3d 343, *review denied*, 176 Wn.2d 1009 (2012); *State v. Pleasant,* 38 Wn.App. 78, 82, 684 P.2d 761 (1984). Whether the State has engaged in outrageous conduct is a matter of law. *Lively,* 130 Wn.2d at 19.

In determining whether the State's conduct offends due process, courts review the totality of the circumstances. *Lively*, 130 Wn.2d at 19. "Each case must be resolved on its own unique set of facts." *Id*. at 21.

This Court should grant review to determine whether the State's conduct in these "Net Nanny" cases where the police control the offense is outrageous governmental conduct. The police here were in complete control of the direction this sting took, especially in selecting the age of the fictitious victim, thereby increasing the potential sentence

that would be imposed.[2] This ability to arbitrarily increase the potential sentence is so outrageous that the attempted rape count should have been dismissed. The trial court erred in failing to grant Mr. Keen's motion to dismiss for outrageous government conduct.

The *Lively* Court suggested several factors which courts should consider when determining whether police conduct offends due process. One factor in determining whether outrageous conduct occurred is whether the government conduct controls the criminal activity or simply allows for the criminal activity to occur.[3] *Lively*, 130 Wn.2d at 25. Another related factor regarding outrageous conduct is whether the police motive was to prevent further crime or protect the populace, i.e., whether the government conduct demonstrates a greater

[2] Mr. Keen moved to dismiss for "sentence entrapment" or "sentence manipulation." CP 12-24. "Sentence manipulation" and "sentence entrapment" fall within the rubric of outrageous government conduct. *United States v. Sanchez*, 138 F.3d 1410, 1413-14 (11th Cir. 1998).

[3]The factors described by the *Lively* Court are: whether 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." *Lively*, 130 Wn.2d at 22.

interest in creating crimes to prosecute than in protecting the public from further criminal behavior. *Id.* at 26.

The jury's question indicated that the jury agreed that the police engineered this crime and directed it but Mr. Keen had not carried his burden of persuading the jury that he was entrapped. The facts certainly bear this out. Even the mere fact that Mr. Keen communicated in a sexual manner with a minor was sufficient to prove he was arguably guilty of the offense of communicating with a minor for an immoral purpose. But this was not enough for the police. The testimony of the troopers shows they specifically chose the age of the fictitious youth at 13 because they were aware that this fact would increase the potential sentence to an offense with an indeterminate sentence.[4] Increasing the potential sentence in this arbitrary manner was outrageous conduct.

The fact that Mr. Keen did not prevail in his entrapment defense does not preclude a finding that the police engaged in outrageous conduct:

> The two defenses, therefore, are independent. A defendant could be predisposed (and thereby lose his entrapment defense), but could prevail on his outrageous

[4] Attempted rape of a child in the second degree is a class A felony with a sentence of a minimum term of the standard range and maximum term of the statutory maximum of life. RCW 9.94A.507(1)(a), (3), RCW 9A.28.020(3)(a), RCW 9A.44.076(2).

> government conduct defense if government misconduct rose to a sufficiently egregious level. A defendant's predisposition would indicate only that the government's conduct in securing his conviction did not contravene Congress's conception of what constitutes a violation of its statutes. Such predisposition would not, however, automatically grant law enforcement officials free reign to secure his conviction through tactics that offend due process. If a defendant is predisposed to commit a particular crime, the government may employ any tactics that do not violate the defendant's due process rights in order to secure his conviction for that crime.

Stephen A. Miller, *The Case for Preserving the Outrageous Government Conduct Defense,* 91 Nw. U. L. Rev. 305, 337 (1996) (internal footnote omitted).

The fact the jury found Mr. Keen had not carried his burden of proving entrapment in no way precludes a finding that the police acted in an outrageous manner in arbitrarily selecting the age of the fictitious minor, thereby subjecting the defendant to a significantly increased potential sentence. Without a remedy of dismissal, the police will continue to seek higher and higher potential sentences based solely on their arbitrary choice of the fictitious victim's age. *See State v. Solomon,* 3 Wn.App.2d 895, 916, 419 P.3d 436 (2018) ("In ruling to dismiss the charges, the trial court did not adopt a view that no reasonable judge would take. Given the court's finding that law enforcement had initiated and controlled the criminal activity,

persistently solicited Solomon to commit the crimes so initiated, and acted in a manner (through the use of language and otherwise) repugnant to the trial judge's view of the community's sense of justice, the trial court's determination was tenable.").

