Supreme Court No. 101929-7
Court of Appeals No. 56532-3-II

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

STATE OF WASHINGTON,
Respondent

v.

LAMAR ALEXANDER SMITH
Appellant

PETITION FOR REVIEW

SUZANNE LEE ELLIOTT
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206-587-2711

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I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Mr. Lamar Smith seeks review of the decision in *State v. Smith,* 56532-3-II filed March 7, 2023. Motion for Reconsideration denied April 17, 2023.

II. ISSUE PRESENTED FOR REVIEW

Did the trial court err when it gave an instruction that commented on the law, was the comment was manifest and did it prejudice Mr. Smith's defense?

III. INTRODUCTION

In this "Net Nanny" prosecution, the police posted an on-line invitation to text with a 20-25 year old woman. Mr. Smith answered the text and began texting – not with an adult woman – but rather with two police officers over several days. The police officers' conversations about sex with Mr. Smith were typical of an adult woman. An officer texted Mr. Smith a picture of an adult female but

their texts stated the adult woman in the picture was only 13 years old. When the police invited Mr. Smith to meet them at an address, he was arrested. Immediately after his arrest, the police accused Mr. Smith of attempting have sex with a 13-year- old but Mr. Smith stated he believed the texts were from an adult woman who was engaging in on-line role playing and never believed texts were from a 13-year-old.

Mr. Smith was denied a fair trial because the jury instructions did not unambiguously tell the jury that the State had to prove beyond a reasonable doubt that Mr. Smith intended to have sex with person who was less than 13 years old, and because Instruction 18 was a comment on the evidence.

IV. STATEMENT OF THE CASE

The Washington State Patrol continues to engage in Net Nanny stings, involving 50-70 law enforcement officers. RP 651. The police characterized these stings as "proactive" and testify –

without any supporting data - that the stings prevent future crimes from taking place. RP 648-49.

The officers who conduct these stings have been banned from using certain websites because their activities are so explicit that they violate the sites' stated policies. But they continue to find platforms where they can post very opaque advertisements by claiming they are posting as adults who meet the stated criteria. In 2019, the Net Nanny personnel set up a chat profile on "Whisper." The site permits anonymous posting. RP 660. According to Detective John Garden: "You can put whatever information you want in a post….You can use your real name but most people don't." RP 660.

Even though there was a Whisper section for 15-17 year olds, Garden posted a profile stating he was a 21-25 year old female whose nickname was "young and fun." RP 665; State's Exhibit 1. The initial post read: "Someone out there has to be real and down to meet." Id.

Mr. Lamar Smith, a 22 year army Private First Class, had no criminal history. RP 810. He lived on Joint Base Lewis-McChord in dormitory style housing. RP 883. He was also an avid video game player, spending about 9 hours a week playing games on line. RP 883. As a young single man, he was interested in meeting other people and signed up for Whisper. RP 885. On February 13, 2019, he responded to Garden's fake Whisper posting believing the post was by a 21-25 year old woman. RP 891. He had never encountered anyone under the age of 18 on Whisper and believed that the platform was limited to persons over that age. RP 895. He saw the message and responded at 6:15 pm, asking where to meet. RP 697.

He did not get an immediate response so he continued to play video games and hang out with this friends. Id. The next day he continued to hang out with friends and got drunk. RP 893. He received a message from "Mandy" with a phone number and a request to text. RP 893.

Mr. Smith did not respond until February 15. RP 895. Mr. Smith and Garden texted for about an hour. Garden communicated

in a manner that was not characteristic of a 13-year-old. When Garden asked Mr. Smith "what you down for" Mr. Smith responded "anything really." He suggested meeting to watch movies or play video games. Because these two responses were not about sex, Garden said he was not interested in either. Id., RP 701-704. Mr. Smith responded: "Damn I am down for what you want. I mean we can fuck." Garden then texted: "You want to fuck, right?" Id. It was only after receiving that response that Detective Garden said: "I am 13 is that a prob. Hope it is not." Id., RP 680.

