

NO. 50089-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KENNETH WESLEY CHAPMAN, JR.,

Appellant.

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

The Honorable Kevin D. Hull

APPELLANT'S OPENING BRIEF

JASON B. SAUNDERS
Attorney for Appellant

GORDON & SAUNDERS, PLLC
1111 Third Avenue, Suite 2220
Seattle, Washington 98101
(206) 332-1280

TABLE OF CONTENTS

A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
C. <u>STATEMENT OF THE CASE</u>	3
1. <u>Law enforcement placed a deliberately vague advertisement in the woman seeks man section of the personals on craigslist to attract persons who would want to have sex with children</u>	3
2. <u>Mr. Chapman responded to the vague advertisement in the woman seeking man personal advertisement section</u>	5
a. <u>On August 26, 2015, Shannon explained to Mr. Chapman that she wanted to find a man to have sex with her daughter(s) as she had when she was very young, but Mr. Chapman continued to shift the conversation back to having sex with Shannon</u>	7
b. <u>Texting conversation on August 27, 2015</u>	10
c. <u>When Detective Rodriguez learns that Mr. Chapman is not serious about having sex with Brooke, but only wants to talk about sex with Shannon, the conversation ends with Mr. Chapman upset and saying good bye to Shannon and her family on August 28, 2015</u>	10
d. <u>On August 31, 2015, Shannon reinitiated the texting between Shannon and Mr. Chapman, and Shannon explained what Mr. Chapman must bring to have sex with her daughter Brooke</u>	12
e. <u>The September 1, 2015, Shannon sets the price for having sex with Brook, while Mr. Chapman continues to try to court Shannon when Shannon first states that she will watch him have sex with Brooke, possibly join in, and that she preferred the doggie position</u>	12

f.	<u>On the date of arrest, September 2, 2015, Shannon becomes very familiar with Mr. Chapman, calling him boyfriend and telling him that she is “wet,” “soaked,” and excited to have sex with Mr. Chapman and tells him that her daughter is not home</u>	14
g.	<u>Mr. Chapman refused to go to the apartment because he wanted to make sure he met Shannon to see if she was good looking first</u>	20
3.	<u>Kenneth Chapman testified he only wanted to have sex with Shannon and not Brooke and only spoke about having sex with Brooke to get to have sex with Shannon</u>	20
4.	<u>Procedural facts</u>	24
5.	<u>Motion to exclude the defense of entrapment and argument from hearing</u>	26
6.	<u>The Court refused Mr. Chapman’s proposed entrapment jury instruction</u>	29
D.	<u>ARGUMENT</u>	32
1.	<u>THE TRIAL COURT ERRONEOUSLY DENIED MR. CHAPMAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE OF ENTRAPMENT</u>	32
a.	<u>This issue was argued below and is thus properly preserved for appeal</u>	32
b.	<u>A jury cannot find a person guilty of a crime if that person had no predisposition to commit the crime and law enforcement unfairly induced the defendant to participate in the crime</u>	35
c.	<u>Although “Net Nanny” sting operations may be used by law enforcement to ferret out criminal offenses against children, the government may not unfairly induce a person to commit an offense when the individual was not predisposed to commit the offense</u>	37

3. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO FILE AN AFFIDAVIT OF PREJUDICE TO PREVENT JUDGE HOUSER FROM HEARING MR. CHAPMAN'S CASE AFTER HE HAD MADE A DISCRETIONARY RULING IN MR. CHAPMAN'S CASE	78
a. <u>Mr. Chapman and the State requested Judge Houser make a discretionary ruling on Mr. Chapman's conditions of release pending trial</u>	78
b. <u>The legislature's failure to release conditions within the list of exceptions stated in RCW 4.12.050 means that the legislature intended to exclude it from the list of judicial rulings that are non-discretionary under RCW 4.12.050</u> ...	81
c. <u>Mr. Chapman's release conditions were not imposed in lieu of bail</u>	84
d. <u>Mr. Chapman's attorney was not required to object in order to preserve the affidavit of prejudice issue for appeal</u>	86
E. <u>CONCLUSION</u>	86

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT DECISIONS

<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	79, 86
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	56
<u>State v. Lile</u> , No. 93035-0, 2017 WL 3139265 (Wash. Sup. Ct. July 20, 2017).....	79, 86
<u>State v. Lively</u> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	36
<u>State v. Parra</u> , 122 Wn.2d 590, 859 P.2d 1231 (1993).....	79, 86
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	56
<u>State v. Smith</u> , 101 Wn.2d 36, 677 P.2d 100 (1984).....	36, 59
<u>State v. Sommerville</u> , 111 Wn.2d 524, 760 P.2d 932 (1988).....	82
<u>State v. Strasburg</u> , 60 Wn. 106, 110 P. 1020 (1910).....	56
<u>State v. Waggoner</u> , 80 Wn.2d 7, 490 P.2d 1308 (1971).....	36, 59
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	56

WASHINGTON STATE COURT OF APPEALS DECISIONS

<u>State v. Birdwell</u> , 6 Wn. App. 284, 492 P.2d 249 (1972).....	57, 61
<u>State v. Callahan</u> , 87 Wn. App. 925, 943 P.2d 676 (2000).....	57
<u>State v. Emerson</u> , 10 Wn. App. 235, 517 P.2d 245 (1973).....	59
<u>State v. Enriquez</u> , 45 Wn. App. 580, 725 P.2d 580 (1986).....	26, 33, 49-52
<u>State v. Finley</u> , 97 Wn. App. 129, 982 P.2d 681 (1999).....	56
<u>State v. Hansen</u> , 69 Wn. App. 750, 850 P.2d 571 (1993).....	58
<u>State v. Keller</u> , 30 Wn. App. 644, 637 P.2d 985	

(1981)	57-60, 74-75, 78
<u>State v. Kerr</u> , 14 Wn. App. 584, 544 P.2d 38 (1975).....	57, 61
<u>State v. Ladiges</u> , 66 Wn.2d 273, 401 P.2d 977 (1965)	57, 61
<u>State v. Scherz</u> , 107 Wn. App. 427, 27 P.3d 252 (2001)	56
<u>State v. Swain</u> , 10 Wn. App. 885, 520 P.2d 950 (1974).....	60
<u>State v. Trujillo</u> , 75 Wn. App. 913, 883 P.2d 329 (1994).....	35
<u>State v. Walker</u> , 11 Wn. App. 84, 521 P.2d 215 (1974)	59
<u>State v. Williams</u> , 70 Wn. App. 567, 853 P.2d 1388 (1993).....	81
<u>State v. Yates</u> , 64 Wn. App. 345, 824 P.2d 519 (1992)	57

UNITED STATES SUPREME COURT DECISIONS

<u>Hampton v. United States</u> , 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976).....	59
<u>Jacobson v. United States</u> , 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992).....	36, 39, 43-44, 50, 52-53, 65-68, 76-77
<u>Sherman v. United States</u> , 356 U.S. 369, 78 S.Ct. 819, 372 2 L.Ed.2d 848 (1958).....	37, 41-42
<u>Sorrells v. United States</u> , 287 U.S. 435, 53 S.Ct. 210, 216, 77 L.Ed. 413, 86 A.L.R. 249 (1932)	36, 39, 44, 64
<u>United States v. Russell</u> , 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)	59

FEDERAL DECISIONS

<u>United States v. Acosta</u> , 67 F.3d 334 (1 st Cir. 1995)	69
<u>United States v. Fedroff</u> , 874 F.2d 178 (3 rd Cir.1989)	58
<u>United State v. Poehlman</u> , 217 F.3d 692 (9 th Cir. 2000).....	37-43, 45-48, 50, 52, 59, 61, 68, 76-77

<u>United States v. Brown</u> , 43 F.3d 618 (11 th Cir.1995).....	68
<u>United States v. Gamache</u> , 156 F.3d 1 (1 st Cir. 1998).....	42-43, 61-71, 73, 75-78
<u>United States v. Gendron</u> , 18 F.3d 955 (1 st Cir. 1994).....	41, 60
<u>United States v. Gifford</u> , 17 F.3d 462 (1 st Cir.1994)	68-69, 77
<u>United States v. Hollingsworth</u> , 27 F.3d 1196 (7 th Cir. 1994) (en banc)	40, 68, 77
<u>United States v. Joost</u> , 92 F.3d 7 (1 st Cir. 1996)	65, 75
<u>United States v. Montanez</u> , 105 F.3d 36 (1 st Cir.1997)	64
<u>United States v. Posner</u> , 865 F.2d 654 (5 th Cir. 1989).....	44
<u>United States v. Warren</u> , 453 F.2d 738 (2d Cir.), <u>cert. denied</u> , 406 U.S. 944 (1972)	44
<u>United States v. Whoie</u> , 925 F.2d 1481 (D.C.Cir. 1991).....	43, 50, 52, 77
<u>Waker v. United States</u> , 344 F.2d 795 (1 st Cir.1965)	65

WASHINGTON STATE CONSTITUTIONAL PROVISIONS

Wash. Const. Art. I, § 20	80
---------------------------------	----

STATUTES

RCW 4.12.040.....	2
RCW 4.12.050.....	2, 78-79, 81-86
RCW 9.68A.090	25
RCW 9.68A.100	25
RCW 9.94A.390	82
RCW 9A.16.070	35-36

RCW 9A.28.020 74
RCW 9A.44.073 25

RULES

CrR 3.2 80-85
CrR 3.2.1 81-83
CrR 4.1 79
CrR 4.7 79
JuCR 7.3 81-83
JuCR 7.4 81-83

OTHER AUTHORITIES

Am.Jur.2d Crim. L. § 202 (1981) 36

A. ASSIGNMENTS OF ERROR.

1. The trial court erroneously denied Mr. Chapman his right to present an entrapment defense that would have led to his acquittal.

