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NO. 49887-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ERIC JACOBSON,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION TO ARGUMENT IN REPLY

Government misconduct infects this case. The government violated fundamental notions of fairness by creating a criminal enterprise, luring adults with no prior record who were participating in lawful activity on a free website, and pursuing them until they relented to the government's unbending plan. The government's conduct was outrageous. Then, at trial, the prosecutor shed his quasi-judicial role and, from start to finish, imbued the proceedings with far-ranging and incurable misconduct. The State's response brief fails to overcome the extensive errors in this trial.

B. ARGUMENT IN REPLY

**1. The prosecutor's pervasive misconduct dominated the trial, prejudiced the outcome, and requires reversal.**

The prosecutor's misconduct pervaded the trial. It occurred at every stage of the proceedings—during jury selection, opening statements, direct and cross-examination, and in closing argument. And the misconduct violated various rules—vouching for witnesses, bolstering the State's case, introducing and relying on facts not in evidence, inflaming the jurors' passions and prejudices, misstating the law, lessening the State's burden of proof, and disparaging the defense by inserting the prosecutor's personal opinion, mischaracterizing the defense, urging the

jury to go inside Jacobson's thought processes, and treating the defense as a choice Jacobson made. The extensive misconduct prejudiced Jacobson's ability to have a fair trial and, therefore, requires reversal.

The State's claim that Jacobson has not provided "meaningful analysis" is untenable. Resp. Br. at 20 n.7, 59. In the opening brief, Jacobson set forth both discrete and overarching episodes of misconduct at length. Op. Br. at 18-42. He cited to legal authority to support every type of misconduct alleged, and presented the facts from the record showing the misconduct occurred. Further, he relied on case law to argue that, even if not standing alone, the cumulative effect of the pervasive misconduct requires reversal. Unlike the cases on which the State relies, the argument covers more than 20 pages and relies on dozens of opinions as well as court rules and other authority. Resp. Br. at 20 n.7, 59 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignment of error found waived where appellant presented "no argument" on it "in their opening brief"); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (where appellant "did not refer specifically to the jury instructions given, nor did she cite any alternate means cases"))).

The pervasive misconduct requires reversal and remand for a fair trial. It is substantially likely that the objected-to improprieties

affected the jury's verdict. *In re Matter of Sandoval*, \_\_ Wn.2d \_\_, ¶39, 408 P.3d 675 (2018).

Moreover, extensive and thematic additional misconduct that was not objected to requires reversal because the misconduct “evinced and enduring and lasting prejudice that could not have been” cured by an admonition to the jury. *Id.* (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). Looked at individually or in the aggregate, the prosecutor's extensive misconduct affected the verdict because it permeated the entirety of the proceedings, worked to lessen the State's burden, inflamed the jury's passions and prejudices against Jacobson, relied on facts not in the record, and, overall, encouraged a verdict not based on the constitutional requirement that the State prove each element of the offenses beyond a reasonable doubt. *See State v. Walker*, 182 Wn.2d 463, 479, 341 P.3d 976 (2015) (prejudicial impact measured by nature of the misconduct and its affect, not upon the sufficiency of the evidence).

The frequency of the misconduct and the inflammatory nature of the prosecutor's improprieties further compel reversal. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (the more frequent the misconduct, the less likely it could have been cured by

an instruction); *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (inflammatory misconduct generally incurable by an instruction). “An objection is unnecessary in cases of incurable prejudice only because ‘there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.’” *Emery*, 174 Wn.2d at 762.

a. The prosecutor committed incurable misconduct during his opening statement.

Misconduct dominated the trial from the outset. The prosecutor bolstered the Task Force’s actions throughout the State—not even simply in this case—and vouched for the police witnesses’ credibility. Op. Br. at 20-21. For example, the prosecutor touted the number of arrests the Task Force had made, but the fact that arrests were made in other cases fails to show that Jacobson committed the acts charged here or even that those individuals were properly charged. *See* RP 119-20. Nonetheless, the prosecutor argued the Task Force was “certainly” effectuating its purpose. *Id.*

Contrary to the State’s argument in response, the prosecutor did not limit his opening statement to the nature of the crime and the evidence in this case. *See* Resp. Br. at 28. Rather, the prosecutor talked about other defendants who were registered sex offenders or who offered their own children for sale. RP 120. Neither was at issue in Jacobson’s case and,

even if it was, reference to other defendants would not prove whether the State could sustain its burden here. The prosecutor also openly discussed inflammatory advertisements not at issue in this case to prejudice the jury against Jacobson by associating him with the worst of the worst, “people who are off[er]ing 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.” RP 121. Unlike the case the State relies on, here the prosecutor was not even referring to the charges against Jacobson but to the actions of third-parties not before the jury. Resp. Br. at 27, 28 (citing *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006)).

In *State v. Claflin*, 38 Wn. App. 847, 849-51, 690 P.2d 1186 (1984), the prosecutor committed misconduct a jury instruction could not cure when the prosecutor read a poem containing vivid and highly inflammatory language and prejudicial allusions to matters outside the evidence at trial against the defendant. Here, too, the prosecutor used language throughout the trial to appeal to the jury’s passion and prejudice rather than seek a verdict free from prejudice and based on reason. The prosecutor also referred to inflammatory and prejudicial matters outside this case to appeal to the jury’s emotions. As in *Claflin*, the prosecutor’s conduct was incurable and prejudicial.

The State also seeks to deflect blame, arguing defense counsel used similar language to describe the allegations against Jacobson. Resp. Br. at 28-29. But Jacobson’s opening statement followed the prosecutor and, in fact, was largely focused on responding to the prejudices the prosecutor inserted during his opening remarks. *See, e.g.*, RP 126 (“This doesn’t have to do with any of those other thousand cases” the prosecutor discussed or “with anything else that might be going on on the websites, bestiality or incest, other things like that.”). In fact, when defense counsel used the word “nasty,” it was to describe the manner in which the prosecutor presented the case, not to describe the defendant’s position. Defense counsel told the jury, “You heard a nasty story [from the prosecutor]. Don’t let it scare you too much. . . . please do keep an open mind and wait until you hear what the evidence actually is, okay?” RP 127.

