

**NO. 49755-7**

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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

**STATE OF WASHINGTON, RESPONDENT**

**v.**

**DARCY DEAN RACUS, APPELLANT**

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Appeal from the Superior Court of Pierce County  
The Honorable James Orlando

No. 15-1-05086-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the trial court correct in finding that defendant implicitly consented to the interception of his text messages and subsequently rejecting defendant's argument that the Washington State Patrol (WSP) violated the privacy act when defendant voluntarily engaged in a discussion about exchanging money for sex with a minor with a person not known to him? (Defendant's assignment of error 1 and 2).
2. Where the evidence shows defendant was not led to commit a crime that he wasn't predisposed to commit, did the trial court correctly deny defendant's proposed entrapment instruction? (Defendant's assignment of error 3).
3. Was sufficient evidence adduced to support the jury's conclusion that defendant took a substantial step toward committing first degree rape of a child when defendant engaged in explicit conversations about having sex with a child and followed up by arriving at the sting house with a package of Skittles? (Defendant's assignment of error 4).

4. Did the State engage in appropriate *voir dire*, witness questioning, and closing argument and, if prosecutorial error did occur, was any error harmless? (Defendant's assignment of error 5).

B. STATEMENT OF THE CASE.

1. Procedure

On December 21, 2015, the State charged defendant Darcy Dean Racus with attempted first degree rape of a child and commercial sexual abuse of a minor. CP 301. On October 10, 2016, the State filed an Amended Information to include one count of Communication with a Minor for Immoral Purposes. CP 136-37.

Jury trial started on October 12, 2016. RP 189. Both parties participated in *voir dire* by asking questions pertinent to the case. RP 189-504. Defense counsel did not object to the State's questions. *Id.*

During trial, defendant moved to suppress all communications between defendant and WSP based on the argument that they were recorded in violation of the Privacy Act, RCW 9.73. CP 6-27. The court denied defendant's motion finding no violation of defendant's privacy rights because defendant voluntarily engaged in text messages with his intended recipient. CP 248-50; RP 53. The court also found probable

cause for issuance of a one-party consent order because the nature of defendant's conversations involved payment in exchange for sex with a minor. CP 248-50; RP 39.

Defendant also proposed an entrapment instruction. CP 162-185. The court ruled it would not give the instruction because the evidence was insufficient to support an entrapment defense. RP 1101. Defense counsel objected to the court's ruling. RP 1120.

At the close of the State's case in chief, the court dismissed the Commercial Sex Abuse of a Minor count (count II) for insufficient evidence. CP 237-38. On October 20, 2016, the jury convicted defendant on counts I and III (Attempted Rape of a Child in the First Degree and Communication with a Minor for Immoral Purposes, respectively). CP 235-36. Defendant was sentenced to a minimum 69.75 months in prison. CP 255-268. Defendant timely appealed. CP 270-297.

## 2. Facts

On December 17, 2015, Washington State Patrol (WSP) Detective Sergeant Carlos Rodriguez posted an ad to Craigslist as part of a sting operation, called "Net Nanny," run by the Missing and Exploited Children's Task Force (MECTF). RP 569, 606.<sup>1</sup> The ad, posted under the "casual encounters" section, read: "Looking for a close family connection – 2 dau, 1 son – w4w (tacoma) [.]” Exh. 1; RP 602. "Dau" means

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<sup>1</sup>The Verbatim Report of Proceedings are contained in 11 files with 8 trial volumes. All trial volumes have consecutive pagination. All other files are labeled by date.

daughters. RP 578, 602. "W4w" means woman for woman. RP 603. The body of the ad stated:

[I ]just moved here and looking for someone to connect with my young family. would like a woman's touch, but open to a man as well. must be discrete, no solicitations, open to presents. No RP[.]

RP 592, 605. "RP" stands for role play. RP 605.

The purpose of posting this fictitious ad was to catch people who are looking to having sex with children. RP 575-76. Similar operations in the past have resulted in the rescuing of exploited children. RP 576. Det. Sgt. Rodriguez chose 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. "Close family" generally means something dealing with incest, and phrases like "new in town" are commonly used to refer to the commercial sex trade or prostitution. RP 585.

Defendant responded to the false ad the day it was posted. RP 665. Defendant exchanged e-mails, text messages, and phone calls with WSP expressing his desire to engage in oral sex with the fictitious mother's 11-year-old daughter. RP 1010, 1027-29, 1045. The series of e-mails, text messages, and phone calls are transcribed below:

<b>Date</b>	<b>Time</b>	<b>Method</b>	<b>Sender</b>	<b>Description</b>
12/17/15	1:22 p.m.	E-mail	Defendant	A little more detail please (Exh. 17)
12/17/15	1:26 p.m.	E-mail	WSP	What are you looking for I am looking for someone with close family experience. I was very close with my father and brother (Exh. 17)
12/17/15	1:28 p.m.	E-mail	Defendant	I am looking to give a gal oral and anything else sexual she needs. (Exh. 17)
12/17/15	1:30 p.m.	E-mail	WSP	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 (Exh. 17)
12/17/15	1:30 p.m.	E-mail	Defendant	How old are you? (Exh. 17)
12/17/15	1:26 p.m.	E-mail	WSP	What are you looking for I am looking fro someone with close family experience. I was very close with my faterh and brother. (Exh. 17)
12/17/15	1:31 p.m.	E-mail	WSP	I am 39, but this is more for them. Im always present, but im into watching to make sure they are ok and happy (Exh. 17)
12/17/15	1:35 p.m.	E-mail	Defendant	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? (Exh. 17)
12/17/15	1:40 p.m.	E-mail	WSP	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 (Exh. 17)
12/17/15	1:42 p.m.	E-mail	Defendant	Do you host and when would this take place? (Exh. 17)
12/17/15	1:56 p.m.	E-mail	Defendant	You no longer interested? I have until 3. (Exh. 17)
12/17/15	2:07 p.m.	E-mail	WSP	im not home till 4. can do

				tomorrow. Text me (503) 482-96twelve text your name and word til three (Exh. 17)
12/17/15	2:07 p.m.	E-mail	Defendant	So what is it your are looking to get out of this? So we are on the up and up. (Exh. 17)
12/18/15	11:17 a.m.	Text	Defendant	Darcy. Till three. Is this free? Or you looking for something. (Exh. 3)
12/18/15	11:27 a.m.	E-mail	Defendant	DARCY. TIL THREE. IS THIS FREE? OR YOU LOOKING FOR SOMETHING? (Exh. 17)
12/18/15	2:58 p.m.	E-mail	WSP	what does that mean (Exh. 17)
12/18/15	3:01 p.m.	E-mail	Defendant	What are you wanting from me? you ask that I text you today and I did no response. you still interested? (Exh. 17)
12/18/15	3:10 p.m.	Text	Defendant	Hello? Family connection? (Exh. 3)
12/18/15	3:12 p.m.	Text	WSP	Sorry darcy so many people answer on here and its hard to see who is real and no a flake (Exh. 3)
12/18/15	3:13 p.m.	Text	Defendant	I am real (Exh. 3)
12/18/15	3:14 p.m.	Text	WSP	what experience do you have and what do you want (Exh. 3)
12/18/15	3:16 p.m.	Text	Defendant	Not much. Looking to give oral and maybe receive if all are clean. What is it you are looking for? (Exh. 3)
12/18/15	3:18 p.m.	Text	WSP	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. (Exh. 3)
12/18/15	3:21 p.m.	Text	Defendant	Have until 430ish today please tell me more and maybe meet quick (Exh. 3)
12/18/15	3:23 p.m.	Text	WSP	well, i need to know exactly what you want. i also have to ask you some important westions first. (Exh. 3)
12/18/15	3:24 p.m.	Text	Defendant	Please ask. (Exh. 3)
12/18/15	3:28 p.m.	Text	Defendant	When I was about 12 my cousin

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

12/18/15	3:48 p.m.	Text	WSP	So which one gal hun (Exh. 3)
12/18/15	3:47 p.m.	Text	WSP	oral pleasure is always good (Exh. 3)
12/18/15	3:48 p.m.	Text	Defendant	Yes it is. Older or you (Exh. 3)
12/18/15	3:49 p.m.	Text	WSP	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. (Exh. 3)
12/18/15	3:49 p.m.	Text	WSP	oh, Lisa is nearly 12 (Exh. 3)
12/18/15	3:50 p.m.	Text	WSP	I don't think I told you their names (Exh. 3)
12/18/15	3:50 p.m.	Text	Defendant	Needs to happen soon or will be next year (Exh. 3)
12/18/15	3:51 p.m.	Text	WSP	K so yo didn't answer we are ready (Exh. 3)
12/18/15	3:51 p.m.	Text	Defendant	Where do I come to? (Exh. 3)
12/18/15	3:52 p.m.	Text	WSP	Tacoma near the funny looking hospital but need to know who so I can get teh ready (Exh. 3)
12/18/15	3:53 p.m.	Text	Defendant	Lisa. have a pic? (Exh. 3)
12/18/15	3:53 p.m.	Text	WSP	Yeah. Hold on (Exh. 3)
12/18/15	3:54 p.m.	Text	WSP	(picture of Lisa) (Not Admitted)
12/18/15	3:55 p.m.	Text	WSP	I have rules (Exh. 3)
12/18/15	3:55 p.m.	Text	WSP	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 (Exh. 3)
12/18/15	3:56 p.m.	Text	Defendant	Just making sure is real. Thanks. Will head that direction from Puyallup. Sure I can talk. (Exh. 3)
12/18/15	3:57 p.m.	Text	WSP	I can call in about 10 if ok (Exh. 3)
12/18/15	3:57 p.m.	Text	Defendant	What re the rules. Ok (Exh. 3)
12/18/15	4:00 p.m.			Privacy Act Authorization Signed. (Exh. 3)
12/18/15	4:02 p.m.	Text	WSP	No pain, no anal, condoms if more that oral (Exh. 3)
12/18/15	4:03 p.m.	Text	Defendant	Ok good with that
12/18/15	4:04 p.m.	Text	WSP	k please send me a pic of you to hun (Exh. 3)