Mr. Smith did not believe Garden's alter-ego "Mandy" was 13; he thought it was someone role playing. RP 896-98. He said he continued texting in the context of her role playing. RP 900. He said, he did not believe a 13-year-old would be sending explicit texts like the ones he was receiving from Garden and, later, Detective Joe Klein. RP 901. After he sent a picture of himself to Garden and Klein, he did not receive a response so he went to bed.

The next day, Garden reinitiated contact with Mr. Smith by sending him a picture of an adult woman. RP 706, 753.

Eventually, the police sent Mr. Smith the address for him to meet "Mandy." When Mr. Smith arrived at the address, he was arrested.

He was immediately questioned by the police. When asked what brought him to the house he said he had received a message from "Mandy" and she said she was 13 but "I was like that's a lie, because you wouldn't be talking to someone that way." RP 823. He also said that at one point during the texting he had been drinking. RP 826. The police interviewer testified that during the interview Mr. Smith never once stated that he intended to have sex with "Mandy." RP 833.

The State eventually charged him with the standard Net Nanny charges: attempted second-degree rape of a child and communicating with a minor for immoral purposes. CP 2. At the close of trial the State gave the jury the Washington Pattern Jury Instruction defining the affirmative defense of entrapment for both counts. CP 138-139.

At the State's request, the Court also gave the following instruction: "It is not a defense to Attempted Rape of a Child in the Second Degree that the completed crime itself was, under attendant circumstances, factually or legally impossible of being committed." This is not a Washington Pattern Jury Instruction. Rather, the State said it was based on the decisions in State v. Patel, 170 Wash. 2d 476, 242 P.3d 856 (2012) and State v. Johnson, 173 Wash. 2d 895, 270 P.3d 591(2012).

In closing the State argued:

> And another instruction that will be important is that it is not a defense to attempted rape of a child in the second degree when -- "that the completed crime itself was under the attendant circumstances factually or legally impossible of being committed." What does that mean?
>
> Well, in this case we heard from law enforcement 13-year-old Mandy is a fictitious child. She is not real. In this case there is not an actual 13-year-old named Mandy that is -- there isn't a real living person that is 13 years old and named Mandy. In this case law enforcement created a persona that was 13 years old and her name was Mandy. So just because that 13-year-old Mandy does not actually exist and we didn't see an actual 13-year-old testify, it does not mean that the defendant cannot be convicted of attempted rape of a child in the second degree.

Mr. Smith argued that he did not intend to have sex with a 13-year-old because he did not believe the person he was texting with was 13. RP 992. He also argued that he had established the defense of entrapment.

In rebuttal the State argued:

> This is the same situation. Mr. Smith said he wanted to have sex multiple times, and then he went and got a condom, and then he went and got his buddy to drive him down to Olympia and showed up at the house where 13-year-old Mandy was. Just because Mandy is fictitious does not make him not guilty. It is not a defense that just because it is a fictitious child that is being talked about in this case it automatically makes someone's intention go away. What his intent was is what his intent was at the time, and I submit to you the evidence shows that his intent was on having sex.

RP 1019-1020. The defense objected and argued that the State was: "Misstating the law. What's at issue is not the intent to have sex but the intent to have sex with a child." RP 1020. The prosecutor responded that "if I may continue with my closing argument I will get to the other part" which she characterized as "whether or not Mr. Smith believed that Mandy was 13." The Court overruled the

objection. The prosecutor then said: "The next thing is whether or not Mr. Smith believed that Mandy was 13 years old." RP 1021.

The jury convicted Mr. Smith on both counts. CP 141-42.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review because the Court of Appeals erred in concluding there was no manifest constitutional error when the trial court commented on the evidence in a manner that prejudiced Mr. Smith's right to present a defense. RAP 13.4(b)(3).

In *State v. Johnson*, 173 Wash. 2d 895, 908, 270 P.3d 591 (2012), this Court explained that for attempted child rape - the incomplete crime - the State must prove both the intent to have sexual intercourse and the defendant intended either that the intercourse be with a child, or that the defendant believed the victim is a child. *Id*. As the Court explained, the "mental state required for criminal attempt (specific intent) is the highest mental state requirement defined by statute." *Id*. at 905. That is because "criminal attempt focuses on the dangerousness of the actor, not the act." *Id*.