Given the rise in this type of activity by the police in the Net Nanny context, it is clear this Court must determine whether the action of the police is consistent with the due process clause. Thus, this Court should grant review to send a message to police agencies that conduct such as occurred in Mr. Keen's case constitutes outrageous governmental conduct which will not be tolerated. As a result, Mr. Keen's conviction for attempted second degree rape of a child in the second degree should be reversed and dismissed.

F. CONCLUSION

For the reasons stated, Mr. Keen asks this Court to grant review and order his case dismissed.

DATED this 7th day of July 2020.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL KEEN JR., Appellant.	No. 81364-1-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Daniel Keen Jr. appeals his convictions for attempted rape of a child in the second degree and communication with a minor for immoral purposes. Keen asserts that law enforcement engaged in outrageous misconduct by choosing the fictitious victim's age of 13. He also challenges the DNA collection fee because the State already collected his DNA. We remand to strike the DNA collection fee, but affirm Keen's convictions.

BACKGROUND

In February 2018, the Washington State Patrol (WSP) conducted a "Net Nanny"[1] online sting operation in Vancouver, Washington by posting a Craigslist advertisement in the "Casual Encounters" section. The advertisement indicated that a young male was seeking a relationship with another male.

[1] During "Net Nanny" operations, the WSP investigate crimes of attempted rape of a child, communication with a minor for immoral purposes, and commercial sex abuse of a minor through undercover capacities.

Keen responded to the advertisement and included nude photographs of himself. WSP Detective Kristl Pohl posed as a 13 year old boy, "Jake," to correspond with Keen. "Jake" told Keen he was 13. Keen responded that "Jake" could get everyone in trouble for talking to him and asked if "Jake" was the police. After "Jake" said he was not the police, Keen stated, "you didn't freak me out I was just covering my ass in case."

Detective Robert Givens then took over as "Jake" and communicated with Keen by text messages. Keen messaged with "Jake" over the next three days and sent sexually explicit messages and nude photos. Keen proposed meeting with "Jake." After "Jake" told Keen his mother was leaving for the night, Keen stated he would come over "if you're absolutely sure that she's gone for the evening I'm taking a big risk coming there." "Jake" responded, "Yeah she's gone for sure. You sure you wanna? I don't want to see you get in trouble." Keen responded he needed to shower first. "Jake" then told Keen to meet him at a 7-Eleven. After Keen sent more sexually explicit text messages about what he was going to do to "Jake," Keen said he was at the 7-Eleven. "Jake" then told Keen to meet him at his house. Keen went to the sting house, knocked on the door, and entered. A police team arrested Keen once he arrived inside the door. He had sex toys, condoms, lubricant, and his cell phone, which contained his communications with "Jake."

The State charged Keen with attempted rape of a child in the second degree and communication with a minor for immoral purposes. After trial, the jury found Keen guilty as charged. Keen appeals.

ANALYSIS

DUE PROCESS CLAIMS

Keen claims the State violated his right to due process by engaging in outrageous governmental misconduct by choosing the age 13 rather than an older age for "Jake."

Due process prevents the police from using the courts to obtain a conviction based on outrageous police conduct.[2] We review whether law enforcement has engaged in outrageous conduct de novo.[3]

Police conduct violates due process when the conduct "shocks the universal sense of fairness."[4] "Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity."[5] Courts reserve dismissal based on outrageous police conduct for only "the most egregious circumstances" and do not provide this remedy each time law enforcement acts deceptively.[6]

When evaluating whether law enforcement engaged in outrageous conduct, we focus on the State's behavior rather than the defendant's predisposition.[7] We evaluate the following factors to decide whether police conduct offends due process: (1) "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity," (2) "whether the defendant's reluctance to commit a

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[2] State v. Lively, 130 Wn.2d 1, 18-19, 921 P.2d 1035 (1996).
[3] Lively, 130 Wn.2d at 19.
[4] Lively, 130 Wn.2d at 19.
[5] Lively, 130 Wn.2d at 20.
[6] Lively, 130 Wn.2d at 20.
[7] Lively, 130 Wn.2d at 22.

crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation," (3) "whether the government controls the criminal activity or simply allows for the criminal activity to occur," (4) "whether the police motive was to prevent crime or protect the public," and (5) "whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.'"[8]

Keen claims the State engaged in outrageous conduct when detectives specifically chose "Jake's" age as 13 because "they were aware that this fact would increase the potential sentence to an offence with an indeterminate sentence."[9] He does not address otherwise the factors used to assess whether police conduct is outrageous. When Keen asked Detective Robert Givens why they chose "Jake's" age as 13, he responded, "we want those who are targeting the more vulnerable, and the younger are logically the more vulnerable." So, the police reasonably chose to set the age to 13 to protect younger children from predators seeking younger children and not to "increase the potential sentence" as Keen suggests.