2. The trial court denied Mr. Chapman a fair trial by failing to instruct the jury on the defense of entrapment.

3. The trial court erroneously permitted the prosecutor to file an affidavit of prejudice against Judge William B. Houser after Judge Houser had made a discretionary ruling in this case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the defendant produces evidence that an agent posing as a mother seeking a sexual mentor for her daughter induced him to commit an offense and no evidence showed he was predisposed to commit the offense, the government cannot overcome an entrapment defense. Here, the trial court prevented the defendant from proceeding at trial with an entrapment offense, incorrectly stating he had failed to show sufficient evidence he was entrapped by the government. Was Mr. Chapman denied a fair trial when the court refused to allow the defense to present an entrapment defense that would have led to his acquittal?

(Assignment of Error 1).

2. In a criminal trial, the court commits reversible error when it fails to instruct the jury on the law as to any legitimate defense advanced by the defendant when there is evidence to support that theory. Here, the appellant presented evidence that the criminal design originated with the government, the government utilized unfair tactics to pressure Mr. Chapman into committing the offenses and there was no evidence that Mr. Chapman was predisposed to commit any such offense. Did the trial court deny Mr. Chapman a fair trial when it refused to instruct the jury on the defense of entrapment? (Assignment of Error 2).

3. Former RCW 4.12.050¹ permits a party or attorney to disqualify a judge from hearing his or her case for prejudice by filing an affidavit stating that the party or attorney believes he or she cannot have an impartial trial before such judge. However, such an affidavit of prejudice must be filed before the judge to be disqualified has made any rulings involving discretion in the party's case. Did the trial court err by permitting the State to file an affidavit of prejudice to disqualify Judge William B. Houser from hearing Mr. Chapman's case after Judge Houser had made discretionary rulings on Mr. Chapman's conditions of release pending trial? (Assignment of Error 3).

¹ RCW 4.12.040 and 4.12.050 was substantially revised by the legislature in 2017. The revisions went into effect July 23, 2017. See SSB 5277.

C. STATEMENT OF THE CASE.

1. Law enforcement placed a deliberately vague advertisement in the woman seeks man section of the personals on craigslist to attract persons who would want to have sex with children. The Washington State Patrol has a Missing and Exploited Children's Task Force ("MECTF"), which handles crimes against children. 1/19/17RP at 52. Detective John Garden testified that MECTF started a new sting operation in 2015, wherein undercover officers place advertisements on craigslist in different locations that concern adults having sex with children, dubbed "Net Nanny." 1/19/17RP at 53; 1/31/17RP at 541. The Kitsap County Net Nanny sting operation was the very first operation MECTF did. 2/1/17 at 607.

Detective Carlos Rodriguez designed and posted the advertisement on craigslist. 2/1/17RP at 586-87. According to Detective Rodrigues, the ad placed in the "woman for men" section of craigslist stated as follows:

Close taboo family looking for fun, young. I am new to the 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 that want to meet respond. 43 F. Bremerton. Reply with ASL. I can tell you more when you respond. No solicitations, but gifts are welcome. Two dau.

1/30/17RP at 285-87. Detective Rodriguez explained that the ad's abbreviations meant the following,

RP	Role Play
F	Female
ASL	Age, Sex, Location
Dau	Daughters

Id. at 287. In Detective Rodriguez's mind, the advertisement's language concerning "taboo family" and "close family," was meant to denote an act "that isn't necessarily morally accepted," which would include "sex with children" as such a taboo act. Id. at 286. Rodriguez also used terms such as "close family," which in his mind would involve incest or people having sex with children. Id.

On cross examination, Detective Rodriguez admitted that the Kitsap County sting operation starting in August 2015 was the very first sting operation that went into effect after his training. 1/31/17RP at 408-09. Rodriguez also admitted that the terms he hoped to convey as incest and having sex with children, such as "taboo" and "close family" could mean something completely different from what he had intended them to mean. Id. at 416. He also admitted "young" could mean any person under the age of the person looking at the advertisement and that a person may not be able to discern what terms such as "RP" and "DAU" mean. Id. at 417.

The reason for having deliberately vague terms in the advertisement was so it could remain on Craigslist as long as possible before a customer “flagged” the advertisement and craigslist removed the advertisement. Id. at 418. The advertisement was posted but soon flagged and quickly removed by Craigslist. 1/30/17RP at 281, 302. Detective Rodriguez testified that if a person is not well-versed with the terms and ideas he utilized, the individual might not understand what the advertisement meant. 1/31/17RP at 419. These types of advertisements usually reap hundreds of responses within the first ten minutes. 1/30/17RP 278. The main evidence against Mr. Chapman consisted of Detective Rodriguez reading the text messages between the person he impersonated, “Shannon,” and Mr. Chapman.

2. Mr. Chapman responded to the vague advertisement in the woman seeking man personal advertisement section.

Detective Rodriguez posed as a woman by the name of “Shannon.” 1/31/17RP 410. The first message from Mr. Chapman was at 8:25 a.m. on August 26, 2015, three minutes before the advertisement was flagged, stating “I would love to know more info about what you’re looking for. Here’s my pic and number (253) 267-3241.” (sent at 8:25 a.m.) 1/30/17RP at 291. The picture Mr. Chapman sent was a picture of his penis. 1/31/17RP at 419-20; 1/30/17RP at

289. The photograph was not sent to a child, but rather to Detective Rodriguez posing as Shannon. 1/31/17RP at 421.

Shannon responded, "You inquired about my two daughters." 1/30/17RP at 291. Mr. Chapman responded, "I thought I was playing with the lady in the pic. What did you have in mind for your daughters?" Id. Rather than correct Mr. Chapman and state there was no photograph of her associated with the advertisement, Detective Rodriguez simply did not respond to that part of Mr. Chapman's response. Id. at 421-22. According to Detective Rodriguez there was no photograph attached to the ad. Id. at 422.

The following exchange took place on Craigslist between "Shannon" and Mr. Chapman:

S: This is more for my close family. I can host and make sure they aren't hurt. If you are serious and want to experience what my youthful, close family has to offer, then respond back. I am very careful about who I meet, and very discreet. If you want to taste true innocence, then this is for you. Two daus, 11/7. Tell me what you want." (sent 8/26/15 at 8:42 a.m.)

KC: Sounds fun. Tell me more. Do you have pics? (sent 9:00 a.m.)

S: We can text if you want to go over rules. I don't send pics of the kids (sent 9:15 a.m.)

K.C.: Here's my number. Text me. 253-267-3241. (sent 9:18 a.m.)

1/30/17RP at 291-93. Detective Rodriguez testified that he wanted to move to texting at that point, because had the ad been flagged and removed during the conversation on craigslist, the communication between emailers would end too. Id. at 294.

a. On August 26, 2015, Shannon explained to Mr. Chapman that she wanted to find a man to have sex with her daughter(s) as she had when she was very young, but Mr. Chapman continued to shift the conversation back to having sex with Shannon. Once they switched to texting, the conversation that followed sporadically talked about Mr. Chapman wanting to have sex with Shannon, and then to Shannon's invitation for Mr. Chapman to have sex with Brooke, her daughter. Shannon asked whether Mr. Chapman had sexual toys, and he responds, "No I don't have toys my cock is big and thick." Id. at 319. Shannon responds, "Yum, k how big" and asks which daughter he prefers. Id. Mr. Chapman responds "K, I don't think o ucan [sic] go all the way in Samantha [sic]. 1/30/17RP at 319.

