

No. 49755-7-II  
Pierce County Superior Court No. 15-1-05086-1

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

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STATE OF WASHINGTON,  
Plaintiff-Respondent,

v.

DARCY DEAN RACUS,  
Defendant-Appellant.

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

The Honorable James Orlando, Judge

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

III. SUMMARY OF THE ARGUMENT .....3

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

    A. PROCEDURAL FACTS.....4

    B. PRETRIAL MOTIONS .....4

    C. VOIR DIRE.....6

    D. TRIAL TESTIMONY .....10

    E. DISMISSAL OF THE COMMERCIAL SEXUAL ABUSE OF A  
        CHILD CHARGE .....20

    F. JURY INSTRUCTIONS.....21

    G. CLOSING ARGUMENTS .....22

IV. ARGUMENT .....26

    A. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS  
        ALL OF THE COMMUNICATIONS BETWEEN RACUS AND  
        THE POLICE BECAUSE THE POLICE HAD NO  
        AUTHORITY TO RECORD THE TEXT AND EMAIL  
        MESSAGES RECEIVED BEFORE 4:00 P.M. ON DECEMBER  
        18, 2015.....26

    B. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS  
        ALL OF THE COMMUNICATIONS BETWEEN RACUS AND  
        THE POLICE THAT OCCURRED AFTER THE POLICE  
        ISSUED AN INTERCEPT AUTHORIZATION BASED UPON  
        RCW 9.73.210(B) .....32

    C. THE TRIAL COURT ERRED IN FAILING TO GIVE  
        RACUS’S PROPOSED ENTRAPMENT INSTRUCTION.....33

D. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY’S CONCLUSION THAT RACUS TOOK A SUBSTANTIAL STEP IN THE ATTEMPTED FIRST DEGREE RAPE CHARGE.....	36
E. PERVASIVE PROSECUTORIAL MISCONDUCT DEPRIVED RACUS OF A FAIR TRIAL .....	40
1. Introduction .....	40
2. The Prosecutor Committed Misconduct when he used Voir Dire to argue his Case, and to Prejudice, Indoctrinate, and to instruct the Jury in Matters of the Law .....	42
3. The Prosecutor Engaged in Questioning that Amounted to Improper Vouching for the Credibility of Det. Sgt. Rodriguez ....	44
4. The Prosecutor Committed Misconduct by Diminishing His Burden of Proof.....	46
5. The Prosecutor Committed Flagrant and Ill-Intended Misconduct by Referring to Charges not Filed and Suggesting that Someone like Racus was the Type of Person Who would Actually Rape a Child and Referred to Matters Outside the Record .....	47
6. The Prosecutor Committed Other Acts of Misconduct during the Proceedings .....	49
V. CONCLUSION.....	50

## TABLE OF AUTHORITIES

### Cases

<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	34
<i>City of Williston v. Hegstad</i> , 562 N.W.2d 91 (N.D. 1997) .....	46
<i>In re Glassmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012) .....	40
<i>Moyer v. Clark</i> , 75 Wn.2d 800, 454 P.2d 374 (1969).....	34
<i>Spain v. State</i> , 386 Md. 145, 872 A.2d 25 (2005) .....	46
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	37
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	48
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	48
<i>State v. Burri</i> , 87 Wn.2d 175, 550 P.2d 507 (1976) .....	34
<i>State v. Case</i> , 49 Wn.2d 66, 298 P.2d 500 (1956) .....	41
<i>State v. Casteneda-Perez</i> , 61 Wn. App. 354, 810 P.2d 74, <i>review denied</i> , 118 Wn.2d 1007, 822 P.2d 287 (1991) .....	47
<i>State v. Chhom</i> , 128 Wn.2d 739, 911 P.2d 1014 (1996).....	37
<i>State v. Clark</i> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	27, 29
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	40
<i>State v. Faford</i> , 128 Wn.2d 476, 910 P.2d 447 (1996).....	27, 29
<i>State v. Feely</i> , 192 Wn. App. 751, 368 P.3d 514, <i>review denied</i> , 185 Wn.2d 1042, 377 P.3d 762 (2016).....	47
<i>State v. Frederiksen</i> , 40 Wn. App. 749, 700 P.2d 369, <i>review denied</i> , 104 Wn.2d 1013 (1985).....	43
<i>State v. Galisia</i> , 63 Wn. App. 833, 822 P.2d 303 (1992), <i>abrogated by State v. Trujillo</i> , 75 Wn. App. 913, 883 P.2d 329 (1994).....	35

<i>State v. Gonzalez</i> , 71 Wn. App. 715, 862 P.2d 598 (1993), <i>review denied</i> , 123 Wn.2d 1022, 875 P.2d 635 (1994) .....	32
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	46
<i>State v. Grundy</i> , 76 Wn. App. 335, 886 P.2d 208 (1994) .....	39
<i>State v. Hinton</i> , 179 Wn.2d 862, 319 P.3d 9 (2014) .....	1, 28, 30, 31
<i>State v. Huson</i> , 73 Wn.2d 660, 440 P.2d 192 (1968), <i>cert. denied</i> , 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969) .....	47
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010) .....	44
<i>State v. Jackson</i> , 62 Wn. App. 53, 813 P.2d 156 (1991) .....	39
<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008) .....	48
<i>State v. Kerr</i> , 14 Wn. App. 584, 544 P.2d 38 (1975), <i>review denied</i> , 87 Wn.2d 1001 (1976) .....	35
<i>State v. Kipp</i> , 179 Wn.2d 718, 317 P.3d 1029 (2014) .....	27, 29
<i>State v. Ladiges</i> , 66 Wn.2d 273, 401 P.2d 977 (1965) .....	35
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014) .....	41
<i>State v. May</i> , 100 Wn. App. 478, 997 P.2d 956, <i>review denied</i> , 142 Wn.2d 1004, 11 P.3d 825 (2000) .....	34
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012), <i>review denied</i> , 176 Wn.2d 1015, 297 P.3d 708 (2013) .....	47
<i>State v. Morgan</i> , 9 Wn. App. 757, 515 P.2d 829, <i>review denied</i> , 83 Wn.2d 1004 (1973) .....	35
<i>State v. Mussey</i> , 153 N.H. 272, 893 A.2d 701 (2006) .....	46
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006) .....	41
<i>State v. Roden</i> , 179 Wn.2d 893, 321 P.3d 1183 (2014) .....	1, 27, 29, 30
<i>State v. Sivins</i> , 138 Wn. App. 52, 155 P.3d 982 (2007) .....	38

<i>State v. Stith</i> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	48
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	41
<i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	27, 37, 38
<i>State v. Williams</i> , 93 Wn. App. 340, 968 P.2d 26 (1998), <i>review denied</i> , 138 Wn.2d 1002, 984 P.2d 1034 (1999).....	34
<i>State v. Wilson</i> , 158 Wn. App. 305, 242 P.3d 19 (2010).....	38
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	37
United States v. Boyd, 54 F.3d 868 (D.C. Cir. 1995).....	46
United States v. Carter, 236 F.3d 777 (6th Cir. 2001).....	41
United States v. Combs, 379 F.3d 564 (9th Cir. 2004).....	45
United States v. Gallardo-Trapero, 185 F.3d 307 (5th Cir. 1999), <i>cert. denied by Hernandez v. United States</i> , 528 U.S. 1127, 120 S.Ct. 961, 145 L.Ed.2d 834 (2000).....	45
United States v. Martinez, 981 F.2d 867 (6th Cir. 1992).....	45
United States v. McMath, 559 F.3d 657 (7th Cir.), <i>cert. denied</i> , 558 U.S. 881, 130 S.Ct. 373, 175 L.Ed.2d 137 (2009).....	45
United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990).....	45
United States v. Sanchez, 659 F.3d 1252 (9th Cir. 2011) .....	41
United States v. Swiatek, 819 F.2d 721 (7th Cir.), <i>cert. denied</i> , 484 U.S. 903, 108 S.Ct. 245, 98 L.Ed.2d 203 (1987).....	45
United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005).....	46
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	34
<i>Wilson v. Layne</i> , 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).....	20

**Statutes**

RCW 4.44.120 ..... 42

RCW 9.73.030 ..... 26, 28

RCW 9.73.090 ..... 32

RCW 9.73.210 ..... 32

RCW 9.73.230 ..... 32, 33

RCW 9A.16.070..... 2, 35

RCW 9A.28.020..... 37

RCW 9A.44.073..... 37

**Other Authorities**

ABA Standards for Criminal Justice 3-6.9 ..... 48

**Rules**

CrR 6.4..... 42

**Constitutional Provisions**

Const., art. 1, § 21 ..... 33

U.S. Const., amend. VI ..... 33, 40

U.S. Const., amend. XIV ..... 33

**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court erred in permitting the State to present evidence of text messages intercepted by the police without consent or a warrant in violation of the controlling Washington State Supreme Court decisions in *State v. Roden*<sup>1</sup> and *State v. Hinton*<sup>2</sup>.
2. The trial court erred in permitting the State to present evidence of intercepted text messages and recorded phone calls obtained after a police supervisor signed an intercept authorization premised upon false information that did not establish probable cause to believe that Racus was engaging in commercial sexual abuse of a minor.
3. The trial court erred in failing to give Racus's proposed instruction on the defense of entrapment.
4. There was insufficient evidence to support the jury's conclusion that Racus took a substantial step to commit the crime of rape of a child in the first degree.
5. Pervasive, flagrant and ill-intentioned prosecutorial misconduct deprived Racus of a fair trial.

