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Division II
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NO. 49887-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

ERIC KERMIT JACOBSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 15-1-05049-6

Brief of Respondent

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

1. Whether, based on the totality of the circumstances, police engaged in outrageous conduct, where police used an undercover operation to detect and apprehend those attempting to commit sex crimes against children? (Assignment of Error No. 5)
2. Whether defendant has failed to show prosecutorial error occurred when the prosecutor's questions and arguments were neither improper, prejudicial, nor flagrant and ill-intentioned? (Assignment of Error No. 1)
3. Whether the State presented sufficient evidence to convict defendant of Attempted Rape of a Child in the First Degree and Attempted Commercial Sexual Abuse of a Minor, where the evidence established that defendant intended to have sexual intercourse with an 11-year-old child in return for a "a fee," defendant offered a "gift card" as payment, and he took a substantial step by driving to the agreed-upon location with condoms, lubricant and Skittles? (Assignments of Error Nos. 2, 3, 4)
4. Whether the trial court properly imposed crime-related conditions of community custody which were reasonably necessary to protect the public from defendant's sexually predatory behavior? (Assignments of Error Nos. 6, 7)

B. STATEMENT OF THE CASE.

1. Procedure

On December 17, 2015, the Pierce County Prosecutor's Office charged ERIC KERMIT JACOBSON (hereinafter "defendant") with one count of Attempted Rape of a Child in the First Degree and one count of

Attempted Commercial Sexual Abuse of a Minor. CP 1-2. Jury trial commenced on October 26, 2016, before the Honorable Ronald Culpepper. RP (9/1/16) 20.¹

Before jury selection, the parties addressed pretrial motions. RP (9/1/16) 29-74. Defendant moved to dismiss Count II (Attempted Commercial Sexual Abuse of a Minor) pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing there was insufficient evidence to establish that defendant agreed or offered to engage in sexual conduct with a minor for a fee. CP 6-11; RP (9/1/16) 20, 29-61. The court denied defendant's motion. CP 77-80; RP (9/1/16) 59-61.

Both parties participated in voir dire by asking questions pertinent to the case. RP 6-88. Defense counsel did not object to the State's questions. *Id.* During trial, the State called the following witnesses: Washington State Patrol (WSP) Detective Sergeant Carlos Rodriguez, United States Postal Inspector Samantha Knoll, WSP Trooper Anna Gasser, Department of Homeland Security Special Agent Reese Berg, and WSP Detective John Garden. RP 128-29, 404-05, 417, 430, 498; CP 106.

After the State rested, defendant again moved to dismiss Count II, arguing there was insufficient evidence that defendant agreed or offered to

¹ For purposes of clarity, the State will refer to the verbatim report of proceedings in the same manner as defendant. *See* Brief of Appellant at 6 n.1.

engage in sexual conduct with a minor for a fee. RP 512-23. The court denied defendant's motion. RP 523-25. Defendant then elected to testify in his defense. *See* RP 551-761. The jury subsequently found defendant guilty of both counts. CP 41-42; RP 834-35.

At sentencing, the court found the crimes to be the "same criminal conduct" and imposed an indeterminate sentence of 85 months to life on Count I (Attempted Rape of a Child in the First Degree) and a determinate sentence of 20.25 months on Count II (Attempted Commercial Sexual Abuse of a Minor). CP 56-68; RP (12/2/16) 14, 31. The court also imposed conditions of community custody. CP 56-68, 87-88; RP (12/2/16) 31-32. Defendant filed a timely notice of appeal. CP 48.

2. Facts

In December of 2015, Detective Sergeant (Sgt.) Carlos Rodriguez of the Missing and Exploited Children's Task Force (MECTF) launched Operation "Net Nanny" in Pierce County, Washington. RP 128-135, 207-08, 332. The MECTF investigates cases involving sex crimes against children, primarily involving the Internet. RP 132. The operation used undercover officers who either pretended to be children or pretended to be parents "pimping out their children" to "go after people or identify people who...want to do harm to kids" by placing or answering ads on Craigslist. RP 132-33. Sgt. Rodriguez played the part of a mother named "Kristl

Collins” with two daughters (ages 11 and 8) and one son (age 13), who provided her three children for sex acts. RP 136, 226, 241.

On December 11, 2015, at 10:34 p.m., Sgt. Rodriguez posted an ad in the Casual Encounters section of Craigslist titled “new to Tacoma, young family – w4m (tacoma).” Exh. 6; RP 140-41, 172, 211-13. The ad read, “I am new to area and interested in new friends. I have a very close young family that is very giving. Experience with incest is a plus. Reply if interested. No RP only serious respond... .” Exh. 6; RP 213. Defendant responded to the ad the same day with, “Good afternoon, caught your post and would love to explore this with you. Serious and available... .” Exh. 6; RP 215-16, 613-15. Defendant did not respond further to this ad. RP 217.

On December 14, 2015, at 9:02 p.m., Sgt. Rodriguez posted another ad in the Casual Encounters section of Craigslist. Exh. 1; RP 164, 207. The title of the ad was “young family fun, no RP lets meet – w4mw (tacoma).” Exh. 1; RP 165. The ad read, “looking for a crazy fun time. only serious need respond. no solicitations. single mom with 2 daus and 1 son.” Exh. 1; RP 165. “No RP” in this context meant “no role play.” RP 165. Defendant again responded to the false ad the day it was posted. Exh. 2; RP 207, 553-54. Defendant responded using the name “John Tepinen.” Exh. 2; RP 196-97, 211, 608, 615-16. Defendant wrote that he was “down

for some fun” and asked to “trade pics.” Exh. 2. He stated that he was interested in “some play with one or both” of the daughters “[d]epending on their look,” and wanted “sensual and intimate exploration.” Exh. 2.

Defendant proceeded to exchange e-mails, text messages, and phone calls with undercover officers expressing his desire to engage in sexual intercourse with the fictitious mother’s 11-year-old daughter “Lisa.”² Exh. 2, 4, 7, 8, 9; RP 196-331. The following are select portions of the text messages and phone calls between defendant and the undercover officers:

| Sender: | Description:³ |
|----------------|---|
| WSP (Kristl) | are you oka with their ages and are you interested in both of them? (Exh. 4, pg. 1) |
| Defendant | If they’re both cute, then sure. And I don’t know their ages. (Exh. 4, pg. 1) |
| WSP (Kristl) | 11 nearly 12 and 8. this isn’t for evveryone (Exh. 4, pg. 1) |
| Defendant | 8 is just too young.. may I see a pic of your older daughter (Exh. 4, pg. 1) |
| Defendant | Do you participate in any way your self? (Exh. 4, pg. 3) |
| WSP (Kristl) | i watch and if it gets me hot i can join in if the sjtuation is right, ut this is more for them (Exh. 4, pg. 3) |
| Defendant | May I ask, how many men has she been with? (Exh. 4, pg. 4) |
| WSP (Kristl) | she hasnt been all the way, mainly toys. she is ready though (Exh. 4, pg. 4) |
| WSP (Kristl) | Okay. And so you’re kind of interested in my 11, soon to be 12-year old? (Exh. 8) |
| Defendant | Sure. (Exh. 8) |
| Defendant | ...basically, you mentioned that lisa was ready to go all the way.. and that’s what I believed you were wanting to bring me in for.. if that’s the case.. then we can discuss arranging (Exh. 4, pg. 5) |
| WSP (Kristl) | definitely ready... (Exh. 4, pg. 5) |

² The role of “Lisa” was played by Trooper Anna Gasser. RP 259.

³ Misspellings are in the original texts.

| | |
|--------------|--|
| Defendant | I can help with that... (Exh. 4, pg. 5) |
| Defendant | I believed we were talking about Lisa being ready to go all the way, and if she is and you are comfortable with that then I would like to help with that (Exh. 4, pg. 5) |
| WSP (Kristl) | and you are good with her being nearly 12 she is very mature (Exh. 4, pg. 5) |
| Defendant | What more do you need to hear from me in order to be comfortable Yes (Exh. 4, pg. 5) |
| WSP (Kristl) | did we go over teh rules (Exh. 4, pg. 5) |
| Defendant | No (Exh. 4, pg. 5) |
| WSP (Kristl) | no pain, no anal, condoms (Exh. 4, pg. 5) |
| Defendant | Ok (Exh. 4, pg. 6) |
| WSP (Kristl) | so when are you okay with gifts she loves gifts. (Exh. 4, pg. 6) |
| Defendant | What does she like (Exh. 4, pg. 7) |
| WSP (Kristl) | roses are always good, she likes gift cards, tracfone minutes for her phone, stuff like that. is taht okay (Exh. 4, pg. 7) |
| Defendant | Ok What is your rule about oral (Exh. 4, pg. 7) |
| WSP (Kristl) | for her or you. fine with both (Exh. 4, pg. 7) |
| Defendant | Both (Exh. 4, pg. 7) |
| WSP (Kristl) | and i guess i should ask where (Exh. 4, pg. 7) |
| Defendant | Genital. (Exh. 4, pg. 7) |
| WSP (Kristl) | you said you are okay with teh rules and condoms so we are good there. how gbig are you (Exh. 4, pg. 7) |
| Defendant | I'm about 7 inches, so not huge but a little larger than average You mentioned that she loves having oral performed on her, has she been able to orgasm yet or is she still too young for that? (Exh. 4, pg. 7) |
| WSP (Kristl) | she likes the toys, she hasnt had someone get ther orally yet. cn you bring lube (Exh. 4, pg. 7) |
| Defendant | Yes Has she performed oral on a man yet? (Exh. 4, pg. 7) |
| Defendant | Once we get to your place, how do you sing things happening once I'm there? (Exh. 4, pg. 8) |
| WSP (Kristl) | well ill let you in...then i'll introduce you to Lisa. did we talk aout any gifts of donations? (Exh. 4, pg. 8) |
| Defendant | Yes (Exh. 4, pg. 9) |
| WSP (Kristl) | what were you thinking hun (Exh. 4, pg. 9) |
| Defendant | Well I'm not sure what to think, that's why I am asking how things will happen and proceed. (Exh. 4, pg. 9) |
| WSP (Kristl) | i told lisa about you and she is excited what do you mean, about donations or us |

| | |
|--------------|---|
| | well think about it and if you want to talk to her let me know (Exh. 4, pg. 9) |
| Defendant | I recall that you had suggested that she liked gifts. That's not a problem. I guess what I'm trying to figure out is once I'm at your place how you would like things to move forward once I'm there. I would like to speak with her. (Exh. 4, pg. 9) |
| Defendant | May I ask, what is her expectation of what she and I will be doing? (Exh. 4, pg. 9) |
| WSP (Kristl) | you can ask her she knows about everything. if you want you can just use the word playtime on the phone instead of sex if you are worried. (Exh. 4, pg. 9) |
| Defendant | ... Well, um, I mean, what, when I, if I were to come over there, what might you like to do? (Exh. 9) |
| WSP (Lisa) | Um, I don't know what I wanna do like, specifically...Like, my mom said that um, that if you came over, you would kind of help teach me and stuff. So I don't know what kind of stuff you would want to teach me, like, or do for like, play time or whatever. (Exh. 9) |
| Defendant | Mm-hm. Well, we can kind of play it by ear, you know...whatever you wanna explore or experience to try out, you can...and then...some play time when I come over. ... And so it's more about just kind of, you know...and exploring whatever might feel good and if it doesn't feel good or it's not like, then stop (Exh. 9) |
| WSP (Lisa) | Are you gonna bring anything with you? (Exh. 9) |
| Defendant | Yeah. Your mom and I talked about that. (Exh. 9) ... Yeah, she said that there are certain things that you like and I'll see what I can do to accommodate that. (Exh. 9) |
| Defendant | How do you want to set up you and i meeting to verify our pics line up with our real self? (Exh. 4, pg. 10) |
| WSP (Kristl) | ...so there is a 76 station right near my house. ill google it. once i see its you you can come by she is excited. Kera 76, 1901 South K Street, Tacoma, WA 98405 (Exh. 4, pg. 10) |
| WSP (Kristl) | are you still good with gifts? i cnat' rememet if we agreed o anything (Exh. 4, pg. 13) |
| Defendant | You mentioned a few things. Anything I brought I would give to you to disperse however you saw fit (Exh. pg. 13) |
| WSP (Kristl) | ok what did yo have in mind hun. anything helps (Exh. 4, pg. 13) |
| Defendant | A gift card, that can be used for any purpose (Exh. 4, pg. 13) |
| WSP (Kristl) | ok and do you have condoms we dont but the 76 station does |

| | |
|--------------|--|
| | (Exh. 4, pg. 13) |
| Defendant | I always have condoms at my disposal. (Exh. 4, pg. 13) |
| WSP (Kristl) | and lube for your 7 inches so??? can i tell her or not. (Exh. 4, pg. 13) |
| Defendant | Okay, I'm all finished here (Exh. 4, pg. 13) |
| WSP (Kristl) | ...i am not into this for her to hangout with you. i will take the gift card like you said for playtime, but you have to understand what this is about...can i tell her you are coming over or not (Exh. 4, pg. 13) |
| Defendant | Ok.. yes I'm coming (Exh. 4, pg. 13) |
| Defendant | I'm leaving my house now (Exh. 4, pg. 14) |
| WSP (Kristl) | ok what kind of car. and can you bring skittles. she likes skittles if not thats ok (Exh. 4, pg. 14) |
| Defendant | Yes I can bring skittles (Exh. 4, pg. 14) |
| Defendant | I'll be driving a silver Kia Sorento... (Exh. 4, pg. 14) |
| Defendant | I'm at the 76 station (Exh. 4, pg. 14) |
| Defendant | Address? (Exh. 4, pg. 15) |
| WSP (Kristl) | 1908 s yakima ave. i rent the top floor. yakima has no parking. drive down 19th and you ahve to drive behind the house. you an drive in front to see whcih one. (Exh. 4, pg. 15) |
| Defendant | On my way (Exh. 4, pg. 15) |