Shannon tells Mr. Chapman that her two daughters know that having an adult man have sex with them is what she wants for them to experience and that they will have sex with a man because they love their mother. Id. at 320. She continued, "I want ou [sic] to teach teh [sic] how to please a man." Id. Mr. Chapman again

attempted to steer the conversation back to having sex with Shannon by saying, "What about you demonstrate on me and show them first." Id. Mr. Chapman asks whether Shannon will be watching, and she responds "Absolutely. I have to protect tehm [sic] and make sure rules are followed I can have no clothes on if ou [sic] want." Id. at 320.

Mr. Chapman later asks Shannon if he can just get a picture of her (Shannon). Id. at 321. Shannon seemingly tries to redirect the conversation back to her daughters, "No nudes I can send of what they will ware [sic] for you too." Shannon sends a picture of children's clothing on the apartment floor and asks Mr. Chapman whether he received it. Id. She then asks Mr. Chapman if he received the pic, to which Chapman responded, "No I didn't of you and clothes right." Id. Then a picture of Detective Beeler holding a dress is taken and sent to Mr. Chapman, followed by a second picture of her chin, teeth, and upper torso. 1/30/17RP at 322-23.

But even when the topic goes back to having sex with the daughters, Mr. Chapman keeps striving to have a sexual conversation with Shannon about the two of them, asking "Oh ok will you be getting pleasure from watching me." Id. at 322. Even when the topic of Mr. Chapman having sex with Brooke and whether Brooke gets wet was exchanged, Mr. Chapman continued

to question Shannon about her arousal, “does it make you wet seeing them get wet.” Id. at 323.

When Mr. Chapman asks whether Brooke was really wet, Shannon said, that he sounded nice on the telephone but she doesn’t just give free sex talk and had other things to do. Id. Mr. Chapman sent Shannon a picture of him. Id. at 326. Mr. Chapman asks Shannon whether when they meet the next day will it be just he and Shannon that meet? Id. at 326. Shannon responds, “once I see you are okay it will be the three of us” (Shannon, Chapman and Brooke). 1/30/17RP at 326. Chapman responds twice, asking whether the three of them will all be in the same room. Id. Shannon then responds, “James, I like you, but you are like a little puppy that needs too much attention that I don’t have time for. If you want to sleep with Brooke then we can do that.” Id.

Shannon then sent a picture of her with the date, 8/26/15, on it and a smiley face. Id. at 327. Mr. Chapman then twice asks Shannon if Brooke and Shannon would want a picture of his cock. Id. Shannon’s responds, “Why don’t you come over and just show us right now. Getting me hot.” Id. Shannon tells Mr. Chapman that he looks strong in the picture he sent. Id. Mr. Chapman responds that he is “tall and strong with a heavy cock lol.” Id. at

328. Shannon answers, "So I think you should come over and show us, I think it will be great for all of us." Id. at 329.

Shannon attempts to convince Mr. Chapman to come over right away, but Mr. Chapman answers he cannot be there until 1:00am. Id. at 329. The meeting is postponed until the next day.

b. Texting conversation on August 27, 2015. The next morning, Mr. Chapman texts Shannon, "Hey Shannon," but Shannon does not respond until 3:33p.m. saying only, "what." Id. at 330. She then says that she doesn't have all day to chat and asks if they could just meet on August 28, 2015. Id.

c. When Detective Rodriguez learns that Mr. Chapman is not serious about having sex with Brooke, but only wants to talk about sex with Shannon, the conversation ends with Mr. Chapman upset and saying good bye to Shannon and her family on August 28, 2015. On August 28, 2015, Shannon reaches out to Mr. Chapman first at 3:21 p.m., "hey" and then "are you still interested." Id. Mr. Chapman responds, "I am but you been giving me the run around." 1/30/17RP at 331. Shannon wants to see Brooke happy and experience what Shannon had experienced when she was young. Id.

Shannon is hesitant to send pictures (not nudes) of the family and Mr. Chapman wonders if he could just meet Shannon

and her family the following week. 1/30/17RP at 332. Mr. Chapman asks if he could just meet them at their camp site the following weekend and that Shannon and Brooke will love his cock. 1/30/17RP at 333. Shannon abruptly states, “no thanks. This isn’t gonna work then.” Id. at 333. Mr. Chapman states, “Damn why do you keep jerking me around” and later “seems like you really don’t want to meet I’m starting to think this is just a big joke.” 1/30/17 at 333-34. Shannon responds, “not a joke I just don’t have time for flakes.” Id. at 334. Shannon and Mr. Chapman tried to iron out payment for getting to have sex with Brooke. Id. at 335. Mr. Chapman asks Shannon again if she and Brooke want to see a picture of his cock and Shannon responded “No im [sic] tired of you you know what up so if you are srious [sic] then msg back.” Id. at 336. Mr. Chapman ends the conversation completely by stating, “If you feel like you can’t respect me then you and your family can get lost good bye.” Id. Mr. Chapman’s statement saying get lost good bye occurred on August 28, 2015, at 6:32 p.m.

Rodriguez (Shannon) conceded that at this point, it became apparent that Mr. Chapman was “very aggressive,” wanting only to talk sexually via text messaging and trade naughty pictures with Shannon to pleasure himself. 1/31/17RP at 431. Rodriguez at that

point just wanted to get rid of Mr. Chapman, since he did not appear focused on Shannon's daughters. Id. at 432.

After Mr. Chapman ended the conversation with Shannon, he deleted the entire text conversation from his cellphone.

1/31/17RP at 435-36.

d. On August 31, 2015, Shannon reinitiated the texting between Shannon and Mr. Chapman, and Shannon explained what Mr. Chapman must bring to have sex with her daughter Brooke. No further conversation was made until Detective Rodriguez reinitiated the conversation three days later, on August 31, 2015. 1/30/17RP at 337; 1/31/17RP at 437. Shannon reinitiated the conversation apologizing for disrespecting him. Id. Shannon tells Mr. Chapman the gifts he can bring in exchange for having sex with Brooke. Id. at 339. Although Mr. Chapman states that he cannot afford the price Shannon expects for Brooke, Shannon settles for getting \$50, video games or maybe an ipod and some beer (for Shannon). Id. at 339.

e. The September 1, 2015, Shannon sets the price for having sex with Brook, while Mr. Chapman continues to try to court Shannon when Shannon first states that she will watch him have sex with Brooke, possibly join in, and that she preferred the doggie position. Shannon again starts the conversation at 11:23

a.m., telling Mr. Chapman "I need more time than that. She isn't even home James. Do you need it bad". 1/30/17RP at 340. Mr. Chapman responds, "Huh need what." Id. Shannon explains she had misread his response "right now 50" from the night before thinking he meant he would come over immediately and pay 50 roses. Id. at 340. Mr. Chapman asks if September 2, 2015 is good. Id.

Mr. Chapman asks Shannon if he can bring her beer, liquor or wine, and she tells him she likes White Zin. Id. at 341. Mr. Chapman asks Shannon what she would like to do the next day and "what would excite you." Id. at 341. Shannon tells Mr. Chapman that she would watch him have sex with Brooke and if she got excited, she'd join in. Id. at 342. Shannon asks Mr. Chapman if he was interested in Brooke and Shannon or just Brooke. Id. Mr. Chapman does not answer the question, but instead asks "What did you want to see while your watching." Id. Shannon answers, "I want to see what I experience growing up." Id.

Shannon begins to make it clear that she will also have sex with Mr. Chapman, asking "What will you do to please brooke, what will you do to please me." 1/30/17RP at 342-43. Shannon tells Mr. Chapman that Brooke's had no favorite position but also told him that Shannon herself liked doggie style. Id. at 346.

A picture is sent to Mr. Chapman, allegedly from Brooke, that says, "XO Brooke" a heart and inside the heart, "Hi James. Can't wait to see all of you." Mr. Chapman asks Shannon whether she was the author of the message, which Shannon denies. Id. Mr. Chapman then says, "Well I hope you feel the same way she does." Id. Shannon says, "She's learning and needs a good teacher :)" Id. Chapman responds, "learning what." Shannon: "Use your imagination." Mr. Chapman responds, "I thought u were talking about writing." Id.

Shannon tells Mr. Chapman to go to the am/pm on 303 and fairgrounds road and call from the am/pm which is near the apartments where Shannon lived. Id. at 351.

f. On the date of arrest, September 2, 2015, Shannon becomes very familiar with Mr. Chapman, calling him boyfriend and telling him that she is "wet," "soaked," and excited to have sex with Mr. Chapman and tells him that her daughter is not home. Rodriguez testified about his text conversation with Mr. Chapman on the day that Mr. Chapman was arrested, September 2, 2015. Mr. Chapman texts Shannon, "Are we still gona [sic] meet today." 1/30/17RP at 351. Shannon answers yes. Id. at 438. At trial, Detective Rodriguez confirmed that Mr. Chapman had not texted with Brooke but only with Shannon. Id. at 438.

