No. 99303-3
COA No. 81834-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EZRA D. WRIGHT,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 16-1-01590-34

ANSWER TO MOTION FOR AMENDED PETITION FOR REVIEW AND ANSWER TO AMENDED PETITION FOR REVIEW

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2. Whether the decision of the Court of Appeals finding that no outrageous state conduct occurred was correct and whether the decision conflicts with any decision of this Court or the Court of Appeals.

3. Whether Wright has provided any basis for review of the issues raised in his Statement of Additional Grounds.

B. STATEMENT OF THE CASE

1. Substantive Facts

The Washington State Patrol Missing and Exploited Children's Task Force (MECTF) conducts undercover operations where detectives post ads online to look for individuals who are looking to have sex with children. RP 362-363, 376. In September

of 2016, the MECTF conducted such an operation in Thurston County. RP 376. For that operation, detectives from the MECTF created personas "based on actual cases where people were providing their children for sex." RP 377. Detective Sgt. Carlos Rodriguez indicated the:

> Internet Crimes Against Children Task Force program helps state and local law enforcement agencies develop an effective response to technology facilitating child sexual exploitation and Internet Crimes Against Children. This support encompasses forensic and investigative components, training and technical assistance, victim services, prevention, and community education.

RP 428-429.

For the Thurston County operation, the MECTF posted an add on Craigslist in the "casual encounters" section. RP 430. The add was titled, "Family playtime!?! -W4M," and the ad stated, "Mommy/Daughter, daddy/daughter, daddy/son, mommy/son. You get the drift. If you know what I'm talking about, hit me up, we'll chat more about what I have to offer you." RP 441, Ex 5. The appellant, Ezra Wright, responded to the ad. RP 442.

Detective Krista Kleinfelder wrote to Wright, "I'm not into role-playing only someone serious. I'm a single mother of three young kids, 13, 11, and 6, looking for someone to teach my kids,"

and provided a phone number and a code word for Wright to continue chatting with her. RP 444, Ex 5. She followed that with "This is taboo and not for everyone." RP 444, Ex 5.

Wright initiated a text message conversation using the code word that Kleinfelder provided, indicating that he was "open to whatever." RP 452, Ex 1. Kleinfelder asked him if he had experience with younger kids and when Wright asked, what do you want me to do with them, responded, "I like to watch someone have sex with them." RP 452, Ex 1. Rather than backing out of the conversation, Wright then asked to see pictures and continued texting with Kleinfelder's fictious persona, "Hannah." RP 452, Ex 1.

At one point during the messaging, Wright stated, "My gut tells me you aren't for real in this," and stated, I'm real. I'm military." RP 454, Ex 1. Kleinfelder responded indicating that she did not feel that he was being honest or direct and indicating that she was trying to filter out flakes. RP 454, Ex 1. Again, rather than discontinuing messages, Wright responded, stating, "This is illegal in a lot of ways. You can - - we can meet if that makes you feel better." RP 454-455, Ex 1.

Kleinfelder responded, "Me and my family live a discreet life filled with taboo. I don't think it's wrong, but others do, so I have to

be careful," to which Wright responded, "I just don't want to get in trouble with the law. Do you want to meet tonight?" RP 455, Ex 1. Kleinfelder replied, "I understand. Then this not for you. For what?" RP 455, Ex 1. Despite having been given a chance to discontinue the chats, Wright continued texting with Kleinfelder and when she asked, "tell me specifically what you want with me kids," Wright replied, "I'll have sex with the girls but not the male. Does that sound good to you?" RP 455, Ex 1.

When Kleinfelder stated, "How big are you? The six-year-old is kind of small. I would also require condoms," Wright responded, I'm 5'5". I have condoms," and asked for a picture of "just the girls." RP 456, Ex 1. Wright asked, "Do they both consent to this? They're not going to tell anyone else." RP 456-457, Ex 1. After Kleinfelder responded, "They know we don't talk about playtime. We have our little secrets. They are both very excited," Wright responded, "when are you available? And where are you from?" RP 457, Ex 1.

Wright continued texting, stating, "I'm available tonight if you are," to which Kleinfelder responded, "Do you have condoms?" RP 457, Ex 1. Wright and Kleinfelder continued chatting and Wright indicated that he was interested in "just the 11-year-old for now."

RP 457, Ex 1. Wright indicating, he was "from JBLM" and asked if Kleinfelder could meet in Puyallup. When Kleinfelder stated, "No. I have a place here, and it will be comfortable and relaxing for you," Wright responded, "Okay. I hope you're not a cop." RP 457, Ex 1.

After Kleinfelder responded, "I hope you are not a cop coming from JBLM," Wright wrote, "Nope. This has to be as discreet as possible." RP 457, Ex 1. Wright asked if the daughters could come outside and asked for pictures of the area surrounding the apartment, to which Kleinfelder responded, "It's okay if you don't want to come here. You can walk away. I'd understand." RP 458-459, Ex 1. Wright asking if they could meet somewhere neutral first and Kleinfelder responded, "I get it. Maybe this isn't for you. I'm not taking my 11-year-old and six-year-old out in the middle of the night. Either at my place or this isn't for you." RP 459, Ex 1.