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<sup>1</sup> *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014).

<sup>2</sup> *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014).

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in rejecting Racus's argument that the Washington State Patrol (WSP) violated the Privacy Act by intercepting his text messages and did the trial court err in finding that Racus "impliedly consented" to the interception?
2. Where the investigating detective falsely told his supervisor that during the initial intercepted text and email messages Racus and the fictitious mother had discussed "trading gifts in exchange for sex with the minors," but there had been no such discussion, was there probable cause for the intercept order?
3. Where Racus presented some evidence that he was entrapped as defined by RCW 9A.16.070, did the trial court err in failing to give Racus's proposed entrapment instruction?
4. Was there sufficient evidence to support the jury's conclusion that Racus took a substantial step toward committing first degree rape when he engaged only in an ambiguous discussion of child sex and arrived at the sting house with only a package of Skittles?
5. Did the prosecutor commit flagrant and ill-intentioned misconduct when he engaged in improper voir dire, introduced prejudicial and inflammatory evidence that had nothing to do with the facts of this crime, referred to charges not filed against Racus, suggested that someone like Racus was the type of

person who would actually rape a child, and improperly vouched for and bolstered the credibility of the WSP witnesses?

### **III. SUMMARY OF THE ARGUMENT**

In 2015, Darcy Racus, a man with no prior criminal history answered a personals advertisement posted on the internet. Unbeknownst to Racus, the ad was part of a sting operation conducted by the WSP. The advertisement purported to be from an adult woman seeking a relationship with a man. When Racus texted the contact in the ad, members of the WSP answered and masqueraded as a 34-year-old mother and an 11-year-old girl. The purpose of this masquerade was to persuade Racus to have sexual intercourse with the fictitious child. Over the course of two days the WSP intercepted most of Racus's texts without his consent, a warrant or a Privacy Act Authorization. Near the conclusion of the conversations a WSP supervisor approved a Privacy Act Authorization after falsely being told that Racus had discussed paying for sex with the minor by providing the mother with a "gift" or "donation." All of the communications intercepted by the WSP were admitted during a trial riddled with flagrant and ill-intentioned prosecutorial misconduct that deprived Racus of a fair trial.

**IV.  
STATEMENT OF THE CASE**

**A. PROCEDURAL FACTS**

On December 21, 2015, Darcy Dean Racus was charged with attempted first degree rape of a child, commercial sexual abuse of a child and communicating with a minor for immoral purposes. The trial court dismissed the commercial sexual abuse of a child count at the close of the State's case in chief. The jury convicted Racus as charged on the other two counts. CP 235-36. Racus was sentenced to 69.75 months in prison. CP 255-268. This timely appeal followed. CP 270-97.

**B. PRETRIAL MOTIONS**

Racus moved to suppress all the text messages sent before Det. Sgt. Rodriquez obtained any warrant or authorization to record those messages. CP 6-27, 66-74. He argued that Washington's Privacy Act forbid the interception and recording of his texts by the police without his consent. The trial judge, however, concluded that Racus "implicitly or impliedly consented" to the "recording." The trial court said:

Here, the defendant voluntarily engaged in text messages with his intended recipient. He knew his messages would "record" on the recipient's telephone just as the messages he received "recorded" on his phone. He also knew, or should have known, that his messages would be retained on the recipient's phone so the recipient could respond whenever "she" chose.

CP 249.

Racus also argued that the authorization to record, signed at 4:00 p.m. on December 18, 2015, was based upon inadequate probable cause to believe that Racus was committing the crime of commercial sexual abuse of a minor.

The authorization form states that the following constituted probable cause to record Mr. Racus's telephone calls:

Detective Sergeant Rodriguez placed a CL ad in an undercover capacity. Darcy answered the ad and engaged in conversations to have sex with eleven year old. Darcy agreed to make a call with UC Rodriguez and wanted to speak with the mother of the minor to arrange the sex acts. Darcy and Detective Sergeant Rodriguez discussed Darcy trading gifts in exchange for sex with the minors.

CP 62. The authorization was signed by Rodriguez and approved by his supervisor. CP 63.

As required by the Privacy Act, the authorization was submitted to a Superior Court judge on December 24, 2015. CP 65. But that judge reviewed only the 3-page authorization form, not the underlying facts to support Det. Sgt. Rodriguez's assertion of probable cause.

At the pretrial suppression hearing, however, the trial judge had a transcript of all of the communications both before and after the authorization was signed. CP 36-48. The trial court found that:

In this case, defendant answered an ad that involved children, then began exchanging e-mails and text messages that discussed sexual conduct with an 11-year-old girl. Defendant raised the issue of payment, both by text message and e-mail, saying "is this free or are you looking for something." Based on the totality

of the circumstances, there was probable cause to believe the telephone conversation that was to be recorded would be with someone engaging in commercial sexual abuse. Det. Sgt. Rodriguez's use of the word "gifts" in his declaration is reasonable given his experience and the e-mail and text message exchanges that he had already had with the defendant.

CP 248-249.

C. VOIR DIRE

During voir dire, the prosecutor asked the jury panel:

Has anyone been on the website backpage? How about craigslist? . . . And have any of you gone and read recently about the chief executive officer of the backpage being arrested for promoting prostitution? A few folks.

RP 448. Juror 23 volunteered:

I've heard a lot of things in the news about backpage, so it doesn't surprise me with what's been reported.

[Prosecutor]: Like what.

Juror 23: I've heard Backpage is a good place to go to find prostitution and kind of that type of activity.

*Id.* Juror 11 agreed that he had heard the same information. RP 449.

The prosecutor then asked how many jurors knew there was a "sex for sale section in craigslist." RP 449. Juror 46 described what his "buddy" told him about this section.

The prosecutor stated:

Well, I've got news for you folks. You're all going to learn a lot about craigslist in this case if you're sitting in that jury box than you have before.

RP 451.

The prosecutor asked jurors if “it should be legal to offer to have sex on the internet?” RP 451.

He asked: “When you hear craigslist has a casual encounters section, do you think to yourself more dating site or one night stand?” RP 452. Juror 5 stated: “Probably more a one night stand.” Juror 55 stated that “The idea of using an online service just to meet someone or even to have sex” seemed “wrong.” RP 452.

The prosecutor asked how many jurors watched “20/20 or Dateline or any of those shows to catch a predator type of thing?” RP 453. He asked if any of the jurors who watched those shows ever “felt bad” for the person arrested. He clarified that “what I am asking you is did you feel sorry for him because he got caught showing up to have sex with somebody or because was so stupid that he did it?” RP 454.

The prosecutor asked:

Should [the police] be able to do the same thing when it comes to advertising sex with adults, a consenting adult situation? Hey, show up and let’s have sex and then the police are there when you get there. Should that be something they do?

RP 454. Juror 50 said that he thought he had seen this scenario on “cops multiple times.” *Id.*

The prosecutor asked: "How many think prostitution should be legal?" RP 455. One juror said: "As long as they pay taxes on the money they made." *Id.*

The prosecutor asked: "Should you [the prostitute] have to be an independent contractor or can you be working for someone else when you're acting as a prostitute?" RP 455. He said: "What I want to know is how do we determine in that situation whether it's a voluntary thing that you want to do or whether you're being trafficked and being forced to do it?" RP 455-456.

The prosecutor stated: "Okay. So the backpage situation is going forward because there's some evidence apparently that there were underage people who were being offered up in their advertisements. We all agree that that's a bad idea, bad thing?" RP 457.

Apparently referring to the Backpage, he asked: "Should the whole thing be shut down?" RP 457. One juror mentioned that if one site were shut down, there would be others. The prosecutor responded: "Right. The Craigslist stopped, Backpage started. Backpage stopped, Plenty of Fish started. Plenty of Fish stopped, Sex for Girls started." RP 457.

