

FILED
Court of Appeals
Division I
State of Washington
6/13/2022 10:44 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
6/13/2022
BY ERIN L. LENNON
CLERK

101013-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
PETITION FOR REVIEW FROM

State of Washington v. Junjie Gong
Court of Appeals No. 83305-7-I

State of Washington,

Respondent,

v.

Junjie Gong

Petitioner,

PETITION FOR REVIEW

By:

Zachary C. Wagnild

Attorney for Petitioner

Law Office of Zachary C. Wagnild, PLLC

705 Second Avenue, Suite 1111

Seattle, WA 98104

zach@wagnildlaw.com

(206) 623-5822

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER.....3

II. COURT OF APPEALS DECISION3

III. ISSUE PRESENTED.....3

IV. STATEMENT OF THE CASE.....4

 A. *PROCEDURAL HISTORY*.....4

 B. *FACTS*.....5

 1. *Net Nanny Operation*5

 2. *Trial*.....10

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED11

 A. THE COURT SHOULD GRANT REVIEW PURSUANT TO RAP 13.4(B)(1) BECAUSE THE COURT OF APPEALS RULING THAT CONTENTS OF AN UNLAWFULLY RECORDED CONVERSATION ARE ADMISSIBLE WHEN THE OFFICER INVOLVED IN THE CONVERSATION IS UNAWARE THAT HER FELLOW OFFICERS ARE RECORDING IS IN CONFLICT WITH MORE RECENT DECISIONS BY THE WASHINGTON SUPREME COURT.11

VI. CONCLUSION18

TABLE OF AUTHORITIES

Cases

<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....	15
<i>State v. Baird</i> , 83 Wn.App. 477, 922 P.2d 157 (1996)	16
<i>State v. Faford</i> ; 128 Wn.2d 476, 910 P.2d 447 (1996).....	13
<i>State v. Fjermestad</i> , 14 Wn.2d 828, 791 P.2d 897 (1990).....	14
<i>State v. Grant</i> , 9 Wn.App. 260, 511 P.2d 1013 (1973).....	14
<i>State v. Kipp</i> , 179 Wn.2d 718, 317 P.3d 1029 (2014)	12
<i>State v. Maesse</i> , 29 Wash.App. 642, 629 P.2d 1349 (1981).....	14
<i>State v. Mance</i> , 82 Wn.App. 539, 918 P.2d 527 (1996)	14
<i>State v. Porter</i> , 98 Wn.App. 631, 990 P.2d 460 (1999).....	16
<i>State v. Salinas</i> , 121 Wn.2d 689, 853 P.2d 439 (1993)	13, 16
<i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	12
<i>State v. White</i> , 76 Wash.App. 801, 888 P.2d 169 (1995).....	14
<i>State v. Williams</i> , 94 Wn.2d 531, 617 P.2d 1012 (1980).....	14

Statutes

RCW 9.73.030	12
RCW 9.73.050	12

I. IDENTITY OF PETITIONER

Junjie Gong (“Mr. Gong”), appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Junjie Gong requests review of the decision of the Court of Appeals, Division I, in State of Washington v. Junjie Gong, filed May 16, 2022, No. 83305-7-I, affirming his convictions for attempted rape of a child in the second degree and felony communicating with a minor for immoral purposes, in the Pierce County Superior Court. *See* Appendix A.

III. ISSUE PRESENTED

- A. Whether this Court should grant review because the Court of Appeals erred by holding that Det. Gasser, who was part of a police task force, was permitted to testify about the contents of a conversation that she had with Mr. Gong despite the fact that the conversation was simultaneously being unlawfully recorded by other members of the task force?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On July 30, 2018, Appellant Junjie Gong was charged with Attempted Rape of a Child in the Second Degree and Felony Communicating with a Minor for Immoral Purposes. CP 1-2. The charges arose from his contact with undercover officers posing as a 13-year-old girl and his alleged attempt to meet her for sex. *Id.* Trial commenced on February 12, 2020 before the Honorable Kathryn Nelson. RP I.¹ Prior to beginning jury selection, the defense brought a motion to dismiss the case for the State's failure to preserve exculpatory evidence. CP 3-28, RP I. This motion was denied and a jury trial commenced on February 12, 2020 and ran through February 25, 2020. CP 90-92. On February 25, 2020 the jury returned a verdict of guilty on both charges. RP VIII 772.

On April 3, 2020 Mr. Gong was sentenced to 76.5 months to life on count I (Attempted Rape of a Child in the Second Degree) and 9

¹ The Verbatim Report of Proceedings consists of 10 separately paginated volumes, each volume representing a separate day. However, because a substitute court reporter was used on the afternoon of February 19, 2020, there are two volumes labelled Volume I. Therefore, Appellant refers to them as follows:

RP I – hearings on 2/12/20; RP II – trial proceedings on 2/13/20; RP III – trial proceedings on 2/18/20; RP IV – trial proceedings on the morning of 2/19/20; RP V – trial proceedings on 2/20/20; RP VI – trial proceedings on 2/24/20; RP VII – trial proceedings on 2/25/20; RP VIII – trial proceedings on 2/26/20; RP IX – sentencing hearing on 4/3/20; RP X – trial proceedings on the afternoon of 2/19/20.

months on Count II (Communicating with a Minor for Immoral Purposes). CP 15-165. He timely filed his notice of appeal on April 3, 2020. CP 166-167.

On May 16, 2022, the Court of Appeals issued a decision denying Mr. Gong's appeal. Mr. Gong now petitions this Court to review the Court of Appeals decision affirming his conviction.

B. FACTS

1. Net Nanny Operation

The charges against Mr. Gong in this case stem from his communication and eventual meeting with undercover law enforcement officers from the Washington State Patrol (hereinafter "WSP") who were playing the role of a fictitious 13-year-old girl nicknamed "Kacityler." RP V 20-21. This undercover operation was one of many such operations (dubbed "Net Nanny") performed by a task force comprised of members of the WSP and federal law enforcement agencies. RP III 191-192.

In late July 2018 the task force placed a "profile" for an 18-year-old female sex-worker on the adult website Adultlook.com.² Exhibit 1. In

² A "profile" is essentially an online ad for a sex-worker that provides information about the sex-worker including age, physical details, activities that they will and will not engage in, geographical location, and contact information such as email address and/or phone number.

addition to the fact that the profile itself was for an adult, Adultlook.com had a pop-up notice that appeared to all website visitors informing them that the website did not allow minors to use the site. RP III 211-212, Exhibit 28. The pop-up notice appeared over the website page and blocked visitors from seeing the content until they acknowledged that they had seen the notice by clicking on a button that said “Agree.” RP III 213-215.