Defendant was arrested between the 76 gas station and the residence on Yakima shortly after sending his last text message. RP 331-32, 345, 436-39. Defendant had lubrication, condoms, two bags of Skittles, and a phone. RP 344, 440-41. Defendant told police that "Kristl" invited him over to "hang out." Exh. 28. When asked if they talked about sex, defendant said, "She was trying to engage in that and I wasn't privy to it." *Id.* Defendant claimed that someone else could have used his phone, and he denied that the whole text "chat" was from him. *Id.*

At trial, defendant admitted he responded to the Craigslist ad and sent all of the text messages. RP 553-54. He testified that he is an active

participant in the BDSM⁴ community as a “kinkster” or “fetishist.” RP 555. He testified that he thought he was talking to another fetishist interested in age play and that “Lisa” was really an adult woman pretending to be an 11-year-old girl. RP 574-77, 599-602.

C. ARGUMENT.

1. POLICE DID NOT ENGAGE IN OUTRAGEOUS CONDUCT IN VIOLATION OF DUE PROCESS.

“The banner of outrageous misconduct is often raised but seldom saluted.” *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993). To obtain dismissal of a criminal prosecution on the basis of outrageous conduct in violation of due process, the conduct must “shock the universal sense of fairness.” *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (citing *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). Outrageous conduct must be more than mere deception. *Lively*, 130 Wn.2d at 20. Dismissal is a “rarely used judicial weapon” reserved for only the most egregious circumstances, and “[i]t is not to be invoked each time the government acts deceptively.” *Id.* at 20 (internal citations omitted); *State v. Rundquist*, 79 Wn. App. 786, 797, 905 P.2d 922 (1995) (internal citations omitted).

“Public policy allows for some deceitful conduct and violation of

⁴ Defendant testified that “BDSM” stands for “bondage, dominance, sadism, masochism.” RP 555.

criminal laws by the police in order to detect and eliminate criminal activity.” *Id.* at 20 (citing *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973)). *See, e.g., State v. Jessup*, 31 Wn. App. 304, 312-14, 641 P.2d 1185 (1982) (dismissal not warranted based on fact that government agent engaged in acts of prostitution). Undercover police tactics are recognized as an essential means to detect unlawful activity. *State v. Huckaby*, 15 Wn. App. 280, 285-86, 549 P.2d 35 (1976). Thus, the “doctrine of outrageous police conduct must be sparingly applied.” *State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014) (citing *Rundquist*, 79 Wn. App. at 793). Whether the State has engaged in outrageous conduct sufficient to bar prosecution is a matter of law the court reviews de novo. *Lively*, 130 Wn.2d at 19; *State v. O’Neill*, 91 Wn. App. 978, 990-91, 967 P.2d 985 (1998).

In reviewing a defense of outrageous government conduct, the court evaluates the conduct based on the totality of the circumstances. *Lively*, 130 Wn.2d at 21. “Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind ‘proper law enforcement objectives – the prevention of crime and the apprehension of violators.’” *Id.* at 21 (internal citations omitted). Factors to consider when determining whether police conduct offends due process include:

whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.'

Id. at 22 (citations omitted). The focus is on the State's behavior rather than the defendant's predisposition. *Id.* at 22.

Relying on *State v. Lively* and *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), defendant argues that police in this case engaged in outrageous conduct that violated due process. Brf. of App. at 42-51. Defendant's claim fails. Both *Lively* and *Twigg* constitute rare exceptions and are factually distinguishable from the present matter.⁵ Here, police did not engage in egregious conduct. At most, police deceived defendant by impersonating an 11-year-old girl and her "pimp" mother, but mere deception does not constitute outrageous conduct. *See Lively*, 130 Wn.2d at 20. The e-mail, phone and text messaging records show that police only provided the opportunity for defendant to commit a crime, while

⁵ *See United States v. Washington*, 869 F.3d 193, 209 (3d Cir. 2017) ("We have found no occasion since *Twigg* in a published decision to reverse a conviction or invalidate an indictment on the theory that the government has strayed outside of the boundaries contemplated by due process."). *See also, Markwart*, 182 Wn. App. at 348, 350-51 ("The defense of government misconduct is nearly impossible to establish... Since *Lively*, no Washington State court has dismissed a defendant's charges or overturned a conviction because of outrageous government conduct – but not for lack of the defense bar trying").

defendant actively pursued that opportunity and attempted to meet the fictitious 11-year-old to engage in sexual conduct. *See* Exh. 2, 4, 7, 8, 9.

In *Lively*, an informant was “trolling for targets” for a police undercover operation at Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings. 130 Wn.2d at 6, 22-23. The defendant was actively solicited at an AA/NA meeting for the purpose of delivering cocaine. *Id.* at 26. At the time of the offenses, the defendant was a recovering drug addict, and she had recently attempted suicide and was emotionally distraught. *Id.* at 6. After befriending and then initiating an intimate relationship with the defendant, the informant allowed the defendant to live with him and the two discussed marriage. *Id.* at 7-8.

According to *Lively*, over a two-week period, the informant repeatedly asked her to obtain cocaine. *Id.* at 7. *Lively* testified she only agreed to do so because she relied on the informant emotionally. *Id.* at 7. She ultimately complied with the informant’s requests, and the State subsequently charged her with delivery of a controlled substance. *Id.* at 5-6. The Washington Supreme Court concluded that the State’s actions constituted outrageous conduct in violation of the defendant’s due process rights. *Id.* at 1, 27. Although all of the relevant factors pointed to outrageous conduct, the court found most important its conclusion that the government engaged in conduct repugnant to a sense of justice and

contrary to “public policy and...basic principles of human decency. *Id.* at 26-27.

In *Twigg*, federal agents, acting through an informant, both conceived a drug crime (the manufacture of methamphetamine), and then, over a period of months, supplied the defendants with the location, equipment, and raw materials needed to create a “speed” lab. *Twigg*, 588 F.2d at 375-76, 380-81. The government was “completely in charge” of the operation and “furnished all of the laboratory expertise.” *Id.* at 380-81. The court held that the police involvement was “so overreaching as to bar prosecution of the defendants as a matter of due process of law.” *Id.* at 377. The court found, “We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators.” *Id.* at 379.

The police conduct in this case is far different from the conduct in *Lively* and *Twigg*. Here, the totality of the circumstances do not amount to outrageous conduct. Police posted ads on the Casual Encounters section of Craigslist to the Craigslist public at large and only targeted those interested in and looking to sexually abuse children. *See* RP 132-33, 136-38, 140-41, 160-61, 163-66; Exh. 1. Police did not establish a relationship with defendant for the purpose of instigating a crime. Rather, defendant

himself searched the Casual Encounters section of Craigslist and responded to the fictitious ad that offered “young family fun.” RP 165, 196-97, 553-55; Exh. 1, 2. Defendant responded asking to trade pictures and expressing his interest in “some play” with the daughters. Exh. 2. But for defendant responding to the ad posted in the Casual Encounters section of Craigslist, police would not have investigated him as part of this operation.

Second, in contrast to *Lively*, defendant was not reluctant to engage in such conduct. The conversations between defendant and police indicate a reluctance to get caught, rather than reluctance to engage in sexual conduct with a minor. *See* Exh. 4. Defendant initiated interest in “sensual and intimate physical exploration” with “Kristl’s” daughters. Exh. 2. Defendant asked for the daughters’ ages and expressed interest in the 11-year-old and helping her “go all the way.” Exh. 4. He asked for pictures. *Id.* He asked about the “rules” and what he could do sexually. *Id.* And, he repeatedly asked how to proceed and where and when to meet for “play time.” *Id.* When “Kristl” texted that she was “done” with defendant and it was too much hassle, defendant responded by asking about her availability and if he could still come over to meet. *Id.*

Third, unlike in *Twigg*, police did not control the criminal activity but simply allowed the criminal activity to occur. Police did not provide

defendant with any materials, equipment, or “expertise.” The undercover operation involving defendant lasted only a few days. RP 207-08, 345; Exh. 1, 2, 4, 5. And, there was no emotional attachment or significant relationship between defendant and the undercover officers. *See Lively*, 130 Wn.2d at 7, 24.

Fourth, according to Sgt. Rodriguez’s testimony, the police motive in the Net Nanny Operation was to prevent crime and protect children. *See Lively*, 130 Wn.2d at 22. He testified that the operation was a “proactive way to go after people or identify people who...want to do harm to kids” and the goal was to “rescue children.” RP 132-33.

Finally, the government conduct itself did not amount to criminal activity and was not “repugnant to a sense of justice.” *Lively*, 130 Wn.2d at 22. As *Lively* noted, public policy allows for some deceitful conduct and violation of criminal law by the police in order to detect and eliminate criminal activity. *Id.* at 20. *See, e.g., Emerson*, 10 Wn. App. at 242 (police conduct did not offend public policy where undercover officer engaged in sexual intercourse with prostitutes paid by money furnished by police department). Here, police posed as an 11-year-old girl and her mother for the purpose of identifying individuals actively interested in sexually abusing children. *Twigg* and *Lively* are the exception. The total circumstances demonstrate that the police conduct in this case did not

offend due process. Defendant's claim of outrageous government conduct accordingly fails.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR⁶ OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND INTENTIONED.

To prove that a prosecutor's actions constitute error, a defendant must show that the prosecutor did not act in good faith and 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 (2011) (citing *State v.*

⁶ "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 (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 (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.

Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

The defendant has 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 that 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, 293-294, 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 instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

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, 85-86, 882 P.2d 747 (1994). "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. The

prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993).

A prosecutor is, however, allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. And, a prosecutor may also argue credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness).

Failure by the defendant to object to an improper remark

constitutes a waiver of that 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 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument “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); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). “Accordingly, reviewing courts focus less on whether the prosecutor’s [error] was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the State committed reversible error by conducting improper voir dire, improperly vouching for police

witnesses and bolstering the State's case, misstating the law and lessening the State's burden of proof, inflaming the jurors' passions, disparaging defense, and arguing facts not in evidence. *See* Brf. of App. at 19-42.

Defendant failed to object to most of the alleged error during trial. For the reasons set forth below, defendant fails to demonstrate that the prosecutor's actions were improper, prejudicial, or flagrant and ill-intentioned.⁷ Defendant's claim of prosecutorial error accordingly fails.

- a. Defendant waived any challenge to the State's questioning of jurors by failing to object and by accepting the jury as constituted. Moreover, the State engaged in appropriate voir dire.

Although a defendant has a right to trial by an impartial jury, the "defendant has no right to be tried by a particular juror or by a particular jury." *Gentry*, 125 Wn.2d at 615. The purpose of voir dire "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,

⁷ Defendant largely fails to provide meaningful analysis as to *how* the prosecutor's actions were either improper or prejudicial. His arguments are comprised primarily of citations to the record and conclusory statements. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); RAP 10.3(a). *See also, State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by* 170 Wn.2d 117 (2010) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review").

371 (1985) (internal citations omitted). *See also*, CrR 6.4(b). Voir dire should not be used to educate the jury as to the facts of the case, to prejudice the jury for or against a party, to indoctrinate the jury, or to argue the law. *Frederiksen*, 40 Wn. App. at 752. The court supervises the voir dire process. CrR 6.4(b). 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 will not be disturbed on appeal. *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000).