The prosecutor asked: "How do we go about figuring out if what is actually being advertised on Backpage and Craiglist in those sections is children?" Juror 53 stated: "By sting." RP 458. Another stated that the

websites should have to verify age. RP 458. The prosecutor stated: "Wouldn't that be nice." RP 458.

The prosecutor stated:

My time is going to run out in a second here, so I just want to talk about one other thing right now and that is this. How many of you think that in Pierce County right now we have a shortage of crime happening? Nobody. Right. Tons, right? So there is a lot of people who need to get caught for what they have already done, right? We don't have enough police to even go get them all. So should we be spending time with the police officers doing undercover stings where we contact folks and engage them and get them to show up and arrest them before they commit a crime? Yes or no.

RP 461. When one juror expressed doubts about the concept, the prosecutor asked: "In the context of sexual offenses against a child, should we wait until they actually commit the crime or catch them before?" Juror 48 stated: "I think that if it was a sting and you showed up to the setup, then you at least had the intention. So if nothing else, you're getting caught for the intention of it." RP 462. The prosecutor responded: "By that time, you've actually committed the crime?" RP 463. Juror 48 responded: "Right or at least had the intention to commit and that's at least a crime in itself." RP 463.

In continuing with this concept, the prosecutor asked if the juror sitting in the box thought about going to rob a bank after court. The juror concurred with the prosecutor that he could not be arrested for that. RP 463. But the prosecutor then said: "If you go to the bank and you walk in, gun in your

pocket, a note that says give me all your money and they arrest you then and there, good or bad?” RP 463. The juror said: “That’s excellent.” The prosecutor followed up: “Because that’s different than if you’re just sitting there thinking about it or if you’re talking to somebody about it?” RP 463. He followed up: “In the context of you actually going down to the bank with the gun and the note, you pretty much acted on your thought, right?”

The prosecutor also asked the venire if anyone had previously sat on a jury. Of those persons he asked: “How many of you had a horrible experience that we haven’t already talked about, like did not reach a verdict?” RP 487. Two potential jurors said they had served on a jury that did not reach a verdict. The prosecutor asked both “how bad was the split?” Both jurors said that during their prior service in a criminal case the “split” was 10-2. The prosecutor asked: “Was it frustrating for you to be undecided at the end or were you okay with it?” Both jurors indicated they were frustrated with the outcome. RP 485. The prosecutor asked both in they were in the majority or the minority and both said that they were in the majority of 10. *Id.*

#### D. TRIAL TESTIMONY

Racus was arrested during a “sting operation” – dubbed Net Nanny – conducted by the WSP’s Missing and Exploited Children Task Force [MECTF]. MECTF is headed by Det. Sgt. Carlos Rodriguez. RP 570-71. According to

him MECTF deals with “the exploitation of children, the bulk of that work deals with sex crimes.” RP 571. Rodriguez said:

Most of the activity that we’ve done involved craigslist – where people post ads, and there we look for people who are posting ads that are either seeking or offering up children for exploitation.

RP 574.

Before introducing any evidence about Racus, the prosecutor elicited evidence from Rodriguez that beginning in August 2015, MECTF had done five Net Nanny stings in various parts of the State. RP 574. Rodriguez was allowed to testify that his goal was

...to catch people who have an interest in committing sex acts with children, providing children for sex acts, that have a sexual attraction to children, and who have done these things in the past.

RP 575. The prosecutor followed up:

You’re seeking out to arrest people looking to have sex with children?

Rodriguez answered: “Yes.” RP 576. The prosecutor also asked:

How do you end up then having contact with children who have been exploited?

Rodriguez answered:

Either people are offering them up. We have instances where people are offering their children up and we rescue those children; or from conducting interviews, there’s evidence that we found that’s led us to rescuing children.

RP 577.

Later, Rodriguez testified that the Pierce County ad generated hundreds of responses. RP 614. The prosecutor asked how many people were arrested and Rodriguez said 12. *Id.* He also said that sometimes people responded with “I’m calling the cops” or flagged the ad as inappropriate. RP 619. The prosecutor later asked Rodriguez how many people had been arrested in all five Net Nanny cases and Rodriguez said 63. RP 648.

Rodriguez was then asked about how he posted ads on Craigslist and in what section. He described an ad – not placed by him – that came up after he searched for the two words “close family.” RP 584. After giving that description, the prosecutor asked him:

Based on your training with Craigslist from Internet Crimes against Children and your experience running these operations, are there words that are used that are suggested to mean something to people viewing the ads?

The defense objected and stated there was no evidence in this case that particular words in the ads meant anything to Racus. RP 585. The objection was overruled and the prosecutor asked for some examples. Rodriguez said:

Close family, that generally means something dealing with incest. “New in town” or “new to the area” that’s commonly used in the commercial sex trade when someone’s new to the area or new to – it’s called the track – an area where people are prostituted. There are a number of different acronyms.

Prosecutor: What about taboo?

Rodriguez: Taboo. So taboo is something that isn’t generally – it’s not your everyday thing. It’s something that isn’t morally accepted and is hard to find.

RP 585.

The prosecutor asked: “What are words that are used to suggest that there is going to be payment involved for the act?” RP 586. Defense counsel objected. He stated: “I’ll object to relevance. That hasn’t been produced. This is expert testimony beyond the scope of what has been produced.” RP 587. Rodriguez answered: “So gifts, presents, roses, donations, flowers, things like that.” *Id.* The prosecutor clarified that all those words meant “money.” *Id.*

The prosecutor asked Rodriguez what he was doing while he was putting the ad together for this sting. Rodriguez responded: “I’m communicating with somebody who wanted to have sex with a six and eleven-year-old.” RP 588.

Rodriguez told the jury there were many ads on Craigslist, including some that included the actual sex act being displayed. RP 590. Rodriguez also testified to the process for reporting objectionable ads to the Craigslist administrators. RP 591.

Rodriguez testified that he rented a house in Pierce County and placed an ad that said:

Looking for close family connection – 2 dau, 1 son – w4w  
(tacoma)

RP 602. He said he picked the phrase “close family connection” because:

I’m going for someone who is looking for a close family experience or may have a close family, because that in turn leads me to a victim, potentially could lead me to a victim.

RP 602. But he also said that his intention in placing the ad was to communicate that he was looking for “someone who wants to have sex with, exploit a child.” *Id.* He said that not everyone he arrested had “a prior incestuous relationship” and admitted that he had no evidence Racus had a prior incestuous relationship with anyone. RP 650.

He signed the ad “Kinkykristal420.” RP 653. He used 420 because it “means marijuana.” RP 654.

The ad was posted on December 17, 2015 at 11:40 am. RP 606. The following exchange of texts and emails occurred between Rodriguez and Racus on December 17 and 18, 2015.

Date	Time	Method	Sender	Bates #	Description
12/17/15	1:22 p.m.	Email	Darcy	00046	A little more detail please
12/17/15	1:26 p.m.	Email	WSP	00046	what are you looking for I am looking fro someone with close family experieince. i was very close with my faterh and brother
12/17/15	1:28 p.m.	Email	Darcy	00046	I am looking to give a gal some oral and anything else sexual she needs.
12/17/15	1:30 p.m.	Email	WSP	00046-00047	what are your age limits. My girsl are nearly 12 and 8. my oldest is very mature for her age. more restrictions with the 8 but she is good for oral
12/17/15	1:30 p.m.	Email	Darcy	00047	How old are you?
12/17/15	1:26 p.m.	Email	WSP - Craigslist	00047	what are you looking for I am looking fro someone with close family experience. i was very close with my faterh and brother.
12/17/15	1:31 p.m.	Email	WSP	00047	i am 39, but this is more for them. im always present, but im into watching to make sure they are ok and happy
12/17/15	1:35 p.m.	Email	Darcy	00047	Really need to be of legal age. A person can go to jail over that. if you

