No. 36250-7-III

99452-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner

v.

DOUGLAS VIRGIL ARBOGAST,

Respondent

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Andy Miller, Prosecuting Attorney, and Terry J. Bloor and Brendan M. Siefken, Deputy Prosecuting Attorneys, asks this Court to accept review of the Court of Appeals decision, as designated in part II of this petition.

II. COURT OF APPEALS DECISION

The State requests review of the Court of Appeals decision that was filed on December 24, 2020 reversing the defendant's convictions. A copy of the decision is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

1. Is the Court of Appeals' decision in conflict with other decisions of the Supreme Court or Court of Appeals, including:

   - whether the defendant's burden of proof for an entrapment instruction should be preponderance of evidence or "prima facie" evidence;
   - whether entrapment involves only one element and whether the trial court's reference to a "normal" amount of police persuasion was correct;
   - whether the defendant's lack of predisposition to commit the crimes could be proven by his lack of criminal history;

- whether any failure to give an entrapment instruction was harmless?

IV. STATEMENT OF THE CASE

The State incorporates its Statement of the Case in the brief filed with the Court of Appeals. The Craigslist ad, admitted as Exhibit 1, the emails, admitted as Exhibit 2, and the text messages, admitted as Exhibit 3, in this net-nanny sting operation are attached as Appendix B, C, and D.

There is no need to parse the texts or guess at whether the defendant really sent messages saying he wanted to have sex with "Brandi's" children. He said he did; he testified that he texted he was interested in having sex with "Brandi's" two children, but claimed he did so in order to get on her good side and that she might then be more open to having sex with him. RP at 1365-66. He admitted the whole context of his conversation with Brandi was about him having sex with her children. RP at 1383. Brandi tried to get rid of him four times when he expressed interest in a sexual relationship with her. RP at 1388. After each time, "Brandi" testified he came back and said he was interested in sex with her children, including having oral sex with both children. RP at 1389, 1397.

The Court of Appeals cited testimony from the defendant about still believing sex with Brandi was a possibility. One was a text, "And when you come in, we all get naked." But the whole text reveals the

context: “You have to come to our place. And when you come in, we all get naked. Cops don’t get naked. And that way we can rule that out.” Ex. 3; RP at 1075-76. Thus, Brandi was continuing the rouse of pretending to be on the lookout for undercover police.

Another text cited by the Court of Appeals was from Brandi, “I could get involved with you and Jake after a few good sessions of you two. . . . Change my mind about us hooking up.” Ex. 3; RP at 1070. Even the defendant testified he thought Brandi was trying to break off contact with him. “I believed Brandi tried to break it off at that point. Like, I think she said that, ‘If we have a few good sessions with Jake, maybe I will have sex with you’ basically.” RP at 1368.

The Court of Appeals did not include the follow up texts:

Brandi: “Yes. You are. [This is in answer to Brandi’s own question, are you trying to get me to change my mind about us hooking up]. But I don’t think you can satisfy my kids nor that you want to sexually.”

The defendant responded: “OK. You mean I need to groom the boy alone? What about your princess?” Ex. 3; RP at 1072.

Concerning the Court of Appeals’ holding that the trial court should have allowed admission of the defendant’s lack of a predisposition for molesting children, the defendant testified that he is not sexually

attracted to children, that he has been married for 47 years, that he responded to the Craigslist ad because he was looking for sex with women. Ex. 1; RP at 1353, 1361. These statements were not rebutted.

Two other points: The Court of Appeals included the results of a polygraph exam in its Statement of the Case. The Court of Appeals also included a photo of an undercover officer. For the reasons stated in the Conclusion, the State strongly suggests this Court not publish a photo of the undercover police officer.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument:

The Court of Appeals' decision is far beyond established caselaw on entrapment. No other "net-nanny" case involving a sting operation by the Missing and Exploited Children's Task Force of the Washington State Patrol has been reversed because the defendant's proposed entrapment instruction was not given.

The Court of Appeals' decision reverses established precedent on the quantum of proof needed for an entrapment instruction. The standard the Court of Appeals used, prima facie evidence, is not supported in any other reported case in Washington State when an affirmative defense instruction should be given. The Court of Appeals also viewed the two elements of entrapment as "two sides of the same coin" and disregarded an

examination of whether the police unduly solicited the defendant into committing the crimes.

This case gives this Court the ability to determine whether the Court of Appeals was correct to cast aside entrapment caselaw. This case will also give this Court the opportunity to set proper entrapment standards on net-nanny cases.

1. Review should be accepted under RAP 13.4 (b)(1) and (2): The decision conflicts with other cases by the Supreme Court and the Court of Appeals.

a. The decision is in conflict with other cases regarding the quantum of proof needed to give an entrapment instruction.

The Court of Appeals rejected the standard set out in *State v. Trujillo,* 75 Wn. App. 913, 917, 883 P.2d 329, 331-32 (1994). *Trujillo* held that a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence.

The Court of Appeals gave several reasons to reject that long-established standard. First, the Court cited *State v. Harvill,* 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) which stated, A defendant "is entitled to have the jury instructed on his theory of the case if there is evidence to support that theory." However, this general statement is consistent with *Trujillo's* more specific statement that the defendant must present

evidence that would permit a reasonable juror to conclude the defense is established. Whether "the evidence supports the defense theory" or "the evidence permits a reasonable juror to conclude the defense is established," it is the same test.

The Court also reasoned that *Trujillo's* standard tasks the trial court with evidence weighing that is the province of the jury. The Court of Appeals, respectfully, misunderstood the distinction between "evidence permitting a reasonable juror to conclude the defense is established" and "whether the evidence would preponderate for a rational juror." The *Trujillo* standard did not require the court to invade the province of the jury and determine whether the defendant has been proven by a preponderance. Rather, the *Trujillo* standard merely requires the trial court to determine whether a rational jury would be permitted to conclude the defense is established. Trial courts make this decision frequently when a defendant moves to dismiss a case at the conclusion of the prosecution's case. The standard is whether a rational juror could conclude that all the elements of the crime have been proved beyond a reasonable doubt. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Instead of the *Trujillo* standard, the Court of Appeals substituted the following: Mr. Arbogast "was entitled to instruction on entrapment by presenting prima facie evidence of the defense." The Court did not explain

what it meant by "prima facie evidence" but such evidence is "evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved." *State v. McConville*, 122 Wn. App. 640, 650, 94 P.3d 401 (2004). With all due respect to the Court of Appeals, this is basically the same standard as the "evidence sufficient to convince a rational juror beyond a reasonable doubt" and the same standard as "evidence sufficient to support the defense." It is difficult to see a circumstance when there would be evidence sufficient to support a logical and reasonable inference that the defendant was entrapped but there was insufficient evidence that a rational juror could be convinced the defendant was entrapped beyond a reasonable doubt.

Further, regarding the Court's concern that the trial judge may invade the province of the jury, the prima facie standard would also involve the judge in evidence-weighing.

The State has found no cases in Washington State supporting the "prima facie evidence" standard as a proper test for determining whether an affirmative defense instruction should be given. In the recent case of *State v. Johnson*, 12 Wn. App. 2d 201, 460 P.3d 1091 (2020), Division II affirmed the "preponderance of the evidence" standard to obtain a jury instruction on entrapment. That court stated, "to obtain a jury instruction regarding a party's theory of the case, there must be substantial evidence

in the record supporting the requested instruction." *Id.* at 208. The *Johnson* court distinguished *State v. Harvill* and specifically rejected an argument that an entrapment instruction is appropriate when there is *any* evidence that, if believed by the jury, would support the defense. *Id.*

The unpublished case of *State v. Wright*, 81834-1-I, 2020 WL 6557814, at *3 (Wash. Ct. App. Nov. 9, 2020) held the same: citing *Trujillo*, the *Wright* court held, the "defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence." The unpublished case of *State v. Chapman*, 50089-2-II, 2019 WL 325668 (Wash. Ct. App. Jan. 23, 2019) held the same. So did the court in the unpublished case of *State v. Racus*, 7 Wn. App. 2d 287, 433 P.3d 830 (2019)[1]. All cases in this paragraph dealt with net-nanny sting operations.

b. The Court of Appeals' decision is not consistent with other cases in claiming there is only one element of entrapment and ignoring whether the police went beyond "normal" inducement.

[1] The 3 above unpublished opinions, attached as App. E, F, and G, are nonbinding authorities that has no precedential value but is cited for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017).

RCW 9A.16.070 provides the framework for an entrapment defense: The criminal design must originate in the mind of law enforcement and the defendant must be lured or induced into committing the crime. These are two separate elements. *State v. Lively*, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996), *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984). However, the Court of Appeals said the two elements are different sides of the same coin. The Court stated that the focal point of entrapment is the defendant's lack of predisposition. That led the Court to criticize the trial court for focusing on the conduct of the police. The Court cited *Smith* in support of its position.

However, *Smith* stated,

> Both by statute and court decision, the entrapment defense focuses on "the intent or predisposition of the defendant to commit the crime." Entrapment occurs only when the criminal design originated in the mind of the police officer or informer, and the accused is lured or induced into committing a crime he had no intention of committing. . . . Thus, both by statute and court decision the defense requires proof of two distinct elements. First, the defendant must demonstrate that he was tricked or induced into committing the crime by acts of trickery by law enforcement agents. Second, he must demonstrate that he would not otherwise have committed the crime.

Id. at 42-43.

By focusing on only the second element, predisposition, the Court of Appeals did not have to consider the behavior of the police. This

allowed the Court to avoid the defendant's lack of proof that the police acted inappropriately and to criticize the trial court for finding that "the defendant was presented with no more that 'the normal amount of persuasion.'"

With due respect, the Court is incorrect. Both elements, lack of predisposition and undue solicitation, must be present for an entrapment defense. A "normal" amount of persuasion is a standard that courts use to determine the second element. *State v. Swain*, 10 Wn. App. 885, 888-89, 520 P.2d 950 (1974), *Trujillo*, 75 Wn. App. at 918, *Smith*, 101 Wn.2d at 42-43, and *State v. Waggoner*, 80 Wn.2d 7, 11, 490 P.2d 1308 (1971). Improper inducement has been described as government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense. *State v. Hansen*, 69 Wn. App. 750, 764 n.9, 850 P.2d 571 (1993), *rev'd on other grounds*, 124 Wn.2d 719, 881 P.2d 979 (1994). In order to show entrapment, a defendant must show more than mere reluctance on his or her part to violate the law. *Trujillo*, 75 Wn. App. at 918.

Concerning the element of improper inducement, repeated requests to commit a crime are not sufficient to constitute entrapment. *Id.* at 918-19; *State v. Vinson*, 74 Wn. App. 32, 871 P.2d 1120 (1994). Even unethical police conduct by itself does not constitute entrapment. A high

degree of trickery has been permitted: when a police officer claimed that he was ill and needed drugs to relieve his pain, it was not sufficient to an instruction on entrapment. *Smith,* 101 Wn.2d at 43. Indeed, there are very few published cases in Washington State holding that an entrapment instruction should have been given. Review should be accepted to determine if the Court of Appeals' decision to focus on only one element of entrapment is consistent with other cases.

c. The Court of Appeals' holding that the defendant can prove his lack of predisposition by citing his criminal history is not consistent with other caselaw.

In *Johnson,* the defendant argued he was entitled to an entrapment instruction because the State failed to show he had a predisposition to commit crimes against children and there was no evidence of a history regarding perverse activity towards children. The *Johnson* court held these facts were not sufficient; pointing to the State's absence of evidence does not meet the defendant's evidentiary burden. *Johnson,* 12 Wn. App. 2d at 209.

Predisposition for entrapment can be proven by a defendant's criminal history. But, can a lack of criminal history prove the defendant was not predisposed to commit the offense? The Court of Appeals held

this made logical sense and cited three cases regarding the sentencing and the SRA, not proving predisposition for an entrapment defense.[2]

In one of those cases there was interesting dicta. *State v. Nelson*, 108 Wn.2d 491, 497, 740 P.2d 835 (1987) stated that,

> the distinction between criminal predisposition and motive or intent is sharply drawn in ER 404 (b), which prohibits the use of evidence of a person's character in order to prove that he or she acted in conformity therewith on a particular occasion—in other words, his or her propensity to act in a criminal manner. To this general prohibition, however, ER 404 (b) excepts and distinguishes other purposes for which character evidence may be admitted "such as *proof of motive*, opportunity, intent" etc.

This is the counterargument to the Court of Appeals argument that because the right criminal history can show predisposition, it must follow that a lack of the same criminal history can show lack of predisposition. However, ER 404 (b) provides for the admissibility of prior bad acts to prove limited things: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Thus, prior criminal history can prove the defendant's predisposition to molesting children. But, a lack of predisposition must be proved by character evidence from someone

[2] In one, *State v. Freitag*, 127 Wn.2d 141, 896 P.2d 1254 (1995), the Court of Appeals mistakenly quoted the dissenting opinion of Justice Madsen, at p. 149. ("The Court of Appeals…properly recognized that lack of criminal history does tend to show lack of a predisposition to commit the crime.") The majority held, "we consistently have held that lack of criminal history is an insufficient ground for sentencing below the standard range…" *Id.* at 144.

other than the defendant. *State v. Mercer-Drummer*, 128 Wn. App. 625, 116 P.3d 454 (2005).

d. Any error in not allowing the defendant to testify about his lack of criminal history is harmless.

The Court of Appeals' decision argues,

> The State provides no authority or reasoned argument why defense counsel was required to proceed through voir dire, opening statement, and most of the trial with one hand figuratively tied behind his back, with the court only later deciding whether, thus hindered, he had nonetheless presented enough evidence to warrant instruction on entrapment.

App. A. To the contrary, the trial court waited to hear all the State's evidence before ruling on entrapment. RP at 1332-33. The defendant was able to bring out via cross-examination from the State's witnesses supporting entrapment. He was able to testify he was confused by the initial ad and did not initially realize "Brandi" was asking him to have sex with her children. He testified he is not interested in having sex with children and only wanted "Brandi" herself. This testimony was not refuted by the State. The dissenting opinion is correct that any error was harmless.

The jury was *also* instructed that the defendant is presumed innocent and that they can only rely on the evidence presented at trial. Based on those instructions and the evidence presented at trial, the jury

was required to find that the defendant did not have any prior criminal history.

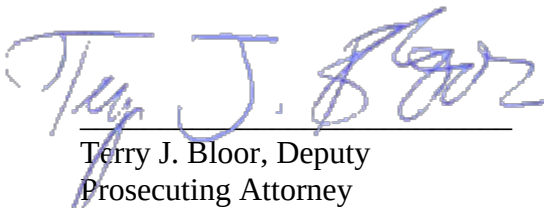
VI. CONCLUSION

The Petition for Review should be granted, and this Court should reverse the Court of Appeals' decision reversing the convictions.

In any event, if this Court accepts review and if this Court writes an opinion, the State requests that no photos be published of undercover police officers. The Court of Appeals published an exhibit, which is a photograph of a woman with the Washington State Patrol's Missing and Exploited Children's Task Force.

RESPECTFULLY SUBMITTED this January 25, 2021.

ANDY MILLER
Prosecutor



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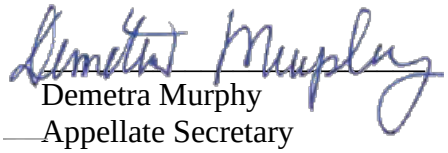
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Lenell Nussbaum
2125 Western Avenue, Suite 330
Seattle, WA 98121

☒ E-mail service by agreement was made to the following parties:
lenell@nussbaumdefense.com

Signed at Kennewick, Washington on January 25, 2021.



Demetra Murphy
Appellate Secretary

APPENDICES

APPENDIX A

Opinion Filed in *Division III*, Court of Appeals
Number 36250-7-III, on December 24, 2020

FILED
DECEMBER 24, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHIINGTON, Respondent, v. DOUGLAS VIRGIL ARBOGAST, Appellant.	))))))))))	No. 36250-7-III OPINION PUBLISHED IN PART

SIDDOWAY, J. — Douglas Arbogast was convicted of attempted child rape after responding to an ad placed by a Washington State Patrol (WSP) task force sting operation. The State persuaded the trial court that Mr. Arbogast was not entitled to an entrapment instruction unless he presented evidence sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence, citing *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994). It persuaded the court that Mr. Arbogast should not be allowed to present evidence of his law-abiding past or argue his lack of criminal predisposition unless he presented evidence sufficient to prove by a preponderance of the evidence that WSP officers used more than a "normal amount of persuasion" in their communications with him.

The procedure prevented Mr. Arbogast from presenting evidence and obtaining an entrapment instruction to which he was entitled. In the published portion of this decision,

we reject *Trujillo*'s standard, hold that Mr. Arbogast was wrongly prevented from presenting "lack of predisposition" evidence, reaffirm that a trial court's decision whether to instruct on entrapment cannot be based solely on law enforcement's conduct to the exclusion of the defendant's lack of predisposition, and reverse and remand for a new trial.

In the unpublished portion of this decision, we reject Mr. Arbogast's contention that all or some of the charges against him should be dismissed for outrageous government conduct or proof of entrapment as a matter of law. Addressing his pro se statement of additional grounds, we reject a claim of insufficient evidence and address instructional and discovery issues likely to arise in a retrial.

FACTS AND PROCEDURAL BACKGROUND

In July 2017, members of the Washington State Patrol Missing and Exploited Children Task Force undertook a "Net Nanny" sting operation in the Tri-Cities by placing ads in the now-defunct "Casual Encounters" section of Craigslist.[1] A member of the task force would later describe the Casual Encounters section as "designed for no-strings-attached sex." Report of Proceedings (RP)[2] at 881-82. "Quite a few" different

[1] As testified to at trial, Craigslist took down its personal ads in response to federal legislation. *See* H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, which became Public Law No. 115-164, 132 Stat. 1253, on April 11, 2018. *And see* https://www.craigslist.org/about/FOSTA [https://perma.cc/KVQ2-7XTE].

[2] Unless otherwise indicated, RP references are to the report of proceedings that begins with proceedings on August 2, 2017, and includes most of the trial proceedings.

ads were placed by the WSP during the Tri-Cities sting operation, including ads from fictional children (female and male) who were themselves looking for sex. RP at 976.

The ad involved in this case was placed by an adult, however: a fictional mother. The ad was reached if a Casual Encounters user clicked a "w4m" (woman for men) hyperlink. It read:

> Mommy loves to watch family fun time. Looking for that special someone to play with. 100%. I know this is a long shot but I have been looking for this for a long item [sic] and haven't had any luck looking for something real and taboo. If this is still up then I am still looking. send me your name and your favorite color so I know you are not a bot. i like to watch ddlg daddy/dau, mommy/dau, mommy/son.

Ex. 1.

Sergeant Carlos Rodriguez, who planned the logistics for the Tri-Cities sting and wrote the "mommy" ad, acknowledged at the trial below that the ad was cryptic and might not be recognized as advertising sex with children, explaining that a more overt advertisement would be removed immediately by Craigslist. He testified that terms in the ad (taboo, ddlg, daddy/dau, mommy/dau, mommy/son) had connotations for child predators whose meaning he learned through his training for and experience in sting operations. He agreed that the task force received responses to the "mommy" ad from people who were not looking to have sex with children.

Then-70-year-old Douglas Arbogast e-mailed a response to the ad with his name and favorite colors, "Doug and black&white" at 1:56 p.m. on July 5. Ex. 2. He would

later testify that after discovering the Casual Encounters section of Craigslist a couple of years earlier, he had responded to a half dozen "woman for man" ads because sex had become painful for his wife of 48 years after her hysterectomy. Responding to such ads paid off once, a couple of months earlier, when he responded to a woman who said she wanted to "meet a man and become his whore for the night." RP at 1356. He met the 50-year-old woman at a local motel for sex.

On receipt of Mr. Arbogast's response to "mommy's" ad by the task force, it was passed on to WSP Detective John Garden, who undertook the sham communication that followed. Mr. Arbogast was pleased when, in the late afternoon, he saw a reply he had received some time earlier to the "mommy" ad:

> hi doug [smiley face emoji] I am brandi . . . are u a black and white kind of guy? 4:14 PM

Ex. 2. He responded at 5:27 p.m.:

> Yes I am. If guessed photography that is why . . . I do B&W Picts So I up for anything if you are 5:27 PM

Id. Brandi quickly replied:

> Let's talk and see if you are interested in my situation. would u mind texting me your name DOUG to 5096202098 so I know its u . . . . i really would rather text than email. 5:29 PM

Id. (Misspellings, punctuation, and capitalization here and in communications hereafter are original.)

Mr. Arbogast responded:

> Ok, give me a few to get back at you in text mode. 5:49 PM

Id. Mr. Arbogast exchanged his iPad for his phone and at 5:54 p.m. began communicating with Brandi by text:

5:54:03 PM	. . .	. . .	Incoming	Hi. I'm Doug. What's happening?
6:00:46 PM	. . .	. . .	Outgoing	*thank u so much better to text*
6:01:18 PM	. . .	. . .	Outgoing	*did you read my last email. i dont want to waste our time if this isnt for you. i really wnt to find the match*
6:07:02 PM	. . .	. . .	Incoming	This really is me. I do B&W Picts if this helps
6:08:22 PM	. . .	. . .	Outgoing	*ok are you good with my kids ages?*
6:09:01 PM	. . .	. . .	Incoming	What are the ages
6:11:09 PM	. . .	. . .	Outgoing	*thats why i asked if you read the last email i sent. . . . its in the email. boy is 13 and my precious baby girl is 11*
6:12:58 PM	. . .	. . .	Incoming	OK sorry I missed it. All the replies on top of each other
6:15:03 PM	. . .	. . .	Outgoing	*i get it…that is why I hate the emails i like texting for that reason*
6:17:08 PM	. . .	. . .	Incoming	I agree. So tell me more about yourself
6:33:02 PM	. . .	. . .	Outgoing	*i was rasied very close to my father. he started sleeping with me when i was young . . . at first i was scared but really enjoyued it. he was so gentle and loving. my mom knew so it made our home open. i miss those days. i want my kids to expereince the same closeness plus they need a techer to help them with sex when they get older*
6:33:59 PM	. . .	. . .	Outgoing	*i have to be honest. i lost my attraction to men a while back. I cant get enough of young boys about my sons age./ their innosense is amazingly a turn on for me*
6:46:54 PM	. . .	. . .	Incoming	Ok Brandi, I am probably a we bit older and know a few things. I can be easy and exploring into everything you might desire. So if you want to try someone older, game on. I d have most of my hair.
6:57:37 PM	. . .	. . .	Incoming	So what would you like me to do to help?

7:02:57 PM	. . .	. . .	Outgoing	*we had a very good man in my kids life for a year or so but lost him to a move becasue of military. i am looking to fill his role in my kids lives. he was bi and very gentle witht hem. taught them oral and orther skills. its so hard to find the right guy. i have to be so careful and so do you. i am not interested in men especailly older. sorry my secrete is i am into boys my sons age . . . i love their innocense. can you be the daddy my two kids need??*

Ex. 3 (formatting modified).

At some point before Mr. Arbogast next texted "Brandi," he evidently found the e-mail she sent him at 5:54 p.m. Her e-mail had said:

> I need you to be honest about what you want, that is best and makes sure we all get what we want. My girl is 11 and my boy is 13. She is not totally active, but still likes to play and is very ready and mature. My son is 13 and very active. I'm single and looking for some one who is open and free to new ideas. If this fits you then lets talk and if it works out we can meet up and have some fun.

Ex. 2.

Twelve minutes after Brandi's "can you be the daddy my two kids need??" text, Mr. Arbogast texted, "Well sorry to hear that. I just read that missed mail. Never have done that. I just wanted to be with mom. Don't know if I could help do kids. It's really up to you." *Id.* Brandi responded, "thanks for not wasting our time. I am not looking for me. I am looking for someone to be with my kids. Good luck with what it is you seek." *Id.* Mr. Arbogast replied, "I can be good with them. Just never thought about it that way." *Id.*

For the next hour and 40 minutes, the two texted in more detail about what Brandi wanted for her children, and whether Mr. Arbogast was willing to provide it. They exchanged photographs. This was Brandi's:

Ex. 5 (cropped and converted from color to greyscale).

At trial, the State pointed out that in the course of the texts, Brandi suggested that her children could engage Mr. Abrogast with kissing, touching, oral, and nonanal penetration (as long as it was not painful) and that Mr. Arbogast did not rule out any of the suggested conduct. Mr. Arbogast pointed out that he repeatedly said that he had not previously engaged in the conduct Brandi was suggesting.[3] The State pointed to several

[3] "Never have done that . . . Don't know if I could help do kids," "[N]ever thought about it that way," "I have not tried young kids," "Like I say. Never have done kids before," "I have a lot to learn as well," "Never done it before," and "Like I said I have not done this before." Ex. 3.

times when Brandi told Mr. Arbogast that she would not be involved—this was for her children. Mr. Arbogast claimed that he still believed that sex with Brandi was a possibility, pointing to the picture she sent, in which she appeared to him to be wearing a "teddy" (a type of lingerie) or bra; her response, after he offered her "TLC," that "i could get invloved with you and jake after a few good sessions of you two"; her enigmatic message, "change my mind about us hookiing [sic] up;" and her statement that he would need to "come to our place," and "when you come in we all get naked." Ex. 3.