Whereas defense counsel merely responded properly to the prosecutor’s inflammatory argument, the prosecutor’s opening statement was in response to nothing. Reference to the defendant’s opening statement does not cure the prosecutor’s egregious misconduct.

b. The prosecutor committed incurable misconduct during jury selection.

As set forth in the opening brief, the prosecutor's misconduct predated even his opening statement; he used voir dire to improperly influence the jury's resolution of the case by inserting his own view of the issues and referencing entirely unrelated matters. Op. Br. at 24-29.

The record belies the State's argument in response that the prosecutor's improper questioning was his way of probing for bias. *See* Resp. Br. at 24, 25. The prosecutor was clearly inserting themes and "facts" not adduced at trial rather than ferreting out the jurors' biases. Mr. Neeb did not follow up his monologues by questioning jurors as to their ability to set aside their bias or their prior knowledge. He simply moved on to another topic, another area in which he could insert his opinions and educate the jury. *E.g.*, RP 14-17 (not following up with any questions about ability to be fair and impartial even after juror states there is no difference between immorality and illegality), 17 (following up on substance of what "flagging" an ad means, not on whether juror's prior knowledge could be set aside), 59-60 (prosecutor tells the jury the mechanics of a Craigslist site and admits to asking rhetorical questions he does not expect the venire to answer).

In its attempt to defend the prosecutor's conduct, the State tellingly rarely provides direct quotes from the prosecutor's voir dire. Rather, the State relies on incomplete whitewashed summaries. The State also fails to respond to Jacobson's argument and quotations showing the prosecutor: educated the jury on his view of the evidence and law; provided information that would not be introduced into evidence at trial, such as illegal sex for sale on Craigslist, and the newsworthy Backpage.com scandal and the sensationalized television show *To Catch a Predator*; and discussed prior verdicts and suggested not reaching a verdict was unsatisfactory. The State's partial response should be rejected.

The State baldly claims that jury instructions could have cured any improper inquiry and testimony during voir dire. Resp. Br. at 26. However, the State offers no instructions by way of example and certainly no instructions could have cured the prosecutor's extensive and biased education of the jury pool.

Finally, Jacobson did not waive the prosecutor's misconduct in voir dire. The State unsuccessfully relies on *State v. Elmore*, 139 Wn.2d 250, 277, 985 P.2d 289 (1998) to argue waiver. Resp. Br. at 21-22. In *Elmore*, the defendant pleaded guilty but a jury was convened for the penalty phase, as the State sought the death penalty. 139 Wn.2d at 262-66. *Elmore* challenged the fairness of his sentence on appeal. *Id.* at 266. The

Court relied on cases presenting challenges to procedural requirements of jury selection to deny a voir dire claim raised for the first time on appeal. *Id.* at 277 (discussing *State v. Tharp* and *State v. Gentry*). In *State v. Tharp*, 42 Wn.2d 494, 501, 256 P.2d 482 (1953), the defendant challenged the failure to provide an oath to the jury panel and in *State v. Gentry*, 125 Wn.2d 570, 615-16, 888 P.2d 1105 (1995), the court considered the replacement of a juror with an alternate juror. *Elmore* presumed that procedural issues with voir dire could not be raised for the first time on appeal. 139 Wn.2d at 277. But our courts have regularly considered prosecutorial misconduct raised for the first time on appeal because those claims affect the defendant's constitutional right to a fair trial and the prosecutor's duty as a quasi-judicial officer to ensure the same. *E.g.*, *Walker*, 182 Wn.2d at 477-81 (reversing for prosecutorial misconduct raised for the first time on appeal); *Glasmann*, 175 Wn.2d at 707-13 (same); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Jacobson's challenge is not one to the jury's composition but to prosecutor's misconduct, which continued throughout trial. It is properly raised and reviewable here.

- c. The prosecutor committed misconduct requiring reversal by vouching for the State and bolstering its witnesses throughout trial.

The prosecutor's misconduct during trial included eliciting witness testimony to vouch for the State and to bolster its witnesses. Op. Br. 21-24. The State confusingly responds that Jacobson improperly uses a misconduct claim to make an evidentiary challenge. Resp. Br. at 31. The State apparently fails to recognize that a prosecutor commits misconduct when he elicits improper witness testimony. *E.g.*, *State v. Jungers*, 125 Wn. App. 895, 902-04, 106 P.3d 827 (2005) (prosecutor committed misconduct by eliciting improper response from witness); *State v. Jones*, 117 Wn. App. 89, 90-93, 68 P.3d 1153 (2003) (prosecutor committed misconduct requiring reversal by eliciting testimony on the credibility of another witness). Thus, both the prosecutor's questions and the witnesses' responses are relevant to the misconduct argument.

The prosecutor's extensive questions about the work of the Task Force, intended to elicit information to bolster the police witnesses' "noble" work and to group Jacobson with a deplorable class of predators, were improper areas of inquiry constituting prosecutorial misconduct. For example, the prosecutor asked generally about the purpose of the Task Force:

Q What is the purpose in general of the Missing Exploited Children's Task Force with the State Patrol?

A So the purpose is to investigate cases dealing with child exploitation, to recover children -- basically, keep people from doing harm to children.

RP 132. Then again, the prosecutor asked the witness to describe its "Net Nanny Operations" in general and broadly: "Can you tell us what those are?" RP 132. And he thereby provided another opportunity for the witness to discuss their heroic rescuing of minors:

So Net Nanny Operation, it's a proactive way to go after people or identify people who we believe want to do harm to kids. They are -- it's where we place or answer ads on Craigslist, it's usually Craigslist. And we use undercover officers to either pretend to be the children or to be the parents who are essentially pimping out their children or wanting to talk to people who are actually doing that.

And then once that happens, once we identify them, hopefully we arrest them. And then in the long run is to see if those -- is to rescue children, as well. We are also trying to do that.

RP 132-33.

The prosecutor also focused the witnesses on matters that were inapplicable to the case at bar—for example, asking about incest and non-fictitious children. RP 149-50 (asking witness repeatedly about incest).

The prosecutor also specifically returned the witness to the bolstering theme of "protect[ing] the children in general":

Q So in the Net Nanny Operations, are you -- are officers playing the roles of children?

A Yes.

Q How is that helping to protect the children in general?