Keen makes no claim that police acted to overcome his reluctance to commit a crime or the crimes for which he was convicted. His own text messages show his awareness of the criminal nature of the conduct he attempted and his desire to commit those crimes.

Keen provides no authority supporting his claim that the State's action of

[8] Lively, 130 Wn.2d at 22.
[9] Keen fails to cite anywhere in the record where a trooper states this.

choosing the age 13 amounts to outrageous conduct.[10] The State did not engage in outrageous conduct by setting "Jake's" age at 13. So, Keen's due process claim fails, and we affirm his conviction.

DNA COLLECTION FEE

Keen asks this court to strike the DNA collection fee from his judgment and sentence. He contends, and the State concedes, that State v. Ramirez[11] requires this relief because the State previously collected his DNA. We accept the State's concession and remand for the trial court to strike it.[12]

STATEMENT OF ADDITIONAL GROUNDS

First Amendment Violation

Keen asserts the State violated his First Amendment right to free speech "due to freedom of conversation and text" and because it is illegal for law enforcement to record any conversation without his prior knowledge. Because Keen provides no explanation about how the State violated his First Amendment right to free speech due to freedom of conversation, we do not address this claim.[13]

Keen also claims that it should be illegal for law enforcement to save text message conversations because it is illegal "for law enforcement to record any conversation without the prior knowledge of the person being recorded." But, the law prevents law enforcement from recording "a private communication or

[10] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[11] 191 Wn.2d 732, 746-50, 426 P.3d 714 (2018).

[12] State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013).

[13] Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

conversation."[14] Because the detectives were a party to the texting conversations with Keen, the State did not intercept any "private communication" between Keen and a third party. And, the State did not record the communications. It preserved them in the form they were sent. So, the State did not violate statutory privacy rights.

Grand Jury Indictment

Keen next claims the State violated his Fifth Amendment right to be charged by a grand jury indictment. But, the grand jury provision of the Fifth Amendment does not apply to state prosecutions.[15] So, Keen's claim fails.

Cruel and Unusual Punishment

Keen next claims he received cruel and unusual punishment because he harmed no victim and he never saw documentation showing the jury agreed to the "sentencing review board" and/or "life on parole."

Keen's crimes do not require a real victim.[16] So, this claim fails. Keen provides no persuasive explanation about how the jury's lack of awareness of the sentencing review board and/or life on parole amounts to cruel and unusual punishment.[17]

Other Claims

Keen also asks whether police are required to reveal their identity when asked. We do not address this inquiry because it is not a properly asserted ground

[14] State v. Racus, 7 Wn. App. 2d 287, 297, 433 P.3d 830 (2019).
[15] State v. Ng, 104 Wn.2d 763, 774-75, 713 P.2d 63 (1985).
[16] State v. Wilson, 158 Wn. App. 305, 242 P.3d (2010); State v. Johnson, 12 Wn. App. 2d 201, 460 P.3d 1091 (2020).
[17] Norcon Builders, LLC, 161 Wn. App. at 486.

for review.[18]

Keen's final ground for review states that a 26-year-old male posing as a minor on Craigslist answered the door when he arrived to meet "Jake." Because a statement of facts without supporting argument does not create a reviewable issue, we do not address it.[19]

CONCLUSION

Because the State reasonably chose "Jake's" age as 13 in order to protect younger children, and because Keen provides no authority supporting his assertion the State engaged in outrageous conduct, his due process claim fails. We affirm Keen's convictions but remand for the trial court to strike the DNA collection fee.

Leach, J.

WE CONCUR:

Andrus, A.C.J.

Mann, C.J.

[18] Norcon Builders, LLC, 161 Wn. App. at 486.
[19] Norcon Builders, LLC, 161 Wn. App. at 486.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 81364-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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