On July 27, 2018 Junjie Gong, a 26-year-old Chinese immigrant, visited the Adultlook.com website and, after seeing the profile for 18-year-old “Kacityler” that Sgt. McDonald with the Washington State Patrol had listed, responded by sending a text message to the mobile number listed in the profile. RP III 225, 242-243. Upon receiving Mr. Gong’s text message Sgt. McDonald responded and the two text-messaged back and forth for several minutes without any mention by Sgt. McDonald of the 13-year-old girl he was supposed to be. Exhibit 2. Prior to Sgt. McDonald texting Mr. Gong that he was 13 rather than the 18 age that was stated in the profile, Mr. Gong inquired about prices to which Sgt. McDonald simply responded “Depends.” Exhibit 2. After this brief exchange about prices, Sgt. McDonald texted Mr. Gong stating that “Kacityler” was actually 13. Following that announcement by Sgt. McDonald there were no further texts or conversations about payment for

sex between Mr. Gong and any of the task force members. Exhibit 2; RP V 447. Instead, what followed were texts from Mr. Gong showing confusion and skepticism that the person he was communicating with was actually a 13-year-old girl. Exhibit 2. For example, he repeatedly asked if he was communicating with a cop and made statements indicating that he wasn't certain about the actual age of the person with whom he was texting. Exhibit 2. Furthering Mr. Gong's confusion, Sgt. McDonald sent him a photo that he claimed was of "Kacityler." Exhibit 2. However, the photo that was sent to Mr. Gong was not that of a 13-year-old girl but rather a photo of Det. Gasser, a 28-year-old woman.³ RP V 436-437. Shortly thereafter, Det. Gasser spoke to Mr. Gong on the telephone for approximately six minutes. RP X 41. This conversation was not recorded but Det. Gasser testified about it on direct examination. RP V 439, RP X 29-41. She mentioned that Mr. Gong had an Asian accent and that he apologized for his poor English; explaining that English was not his first language. RP X 35-36, V 443-444. According to Det. Gasser there was no discussion of payment for sex during the phone conversation between

³ Det. Gasser conceded that she had provided a picture of herself from when she was a teenager to the task force for use in the operation but that, for reasons she did not know, Sgt. McDonald elected to send a picture of her when she was an adult to Mr. Gong rather than from when she was a teenager. RP V 436-437.

her and Mr. Gong. RP V 447. However, they did discuss contraception, sexual experience, and the need for hygiene. RP X 39-41.

After being directed to go to a private residence, Mr. Gong arrived in the early morning hours of July 28, 2018. RP X 45. Unbeknownst to him, the residence was a “target house” set up by the task force that was outfitted with both video and audio surveillance devices both inside and outside of the home. RP X 45. Waiting for him inside was Det. Gasser dressed in undercover clothes. RP X 45-46. Also inside was an arrest team that was hiding out of sight in bedrooms that were adjacent to the main room where the front door was located. RP X 45-46. When Mr. Gong knocked on the door Det. Gasser answered and invited him inside. RP X 67. After entering the residence and seeing Det. Gasser in person, Mr. Gong asked her how old she was. RP X 67. When Det. Gasser responded that she was 13 Mr. Gong exclaimed “Really?” and, according to Det. Gasser, appeared “surprised.” RP X 67-68. Det. Gasser responded, “Yeah” and then announced that she was going to go prepare to take a shower and began leading Mr. Gong towards the back of the house. RP X 67-68. At this point the arrest team came out of hiding and informed Mr. Gong that he was being audio recorded. RP X 67-68. Unbeknownst to Mr. Gong, the arrest team had actually begun audio recording his interaction with Det. Gasser shortly after he entered the

target house but before it came out of hiding and notified him that he was being audio recorded. RP V 464-465.⁴ As a result, the aforementioned conversation between Mr. Gong and undercover Det. Gasser regarding her age was audio recorded without Mr. Gong's knowledge or consent. RP V 464-465.

After being placed under arrest Mr. Gong was interrogated by Detective Garden and another member of the arrest team. RP VI 635. The interrogation lasted for approximately an hour and was done without the aid of an interpreter. RP VI 635. While the operation typically utilized two recorders to capture suspect interviews, during Mr. Gong's interview both recorders failed to work properly and only a portion of the interview was actually recorded. RP II 106-107. During trial the prosecutor elicited testimony about the unrecorded portion of the interrogation including statements Mr. Gong made about his ethnicity, how long he had been in the United States, what he was doing while here, and why he came to the United States. RP VI 632-633. During the recorded portion of the conversation Mr. Gong, after apologizing for his poor English, explained in broken English that he did not intend to have

⁴ Although she was part of the task force and aware that the "trap house" was wired with recording devices, Det. Gasser testified out of the presence of the jury that she was unaware that other members of her task force had begun recording the conversation as soon as Mr. Gong entered the home.

sex with a minor but decided to come meet “Kacityler” because he was “curious.” P VI 652-653. The recorded portion of the interrogation was played for the jury and Det. Garden testified from his notes about the unrecorded portion of the interrogation. RP VI.

2. *Trial*

During direct examination of Det. Gasser the prosecutor, without first bringing the unlawful recording to the attention of the court and/or the defense, introduced evidence of Det. Gasser’s conversation with Mr. Gong and her simultaneous observations of his behavior immediately after he entered the target house but before he was notified that he was being recorded.⁵ RP X 67-68. However, when, on cross examination, Mr. Gong’s attorney inquired about the recording, the prosecutor objected to it being mentioned due to the fact that it had been unlawfully recorded. RP V 464-465. Upon further review of the evidence and law, defense counsel agreed with the prosecutor that the conversation had been unlawfully recorded and moved, alternatively: 1) to dismiss the case pursuant to Criminal Rule 8.3; 2) for a mistrial, or 3) to suppress Det. Gasser’s testimony about the conversation and her simultaneous observations and

⁵ The prosecutor explained that, despite knowing that the private conversation was illegally recorded, he didn’t bring it to the attention of the defense or court before introducing Det. Gasser’s testimony about it because he had determined “on his own” that he had a “good faith” basis to believe her observations were admissible. RP VI 580.

to instruct the jury to disregard that part of Det. Gasser's testimony. RP VI 559-602. After argument the court ruled that the State had violated RCW 9.73 and that the recording of the conversation was inadmissible. RP VI 579-582, CP 145-149. However, the court denied the defense motions and ruled that Det. Gasser's testimony about the conversation and her simultaneous observations were admissible despite having been unlawfully recorded. RP VI 580-583, CP 145-149. The court also prohibited the defense from playing the recording ruling that the "best evidence is not at all admissible." RP VI 582, 604.⁶ Finally, at the prosecutor's request and over the defendant's objection, the court gave a limiting instruction to the jury suggesting that no recording of the conversation existed. RP VI 602, 606-607; CP 66-67.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. THE COURT SHOULD GRANT REVIEW PURSUANT TO RAP 13.4(B)(1) BECAUSE THE COURT OF APPEALS RULING THAT CONTENTS OF AN UNLAWFULLY RECORDED CONVERSATION ARE ADMISSIBLE WHEN THE OFFICER INVOLVED IN THE CONVERSATION IS UNAWARE THAT HER FELLOW OFFICERS ARE RECORDING IS IN CONFLICT WITH MORE RECENT DECISIONS BY THE WASHINGTON SUPREME COURT.

⁶ The court indicated that it would consider permitting the defense to play the recording itself but only if Mr. Gong waived his rights under RCW 9.73. RP VI 582-583.

RCW 9.73.030(1) provides that it is unlawful for anyone, including the State of Washington, to intercept or record any:

(b) Private conversations, by any device electronic or otherwise designed to record or transmit such conversation regardless of how the device is powered or actuated without first obtaining the consent of all the person engaged in the conversation.

