98609-6

NO. 36230-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JASON LEE BORSETH, aka JASON LEE FISHEL,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Jason Lee Borseth, aka Jason Lee Fishel requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Borseth seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated May 5, 2020. (Appendix "A" 1-18)

3. ISSUES PRESENTED FOR REVIEW

1. Does *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) stand for the proposition that all emails and text messages result in an implied waiver of the protection of the Privacy Act (Ch. 9.73 RCW) or is it a case limited to its specific facts?

2. Do attempted first-degree child rape (RCW 9A.44.073) and attempted commercial sexual abuse of a minor (RCW 9.68A.100) constitute the "same criminal conduct" for sentencing purposes?

4. STATEMENT OF THE CASE

Members of the Washington State Patrol Missing and Exploited Children's Task Force commenced "Operation Net Nanny" in Spokane on July 5, 2016. (RP 21, ll. 10-20; RP 24, ll. 16-22; RP 28, ll. 9-11)[1]

[1] All RPs reference Heather Gipson's transcripts

The "Net Nanny" operation involved a single parent with two (2) to three (3) children under the age of eighteen (18). (RP 346, l. 16 to RP 347, l. 1)

The "Net Nanny" team was composed of undercover officers. They acted as actual participants posing as the mother and children. They also consisted of forensics, surveillance, search warrant, and arrest teams. (RP 354, ll. 14-23)

An ad was placed on Craigslist in the casual encounters section which stated:

> **Mommy wants daddy to for son and daughters - w4m (spokane)**
>
> help mommy take care of her young family, send me a pic if you are serious. be sure to send me you're a/s/l, name, and daddy in the title when you respond so i know you are not a bot. we appreciate generosity. if you want a unique fun experience then hmu.

(RP 28, ll. 14-20; RP 29, ll. 18-19; Exhibit P-2)

The purpose behind the ad was to solicit adults interested in having sex with children. (RP 347, l. 16 to RP 350, l. 9)

The ad in question was posted at 1:46 a.m. on July 7, 2016. Mr. Borseth initially responded at 3:47 a.m. Mr. Borseth responded to the ad in an e-mail. He attached photos of himself. One (1) of the photos showed him completely nude. After some initial e-mails he switched to text messaging. A later telephone call was recorded and transcribed. The e-mails, text messages and telephone call occurred prior to his arrest after 10:00 p.m.

that same date. (RP 33, ll. 17-23; RP 34, l. 25 to RP 35, l. 15; RP 39, ll. 19-25; RP 396, ll. 1-8; RP 396, ll. 7-13; RP 399, ll. 1-6; RP 400 l. 24 to RP 434, l. 9; RP 435, l. 5 to RP 447, l. 13; RP 585, l. 20 to RP 586, l. 2; Exhibit P-4)

When Mr. Borseth entered the home where "Net Nanny" was operating he was immediately arrested. He was then interviewed. The interview was recorded. (RP 545, ll. 17-20; RP 553, l. 7)

An Information was filed on July 12, 2016 charging Mr. Borseth with one (1) count of attempted first degree child rape; one (1) count of attempted commercial sexual abuse of a minor; and unlawful possession of a controlled substance. (CP 16)

A CrR 3.5 motion was filed on April 17, 2018. The CrR 3.5 hearing was held on April 23, 2018. Defense counsel only challenged the recorded interview with Mr. Borseth. No argument was provided concerning the telephone calls, e-mails or text messages. (CP 79; RP 67, ll. 13-15)

Defense counsel raised the issue of a Privacy Act violation in a pretrial motion. The challenge was not to a violation of the act itself; but to lack of probable cause for the offense of commercial sexual abuse of a minor. The trial court denied the motion. (RP 85, l. 25 to RP 86, l. 20; RP 90, l. 15 to RP 91, l. 21)

Following the trial defense counsel submitted a memorandum of authorities asserting that all counts constituted the same criminal conduct. The

trial court ruled that none of the offenses constituted the same criminal conduct. (CP 209; RP 831, l. 24 to RP 833, l. 8; RP 837, ll. 4-21)

Judgment and Sentence was entered on July 11, 2018. The trial court imposed concurrent sentences. (CP 217; RP 846, ll. 14-23)

The Court of Appeals issued its unpublished decision on May 5, 2020. The Court ruled that when Mr. Borseth used his cell phone for emails and text messaging that he impliedly waived any protection under the Privacy Act pursuant to *State v. Townsend, supra*.

The Court of Appeals also determined that attempted first degree rape of a child and attempted commercial sexual abuse of a minor do not constitute the "same criminal conduct" believing that the offenses did not occur at the same time and place.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Borseth contends that the Court of Appeals decision, insofar as the two identified issues are concerned, is subject to discretionary review under RAP 13.4 (b)(1) and (4).