					are interested in receiving oral I don't mind if they watch or even do their own thing. You have photos?
12/17/15	1:40 p.m.	Email	WSP	00048	i know can go to jail, i'm with you of course. if you want to text so more safe we can do that. i need to be careful
12/17/15	1:42 p.m.	Email	Darcy	00048	Do you host and when would this take place?
12/17/15	1:56 p.m.	Email	Darcy	00048	You no longer interested? I have until 3.
12/17/15	2:07 p.m.	Email	WSP	00049	im not home till 4. can do tomorrow. Text me (503) 482-96twelve text your name and word til three
12/17/15	2:07 p.m.	Email	Darcy	00049	So what is it your are looking to get out of this? So we are on the up and up.
12/18/15	11:17 a.m.	Text	Darcy	00052	Darcy. Till three. Is this free? Or you looking for something.
12/18/15	11:27 a.m.	Email	Darcy	00049	DARCY, TILL THREE, IS THIS FREE? OR YOU LOOKING FOR SOMETHING?
12/18/15	2:58 p.m.	Email	WSP	00050	what does that mean
12/18/15	3:01 p.m.	Email	Darcy	00050	What are you wanting from me? you ask that I text you today and I did no response. you still interested?
12/18/15	3:10 p.m.	Text	Darcy	00052	Hello? Family connection?
12/18/15	3:12 p.m.	Text	WSP	00052	Sorry darcy so many people answer on here and its hard to see who is real and not a flake
12/18/15	3:13 p.m.	Text	Darcy	00052	I am real
12/18/15	3:14 p.m.	Text	WSP	00052	what experience do you have and what do you want
12/18/15	3:16 p.m.	Text	Darcy	00052	Not much. Looking to give oral and maybe receive if all are clean. What is it you are looking for?
12/18/15	3:18 p.m.	Text	WSP	00052	That sounds good. THIS is more for my family to have the same experience I hasd growing up. My son is 13, my daughters are nearly 12 and 8.
12/18/15	3:21 p.m.	Text	Darcy	00052	Have until 430ish today please tell me more and maybe meet quick
12/18/15	3:23 p.m.	Text	Darcy	00052	well, i need to know exactly what you want. i also have to ask you some improtatn westions first.

12/18/15	3:24 p.m.	Text	Darcy	00052	Please ask.
12/18/15	3:28 p.m.	Text	Darcy	0052	When I was about 12 my cousin and I messed around she was 9 or so.
12/18/15	3:31 p.m.	Text	Darcy	0052	Where in Tacoma are you?
12/18/15	3:32 p.m.	Text	WSP	00052	first for my protection, are you affiliated with law enforcement in any way
12/18/15	3:32 p.m.	Text	WSP	0052	near st joes hospital
12/18/15	3:33 p.m.	Text	Darcy	00052	No i am not. Are you?
12/18/15	3:33 p.m.	Text	WSP	00052	i am no way affiliated with law enforcement. i just need that in writing so I am protected.
12/18/15	3:34 p.m.	Text	Darcy	00052	Ok what is it I would be signing?
12/18/15	3:35 p.m.	Text	WSP	00052	no not signing. the text is enough hun
12/18/15	3:35 p.m.	Text	Darcy	00052	Your not taking it to law enforcement right?
12/18/15	3:36 p.m.	Text	WSP	00052	Oh god no hun, if you are a cop i can say you lied to me so I am protected
12/18/15	3:36 p.m.	Text	WSP	00052	i cant lose my kids
12/18/15	3:37 p.m.	Text	Darcy	00052	I understand that quite well. You have a address?
12/18/15	3:38 p.m.	Text	WSP	00052	I wont give you my address till I talk to you and we have agreed to what is good for both yo and my family
12/18/15	3:38 p.m.	Text	WSP	00052	that's too dangerous
12/18/15	3:40 p.m.	Text	Darcy	00052	So this won't happen today? May have some time next week
12/18/15	3:41 p.m.	Text	WSP	00052	im out of town next week for Christmas i can do today otherwise will have to wait till next year (emoji)
12/18/15	3:42 p.m.	Text	Darcy	00052	So you want to meet?
12/18/15	3:42 p.m.	Text	WSP	00052	not till I know what you want hun and I have a systme. i have to talk to you first.
12/18/15	3:43 p.m.	Text	Darcy	00052	Want to orally please a gal and have it done back to me. Or sex
12/18/15	3:48 p.m.	Text	WSP	00052	So which one gal hun
12/18/15	3:47 p.m.	Text	WSP	00052	oral pleasure is always good

12/18/15	3:48 p.m.	Text	Darcy	00053	Yes it is. Older or you
12/18/15	3:49 p.m.	Text	WSP	00053	You mean Lisa, this is more for them but if it gets me hot i can go after, but only if I know she is happy this is for her not me.
12/18/15	3:49 p.m.	Text	WSP	00053	oh, Lisa is nearly 12
12/18/15	3:50 p.m.	Text	WSP	00053	I don't think I told you their names
12/18/15	3:50 p.m.	Text	Darcy	00053	Needs to happen soon or will be next year
12/18/15	3:51 p.m.	Text	WSP	00053	K so yo didnt answer we are ready
12/18/15	3:51 p.m.	Text	Darcy	00053	Where do I come to?
12/18/15	3:52 p.m.	Text	WSP	00053	Tacoma near the funny looking hospital but need to know who so I can get teh ready
12/18/15	3:53 p.m.	Text	Darcy	00053	Lisa . have a pic?
12/18/15	3:53 p.m.	Text	WSP	00053	Yeah. Hold on
12/18/15	3:54 p.m.	Text	WSP	00053	
12/18/15	3:55 p.m.	Text	WSP	00053	I have rules
12/18/15	3:55 p.m.	Text	WSP	00053	do you want to hear them or talk about it on the phoen. I have to talk to you so I know you are legit
12/18/15	3:56 p.m.	Text	Darcy	00053	Just making sure is real. Thanks. Will head that direction from Puyallup. Sure I can talk.
12/18/15	3:57 p.m.	Text	WSP	00053	I can call in about 10 if ok
12/18/15	3:57 p.m.	Text	Darcy	00053	What are the rules. Ok
	4:00 p.m.				Privacy Act Authorization Signed.
12/18/15	4:02 p.m.	Text	WSP	00053	No pain, no anal, condoms if more that oral
12/18/15	4:03 p.m.	Text	Darcy	00053	Ok good with that
12/18/15	4:04 p.m.	Text	WSP	00053	k please send me a pic of you to hun
12/18/15	4:11 p.m.	Text	Darcy	00053-00054	Picture of Darcy
12/18/15	4:11	Text	Darcy	00054	Sorry I am just getting off work and

	p.m.				hard to take a photo while driving I look a lot better than the pic shows
12/18/15	4:13 p.m.	Text	WSP	00054	Call me hun
12/18/15	4:13 p.m.	Text	WSP	00054	i like your beard
12/18/15	4:27 p.m.	Text	Darcy	00054	Thanks
12/18/15		Ph Call			
12/18/15	4:27 p.m.	Text	WSP	00054	k so this is right near my place, do you at cause my place is hard to find
12/18/15	4:27 p.m.	Text	WSP	00054	hold on have to google the address.
12/18/15	4:28 p.m.	Text	WSP	00054	1901 mlk way. There is a 76 station there a chicken place too. once you are there i can alk you in to my place
12/18/15	4:29 p.m.	Text	WSP	00054	can you rig her skittles? she asked for some
12/18/15	4:33 p.m.	Text	Darcy	00054	Will try
12/18/15	4:43 p.m.	Text	WSP	00054	K well how far away i'm going to get her ready
12/18/15	4:51 p.m.	Text	Darcy	00054	By the 76 station now have skittles here at 76 now
12/18/15	4:53 p.m.	Text	Darcy	00054	have skittles here at 76 now
12/18/15	4:53 p.m.	Text	WSP	00054	What car hun
12/18/15	4:53 p.m.	Text	Darcy	00054	Big truck
12/18/15	4:54 p.m.	Text	WSP	00054	Color
12/18/15	4:54 p.m.	Text	WSP	00054	k ill call
12/18/15		Ph Call			
12/18/15	4:55 p.m.	Text	Darcy	00054	Need a place to park
12/18/15	4:55 p.m.	Text	WSP	00054	What color so I know
12/18/15	4:56 p.m.	Text	Darcy	00054	White truck on street in front of van
12/18/15	4:57 p.m.	Text	Darcy	00054	in front of van in front of lot for sale.
12/18/15	4:59 p.m.	Text	Darcy	00054	Which house?
12/18/15	5:00 p.m.	Text	WSP	00054	My mom is in bathroom. I am bad with directions hold on she is almost done

12/18/15	5:04 p.m.	Text	WSP	00054	I have a silver van park by that
12/18/15	5:04 p.m.	Text	WSP	00054	1908 s yakima
12/18/15	5:04 p.m.	Text	Darcy	00055	Ok
12/18/15	5:06 p.m.	Text	WSP	00055	im bad with directions. Gona get her ready.
12/18/15	5:06 p.m.	Text	WSP	00055	Oh yeah, I live upstairs I rent teh top floor of house different people live downstairs
12/18/15	5:08 p.m.	Text	Darcy	00055	I'm here
12/18/15	5:09 p.m.	Text	WSP	00055	K at door
12/18/15	5:10 p.m.	Text	WSP	00055	test

RP 660-679. The picture in the email chain was of another state trooper when she was 16 or 17 years old. RP 712. The misspellings are in the original texts.

