73702-3

No. 73702-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JACKSON,

Appellant.

FILED
Apr 28, 2016
Court of Appeals
Division I
State of Washington

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Robert Jackson responded to a Craigslist advertisement, allegedly posted by a 20-year-old woman interested in having sex. The poster was actually a police detective, who later represented he was "almost 16" but looked 25. Mr. Jackson agreed to meet this fictional person at a hotel, where he was immediately arrested and charged with attempted commercial sexual abuse of a minor.

The State charged Mr. Jackson under two alternative means of committing the crime, but presented no evidence of one of the means. This violated Mr. Jackson's right to a unanimous jury verdict.

In addition, before closing argument but after the presentation of evidence, the State requested a jury instruction on expert testimony, despite the fact it had never notified the defense it intended to present expert testimony at trial. The trial court granted the State's request after the State argued, incorrectly, that no such notice was required.

Finally, the State improperly argued during its closing argument that the defense's argument for a conviction on a lesser included charge was an overused trial tactic the jury should reject outright. For all of these reasons, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. Mr. Jackson's article I, section 21 right to a unanimous jury was violated.

2. The trial court erred when it granted the State's request for an expert testimony jury instruction where the State failed to notify the defense it was eliciting expert testimony at trial.

3. Mr. Jackson was denied his constitutional right to a fair trial when the prosecuting attorney impugned defense counsel's integrity during closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal defendants have a constitutional right to a unanimous jury verdict. When the State alleges a defendant committed attempted commercial sexual abuse of a minor by two alternative means, reversal is required if each of the means is not supported by sufficient evidence. Where the State argued Mr. Jackson was guilty of the crime both because he *agreed* to pay a minor a fee to engage in sexual conduct and because he *offered* to pay a minor a fee to engage in sexual conduct, is reversal required where the evidence only supported a finding that he agreed?

2. The criminal discovery rule, CrR 4.7, requires the State to notify the defense if it intends to present expert testimony. Here, the State did not provide notice of an expert, but requested after the close of evidence that the court instruct the jury on expert testimony, claiming that no such notice was required. Where the trial court prejudiced Mr. Jackson by erroneously accepting the State's argument and granting its request for the expert testimony instruction, is reversal required?

3. A defendant may be denied his constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. Where the State impugned defense counsel's integrity by suggesting that arguing for a lesser included crime was a overused trial tactic that should be rejected, must this Court reverse?

D. STATEMENT OF THE CASE

Robert Jackson worked as a merchandiser for Kroger, moving products from one shelf to another when companies paid for a better location in the store. 5/6/15 RP 333-34. At 46 years old, he was unmarried and had moved back in with his parents. 5/6/15 RP 333. His opportunities for social contact with women were limited, so after

work Mr. Jackson sometimes looked through Craigslist postings, hoping to find companionship and human contact. 5/6/15 RP 334.

One Friday afternoon, after he had finished his shift for the day, he came across a Craiglist posting by a 20-year-old woman interested in having sex. Ex. 7; 5/6/15 RP 335. He responded to the posting, and was pleasantly surprised when the poster replied a few hours later, saying "baby come see me." Ex. 8; 5/6/15 RP 336.

When he asked where they should meet, the poster, who was actually Detective Michael Garske with the King County Sherriff's Office, represented that the poster was in Renton and would need at least $100 if Mr. Jackson wanted to meet. Ex. 8. Between those two statements, in a longer paragraph explaining why no photo was available, Detective Garske told Mr. Jackson that he was almost 16 years old but looked 25. Ex. 8.

Mr. Jackson did not consider he might be corresponding with a teenager. 5/6/15 RP 339. He was focused on how much money he needed to bring and assumed that the woman he was speaking with was an adult who was likely older than 20, but who was not being forthright about her age out of a desire to appear younger. 5/6/15 RP 344.

Mr. Jackson made arrangements to meet the poster at the Red Lion Inn. Ex. 8. He understood his actions were illegal, but believed that he was engaging in a consensual transaction with another adult. 5/6/15 RP 368, 370. When he arrived, Officer Susan Hassinger spoke with him on the phone and directed him to the room where the sting operation had been set up. 5/6/15 RP 307-08. As soon as he approached the door, he was arrested. 5/6/15 RP 319.

The State charged Mr. Jackson with attempted commercial sexual abuse of a minor, alleging both that Mr. Jackson attempted to agree to pay a fee to a minor in exchange for sexual conduct and attempted to offer to pay a fee to a minor in exchange for sexual conduct. CP 7. At trial, the State did not elect either of these means of committing the crime.