A defendant waives any challenge to questioning during voir dire by failing to object to the questioning. *State v. Elmore*, 139 Wn.2d 250, 277, 985 P.2d 289 (1998). Jury selection involves compliance with a procedural court rule rather than a constitutional issue, and therefore, a party may not raise such a challenge for the first time on appeal. *Gentry*, 125 Wn.2d at 615-16. *See also*, RAP 2.5(a)(3). A defendant who accepts a jury as constituted and does not exhaust his peremptory challenges **cannot show prejudice** based on the jury's composition. *Elmore*, 139 Wn.2d at 277-78 (emphasis added) (citing *State v. Tharp*, 42 Wn.2d 494, 500, 256 P.2d 482 (1953) (defendant must show the use of all his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror and is barred from any claim of error in this regard); *State v. Collins*, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (no

prejudicial error regarding prosecutor's questioning of panel where defendant accepted the jury while having available four peremptory challenges; nor did he challenge the panel); *Gentry*, 125 Wn.2d at 616 (where defendant participated in selecting and ultimately accepted jury panel, his constitutional right to an impartial jury selected by him was not violated)).

Here, defendant argues that the prosecutor used voir dire to improperly educate the jury to the facts of the case, introduce inadmissible evidence, and prejudice the jury. Brf. of App. at 24-29. However, defendant failed to object to any of the alleged instances of error. *See* RP 6-88. And, defendant did not exercise all of his peremptory challenges. CP 92. Defendant waived these arguments by not objecting, and he cannot show prejudice based on the jury's composition because he did not exhaust his peremptory challenges. *See Elmore*, 139 Wn.2d at 277-78. Defendant's challenge to the State's questioning of jurors is not properly raised, and this Court should therefore decline to review his claim of error. *Id.*

However, even if this Court were to consider defendant's waived arguments, review of the alleged instances of error shows that the prosecutor did nothing more than inquire about matters important to the State's ability to determine challenges for cause and the advisability of

peremptory challenges. The State's questions were proper, and defendant cannot show prejudice.

Before voir dire commenced, defendant agreed that it would be appropriate to tell the jury panel that the case involved a sting operation. RP (9/1/16) 81-82. *See also*, RP 43. The court informed the jury panel about the nature of the case, including that it involved an undercover "sting operation" "using an ad placed in the Casual Encounters section of the web site Craigslist.com." RP (9/1/16) 88; CP 18-19. *See* CrR 6.4(b) ("The judge shall initiate voir dire examination by identifying the parties...and by briefly outlining the nature of the case"). Defendant did not object to this statement. The court further informed the jury panel that no evidence would be presented during the jury selection process. RP (9/1/16) 88.

The prosecutor began voir dire by telling the jury panel, "It's your opinion that matters here because what we are trying to do is to pick a jury that's going to be fair to both sides." RP 9. The prosecutor proceeded to ask the panel about their experience using the Internet and inquired specifically about Craigslist. RP 10-11, 19-21. The prosecutor asked about their familiarity with the Causal Encounters section of Craigslist. RP 11-13. The prosecutor's subsequent questions concerned online dating websites and their familiarity with websites offering sex for sale. RP 14-

16. He asked for the jurors' opinions regarding who should be held responsible for illegal activity advertised online. RP 15-16. After a prospective juror offered that Craigslist ads could be flagged as inappropriate, the prosecutor then asked about experience flagging an ad. RP 16-18. 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 or experience could cause a juror to be biased.

The prosecutor asked if anyone watched shows involving "sting" operations like "To Catch a Predator." RP 22. He followed that question by asking if anyone felt bad for the individuals who showed up and were arrested, if sting operations were a "good idea or bad idea," and whether people should be punished criminally for their thoughts. RP 22-25. These questions were important to enable the prosecutor to detect whether any of the jurors harbored prejudices or sympathies regarding defendants caught in sting operations.

The prosecutor asked the jurors about their ability to make decisions using common sense rather than sympathy or prejudice. RP 55-58. The purpose of these questions was to determine if the jurors could be fair and impartial. The prosecutor then discussed potential hesitation to acknowledge familiarity with Casual Encounters, and he told the jurors

that defendant was entitled to a fair trial and asked if they could give both defendant and the State a fair trial in this case. RP 59-61. The prosecutor concluded voir dire by reminding the jury that defendant was presumed innocent and if the State did not meet its burden beyond a reasonable doubt, then “you have to find him not guilty.” RP 60, 63.

Defendant did not object to any of these questions. *See* RP 6-88. Rather, defense counsel addressed topics discussed by the prosecutor and prospective jurors during his time for questioning. *See* RP 29-30 (questions regarding immoral versus illegal activity), 30-33 (questions regarding online dating), RP 34-36 (questions regarding views on Casual Encounters and “one-night stands”). Defense counsel acknowledged that information provided to the jurors during voir dire, including the nature of the case, was for a purpose. RP 72-73 (“We can't ask you questions in a vacuum, right? We are trying to figure out if you can be a fair jury, so we have got to get you just enough so you can try to figure out whether this is the right case, right?”).

The prosecutor’s questions here were proper. As defense counsel acknowledged, the parties had to provide “just enough” information to the jurors to determine if they could be fair and impartial in this type of case. However, even if the prosecutor’s questions were improper, defendant cannot show prejudice. Defendant agreed to the court’s preliminary

statement to the jury panel informing them about the nature of the case. RP (9/1/16) 81-82, 88; RP 43; CP 18-19. As discussed above, defense counsel used voir dire to explore topics raised by the court and the prosecutor. The jury panel was told that nothing said during the jury selection process was evidence. RP (9/1/16) 88-89; RP 72-73. And, again, defendant did not exercise all of his peremptory challenges. CP 92.

This Court should decline to address defendant's assertions that the State asked improper questions during voir dire, because he failed to object to such questions and he accepted the jury as empaneled. Despite defendant's failure to preserve his claim of error, the prosecutor's questions here were proper, and even if this Court finds they were improper, they were easily curable by jury instructions. *See Emery*, 174 Wn.2d at 761. 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, and since defendant cannot show prejudice by virtue of accepting the jury as constituted, this Court should affirm defendant's convictions.

- b. The State properly referred to the nature of the crime and the evidence during opening statement.

“A prosecutor is not muted because the acts committed arouse natural indignation.” *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469

(2006) (quoting *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)). A prosecutor is not barred from referring to the repugnant nature of a crime but nevertheless retains the duty to ensure a verdict “free of prejudice and based on reason.” *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984).

During his opening statement here, the prosecutor stated:

The Casual Encounter section of Craigslist is filth like almost no other. There are any number of different sections in the Casual Encounter section as a whole, and they are divided by who is looking for whom...Each time you click on one of those sections, you open up a list of 2000-plus advertisements, many with pictures, some without, all of which have the ability to be replied to. Sergeant Rodriguez will tell you about some of the advertisements that they have come across when they do these operations because not only does Sergeant Rodriguez post the advertisements, but while he is responding to people who are responding to him, he is also looking up other ads, people who are offing up children, people who are offering up acts of bestiality, with animals, people offering up all kinds of stuff you cannot believe, and the filthier the better in some respects. And you'll see, as Sergeant Rodriguez walks you through Craigslist, the different type of advertisements.

RP 120-21. The prosecutor proceeded to tell the jury what the State's evidence was expected to show. RP 121-25. He concluded by stating,

So that's the evidence that the State expects for you to hear in this case...I am going to also apologize in advance for some of the evidence and some of the things you are going to see in this case because they are offensive content. Unfortunately, it's the defendant's actions that are bringing us here today, and at the end of this case, I will be asking that you return to verdict of guilty of Attempted Rape of a Child in the First Degree and Attempted Commercial Sexual Abuse of a Minor.

RP 125-26.

Defendant did not object to these statements at trial and did not request a curative instruction. Thus, he bears the burden of proving (1) that the prosecutor's remarks were improper, (2) that the remarks were so flagrant and ill-intentioned that they resulted in enduring prejudice, and (3) that the prejudice could not have been alleviated by a proper curative instruction. See *Emery*, 174 Wn.2d at 761; *Thorgerson*, 172 Wn.2d at 455. Defendant fails to meet his burden.

The prosecutor properly outlined for the jury what the State's evidence was expected to show. See *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). In doing so, he referenced the nature of the evidence (the Craigslist ads posted in Casual Encounters) and the nature of the crimes. See, e.g., *Borboa*, 157 Wn.2d at 123 (neither improper nor prejudicial for prosecutor to refer to the "horrible" nature of the crime). Given the nature of the charges – attempted rape of a child and attempted commercial sexual abuse of a minor – this was not improper.

However, even if the prosecutor's remarks were improper, they were not flagrant and ill-intentioned and did not result in enduring prejudice. During defense counsel's opening statement, he referred to the expected evidence as "a nasty story." RP 127. Defendant testified that he

has been an “active participant in the BDSM community and an active kinkster...or fetishist.” RP 555. Defendant acknowledged that “in many people’s eyes it’s highly offensive and morally reprehensible to discuss things that happen[] in the...BDSM community.” RP 552. He described himself as a “facilitator” in “fetish, fantasy, kink play,” including “pet play” and “age play.” RP 561-64.

In closing argument, defense counsel acknowledged that the jury may have found it difficult to listen to the evidence and stated, “[W]hat you are ultimately asked to decide isn’t whether you agree with his life-style...or are disgusted with it...its’s difficult, but you’ve got to be able to set that aside.” RP 809. *See also*, RP 823 (“we are also asking you to consider all sorts of evidence that you probably didn’t want to hear”). Defendant cannot show prejudice from the prosecutor’s remarks where defendant himself described his BDSM life-style as “alternative,” “not mainstream,” and “not generally accepted,” and where he acknowledged his life-style was viewed as “highly offensive” and “morally reprehensible.” RP 552, 652-53.

The court instructed the jury that “the lawyers’ statements are not evidence” and that they must reach their decision based on the facts proved and the law given and “not on sympathy, prejudice, or personal evidence.” CP 22-40 (Instruction No. 1). The jury is presumed to follow

the court's instructions. *Stein*, 144 Wn.2d at 247. Thus, there could be no "substantial likelihood" that the prosecutor's statements, even if construed as improper, "affected the jury's verdict," and therefore, the remarks could not have been prejudicial. *Yates*, 161 Wn.2d at 774. Moreover, any prejudice could easily have been alleviated by a proper curative instruction had defendant requested one. Defendant's claim of prosecutorial error accordingly fails.

- c. The State properly introduced evidence concerning the nature of, and reason for, the undercover operation that resulted in defendant's arrest.

It is improper for a prosecutor to personally vouch for the credibility of a witness. *Warren*, 165 Wn.2d at 30; *Brett*, 126 Wn.2d at 175. Vouching occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2011). It is also generally improper for prosecutors to bolster a police witness's good character, even if the record supports such argument. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). However, on appeal, the court will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion." *Warren*, 165 Wn.2d at 30. *See, e.g., State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (prosecutor improperly stated

personal belief by telling the jury, “*I believe [the witness]. I believe him*”).

Here, defendant argues the prosecutor “bolstered the Task Force’s actions and vouched for the police witnesses’ credibility.” Brf. of App. at 19. First, defendant repeatedly cites to witness testimony, rather than the prosecutor’s questions or argument, in support of his claim of prosecutorial error. *See* Brf. of App. at 21-24. Defendant thus improperly frames a challenge to the evidence (e.g., the probative value of the witness’s testimony versus any prejudice under ER 402 and 403) as prosecutorial error, where the challenged statements were made not by the prosecutor but rather Sgt. Rodriguez. Defendant’s claim is more properly an evidentiary challenge. In order to preserve an evidentiary challenge on appeal, a party must make a specific objection to the admission of the evidence before the trial court. ER 103; *State v. Ruiz*, 176 Wn. App. 623, 644, 309 P.3d 700 (2013); *State v. Fleming*, 155 Wn. App. 489, 498, 228 P.3d 804 (2010) (a party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence). Failure to do so precludes appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Here, defendant failed to object to any of the allegedly improper testimony. Thus, defendant failed to preserve the issue below.

Second, defendant’s claim of improper vouching and bolstering

fails, because the prosecutor neither made statements conveying his personal belief about the law enforcement witnesses' credibility, nor did he introduce evidence that the witnesses received awards or had distinguished careers. Rather, the prosecutor properly introduced evidence regarding the purpose of the MECTF and the nature of the Net Nanny Operation which led to defendant's arrest. Defendant's argument accordingly fails.

During his opening statement, the prosecutor outlined the expected evidence regarding the various task forces involved in this case and the purpose and nature of the "Net Nanny Operations." RP 119-122. During an opening statement, a prosecutor may state what the State's evidence is expected to show. *Magers*, 164 Wn.2d at 191. Sgt. Rodriguez subsequently testified regarding his role with the MECTF, the general purpose of the task force, and the task force's use of undercover operations, such as the Net Nanny Operations, to address sex crimes against children.⁸ RP 130-36. He testified regarding the mechanics and

⁸ See, e.g., RP 132 (prosecutor asks, "What is the purpose in general of the Missing Exploited Children's Task Force with the State Patrol?"); RP 132 (prosecutor asks witness to describe Net Nanny Operations); RP 133 (prosecutor asks how operation accomplishes its stated purpose); RP 134 (prosecutor asks witness about experience supervising Net Nanny Operations); RP 135-36 (prosecutor asks witness about mechanism used for operation as well as his personal role); RP 136 (prosecutor asks about training); RP 140 (prosecutor asks for quantity and response time of responses to Craigslist ads); RP 160 (prosecutor asks, "[H]ow do you determine when you are going to post a new ad, how many you are going to post?"); RP 161 (prosecutor asks, "Was there a particular theme in the ads that you were posting during the Pierce County Net

procedures of the Net Nanny Operations, and the theme of the particular operation in this case. *See* RP 133-71, 208-09. Defendant objected neither to the questions asked nor the answers given.

