98942-7

NO. 81366-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

State of WASHINGTON
Respondent
v.
Steven Allen Pemberton
Appellant

On appeal FROM THE SUPERIOR COURT OF KITSAP COUNTY, STATE OF WASHINGTON
SUPERIOR COURT NO. 17-1-01554-5

MOTION FOR DISCRETIONARY REVIEW

Treated as a Petition for Review

STEVEN PEMBERTON
Appellant, Pro Se
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

IDENTITY OF PETITIONER

I, STEVEN ALLEN PEMBERTON, AM FILING THIS MOTION FOR DISCRETIONARY REVIEW ON BEHALF OF MYSELF. MY APPELLATE COUNSEL, LISA TABBUTT, REFUSED TO FILE ANY MOTIONS ON MY BEHALF EVEN THO SHE IS MY COUNSEL.

DATED: AUGUST 18, 2020

RESPECTFULLY

STEVEN PEMBERTON
PRO SE

CITATION TO COURT OF APPEALS DECISION

THE DIVISION 1 Court of appeals Denied my appeal in case No. 81366-8-1 on 6/8/2020. I am asking The Supreme court of WASHINGTON STATE TO REVIEW THE VALIDITY as to the charges:
① ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE
② ATTEMPTED COMMERCIAL Sale of A MINOR AND
③ COMMUNICATION WITH A MINOR FOR IMMORAL Purposes
ALONG WITH Brady VIOLATION and my Constitutional Right to choose my Defense being Violated.

THE DIVISION 1 COURT OF APPEALS DENIED MY MOTION FOR RECONSIDERATION ON 7/22/2020.

ISSUES PRESENTED FOR REVIEW

I have provided specific case law from the Supreme Court in regards to fictious victims related to police stings. Also provided are quotes from R.C.Ws that challenge the validity of the charges against myself.

Included is evidence that the state withheld exculpatory evidence until after trial. this BRADY violation violated my Right to a fair trial. My defense counsel admitted in the Record that he never seen evidence prior to trial. Prosecution violated my state and federal Constitutional Rights along with Court Rules.

I was denied my choice to choose my own defense by defense counsel violating my 6th amendment right.

Statement of the case

I, Steven Pemberton, was arrested on 10-13-2017 as part of a police internet sting. I was charged with attempted rape of a child in the second degree, attempted commercial sale of a minor and communication with a minor for immoral purposes. My case proceeded to TRIAL on May 29, 2018. After trial and prior to sentencing defense counsel was removed from representating me and I continued pro se. on Aug. 20, 2018 an ineffective assistance of counsel hearing was held. I was later sentenced to 234 month in prison.

This case arises from an internet sting done by Law enforcement. ~~ON~~ 10-12-17 Detective Carlos Rodriguez posted a legal and lawful advertisement on an adult website, which you have to acknowledge to being 18 years or older to be on, which I lawfully responded to. Law enforcement arrested me on the other side of town, 22 blocks away from the address given to him, driving away from the location. Law enforcement posted a legal advertisement, on an adult website, provided pictures of adult women and spoke in adult manerisms in attempt to trick any Random individual who responded to the ad. I was not targeted because of ongoing criminal activity. I was not predisposed to commit these crimes

Argument

In regards to the attempted rape of a child in the Second degree, attempted commercial sale of a minor and communication with a minor for immoral purposes, I, Steven Pemberton, bring several arguments to this Court's attention.

The supreme court of Washington State noted in State V. PATEL, 170 Wn.2d 485 "While intent with regards to age of the victim, is not an element of the crime, a defendants knowledge of the victim's age is relevant in defendants may assert an affirmative defense and prove by a preponderance of the evidence that they reasonably believed the victim was older based on the victim's own declarations." RCW 9A.44.030 (2). Attached is a copy of the Craigslist.Org Disclosure that was admitted at trial. It states "By clicking the link below you confirm that you are 18 or older and understand personals may include adult content. That was law enforcement's first declaration that their fictcous victim was 18 years of age or older. Their second declaration was sending pictures of adult women who were 27 and 31 years old at the time. Due to the detective's declarations at no point in time did I believe I was talking to anyone but an adult.

The Supreme Court goes on in State V. Johnson, 173 Wn.2d 895 (2011) to state" an actual child's age can

be proved by extrinsic sources, a birth certificate for example. Having proved the intended victim's age, the state must show that the defendant intended to have sexual intercourse with a child. BUT, a ficticous victim exists only within the context of the sting operation, her age can be established only by publication and receipt of the information. Thus, the state must show that the defendant knew the perceived victims age, usually by proving that the perceived victim communicated her age and the defendant received the information. The state must then prove that the defendant intended to have sexual intercourse with this victim."

This case is wether I believed I was speaking to a minor or to an adult. The state contends that they stated the ficticous minor's age of being 13 in an email and in a text. Therefore, in accordance with the statement made in Johnson, 173 wn.2d 895 the state must prove the defendant was in receipt of these messages of age by law enforcement.

Report of proceedings, Page 315 at 7 " The defendant gave permission for law enforcement to extract all emails, text messages and photos from his phone to prove I never received these messages.

Detective Sergeant Jason hicks, who was the primary digital forensic examiner in this case, testified to several key factors:

① when asked if he was able to extract the text messages completely he answered "The text messages, yes" (RP 314 at 17)
② when asked if he was able to recover the emails from the phone, which he had consent, he answers "I opted not to even try it." (RP 313 at 14)
They even asked him a second time "So you didn't even attempt to extract the emails?" (RP 314 at 12) and he again responded "no, I did not" (RP 314 at 13).
Law enforcement didn't even make an attempt to find out if I was ever in receipt of this information. They simply chose not to do their jobs.

STATE V Johnson, 173 Wn. 2d at 909 "to prove the specific intent element of attempted Rape of a child, either the child's actual age or the defendant's belief in a fictious age is material."

A defendant's belief is material. I sat with 2 detectives for 3 hours in an audio/video recorded interview, took a polygraph and had a physcoSexual evaluation completed. These were deemed as "Self Serving" statements and not used at trial. How can a person not share their belief if not through a self serving statement?

attached are sections of that police interview. (page 23 at 34) police ask "So did you in your mind at all think she wasn't 13?" while looking at the picture sent to me by law enforcement I respond four times. "Thats not 13", "thats not 13 at all", "that's not 13 at all", "thats, thats a 19/20 year old woman (Page 24 at 1-7)

(page 48 at 12) the defendant clarifies "its an 18 and older site. Casual encounters are 18 and over."
(page 72 at 22) I clarify my belief again as to the ficticous victims age "18/19 years old"
(Page 73 at 28) I state again "that's it's 18 and 18 and older."
(Page 74 at 4) "... they're at least 18. They're an adult, They're in the adult section."
(page 74 at 23) Law enforcement asks "you were not Suspicious that they might be a Juvenile?" and my response is "AT NO point in time, NO."