At 9:00 p.m. Brandi texted, "when can we make this happen. the sooner the more it makes me less cautious its not a set up," adding a few minutes later, "we could do it tonight." Ex. 3. Once that was agreed, the following exchange occurred:

9:11:56 PM	. . .	. . .	Outgoing	*what did you have in mind for play time tonight? what would u like*
9:14:20 PM	. . .	. . .	Incoming	I'm easy for it. Just get to know one another. Are good with it. Send address
9:16:32 PM	. . .	. . .	Outgoing	*can you stop and get condoms and lube. i dont want u to be unprepared if you need them. I have to prep the kids for what it is you want oral, hand job, penatration, kissing. we r night owls so time is good*
9:19:42 PM	. . .	. . .	Incoming	Like I said have not done this before. Could do almost anything without penetration.
9:21:40 PM	. . .	. . .	Outgoing	*are u interested in both anna and jake? same time or separate*
9:22:34 PM	. . .	. . .	Incoming	Anna first
9:23:10 PM	. . .	. . .	Incoming	I'm leaving now so send address
9:23:23	. . .	. . .	Outgoing	*ok separate is best. i will have to watch to make sure all is safe*
9:25:09 PM	. . .	. . .	Incoming	K
9:25:17 PM	. . .	. . .	Outgoing	*do you want to start with touching and move to oral or what. help me . . . . . i want to tell anna. do you want her dressed in anything specific*

9:26:18 PM	. . .	. . .	Incoming	Just under things touching then oral
9:27:15 PM	. . .	. . .	Outgoing	*you giving or them giving oral or both??*
9:28:14 PM	. . .	. . .	Incoming	Both
9:29:12 PM	. . .	. . .	Incoming	Ok I'm driving. Address please. Can't look at same time
9:29:33 PM	. . .	. . .	Outgoing	*ok . . . give me 10-15 minutes to prep them and shower anna. I am excited you want to see them. i hope this turns out to be what i am looking for.*
9:29:56 PM	. . .	. . .	Incoming	Ok
9:30:54 PM	. . .	. . .	Incoming	On the road
9:41:22 PM	. . .	. . .	Outgoing	*what clothes u didnt say to put them in. sorry hurrying*
9:43:07 PM	. . .	. . .	Incoming	Under clothes is good

Ex. 3 (formatting modified).

At 10:18 p.m., Mr. Arbogast arrived at the apartment whose address Brandi had provided. Brandi, played by Detective Makayla Morgan, greeted him, invited him to take off his shoes, and left the room to "get the kids." RP at 1195. A team of officers then arrested him. Mr. Arbogast did not have the condoms or lube that Brandi had asked him to pick up.

Mr. Arbogast waived his rights and agreed to speak with detectives. He provided his passcode so that officers could search his phone. He allowed officers to search his car. During the interview, Mr. Arbogast said several times he had only come to the apartment to meet the mom and that he was not attracted to children, but he also admitted that he understood what Brandi had offered. RP at 1280-81. Mr. Arbogast said he was "BS-ing" with the mom and "going with the flow." RP at 1285.

At the conclusion of the interview, Mr. Arbogast agreed to submit to a polygraph, and around midnight, the detectives interviewing him asked Detective John Davis, a

polygraph examiner with the Kennewick Police Department, to come to the undercover location. Detective Davis arrived shortly after 12:30 a.m. He conducted a pretest interview, part of which he recorded, before conducting a recorded polygraph test. In a report of the test results, he expressed his opinion that Mr. Arbogast showed no deception when answering the following questions:

> Q. Since becoming an adult, have you had sexual contact with anyone under the age of 16?
>
> A. No.
>
> Q. Have you had any sexual contact with anyone under the age of 16, since becoming an adult.
>
> A. No.

Clerk's Papers (CP) at 12, 86.

A forensic download was taken of Mr. Arbogast's phone that the State "thorough[ly] review[ed]" for evidence. RP at 972. No indication was found that Mr. Arbogast was seeking sex with children when visiting Casual Encounters.[4] The phone was searched for child pornography. None was found. Other than the communications Mr. Arbogast had with Detective Garden as "Brandi," there was nothing of evidentiary value on the phone. No evidence was recovered in the search of Mr. Arbogast's car.

[4] Sergeant Rodriguez testified that if Mr. Arbogast had responded to one of the ads from fictional children that was placed during the Tri-Cities sting operation, the response would have been given to an undercover officer, who would have engaged Mr. Arbogast in further conversation. As far as he knew, that never happened.

Mr. Arbogast was charged with one count of attempted rape of a child in the first degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 11-year-old Anna, and one count of attempted rape of a child in the second degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 13-year-old Jake.

Early in the case, the defense moved to admit the results of the polygraph examination and to call Detective Davis as an expert witness, arguing that the results of the polygraph test were relevant to Mr. Arbogast's entrapment defense. In the alternative, the defense moved the court to admit the polygraph for the limited purpose of determining whether Mr. Arbogast was entitled to an entrapment instruction. The motions were denied. The State was unwilling to stipulate to the admissibility of the polygraph report and the trial court concluded that absent a stipulation, it lacked the authority to admit the results for any purpose.

Mr. Arbogast later moved to compel discovery of e-mails and texts the Net Nanny operation exchanged with other targets. He wanted to see if they bore out his belief that the cryptic nature of the Casual Encounters ad was misleading to others and that Detective Garden engaged in particularly entrapping behavior and excessive conversation-leading with him. The court denied the motion on the basis that what other

officers did in chatting with other targets was not relevant to Mr. Arbogast's entrapment defense.

The State's pretrial motions in limine asked the court to prohibit any mention that Mr. Arbogast had no prior criminal convictions or arrests, arguing that his lack of criminal history was irrelevant and was character evidence that was not pertinent to the charge of attempted rape of a child. Defense counsel argued that the evidence was relevant to the defense of entrapment—specifically, Mr. Arbogast's lack of predisposition to attempt child rape.

In arguing the motion, the State admitted that case law from other jurisdictions recognizes that when a defendant asserts entrapment, the State can present evidence of the defendant's prior criminal conduct to prove that he *does* have a criminal predisposition.[5] The State's own trial brief cited cases holding that "any prior criminal record" is evidence of predisposition. RP at 75. The prosecutor argued, however, that such case law speaks of a "prior criminal record. It doesn't talk about a lack of it." *Id.*

The State argued that in any event, Mr. Arbogast's contention that he should be able to offer evidence of his crime-free past was premature and before Mr. Arbogast could obtain an entrapment instruction, "he has to be willing to admit the crime that constitutes the crime charged, which is attempted rape of a child." RP at 59. Defense

[5] In oral argument, the prosecutor cited *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir. 1985) and *United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983).

counsel disagreed, arguing that it was "enough that the defendant admit acts which if proved would constitute the crime." RP at 61.

The trial court granted the State's in limine motion provisionally, prohibiting the defense from presenting evidence that Mr. Arbogast had no prior convictions or arrests until such time as he had presented enough evidence of the luring, inducing aspect of entrapment to be entitled to the instruction.

The State's trial witnesses in its case-in-chief were five WSP officers who participated in the sting operation. A videotape of Mr. Arbogast's interview following his arrest was played for jurors. At the conclusion of the State's evidence, the prosecutor asked the trial court to rule whether Mr. Arbogast was entitled to present "lack of predisposition" evidence in the defense case in support of an entrapment instruction. The State argued Mr. Arbogast had not proved by a preponderance of the evidence that the government engaged in "anything more than normal salesmanship, which is allowed." RP at 1324-25.

Given the trial court's ruling that Mr. Arbogast could not argue lack of predisposition or obtain an entrapment instruction without first proving law enforcement's luring or inducement, the defense pointed among other evidence to the placement of a "woman for men" ad; the fact that the ad did not offer sex with children; Detective Garden's violation of standards on which he had been trained for chatting with

targets;[6] the picture Brandi sent, in which she appeared to be wearing a "teddy" or bra;[7] her statement that she "could get invloved [sic] with you and jake after a few good sessions of you two;" her enigmatic message, "change my mind about us hookiing [sic] up;" and her statement that Mr. Arbogast would need to "come to our place," and "when you come in we all get naked." Ex. 3.

In ruling, the trial court identified the issue as "whether or not the officer applied more than the normal amount of persuasion to induce the defendant to come to engage in the behavior." RP at 1332. It concluded there was not sufficient evidence of "more than the normal amount of persuasion." RP at 1333. On that basis, it refused to instruct on entrapment and did not allow evidence "regarding whether or not the defendant had engaged in this type of behavior previously to show a lack of predisposition." RP at 1334.

The only witness called by the defense was Mr. Arbogast. He testified he did not like the idea of adults having sex with children, had not been looking for that when he answered Brandi's ad, and had gone along when she disclosed what she was looking for to "get on her good side"—because he believed there was a possibility of having sex with

[6] The WSP task force is part of the United States Department of Justice's Internet Crimes Against Children (ICAC) Task Force Program. ICAC's Operational and Investigative Standards for task forces include generally "allow[ing] the investigative target to set the tone, pace, and subject matter of the online conversation." RP at 968 (quoting Ex. 16, at 13).

[7] Detective Morgan testified it was a tank top.

her. RP at 1365. He testified that he did not intend to have sex with Anna or Jake when he went to the apartment.

In rebuttal, the State called Detective Davis to testify that during the unrecorded part of his pretest interview, Detective Davis asked Mr. Arbogast if his intent, before he arrived was "to be with the children," to which Mr. Arbogast answered yes. RP at 1446. In cross-examination, he affirmed that he did not ask Mr. Arbogast if he intended "to have sex with the children," but instead, whether he intended "to be with" them. RP at 1451.

The jury found Mr. Arbogast guilty of both charges. He appeals.

ANALYSIS

We begin with the issues that compel our decision to reverse Mr. Arbogast's convictions for instructional error. Other assignments of error are addressed in the unpublished portion of the opinion.

The State's defense of the trial court's refusal to instruct on entrapment presents four issues that we address in the following order: (1) the State's argument that Mr. Arbogast was not entitled to the instruction because he denied intending to have sex with children, (2) the validity of *Trujillo*'s heightened, evidence-weighing standard for determining whether to instruct on entrapment, (3) the in limine ruling preventing Mr.

Arbogast from presenting evidence of his lack of criminal predisposition, and (4) whether Mr. Arbogast's evidence was sufficient to entitle him to instruction.

We begin with an introduction of Washington's law of entrapment and the standard by which we review a trial court's refusal to instruct on an affirmative defense.

I. LAW OF ENTRAPMENT AND STANDARD OF REVIEW

Washington courts have "long recognized" the existence of the common law defense of entrapment. *State v. Lively*, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996). In 1975, the legislature codified the common law definition of entrapment. *Id.* RCW 9A.16.070 provides:

> (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.

The statute restates the subjective test of entrapment applied by federal and Washington state courts, which focuses on the issue of whether the defendant was predisposed to commit the crime rather than on the conduct of the State to induce or entice the defendant. *Lively*, 130 Wn.2d at 10 & n.2 (citing *Sorrells v. United States*, 287

U.S. 435, 451, 53 S. Ct. 210, 77 L. Ed. 413 (1932) and *State v. Waggoner*, 80 Wn.2d 7, 10, 490 P.2d 1308 (1971).

The Washington Supreme Court has held that RCW 9A.16.070(1)(b) requires proof that the defendant "'was tricked or induced into committing the crime by acts of trickery by law enforcement agents,'" and "'[s]econd, . . . that he would not otherwise have committed the crime.'" *Lively*, 130 Wn.2d at 10 (quoting *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984)). In *Lively*, the Supreme Court addressed whether the burden of proof on a defense of entrapment should rest with the State or the defendant. It observed that under federal common law and the law of many states applying the subjective standard for entrapment the burden of persuasion is on the government to disprove entrapment beyond a reasonable doubt. 130 Wn.2d at 12-13 & n.3. In deciding that a Washington defendant would bear the burden instead, it reasoned that like other affirmative defenses that are uniquely within the defendant's knowledge and ability to establish, the predisposition of the defendant to commit the crime "is the focal element of the defense." *Id.* at 13.

A party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). "'The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].'" *Id.* at 849

(alterations in original) (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (plurality opinion)). In evaluating a defendant's evidence in support of an affirmative defense, the trial court must view it in the light most favorable to him. *Id.* (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). Failure to give instruction on an affirmative defense to which the defendant is entitled is reversible error. *Id.*

We review de novo a trial court's refusal to give a requested jury instruction when the refusal is based on a ruling of law. *State v. Ponce*, 166 Wn. App. 409, 416, 269 P.3d 408 (2012). We review a trial court's factual determination of whether a jury instruction should be given for an abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

II. MR. ARBOGAST COULD CHALLENGE CRIMINAL INTENT AND AT THE SAME TIME ASSERT THE DEFENSE OF ENTRAPMENT

The State argued below that by denying he intended to have sexual intercourse with Anna and Jake, Mr. Arbogast could not assert the defense of entrapment because "[e]ntrapment only applies if the defendant committed a crime." Br. of Resp't at 17 (citing RCW 9A.16.070(1)(b)). The trial court implicitly rejected the argument, but the State renews it on appeal.

The State's argument was rejected by this court in *State v. Galisia*, 63 Wn. App. 833, 837, 822 P.2d 303 (1992), *abrogated on other grounds by Trujillo*, 75 Wn. App. at

917. In *Galisia*, the court explained that while a defendant cannot deny that the actions on which a criminal charge even happened while at the same time asserting entrapment, it is a different matter when a defendant admits his actions but denies criminal liability:

> [*State v.*] *Matson*[, 22 Wn. App. 114, 587 P.2d 540 (1978)] and [*State v.*] *Draper*[, 10 Wn. App. 802, 806, 521 P.2d 53 (1974)] thus do not require a defendant to admit either the crime itself or all the elements of a crime before being entitled to an entrapment instruction. It is enough that a defendant admit acts which, if proved, would constitute the crime.

Galisia, 63 Wn. App. at 837.

Galisia was cited with approval on this point by the Washington Supreme Court in *State v. Frost*, 160 Wn.2d 765, 776 n.4, 161 P.3d 361 (2007). *Frost* held that the defendant's rights under the Sixth Amendment to the United States Constitution as well as his due process rights were violated when the trial court told defense counsel that if he argued that the State's evidence failed to establish the defendant's accomplice liability, the court would not give the defendant's requested instruction on duress. *Id.* at 776-79. The defendant forwent challenging the State's evidence to ensure that the duress instruction would be given.

Frost was unanimous in finding that the court erred in limiting the defendant from challenging the State's proof while at the same time asserting duress. While a 5-4 decision, the justices only disagreed about whether the trial court's error was harmless (the majority view) or structural error (the dissent's view).

III. THERE IS NO VALID LEGAL BASIS FOR *TRUJILLO*'S HEIGHTENED, EVIDENCE-WEIGHING STANDARD FOR DETERMINING WHETHER TO INSTRUCT ON ENTRAPMENT

In *Trujillo*, the court rejected the usual "some" or "substantial" evidence standard for obtaining instruction on an affirmative defense when it comes to entrapment. It announced a heightened standard, holding that "to entitle a defendant 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 of entrapment by a preponderance of the evidence." 75 Wn. App. at 917 (declaring the contrary holding in *Galisia*, 63 Wn. App. at 836, to be "overly broad" and "improper[ ]"). *Trujillo*'s holding on this heightened standard for instruction has been relied on without examination in over a dozen unpublished Court of Appeals decisions, including an opinion from this division in which this author was a member of the panel.[8] It has not been cited by the Supreme Court. Mr. Arbogast is the first to challenge the standard as erroneous, and we now agree that it does not withstand examination.[9]

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[8] The standard was also discussed in the published opinion in *State v. Buford*, 93 Wn. App. 149, 152-53, 967 P.2d 548 (1998), in which the court held that since the defense of unwitting possession, like entrapment, admits the crime but seeks to excuse the conduct, the *Trujillo* standard should apply to unwitting possession. Whether *Trujillo*'s instructional standard was legitimately applied when the defense was entrapment was not challenged or reexamined.

[9] The dissent begins with a vigorous defense of a "more than a scintilla of evidence" standard that has long been required to carry a case to a Washington jury. *E.g.*, *Knight v. Trogdon Truck Co.*, 191 Wash. 646, 653, 71 P.2d 1003 (1937). The "more than a scintilla of evidence" standard is not challenged by Mr. Arbogast. That well settled standard was not the standard used by the trial court and is not questioned by us. The

In adopting the heightened standard, the *Trujillo* court cited *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994) and another Division One decision in *State v. Chapin*, 75 Wn. App. 460, 879 P.2d 300 (1994). 75 Wn. App. at 917.

In *Riker*, the Supreme Court rejected a defendant's argument that while she had the burden of proving the defense of duress, it was only to the extent of creating a reasonable doubt in the minds of the jurors as to her guilt—a lower standard than preponderance of the evidence. 123 Wn.2d at 366. Clarifying the court's decision in *State v. Bromley*, 72 Wn.2d 150, 155, 432 P.2d 568 (1967), *Riker* held that because duress does not negate an element of the offense but pardons the conduct for a different reason, the defendant was required to prove duress by a preponderance of the evidence. *Id.* at 366-69.

In *Chapin*, the court applied *Riker*'s reasoning in rejecting a defendant's argument that to defend on the basis of entrapment, he was only required to produce sufficient evidence to create a reasonable doubt as to his guilt. 75 Wn. App. at 471.

In both *Riker* and *Chapin*, what was at issue was the burden of proof at trial. The juries in both cases had been instructed on the relevant affirmative defense, so the standard for obtaining an instruction on the defense was never at issue. *Riker*, 123 Wn.2d at 358 (prosecutor had no objection to instructing on duress); *Chapin*, 75 Wn. App. at 470

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problem is *Trujillo*'s holding that the standard to be applied *before the trial court instructs on entrapment* is the preponderance of the evidence standard rather than a prima facie evidence standard.

("Chapin requested and received an entrapment instruction."). Later decisions recognize that where the burden of proving an affirmative defense is by a preponderance of the evidence, the standard for *obtaining instruction* is still that "there is evidence to support [the defense] theory." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (defense of duress).

The obvious problem with *Trujillo*'s standard is that it tasks the trial court with evidence-weighing that is the province of the jury. Rather than evaluate whether prima facie evidence of an affirmative defense has been presented, *Trujillo* holds that the court examines all the evidence and determines whether evidence supporting the defense would preponderate for a rational juror. *Trujillo*'s standard does not even require the court to view the evidence in the light most favorable to the defendant. Nothing in *Riker* or *Chapin* provides support for this heightened standard.

We agree with Mr. Arbogast that the heighted standard violates due process and his right to trial by jury. Only a jury can decide whether a defendant has met his burden of proving an affirmative defense by a preponderance of the evidence. U.S. CONST., amend. VI, XIV; WASH. CONST. art. I, §§ 3, 21. "At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." *Davis v. Cox*, 183 Wn.2d 269, 289, 351 P.3d 862 (2015) (declaring unconstitutional

threshold evidence weighing in Anti-SLAPP[10] suits), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 423 P.3d 223 (2018).

To preserve the right to a jury's determination, the burden of production is a matter-of-law standard. As Mr. Arbogast points out, the State is required to prove every element of a criminal charge beyond a reasonable doubt, but it can survive a *Knapstad* motion to dismiss and proceed with prosecution as long as it produces prima facie evidence of the elements. *State v. Knapstad*, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). A civil litigant can survive a motion for summary judgment by presenting a prima facie case. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 410-13, 430 P.3d 229 (2018).

We agree with Mr. Arbogast that due process and the right to a jury trial can require no more for a criminal defendant to present an entrapment defense to the jury. He was entitled to instruction on entrapment by presenting prima facie evidence of the defense. *Trujillo*'s heightened standard for obtaining instruction on entrapment is legally insupportable and we reject it.

IV. IT WAS ERROR TO LIMIT MR. ARBOGAST'S EVIDENCE OF LACK OF PREDISPOSITION

The State persuaded the trial court that Mr. Arbogast should not be allowed to present evidence that in his 70-year life he had not been suspected of, arrested for, or convicted of crime. The State argued that such evidence was inadmissible character

[10] Strategic Lawsuits Against Public Participation, RCW 4.24.510.

evidence under ER 404. In a more typical prosecution, this would be true. But this prosecution was the result of a sting operation. It was and remains undisputed that "[t]he criminal design originated in the mind of law enforcement officials, or any person acting under their direction" within the meaning of the statutory defense. RCW 9A.16.070(1)(a). Entrapment was a possible defense, and once it was asserted, evidence that Mr. Arbogast had no criminal history, and particularly no history of child predation, was evidence of a pertinent trait of character: that he lacked a predisposition to commit child rape.

Case law under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, is relevant. Under the SRA, a defendant's lack of "apparent predisposition" to commit a crime in which he was induced to participate by others is a mitigating circumstance for purposes of exceptional sentencing. RCW 9.94A.535(1)(d). When it comes to evidence supporting the lack of an "apparent predisposition," our Supreme Court recognizes the lack of criminal history as not only relevant, but as a paradigm. *State v. Nelson*, 108 Wn.2d 491, 496-98, 740 P.2d 835 (1987) (The existence of a motive "does not establish criminal disposition, [which is] measured under the SRA by a history of prior convictions."); *State v. Freitag*, 127 Wn.2d 141, 149, 896 P.2d 1254 (1995) ("The Court of Appeals . . . properly recognized that lack of criminal history does tend to show lack of a predisposition to commit the crime."). In reviewing whether the defendant in *Lively*

established entrapment as a matter of law, the Supreme Court viewed as relevant the fact that she had no criminal record or prior involvement in the offense charged. 130 Wn.2d at 18.

Evidence that Mr. Arbogast had not been suspected of, arrested for, or convicted of crime was admissible under ER 404(a)(1). Mr. Arbogast might not ultimately demonstrate entitlement to an entrapment instruction, but he was entitled to try. The State provides no authority or reasoned argument why defense counsel was required to proceed through voir dire, opening statement, and most of the trial with one hand figuratively tied behind his back, with the court only later deciding whether, thus hindered, he had nonetheless presented enough evidence to warrant instruction on entrapment.

V. SUFFICIENT EVIDENCE SUPPORTED GIVING AN ENTRAPMENT INSTRUCTION

A. The trial court erred in considering only whether the undercover officer used more than the "normal amount of persuasion."

"Both by statute and court decision, the entrapment defense focuses on 'the intent or predisposition of the defendant to commit the crime.'" *Smith*, 101 Wn.2d at 42 (quoting *Hampton v. United States*, 425 U.S. 484, 488, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976)); *accord Lively*, 130 Wn.2d at 13 (The predisposition of the defendant to commit the crime "is the focal element of the defense."). Indeed, our Supreme Court imposed the burden of proof on the defendant for the reason that "[t]he defendant has the knowledge

and ability to establish whether he or she was predisposed to commit the crime; whether he or she was lured or induced to do so by the State; and whether the criminal design originated in the mind of the police or an informant." *Lively*, 130 Wn.2d at 13. To determine whether evidence supports giving an instruction, a court should consider the defendant's testimony and the inferences that can be drawn from it. *Galisia*, 63 Wn. App. at 836. Despite this, in deciding that Mr. Arbogast did not present sufficient evidence to be entitled to an entrapment instruction, the trial court considered only one type of evidence: "whether or not the officer applied more than the normal amount of persuasion to induce the defendant to come to engage in the behavior." RP at 1332.

The legislature explicitly provided that "[t]he defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). It did not otherwise limit the manner in which a defendant might be "lured or induced" to commit a crime he had not otherwise intended to commit. RCW 9A.16.070(1)(a).