The statute further provides that where consent by all parties is required, it shall be considered obtained whenever one party has announced to all other parties engaged in the conversation that such conversation is about to be recorded provided that the announcement is recorded. RCW 9.73.030(3). In addition, RCW 9.73.050 provides that:

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provision of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in any criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

In applying and interpreting RCW 9.73, Washington courts have held strictly to the letter and spirit of the statute. “Washington State’s privacy act is considered one of the most restrictive in the nation.” *State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014) (citing *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002)). The Washington

Supreme Court has repeatedly held that when a private conversation is unlawfully recorded by law enforcement, not only must the recording itself be suppressed but so must all information and observations made simultaneously with the unlawful recording. *See e.g., State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439 (1993); *State v. Faford*; 128 Wn.2d 476, 910 P.2d 447 (1996); *State v. Fjermestad*, 114 Wn.2d 828, 901-902, 791 P.2d 897 (1990) (“Once the police step outside the boundaries delineated by the law, we have no choice but to make inadmissible any information obtained.”). What’s more, suppression is mandatory of all information obtained by law enforcement during an encounter that was unlawfully recorded or transmitted *even when that information was not obtained through the aid of the unlawful recording or transmission. State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439 (1993) (emphasis added).

Nevertheless, the Court of Appeals ruled admissible Det. Gasser’s testimony regarding the conversation and her observations of Mr. Gong that occurred while he was being unlawfully recorded, relying solely on the fact that Det. Gasser herself was unaware that her colleagues on the task force had knowingly and purposefully begun recording the conversation unlawfully. *See Appendix A*, p. 10. In arriving at this conclusion the Court of Appeals could point to no authority for this from the Washington Supreme Court. Instead, it relied on a court of Appeals

decision, *State v. Grant*, 9 Wn.App. 260, 511 P.2d 1013 (1973). It then pointed to two Washington Supreme Court cases, each over 30 years old, *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980) and *State v. Fjermestad*, 14 Wn.2d 828, 791 P.2d 897 (1990) as support for the holding in *Grant*. However, neither *Williams* nor *Fjermestad* affirmed the holding in *Grant*. Rather, in both cases the Washington Supreme Court merely distinguished the facts at issue from those of *Grant*. See Appendix A, p. 9-10).

More importantly, the reasoning in *Grant* stands in direct contradiction to the reasoning from that of more recent decisions in which the court established, and the Supreme Court affirmed, what has become known as the “fellow officer rule.” This rule holds that police officers who effectuate an arrest are imputed to know facts and evidence that other officers in their department know at the time of the arrest even when the arresting officer his or herself is unaware of those facts and evidence. See e.g. *State v. Maesse*, 29 Wash.App. 642, 647, 629 P.2d 1349 (1981) review denied, 96 Wn.2d 1009 (1981) (fellow officer rule permits probable cause to be determined upon the information possessed by the police as a whole when they are acting in concert); *State v. Mance*, 82 Wn.App. 539, 542, 918 P.2d 527 (1996); *State v. White*, 76 Wash.App. 801, 805, 888 P.2d 169 (1995), aff’d, 129 Wn.2d 105, 915 P.2d 1099

(1996). The notion that the “fellow officer rule” imputes knowledge to an officer when it’s helpful to law enforcement but does not when it’s detrimental is both illogical and legally unsupportable. This is especially true in a situation like the one in Mr. Gong’s case where the law enforcement officers are all part of a task force working together on the same case towards the same goal.⁷

What’s more, the Washington Supreme Court has clearly established that Washington does not have a “good faith” exception to the exclusionary rule. *See, e.g., State v. Afana*, 169 Wn.2d 169, 181-182, 233 P.3d 879 (2010). When police officers obtain evidence unlawfully it must be suppressed even when those officers are acting in “good faith” and are unaware of the circumstances making their actions unlawful. Consequently, following the reasoning in *Grant* is tantamount to carving out an exception to this well-established Washington safeguard of citizens’ rights when it comes to police violations of the Recording Act.⁸

⁷ Ironically, had Det. Gasser not known anything about Mr. Gong’s text conversations with a fellow undercover task force officer yet arrested him immediately after he arrived at the trap house, the “fellow officer rule” would have imputed the knowledge of other task force members thereby giving her probable cause for the arrest.

⁸ It’s significant to note here that in finding what amounts to a good faith exception to the exclusionary rule applied to Recording Act violations, the Division One Court of Appeals is at odds with the Division Two Court of Appeals (where the appeal was originally filed). *See State v. Elmore*, 187 Wn.App. 1009 (2015) (Unpublished). (“Because there is not a “good faith” exception ... to the prohibition on admissibility of evidence obtained in violation of the privacy act, the evidence of the recording, including the officers

Finally, cases in the more than 40 years since *Williams* do not align with the reasoning in *Grant*. To the contrary, in all other cases found by appellant, courts have suppressed all evidence obtained from or during an unlawfully recorded conversation. *See e.g., State v. Porter*, 98 Wn.App. 631, 635, 990 P.2d 460 (1999) (RCW 9.73 requires suppression of evidence obtained against defendant during unlawfully intercepted conversation between defendant's girlfriend and another individual despite fact that defendant was not a party to the conversation); *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996) (Privacy Act requires suppression of evidence of marijuana grow found during execution of search warrant that was based on information that was unlawfully intercepted by a private citizen); *State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439 (1993) (suppression is mandatory of all information obtained by law enforcement during unlawfully transmitted encounter despite fact that information was not obtained through the aid of the unlawful transmission; *State v. Baird*, 83 Wn.App. 477, 922 P.2d 157 (1996) (interests served by enforcement of the Privacy Act justified suppression of conversation unlawfully recorded by defendant despite his constitutional right to present a defense).

observations and communications with the defendants, and all evidence subsequently obtained as a result of the unlawful recording of the defendants, is hereby suppressed.”).

It is both illogical and legally unsupportable to hold that the Privacy Act suppresses conversation under all of the circumstances outlined above but only if the testifying officer knew that other officers he or she was working with at the time were unlawfully recording the conversation. And, if this is not the state of the law, the Washington Supreme Court needs to clarify this immediately. Washington citizens are being convicted of crimes on the backs of such evidence and the rapidly increasing use of recording devices by both private citizens and law enforcement will only serve to make this issue more prevalent in criminal matters.

VI. CONCLUSION

For the foregoing reasons, the Court should accept Mr. Gong's petition for review and reverse his conviction.

DATED this 9th day of June, 2022.

Respectfully submitted,

LAW OFFICE OF ZACHARY C. WAGNILD, PLLC

/s/ Zachary C. Wagnild

Zachary C. Wagnild, WSBA No. 27640
Attorney for Junjie Gong
705 Second Avenue, Suite 1111
Seattle, WA 98104
zach@wagnildlaw.com
206.623.5822(p) 206.658.2401(f)

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by one copy of the foregoing and all appendices on the following:

Pierce County Prosecuting Attorney's Office

DATED this 13th day of June, 2022.

Respectfully submitted,

LAW OFFICE OF ZACHARY C. WAGNILD, PLLC

/s/ Zachary C. Wagnild

Zachary C. Wagnild, WSBA No. 27640

Attorney for Junjie Gong

705 Second Avenue, Suite 1111

Seattle, WA 98104

zach@wagnildlaw.com

206.623.5822(p) 206.658.2401(f)

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUNJIE GONG,

Appellant.