Shannon asks what Mr. Chapman would like to see her wear. Id. at 439. Mr. Chapman told her that should wear anything as long as she does not wear underwear. Id. at 439.

At noon, Shannon sent Mr. Chapman a text that read: "What will you be wearing bae?" 1/31/17RP at 440. Detective Rodriguez testified at trial that Shannon's use of the term "bae" means "boyfriend."

At 12:29 p.m., Mr. Chapman texts Shannon about getting a picture, "Did you send it yet? Can't wait to see." 1/31/17RP at 441. Then Shannon texted "Not yet. Hold on." This text was accompanied by a picture of an 11-year-old holding a heart. Id. Mr. Chapman asked Shannon "Is that you?" 1/31/17RP at 442. Shannon responded "I'll send you another one in a minute. I asked her to send me that. She is at her friend's." Id. Chapman, convinced that Brooke is not at the apartment, replies "Oh, okay. I can't wait to see another." Id. The detective next said, "Send me one bae." To which Mr. Chapman responded, "What do you want to see?" Id. Mr. Chapman responded with a picture of himself, sitting in his car, getting ready to pay Shannon a visit, under the impression that Shannon's daughter was not at home. 1/31/17RP 443. Detective Rodriguez conceded Brooke was allegedly at a friend's house. Id.

At 12:54 p.m., Shannon tells Mr. Chapman, "You are way sexier than I thought. Is 2 still goo. We may need you earlier now." 1/31/17RP 443. To which Mr. Chapman texts, "Really? I'm on my way. Looks like it will be around 2:30. Are you wet thinking about our meet." Id. Shannon replies, texting, "Soaking. Where are you coming from?" 1/31/17RP 444. Mr. Chapman texts back: "Really? Tacoma. I have to make a few stops to pick up wine and 420." Id. Rodriguez clarified that "420" refers to marijuana. Id. Shannon replies, "Okay. When you get closer tell me what car to look for so I don't go to the wrong guy." Id.

Mr. Chapman texts back, "Are you going to come outside and smoke with me when I get there? Did you send the other pic yet?" Id. Shannon replies: "Hell, yeah. I want to smoke. We can do that at my place. Not yet." 1/31/17RP 445. Mr. Chapman responds: "Are you meeting me at ampm?" Id.

Shannon then texts Mr. Chapman back: "Once you get there call m and I'll give you my address. I don't care now that I saw your smile. You seem real chill." 1/31/17RP 445. Mr. Chapman responds, "Okay. What do you have on now?" Id. Shannon replies, "We have a hookah if you like that." Id. And Mr. Chapman texts back, "Never tried it. What kind of wine do you like?" Id. Shannon responds "White Zen makes me happy." Id. Mr.

Chapman replies "Good. I want you happy." and Shannon texts Mr. Chapman a photograph of herself, from the neck down, which was intended to depict Shannon from the neck down. 1/31/17RP 446-7.

After being texted a photograph of a grown woman, Mr. Chapman responded: "Okay. I hope you will stay wet." 1/31/17RP 447. Shannon responds to Mr. Chapman: "What will you do to keep me wet?" 1/31/17RP 448. Mr. Chapman responds to this texting, "Whatever you ask." Id. Shannon replies: "Tell me bae." Id. Mr. Chapman then texts Shannon: "I never met you before. Tell me what keeps you wet." Id. Shannon then texts "Tell me what's in your pants." 1/31/17RP 449. Mr. Chapman responds, "A very hard thick cock." Id. To which Shannon replies "Yum. Keep going. That is working. Be careful. Don't text and drive. Is your cock hitting the steering wheel?" Id. Mr. Chapman then texts her "Ha ha. Yes. It can if I take it out and you can put it wherever you want." Id.

Shannon then text Mr. Chapman: "I'm dripping." 1/31/17RP 450. Mr. Chapman responds by asking: "Would you like me to taste it?" Id. Shannon replies: "I'm moaning right now. We need to stop or you won't be able to please us." Id. Mr. Chapman then asks Shannon: "And where are you going to put my cock?" Id. To which Shannon replies: "Get here and I'll show you." 1/31/17RP

451. Mr. Chapman then says: "Only if you promise I can cum deep in your pussy." Id. Shannon replies: "Mmm. I hope you are else." Id. And Mr. Chapman texts back: "Why is that?" Id. Shannon replies: "You know why" 1/31/17RP 452. Detective Rodriguez concedes that this is a conversation between Mr. Chapman and Shannon about having sex between consenting adults. Id. at 451.

Mr. Chapman then asks Shannon: "Who will be there when I get there?" Id. Shannon responds: "Brooke Sam and me." Id. At this late time when Mr. Chapman is almost at the apartment, this was the first point in their text conversation when Shannon brought up the possibility that the children would be present at the apartment when Mr. Chapman arrived.

But even at that point, Shannon tells Mr. Chapman that Brooke is still not home yet. Id. Mr. Chapman texted Shannon: "Okay. She's back from her friend's?" 1/31/17RP 452. Shannon responded: "Not yet." Id. Shannon also told Mr. Chapman that "She will be here. She wants it as much as you do." Id. His response to that was: "And what about?" Id. Shannon responded: "One word. Soaked." Id. Mr. Chapman then informed Shannon that he was close, texting her: "Crossing the bridge. Are you going to open the door naked?" 1/31/17RP 453. Shannon replied: "No, Hon, the neighbor is right there. I'll let you start with Brooke and I'll

strip down quick.” Id. Mr. Chapman then asked Shannon: “What’s your address. I should be there soon.” Id. Shannon responded: “Let me know when you are at the store. Can you get some Sour Patch Kids and a Monster for Brooke. What car are you in, Bae. I’m Olympic Village right near there.” 1/31/17RP 453-4. Mr. Chapman replied: “I have a red car.” 1/31/17RP 454. Shannon texted back: “K.” Id. Then Mr. Chapman texted: “Monster energy drink.” Id. Shannon replied: “Yeah. So look for a red car and a big hard cock.” Id. Then Mr. Chapman responded: “Yes. You never promised me what I asked you.” Id. Shannon replied: “Huh? I can’t think straight. Nervous and hot right now. What promise?” Id. Mr. Chapman responded: “I asked you only if you promise I can cum deep in your pussy.” 1/31/17RP 455. Shannon replied: “Oh, yeah. In mine, yes, if you have the papers like you said. In Brooke, only a few strokes like you said; right?” Id.

Then, at 2:09 p.m., Mr. Chapman texted Shannon: “Why are you nervous?” 1/31/17RP 456. Shannon then told him: “This is so exciting. The 420 will chill me out, though.” Id. Mr. Chapman responded to that: “LOL. You haven’t seen me yet.” 1/31/17RP 457. Mr. Chapman then asked “why are you nervous and excited?” Shannon responded “For your big cock.” Id. This is when Mr. Chapman responded “LOL you haven’t seen it yet.” Id. Shortly

after Mr. Chapman sent that text he arrived at the apartment and attempted to telephone Shannon. At this point there is still no mention of Brooke but instead a conversation about sex between Shannon and Mr. Chapman. Id. at 457.

g. Mr. Chapman refused to go to the apartment because he wanted to make sure he met Shannon to see if she was good looking first. Ms. Chapman talked on the telephone with a female officer, Detective Pohl, who pretended to be Shannon and gave Mr. Chapman instructions on how to find the correct apartment and invited him in. Id. at 459. Mr. Chapman refused to go up, instead demanding that Shannon come down and meet him. Id. When police see that Mr. Chapman is not going to go up to the apartment, police arrest Mr. Chapman in his car. 1/31/17RP at 460.

3. Kenneth Chapman testified he only wanted to have sex with Shannon and not Brooke and only spoke about having sex with Brooke to get to have sex with Shannon. Mr. Chapman testified that he was on the computer looking for a job and was on Craigslist on August 26, 2015, because he was unemployed at the time. 2/1/17RP at 616. Mr. Chapman stated he would look at the personals whenever he had free time to meet women. Id. When he saw the ad posted by Detective Rodriguez, Mr. Chapman saw a

picture of a nice looking voluptuous woman and therefore responded to the advertisement with a picture of his penis. Id. at 616-17.

When Shannon responded, Mr. Chapman did not take the response seriously, did not understand the response and barely read it. Id. at 617. When Shannon talked to him about having sex with her children, Mr. Chapman admitted that he did engage in inappropriate conversation about having sex with her children, but insisted he did so only to keep her interested by telling her what she wanted to hear. 2/1/17RP at 618. Mr. Chapman testified that he only responds to advertisements with photographs, which he remembered that this one did. Id. at 633. He testified he was not familiar with terms like “taboo” or “young” or “family” or any indication that that might mean incest or having sex with underage minors. Id. at 634. He believed if an advertisement was inappropriate or dealt with having sex with children, it would have been red flagged and taken off Craigslist. Id. at 635.