It's clear as to what my belief was. The state chose not to use this because it proved me innocent. I can not be guilty of the crimes for 2 Reasons:

1. I DID not believe the ficticous victim to be 13, and
2. Law enforcement led me to believe they were over 18 through their declarations of posting and advertisement on an adult website, Verifying they were over 18, Sending pictures of adult women and Speaking in adult manerisms.

Brady V. Maryland, 373 U.S. 83 (1963) in this case the Supreme court held the prosecution must turn over any evidence favorable to the defendant. when the prosecution withholds favorable evidence from the defense, Brady material is implicated and a defendant's right to due process under the united states constitution are violated.

The cell phone extracts from my phone that Law

enforcement gave the prosecutor proved that I never received a message on my phone stating a ficticous victim's age. These were never disclosed to me or my attorney. My attorney testified to that on aug. 20, 2018. This was exculpatory evidence that proved my innocence. Why did the prosecution not disclose these to me?

United States V. Dreamer, C.A. 8 (S.D.) 1996, 88 F.3d 655. "The government has a duty under the Due process clause to disclose to the defendant any and all evidence which is favorable to him and material to the issue of his or her guilt."

as discussed earlier in Patel, 170 wn.2d 485 "... a defendant's knowledge of the victim's age is Relevant." the prosecution withheld this evidence that proved my innocence. The prosecution did not disclose these to me until nearly 90 days after trial. It proved that I never received a message stating the ficticous victim to be 13. I had no reason to believe the victim to be under 18. when it comes to what my belief was, this evidence was exculpatory.

State V. Boyd, 160 Wash.2d 424, 158 P.3d 54 (2007) "where the nature of the case is such that copies of materials are necessary in order that defense counsel can fulfill critical Role necessary to ensure that the trial is fair, Criminal discovery rules governing prosecutor's obligations, Requiring prosecutor to disclose to the

defendant evidence he or she intends to use at the hearing or trial, obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective counsel and a fair trial."

A Brady Violation has 3 components. "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertantly and prejudice must have ensued." In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012) (quoting Strickler V. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 286 (1999))

A.) I could very easily argue that the cell phone extracts that were withheld were both exculpatory and impeaching. I choose to argue that the evidence was exculpatory. In regards to my case, which is a police sting, Law enforcement can establish age of a fictious victim through publication and receipt of the information. The withheld evidence from the defendant's phone proves he was never in receipt of these messages.

B.) I do not choose to make an attempt to read the mind of the prosecutor to determine wether they withheld this evidence on purpose or not, but the fact is the prosecution had this evidence and my attorney or me never received it. Court transcripts from

my attorneys testimony on aug. 20, 2018 states he never received this evidence prior to TRIAL.

C.) By not receiving this evidence it proves that the I was not in receipt of information in regards to age. The willful or inadvertant withholding of this exculpatory evidence violated my Right to a fair trial which prejudices me.

RCW 9A.44.030 (2)

While intent with regards to age of the victim, is not an element of the crime, a defendant's knowledge of the victim's age is relevant in that defendant's may assert an affirmative defense and prove by the preponderance of the evidence that they reasonably believed the victim was older based on the victims own declarations.

To present an affirmative defense, a defendant "must offer sufficient admissable evidence to justify giving the Jury an instruction on the defense." State V. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005)

RCW 9A.16.070 defines the entrapment defense:

1.) In any prosecution for a crime, it is a defense that:

A.) The criminal design originated in the mind of Law enforcement officials, or any person acting under their direction, and

B.) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

The court of appeals determined "Pemberton kept talking to Brandi even though she told him she was 13 years old."

I documented earlier in this motion, I was never in any receipt of law enforcements publication of an age.

So to fulfill the 2 elements of the entrapment defense:

1.) DID the criminal design originate in the mind of law enforcement?

"Generally, the government may not manufacture a crime from whole cloth and the prosecute a defendant for becoming ensnared in the governments scheme." United States V. Harris, 997 F.2d 812, 816 (10th CA 1993)

In State V. Solomon, 3 Wn. App. 2d 895, it was determined "Law enforcement initiated communication with Mr. Solomon, and any number of other unsuspecting would-be-adult daters, by posting a advertisement in the Casual Encounters, 18-And-over Page of Craigslist.org the government approched the defendant to initate criminal activity. IT did not join ongoing criminal activity initiated by the accused after he had formulated a criminal plan."

This is also true in my case. Law enforcement instigated and directed the CRIMINAL activity in my case.

2.) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

As mentioned earlier. Several times. I was never in receipt of a minor being involved in these messages. I had no knowledge of this information. IT proves the opposite. Law enforcement's declarations proves that I believed the fictious victim to be at least 18 years of age. Therefore I should had been entitled to the affirmative defense of entrapment.

State V. Wiebe, 195 Wash. App. 257, 377 P.3d 290 (2016)
"Defendant has a 6th amendment right to choose his defense. It is implicit in the 6th amendment that a criminal defendant has the right to control his defense."

State V. Jones, 99 Wash. 2d 735, 644 P.2d 1216 (1983)
"The 6th amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."

State V. Lynch, 178 Wn. 2d 487, 491-92 309 P. 3d 482 (2013)
"It is implicit in the 6th amendment that the defendant has a constitutional right to control his defense."

State V. Coristine, 177 Wash. 2d 370, 300 P.3d 400 (2013)
"The defendant has a right to choose his defense, as it is his life and Liberty at stake."

My 6th amendment right to choose my defense was violated when my defense counsel neglected to use the defense of entrapment.

referring to Court transcripts of aug 20, 2018 page 70 at 18 "I didn't raise entrapment" page 71 at 22 "I have not looked at entrapment case law in a while... I didn't believe that we could meet the elements of entrapment." My 6th amendment was violated simply because my defense Counsel was Lazy and hadn't looked at case Law in awhile.

Conclusion

In Conclusion, I have shown how I was neglected a fair trial, Denied Due process, had evidence withheld from me and my constitutional rights were Violated. I ask this Court to dismiss my case with prejudice or Remand for new trial so I may assert the defense of My choice.

Dated aug 18, 2018

Respectfully

STEVEN PEMBERTON
Pro Se.