No. 83305-7-1

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Junjie Gong appeals his conviction for one count of attempted rape of a child in the second degree and one felony count of communication with a minor for immoral purposes. He contends that the Privacy Act should have barred the admission of his statements, that the trial court failed to provide a necessary unanimity instruction, and that the prosecutor engaged in several acts of misconduct. Finally, Gong claims that the State violated his right to due process by failing to preserve exculpatory evidence when it did not retain an adult website pop-up notice. Gong fails to establish any basis for relief. We affirm.

FACTS

In July 2018, the Washington State Patrol (WSP) conducted “Operation Net Nanny,” an undercover investigation into child exploitation. The WSP had a human trafficking unit that partnered with Homeland Security. The operation

Citations and pin cites are based on the Westlaw online version of the cited material.

No. 83305-7-1/2

involved local and federal detectives. WSP detective sergeant Daniel McDonald created a fake profile on Adultlook.com, an escort website. McDonald posed as "Kacityler," age 18, stating that she was "ready to have some fun" and "younger than you think."

Late in the evening on July 27, Gong text messaged the phone number McDonald posted for Kaci on Adultlook.com. Gong messaged that he found the number from a website and asked if she was "kacityler." McDonald confirmed Gong was messaging kacityler, who we will refer to as Kaci to depict when McDonald was responding in character. Gong asked Kaci if she lived in Tacoma, had "time tonight," and how much she charged. After Gong asked for her address and said he could drive, Kaci text messaged "tbh¹ im 13 and trying to find a older guy. i understand if im to young but boys my age suck. im free if ur ok iwth that." Gong responded, "what," "is that a crime?" and "well, at least we can meet." Gong asked Kaci if she was a cop. Kaci responded, "im 13! I cant be a cop dummy." Gong asked Kaci "how much do you need" and if she was able to talk. Kaci responded "yes but only if ur serious about hooking up and teaching me." Gong asked for her address and said "I understand my action is putting me in a jail[.]"

McDonald sent Gong a photo of Kaci. The photo depicted another undercover officer, WSP trooper Anna Gasser, with digital filters that applied bear ears and glasses on her face to make her look younger. Gong refused Kaci's request to send a selfie so as not to "self evidence myself". Gong

¹ Common acronym for "to be honest," as testified to by McDonald.

No. 83305-7-1/3

messaging, "i may can help you," and "i must be lost my mind today" "guilty" and asked Kaci to "tell me i am guilty." Gong asked Kaci if he needed to "book a room." Kaci told Gong he could come over since she was home alone. Gong agreed to Kaci's request to bring condoms, lubricant, and a cherry Slurpee from 7-Eleven.

As their text messages continued before Gong arrived, Kaci told Gong she did not have a lot of experience and asked what Gong could teach her. Gong replied "the history and science" "about make sex". Gong asked to speak with Kaci over the phone.

Gasser pretended to be Kaci over the phone and in person. During the short unrecorded phone call between Gong and Gasser, Gong asked Kaci what she wanted to learn, and Gasser told him she wanted to experience sex. Gong said he would be "proficient enough" at having sex and there were a lot of things he had to teach her. He said he would help her learn by experience. He agreed to bring condoms, and he didn't want her to be a "young mom" and that she "might hurt a little bit." Gong also told her that hygiene was very important and he did not want to be "like two pigs fucking."

Gong was given an address to an undercover target house, where law enforcement set up video cameras. While Gasser greeted Gong, federal agents in another room at the house controlled the video equipment.

Gong arrived at the undercover target house at about one o'clock in the morning. When Gasser answered the door, Gong handed her the Slurpee and told her he brought the condoms.

No. 83305-7-I/4

Unbeknownst to Gasser, the agents started audio recording three seconds too soon, capturing a short interaction between Gong and Gasser before the arrest team entered. Gong asked Gasser how old she was and she told him 13 and he asked "really?" Trooper Gasser testified that Gong looked "shocked" and stepped back "as if I looked older than 13." Trooper Gasser told him "yeah" and then said she was going to warm up the shower. As Gong followed her toward the bathroom, the arrest team came in and announced to Gong that he was under arrest and being recorded and then took Gong into custody. Gasser testified at trial about her personal interactions with Gong. The audio recording of their conversation was never played for the jury or admitted into evidence.

Detective John Garden interviewed Gong after his arrest. Gong told Garden that he was an immigrant, having arrived in the United States eight years ago, and was currently serving in the army. Gong told the detective that "curiosity" brought him to the house to meet Kaci. He said he continued to talk to Kaci after she said she was 13 because she was the only one who responded to him. When the detective asked Gong about bringing a condom, Gong said there was a "50 percent chance" that he would have had sex with Kaci. Gong expressed that he knew having sex with someone under 16 was illegal and clarified he intended to have sex with the 13-year-old girl "only if she agreed."

Gong was charged with one count of attempted rape of a child in the second degree and one count of communication with a minor for immoral purposes. A jury found Gong guilty on both charges. The trial judge sentenced Gong to an indeterminate sentence of 76.5 months to life in prison for the

No. 83305-7-1/5

attempted rape in the second degree concurrent to the nine months imposed for communication with a minor for immoral purposes. Gong appeals.

DISCUSSION

Privacy Act

Gong argues the court erred by allowing Gasser to testify about the conversation she had with Gong at the target house because the conversation was unlawfully recorded in violation of the Privacy Act. The State responds that because Gong never objected to Trooper Gasser's testimony, this appeal is more properly framed as a challenge to the court's denial of Gong's motion for mistrial. Based on the record, we agree with the State. Though the conversation between Gasser and Gong may have been improperly recorded, Gong mischaracterizes the trial court's actions and misunderstands what this court will review on appeal.

Gong claims that Gasser was permitted to testify over his objection. This is incorrect. At the time she was called to testify, Gong did not object to Gasser testifying, nor to her statements about her in-person conversation with Gong.

In fact, when defense counsel cross-examined Gasser, counsel himself directly asked her about the recording in front of the jury:

[Defense counsel] All right. The portion or the thing we're talking about where Mr. Gong shows up at the residence and asks you how old you are, now, [the prosecutor] was asking you a lot of questions about [Gong's] inflection and things like that, but the fact is is [sic] that your memory is not really all that necessary, right, because this was recorded, wasn't it?

[Trooper Gasser] It was.

[Defense counsel] Okay. So if we want to hear what the inflection was, the best evidence out there is probably just going to be hear the recording, isn't it?

[Trooper Gasser] Yes.

Outside the presence of the jury, the State addressed defense counsel referencing the recording in front of the jury. The State explained it believed this audio recording was inadmissible under the Privacy Act. The prosecutor stated,

[T]he defense has mentioned inadmissible evidence in front of this jury in an attempt to suggest the State is hiding information from them [Defense counsel] either knows or should know that the audio interchange between Mr. Gong and Anna Gasser at the door of that trap house is inadmissible as a matter of law under the Privacy Act. The reason for that is, there was no announcement beforehand that it was being audio and video recorded.

. . . .

He's now told the jury there's an audio exchange the State did not play for them at the door.

To remedy the defense's actions, the State requested that the court tell the jury the audio recording did not exist for the purposes of the trial, or alternatively, that the defense elect to play the audio.

In response, defense counsel told the court he assumed the recording would be played stating, "Well, we've never had a problem with it being played, so we want it to be played." Defense counsel also suggested that if the recording really was inadmissible, no testimony would be permitted regarding the recording. The prosecutor disagreed:

[A] violation of the Privacy Act prevents the witness from using that evidence to prepare for testimony. It's just a flat lie that it means they can't testify at all and we have a mistrial.