12/18/15	4:11 p.m.	Text	Defendant	(Photo of Defendant)
12/18/15	4:11 p.m.	Text	Defendant	Sorry I am just getting off work and hard to take a photo while driving I look a lot better than the pic shows (Exh. 3)
12/18/15	4:13 p.m.	Text	WSP	Call me hun (Exh. 3)
12/18/15	4:13 p.m.	Text	WSP	i like your beard (Exh. 3)
12/18/15		Ph. Call	WSP	Hello? (Exh. 6)
12/18/15		Ph. Call	Defendant	Hello? (Exh. 6)
12/18/15		Ph. Call	WSP	Darcy? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yes, it is. (Exh. 6)
12/18/15		Ph. Call	WSP	Hey hun. How you doing? (Exh. 6)
12/18/15		Ph. Call	Defendant	(Unintelligible) good, how are you? (Exh. 6)
12/18/15		Ph. Call	WSP	Good. Glad we finally got to talk. (Exh. 6)
12/18/15		Ph. Call	Defendant	Sorry about the picture, it's not very good (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, no. It's fine. I like your beard. It's cute. Can you hear me (Exh. 6)
12/18/15		Ph. Call	Defendant	(Unintelligible) (exh. 6)
12/18/15		Ph. Call	WSP	Can you hear me okay? (Exh. 6)
12/18/15		Ph. Call	Defendant	Do what now? (Exh. 6)
12/18/15		Ph. Call	WSP	Can you hear me okay? I have a really crappy phone. (Exh. 6)
12/18/15		Ph. Call	Defendant	I don't think I understood what you said one hundred percent there. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, can you hear me okay? (Exh. 6)
12/18/15		Ph. Call	Defendant	Oh, yeah. I can hear you fine. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, okay. I don't have the greatest phone so I wanted to make sure. So - (Exh. 6)
12/18/15		Ph. Call	Defendant	So you guys from Oregon? (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, no - oh, it's one of those Tracfones. I have like a Tracfone (Exh. 6)
12/18/15		Ph. Call	Defendant	Oh, okay (Exh. 6)

12/18/15		Ph. Call	WSP	So I just, it's just whatever number is available and I kind of put minutes on it when I can so and I pick like a really crappy phone. I'm like, well just give me whatever number, I really don't care. I don't even, yeah. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. Well I, I just, I mean, that's really curious. (Exh. 6)
12/18/15		Ph. Call	WSP	No, I understand. I have a bunch of friends that have phone numbers from all over the place and I'm like, you are like, right in the same state, so yeah. No worries. So you just getting off work? (Exh. 6)
12/18/15		Ph. Call	Defendant	I am, yes. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, nice. Okay. SO, through our conversations, you're good with everything we kind of talked about? (Exh. 6)
12/18/15		Ph. Call	Defendant	Correct. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay. And I apologize. I know texting sometimes is confusing regarding like, the law enforcement thing cause I was just basically wanting you to say you weren't law enforcement cause, you know, I can't lose my kids, so I didn't mean for you to think that you had to sign anything like that so I apologize. (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah, I just don't want, I'm not looking to go to jail, that's for sure. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh yeah, no. And I'm not either. I'm not looking to lose my kids. (Exh. 6)
12/18/15		Ph. Call	Defendant	And I don't want, I don't want (Unintelligible) (Exh. 6)
12/18/15		Ph. Call	WSP	Right, exactly. And that's what it was about. I just, I was asking if you were law enforcement. I

				didn't mean to think that you had to sign anything. So I wanted to just apologize for my, you know, my typing mistakes. (Exh. 6)
12/18/15		Ph. Call	Defendant	Got it. (Exh. 6)
12/18/15		Ph. Call	WSP	And so, yeah. So just to make sure that we're good, you're good with the rules, right? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yes. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, yeah, so like the no pain, no c—and you're okay with brining condoms? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yep. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, perfect, perfect. Um, and just so— (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, I don't have any with me but. (Exh. 6)
12/18/15		Ph. Call	WSP	That's fine, there's, like, cause normally what we do is I'll give you an address to a close, a place nearby me and usually there's a couple stores there you can pick some up on the way if that's okay. (Exh. 6)
12/18/15		Ph. Call	Defendant	(Unintelligible) (Exh. 6)
12/18/15		Ph. Call	WSP	Perfect (Exh. 6)
12/18/15		Ph. Call	Defendant	Well actually, I'm not planning on having sex, so (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, you're not planning, oh, that's right. You just wanted oral right? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, yeah. Then I'm sorry, my apologies. And that's another thing, so you're kind of looking, are you looking just on doing oral with Lisa? (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, and or you. (Exh. 6)
12/18/15		Ph. Call	WSP	Or are you wanting her—okay. And that's, I'm a little nervous. (Exh. 6)
12/18/15		Ph. Call	Defendant	It's just something I don't get,

				it's something I don't get often, so it's, to me it's like (Unintelligible) (Exh 6)
12/18/15		Ph. Call	WSP	Right, yeah. So, and that's something, you know, my main concern is, you know, with, you know, with Lisa and depending upon how it goes, you know, we can definitely maybe think about that, but I wanted to make sure. I wasn't quite sure if you're looking to give oral to Lisa or have her give it to you or both? (Exh. 6)
12/18/15		Ph. Call	Defendant	Both would be great. (Exh. 6)
12/18/15		Ph. Call	WSP	Both would be great? Okay. That's fine. That's fine. (Exh. 6)
12/18/15		Ph. Call	Defendant	The one with the braces, though (Unintelligible) (Exh. 6)
12/18/15		Ph. Call	WSP	No, we've, and you know, she's good. All my, well, she knows she's got braces and she's kind of worked with that, you know, cause she's, you know, she's been somewhat experienced in a sense of like she's played with toys and stuff, so she knows not to scratch with braces, so. (Exh. 6)
12/18/15		Ph. Call	Defendant	Got it. (Exh. 6)
12/18/15		Ph. Call	WSP	I'll make sure she's really good with that and I definitely don't want her to scrape you with her braces, so I'll definitely talk to her about that before. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. So I. Okay, I guess I', kind of curious, how did you grow up? (Exh. 6)
12/18/15		Ph. Call	WSP	How did what? (Exh. 6)
12/18/15		Ph. Call	Defendant	How did you grow up? You're a close family. I understand that part of it, but. (Exh. 6)
12/18/15		Ph. Call	WSP	Yeah, so close family, you know. I mean, I learned, you

				know, with my father and stuff, you know, growing up and everything with my dad and my brother, it's kind of a very close knit family and we, you know, experimented with each other. And you know, my mom kind of knew about it and just never really said anything. It's just kind of how our family grew up and you know, I want that for my kids, too and I'm just, I'm not able to kind of give that to them right now with my current situation, so I'm glad we found a good fit and you're willing to help us out. (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah, I understand it and kind of don't, you know what I mean? (Exh. 6)
12/18/15		Ph. Call	WSP	Oh. Relieved to kind of hear you say that. Not many people understand, you know. It's, not many people understand that it's a very loving thing. (Exh. 6)
12/18/15		Ph. Call	Defendant	Got it. (Exh. 6)
12/18/15		Ph. Call	WSP	Yeah. So I can kind of get Lisa prepared, how big are you? (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, not very. (Exh. 6)
12/18/15		Ph. Call	WSP	Well, what's not very? (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, six inches or so. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay. That'll be fine, Um, and then are you clean? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yes. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, okay. Cause I— (Exh. 6)
12/18/15		Ph. Call	Defendant	I'm one hundred percent clean. (Exh. 6)
12/18/15		Ph. Call	WSP	You're one hundred percent clean? (Exh. 6)
12/18/15		Ph. Call	Defendant	And I'm also baby safe, so. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, and you're also baby safe? (Exh. 6)