After the Privacy Act Authorization was signed, the police recorded two telephone calls that Racus made to two police officers masquerading as the 34-year-old mother and her 11-year-old daughter. The first call was recorded at 4:09 p.m. with both the fictitious mother and daughter. During that conversation, Racus discussed sex with the fictitious daughter. The fictitious mother asked Racus to bring a “donation” or “gift” for the fictitious daughter because it was Christmas time.

In the second call, he asked for and received directions to the sting house. See Exhibit 8. When Racus arrived, he was arrested. RP 560. During the search incident to the arrest the police found a bag of Skittles. *Id.*

Racus testified that his intention throughout these conversations was to have sexual intercourse with the fictitious 34 year old mother. He never intended to have any sexual contact with the fictitious 11 year-old daughter. RP 919-978. During the prosecutor's cross examination, he repeatedly asked the same questions and posed argumentative questions, and some of defense counsel's objections to the prosecutor's questioning were sustained.

During this Net Nanny operation, there was a FOX Q13 employee named Parella Lewis in the sting house. She was apparently from the television program "Washington's Most Wanted." RP 692.<sup>3</sup>

E. DISMISSAL OF THE COMMERCIAL SEXUAL ABUSE OF A CHILD CHARGE

At the close of the State's case, Racus moved to dismiss the commercial sexual abuse of a minor charge. RP 905. The trial judge granted that motion. He said that the statute clearly required that the defendant had to pay a "fee." Racus clarified to the police he had no money, and said he could not bring a present or donation. RP 906-907. He also said that the Skittles were a means by

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<sup>3</sup> It unclear why a reporter would be present and observing private conversations between the police and Racus during the sting operation. The United States Supreme Court has stated that it violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution. *Wilson v. Layne*, 526 U.S. 603, 604, 119 S.Ct. 1692, 1694, 143 L.Ed.2d 818 (1999). Similarly, the presence of the media during a sting operation which involves private conversations raises serious questions about the propriety of the officer's actions during this sting.

which the police could identify Racus when he arrived and not a fee as contemplated by the statute. RP 908. Thus,

I think to allow this count to go to the jury is just rank speculation, and I think it doesn't apply with the statutory intent. Factually it's way out of the realm of a factual basis to support this charge, even construing the evidence in a light most favorable to the state. I think that while there was some ambiguity over this idea of doing something in the future after the first of the year, by the time the dialogue with the undercover officer had been completed, it was clear that Mr. Racus had no intent of promising something or giving something in return for any sex at that time, and that there was no discussion of any fee.

RP 908.

#### F. JURY INSTRUCTIONS

Racus proposed an entrapment instruction. CP 182; RP 1095-96. The prosecutor objected and said "the defense is only available to a defendant who admits the acts that are charged." RP 1096. In the prosecutor's view, Racus could only claim entrapment if he testified and admitted that he went to the sting house with the intention of raping the fictitious 11-year-old. RP 1099. He also said:

You will remember, Judge Orland, that on the 17<sup>th</sup> day of December, there wasn't any real specific conversation about defendant having oral sex with a child.

The State's argument was that because Racus had reinitiated contact with the fictitious mother on December 18, he could not claim entrapment. RP 1098.

The judge ruled that he would not give the instruction:

I think that under this fact pattern, the fact that it went over a two day period of time that he, Mr. Racus, reinitiated the dialogue knowing that the purpose in the ad was for somebody to get close to this woman's children primarily. I think in that conversation mom said this was not for me. It's for my kids, and it escalated from there, so it's hard to say that Mr. Racus was led to commit a crime he was not otherwise disposed to commit. The jury may believe that when he said that his intent was just to go along with it in order to get to the mom. That really goes to whether or not they find he had the intent to commit the crime, but I don't think this is a case based upon the evidence that rises to the level of an entrapment defense, so I would not be inclined to give the entrapment instruction.

RP 1100-01. Defense counsel objected to the Court's failure to give the instruction. RP 1120.

#### G. CLOSING ARGUMENTS

The prosecutor began by stating:

Fortunately, this isn't a case that involves the sexual abuse of a child. It doesn't involve the actual sexual assault of a young girl. That's the good news. It also doesn't involve the potential sexual assault of an actual child.

RP 1124.

He said:

There is a lot of circumstantial evidence I think as to why. I shouldn't say as to why. I guess I shouldn't say as to why. The why question becomes more problematic in the context of the sex offense, because I guess what I'm going to suggest to you folks is this. In our world, in our society, there are two kinds of people. One, the people who will engage in sex with children, and the other people who will not. There is no gray area in there.

A lot of life isn't black and white. This is. You either will have sex with a child or you will not have sex with a child. And I'm going to suggest to you that the category of people who will not have sex with a child also will not talk about it as if they're going to do it. They won't have a conversation with anyone else that says, hey, how about oral sex with a kid, She has braces, any of that kind of stuff. No one who will not actually go forward with that act, would even talk about that act. I'm going to suggest to you further, not only will people who won't have sex with a child will not talk to others about it, they won't even have that conversation in their own mind. They won't think to themselves at any point ever, huh, wonder what it would be like to have sex with an 11-year-old or I think I will have sex with an 11-year-old or I think I will talk about having sex about an 11-year-old. They will not do that. You know from Darcy Racus' own mind, I mean, own mouth that it piqued his interest to talk about close family connection.

The reason for that is the ad in the title talked about two daughters and one son and talked about young. And the content of the ad said connect with my young family, and the defendant knows, as he's testifying to you, that it's going to be difficult to explain why that piqued his interest, because there are people who will and there are people who are absolutely appalled at that thought.

When you evaluate credibility, ask yourself if it's reasonable what the defendant told you, which is 90 percent of them are unreal, not real, and while I opened some ads for adult women, I followed through on this ad, but only because I wanted this mom.

Keep in mind the defendant told you that -- and you know that craigslist sexual encounters -- sorry, casual encounters, has ads with photographs. Sergeant Rodriguez told you, "I didn't pick an ad to show you folks that it had pictures, because quite frankly some of these pictures are pornographic, nudity, bestiality, child pornography."

RP 1132-42. He also argued that Det. Sgt. Rodriguez would never lie but Racus would. He said:

You folks decide whether or not the questions asked of Sergeant Rodriguez about altering the emails and the text messages affects his credibility. You decide if Sergeant Rodriguez cares so much about Darcy Racus that he is going to toss in his career and he's going to complicate the investigations of all the other 62 people he's arrested for this kind of stuff, because he's got to get Racus. Does that seem reasonable to you? No. The defendant's lie, admittedly lie under oath, seem reasonable to you? It might make sense why he did it, because he doesn't want to look like the predator that he actually is, and that's a word that's a strong word, and it's not designed to mean anything other than his actions in this case suggest predatory behavior focused on an 11-year-old girl, based on the way he talked, based on what he said, based on what he said he wanted to do, based on what he did is going over there to engage in that act.

RP 1150-51.

In rebuttal closing argument, he said:

Let's just talk one minute about MECTF. These are -- you saw five members, four members and a couple visiting members, for lack of a better word, of that task force. Those are folks whose lives and careers are dedicated toward protecting children. These are people who swim in the filth that's on the internet. By choice, they have to go in and read these ads. Detective Sergeant Rodriguez has to pose as a woman offering to sell children for sex. Samantha Knoll has to talk to the defendant, who wants to engage in sex with a child. Anna Gasser has to pretend to be interested in sex as an 11-year-old with an adult. Can you really criticize what the MECTF is doing and what these folks are doing?

It's been suggested to you that of 63 people that they've arrested -- by the way, hundreds, hundreds of people have answered Detective Sergeant Rodriguez' ads soliciting sex with children. Kitsap, Pierce, Snohomish, Spokane, Thurston counties; 39 counties in this state. They have done sting operations in five. Hundreds of people have sought out sex with children, hundreds. They're everywhere in our society. They've arrested 63 people who showed up to have sex with children. Three were already

registered sex offenders. They already have been caught. They were already registering. It's been suggested to you that they're supposed to just find those people.

Fifty-eight people have been arrested who showed up to have sex with a child before sex with a child before they could actually do it. At least that time.

I'm not suggesting to you in any way at all that Mr. Racus did this before, because you don't have any evidence of that at all. I'm suggesting you judge what he did that day. And what he did, is he was one of the people who showed up to have sex with a girl who was 11, and got arrested before he could, because of the work that the Missing and Exploited Children's Task Force does. For all of us who are in the category of it's too repulsive to even think about it, much less talk about it, much less do it.

RP 1172-73.