ISSUE 1: *Does the Court of Appeals reliance upon the language from State v. Townsend,* 147 Wn.2d 666, 57 P.3d 255 (2002) r*egarding implied waiver, apply to the facts and circumstances of Mr. Borseth's case?*

The *Townsend* Court determined that email communications are intended to be private. As it stated at 674: "… It is readily apparent from the

undisputed facts that Townsend's subjective intention was that his messages to Amber were for her eyes only."

Nonetheless, the Court went on to discuss the factual predicates that underlie its final determination that Townsend impliedly waived his constitutional rights under the Privacy Act. The Court noted at 670-71:

> **At the urging of Townsend**, Detective Keller, under the guise of Amber, "set up" an ICQ account on June 1, 1999. CP at 335. ICQ is an Internet discussion software program that allows users to communicate "across the Internet to chat freely almost as if they were talking on the phone but typing on the keyboard. …" Keller's ICQ program was "defaulted" to automatically record the ICQ messages he received. … The ICQ communications between Townsend and Amber contained graphic discussions about sexual topics including sexual intercourse. Shortly after the ICQ communications began, Townsend made arrangements via ICQ to meet Amber at a Spokane motel room on June 4, 1999. The night before the scheduled meeting, Townsend sent Amber an ICQ message in which he stated "he wanted to have sex with [her]" the following day. On June 4, 1999, about an hour before the arranged meeting, Townsend sent his last ICQ message to Amber indicating that "he still wanted to have sex" with her.

(Emphasis supplied.)

The Court of Appeals opinion in *State v. Racus,* 7 Wn. App. 2d 287, 433 P.3d 830 (2019) relies upon the same defect as in the *Townsend* case.

The *Racus* Court departs from the protections afforded by the Privacy Act by relying on *Townsend* and determining that Mr. Racus impliedly consented to the recording.

Racus is distinguishable on the fact that he had created a Gmail account to use Craigslist when he responded to the advertisement. There was testimony by Racus at trial that he was aware that his text messages would be preserved. *See*: *State v. Racus, supra* 300.

It is, without a doubt, a different situation in Mr. Borseth's case. He did not set up any account.

There is no record of knowledge concerning any expertise he may have with electronic communications. The only indication of prior experience pertains to his Google search involving potential same sex interests.

The *Townsend* Court's decision is based upon consent. The Court determined that Townsend impliedly consented to the recording of his messages. It ruled at 676:

> Although Townsend did not explicitly announce that he consented to the recording of his e-mail and ICQ messages to Amber, we are of the view that his consent may be implied. Insofar as Townsend's e-mail messages are concerned, in order for e-mail to be useful it must be recorded by the receiving computer. We entirely agree with the observation of the Court of Appeals that:
>
> > A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be

> recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer.
>
> *Townsend*, [*State v. Townsend*, 105 Wn. App. 622, 629, 20 P.3d 1027, *review granted*, 144 Wn.2d 1016, 32 P.3d 283 (2001)]. In sum, because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

ICQ software appears to be similar to what is more commonly known as a chatroom. If a chatroom was involved in Mr. Borseth's case he would not have an argument. Chatrooms are indicative of any number of people having acc ess to the particular discussion being conducted. The *Townsend* Court went on to find that:

> ICQ technology does not require that messages be recorded for later use. Rather, it functions with both communicators on-line at the same time. In other words, each party talks in "real time" by sending their message on to the computer monitor of the other party who may respond with an answering message. Necessarily, the computer message is saved long enough to allow the person to whom the communication is addressed to answer. Whether the ICQ communication is saved for a longer period of

> time depends on the computer software used by the recipient.

State v. Townsend, supra, 676-77.

No mention of Mr. Borseth's consent is involved in the text messages, the e-mails or telephone conversation.

The recent cases of *State v. Kipp*, 179 Wn.2d 718, 725, 317 P.3d 1029 (2014) and *State v. Roden*, 179 Wn.2d 893, 900-01, 321 P.3d 1183 (2014) help to clarify Mr. Borseth's position. The *Kipp* and *Roden* decisions recognize that Washington's Privacy Act provides more protection than either the state or federal constitutions. Text messages and emails are granted full protection as afforded by the Privacy Act.

Mr. Borseth contends that testimony concerning the text messages, along with the text messages themselves, should never have been admitted at trial.

The Court of Appeals decision, in its reliance upon *Townsend* and *Racus*, and the use of implied consent/waiver to contravene the critical components of the Privacy Act, detracts from the guarantees of Const. art. I, § 7 as well as the intent of the act.