12/18/15		Ph. Call	Defendant	I'm baby safe here, so. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, all right. Okay. And then do you know, since it's kind of Christmas time, would you be okay doing like a donation or a gift to kind of give to Lisa? (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, a gift? (Exh. 6)
12/18/15		Ph. Call	WSP	Yeah. (Exh. 6)
12/18/15		Ph. Call	Defendant	Is that what you're saying? (Exh. 6)
12/18/15		Ph. Call	WSP	Like a gift or like a donation of some sort to her cause I know that would probably— (Exh. 6)
12/18/15		Ph. Call	Defendant	Um. I won't be able to today, but I could after the 1 <sup>st</sup> of the year. (Exh. 6)
12/18/15		Ph. Call	WSP	You could do it after the 1 <sup>st</sup> of the year? Okay. (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah. (Exh. 6)
12/18/15		Ph. Call	WSP	Maybe. (Exh. 6)
12/18/15		Ph. Call	Defendant	So if you wanna reschedule this after the 1 <sup>st</sup> of the year, we can (Unintelligible) (Exh. 6)
12/18/15		Ph. Call	WSP	No, no. We don't have to. If you'd kind of promise to give it to us after, that'd be great. It'd be kind of like a late Christmas present for her. (Exh. 6)
12/18/15		Ph. Call	Defendant	Well, to be honest, I don't wanna get, if I can't give, so. (Exh. 6)
12/18/15		Ph. Call	WSP	I'm sorry, what'd you say? (Exh. 6)
12/18/15		Ph. Call	Defendant	I don't wanna get from somebody if I can't give at the moment, so. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, okay. Well then, I'm sure I wouldn't really, really worry about it, just don't worry about it. (Exh. 6)
12/18/15		Ph. Call	Defendant	You understand where I'm coming from. (Exh. 6)
12/18/15		Ph. Call	WSP	No, I understand what you're

				saying and I get that and I, you know what, I really appreciate that. You know, that is another thing that lets me know that you're a really good guy. So I really do appreciate that. (Exh. 6)
12/18/15		Ph. Call	Defendant	So I, fair is fair. (Exh. 6)
12/18/15		Ph. Call	WSP	Right. (Exh. 6)
12/18/15		Ph. Call	Defendant	And I totally agree with that, so today was, like I said, I've got no cash on me, so. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, okay. Okay. All right. So where are you coming from? (Exh. 6)
12/18/15		Ph. Call	Defendant	I'm over on the South Hill of Puyallup. (Exh. 6)
12/18/15		Ph. Call	WSP	Oh, so you're not that far? (Exh. 6)
12/18/15		Ph. Call	Defendant	No. (Exh. 6)
12/18/15		Ph. Call	WSP	That's, oh, okay. That's good. How is traffic? (Exh. 6)
12/18/15		Ph. Call	Defendant	Terrible. (Exh. 6)
12/18/15		Ph. Call	WSP	Ugh. With the rain and everything, I'm sure it's absolutely ridiculous. (Exh. 6)
12/18/15		Ph. Call	Defendant	(Laughs) yes, it is. (Exh. 6)
12/18/15		Ph. Call	WSP	Yeah. (Exh. 6)
12/18/15		Ph. Call	Defendant	Well, I got your number, why don't we plan on possibly try after the 1 <sup>st</sup> of the year? (Exh. 6)
12/18/15		Ph. Call	WSP	We can, we can do today if you're interested. I mean, we got some, Lisa's home. She's homeschooled so she's here and you know, I'm off work, so. You know, if you want to— (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay, but you, so you're totally understanding that I don't have anything to give back in return, though, right? (Exh. 6)
12/18/15		Ph. Call	WSP	I fully understand you don't

				have anything to give back in return. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. That bothers me just a hair, but. (Exh. 6)
12/18/15		Ph. Call	WSP	It bothers you a little bit? You know that's another thing, you sound like a very kind of upstanding, loving guy, you know, that would bother you, you know. And I do appreciate that, you know. You know, maybe once, depending on how— (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah, I, I— (Exh. 6)
12/18/15		Ph. Call	WSP	Depending on how Lisa likes you and everything, maybe that's something we could, you know, do a different time. (Exh. 6)
12/18/15		Ph. Call	Defendant	True, that is true. (Exh. 6)
12/18/15		Ph. Call	WSP	You know? You know, we can meet up today and depending on how things go and if Lisa really likes you and we can always arrange for another meet and we can do that then. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. If that's fine with you. (Exh. 6)
12/18/15		Ph. Call	WSP	Yeah, No that's— (Exh. 6)
12/18/15		Ph. Call	Defendant	I just don't want to feel like I'm (Unintelligible) somebody out of something (Exh. 6)
12/18/15		Ph. Call	WSP	No, I don't think so at all. But I think that's something we can definitely look forward to in the future again. Do you, would you like to say hi to her? (Exh. 6)
12/18/15		Ph. Call	Defendant	Sure. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay. And just so you know, you kinda gotta keep it a little short cause of the minutes but you can talk to her about

				anything. She's fully aware and she's actually kind of excited to kind of get to experience some stuff so you don't have to worry about what you can and can't talk about, okay? (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, all right. Here you go, I'm gonna hand over the phone to you. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 6)
12/18/15		Ph. Call	WSP	Hey Lisa? (Exh. 6)
12/18/15		Ph. Call	Lisa	Yeah. (Exh. 6)
12/18/15		Ph. Call	WSP	Remember I was talking to you about Darcy? (Exh. 6)
12/18/15		Ph. Call	Lisa	Uh-huh. (Exh. 6)
12/18/15		Ph. Call	WSP	Here you go. Here he is. (Exh. 6)
12/18/15		Ph. Call	Lisa	Hello? (Exh. 6)
12/18/15		Ph. Call	Defendant	Is this Lisa? (Exh. 6)
12/18/15		Ph. Call	Lisa	Yeah, is this Mr. Darcy? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yes, it is. (Exh. 6)
12/18/15		Ph. Call	Lisa	How are you doing? (Exh. 6)
12/18/15		Ph. Call	Defendant	Good. How are you today? (Exh. 6)
12/18/15		Ph. Call	Lisa	I'm good. (Exh. 6)
12/18/15		Ph. Call	Defendant	Doing good, huh? (Exh. 6)
12/18/15		Ph. Call	Lisa	Yeah. (Exh. 6)
12/18/15		Ph. Call	Defendant	So, are you looking forward to this? (Exh. 6)
12/18/15		Ph. Call	Lisa	Yeah. I don't know how to keep up with my friends. My mom wants me to learn like, like she did and I have some friends that do that, too, so. I don't know, I'd like to get experience. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay, yeah. Well, like I said, I'll be heading that way as soon as your mom sends me an address. (Exh. 6)
12/18/15		Ph. Call	Lisa	Oh, okay. So I'll get to meet you really soon then? (Exh. 6)

12/18/15		Ph. Call	Defendant	Yeah. I'm over here in Puyallup so it's gonna take me probably 15/20 minutes at least to get there. (Exh. 6)
12/18/15		Ph. Call	Lisa	Oh. (Exh. 6)
12/18/15		Ph. Call	Defendant	As soon as I get an address. (Exh. 6)
12/18/15		Ph. Call	Lisa	Okay. That's exciting. (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah, me, too, kinda. (Exh. 6)
12/18/15		Ph. Call	Lisa	Okay. Do you want to talk to my mom then so she can help you get here fast? (Exh. 6)
12/18/15		Ph. Call	Defendant	Yeah, yeah. Actually, if she just wants to send me a text with the address, I'll punch it in and I'll follow to get there. (Exh. 6)
12/18/15		Ph. Call	Lisa	Oh, okay. So do you need to talk to her again, or are you just gonna text with her? (Exh. 6)
12/18/15		Ph. Call	Defendant	Um, sure. I'll talk to her real quick. (Exh. 6)
12/18/15		Ph. Call	Lisa	Oh, okay. Here. (Exh. 6)
12/18/15		Ph. Call	WSP	Hello? (Exh. 6)
12/18/15		Ph. Call	Defendant	Hello. (Exh. 6)
12/18/15		Ph. Call	WSP	Hey. (Exh..6)
12/18/15		Ph. Call	Defendant	So if you just want to send me a text with the address, I will punch it in my phone and I will try to get there as soon as possible. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay, great. Um, I will do that. I will send you a text when we get off the phone. (Exh. 6)
12/18/15		Ph. Call	Defendant	All right. Thank you. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay. We'll see you soon. (Exh. 6)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 6)
12/18/15		Ph. Call	WSP	Okay. All right. Bye-bye. (Exh. 6)
12/18/15		Ph. Call	Defendant	Bye. (Exh. 6)
12/18/15	4:27 p.m.	Text	Defendant	Thanks (Exh. 3)
12/18/15	4:29 p.m.	Text	WSP	k so this is right near my place, do you at cause my place is hard to find (Exh. 3)