Wright then asked about meeting during the next day, to which Kleinfelder responded, "Sorry, I'm done with these games." RP 459, Ex 1. Again, rather than discontinuing the conversation, Wright responded, this time stating, "All right, I'll be there. But if your place looks sketchy, I'm out." RP 459, Ex 1. Wright followed directions to a 7-Eleven in Tumwater and was eventually given the

address of the apartment that the MECTF was using for its operation. RP 459-460, Ex 1.

When he arrived, Wright called to ask her to open the door because he was on the sidewalk. RP 462. Kleinfelder opened the door and waved to him, at which time he asked to push the door open so he could see inside because he was concerned that there would be police offices inside. RP 462. Wright entered the apartment and said that "he was concerned that it was like a *To Catch a Predator* situation." RP 463. Wright was ultimately arrested by the MECTF operation in the apartment. RP 490. During a search incident to arrest, Wright had "a set of car keys, a cell phone and then a single Durex condom." RP 490. When law enforcement searched Wright's vehicle, they located a box of condoms. RP 499.

Wright was charged with attempted rape of a child in the first degree. CP 2. Following the State's case in chief, Wright offered Exhibit 16, which was a report containing the messages from Exhibit 1, along with other messages recovered from Wright's phone. RP 519, 524, 548. The defense offered no witnesses. RP 548-549. Wright's attorney proposed a jury instruction on entrapment, based on WPIC 18.05. CP 90. The trial court

considered arguments from counsel regarding the instruction. RP 560-571. The trial court ruled:

> With regard to the defense proposed entrapment instruction, the court is not including that instruction in its final set of instructions. The court believes that there is inadequate evidence in the record to support that instruction. The evidence here is quite limited. I do not believe that the lapse of time alone is enough, and the text messages, which I think are really the basis of any entrapment defense, clarify exactly what the detective was proposing, rather than luring or inducing, which is required. Therefore, the court is not including that instruction.

RP 572-573.

The jury convicted Wright as charged. CP 159. The minimum sentence was a downward exceptional sentence of 50 months, with a maximum sentence of life pursuant to RCW 9.94A.512. CP 240-253.

2. Decision of the Court of Appeals

Division I of the Court of Appeals affirmed Wright's conviction and sentence. State v. Wright, No. 81834-1-I (Unpublished Opinion) (attached to Petition for Review). The Court of Appeals held that Wright "failed to point to evidence that could permit a reasonable juror to conclude that he was entrapped." *Id.* at 6. The Court of Appeals further applied this Court's factors from State v. Lively, 130 Wn.2d 1, 22, 921 P.2d 1035 (1996), to find that

the "State's actions did not violate Wright's due process rights." Unpublished Opinion at 9-13. Wright now seeks review of this Court. The State does not object to the filing of the amended petition for review.

C. ARGUMENT

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

1. The Court of Appeals correctly found that the evidence did not support an instruction on entrapment and *State v. Arbogast*, 15 Wn.App.2d 851, 478 P.3d 115 (2020) does not change that outcome because Wright did not present prima facie evidence of entrapment.

An instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. State v. Trujillo, 75 Wn. App. 913, 917, 833 P.2d 329 (1994); State v. Davis, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992). In order to be entitled to an entrapment instruction, "a defendant must present evidence

which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence." Trujillo, 75 Wn. App. 917.

"The defense of entrapment is not established by a showing that law enforcement officials merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. In re Detention of Pouncey, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). To prove the affirmative defense of entrapment, a defendant must show that he committed a crime, that the State or a State actor lured or induced him to commit the crime, and that the defendant lacked the disposition to commit the crime. State v. Lively, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996); RCW 9A.16.070.

In State v. Arbogast, Division III of the Court of Appeals held that the decision on Division I in State v. Trujillo incorrectly placed too high of a burden of production on a defendant seeking an entrapment defense. Arbogast, 115 Wn. App.2d at 871. Division III found that due process requires only that a defendant seeking an

entrapment defense demonstrate prima facie evidence of the elements of the defense. *Id*. The Court found that Arbogast was entitled to the entrapment defense, in part, because law enforcement had implied that sexual participation by the adult fictious mother was possible. *Id*. at 878.

The holding of Trujillo, stating, "a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence," is correct and consistent with RCW 9A.16.070 and precedent set by this Court. Trujillo, 75 Wn. App. at 917. In State v. Riker, 123 Wn.2d 351, 368, 869, P.2d 43 (1994), this Court stated, "generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proven by a preponderance of the evidence." *See also*, State v. Rice, 102 Wn.2d 120, 124-126, 683 P.2dd 199 (1984); State v. Box, 109 Wn.2d 320, 323-30, 745 P.2d 23 (1987). In State v. Gray, 69 Wn.2d 432, 434-435, 418 P.2d 725 (1966), this Court held that there entrapment is such an affirmative defense and found that the use of a decoy to present an opportunity for commission of a crime does not support an instruction for entrapment, even when the defendant testified that

he told the officer and informer that he did not want to sell marijuana. This Court stated, "we do not have more than the scintilla of evidence necessary for an instruction." *Id*. at 435.