Numerous cases discuss implied consent/waiver and provides a sound basis for Mr. Borseth's argument. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). (The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances in each case, including the defendant's

experience and capabilities. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 146 A.L.R. 357 (1938). Moreover, the inquiry by the court will differ depending on the nature of the constitutional right at issue). *State v. Thomas*, 128 Wn.2d 553, 558 910 P.2d 475 (1996) (In *Johnson v. Zerbst*, the Supreme Court set forth the standard for a valid waiver of fundamental constitutional rights. … In order to be effective, the waiver of a fundamental constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." *Id.* In general, the waiver of a fundamental constitutional right must be made knowingly, voluntarily, and intelligently). *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (An inviolate right "does not diminish over time and must be protected from all assaults to its essential guaranties. *Sofie v. Fiberboard Corp*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right. *Burham v. North Chicago St. Ry. Co*., 88 F. 627, 629 (7th Cir.) (1898)). *Doe v. Gonzaga University*, 143 Wn.2d 687, 711, 24 P.3d 390 (2001) (Waiver is the intentional and involuntary relinquishment of a known right; it may be either express or implied. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. *Wagner v. Wagner*, 95 Wn.2d 95, 102, 621 P.2d 1279 (1980)). *Seattle v. Klein*, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (When constitutional rights are involved, we

require the government to bear the burden to prove "intentional relinquishment or abandonment").

Whether or not a computer records and saves an email; whether or not a cell phone records and saves a text message; whether or not an answering machine records a voice message; the person leaving the message does not waive his/her constitutional rights. The subjective intent behind leaving a message is for the intended recipient; not any other individual.

Further support for Mr. Borseth's position can be found in RCW 9.73.210 (4).

RCW 9.73.210(4) provides, in part:

> (4) Any information obtained pursuant to this section is inadmissible in any … criminal case in all courts of general or limited jurisdiction in this state, except:
>
> (a) With the permission of the person whose communication or conversation was intercepted, transmitted, or recorded without his or her knowledge; or
> (b) …; or
> (c) In a criminal prosecution, arising out of the same incident for a **serious violent offense as defined in RCW 9.94A.030** in which a party who consented to the interception, transmission, or recording was a victim of the offense.

(Emphasis supplied.)

Mr. Borseth did not give his permission for any recording.

Mr. Borseth was not a victim.

The crimes under consideration are not serious violent offenses.

It is clear that the WSP's non-compliance with RCW 9.73.210 interfered with Mr. Borseth's privacy rights under both the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

Practical considerations aside, the intent behind the Privacy Act must prevail.

> Washington's privacy act, chapter 9.73 RCW, places great value in the privacy of communications. *State v. Christensen,* 153 Wn.2d 186, 199-200, 102 P.3d 789 (2004). The act "tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." *Id.* at 199.

Lewis v. Dep't of Licensing, 157 Wn.2d 446, 457, 139 P.3d 1078 (2006).

In *State v. Clark,* 129 Wn.2d 211, 231-32 916 P.2d 384 (1996) the Court acknowledged:

> We also make no suggestion in this opinion that law enforcement officials should electronically intercept or record *private* conversations without complying with the requirements in the Privacy Act. …
>
> The Privacy Act, (RCW 9.73), is designed to protect private conversations from governmental intrusion. …

An implied waiver of the Privacy Act protections does not occur when an officer who is impersonating a fictitious person shares a defendant's conversation with another officer who is portraying the fictitious person's daughter.

The conversation alluded to was a private conversation between Mr. Borseth and the officers portraying the mother and the daughter. The conversation was shared because the mother wanted the daughter to be aware of her potential involvement.

The fact that the mother conveyed information, provided by Mr. Borseth, to the daughter does not indicate that his expectations of a private conversation were impliedly waived. Neither does his separate conversation with the daughter.

ISSUE 2: *Do attempted first-degree child rape (RCW 9A.44.073) and attempted commercial sexual abuse of a minor (RCW 9.68A.100) constitute the "same criminal conduct" for sentencing purposes?*

RCW 9.94A.589 (1)(a) provides, in part:

> If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. … "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. …

The Court of Appeals determined that the "same time and place" requirement is absent in Mr. Borseth's case. It did not address the issue of "same victim" or "same criminal intent."

Counts I and II involve the same victim. Either the public is the victim or the fictitious child is the victim.

Counts I and II also involve the same criminal intent. The alleged intent is to have engage in sexual conduct/sexual intercourse with a minor child. Each offense appears to be a strict liability offense.

In viewing the trial transcript as a whole it cannot be doubted that there was a continuous course of conduct commencing with Mr. Borseth's initial response to the Craigslist posting and his arrival at the residence where he was arrested.