12/18/15	4:29 p.m.	Text	WSP	holld on have to google the address (Exh. 3)
12/18/15	4:29 p.m.	Text	WSP	1901 mlk way. There is a 76 statin there a chicken place too. once you are there i can alk you in to my place (Exh. 3)
12/18/15	4:29 p.m.	Text	WSP	can you rig her skittles? she asked for some (Exh. 3)
12/18/15	4:33 p.m.	Text	Defendant	Will try (Exh. 3)
12/18/15	4:43 p.m.	Text	WSP	K well how far away i'm going to get her ready (Exh. 3)
12/18/15	4:51 p.m.	Text	Defendant	By the 76 station now (Exh. 3)
12/18/15	4:53 p.m.	Text	Defendant	have skittles here at 76 now (Exh. 3)
12/18/15	4:53 p.m.	Text	WSP	What car hun (Exh. 3)
12/18/15	4:53 p.m.	Text	Defendant	Big truck (Exh. 3)
12/18/15	4:54 p.m.	Text	WSP	Color (Exh. 3)
12/18/15	4:54 p.m.	Text	WSP	k ill call (Exh. 3)
12/18/15	4:55 p.m.	Text	Defendant	Need a place to park (Exh. 3)
12/18/15	4:55 p.m.	Text	WSP	What color so I know (Exh. 3)
12/18/15		Ph. Call	WSP	Hello? (Exh. 8)
12/18/15		Ph. Call	Defendant	Hello? (Exh. 8)
12/18/15		Ph. Call	WSP	Hey, sorry. I just got out of the bathroom. Um, so do you want— (Exh. 8)
12/18/15		Ph. Call	Defendant	So, which house, house do you live? (Exh. 8)
12/18/15		Ph. Call	WSP	I'm gonna give you my address then I'm gonna kind of, cause it's kind of weird, so I'll talk to you as well. So, it's 1908 South Yakima (Exh. 8)
12/18/15		Ph. Call	Defendant	South Dracula? (Exh. 8)
12/18/15		Ph. Call	WSP	Not Dracula, Yakima, Y (Exh. 8)
12/18/15		Ph. Call	Defendant	Yakima. (Exh. 8)
12/18/15		Ph. Call	WSP	Yakima. Yeah. And so— (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay (Unintelligible) (Exh. 8)
12/18/15		Ph. Call	WSP	When you come— (Exh. 8)
12/18/15		Ph. Call	Defendant	Is it towards the hospital, or? (Exh. 8)
12/18/15		Ph. Call	WSP	It's by St. Joe's. So. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. Well, I'm right here in

				front of the 76 <sup>th</sup> Station heading south. (Exh. 8)
12/18/15		Ph. Call	WSP	You're by that 76 <sup>th</sup> Station heading south? Okay, so— (Exh. 8)
12/18/15		Ph. Call	Defendant	Yeah. I'm on the (Unintelligible) side of the road by (Unknown) (Exh. 8)
12/18/15		Ph. Call	WSP	Okay. I'm not super, super great with directions. So if I can text, if you could help with the, GPS give you the address and you can get in. I can tell you I'm between 19 <sup>th</sup> and 21 <sup>st</sup> . And you can't park on Yakima. (Exh. 8)
12/18/15		Ph. Call	Defendant	You're between. Okay, so you're between 19 <sup>th</sup> and 21 <sup>st</sup> and I'm on Martin Luther King Way now. (Exh. 8)
12/18/15		Ph. Call	WSP	You're on Martin Luther King right now. Okay, yeah. So I'm on, between 19 <sup>th</sup> and 21 <sup>st</sup> . (Exh. 8)
12/18/15		Ph. Call	Defendant	(Unintelligible) I'm pointed away from the hospital heading south towards Tacoma. (Exh. 8)
12/18/15		Ph. Call	WSP	Heading south towards Tacoma. I'm not, I'm really, really bad at directions. Um, do you— (Exh. 8)
12/18/15		Ph. Call	Defendant	So how close are you to the hospital there? (Exh. 8)
12/18/15		Ph. Call	WSP	Super close to the hospital. Like, there's an alley way right by the parking lot of Saint Joe's off of 21 <sup>st</sup> and like 19 <sup>th</sup> and 21 <sup>st</sup> off of 19 <sup>th</sup> , yeah, off of 19 <sup>th</sup> and you have to go in the alley way— (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. So if I just— (Exh. 8)
12/18/15		Ph. Call	WSP	And um. (Exh. 8)
12/18/15		Ph. Call	Defendant	So if I go, if I'm leaning out of the 76 <sup>th</sup> Station and head

				towards the hospital on Martin Luther King Way, which way would I go? (Exh. 8)
12/18/15		Ph. Call	WSP	Which? So if you're on Martin Luther King heading towards the hospital, which way would you go? You have to go towards 19 <sup>th</sup> . (Exh. 8)
12/18/15		Ph. Call	Defendant	Towards 19 <sup>th</sup> . (Exh. 8)
12/18/15		Ph. Call	WSP	Yeah. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. It's 1901 Yakima? (Exh. 8)
12/18/15		Ph. Call	WSP	1908 South Yakima. And you can't park on Yakima. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 8)
12/18/15		Ph. Call	WSP	There's no parking. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 8)
12/18/15		Ph. Call	WSP	You have to go in the alley way and then I have Christmas lights kind of like on one of the railings and there's a parking sport right in that way. You have to go upstairs because I rent the top apartment. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. I'll punch it in and see if I can find it. (Exh. 8)
12/18/15		Ph. Call	WSP	Okay. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. And I'll give you a call if I can't. (Exh. 8)
12/18/15		Ph. Call	WSP	Okay, sounds good. (Exh. 8)
12/18/15		Ph. Call	Defendant	Okay. (Exh. 8)
12/18/15		Ph. Call	WSP	Okay, bye. (Exh. 8)
12/18/15	4:59 p.m.	Text	Defendant	White truck on street in front of van in front of lot for sale. (Exh. 3)
12/18/15	4:59 p.m.	Text	Defendant	Which house? (Exh. 3)
12/18/15	5:04 p.m.	Text	WSP	My mom is in the bathroom. I am bad with directions hold on she is almost done (Exh. 3)
12/18/15	5:04 p.m.	Text	WSP	I have a silver van Park by that (Exh. 3)
12/18/15	5:04 p.m.	Text	WSP	1908 s Yakima (Exh. 3)
12/18/15	5:05 p.m.	Text	Defendant	Ok (Exh. 3)
12/18/15	5:06 p.m.	Text	WSP	im bad with directions. gona get

				her ready (Exh. 3)
12/18/15	5:06 p.m.	Text	WSP	oh yeah, i live upstairs, i rent the top floor of house. different people live downstairs (Exh. 3)
12/18/15	5:08 p.m.	Text	Defendant	I'm here (Exh. 3)
12/18/15	5:10 p.m.	Text	WSP	k at door (Exh. 3)
12/18/15	5:10 p.m.	Text	WSP	test (Exh. 3)

RP 660-79, 724-32. Misspellings are in the original texts.

The fictitious mother greeted defendant at the door when he arrived. RP 741-42. Defendant handed her the bag of skittles, but she gave them back to him and said he should give them to Lisa himself. RP 743. The fictitious mother told defendant to take off his shoes while she went to get Lisa; thereafter defendant was arrested. RP 742.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS RECORDED EVIDENCE WHEN IT FOUND THAT DEFENDANT IMPLICITLY CONSENTED TO THE INTERCEPTION OF HIS TEXT MESSAGES, AND REJECTION OF THE DEFENDANT'S ARGUMENT THAT WSP VIOLATED THE PRIVACY ACT WAS PROPER.

Washington's Privacy Act provides:

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual ... or the state of Washington, its agencies, and political subdivisions 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).

While the word “private” is not defined by statute, the 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.” *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (quoting *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992); quoting *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1969))). 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 is determined on a case-by-case basis. *Id.* (citing *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996)). Factors to consider when evaluating whether there was a reasonable expectation of privacy 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.” *State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029, 1034 (2014) (citing *State v. Clark*, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996)).

The court considers four prongs when analyzing alleged violations of the privacy act: (1) whether there was a private communication transmitted by a device, (2) which was intercepted or recorded (3) by use of 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, 1186 (2014) (citing *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004) (citing RCW 9.73.030)).

The Privacy Act does not preclude recording of conversations when both parties consent to the recording. *Id.*; CP 248-50. Additionally, the Privacy Act allows for telephone calls to be recorded without consent if probable cause exists to believe that the conversation involves a party

engaging in the commercial sexual abuse of a minor.” RCW 9.73.230; CP 248-50; RP 25.

When the facts are undisputed, the question of whether a particular communication is private is a matter of law reviewed *de novo*. *State v. Kipp*, 179 Wn.2d 718, 722–23, 317 P.3d 1029, 1031 (2014).

- a. There was probable cause to intercept defendant’s text messages when defendant communicated his intention to engage in commercial sexual abuse of a minor by responding to a Craigslist ad where children were being offered for sex and by inquiring about paying for the sex.

The exception to the Privacy Act provides that phone calls may be recorded without consent when authorized by someone above a “first line supervisor” if “probable cause exists to believe that the conversation or communication” will involve “a party engaging in the commercial sexual abuse of a minor.” RCW 9.73.230; CP 248-50; RP 25. Accordingly, consent of the parties is not necessary where the exception applies. RCW 9.73.230.