A Because when people are showing up to do something to a child, that's a child that they are not -- you are keeping them from doing that to a child. In these operations, we have also identified or removed 18 kids. We have located children through these operations.

RP 133-34.

Contrary to the State's reliance on *State v. Perez-Arellano*, 60 Wn. App. 781, 783, 807 P.2d 989 (1991), where the Court permitted an officer to testify about a "high narcotics area," the issue here is the prosecutor's bolstering of its own witnesses through questions about the Task Force's noble conduct. *See* Resp. Br. at 33-34. It is error for the prosecutor to bolster police witnesses' credibility with evidence they received commendations and awards or had distinguished careers. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citing *State v. Smith*, 67 Wn. App. 838, 844-45, 841 P.2d 76 (1992)). Likewise, it is generally improper for prosecutors to bolster police witnesses' through evidence of their good character or reliability. *Id.* at 293-94. Those rules apply here and show the impropriety of the prosecutor's conduct in eliciting information about the Task Force to bolster the State's case.

The prosecutor's misconduct continued. He argued in closing that the police witnesses' arrest of dozens of people made them unbiased as to this particular defendant. RP 798-99. And, contrary to the State's assertion, the prosecutor did not use "vague wording" when he told the jury to apply the instruction's credibility standard "particularly" "to the defendant." *See* Resp. Br. at 37 (arguing "the prosecutor perhaps used vague wording in suggesting the jury 'apply that [credibility] standard to the defendant particularly.'"). The prosecutor told the jury to "particularly" assess Jacobson's credible, and not the credibility of the State's witnesses. RP 798-99. "Particularly" is the precise opposite of the "vagueness" for which the State now argues. Moreover, the prosecutor's next sentence makes his purpose clear: "Because if there is anyone who has an interest in the outcome of this case, it's him." RP 798. The prosecutor's wording was not vague.

As discussed before, the prosecutor's vouching and bolstering encouraged a verdict on improper bases. Both the nature and the extent of the misconduct indicate a substantially likely affect on the verdict that could not be cured through an admonition. *See, e.g., Glasmann*, 175 Wn.2d at 707 (extensive misconduct less likely to be curable by an instruction); *Emery*, 174 Wn.2d at 761-62 (misconduct aimed at improper bases less likely to be curable by an instruction).

- d. The prosecutor also committed misconduct in closing argument by conflating the elements of the two charged offenses, lessening the State's burden of proof, and asking the jury to send a message by convicting Jacobson.

The prosecutor further used closing argument to secure a conviction on the improper basis of sending a message while also reducing the State's burden and conflating the elements of the separate charged counts. The State spends much of its response discussing the offense of an attempt to commit a crime. Resp. Br. at 38-39. But as the State implicitly concedes, the prosecutor's improper conflation of the offenses charged came about while the prosecutor discussed the substantive crimes of commercial sexual abuse of a minor and rape of a child in the first degree. Resp. Br. at 39-40 (quoting prosecutor's argument that "there is a lot of overlap between the[se] two [completed] crimes"). The prosecutor argued, "there is a lot of overlap between the two [completed] crimes"—rape of a child and commercial sexual abuse of a minor. RP 781.

The State tries to explain how the prosecutor's argument could have been made. Resp. Br. at 40. But, without conceding that such argument would have been permissible, this argument is unavailing because it does not reflect what the prosecutor actually said to Jacobson's jury. What the prosecutor actually argued was simply that "there is a lot of overlap between the two crimes" and "the only difference really

between the completed crime[s] is the element of ‘for a fee.’” RP 781-82; *see also* RP 785 (arguing guilt would be determined together for the two counts). The prosecutor’s actual argument misstates the law. *See State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015) (prosecutor commits misconduct by misstating the law).

The prosecutor also lessened its burden of proof and trivialized the specific intent it was required to prove by analogizing attempted rape of a child and attempted commercial sexual abuse of a minor to attempted movie-watching. Op. Br. at 32-33 (citing RP 783-84). The prosecutor trivialized the allegations it was burdened to prove by “put[ting] it in real world terms” that are not comparable. RP 783-84; *State v. Fuller*, 169 Wn. App. 797, 823-27, 282 P.3d 126 (2012) (discussing cases to set forth rule that misconduct occurs when an analogy is used to equate to an everyday choice or to quantify the level of certainty necessary); *State v. Berube*, 171 Wn. App. 103, 122, 286 P.3d 402 (2012) (same).

The prosecutor’s misconduct here is distinct from the statements reviewed in *Fuller* and *State v. Curtiss*. In *Fuller*, the prosecutor did not improperly minimize the burden of proof or quantify it by analogizing beyond a reasonable doubt generally to putting a puzzle together and knowing what the image is not right away, not after more pieces, but eventually before all the pieces are in place there might be enough. 169

Wn. App. at 827. Likewise, in *State v. Curtiss*, 161 Wn. App. 673, 699-701, 250 P.3d 496 (2011), which this Court addressed in *Fuller*, a puzzle analogy did not minimize the burden because it did not quantify the level of certainty required or minimize or shift it where the prosecutor stated, “There will come a time when you’re putting that puzzle together, and even with pieces missing, you’ll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.”

Here, on the other hand, the prosecutor analogized the crimes themselves to the decision of whether to go to a movie. Comparing these crimes to the everyday, blissful occasion of going to see a movie “improperly minimizes and trivializes the gravity” of the charges, the “standard [of proof] and the jury’s role.” *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) (quoting this Court’s opinion *State v. Lindsay*, 171 Wn. App. 808, 288 P.3d 641 (2012)).

The prosecutor also specifically analogized the intent required to go see a movie and the specific intent the State had to prove for the jury to convict Jacobson of attempted rape of a child and attempted commercial sexual abuse of a minor.<sup>1</sup>

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<sup>1</sup> The State’s response is accordingly also insufficient because it argues Mr. Neeb was simply describing the “substantial step” requirement. Resp. Br. at 42-45. By the prosecutor’s own terms, he was describing the intent requirement as well: “did you intend to see a movie?” RP 784.

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, since none of you have been in a scenario like this defendant was in, 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.

RP 783-84 (emphasis added).