I will represent to you that Detective Gasser will testify under oath that her testimony was not refreshed with any audio from the recording and that she testified from her memory and from her written report.

The court asked both parties to provide additional authority on the issue.

Four days later, defense agreed with the State that the audio recording of Gong and Gasser presented a Privacy Act violation. Defense counsel asked the court to (1) dismiss the case for government misconduct under CrR 8.3(b)² for the State eliciting testimony that was the substance of the unlawful recording, (2) declare a mistrial, or (3) instruct the jury not to consider any statements made by Gong to Gasser after he entered the target house.

The State asked the court to deny Gong's requests and issue a jury instruction not to consider the defense referencing the audio recording. Gong objected to the court issuing a limiting instruction.

The court denied Gong's request for dismissal or mistrial and granted the State's request for a limiting instruction, which was read to the jury:

Last week during the testimony of Detective Anna Gasser, there were questions asked about a recording of an exchange between Detective Gasser and Mr. Gong at the door regarding or relating to age. That was a subject that I should not have allowed. You are to entirely disregard the question and the answer given at this time. You are instructed that there is no audio recording between Mr. Gong and Detective Gasser that is or will be in evidence at this trial.

As Gong did not timely object to the testimony of Gasser at trial, we will not review this claim of error raised for the first time on appeal. See RAP 2.5(a) ("the appellate court may refuse to review any claim of error which was not raised in the trial court."). However, to the extent Gong challenges the trial court's rejection of his motion for mistrial or proposed instruction to the jury to disregard

² Criminal Rule 8.3(b) provides that the "court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

No. 83305-7-1/8

Gasser's testimony about what Gong said to her after entering the target house, we review his Privacy Act claim on that basis.

We review a trial court's rulings on motion for mistrial and admissibility of testimonial evidence for abuse of discretion. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010); State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

Washington's Privacy Act prohibits the recording of private communications without the consent of all participants. RCW 9.73.030(1). Consent may be obtained by announcing to all parties that the conversation will be recorded, so long as the announcement is itself recorded. RCW 9.73.030(3). RCW 9.73.050 further provides that information obtained in violation of RCW 9.73.030 is inadmissible as evidence in Washington courts. Where a trial court improperly admits information obtained in violation of the Privacy Act statute, an appellate court must determine whether the error was so prejudicial as to materially affect the outcome of the trial. State v. Rupe, 101 Wn.2d 664, 682, 683 P.2d 571 (1984).

The State conceded at trial that the brief conversation between Gasser and Gong at the target house was unlawfully recorded according to RCW 9.73.³ But the State argues that Gasser's testimony was properly admissible because she did not participate in the unlawful recording, and she only testified as to her personal knowledge of the conversation. We agree.

In State v. Grant, this court held that the Privacy Act did not bar a

³ There was another Privacy Act issue at trial related to the post-arrest recording of Gong with Detective Garden, but that is not at issue in this appeal.

detective's testimony about a conversation with a defendant where the detective had no knowledge of the illegal monitoring. State v. Grant, 9 Wn. App. 260, 267, 511 P.2d 1013 (1973). In Grant, we stated,

The instant case does not involve an objection to the testimony by the overhearing police officers concerning the illegally-monitored and taped conversation. This case is one involving testimony to the objected-to conversation from one of the parties to that conversation. Had Detective Hume been a party to the illegal recording and taping, a different question would be presented.

Grant, 9 Wn. App. at 267.

In State v. Williams, our Supreme Court referred to Grant when distinguishing that case from the one before it. State v. Williams, 94 Wn.2d 531, 543, 617 P.2d 1012 (1980). In Williams, the federal agents who participated in the communication with the defendant also took part in illegally recording the conversation. Williams, 94 Wn.2d at 543. The court ruled:

Unlike the situation in Grant, the federal agents and informant who participated in the conversations in the present case knew of, and took part in the illegal recordings of the conversations, and therefore obtained the information from the conversations in an unlawful manner. . . . [T]he privacy act precludes the dissemination of this illegally obtained information-whether it is disseminated by introducing the tape recordings of the testimony of the officer or civilian informant who participated in the conversation. Accordingly, the federal agents and informant cannot testify as to the contents of the illegally recorded conversations.

Id. at 543.

Grant is analogous to Gong's case before us, not Williams. There is no dispute that Gasser did not know at the time of the recording that officers illegally recorded the brief interaction between her and Gong before the entrance of the arrest team. The trial court specifically found that Gasser "did not know the audio

recording existed until immediately before testifying.” The State called Gasser to testify about the conversation she had with Gong at the entrance of the target house. The State did not ask Gasser about the recording of this interaction, or seek to introduce it, but instead asked her to testify only about her personal knowledge of the conversation with Gong. Gasser’s testimony was not barred by the Privacy Act.

Gong cites to State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990) for his contention that an unlawfully recorded conversation requires suppression of “all information and observations made simultaneously with the unlawful recording.” We disagree with Gong’s interpretation of Fjermestad. In Fjermestad, an undercover officer was communicating with the defendant while wearing a body wire that transmitted the conversation to nearby officers. Fjermestad, 114 Wn.2d at 829-30. Our Supreme Court specifically delineated Fjermestad from Grant, concluding that “[u]nlike the situation in Grant, the undercover officer was fully aware that he was transmitting the conversation.” Id. at 834. The court held that “when an officer knowingly transmits a private conversation, without court authorization or without the consent of all the parties, any evidence obtained, including simultaneous visual observation and assertive gestures, is inadmissible in a criminal trial.” Id. at 836. Because Gasser did not know her interaction with Gong was being unlawfully recorded, Fjermestad is distinguishable.⁴

⁴ Gong also cites to other distinguishable cases: State v. Salinas, 121 Wn.2d 689, 693, 853 P.2d 439 (1993) (undercover detective wore an unauthorized body wire that transmitted his conversation with a defendant to other officers); State v. Elmore, No.

Following Grant, we hold that the Privacy Act did not bar Gasser from testifying at trial about her conversation with Gong inside the target house. Thus, trial court did not abuse its discretion in rejecting Gong's motion for a mistrial or refusal to grant his request to instruct the jury to disregard Gasser's testimony.⁵

Unanimity Instruction

Gong, who did not request a unanimity instruction at trial,⁶ next asserts that the trial court erred by failing to give a jury unanimity instruction for the charge of felony communicating with a minor for immoral purposes (CMIP). He insists that because there was no unanimity instruction, it was unclear if the jury relied on the text messages sent to McDonnell or the telephone call with Gasser as the basis for the CMIP charge. The State argues that no unanimity instruction was necessary because Gong's communications with law enforcement constituted a "continuing course of conduct" warranting an exception to a unanimity instruction. We agree with the State.

A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington State Constitution. State v. Brown, 159 Wn. App. 1, 14, 248 P.3d

45531-5-II, slip op. at 3-4 (Wash. Ct. App. Apr. 21, 2015) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2045531-5-II%20%20Unpublished%20Opinion.pdf> (undercover officer knowingly activated the recording device he was wearing to record an unauthorized conversation).