By clicking the link below you confirm that you are 18 or older and understand personals may include adult content.

casual encounters >>> w4m m4m m4w w4w t4m m4t t4w w4t t4t

mw4mw mw4w mw4m w4mw m4mw w4ww m4mm mm4m ww4w ww4m mm4w m4ww w4mm t4mw mw4t

Safer sex greatly reduces the risk of STDs (e.g. HIV). Please report suspected exploitation of minors.

craigslist

post to classifieds

my account

search craigslist

search

event calendar

M	T	W	T	F	S	S
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31	1	2	3	4	5	6

help, faq, abuse, legal

avoid scams & fraud

personal safety tips

terms of use

privacy policy

system status

about craigslist

craigslist is hiring in sf

craigslist open source

craigslist blog

best-of-craigslist

craigslist TV

"craigslist joe"

craig connects

community

activities
artists
childcare
classes
events
general
groups
local news
lost+found
musicians
pets
politics
rideshare
volunteers

personals

strictly platonic
women seek women
women seeking men
men seeking women
men seeking men
misc romance
casual encounters
missed connections
rants and raves

discussion forums

apple
arts
atheist
autos
beauty
bikes
celebs
comp
crafts
diet
divorce
dying
eco
educ
feedbk
film
fitness
fixit
food
frugal
gaming
garden
haiku
help
history
housing
jobs
jokes
kink
legal
linux
m4m
manners
marriage
media
money
motocy
music
nonprofit
open
outdoor
over 50
parent
pets
philos
photo
p.o.c.
politics
psych
queer
recover
religion
romance
science
spirit
sports
tax
travel
tv
vegan
w4w
wed
wine
women
words
writing
yoga

housing

apts / housing
housing swap
housing wanted
office / commercial
parking / storage
real estate for sale
rooms / shared
rooms wanted
sublets / temporary
vacation rentals

for sale

antiques
appliances
arts+crafts
atv/utv/sno
auto parts
baby+kid
barter
beauty+hlth
bikes
boats
books
business
cars+trucks
cds/dvd/vhs
cell phones
clothes+acc
collectibles
computers
electronics
farm+garden
free
furniture
garage sale
general
heavy equip
household
jewelry
materials
motorcycles
music instr
photo+video
rvs+camp
sporting
tickets
tools
toys+games
trailers
video gaming
wanted

services

automotive
beauty
computer
creative
cycle
event
farm+garden
financial
legal
lessons
marine
pet
real estate
skill'd trade
sm biz ads
therapeutic

jobs

accounting+finance
admin / office
arch / engineering
art / media / design
biotech / science
business / mgmt
customer service
education
food / bev / hosp
general labor
government
human resources
internet engineers
legal / paralegal
manufacturing
marketing / pr / ad
medical / health
nonprofit sector
real estate
retail / wholesale
sales / biz dev
salon / spa / fitness
security
skilled trade / craft
software / qa / dba
systems / network
technical support
transport
tv / film / video
web / info design
writing / editing
[ETC]
[part-time]

gigs

computer
creative
crew
domestic
event
labor
talent
writing

resumes

nearby cl

bellingham
bend
comox valley
corvallis
east oregon
eugene
fraser valley
kamloops
kelowna
klamath falls
kootenays
lewiston
medford
moses lake
nanaimo
olympic pen
oregon coast
portland
pullman-moscow
roseburg
salem
skagit
spokane
sunshine coast
tri-cities
vancouver
victoria
wenatchee
whistler / squamish
yakima

us cities

us states

canada

cl worldwide

SP: Yesterday.

GS: Yesterday?

SP: Mm-hm.

GS: You didn't use it before or after work today?

SP: Nuh-uh.

GS: Your eyes are really (unintelligible).

SP: Oh. Everything kind of came right back when I got put in handcuffs.

GS: Okay.

SP: It was like, like I feel like I'm high (unintelligible) so.

GS: Okay. Alright. Endorphins and shit. Adrenaline.

SP: Yeah. It's all fucked up right now.

GS: Do you got some? Maybe we can do it before we do it? Whenever (unintelligible) home to change. (Unintelligible) shower, do you still want to come over? I'm very curious if you're real or not.

SP: Mm-hm.

GS: I'm not a bot. More like praying you're not a cop. I'm no cop, that's for sure. What? No comment? I answered you. I'm not a cop. Are you? And this is you, I've done more time in prison that you've been alive. So I guess there's only one way to find out what's up, huh? Time to put up or shut up. How long until you can get to Starbucks?

SP: So there's a star beside that on comment.

JK: Mm-hm.

GS: Yeah.

SP: To find out if she's real or not. If she's a real person or not. It's time to like, I guess we're gonna have to find out if you're real or not.

GS: Okay.

SP: That has got nothing to do with the sexual nature.

GS: I didn't realize the star there. Um.

JK: It's more (unintelligible) clarify on the age. Anna—or I'm sorry, in the earlier chats she said she was 13.

SP: Mm-hm.

JK: And how much time have you done in prison?

SP: About 14 years.

JK: About 14 years. So did you in your mind at all think she wasn't 13?

SP: That's not 13.

GS: Okay.

SP: That's not 13 at all.

GS: When you saw this?

SP: That's not 13 at all.

GS: Okay.

SP: That's, that's a 19/20 year old woman.

GS: Okay. Which one?

SP: That one.

GS: Okay.

SP: The one on the right. But even with that, I still, I, you know, I felt (unintelligible) I just felt it was all a game. And I said it in my text, it said right there in the message. Either you're fucking on a computer playing some dumbass game, or you're a cop. I guess we'll find out.

GS: Okay.

SP: And we found out that she was faking a cop.

GS: And when do you want (unintelligible) to come to the house. I thought it was right up the street. I'm confused. Do you want my address? What's the address? Are you walking to Starbucks? What's the plan? Um (unintelligible) on east 31st Street. But don't go to the front door. That's the landlord. (Unintelligible) Anna lives in the basement. Sorry. Had to find a piece of mail. Did you drive over there, Steve?

SP: No.

GS: I wasn't out there, so I don't know.

SP: Nope.

GS: Did you go to 7/11?

SP: No. I wasn't at 7/11. I was uh—

GS: Or Starbucks?

SP: In that big parking lot.

GS: Like where Grocery Outlet is?

SP: Yeah.

GS: Okay.

SP: Yeah.

GS: I don't know where you were out there, so that's why I'm asking.

SP: Yeah, that's where I, that's where I was. And then like—

JK: That way, we can kind of clear this whole situation up, you know what I mean? And the emails kind of bring a lot to life cause that's that the connection from the Craig's List advertisement to you going to text messages, you know. Cause we don't know how that happened. You know what I mean?

SP: Yeah. And it was just.

GS: Did you talk to her on Facebook messenger or anything?

SP: Actually, hold on. Check this out.

JK: Go ahead.

SP: This right here.

GS: Yep.

JK: Yeah.

SP: Is an 18 or older site. Casual Encounters are 18 and over.

GS: Okay.

JK: Right.

SP: So with me sending my initial response, there's inappropriate pictures of me being sent to an 18-year old. And I didn't know that until afterwards.

JK: That's, I understand that. I understand that.

SP: So feel free. There's a face shot, a body shot and my member shot.

JK: Yeah.

SP: And I didn't—

JK: When you say your member shot, you're talking about your penis?

SP: Yeah. And I didn't know that it was, it was never was—this is, I'm thinking 18 or over. Casual Encounters, let's go meet.

JK: Right. Until she says she's 13 in a text.

SP: So—in a text.

JK: Okay.

SP: And that time span right there.

JK: Right.

SP: That's just later.