The Trujillo Court relied on those decisions in reaching its holding. Trujillo, 75 Wn. App. at 917-918. In following the holding of Trujillo, in this case, the Court of Appeals noted that the review of the sufficiency of evidence to support a jury instruction on an affirmative defense is done in a light most favorable to the defendant. Unpublished Opinion at 5, citing State v. O'Dell, 183 Wn.2d 680, 687-688, 3583 P.3d 359 (2015). In a light most favorable to Wright, the Court of Appeals found that "Wright failed to point to evidence that could permit a reasonable juror to conclude that he was trapped." Unpublished Opinion, at 6. The Court of Appeals applied the correct standard, Wright was not entitled to an entrapment instruction. To the extent that Arbogast departs from that standard, the State agrees that a split of authority has been created.

However, even under a prima facie standard, Wright did not demonstrate that he was entrapped. Wright never expressed a desire to have sex with the fictitious mother and the undercover officer never indicated that the mother was willing to have sex with

him if he came to have sex with the minor child. Ex 1. The trial court correctly concluded that the evidence to support an entrapment instruction was "quite limited." RP 572-573. Even under the rationale of Arbogast, Wright would not have been entitled to an entrapment instruction.

Under the facts of this case, there is no basis upon which this Court should accept review. However, the State notes that a petition for review was filed in State v. Arbogast, which is set for consideration by this Court on April 27, 2021. No. 994528. While the State contends that Arbogast should not change the outcome of this case, it may be appropriate to stay this petition pending the petition for review in Arbogast.

2. The Court of Appeals properly applied the *Lively* factors in determining that there was no outrageous government conduct. Wright has not demonstrated any reason why review of that decision is appropriate.

"Outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be 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). For police conduct to violate due process, "the conduct must be so shocking

that it violates fundamental fairness." *Id*. Examples of outrageous conduct include "those cases where the government conduct is so integrally involved in the offense that the government agents direct the crime from the beginning to end, or where the crime is fabricated by the police to obtain a defendant's conviction, rather than to protect the public from criminal behavior." *Id*. at 21.

"Public policy allows for some deceitful conduct and a violation of criminal laws by the police in order to detect and eliminate criminal activity." *Id*. at 20. "Dismissal based on outrageous conduct is reserved for only the most egregious circumstances." *Id*. In reviewing a claim of outrageous government conduct, the court evaluates the totality of the circumstances. *Id*. at 21. Factors that a court must consider when determining whether police conduct offends due process 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.

Id. at 22.

The Court of Appeals correctly applied the Lively factors in this case. Unpublished Opinion, at 9-11. The decision of the Court of Appeals does not conflict with State v. Solomon, 3 Wn. App.2d 895, 916, 419 P.3d 436 (2018). In Solomon, the Court of Appeals declined to reverse a trial court's finding that outrageous State conduct occurred. In this case, the Court of Appeals discussed, and distinguished Solomon based on the facts presented. Unpublished Opinion, at 9-11. There was no error in the Court of Appeals' application of Lively. The decision is consistent with, rather than contrary to, the decision in Solomon. There is no basis upon which this Court should accept review.

3. Wright has provided no analysis as to why this Court should accept review of any issue included in his Statement of Additional Grounds.

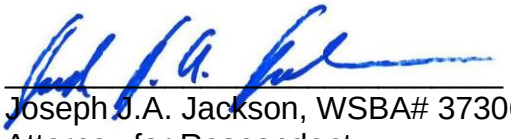
As a catchall, Wright asks this Court to review the issues raised in his Statement of Additional Grounds. Wright does not specify any decision of this Court or the Court of Appeals that conflicts with the decision of the Court of Appeals. The decision of the Court of Appeals is in fact consistent with this Court's decision in State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), and the decisions in the Court of Appeals in State v. Raucus, 7 Wn. App.2d 287, 299-300, 433 P.3d 380, *review denied*, 193 Wn.2d 1014

(2019) and State v. Glant, 13 Wn. App.2d 356, 465 P.3d 382 (2020), *review denied*, 196 Wn.2d 1021 (2020). Wright has provided no basis upon which this Court should accept review of the Court of Appeals' decisions regarding the statement of additional grounds.

D. CONCLUSION

The State does not object to the consideration of amended petition for review, however, for the reasons stated above, the State respectfully request that this Court deny review. If this Court appropriate that review based on Arbogast is appropriate, this matter should be stayed pending the petition for review filed in State v. Arbogast, No. 994528.

Respectfully submitted this 25th day of March, 2021.



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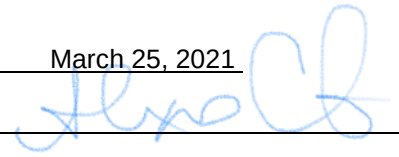
DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellate Courts' Portal utilized by the Washington State Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: March 25, 2021

Signature: 

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