A distinguished commentator on Washington criminal law has observed that "[m]any kinds of evidence can be used to prove predisposition." 13B SETH A. FINE, WASHINGTON PRACTICE: CRIMINAL LAW & SENTENCING § 38:3, at 411 (3d ed. 2019). Examples identified are "ready compliance with an illegal request, previous commission of the same crime, acts showing eagerness to commit the crime, substantial effort in

investigating and arranging an illegal transaction, and familiarity with the practices of an illegal trade." *Id.* (footnotes omitted). Logic dictates that contrary evidence can be used to prove a lack of predisposition. An additional kind of evidence recognized as relevant in *Lively* is the fact that the defendant was not the target of any criminal investigation until the law enforcement activity that made her a suspect. 130 Wn.2d at 18.[11]

In *Smith* and *Lively*, the Supreme Court characterized entrapment as encompassing two elements: that the defendant "was tricked or induced into committing the crime by acts of trickery by law enforcement agents," and "[s]econd, . . . that he would not otherwise have committed the crime." *Lively*, 130 Wn.2d at 10 (quoting *Smith*, 101 Wn.2d at 43). While characterized as two elements, however, our Supreme Court has treated them as two sides of the same coin. In *Smith*, for instance, the Supreme Court characterized itself as focusing on the inducement element, but in a case where the defendant's only evidence of his lack of predisposition to sell drugs was that he succumbed to a deceptive sympathetic appeal: a customer seeking marijuana who was

[11] *Perez-Leon* and *Kaminski*, the cases the State argued would allow it to offer evidence of a defendant's criminal history, include their own identification of factors relevant in determining the predisposition of a defendant. Relevant to the determination are: "(1) assessing the character or reputation of the defendant, including any prior criminal record; (2) whether the suggestion of criminal activity was made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion, and (5) the nature of the inducement or persuasion applied by the government." *Perez-Leon*, 757 F.2d at 871 (citing *Kaminski*, 703 F.2d at 1008).

dying. In analyzing the inducement element, the court necessarily considered the defendant's evidence; it did not ignore it.

Here, the trial court too narrowly considered only police conduct, when the focal point of the defense was the defendant's lack of predisposition.

In arguing to the trial court that Mr. Arbogast was presented with no more than the "normal amount of persuasion," the State argued conclusorily, never identifying what made Brandi's communications with Mr. Arbogast "normal" persuasion. A trial court should not accept at face value the State's contention that its persuasion was of the "normal amount." The State never demonstrated or explained how its communications with Mr. Arbogast were nothing more than "normal."

B. Mr. Arbogast was entitled to the instruction

Mr. Arbogast testified that he had never had sex with children or any interest in sex with children. There was no dispute that before responding to Brandi's ad, he had not been convicted of, charged with, or even suspected of a sex crime against a child. He responded to what was posted as a "woman for man" ad that Sergeant Rodriguez admitted was cryptic, might not be recognized as advertising sex with children, and in fact had not been recognized by other responders as advertising sex with children.

Once Mr. Arbogast recognized what was being offered, his immediate response was "Never have done that. . . . Don't know if I could help do kids." Ex. 3. He retreated

from that position when Brandi made clear that engaging in sex with her children was required to get together with her, but he repeatedly stated he had never engaged in such conduct with children before. Detective Garden could have refrained from *any* suggestion that Brandi's participation was a possibility, but he did not. When Mr. Arbogast arrived at the undercover location, he had not stopped to pick up lube or condoms as Brandi had requested. No incriminating evidence was found on his phone or in his car.

A final aspect of the inducement that has been found relevant by federal courts is that Brandi was not prostituting her fictional children, but presented as a loving mother who sought to provide something she had benefitted from as a child. She made clear that whatever Mr. Arbogast did with her precious children would only be under her protective oversight and rules. As explained in *United States v. Poehlman*, a case involving a similarly-premised sting:

> Throughout the correspondence with Poehlman, Sharon made it clear that she had made a firm decision about her children's sexual education, and that she believed that having Poehlman serve as their sexual mentor would be in their best interest. She made repeated references to her own sexual mentor, explaining that he could have mentored her daughters, had he not died in a car crash in 1985. While parental consent is not a defense to statutory rape, it nevertheless can have an effect on the "self-struggle [to] resist ordinary temptations." *Sherman* [*v. United States*], 356 U.S. [369,] 384, 78 S. Ct. 819[, 2 L. Ed. 2d 848 (1958)] (Frankfurter, J., concurring). This is particularly so where the parent does not merely consent but casts the activity as an act of parental responsibility and the selection of a sexual mentor as an expression of friendship and confidence. Not only did this diminish the risk of detection, it also allayed fears defendant might have

> had that the activities would be harmful, distasteful or inappropriate, particularly since Sharon claimed to have herself benefitted from such experiences.

217 F.3d 692, 702 (9th Cir. 2000) (first alteration in original) (citation to record omitted).

The same conclusion was reached by the First Circuit Court of Appeals in *United States v. Gamache*, which also involved a "mother seeking mentor" premise that the court found to be improper inducement based in part on the story line:

> [T]he government agent provided justifications for the illicit activity (intergenerational sex) by describing "herself" as glad that Gamache was "liberal" like her, expressing that she, as the mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her. These solicitations suggested that Gamache ought to be allowed to engage in the illicit activity, just as the Government in *Jacobson*[*v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992)] used a fake lobbying organization to appeal to anti-censorship motives.

156 F.3d 1, 11 (1st Cir. 1998).

As previously noted, the burden of proof is different in federal court, and in the unpublished portion of the decision, we deny Mr. Arbogast the remedy of reversal and dismissal that the defendants obtained in *Poehlman* and *Gamache*. But the relevance of the nature of the inducement is the same here.

The State has tended to defend the trial court's refusal to instruct on entrapment by pointing to the evidence that Mr. Arbogast intended to have sex with the children. It is a given for this issue that Mr. Arbogast committed attempted first and second degree child

rape. The question is whether the jury might, if instructed, have found that he was lured or induced to commit those crimes, which he had not otherwise intended to commit. The jury might make that finding on this evidence. It was not given the opportunity.

We reverse the convictions and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

VI. REVERSAL WITH DIRECTIONS TO DISMISS THE CHARGES IS NOT WARRANTED ON THE BASIS OF OUTRAGEOUS GOVERNMENT CONDUCT OR PROOF OF THE ENTRAPMENT DEFENSE AS A MATTER OF LAW

Despite reversing and remanding, we need to address Mr. Arbogast's two other assignments of error because they would, if established, entitle him to dismissal of the charges. We address them in the order presented.

A. Mr. Arbogast does not demonstrate outrageous conduct requiring dismissal

A claim of outrageous government 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.'" *Lively*, 130 Wn.2d at 19 (quoting *United States v. Russell*, 411

U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). "For the police conduct to violate due process, the conduct must shock the universal sense of fairness." *Id.* Courts evaluate the government's actions under the totality of circumstances. *Id*. at 21. *Lively* identifies the following factors for determining whether police conduct was outrageous:

> [(1)] whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; [(2)] whether the defendant's reluctance to commit a 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; [(5)] whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

Lively, 130 Wn.2d at 22 (citations omitted). "Dismissal based on outrageous conduct is reserved for only the most egregious circumstances. 'It is not to be invoked each time the government acts deceptively.'" *Id.* at 20 (quoting *United States v. Sneed*, 34 F.3d 1570, 1577 (10th Cir. 1994)). Courts "focus on the State's behavior and not the Defendant's predisposition." *Id.* at 22.

As Sergeant Rodriguez testified, if someone responding to an ad placed by the task force was not interested in children, "then we don't talk to them any longer." RP at 896. Detective Garden testified that consistent with his training, he would not continue to pursue someone he was chatting with who was not interested in sex with a child, and would instead respond with "'good luck' or 'bye,' 'not for you,' 'thanks for not wasting my time,' whatever, something like that." RP at 1024. While Detective Garden did not

refrain from suggesting that Brandi's participation was a possibility in his texts with Mr. Arbogast, he also made statements of this sort.[12] While we have rejected the State's argument that these statements of deflection were enough to disprove entrapment, they are, under a "totality of circumstances" analysis, enough to defeat Mr. Arbogast's claim of outrageous government conduct.

B. Mr. Arbogast did not prove entrapment as a matter of law

Alternatively, Mr. Arbogast urges us that dismissal of the charges is required because entrapment was proved as a matter of law. He relies on federal cases, in which entrapment is found as a matter of law if the government's evidence does not disprove entrapment beyond a reasonable doubt. Under Washington law, the appropriate standard of review is whether, "considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence." *Lively*, 130 Wn.2d at 17.

Viewing the evidence in the light most favorable to the State, we ignore Mr. Arbogast's exculpatory statements when interviewed following his arrest and his exculpatory trial testimony, all of which the jury might have rejected. The jury never heard that Mr. Arbogast had not previously been convicted, charged, or suspected of

[12] *E.g.*, "I am not looking for me. I am looking for someone to be with my kids. good luck with what it is you seek," "do you have an attraction to children. i am not looking for a friend," "i don't think you could satisfy my kids or that you want to sexually," "i cant force you to do this nor do i want to," "i have to be clear i am not involved." Ex. 3.

sexual misconduct toward children. What is left is the evidence of the e-mail and text communications with Brandi. Had the jury been asked to address the defense of entrapment, a rational juror reviewing the evidence presented could have found that Mr. Arbogast failed to prove entrapment by a preponderance of the evidence.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Arbogast raises four. One is a challenge to community custody conditions to which Mr. Arbogast did not object at sentencing. If convicted in a retrial, he will have the opportunity to object if the trial court considers imposing those conditions again, so we decline to address that issue. We address the remaining three.

Instructional error

The court instructed the jury: "A substantial step is conduct that strongly indicates *a* criminal purpose and that is more than mere preparation." CP at 157 (emphasis added). The defense proposed that the instruction read "A substantial step is conduct that strongly indicates *the* criminal purpose and that is more than mere preparation." CP at 137 (emphasis added). Similarly the court instructed the jury: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP at 161.

Mr. Arbogast argues that the instructions failed to consider that jurors might find he had a criminal purpose, but not to commit child rape. He gives as examples a possible criminal purpose to talk with the children (communication with a minor for immoral purposes, RCW 9.68A.090) or to touch them (child molestation, RCW 9A.44.083, .086). SAG at 4.

The trial court's "to convict" instructions specified that the intent and substantial step must relate to the charged crime, however. For example, instruction 11, the "to convict" instruction for the attempted first degree rape charge read in relevant part:

> To convict the defendant of the crime of attempted rape of a child in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 5, 2017, the defendant did an act that was a substantial step toward the commission of rape of a child in the first degree;
>
> (2) That the act was done with the intent to commit rape of a child in the first degree . . . .

CP at 158. Instruction 12, the "to convict" instruction for the attempted second degree rape charge, was couched in similar terms.

"[W]e do not review the adequacy of jury instructions in isolation; we review the jury instructions as a whole." *State v. Davis*, 174 Wn. App. 623, 638, 300 P.3d 465 (2013) (citing *State v. Prado*, 144 Wn. App. 227, 240, 181 P.3d 901 (2008)). Reading the instructions as a whole, there is no danger the jury believed that Mr. Arbogast's

substantial step could be toward *any* crime, or with an intent to commit *any* crime. *See id.*

Evidence sufficiency to prove the attempted second degree rape of Jake

Mr. Arbogast next argues there was insufficient evidence to support his conviction for the attempted second degree rape of Jake. There was less evidence of the attempted second degree rape of Jake than of the attempted first degree rape of Anna. Mr. Arbogast's text communications stated, "I do look at young girls, not so much boys." Ex. 3. Brandi expressed her own sexual attraction to her son, leading Mr. Arbogast to ask if he would "need to groom the boy alone." *Id.* Mr. Arbogast told Brandi he had "[n]ever done anal." Ex. 3 (CP at 79). Asked by Brandi if he was "interested in both anna and jake?" once they agreed to meet, he answered, "Anna first." *Id.* When it came to how to dress the children, Brandi initially texted only about what Mr. Arbogast wanted Anna to wear. *Id.*

Bearing in mind the State's burden in an attempt crime to prove a substantial step that is strongly corroborative of the actor's criminal purpose, we viewed a sufficiency challenge as a viable issue and requested a response from the State. Having reviewed its response, and considering all, we conclude that the evidence was sufficient given that we view the evidence and all reasonable inferences in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). After Mr. Arbogast began

driving to Brandi's apartment, some of Brandi's texts were ambiguous as to whether she expected Mr. Arbogast to engage in sex with both children. While Mr. Arbogast was driving, he continued to text and did not correct the ambiguity. It is not our role to reweigh the evidence and substitute our judgment for that of the trier of fact. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion).

Discovery

Finally, Mr. Arbogast argues the court erred when it denied his request for discovery of chat logs for other Net Nanny cases. He had argued that given case law holding that a defendant must prove the State used "more than normal" persuasion, evidence of what occurs in other Net Nanny chats could help prove entrapment. Since the trial court did not instruct on entrapment in the trial below, the State had no occasion to argue to the jury that undercover officers had used only the "normal amount of persuasion."

We do not hold that the trial court should have ordered the requested discovery in the trial below. But since the court will instruct the jury on entrapment in any future trial, it should revisit the discovery issue, at least for the purpose of determining whether the State intends to present evidence and argument that no more than the "normal amount of persuasion" was used, and what that evidence would be.

It is not clear from the record what the State contends "normally" persuades an adult to rape a child. Seeking guidance from controlling cases, we went back to *State v. Waggoner*, 80 Wn.2d at 10-11, the decision that initially identified the "normal amount of persuasion" as relevant where entrapment is asserted as a defense. In *Waggoner*, the defendant was charged with selling LSD[13] to a police informant. His only evidence of entrapment was that for unexplained reasons he was initially reluctant to act on the informant's expressed interest in purchasing large quantities of drugs. A couple of days later, however, he called the informant and made the offer leading to a sale from which he was to receive a commission. As explained by the *Waggoner* court, "[t]he record itself reveals that the activities of individuals such as [the informant] have made discretion and suspicion an operating principle for drug dealers in all of their sales." *Id.* at 10.

Giving consideration to a "normal amount of persuasion" makes sense in a context where there *is* a "normal amount" of persuasion for which evidence exists, such as the wariness of drug sellers to sell to unfamiliar buyers. Our Supreme Court has applied the concept only in connection with the sale of drugs. *See id. and see Smith*, 101 Wn.2d at 42-43 ("A police informant's use of 'a normal amount of persuasion to overcome' and 'expected resistance' to sell drugs 'does not constitute entrapment and will not justify an entrapment instruction.'" (quoting *Waggoner*, 80 Wn.2d at 11)).

[13] Lysergic acid diethylamide.

No Washington decision has analyzed a "normal amount of persuasion" that induces adults to rape children. If the State intends to present evidence and argument that there *is* a normal amount of persuasion that causes an adult to attempt child rape, and if its evidence will be WSP witnesses testifying to their experience in prior sting operations, then obtaining relevant discovery might be needed for meaningful cross-examination. We leave it to the trial court to determine in light of the evidence the State proposes to offer what discovery, if any, should be permitted.

We reverse the convictions and remand for further proceedings consistent with this opinion.

Siddoway, J.

I CONCUR:

Lawrence-Berrey, J.

No. 36250-7-III

KORSMO, A.C.J. (Dissenting) — The majority errs in two significant ways. First, it attacks the wrong case and thereby conflicts with controlling Washington Supreme Court precedent concerning the sufficiency of the evidence to support an entrapment instruction. What the majority calls the "heightened" *Trujillo* standard is nothing more than the Washington Supreme Court's longstanding standard for any affirmative defense that excuses criminal conduct. Using the proper standard, the trial court correctly concluded that there was only "normal" persuasion rather than entrapping behavior. Second, the majority fails to recognize that the errors in excluding defendant's proposed evidence were harmless even if he had been entitled to an entrapment instruction. I will address those issues in the order listed.

Sufficient Evidence Standard. The majority faults the "heightened" standard supposedly applied by *State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994). However, *Trujillo* got that standard from *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994), and *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966). It is the standard consistently used in every appellate decision. As recognized by *Trujillo* and *State v. Chapin*, 75 Wn. App. 460, 879 P.2d 300 (1994), *Riker* did not change *Gray* and its progeny.

The majority confuses the evidence needed to support a general instruction and the evidence needed to support an instruction carrying a burden of proof. For instance, in a

criminal case, the court will not instruct the jury on the elements of a crime if the State does not present evidence supporting each element of the crime. Likewise, if the evidence does not establish the affirmative defense, no instruction will be given.[1]

In *Gray*, a police informant who was in trouble with federal authorities repeatedly asked to purchase marijuana from Gray. 69 Wn.2d at 433. The two negotiated terms and then drove to the defendant's home. He returned with plastic wrapped marijuana that he turned over to the informant. *Id*. A second sale was arranged and consummated under similar circumstances. *Id*. at 433-34. At trial, Gray admitted making the sales, but contended that they were done to help out his friend, the informant, who was shunned by most marijuana suppliers due to his legal troubles. *Id*. at 434. Appellant had never been charged or convicted of narcotics offenses. *Id*.

The trial court declined to give an entrapment instruction or other instructions in support of the defense theory. *Id*. The Supreme Court agreed that there was insufficient evidence to support entrapment:

[1] For example, if slight evidence of intoxication is presented, the jury may be instructed concerning the impact of intoxication on a defendant's ability to act with the appropriate mental state. No party bears a burden of proof on that defense. In contrast, an instruction on self-defense would require some evidence supporting each element of the defense—a subjective understanding of the situation and an objective requirement to act as a reasonably prudent person faced with those circumstances. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). For instance, if the defendant reacted to a verbal insult with deadly force, the court would not instruct on self-defense despite the defendant's testimony that he acted in self-defense since a reasonable person would not use deadly force in the absence of a threat of death or great personal injury. *Id*.

> Even if we accept appellant's testimony that he told the officer and the informer he did not want to sell marijuana and was only persuaded through friendship and sympathy, we do not have more than the scintilla of evidence necessary for an instruction. We must also consider the undisputed testimony in this case. Appellant took the officer to his own home to get the marijuana. Appellant accepted money for the marijuana; most importantly appellant gave the officer his telephone number and told him to return any time. In light of this, appellant's original protests (if indeed they were ever made) were just his own manner of bargaining.
>
> It is quite obvious that appellant was furnished nothing more than an opportunity to sell.

Id. at 435.

A different problem primarily was at issue in *State v. Galisia*, 63 Wn. App. 833, 822 P.2d 303 (1992). There the trial court declined to give an entrapment instruction in a case where an informant repeatedly asked the defendant, a man named Norgard, for help in obtaining cocaine. The defendant gave the informant his telephone number. *Id*. at 834. Three times the informant called and was told that the defendant could not help him. *Id*. at 834-35. Running into the informant in downtown Seattle five days later, Norgard steered him to another man and a deal was ultimately reached to purchase a large quantity of cocaine; Norgard was to get cash and cocaine for facilitating the transaction. *Id*. at 835. The trial judge declined to give an entrapment instruction because Norgard did not admit to delivering the cocaine. *Id*. at 836.

Division One of this court disagreed with that rationale, reasoning that a defendant need not admit his guilt before raising entrapment. The court distinguished between a

defendant admitting the actions which gave rise to the charges and admitting that criminal liability existed.[2] *Id*. at 837. A defendant need only do the former. *Id*. The court, nonetheless, affirmed the determination that Norgard was not entitled to an entrapment instruction, reasoning that Norgard had not presented sufficient evidence that he was lured to commit a crime that he did not otherwise intend. *Id*.

In the beginning of its analysis, the *Galisia* court had stated that "a defendant need not present that quantity of evidence necessary to create a reasonable doubt in the minds of jurors to be entitled to an entrapment instruction." *Id*. at 836. That sentence was, at least initially, at issue in *Trujillo*. That court recognized that *Galisia* had misstated the burden of proof in light of *Riker*:

> With respect to the quantum of proof necessary to entitle a defendant to an entrapment instruction, we hold that a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence. We recognize that in . . . [*Galisia*] the court held that a defendant need only produce "some evidence" to support an entrapment instruction. We conclude that in light of . . . [*Riker*] and our discussion of the defendant's burden of proof on the entrapment defense in . . . [*Chapin*] this statement of the required quantum of proof is overly broad and improperly entitles a defendant to an entrapment instruction upon production of a mere scintilla of evidence. A scintilla of evidence is not sufficient to justify an entrapment instruction.

Trujillo, 75 Wn. App. at 917 (footnote and citations omitted). Judge Agid, the author of *Galisia*, was a member of the *Trujillo* panel.

[2] The same distinction subsequently was made by *State v. Frost*, 160 Wn.2d 765, 161 P.3d 361 (2007).

One issue in *Riker* involved the burden of proof when an affirmative defense of duress is raised. 123 Wn.2d at 366-69. The court concluded that any defense such as duress that excuses conduct must be established by the preponderance of the evidence. *Id*. at 368-69. Defenses that negate an element of the crime need only be established to the point where they raise a reasonable doubt. *Id*. at 368. In light of *Riker*, the *Trujillo* court understandably took the time to correct the misstatement in *Galisia* about the nature of the defendant's burden of proof to establish entrapment. He must establish the defense by a preponderance of the evidence.

The other issue in *Trujillo* was whether the defendant had produced enough evidence to justify an entrapment instruction. There the defendant, a man named Chrisostomo, was asked on multiple occasions by an informant pretending to be a fellow employee if he could sell him some cocaine.[3] 75 Wn. App. at 914-16. The defendant rebuffed his efforts repeatedly. *Id*. at 915-16. Asked to obtain information about a seller, the defendant later called an acquaintance to a tavern where the informant was drinking. The acquaintance sold Chrisostomo cocaine which he in turn sold to the informant. *Id*. at

[3] Similar is *State v. Waggoner*, 80 Wn.2d 7, 490 P.2d 7, 490 P.2d 1308 (1971). There an informant repeatedly asked, but was turned down, to obtain LSD from the defendant. The defendant later arranged, on a commission basis, for the informant to make the purchase from a different seller. *Id*. at 8. The court concluded that the evidence was insufficient to support an entrapment instruction since it showed the informant used "a normal amount of persuasion." *Id*. at 10-11.

916. Defendant later stated that he obtained the cocaine solely to get the informant to stop pestering him. *Id*.

Accepting the defendant's testimony as true, Division One concluded that it was insufficient to justify an entrapment instruction. *Id*. at 918. The amount of badgering did not amount to improper persuasion. *Id*. at 919. In the course of its analysis, *Trujillo* also noted its prior decision in *State v. Enriquez*, 45 Wn. App. 580, 725 P.2d 1384 (1986) (informant pointing out defendant could support his drug addiction by selling drugs not improper inducement). *Trujillo*, 75 Wn. App. at 918.

Also of interest is a decision discussed by the majority, *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (1984). There an informant introduced an undercover officer to her friend as the informant's husband. The putative husband was dying and needed marijuana to ease his pain. *Id*. at 38. After initially declining to do so, the defendant sold the "husband" marijuana on three occasions. *Id*. This evidence was no more than a "normal" amount of persuasion and, thus, insufficient to establish that the defendant was induced to commit the crime. Entrapment was not established. *Id*. at 42-43.

This historical recital establishes that the trial court correctly concluded here that the evidence of inducement was insufficient to justify an entrapment instruction. Trial and appellate courts have always "weighed" the sufficiency of the evidence to support an affirmative defense instruction—if it is not legally sufficient to constitute inducement, no instruction is proper even if there is some evidence of an "inducement." *Id*. at 43. In

each and every one of the recited cases, the defense failed to produce sufficient evidence to support the defense theory. In every one of those cases, including *Galisia*, the appellate court found the evidence insufficient to support an entrapment instruction. The majority's new standard is inconsistent with the case law.

Mr. Arbogast argues that the inducement was the possibility of a future sexual encounter with "Brandi" if he first became a sexual mentor to her children. This "inducement" should be rejected as a lawful justification for a sexual encounter with children. However, even that alleged inducement does not suffice since, at least five times by the majority's count, the detective texted that "Brandi" would not be sexually involved with the defendant.[4] The alleged inducement was removed from this case long before Mr. Arbogast got in his car to drive to Brandi's apartment.

To prove entrapment, a defendant must establish both that he was induced to commit the crime and also that he was not predisposed to commit it. RCW 9A.16.070; *Smith*, 101 Wn.2d at 42. In addition to showing the lack of predisposition, a defendant must show the existence of an unfair or improper inducement.[5] *Smith*, 101 Wn.2d at 43. It is this last proposition that sinks this appeal. "Normal" persuasion is simply the

[4] *See* majority at 27, fn.11 (citing Ex. 3).

[5] The example cited by *Smith* was *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958). In *Sherman*, the police informant had induced the defendant to return to drug usage, an action that amounted to entrapment. 101 Wn.2d at 43.

inducement used to obtain the defendant's participation in the scheme. In the above-noted cases, "normal" persuasion has included repeated requests (*i.e.*, not taking no for an answer) and appeals to sympathy. Only if there is something unlawful or improper about the inducement does it rise to the level of entrapping behavior. *Id.* Offering a future consensual sexual encounter did not amount to an improper inducement to commit a crime.

The trial court correctly concluded that Mr. Arbogast did not have any evidence of some improper inducement to commit the crime. The officers merely afforded him the opportunity to do so. He was not entitled to an entrapment instruction. There was no error.