This analogy fundamentally misstates the law. "Unlike the crime of rape, attempted rape requires proof of a specific intent to rape." *State v. Aumick*, 73 Wn. App. 379, 383, 869 P.2d 421 (1994). The State did not only have to prove that Jacobson went to the 76 gas station (arguably the equivalent of the movie theater in the State's inapt analogy), the State had to prove beyond a reasonable doubt that Jacobson went with the specific intent to have sexual intercourse with a child who was less than 12 years

old. CP 29-31, 33. The State reduced and trivialized its burden by analogizing the case to the decision to see a movie.

The State apparently argues the prosecutor did not lessen the burden of proof because he did not use the words “beyond a reasonable doubt.” Resp. Br. at 44 (arguing prosecutor did not commit misconduct because he “was not even discussing the beyond a reasonable doubt standard”). However, the State cites no authority to support its contention that the prosecutor must recite those words to commit misconduct. In fact, misconduct can be indirect or implied; the focus is on the effect or the meaning, not the literal words used. *See, e.g., State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct for prosecutor to imply defense counsel’s wrongful deception); *State v. Chavez*, 76 Wn. App. 293, 299, 884 P.2d 624 (1994) (prosecutor may not indirectly vouch for a witness); *State v. Monday*, 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011) (“subtle references” and a “careful word here and there” can amount to misconduct). The prosecutor’s analogy between attempted rape of a child and the decision to go see a movie effected a lessening of the State’s burden regardless of whether the prosecutor uttered the words “burden.”

The prosecutor committed further misconduct when he urged the jury to send a message with its verdict. Op. Br. at 33-34 (citing RP 829).

The trial court overruled Jacobson’s objection to this argument. RP 829. The State, however, relies in response on *State v. Davis*, 141 Wn.2d 798, 871, 10 P.3d 977 (2000), a death penalty case where the Court emphasized the lack of objection at the penalty phase. Resp. Br. at 46.

The clear aim of the prosecutor’s argument was to take the jury away from its task of evaluating whether the evidence satisfied the State’s substantial burden of proof and to, instead, put the weight of accountability and the fortitude of American society squarely on the jurors’ shoulders: “This is the greatest country in the world. We have unlimited freedoms . . . You can choose to do illegal stuff . . . But . . . you will be held accountable. . . . **now it’s up to you folks to hold him responsible** for what he did.” RP 828-29 (emphasis added). The prosecutor sought to arouse jurors’ social responsibility and sense of morality to obtain guilty verdicts. His argument urged the jury to use the verdict to send a message to this country about how America operates. “This plea is not based solely on the evidence, however, but in effect exhorts the jury to **send a message to society** about the general problem of child sexual abuse. Such an emotional appeal is improper.” *State v. Bautista–Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (misconduct to argue the jury should convict to send a message) (emphasis added); accord *State v. Perez-Mejia*, 134 Wn. App. 907, 916-20, 143 P.3d

838 (2006) (“a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty”).

The State also claims “The prosecutor did not urge the jury to ignore the evidence in this case or introduce new evidence in closing argument.” Resp. Br. at 47. The State is correct that this Court can measure the prosecutor’s inflammatory intent by looking at his other misconduct. In fact, the prosecutor did rely on facts not in evidence and otherwise inflame the passions and prejudices of the jurors, as is discussed at length in the opening brief at pages 35 through 41 and herein. The prosecutor’s argument in urging the jury to hold Jacobson responsible also corresponded to the eliciting of the Task Force’s overall purpose and substantial arrests. *See, e.g.*, Op. Br. at 20-24.

The prosecutor sought to tie this case to the overall narrative of noble police officers saving non-fictitious children from incest and abuse, thereby distracting the jury from scrutinizing solely the actual evidence adduced in this trial (outrageous government conduct to create fictionalized crime and insufficient evidence to support the charges). Thus, the prosecutor’s argument that the jurors should “hold him responsible for what he did” did not arise in a vacuum, although it would have been prejudicial even on its own.

The State also ignores that the trial court overruled Jacobson's objection to this argument. RP 829. In doing so, the court "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Thus, the State's reliance on other trial court instructions to cure the prosecutor's misconduct is misplaced. When the trial court overruled the defense objection, the jury was incorrectly instructed that its sense of moral responsibility and social justice, its duty to hold someone accountable, were proper bases to convict. *Perez-Mejia*, 134 Wn. App. at 920.

- e. The prosecutor committed misconduct that lessened the presumption of innocence by inflaming the jurors' passions and prejudices, arguing facts not in evidence and disparaging the defense.

The prosecutor further relied on facts not in evidence, reduced the burden of proof and inflamed the jurors' passions and prejudices by arguing a willingness to talk about having sex with children is sufficient to convict one of attempted rape of a child. RP 786-87. This argument lowered the State's burden of proving a substantial step. Thoughts and speech are not a substantial step, and yet the prosecutor tried to convey to the jury that they are. The prosecutor further sought to instill fear in the jury that coincided with this societal responsibility to convict argument—he was messaging to the jury that even if Jacobson was not going to

commit an actual offense this time, he would certainly do so in the future if you do not put him in prison (it “is black and white . . . There isn’t any gray area there. An adult that is willing to talk about having sex with a child falls into the category of an adult who will [someday have sex with a child.]”). RP 786-87.

The prosecutor also disparaged Jacobson’s defense. First, he built a strawman from material that was not admitted at trial. The prosecutor definitively asserted to the jury “There are three defenses in a criminal case, generally speaking.” This is not true and was not in the record at trial. The misconduct did not end there, however, because the prosecutor discussed these three defenses so that he could then tell the jury that Jacobson was not even relying on one of these three “accepted” defenses. The prosecutor implied Jacobson’s defense was meritless because it fell outside the three-defense strawman the prosecutor fabricated for the jury.

The State’s response ignores, presumably because it cannot excuse, the prosecutor’s misconduct in describing Jacobson’s defense as a choice. The Court should treat the State’s failure to respond as a concession on this point. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (“The State does not respond and thus, concedes this point.”).

Further, contrary to the State’s argument, the prosecutor did not simply replace pronouns from Jacobson’s testimony with the first person

“I.” *See* Resp. Br. at 54-55. The prosecutor stepped into Jacobson’s shoes, ascribing thought processes to his “choice” of defenses. RP 786 (“In this case, the defendant has chosen to kind of combine a couple of things. . . . 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.”). Thus, the prosecutor not only treated the defense as a choice and relied on facts not in evidence to do so but he also attempted to personalize it and to step into Jacobson’s shoes by speaking in the first person.