After each side presented its case, the parties reviewed the proposed jury instructions prior to closing arguments. 5/7/15 RP 412. Mr. Jackson objected to the State's request for an expert testimony instruction, based on the fact the State never indicated it intended any of its witnesses to present testimony as an expert. 5/7/15 RP 412-414. After the State argued no notice was required, the court overruled Mr. Jackson's objection. 5/7/15 RP 415-16.

In closing, the State told the jurors that Mr. Jackson was engaging in a "time-honored tradition of trying to cut his losses" by asking the jury to convict him of the lesser count of attempted patronizing a prostitute, and that they should "cut him loose" rather than be "looped into" such a tactic. 5/7/15 RP 458-59. The jury convicted Mr. Jackson as charged. CP 87. With an offender score of zero, he was sentenced to 15.75 months in prison and required to register as a sex offender. CP 90, 97.

E. ARGUMENT

1. Reversal is required because Mr. Jackson was denied his right to a unanimous jury.

a. Mr. Jackson had a constitutional right to a unanimous jury verdict as to the means by which he was alleged to have committed attempted commercial sexual abuse of a minor.

Criminal defendants are guaranteed the right to a unanimous jury under article I, section 21. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Const. art. I, § 21. "This right includes the right to an expressly unanimous *verdict*." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (emphasis in original). When a defendant is charged with an alternative means crime, he has a right to a unanimous jury verdict as to the means by which he was alleged to

have committed the crime. *Owens*, 180 Wn.2d at 95; *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980).

"An alternative means crime is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). If the State chooses not to elect the specific means of committing the crime, the reversal of the conviction is required if one of the charged methods is not supported by sufficient evidence. *Ortega-Martinez*, 124 Wn.2d at 707-708; *see also State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

An individual can commit commercial sexual abuse of a minor three different ways. RCW 9.68A.100. The State alleged Mr. Jackson committed the attempted crime in two of these ways, encompassed in RCW 9.68A.100(b) and (c):

> (1) A person is guilty of commercial sexual abuse of a minor if:
>
> …
>
> (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or

> (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

CP 7, 51.

An individual is guilty of attempt if, with the intent to commit a specific crime, he commits any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. "The intent required is the intent to accomplish the criminal result of the base crime." *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). Thus, the State needed to show that Mr. Jackson either intended to agree to pay a fee to a minor or intended to offer to pay a fee to a minor, and that he took a substantial step toward accomplishing that result. Because the State asked the jury to find Mr. Jackson guilty on either of these means, Mr. Jackson's constitutional right to a unanimous jury was satisfied only if the State presented sufficient evidence of each. *Ortega-Martinez*, 124 Wn.2d at 707-708.

b. <u>The State failed to present sufficient evidence that Mr. Jackson attempted to solicit, offer, or request to engage in sexual conduct with a minor.</u>

The State proceeded against Mr. Jackson under subsections (b) and (c) of the statute, but drew no distinction between them. 5/7/15 RP 420, 424-426, 454. In its closing argument, the State told the jury:

> What's interesting here is the moment that the defendant *agrees* to do all that stuff – that he knows the price, he knows it is for sex – at the moment he knows that and *agrees* do [sic] it, he has committed a crime.
>
> Remember, we go all the way back here: Pays or agrees to pay; solicit, offer, or request to engage. At the moment when he has that back-and-forth, he has committed the crime.

5/7/15 RP 425-26 (emphasis added). Rather than explaining how Mr. Jackson either agreed to pay or offered to pay, it described Mr. Jackson as agreeing, but then grouped agreement with making an offer or solicitation. In doing so, it conflated the two alternative means and presented them as one.

This is not permitted by the statute. "[T]he legislature's choice of different language indicates a different legislative intent." *State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015). Here, the legislature provided separate means by which an individual commits the offense, and used different language to express these alternatives. The common meaning of "solicit" is to "approach with a request or plea," whereas the common meaning of "agree" is to "to consent to as a course of action."[1] *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740

[1] http://www.merriam-webster.com/dictionary/solicit (last accessed April 20, 2016); http://www.merriam-webster.com/dictionary/agree (last accessed April 20, 2016).

(2015) (when interpreting a statute, this Court must look to the plain meaning first, as it is "the surest indication of legislative intent").

Contrary to the State's argument, the two terms are not interchangeable. By separating them into different methods of committing the same crime, the legislature evinced its intent that an individual be guilty of the commercial sexual abuse of a minor when he agreed to pay for sexual contact with a minor, *or* when he requested to engage in sexual contact with a minor.