Defendant was contacted by police as part of the Pierce County Net Nanny Operation. RP 163. Defendant cites to no legal authority in support of his argument that it is improper to ask questions and introduce evidence regarding the purpose and nature of an undercover operation. Rather, the State is generally entitled to submit evidence concerning a police witness's experience and the nature of, and reason for, the operation that resulted in a defendant's arrest. *See, e.g.*, ER 702; *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992) ("Practical experience is sufficient to qualify a witness as an expert").

In *State v. Perez-Arellano*, 60 Wn. App. 781, 783, 807 P.2d 898 (1991), the trial court permitted multiple police officers to testify that the area in which the defendant was arrested was known as a high crime neighborhood. On appeal, the court held that this evidence was relevant and helpful to the jury, because it explained why the police were observing that area. *Id.* at 784-85. The court stated,

The average juror has little or no knowledge or

Nanny Operation?"); RP 169 (prosecutor asks, "When you...get a response to this ad[], do you focus on just that response, or are you responding to multiple different people at once?" and "How do you end up focus[ing] on individuals?"); and RP 208 (prosecutor asks, "What does it take...to have the operation kick off?").

understanding of police drug operations and may well wonder whether it is appropriate, or even legal, for police to hide in tall buildings, watch people, and then arrest them when they engage in illegal conduct. Testimony explaining why a particular area was chosen for observation is therefore relevant to explain the circumstances of an arrest.

Id. at 784. The challenged questions and evidence here generally served these purposes and was proper.⁹

During cross-examination, defense counsel asked Sgt. Rodriguez about the operation's funding and suggested there was "pressure to get some results" because of the money involved. RP 358-62. On redirect examination, the prosecutor countered this suggestion by confirming with Sgt. Rodriguez that the Net Nanny Operation which led to defendant's arrest was not for the purpose of getting paid but rather for the previously stated purpose of preventing sexual abuse of children. RP 132-33, 389-90. Defense counsel did not object to this line of questioning. These questions were a proper response to the arguments of defense counsel and did not constitute improper vouching or bolstering. *See State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) (a prosecutor is entitled to make a fair response to the arguments of defense counsel).

The prosecutor did not commit error. However, because defendant

⁹ Again, however, these arguments are regarding the relevance of the testimony, which is an evidentiary issue under ER 401, 402 and 403. Defendant waived any evidentiary challenge by failing to object. *See Guloy*, 104 Wn.2d at 422.

did not object to any of the prosecutor's questions or remarks cited above, he waived any error unless the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Here, any prejudice could have been cured by a timely objection and curative instruction. An appellate court will not find prejudicial error for improper vouching "unless it is *clear and unmistakable* that counsel is expressing a personal opinion." *Warren*, 165 Wn.2d at 30 (emphasis added). The prosecutor here made no such statements, and his questions of Sgt. Rodriguez pertained to the officer's training, practical experience and qualifications.¹⁰ Notably, defendant fails to even address prejudice in his argument. *See* Brf. of App. at 19-24. Defendant cannot meet his burden to show the requisite prejudice if he fails to even argue prejudice. *See Emery*, 174 Wn.2d at 760-61. Defendant therefore waived any error.

The only objection made by defendant to the allegedly improper remarks was during the State's closing argument. RP 798. While addressing defendant's three statements to "Kristl," Detective Garden, and the jury during trial, the prosecutor stated,

I stand here right now and tell you [defendant] is still

¹⁰ *See also, State v. Smith*, 67 Wn. App. 838, 845, 841 P.2d 76 (1992) (erroneous admission of evidence of arresting officer's awards and commendations was not prejudicial, where jury could legitimately consider officer's properly allowed substantial training and experience in 2,000 drug arrests as foundation for his testimony).

presumed innocent as he sits here today...He is presumed innocent, but he is not presumed credible. **You evaluate his testimony in this trial the same way as you evaluate...all of the witnesses who testified. You evaluate their credibility the same way using the same standard.**

RP 787-88 (emphasis added). Later, while still discussing witness credibility, the prosecutor stated,

I am going to suggest to you -- one of the things the judge read you was an instruction that said you can consider any...interest in the outcome, bias or prejudice. I would suggest that you apply that standard to the defendant particularly. Because if there is anyone who has an interest in the outcome of this case, it's him.

RP 798. Defense counsel objected to the phrase "particularly to the defendant," and before the court sustained the objection, the prosecutor said, "Yeah...I will clarify that." RP 798. Defense counsel did not request a curative instruction. *Id.* The prosecutor then clarified,

I am not saying weigh his testimony differently. I am encouraging you, asking you to apply the same standard you applied to Detective Rodriguez, Samantha Knoll, Agent Berg, Trooper Gasser and Detective Garden. Apply the same exact standard...Ask yourself, what interest do they have in the outcome of this case? What bias? What prejudice?

RP 798 (emphasis added). The prosecutor then asked the jury to consider the credibility of the State's witnesses and any bias, prejudice, or interest they may have. RP 798-99. Defense counsel did not object to these statements.

Although the prosecutor perhaps used vague wording in suggesting the jury “apply that [credibility] standard to the defendant particularly,” he clarified his statement and again asked the jury to assess defendant’s credibility in the same manner as the other witnesses. *Id.* See also, RP 788. Moreover, the court instructed the jury that they were the “sole judges of the credibility of each witness” and the “sole judges of the value or weight to be given to the testimony of each witness.” CP 22-40 (Instruction No. 1). Juries are presumed to follow their instructions. *Stein*, 144 Wn.2d at 247. See also, RP 807-08 (defense counsel states, “counsel is correct and the instructions say you get to decide how much credibility or weight you give to the evidence”). The prosecutor did not express his personal opinion as to the credibility of the State’s witnesses. Rather, he permissibly argued inferences from the evidence adduced at trial. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Viewing the prosecutor’s challenged statements in the context of the whole argument, the arguments were proper. See *Russell*, 125 Wn.2d at 85-86.

However, even if the prosecutor’s remarks during closing argument were improper, defendant cannot show prejudice where defense counsel failed to request a curative instruction, and any curative instruction given would essentially have mirrored the prosecutor’s clarifying statements. Defendant’s claim of improper vouching and

bolstering accordingly fails.

d. The State properly discussed the elements of the crimes during closing argument.

Misstating the law is improper and has the potential to mislead the jury. *State v. Davenport*, 100 Wn.2d 757, 763, 657 P.2d 1213 (1984).

Here, defendant claims the prosecutor misstated the law during closing argument by “conflating the two charges.” Brf. of App. at 30-32.

Defendant fails to show the prosecutor’s arguments, which followed the court’s instructions to the jury, were improper. Moreover, defendant did not object to the prosecutor’s remarks, and he cannot show that any prejudice could not have been cured by an instruction to the jury.¹¹

The court instructed the jury regarding the elements of Attempted Rape of a Child in the First Degree and Attempted Commercial Sexual Abuse of a Minor. CP 22-40 (Instruction Nos. 5, 9, 10, 12). Both crimes require proof that defendant did an act that was a substantial step toward the commission of the completed crime, and that the act was done with the intent to commit the completed crime. *Id. See also*, RCW 9A.28.020. The court also instructed the jury regarding the completed crimes of Rape of a Child in the First Degree and Commercial Sexual Abuse of a Minor. CP 22-40 (Instruction Nos. 7, 11).

¹¹ Again, defendant fails to even address prejudice in this argument. *See* Brf. of App. at 30-32.

A person commits Rape of a Child in the First Degree when that person has sexual intercourse with a child who is less than twelve years old and who is not married to the person and who is at least twenty-four months younger than the person. CP 22-40 (Instruction No. 7); RCW 9A.44.073. A person commits Commercial Sexual Abuse of a Minor when he pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return for the fee the minor will engage in sexual conduct with him; or he solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee. CP 22-40 (Instruction No. 11); former RCW 9.68A.100(b), (c) (2015). “Sexual conduct” means sexual contact or sexual intercourse. *Id.* The instructions here were accurate statements of the law, and defendant does not allege instructional error.

During closing argument, the prosecutor stated that the elements of the two charges were “intent to commit the completed crimes and a substantial step.” RP 780-81. *See also*, RP 782-83.¹² As noted above, this was an accurate statement of law and the instructions as given. *See* RCW 9A.28.020(1). The prosecutor then discussed the completed crimes as follows:

Rape of a Child First Degree, the completed crime, requires

¹² The prosecutor stated, “So attempt to commit a crime, I am going to talk about those crimes again together because the elements are so similar. For Attempted Rape of a Child 1, it’s intent to commit the crime, a substantial step. For Commercial Sex Abuse of a Minor, it’s intent to commit the crime, a substantial step.” RP 782-83.

sex, and by that I mean sexual intercourse with a child under 12 not married to the defendant and more than 24 months younger. Commercial Sex Abuse of a Minor requires sexual conduct with a minor for a fee. So there is a lot of overlap between the two crimes. The age of the child; under 12 is a minor...[S]exual conduct is described as sexual intercourse or sexual contact...Both of those two things, sexual intercourse and sexual contact, equal sexual conduct. So the only difference really between the completed crime[s] is the element of "for a fee."

RP 781. Again, this was an accurate statement of the law and instructions. The prosecutor properly argued that there was "overlap" between the two crimes, as "a child under 12" for purposes of Rape of a Child in the First Degree is necessarily a "minor" for purposes of Commercial Sexual Abuse of a Minor, and "sexual intercourse" for purposes of Rape of Child in the First Degree is necessarily "sexual conduct" for purposes of Commercial Sexual Abuse of a Minor. RCW 9A.44.073; former RCW 9.68A.100 (2015). It was also accurate to argue that the element "for a fee" distinguishes the two crimes, because sexual intercourse with a child under 12 years old is first degree child rape, whereas sexual intercourse with the same child in return for a fee is commercial sexual abuse of a minor. *Id.*

The prosecutor distinguished that they were two separate crimes. RP 781 ("And when you agree to pay a fee to a minor or a third person in exchange for sexual contact with a minor, you've committed an *additional*

crime here in Washington which is Commercial Sexual Abuse of a Minor”) (emphasis added). This too was an accurate statement of the law. Rape of a Child in the First Degree and Commercial Sexual Abuse of a Minor are separate crimes charged under separate statutes. RCW 9A.44.073; former RCW 9.68A.100 (2015).

Finally, in discussing defendant’s intent to commit both crimes, the prosecutor argued,

If you believe and if you find that [the defendant] thought he was talking about an actual girl, then he is guilty of both counts. And if you find that he thought this was all pretend and he was dealing with an adult who was going to pretend to be 11, then he is not.

RP 785. In context, this was a proper argument. The prosecutor had already told the jury that both crimes required proof of intent and a substantial step. RP 780-83. He had already discussed the different requirements of the completed crimes. RP 781-82. He discussed the evidence that supported defendant took a substantial step. RP 783-85. Thus, in context, the prosecutor’s argument above was that if the jury found that defendant intended to have sexual intercourse with an actual 11-year-old girl in return for a fee and he took a substantial step, then the elements of both crimes were satisfied.¹³ If, however, the jury found that

¹³ There was no dispute during trial that defendant (an adult male) was not married to the fictitious 11-year-old. *See, e.g.*, RP 536.

defendant intended to have sexual intercourse with an adult pretending to be an 11-year-old girl in return for a fee, then the elements were not satisfied. This was an accurate statement of the law.

Defendant fails to demonstrate the prosecutor's arguments were improper. And, even if they were improper, defendant fails to demonstrate that a curative instruction could not have cured any resulting prejudice. Defendant neither objected to these arguments during trial nor requested a curative instruction. Defendant cannot show prejudice, where the court instructed the jury: that the attorneys' statements during closing argument are not evidence; that a separate crime is charged in each count and they must decide each count separately; that the State has the burden of proving each element of each crime beyond a reasonable doubt; and that the elements of both crimes require proof of intent to commit the completed crime and a substantial step. CP 22-40 (Instruction Nos. 1, 2, 9, 12, 13). These instructions cured any potential juror confusion, and jurors are presumed to follow their instructions.¹⁴ *Stein*, 144 Wn.2d at 247. Thus, defendant fails to establish prosecutorial error.