Harmlessness. It is fundamentally inconsistent to say both "I didn't do it" and "the government made me do it." While taking inconsistent positions does not mean that a defendant is not entitled to a defense supported by the evidence, it does suggest that any error can be harmless. *State v. Frost*, 160 Wn.2d 765, 771, 161 P.3d 361 (2007). That is the situation here.

I agree that once he had testified to set a foundation for putting his reputation for sexual morality in question, Mr. Arbogast's evidence of lack of predisposition should

have been admitted at trial.[6] As noted by the majority, there is a distinction between admitting the actions and admitting liability for those actions. *Id*. at 776. The trial court erred by excluding the evidence of lack of predisposition.

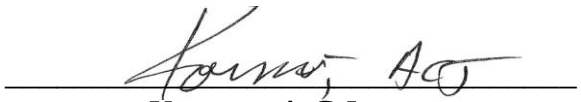
Nonetheless, this error was harmless for two distinct reasons. First, as just discussed, it was harmless because Mr. Arbogast did not bear his burden of proving an unlawful inducement. Second, even had he been entitled to an entrapment instruction, the error was harmless because entrapment was a weaker defense that largely duplicated his primary defense of lack of criminal intent. Indeed, his own testimony that he was present to meet the mother rather than the children undercut any claim that he was entrapped to committing a crime. Entrapment was an inferior defense and pursuing that course would only have undercut Mr. Arbogast's credibility to the ruin of his primary defense. When credibility is critical, inconsistent defenses are a poor strategy.

The defense of lack of criminal intent was the appropriate approach for the jury since it allowed Mr. Arbogast to show his apparent naivety before the jury to argue that he was not a child abuser. If the jury did not believe his primary story, as they apparently did not, an entrapment argument would not have done him any good since his credibility

[6] Why anyone would want to put this type of evidence in front of a jury is a question I cannot answer. A person who has a "reputation" has one because others have been talking about him in their community. ER 608; *State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993). Every time I have seen this evidence admitted at trial, the result has been devastating cross-examination of the reputation witnesses concerning why they gossiped about another person's reputation for sexual morality. Neither the witnesses nor the proponent came out looking very good.

was key to either defense.[7] The exclusion of the entrapment theory was absolutely harmless here. *Frost*, 160 Wn.2d at 782-83.

I respectfully dissent.



Korsmo, A.C.J.

[7] If there is any good to come from this appeal, perhaps it will be in the parties finding new incentive to settle this case.

APPENDIX B

Exhibit 1, Copy of Craigslist Ad

CL tri-cities, WA > personals > casual encounters

reply prohibited [!] Posted 16 minutes ago print

☆ Mommy likes to watch - young family fun - 420 friendly - w4m (RichSland)

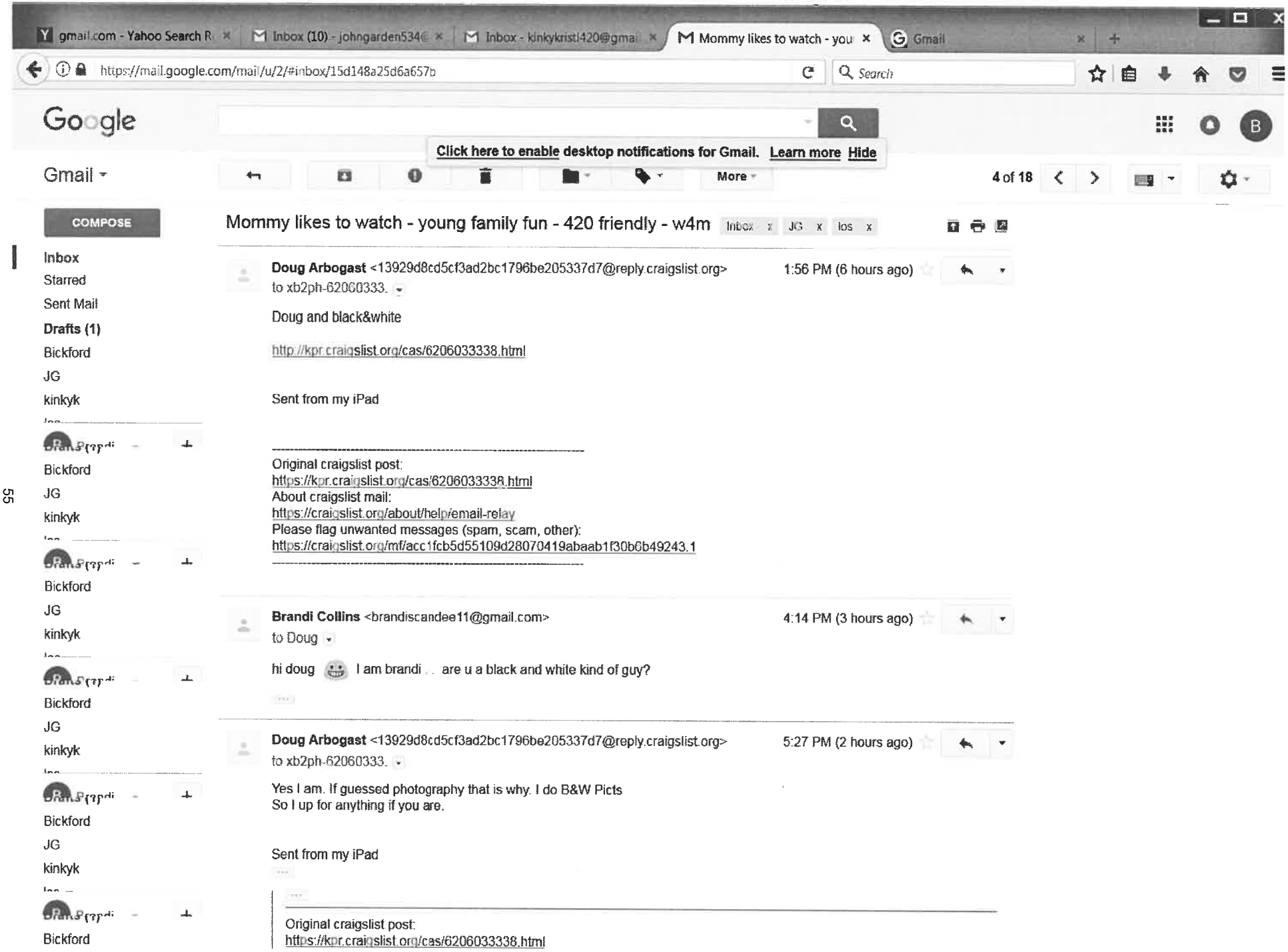
Mommy luvs to watch family fun time. Looking for that special someone to play with. 100% I know
this is a long shot but I have been looking for this for a long item and haven't had any luck. looking for something real and taboo. If this is still up then I am still looking. send me your name and your favorite color so I know you are not a bot. i like to watch ddlg daddy/dau, mommy/dau mommy/son.

- do NOT contact me with unsolicited services or offers

post id: 6206033338 posted: 16 minutes ago email to friend best of

APPENDIX C

Exhibit 2, Gmail messages


gmail.com - Yahoo Search R
Inbox (10) - johngarden534@
Inbox - kinkykristl420@gmai
Mommy likes to watch - you
Gmail
https://mail.google.com/mail/u/2/#inbox/15d148a25d6a657b
Search
Google
Click here to enable desktop notifications for Gmail. Learn more Hide
Gmail
More
4 of 18
COMPOSE
Inbox
Starred
Sent Mail
Drafts (1)
Bickford
JG
kinkyk
Mommy likes to watch - young family fun - 420 friendly - w4m
Inbox x
JG x
los x
Doug Arbogast <13929d8cd5cf3ad2bc1796be205337d7@reply.craigslist.org>
1:56 PM (6 hours ago)
to xb2ph-62060333.
Doug and black&white
http://kpr.craigslist.org/cas/6206033338.html
Sent from my iPad
Original craigslist post:
https://kpr.craigslist.org/cas/6206033338.html
About craigslist mail:
https://craigslist.org/about/help/email-relay
Please flag unwanted messages (spam, scam, other):
https://craigslist.org/mf/acc1fcb5d55109d28070419abaab1f30b0b49243.1
Brandi Collins <brandiscandee11@gmail.com>
4:14 PM (3 hours ago)
to Doug
hi doug I am brandi . . are u a black and white kind of guy?
Doug Arbogast <13929d8cd5cf3ad2bc1796be205337d7@reply.craigslist.org>
5:27 PM (2 hours ago)
to xb2ph-62060333.
Yes I am. If guessed photography that is why. I do B&W Picts
So I up for anything if you are.
Sent from my iPad
Original craigslist post:
https://kpr.craigslist.org/cas/6206033338.html

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About craigslist mail:
https://craigslist.org/about/help/email-relay
Please flag unwanted messages (spam, scam, other):
https://craigslist.org/mf/aa92ee033bc091d7d92c4c40b83aee987c1491b1.143

Original craigslist post:
https://kpr.craigslist.org/cas/6206033338.html
About craigslist mail:
https://craigslist.org/about/help/email-relay
Please flag unwanted messages (spam, scam, other):
https://craigslist.org/mf/2772bdf2a6acf4f283e1453ca85e01d8927fecb5.1

Brandi Collins <brandiscandee11@gmail.com> 5:29 PM (2 hours ago)
to Doug

Lets talk and see if you are interested in my situation. would u mind texting me your name DOUG to 5096202098 so I know its u....i really would rather text than email.

Doug Arbogast <13929d8cd5cf3ad2bc1796be205337d7@reply.craigslist.org> 5:49 PM (2 hours ago)
to xb2ph-62060333.

Ok, give me a few to get back at you in text mode

Sent from my iPad

https://craigslist.org/mf/23e510001c970d12bb054cb59b55ab15cf936d5a.179

Original craigslist post:
https://kpr.craigslist.org/cas/6206033338.html
About craigslist mail:
https://craigslist.org/about/help/email-relay
Please flag unwanted messages (spam, scam, other):
https://craigslist.org/mf/fcf09257b1b6c03103194057b78ab753933df622.1

Brandi Collins <brandiscandee11@gmail.com> 5:54 PM (2 hours ago)
to Doug

I need you to be honest about what you want, that is best and makes sure we all get what we want. My girl is 11 and my boy is 13. She is not totally active, but still likes to play and is very ready and mature. My son is 13 and is very active. I'm single and looking for some one that is open and free to new ideas. If this fits you then lets talk and if it works out we can meet up and have some fun.

Click here to Reply or Forward

APPENDIX D

Exhibit 3, Text messages between defendant and "Brandi"

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	05:54:03 PM PDT	509-547-8758	SMS	Incoming	Hi. I'm Doug. What's happening ?		2017-07-05_17-54-03_PDT.txt	
2017/07/05	06:00:46 PM PDT	509-547-8758	SMS	Outgoing	thank u so much better to text		2017-07-05_18-00-46_PDT.txt	
2017/07/05	06:01:18 PM PDT	509-547-8758	SMS	Outgoing	did you read my last email. i dont want to waste our time if this isnt for you. i really wnt to find the match		2017-07-05_18-01-18_PDT.txt	
2017/07/05	06:07:02 PM PDT	509-547-8758	SMS	Incoming	This really is me. I do B&W Picts if this helps		2017-07-05_18-07-02_PDT.txt	
2017/07/05	06:08:22 PM PDT	509-547-8758	SMS	Outgoing	ok are you good with my kids ages?		2017-07-05_18-08-22_PDT.txt	
2017/07/05	06:09:01 PM PDT	509-547-8758	SMS	Incoming	What are the ages		2017-07-05_18-09-01_PDT.txt	
2017/07/05	06:11:09 PM PDT	509-547-8758	SMS	Outgoing	thats why i asked if you read the last email i sent. ...its in the email. boy is 13 and my precious baby girl is 11		2017-07-05_18-11-09_PDT.txt	
2017/07/05	06:12:58 PM PDT	509-547-8758	SMS	Incoming	Ok sorry I missed it. All the replies on top of each other.		2017-07-05_18-12-58_PDT.txt	
2017/07/05	06:15:03 PM PDT	509-547-8758	SMS	Outgoing	i get it...that is why i hate the emails i like texting for that reason		2017-07-05_18-15-03_PDT.txt	
2017/07/05	06:17:08 PM PDT	509-547-8758	SMS	Incoming	I agree. So tell me more about yourself		2017-07-05_18-17-08_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	06:33:02 PM PDT	509-547-8758	SMS	Outgoing	i was rasied very close to my father. he started sleeping with me when i was young...at first i was scared but really enjoyued it. he was so gentle and loving. my mom knew so it made our home open. i miss those days. i want my kids to expereince the same closeness plus they need a techer to help them with sex when they get older		2017-07-05_18-33-02_PDT.txt	
2017/07/05	06:33:59 PM PDT	509-547-8758	SMS	Outgoing	i have to be honest. i lost my attraction to men a while back. i cant get enough of young boys about my sons age./ their innocense is amazingly a turn on for me		2017-07-05_18-33-59_PDT.txt	
2017/07/05	06:46:54 PM PDT	509-547-8758	SMS	Incoming	Ok Brandi, I am probably a we bit older and know a few things. I can be easy and exploring into everything you might desire. So if you want to try someone older, game on. I d have most of my hair.		2017-07-05_18-46-54_PDT.txt	
2017/07/05	06:57:37 PM PDT	509-547-8758	SMS	Incoming	So what would you like me to do to help?		2017-07-05_18-57-37_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	07:02:57 PM PDT	509-547-8758	SMS	Outgoing	we had a very good man in my kids life for a year or so but lost him to a move becasue of military. i am looking to fill his role in my kids lives. he was bi and very gentle witht hem. taught them oral and orther skills. its so hard to find the right guy. i have to be so careful and so do you. i am not interested in men especailly older. sorry my secrete is i am into boys my sons age ... i love their innocense. can you be the daddy my two kids need??		2017-07-05_19-02-57_PDT.txt	
2017/07/05	07:15:42 PM PDT	509-547-8758	SMS	Incoming	Well sorry to hear that. I just read that missed mail. Never have done that. I just wanted to be with mom. Don't know if I could help do kids. It's really up to you		2017-07-05_19-15-42_PDT.txt	
2017/07/05	07:18:04 PM PDT	509-547-8758	SMS	Outgoing	thanks for not wasting our time. I am not looking for me. I am looking for someone to be with my kids. good luck with what it is you seek		2017-07-05_19-18-04_PDT.txt	
2017/07/05	07:19:25 PM PDT	509-547-8758	SMS	Incoming	I can be good with them. Just never thought about that way		2017-07-05_19-19-25_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	07:20:45 PM PDT	509-547-8758	SMS	Outgoing	do you have an attraction to children. i am not looking for a friend. i can find them anywhere. i am looking for their love trainers to give them expereience		2017-07-05_19-20-45_PDT.txt	
2017/07/05	07:29:22 PM PDT	509-547-8758	SMS	Incoming	I have not tried young kids. I do look at young girls, not so much boys. Would like to try a young lady once.		2017-07-05_19-29-22_PDT.txt	
2017/07/05	07:30:57 PM PDT	509-547-8758	SMS	Outgoing	could you be gentle with my princess or is this not for you?		2017-07-05_19-30-57_PDT.txt	
2017/07/05	07:32:18 PM PDT	509-547-8758	SMS	Incoming	I would be gentle of course. Has she had any teaching at all?		2017-07-05_19-32-18_PDT.txt	
2017/07/05	07:37:15 PM PDT	509-547-8758	SMS	Outgoing	yes we had a very good man taht was with both my son and daughter for almost half a year. he was married and in military. he undestood the lifestyle and was the fatehr figure they needed and like i had. he left because of the military and been looking ever since		2017-07-05_19-37-15_PDT.txt	
2017/07/05	07:41:27 PM PDT	509-547-8758	SMS	Incoming	Well I am married. Wouldn't be able to spend as much time that I think would be necessary for this training. The thought would be nice to see what would happen		2017-07-05_19-41-27_PDT.txt	
2017/07/05	07:49:06 PM PDT	509-547-8758	SMS	Incoming	I assume kids are in school, would you like to meet publicly for a coffee? Could discuss more from there		2017-07-05_19-49-06_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	07:56:35 PM PDT	509-547-8758	SMS	Outgoing	I am not looking for someone to live with us. come and go when they want. the last guy was married too.		2017-07-05_19-56-35_PDT.txt	
2017/07/05	07:57:06 PM PDT	509-547-8758	SMS	Outgoing	i homeschool my kids. it keeps our secrets and gives me the control.		2017-07-05_19-57-06_PDT.txt	
2017/07/05	07:58:14 PM PDT	509-547-8758	SMS	Incoming	Ok. And my secret as well if chosen		2017-07-05_19-58-14_PDT.txt	
2017/07/05	08:06:00 PM PDT	509-547-8758	SMS	Outgoing	can i get one of your black and white photos of yourself holding up 3 fingers? i want to see what you look like and make sure you are who u say		2017-07-05_20-06-00_PDT.txt	
2017/07/05	08:09:28 PM PDT	509-547-8758	SMS	Incoming	Me		2017-07-05_20-09-28_PDT.txt	
2017/07/05	08:09:31 PM PDT	509-547-8758	MMS	Incoming	Ok		2017-07-05_20-09-31_PDT_1.jpg	
2017/07/05	08:09:48 PM PDT	509-547-8758	SMS	Incoming	How about some from you?		2017-07-05_20-09-48_PDT.txt	
2017/07/05	08:13:18 PM PDT	509-547-8758	SMS	Outgoing	nice B & W pic i can show the kids if you would like and are serious about this		2017-07-05_20-13-18_PDT.txt	
2017/07/05	08:14:00 PM PDT	509-547-8758	SMS	Incoming	Go for it.		2017-07-05_20-14-00_PDT.txt	
2017/07/05	08:14:43 PM PDT	509-547-8758	MMS	Outgoing	he is mine...its a good hair day		2017-07-05_20-14-43_PDT_1.jpg	
2017/07/05	08:16:57 PM PDT	509-547-8758	SMS	Incoming	Ok. Yes good day. You sure you don't need some talc?		2017-07-05_20-16-57_PDT.txt	
2017/07/05	08:18:53 PM PDT	509-547-8758	SMS	Outgoing	talc???? what is that		2017-07-05_20-18-53_PDT.txt	
2017/07/05	08:20:02 PM PDT	509-547-8758	SMS	Incoming	Sorry. Fat fingered the letters. TLC		2017-07-05_20-20-02_PDT.txt	
2017/07/05	08:21:35 PM PDT	509-547-8758	SMS	Outgoing	i could get invloved with you and jake after a few good sessions of you two but i am not into it and dont want to take away from my kids expereince		2017-07-05_20-21-35_PDT.txt	
2017/07/05	08:22:26 PM PDT	509-547-8758	SMS	Outgoing	change my mind about us hookiing up?		2017-07-05_20-22-26_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	08:23:23 PM PDT	509-547-8758	SMS	Outgoing	yes u r but i dont think you could satisfy my kids nor that you want to sexually		2017-07-05_20-23-23_PDT.txt	
2017/07/05	08:23:47 PM PDT	509-547-8758	SMS	Incoming	Ok you mean I need to groom the boy alone? What about your princess		2017-07-05_20-23-47_PDT.txt	
2017/07/05	08:24:12 PM PDT	509-547-8758	SMS	Incoming	Like I say. Never have done kids before		2017-07-05_20-24-12_PDT.txt	
2017/07/05	08:26:33 PM PDT	509-547-8758	SMS	Incoming	How active are they? Are they like needing a regular meeting a couple times a week?		2017-07-05_20-26-33_PDT.txt	
2017/07/05	08:29:16 PM PDT	509-547-8758	SMS	Outgoing	oh no anna needs her time to. she is very curious and is in the prime time to learn i cant force you to do this nor do i want to.		2017-07-05_20-29-16_PDT.txt	
2017/07/05	08:29:49 PM PDT	509-547-8758	SMS	Outgoing	optimal couple times a week....play dates😆		2017-07-05_20-29-49_PDT.txt	
2017/07/05	08:31:00 PM PDT	509-547-8758	SMS	Incoming	You know, we should meet and try it out. Both at the same time or separate		2017-07-05_20-31-00_PDT.txt	
2017/07/05	08:33:33 PM PDT	509-547-8758	SMS	Outgoing	up to you but i have rules that must be followed		2017-07-05_20-33-33_PDT.txt	
2017/07/05	08:34:09 PM PDT	509-547-8758	SMS	Incoming	Tell me the rules then		2017-07-05_20-34-09_PDT.txt	
2017/07/05	08:36:34 PM PDT	509-547-8758	SMS	Outgoing	no pain or anal condoms are a must no prego kid you must stop when if i say so you have to come to our place and when you come in we all get naked cops dont get naked and that way we can rule that out R U ok with them		2017-07-05_20-36-34_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	08:39:25 PM PDT	509-547-8758	SMS	Incoming	Yes. No prego cause I shoot blanks. Never done anal so no worry. Just like doing oral along with regular sex		2017-07-05_20-39-25_PDT.txt	
2017/07/05	08:41:29 PM PDT	509-547-8758	SMS	Outgoing	but you have to wear condoms if going to penatrate anna or jake. there are no exceptions. lube is a must for her too		2017-07-05_20-41-29_PDT.txt	
2017/07/05	08:41:53 PM PDT	509-547-8758	SMS	Outgoing	how big are u		2017-07-05_20-41-53_PDT.txt	
2017/07/05	08:44:52 PM PDT	509-547-8758	SMS	Incoming	Condoms it is. I don't have them nor lube been a very long while since I have even seen or touched a bare body. Probably won't last but 15 seconds		2017-07-05_20-44-52_PDT.txt	
2017/07/05	08:45:45 PM PDT	509-547-8758	SMS	Incoming	And I am about average. Nothing big		2017-07-05_20-45-45_PDT.txt	
2017/07/05	08:46:38 PM PDT	509-547-8758	SMS	Outgoing	thats funny....anna is good even at her age and could make that happen. good i dont want a large penis entering her		2017-07-05_20-46-38_PDT.txt	
2017/07/05	08:47:04 PM PDT	509-547-8758	SMS	Incoming	No worry there		2017-07-05_20-47-04_PDT.txt	
2017/07/05	08:48:08 PM PDT	509-547-8758	SMS	Outgoing	do you want to see a pic of us....you seem legit and ok to trust.		2017-07-05_20-48-08_PDT.txt	
2017/07/05	08:48:30 PM PDT	509-547-8758	SMS	Incoming	Yes. Send a photo		2017-07-05_20-48-30_PDT.txt	
2017/07/05	08:49:01 PM PDT	509-547-8758	SMS	Outgoing	give me a sec i will get them		2017-07-05_20-49-01_PDT.txt	
2017/07/05	08:49:09 PM PDT	509-547-8758	SMS	Incoming	K		2017-07-05_20-49-09_PDT.txt	
2017/07/05	08:52:09 PM PDT	509-547-8758	MMS	Outgoing			2017-07-05_20-52-09_PDT_1.jpg	
2017/07/05	08:53:32 PM PDT	509-547-8758	SMS	Outgoing	thats my whole world. such good kids		2017-07-05_20-53-32_PDT.txt	
2017/07/05	08:53:57 PM PDT	509-547-8758	SMS	Incoming	Ok Looking good'		2017-07-05_20-53-57_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	08:54:23 PM PDT	509-547-8758	SMS	Incoming	I'm in if you want an old guy		2017-07-05_20-54-23_PDT.txt	
2017/07/05	08:55:36 PM PDT	509-547-8758	SMS	Outgoing	i have to be clear i am not involved...so when you say "you" i dont want you to be disappointed and especially dont want my kids disapponted because u dont want them		2017-07-05_20-55-36_PDT.txt	
2017/07/05	08:57:31 PM PDT	509-547-8758	SMS	Incoming	Ok. I would try for mo disappoint. I have a lot to learn as well		2017-07-05_20-57-31_PDT.txt	
2017/07/05	08:58:02 PM PDT	509-547-8758	SMS	Outgoing	where do u live		2017-07-05_20-58-02_PDT.txt	
2017/07/05	08:58:57 PM PDT	509-547-8758	SMS	Incoming	Pasco		2017-07-05_20-58-57_PDT.txt	
2017/07/05	09:00:05 PM PDT	509-547-8758	SMS	Outgoing	when can we make this happen. the sooner the more it makes me less cautious its not a set up		2017-07-05_21-00-05_PDT.txt	
2017/07/05	09:04:22 PM PDT	509-547-8758	SMS	Incoming	Ok. I'm not setting you up cause I just being cautious to. Tell me times suited for you. I have to be discreet and time things just right. Sometimes mornings work for me. Then of course getting stuff. Never done it before		2017-07-05_21-04-22_PDT.txt	
2017/07/05	09:06:18 PM PDT	509-547-8758	SMS	Outgoing	we are flexable. I clean houses for work and can adjust my schedule. we could do it tonight it you would like 15 seconds of fun it sounds like u have more problems. pick a time		2017-07-05_21-06-18_PDT.txt	
2017/07/05	09:08:48 PM PDT	509-547-8758	SMS	Incoming	You are right. I don't have the required stuff. So we would have to flexible for tonight		2017-07-05_21-08-48_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	09:10:03 PM PDT	509-547-8758	SMS	Incoming	Where r u?		2017-07-05_21-10-03_PDT.txt	
2017/07/05	09:11:20 PM PDT	509-547-8758	SMS	Outgoing	kind of new to the area....liv in richland by the 240 bypass.		2017-07-05_21-11-20_PDT.txt	
2017/07/05	09:11:56 PM PDT	509-547-8758	SMS	Outgoing	what did you have in mind for play time tonight? what would u like		2017-07-05_21-11-56_PDT.txt	
2017/07/05	09:14:20 PM PDT	509-547-8758	SMS	Incoming	I'm easy for it. Just get to know one another. Are good with it. Send address		2017-07-05_21-14-20_PDT.txt	
2017/07/05	09:16:32 PM PDT	509-547-8758	SMS	Outgoing	can you stop and get condoms and lube. i dont want u to be unprepared if you need them. i have to prep the kids for what it is you want oral, hand job, penatration, kissing. we r night owls so time is good		2017-07-05_21-16-32_PDT.txt	
2017/07/05	09:19:42 PM PDT	509-547-8758	SMS	Incoming	Like I said have not done this before. Could do almost anything without penetration.		2017-07-05_21-19-42_PDT.txt	
2017/07/05	09:21:40 PM PDT	509-547-8758	SMS	Outgoing	are u interested in both anna and jake? same time or separate		2017-07-05_21-21-40_PDT.txt	
2017/07/05	09:22:34 PM PDT	509-547-8758	SMS	Incoming	Anna first		2017-07-05_21-22-34_PDT.txt	
2017/07/05	09:23:10 PM PDT	509-547-8758	SMS	Incoming	I'm leaving now so send address		2017-07-05_21-23-10_PDT.txt	
2017/07/05	09:23:23 PM PDT	509-547-8758	SMS	Outgoing	ok separate is best. i will have to watch to make sure all is		2017-07-05_21-23-23_PDT.txt	
2017/07/05	09:25:09 PM PDT	509-547-8758	SMS	Incoming	K		2017-07-05_21-25-09_PDT.txt	
2017/07/05	09:25:17 PM PDT	509-547-8758	SMS	Outgoing	do you want to start with touching and move to oral or what. help me.....i want to tell anna. do you want her dressed in anything specific		2017-07-05_21-25-17_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	09:26:18 PM PDT	509-547-8758	SMS	Incoming	Just under things touching then to oral		2017-07-05_21-26-18_PDT.txt	
2017/07/05	09:27:15 PM PDT	509-547-8758	SMS	Outgoing	you giving or them giving oral or both??		2017-07-05_21-27-15_PDT.txt	
2017/07/05	09:28:14 PM PDT	509-547-8758	SMS	Incoming	Both		2017-07-05_21-28-14_PDT.txt	
2017/07/05	09:29:12 PM PDT	509-547-8758	SMS	Incoming	Ok I'm driving. Address please. Can't look at same time		2017-07-05_21-29-12_PDT.txt	
2017/07/05	09:29:33 PM PDT	509-547-8758	SMS	Outgoing	ok...give me 10-15 minutes to prep them and shower anna. i am excited you want to see them. i hope this turns out to be what i am looking for.		2017-07-05_21-29-33_PDT.txt	
2017/07/05	09:29:56 PM PDT	509-547-8758	SMS	Incoming	Ok		2017-07-05_21-29-56_PDT.txt	
2017/07/05	09:30:54 PM PDT	509-547-8758	SMS	Incoming	On the road		2017-07-05_21-30-54_PDT.txt	
2017/07/05	09:41:22 PM PDT	509-547-8758	SMS	Outgoing	what clothes u didnt say to put them in. sorry hurrying		2017-07-05_21-41-22_PDT.txt	
2017/07/05	09:43:07 PM PDT	509-547-8758	SMS	Incoming	Under clothes is good		2017-07-05_21-43-07_PDT.txt	
2017/07/05	09:43:48 PM PDT	509-547-8758	SMS	Incoming	I'm in town. Just need directions		2017-07-05_21-43-48_PDT.txt	
2017/07/05	09:50:24 PM PDT	509-547-8758	SMS	Outgoing	you have to do one more thing there is a car wash next to our place i have to google the name and address but go there and take a selfie with it in the background holding 3 fingers and send it to me and i will give u my addrss.		2017-07-05_21-50-24_PDT.txt	
2017/07/05	09:50:51 PM PDT	509-547-8758	SMS	Incoming	Ok		2017-07-05_21-50-51_PDT.txt	
2017/07/05	09:51:33 PM PDT	509-547-8758	SMS	Outgoing	its callled liberty car wash 418 riverstone drive		2017-07-05_21-51-33_PDT.txt	
2017/07/05	09:51:48 PM PDT	509-547-8758	SMS	Incoming	Ok		2017-07-05_21-51-48_PDT.txt	