The State did not explain how Mr. Jackson had solicited, offered, or requested to engage in sexual conduct with a minor because there was no evidence that he had. RCW 9.68A.100(c). At trial, the State admitted evidence of the Craigslist post and Mr. Jackson's exchange with Detective Garske. Ex. 8. The Craigslist posted stated:

> Young Hard Body looking for NSA – wfm – 20 (Newcastle)
>
> Im [sic] hella horny. What more can I say. Please be for real and come save me. I don't like to do the pic thing because of the "pervs" who just want to play with themselves. I [sic] rather be in the room when that happens… that it [sic] makes it ok. I would help. horny girl needs love

Exhibit 10.

Mr. Jackson responded with language that could be construed as an offer:

> Do you still need that lovin'? I just got off work and my weekend has begun and could use some loving myself.

Exhibit 8. However, this statement did not offer payment. In addition, it was not directed at a minor, nor was there evidence Mr. Jackson intended to direct it at a minor. It was made in response to a post that represented the individual was 20 years old. Exhibit 10. Only later in the exchange did Detective Garske pretend to be a minor:

> im [sic] in renton right now
>
> baby I don't like to send pics of myself to anyone last time I did that some dude posted by pick [sic] as a [sic] anal queen. I have to be careful with that my mom found that ad. I am almost 16 but I look 25. I am smoking hot and look like that girl from Twilight. I am nice and tan though
>
> I need you to come see me or come get me so we can meet. I need at least 100. When do you want to want to meet

Ex. 8.

Mr. Jackson indicates agreement in response, stating "I can come to you." Ex. 8. The remainder of the exchange revolves around where and when they should meet, and that Mr. Jackson will bring condoms at the detective's request. Ex. 8. At no point does Mr.

Jackson extend an offer or solicitation to the detective. Thus, sufficient evidence does not support the State's allegation that Mr. Jackson attempted to solicit, offer, or request to engage in sexual conduct with a minor.

c. Reversal is required.

Where one of the charged means of committing the crime is not supported by sufficient evidence, reversal of the conviction is required. *Ortega-Martinez*, 124 Wn.2d at 707-708; *State v. Boiko*, 131 Wn. App. 595, 601, 128 P.3d 143 (2006). Because no rational juror could have found Mr. Jackson attempted to solicit, offer, or request to engage with sexual conduct with a minor when all of his statements indicated agreement with the detective's offer, this Court should reverse.

2. The trial court erred when it instructed the jury on expert testimony when the State did not identify its police officers as "experts" until after the close of evidence.

a. The State is obligated to identify any expert witnesses and disclose this information to the defense during discovery.

Criminal Rule 4.7 governs the exchange of discovery in a criminal action. *State v. Pawlyk*, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The underlying purpose of the rule is "to provide adequate information for informed pleas, expedite trials, minimize surprise,

afford opportunity for effective cross-examination, and meet the requirements of due process. *Id*. (internal citations omitted).

This rule requires the prosecuting attorney to disclose to the defense "any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." CrR 4.7(a)(2)(ii). The State's failure to comply with this rule can violate a defendant's constitutional right to a fair trial. *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); U.S. Const. amends. V, XIV; Const. art. I, § 3. Thus, when a prosecuting attorney violates this rule, the trial court has the power to take action to remedy any prejudice to the defense, including dismissal of the charges and, when the failure to disclose appears willful, sanctions against the prosecuting attorney. CrR 4.7(h)(7).

Trial courts are granted broad discretion to elect the appropriate sanction for a deputy prosecutor's violation of the discovery rule. *State v. Oughton*, 26 Wn. App. 74, 79, 612 P.2d 812 (1980). However, the trial court abuses that discretion when its decision is manifestly unreasonable, exercised for untenable reasons, or based on untenable grounds. *Blackwell*, 120 Wn. App. at 830.

b. The State failed to disclose any expert witnesses to the defense and justified its discovery violation by conflating lay witness opinion testimony with expert witness opinion testimony.

The State did not notify Mr. Jackson it sought to qualify its testifying police officers as expert witnesses. When the parties were reviewing the jury instructions for the final time, defense counsel objected to the State's proposed expert instruction, noting the State must have included such an instruction in error. 5/7/15 RP 412. The State informed the court that there was no mistake, explaining:

> I think that several police officers testified to topics that were based on their training and experience. I think this is particularly true for Detective Garske. He was asked a number of questions both by the State and by defense about how things work in this underworld. This is always something that's going to be assessed by the jury. This instruction authorizes the jury to accept that or not accept it.
>
> I don't think it's limited to the combined circumstances where an expert just offers an opinion on guilt or an opinion on mental state. It can be offered where an expert offers an opinion or expert testimony on anything. That definitely happened here.