In *Lindsay*, the Court held the prosecutor expressed his personal opinion by calling the defense a “crock” and “the most ridiculous thing I’ve ever heard.” *Lindsay*, 180 Wn.2d at 429, 437-38. The argument carried no reasonable interpretation except that it was an expression of the prosecutor’s personal opinion of the defendant’s credibility. *Id.* at 437-38. Mr. Neeb conveyed the same personal opinion when he called Jacobson’s defense “BS.” RP 791-92.

A prosecutor cannot erase his own misconduct by preempting it with an excusal. Here, Mr. Neeb told the jury that he was not expressing his personal opinion when he “use[d] the word ‘I’ multiple times in this closing argument.” RP 780. The prosecutor could not insulate his misconduct below and the State likewise cannot rely on this foreshadowing to excuse the prosecutor’s misconduct on appeal. *See* Rep.

Br. at 57. Because there is none, the State points to no opinion where the Court found the prosecutor preemptively excused his or her own misconduct. Such a rule would allow a prosecutor to make any unconstitutional, improper argument, so long as the prosecutor also told the jury that when he or she does so, he or she does not mean anything unconstitutional or improper by it. Moreover, the State apparently believes the jury could credit this portion of the prosecutor's argument (that he was not inserting his personal opinion even when explicitly doing so), yet disregard other portions of the argument that constitute misconduct. *See* Resp. Br. at 29, 42 (arguing no prejudice because jury was instructed that counsel's argument is not evidence). The State cannot have it both ways.

The prosecutor also disparaged Jacobson and defense counsel, committing further misconduct, in his cross-examination of Jacobson. The State claims Jacobson did not preserve this error for review because his extensive objections to the prosecutor's cross-examination were not specific enough. Resp. Br. at 59. However, as set forth below, defense counsel almost always set forth the basis for his objections. And the State ignores that the trial court understood and sustained Jacobson's objections. Those objections continued, however, because the prosecutor's misconduct continued. In fact, the prosecutor's misconduct became so

predictable that the trial court *sua sponte* sustained his question, thus not even requiring an objection from Jacobson. RP 759.

The prosecutor's argumentative, irrelevant misconduct was readily apparent to the trial court and is equally clear from the transcript. The prosecutor's cross-examination started off with improper opinion questioning and argumentatively:

Q How many times did you say "experienced fetishist and Kinkster" during your testimony here in the last hour and a half?

A I have no idea.

Q Pardon me?

A I have no idea.

Q Do you think it was more than five?

A I have no idea.

Q You said at the very beginning of your testimony that it was kind of embarrassing to talk about this, and yet, it sounded to me during your testimony that you were proud of your life-style. Did I get that wrong?

A Yes.

Q Is it embarrassing?

A It is.

Q Are you embarrassed about your life-style?

A Am I embarrassed about it? I'm embarrassed to talk about it among people that don't understand it, yes.

Q Did you think that came across during your direct testimony, Mr. Jacobson? Do you think you sounded embarrassed?

A I have no idea how I sounded.

Q Are you concerned about how it might have sounded?

A Am I concerned about it?

Q Yeah. Do you think it sounded truthful?

A It is what it is.

MR. CURRIE: Your Honor, I am going to object to that question.

THE COURT: I will sustain the objection.  
Mr. Neeb, next question.

RP 608-09. Upon defense counsel's objection, the court admonished Mr. Neeb not to argue with the witness on the next page of transcript:

Q Did you get the impression that Sergeant Rodriguez thought he was talking to someone willing to have sex with a child?

A I would have to ask for clarification on time frame.

Q Okay. You didn't ask your attorney for clarification once during direct. Are we going to go through that a bunch of times during my cross, do you think?

MR. CURRIE: I am going to object.

THE COURT: I will sustain. Let's ask questions, not argue.

RP 610-11.

But the prosecutor did not heed the court's directive; he proceeded to use cross-examination to argue with Jacobson rather than for its proper purpose:

Q You were asking if she was still too young for that.

A Right.

Q Which I am sure you are going to tell us is role play?

MR. CURRIE: Objection; argumentative.

THE COURT: Sustained.

RP 710.

Q Why do you keep quibbling about whether or not you are going to have sex with this 11-year-old?

A I am simply responding to your questions, Mr. Neeb.

Q And that's what you think you are doing?

A Yes.

Q Okay. Fair enough. Fair enough.

MR. CURRIE: Objection, Your Honor.

THE COURT: Let's get a question, Mr. Neeb.  
We don't need argument at this point.

RP 729.

The prosecutor also repeatedly used cross-examination to disparage Jacobson and his defense, to editorialize, and for other improper purposes. RP 709 (objection to prosecutor's question whether Jacobson

“had occasion to successfully bring a woman to an orgasm” is sustained); RP 626, 759 (editorializing); RP 749-50 (objection sustained where prosecutor asks Jacobson for a legal conclusion). In short, the prosecutor did not act as a quasi-judicial officer seeking a constitutionally fair verdict.

In sum, for all the reasons set forth here and in the opening brief, the prosecutor’s pervasive misconduct requires reversal. If a prosecutor “lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.”

*Walker*, 182 Wn.2d at 476 (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). There is no other explanation for what occurred below than that the prosecutor set aside his duty as a quasi-judicial officer and repeatedly used his podium to secure a conviction on improper grounds.

**2. The government’s behavior in orchestrating a team of police officers to relentlessly and indiscriminately pursue adults interested in consensual casual sexual relationships shocks the universal sense of fairness.**

“Generally, the government may not manufacture a crime from whole cloth and then prosecute a defendant for becoming ensnared in the

government's scheme." *United States v. Harris*, 997 F.2d 812, 816 (10th Cir. 1993). Due process bars prosecution for victimless crimes the government engineers and controls from start to finish, with the defendant bringing nothing more than his presence and enthusiasm. *Id.*; *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978). Because that is what occurred here, the Court should dismiss based on the government's outrageous conduct.