Defendant claims that the trial court erred when it denied defendant’s motion to suppress all of the communications between defendant and WSP that occurred after WSP issued an intercept authorization based on RCW 9.73.210(b). Brief of Appellant at 32.

Absent facts supporting his assertion, defendant argues that Det. Sgt. Rodriquez lied to his supervisor when he reported that the

conversation between the defendant and WSP prior to 4:00 p.m. on December 18, 2015, included a discussion of an exchange of gifts, donations, or fees. Brief of Appellant at 33. Accordingly, defendant argues there was a lack of probable cause to believe the defendant was engaging in the commercial sexual abuse of a minor. *Id.* Defendant does not dispute that the authorizing officer was above a first line supervisor. *Id.*

The trial court found, however, that based on the totality of the circumstances, there was probable cause for the officer to believe that the communication involved the commercial sexual abuse of a minor. CP 248-50; RP 38-39. Facts supporting that conclusion include the fact that the Craigslist ad itself mentioned the exchange of money for sex when it said “open to presents.” RP 605. Det. Sgt. Rodriguez chose that phrase because his experience and training with Craigslist taught him that words like “presents,” “gifts,” and “donations” are used to suggest payment. RP 574, 586-87. Defendant familiarized himself with the casual encounters section throughout the year prior to his arrest. RP 925-26. Shortly after defendant’s conversation with the fictitious mother began, defendant e-mailed: “So what are you looking to get out of this? So we are on the up and up.” When he did not get a response, he followed up the next morning by both text message and e-mail asking, “Is this free or are you looking for something?” *See* series of e-mails, text messages, and phone calls *supra*.

It is clear from defendant's texts and e-mails that he was aware the mother was offering her children for sex in exchange for money and that defendant was interested in paying. *Id.* Taking all of the above evidence, WSP had probable cause to believe defendant was engaging in the commercial sexual abuse of a minor and thus had authority to authorize the intercept order. WSP did not have to obtain the consent of the party being recorded.

- b. Defendant impliedly consented to the interception of his text messages when he voluntarily discussed having sex with an 11-year-old to a stranger knowing his messages would record on the recipient's phone.

In *State v. Townsend*, our supreme court held a defendant implicitly consents to his e-mail messages being recorded because e-mails must be recorded in order to be useful. 147 Wn.2d 666, 676, 57 P.3d 255 (2002). The court adopted 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.

*Id.* at 676.

The court concluded that because the defendant in that case had to understand that his e-mails would be recorded on the computer of the

recipient, he was properly deemed to have consented to the recording of his e-mails. *Id.*

Apart from e-mail, Townsend also communicated via instant messenger through a program called "ICQ." *Id.* at 678-79. While ICQ is different from e-mail in that messages are exchanged in "real time," the court held that the defendant was similarly aware ICQ messages could be recorded. *Id.* Since defendant assumed that risk by continuing to send ICQ messages, he implicitly consented to those messages being recorded as well. *Id.*

Here, the defendant was also aware that his e-mails and text messages would be recorded. RP 1031-32. That was why defendant carefully avoided stating explicitly his intent to engage in oral sex with the 11-year-old over text. *Id.* In line with *Townsend*, where the defendant assumed the risk his instant messages would be recorded, here, defendant assumed the same risk regarding his text messages, which are essentially the modern equivalent of instant messages. RP 40. Thus, defendant's rights under the privacy act were not violated when Det. Sgt. Rodriguez<sup>2</sup> recorded messages sent to him by the defendant.

Next, defendant claims that since Det. Sgt. Rodriguez was not the "intended recipient" of his text messages, the facts are "on all fours" with

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<sup>2</sup> Defendant refers to Det. Sgt. Gonzalez at Brief of Appellant at 31. Because there is no Det. Sgt. "Gonzalez" involved in this case, the State assumes the defendant mistakenly referred to Det. Sgt. Rodriguez as Det. Sgt. Gonzalez.

*State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014); Brief of Appellant p. 27. *Hinton* actually supports the State’s case, yet the facts are distinguishable. 179 Wn.2d 862. In *Hinton*, the defendant thought he was sending text messages to a *known associate* when, in reality, police had custody of the associate’s phone and used subterfuge to set up a fictitious drug deal wherein the defendant was arrested. *Id.* at 866, 875. In that case, our supreme court held:

[O]ne who has a conversation with a *known associate* through personal text messaging exposes some information but does not expect governmental intrusion... [but] where an individual voluntarily discloses information to a *stranger*, he cannot claim a privacy interest.

*Id.* at 875 (emphasis added).

Unlike in *Hinton*, here, defendant was communicating with a stranger. The conversation was never just between “two adults” as defendant claims, brief of appellant at 28; it was always between the defendant and an undercover detective. Defendant was also aware of the risk of being deceived as to the true identity of the recipient. He expressed this concern multiple times. Defendant asked the fictitious mother, “[You’re] not taking it to law enforcement right?” and defendant asked for a “pic[ture]” in order to make sure the child was “real.” See series of e-mails, text messages, and phone calls *supra*.

The defense again attempts to analogize this case to one where the facts are incompatible with those of the case at hand. In *State v. Kipp*, the

defendant confessed to molesting a child to his brother-in-law without knowing he was being recorded. 179 Wn.2d 718, 723, 317 P.3d 1029, 1031 (2014). Considering all of the factors set out above, including that the defendant was speaking to a known family member, our supreme court found that he had a reasonable expectation of privacy. *Id.* at 733. However, the court explicitly distinguished that case from others where the nonconsenting party willingly imparts information to a stranger. *Id.* at 732. In cases like those, as in the present case, the disclosed information is not protected under the privacy act. *Id.*

This case is more like *State v. Goucher* and *State v. Athan* where the defendants knew they were communicating with a stranger and voluntarily disclosed private information to that stranger. 124 Wn.2d 778, 881 P.2d 210 (1994); 160 Wn.2d 354, 158 P.3d 27 (2007). Our supreme court upheld those convictions because:

[T]he defendants...voluntarily disclosed information to strangers and assumed the risk of being deceived as to the identity of one with whom one deals, a risk that is inherent in the conditions of human society.

*Hinton*, 179 Wn.2d at 876 (citing *Hoffa v. United States*, 385 U.S. 293, 303, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966) quoting *Lopez v. United States*, 373 U.S. 427, 465, 83 S. Ct.1381, 10 L.Ed.2d 462 (1963)).

In *Goucher*, police obtained a search warrant for a person and residence known to be involved in drug trafficking. 124 Wn.2d at 780.

During the search, a telephone rang, and a detective answered it. *Id.* at 780-81. When the caller asked for “Luis,” the detective told him that Luis was gone and that he (the detective) was “handling business until Luis returned.” *Id.* 781. The caller told the detective he wanted to buy some cocaine. *Id.* When the caller showed up at the residence to complete the transaction, he was arrested. *Id.* Since the caller voluntarily chose to continue the conversation and expose his desire to buy drugs to someone he did not know, his communication was not private. *Id.* at 783-84.

Similarly, in *Athan*, detectives invented a ruse to obtain the defendant’s DNA as part of an old murder investigation. 160 Wn.2d 354, 363, 158 P.3d 27, 30 (2007). Detectives posed as a fictitious law firm when they sent a letter to the defendant inviting him to join a fictitious class action suit. *Id.* The defendant believed the ruse to be true, and he returned the class action authorization form by mail. *Id.* Without opening it, detectives forwarded the envelope to the crime lab where a technician extracted the defendant’s DNA from saliva located on the flap of the envelope. *Id.* The defendant argued that his privacy rights were violated because the “law firm,” not the police, was his intended recipient. *Id.* at 371. Our supreme court, however, held that nothing in the privacy act indicates the intended recipient must be who the recipient claims to be. *Id.* at 371-72. Since the defendant’s letter was received by the intended addressee, though not an attorney as the defendant believed, there was no privacy act violation. *Id.* at 372.

Defendant here claims that Det. Sgt. Rodriguez was not the “intended recipient” of his text messages; “Kristl” was. Brief of Appellant at 30. Thus, WSP had no right to record those messages. But the above case law simply does not support that conclusion. The defendant voluntarily communicated his intent to have sex with an 11-year-old to a stranger he met on Craigslist. That the defendant was deceived into thinking the stranger was a 39-year-old mother does preclude the recording of his conversation. *State v. Hinton*, 179 Wn.2d 862, 876, 319 P.3d 9 (2014) (citing *Hoffa v. United States*, 385 U.S. 293, 303, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966) quoting *Lopez v. United States*, 373 U.S. 427, 465, 83 S. Ct.1381, 10 L.Ed.2d 462 (1963)). Therefore, defendant’s privacy rights were not violated, and the officer acting as “Kristl” was not required to obtain an order under RCW 9.73 before recording defendant’s messages.

2. THE TRIAL COURT CORRECTLY DENIED DEFENDANT’S PROPOSED ENTRAPMENT INSTRUCTION BECAUSE THE EVIDENCE SHOWS THAT DEFENDANT WAS NOT LED TO COMMIT A CRIME THAT HE WASN’T PREDISPOSED TO COMMIT.

An instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994) (citing *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992)). In order to be entitled to an entrapment instruction, “a defendant must present evidence which would be sufficient

to permit a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence.” *State v. Trujillo*, 75 Wn. App. at 917.

Washington’s entrapment defense 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.

- a. Evidence was insufficient to support a finding of entrapment by a preponderance of the evidence.

In his opening brief, defendant asserts “Racus need only present some evidence [of entrapment] to support an instruction on the affirmative defense.” Brief of Appellant at 35. To support that claim, defendant cites *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).

The defense claims that the ad posted by WSP was deliberately vague, that the trooper directed the conversation to the imaginary children, and that the trooper persisted in texting defendant after he mentioned sex with children is illegal. Brief of Appellant at 36. According to defendant,

those facts show WSP was deliberately trying to overcome his resistance to criminal activity which constitutes “some” evidence of entrapment. *Id.* However, even accepting defendant’s argument that those facts show “some” evidence, the point is irrelevant because “some” evidence is not the correct standard. *Trujillo*, 75 Wn. App. at 917.

*Galisia*, as indicated above, has since been overruled by *Trujillo*. In *Trujillo*, the court held that the “some evidence” standard in *Galisia* is “overly broad and improperly entitles a defendant to an entrapment instruction upon production of a mere scintilla of evidence.” *Trujillo*, 75 Wn. App. at 917.<sup>3</sup> Accordingly, a defendant is not entitled to an entrapment instruction unless he can produce “sufficient evidence to persuade a reasonable jury that he has established the defense by a preponderance of the evidence.” *Id.* at 917-18.

The correct standard, therefore, is whether the evidence is sufficient to support a finding of entrapment by a preponderance of the evidence. *Id.* In order to make that determination, the court had to evaluate the evidence. In doing so, the court found that the fact that the conversation spanned over two days and that defendant reinitiated contact with the fictitious mother after learning she was only offering her children for sex, showed that defendant was not led to commit a crime he wasn’t otherwise predisposed to attempt to commit. RP 1100-01. Taking into

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<sup>3</sup> The court of appeals made this decision in light of the Washington Supreme Court case *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994).

account all of the communications between defendant and WSP produced above, the evidence shows that WSP merely afforded defendant the opportunity to commit a crime.

The casual encounters section on craigslist contains approximately 2,500 ads. RP 955. There was ample opportunity for defendant to meet up with an adult woman through Craigslist and have sex. RP 1013. He began browsing the casual encounters section about a year before his arrest. RP 925-26. Yet, while he contacted many of those women, he never set up any plans with them. RP 1023. The only ad for which he did set up a meeting was for the fictitious mother offering her children for sex. *Id.* Defendant agreed that when the fictitious mother asked him over text “what experience do you have?” he took that to mean experience with children. RP 1027.

Since defendant failed to provide sufficient evidence that would persuade a reasonable jury of his defense of entrapment by a preponderance of the evidence, the trial court correctly denied defendant’s proposed entrapment instruction.

- b. The State did not argue that defendant must admit his attempt to commit the crime or all of the elements of the crime in order to be entitled to an entrapment instruction.

“An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so.” *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1, 5 (2010) (citing *State v. Votava*, 149 Wn.2d 178, 187–88,

66 P.3d 1050 (2003) (citing *State v. Riker*, 123 Wn.2d 351, 367–68, 869 P.2d 43 (1994)). Here, defendant correctly used *Galisia*, 63 Wn. App. at 837, to support the proposition that a defendant is not required to admit to the crime itself 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. Brief of Appellant at 35. Nevertheless, defendant incorrectly claims that the State persistently argued that defendant would have to admit to the crime itself in order to be entitled to entrapment. *Id.* Defendant cites to the prosecutor’s statement:

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. Brief of Appellant at 35.

There, the State did not argue that defendant had to admit to attempting to have sex with the child. Rather, defendant had to admit to the criminal act of going to the house and buying skittles with the intention of having sex with Lisa. The reason the State addressed this issue was because defendant denied ever intending to have sex with 11-year-old Lisa. RP 941, 943. In order to bring an affirmative defense such as entrapment, the defendant has to at least admit to the acts upon which the

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<sup>4</sup> *Galisia* was abrogated by *Trujillo* on other grounds. See above.

crime was charged. That is because an affirmative defense, like entrapment, is an excuse for a crime the defendant already committed or attempted to commit. See *Fry*, 168 Wn.2d at 7 (citing *Votava*, 149 Wn.2d at 187–88) (citing *Riker*, 123 Wn.2d at 367–68). Accordingly, the State did not incorrectly argue that defendant had to admit to the crime itself.

3. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO CONCLUDE THAT DEFENDANT TOOK A SUBSTANTIAL STEP TOWARD COMMITTING FIRST DEGREE RAPE OF A CHILD WHEN THE DEFENDANT ENGAGED IN EXPLICIT CONVERSATIONS ABOUT HAVING SEX WITH A CHILD AND FOLLOWED UP BY ARRIVING AT THE STING HOUSE WITH A PACKAGE OF SKITTLES.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the jury should be upheld. *Id.*

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Evidence is sufficient to support a conviction of Attempted Rape of a Child in the First Degree when the State has proven beyond a reasonable doubt that the defendant took a "substantial step" toward having sexual intercourse with a child who is less than 12 years old and not married to the defendant and when the defendant is at least 24 months older than the victim. RCW 9A.28.020; RCW 9A.44.073. A "substantial step" is conduct that strongly corroborates the actor's criminal purpose. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255, 262 (2002) (citing *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995); *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978)); WPIC 100.05. More than mere preparation to commit a crime is required for a substantial step. *Workman*, 90 Wn.2d at 449-50.

The intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse. *See State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003) (*citing State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591, 593–94 (2012)).

Defendant engaged in a series of e-mails, text messages, and phone calls with a person from Craigslist whom he believed was an adult mother offering her three young children for sex. *See* series of e-mails, text messages, and phone calls *supra*. The person posing as the mother was actually Det. Sgt. Rodriguez of the WSP. RP 949.

Throughout their conversations, defendant made it clear he was looking to engage in oral sex with the 11-year-old. *See* series of e-mails, text messages, and phone calls *supra*. At the beginning of their conversation, defendant stated: “I am looking to give a gal oral and anything else sexual she needs.” *Id.* When asked which girl he would like to have oral sex with, defendant responded: “Lisa. have a pic[ture]?” *Id.* Later on, defendant spoke to “Lisa” over the phone. He asked her, “So, are you looking forward to this?” referring to the sex. RP 1049-50. On defendant’s way to the sting house, the fictitious mother texted him asking him to bring skittles for Lisa because “she asked for some.” RP 1052. Defendant bought the skittles and brought them to the house where he planned to meet Lisa. RP 743.

Defendant claims that while the exchanges between he and the fictitious mother were sexual in nature, they “were vague regarding what, if anything, would happen if an eventual meeting took place[.]” Brief of Appellant at 37. Defendant also claims that while he did speak briefly to the fictitious 11-year-old, “no specific conduct was ‘planned’ regardless of the sexual nature of the conversation.” *Id.* Defendant, however, fails to mention any statute or case law where the absence of a “plan” denotes the absence of a substantial step.

Accepting for a moment defendant’s flawed argument that the lack of a plan for specific conduct constitutes the lack of a substantial step altogether, the evidence still shows that defendant discussed specific conduct he intended to engage in and made a plan to execute it. During their conversations, defendant told the mother he planned on giving and receiving oral sex with Lisa. RP 1045. Defendant also agreed to the mother’s “rules” which included no pain, no anal, and condoms if more than oral. RP 1043. While on the phone with Lisa, defendant told her he would head her way as soon as her mother gave him an address. RP 1049. The mother texted him her address, and defendant arrived approximately 30 minutes later. *See* series of e-mails, text messages, and phone calls *supra*.

In similar cases involving sting operations, courts have held that a substantial step was completed when the defendant took steps beyond mere words, such as arriving at the place where the crime was planned to occur. In *State v. Wilson*, an undercover detective, posing as a mother, posted an ad on craigslist offering sex with her and her daughter. 158 Wn. App. 305, 308, 242 P.3d 19, 27 (2010). The defendant responded, exchanged pictures, and arranged to have oral sex with the 13-year-old daughter in exchange for \$300. *Id.* at 317. On the day in question, the defendant drove to a Dick's Drive-In near the child's house. *Id.* at 317-18. He sat in his car and waited for approximately 30 minutes before he was arrested. *Id.* The defendant argued that the evidence only establishes mere preparation, so his conviction should be reversed. *Id.* at 316. The court of appeals disagreed. *Id.* at 320. The defendant exchanged photos with the fictitious mother, obtained the mother's address, and drove to the agreed upon location with the \$300 he agreed to pay for sex. *Id.* at 318. These facts showed that defendant took a substantial step towards the commission of second degree rape. *Id.*

In *State v. Townsend*, the defendant communicated via e-mail and instant messenger with someone he believed was a 13-year old girl. 147 Wn.2d 666, 670, 57 P.3d 255 (2002). The defendant told her he wanted to have sex with her, and the two of them planned to meet at a hotel. *Id.* at 671. When the defendant arrived at the hotel room and asked to see the

girl, he was arrested. *Id.* Our supreme court rejected the defendant's impossibility argument. *Id.* at 679. Instead, it held that the defendant took a substantial step because his actions showed he intended to have sexual intercourse with the child. *Id.*

Similarly, in *State v. Sivins*, the court found that the defendant took a substantial step toward rape of a child when he engaged in sexually graphic internet communications with a fictitious 13-year-old and when he drove five hours to Pullman and secured a motel room for two. 138 Wn. App. 52, 64, 155 P.3d 982 (2007).