- e. The State's movie analogy used to describe "a substantial step" was proper and did not minimize

¹⁴ Moreover, defense counsel stated during closing argument, "Your job is to try to decide whether or not the State has met its burden...beyond a reasonable doubt, whether they have proved the elements of the offense, in this case two offenses, each offense separately, but evidence of any particular offense beyond a reasonable doubt." RP 804. This statement, in addition to the court's instructions, cured any potential confusion.

the State's burden of proof.

An argument that trivializes the State's burden of proof and compares the reasonable doubt standard to everyday decision making is improper. *Lindsay*, 180 Wn.2d at 436. However, analogy arguments are proper when they accurately convey the law and describe the evidence. *See, e.g., State v. Fuller*, 169 Wn. App. 797, 823-28, 282 P.3d 126 (2012); *State v. Curtiss*, 161 Wn. App. 673, 699-01, 250 P.3d 496 (2011).

Here, the prosecutor argued in closing:

The law doesn't require that you take every single step up to and including the act, itself, getting undressed and having this 11-year-old girl come close enough to engage in sexual contact in order to be guilty of attempt. The law says "a substantial step."

If you put it in real-world terms...if you get together with your spouse or your children and you talk about going to a movie and you decide what movie you're going to go to, what theater you're going to go to, what time the movie is going to be, and then you get in your car and you drive to the movie; you have your money; you get some candy because you are not going to pay that kind of price at the movie theater and it's in your pocket; you get to the movie theater and the phone rings and you get called away and you can't go, did you intend to see a movie? That's what the law criminalizes in the attempted commission of a crime, a substantial step. This crime was completed when the defendant got in his car in Enumclaw. It was certainly completed when he got to the gas station. It was completed by the fact that he took the condoms and lube out of the containers that they were in and put them in his clothing in order to go into the house. And it was completed when he left the gas station and drove on his way to the residence before getting pulled over.

RP 783-84.

Here, the prosecutor was not even discussing the beyond a reasonable doubt standard. Rather, he was discussing “a substantial step” in the context of criminal attempt. He did not draw any analogy between going to a movie and proof beyond a reasonable doubt. *See* RP 783-84. He never equated going to a movie with being convinced beyond a reasonable doubt, and therefore, never misstated the law or minimized his burden of proof.

Defendant cites to *Lindsay* in support of his argument that the prosecutor’s movie analogy improperly “trivialized the gravity of the State’s charges.” Brf. of App. at 32. However, the rule in *Lindsay* does not apply here, because the State used the movie analogy to describe the evidence, not to explain reasonable doubt. The prosecutor committed no misconduct or error whatsoever. Hence, these comments were not improper and defendant has failed to meet his burden of showing prosecutorial error.

However, even assuming the impropriety of the prosecutor’s comments, the defendant did not object below, and he fails to show the comments were so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice. Again, defendant fails to even allege or discuss prejudice in his argument. *See* Brf. of App. at 32-33. In the present case, the trial court gave proper instructions on

proof beyond a reasonable doubt and “a substantial step,” as well as a proper instruction that the jury “must disregard any remark, statement, or argument [made by the lawyers] that is not supported by the evidence or the law in [the] instructions.” CP 22-40 (Instruction Nos. 1, 2, 8); *Curtiss*, 161 Wn. App. at 700. Because this Court “presume[s] that the jury follows the court’s instructions,” *Id.* (citing *Stein*, 144 Wn.2d at 247), this Court must presume that even if the prosecutor misstated the law, the jury would, under Instruction No. 1 disregard that misstatement, and, under Instruction Nos. 2 and 8, apply the proper standards. *Curtiss*, 161 Wn. App. at 699.

This is especially true given other statements made by both the prosecutor and the defense. Both parties reiterated the reasonable doubt standard during argument. *See, e.g.*, RP 799-800, 804, 806-08, 823, 827-29. In this context, there could be no “substantial likelihood” that the prosecutor’s movie analogy, even if construed as improper, “affected the jury’s verdict,” and therefore, the remarks could not have been prejudicial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Because the prosecutor’s comments were a proper “analogy” used to describe “a substantial step,” and because, even if they were construed as improper, they were neither flagrant and ill-intentioned nor incurably prejudicial, the defendant has failed to meet his burden of showing prosecutorial error.

Therefore, defendant's convictions should be affirmed.

- f. The State properly asked the jury to hold defendant responsible by returning a verdict of guilty based on the evidence proved beyond a reasonable doubt.

A prosecutor has a duty to seek a verdict based on the evidence without appealing to the jury's passion and prejudice. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future criminal activity. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). However, "[a]rguments by the State asking the jury to act as 'a conscience of the community' are not improper unless intended to inflame the jury." *State v. Davis*, 141 Wn.2d 798, 873, 10 P.3d 977 (2000).¹⁵ In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991); *Lewis*, 156 Wn. App. at 240.

Defendant argues the prosecutor here improperly asked the jury during closing argument to "send a message" by holding defendant

¹⁵ See also, e.g., *State v. Finch*, 137 Wn.2d 792, 839-42, 975 P.2d 967 (1999) (prosecutor's comments during rebuttal closing argument in murder prosecution that "when something happens in a civilized land, we want that something to be dealt with by the rule of law," and that because an entire county could not be called, jurors were the "representative sampling," "conscience," and "voice of law" of community, did not amount to prosecutorial error).

responsible. Brf. of App. at 33-34. During rebuttal argument, the prosecutor actually stated,

This is the greatest country in the world. We have unlimited freedoms. We can live whatever life-style we want. Consenting adults can do whatever they want behind closed doors. You get to make any choice you want. You can choose to do illegal stuff, like have sex with a child, in this country. But the price for that freedom is that if you make those decisions, you will be held accountable. He decided to have sex with an 11-year-old-girl, and he decided he was going to pay for it to accomplish it. And now it's up to you folks to hold him responsible for what he did.

RP 828-29. Defense counsel objected, and the court overruled the objection. RP 829. The prosecutor concluded by stating, "When the evidence is there, beyond a reasonable doubt, the just verdict is also what holds the defendant responsible and that's a verdict of guilty as charged..." RP 829. Defendant did not object to this statement and did not request a curative instruction.

In this case, the prosecutor's closing argument does not amount to a so-called "call to arms" that was intended to inflame the jury. The prosecutor did not urge the jury to ignore the evidence in this case or introduce new evidence in closing argument, nor did the prosecutor instruct the jury to uphold moral order by convicting defendant. At no point did the prosecutor suggest that the jurors, acting on behalf of the community, had a civil duty to convict defendant. The prosecutor, in

rebuttal argument, discussed the evidence that showed defendant intended to have sex with an 11-year-old girl, and based on that evidence proved beyond a reasonable doubt, asked the jury to hold defendant responsible by finding him guilty. RP 824-29. The prosecutor's remarks were not improper.

In *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), the court found the prosecutor's plea to the jury to send a message to society about the general problem of sexual abuse was an improper, *but not prejudicial*, emotional appeal. There, the prosecutor argued, "[D]o not tell that child that this type of touching is okay... Let her and children know that you're ready to believe them and [e]nforce the law on their behalf." *Bautista-Caldera*, 56 Wn. App. at 195. See also, *State v. Perez-Mejia*, 134 Wn. App. 907, 916-20, 143 P.3d 838 (2006) (prejudicial error for prosecutor to urge jury to "send a message" that "we had enough. We will not tolerate it any longer," in addition to other objectionable remarks that invoked the jurors' patriotic sentiments).

Here, in contrast, the prosecutor asked the jury to hold defendant responsible based on the evidence proved beyond a reasonable doubt. The argument did not ask the jury to "send a message" and was not intended to inflame the jury. Rather, the remarks were designed to ensure a just

verdict based on the evidence presented.¹⁶ Defendant cites to no Washington authority holding that a prosecutor's statement asking the jury to "hold[] the defendant responsible" based on the evidence presented and proved beyond a reasonable doubt is improper or prejudicial. The prosecutor's statements were proper.

Additionally, the trial court instructed the jury not only as to the State's burden of proof and defendant's presumption of innocence, but also that the attorneys' arguments are to be disregarded if they are not supported by the law or the evidence. CP 22-40 (Instruction Nos. 1, 2). These instructions ameliorate any concern that the jury was unfairly prejudiced by the prosecutor's argument. *See Stein*, 144 Wn.2d at 247. Moreover, there was overwhelming evidence of defendant's guilt by way of the e-mails, text messages, and phone calls admitted into evidence (and acknowledged by defendant as his statements). Exh. 2, 4, 7, 8, 9; RP 553-54. Thus, there could be no "substantial likelihood" that the prosecutor's comments, even if construed as improper, "affected the jury's verdict," and therefore, the remarks could not have been prejudicial. *Yates*, 161 Wn.2d at 774. Defendant's claim of prosecutorial error accordingly fails.

- g. The State argued permissible inferences from the evidence during closing argument.

¹⁶ It is not error for the State to ask the jury to return a just verdict supported by the evidence. *Fuller*, 169 Wn. App. at 822 (citing *Curtiss*, 161 Wn. App. at 701).

The State is allowed to draw reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 727. The State is also allowed to argue that evidence does not support the defense theory. *Thorgerson*, 172 Wn.2d at 449 (citing *Russell*, 125 Wn.2d at 87). And, “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87. A prosecutor’s comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Yates*, 161 Wn.2d at 774.

During closing argument here, the prosecutor stated:

That's what the law criminalizes in the attempted commission of a crime, a substantial step. This crime was completed when the defendant got in his car in Enumclaw. It was certainly completed when he got to the gas station... And it was completed when he left the gas station and drove on his way to the residence before getting pulled over.

The only reason that he got pulled over before he got to the house and walked in...[is] because there wasn't a little girl, and this defendant was cautious. This defendant wanted to put eyes on that little girl. And the officers weren't going to take a chance of him pulling into Yakima Street, Samantha Knoll going outside without a child and having him take off and get into a more **dangerous situation**.

RP 784 (emphasis added).

The prosecutor did not refer to defendant as “dangerous” as suggested in appellant’s opening brief. *See* Brf. of App. at 37. Rather, the

prosecutor referred to a potentially “dangerous situation.” This inference is supported by the record. Sgt. Rodriguez testified that he did not want to meet defendant at another location, as defendant had suggested, “because there is safety involved.” RP 310-11. Sgt. Rodriguez was not intending to send Inspector Knoll and Trooper Gasser (i.e., “Kristl” and “Lisa”) to the 76 gas station, because they “hadn’t gone through that scenario” and he was not “going to just on the fly send somebody out there.” RP 312-13. Inspector Knoll had not gone through that type of undercover training, and Sgt. Rodriguez wanted to “make sure everything [was] safe.” RP 313. After Sgt. Rodriguez texted defendant the address to meet “Kristl” and “Lisa,” defendant texted back, “Why don’t I pick you up out front and then you can jump in.” RP 330-31; Exh. 4. Defendant was arrested shortly thereafter between the gas station and the residence. RP 331-33.

Sgt. Rodriguez had already testified that it was unsafe for Inspector Knoll, playing “Kristl,” to meet defendant outside of the residence. It would therefore be a “dangerous situation,” given her lack of undercover training, for Inspector Knoll to “go[] outside,” enter defendant’s car, and have defendant “take off.” *See* RP 784. The prosecutor thus properly argued a reasonable inference drawn from the evidence.

Following this argument, the prosecutor proceeded to discuss defendant’s intent and stated:

There are three defenses in a criminal case, generally speaking. First one is, I did not do it. It was someone else. The second one is, I may have done something, but the State can't prove it. Let's make the State prove it. And the third one is, I did it, darn right I did it, but I had an excuse or a justification of doing it; self-defense, for example, or an accident.

In this case, the defendant has chosen to kind of combine a couple of things. What he said is, "I did everything that the State says that I did, but I have an excuse for it, which is, I thought I was pretending and so they can't prove that I thought this girl was real.["]

So he is combining -- because if -- he doesn't have a legal excuse. He is going on a factual excuse, which is, I am going to tell the jury that I thought she was pretend so that the State can't prove that I thought she was real.

So what is important in this case is, what did the defendant know when he was having his conversations and when he drove over to this house?

A lot of our law is a gray area. There aren't many things that are black or white, one or the other, but I am going to suggest to you that there is one thing that is black and white, and that's this: An adult will either have sex with a child or will not. There isn't any gray area there. An adult either will or will not.

And I am going to go a little bit further than that and say that an adult that is willing to talk about having sex with a child falls in the category of an adult who will because there isn't any adult in our society to whom the idea of sex with a child is repulsive, who will talk about having sex with a child. That doesn't happen in the real world.

This defendant clearly was willing to talk about having sex with a child. He pursued that topic over the course of three dates. He saw it out and then he drove to the place where he thought it was going to happen, and that's what makes him guilty of both of these crimes.

RP 785-87. The prosecutor then proceeded to discuss the evidence regarding defendant's intent. RP 787-797.