⁵ As a result of our ruling that Gasser's testimony was not barred by the Privacy Act, we need not reach whether any error was so prejudicial as to impact the outcome of the trial requiring reversal of Gong's conviction.

⁶ Gong did raise the issue at sentencing when he asked the court to find the communicating with a minor for immoral purposes conviction invalid, "withdraw" the finding of guilty, and enter a finding of not guilty, because it was unclear which communications with law enforcement the jury relied on to convict Gong. The trial court interpreted defense counsel's argument as a motion for a judgment notwithstanding the verdict and denied the motion. Gong does not challenge this ruling on appeal.

No. 83305-7-I/12

518 (2010) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

Because a trial court's failure to provide a unanimity instruction affects a constitutional right, it can be raised for the first time on appeal. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006). We review the adequacy of jury instructions de novo. Brown, 159 Wn. App. at 14 (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

Where a defendant has engaged in multiple acts that could be the basis for a single count, the State is required to elect one act on which it relies for the conviction or the court must instruct the jury to agree on a single act. State v. Monaghan, 166 Wn. App. 521, 536, 270 P.3d 616 (2012) (citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). No unanimity instruction is required, however, where a defendant's criminal acts form a "continuing course of conduct." Monaghan, 166 Wn. App. at 537 (citing State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991)). We review whether to apply the continuing course of conduct exception in a "commonsense manner" considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. State v. Brown, 159 Wn. App. at 14 (citing State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996)). "Evidence that multiple acts were intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct." State v. Rodriguez, 187 Wn. App. 922, 937, 352 P.3d 200 (2015).

To convict Gong of CMIP the jury had to find that: (1) Gong communicated with another person for immoral purposes of a sexual nature; (2) Gong believed

the other person was a minor; and (3) the communication was made through the sending of electronic communication.⁷

Gong did, in reality, communicate with two different people. He text messaged McDonnell and spoke to Gasser. However, Gong believed he was communicating with the same person, Kaci. And the objective of both types of communications was the same—to work out the details of their arrangement where Gong would teach Kaci about sex despite the fact that she was a minor. Through the text messages, which were exchanged within minutes both before and after the phone call, Gong confirmed that Kaci was 13, that he would bring condoms, that he would teach her and show her how to have sex, and that he would come to her house that evening. During the phone call, Gong again confirmed that Kaci was 13, that she wanted to truly experience sex, that he would bring condoms, that she might hurt a little bit, and that he had a lot to teach her.

Gong's interaction with Kaci lasted less than two hours between the time Gong sent his first text message to the time of his arrest. Reviewed in a "commonsense manner," this was not two separate crimes involving different victims at separate locations. Gong's text messages and the phone call was an on-going conversation with Kaci for a single purpose—to have a sexual encounter with a person he believed to be a 13-year-old child.

What Gong contends were two separate acts was nothing more than a

⁷ Electronic communication was defined in the jury instructions as "the transmission by wire, radio, optical cable, electromagnetic, or other similar means, and includes, but it is not limited to, electronic mail, internet-based communications, pager services, and electronic text messaging."

No. 83305-7-I/14

continuous course of conduct with law enforcement that did not require a unanimity instruction.

Prosecutorial Misconduct

A. Shifting the burden of proof

Gong argues that the State engaged in several acts of prosecutorial misconduct and as a result his convictions should be reversed. We conclude that none of the State's actions warrant reversal of Gong's convictions.

For Gong to prevail in his prosecutorial misconduct claims he must demonstrate that in the "context of the entire record and the circumstances at trial" the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice requires showing a "substantial likelihood that the misconduct affected the jury verdict." In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Where a defendant fails to object to the prosecutor's misconduct at trial, the errors are considered waived unless the conduct was so flagrant and ill-intentioned that no jury instruction would have cured the prejudice. Thorgerson, 172 Wn.2d at 443. We review an allegation of prosecutorial misconduct under an abuse of discretion standard. State v. Osman, 192 Wn. App. 355, 366, 366 P.3d 956 (2016).

(i) Claiming only three defenses exist

Gong first argues that the State engaged in misconduct because the prosecutor improperly shifted the State's burden of proof by stating that there were only "three defenses that exist in a criminal case."

The State bears the burden to prove a criminal case beyond a reasonable

doubt, and it may not shift the burden of proof to the defendant. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A criminal defendant is not required to present any evidence at trial. Osman, 192 Wn. App. at 366.

During the prosecutor's first closing argument the prosecutor said:

I also want to talk about the three possible defenses that exist in a criminal case. There is, it was not me. Someone else did it. There is, I may have done something, but the State can't prove what I did. And then there is, I did everything that the State said I did, but I was justified, excused, or entitled for some legal reason to do it.

Defense counsel objected, telling the trial court this statement was burden shifting. The trial court overruled the objection and the prosecutor continued:

Make no mistake about that. The State has to prove every single element. That really has nothing to do with what we're talking about right here, but I'll repeat it multiple times. The State has to prove every element.

In fact, let's do this right now. The burden of proof in this case, beyond a reasonable doubt, and it's the highest burden that's put on any party in any court in this country. It's a burden that's been met and it's a burden the State bears, the State accepts, and the State has met in this case. We'll get to that.

It wasn't me. I may have done something, but the State can't prove it, or I did it and I was entitled to. Usually those are exclusive, or, you know, they're not. It's not two of them. It's not all three of them. It's usually one of them, and it is in this case.

The prosecutor incorrectly suggested that there were only "three possible defenses" in a criminal trial. Absent is the scenario where no crime occurred. By listing limited defenses, the prosecutor comes dangerously close to suggesting that the defendant must actively present a defense. In context, the prosecutor's statements did not amount to burden shifting because the prosecutor made clear during closing argument that the State retained the burden to prove every

element beyond a reasonable doubt. Even if the prosecutor's list of criminal defenses was inaccurate, Gong has not established that such an error created a substantial likelihood that it affected the jury verdict

(ii) Finding contrary evidence

Gong next claims that the prosecutor shifted the burden of proof when he told the jury to try and find evidence that Gong did not believe the undercover officer was 13 years old.

The prosecutor told the jury:

So in one respect, play devil's advocate. Play opposite and see what evidence you can find, not make up, of course, because you're confined to the evidence that was presented. Find what evidence was presented that suggests she is not 13.

The prosecutor went on to remind the jury that Gasser told Gong she was 13 when he came into the target house, and during an interview with a detective, Gong suggested he believed Kaci was underage. The prosecutor continued:

What our law requires is you look at the evidence that you have and you say to yourselves, do I have enough? And what I would suggest to you is part of that process is to say, what evidence can we find from the – what evidence can we find in this case that refutes his belief that [she's] 13. That doesn't mean presume he knew it to begin with. Doesn't mean the State doesn't have to prove. . . he believed she was 13. It means, look at the evidence that contradicts the State's proof. There isn't any.

Defense counsel objected, arguing that the prosecutor was burden shifting. The court overruled the objection.

The prosecutor continued, "You have to determine, did he believe she was 13, and did he intend to have sex? And the uncontroverted evidence from the witness stand, and even from Mr. Gong's mouth in his interview, is yes to both of

those questions.”