GS: So when you, so when you initially responded to this via email, that's when you said—

SP: You included a pic.

GS: Alright.

SP: You include your pics with it.

SP: If someone else is going there—

JK: Yes.

SP: Then there shouldn't be police there waiting. There should be someone else off to the side waiting. And if you guys, yeah (unintelligible) if someone, if they're having a conversation of sexual in nature with a minor and they're going to meet up to have sex with her, hook 'em up. I don't care. Here's what it is, I'm not, my conversation from my point of view with that girl was not of sexual nature. I never brought up my dick size to her. I never talked about how I was gonna fuck her, or what I was gonna let her do to me. Shit never came out my mouth. It's just is, I mean. My intentions were not to go have sex with this girl at all. And if they were, then I shouldn't be sitting in this room. Y'all should be beating my ass in the back right now cause that's how it (unintelligible) happening, sorry.

GS: And, once again, I can, I can go back to, you know, I know you're, and I'm gonna be straight up with you like I always am with you (unintelligible) any bullshit, but when you're answering this ad, Steve, once again, and I'm just looking at it as let's say I'm a freaking juror.

SP: A what?

GS: A juror.

SP: Okay.

GS: I'm on your jury. I'm Joe citizen. I'm your peer. And it says the girl, she's been—oh, okay. So she's crazy and young. So young, okay.

SP: 18/19 years old.

GS: Hold on, hold on. Maybe that's a little odd. I'm a juror, remember. Really looking to meet a DDF guy. Okay. That can teach me what it's like to be an adult. So that tells me hmm, maybe there's some suggestion that she might not be an adult. Right?

SP: Can you get on Craig's List for like—

GS: Dude.

SP: 30 minutes and read some of the shit on there?

GS: I'm just—

JK: Oh, I know.

SP: And that's, so that becomes normal.

GS: This is—

JK: I know.

SP: That's normal reading. Like, oh, you wanna be an adult. You wanna—

GS: I'm just telling you how somebody—

SP: Maybe you're into some bondage or something, like.

GS: Okay. Well take your peer who is on the jury. They look at that and they go okay, well maybe she's not an adult. Yet, Mr. Steve Pemberton sent a dick pic to her right off the bat.

SP: And you include pic. You include pic. You include your pic in the response.

GS: But you did it after you saw that she was young. So all I'm saying is it doesn't look good to start with, right?

SP: Okay. Continue.

GS: Do you not agree?

SP: I don't agree.

GS: If you're not in that world, would you agree?

SP: I mean, if, you have to be hon—I mean, you kind of—(unintelligible) jury, have you been on Craig's List? Have you read the Personals section?

GS: Of course, of course.

SP: You read the Casual Encounters?

GS: Of course you'd ask him that. But no, I'm just saying that you read this, I'm gonna personally, if I was in your shoes, I'm gonna air on the side of caution, I ain't sending her shit until I verify how old she is.

SP: Well I (speaking at the same time)

GS: But you thought you'd go ahead and send her a dick pic.

SP: Most of them say—well obviously it's 18 or older. So first off, you got someone (unintelligible)

GS: Do you not think there's juveniles on there?

SP: I've never thought of it like that. I haven't thought of it. It's always been—

GS: Do you believe—

SP: And as a matter of fact, I believe there is even like a little fucking thing that states that—

GS: Right.

SP: That's it's 18 and 18 and older.

GS: But I've got teenagers.

SP: No, I get it. I get it, but.

GS: And all these websites say you gotta be 18..

SP: No, I, no, I get that.

GS: But my kids are on there creating freaking accounts all the time.

SP: No, I get that. But still, it's like you're on an adult site like in the Casual Encounters for like adult hook-ups, like.

GS: Right.

SP: That's what it's for. So like all of a sudden, no I just, no. You assume. And that's, that's the only reason why a pic was sent is because you assume like oh fuck, okay, they're at least 18. They're an adult. They're in the adult section.

GS: Yeah.

SP: (Mumbling) no.

GS: So you're comfortable doing that? Taking that gamble? I mean.

SP: I mean, it was never thought of as a gamble.

JK: Do you think that minors never go on there?

SP: (Unintelligible). No, I've never thought about it like that. But I mean, cause I've, I've—

JK: Does it make sense to you that they would though?

SP: Well I mean it could now, but like I've always, I mean, I've responded to (unintelligible)—recording stops.

SP: (Unintelligible) you know. Most of them turn out to be bots. They want you to join this web—other website, or.

GS: Right.

JK: Mm-hm.

SP: You know, it's just a whole bunch of stupid shit, but no, at no point in time—

GS: Excuse me.

SP: Oh no, and so to answer your question, no, at that point in time, no I did not think of it, no.

GS: You were not suspicious that they might be a juvenile?

SP: At that point in time, no.

JK: Why did you send a dick pic at first though?

SP: Cause most of them say fucking include a dick pic. Include pic of dick. Most of them say that, so. It's just a mandatory response. It just comes out of me. (Unintelligible)

JK: Oh, it's just a, like an automatic reaction?

SP: Yeah, yeah. (Unintelligible) comes out cause that's what I'm used to. It's kind of, it's kind of—

JK: Respond to an ad and here's, here's my dick. (Unintelligible)

SP: Well, I got one on my phone that I used. It's a pretty good (unintelligible) pretty good one. So you know, I mean.

JK: Got some good lighting on there, good filter?

FILED
7/22/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. STEVEN ALLEN PEMBERTON, Appellant.	No. 81366-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Steven Pemberton filed a motion to reconsider the opinion filed on June 8, 2020. The panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN ALLEN PEMBERTON, Appellant.	No. 81366-8-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The Washington State Patrol's Missing and Exploited Children Task Force (MECTF) posted an advertisement on the "Casual Encounters" section of Craigslist. Steven Pemberton responded. An MECTF officer replied, pretending to be a 13-year-old girl. Pemberton set up a time and place to meet, at which officers arrested him. A jury convicted him of attempted rape of a child in the second degree, attempted commercial sexual abuse of a minor, communication with a minor for immoral purposes, and possession of a controlled substance. Pemberton raises several issues on appeal and through a statement of additional grounds (SAG) and Personal Restraint Petition (PRP). We affirm Pemberton's convictions and remand for the trial court to strike two community custody conditions and to correct two scrivener's errors.

I. BACKGROUND

MECTF commenced a "Net Nanny" sting operation in Kitsap County. In such an operation, MECTF works undercover using different personas, such as a

13-year-old runaway girl or boy, to go on social media sites and "contact people who are interested in having sex with kids." For the operation in Kitsap County, MECTF used the "Casual Encounters" section of Craigslist to post an ad. The Craigslist site conveyed that, to use this section, one must be 18 or older. MECTF titled the ad "crazy and young. looking to explore." The ad also provided, that the person was looking for a guy "that can teach [her] what its like to be an adult."