The prosecutor also referred to the defendant's argument as "legal technicalities." RP 1171, 1177. He said these defense arguments were intended to "distract you away from the evidence." *Id.*

Finally, he argued:

After you return your verdict, Judge Orlando is going to release you from the instruction that you can't talk about this case. So when you go home after your verdict and your loved ones say, "Hey, are you done?" And you say, "Yeah." "What did you do?" "Well, we found the defendant guilty and here's the crime." Then they say to you, "Did you do the right thing?" And you say, "Yeah, we did." That's an abiding belief.

And a month later, when you're thinking about jury duty and you think to yourself, we did the right thing, that's an abiding belief. And then the next time you receive your jury summons, before you throw it away, or the next time you're talking to someone else who got a jury summons, you can tell them, "You know what? That's up to you, but when I was on jury duty, I did justice. I did the right thing." That's an abiding belief.

RP 1181.

#### IV. ARGUMENT

- A. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL OF THE COMMUNICATIONS BETWEEN RACUS AND THE POLICE BECAUSE THE POLICE HAD NO AUTHORITY TO RECORD THE TEXT AND EMAIL MESSAGES RECEIVED BEFORE 4:00 P.M. ON DECEMBER 18, 2015

Washington’s Privacy Act applies to “any individual” and to “the state of Washington [and] its agencies.” RCW 9.73.030(1). The “sweeping language” of the Act that protects personal conversations from governmental and other intrusions and makes it unlawful for any individual or Washington agency to intercept or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

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

RCW 9.73.030(1)(a)-(b).

Because the Act does not define the word “private” for statutorily protected communications and conversations, our supreme court has adopted a dictionary definition: “‘belonging to one’s self . . . secret . . . intended only for

the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message; a private communication . . . secretly; not open or in public.” *Roden*, 179 Wn.2d at 899 (quoting *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (omitting internal quotation marks)). Whether a particular communication is private under the Act is a question of fact, but may be a matter of law if the facts are undisputed. *Id.* at 900. A communication is private under the Act “(1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014) (citing *Townsend*, 147 Wn.2d at 673). The reasonable expectation standard for determining whether particular communications and conversations are private “calls for a case-by-case consideration of all the facts.” *Id.* (citing *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996) (evidence obtained eavesdropping on cordless telephone conversations violated Privacy Act and was held inadmissible). Reasonableness factors include “the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party.” *Id.* (citing *State v. Clark*, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996)). The Act protects private conversations involving “an incriminating statement of a serious subject matter.” *Id.* at 730. A private communication containing a confession of child molestation was held to be “not one that is

normally intended to be public, demonstrating Kipp's reasonable expectation of privacy." *Id.* at 731.

Racus clearly had an expectation of privacy in his text and email messages with the fictitious mother in this case. The communications were between two adults communicating directly about a personal advertisement on Craigslist. And MECTF personnel secretly intercepted and recorded Racus's personal and private sexual communications without his consent or authority of law.

The Act also mandates that consent shall be "announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted," and the "announcement shall also be recorded." RCW 9.73.030(1)(c). No such announcement was made when Det. Sgt. Rodriguez intercepted and recorded communications.

Controlling Washington precedent amply demonstrates that Racus's email and text messages regarding sexual matters, even if of criminal nature per the State's theory, constitute private electronic communications protected by the Act. In *Hinton*, the supreme court noted that based on the "sweeping language" of the Act, "this court has consistently extended statutory privacy in the context of new communications technology, despite suggestions that we should reduce the protections because of the possibility of intrusion," citing as protected

technological examples the “cordless phone,” “e-mails,” and “text messages.”

*Hinton*, 179 Wn.2d at 872 (citations omitted). In *Roden*, the supreme court

addressed the private nature of text messaging protected by the Act:

Sophisticated text messaging technology enables “[l]ayered interpersonal communication[s]” that reveal “intimate ... thoughts and emotions to those who are expected to guard them from publication.” . . . Text messaging is an increasingly prevalent mode of communication and text messages are raw and immediate communications. . . . Individuals closely associate with and identify themselves by their cell phone numbers, such that the possibility that someone else will possess an individual’s phone is “unreflective of contemporary cell phone usage.”

The possibility that an unintended party can intercept a text message due to his or her possession of another’s cell phone is not sufficient to destroy a reasonable expectation of privacy in such a message.

*Roden*, 179 Wn.2d at 901.

Last, in *Kipp*, the Supreme Court rejected the State’s argument that “a person who confesses to child molestation” in an electronic communication, “should expect this information to be reported to the authorities, and therefore it is unreasonable to expect the conversation to remain private.” *Kipp*, 179 Wn.2d at 731. Rather, the court acknowledged that:

accepting the State’s argument would mean that a confession of child molestation is never subject to a reasonable expectation of privacy. This is in direct opposition to what we said in *Clark* and *Faford*. Instead, the subject matter of the conversation in this case was not one that is normally intended to be public, demonstrating *Kipp*’s reasonable expectation of privacy.

*Id.*

The trial court's ruling that Racus "impliedly consented" to the recordings in this case was error.

First, under the plain language of the Act, the mere interception of a text message is prohibited. "Recording" of the text message is not required. See *Roden*, 179 Wn.2d 893.

Second, the trial court also erred in finding that Det. Sgt. Rodriguez was the "intended recipient" of Racus's text messages. He was not. Racus's "intended recipient" was "Kristal." While the officer may have used subterfuge, the State never argued, nor could it, that Det. Sgt. Rodriguez was Racus's intended recipient.

Third, because Det. Sgt. Rodriguez was using a subterfuge and was not the intended recipient, the facts are on all fours with the facts in *Hinton*. There, Hinton sent text messages to a phone that belonging to Daniel Lee. Unbeknownst to Hinton, the phone had been seized by the police. A police detective read text messages on a cell phone police seized from Daniel Lee, who had been arrested for possession of heroin. The detective read an incoming text message from Shawn Hinton, responded to it posing as Lee, and arranged a drug deal. The Court said:

Unlike a phone call, where a caller hears the recipient's voice and has the opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone, and Hinton reasonably believed he was disclosing information to his

known contact. The disclosure of information to a stranger, Detective Sawyer, cannot be considered voluntary.

*Hinton*, 179 Wn.2d at 876. Under the trial court's reasoning, any police officer could use subterfuge to intercept and record any text message from any suspect during an investigation. Most modern telephone technology provides a texting function that can be recorded and retained. Under the trial judge's ruling, anyone who uses a phone with a text function has impliedly consented to government interception.

This is clearly not what the drafters of the statute intended. The statute contains a specific provision for one-party consent. The privacy statute provides a mechanism for Det. Sgt. Gonzalez to obtain authorization for one-party consent if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony. Approving the notion of "implicit or implied" consent by Racus renders this portion of the statute superfluous. And it significantly undermines the strict protections of the Privacy Act.

In *Hinton*, the Supreme Court concluded that forcing citizens to assume the risk that they are exchanging information with a undercover police detective who is recording and saving their text messages tips the balance too far for law enforcement at the expense of the right to privacy. This court should reach the same conclusion and find that the text messages should have been suppressed.

B. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL OF THE COMMUNICATIONS BETWEEN RACUS AND THE POLICE THAT OCCURRED AFTER THE POLICE ISSUED AN INTERCEPT AUTHORIZATION BASED UPON RCW 9.73.210(B)

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

Probable cause exists to believe that the conversation or communication involves:

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and RCW 9.73.230.

The statute specifically requires that the written report prepared during authorization will indicate the names of the officers authorized to intercept, transmit and record the conversation. RCW 9.73.230(2)(c). The statute must be strictly complied with for authorizations to be valid. *State v. Gonzalez*, 71 Wn. App. 715, 718-19, 862 P.2d 598 (1993), *review denied*, 123 Wn.2d 1022, 875 P.2d 635 (1994). The *Gonzalez* court found that, unlike the consensual taping of in-custody interrogations under RCW 9.73.090, technical errors are fatal to an authorization under RCW 9.73.230. *Id.* at 719. Unlike RCW 9.73.090, the persons against whom the recordings are being used have not consented to, and are unaware of, a recording made under RCW 9.73.230. The specific procedural

instructions of RCW 9.73.230 are necessary to “limit abuse of what amounts to self-authorized electronic surveillance.” *Gonzalez*, 71 Wn. App. at 719.

The authorization was signed at 4:00 p.m. The defense supplied the trial judge with the printout of all of the text messages set forth above. RP 75-80. In reviewing the text conversations set forth above, no reasonable person would find there had been a discussion of “trading gifts in exchange for sex with the minors” before that time. As the trial court noted when it dismissed the commercial sexual abuse of a minor charge at the close of the state’s case, an agreement to pay a fee is an essential element of the crime of commercial sexual abuse of a minor.