Detail for 509-620-2098

Date	Time	Number	Type	Direction	Content	Min.	File Name	MD5 Hash
2017/07/05	09:52:29 PM PDT	509-547-8758	SMS	Outgoing	wow the kids are freaking bouncing around....anna is singing. u will like her underwear😊		2017-07-05_21-52-29_PDT.txt	
2017/07/05	09:59:06 PM PDT	509-547-8758	MMS	Incoming	Excited		2017-07-05_21-59-06_PDT_1.jpg	
2017/07/05	10:00:10 PM PDT	509-547-8758	SMS	Outgoing	thanks hun come on over 2513 duportail st E-235 at the mosiac on the river apartment down the street. this will be fun		2017-07-05_22-00-10_PDT.txt	
2017/07/05	10:04:28 PM PDT	509-547-8758	SMS	Incoming	Ok Clue.		2017-07-05_22-04-28_PDT.txt	
2017/07/05	10:04:51 PM PDT	509-547-8758	SMS	Outgoing	u lost....ha ha		2017-07-05_22-04-51_PDT.txt	
2017/07/05	10:04:59 PM PDT	509-547-8758	SMS	Incoming	Yup		2017-07-05_22-04-59_PDT.txt	
2017/07/05	10:05:40 PM PDT	509-547-8758	SMS	Outgoing	it the new aparetments with different colors on the river. you have to drive past older apartments. i dont know where u r		2017-07-05_22-05-40_PDT.txt	
2017/07/05	10:06:55 PM PDT	509-547-8758	SMS	Incoming	Ok went end and turned left		2017-07-05_22-06-55_PDT.txt	
2017/07/05	10:08:33 PM PDT	509-547-8758	SMS	Outgoing	take your first left after the intersection and drive straight down until get to new apartmets. my unit is close to river by pool		2017-07-05_22-08-33_PDT.txt	
2017/07/05	10:13:36 PM PDT	509-547-8758	SMS	Outgoing	r u still lost		2017-07-05_22-13-36_PDT.txt	
2017/07/05	10:13:38 PM PDT	509-547-8758	SMS	Incoming	At pool		2017-07-05_22-13-38_PDT.txt	
2017/07/05	10:13:53 PM PDT	509-547-8758	SMS	Incoming	Need to park		2017-07-05_22-13-53_PDT.txt	
2017/07/05	10:13:54 PM PDT	509-547-8758	SMS	Outgoing	come on up		2017-07-05_22-13-54_PDT.txt	
2017/07/05	10:18:32 PM PDT	509-547-8758	SMS	Outgoing	test		2017-07-05_22-18-32_PDT.txt	
2017/07/05	10:18:50 PM PDT	509-547-8758	SMS	Outgoing	test		2017-07-05_22-18-50_PDT.txt	

APPENDIX E

State v. Wright, 81834-1-I, 2020 WL 6557814
(Wash. Ct. App. Nov. 9, 2020)

2020 WL 6557814
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,

v.

Ezra Danilo WRIGHT, Appellant.

No. 81834-1-I
|
11/9/2020

Opinion

SMITH, J.

***1** Ezra Wright appeals his conviction for attempted rape of a child after he was arrested in a sting operation conducted by the Missing and Exploited Children's Task Force (MECTF). He contends that the trial court erred by declining to instruct the jury on entrapment and that the government engaged in such outrageous conduct that due process barred his conviction. In a statement of additional grounds (SAG), he also contends that (1) the trial court abused its discretion by revoking Wright's access to social media as part of the felony judgment and sentence and (2) MECTF's sting operation used fictional children to cause the imposition of an unfairly long sentence.

We conclude that Wright did not present sufficient evidence to require an entrapment instruction and that the State's conduct did not violate due process. Furthermore, we conclude that the facts linking Wright's crime to social media usage are sufficient to permit the restriction of social media and that the fact that there are only fictional victims does not require a lighter sentence under the statutory scheme. Therefore, we affirm.

FACTS

In September 2016, MECTF posted an advertisement in the Craigslist casual encounters section entitled "Family Play Time!?!? – w4m."[1] 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."

Wright, a 20-year-old soldier stationed at Joint Base Lewis-McChord, responded to the ad, saying he was interested and asking if they could speak more. Krista Kleinfelder, a member of MECTF posing as "Hannah Jacobs," responded. She wrote, "I'm not interested in RP,[2] only someone serious. [I]'m a single mother of three young kids 13, 11, 6[ ] and looking for someone to teach my kids. ... this is taboo and not for everyone." She included a phone number that Wright could text her at if he was "serious."

At 1:19 p.m. on September 9, Wright texted Kleinfelder,[3] and the two had the following exchange:

[Wright:] I'm open to whatever

[Wright:] It depends on what you want out of this

[Kleinfelder:] Did you have experience with younger kids?

[Wright:] How much experience do you need? And what exactly would I do?

[Kleinfelder:] I just want someone you knows how to make it fun for my girls without them experiencing pain

[Wright:] What do you want me to do with them?

[Kleinfelder:] I'd like to watch someone have sex with them.

[Wright:] Can you send a picture of them?

When Kleinfelder declined to immediately send a picture of her "children," Wright responded, "What about of you." Kleinfelder sent Wright a picture of herself with two other undercover law enforcement officers posing as her children. The picture had a Snapchat puppy filter applied to it which obscured the officers' faces and made them look younger. Wright replied, "The girl is cute. Do you wanna meet up sometime?" Kleinfelder expressed doubts that he was "for real," and the two had the following exchange:

***2** [Wright:] I'm real

[Wright:] I'm military I'm not supposed to be in this

[Kleinfelder:] not sure what that means

> [Kleinfelder:] I have rules the first one is honesty and the next is directness. I don't feel I'm getting either from you. I'm trying to filter out the fakes and I think y [sic]
>
> [Wright:] This is illegal in a lot of ways
>
> [Wright:] We can meet if that makes you feel better
>
> [Kleinfelder:] me and my family live a discreet life filled with taboo. i don't think it's wrong but other do so I have to be careful
>
> [Wright:] I just don't want to get in trouble with the law
>
> [Wright:] Do you want to meet tonight?
>
> [Kleinfelder:] i understand. then this is not for you
>
> [Kleinfelder:] for what?
>
> [Wright:] Can we at least meet first?
>
> [Wright:] Because I wanna make sure you're not a cop before I agree to this

Kleinfelder asked Wright to send her a picture of him. When he did, she said, "you[']r[e] attractive. [B]ut tell me specifically what you want with me kids," and Wright responded, "I'll have sex with the girls ... [b]ut not the male." Kleinfelder asked, "How big are you[? T]he six year old is kind of small. I would also require condoms," and Wright responded, "I'm 5'5". I have condoms. Can you send me a pic of just the girls?" He subsequently asked, "Do they both consent to this? They're not gonna tell anyone else?," and Kleinfelder responded, "[T]hey [know] we don't talk about playtime[. W]e have our little secrets. They are both very excited." Wright responded, "When are you available?"

The two arranged to meet up that night. Wright indicated that he was interested in "[j]ust the 11[-year-old] for now." He asked if they could meet in Puyallup, but Kleinfelder indicated he should come to her home in Tumwater. He agreed, saying, "Ok. I hope you're not a cop." He continued to express caution, asking if she and her daughter could come outside first when he got to their home, asking if her home was isolated, and asking if they could meet somewhere neutral first. Kleinfelder answered his questions and said, "It's ok if you don't want to come here. You can walk away I'd understand." He asked if tomorrow worked for her, and she said, "[S]orry [I]'m done with these games." Wright then agreed to come to her home that night.

Around 10 p.m. on September 9, Wright arrived at the address that Kleinfelder had told him. After meeting Kleinfelder, he went inside the house and was promptly arrested by officers inside. He had a single condom in his pocket and a box of condoms in his car. He was charged with one count of attempted rape of a child in the first degree.

At trial, after the State presented the above evidence, the court heard argument about instructing the jury on entrapment. Wright contended that the fact that Kleinfelder was the one who brought up having sex with the girls, that Wright took several hours to agree to do so, and that at one point Kleinfelder was the one to reinitiate texting after a 30-minute break in the conversation all pointed toward entrapment. The court determined that there was inadequate evidence to support the entrapment instruction and did not provide it to the jury.

***3** The jury found Wright guilty. Wright appeals.

ANALYSIS

Sufficiency of Evidence for Entrapment Instruction

Wright contends that the trial court erred when it declined to instruct the jury on entrapment. We disagree.

We review a trial court's decision regarding jury instructions de novo to the extent it is based on legal conclusions and for abuse of discretion to the extent it is based on factual determinations. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). In determining whether the evidence is sufficient to support a jury instruction on an affirmative defense, we view the evidence in the light most favorable to the defendant. State v. O'Dell, 183 Wn.2d 680, 687-88, 358 P.3d 359 (2015).

The defense of entrapment is defined in RCW 9A.16.070: "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." RCW 9A.16.070(1). However, if "law enforcement officials merely afforded the actor an opportunity to commit a crime," the defendant was not entrapped. RCW 9A.16.070(2). Neither the use of a "normal amount of persuasion," nor the use of

"deception, trickery, or artifice" by the police is sufficient to establish this defense. State v. Trujillo, 75 Wn. App. 913, 918, 883 P.2d 329 (1994). Furthermore, a defendant must show more than "mere reluctance on [their] part to violate the law" to establish entrapment. Trujillo, 75 Wn. App. at 918.

A defendant is entitled to a jury instruction for an affirmative defense if sufficient evidence supports the defense. State v. Fisher, 185 Wn.2d 836, 848-49, 374 P.3d 1185 (2016). The "defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence." Trujillo, 75 Wn. App. at 917. The defendant may point to evidence presented by the State to support the instruction but may not point to an absence of evidence. Fisher, 185 Wn.2d at 851.

In this case, Wright failed to point to evidence that could permit a reasonable juror to conclude that he was entrapped. Wright may have established that the criminal act originated in the mind of law enforcement, but he did not point to any evidence that establishes that he was "lured or induced" to commit the crime. Wright did not express any reluctance to have sex with a girl he thought was 11 years old; he only expressed concern that Kleinfelder was a law enforcement officer and that he would be caught breaking the law. At most, this evidence showed only a "mere reluctance ... to violate the law." Trujillo, 75 Wn. App. at 918. And while Kleinfelder did deceive Wright, the posting of the ad and the subsequent conversation merely provided Wright with "an opportunity to commit a crime." See RCW 9A.16.070(2). Kleinfelder did not engage in more than a "normal amount of persuasion" and indeed told Wright that she would not be mad if he did not want to go forward. Trujillo, 75 Wn. App. at 918.

***4** Wright contends that Kleinfelder improperly continued to steer the conversation toward sex with the children, but the record does not support this contention. For instance, Wright asserts that when he asked to see a picture of the "mother," Kleinfelder quickly changed the topic and instead sent him a picture of the children. But the record shows that Wright's initial request was for a picture of the children, and he then continued to ask for pictures of both the children and of Kleinfelder. Kleinfelder responded to both of these requests by sending a "family photo." Ultimately, the text conversation does not show that Kleinfelder lured or induced Wright to agree to have sex with a child.

Wright compares this case to State v. Chapman, No. 50089-2-II (Wash. Ct. App. Jan. 23, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2050089-2-II%20Unpublished%20Opinion.pdf. In this unpublished case discussing a similar sting operation that led to attempted child rape charges, the court held that an entrapment instruction was required where the defendant had presented evidence that he had stopped talking to the fictional mother for two days. Chapman, No. 50089-2-II, slip op. at 5, 10-11. When the fictional mother reinitiated contact, and before he met her and her fictional daughter, he asked her to promise he could have sex with her. Chapman, No. 50089-2-II, slip op. at 5-6. Because the defendant had presented evidence that he did not otherwise intend to commit the crime, he met his burden and was entitled to the entrapment jury instruction. Chapman, No. 50089-2-II, slip op. at 10-11. Here, Wright presented no such evidence. There was no discussion of Wright having sex with the fictional mother, Wright did not express attraction to her, and he expressed a willingness to meet up based only on an agreement to have sex with the 11-year-old. While Wright contends in his brief that he wanted to meet with the mother rather than the daughter, he did not present the jury with any evidence that this was the case.

Finally, Wright contends that the court improperly weighed the proof and evaluated witness credibility. The record does not support this assertion. The court explained its reasoning that the lapse in time in the texts was not significant and that Kleinfelder's text messages discussing sex with children served to clarify her proposal rather than lure Wright. The court did not address witness credibility in its decision to deny the entrapment instruction. The court only considered whether there was sufficient evidence to support the instruction, as required by Fisher, 185 Wn.2d at 848-49. Thus, the court did not err by denying the entrapment instruction.[4]

Outrageous Government Conduct

Wright contends that the State's conduct in this case was so outrageous that due process should bar the State from seeking his conviction. We disagree.

The question of whether the State has engaged in outrageous conduct in violation of the defendant's due process rights is a question of law. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). We therefore review this question de novo. State v. Lyons, 199 Wn. App. 235, 240, 399 P.3d 557 (2017).

The principle of outrageous government conduct focuses solely on the actions of the State and bars the use of judicial processes to obtain a conviction if the State's actions are so shocking that they violate fundamental fairness. Lively, 130 Wn.2d at 19. This doctrine is not triggered by mere deceitful conduct but instead is reserved for the "most egregious circumstances." Lively, 130 Wn.2d at 20. We consider several factors to determine whether police conduct reaches this level: (1) "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity," (2) "whether the defendant's reluctance to commit a 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.' " Lively, 130 Wn.2d at 22 (quoting People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714, 719 (1978)).

***5** In State v. Solomon, we declined to reverse a trial court's determination that there was outrageous State conduct in a similar Craigslist sting. 3 Wn. App. 2d 895, 916, 419 P.3d 436 (2018). In that case, the court found that law enforcement had (1) instigated the criminal activity by not only posting an advertisement on Craigslist, but by then messaging Solomon even after he indicated he would not again contact the poster, (2) engaged in persistent solicitation by continuing to text him after he indicated that he was not interested on seven occasions, and (3) controlled the conduct by initiating most of the texting exchanges and by continuing to string him along over several days. Solomon, 3 Wn. App. 2d at 910-14. Finally, the court found that the law enforcement's conduct was repugnant to a sense of justice because the detective, acting as a 15-year-old, sent explicitly lewd messages to the defendant. Solomon, 3 Wn. App. 2d at 914-15.

The circumstances of this case do not support a finding of outrageous state conduct. The first factor, whether police instigated the crime or merely infiltrated ongoing activity, does not weigh one way or another. While law enforcement arguably instigated the activity by posting the ad and bringing up sex with children, Wright twice initiated communication by voluntarily responding to the ad and sending the first text message after learning what the fictional mother was looking for. The record indicates that MECTF posted ads using language it found from real ads on Craigslist, which indicates that there may be at least some ongoing criminal activity.

With regard to the second factor, Wright did not express a reluctance to continue, he only expressed concern about being caught by law enforcement. There was none of the persistent solicitation that was present in Solomon, and law enforcement did not have to appeal to sympathy, profit, or other motivators for Wright to agree. The second factor does not indicate that the State's conduct was outrageous.

As to the third factor, law enforcement did not control the conduct. Wright asked Kleinfelder when she was available, and she said she could meet that night. Although she specified the location, Wright agreed to travel there within several hours of their first text messages. Wright contends in his brief and in his SAG that law enforcement controlled the communication by, for instance, steering the conversation toward sex with the daughters and threatening to break off the conversation if he did not agree to meet at her home. However, the record indicates that while Kleinfelder was the first to bring up the question of sex with children, Wright was not averse to the subject, readily asked for more information, and eventually agreed. Furthermore, while law enforcement did set the time and location for the meeting, this was after Wright initially asked when Kleinfelder was available.

Finally, law enforcement did not engage in the lewd, proactive, and extended communications that characterized Solomon but instead arrested someone who fairly readily expressed an intention to have sex with an 11-year-old. Law enforcement acted with an interest in protecting the public, and their actions are not " 'repugnant to a sense of justice.' " Lively, 130 Wn.2d at 22 (quoting Isaacson, 406 N.Y.S.2d at 719). Thus, the fourth and fifth factors both indicate that this was not outrageous State conduct.

Wright makes several additional contentions in his SAG. He contends that the fifth element of outrageous conduct is met because the State conduct amounted to criminal activity. He contends MECTF was violating the Washington privacy act, chapter 9.73 RCW, by recording his conversations. Specifically, RCW 9.73.030(1) provides that it is unlawful to intercept or record any "[p]rivate communication transmitted by telephone ... or other device" with a device designed to record or transmit that communication without first obtaining the consent of all the participants in the communication. However, our Supreme Court has held that an e-mail sender consents to the recording of the e-mail, because the e-

mail user necessarily understands that their message will be recorded on the recipient's computer. State v. Townsend, 147 Wn.2d 666, 676, 57 P.3d 255 (2002). Similarly, the sender of a text message impliedly consents to the recipient's phone recording the text message. State v. Racus, 7 Wn. App. 2d 287, 299-300, 433 P.3d 830, review denied, 193 Wn.2d 1014 (2019). Thus, the State did not violate the Washington privacy act.[5]

***6** Wright also asserts that the State's conduct was outrageous because it did not comply with the Internet Crimes Against Children (ICAC) Program Operational and Investigative Standards, which he contends MECTF must comply with. Specifically, he argues that law enforcement "set the tone, pace, and subject matter of the conversation" in violation of the ICAC standards. However, even if we accept this as true, there is no indication that this would make the State's conduct criminal or otherwise so outrageous that it violated Wright's due process rights.

Finally, Wright contends that MECTF, in performing sting operations, has exceeded its statutory authority, because the statute establishing the task force discusses only cases "involving missing or exploited children." RCW 13.60.110. While the statute does not specifically mention stings such as the one that led to Wright's arrest, where no children are involved, Wright does not show that this compromises the constitutionality of his arrest, trial, or conviction. Wright cites State v. Glant, in which the court considered whether a private organization's funding of the task force caused the State's conduct to be so outrageous as to violate his due process rights. 13 Wn. App. 2d 356, 370-71, 465 P.3d 382 (2020). Wright's reliance is misplaced, both because he does not raise similar facts and because the court in Glant concluded that the State action was not improper. 13 Wn. App. 2d at 371.

We therefore conclude that the State's actions did not violate Wright's due process rights and reversal of Wright's conviction is not required.

Social Media Provision of Community Custody

Wright contends that we should strike the community custody condition that bars his access to social media websites, including "[F]acebook, [I]nstagram, [S]napchat, and chat rooms." We disagree.

We review a trial court's imposition of crime-related community conditions for abuse of discretion. State v. Cordero, 170 Wn. App. 351, 373, 284 P.3d 773 (2012). Trial courts may impose crime-related prohibitions on a defendant in community custody. Former RCW 9.94A.505(9) (2015). These prohibitions must be reasonably related to the circumstances of the crime committed by the defendant. RCW 9.94A.030(10); State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). We "review[ ] the factual bases for crime-related conditions under a 'substantial evidence' standard." State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) (quoting State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010)).

In Irwin, we upheld a restriction prohibiting the defendant from possessing or maintaining access to a computer where the defendant had previously stored child pornography images on his computer. 191 Wn. App. at 658. In this case, although Wright also used a computer as part of his crime, the restriction is much narrower. While social media is an amorphous concept, we note that Craigslist has many features similar to the forums listed in the court's order, including the ability to post text and pictures, and to invite replies to that content. Thus, it was not manifestly unreasonable to conclude that substantial evidence links social media to Wright's crime. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (A court abuses its discretion if its decision is manifestly unreasonable.).