First, the prosecutor's initial remarks regarding the three general defenses in criminal cases were not improper and defendant fails to provide any authority to indicate otherwise. The prosecutor was not interjecting "facts not in evidence," but rather was arguing permissible inferences based on the evidence. Defendant did not testify "I did not do it." Rather, he admitted that he sent the emails and text messages in response to the Craigslist ad. *See* RP 552-54. He did not dispute that the exhibits introduced in trial were his responses. *Id.* The text messages discussed having sexual intercourse with an 11-year-old girl. Exh. 4. Defendant disputed his intent. He testified that he thought an adult woman was playing the role of the 11-year-old girl. RP 574-77, 599-600, 611.

Defendant admitted it would be a "real problem" if it turned out he was "setting up a sex act with an 11-year-old and bringing lube and condoms and candy for her." RP 733-34. *See* Exh. 4. Therefore, the prosecutor properly argued a reasonable inference from defendant's testimony: that defendant had an excuse for his conduct because he thought "Lisa" was "pretend." Defendant claims the prosecutor left out his "fourth alternative" defense of "I did something but it is not illegal." Brf. of App. at 38. However, this is precisely what the prosecutor argued when

he stated, “[I]f you find that [defendant] thought this was all pretend and he was dealing with an adult who was going to pretend to be 11, then he is not [guilty].” RP 785. Defendant fails to show the prosecutor’s remarks were improper.¹⁷

Finally, the prosecutor’s latter remarks regarding defendant’s intent to have sexual intercourse with a child were also proper. In context, the prosecutor was arguing that because of defendant’s persistent verbal expressions of interest in going “all the way” and having “playtime” and oral sex with an 11-year-old girl (i.e., his “willing[ness] to talk about having sex with a child”), defendant was willing to actually have sexual intercourse with a child, as shown by defendant’s subsequent actions of bringing lube, condoms, and candy and driving to the agreed-upon location. RP 786-87; Exh. 4. The State’s argument was in response to defendant’s testimony at trial that it is not “offensive” to engage in “role play” with someone pretending to be a child, and he thought Kristl was pretending. *See* RP 574-77, 599-600, 636, 656. The prosecutor thus drew permissive inferences from the evidence and properly responded to

¹⁷ Defendant cites to *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), and argues, “It is patently improper for the prosecutor to use the first person singular to step into the defendant’s shoes.” Brf. of App. at 38-39. In *Pierce*, the prosecutor argued in the first person singular attributing “repugnant and amoral thoughts” to defendant that were “based on the prosecutor’s speculation and not the evidence.” 169 Wn. App. at 553-54. Here, in contrast, the prosecutor was simply paraphrasing defendant’s testimony at trial (i.e., the evidence) when he stated, “I was pretending” and “I thought she was pretend.” RP 786. *See also*, RP 574-77, 599-602. *Pierce* therefore does not apply.

defendant's testimony, and defendant again fails to show the remarks were improper.

Defendant did not object to any of the above statements during trial, nor did he request a curative instruction. The absence of an objection to the remarks to which error has been assigned here suggests that defense counsel saw nothing wrong with them or that they were not prejudicial. *See Swan*, 114 Wn.2d at 661. Indeed, as argued above, the arguments were proper. Defendant waived the issue because he failed to object. He does not show that these remarks are improper, let alone flagrantly so. Moreover, as argued in the preceding sections, the court properly instructed the jury that the lawyers' statements are not evidence and they must "disregard any remark, statement, or argument that is not supported by the evidence or the law." CP 22-40 (Instruction No. 1). *See Stein*, 144 Wn.2d at 247. Since none of the prosecutor's arguments could possibly give rise to an enduring and resulting prejudice incurable by a jury instruction, this Court should affirm defendant's convictions.

- h. The State properly argued that the evidence did not support defendant's theory.

"When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching

examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

While it is improper for a prosecutor to disparagingly comment on defense counsel's role or challenge defense counsel's integrity, the State is provided significant latitude in closing arguments, including arguing inferences as to witness credibility, and disparaging opposing counsel's *argument* is not a prohibited attack. See *Warren*, 165 Wn.2d at 29-30. A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *Lindsay*, 180 Wn.2d at 431. And, where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *State v. Copeland*, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30.

Here, the prosecutor stated during closing argument,

I am going to suggest to you that the defendant's explanation of what "no RP" means was a couple of other initials, one of which is a B. But you know what? BS. It's not possible that "no RP" means no real person.

RP 792. Defendant did not object to this statement. Now, however, defendant argues that the statement was a "forbidden expression of the

prosecutor's personal opinion." Brf. of App. at 40.

First, the prosecutor told the jury that his personal opinion had no place in the case, and his subsequent use of the word "I" was conveying only what the evidence and law showed. RP 780. Second, the prosecutor's argument, in context, was discussing the incompatibility of the defendant's testimony with the other evidence presented at trial. The Craigslist ad in this case said "no RP." Exh. 1. Defendant testified that "No RP" meant "no real people." RP 567, 613. Sgt. Rodriguez, however, testified that "RP" stands for "role play." RP 151. The evidence established that defendant repeatedly asked for pictures of both "Kristl" and "Lisa," including a picture of the two of them together. Exh. 4. And, defendant spoke with both "Kristl" and "Lisa" on the phone. Exh. 7, 8, 9. These actions arguably conveyed to defendant that "Kristl" and "Lisa" were two different people and were "real."

The prosecutor was not expressing his personal opinion as to defendant's guilt, but rather was arguing that the evidence did not support defendant's claim that "no RP" meant "no real person." See RP 790-92. While the prosecutor's use of the term "BS" was perhaps colorful, it was limited to the substance of defendant's testimony and was not improper. See *Brown*, 132 Wn.2d at 566 ("The prosecutor's characterization of the defense theory as 'ludicrous' was reasonable in light of the evidence.");

State v. Anderson, 153 Wn. App. 417, 430-31, 220 P.3d 127 (2009)

(characterization of defendant's testimony as "'made up on the fly,' 'ridiculous,' and 'utterly and completely preposterous'" not improper).

Defendant did not object to the prosecutor's argument. Therefore, even if the comments were improper, defendant waived any error unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Since the prosecutor's brief remarks could not possibly give rise to an enduring and resulting prejudice incurable by a jury instruction, this Court should affirm defendant's convictions.

- i. Defendant fails to argue, analyze or establish how the prosecutor's questions during cross-examination were improper or prejudicial and cannot establish prosecutorial error.

If a defendant chooses to testify, he or she is subject to cross-examination regarding any material matters within the scope of his direct testimony. *State v. Olson*, 30 Wn. App. 298, 301, 633 P.2d 927 (1981). "[A] defendant may be cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify. Any fact which diminishes the personal trustworthiness of the witness may be elicited if it is material and germane to the issue." *State v. Robideau*, 70 Wn.2d 994, 998, 425 P.2d 880 (1967).

Here, defendant characterizes the prosecutor's cross-examination as "repetitive, argumentative and editorialized" and appears to argue that the prosecutor committed error by asking questions that were objected to and sustained. *See* Brf. of App. 40. Defendant fails to meaningfully discuss or explain how or why the prosecutor's questions were either improper or prejudicial, and the State is left to speculate as to the basis for his claim of error. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon*, 118 Wn.2d at 809; *Elliott*, 114 Wn.2d at 15; *Saunders*, 113 Wn.2d at 345; RAP 10.3(a). *See also*, *Stubbs*, 144 Wn. App. at 652. This Court should therefore decline to consider defendant's claim of error, where defendant's passing treatment of the issue and lack of reasoned argument is insufficient to allow for meaningful review.

However, even if this Court considers defendant's apparent claim of error, review of the cited questions shows that prosecutorial error did not occur. First, although defense counsel objected to the questions below, he largely failed to provide a specific basis for the objections and therefore failed to preserve the issue. *See* RP 609, 610-11, 626, 709, 729, 730, 747 (no basis for objection); 710 (counsel objects to question as argumentative); 750 (counsel objects to question as asking for a legal conclusion). A defendant's objection to a prosecutor's question is

inadequate unless it calls the trial court's attention to the specific reason for the impropriety of the question. *See State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) ("Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was [] flagrant and ill intentioned..."). *See also*, ER 103(a)(1). Although two of defense counsel's objections provided some kind of basis, counsel's other objections were not specific enough to preserve the issue.

Second, defendant fails to show prejudicial error (or, for that matter, flagrant and ill-intentioned error). For example, the State asked defendant during cross-examination for his impression of his own demeanor and testimony. RP 608-09. The prosecutor asked defendant if his testimony on direct examination sounded "embarrassed" or "truthful." RP 609. Defense counsel objected to this question without providing a specific basis, and the court sustained. *Id.* This question was not improper. The prosecutor did not ask defendant if another witness's testimony sounded truthful – he asked about defendant's own demeanor and manner while testifying, which was relevant to help the jury assess defendant's credibility.

The prosecutor later asked defendant if he had "occasion to successfully bring a woman to orgasm." RP 709. In context, the prosecutor

was testing defendant's credibility. Defendant testified he thought 11-year-old "Lisa" was being played by an adult, yet he asked via text message if "Lisa" was "too young" to orgasm. RP 708-10. *See* Exh. 4. The prosecutor's question thus concerned why defendant would care about an adult woman's ability to orgasm. In context the question was not improper. Moreover, defendant provided no basis for his objection.

Defendant cites to the prosecutor's other questions as argumentative, but he provides no authority for the proposition that a prosecutor commits prejudicial error simply based on the form of the question posed. The same is true for questions which purportedly call for a legal conclusion. A question does not constitute prosecutorial error simply because it was objected to by defense counsel and sustained, and defendant provides no authority to indicate otherwise.

Defendant fails to meet his burden to show the prosecutor's questions were improper, and even if improper, defendant fails to show they were prejudicial where the court sustained the objections, the prosecutor rephrased his questions, and the court instructed the jury that the lawyers' statements are not evidence and the lawyer's objections should not influence them. CP 22-40 (Instruction No. 1). Given the weight of the properly admitted evidence against defendant, there could be no substantial likelihood that the prosecutor's questions affected the jury's

verdict. *See Yates*, 161 Wn.2d at 774. Moreover, any prejudice could easily have been alleviated by a proper curative instruction had defendant requested one. Defendant's convictions should be affirmed.

- j. Defendant fails to show cumulative error where no prejudicial error occurred.

In sum, defendant argues that the prosecutor's conduct throughout trial constitutes cumulative error depriving the defendant of a fair trial. Brf. of App. at 42. "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." *In re Per. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). "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)). Defendant bears the burden of showing multiple trial errors and the accumulation of prejudice that affected the outcome of the trial. *In re Cross*, 180 Wn.2d at 690.

Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal. This is because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38,

review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred”). Moreover, “[t]here is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant.” *In re Cross*, 180 Wn.2d at 691.

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. *Thorgerson*, 172 Wn.2d at 454 (citing *Weber*, 159 Wn.2d at 279)). Here, defendant fails to establish how the claimed instances of alleged error affected the outcome of the trial or how the combined instances of alleged error affected the outcome of the trial. See Brf. of App. at 41-42. The prosecutor’s conduct here was proper, there was no prejudice, and the evidence against defendant was overwhelming. Accordingly, the cumulative error doctrine does not apply.

3. DEFENDANT’S CONVICTIONS FOR ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE AND ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR ARE SUPPORTED BY SUFFICIENT EVIDENCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). The applicable

standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Thus, sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. 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). Circumstantial and direct evidence are considered equally reliable. *Salinas*, 119 Wn.2d at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this 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)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Here, viewing the evidence in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to find that defendant intended to commit rape of a child in the first degree and commercial sexual abuse of a minor, and he took a substantial step toward the commission of those crimes.

- a. The evidence was sufficient for a rational trier of fact to find defendant guilty of Attempted Rape of a Child in the First Degree.

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 intended to have sexual intercourse with a child who is less than 12 years old and not married to the defendant and at least 24 months younger than the defendant, and the defendant took a “substantial step” toward the commission of that crime. RCW 9A.28.020;¹⁸ RCW 9A.44.073. *See also*, RCW 9A.44.010(1). “The intent required is the intent to accomplish the criminal result of the base crime.” *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). The intent required for attempted rape of a child is the intent to have sexual intercourse with a child (here, a child under the age of 12). *See State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003); *Johnson*, 173 Wn.2d at 908. In the case of a fictitious child victim, the State must show the defendant knew the perceived victim’s age. *Johnson*, 173 Wn.2d at 908.

A substantial step is an act that is “strongly corroborative” of the actor’s criminal purpose. *Johnson*, 173 Wn.2d at 899 (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)); *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). “[I]t makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur.” *Luther*, 157 Wn.2d at 74. However, more than mere preparation to commit a crime is required for a substantial

¹⁸ Pursuant to RCW 9A.28.020(1), “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”

step. *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978)).