Before 4:00 p.m. on December 18, Racus and the police masquerading as the fictitious mother had *no* discussion regarding gifts or donations. Det. Sgt. Rodriguez violated the strict compliance required by RCW 9.73.230 when he misrepresented to his supervisor that the text messages he sent to and received from Racus before 4:00 p.m. on December 18 included a discussion of gifts, donations or fees. The trial court should have suppressed all text messages and phone calls, including Exhibits 6 and 8, recorded after that time.

C. THE TRIAL COURT ERRED IN FAILING TO GIVE RACUS’S  
PROPOSED ENTRAPMENT INSTRUCTION

The right to a fair trial includes the right to present a defense. The Sixth and Fourteenth Amendments of the Federal Constitution, and article 1, § 21 of

the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

A trial court must instruct on a party's theory if the law and the evidence support it; failing to do so is reversible error. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956, *review denied*, 142 Wn.2d 1004, 11 P.3d 825 (2000). In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility. *May*, 100 Wn. App. at 482 (citing *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999)). If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. *Moyer v. Clark*, 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

In Washington, the defense of entrapment is defined by statute:

(1) In any prosecution for a crime, it is a defense that: (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

Racus need only present some evidence to support an instruction on the affirmative defense. *State v. Galisia*, 63 Wn. App. 833, 836, 822 P.2d 303, 305 (1992), *abrogated by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994). In determining whether the evidence supports giving the instruction, a court should consider the defendant's testimony and the inferences that can be drawn from it. *State v. Morgan*, 9 Wn. App. 757, 759-60, 515 P.2d 829, *review denied*, 83 Wn.2d 1004 (1973). Failure to give an instruction is reversible error if there was evidence to support the defense. *State v. Ladiges*, 66 Wn.2d 273, 276-77, 401 P.2d 977 (1965); *State v. Kerr*, 14 Wn. App. 584, 587, 544 P.2d 38 (1975), *review denied*, 87 Wn.2d 1001 (1976).

Contrary to the State's persistent argument in this case, an entrapment defense does not require a defendant to admit either the crime itself or all the elements of a crime before being entitled to an entrapment instruction.<sup>4</sup> "It is enough that a defendant admit acts which, if proved, would constitute the crime." *Galisia*, 63 Wn. App. at 837. Racus did precisely that in his testimony.

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<sup>4</sup> Throughout the proceedings the prosecutor argued that Racus was required to "admit" the crime before he was entitled to an entrapment instruction. See, e.g., RP 635-56. He said: "The defendant has to say I intended to go have oral sex with that girl, and I intended to pay her for that sex with a bag of Skittles in order to bring entrapment." RP 636.

Here, the trial judge erred in two ways. First, he erred in determining there were not “some” facts to support entrapment. The police were not investigating ongoing criminal activity. Taking the facts in a light most favorable to Racus, the judge should have recognized that the ad posted by the police was deliberately vague. When he stated that he wanted to have sex with the fictitious 39-year-old mother, the police directed the conversation to the imaginary children. Racus specifically stated that he did not want to do something illegal but the police persisted in texting him. In doing so, they deliberately tried to overcome his resistance to their vague proposals of criminal activity.

Second, he weighed the proof and evaluated the witnesses’ credibility. Those issues are not a proper inquiry for the trial judge. They must be submitted to the jury determination.

Because there was sufficient evidence to submit this issue to the jury, the convictions should be reversed.

D.     **THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY’S CONCLUSION THAT RACUS TOOK A SUBSTANTIAL STEP IN THE ATTEMPTED FIRST DEGREE RAPE CHARGE**

To convict a defendant of attempted rape of a child in the first degree the State must prove beyond a reasonable doubt that the defendant took a substantial step toward having sexual intercourse with another who is less than 12 years old and not married to the perpetrator, and that the perpetrator is at

least 24 months older than the victim. RCW 9A.44.073. 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). A “substantial step,” is conduct that strongly corroborates the actor’s criminal purpose. *Townsend*, supra; *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995). In attempt cases, a substantial step requires more than mere preparation. *Townsend*, 147 Wn.2d at 679. For conduct to comprise a substantial step, it must be strongly corroborative of the defendant’s criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). “[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse. *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

Racus engaged in email exchanges with an adult woman claiming to have two girls and a boy that were underage. The woman posing as the mother was an undercover State police officer. The email exchanges, although sexual in nature, were vague regarding what, if anything, would happen if an eventual meeting took place, and were more directed at the “mother.” And, although Racus did briefly speak to the fictitious 11-year-old, no specific conduct was “planned” regardless of the sexual nature of the conversation. Finally, although Racus was eventually lured to the sting house, there were no firm plans to perform any sexual acts, let alone intercourse with the fictitious 11-year-old.

Similar cases holding that a substantial step toward the commission of the crime of child rape had been established are distinguishable from the present case. In *Townsend* the Court found that a substantial step had been established after defendant Townsend repeatedly exchanged messages with someone he believed was a 13-year-old girl, scheduled a meeting at a hotel room with her, specifically told her he wanted to have sex with her the night before the meeting, and then while on the way to meet her, sent her an instant message saying that he still wanted to have sex with her. *Townsend*, 147 Wn.2d at 671.

Likewise, in *State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007), a substantial step was established after defendant Sivins had repeated sexual conversations with someone he believed was 12 or 13. He subsequently mailed her a vibrator, specifically told her he wanted to have sex with her, secured a hotel for their meeting at a motel five hours away, met her at the motel room, and brought condoms, lubricant, alcohol and other items with him.

Similarly, in *State v. Wilson*, 158 Wn. App. 305, 242 P.3d 19 (2010), a substantial step was established after defendant Wilson, believing he would meet a mother and daughter for sexual intercourse with both, agreed to pay \$300 and use condoms during sex. He then drove to a specific location to meet them, had \$300 on his person when he got there and was arrested, and also fully confessed regarding his intent.

Finally, a substantial step was also established in an attempted second degree rape case in *State v. Jackson*, 62 Wn. App. 53, 813 P.2d 156 (1991). There, defendant Jackson asked his victim to remove her clothes so he could take her measurements, and after she did so, he touched her vagina, pulled her down on her bed, lay on top of her, and moved around as if he were having sexual intercourse.

Unlike the cases above, this case represents a mere preparation case rather than a substantial step case. It is much more analogous to *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994). In *Grundy*, an undercover officer posing as a drug dealer approached Grundy and asked what he wanted. Grundy said he wanted “20.” *Id.* at 336. The officer then asked “20 what?” and Grundy replied “20 of coke.” *Id.* The officer then asked to see Grundy’s money, and when Grundy replied that he wanted to see the drugs first, the officer arrested him. *Id.* Grundy was charged and convicted of attempted possession of cocaine. *Id.* On appeal, the Court then concluded that Grundy’s conduct could not constitute a substantial step and that the parties were still in the “negotiation stage.” *Id.* at 338.

As in *Gundy*, Racus’s conduct did not amount to a substantial step toward the commission of the crime because the parties, at most, were still involved in negotiations. At best Racus engaged in conversations that were very vague and he certainly had not specifically agreed to perform any sexual acts on

that “child.” In addition, the only thing that he had when he arrived at the house was a bag of Skittles that the fictitious mother asked him to bring. This was all simply too ambiguous to comprise a substantial step.

E. PERVASIVE PROSECUTORIAL MISCONDUCT DEPRIVED  
RACUS OF A FAIR TRIAL

1. Introduction

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.” *In re Glassmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *In Re Glassmann*, 175 Wn.2d at 703-04.

Even where a defendant does not object to improper argument, this Court will reverse if the misconduct was flagrant and ill-intentioned and incurable by an instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Where, as here, a defendant does not object he is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that “(1) ‘no curative instruction would have obviated any prejudicial

effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we “focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

Multiple instances of misconduct may cause an unfair trial requiring reversal even if each improper comment in isolation would not. “There comes a time ... when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.” *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); see also *State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (reversing murder conviction because cumulative misconduct denied defendant a fair trial).

Improper comments at the end of a prosecutor’s rebuttal closing are more likely to cause prejudice. *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (citing *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011)) (finding it significant that prosecutor made improper statement “at the end of his closing rebuttal argument, after which the jury commenced its deliberations”); *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001) (significant that “prosecutor’s improper comments occurred during his rebuttal

argument and therefore were the last words from an attorney that were heard by the jury before deliberations”).