Wright disagrees and further contends that the restriction is overly broad, because it would hinder his ability to pursue many legitimate functions on the internet and therefore infringe on his constitutional rights. However, a defendant's constitutional rights during community custody are " 'subject to the infringements authorized by the [Sentencing Reform Act of 1981, chapter 9.94A RCW].' " State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998) (quoting State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). Because the restriction reasonably relates to Wright's crime, the court did not err by imposing it.

Sentencing in Sting Sex Offense Cases With No Victims

***7** Finally, Wright contends that the prosecutor and law enforcement are abusing their power to increase punishments. He contends that law enforcement purposefully creates

younger fictional victims to increase sentences and that law enforcement eliminates the ability to request a special sex offender sentencing alternative (SSOSA) under RCW 9.94A.670.

First, other task force cases do involve fictional children of different ages, which would result in lower sentences. See, e.g., Solomon, 3 Wn. App. 2d at 899. The task force's use of younger fictional children in some cases can be understood as targeted at finding people who are willing to perpetrate more serious crimes.

As to Wright's discussion of SSOSA, this law provides that a defendant can be eligible for a sentence alternative if they meet certain factors, including: "[t]he offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime." RCW 9.94A.670(2)(e). This is the only factor that Wright did not meet, because there is no victim in this case. We have previously stated that in cases with no victims, SSOSA is not available. State v. Willhoite, 165 Wn. App. 911, 268 P.3d 994 (2012); State v. Landsiedel, 165 Wn. App. 886, 269 P.3d 347 (2012). Wright argued before the trial court that the legislature was considering cases involving actual victims when it passed this condition. While this may be the case, the law is nonetheless unambiguous. Wright's contention that the use of fictional victims is exploited to deny access to SSOSA does not acknowledge the fact that if there had been a real victim in this case, he still would not have qualified because he would not have an established relationship with her. The trial court did not err by denying Wright a SSOSA sentence.

We affirm.

WE CONCUR:

All Citations

Not Reported in Pac. Rptr., 2020 WL 6557814

Footnotes

1 "[W]4m" is an abbreviation that means women for men.
2 The detective explained RP is an abbreviation for role-playing.
3 Wright's text records indicate that while he was texting with Hannah, he was also responding to other Craigslist ads to meet up with someone.
4 Wright further contends in his statement of additional grounds (SAG) that the defendant need not admit a crime to allow the entrapment instruction. Because we affirm the denial of the entrapment instruction on other grounds, we need not address this contention.
5 Wright also appears to contend that the post was unlawful because it violates the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018). However, as Wright notes, this act was passed after the post in his case. Thus, we need not address it.

APPENDIX F

State v. Chapman, 50089-2-II, 2019 WL 325668 (Wash. Ct. App. Jan. 23, 2019)

7 Wash.App.2d 1026

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Kenneth Wesley CHAPMAN, Jr., Appellant.

No. 50089-2-II

|

Filed January 23, 2019

Appeal from Kitsap Superior Court, 15-1-01040-7, Honorable Kevin D. Hull, Judge.

Attorneys and Law Firms

Jason Brett Saunders, Gordon & Saunders PLLC, 1000 2nd Ave., Suite 3140, Seattle, WA, 98104, for Appellant.

John L. Cross, Kitsap County Prosecutor's Office, 614 Division St., Port Orchard, WA, 98366-4681, for Respondent.

UNPUBLISHED OPINION

Lee, J.

***1** Kenneth W. Chapman, Jr. appeals his convictions for attempted first degree rape of a child, attempted commercial sex abuse of a minor, and communicating with a minor for immoral purposes, arguing that the trial court erred by refusing to instruct the jury on entrapment and by accepting the State's affidavit of prejudice. In a Statement of Additional Grounds (SAG),[1] Chapman claims that the State failed to present sufficient evidence to prove intent and that the officers prematurely arrested him.

We hold that the trial court erred by refusing to instruct the jury on entrapment for the attempted first degree rape of a child and attempted commercial sex abuse of a minor charges, but that the trial court did not err by refusing to instruct the jury on entrapment for the communicating with a minor for immoral purposes charge. We also hold that Chapman has waived his challenge to the State's affidavit of prejudice and that Chapman's SAG claims fail. Accordingly, we reverse Chapman's convictions for attempted first degree rape of a child and attempted commercial sex abuse of a minor, affirm his conviction for communicating with a minor for immoral purposes, and remand for further proceedings consistent with this opinion.

FACTS

Chapman was arrested during an undercover police investigation into sexual exploitation of children on the internet. The State charged Chapman with attempted first degree rape of child and commercial sex abuse of a minor. Chapman was arraigned on September 10, 2015.

On November 4, 2015, the State filed an affidavit of prejudice against the judge who presided over Chapman's arraignment. Nothing in the record before us indicates that Chapman objected to the State's affidavit of prejudice. Although there was no hearing on the affidavit of prejudice, the judge against whom it was filed did not hear any further matters in this case.

The State filed an amended information charging Chapman with attempted first degree rape of a child, attempted commercial sex abuse of minor, and communication with a minor for immoral purposes. Chapman's jury trial began on January 19, 2017.

Before opening statements, the State moved to exclude any evidence related to an entrapment defense. At first, the trial court expressed concern about the motion being premature. Specifically, the trial court expressed concern about whether it could exclude an entrapment defense without the defendant testifying. But the State argued,

> Well, I guess the majority—I think the distinction between this case and many other cases in which entrapment occurs is the evidence is primarily already, you know, in the form of text messages. So it's not like there can be a significant difference in terms of, you know, what Mr. Chapman said versus what he didn't say.
>
> I guess the State's concern is that the defendant, knowing that he can't meet the burden of proof for entrapment to begin with, uses the entrapment defense as a way to get in otherwise inadmissible evidence under the theory that they need to show the defendant's predisposition to commit[ ] this offense.

***2** I Verbatim Report of Proceedings (VRP) at 119-20. Chapman argued two points to support his position that the officers used inducement. First, he argued there was a two-day break in communications after which officers, not Chapman, reinitiated the contact. Second, Chapman argued there was a significant difference in the interaction and tone of the communication—focused on sex with the adult woman rather than the child—after officers reinitiated contact. The trial court granted the prosecution's motion to exclude evidence related to entrapment.

Sergeant Carlos Rodriguez of the Washington State Patrol testified at trial that he was a detective with the Missing and Exploited Children's Task Force (MECTF). Part of his job is to conduct undercover online investigations to target people who commit crimes against children. Sergeant Rodriguez came into contact with Chapman when Chapman responded to an online ad that Sergeant Rodriguez had posted.

The title of the ad was " 'Close taboo family looking for fun, young.' " VRP (Jan. 30, 2017) at 285-86. The ad read,

> "I am new to area and interested in new friends. I have a very close young family that is very giving. Experience with incest is a plus. Reply if interested. No RP ... Only serious that want to meet respond. 43 F Bremerton ... Reply with ASL ... I can tell you more when you respond. No solicitations, but gifts are welcome. Two dau."

VRP (Jan. 30, 2017) at 287. Sergeant Rodriguez testified that "RP" means role play. VRP (Jan. 30, 2017) at 287-88. "ASL" means age, sex, location. VRP (Jan. 30, 2017) at 287. And "dau" means daughters. VRP (Jan. 30, 2017) at 287. Sergeant Rodriguez also testified that there was no photograph posted with the ad.

Chapman responded to the ad with an email account listing his name as James Peterson. His response stated, " 'I would love to know more info about what you're looking for. Here's my pic and number.' " VRP (Jan. 30, 2017) at 291. The response included Chapman's phone number and a picture of his penis. Sergeant Rodriguez, as his undercover persona "Shannon," responded to Chapman,

> "This is more for my close family. I can host and make sure they aren't hurt. If you are serious and want to experience what my youthful, close family has to offer, then respond back. I am very careful about who I meet, and very discreet. If you want to taste true innocence, then this is for you. Two daus, 11/7. Tell me what you want."

VRP (Jan. 30, 2017) at 292. Chapman responded, " 'Sounds fun. Tell me more. Do you have pics?' " VRP (Jan. 30, 2017) at 293. "Shannon" declined to send pictures and moved the conversation off of email and to text messaging.

"Shannon" communicated with Chapman for the next couple days attempting to arrange an encounter between Chapman and her fictional 11-year-old daughter "Brooke." Chapman repeatedly tried to get "Shannon" to send pictures or describe sex acts over text messages. "Shannon" responded by focusing on arranging the encounter with "Brooke:"

> "[Chapman], I like you, but you are like a little puppy that needs too much attention that I don't have time for. If you want to sleep with brooke then we can do that. Is that clear enough. She is ready right now ill try for tomorrow [sic].
>
> ....
>
> ... [Chapman], we are going down that road again. If you want it get your ass over here. If not then hopefully we are here tomorrow.
>
> ....
>
> ... I'm a busy lady brooke is free well not free, but she has time."

VRP (Jan. 30, 2017) at 326, 329, 331 (second alteration in original). Chapman engaged in negotiations regarding "roses" for time with "Brooke." VRP (Jan. 30, 2017) at 333-336. Sergeant Rodriguez testified that "roses" is "commonly a term used when people are exchanging money in exchange for a sex act." VRP (Jan. 30, 2017) at 332. Chapman agreed to bring " 'some Xbox games and small amount of roses.' " VRP (Jan. 30, 2017) at 335. Chapman later clarified that he would bring " '3 connect games and 50 roses.' " VRP (Jan. 30, 2017) at 335.

***3** When Chapman began discussing sending pictures again, "Shannon" accused him of not being serious about the encounter. Chapman responded, " 'If you feel like you can't respect me then you and your family can get lost good bye.' " VRP (Jan. 30, 2017) at 336. There was no communication between Chapman and "Shannon" for the next two days.

"Shannon" reinitiated the contact with Chapman. "Shannon" reinitiated the contact by stating that "Brooke" really wanted to meet with Chapman. They arranged a meeting for the next day. At one point "Shannon" texted, " 'Yo ukeep [sic] talking about [m]e, are you only interested in me.' " VRP (Jan. 30, 2017) at 344 (first alteration in original). Chapman responded,

" 'No I just want to make sure you['re] happy for starters then everyone else would just trying to figure out what you both like.' " VRP (Jan. 30, 2017) at 344. Chapman then discussed whether he had to use a condom. When "Shannon" responded, " 'I can't have a prego kid,' " Chapman responded, " 'I think it would be really hot,' " and " 'I understand well it's up to you maybe a couple of strokes raw.' " VRP (Jan. 30, 2017) at 344. "Shannon" responded, "With brooke ok, if you have papers. Im fixed so if yo uhave [sic] papers we can do that after I know she is taken care of if you do a good job." VRP (Jan. 30, 2017) at 344 (alterations in original.)

Chapman drove to a gas station near the apartment Sergeant Rodriguez used for the operation. "Shannon" asked Chapman to pick up candy and an energy drink for "Brooke." Leading up to the meeting, Chapman continued to text with "Shannon" about the upcoming sexual encounter. At one point, Chapman texted, " 'I asked you Only if you promise I can cum deep in your pussy.' " VRP (Jan. 30, 2017) at 357. "Shannon" responded, " 'Oh yeah. In mine yes if yo uhave the papers like you said. In brooke though on ly a few strokes like you said right? ?' " VRP (Jan. 30, 2017) at 357.

Sergeant Rodriguez informed the arrest team he had probable cause to arrest Chapman in the parking lot outside the apartment. The arresting officers saw in plain view candy, an energy drink, and a bottle of wine in Chapman's car.

Sergeant Rodriguez also testified that Chapman engaged in two phone calls with law enforcement officers pretending to be "Shannon" and "Brooke." The first conversation occurred before Chapman terminated contact. Chapman spoke with the detective pretending to be "Shannon" to discuss the rules of his sexual contact with "Brooke." Chapman also spoke with a trooper pretending to be "Brooke." Chapman made comments to "Brooke" about certain sex acts he wanted to perform with her. The second phone call occurred just after Chapman arrived at the apartment complex and before he was arrested. During the call, Chapman spoke with "Brooke" who attempted to get Chapman to come to that apartment. Chapman wanted "Shannon" to come meet him at the car.

Chapman testified at trial. Chapman testified that the online ad he responded to had a picture and that he responded to the ad because he was attracted to the woman in the picture. Chapman admitted that he engaged in inappropriate discussion about sex with a child:

> It was just various subjects just kind of gauging what she likes to hear, so honestly I was just telling her what she would like to hear to see if the conversation went further. So I was just kind of gauging seeing what she was talking about. It was definitely inappropriate. I own up to that. Absolutely.

***4** VRP (Feb. 1, 2017) at 618. Chapman also testified that he engaged in the conversation after "Shannon" reinitiated contact because "she started using terms like 'bae' and, you know, really started getting excited when we talked about sex between us." VRP (Feb. 1, 2017) at 623. Chapman admitted the conversation was usually redirected back to the children, but he continued the conversation because he did not know if there were any actual children or if it was just something "Shannon" liked.

Chapman further testified about the discussions regarding money and gifts, stating that "Shannon" tried to get Chapman to pay $50-$150 for the children, but he was not interested in the children, so he "wasn't going to bring that amount." VRP (Feb. 1, 2017) at 625. Instead, Chapman brought with him to his meeting with "Shannon" the $40 that he had in his car. Chapman also brought a bottle of wine, marijuana, an energy drink, and some candy. The candy was for "Shannon's" kids.

Chapman explained that when he arrived at the apartment, he tried to get "Shannon" to come down and meet him, but he was arrested in the parking lot. He testified that he was already getting ready to leave because the situation "was super weird." VRP (Feb. 1, 2017) at 631. He stated that, if "Shannon" had come down and been unattractive, he also would have just left. Chapman also stated that he never intended to have sex with an 11-year-old. Chapman went to the apartment to have sex with "Shannon" based on her promise that he could come inside her vagina.

Chapman also testified that, although he told "Shannon" on multiple occasions he was unavailable to meet her because he was working, he was actually in school and did not have a job. He testified he could have met with "Shannon" at any time but he was not interested because she did not promise to have sex with him. And he ended the initial interaction because "Shannon" did not seem interested in him.

During rebuttal testimony, Sergeant Rodriguez testified that he had contacted the website where he posted the ad and confirmed that there was no photograph posted with the original ad. Sergeant Rodriguez admitted that he did not take a screenshot of the original ad.

After testimony concluded, Chapman renewed his request for a jury instruction on entrapment. Chapman again argued that an entrapment instruction was appropriate because Sergeant Rodriguez, as his undercover persona "Shannon," was the one who reinitiated the contact and there was a greater emphasis on sex with "Shannon" after contact was reinitiated. The State argued that Chapman's argument was relevant to intent, not entrapment, and an entrapment instruction was not warranted. The trial court denied Chapman's request for a jury instruction on entrapment.

The jury found Chapman guilty of attempted first degree rape of a child, attempted commercial sexual abuse of a minor, and communicating with a minor for immoral purposes. The trial court imposed a standard range sentence of 121.5 months confinement.

Chapman appeals.

ANALYSIS

A. Entrapment

Chapman argues that the trial court erred by refusing to instruct the jury on the defense of entrapment. With regard to the attempted first degree rape of a child and attempted commercial sexual abuse of a minor charges, we agree. With regard to the communicating with a minor for immoral purposes charge, we disagree.

The defense of entrapment is codified in RCW 9A.16.070, which states,

> (1) In any prosecution for a crime, it is a defense that:
>
> ***5** (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.

Entrapment is an affirmative defense, and the defendant bears the burden of proving entrapment by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996) ("Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed.").

The use of a "normal amount of persuasion to overcome the defendant's expected resistance" is not entrapment. *State v. Trujillo*, 75 Wn. App. 913, 918, 883 P.2d 329 (1994), *review denied*, 126 Wn.2d 1008 (1995). Police may also use deception, trickery, or artifice. *Id.* And solicitations " 'made in connection with an appeal to sympathy or to friendship' does not, by itself, constitute entrapment." *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984). "In order to show entrapment, a defendant must show more than mere reluctance on his or her part to violate the law." *Trujillo*, 75 Wn. App. at 918.

To be entitled to an instruction on the defense of entrapment, "a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence." *Id.* at 917. We review a trial court's factual determination of whether a jury instruction should be given for an abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

1. Attempted First Degree Rape of a Child/Attempted Commercial Sexual Abuse of a Minor

The State has conceded that the attempted commercial sex abuse of a minor and the attempted rape of a child were not committed until Chapman drove to Kitsap County. Wash. Court of Appeals oral argument, *State v. Chapman*, No. 50089-2-II (Sept. 14, 2018), at 15 min., 27 sec. through 15 min., 37 sec. (on file with court). At trial, Chapman presented evidence that he was induced to drive to Kitsap County because of "Shannon's" promises to have sex with him. And Chapman presented evidence that he did not otherwise intend to commit the crime because, during earlier communications —without the promises of sex with "Shannon"—Chapman declined to drive to Kitsap County.[2]

Because Chapman presented evidence that shows he was improperly induced to commit a crime he did not otherwise intend to commit, Chapman met his burden to be entitled to a jury instruction on entrapment for the attempted commercial sex abuse of a minor and the attempted rape of a child charges. Therefore, the trial court abused its discretion in finding that the evidence did not support giving Chapman's proposed entrapment instruction for the attempted commercial sex abuse of a minor and the attempted rape of a child charges.

2. Communicating with a Minor for Immoral Purposes

***6** With regard to the communicating with a minor for immoral purposes charge, Chapman failed to meet his burden to show he was entitled to a jury instruction on entrapment. Chapman only identified two facts that supported his claim of entrapment. First, that Sergeant Rodriguez, as his undercover persona "Shannon," reinitiated contact with him. Second, that after contact was reestablished, "Shannon" expressed more interest in engaging in a sexual relationship with him herself. But it is not entrapment simply because a law enforcement officer or informant repeatedly solicits the criminal conduct. *See Trujillo*, 75 Wn. App. at 915-17 (holding that although police informant made numerous requests for drugs, conduct did not entitle defendant to an entrapment defense).

Here, the evidence showed that law enforcement merely provided Chapman an opportunity to commit a crime when it posted the online ad that Chapman responded to. "Shannon's" initial response to Chapman made it clear that the subject of the encounter was her daughters rather than herself. And Chapman engaged in a conversation with a trooper posing as "Brooke" regarding sexual acts *before* Chapman terminated contact. Therefore, Chapman's argument that he was entrapped when Sergeant Rodriguez reinitiated contact with him does not apply to the communicating with a minor for immoral purposes charge.

Thus, Chapman did not present sufficient evidence to permit a reasonable juror to conclude that he was entrapped on the communicating with a minor for immoral purposes charge. Therefore, Chapman was not entitled to an entrapment instruction on that charge, and the trial court did not abuse its discretion by declining to give Chapman's proposed entrapment instruction on the communicating with a minor for immoral purposes charge.

B. Affidavit of Prejudice

Chapman argues that the trial court erred by accepting the State's affidavit of prejudice because the trial court had already made a discretionary ruling in the case. We decline to consider this argument.

Our record does not show that Chapman objected to the State's affidavit of prejudice at the trial court. "The general rule is that appellate courts will not consider issues raised for the first time on appeal." *State v. Gentry*, 183 Wn.2d 749, 760, 356 P.3d 714 (2015); RAP 2.5(a). Although RAP 2.5(a)(3) provides an exception for manifest errors affecting a constitutional right, our Supreme Court has held that errors related to affidavits of prejudice under RCW 4.12.050 arise from statute and, therefore, are "not of constitutional dimension." *Gentry*, 183 Wn.2d at 760. Because the record does not show that Chapman objected to the State's affidavit of prejudice and he is not raising an issue affecting a constitutional right, we decline to consider his argument made for the first time on appeal that the trial court erred by accepting the State's affidavit of prejudice.

C. SAG

1. Sufficiency of the Evidence – Intent

Chapman asserts that the State could not prove his "true intent" because the State did not present the original version of the online ad Sergeant Rodriguez had posted. SAG at 1 (Ground 1). Because the State presented sufficient evidence to prove Chapman's intent without the original version of the ad, Chapman's claim fails.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

***7** To prove criminal attempt, the State must prove that the defendant had the specific intent to commit the attempted offense. RCW 9A.28.020(1). Therefore, for attempted first degree rape of a child, the State had to prove that Chapman had the specific intent to have sexual intercourse with another who is less than twelve years old. RCW 9A.44.073(1). And for attempted commercial sexual abuse of a minor the State had to prove that Chapman had the specific intent to solicit, offer, or request to engage in sexual conduct with a minor in return for a fee. Former RCW 9.68A.100(1)(c) (2013). A person is guilty of communicating with a minor for immoral purposes if he communicates with someone he believes to be a minor for immoral purposes. RCW 9.68A.090.

Chapman appears to claim that the original online ad would have demonstrated his intent to communicate with an adult woman for sex because the original online ad contained a picture of an adult woman. But copies of the online ad were attached to emails that were admitted at trial. And Sergeant Rodriguez testified that the online ad company confirmed the original ad did not include a picture. Although Chapman testified that he responded to an ad with a picture, this is an issue of credibility for the jury and not for us to review on appeal.

Moreover, even without the original online ad, the State presented sufficient evidence to prove Chapman's intent beyond a reasonable doubt. The State presented extensive text messages in which Chapman repeatedly made explicit statements about engaging in sex acts with the fictional 11-year-old "Brooke." And Chapman admitted that he engaged in negotiations about exchanging money and gifts for sex with "Brooke." Again, although Chapman testified that he did not intend to follow through with those statements, that is an issue of credibility for the jury to decide. Based on the jury's verdict, the jury determined that the text messages, rather than Chapman's trial testimony evidenced his true intent. We will not review the jury's credibility determinations on appeal. Therefore, Chapman's argument challenging the sufficiency of the evidence supporting intent fails.

2. Premature Arrest

Chapman also claims that his arrest was premature because a crime had not been committed yet. Because there was probable cause to support Chapman's arrest, the arrest was not premature.

" 'Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed.' " *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999) (internal quotations omitted) (quoting *O'Neill v. Dep't of Licensing*, 62 Wn. App. 112, 116-17, 813 P.2d 166 (1991)). "Probable cause is determined by considering the total facts of each case, viewed in a practical, nontechnical manner." *Gillenwater*, 96 Wn. App. at 671.

First degree rape of a child is sexual intercourse with a child under twelve years old. RCW 9A.44.073(1). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

At the time of the arrest, Chapman had engaged in several text message communications negotiating a sexual encounter with 11-year-old "Brooke." And after Chapman had agreed to obtain alcohol, marijuana, money, candy, and an energy drink to engage in the sexual encounter, he arrived at the parking lot of the apartment where he anticipated meeting "Shannon" and "Brooke." Based on the facts and circumstances known to Sergeant Rodriguez, a reasonably cautious person would believe that Chapman arrived at the apartment with the intent to have sex with an 11-year-old girl. And Chapman took several substantial steps by driving to the apartment complex and obtaining drugs, candy, and an energy drink. This provides probable cause to arrest Chapman for attempted first degree rape of a child. Because Sergeant Rodriguez had probable cause to believe Chapman had committed attempted first degree rape of a child, the arrest was not premature. Therefore, Chapman's claim fails.

***8** We reverse Chapman's conviction for attempted first degree rape of a child and attempted commercial sex abuse of a minor, affirm his conviction for communicating with a minor for immoral purposes, and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Bjorgen, P.T.J.

Maxa, C.J.

All Citations

Not Reported in Pac. Rptr., 7 Wash.App.2d 1026, 2019 WL 325668

Footnotes

1 RAP 10.10.

2 Chapman encourages us to adopt the federal standard which requires demonstrating that the defendant was predisposed to commit the crime *before* the criminal acts were committed. We decline to make such a holding and, instead, rely on the plain language of the statute defining entrapment, which requires the defendant to show he did not otherwise intend to commit the crime charged. RCW 9A.16.070.

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APPENDIX G

State v. Racus, 7 Wn. App. 2d 287, 433 P.3d 830 (2019)

7 Wash.App.2d 287
Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Darcy Dean RACUS, Appellant.

No. 49755-7-II
|
Filed January 23, 2019

Synopsis

Background: Defendant was convicted in the Superior Court, Pierce County James R. Orlando, J., of attempted first degree rape of a child and communicating with a minor for immoral purposes, and he appealed.

Holdings: The Court of Appeals, Sutton, J., held that:

[1] pre-intercept e-mail and text messages between defendant and undercover officer, posing as female parent seeking others to have sexual contact with her children, were private under Washington Privacy Act (WPA);

[2] under WPA, defendant impliedly consented to his pre-intercept e-mail and text messages to undercover officer being recorded; and

[3] probable cause existed to believe that defendant would engage in commercial sexual abuse of minor in exchange for fee, so as authorize recording of communications under WPA.

Affirmed.