As the Court noted in *State v. Garza-Villarreal,* 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993):

> In *State v. Dunaway,* 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987) … we directed:
>
> > [I]n deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next …. [P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.
>
> *Dunaway,* 109 Wn.2d at 215. In *Dunaway,* we also required concurrent offenses involving the same victim to be classified as the same criminal conduct. *Dunaway,* 109 Wn.2d at 215 (overruling *State v. Edwards,* 45 Wn. App. 378, 725 P.2d 442 (1986)). We reaffirmed the *Dunaway* furtherance test in

> *State v. Collicott,* 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

Since Mr. Borseth was charged with an attempt in both Counts I and II, the time and place aspect of "same criminal conduct" arises when a substantial step has been taken toward the commission of the particular offense.

Mr. Borseth's arrival at the residence is the point in time when the substantial step for the two offenses arose.

The specific intent for attempted first degree rape of a child is to engage in sexual intercourse. You cannot engage in sexual intercourse without some sexual conduct.

The specific intent with regard to commercial sexual abuse of a minor, even though the statute uses the phrase "sexual conduct," has as one of its components sexual intercourse. (RCW 9.68A.011 (4)(a)(b)).

> Our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time.

State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). *See*, e.g., *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The recent case of *State v. Johnson*, 12 Wn. App. 2d 201 (2020) addressed the intent aspect of "same criminal conduct" in relationship to second degree child rape and commercial sexual abuse of a minor. It ruled at 213:

> The intent for second degree rape of a child is the intent to have sexual intercourse, whereas the intent for commercial sexual abuse of a minor is the intent to exchange something of value for sexual conduct.

Mr. Borseth contends that that analysis is erroneous. He agrees insofar as the intent for child rape. He disagrees with regard to the commercial sexual abuse of a minor.

The overall purpose of RCW 9.68A.100 is to protect minors from sexual abuse in the form of sex in exchange for something of value. Whether a person intends to pay for sex or not, the ultimate intent is to engage in a sexual act. The facts of of a specific case are the basis for determining whether "same criminal conduct" is established.

6. CONCLUSION

Jason Lee Borseth was improperly convicted of attempted first degree child rape and attempted commercial sexual abuse of a minor.

The evidence adduced at trial derives from the State's violation of the Privacy Act. In the absence of the e-mails and text messages the State's case lacked sufficient evidence to prove either offense beyond a reasonable doubt.

Using implied consent/waiver as a means to skirt the strictures of the Privacy Act deprives Jason Lee Borseth of his right to privacy under the provisions of Const. art. I, § 7. If advances in technology lead to an

undermining of a person's right to privacy these violations require a reassessment of just how far the government is allowed to go in invading our daily lives.

In the event that the Court determines that there was no Privacy Act violation, then a "same criminal conduct" analysis is required. The subjective intent to be derived from the respective charges is that there was an intent to engage a minor in sexual intercourse. The fact that one statute refers to "sexual contact" and requires a fee does not detract from the factual predicates pointing toward sexual intercourse. Sexual contact occurs during sexual intercourse.

Counts I and II should be dismissed and/or treated as the "same criminal conduct."

DATED this 1st day of June, 2020.

Respectfully submitted,

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APPENDIX A

FILED
May 5, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JASON LEE BORSETH, a/k/a JASON LEE FISHEL, Appellant.	)	No. 36230-2-III UNPUBLISHED OPINION

SIDDOWAY, J. — Jason Borseth responded to an advertisement for sexual conduct with a minor placed by officers engaged in a "Net Nanny" sting operation, and was convicted of attempted first degree rape of a child, attempted commercial sexual abuse of a minor, and possession of a controlled substance. He challenges the legality of the Net Nanny operation, the sufficiency of evidence for the attempted commercial sexual abuse charge, ineffective assistance of counsel, prosecutorial misconduct, and sentencing error.

The State concedes that a sentencing enhancement and criminal filing fee should not have been imposed. We accept the State's concessions and otherwise affirm. We remand with directions to strike the sentencing enhancement and criminal filing fee.

FACTS AND PROCEDURAL BACKGROUND

Jason Borseth answered an advertisement on the Spokane Craigslist "casual encounters" page placed by undercover police officers, who posed as a mother offering sexual conduct with her minor children. Law enforcement recorded Mr. Borseth's e-mails, text messages, and phone calls with officers who posed as "Jay," the fictional mother of three children, including a fictional 11 year old named "Anna."

After officers engaged Mr. Borseth in enough distasteful discussion about what he might do with Anna to make a case against him, including getting his assurances that he would bring condoms, cash, and methamphetamine, Jay gave him an address for her fictitious home. When he arrived, Mr. Borseth was arrested.