Pemberton responded to the ad through email, expressing interest and sending two photos of his penis. The person wrote back, saying, among other things, "Im 13, but I know what to do." The person also purported to attach a photo of herself and a friend, which was actually a photo of two law enforcement officers who looked young. After exchanging emails, the two began texting. The person who posted the ad identified themselves as "Brandi." Brandi, however, was actually a Kitsap County Sheriff's detective. Brandi asked Pemberton, "you down with me being 13[?]" Pemberton did not respond to the question.

Brandi and Pemberton texted over a two-day period. Brandi said that she was "looking for a daddy who [she] can have some fun with and get [her] some roses," and clarified that "roses" meant money. Brandi texted that she thought Pemberton "wanted some fun" with her, to which he responded that they "would have to discuss that in person." Later, when Brandi texted after her phone had died, she told Pemberton "maybe I can suck you for a phone charger" and that she "could do more to [him]" if he wanted. Pemberton again said that they would

have to "talk in person" because he was "not even trying to catch some criminal charges."

In later texts, Pemberton said that he was "the one that has everything you want." Brandi responded, "have a big dick that what i want." When Brandi asked Pemberton if she had scared him off, he replied, "You haven't scared me one bit your not big enough to scare me."

The two planned to meet up the next day. On that day, Brandi said that she thought she, her friend "Anna," and Pemberton "were gonna do some condom testing." Brandi also asked for $40 to get more minutes for her phone. Brandi told Pemberton to come to her friend Anna's home because the latter's mother was out of town. Pemberton asked Brandi if she drank alcohol or did drugs for fun. Brandi said she was curious about "meth" because a friend told her "sex on meth was amazing." Pemberton responded, "That is a very true statement." The two eventually agreed to meet at a Starbucks.

The police located Pemberton near the Starbucks where he was to meet Brandi. They pulled Pemberton over in his truck and arrested him. The police then searched Pemberton's truck and collected his cellphone and "a little orange straw" that contained methamphetamine.

The State charged Pemberton with attempted rape of a child in the second degree, attempted commercial sexual abuse of a minor, communication with a minor for immoral purposes, and possession of a controlled substance.

A jury convicted Pemberton as charged. Pemberton appeals.

II. ANALYSIS

A. Sufficiency of the Evidence

Pemberton argues that the State presented insufficient evidence for count 2, attempted commercial sex abuse of a minor, because the evidence did not show that he offered to exchange anything of value for sex. We disagree. When a defendant challenges the sufficiency of the evidence on appeal, "we draw all inferences in favor of the State and interpret them most strongly against the defendant." State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009). "Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt." Garbaccio, 151 Wn. App. at 742.

To prove attempt under RCW 9A.28.020(1), the State must prove the defendant "with intent to commit a specific crime, . . . d[id] any act which is a substantial step toward the commission of that crime." A substantial step is an action strongly corroborative of the defendant's criminal purpose. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). Additionally, a person commits the crime of commercial sexual abuse of a minor if "[they] provide[] or agree[] to provide anything of value to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with [them]." RCW 9.68A.100(1)(b).

Pemberton asserts the State failed to provide sufficient evidence because "[he] never agreed to provide anything of value in exchange for sex." But the

State needed to prove only that Pemberton, with the requisite intent, took a substantial step toward agreeing to provide anything of value to a minor in exchange for sexual conduct. RCW 9A.28.020(1); 9.68A.100. Brandi brought up the exchange of sex for money when she messaged, "im looking for a daddy who I can have some fun with and get me some roses." After Brandi clarified that "roses" meant "money," Pemberton said that they "would have to discuss that in person." A few texts later, Brandi told Pemberton "maybe I can suck you for a phone charger." Pemberton replied, "Oh really now," and then again said that they would "talk in person" because he was "not even trying to catch some criminal charges." Finally, Brandi and Pemberton discussed him giving her money for more minutes on her phone:

> [Brandi:] thought the three of us were gonna do some condom testing lol
>
> [Pemberton:] Oh is that what you're needing
>
> [Brandi:] [Y]es babe. And a few bucks for it that cool?
>
> [Pemberton:] Hmmmmmm..... What's a few bucks????
>
> [Brandi:] 40 it will get me more minutes for my phone
>
> [Pemberton:] Interesting. Very interesting
>
> . . .
>
> [Brandi:] Anna's mom job takes out of town for like a week a few months then we get to do our own thing.
>
> What u think w're [sic] able to fuck a guy three way with my in the kitchen
>
> [Pemberton:] Freeway huh. So you get money and Anna doesn't?
>
> [Brandi:] im the one that needs a phone card if you want to pay her for sex you can lol
>
> [Pemberton:] I never said I was paying for sex. I was just helping you out with some phone time

> [Brandi:] I didn't ask for money for sex why when we want it i just need a phone card

Viewing the evidence in the light most favorable to the State, Pemberton knew that Brandi sought various things of value–money, a phone charger, $40 for phone minutes–in exchange for sexual conduct. Though Pemberton did not explicitly agree to such an arrangement, he did not refuse to provide these things in exchange for sexual relations. Instead, Pemberton told them they would need to speak in person so that he would not "catch some criminal charges." Furthermore, Pemberton seemingly acknowledged the money-for-sex arrangement when he texted, "What's a few bucks" and "So you get money and Anna doesn't." Drawing all reasonable inferences in favor of the State, a rational trier of fact could conclude that through these text messages, Pemberton took a substantial step toward agreeing to provide something of value in exchange for sexual conduct beyond a reasonable doubt.

Pemberton also argues that the fact that he did not have any money or a phone card on his person when he was arrested shows that he did not commit the crime. But Pemberton made this argument to the jury, and they rejected it. We defer to the trier of fact on the persuasiveness of the evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). We determine sufficient evidence supported Pemberton's conviction for attempted commercial sex abuse of a minor.

B. Sufficiency of the Charging Language for Attempted Commercial Sex Abuse of a Minor

Pemberton claims that we should reverse his conviction for attempted commercial sex abuse of a minor because the use of outdated charging language failed to apprise him of the essential elements of the crime. The State contends that we should uphold the conviction because the unartful charging language did not prejudice Pemberton. We agree with the State.

The language charging attempted commercial sex abuse of a minor in Pemberton's amended information provides that he took a substantial step to pay, or agree to pay, a "fee" in exchange for sexual conduct with a minor. But earlier in 2017, the legislature had revised RCW 9.68A.100, regarding commercial sex abuse of a minor.[1] LAWS OF 2017, ch. 231. While the statute had required before that the defendant had paid or agreed to pay a fee, the legislature amended the statute to require that the defended provided or agreed to provide "anything of value." LAWS OF 2017, ch. 231, § 3. The legislature made this change to account for the "practical reality" of the crime, "which often involve an exchange of drugs or gifts for the commercial sex act." LAWS OF 2017, ch. 231, § 1.