Mr. Smith argued the State failed to prove the requisite specific intent for attempted second degree rape of a child when the "child" is fictitious i.e. a police officer pretending to be a child. . He testified he did not intend to have sex with a 13-year-old because he did not believe the person he was texting with was 13. RP 992.

At the State's request, the Court gave the following instruction: "It is not a defense to Attempted Rape of a Child in the Second Degree that the completed crime itself was, under attendant circumstances, factually or legally impossible of being committed." This is not a Washington Pattern Jury Instruction. Rather, the State said it was based on the decisions in *State v. Patel*, 170 Wash. 2d 476, 242 P.3d 856 (2012).

The instruction was was intended to confuse the jury about Mr. Smith's defense. See State's closing argument cited above. It was also a comment on the evidence as presented in this trial. His argument was the State failed to prove the requisite specific intent for attempted second degree rape of a child. Instruction 18 directed a verdict on the issue. It told the jury that any failure by the the State

to prove that Mr. Smith intended to have sex with a 13-year-old was not a "defense to the crime." And as argued above, it allowed the State to argue that it was Mr. Smith's burden to prove that his lack of intent.

Here, in rejecting Smith's argument that Instruction 15 was not a comment on the evidence, and thus, the error alleged was not "manifest", the Court of Appeals held that because the instruction was "not an incorrect statement of the law." This Court said it was immaterial that Smith did not argue that he could not be convicted because the victim was fictitious because "the jury might legitimately wonder whether Smith could attempt to rape a fictitious person." Slip Opinion at 7.

This analysis misapprehends the law in two ways. First, whether an instruction is an incorrect statement of the law is not determined in a vacuum. See e.g. *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 396, 438 P.2d 865, 867 (1968)(An instruction can be correct but incomplete). It is determined under the facts of a particular case. The jury instruction in this case was an

incorrect statement of the law because no one was arguing that Mr. Smith could be acquitted because the victim was actually a law enforcement officer and not a 13-year-old. Instruction 15 is a legal conclusion from *Johnson,* 173 Wn. 2nd 895, 900-01, 270 P.3d 591 (2012). But that language from *Johnson* was based upon the particular facts and defense raised in that case. This Court has never endorsed the language as a jury instruction. It is manifestly not a correct statement of the law in this case because Mr. Lewis did not raise that issue.

The comment on the law in Instruction 15 was manifest and the prosecutor used it to confuse and mislead the jury in rebuttal argument. And, when Mr. Smith objected, the trial judge did not sustain the objection or issue a clarifying instruction.

V. CONCLUSION

This Court should grant review because this case raises a significant question of state and federal constitutional law. RAP 13.4(b)(3).

This document complies with RAP 18.17 and contains 2,377 words.

RESPECTFULLY SUBMITTED this 24th day of April 2023.

/s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Lamar Alexander Smith

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56532-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 24, 2023

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March 7, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LAMAR ALEXANDER SMITH, Appellant.	No. 56532-3-II UNPUBLISHED OPINION

MAXA, J. – Lamar Smith appeals his convictions of attempted second degree child rape and communication with a minor for immoral purposes. The convictions arose from a sting operation in which Washington State Patrol officers posed as a 13-year-old girl with whom Smith exchanged text messages about having sex. Smith was arrested when he arrived at the fictional girl's house to have sex with her.

Smith argues that (1) the trial court's to-convict jury instruction for second degree child rape did not make it clear that the State had to prove that he believed he was texting with a 13-year-old girl and that he intended to have sex with a 13-year-old, and (2) the trial court erred in giving a jury instruction stating that it is not a defense to attempted second degree child rape that the completed crime was factually or legally impossible. However, he did not object to either instruction at trial. We decline to consider Smith's arguments for the first time on appeal because they do not involve manifest constitutional errors under RAP 2.5(a)(3). Accordingly, we affirm Smith's convictions.

FACTS

Background

In February 2019, Washington State Patrol detective John Garden posted an online advertisement on Whisper, an anonymous social media platform, posing as a female named Mandy. The advertisement used the nickname "young and fun" and read "someone out there has to be real and down to meet." Report of Proceedings (RP) at 663, 664.