Mr. Borseth was read *Miranda*[1] warnings and agreed to be interviewed. Throughout an almost two-hour interview, he repeatedly denied that he was there to have sex with Anna, insisting he was only interested in Jay. He would later testify that he gave police permission "to look through my car, my phone, my tablet, all my Internet history. I gave them my passwords. I gave them everything to look forward to see if there's

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

anything about children in any of my e-mails or anything, any of my computer history." Report of Proceedings (RP)[2] at 636. He told the officers interviewing him that he had used Craigslist before and had made Craigslist posts seeking men. He said he was "curious about guys" although so far he had not "done nothing." Ex. P12 at 139.

Mr. Borseth was charged with attempted first degree rape of a child, attempted commercial sexual abuse of a minor, and possession of a controlled substance (methamphetamine).

In discussion of motions in limine before trial, the prosecutor told the court that the State anticipated presenting evidence that Mr. Borseth had previously arranged sex online and posted his interest in sex with men, as disclosed in the interview following his arrest. Defense counsel responded, "We can kind of shorten this down. We're not going to be seeking to suppress the fact that Mr. Borseth has used Craigslist for other liaisons. We don't have any objection to that." RP at 92. Asked by the prosecutor if he was referring to Mr. Borseth's confession, defense counsel answered, "Correct." *Id.*

During the four-day jury trial, the State called as witnesses eight law enforcement officers and a forensic expert from the Washington State Patrol Crime Laboratory, to testify that the controlled substance found in Mr. Borseth's possession was methamphetamine. In the defense case, Mr. Borseth testified on his own behalf.

[2] All references are to the report of trial proceedings taking place in April 2018.

Mr. Borseth testified that he was only interested in Jay and expressed that interest many times in their communications. He testified that when he realized Jay was offering sex with her children, he did not stop the conversation because he wanted to "buy them some food or whatever, talk to her about what she's trying to do, tell her it ain't the right way to make money." RP at 655. He claimed he offered methamphetamine to her because she could sell it to make money. Mr. Borseth agreed to the terms Jay set out to have sex with Anna because he was trying to "get in the door" with Jay. RP at 680.

During cross-examination, the prosecutor asked Mr. Borseth about his experience posting ads on Craigslist, asking whether they included offers to perform different sexual acts with men. Mr. Borseth disavowed offering anything, stating "I was just curious, and I didn't do nothing with nobody." RP at 716.

During closing argument the prosecutor attacked Mr. Borseth's credibility, telling jurors that the only time Mr. Borseth told the truth during his testimony was when he was going through the text messages, the phone call, and the e-mails. When the defense objected, the judge reminded the jury that the attorneys' statements were not evidence.

Defense counsel argued to jurors that Mr. Borseth was only interested in Jay. He urged them to consider that when interviewed by police, Mr. Borseth admitted that he had methamphetamine and revealed that he was curious about same-sex activities, but throughout what was a two-hour interrogation he never conceded interest in Anna.

The jury found Mr. Borseth guilty as charged. At sentencing, the court rejected the defense argument that his three crimes were the same criminal conduct. Noting that Mr. Borseth had no prior felonies, the trial court imposed a low end sentence. It imposed a one-year sentence enhancement to the rape count provided by RCW 9.94A.533(9) because it involved sexual conduct with a child for a fee. The court ordered Mr. Borseth to pay legal financial obligations that included a $200 criminal filing fee and a $1,650 assessment for commercial sexual abuse.

Mr. Borseth appeals.

ANALYSIS

I. RELIANCE ON TEXT MESSAGES AND E-MAILS IN THE NET NANNY OPERATION DID NOT VIOLATE THE "PRIVACY ACT." MR. BORSETH'S ALTERNATIVE ARGUMENTS THAT (1) HIS TRIAL LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND (2) THE VIOLATION CONSTITUTED OUTRAGEOUS GOVERNMENT MISCONDUCT FAIL

Mr. Borseth identifies provisions of the Privacy Act that permit law enforcement recording of conversations with one-party consent and persuasively argues that the officers did not comply with those provisions in connection with the e-mail and text communications. The problem with his argument is that with e-mails and text messages (unlike telephone conversations) the government had no need to rely on the one-party consent provisions. Like other users of e-mail and text messaging, Mr. Borseth impliedly consented to the recording of his e-mail and text communications.

A violation of the Privacy Act requires "(1) a private communication transmitted by a device, that was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private communication." *State v. Roden*, 179 Wn.2d 893, 899, 321 P.3d 1183 (2014). While the first three elements of a violation are generally true of e-mails, the fourth is not. The recipient of an e-mail does not violate the Privacy Act because the sender, as a user of e-mail, will understand that his e-mail messages will be recorded on the computer of the recipient. *State v. Townsend*, 147 Wn.2d 666, 676, 57 P.3d 255 (2002). The sender "is properly deemed to have consented to the recording of those messages." *Id.* The same is true of text messages. *State v. Racus*, 7 Wn. App. 2d 287, 299-300, 433 P.3d 830 (2019). If the parties consent to the recording, there is no violation of the Privacy Act and the recording is admissible. *Id.* at 300.