5/7/15 RP 413.

Defense counsel explained that the issue was notice, as the State was indicating for the first time after the close of evidence that it had presented expert testimony. 5/7/15 RP 414. The trial court indicated

Mr. Jackson's objection was "confusing," citing the fact the State often proposed, and was granted, this instruction. 5/7/15 RP 415. However, it acknowledged the State's failure to provide notice of its expert witnesses might be problematic. 5/7/15 RP 415.

The State claimed no such notice was necessary. 5/7/15 RP 414-15. It argued:

> The notice that is contemplated in the court rules is discussing an expert who is going to offer an opinion that relates to usually some element of the crime, the guilt or otherwise.
>
> I think that witnesses are always, based on their training and experience under ER 701 and 702, allowed to testify about certain things that they know. That's not a notice issue. It's something that just happens in the course of trial.

5/7/15 RP 416. Based on this representation, the trial court overruled Mr. Jackson's objection. 5/7/15 RP 416.

The trial court's denial was based on a misapprehension of the law, as the State's summary of ER 701 and 702 improperly conflated opinion testimony offered by expert witnesses with opinion testimony offered by lay witnesses. Under ER 701, a witness may offer testimony in the form of an opinion under some circumstances, but such a witness

does not offer expert testimony.[2] Under ER 702, a witness may present expert testimony if the specialized knowledge will assist the trier of fact and he qualifies as an expert.[3]

The instruction proposed by the State was the Washington Pattern Jury Instruction on expert testimony. CP 48; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 6.51 (3d ed. 2014). It is titled "Expert Testimony," and describes a witness with "special training, education, or experience." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 6.51 (3d ed. 2014). It applies to witnesses who have been permitted to testify as experts, but not witnesses who offer testimony under ER 701, as they are explicitly "not testifying as an expert" and their testimony is "not based on scientific, technical, or other specialized knowledge within the scope of rule 702." By confusing these two types of opinion testimony, the State argued it was entitled to an *expert* testimony

[2] ER 701 provides: "If the witness is not testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702."

[3] ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form or an opinion or otherwise."

instruction because *lay* witness opinion testimony is permitted at trial without providing prior notice to the defense. 5/7/15 RP 416.

c. Given the State's failure to notify the defense of its "expert" witnesses until after the close of evidence, the court erred when it granted the State's request for an expert testimony instruction.

The trial court erred when it adopted the State's inaccurate recitation of the law and overruled Mr. Jackson's objection. While practical experience alone may be sufficient to qualify a witness as an expert, the subject upon which the witness is expected to offer an opinion must be within the witness's area of expertise and must be helpful to the jury. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (superseded by statute on other grounds). It may not be based on "conjecture and speculation." *Id*. (quoting *Queen City Farms, Inc. v. Central Nat'l Ins. Co*., 126 Wn.2d 50, 104, 882 P.2d 703 (1994)). When these conditions are not satisfied, a police officer's testimony is not admissible under ER 702. *Farr-Lenzini*, 93 Wn. App. at 462.

Thus, if the State wished to have its officers present expert opinion testimony, it was required to comply with discovery rule CrR 4.7(a)(2)(ii). Only by providing the defense with notice of the witnesses who it expected to provide expert opinions, and the specific

subjects of those opinions, could the defense effectively challenge whether the testimony complied with ER 702. Yet the trial court's ruling permitted the State to bypass its discovery obligations, surprise the defense with a declaration after the close of evidence that it had provided expert testimony at trial, and obtain a jury instruction to that effect. In doing so, the defense was given no opportunity to challenge whether each officer's "expert" testimony was within his or her area of expertise and helpful to the jury. The trial court's ruling was error. 5/7/15 RP 416.

d. Reversal is required.

When the trial court improperly instructs the jury, reversal is required where the defendant can show prejudice. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). When Mr. Jackson objected to the instruction he explained the prejudice pervaded the trial. 5/7/15 RP 414. Because defense counsel was not on notice that the officers were offering expert opinions, he did not make objections, or raised objections on different grounds, than he otherwise would have. 5/7/15 RP 414. In addition, when defense counsel elicited information from the officers, he did so unaware that the State would later have them qualified as expert witnesses. 5/7/15 RP 414.