Smith responded to Garden's advertisement, and Smith and Garden started exchanging text messages. Smith eventually stated that he was willing to do whatever Garden wanted, including sex. Garden confirmed that Smith wanted to have sex, and then revealed that "Mandy" was 13 years old and asked if that was a problem for Smith. Smith messaged, "Well in a way but f***ing is f***ing." RP at 897; Ex. 8. The next day Garden sent a photo of a female to Smith, and Smith's response was "I'd def fuxk [sic]." Ex. 8.

At this point, detective Jake Klein took over for Garden and began communicating with Smith as "Mandy." The two continued to talk in detail about having sex. Klein remarked that he was glad that being 13 did not scare off Smith. Smith responded, "you being 13 is probs the lowest age I f***ed." RP at 899; Ex. 12.

Klein provided Smith with an address for "Mandy's" house. Smith arrived at the address, walked up the stairs, and entered the residence. Officers stationed in the house then arrested Smith. Officers searched Smith and found a condom.

The State charged Smith with attempted second degree child rape and communication with a minor for immoral purposes.

Trial and Jury Instructions

At trial, detectives Garden and Klein testified regarding the facts above, and the text message exchanges between Smith and Garden/Klein were admitted as exhibits.

Smith testified that he thought Mandy was between 21 and 25 when he first texted her. He thought Mandy was role playing when she said she was 13 years old. He testified that he did not think he was actually communicating with a 13-year-old girl. Smith testified that when he arrived at Mandy's house a grown woman answered the door, who he thought was Mandy.

At the end of the trial, the trial court gave a to-convict jury instruction regarding the attempted second degree child rape charge that stated in part as follows:

> To convict the defendant of the crime of attempted rape of a child in the second degree, in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between February 13, 2019, and February 16, 2019, the defendant did an act that was a substantial step toward the commission of rape of a child in the second degree;
>
> (2) That the act was done with the intent to commit rape of a child in the second degree.

Clerk's Papers (CP) at 133. The court's instruction defined second degree child rape in part as when a person "has sexual intercourse with a child who is at least twelve years old but less than fourteen years old." CP at 127.

The trial court also gave instruction 15, which stated that "[i]t is not a defense to attempted rape of a child in the second degree that the completed crime itself was, under the attendant circumstances, factually or legally impossible of being committed." CP at 134. After providing both parties with the proposed jury instructions, the trial court asked if Smith had any objections to the instructions. Smith's defense counsel stated that there were no objections. In addition, Smith did not propose a different to-convict instruction than the one the court gave.

The jury found Smith guilty of attempted second degree child rape and communication with a minor for immoral purposes. Smith appeals his convictions.

ANALYSIS

A. LEGAL PRINCIPLES – FAILURE TO OBJECT TO JURY INSTRUCTIONS

Smith challenges two of the trial court's jury instructions. However, Smith did not object to these instructions at trial.

In general, a party who fails to object to the trial court's jury instructions waives a claim of error on appeal. *State v. Richardson*, 12 Wn. App. 2d 657, 666, 459 P.3d 330 (2020). "Our refusal to review unpreserved errors encourages parties to make timely and well-stated objections so the trial court has an opportunity to correct the error." *Id.* In addition, under RAP 2.5(a), we generally will not review claims raised for the first time on appeal. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

However, RAP 2.5(a)(3) states that a party is allowed to raise a "manifest error affecting a constitutional right" for the first time on appeal. To determine the applicability of RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest. *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020). An error is manifest if the appellant shows actual prejudice. *City of Seattle v. Long*, 198 Wn.2d 136, 156, 493 P.3d 94 (2021). The appellant must make a plausible showing that the claimed error had practical and identifiable consequences at trial. *Grott*, 195 Wn.2d at 269. The focus is on whether the error "is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009).

B. TO-CONVICT INSTRUCTION

Smith argues that the to-convict instruction for second degree child rape did not make it clear that the State had to prove that he believed he was texting with a 13-year-old girl and that he intended to have sex with a 13-year-old. We decline to consider this argument for the first time on appeal.