Mr. Borseth recognizes that we could have refused to address this alleged error since it was not raised in the trial court, *see* RAP 2.5(a), so he makes the alternative argument that his trial lawyer provided ineffective assistance of counsel by failing to move to suppress the e-mail and text communications. To prevail on his ineffective assistance of counsel claim, Mr. Borseth must establish that his trial lawyer's representation was deficient and the deficient representation prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish one prong, the court need not consider the other. *State v. Hendrickson*, 129

Wn.2d 61, 78, 917 P.2d 563 (1996). Because law enforcement's reliance on e-mails and text messages did not violate the Privacy Act, deficient representation is not shown.

Finally, a court may dismiss a criminal charge where the State is found to have engaged in outrageous misconduct in violation of a defendant's due process right to fundamental fairness, and Mr. Borseth argues that the officers' conduct (including the asserted violation of the Privacy Act) constitutes outrageous misconduct warranting dismissal of the charges against him. *See State v. Solomon*, 3 Wn. App. 2d 895, 909-16, 419 P.3d 436 (2018). A claim of outrageous government conduct may be raised for the first time on appeal. *State v. Lively*, 130 Wn.2d 1, 18-19, 921 P.2d 1035 (1996).

In assessing whether there has been a violation of due process, courts review the totality of the circumstances. *Id.* at 21. The *Lively* court identified the following factors for consideration:

> [(1)] whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; [(2)] whether the defendant's reluctance to commit a crime was overcome by . . . persistent solicitation; [(3)] whether the government controls the criminal activity or simply allows for the criminal activity to occur; [(4)] whether the police motive was to prevent crime or protect the public; [(5)] whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

State v. Markwart, 182 Wn. App. 335, 351, 329 P.3d 108 (2014) (quoting *Lively*, 130 Wn.2d at 22 (alterations original)). "Dismissal based on outrageous conduct is reserved for only the most egregious circumstances. 'It is not to be invoked each time the

government acts deceptively.'" *Lively*, 130 Wn.2d at 20 (quoting *United States v. Sneed*, 34 F.3d 1570, 1577 (10th Cir. 1994)).

In *Solomon*, the court upheld a trial court's dismissal of charges stemming from an operation similar to Net Nanny under an abuse of discretion standard where the defendant tried to disengage seven times, but each time the undercover officer drew him back using "graphic and highly sexualized language." 3 Wn. App. 2d at 909-16. Division One of this court agreed with the lower court that this amounted to outrageous police conduct because the police overcame the defendant's reluctance with constant solicitation that was manipulative because the messages were so sexualized. *Id.* at 913-15.

The deception in this case was in line with a typical sting operation. Unlike in *Solomon*, Mr. Borseth never said he was not interested in sexual contact with Anna. At most, he can point to messages in which he flirted with Jay. Rather than try to disengage, he actively participated in discussion of what he and Anna might do and took the conversation with Jay in graphic and sexual directions, sending nude photos of himself and bringing up specific sex acts. It is apparent from the communications that Mr. Borseth's reluctance to commit a crime was not overcome by persistent police solicitation.

II. THE EVIDENCE OF ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR WAS SUFFICIENT

Mr. Borseth's next assignment of error is that there was insufficient evidence of attempted commercial sexual abuse of a minor under former RCW 9.68A.100(1)(c) (2013).[3] At the time of Mr. Borseth's offense conduct, the statute provided:

> (1) A person is guilty of commercial sexual abuse of a minor if:
> . . . .
> (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

LAWS OF 2013, ch. 302, § 2.[4] A person is guilty of criminal attempt if, with intent to commit a specific crime, the person does any act that is a substantial step toward committing the completed crime. RCW 9A.28.020(1); *State v. Aumick*, 73 Wn. App. 379, 383, 869 P.2d 421 (1994), *aff'd*, 126 Wn.2d 422, 894 P.2d 1325 (1995). Washington courts have defined a "substantial step" as "an act strongly corroborative of the actor's criminal purpose." *State v. Newbern*, 95 Wn. App. 277, 287, 975 P.2d 1041 (1999).

The test for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

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[3] Mr. Borseth originally assigned error to the State's failure to elect which of two alternative means of committing the crime, both of which were charged, had been committed. The State pointed out in response that only one means was addressed in the jury instructions. Mr. Borseth now concedes that the State effectively made an election.

[4] Effective July 23, 2017, "fee" was replaced by "anything of value." RCW 9.68A.100.

(1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

Mr. Borseth argues that his and Jay's communications fell short of an agreement under contract law, and an assurance that he would "contribute" and bring cash and methamphetamine is not evidence of a "fee."