The State argues that the due process protections for outrageous government conduct should be applied extremely narrowly. Resp. Br. at 9, 11. However, in *Lively*, our Supreme Court specifically rejected this argument. 130 Wn.2d at 21. The outrageous government conduct doctrine, as adopted in *Lively*, was intentionally broader than the State contends, requiring dismissal where law enforcement directs the crime or fabricates it to obtain a conviction, even absent brutal coercion. *Id.*

Even outside this jurisdiction, dismissals for outrageous government conduct are not as rare as the State alleges. *See* Resp. Br. at 9-10. Neither the State nor Mr. Jacobson knows how many prosecutions have been dismissed in the trial court and not subject to a government appeal. However, appellate courts have dismissed prosecutions for outrageous government conduct or affirmed trial court dismissals for outrageous government conduct in at least the following cases: *Lively*, 130

Wn.2d at 27 (dismissing for outrageous government conduct); *State v. Martinez*, 121 Wn. App. 21, 35-36, 86 P.3d 1210 (2004) (affirming trial court); *Twigg*, 588 F.2d 373 (dismissing for outrageous government conduct); *United States v. West*, 511 F.2d 1083, 1085-86, 1087 (3d Cir. 1975) (dismissing for outrageous government conduct); *Greene v. United States*, 454 F.2d 783, 783-87 (9th Cir. 1971) (dismissing for outrageous government conduct); and *Pennsylvania v. Mathews*, 347 Pa. Super. 320, 500 A.2d 853 (1985) (affirming trial court).

Moreover, there is no one-size-fits-all rule. *Lively* directs the appellate courts to review each case on its own unique facts and circumstances. 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, rather than the encouragement of and participation in sheer lawlessness.’” *Id.* at 21 (quoting *New York v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y. 1978)).

The State is correct that the police sought to deceive its broad net of non-suspect targets. Resp. Br. at 11. For instance, Detective Rodriguez set up a “call center” to run the operation and has 40 to 50 officers working on it. RP 251-52. He recruited a young-appearing police officer

from another county to act the part of the older girl, Lisa. *E.g.*, RP 258-61. A postal inspector shared with Rodriguez the role of the fictitious mother who posted the advertisement, appearing in photographs and talking on the telephone with responders to “her” advertisement. RP 135-36, 166-67, 264-65; Exs. 7, 8.

But the government’s conduct went beyond just deception. Rodriguez admitted the program was persistent, engaging in conversations until the police were able to persuade the individual on the other end to “show up and get arrested.” RP 209-10. The State falsely claims the government did not engage in an emotional game. Resp. Br. at 15. In fact, Rodriguez acting as Kristl, used the falsified emotions of the fictitious Lisa to prevent Jacobson from exiting the conversations or decriminalizing the plan. For example, exhibit 4 shows Jacobson suggested “face time . . . Skype [or] Video chat” instead of an in-person meeting. Ex. 4, p.12. To which Rodriguez responded, “im done with you . . . i will find someone else.” Ex. 4, p.12. Jacobson concurred that they should end their conversions, replying simply “Ok.” *Id.* But despite Jacobson’s consent to end the charade, Rodriguez would not let Jacobson exit.

Rodriguez did not quit the conversation, he pursued it further by responding to Jacobson, “I am upset with you now. I have to tell [my

fictitious daughter, Lisa] you aren't coming. I shouldn't have let . . . her talk to you." RP 322; Ex. 4, p.12. Rodriguez's emotional tug unfortunately worked: Jacobson responded "Ugh...I feel bad," and he was drawn right back into Rodriguez's scheme. Ex. 4, p.12. Additional examples of the emotional cards the government played to ensure Jacobson stayed engaged are set forth in the opening brief. Op. Br. at 46-48.<sup>2</sup>

The State also wrongly contends Rodriguez did not control the operation, "but simply allowed the criminal activity to occur." Resp. Br. at 14-15. Rodriguez posted the initial advertisement and directed the course of the communications and the terms of engagement, thereby engineering and directing the criminal activity. RP 165; Ex. 1; *Harris*, 997 F.2d at 816. As Rodriguez testified at trial, he designed the operation to be "proactive." RP 132. Rodriguez would not alter his course to the

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<sup>2</sup> The government's insistent pursuit despite Jacobson's expressed reluctance violates the King County Prosecuting Attorney's Office's entrapment policy. The King County Prosecuting Attorney's Office, Electronic Surveillance and Digital Evidence in Washington State 2017 at Appendix C: Entrapment; Policy Issues and Investigative Tools Available from the Prosecutor's Office ("**NEVER, EVER, TELL OR ENCOURAGE A SUSPECT TO COMMIT A CRIME.** If the suspect expresses reluctance to complete a previously planned criminal act, **back off** and consult with the prosecutor."), <http://70.89.120.146/wapa/materials/2017%20SURVEILLANCE%20MANUAL%20FINAL.pdf>. A copy is attached as an appendix.

whims of Jacobson, as “Kristl” told him several times: like i said. i have a system and it has kept me out of trouble. i will not change.” Ex. 4, p.10. Even when Jacobson told Kristl he did not want to go forward with the plan and asked to “just meet somewhere, and have an innocent chat over coffee or ice cream or something” the police responded, “no way JOhn. i have a systime. answer a different ad then.” *Id.*

Moreover, the government’s conduct was outrageous because the police did not respond to illegal activity initiated by another. Rather, the police initiated criminal activity by posting an innocuous advertisement on a legal dating site. When Rodriguez posted the innocuous advertisement, he did not already suspect Jacobson was engaging in ongoing criminal activity. The government simply cast a wide net and then pursued conversations with people until they were willing to show up, regardless of whether it took 30 minutes or more than a month. RP 209-10.

Thus, this case stands in contrast to those where the charges have been upheld. For example, in *United States v. Russell*, the Supreme Court found the government’s conduct was not outrageous because the defendant “was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene.” 411 U.S. 423, 436, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973); accord *State v. Markwart*, 182 Wn. App. 335, 351-52, 329 P.3d 108

(2014) (government conduct not outrageous where informants purchased marijuana from an individual who grew and sold large quantities of marijuana in violation of the law “before any interaction with the Pullman Police Department”); *State v. Jessup*, 31 Wn. App. 304, 641 P.2d 1185 (1982) (government conduct not outrageous where it infiltrated an ongoing prostitution enterprise and did not increase the “already occurring” criminality).