Although Mr. Chapman had the time and could have met up with Shannon from the very first day, Mr. Chapman testified that he was not so interested in meeting those days because Shannon did not seem to want to have sex with him. Id. at 620. Finally, on August 28, 2015, Mr. Chapman ended his interactions with

Shannon because he felt she was not interested in him and just wanted him to be interested in having sex with her children. Id. When he told her goodbye in a text, he followed that up by deleting everything from his phone -- her number and all text messages. Id. at 622.

Shannon reinitiated the conversation days later. Id. at 623. This time, however, Mr. Chapman believed she was interested in him because she used terms like “bae” (meaning “boyfriend”) and showed great interest in having sex with Mr. Chapman. Id. Because of the change in her interest, Mr. Chapman believed Shannon was interested in having sex with Mr. Chapman even though she still brought up the children. Id. But Mr. Chapman also knew that just because a person claims they want you to have sex with their children doesn’t necessarily mean that is the case, because people who chat from personal ads sometime role play, or refer to themselves as children or their pets or even dolls. Id.

On September 2, 2015, the conversation between Shannon and Mr. Chapman was sexually intense, with Shannon stating that she was wet and that got Mr. Chapman excited. Id. at 624. Mr. Chapman was not interested in having sex with Shannon’s daughters, if there were any daughters. Id. at 625. On his way down to Tacoma, he was driving while texting with her, asking her

to make one promise, to have sex with him and let him ejaculate in her vagina. Id. at 627-28. He asked her twice. Id. at 628.

Shannon kept saying she wanted to have sex with him and that the children were not there at the time, so Mr. Chapman thought it was the perfect time to have sex with Shannon. Id.

When he arrived at the apartment complex, Mr. Chapman called Shannon to told her to come down. 2/1/17RP at 629. Mr. Chapman refused to go up to the apartment, instead insisting that Shannon come down to the car for them to meet. Id.

Police surround Mr. Chapman's car and he was arrested in the parking lot. Id. Mr. Chapman testified he only was there to have sex with Shannon, and had she come down and was unattractive, he would have left and if she did not come down at all, he would have left. Id. at 631. Concerning conversations with Brooke on the telephone, Mr. Chapman insisted he only had a very brief conversation with Brook (the person he thought was Shannon) right before he was arrested. 2/1/17/RP at 641-42. Mr. Chapman denied speaking with Brooke on 8/26/14. Id. at 642.

Mr. Chapman stated that when he talked to Shannon about sex with Brooke, he did not even know for sure if there really were children but that he tried to entertain Shannon to keep her engaged with conversation. Id. at 667. Mr. Chapman stated he just wanted

to have sex with Shannon and had no intention to have sex with any children. Id. at 683-84, 704.

4. Procedural facts. On September 9, 2015, the Prosecuting Attorney for Kitsap County originally charged Mr. Chapman with one count of Attempted Rape of a Child in the First Degree and one count of Commercial Sexual Abuse of a Minor. CP 1-4 (Information). Mr. Chapman was arraigned on September 10, 2015. 9/10/15RP at 1. He was arraigned by the Honorable William B. Houser. Id. at 2. Judge Houser heard argument on the issue of probable cause for the Commercial Sexual Abuse of a Minor charge and ultimately found that there was no probable cause. Id. at 5-6. Judge Houser set bail for Mr. Chapman in the amount of \$75,000, which was uncontested by the defense. Id. at 6. Judge Houser also heard argument on Mr. Chapman's conditions of release.

The State requested that Mr. Chapman be prohibited from having any contact with minors whatsoever. Id. at 6. Mr. Chapman's attorney requested exceptions to the no contact with minors order be made to permit Mr. Chapman to have contact with his daughter and to attend religious services where minors would be present. Id. at 8-10. The Court heard argument from the State and from the defense concerning these release conditions and

granted the defense's request to allow Mr. Chapman to have supervised contact with his daughter and to attend religious services where minors would be present. Id. at 6-9. The defense and State then sought clarification regarding who could be a supervisor for Mr. Chapman and the Court clarified that the supervisor could be any adult who was aware of Mr. Chapman's pending charges. Id. at 9-10.

On November 4, 2015 the Kitsap County Prosecutor's Office filed an affidavit of prejudice to disqualify Judge Houser from hearing Mr. Chapman's case. CP 11.² A notation was subsequently placed on the docket of Mr. Chapman's case in SCOMIS that an affidavit of prejudice had been filed concerning Judge Houser.

On November 23, 2015, the Prosecuting Attorney for Kitsap County charged Mr. Chapman with Attempted Rape of a Child in the First Degree, in violation of RCW 9A.44.073 (Count I); Attempted Commercial Sexual Abuse of a Minor, in violation of RCW 9.68A.100 (Count II); and Communication with a Minor for Immoral Purposes, in violation of RCW 9.68A.090(2) (Court III). CP 47-50.

² The prosecutor's office filed an identical Affidavit of Prejudice concerning Judge Houser on November 16, 2015. CP 45. It is unclear why the State filed the second affidavit.

Following a jury trial, the jury determined Mr. Chapman was guilty of all three counts. CP 402-03.

This appeal timely followed. CP 445-59.

5. Motion to exclude the defense of entrapment and argument from hearing. Before trial, the State filed a Memorandum of Authorities Re: State's Motion to Exclude the Defense of Entrapment. CP 285. The State argued that the Court should exclude the defense of entrapment because the defendant could not meet his burden of production. CP 285. The State argued that while law enforcement provided Mr. Chapman the opportunity to commit the crime, he must show law enforcement's efforts to induce the defendant to commit the offense were through unfair efforts. CP 287. The State argued that, because law enforcement allegedly only offered the defendant an opportunity to commit the crime, Mr. Chapman could not prove he was induced. CP 288.

Concerning predisposition to commit the crime, the State argued that the Court should determine whether Mr. Chapman had any predisposition to commit the crime from consideration of his behavior throughout the interactions and negotiations from law enforcement. CP 288, citing State v. Enriquez, 45 Wn. App. 580, 586, 725 P.2d 580 (1986). The State argued that in the instant case, Mr. Chapman had responded to the advertisement on

Craigslist that mentioned incest and two daughters. CP 288. Then Mr. Chapman communicated with the undercover officer and even had a conversation with a person he believed was 11 years old. CP 288.

On January 19, 2017, a hearing was held to address the entrapment defense before the Honorable Kevin Hull. 1/19/17RP at 118. The Court began the hearing asking the State whether the motion was premature, because a claim of entrapment will almost invariably require the defendant to testify at trial to meet the burden of production, and then asking the State how the Court could preclude Mr. Chapman from raising the defense when he had not yet testified. Id. at 119. The State responded that the evidence of what was said is mostly captured via text messages so testimony about what was said was not important. Id. The State was concerned that Mr. Chapman could not meet his burden of proof for entrapment, but then would be able to use the defense to otherwise get in inadmissible evidence to show he had no predisposition to commit the offense. 1/19/17RP at 119-20.

Mr. Chapman argued that the criminal act originated in the mind of law enforcement. Id. at 122. During the texting between Shannon and Mr. Chapman, Mr. Chapman bluntly ended the conversation, saying “If you feel like you can’t respect me, then you

and your family can get lost. Bye.” Id. at 122. There is then a two-day break and the party that reinitiates the contact is Shannon, not Mr. Chapman. Id. Then the manner in which the parties started to talk after conversation picks up again changes – Shannon begins to talk sexually to Mr. Chapman (she wants to have sex with him and she is wet thinking about it) and Mr. Chapman responds by talking more about Shannon with little discussion of Brooke. Id. at 126-27. Ultimately, that sexual talk between Mr. Chapman and Shannon leads him to go to her apartment to have sex with her. Id. at 127. Mr. Chapman believed there was sufficient evidence to argue the entrapment defense and let the jury decide whether or not he was entrapped. Id. at 128.

The State argued then that the actions of law enforcement must rise to the level of illegal behavior in order for a defendant to prove entrapment, or at least “committed some unfair conduct.” Id. at 129.

Mr. Chapman responded that when police reinitiated the conversation, Shannon and Chapman’s conversation turns to sex between those two consenting adults and that is why Mr. Chapman went to the apartment. Id. at 130. When he arrived in the parking lot to meet Shannon for sex, he was arrested because police claim you showed up, so you must have wanted sex with the daughter.

Id. In his statement to police, Mr. Chapman states that he was at the apartment for sex with Shannon. Id. at 131. The conduct of the police in luring Mr. Chapman to the apartment complex based on a belief that he'd have sex with Shannon and then arresting him for showing up is unfair and entrapment. Id.