The advertisement to which Mr. Borseth responded stated, "we appreciate generosity," Ex. P2, and Jay covered that further when she and Mr. Borseth text messaged (given the numerous misspellings, we have not made corrections):

> [Jay:] ill need to talk to you first. to go over rules. are you good with gifts or donations.??? and she is avialbel tonight for sure.
> [Mr. Borseth:] Like how much!?
> [Jay:] it depends on what you want and wht you look like. lol we jsut moved here so anythig helps. what did you want to experience if you want we can talk about that on the phone if makes you feel better. . . .
> [Mr. Borseth:] Do you get high?
> [Jay:] um yeah!!
> [Mr. Borseth:] I'll get you high.
> . . . .
> [Jay:] so berfore we call need ot make sure wht you want oso i dont waste my time are you offering up some money and the meth or just the meth and you nknow you cant have sex with just me this is about my daughter
> [Mr. Borseth:] I have cash too. And meth. And I'm in it for The adventure

Ex. P4. Mr. Borseth was carrying about $135 and methamphetamine when he arrived and was arrested.

RCW 9.68A.100(1)(c) does not require a contract or agreement, only a solicitation, offer, or request. And because Mr. Borseth was charged with attempt, the

jury needed to find only that he took a substantial step to that end. Reasonable jurors could find that Mr. Borseth offered to bring cash, did bring cash, and expected to pay it in return for sexual conduct with Anna.

Finally, Mr. Borseth argues that the means of committing the crime addressed in subsection (c) is "ambiguous at best" and appears to mean that a violation occurred if *Mr. Borseth* was expecting to be paid a fee. Br. of Appellant at 23. Our Supreme Court's binding interpretation of a former version of this statute holds otherwise, however. In *State v. Farmer*, the former statute, which provided that "[a] person is guilty of patronizing a juvenile prostitute if that person engages or agrees or offers to engage in sexual conduct with a minor in return for a fee" unambiguously meant that "the individual soliciting the prostitute or the payor of the fee violates the statute." 116 Wn.2d 414, 424-25, 805 P.2d 200, 812 P.2d 858 (1991) (emphasis omitted) (quoting former RCW 9.68A.100 (1989)). *And see* RCW 9.68A.001 (identifying as a purpose of chapter "to hold those who pay to engage in the sexual abuse of children accountable").

The evidence was sufficient.

III. MR. BORSETH DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL LAWYER DID NOT OBJECT TO EVIDENCE ABOUT HIS PRIOR USE OF CRAIGSLIST

Mr. Borseth next argues that his trial lawyer's failure to request an ER 404(b) hearing in connection with the State's proposed use of other Craigslist contacts by Mr. Borseth was ineffective assistance of counsel. He contends the contacts had nothing to

do with minor children and jurors who disapproved of same-sex relations might have viewed Mr. Borseth's interest as indicative of an interest in aberrant sex.

"Courts engage in a strong presumption counsel's representation was effective," and "legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel." *McFarland*, 127 Wn.2d at 335-36 (citing *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). We presume that trial counsel's waiver of any objection to the evidence of Mr. Borseth's prior Craigslist liaisons was strategic here. Sting operation prosecutions of this sort are difficult to defend. From the outset, Mr. Borseth's lawyer sought to portray him as sexually adventurous, but only with other adults. During voir dire, he told prospective jurors that there might be references to sexual conduct between consenting adults that some might disagree with, and asked them if it would affect how they approached the case. Every juror asked said it would not influence their decision making, and three of them were put on the jury.

In closing argument, defense counsel used Mr. Borseth's willingness during the police interview to disclose interest in adult sexual conduct that might not be viewed as mainstream as a reason jurors should believe him when he said he had no interest in having sex with a minor. He emphasized that Mr. Borseth had nothing to hide, reminding jurors, "Mr. Borseth said that you can look through my phone. You can look at my tablet. He gave them permission to do that." RP at 810.

The strategy was somewhat undermined when, during cross-examination, Mr. Borseth proved reluctant to admit to sexual adventurousness. That does not mean that it was not a legitimate trial strategy. Ineffective assistance of counsel is not shown.

IV. PROSECUTORIAL MISCONDUCT IS NOT SHOWN

Mr. Borseth's final trial-related assignment of error is to the closing argument of the prosecutor to which he objected. It arose in the prosecutor's summary, after the prosecutor had thanked jurors for their attention, and unfolded as follows:

> [PROSECUTOR]: . . . [W]hat I'm going to ask you to do when you go back to that jury room, know that Mr. Borseth told the truth in this case. He told it once when he was going through the text message, the phone call, the e-mail, and that's the only time he told the truth in this case—
>
> [DEFENSE COUNSEL]: I'm going to object to that, Your Honor.
>
> THE COURT: I'm going to remind the jury that this is closing arguments. What the attorneys say are not evidence or instructions.
>
> [PROSECUTOR]: The evidence shows that you should not believe Mr. Borseth. Believe what he did, not what he said here in court.