In *Twigg*, on the other hand, the court dismissed the charge due to outrageous government conduct because the police investigation that set up the accused did not target an existing criminal operation such as a drug laboratory or ongoing enterprise. 588 F.2d at 381. There, “the illicit plan did not originate with the” people who were charged. *Id.* As in *Twigg*, there was no ongoing illegality that Rodriguez joined. To the contrary, Rodriguez fabricated characters and an advertisement and posted it to a legal dating website so that he could initiate criminal activity. Jacobson happened to get caught in the police fabrication when he responded to the innocuous advertisement posted on a free, lawful, adult casual dating website.

Viewed from a totality of the circumstances, the government’s conduct was so outrageous that it violates the common sense of

fundamental fairness. Reversal and dismissal is required. *See, e.g., Lively*, 130 Wn.2d at 19; *Russell*, 411 U.S. at 431-32.

**3. The State’s evidence was insufficient to show failed that Jacobson attempted to agree to pay a fee, an essential element of the attempted commercial sexual abuse of a minor charge.**

- a. The plain language of the statute required “a fee,” which the State failed to prove.

As set forth in Jacobson’s opening brief, the State failed to prove “a fee” was at issue, as required by the statute. Op. Br. at 51-55. Former RCW 9.68A.100(1)(b) criminalized an individual who 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. RCW 9.68A.100(1)(b) (2013). Consistent with its dictionary definition, “a fee” generally refers to a sum of money in the revised code. *E.g.*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/fee> (last visited Jan. 25, 2018); RCW 82.02.090(3) (defining “impact fee” as “a payment of money”); RCW 36.18.020 (setting forth various “clerk’s fees, surcharges”); RCW 46.61.5054 (additional fees for alcohol violators).

Rodriguez confirmed in his testimony to the Legislature that this former version of the statute did not cover agreements to forms of payment other than “money.” Testimony of Sergeant Carlos Rodriguez,

Senate Law & Justice Committee Public Hearing on SB 5030 at 1:09:57–1:10:30 (Jan. 17, 2017 at 10:00am).<sup>3</sup> He testified that a broader definition was required to cover gift cards and other items of value. *Id.* In response, the Legislature “broadened” the statute to criminalize the agreement to provide “anything of value.” RCW 9.68A.100; Senate Bill Report, SB 5030 (Apr. 6, 2017) (amended version “broadens” forms of payment criminalized under statute).

The State was required to prove this case under the agreement to pay a fee language (i.e., a sum of money) that was in effect at the time of the alleged crime. Yet, the State failed to prove any attempted agreement to pay a fee, or sum of money, in this case. As Det. Rodriguez testified,

Q So there wasn’t ever any agreement in this case that that -- that money, some amount of money was going to be exchanged for the sex involved, correct?

A No, just the gift card.

Q And he didn’t have a gift card [with him when he was arrested]?

A He did not.

RP 371.

The State relies on the promoting prostitution statutes to argue, contrary to Rodriguez’s testimony and the Legislature’s understanding,

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<sup>3</sup> <https://www.tvw.org/watch/?eventID=2017011203>.

that the “fee” language here was as broad as the “anything of value” language now is. But, the promoting prostitution statute used the terms “profits” and “money or other property.” RCW 9A.88.060(2) (2015). Thus, the language was not the same as the language at issue here. The State’s argument also fails because it would render irrelevant the amended statutory language, which was in fact intended to broaden the forms of payment reached by the statute. This Court cannot treat the Legislature’s choice of words as meaningless. *E.g., Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992); *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

b. The evidence was otherwise insufficient to prove attempted commercial sexual abuse of a minor.

Even if the State somehow proved “a fee,” the State’s evidence remained insufficient to prove that Jacobson agreed to pay it or solicited, offered, or requested to engage in sexual conduct with a minor in return for it.

The State selectively excerpts from the record to argue Jacobson and “Kristl” agreed that Jacobson agreed to bring gift cards in return for playtime. Resp. Br. at 76, 77, 78 (stringing together various excerpts from the 16 pages of text messages at exhibit 4, for example). The record does not bear out the State’s claim.

First, the State's recitation of Jacobson's phone call with "Lisa" simply states Jacobson knew "there are certain things that you like" that he could bring with him, such as sex toys and Skittles. *See* Resp. Br. at 77; Ex. 4, pp.4, 6-7. There is no evidence this referred to "a fee." In fact, as Rodriguez subsequently noted, they had not agreed to any fee. Ex. 4, p.13; RP 371.

Next, Exhibit 4, page 13 shows Kristl asked about "gifts" and then asked what Jacobson had in mind. Jacobson responded "A gift card, that can be used for any purpose." Ex. 4, p.13. Rodriguez did not tell Jacobson the "gift" was necessary to get the "playtime." *See id.* In fact, Kristl had already invited Jacobson over before, as "she" acknowledged, there was any agreement on gifts. *Id.* When Kristl later wrote "i will take the gift card like you said for playtime" she was not quoting anything that Jacobson said. *Id.*

Moreover, Jacobson did not respond "ok." *Id.* Rather, Kristl's message continued at length, ending in "can i tell her you are coming over or not," to which Jacobson responded, "Ok..yes I'm coming." Ex. 4, p.13. Jacobson did not say "ok" to an exchange of gift cards for playtime. And, in fact, he did not have a gift card or fee with him when he was arrested. RP 337-38, 343-45, 371, 440-41, 453.

**4. The State failed to prove Jacobson attempted to engage in sexual intercourse with a minor under 12 years of age, requiring reversal and dismissal of the attempted rape of a child count.**

The evidence was also insufficient to prove Jacobson committed attempted rape of a child in the first degree. Op. Br. at 57-62. The age of “Kristl’s” fictitious older daughter was ambiguously presented during communications and Kristl held her out to be at least 12. *E.g.*, Ex. 8, p.2 (describing girl as “soon to be 12-year[s] old”); RP 258, 261; Ex. 4, pp.1, 2 (photographs depict person over the age of 12); Ex. 1 (advertisement does not mention age); Ex. 4, p.8 (Rodriguez does not correct Jacobson when he notes her age as 12). Jacobson never committed to sexual intercourse and, in fact, indicated he wanted to meet Kristl before any act was determined. *E.g.*, Ex. 9, pp.2, 3; Ex. 8, p.2; Ex. 7 at 3:47-4:01. Finally, Jacobson did not show up at the location “Kristl” told him, he was arrested while he was driving away from a gas station nearby. *E.g.*, RP 332, 434-38, 444-52, 454-58. And although the State claims Jacobson agreed to gift cards in exchange for “playtime,” Jacobson did not have any gift cards with him. RP 371.