Neither factual nor legal impossibility is a defense to criminal attempt. RCW 9A.28.020(2). “[A] defendant who intends to have sexual intercourse with a fictitious underage person and takes a substantial step in that direction can be convicted of attempted rape of a child.” *Johnson*, 173 Wn.2d at 904. *See also, Townsend*, 147 Wn.2d at 679 (defendant took a substantial step toward rape of a 13-year-old child that he met in an on-line chat room even though the victim was actually a male detective pretending to be a 13-year-old girl).

Here, 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* Exh. 2, 4, 8, 9. The person posing as the mother was actually Sgt. Rodriguez. RP 136, 163-66. Throughout their conversations, defendant made it clear he was looking to engage in oral and vaginal/penile sex with the 11-year-old daughter. *See* Exh. 2, 4, 7, 8, 9.

Despite this evidence, defendant claims the State “did not prove intent to have sexual intercourse.” *See* Brf. of App. at 59. The record proves otherwise. At the beginning of their e-mail conversation, in response to the Craigslist ad, defendant stated: “plain and simple, some play with one or both of your daughters is all I would be interested in.” RP

241; Exh. 2. Defendant described his interest in “sensual and intimate physical exploration.” RP 244; Exh. 2. When the conversation progressed to text messaging, defendant expressed interest in the 11-year-old daughter and helping her “go all the way.” RP 257, 268, 276-79, 693, 697; Exh. 4, 8. Defendant knew “all the way” meant penile/vaginal penetration. RP 671-72, 677. Defendant and “Kristl” then negotiated what “playtime” would entail. Defendant agreed to the rules of “no pain, no anal, [and] condoms.” RP 279, 588, 599, 694-95; Exh. 4. Defendant asked if mutual [genital] oral sex was permissible. RP 284-86; Exh. 4. Defendant discussed “playtime” (i.e., “sex”) with “Lisa.” RP 298, 736; Exh. 4, 9. Defendant asked if “Lisa” was able to orgasm. RP 287-88, 708-09; Exh. 4. Defendant described his penis size as “about 7 inches” and agreed to bring “lube.” RP 287-88, 325; Exh. 4.

During trial, defendant admitted that he had condoms and lubricant on his person when arrested, and he was “prepared” to engage in sexual conduct. RP 620-21. He was “potentially” going to have sex if it was available. RP 714. He also agreed that he pursued “Lisa” in a sexual manner. RP 684. During cross-examination, defendant admitted he discussed having “sexual intercourse with,” “going all the way with,” “lubricant and condoms with,” “oral sex with,” and “penile/vaginal sex” with Kristl playing her 11-year-old daughter. RP 697. Viewed in the light

most favorable to the State, there was sufficient evidence to establish that defendant intended to have sexual intercourse.

Defendant also claims that “the State did not prove a substantial step toward sexual intercourse with a minor under 12 years old because the evidence of the fictitious child’s age was ambiguous.” Brf. of App. at 58. This claim also fails. The fictitious child’s (i.e., Lisa’s) age was not ambiguous to defendant. As defendant admitted during cross-examination:

[State:] You’ve asked for a picture of Kristl and Lisa, right?

[Defendant:] Correct.

...

[State:] An adult and an **11-year-old** girl together, right?

[Defendant:] Correct.

...

[State:] You had extensive conversation about having sex with an **11-year-old** girl.

[Defendant:] With the persona of an **11-year-old** girl, yes.

...

[State:] She is playing an **11-year-old**.

[Defendant:] Yes.

RP 728 (emphasis added).

Defendant admitted during trial that he responded to the Craigslist ad via text messages and phone calls as documented in Exhibits 4, 8, and 9. RP 553-54. Review of those text messages confirms that “Lisa’s” age was not ambiguous. “Kristl” texted defendant that her daughters were “11 nearly 12 and 8.” RP 257; Exh. 4. Defendant responded that the eight-

year-old daughter was “too young” but asked for a picture of her “older daughter.” RP 257; Exh. 4. “Kristl” confirmed in a later phone call with defendant that her daughter was “11, soon to be 12.” Exh. 8. Use of the words “nearly” and “soon to be” clearly communicated that “Lisa” was 11 years old and *not* 12 years old.¹⁹ Viewed in the light most favorable to the State, there was sufficient evidence to establish that defendant intended to have sexual intercourse with an 11-year-old girl.

Finally, the State presented sufficient evidence to establish that defendant took a substantial step toward the commission of the crime of rape of a child in the first degree. 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. The defendant drove to a Dick’s Drive-In near the child’s house and waited in his car for approximately 30

¹⁹ Defendant’s argument that Lisa’s age was ambiguous because the photographs sent to defendant were of 15 or 16-year-old Trooper Gasser conflicts with RCW 9A.28.020(2) and *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002), *supra*.

minutes before he was arrested. *Id.* at 317-18. The defendant argued that the evidence only established mere preparation. *Id.* at 316. On appeal, the court 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 of a child. *Id.* at 318-20.

In *State v. Townsend*, the defendant communicated via e-mail and instant messenger with someone he believed to be 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.* The 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.*

Defendant here took a substantial step as the defendants did in *Wilson, Townsend, and Sivins, supra*. Defendant exchanged photos with the mother (“Kristl”). *See* RP 576, 579, 618, 629, 639; Exh. 4. He engaged in explicit communication via text message with “Kristl” regarding the “rules” of sexual intercourse with “Lisa.” Exh. 4. Defendant drove 45 minutes from his home in Enumclaw to meet at the agreed-upon gas station. RP 592, 738-740; Exh. 4. Defendant showed up at the gas station. RP 738; Exh. 4. He described his vehicle for “Kristl.” RP 738; Exh. 4. He brought condoms and lubricant for the purpose of engaging in sex. RP 440-41, 619-21, 714, 727, 732, 738-40. He also brought Skittles as

requested. RP 440-41, 739; Exh. 4. Defendant requested “Kristl” and “Lisa’s” address, and he was pulled over by police and arrested en route to their residence. RP 436-39, 740; Exh. 4.

Here, defendant engaged in conduct that went far beyond mere words. His above actions were in order to fulfill his plan of having sexual intercourse with an 11-year-old girl. Review of the numerous e-mails, text messages, and phone calls show that defendant intended to have sex with the 11-year-old. *See* Exh. 2, 4, 8, 9. Defendant’s verbal expressions of his intent to have sexual intercourse with “Lisa,” combined with the physical steps he took to carry out that crime, support the conclusion that defendant intended to and took a substantial step toward the completion of first degree child rape.

- b. The evidence was sufficient for a rational trier of fact to find defendant guilty of Attempted Commercial Sexual Abuse of a Minor.

Defendant next challenges the sufficiency of the evidence pertaining to his attempted commercial sexual abuse of a minor conviction. Brf. of App. at 51-57. He specifically alleges his right to a unanimous jury was violated because the State presented no evidence that he solicited, offered, or requested to engage in sexual conduct with a minor for a fee. Brf. of App. at 55-57. *See* former RCW 9.68A.100(c)

(2015).²⁰ Defendant is mistaken. The State was not required to prove defendant actually solicited, offered, or requested to engage in sexual conduct with a minor for a fee. Rather, the State was required to prove defendant *attempted* to solicit, offer, or request to engage in sexual conduct with a minor for a fee. *See* RCW 9A.28.020; former RCW 9.68A.100 (2015). “[I]t makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur.” *Luther*, 157 Wn.2d at 74. Here, the State presented sufficient evidence that defendant attempted to solicit, offer, or request to engage in sexual conduct with “Lisa” in return for a fee.

Criminal defendants have a right to a unanimous jury verdict under article I, section 21 of the Washington Constitution. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). This right includes the “right to a unanimous jury determination as to the *means* by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crimes.” *Owens*, 180 Wn.2d at 95. When there is sufficient evidenced before the jury to support each of the alternative means of committing the crime, “express jury unanimity as to which means is not required.” *Id.* However, if there is insufficient

²⁰ The commercial sexual abuse of a minor statute, RCW 9.68A.100, was amended in 2017. *See* Laws of 2017, ch. 231, § 3.

evidence to support any of the means, “a particularized expression of jury unanimity is required.” *Id.* (citing *State v. Ortega-Martinez*, 124 Wn.2d 702-707-08, 881 P.2d 231 (1994)).

The State charged defendant with Attempted Commercial Sexual Abuse of a Minor. CP 1-2. Under former RCW 9.68A.100(1) (2015), a person is guilty of the completed crime of commercial sexual abuse of a minor if:

- (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with her or her;
- (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
- (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

“Sexual conduct” means “sexual intercourse or sexual contact.” Former RCW 9.68A.100(5) (2015). Here, the court defined the completed crime of commercial sexual abuse of a minor for the jury using elements (b) and (c) above. CP 22-40 (Instruction No. 11). As a result, in order to convict defendant of attempted commercial sexual abuse of a minor, the State was required to prove that defendant intended to, and took a substantial step toward: (1) agreeing to pay a fee to a minor or a third person to engage in sexual conduct with the minor, or (2) soliciting, offering, or requesting to engage in sexual conduct with a minor in return for a fee.

The evidence establishes that defendant intended to solicit, offer, or request to engage in sexual conduct with “Lisa” in return for a fee. During defendant’s text message exchange with “Kristl,” defendant expressed interest in going “all the way” with “Lisa” and agreed to “Kristl’s” rules of “no pain, no anal, condoms.” RP 276-79; Exh. 4. “Kristl” asked defendant if he was “still good with gifts.” RP 324; Exh. 4. Defendant responded, “Anything I brought I would give to you to disperse however you saw fit.” *Id.* When asked what he was willing to give, defendant offered a “gift card” “that can be used for any purpose.” RP 324-25; Exh. 4. “Kristl” and defendant followed this exchange by discussing condoms and “lube for [defendant’s] seven inches.” RP 325; Exh. 4. This exchange demonstrates the negotiation process between defendant and “Kristl” regarding what defendant would give in return for “playtime” with “Lisa.” Defendant chose to offer a “gift card.”

Shortly thereafter, “Kristl” confirmed defendant’s offer: “[I] am not into this for her to hangout with you. **[I] will take the gift card like you said for playtime,** but you have to understand what this is about.” RP 326; Exh. 4 (emphasis added). Defendant responded, “Ok.. yes, I’m coming.” *Id.* During trial, defendant acknowledged that “Kristl” was under the impression that he would bring a gift card, and he did not disavow her

of that impression.²¹ RP 736-37. He also did not disavow her of the impression that he was bringing the gift card for “playtime.” RP 737. Interpreted in the light most favorable to the State, the text exchange demonstrates defendant’s intent to solicit, offer, or request to engage in sexual conduct with a minor in return for a fee.

There was also sufficient evidence that defendant intended to agree to pay a fee in exchange for sexual conduct with a minor. Former RCW 9.68A.100(1)(b) (2015). “Kristl” asked defendant if he was okay with “gifts” for “Lisa,” such as “roses,” “gift cards” or minutes for her phone.²² RP 283-84; Exh. 4. Defendant responded with “Ok” and immediately asked about oral sex. RP 284; Exh 4. Defendant later confirmed that “gifts” were “not a problem.” RP 297; Exh. 4. He proceeded to talk to “Lisa” on the phone about having “playtime” (i.e., sex), and when asked if he was going to bring anything with him, defendant responded, “Yeah. Your mom and I talked about that...she said that there are certain things that you like.” RP 298-300; Exh. 4, 7, 9. When told that “Kristl” would “take the gift card” for “playtime,” defendant agreed.²³ RP 326; Exh. 4. He

²¹ Defendant agreed that he let “Kristl” believe he was bringing a gift card. RP 736-37.

²² “Roses” in this context means money, and “gifts” conveys an expectation of payment. RP 162-63, 284.

²³ Defendant acknowledged during trial that he read an article from ABC News about parents who “pimp” their children. RP 680. This suggests defendant’s understanding that “Kristl” expected payment in return for sex with “Lisa.”

also agreed to bring Skittles candy for “Lisa.” RP 327; Exh. 4.

An agreement, or mutual assent, generally takes the form of an offer and acceptance. See *Weiss v. Lonquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009). Here, defendant intended to agree to pay a fee to a minor or a third person pursuant to an understanding that in return the minor would engage in sexual conduct with him. “Kristl” offered “playtime” with “Lisa” in return for “gifts” (payment), “roses” (money), “gift cards” or other forms of payment, and defendant accepted by saying, “Ok” and “gifts” were “not a problem.” Exh. 4. Viewed in the light most favorable to the State, defendant not only intended to agree to pay a fee, but he actually agreed to pay a fee, as shown by the offer and acceptance text message exchanges described above.