The prosecutor later returns to this issue, and referring to the photo of Gasser said,

All of what Mr. Wagnild said about Detective Gasser as a person is all true. She is an adult, she is female, and it was her picture. If you look at Exhibit Number 3 and you say, if I were told that this is a 13-year-old girl, then I got this picture, there's no chance I could ever believe it. Fine. Not going to get in your way. Doesn't really matter whether or not you think that could be a 13 year old. What you have to look at is what evidence did Mr. Gong – what evidence from Mr. Gong do you have that he didn't believe it? What clarification question did he ask on the text messages? What conversation did he have during the telephone call with Detective Gasser?

A prosecutor has “wide latitude to comment on the evidence introduced at trial and to draw reasonable inferences from the evidence.” Osman, 192 Wn. App. at 367. A prosecutor may properly reference the defense's lack of evidentiary support for their claims. Id. We have previously held that a prosecutor's “mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

The prosecutor told the jury that the State had the burden to prove that Gong believed Kaci was underage. In anticipation that Gong would contest that element of the crime, the prosecutor told the jury to consider all the evidence about what Gong knew of Kaci's age and to consider the lack of evidence that “contradict[ed] the State's proof.” In context, when the prosecutor asked “what evidence from Mr. Gong do you have that he didn't believe it?” it was in reference to Gong's statements in the text messages and during the phone conversation with Gasser. The prosecutor never suggested Gong failed to present evidence

at trial. The prosecutor's comments about the evidence did not improperly shift the burden of proof to the defense.

(iii) Minimizing proof

Gong also argues that the prosecutor minimized the burden of proof when he told the jury it could disregard the evidence. Gong refers to the prosecutor recalling Gong telling a detective there was only a 50 percent chance he was going to have sex with Kaci and then arguing, "I suppose it could be argued that that isn't beyond a reasonable doubt. It's not. But who cares? There's a lot in this world that's a grey area but having sex with a child isn't one of them." We first note that Gong misquotes the statement and takes it out of context. In closing, the prosecutor stated,

[Detective Garden asked] "Would you have had sex with a 13 year old?" [and Gong said] "Only if she agreed." "Only if she agreed." Those were his words.

[Gong] said at some point, according to Detective Garden, 50 percent chance he was going to have sex. I suppose it could be argued 50 percent isn't beyond a reasonable doubt. It's not. But who cares? The fact of the matter is, folks, you know, there's a lot in this world that's gray area. Not a lot that's just yes or no, on or off, black or white. A lot of stuff has middle ground. You know what doesn't? You either will have sex with a child when you're an adult or you will not. There isn't any gray area there. There isn't any adult – in this case, male – who says, "Thirteen. Well, if she wants to, I guess it's okay if we're going to have sex, but only because she wants to." That's never going to happen for someone who – for someone who isn't willing to have sex with a 13 year old. It's not a normal thought process. It's not a reasonable thought process, but none of those things matter.

What does matter is, is that you have to remember that when Mr. Gong is talking to Detective Gasser and Agent McNelis, what he's doing is he's sitting in that house where he showed up to have sex with Kaci. He's in handcuffs. He's been told he's under arrest for showing up to have sex with a 13 year old, and so he minimizes a couple things. He minimizes a couple things. Does that

exonerate what he did, or is he just not making it as bad as it really is from the way that the evidence comes forward?

Gong did not timely object to the statement he now challenges on appeal.⁸

Regardless, in context, the prosecutor was arguing to the jury that Gong's post-arrest statement, that there was only a 50 percent chance he was going to have sex, was self-serving and did not establish reasonable doubt in light of all the evidence. Arguing that the evidence is weak is not the same as telling the jury to disregard it. The prosecutor argued, "Hold the State to proving this case beyond a reasonable doubt because when you review all of the evidence that's here, what you'll find is that the defendant spoke to a 13-year-old girl by text messages about sexually immoral subject, and believing she was 13, he took a substantial step toward engaging in sex with her."

The prosecutor's statements did not minimize the State's burden of proof. Even if the statements were improper, they were not so flagrant and ill-intentioned that no jury instruction would have cured the prejudice.

B. Disparaging defense counsel

Gong claims that the prosecutor engaged in misconduct when he "repeatedly disparaged defense counsel's closing argument by calling into question his integrity." Gong argues multiple statements by the prosecutor in rebuttal are problematic. First, the prosecutor told the jury:

⁸ Gong claims he did object, citing to another objection in the record made seven paragraphs later to suggest an objection was made here. The record indicates that the objection made related to another statement. After the prosecutor stated "It means, look at the evidence that contradicts the State's proof. There isn't any. The reason why we have a standard of beyond a reasonable doubt is —" Gong objected "to that burden-shifting argument," which the court overruled.

It's been said, when you have the facts on your side you pound the facts in closing argument. When you have the law on your side, you pound the law, and when you have neither you pound the table.

Second, the prosecutor described the defense closing statement: "You just got 40 minutes [that] was, look over there, so that you won't look there." Third, the prosecutor expressed frustration at having to address the adult website's age-restriction pop-up notice:

It's ridiculous that I'm standing up here talking about it because then the defense wins and you're not focused on the facts. You're focused on the made-up fiction. You're focused on the closing argument Mr. Wagnild gave, which is, focus on anything except [Gong's] behavior[.]"

Gong did not object to any of these statements at trial. The prosecutor was responding to the following defense argument:

So let's talk about the investigation and why they fell short. One of the first problems, of course, is they go to this website. It's called AdultLook.com. That is what it is, but anyone going to it doesn't – it's not like it's called minors.com or teens.com. I mean, this is for adults, and it has this notice when you arrive at the website. And you know, Sergeant McDonald kind of glossed over this notice. And because, well, you don't really have to pay attention to it. But the notice is important here, and you're going to have it. It's Exhibit Number 28, and here's why that – it's important. It's because this is a notice. It's something that pops up on the screen that you're sort of forced to look through and acknowledge, and it has a line in it. And you're going to see it, but the line says, "We do not allow links to children, to child pornography, or minors."

All right. Now, you can say, well, you can just disregard that, okay? Yes, it can be disregarded, but think about what it says to someone who's looking at it. Someone looks at that and says, oh, hey, look at this. The website is letting me know that it takes some steps to make sure because it's saying it does not allow it.

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. Thorgerson, 172 Wn. 2d

No. 83305-7-1/21

at 451 (citing State v. Warren, 165 Wn.2d 17, 29–30, 195 P.3d 940 (2008); State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993)). Where the comments can fairly be said to focus on the evidence, no misconduct occurs. Thorgerson, 172 Wn.2d at 451.

The prosecutor's "made-up fiction" comment improperly suggested defense counsel was making up facts to the jury. Defense counsel's argument was based on reasonable inferences based on admitted evidence. The prosecutor's comments went further than suggesting that no one would reasonably believe these notices prevented minors from participating on the website. The prosecutor suggested that the fiction was "made-up" by defense counsel. However, the comment was not so flagrant and ill-intentioned that it could not have been cured with a jury instruction. Because Gong did not timely object, he waives this claim. Even if it could be argued that a later objection applied to this comment, Gong fails to show a substantial likelihood that the misconduct affected the jury verdict. We do not find that the other challenged comments discussed above to be improper.

C. Witness credibility

Gong next asserts that the prosecutor engaged in misconduct when he told the jury that Gasser was either lying or telling the truth and they could not pick and choose what they believed.