The Court ruled in favor of the State, finding that the arguments Mr. Chapman made about why he ended up at the apartment goes to his intent. Id. The Court ruled Mr. Chapman had failed to prove entrapment under the cases he reviewed. Id.

Although the Court found Mr. Chapman had “made it abundantly clear that you believe that’s an appropriate defense that you should be allowed to offer to the jury,” but based on the record, the judge was not satisfied there was sufficient evidence that Mr. Chapman’s will was overcome or that there was unnecessary or inappropriate duress. 1/23/17RP at 152.

6. The Court refused Mr. Chapman’s proposed entrapment jury instruction. After testimony was given and both parties rested, Mr. Chapman asked for an entrapment jury instruction. 2/1/17RP at 716. Mr. Chapman argued that the initial conversation between Shannon and Mr. Chapman was from August 26 to August 28, and during those days, the undercover agent asked Mr. Chapman whether or not he was just interested in her and it seemed like she

was not interested in Mr. Chapman. Id. at 716-17. Mr. Chapman ended the conversation saying he was not being respected and told Shannon “good bye.” Id. at 717. Mr. Chapman then erased all the data associated with those texts from his telephone. It was Shannon who then re-initiated the conversation two days later on August 21st. Id. Shannon changed tactics by having a conversation with Mr. Chapman with a “noticeable and substantial change in the tone and tenor of the communications between ... Shannon and Mr. Chapman,” with an agreement that Shannon would have sexual intercourse with Mr. Chapman and then Mr. Chapman drove to the apartment on September 2nd. Id. at 717.

The intensity of the sexual conversation between Chapman and Shannon grew greater. Id. At the same time, Shannon tried to steer the conversation again to her children. Id. at 717-18. Despite this attempt, the evidence showed “overwhelmingly” that Chapman’s responses were to Shannon and Shannon’s responses were directed to him, with their explicit texts discussing a sexual encounter between them and not involving Brook. Id. at 718. That talk of sex between Mr. Chapman and Shannon, Mr. Chapman testified, was the reason he went to the apartment. Id. The record also showed that Mr. Chapman could have met Shannon had he wanted to have sex with Brooke on many occasions in the past, but

he never did when the conversation was only about him having sex with Brooke. Id. Instead, it was the sexual discussion between Mr. Chapman and Shannon that made him go see her. Id. at 719.

The State responded that this information goes to Mr. Chapman's intent, "not necessarily to entrapment." Id. at 720. The State insisted police tactics of offering sympathetic stories or badgering a client into committing an offense is not enough, there must be governmental misconduct. Id.

Mr. Chapman argued that using Shannon's sexuality and promise of sex with her to get him to go to the apartment is unfair conduct, inducement and entrapment. Id. at 721.

The Court found that what Mr. Chapman anticipated testimony would be for his entrapment defense did in fact occur at trial. Id. at 721-22. The Court found pretrial that it was insufficient evidence for an entrapment defense and decided that its earlier decision had not changed. The pattern instruction states there must be something more than simply law enforcement affording a defendant an opportunity to commit the crime. Even when the criminal design originates in the police officer's mind, if the defendant willingly participates it will not be entrapment. Id. at 722-23.

The Court found that Shannon used her sexuality to engage with Mr. Chapman and that Mr. Chapman may not have intended to go to the apartment for sex with any person but Shannon, but whether or not he intended to have sexual relation with Brooke is “the jury’s call” but does not relate to entrapment. Id. at 723. The Court addressed case law that stated repeated requests was not sufficient to constitute entrapment. Id. Nor was sympathy or friendship. Id. For entrapment, the Court found the evidence must show the defendant’s lack of predisposition to commit the crime, meaning he must not have any preexisting intent, inclination or tendency towards its commission. Id. at 724. But the Court found the evidence showed Mr. Chapman did have such an inclination. Although “there were moments of reluctance,” “mere reluctance to commit a crime is not enough.” Id. at 724. Although the difference in testimony as to why Mr. Chapman went to the apartment was made at trial, that difference goes to intent and not entrapment. Id. at 725.

D. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY DENIED MR. CHAPMAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE OF ENTRAPMENT

a. This issue was argued below and is thus properly preserved for appeal. The State sought to exclude any entrapment

defense before trial, arguing Mr. Chapman could not meet his burden of production. CP 285. The State contended that law enforcement only offered the defendant an opportunity to commit the crime, and, therefore, Mr. Chapman could not prove he was induced. CP 288. Concerning his predisposition to commit the crime, the State argued that the Court should determine whether Mr. Chapman had any predisposition to commit the crime from consideration of his behavior throughout the interactions and negotiations with law enforcement. CP 288, citing State v. Enriquez, 45 Wn. App. 580, 586 (1986). The State provide no other evidence of predisposition that occurred before law enforcement started the Net Nanny sting operation in Kitsap County.

The Honorable Kevin Hull at first indicated that the State's motion was premature, since a claim of entrapment inevitably requires the defendant to testify at trial to meet the burden of production. 1/19/17RP at 119. But the State responded that unless such evidence was excluded, Mr. Chapman would then be able to have the jury hear inadmissible evidence to show he had no predisposition to commit the offense. 1/19/17RP at 119-20.

Mr. Chapman argued that the criminal act originated in the mind of law enforcement. Id. at 122. At one point, Mr. Chapman

ended the interaction with law enforcement, and it was law enforcement that then reinitiated contact with Mr. Chapman and used the enticement of having sex with Shannon as a lure to get Mr. Chapman to drive to Kitsap County where he was arrested. Id. The day he finally went to Kitsap County, there was very little discussion at all about having sex with Brooke, the daughter, but instead was almost exclusively conversation about having sex between two consenting adults. Id. at 126-27. This sexual conversation between Mr. Chapman and Shannon lured him to her apartment to have sex with her, where he was arrested before he even went to the apartment. Id. at 127. Thus, Mr. Chapman argued that there was sufficient evidence to offer the entrapment defense and allow a jury decide whether or not he was entrapped. Id. at 128. Mr. Chapman further argued that law enforcement's conduct of luring Mr. Chapman to the apartment complex with a belief he would have sex with Shannon and then arresting him just for appearing in the parking lot is unfair and entrapment. Id.

The Court ruled in favor of the State, finding that the arguments Mr. Chapman made about why he ended up at the apartment go to his intent, rather than whether he was entrapped. Id. The Court ruled Mr. Chapman had failed to prove entrapment under the cases he reviewed. Id. Although the Court found Mr.

Chapman had “made it abundantly clear that you believe that’s an appropriate defense that you should be allowed to offer to the jury,” based on the record, the judge was not satisfied there was sufficient evidence that Mr. Chapman’s will was overcome or that there was unnecessary or inappropriate duress. 1/23/17RP at 152.

b. A jury cannot find a person guilty of a crime if that person had no predisposition to commit the crime and law enforcement unfairly induced the defendant to participate in the crime. This Court ruled that for an entrapment defense, a defendant must present sufficient evidence to permit a reasonable juror to conclude the defendant had established the entrapment defense by a preponderance of the evidence. State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994). Under RCW 9A.16.070, entrapment is an affirmative defense to a crime if:

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

RCW 9A.16.070, State v. Lively, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996). The Lively Court ruled that this statute codified the common law requiring proof that the defendant was induced to commit the crime and was not predisposed to commit such an offense:

The statute codified the common law definition of entrapment. Under RCW 9A.16.070, and common law, entrapment occurs when the crime originates in the mind of the police or an informant and the defendant is induced to commit a crime which he was not predisposed to commit. State v. Smith, 101 Wn.2d 36, 42, 677 P.2d 100 (1984). The statute thus constitutes a restatement of the subjective test of entrapment as applied by both the federal and Washington State courts. See Sorrells v. United States, 287 U.S. 435, 451, 53 S.Ct. 210, 216, 77 L.Ed. 413, 86 A.L.R. 249 (1932); State v. Waggoner, 80 Wash.2d 7, 10, 490 P.2d 1308 (1971). See also 21 Am.Jur.2d Crim. L. § 202, at 365 (1981).

Lively, 130 Wn.2d at 9–10 (footnote omitted).