After defendant agreed to pay for sex with “Lisa” and offered a gift card as payment, defendant took a substantial step toward that result by: driving 45 minutes from his home in Enumclaw; arriving at the agreed-upon gas station; asking for Kristl/Lisa’s address; bringing condoms, lubricant, and Skittles; and driving toward “Lisa” and “Kristl’s” residence to engage in sex. RP 436-41, 592, 619-21, 714-40; Exh. 4.

The above evidence, viewed in the light most favorable to the State, is sufficient to allow a rational juror to conclude that defendant intended to commit commercial sexual abuse of a minor and that he took a

substantial step toward that result. The defendant agreed to bring “a fee” and offered a “gift card” in exchange for a sex act with a child. The evidence need not establish that defendant actually brought, or that he was ever actually going to bring, a fee. Because sufficient evidence supports each of the alternative means, defendant’s constitutional right to a unanimous jury verdict was not violated. Defendant’s conviction should be affirmed.

i. *The State presented sufficient evidence of “a fee.”*

Defendant goes on to argue there was insufficient evidence to prove “a fee” because there was no discussion of “an exchange of money.” Brf. of App. at 52. Defendant argues that a “fee” here means only a “sum of money.” *Id.* at 52-55. Defendant’s claim again fails, because the record establishes that “Kristl” and defendant did, in fact, discuss the exchange of money. Moreover, the statute in effect when defendant committed the crime contemplated that “fee” meant not only money, but also other forms of payment.

Former RCW 9.68A.100 (2015) does not explicitly define “a fee.” When a statute does not define a term, the court gives the term “its plain and ordinary meaning unless a contrary legislative intent is indicated.” *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (quoting

Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998)). The term's plain meaning is derived from the "context of the entire act" as well as other related statutes. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). "When a statute does not define a term, the court may [also] consider the plain and ordinary meaning of the term in a standard dictionary." *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015) (citing *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008)). The court presumes the legislature does not intent absurd results and, where possible, interprets ambiguous language to avoid such absurdity. *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010).

Here, because the term "fee" is undefined, the court gives the term its plain and ordinary meaning as ascertained from a standard English dictionary. *Fuentes*, 183 Wn.2d at 160. "Fee" is defined as "compensation often in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill." *Webster's Third New International Dictionary* 833 (2002). "Compensation" is further defined as "something that constitutes an equivalent or recompense: as : payment for value received or service rendered." *Id.* at 463.

Under this definition, the term "fee" can include money. Here, "Kristl" asked defendant if he was okay with "gifts" or "donations." RP 283, 292, 324; Exh. 4. "Kristl" suggested "roses...gift cards...stuff like

that.” RP 284; Exh. 4. Defendant said “Ok” and gifts were “not a problem.” RP 284, 297; Exh. 4. Sgt. Rodriguez testified that in these types of Craigslist ads, “roses” and “flowers” means “money.” RP 162-63, 284. *See also*, RP 702 (defendant admits that on Craigslist “roses” can mean “money”). The expectation of payment is also communicated through Craigslist ads by the use of such terms as “presents,” “gifts,” and “donations.” RP 162. Here, use of the terms “gifts,” “roses” and “donations” demonstrates that defendant and “Kristl” discussed the exchange of money.

Defendant specifically discussed bringing a “gift card” for playtime. *See* RP 284, 324-25, 326, 736-37; Exh. 4. “[A] gift card can access an account...It is a card that can be used to receive goods or services of a specified value...It is a device that can be used to access...a sum of money.” *State v. Nelson*, 195 Wn. App. 261, 268, 381 P.3d 84 (2016) (holding that a gift card is an access device within the meaning of theft statutes). Defendant’s claim that a gift card is not a “fee” ignores the very purpose and nature of gift cards. *See Nelson*, 194 Wn. App. at 268. Here, defendant offered to bring a gift card – a fee – in exchange for sex with Lisa.

In addition to money, the dictionary definition of “fee” also contemplates property and other items of value. This meaning is also in

accord with the context of the entire act and other related statutes.

Jametsky, 179 Wn.2d at 762. Under the prostitution statute, RCW 9A.88.030, a person is guilty of prostitution if she/he engages or agrees to engage in sexual conduct with another “in return for a fee.” *See also*, RCW 9A.88.110. Under former RCW 9A.88.060(2) (2015), a person “profits from prostitution” if, acting other than a prostitute receiving compensation, he or she “accepts or receives *money or other property*” pursuant to an agreement to participate in the proceeds of prostitution activity.²⁴ (Emphasis added). The current version of RCW 9A.88.060(2) replaced “other property” with “anything of value.” *See* Laws of 2017, ch. 231, § 5. These statutes contemplate that “a fee” for purposes of prostitution related activities means money or anything of value, including property.

The commercial sexual abuse of a minor statute, RCW 9.68A.100, was amended in 2017. *See* Laws of 2017, ch. 231, § 3. The amendment replaced the term “a fee” with “anything of value.” *Id.* The legislature clarified and amended the statute upon finding “that statutes governing commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, and promoting prostitution should be consistent with all human

²⁴ The proceeds of prostitution would arguably be the prostitution fee.

trafficking related statutes, and reflect the practical reality of the crimes, which often involve an exchange of drugs or gifts for the commercial sex act.”²⁵ Laws of 2017, ch. 231, § 1. The commercial sexual abuse of a minor and promoting prostitution statutes are related and therefore, as demonstrated above, “a fee” for purposes of both statutes means not only money but also non-monetary forms of compensation.

“A fee” is payment that can but need not include money. Here, even if defendant had agreed to bring a literal bouquet of roses or offered drugs in exchange for sex with Lisa, defendant would still be guilty of attempted commercial sexual abuse of a minor. As argued above, the State presented sufficient evidence that defendant intended to commit commercial sexual abuse of a minor by agreeing to and offering “a fee” in return for sexual conduct with an 11-year-old girl, and his conviction should be affirmed.

4. THE TRIAL COURT PROPERLY IMPOSED CRIME-RELATED CONDITIONS OF COMMUNITY CUSTODY WHICH WERE REASONABLY NECESSARY TO PROTECT THE PUBLIC.

The Sentencing Reform Act of 1981 (SRA) authorizes the trial court to impose “crime-related prohibitions and affirmative conditions” as

²⁵ The human trafficking statute, for example, defines “commercial sex act” as “any act of sexual contact or sexual intercourse...for which something of value is given or received by any person.” RCW 9A.40.100(6)(a). *See also*, RCW 9A.40.010(2).

part of any sentence. RCW 9.94A.505; *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). When a court sentences an offender to a term of community custody, the court must sentence that offender to conditions of community custody listed in RCW 9.94A.703(1) and (2).²⁶ The court must order the offender to comply with conditions imposed by the Department of Corrections (DOC). RCW 9.94A.703(1)(b) (citing RCW 9.94A.704); RCW 9.94A.030(17). The court may also order those conditions provided in RCW 9.94A.703(3).

Whether a trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *Johnson*, 180 Wn. App. at 325. A community custody condition is beyond the court's authority to impose if it is not authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). However, imposing statutorily authorized conditions of community custody is within the discretion of the sentencing court and is reviewed for abuse of discretion. *Bahl*, 164 Wn.2d at 753; *Johnson*, 180 Wn. App. at 326. The proper remedy for a condition not authorized by statute is to reverse that portion of the sentence and remand for resentencing of the improper condition. *State v. Sansone*, 127

²⁶ Community custody is generally required for those convicted of attempted rape of a child in the first degree and attempted commercial sexual abuse of a minor and sentenced to the custody of the department of corrections. See RCW 9.94A.507; RCW 9.94A.701.

Wn. App. 630, 643, 111 P.3d 1251 (2005). Community custody conditions generally will be reversed only if their imposition is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

The trial court may impose as part of any term of community custody conditions that defendant: “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals,” or “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(b), (f). “A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (internal citation and emphasis omitted). *See also*, RCW 9.94A.030(10). A prohibition of conduct must be directly related to the crime but need not be causally related. *Zimmer*, 146 Wn. App. at 413. A community custody prohibition designed to prevent the offender from further criminal conduct of the type for which the offender was convicted can be crime-related. *See State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Generally, the court will uphold crime-related prohibitions if they are reasonably related to the crime. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Defendant in the present case challenges two conditions of community custody imposed by the court in Appendix H of his judgment

and sentence. Brf. App. at 62. In Conditions 23 and 24 of Appendix H, the trial court ordered defendant to comply with the following terms of community custody:

23. [X] No internet access or use, including email, without the prior approval of the supervising CCO.
24. [X] No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

CP 87-88. These conditions were imposed under the heading “Offenses Involving Computers, Phones or Social Media.” *Id.* Defendant claims these conditions unreasonably infringe on his First Amendment rights. Brf. of App. at 62. Defendant’s claims fail, because the conditions are crime-related prohibitions that are reasonably necessary to protect the public from defendant’s sexually predatory behavior.

The government’s important interest in protecting minors is served by imposing stringent conditions on convicted child molesters. *See State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). “[A defendant’s] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those conditions... serve an

important societal purpose in that they are limitations on ... rights that relate to the [offender's] crimes....” *Id.* at 702-703.

“[A]n offender’s constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions.” *State v. McKee*, 141 Wn. App. 22, 37, 167 P.3d 575 (2007) (provision barring pornographic materials was crime-related condition of community custody and therefore not overbroad in violation of defendant’s free speech rights). A community custody condition may restrict a defendant’s First Amendment rights if it is reasonably necessary to accomplish the needs of the State and public order. *Bahl*, 164 Wn.2d at 757. Limitations on constitutionally-protected conduct must therefore be “narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” *Id.*

A sentencing court may prohibit an offender from accessing the Internet or possessing a computer provided the prohibition is crime-related. In *State v. Irwin*, 191 Wn. App. 644, 656-59, 364 P.3d 830 (2015), the court upheld a community custody condition prohibiting the defendant from possessing a computer or any digital media storage device. The defendant had sexual contact with three underage females and subsequently pleaded guilty to three counts of child molestation and one count of possession of depictions of minors engaged in sexually explicit

conduct. *Id.* at 647-48. A search of defendant's computer revealed "a history of Internet searches related to child pornography and ten photographs...of nude or partially nude girls." *Id.* at 648. The court found the challenged community custody condition to be a valid crime-related prohibition, because "Irwin's molestation of his victims included taking photographs (which he stored on his computer)." *Id.* at 656. *See also, State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (upholding condition prohibiting defendant convicted of computer trespass from having a computer).

Here, defendant does not appear to argue that the challenged conditions are *not* crime-related. Defendant clearly used the Internet and a computer or computer-related device to [attempt to] meet and have sexual intercourse with an 11-year-old girl. *See* Exhibits 1, 2, 4, 6. *See also*, RP 553-54, 613-18 (defendant responded to Craigslist²⁷ posts advertising "incest" and "young family fun"); RP 616-18 (defendant responded to ads via e-mail from his laptop or phone); RP 571, 615-16, 637-38 (defendant used Craigslist anonymizer to communicate); RP 680 (defendant conducted internet Google search of "What is it called when a mother likes to see her daughter perform sex" and "Mother's [sic] who find their

²⁷ Craigslist is an online website. RP 136, 153. *See also, State v. Daniels*, 183 Wn. App. 109, 111 n.2, 332 P.3d 1143 (2014) (Craigslist is an online classified website).

young daughters sexual partners”); RP 555, 570, 576, 612, 622, 648 (defendant responded to “hundreds” of ads posted on Casual Encounters section of Craigslist over a five or six year period).

Not only are the challenged conditions crime-related, but they are also reasonably necessary to protect the public (i.e., children) from defendant’s sexually predatory behavior. Moreover, the conditions are sensitively imposed, as they permit defendant to use a computer or computer-related device with access to the Internet for employment purposes and permit him to access the Internet, including email, with the prior approval of his CCO. CP 87-88. See *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003). Defendant cites to no Washington authority in support of his position that the challenged conditions here are unconstitutionally overbroad, and the federal cases on which he relies are distinguishable and/or in conflict with other federal authority.²⁸ See, e.g., *United States v. Brigham*, 569 F.3d 220, 232-35 (5th Cir. 2009) (upholding absolute ban on all computer and internet use during term of supervised release for defendant convicted of child pornography); *Zinn*, 321 F.3d at 1092-93 (upholding limited restriction on defendant’s Internet

²⁸ For example, defendant cites to *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), but that case involved a North Carolina statute that made it a felony offense for registered sex offenders to access social networking websites. That case is factually distinguishable from the present matter.

usage while on supervised release for child pornography, where restriction was reasonably related to legitimate sentencing considerations and did not overly burden defendant's First Amendment rights).

Here, the prohibitions are valid crime-related conditions of community custody. Condition 23 and 24 are not overbroad, and the sentencing court had the statutory authority to impose the conditions. This Court should affirm the conditions of community custody imposed by the trial court.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: November 20, 2017

MARK LINDQUIST
Pierce County Prosecuting Attorney



BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by U.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.

11.20.17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 20, 2017 - 2:11 PM

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