Because the evidence was insufficient to show either that Jacobson intended to have sexual intercourse with a person under the age of 12 or that he took a substantial step toward having sexual intercourse with a

person under the age of 12, the conviction should be reversed and the charge dismissed.

**5. The overbroad conditions prohibiting Jacobson from all unsupervised internet use and from using any device with internet access violates his First Amendment rights..**

If the Court reverses the convictions and dismisses the charges for insufficient evidence or remands for a new trial, it need not reach Jacobson's challenge to the overbroad community custody provisions. However, if the Court reviews the internet prohibitions, it should strike them as overbroad under the First Amendment. Op. Br. at 62-70. The State fails to show that a wholesale prohibition on access to the Internet absent specific approval is narrowly tailored.

**C. CONCLUSION**

The Court should reverse the convictions and dismiss the charges. The government violated due process by pursuing Jacobson despite his expressed intent to withdraw and by creating and directing the criminal enterprise. Furthermore, the State failed to prove the offenses beyond a reasonable doubt.

Alternatively, a new trial should be held because the prosecutor grossly and constantly deviated from his role as a quasi-judicial officer, infecting the trial with pervasive, prejudicial misconduct.

DATED this 31st day of January, 2018.

Respectfully submitted,

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# **APPENDIX**

**ELECTRONIC  
SURVEILLANCE  
and  
DIGITAL EVIDENCE  
IN WASHINGTON STATE  
2017**

by:

THE KING COUNTY PROSECUTING ATTORNEY'S OFFICE

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## Law Enforcement Use Only

This Electronic Surveillance and Digital Evidence Manual is the work product of the King County Prosecuting Attorney's Office. As such, this manual contains legal opinions and advice on the various legal issues discussed. This Manual is written primarily to advise police and prosecutors in case development and case evaluation. It gives conservative advice in many places where a trial prosecutor might not be so conservative when seeking admission of previously gathered evidence. This manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.

**To enable easy copying of text for insertion into legal memorandums, all legal citations in this document are intentionally written in the long form, regardless of any prior citation to the same authority.**

## APPENDIX C: ENTRAPMENT; POLICY ISSUES AND INVESTIGATIVE TOOLS AVAILABLE FROM THE PROSECUTOR'S OFFICE

### A. ENTRAPMENT DEFENSE - RCW 9A.16.070

It is a defense that:

- the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
- the actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

Merely affording the actor an opportunity to commit a crime, which the actor had not otherwise intended to commit, does not constitute entrapment.

However, public policy must be considered in addition to the technical requirements of the statute. If you overreach, you will lose.

Because each undercover encounter is unique, there is no "entrapment-proof" script. That said, the following are important rules that will prevent entrapment defense problems.

- **NEVER, EVER, TELL OR ENCOURAGE A SUSPECT TO COMMIT A CRIME.** If the suspect expresses reluctance to complete a previously planned criminal act, **back off** and consult with the prosecutor.
- **DISTINGUISH BETWEEN POLICE CONTROLLED CRIME VERSUS CRIMINAL ACTIVITY THE POLICE ALLOW TO OCCUR.** As a general rule, detectives should let the suspect initiate all contacts. Suspects, not investigators, should by their words and actions initiate the crimes and show their interest in and agreement to the crimes. Do not badger the suspect if the suspect loses interest in the criminal activity. Don't order things that are not already contraband.
- Whenever possible have at least two undercover detectives present during contacts with the suspect (and informant). This may not be possible at the beginning, but should occur as soon as possible thereafter. This provides corroboration for the undercover's accounts of the contacts with the suspects.

Avoiding Entrapment, Policy And Practice

- Detectives should IMMEDIATELY document ALL transactions and the details of ALL conversations with potential defendants. Even though short encounters may seem unimportant at the time, they may take on unanticipated significance at trial.
- Avoid using the confidential informant as a transactional witness. Paid informants are difficult to control, create almost automatic entrapment issues, and have no credibility in the eyes of a jury.
- Obtain rap sheets as soon as possible for all suspects with whom you deal. A fact-finder is much less likely to believe entrapment if the suspect has prior convictions for the same offense.
- Use other resources at your disposal to ensure the suspect is a worthy target: witness interviews, intelligence, surveillance; public records (business licenses, incorporation papers, utilities) bank records, telephone records, insurance records, etc.
- Avoid pressuring investigative suspect to commit crime s/he is otherwise reluctant to commit. Could result in case dismissal for “outrageous conduct,” in violation of defendant’s due process rights. *See State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

## B. USING THE PROSECUTOR'S EXPERTISE

Special evidence gathering tools that the prosecutor can help you use:

**Inquiry Judge** - RCW 10.27 – A **secret judicial proceeding** that allows prosecutors to obtain evidence, from witnesses and/or records, upon a showing that the prosecutor has **reasonable suspicion** to believe that criminal activity is occurring within the jurisdiction.

- Excellent means for obtaining records from third parties, i.e., banks, utilities, businesses, phone companies, to document reasonable suspicion and build probable cause, without alerting suspects in undercover operation.
- Usually limited in its use with witnesses. You don't usually need it for cooperating witnesses and it is unlikely a hostile witness would abide by the secrecy requirements.

Avoiding Entrapment, Policy And Practice

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49887-1-II
	)	
ERIC JACOBSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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AIRWAY HEIGHTS, WA 99001		

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JANUARY, 2018.



X \_\_\_\_\_

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# WASHINGTON APPELLATE PROJECT

January 31, 2018 - 4:44 PM

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**Appellate Court Case Number:** 49887-1  
**Appellate Court Case Title:** State of Washington, Respondent v Eric K. Jacobson, Respondent  
**Superior Court Case Number:** 15-1-05049-6

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