West Headnotes (11)

[1] **Telecommunications** Acts Constituting Interception or Disclosure

Under Washington Privacy Act (WPA), a communication is private when parties manifest a subjective intention that it be private and that expectation is reasonable. Wash. Rev. Code Ann. § 9.73.030.

[2] **Telecommunications** Acts Constituting Interception or Disclosure

Proof of subjective intent that parties' conversation is private, pursuant to Washington Privacy Act (WPA), need not be explicit. Wash. Rev. Code Ann. § 9.73.030.

[3] **Telecommunications** Offenses and prosecutions

When analyzing alleged violations of Washington Privacy Act (WPA), courts consider (1) whether there was a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit, and (4) was done without the consent of all parties to the private communication. Wash. Rev. Code Ann. § 9.73.030.

4 Cases that cite this headnote

[4] **Criminal Law** Review De Novo

Appellate courts review alleged violations of Washington Privacy Act (WPA) de novo. Wash. Rev. Code Ann. § 9.73.030.

[5] **Searches and Seizures** Expectation of privacy

Telecommunications Wireless or mobile communications

Telecommunications Computer communications

Pre-intercept e-mail and text messages between defendant and undercover officer, posing as a female parent seeking others to have sexual contact with her children, were "private" under Washington Privacy Act (WPA) since defendant intended that communications be kept private and his expectation that they were private communications was reasonable; defendant manifested his subjective intent that text messages would remain private by not using group texting function, or indicating

in any other manner that he intended to expose his communications to anyone other than undercover officer, and defendant's expectation that these were private communications was reasonable given that defendant was only texting with officer. Wash. Rev. Code Ann. § 9.73.030.

[6] **Telecommunications** Persons concerned; consent

Under Washington Privacy Act (WPA), communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded. Wash. Rev. Code Ann. §§ 9.73.030(1)(a), 9.73.030(1)(b).

2 Cases that cite this headnote

[7] **Telecommunications** Persons concerned; consent

Under Washington Privacy Act (WPA), defendant impliedly consented to his pre-intercept e-mail and text messages to undercover officer, posing as female parent seeking others to have sexual contact with her children, being recorded; pre-intercept communications sent by defendant to officer were communications made by defendant in response to advertisement in casual encounters section of classified ads, defendant created e-mail account to respond to advertisement posted by officer, and defendant had to understand that computers were message recording devices and that his text messages with officer would be preserved and recorded on computer. Wash. Rev. Code Ann. § 9.73.030(1)(a).

2 Cases that cite this headnote

[8] **Telecommunications** Probable cause

Probable cause existed to believe that defendant would engage in commercial sexual abuse of minor in exchange for fee, so as authorize recording of communications under Washington Privacy Act (WPA) between defendant and undercover officer, posing as female parent seeking others to have sexual contact with her children; defendant responded to officer's advertisement, advertisement used a colloquialism for payment, defendant asked about payment, and defendant's communications with officer established that he was aware that officer was offering children for sex in exchange for fee and that defendant appeared interested in paying. Wash. Rev. Code Ann. §§ 9.68A.100(1)(c), 9.73.230(1)(b)(ii).

[9] **Telecommunications** Probable cause

As used in Washington Privacy Act (WPA), allowing for communications to be recorded if probable cause exists to believe that communication will involve party engaging in commercial sexual abuse of minor, "probable cause" exists when facts and circumstances are within officer's knowledge and facts and circumstances are such that officer has reasonably trustworthy information sufficient to warrant person of reasonable caution to believe that offense has been committed. Wash. Rev. Code Ann. § 9.73.230(1)(b)(ii).

3 Cases that cite this headnote

[10] **Telecommunications** Probable cause

Probable cause requires more than a bare suspicion of criminal activity, as that term is used in Washington Privacy Act (WPA), allowing for communications to be recorded if probable cause exists to believe that communication will involve party engaging in commercial sexual abuse of minor. Wash. Rev. Code Ann. § 9.73.230(1)(b)(ii).

[11] **Criminal Law** Review De Novo

Whether probable cause exists to believe that communication will involve party engaging in commercial sexual abuse of minor, so as to permit authorization of recording under Washington Privacy Act (WPA), is a legal question that appellate courts review de novo. Wash. Rev. Code Ann. § 9.73.230(1)(b)(ii).

****832** Appeal from Pierce County Superior Court, 15-1-05086-1, Honorable James R. Orlando, J.

Attorneys and Law Firms

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PART PUBLISHED OPINION

Sutton, J.

***289** ¶ 1 Darcy Dean Racus appeals his convictions for attempted first degree rape of a child and communicating with a minor for immoral purposes. Racus argues[1] ***290** that the trial court erred by denying his motion to suppress private communications that he had with an undercover Washington State Patrol (WSP) detective because he did not consent to these communications being recorded as required by the Washington Privacy Act (WPA).[2] We disagree.

¶ 2 In the published portion of the opinion, we hold that Racus's communications with the undercover detective that occurred before the authorization to record was issued (referred to as "pre-intercept communications") were private, but that Racus impliedly consented to the communications being recorded, and thus, the trial court did not err by denying the motion to suppress the pre-intercept communications.

¶ 3 In the unpublished portion of the opinion, we reject all additional arguments and hold that probable cause supported the authorization to record Racus's communications; thus, the trial court did not err by denying the motion to suppress Racus's communications with the undercover detective that occurred after the authorization to record was issued (referred to as "post-intercept communications"). We further hold that the trial court did not err by refusing to give an entrapment instruction because the evidence did not support giving the instruction. We also hold that the State presented sufficient evidence to allow the jury to find that Racus took a substantial step toward committing the crime of attempted first degree rape of a child. Lastly, we hold that because Racus did not object at trial and fails to show that any of the prosecutor's arguments were so flagrant and ill-intentioned that they could not have been cured with an instruction, he has waived his claim of prosecutorial misconduct. We affirm.

***291** ****833** FACTS

I. Background

¶ 4 On December 17, 2015, WSP Detective Sergeant Carlos Rodriguez (Det. Rodriquez) posted an advertisement on Craigslist as part of an online sting operation by the WSP Missing and Exploited Children's Task Force.The advertisement was posted in the "casual encounters" section of Craigslist. Det. Rodriguez posed as a female parent seeking others to have sexual contact with her minor children. The advertisement stated, "Looking for a close family connection - 2 dau, [ ] 1 son - w4w (Tacoma)." 4 Verbatim Report of Proceedings (VRP) at 602. The body of the advertisement stated,

> I just moved here and looking for someone to connect with my young family. Would like a woman's touch, but open to a man as well, must be discrete, no solicitations, open to presents. No RP.

4 VRP at 605.

¶ 5 Det. Rodriguez later explained at trial that "dau" means daughters and "w4w" means woman for woman. Using an anonymous e-mail address, Det. Rodriguez posed as a fictitious mother named "Kristl," who had three minor children. Det. Rodriguez's computer used Google Hangouts software to preserve the messages received by persons who responded to the advertisement.

¶ 6 On December 17, Racus answered the advertisement. He then engaged in a series of e-mails and text messages with "Kristl," asking about having sex and asking about her children. The next day, Racus reinitiated contact though another series of e-mails and then text messages.

¶ 7 On December 18 at 4:00 PM, Det. Rodriguez obtained an authorization to record communications. The intercept authorization was based on Det. Rodriguez's belief that there was probable cause to believe Racus would engage in ***292** the commercial exploitation of a minor for sex for a fee later that day when he met "Kristl" and her children. Based on the intercept authorization, Det. Rodriguez recorded all communications with Racus after December 18 at 4:00 PM, including numerous text messages and two telephone calls

related to Racus's desire to meet with the mother and her children for sex.

¶ 8 During the two telephone calls with "Kristl," Racus agreed to meet the mother and her children at their house to have sex, and then obtained the address of "Kristl's" house. After arriving at "Kristl's" house and greeting her, Racus was arrested. The State charged Racus with attempted first degree rape of a child and communicating with a minor for immoral purposes.[3]

¶ 9 Prior to trial, Racus filed a motion to suppress the communications that occurred before the authorization to record based on a lack of consent. Racus also moved to suppress the communications that occurred after the authorization to record based on a lack of probable cause. The trial court reviewed the transcript of all of the communications both before and after the authorization to record communications, and found that Racus "implicitly or impliedly" consented to the recording of the pre-intercept communications and text messages. Clerk's Papers at 249-50. Accordingly, the court denied the motion to suppress the pre-intercept text messages. The trial court also ruled that probable cause existed to authorize the intercept and denied the motion to suppress the post-intercept communications.

II. Trial Testimony

¶ 10 At trial, Det. Rodriguez testified about the sting operation that resulted in Racus's arrest. Det. Rodriguez ***293** explained that he completed an online form on Craigslist using a fictitious name and an anonymous e-mail address. Using the name "Kristl" and the e-mail address, Det. Rodriguez then typed the message and posted the advertisement in the "casual encounters" section of Craigslist which is viewed by persons looking for people to engage in sex. He explained that each advertisement on Craigslist is assigned a unique post identification number that lists the date and time of the particular ****834** posting. He testified that a person responding to the advertisement would contact him using the anonymous e-mail address. Det. Rodriguez would respond via e-mail and then attempt to have the person agree to respond back by text message and then by telephone.

¶ 11 The Craigslist advertisement posted on December 17 contained the phrase "looking for a close family connection." 4 VRP at 602. Det. Rodriguez explained that he used this phrase because "close family ... generally means something dealing with incest." 4 VRP at 585. The advertisement also contained the phrase "open to presents." 4 VRP at 605. Det. Rodriguez explained that he used the words "presents," "gifts," and "donations" in the advertisement because those words are commonly used on Craigslist to suggest payment for a fee or the exchange of money for sex. 4 VRP at 586-87. He also explained that the term "RP" as used in the advertisement means role play. 4 VRP at 605.

¶ 12 Det. Rodriguez testified that Racus responded to the advertisement on Craigslist on the same day it was posted. Racus's full name appeared in the e-mail response. Because Racus had an account with Craigslist, the post identification number "4747" on the first e-mail sent by Racus allowed Det. Rodriguez to verify that a person by the name of Darcy Racus was responding to the same Craigslist advertisement that he had posted in the casual encounters section earlier that day. 4 VRP at 603.

¶ 13 Det. Rodriguez testified that he was able to capture, preserve, and record his communications with Racus using ***294** a Gmail account. Det. Rodriguez was able to display the communications to and from Racus to the jury.

¶ 14 In his initial e-mail to "Kristl," Racus stated, "A little more detail, please." 5 VRP at 662. Det. Rodriguez responded by e-mail, "What are you looking for? I am looking for someone with close family experience. I was very close with my father and brother." 5 VRP at 663. Racus e-mailed that he was "looking to give a gal some oral and anything else sexual she needs." 5 VRP at 665. "Kristl" responded, "What are your age limits? My girls are nearly 12 and 8. My oldest is very mature for her age. More restrictions with the 8, but she is good for oral." 5 VRP at 666. Racus asked, "How old are you?" 5 VRP at 667. "Kristl" e-mailed, "I am 39, but this is more for them. I'm always present, but I'm into watching to make sure they are ok and happy." 5 VRP at 667.

¶ 15 Racus e-mailed, "Really need to be of legal age. A person can go to jail over that. If you are interested in receiving oral, I don't mind if they watch or even do their own thing. You have photos?" 5 VRP at 667. "Kristl" acknowledged that Racus could go to jail and asked whether he would feel more comfortable texting. Racus replied, "Do you host and when would this take place?" 5 VRP at 672. "Kristl" explained that the person would come to her place. Racus then e-mailed and asked, "You no longer interested? I have until 3." 5 VRP at 663. "Kristl" e-mailed that she was "not home till 4. Can do tomorrow. Text me [at the telephone number provided]. Text

your name and word till three." 5 VRP at 675. In his last e-mail that day, Racus asked, "So what is it you are looking to get out of this? So we are on the up and up." 5 VRP at 677.

¶ 16 The next day, December 18, Racus reinitiated contact by text at 11:27 AM and asked, "Darcy till three. Is this free? Or are you looking for something?" 5 VRP at 679. Soon after, he e-mailed the same message in all capital letters. Racus e-mailed again and said, "What you wanting from me? You ask that I text you today and I did. No response. ***295** You still interested?" 5 VRP at 683. He then e-mailed, "Hello? Family connection?" 5 VRP at 698. In response, "Kristl" texted back, "Sorry, Darcy. So many people answer on here and it's hard to see who is real and not a flake." 5 VRP at 699. Racus texted back, "I am real." 5 VRP at 699. "Kristl" texted and asked what experience Racus had and what he wanted. Racus promptly texted, "Not much. Looking to give oral and maybe receive if all are clean. What is it you are looking for?" 5 VRP at 700. "Kristl" texted, "That sound[s] good[ ]. This is more for my family to have the same experience that I had growing up. My son is 13, my daughters are nearly 12 and 8." 5 VRP at 700.

****835** ¶ 17 After several texts, Racus asked if the mother wanted to meet. "Kristl" texted, "Not till I know what you want, hun, and I have a system. I have to talk to you first." 5 VRP at 708. He then texted, "Want to orally please a gal and have it done back to me. Or sex." 5 VRP at 708. "Kristl" texted, "So which one gal, hun? Oral pleasure is always good." 5 VRP at 709. Racus texted, "Yes it is. Older or you." 5 VRP at 709. "Kristl" texted that Lisa, her fictitious daughter, was nearly 12 years old.

¶ 18 Racus and "Kristl" continued to text and then talked on the telephone. In response, Racus asked Kristl to explain the rules of the encounter, "Kristl" texted, "No pain, no anal, condoms if more than oral," and Racus texted, "Ok. Good with that." 5 VRP at 714. After this message at 4:00 PM, Det. Rodriguez requested and obtained an intercept authorization warrant from a supervisor based on his belief that Racus was going to engage in the commercial exploitation of a minor for a fee when he went to meet with "Kristl" later that day. The intercept authorized Det. Rodriguez to record all communications with Racus from that point forward.

¶ 19 "Kristl" and Racus spoke on the telephone and during those calls, "Kristl" confirmed that Racus wanted to have oral sex. When "Kristl" asked Racus which of the daughters he would prefer to have sex with, he responded, "Lisa. Have a pic?" 5 VRP at 711. Det. Rodriguez sent a ***296** picture of a young girl. During another telephone call, Racus mentioned Lisa's braces as he saw them in the picture that "Kristl" sent him. "Kristl" assured Racus that Lisa could give him oral sex without scraping his genitals. Det. Rodriguez then handed the telephone to another undercover officer posing as Lisa. Racus asked Lisa if she was looking forward to their meeting, she said yes and referred to all of her other friends' experiences.

¶ 20 Racus then coordinated with "Kristl" when and where to meet them. On his way to meet them, "Kristl" asked Racus to bring Skittles for Lisa because "[s]he asked for some." 5 VRP at 716. Racus said he would try and then confirmed that he had obtained a bag of Skittles for Lisa. Racus arrived at the agreed address provided by "Kristl." Another female undercover officer posing as "Kristl" greeted Racus at the door of the house. Officers then arrested Racus.

III. Verdict

¶ 21 The jury found Racus guilty of attempted first degree rape of a child and communicating with a minor for immoral purposes. The trial court sentenced Racus to a standard range sentence. He appeals his convictions.[4]

ANALYSIS

I. Communications Before Authorization

A. Legal Principles

¶ 22 Racus first argues that the trial court erred by failing to suppress the pre-intercept recorded communications because he did not consent to their being recorded under the WPA. We disagree because Racus impliedly consented to the pre-intercept e-mails and text messages being ***297** recorded under the WPA. Thus, we hold that the trial court did not err by denying Racus's motion to suppress the pre-intercept communications.

[1] **[2]** ¶ 23 The WPA provides that it is unlawful for any individual or for the State to intercept or record a private communication or conversation, by any device, electronic or otherwise, without obtaining the consent of all of the parties participating in the conversation. RCW 9.73.030(1)(a), (b). Under the WPA, a communication is private when parties manifest a subjective intention that it be private and where

that expectation is reasonable. *State v. Kipp*, 179 Wash.2d 718, 729, 317 P.3d 1029 (2014). Proof of subjective intent need not be explicit. *Kipp*, 179 Wash.2d at 729, 317 P.3d 1029.

[3] **[4]** ¶ 24 When analyzing alleged violations of the WPA, we consider (1) whether there was a private communication transmitted by a device that was (2) intercepted or ****836** recorded by use of (3) a device designed to record and/or transmit, and (4) was done without the consent of all parties to the private communication. *State v. Townsend*, 147 Wash.2d 666, 672-75, 57 P.3d 255 (2002). We review alleged violations of the WPA de novo. *Kipp*, 179 Wash.2d at 728, 317 P.3d 1029.

B. Private Communications

[5] ¶ 25 We first consider whether the communications between Racus and "Kristl" were private and whether the expectation that they be private was reasonable. *See Townsend*, 147 Wash.2d at 672-74, 57 P.3d 255. Text messages encompass many of the same subjects as telephone conversations and e-mails, which have been protected under the WPA. *See State v. Faford*, 128 Wash.2d 476, 488, 910 P.2d 447 (1996); *Townsend*, 147 Wash.2d at 680, 57 P.3d 255. The term "private" is not defined in the WPA, but we have adopted a dictionary definition: " 'belonging to oneself ... secret ... intended only for the persons involved (a ~ conversation) ... holding a confidential relationship to something ... a secret message: ***298** a private communication ... secretly: not open or in public.' " *Kipp*, 179 Wash.2d at 729, 317 P.3d 1029 (quoting Webster's Third New International Dictionary 1804-05 (1969)) (alterations in original); *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 190, 829 P.2d 1061 (1992).

¶ 26 Here, Racus thought he was texting "Kristl." He manifested his subjective intent that the text messages would remain private by not using a group texting function, or indicating in any other manner that he intended to expose his communications to anyone other than "Kristl." *See Townsend*, 147 Wash.2d at 673, 57 P.3d 255. The expectation that these were private communications was reasonable given that Racus was only texting with "Kristl" and only "Kristl" was texting him back. Because he intended that the communications be kept private and his expectation that they were private communications was reasonable, the communications were private under the WPA.

C. Intercepted or Recorded by Use of a Device Designed To Record and/or Transmit

¶ 27 We next consider the second and third prongs of the test, whether the communication was intercepted or recorded by use of a device designed to record and/or transmit. *Townsend*, 147 Wash.2d at 672, 57 P.3d 255. The parties do not dispute this fact. Here, Det. Rodriguez testified that his computer captured, preserved, and recorded all communications with Racus using the anonymous Gmail account and a Google software application installed on his computer as part of the sting operation. Thus, the communications were intercepted and recorded by use of a device designed to record and/or transmit under the WPA.

D. Consent

[6] **[7]** ¶ 28 Lastly, we consider whether Racus consented to the communications being recorded. *Townsend*, 147 Wash.2d at 672, 57 P.3d 255. If Racus consented, then the recording was not unlawful under the WPA because it is not unlawful to ***299** record a communication on a device where the "consent of all the participants in the communication" has been obtained. RCW 9.73.030(1)(a); *see* RCW 9.73.030(1)(b). A communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded. *See Townsend*, 147 Wash.2d at 672, 57 P.3d 255.

¶ 29 In *Townsend*, the police recorded and tracked the defendant's e-mail and instant messages to a fictitious adolescent girl that police created for a sting operation.[5] *Townsend*, 147 Wash.2d at 670, 57 P.3d 255. Our Supreme Court held that although the defendant did not explicitly announce that he consented to the recording of his e-mail and instant messages to his fictitious target, his consent to such recordings could be implied

> [B]ecause [the defendant], as a user of e-mail had to understand that computers are, among other things, a message recording ****837** device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

Townsend, 147 Wash.2d at 676, 57 P.3d 255. The court noted that "the saving of messages is inherent in e-mail and ... messaging" and through his use and familiarity of such systems, the defendant had impliedly consented to the recording of such messages. *Townsend*, 147 Wash.2d at 678, 57 P.3d 255.

¶ 30 The Supreme Court stated,

> "A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer."

***300** *Townsend*, 147 Wash.2d at 676, 57 P.3d 255 (quoting *State v. Townsend*, 105 Wash. App. 622, 629, 20 P.3d 1027 (2001)).

¶ 31 Here, the pre-intercept communications sent by Racus to "Kristl" were communications made by Racus in response to an advertisement in the casual encounters section of Craigslist. Racus had created a Gmail account to use Craigslist and to respond to the advertisement posted by Det. Rodriguez. Racus also testified that he was aware that the text messages "would be preserved and potentially seen." 6 VRP at 1032. As a result, in his text messages to "Kristl," Racus avoided explicitly stating that it was his intent to engage in oral sex with "Kristl's" fictitious 11-year-old daughter.

¶ 32 Similar to the defendant in *Townsend*, here, Racus had to understand that computers are message recording devices and that his text messages with "Kristl" would be preserved and recorded on a computer. *See Townsend,* 147 Wash.2d at 678, 57 P.3d 255. By communicating in this way, Racus impliedly consented to the communications being recorded, and thus, the recording of the communications was lawful under RCW 9.73.030(1)(a). Because the recording of the pre-intercept communications was lawful, the trial court did not err by denying Racus's motion to suppress the pre-intercept e-mail and text messages.[6] Thus, this argument fails.

***301** II. Communications After Authorization

[8] ¶ 33 Racus next argues that the trial court erred by not suppressing the post-intercept communications. Racus argues that Det. Rodriguez lied to the supervisor when he claimed that Racus and "Kristl" had a discussion about "trading gifts in exchange for sex with minors," as required for an intercept to be lawfully authorized under RCW 9.73.230(1)(b)(ii). Appellant's Opening Br. at 33. Racus argues that no reasonable detective would have had probable cause to believe that Racus was engaging in the commercial sexual abuse of a minor. Therefore, he argues that the requirements of RCW 9.73.230(1)(b)(ii) were not met for the supervisor to authorize an intercept to record the communications Racus had with "Kristl" after 4:00 PM on December 18. We disagree.

¶ 34 The WPA allows for communications to be recorded when authorized by someone above a "first line supervisor" if "[p]robable cause exists to believe that the conversation or communication" will involve "[a] party engaging in the commercial sexual abuse of a minor." RCW 9.73.230(1)(b)(ii).

¶ 35 Former RCW 9.68A.100(1)(c) (2013) provides that a "person is guilty of commercial sexual abuse of a minor if ... [h]e or she ****838** solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee." The WPA also provides that "[a]ny information obtained in violation of RCW 9.73.030 ... [is] inadmissible." RCW 9.73.050.

[9] **[10]** **[11]** ¶ 36 Probable cause exists where the facts and circumstances are within the officer's knowledge and the facts and circumstances are such that the officer has reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *State v. Terrovona*, 105 Wash.2d 632, 643, 716 P.2d 295 (1986). Probable cause requires more than a bare suspicion of criminal activity. ***302** *Terrovona*, 105 Wash.2d at 643, 716 P.2d 295. Whether probable cause exists is a legal question that we review de novo. *State v. Neth*, 165 Wash.2d 177, 182, 196 P.3d 658 (2008).

¶ 37 Det. Rodriguez testified that the terms "presents," "gifts," and "donations" and the phrase "open to presents" as used in the advertisement, are used by persons viewing the Craigslist casual encounters section to suggest payment for a fee or the exchange of money for sex. 4 VRP at 586-87, 605. Shortly after contacting "Kristl," Racus e-mailed and asked, "So what is it you are looking to get out of this? So we are on the up and up." 5 VRP at 677. When Racus did not receive a response, he followed up the next morning by sending an e-mail and then a text message asking, "Is this free? Or are you looking for something?" 5 VRP at 679-80. He then sent a series of e-mail and text messages attempting to set up sex between him and "Kristl's" daughter. Based on all of these communications, Det. Rodriguez requested and obtained an intercept authorized by a supervisor.

¶ 38 In the case at bar, Racus responded to an advertisement that requested a sexual encounter with a minor, the advertisement used a colloquialism for payment, and Racus asked about payment. The communications that Racus exchanged with "Kristl" establish that he was aware that she was offering her two minor daughters for sex in exchange for a fee and that he appeared interested in paying.

¶ 39 All of these communications demonstrate that Racus intended to exchange sex with a minor for a fee. Thus, we hold that based on the totality of the circumstances, there were facts that would lead a reasonable detective to conclude that probable cause existed to believe that Racus would engage in the commercial sexual abuse of a minor in exchange for a fee. Thus, the WSP properly authorized the intercept to record the communications with Racus under RCW 9.73.230(1)(b)(ii). Therefore, because intercept authorization was proper, we hold that the trial court did not err by denying the motion to suppress the post-intercept communications.