During closing, the defense questioned the reliability of Gasser's testimony. In response, the prosecutor told the jury:

[It's] fascinating to hear how badly Detective Gasser behaved and how much she manipulated you when she destroyed her notes and

when she, you know, relayed the conversation that happened at the door and all the other things that she did wrong, and yet then the very words out of [defense counsel's] mouth were, and I quote, "Detective Gasser was very honest with you. She said, 'I don't look 13.'" You can't have it both ways. She's either telling you the truth or she's not[.]

Gong objected to the prosecutor's statements stating that this was an improper argument, but the court overruled the objection. The prosecutor continued:

You can't pick and choose. You can decide what words out of her mouth you believe and don't. You could actually pick and choose. If you think she told you something that's not true, flat reject it. I'm asking you, I'm encouraging you, I'm demanding that if you find she misrepresented anything, reject it. And if you found that he made up the facts, reject those. Concentrate on the evidence that was presented to you, the true facts of this case. Look at the entirety of the communication and look at any evidence you have that this defendant thought he was dealing with an adult from five minutes in when he's told, "I'm 13," until he goes into handcuffs. It's not there.

It is the province of the jury to determine witness credibility. State v. Beasley, 126 Wn. App. 670, 690, 109 P.3d 849 (2005). Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. Thorgerson, 172 Wn. 2d at 443 (citing State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010)).

The prosecutor's comments prior to the objection suggested that the jury had to either accept all of Gasser's testimony or reject all of Gasser's testimony, which is incorrect. The context of the prosecutor's comments after the objection was confusing. The prosecutor said, "You can't pick and choose," and immediately followed with "You can decide what words out of her mouth you believe and don't. You could actually pick and choose."

Though the prosecutor's comment prior to the objection was improper,

and the comment after the objection was confusing, the prosecutor immediately told the jury that it could choose what parts of a testimony it wished to believe and what parts it wished to reject. Gong fails to show a substantial likelihood that the misconduct affected the jury verdict.

D. Nationalism

Finally, Gong claims the prosecutor engaged in misconduct by asking the jury “to consider [Gong’s] immigrant status as a factor in the case” when the prosecutor, in closing, stated,

It’s the greatest country in the entire world. What we say is that you can have unlimited freedoms here, but there’s a price for that freedom. And that is that you will be held accountable for your actions. Mr. Gong chose to pursue a sexual encounter with someone who told him she was 13 and never told him anything different. He chose to do that. And now he wants you to excuse him.

Gong did not object to the prosecutor’s statement. Before and throughout trial, defense counsel repeatedly raised the issue that Gong spoke Chinese, suggesting the possibility that his text messages were mistranslated or misunderstood.⁹ It was in this context that the prosecutor elicited evidence to establish Gong’s proficiency in English. The prosecutor’s inquiries in this regard were both relevant and limited to rebut a defense strategy.

However, the prosecutor’s closing remarks had nothing to do with arguing Gong’s proficiency with English despite being an immigrant. It, instead, portrayed Gong as an outsider who abused his privilege of the freedom this country offers and who must pay a price for doing so. Such an argument was

⁹ Gong relied on a Chinese interpreter at trial.

No. 83305-7-I/24

improper, but the statement was not so flagrant and ill-intentioned that it could not have been cured with a jury instruction. Because Gong did not object to the comment, he waives this claim. Even if the comment could be considered flagrant and ill-intentioned, we do not believe Gong met his burden in showing a substantial likelihood that the misconduct affected the jury verdict.

Preservation of Evidence

Gong's last claim on appeal is that the State violated his constitutional right to due process by not preserving the AdultLook.com pop-up notice as evidence. We disagree.

To comport with due process under the Fourteenth Amendment, the State has an obligation to preserve and disclose material exculpatory evidence for use by the defense. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). "Material exculpatory evidence" possesses both an "exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Wittenbarger, 124 Wn.2d at 475 (citing California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). We review de novo a trial court's determination about whether missing evidence is materially exculpatory. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

Before trial, Gong filed a motion to dismiss the case, arguing that the State violated CrR 8.3 by failing to preserve potentially exculpatory evidence. The evidence the State failed to preserve was the pop-up notice "disclaimer" on

AdultLook.com that informed users that only adults were permitted on the website, which required a user to click on a button indicating that they agreed to the terms and conditions. The motion included a declaration from a private investigator stating that AdultLook.com included a disclaimer on its website but that she could not find the disclaimer in effect in July 2018. Gong provided the court with an example of what the AdultLook.com disclaimer may have looked like. The disclaimer was not material exculpatory evidence. Its existence does not change the fact that Kaci told Gong she was 13. Also, Gong fails to show that there was no "comparable evidence" available.

There was readily comparable evidence. Gong's own private investigator was able to find an AdultLook.com disclaimer that comported with his own recollection of when he accessed the site: a message that indicated that no minors were allowed on the website. The State stipulated that there was such a pop-up message and asked law enforcement to testify about the existence and content of the pop-up message:

[State]: When you go to adultlook.com and just log into the site, are you confronted with any information before you actually enter the site?

[Witness]: Yeah. There's a disclaimer that you have to agree to being over 18.

The State continued to inquire about the disclaimer, asking the detective to confirm that the disclaimer provided to the court contained similar verbiage to the one he would have seen in July 2018. The State did not dispute that the disclaimer existed or that it stated all users must be 18. The evidence at trial established that when Gong originally text messaged Kaci he was messaging a

No. 83305-7-1/26


profile that stated she was 18 years old. It was only after Gong began messaging Kaci that she said she was actually 13. Gong does not provide any reason to believe that the July 2018 disclaimer was not comparable to the disclaimer he provided to the trial court.

There was no due process violation with regard to the website disclaimer.

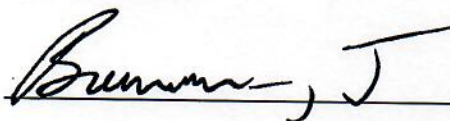
CONCLUSION

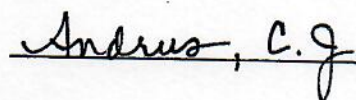
Admission of Gong's statements by an eyewitness officer unaware of the improper recording of the conversation did not violate the Privacy Act. The trial court was not required to provide a jury unanimity instruction because the alleged separate acts of communications by Gong was nothing more than a continuous course of conduct. Even where the prosecutor made improper statements during closing argument, they either were not so flagrant and ill-intentioned that they could not be cured with a jury instruction, or Gong failed to show a substantial likelihood that the misconduct affected the jury verdict. Lastly, Gong failed to establish a due process violation when the evidence at issue was not materially exculpatory, and Gong was able to introduce comparable evidence.

We affirm.



WE CONCUR:





LAW OFFICE OF ZACHARY C. WAGNILD, PLLC

June 13, 2022 - 10:44 AM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 83305-7
Appellate Court Case Title: State of Washington, Respondent v. Junjie Gong, Appellant
Superior Court Case Number: 18-1-02954-8

The following documents have been uploaded:

- 833057_Petition_for_Review_20220613104237D1736667_9573.pdf
This File Contains:
Petition for Review
The Original File Name was Petition for Review w Appendix.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- teresa.chen@piercecountywa.gov

Comments:

Sender Name: Zachary Wagnild - Email: zach@wagnildlaw.com
Address:
705 2ND AVE STE 1111
SEATTLE, WA, 98104-1720
Phone: 206-623-5822

Note: The Filing Id is 20220613104237D1736667