In contrast, in *State v. Grundy*, an undercover officer posing as a drug dealer approached the defendant and asked what he wanted. 76 Wn. App. 335, 336, 886 P.2d 208 (1994). The defendant said he wanted "20." *Id.* The officer asked, "20 what?" *Id.* The defendant replied, "20 of coke." *Id.* The officer asked to see the defendant's money and the defendant replied he wanted to see the drugs first. *Id.* Thereafter, the defendant was arrested. *Id.* Defendant argued on appeal that there was insufficient evidence to support a finding that a substantial step was taken toward possession of a controlled substance. *Id.* at 337. The court of appeals agreed holding the defendant's words, "without more," were insufficient "to constitute the requisite overt act." *Id.*

Here, defendant engaged in conduct that went far beyond mere words. Defendant not only exchanged photos with the mother, obtained her address, and arrived at the address with a package of skittles, he also got out of his car, walked up to the door of the house, stepped inside, handed the mother the skittles, and began taking off his shoes. RP 741-43. Defendant drove from the South Hill of Puyallup to Hilltop in Tacoma. RP 1050. He drove all this way through traffic, after work, knowing his wife would be suspicious of his whereabouts. RP 941, 1025. He did this in order to fulfill his plan of performing oral sex on an 11-year-old girl and having it done back to him. Review of the numerous e-mails, text messages, and phone calls show that defendant intended to have sex with the 11-year-old. *See* series of e-mails, text messages, and phone calls *supra*. Defendant's verbal expressions of his intent to have sex with Lisa, combined with the physical steps he took to carry out that crime, support the conclusion that defendant took a substantial step toward the completion of first degree child rape.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR<sup>5</sup> OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

To prove that a prosecutor's actions constitute error, the defendant must show that the prosecutor failed to act in good faith and that the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 47 (2011) (citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

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<sup>5</sup> "Prosecutorial misconduct" is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand can undermine the public's confidence in the criminal justice system, both the National District Attorney's Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "Prosecutorial misconduct" for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf) (last visited June 28, 2016). National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010). [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited June 28 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft* 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford* 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this court to use the same phrase in its opinions.

The defendant bears the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Juries are presumed to follow the court's instruction. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Failure by the defendant to object to an improper remark constitutes waiver of error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719. This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the

issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). “The State is generally afforded wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

“Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

“Trial court rulings based on allegations of prosecutorial [error] are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Defense counsel failed to object to any alleged instance of error raised in defendant’s appeal. RP 189-504.

- a. The prosecutor acted properly when he engaged in appropriate voir dire.

The purpose of *voir dire* examination is to enable the parties to learn the state of mind of the prospective jurors so that they can know whether or not any of them may be subject to a challenge for cause and determine the advisability of interposing their peremptory challenges. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369, 371 (1985). 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. *Id.*

Absent an abuse of discretion and a showing that the rights of the accused have been substantially prejudiced, a trial court's ruling on the scope and content of *voir dire* shall not be disturbed on appeal. *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977, 995 (2000). Failure by the defendant to object to an improper remark constitutes waiver of error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719.

Defendant argues that the prosecutor used *voir dire* to argue his case, and to prejudice, indoctrinate and instruct the jury in matters of law.

Brief of Appellant at 43. Review of the alleged instances, however, show that the prosecutor did nothing more than inquire about matters important to the State's ability to determine challenges for cause. Furthermore, defense counsel failed to object to any of the alleged instances of error. RP 189-504.

After asking the venire if any of them were familiar with the website "Craigslist," the prosecutor asked if any of them knew it contained "sex for sale section." RP 448-49. The prosecutor seemed to be referring to some of the ads under the "casual encounters" section. The prosecutor also asked about the website "Backpage," a site very similar to Craigslist. RP 448. He asked if any of them read about the CEO of Backpage being arrested for promoting prostitution. *Id.* Numerous jurors indicated that they had. RP 448. One said that he heard Backpage was a good place to find prostitution. *Id.* The purpose of these questions was to enable the State to learn if any potential juror had prior knowledge about ads like the one in the present case. Prior knowledge could cause a juror to be biased.

The prosecutor also asked what jurors thought about the legality of prostitution. RP 455. At the time, this question was particularly relevant because the commercial sexual abuse of a minor count had not yet been dismissed.

The prosecutor asked if the jurors followed shows like “To Catch a Predator.” RP 453. The prosecutor asked if any of the jurors felt sorry for persons who got caught on the show. *Id.* That question was important to enable the prosecutor to detect whether any of the jurors harbored prejudices regarding defendants caught in sting operations. Taking it a step further, the prosecutor asked what the jurors thought about sting operations like the one in question. RP 461. He asked if anyone thought it was not worth the use of state resources. *Id.* When one of the jurors expressed reservations about the concept, the prosecutor clarified: “In the context of sexual offenses against children, should we wait until they actually commit the crime or catch them before?” RP 461-62. The defense claims that this statement improperly suggested that without a sting, sexual abuse would occur. Brief of Appellant at 44. The prosecutor was not making any suggestions at all. Sexual abuse occurs in the presence and absence of sting operations. The point of the question was not to prejudice or indoctrinate the jury; it was to ascertain potential jurors’ thoughts and feelings about sting operations like the one in question.

Defendant claims that the prosecutor “misrepresented the law by telling jurors that simply showing up to the sting house was a completed crime.” Brief of Appellant at 43. The prosecutor made no such statement. Following the discussion about whether sting operations are a good thing,

one juror commented, "I think 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." The prosecutor asked, "By that time, you've already committed the crime?" The juror responded, "Right. Or at least had the intention to commit and that's at least a crime in itself." RP 462-63. Viewed in context, the prosecutor did not make a statement about the law. He merely asked the juror to clarify what his opinion was. The juror expressed his opinion that intending to commit a crime is a crime itself.

Finally, the prosecutor asked the venire if any of them had prior jury experience. RP 484. He asked of those that raised their hands if they found the process frustrating or if they ever had a horrible experience like failing to reach a verdict. *Id.* Defendant claims that these questions were irrelevant, yet fails to show how they were prejudicial. Further review of the transcript shows that the prosecutor continued this line of questioning asking if any of the jurors would feel uncomfortable working with others. RP 485, 487. The prosecutor also asked if any of the jurors had a hard time saying the defendant is innocent as he sits there now. RP 488. The point of all of this was to discover any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges.

Defendant did not object to any of these questions. RP 189-504. Failure by the defendant to object to an improper remark constitutes

waiver of error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719. Since none of the prosecutor’s conduct during *voir dire* could possibly give rise to an enduring and resulting prejudice incurable by a jury instruction, this court should affirm defendant’s conviction.

b. The prosecutor engaged in appropriate questioning of witnesses.

“Improper vouching generally 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, 392–93 (2010) (citing *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (quoting *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002))).

Here, the prosecutor neither expressed his personal belief as to the veracity of Det. Sgt. Rodriguez nor used evidence not presented to support that witness’ testimony.

Defendant claims that by asking Det. Sgt. Rodriguez about the number of “Net Nanny” arrests in Pierce County and around the state, the prosecutor improperly suggested to the jury that Det. Sgt. Rodriguez must

have been correct in arresting the defendant. Brief of Appellant at 44-45. However, the real purpose for asking Rodriguez questions about the success of other sting operations was to elicit testimony that would help the jury determine the credibility of this sting operation as well as the credibility of Rodriguez himself.

Defendant took the prosecutor's closing statement out of context when he claimed the prosecutor argued that Det. Sgt. Rodriguez was "more credible and would not lie because he would jeopardize his career or the other Net Nanny arrests." Brief of Appellant at 45. In closing argument, the prosecutor 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.

RP 1150. No objection was made thereafter. *Id.*

The prosecutor made this statement in the context of recounting evidence and reasonable inferences that could support the jury's conclusion that Rodriguez was credible. When asked on re-direct examination if altering e-mails or text messages in this investigation

would impact his career, Rodriguez responded that he could go to prison.

RP 881. The prosecutor followed up:

Is any criminal case important enough to you, Sergeant Rodriguez, to you that you would alter the content of the meaning of messages between you and a suspect?