Here, prosecutorial misconduct permeated the proceedings, depriving Racus of a fair trial and requiring reversal. Because the misconduct started in voir dire, continued through his questioning of Det. Sgt. Rodriguez and Racus and culminated in a closing argument riddled with improper arguments, no curative instructions could have cured the cumulative misconduct.

2. The Prosecutor Committed Misconduct when he used Voir Dire to argue his Case, and to Prejudice, Indoctrinate, and to instruct the Jury in Matters of the Law

RCW 4.44.120 provides that:

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

Similarly, CrR 6.4(b) provides:

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

Voir dire should be coextensive with its purpose to enable parties to learn the state of mind of prospective jurors, so they can know whether any of them may be subject to challenge for cause and determine advisability of interposing peremptory challenges, it is not a function of voir dire to educate the jury to particular facts of the case, compel jurors to commit themselves to vote a particular way, to prejudice the jury, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. *State v. Frederiksen*, 40 Wn. App. 749, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985).

Here, the prosecutor introduced prejudicial concepts and alleged “facts” in voir dire that had nothing to do with the facts here. Introducing this material had no purpose other than to prejudice the jurors against Racus. Those concepts or “facts” included questions such as whether or not the internet was a good place to find prostitution, whether there was “sex for sale” on the internet, and whether the internet was a good place to meet someone just to have sex. He asked what jurors what they thought about the legality of prostitution. He asked about sites, like Backpage, that had nothing to do with the case. He even mentioned the arrest of an executive for Backpage.

He sought to inflame the jury by asking if they felt sorry for persons arrested on the “To Catch a Predator” shows. Using the name of the show was particularly prejudicial. He misrepresented the law by telling jurors that simply showing up to the sting house was a completed crime.

He asked about the potential jurors' attitudes regarding the allegation of police resources to an internet sting. He improperly suggested that, without such a sting, actual sexual abuse would occur. He also asked if jurors believed that the police should be able to conduct sting operations like this one.

Finally, he elicited improper information about jurors who sat on juries that failed to reach a verdict. It is irrelevant that former jurors found it "frustrating" when they had voted to convict but other jurors had not.

None of these inquiries were for the purpose of discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges. All the inquiries were improper and designed to prejudice the entire venire against Racus and make them sympathetic to the State, and to suggest there should not be a "hung" jury.

3. The Prosecutor Engaged in Questioning that Amounted to Improper Vouching for the Credibility of Det. Sgt. Rodriguez

Improper vouching occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

Here, the prosecutor engaged in impermissible vouching in several ways. First, he asked Det. Sgt. Rodriguez more than once about the number of Net Nanny arrests in Pierce County and around the state. This was intended to

confirm that Rodriguez's actions were effective in other cases and that, given his arrest record, he must be correct in arresting in Racus.

He twice argued that Rodriguez was more credible and would not lie because he would jeopardize his career or the other Net Nanny arrests. In *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004), the Ninth Circuit said that similar comments were impermissible vouching because the prosecutor "plainly implied that she knew [an agent] would be fired for committing perjury and that she believed no reasonable agent in his shoes would take such a risk." *Id.* at 575. The Court opined: "Vouching of that sort is dangerous precisely because a jury may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." *Id.* (Internal citations omitted). The weight of authority in other jurisdictions holds that such comments are improper. See, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990); *United States v. Gallardo-Trapero*, 185 F.3d 307, 319 (5th Cir. 1999), *cert. denied by Hernandez v. United States*, 528 U.S. 1127, 120 S.Ct. 961, 145 L.Ed.2d 834 (2000); *United States v. Martinez*, 981 F.2d 867, 871 (6th Cir. 1992); *United States v. Swiatek*, 819 F.2d 721, 731 (7th Cir.), *cert. denied*, 484 U.S. 903, 108 S.Ct. 245, 98 L.Ed.2d 203 (1987); *United States v. McMath*, 559 F.3d 657, 668 (7th Cir.), *cert. denied*, 558 U.S. 881, 130 S.Ct. 373, 175 L.Ed.2d 137 (2009); *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th

Cir. 2005); *United States v. Boyd*, 54 F.3d 868, 870 (D.C. Cir. 1995); see also, e.g., *State v. Mussey*, 153 N.H. 272, 893 A.2d 701, 705 (2006); *Spain v. State*, 386 Md. 145, 872 A.2d 25, 31 (2005); *City of Williston v. Hegstad*, 562 N.W.2d 91, 94-95 (N.D. 1997).

4. The Prosecutor Committed Misconduct by Diminishing His Burden of Proof

Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). The prosecutor diminished his burden of proof in two ways.

First, he told the jury only people who would rape a child would think about child sex or discuss it. He said that "everyone else would be appalled at the thought." This lowered his burden of proving a substantial step. The prosecutor argued that merely thinking about or talking about child sex was proof of a "substantial step." But a substantial step requires "conduct", not thoughts.

Second, the trial court included the reasonable doubt instruction that said "if, after your deliberation you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt." The State acts improperly when it mischaracterizes this standard as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a

reasonable doubt. *State v. Feely*, 192 Wn. App. 751, 762, 368 P.3d 514, 519, *review denied*, 185 Wn.2d 1042, 377 P.3d 762 (2016).

But here, the prosecutor argued that if a juror believed that he did the right or just thing, he or she had an abiding belief in the truth of the charge and, therefore, the reasonable doubt standard was satisfied. A belief in doing the right or just thing differs from a belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt. But equating abiding belief to doing the right or just thing diminishes the State's burden to prove the elements of the offense. This case is similar to *State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013), where the court held that argument that jurors must "determine if [they] have an abiding belief in the truth of the charge . . . truth in what each of these defendants did" was improper.

5. The Prosecutor Committed Flagrant and Ill-Intended Misconduct by Referring to Charges not Filed and Suggesting that Someone like Racus was the Type of Person Who would Actually Rape a Child and Referred to Matters Outside the Record

A prosecutor must "seek convictions based only on probative evidence and sound reason." *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). "[T]he scope of argument must be consistent with

the evidence and marked by the fairness that should characterize all of the prosecutor's conduct." *In re Glassmann*, 175 Wn.2d at 705. Hence, a prosecutor may not refer to charges not brought against the defendant. *State v. Boehning*, 127 Wn. App. 511, 522, 111 P.3d 899, 905 (2005); *State v. Torres*, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976); ABA Standards for Criminal Justice 3-6.9.

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Thus, "[a]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). A closing argument "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper." *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993).

Here, the prosecutor argued – without any admissible evidence – that the task force had "arrested 63 people who showed up to have sex with children." There was no evidence of that in the record and the other arrests were irrelevant to this prosecution. He said "three were already registered as sex offenders." There was no evidence of that in the record.

Finally, the prosecutor appealed to the passion and prejudice of the jury by arguing that the task force were particularly noble people because they were

“dedicated toward protecting children.” He suggested that Racus, and people like him, required the noble members of the task force to “swim in the filth of the internet.” RP 1172. He argued that it would be improper to criticize “what these folks are doing.” *Id.* It was clear from the argument that criticism included acquitting Racus.

6. The Prosecutor Committed Other Acts of Misconduct during the Proceedings

Besides misstating the law to the jury, the prosecutor persisted in misstating the law and the facts to the trial judge. He insisted that to claim entrapment, Racus had to admit guilt rather than simply admitting the acts that might otherwise constitute a crime.

He misrepresented what the first judge did in reviewing the authorization on December 24, 2015. That judge had reviewed only the three-page authorization. Nonetheless the prosecutor argued:

Secondarily, the motion should be denied because you’re not a reviewing court, Judge Orlando, and Judge Rumbaugh already reviewed this case and said, “Yes, that does establish probable cause.”

RP 33. Plainly, Rumbaugh had not reviewed the case. Moreover, Rumbaugh did not and could not find probable cause because he never had the transcript of the conversations that Det. Sgt. Rodriguez claimed established probable cause.

He also vouched for the credibility of Det. Sgt. Rodriguez to the judge. He said:

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

RP 34.

The trial judge had to hold a sidebar and admonish the prosecutor for argumentative and repetitive questioning of Racus.

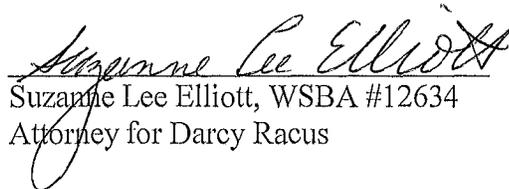
The cumulative effect of this persistent misconduct deprived Racus of a fair trial.

V.  
**CONCLUSION**

For the reasons stated above, this Court should reverse Racus's convictions and remand for further proceedings.

DATED this 9<sup>th</sup> day of June, 2017.

Respectfully submitted,

  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Darcy Racus

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by email where indicated and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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