Pemberton asserts that the use of the outdated charging language failed to put him on notice of all the essential elements of the charged crime. "We review challenges to the sufficiency of a charging document de novo." State v. Lindsey, 177 Wn. App. 233, 244, 311 P.3d 61 (2013).

[1] The revision became effective on July 23, 2017. S.B. 5030, 65th Leg., Reg. Sess. (Wash. 2017).

A charging document must include all essential elements of a crime, both statutory and nonstatutory, to notify the accused of the nature and cause of the accusation against them. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). If the information fails to allege each essential element, the charged crime must be dismissed. State v. Pry, 194 Wn.2d 745, 752, 452 P.3d 536 (2019). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." Pry, 194 Wn.2d at 752 (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). But "it has never been necessary to use the exact words of a statute in a charging document." Kjorsvik, 117 Wn.2d at 108. Instead, "it is sufficient if words conveying the same meaning and import are used." Kjorsvik, 117 Wn.2d at 108.

To determine whether the amended information sufficiently charged attempted commercial sex abuse of a minor, we apply a two-pronged test: "(1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show [they were] actually prejudiced by the unartful language." State v. Zillyette, 178 Wn.2d 153, 162, 307 P.3d 712 (2013) (citing Kjorsvik, 117 Wn.2d at 105-06). The State meets the first prong if the charging language "would reasonably apprise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109. When making this determination, we read the words in the charging document as a whole and construe them according to common sense. Kjorsvik, 117 Wn.2d at 109. If the State cannot satisfy the first prong, we presume prejudice and reverse. Pry, 194 Wn.2d at 753.

Because Pemberton challenges the sufficiency of the charging document for the first time on appeal, we construe it liberally. See Pry, 194 Wn.2d at 752. Under such liberal construction, "when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document." Kjorsvik, 117 Wn.2d at 104.

Liberally construing the amended information, the charging language reasonably apprised Pemberton of the essential elements of the crime. Though the amended information used "fee" instead of "anything of value," the information did not need to restate the precise statutory language. See Pry, 194 Wn.2d at 752 ("the information need not restate the precise language of the essential elements of a crime"). The use of "fee" conveyed that the State believed Pemberton had taken a substantial step toward agreeing to provide something of value in exchange for sexual conduct. This is not a case in which specifying exactly what Pemberton would agree to provide in exchange for sexual conduct is necessary to establish the illegality of the behavior charged. See, e.g., Zillyette, 178 Wn.2d at 160 (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) ("However, because not all controlled substances can be the basis for controlled substances homicide, some degree of specification 'is necessary to establish the very illegality of the behavior charged' in order to charge a person with controlled substances homicide."). Thus, when reading the charging language in a commonsense manner, a fair construction of the

amended information conveyed the necessary element of exchanging something of value in exchange for sexual conduct of a minor.

Having concluded that the State meets the first prong, we would typically next consider whether the charging language still prejudiced Pemberton. But because Pemberton has the burden of raising and showing prejudice and fails to address this issue, we will not consider the issue further. See Lindsey, 177 Wn. App. at 246 (refusing to consider the prejudice prong when the defendant did not argue it). We determine the charging language was sufficient.

C. CrR 3.5

Pemberton contends that because the trial court did not enter written findings of fact and conclusions of law (FFCL) after the CrR 3.5 hearing, we must remand. The State asserts that the error was harmless and therefore does not require remand. We agree with the State.

CrR 3.5(c) requires that "[a]fter the [CrR 3.5] hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore." Thus, a trial court's failure to enter written FFCL after a CrR 3.5 hearing constitutes error. State v. France, 121 Wn. App. 394, 401, 88 P.3d 1003 (2004). But such error "is harmless as long as oral findings are sufficient to allow appellate review." State v. Thompson, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

Although the trial court below did not enter written findings, its oral ruling sufficed to permit appellate review and Pemberton does not argue otherwise. In

admitting Pemberton's statements, the court noted that police had advised him of his rights more than once, he signed an advisement form, and no evidence showed that he was under the influence. Additionally, it recognized that Pemberton was cooperative, gave appropriate answers to questions, and did not ask for an attorney. The court also stated that Pemberton asking to speak to officer constituted further indicia of the voluntariness of his statements.

As Pemberton does not explain how the court's failure to enter the findings prejudiced him, or even challenge the findings and conclusions made at the hearing, we determine the error was harmless. We decline to remand for entry of written FFCL.

D. Community Custody Provisions

Pemberton challenges two of his community custody provisions. First, he asserts that a provision preventing him from entering locations where the primary product is alcohol is not sufficiently crime-related. Second, he claims that a provision requiring him to inform his Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved is unconstitutionally vague. We address each challenge in turn.

"We review community custody conditions for an abuse of discretion and will reverse them if they are manifestly unreasonable." State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). It is manifestly unreasonable for a trial court to impose an unconstitutional condition. Nguyen, 191 Wn.2d at 678.

1. Alcohol Community Custody Provision

Pemberton challenges a community custody condition preventing him from entering any location where alcohol is the primary product. He claims the condition is not statutorily authorized because it is not directly related to the circumstances of his crimes. We agree.

The court attached an appendix titled "Additional Conditions of Sentence" to Pemberton's Judgment and Sentence. Under "Crime Related Prohibitions," the fifth condition stated, "Do not enter any location where alcohol is the primary product, such as taverns, bars and/or liquor stores."

RCW 9.94A.703(3)(f) permits sentencing courts to exercise their discretion to impose any crime-related prohibitions as community custody provisions. "A 'crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Nguyen, 191 Wn.2d at 683 (quoting RCW 9.94A.030(10)). We typically uphold community custody conditions if a reasonable relationship exists between the crime and the condition. Nguyen, 191 Wn.2d at 684. "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" Nguyen, 191 Wn.2d at 684 (quoting State v. Irwin, 191 Wn. App. 644, 558-59, 364 P.3d 830 (2015)).

The State does not assert any facts showing that alcohol related to the circumstances of Pemberton's crimes or contributed to his commission of them. Instead, the State merely argues that Nguyen "expanded the universe" so that "[t]hings that go to the particular defendant's character, like impulsivity, may be

considered by the trial court in imposing conditions of sentence." While Nguyen provided that sentencing courts may use "their discretion to impose prohibitions that address the cause of the present crime or some factor of the crime that might cause the convicted person to reoffend," it maintained that a sufficient connection must exist between the prohibition and the convicted crime. 191 Wn.2d at 684-86. The State fails to point to any evidence in the record connecting alcohol to any of Pemberton's convicted crimes. Because no reasonable relationship exists between Pemberton's crimes and the prohibition on him entering locations where alcohol is the primary product, the trial court abused its discretion by imposing it. See State v. Morgan, noted at 10 Wn. App. 2d 1033, slip op. at 6 (2019) (determining a trial court erred in imposing a community custody provision to not enter locations where alcohol is the primary source of business because "nothing in the record indicates that alcohol contributed to the [defendant's] offenses"). We remand for the trial court to strike the provision.[2]

[2] The State also contends that because Pemberton possessed methamphetamine at the time of his arrest, the prohibition on entering places where alcohol is the primary product was reasonably related to his crimes. The State provides that it "sees little difference between one drug or the other–alcohol is a drug." This argument, however, contradicts courts holding that alcohol is not interchangeable with other substances. See State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (noting that if alcohol, but not another substance, contributed to a crime then evaluation and treatment for substances other than alcohol are not crime related); State v. Jones, 118 Wn. App. 199, 202, 207-08, 76 P.3d 258 (2003) (holding that trial court erred by imposing a community custody provision that required the defendant to participate in alcohol counseling where no evidence demonstrated that alcohol contributed to the crimes, even though the defendant was under the influence of methamphetamine at the time of his crime). As a result, we reject this argument.