There is good reason for the discovery requirements of CrR 4.7. They prevent a situation precisely like the one that occurred at Mr. Jackson's trial, where the State gains an unfair advantage over the defendant by eliciting testimony from its witnesses and later making a general request that the witnesses be found to be experts on the topics on which they presented testimony. The trial court had the power to remedy this injustice, by refusing the State's request to instruct the jury on expert testimony, but it failed in its duty. This Court should reverse.

3. Mr. Jackson was denied a fair trial when the deputy prosecutor impugned defense counsel's integrity and used facts not in evidence to appeal to the jury's passion and prejudice in its closing argument.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id.*; *see also Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*. A prosecutor's misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App. 953, 327 P.3d 67, 69-70 (2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675).

a. <u>The prosecuting attorney improperly suggested defense counsel was using a "time-honored" trial tactic to mislead the jury.</u>

A prosecutor is prohibited from impugning the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defence counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Id*. (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983)). When a prosecuting attorney makes statements that suggest defense counsel acted with deception or dishonesty, this directly impugns defense counsel's integrity and reversal is warranted. *Id*. at 433.

A prosecutor is also prohibited from using facts not in evidence to appeal to the jurors' passion and prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Reversal is warranted where the State fails to adhere to this duty. *Id*.

During his closing argument, the deputy prosecutor told the jury:

> The defendant knows what he did. He has engaged in the time-honored tradition of trying to cut his losses by asking you to acquit [sic] him of that lesser count. Don't be looped into that.
>
> If you believe his story, cut him loose. Cut him loose.

5/7/15 RP 458-59. Defense counsel objected, but the trial court overruled the objection. 5/7/15 RP 459.

A prosecutor commits misconduct when he disparages defense counsel by suggesting counsel has acted with deception or dishonesty. *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). In *Thorgerson*, the prosecutor referred to the defense's presentation at trial as involving "sleight of hand." *Id*. While the court found the error harmless, it determined "the prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel." *Id*. at 452; *see also State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012).

Similar to employing the phrase "sleight of hand," suggesting that defense counsel was engaged in a "time-honored tradition" of asking the jury to find the defendant guilty of a lesser included charge, and that the jury should ignore such a tactic and either find him guilty of the alleged crime or "cut him loose" suggests that defense counsel was attempting to intentionally mislead or confuse the jury.

In addition, the State relied on facts not in evidence (that this practice was a "time-honored tradition") to disparage the practice of defense work as a whole and inflame the prejudice of the jury against Mr. Jackson. This statement was improper, and the trial court erred when it overruled Mr. Jackson's objection.

b. This error was not harmless beyond a reasonable doubt.

When the prosecuting attorney improperly impugned defense counsel's integrity, he committed constitutional error. *Bruno*, 721 F.2d at 1195 (attacks on the integrity of defense counsel is an error of constitutional dimension). Such error is presumed prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. *Id*.; *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

The State cannot meet this burden here. Mr. Jackson initially responded to a Craigslist post that represented the poster was 20 years old. The individual he spoke with on the phone was an adult woman, not a 15 year-old, and appeared to be an experienced sex worker. 5/6/15 RP 305-06 (Officer Hassinger testifying she asked Mr. Jackson to drive around the back to prove he was not a police officer, because she had been busted before). Mr. Jackson testified he believed the Craigslist poster was an adult, but provided several different ages in an attempt to appear younger. 5/6/15 RP 343-44. He never actually saw a woman in person, to make his own judgment about her age. 5/6/15 RP 319 (describing Mr. Jackson's arrest before he entered the hotel room). The State's improper conduct at closing argument, by suggesting that the defense's theory was an overused and misleading trial tactic, resulted in prejudice to Mr. Jackson. He was denied a fair trial and this Court should reverse.

4. The Court should not impose costs against Mr. Jackson on appeal.

Mr. Jackson is indigent and represented by appointed counsel on appeal. In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5; *State v. Sinclair*, 192 Wn. App.

380, 393, 367 P.3d 612 (2016); *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

F. CONCLUSION

This Court should reverse Mr. Jackson's convictions because the State failed to present sufficient evidence of both alternative means of committing attempted commercial sexual abuse of a minor. In addition, reversal is required because the trial court erroneously granted the State's request for an expert instruction and because the State improperly impugned defense counsel's integrity and relied on facts outside the record to inflame the prejudice of the jury during closing argument.

DATED this 28th day of April, 2016.

Respectfully submitted,

_____

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

STATE OF WASHINGTON, Respondent, v. ROBERT JACKSON, Appellant.	)))))))))	NO. 73702-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] ROBERT JACKSON 15629 129TH CT SE RENTON, WA 98058	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF APRIL, 2016.

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