To convict a defendant of second degree child rape, the State must prove beyond a reasonable doubt that the defendant had "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." Former RCW 9A.44.076(1) (1990). A person is guilty of attempting 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).

Here, instruction 14 specifically told the jury that it had to find that Smith took a substantial step towards the commission of second degree child rape. And instruction 8 outlined the elements of second degree child rape:

> A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with a child who is at least twelve years old but less than fourteen years old, who is not married to the person, and who is at least thirty-six months younger than the person

CP at 127. This instruction was copied almost verbatim from RCW 9A.44.076(1), and was identical to WPIC 44.12.[1] The instruction informed the jury of the age the victim needed to be in order to convict – someone who is at least 12 but under 14 years old.

Instruction 14, the to-convict instruction, stated that the State had to prove beyond a reasonable doubt that (1) Smith did an act that was a substantial step toward the commission of

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL: 44.12, at 938 (4th ed. 2016).

second degree child rape, and (2) the act was done with the intent to commit second degree child rape. This instruction is based on WPIC 100.02.[2] Combined with the definition of second degree child rape in instruction 8, instruction 14 informed the jury that it had to find that Smith intended to have sexual intercourse with a child who was between 12 and 14 years old in order to convict him.

Smith argues that the instruction should have explained that the jury had to find that he thought he was texting with a 13-year-old and intended to have sex with a 13-year-old. But that is exactly what instructions 8 and 14 stated. In order to intend to commit second degree child rape under those instructions, Smith had to intend to have sex with someone between the ages of 12 and 14. This necessarily meant that Smith thought that the person with whom he intended to have sex was between those ages.

Jury instructions are sufficient if, viewed as a whole, they properly state the law and allow the parties to argue their theories of the case. *State v. Wilson*, 10 Wn. App. 2d 719, 727, 450 P.3d 187 (2019). The to-convict instruction allowed Smith to argue his theory – that he did not believe that "Mandy" was 13 years old. Therefore, we conclude that giving the to-convict instruction was not manifest error.

Because there was no manifest constitutional error, we decline to consider Smith's challenge to the to-convict instruction.

C. FACTUALLY OR LEGALLY IMPOSSIBLE INSTRUCTION

Smith argues that the trial court erred in giving a jury instruction stating that it is not a defense to attempted second degree child rape that the completed crime was factually or legally

[2] 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL: 100.02, at 492 (4th ed. 2016).

impossible. Smith argues that this instruction 15 was an incorrect statement of law and an improper comment on the evidence. We decline to consider this argument for the first time on appeal.

Under article IV, section 16 of the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits judges from conveying their personal opinions on the merits of the case to the jury. *State v. Higgins*, 168 Wn. App. 845, 859, 278 P.3d 693 (2012). An instruction that accurately states the law as it pertains to an issue in the case does not constitute an impermissible comment on the evidence. *Id.* at 859-60.

Instruction 15 was not an incorrect statement of the law. RCW 9A.28.020(2) states that "it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission." Jury instruction 15 is almost identical to the statutory language. And the Supreme Court has expressly held that there is no impossibility defense with regard to attempted crimes against minors. *State v. Johnson*, 173 Wn.2d 895, 900-01, 270 P.3d 591 (2012); *State v. Patel*, 170 Wn.2d 476, 483-85, 242 P.3d 856 (2010).

Smith argues that instruction 15 was improper because he did not argue that he could not be convicted because the victim was fictitious. But that fact is immaterial when the jury legitimately might wonder whether Smith could attempt to rape a fictitious person. The instruction was necessary to fully explain the law in this situation.

Smith also claims that instruction 15 stated that there are no defenses available when the victim is fictitious. But instruction 15 did not say that no defenses were available. The instruction stated only that impossibility was not a defense.

We conclude that giving instruction 15, which was a correct statement of the law, was not manifest error. Because there was no manifest constitutional error, we decline to consider Smith's challenge to instruction 15.

CONCLUSION

We affirm Smith's convictions of attempted second degree child rape and communication with a minor for immoral purposes.

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.

MAXA, J.

We concur:

CRUSER, A.C.J.

VELJACIC, J.

WASHINGTON APPELLATE PROJECT

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