Law enforcement may afford opportunities to commit an offense and it may do so with various strategies to catch those engaged in criminal activity. Jacobson v. United States, 503 U.S. 540, 548, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), citing Sorrells, 287 U.S. at 441. However, law enforcement may not originate a criminal design, implant the disposition to commit a criminal act in an innocent person's mind, and then induce the commission of that crime so that law enforcement may then prosecute that person. Jacobson, 503 U.S. at 549. The United States Supreme Court has

ruled that law enforcement cannot “play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted.” Jacobson, 503 U.S. at 553, citing Sherman v. United States, 356 U.S. 369, 376, 78 S.Ct. 819, 372 2 L.Ed.2d 848 (1958). Law enforcement goes “too far when they ‘implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.” Jacobson, 503 U.S. at 553. Importantly, the Jacobson Court found that a suspect’s “ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime.” Jacobson, 503 U.S. at 553.

c. Although “Net Nanny” sting operations may be used by law enforcement to ferret out criminal offenses against children, the government may not unfairly induce a person to commit an offense when the individual was not predisposed to commit the offense. The 9th Circuit Court of Appeals case United State v. Poehlman, 217 F.3d 692 (9th Cir. 2000) is strikingly similar to Mr. Chapman’s case. First, the defendant (a cross-dresser and foot-fetishist) sought other adults like him on “alternative lifestyle” discussion groups to find a companion. Id. at 695. “Sharon” was in

such a discussion group and said she was looking for a person to understand her family's "unique needs." Id. Mr. Poehlman replied that he was looking for a long-term relationship, didn't mind children, and had unique needs. Id.

Sharon explained that she was looking for a "special man teacher" for her children but not herself. Id. at 696. Mr. Poehlman said he would teach the children proper morals and give them support, but then reiterated his interest in Sharon. Id. Sharon tried to dissuade Poehlman's interest in her, asking how he would teach her children in the first lesson but that she would like to watch. Poehlman, 217 F.3d at 697. Mr. Poehlman determined that Sharon enjoyed the idea of him being a sex instructor for the children and expressed his willingness to do so. Id. He talked about teaching them about oral sex, anal sex, and, according to the 9th Circuit Court of Appeals, other sex acts, usually at Sharon's prompting. Id.

Poehlman travelled to California from his home in Florida, and went to the hotel room where he met Sharon, who showed him pornographic magazines featuring children, photos of her children, and then directed Mr. Poehlman to the room where he was to meet the children. Id. When he entered the room he was arrested by FBI agents and Los Angeles County Sheriff's Deputies. Id. Mr.

Poehlman was charged and convicted of attempted lewd acts with a minor, and then later arrested again and charged with federal crimes for the same incident. Id.

The 9th Circuit Court of Appeals reversed his convictions. 217 F.3d at 705. The Court started its analysis by ruling that the entrapment defense is the very vehicle to reconcile the danger that 1) the government might originate a criminal design and improperly implant it into an innocent person's mind not predisposed to commit the crime with 2) allowing the government the opportunity to use all kinds of strategy to catch people who would commit sexual crimes against children:

“In their zeal to enforce the law ... Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.” Jacobson v. United States, 503 U.S. 540, 548, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). On the other hand, “the fact that officers or employees of the Government merely afford opportunity or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.” Sorrells v. United States, 287 U.S. 435, 441, 53 S.Ct. 210, 77 L.Ed. 413 413 (1932). The defense of entrapment seeks to reconcile these two, somewhat contradictory, principles.

Poehlman, 217 F.3d at 697. The Court then broke down its analysis into two important entrapment issues – inducement and

predisposition. The Court recognized that even though these are two different inquiries to consider,

The two are obviously related: If a defendant is predisposed to commit the offense, he will require little or no inducement to do so: conversely, if the government must work hard to induce a defendant to commit the offense, it is far less likely that he was predisposed.

Poehlman, 217 F.3d at 698, citing United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

i. Inducement is greater than mere opportunity – it concerns a type of persuasion that material alters the balance of risks and rewards and changes a defendant's decision to commit an offense he otherwise would not have committed. Concerning inducement, the Poehlman Court ruled that the government can induce a person to commit a crime, which can consist of “anything that materially alters the balance of risks and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he will engage in the particular criminal conduct.” 217 F.3d at 698.

The 9th Circuit found that the facts of this particular case was not simply an invitation to have a sexual relationship with her young daughters but also a condition of her own continued interest in Mr. Poehlman. 217 F.3d at 699-700. But to further entice and lure him into the criminal act, Sharon had protracted email exchanges that

became increasingly intimate and sexually explicit. Id. at 700. Poehlman began signing off as “Nancy,” which is the name he adopted with he dressed in women’s clothing, and Sharon adopted that name for him, a symbol of acceptance and friendship. While discussions about the mentorship with the girls continued, Poehlman still told Sharon about his desire to have a relationship with her, including marriage. Id. Even when Sharon rebuffed those proposals telling Mr. Poehlman that the priority was the children’s education, Mr. Poehlman continued to seek a relationship with Sharon as well as her daughters. Id. at 701.

The Poehlman court distinguished instances of agents providing the defendant an opportunity to commit the crime with inducement to commit the crime when the persuasion materially affects the “self-struggle [to] resist ordinary temptations.” Poehlman, 217 F.3d at 701, citing Sherman v. United States, 356 U.S. 369, 384, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) (Frankfurter, J., concurring). This is more than a simple opportunity to commit a crime: instead, an inducement is an opportunity combined with either excessive pressure by the government or the government’s taking advantage of an alternative, non-criminal type of motive. Poehlman, 217 F.3d at 701, citing United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994), quoting Jacobsen, 503 U.S. at 550).

The Court found that the Government induced Mr. Poehlman to commit the crime. Id. at 702. The Court ruled that there was “no doubt” that Sharon did more than just provide an opportunity, she made it clear that a firm decision was made about her daughter’s sexual education, and she believed having Mr. Poehlman serve as sexual mentor would be in their best interest, relying on herself being mentored. Id. The Court found that while parental consent is not a defense to statutory rape, it nevertheless “can have an effect on the ‘self-struggle [to] resist ordinary temptations.’” 217 F.3d at 702, citing Sherman, 356 U.S. at 384 (Frankfurter, J., concurring). The Court found that Shannon did so by providing Mr. Poehlman a moral cover to alleviate his understanding that the act is wrong:

This is particularly so where the parent does not merely consent but casts the activity as an act of parental responsibility and the selection of a sexual mentor as an expression of friendship and confidence. Not only did this diminish the risk of detection, it also allayed fears defendant might have had the activities would be harmful, distasteful or inappropriate, particularly since Sharon claimed to have herself benefitted from such experiences. See United States v. Gamache, 156 F.3d 1, 11 (1st Cir. 1998) (“[T]he government agent provided justifications for the illicit activity (intergenerational sex) by describing ‘herself’ as glad that Gamache was ‘liberal’ like her, expressing that she, as the mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her.”).

Poehlman, 217 F.3d at 702. The 9th Circuit acknowledged that Gamache, with very similar facts, had ruled “[t]he record is clear that it was the Government’s insistence and artful manipulation of appellant that finally drew him into the web skillfully spun by the detective.” Id., citing Gamache, 156 F.3d at 10.

ii. Poehlman ruled that predisposition equates to conduct that occurs before law enforcement intervenes and tries to persuade a suspect to commit an unlawful act. The Poehlman Court noted, “obviously, by the time a defendant actually commits the crime, he will have become disposed to do so.” 217 F.3d at 703. Thus, the time frame for determining whether the defendant is predisposed comes before he has had any contact with law enforcement, “which is doubtless why it’s called *predisposition*.” (Emphasis in original). Id. at 703, citing Jacobson, 503 U.S. 540, 549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1972) (“prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”) (quoting United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C.Cir. 1991)).

The Government’s argument that predisposition was proved because Poehlman had an eager willingness to have sex with the minor was incorrect. As the Court noted, that cannot be the test

because the United States Supreme Court's decision in Jacobson would have been different. 217 F.3d at 703. The United States Attorneys' Office recognizes that predisposition must be proved by prior acts before the offense itself. In Section 647 of the U.S. Attorneys' Manual, entitled "Entrapment – Proving Predisposition," the manual states:

A defendant who claims that he was entrapped opens himself to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells v. United States*, 287 U.S. 435, 451 (1932). Thus, predisposition may be shown by evidence of other crimes that might not otherwise be admissible. And, although *Jacobson's* focus on the government's duty to show that the defendant was disposed to commit the crime "prior to first being approached by [g]overnment agents" (*Jacobson v. United States*, 503 U.S. 540, 549 (1992)) seems to cast doubt on the admissibility of evidence of subsequent crimes to show predisposition (as in *United States v. Posner*, 865 F.2d 654 (5th Cir. 1989); *United States v. Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972)), it is fair to argue that such evidence is admissible under *Jacobson* as long as the subsequent crimes were "independent and not the product of the attention that the [g]overnment had directed" at the defendant (503 U.S. at 550).

Thus, predisposition must address only conduct that is independent of the events occurring during the offense itself, typically *prior* to first being approached by law enforcement but perhaps even *subsequently* as long as it is still independent evidence of predisposition and not the product of what the government had directed at the defendant during the offense.