RP at 794.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Prosecutors are not to express a personal opinion as to a defendant's guilt or a witness's credibility independent of a belief jurors may arrive at based on evidence in the case. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). They may "argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another." *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). When determining whether a prosecutor improperly expressed a personal opinion, the reviewing court looks at the ostensible statement of opinion in the context of the entire argument. *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). "Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 561, 397 P.3d 90 (2017) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006)).

The prosecutor's objected-to statement was made at the conclusion of his closing argument. In earlier argument, he had reviewed the evidence supporting the State's case and told jurors at one point,

> The Judge gave you some information on credibility. She told you're the only judges of it. Doesn't matter what I think. It doesn't matter what [defense counsel] thinks. Except on matters of the law, it doesn't matter even what the Judge thinks. It matters what you folks think.

RP at 786.

The prosecutor did not "clearly and unmistakably" couch the statement to which the defense objected in personal opinion terms. In context, he can be understood as suggesting a logical inference the jurors should draw from the evidence he had recapped. Misconduct is not shown.

V. ALLEGED SENTENCING ERRORS

Mr. Borseth asserts three sentencing errors. One—that the trial court imposed an uncharged one-year sentencing enhancement in reliance on RCW 9.94A.533(9)—is conceded by the State. Another—that the trial court improperly imposed legal financial obligations—is conceded in part: the State agrees that the trial court should not have imposed the $200 criminal filing fee. Despite Mr. Borseth's failure to object to the fee at sentencing, the State does not object if we remand with directions to strike that fee.

Same criminal conduct. Turning to alleged sentencing errors the State does not concede, Mr. Borseth contends the trial court erred by refusing to treat the commercial sexual abuse of a minor and attempted rape of a child offenses as the same criminal conduct. For sentencing purposes, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* If any of the

three elements are not established, the offenses are not the "same criminal conduct." *State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

"'A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law.'" *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (quoting *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993)). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Aldana Graciano*, 176 Wn.2d at 537-38. A defendant bears the burden of establishing that offenses amount to the same criminal conduct. *Id.* at 538-40.

Mr. Borseth argued same criminal conduct at sentencing and the trial court explained why it viewed the offense conduct for the two sex offenses as separate:

> Looking at the intent, the time and place and the same victim, I'm going to have to follow what the State indicated is that the commercial sexual abuse of the minor happened while he's texting from work and making these arrangements, and then appearing at the house is the attempted rape of the child.

RP at 837.

The evidence presented was that between 10:30 a.m. and 11:57 a.m. on the day of Mr. Borseth's arrest, Jay and Mr. Borseth exchanged text messages about money and methamphetamine being delivered in connection with the upcoming sexual interaction with Anna. Mr. Borseth argues that the substantial step for both attempt crimes was his

arrival at Jay's fictitious home in the evening. But the trial court clearly found that while the substantial step for *attempted rape* occurred at that time, the substantial step for *attempted commercial sexual abuse* occurred in the morning, when Mr. Borseth, then at work, texted that he would bring cash and methamphetamine. Because the offense only requires a solicitation, offer, or request, it is complete when an offer is made. The trial court's view of when and where the offense conduct occurred is supported by the record.

Commercial sexual abuse fee. Under RCW 9.68A.105, courts are required to impose a $5,000 fee on defendants convicted of commercial sexual abuse of a minor. RCW 9.68A.105(b) states that a "court may not reduce, waive, or suspend payment of all or part of the fee assessed unless it finds, on the record, that the adult offender does not have the ability to pay in which case it may reduce the fee by an amount up to two-thirds of the maximum allowable fee." The trial court found that Mr. Borseth did not have the ability to pay and imposed a reduced fee of $1,650.

Mr. Borseth contends that the fee is a "cost" within the meaning of RCW 10.01.160(3), which cannot be imposed at all on an indigent defendant. But "costs" are limited by RCW 10.01.160(2) to "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." Mr. Borseth offers no argument that the fee fits within that limited concept of "cost." Clearly it does not; under RCW 9.68A.105(2), the fee

"must be used for local efforts to reduce the commercial sale of sex." The court properly imposed the fee, reduced in light of Mr. Borseth's inability to pay.

We affirm the convictions and remand with directions to make the ministerial corrections of striking the one-year sentence enhancement and the criminal filing fee.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, C.J.

NO. 36230-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JASON LEE BORSETH, AKA JASON LEE FISHEL, Defendant, Appellant.	)	SPOKANE COUNTY NO. 16 1 02613 4 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of June, 2020, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

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Superior Court Case Number:	16-1-02613-4

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