2. Romantic Relationships Community Custody Provision

Pemberton also challenges as unconstitutionally vague a community custody provision requiring him to inform his Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved. We agree.

Condition 19 under the "Crime Related Prohibitions" section of Pemberton's Additional Conditions of Sentence stated that he "[s]hall inform [his] Community Corrections Officer of any romantic relationships to verify that there are no victim-age children involved."

"A community custody condition is unconstitutionally vague if it '(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" Nguyen, 191 Wn.2d at 678 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)) (alterations in original). A community custody provision is not unconstitutionally vague simply because a person cannot predict with absolute certainty the exact point at which their actions would constitute prohibited conduct. Nguyen, 191 Wn.2d at 679.

Pemberton argues that "[t]he term 'romantic relationship' lacks sufficient definiteness such that an ordinary person would understand what conduct is proscribed." Our Supreme Court addressed a similar argument in Nguyen, and determined that "a person of ordinary intelligence can distinguish a 'dating relationship' from other types of relationships." 191 Wn.2d at 682 (quoting

RCW 26.50.010(2). The Court noted, however, that, rather than the term "dating," the term "'romantic' [was a] highly subjective qualifier[]." Nguyen, 191 Wn.2d at 683. Division III similarly held that the term "romantic relationships" is unconstitutionally vague. State v. Peters, 10 Wn. App. 2d 574, 590, 455 P.3d 141 (2019). Because it is often difficult to determine at what point a relationship becomes "romantic," the term "romantic relationships" is not definite enough for an ordinary person to understand what conduct is proscribed. We adhere to the analysis from Nguyen and the holding in Peters and conclude that the "romantic relationship" community custody provision here is unconstitutionally vague. Because imposing an unconstitutional condition constitutes an abuse of discretion, the trial court abused its discretion by imposing it. See Nguyen, 191 Wn.2d at 678. We remand for the sentencing court to strike the provision from Pemberton's Judgment and Sentence.

E. Scrivener's Error

Pemberton asks us to remand for correction of two scrivener's errors on his Judgment and Sentence. The State agrees that the Judgment and Sentence contains two scrivener's errors that the trial court should correct. We agree and remand for correction of the errors.

Pemberton points to two portions of his Judgment and Sentence that he identifies as scrivener's, or clerical, errors. First, the Judgment and Sentence says that he pleaded guilty, even though a jury convicted him after a trial. Second, the criminal history portion provides that the date of a crime for

possession of a dangerous weapon was January 19, 2015, but that he was sentenced for the crime nearly two years earlier on February 12, 2013.

CrR 7.8 provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." CrR 7.8(a). When a scrivener's error occurs in a Judgment and Sentence, the remedy is to remand to the trial court for correction. In re Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

The errors pointed out by Pemberton constitute clerical mistakes covered under CrR 7.8. For these reasons, we remand for the trial court to correct the errors.

F. SAG

1. Brady[3] Violation

Pemberton asserts that the State committed a Brady violation related to "text message exhibits" because he "did not receive evidence that admitted at the trial until 90 days after [his] trial was over." A Brady violation has three components: "'[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486-87, 276

[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

P.3d 286 (2012) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 286 (1999)).

In his SAG, Pemberton fails to identify which text message exhibits the State allegedly suppressed, but his PRP suggests that he refers to exhibits 5 and 6.[4] The exhibits appear to be text messages sent from Pemberton's phone, but do not include all the text messages sent between him and Brandi. Though Pemberton labels these exhibits as "key evidence," he does not explain how the evidence is exculpatory or impeaching. Additionally, exhibit 4 includes all the text messages from exhibits 5 and 6, and Pemberton does not claim that the State suppressed or withheld exhibit 4. Because Pemberton cannot establish the elements necessary to show a Brady violation, we reject his claim.

2. Right to Choose Defense - Entrapment

Pemberton claims that his Sixth Amendment rights were violated because his attorney would not argue entrapment as a defense. We disagree.

We review de novo allegations of constitutional violations. State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).

A criminal defendant's right to control their defense is implicit in the Sixth Amendment. Lynch, 178 Wn.2d at 491. Encompassed in this right is the decision to present an affirmative defense. State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013). But this right has limits. Coristine, 177 Wn.2d at 377.

[4] Pemberton also appears to claim that the exhibits constitute newly discovered evidence. But as the court admitted the exhibits at trial, he cannot show that they were newly discovered. See CrR 7.8(b)(2) ("Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5.").

To present an affirmative defense, a defendant "must offer sufficient admissible evidence to justify giving the jury an instruction on the defense." State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

RCW 9A.16.070 defines the entrapment defense:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

Here, the evidence did not support an entrapment defense. MECTF created an advertisement on Craigslist that conveyed a "crazy and young" girl was looking for someone to teach her "what its like to be an adult." Pemberton initiated contact by answering the advertisement and then continued the contact through text messages. Pemberton kept talking to Brandi even though she told him she was 13 years old. This evidence demonstrates that the police afforded Pemberton the opportunity to commit the crimes, but did not lure or induce him to. Because Pemberton failed to show sufficient evidence to justify an entrapment defense, his lawyer's decision to not use the defense at trial did not violate Pemberton's Sixth Amendment rights.[5]

[5] Pemberton also argues in his PRP that the police improperly targeted him. But Pemberton fails to explain how MECTF posting an ad and waiting for responses amounted to targeting. He also does not provide any citations to case law for this argument. Thus, we reject this claim.

3. Sufficiency of the Evidence

a. Attempted Rape of a child in the second degree

Pemberton asserts that his driving to Bremerton did not constitute a substantial step toward the crime of attempted rape of a child. We disagree.

As discussed above, a person attempts a crime if they take a substantial step towards its commission. RCW 9A.28.020(1). An action strongly corroborative of the defendant's criminal purpose constitutes a substantial step. Johnson, 173 Wn.2d at 899. "Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt." Garbaccio, 151 Wn. App. at 742.

Under RCW 9A.44.076 (1), a person commits rape of a child in the second degree "when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."