*Id.* Rodriguez responded, "Absolutely not." *Id.*

It was clear the prosecutor was referring to prior testimony during closing argument. He did not give his personal opinion as to the truth of Rodriguez's testimony; he merely reminded the jury what Rodriguez testified to and asked the jurors to use that evidence in determining whether Rodriguez was credible.

Defendant compares this to improper statements made by the prosecutor in *United States v. Combs*, 379 F.3d 564, 574-76 (9<sup>th</sup> Cir. 2004). There, the prosecutor argued to the jury that in order to acquit the defendant, the jury would have to believe the witness (DEA agent) risked losing his job by lying on the stand. *Id.* at 574. The Ninth Circuit said the prosecutor's comment plainly implied that she knew the agent would be fired for committing perjury. *Id.* at 576. Therefore, the prosecutor's vouching was improper. *Id.*

Unlike in *Combs*, the prosecutor here specifically told the jury that it is up to them to determine Rodriguez's credibility. RP 1150. The

prosecutor then reminded the jury of Rodriguez's testimony to help them come to that decision.

In rebuttal argument, the prosecutor reminded the jury that the task force had "arrested 63 people who showed up to have sex with children. Three were already registered sex offenders." RP 1172. Defendant claims that there was nothing in the record to support that argument. However, Det. Sgt. Rodriguez testified that 63 people had been arrested in this operation, RP 648, and three were already registered as sex offenders, RP 806.

Finally, defendant claims that the prosecutor "appealed to the passion and prejudice of the jury by arguing [in rebuttal] that the task force were particularly noble people 'dedicated toward protecting children.'" Brief of Appellant at 49. Defendant claims that the prosecutor argued people like defendant *require* task force members to "swim in the filth of the internet." *Id.* What the prosecutor actually said is as follows:

Those 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?

RP 1172. Defense counsel did not object to this statement.

Read in context, the prosecutor was responding to defense counsel's argument where he claimed this was a case of governmental overreach by MECTF, that Det. Sgt. Rodriguez was too aggressive in the investigation, and that he acted aggressively in order to justify the cost of the operation. RP 1159-61.

When the prosecutor stated, "[t]hese are people who swim in the filth that's on the internet[,] he was not arguing that defendant requires them to, as the defense claims. Brief of Appellant at 49. Task force members voluntarily expose themselves to nasty things on the internet as part of their jobs, not because people like defendant require them to.

None of these instances constitute flagrant and ill-intentioned misconduct worthy of reversal.

c. The prosecutor upheld his burden of proof throughout the trial.

The State bears the burden of proving each element of its case beyond a reasonable doubt, and it may not shift any of that burden to the defendant. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Fleming*, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The State upheld its burden here.

Defendant claims that the prosecutor diminished his burden of proving a substantial step when he said "there are people who will

[consider having sex with an 11-year-old] and there are people who are absolutely appalled at that thought.” RP 1134. Defendant claims that by saying this the State argued that merely thinking about or talking about child sex was a substantial step, but a substantial step requires conduct, not thoughts. Brief of Appellant at 46.

It is quite a leap for the defense to argue this lowered the State’s burden. First, it did not have a substantial likelihood of affecting the jury verdict. The State had already proven its burden of showing a substantial step by defendant’s conduct. Second, defense counsel failed to object to the statement at trial, so even if it was error, it could have been cured by an instruction to the jury.

Next, defendant argues that the State “mischaracterized” the reasonable doubt standard by equating an “abiding belief” with “doing the right or just thing.” Brief of Appellant at 46-47. Read in context, the prosecutor made no such argument.

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.

*And you only have that abiding belief if you render a just verdict according to the evidence and the law. If you don't let sympathy for the defendant's family get in your way. He should be found guilty based on the evidence, but that's for what he did, not the name of the crime that he committed. There is a difference. You're finding him guilty from the evidence that was presented, and not just from the repugnant nature of the charge of Attempted Rape of a Child First Degree.*

RP 1181-82 (emphasis added). The defendant did not object.

It is clear from the record that doing the right or just thing meant finding the defendant guilty or not guilty based on the facts and the law presented. When the jury finds the defendant guilty or not guilty based on the law and evidence, they have an abiding belief in that decision. When they have such an abiding belief, they have done the right thing.

Defendant mischaracterizes the prosecutor's argument by claiming that a juror's subjective belief as to the right or just thing is an abiding belief.

Brief of Appellant at 47. Read in its entirety, that is simply not what the prosecutor argued.

Prior to his statement about the abiding belief, the prosecutor recounted and corrected what defense counsel said about the presumption of innocence. The State made it a point to ensure that the jury upheld the

defendant's presumption of innocence until it found defendant guilty beyond a reasonable doubt.

Let me back up for a second. Mr. Firkins actually told you that the presumption of innocence is maintained, he still has it, until you go back there and start deliberating. That's not true. I have the burden of proof for the state. It's the highest burden in the law. And I want to make sure that you don't minimize it at all. He maintains his presumption throughout your deliberations, not just until you get there. Throughout your deliberations, he is presumed innocent until you find that all of the mountain of evidence that you heard overcomes that presumption beyond a reasonable doubt. So absolutely, give him his constitutional right.

RP 1180.

In light of the whole context of the State's argument and rebuttal, it is clear no error was made. The State did not diminish its burden of proof. Rather, it reminded the jury of the high standard the State has to overcome and implored the jury to make its decision in light of that standard. Furthermore, even if the State did make an error, the defendant has failed to show that it prejudiced the jury.

d. The prosecutor did not engage in misconduct outside the presence of the jury.

Judges are presumed to know and apply the law. *State v. Cantu*, 156 Wn.2d 819, 834, 132 P.3d 725, 733 (2006), *as amended* (May 26, 2006). That presumption can only be overcome by a strong showing that the trial judge misunderstood and misapplied the law. *Id.* at 826-27.

First, defendant claims that the State misstated the law regarding entrapment by arguing that defendant is required to admit guilt before getting that instruction. Brief of Appellant at 49. The State's argument on the entrapment issue has already been discussed above. Defendant misrepresented the State's argument on entrapment. In addition to that, however, the judge is presumed to know what the law is. *Cantu*, 156 Wn.2d at 834. Therefore, whether or not the State "misstated" the law, the court would be expected to apply the law correctly. Any error was thus harmless.

Second, defendant argues the State misrepresented to the trial judge what the first judge did in reviewing the intercept authorization. Brief of Appellant at 49. 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." Now, granted, Judge Rumbaugh, didn't have the argument being made, which is that Sergeant Rodriguez lied, and so you can certainly revisit this.

RP 33. Defendant claims that "[p]lainly, 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." Brief of Appellant at 49. However, defendant fails to support these arguments with a citation to the record. Defendant is merely stating his opinion based on what was said to

the second judge. Defendant fails to show any error on the part of the State. The court gave its own reasons for denying the motion. RP 52-53.

Finally, defendant argues the prosecutor improperly vouched for the credibility of Det. Sgt. Rodriguez when he argued to the trial court:

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. The fact is the defendant brought up the subject of payment and Sergeant Rodriguez just put that that was their discussion when he saw probable cause from Lieutenant Eggleston. The motion should be denied.

RP 33. It is clear from the record that the State's reference to Rodriguez's 20-year-plus career with WSP did not improperly influence the court's ruling on the motion. As stated above, the court gave its own reasons for denying the motion. Thus, defendant fails to show how the prosecutor's statement prejudiced the defendant.

- e. Defendant has failed to show how the prosecutor's conduct throughout trial constitutes cumulative error.

In sum, defendant argues that the prosecutor's conduct throughout the trial constitutes cumulative error depriving the defendant of a fair trial. Brief of Appellant at 50. "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of the circumstances substantially prejudiced the defendant and denied him a fair

trial.” *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014) (citing *State v. Gallegos*, 286 Kan. 869, 190 P.3d 226 (2008)). “Cumulative error may warrant reversal even if each error standing alone would otherwise be considered harmless.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006) (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

The doctrine of cumulative error does not apply where the defendant fails to establish how claimed instances of prosecutorial error affected the outcome of the trial or how combined instances affected the outcome of trial. *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43, 52 (2011) (citing *Weber*, 159 Wn.2d at 279)).

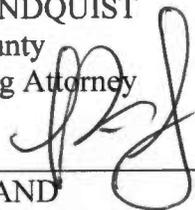
Defendant has failed to show how any instance of alleged error affected the outcome of his trial. Defense counsel never objected to any alleged error indicating that all of the prosecutor’s questions and arguments were proper in context. Furthermore, defendant has failed to show how the combined instances of alleged error affected the outcome of the trial. Brief of Appellant at 50. Accordingly, the cumulative error doctrine does not apply here.

D. CONCLUSION.

For all of the above stated reasons, the State respectfully requests that this court affirm the defendant's convictions of Attempted Rape of a Child in the First Degree and Communicating with a Minor for Immoral Purposes.

DATED: October 6, 2017.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



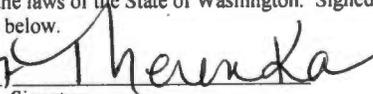
ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 47838



Madeline Anderson  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~E.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-6-17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**October 06, 2017 - 1:55 PM**

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