***303** ¶ 40 Thus, we affirm.

¶ 41 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Unpublished Text Follows

ADDITIONAL FACTS

I. Jury Voir Dire

¶ 42 During voir dire, the prosecutor asked the jurors specific questions about internet sites and the ability to buy sex online. He asked if the jurors knew what Backpage.com[7] was and mentioned that an executive from Backpage.com had been recently arrested. He then asked the venire, "[H]ow many of you knew that there is a sex for sale section in Craigslist?" 4 VRP at 449. He also asked the venire about their thoughts on the legality of prostitution. The prosecutor referenced *To Catch a Predator*,[8] discussed sting operations, and asked if police should be able to conduct sting operations as they did in this case. Lastly, he asked whether any potential jurors who had sat on previous juries had failed to reach a verdict, and if so, whether they had found the experience frustrating. Racus did not object to any of these questions or statements.

II. Jury Instructions—Entrapment

¶ 43 Defense counsel proposed an instruction on the affirmative defense of entrapment. The prosecutor objected and stated that "the defense is only available to a defendant who admits the acts that are charged." 7 VRP at 1096. The trial court ruled that it would not give the instruction because the facts did not support giving an instruction on entrapment.

III. Closing Arguments

¶ 44 During closing arguments, the prosecutor said,

> There is a lot of circumstantial evidence I think as to why. I shouldn't say as to why. I guess I shouldn't say as to why. The why question becomes more problematic in the context of the sex offense, because I guess what I'm going to suggest to you folks is this. In our world, in our society, there are two kinds of people. One, the people who will engage in sex with children, and the other people who will not. There is no gray area in there. A lot of life isn't black and white. This is. You either will have sex with a child or you will not have sex with a child. And I'm going to suggest to you that the category of people who will not have sex with a child also will not talk about it as if they're going to do it. They won't have a conversation with anyone else that says, hey, how about oral sex with a kid, 11. She has braces, any of that kind of stuff. No one who will not actually go forward with that act, would even talk about that act.
>
> I'm going to suggest to you further, not only will people who won't have sex with a child will not talk to others about it, they won't even have that conversation in their own mind. They won't think to themselves at any point ever, huh, wonder what it would be like to have sex with an 11-year-old or I think I will have sex with an 11-year-old or I think I will talk about having sex about an 11-year-old. They will not do that. You know from [Racus's] own mind, I mean, own mouth that it piqued his interest to talk about close family connection.

7 VRP at 1132-33.

> When you evaluate credibility, ask yourself if it's reasonable what the defendant told you, which is 90

> percent of [Craigslist advertisements] are unreal, not real, and while I opened some ads for adult women, I followed through on this ad, but only because I wanted this mom. Keep in mind the defendant told you that—and you know that [C]raigslist sexual encounters-sorry, casual encounters, has ads with photographs. [Detective] Rodriguez told you, "I didn't pick an ad to show you folks that it had pictures, because quite frankly some of these pictures are pornographic, nudity, bestiality, child pornography."

7 VRP at 1142.

¶ 45 During rebuttal argument, the prosecutor focused on the credibility of the witnesses and explained what the term "abiding belief" meant:

> Let's just talk one minute about the MECTF. These are—you saw five members, four members and a couple visiting members, for lack of a better word, of that task force. Those are folks whose lives and careers are dedicated toward protecting children. These are people who swim in the filth that's on the internet. By choice, they have to go in and read these ads. [Det. Rodriguez] has to pose as a woman offering to sell children for sex. [Knoll] has to talk to the defendant, who wants to engage in sex with a child. [Gasser] has to pretend to be interested in sex as an 11-year-old with an adult. Can you really criticize what the MECTF is doing and what these folks are doing?
>
> ....
>
> Fifty-eight people have been arrested before they could have sex with a child. How is that a bad thing? Fifty-eight people have been arrested who showed up to have sex with a child before they could actually do it. At least that time. I'm not suggesting to you in any way at all that [Racus] did this before, because you don't have any evidence of that at all. I'm suggesting you judge what he did that particular day. And what he did, is he was one of the people who showed up to have sex with a girl who was 11, and got arrested before he could, because of the work that the [MECTF] does. For all of us who are in the category of its too repulsive to even think about it, much less talk about it, much less do it.

7 VRP at 1172-73.

> Let me back up one second. [Defense counsel] actually told you that the presumption of innocence is maintained, he still has it, until you go back there and start deliberating. That's not true. I have the burden of proof for the state. It's the highest burden in the law. And I want to make sure that you don't minimize it at all. He maintains his presumption throughout your deliberations, not just until you get there. Throughout your deliberations, he is presumed innocent until you find that all of the mountain of evidence that you heard overcomes the presumption beyond a reasonable doubt. So absolutely, give him his constitutional right.
>
> ....
>
> After you return your verdict, [the judge] is going to release you from the instruction that you can't talk about this case. So when you go home after your verdict and your loved ones say, "Hey, are you done?" And you say, "Yeah." "What did you do?" "Well, we found the defendant guilty and here's the crime." Then they say to you, "Did you do the right thing?" And you say, "Yeah, we did." That's an abiding belief.
>
> And a month later, when you're thinking about jury duty and you think to yourself, we did the right thing, that's an abiding belief. And then the next time you receive your jury summons, before you throw it away, or the next time you're talking to someone else who got a jury summons, you can tell them, "You know what? That's up to you, but when I was on jury duty, I did justice. I did the right thing." That's an abiding belief.

7 VRP at 1180-81. Racus did not object to any of these statements.

¶ 46 The jury returned verdicts of guilty on both charges. Racus appeals his convictions for attempted first degree rape of a child and communicating with a minor for immoral purpose.

ADDITIONAL ANALYSIS

I. Entrapment

A. Legal Principles

¶ 47 Racus next argues that the trial court erred by not giving his proposed jury instruction on entrapment. We disagree because the evidence did not support giving the instruction.

¶ 48 A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. *In re Detention of Pouncy*, 168 Wash.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 Wash.2d 767, 771-72, 966 P.2d 883 (1998).

¶ 49 To obtain a jury instruction regarding a party's theory of the case, there must be sufficient evidence supporting the requested instruction. *State v. Redmond*, 150 Wash.2d 489, 493, 78 P.3d 1001 (2003). To prove the affirmative defense of entrapment, a defendant must show, by a preponderance of the evidence, 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 Wash.2d 1, 9, 921 P.2d 1035 (1996); RCW 9A.16.070. Failure to prove either of these prongs is fatal to the defense of entrapment. *Lively*, 130 Wash.2d at 9-10, 921 P.2d 1035.

¶ 50 However, entrapment is not a defense if law enforcement "merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). Neither the defendant's mere reluctance to violate the law, nor the use of a normal amount of persuasion to overcome the defendant's resistance is not entrapment. *State v. Trujillo*, 75 Wash. App. 913, 918, 883 P.2d 329 (1994). The quantum of evidence required for an instruction to be given as an affirmative defense is sufficient evidence "to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence."[9] *Trujillo*, 75 Wash. App. at 917, 883 P.2d 329.

B. Jury Instruction Not Supported

¶ 51 Here, Det. Rodriguez created a Craigslist advertisement that indicated that someone was looking for a man or woman to have sex with their minor children. Racus initiated contact by answering the advertisement in the casual encounters section on the Craigslist website. Though it is true that Racus originally said that he did not want to do anything illegal, he reengaged in communications the next day despite the fact that "Kristl" had told him that she only wanted the sexual encounter for her minor children. This evidence shows that the WSP simply afforded Racus the opportunity to commit the crime. WSP did not lure him or induce him to commit the crime and the evidence shows that Racus had the predisposition to commit the crime.[10] Because Racus failed to show by a preponderance of the evidence that he was entitled to a jury instruction on entrapment, we hold that the trial court did not err by refusing to instruct the jury on entrapment.

II. Sufficient Evidence of a Substantial Step

A. Legal Principles

¶ 52 Racus argues that the State did not produce sufficient evidence to convince a jury that he took a substantial step towards committing the crime of attempted first degree rape of a child. We disagree.

¶ 53 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 crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence." *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068.

¶ 54 "A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

¶ 55 A substantial step is an action that is strongly corroborative of the defendant's criminal purpose. *State v. Johnson*, 173 Wash.2d 895, 899, 270 P.3d 591 (2012). "Mere preparation to commit a crime is not an attempt." *State v. Wilson*, 1 Wash. App. 2d. 73, 83, 404 P.3d 76 (2017). However, any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the accused to commit the crime. *Wilson*, 1 Wash. App. 2d. at 83, 404 P.3d 76.

B. Sufficient Evidence

¶ 56 Here, Racus communicated with "Kristl" about having sex and admits that "Kristl's" stated intention was always that he have sex with her children. When asked which of the daughters he would prefer to have sex with, Racus responded "Lisa. Have a pic?" 5 VRP at 711. He also discussed details of what the sexual encounter would be and spoke to Lisa. He then coordinated with "Kristl" about when he would come to meet the mother and Lisa at their house. At "Kristl's"

request, he purchased a bag of skittles for Lisa, went to the house, greeted "Kristl," and then entered the home. Taking all reasonable inferences in favor of the State, any rational trier of fact could have found that Racus's conduct is strongly corroborative of the criminal purpose of having sex with a minor who was under twelve years old.

¶ 57 Because the State proved Racus's desire to commit the crime and the actions he took in furtherance of the rape of a child, the State produced sufficient evidence for a reasonable jury to conclude that Racus took a substantial step towards the commission of the crime of attempted first degree rape of a child. Thus, Racus's sufficiency claim fails.

III. Prosecutorial Misconduct

A. Legal Principles

¶ 58 Racus argues that the prosecutor committed multiple acts of misconduct during trial that warrant reversal of his convictions. Racus claims that the prosecutor: (1) improperly conducted voir dire to educate the jury, indoctrinate them, and instruct them on the law, (2) improperly vouched for Det. Rodriguez, (3) diminished his burden of proof during closing, (4) made inappropriate comments during closing, and (5) committed various other inappropriate acts during the trial. Because Racus fails to show that any of the prosecutor's conduct was so flagrant and ill-intentioned it could not have been cured with an instruction. We hold that his claim of prosecutorial misconduct is waived.

¶ 59 To prevail on a claim of prosecutorial misconduct, Racus must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wash.2d 741, 756, 278 P.3d 653 (2012). Because Racus did not object at trial to any of this alleged misconduct, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wash.2d at 760-61, 278 P.3d 653. Because Racus did not object, he is required to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Emery*, 174 Wash.2d at 761, 278 P.3d 653 (quoting *State v. Thorgerson*, 172 Wash.2d 438, 455, 258 P.3d 43 (2011)).

¶ 60 When reviewing a prosecutor's misconduct that was not objected to, we focus "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wash.2d at 762, 278 P.3d 653. When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wash.2d 714, 774, 168 P.3d 359 (2007). We also presume that the jury follows the trial court's instructions. *State v. Anderson*, 153 Wash. App. 417, 428, 220 P.3d 1273 (2009).

B. Voir Dire

¶ 61 Racus first argues that the prosecutor's conduct during voir dire was improper because he used voir dire to argue his case, indoctrinate the jury, and to instruct the jury in the law. Racus also argues that the prosecutor improperly asked whether any jurors had served on a jury before but failed to reach a verdict, and whether they found that experience frustrating.

¶ 62 RCW 4.44.120 provides that

> [w]hen the action is called for trial, a panel of potential jurors shall be selected at random from the citizens summoned for jury service who have appeared and have not been excused. A voir dire examination of the panel shall be conducted for the purpose of discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges.

¶ 63 The purpose of voir dire is to select an impartial jury, not to " 'educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.' " *State v. Frederiksen*, 40 Wash. App 749, 752, 700 P.2d 369 (1985) (quoting *People v. Williams*, 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869, 877 (1981)); *State v. Munzanreder*, 199 Wash. App. 162, 175, 398 P.3d 1160, *review denied*, 189 Wash.2d 1027, 406 P.3d 280 (2017).

¶ 64 Here, the prosecutor asked the jurors questions about online websites that had sections on the websites where individuals could pay for sex or find a partner for casual sex. He also asked the jurors about their general feelings about sting operations. In the context of the entire voir dire, these questions did not argue the prosecutor's case, nor were they designed in any way to prejudice the jury prior to hearing the evidence in the case. Rather, these questions were meant

to discover any basis to challenge a potential juror for cause and to permit the exercise of preemptory challenges. Thus, because the questions did not argue the case or were an attempt to prejudice the jury, the questions were not improper.

¶ 65 However, one area of voir dire was troubling—when the prosecutor asked whether any jurors had previously served on a jury and whether any of the jurors were frustrated when the jury panel could not reach a verdict. These questions may have implied that it was not proper for the jury not to reach a verdict. However, a jury is legally permitted not to reach a verdict. *See State v. Burdette*, 178 Wash. App. 183, 195, 313 P.3d 1235 (2013). Thus, these specific questions asked by the prosecutor were likely improper. However, Racus does not show how the prosecutor's arguments were so flagrant and ill-intentioned that they could not have been cured with an instruction. Thus, this claim is waived.

C. Vouching

¶ 66 Racus next argues that the prosecutor committed misconduct by questioning Det. Rodriguez in a manner that constituted improper vouching. We disagree.

¶ 67 A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity. *State v. Ish*, 170 Wash.2d 189, 196, 241 P.3d 389 (2010). "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *Ish*, 170 Wash.2d at 196, 241 P.3d 389. "Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent*, 40 Wash. App. 340, 344, 698 P.2d 598 (1985)).

¶ 68 First, Racus claims that the State improperly vouched by questioning Det. Rodriguez about how many types of online sting operations he had conducted. This question does not express the prosecutor's personal belief, nor does it indicate that evidence not presented supports the detective's testimony. Further, the question and the response were tied to the specific evidence admitted at trial by Det. Rodriguez about the sting operations. Because this line of questioning was neither type of impermissible vouching and was tied to specific evidence, the question was not improper.

¶ 69 Second, Racus claims that during closing argument the State impermissibly vouched for Det. Rodriguez when it asked the jury whether or not it was reasonable that Det. Rodriguez would have altered the e-mails. The prosecutor's argument related to specific testimony by Det. Rodriguez regarding whether he could have altered any communications between "Kristl" and Racus. Thus, because the prosecutor was referring to testimony elicited at trial, he was not expressing his own belief or referring to evidence not admitted at trial. Because he did not express his own belief or refer to evidence not admitted at trial, Racus's claim of prosecutor misconduct on these bases is waived.

D. Burden Shifting

¶ 70 Racus next argues that the prosecutor diminished its burden of proof during closing argument. We disagree.

¶ 71 The State bears the burden of proving each element of its case beyond a reasonable doubt, and it may not shift any of that burden to the defendant. *State v. W.R.*, 181 Wash.2d 757, 762, 771, 336 P.3d 1134 (2014). First, Racus claims that the prosecutor lowered his burden of proving a substantial step when he said only people who would rape a child would think or discuss it and that "everyone else would be appalled at that thought." Appellant's Opening Br. at 46. Racus argues that by saying this, the State essentially argued that a defendant who just thinks about or talks about having sex with a child has taken a substantial step toward committing the crime of first degree child rape. Racus mischaracterizes the implication of the State's argument that just thinking or talking about having sex with a minor constitutes a substantial step and this argument did not diminish the State's burden. Because the State did not shift its burden of proving each essential element, this argument fails.

¶ 72 Second, Racus claims that the prosecutor diminished his burden of proof by equating a juror's abiding belief with a juror doing the right thing, which mischaracterized the burden of proof beyond a reasonable doubt. Racus analogizes his case to *State v. McCreven*, 170 Wash. App. 444, 284 P.3d 793 (2012). There, the court held that the trial court erred in not sustaining the defense counsel's objection to the prosecutor's closing argument because the prosecutor did shift its burden by equating a juror's abiding belief with a juror doing the right thing. *McCreven*, 170 Wash. App. at 473, 284 P.3d 793.

¶ 73 However, Racus's case is distinguishable. Here, the prosecutor explained to the jury what the term "abiding belief" means:

> After you return your verdict, [the judge] is going to release you from the instruction that you can't talk about this case. So when you go home after your verdict and your loved ones say, "Hey, are you done?" And you say, "Yeah." "What did you do?" "Well, we found the defendant guilty and here's the crime." Then they say to you, "Did you do the right thing?" And you say, "Yeah, we did." That's an abiding belief.
>
> And a month later, when you're thinking about jury duty and you think to yourself, we did the right thing, that's an abiding belief. And then the next time you receive your jury summons, before you throw it away, or the next time you're talking to someone else who got a jury summons, you can tell them, "You know what? That's up to you, but when I was on jury duty, I did justice. I did the right thing." That's an abiding belief.

6 VRP at 1180-81. Contrary to Racus's argument, the prosecutor did not imply or tell the jury that they only need to have an abiding belief in the truth of the charge, but he described what exactly the term "abiding belief" meant. Importantly, right before the explanation of abiding belief, the prosecutor explicitly described what the State's burden of proof was and how high of a burden it was.

¶ 74 Thus, the State did not diminish its burden of proof. Because the State did not diminish its burden, Racus's claim of prosecutorial misconduct on this basis fails.

E. Comments During Closing

¶ 75 Racus next argues that the prosecutor made improper arguments during closing by referring to evidence that was not in the record and also by appealing to the jury's passion and prejudice. We disagree.

¶ 76 "In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." *State v. Reed*, 168 Wash. App. 553, 577, 278 P.3d 203 (2012). In rebuttal, a prosecutor generally is permitted to make arguments that were "invited or provoked by defense counsel and are in reply to his or her acts and statements." *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

¶ 77 First, Racus argues that the prosecutor mentioned the number of people that MECTF arrested as a part of its sting operation, and mentioned that three of those arrested were sex offenders, absent any admissible evidence. This claim fails because the State had elicited this exact evidence during trial.

¶ 78 Second, Racus argues that the prosecutor appealed to the passion and prejudice of the jury by arguing that MECTF was particularly noble because they were dedicated to protecting children. Specifically, he argues that the prosecutor committed misconduct by arguing that Racus and people like him, required the members of the task force to "swim in the filth of the internet." Appellant's Opening Br. at 49; 7 VRP at 1172. Racus also argues that when the prosecutor "argued that it would be improper to criticize 'what [MECTF] was doing' ... it was clear from the argument that criticism included acquitting Racus." Appellant's Opening Br. at 49; 7 VRP at 1172. However, this mischaracterizes the State's closing argument:

> These are people who swim in the filth that's on the internet. By choice, they have to go in and read these ads. [Det. Rodriguez] has to pose as a woman offering to sell children for sex. [Knoll] has to talk to the defendant, who wants to engage in sex with a child. [Gasser] has to pretend to be interested in sex as an 11-year-old with an adult. Can you really criticize what the MECTF is doing and what these folks are doing?

6 VRP at 1172. When viewed in context, the State's quoted argument above does not blame Racus for making MECTF do their job, nor can it be implied from the last sentence that the criticism included acquitting Racus.

¶ 79 Thus, because the prosecutor's arguments during closing argument did not refer to evidence outside the record nor did the arguments appeal to the jury's passion and prejudice, we hold that the arguments were not improper, and thus, Racus's claim of prosecutor misconduct on this basis fails.

F. Other Acts

¶ 80 Lastly, Racus argues that the prosecutor committed various other inappropriate acts during the proceeding and that those acts taken together with the other allegations of prosecutorial misconduct cumulatively warrant reversal. We disagree.

¶ 81 "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Pers. Restraint of Cross*, 180 Wash.2d 664, 690, 327 P.3d 660 (2014). To support a cumulative error claim, the appellant must demonstrate multiple errors. *In re Cross*, 180 Wash.2d at 690-91, 327 P.3d 660. "Under the cumulative error doctrine, a defendant may be entitled to

a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wash.2d at 766, 278 P.3d 653.

¶ 82 Racus first claims that the State misstated the law and the facts when it argued to the trial court that in order for Racus to be entitled to an instruction on the affirmative defense of entrapment, Racus had to admit guilt. Even if the statement was improper, the error was harmless because Racus was not prejudiced because the evidence did not support giving the instruction on entrapment.

¶ 83 Second, Racus claims the prosecutor misrepresented to the trial judge what a prior judge did when he reviewed and approved the intercept authorization on December 24. In arguing to the trial judge that Racus's motion to suppress should be denied, the prosecutor stated to the trial judge "[s]econdarily, the motion should be denied because you'[re] not a reviewing court, and [the prior judge] already reviewed this case and said, 'Yes, that does establish probable cause.' Now granted, [the prior judge] didn't have the argument being made, which is that [Detective] Rodriguez lied, and so you can certainly revisit this." 1 VRP at 33. The prosecutor was merely explaining to the trial judge that the arguments Racus made to the prior judge related to that's judge's approval of the intercept authorization. The prosecutor then pointed out to the trial judge, that Racus now was making a different argument —that Det. Rodriguez lied to the supervisor in order to obtain the intercept authorization. Because the prosecutor did not misstate the facts or the law in the argument he made to the trial judge, this claim fails.

¶ 84 Third, Racus argues that the prosecutor improperly vouched for the credibility of Det. Rodriguez when it argued,

> [The prior judge] didn't have the argument being made, which is that [Detective] Rodriguez lied and so you can certainly revisit this. The question is whether or not here is a sufficient basis upon which to impugn a 20-plus year veteran of the state patrol by saying that they discussed trading gifts is-well, anywhere close to lie, untrue, fabrication, deception, disingenuousness, whatever you want to call it.

Appellant's Opening Br. at 49-50; 1 VRP at 34.[11] It is difficult to discern from this record what the State's argument means, but regardless of the meaning, the State's argument here does not constitute vouching. Thus, we hold that his claim of improper vouching fails.

¶ 85 In summary, the only potential errors we have identified are (1) the voir dire question asking about whether any jurors had served on a jury panel that could not reach a verdict and whether that experience was frustrating and (2) the prosecutor's argument to the trial court regarding the proposed entrapment instruction. However, Racus fails to show that either of these claimed errors resulted in a trial that was fundamentally unfair. Therefore, the cumulative error doctrine does not apply and reversal is not warranted. Thus, we affirm.

End of Unpublished Text

We concur:

Worswick, P.J.

Bjorgen, J.

Opinion
Review denied at 193 Wn.2d 1014 (2019).

All Citations

7 Wash.App.2d 287, 433 P.3d 830

Footnotes

1 Racus makes additional arguments noted below.
2 Ch. 9.73 RCW; RCW 9.73.030.
3 The State also charged Racus with commercial sexual abuse of a child. At the close of the State's case, the trial court dismissed the charge of commercial sexual abuse of a child.
4 We set out additional facts related to the issues raised in the unpublished portion of this opinion below.
5 The instant messaging software in that case was a software program called ICQ. *Townsend*, 147 Wash.2d at 669, 57 P.3d 255.
6 Racus also argues that the trial court erred by finding that Det. Rodriguez was the "intended recipient" of the messages; thus, Racus did not consent to the communications being recorded. Appellant's Opening Br. at 30. However, this argument

fails because our Supreme Court has held that a defendant's unawareness that the recipient of a message was a police detective does not destroy consent. *State v. Athan*, 160 Wash.2d 354, 371, 158 P.3d 27 (2007).

Racus also analogizes his case to *State v. Hinton*, 179 Wash.2d 862, 319 P.3d 9 (2014). In *Hinton*, the defendant sent text messages to a known associate, and unbeknownst to him, officers had his associate's telephone. *Hinton*, 179 Wash.2d at 865, 319 P.3d 9. That case is not analogous because the court in *Hinton* was addressing a claim under article I, section 7 of our state constitution, not a claim under the WPA. *Hinton*, 179 Wash.2d at 877, 319 P.3d 9.

7 Backpage operated an online classified advertising service. *In re Pers. Restraint of Hopper*, 4 Wash. App. 2d 838, 424 P.3d 228, 229 (2018). The United States Department of Justice seized Backpage.com in April 2018. *In re Pers. Restraint of Hopper*, 424 P.3d at 230 n.2 (citing Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (April 9, 2018), https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads).

8 *To Catch a Predator* was an MSNBC broadcast television show where a host confronts sex offenders prior to their arrest.

9 Racus cites to *State v. Galisia*, 63 Wash. App. 833, 822 P.2d 303 (1992), for the proposition that only "some evidence" is needed to be introduced in order to support the giving of an entrapment instruction. Appellant's Opening Br. at 35. However, that case was abrogated by *Trujillo* on the same issue. *Trujillo*, 75 Wash. App. at 917, 883 P.2d 329.

10 Though Racus appears to argue that WSP reinitiated or continued contact with him, Racus is the one who reinitiated communications on December 18.

11 Racus claims that the trial court held a sidebar to admonish the prosecutor. However, he fails to cite to the record to support this statement. Thus, pursuant to RAP 10.3(a)(6) we do not reach the merits of this argument.

BENTON COUNTY PROSECUTOR'S OFFICE

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