Pemberton responded to the Craigslist ad with photos of his penis. He then continued to text Brandi about having sexual relations with her even though she told him she was 13 years old. Pemberton continued to text with Brandi after she said she wanted "a big dick," to "do some condom testing," and to "fuck a guy three way." The two exchanged several text messages setting up a time and place to meet. When it came time to meet, Pemberton told Brandi that it was "[t]ime to put up or shut up." Pemberton then drove to nearby a park at the time Brandi said she was walking there. The two discussed having sex on

methamphetamine and Pemberton had the drug when arrested. Viewing these facts in the light most favorable to the State, a rational juror could have found beyond a reasonable doubt that Pemberton's conduct was strongly corroborative of the criminal purpose of having sex with a person between 12 and 14 years old.

b. Communication with a minor for immoral purposes

Additional Ground 5 of Pemberton's SAG provides, "Next I want to challenge the validity of count 3 communication with a minor for immoral purposes. To be convicted of this a defendant must believe that the other person was a minor." Pemberton's statement appears to challenge the sufficiency of the evidence for his conviction for communication with a minor for immoral purposes because he did not believe Brandi was a minor. Indeed, RCW 9.68A.090(1) provides that a person is guilty of the crime if "a person who communicates with someone the person believes to be a minor for immoral purposes."

But the evidence shows that after Pemberton responded to Brandi's Craigslist advertisement through e-mail, she responded "Im 13, but I know what to do." Later, through text message, Brandi again told Pemberton that she was 13. Given that Brandi told Pemberton that she was 13 at least twice, a rational juror could find beyond a reasonable doubt that Pemberton believed Brandi was a minor. Other evidence suggests Brandi may have been over 18 years old, such as one needing to affirm that they are 18 to enter the Casual Encounters section on Craigslist and that the photo Brandi sent of herself was actually a photo of a young-looking law enforcement officer. But we defer to the trier of fact on the persuasiveness of the evidence. Hernandez, 85 Wn. App. at 675.

Drawing all inferences and viewing all facts in favor of the State, we determine the sufficient evidence supported the jury's conclusion that Pemberton committed communication with a minor for immoral purposes.

4. Police Misconduct

Pemberton contends that "[l]aw enforcement violated [his] Fifth and Fourteenth Amendment to the United States Constitution due process right to fundamental fairness with its illegal actions and illegal tactics." We disagree.

We review de novo constitutional issues. Zillyette, 178 Wn.2d at 158.

A police officer's conduct may violate due process principles if it is so outrageous that it shocks the universal sense of fairness. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). If law enforcement acts in such a manner, then due process principles would bar the State from using the judicial process to convict the defendant. Lively, 130 Wn.2d at 19. Courts evaluate the totality of the circumstances when reviewing a defense of outrageous government conduct. Lively, 130 Wn.2d 21. Five factors guide a court's analysis:

> There are several factors which courts consider when determining whether police conduct offends due process: 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 (internal citations omitted) (quoting People v. Isaacson, 44 N.Y. 2d 511, 378 N.E. 2d 714, 719, 406 N.Y. 2d 714 (1978)).

Below, Pemberton filed several post-conviction motions under CrRs 7.4 and 7.5. After a hearing, the trial court entered written FFCL. The court made several findings on the five factors related to the outrageous government conduct defense:

> 1) The police, in this case, infiltrated ongoing criminal activity. Sergeant Rodriguez has investigated instances of child exploitation and sexual abuse through the internet for several years. The current form of investigation was designed to infiltrate the already extensive sexual exploitation of children on our internet. The investigations are created using information obtained from other criminal investigations. In this case, the defendant choose [sic] to respond to and communicate with someone he believed was a 13 year old despite the undercover's attempts to end communications.
> 2) Law Enforcement did not engage in persistent solicitation to overcome the defendant's reluctance to commit the crime because the defendant was never reluctant to commit the crime. The defendant repeatedly communicated with the undercover and pursued the conversation, eventually driving across town to meet with, who he believed, was a 13-year-old girl.
> 3) The government did not control the criminal behavior but simply allowed for the criminal activity to occur. Although law enforcement made the initial post and engaged in sexual conversation, it was the defendant who decided what the terms were for meeting the undercover. The defendant decided the location and when he would meet with the undercover. The undercover's attempts to discontinue the conversation were quickly rebuffed by the defendant who indicated that he wished to pursue the conversation.
> 4) The current investigation was designed to prevent crime and protect the public.
> 5) The government's conduct did not amount to criminal activity and was not repugnant to a sense of justice. The investigation gave the defendant several opportunities to abandon his criminal intent, yet the defendant choose [sic] to continue the conversation and criminal behavior.

Pemberton does not explain how the court's findings are incorrect or challenge them on appeal. Unchallenged findings of fact are verities on appeal. State v.

Pillon, 11 Wn. App. 2d 949, 971, 459 P.3d 339 (2020). Accepting the trial court's findings as verities, we can conclude only that the government did not act outrageously. Indeed, given that the police posted an advertisement, waited for a response, and even purportedly attempted to discontinue conversation,[6] its actions do not shock the universal sense of fairness. Pemberton's outrageous police conduct defense fails.[7]

We affirm Pemberton's convictions and remand for corrections to his Judgment and Sentence consistent with this opinion.

Chun, J.

WE CONCUR:

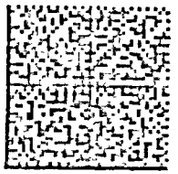
[6] Pemberton texted "???" when Brandi did not respond for 11 minutes; "Sooo" after Brandi texted "gotcha have a nice day," and when Pemberton wanted to meet at 7 a.m., Brandi texted "i'll pass to early for me."

[7] Pemberton's PRP raises the same issues that he raised in his SAG–i.e., Brady violation, entrapment, and outrageous police conduct. For the reasons explained in our analysis, these arguments fail on their merits.

To the extent Pemberton's PRP raises ineffective assistance of counsel arguments in relation to his claims of Brady violation, entrapment, and outrageous police conduct, these arguments fail because, as we rejected these claims on their merits, he cannot show prejudice. See State v. Grott, 195 Wn.2d 256, 274, 458 P.3d 750 (2020) (providing that to succeed on an ineffective assistance of counsel claim the defendant must establish both deficient performance and prejudice).

Finally, Pemberton argues in his PRP that the court violated CrR 7.8 by failing to transfer to the Court of Appeals two other motions that he filed on September 1, 2018 and September 11, 2018. But Pemberton did not include these motions in the appellate record. As the appellant, Pemberton has the burden to provide an adequate record to establish error. State v. Hernandez, 6 Wn. App. 2d 422, 429, 431 P.3d 126 (2018). Because we do not have an adequate record to review this claim, we do not address it.

Steven Pemberton 876309 CH11
Washington Correction Center
P.O. Box 900
Shelton, WA 98584



US POSTAGE
$01.80º
Mailed From 98584
08/19/2020
031A 0005181388

Legal mail

Court of appeals
Division I
One Union Square
600 University St.
Seattle, WA 98101-4170