In Mr. Poehlman's case, the Court noted the government discovered no e-mails, chat room postings, letters, tapes, magazines, or photographs expressing any interest in having sex with children after a thorough search of his house. Id. The Court also noted that the title of the advertisement, "Divorced mother of 3 looking for someone who understands my family's unique needs," the age of the daughters or what "unique needs" exactly meant was unclear. Id. at 704. It could have meant just as easily that a child had a physical disability, or even the fact that the mother had three children and was single. Id. The Court found that when Mr. Poehlman learned that he was to be a sexual mentor to the children, he still tried to revert the conversation to a non-sexual matter. The Court found that Poehlman's reluctance made Sharon even more aggressive in her suggestions, which would actually augment his case for inducement. Id.

The Court found that his responses all followed specific pointed suggestions by Sharon. Id.

The e-mails thus tell us what Poehlman's disposition was once the government had implanted in his mind the idea of sex with Sharon's children, but not whether Poelman would have engaged in such conduct had he not been pushed in that direction by the government. In short, Poehlman's erotic e-mails cannot provide proof of predisposition because nothing he says in them helps differentiate his state of mind prior to the government's intervention from that afterwards.

217 F.3d at 704.

d. Mr. Chapman's case is very similar to *Poehlman*, utilizing the same form of inducement to convince the target to drive to a location to have sex with her children. This sting operation also involved a government agent in with an advertisement in a personals section that was meant for adult women to meet men. 1/30/17RP at 285. Mr. Chapman testified he often looked at the personal ads in Craigslist under the man for women section to find sex with women. 2/1/17RP at 616. Like the facts in *Poehlman*, the advertisement was deliberately unclear as to what exactly "Shannon" wanted in this case, which is the same as what "Sharon" wanted in *Poehlman*. 1/31/17RP at 417-18. As in *Poehlman*, Mr. Chapman thought the advertisement was for Shannon wanting to have sex with a man. 1/31/17RP at 421. It was then that Shannon explained she wanted a sexual mentor for her children like she had had when she was young. 1/30/17RP at 320, 331. Mr. Chapman testified that in these conversations with women from Craigslist, a woman might claim they want you to have sex with children, but these people could also be into role play, refer to themselves as children or their pets or even dolls. 2/1/17RP at 695.

In his conversation with Shannon, Mr. Chapman indicated he was interested in having sex with Shannon, but she continued to steer the conversation to him having sex with her daughter Brooke. 130/17RP at 319-21. Detective Rodriguez confirmed that he thought Mr. Chapman just wanted to have sex talk with Shannon and trade nude pictures with her. 1/31/17RP at 431-32. Because the conversation was not going to lead to him having sex with Shannon, Mr. Chapman ended the conversation and deleted all the texts from his cellphone. 2/1/17RP at 622.

Mr. Chapman testified that he only wanted to have sex with Shannon and did not want to have sex with Brooke. 2/1/17RP 683-84, 704. Like Poehlman, Shannon became friendlier with Mr. Chapman, calling him “bae”, which means boyfriend. 1/31/17RP at 440, 448, 453-54. When Shannon reengaged Mr. Chapman, she started to talk about joining in when Mr. Chapman and Brooke had sex. 1/30/17RP 342. On the day of his arrest, Mr. Chapman drove from Tacoma to Kitsap County and during that drive the entire conversation was about Shannon getting sexually aroused, “wet,” “soaked,” “dripping” and when told about Mr. Chapman’s penis, she replies “yum.” 1/31/17RP 443, 444, 448, 449, 450. She also promises that he will be able to cum deep in her vagina and that

she prefers the doggy position. 1/30/17RP at 346; 1/31/17RP at 451.

Moreover, Shannon told Mr. Chapman that Brooke was not home. 1/31/17RP 442, 452. Mr. Chapman testified he believed that was a good time to have sex with Shannon. 2/1/17RP at 628. When he finally arrived at the apartment, Mr. Chapman insisted Shannon meet him at his car. 1/31/17RP at 459. He testified that he would have driven away had Shannon turned out to be ugly or if she refused to come down to meet him in the parking lot. 2/1/17RP at 631.

The amount of inducement by Shannon mirrors that inflicted against Mr. Poehlman by Sharon. The very same tactics of using a vague statement in an adult personal section and then wanting a sexual mentor for the children because they had the same experience when they were young is a form of inducement recognized by the Poehlman Court. The Court ruled that these facts were more than an invitation to have a sexual relationship with a child but also a condition of any continued interest in the adult male. 217 F.3d at 699-700. The Court found it was also inducement to lure the target into the web by becoming increasingly more friendly, intimate, and sexually explicit. Id. at 700. Like Poehlman, this Court should find that this was more than

just an opportunity to commit a crime. Shannon's statement that she had made a decision that sexual mentors would be beneficial to her children because they had been beneficial for her could have an effect on the target's self-struggle to resist ordinary temptations. 217 F.3d at 702. It also provided the target with a moral cover to lessen the thought that the action was wrong. 217 F.3d at 702.

e. The State failed to produce any evidence Mr. Chapman had any predisposition to commit the crimes before the string operation began. Concerning the determination of whether Mr. Chapman had a predisposition to commit the offense, the State argued that "the court should consider the defendant's behavior throughout the negotiations." CP 288, citing Enriquez, 45 Wn. App.at 586. The State argued that predisposition was apparent from the following facts that occurred after government intervention:

1. Mr. Chapman responded to the advertisement, which mentioned incest and two daughters;
2. Mr. Chapman spent a week communicating with the undercover agent to have sex with the 11-year-old girl;
3. During the transactions, he was offered several opportunities to discontinue the conversation but failed to; and
4. He conversed at one point with the person he believed to be 11 years old.

CP 288. The State argued that the trial court could look at the facts after the intervention to show the defendant's predisposition,

citing State v. Enriquez, 45 Wn.App. 580, 586 (1986). CP 287.³

But all these events were part and parcel of the interaction after government intervention and therefore do not indicate predisposition. Jacobson, 503 U.S. at 553; Poehlman, 217 F.3d at 703. “[T]he time frame for determining whether the defendant is predisposed comes before he has had any contact with law enforcement, ‘which is doubtless why it’s called *predisposition*.’” (Emphasis in original). Id. at 703, citing Jacobson, 503 U.S. 540, 549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1972) (“prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”) (quoting United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C.Cir. 1991)).

The State’s reliance on Enriquez was misplaced. In Enriquez, the police had already been told by an informant that the defendant was dealing cocaine out of his apartment. 46 Wn. App. at 581. The Enriquez Court noted that predisposition was shown during the actual negotiations but those instances were not part of the government intervention:

³ The State recognized that Mr. Chapman had a character witness who would have testified that Mr. Chapman was always protective of children. CP 288. The State argued that witness should not be able to testify because that was not sufficient for Mr. Chapman to meet his burden of entrapment. *Id.*

Moreover, Enriquez demonstrated his predisposition to commit the crime by his conduct throughout the negotiations and the sale. For example, he went out of his way to reassure the undercover officer that he wanted to proceed with the deal despite his arrest on an unrelated charge. In order to consummate the deal, Enriquez spent 3 hours making connections with his supplier at the time of the sale.

Enriquez, 45 Wn. App. at 586. The “predisposition” evidence adduced during the negotiations was the fact that the defendant had been arrested on the unrelated charge, therefore not a fact adduced during the government intervention. This is proof of predisposition because there is evidence unrelated to this particular offense but still showing he engages in this type of activity. This type of testimony does show predisposition because it indicates that he is a drug dealer from evidence that did not result from the intervention.

The balance of the cite above shows that the defendant also spent three hours connecting with his already established supplier during the sale. The fact that he already had a supplier before the government intervened in this case shows that he was predisposed to committing this type of offense. Accordingly, the Enriquez Court was correct that this evidence of the unrelated arrest as well as the fact that the defendant already had a supplier were two pieces of evidence unrelated to the current offense that were proper to

demonstrate the defendant's predisposition to commit the current offense.

The Enriquez Court did not rule that evidence that is the result of the current offense was proper to show predisposition. Had the Court ruled in such a manner back in 1986, it would have been contrary to what the common law states is predisposition evidence. As the Poehlman Court noted, "obviously, by the time a defendant actually commits the crime, he will have become disposed to do so." 217 F.3d at 703. Thus, the time frame for determining whether the defendant is predisposed comes before he has had any contact with law enforcement, "which is doubtless why it's called *predisposition*." (Emphasis in original). Id. at 703, citing Jacobson, 503 U.S. at 549 ("prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.") (quoting United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C.Cir. 1991)).

Like Mr. Poehlman, Mr. Chapman had no previous criminal history. CP 429 (Judgment & Sentence). At trial, no evidence was produced indicating that Mr. Chapman had sought out sex with minor girls. Mr. Chapman responded to a vague advertisement in

the woman looking for man personals section of Craigslist.

1/31/17RP at 418; 2/1/17RP 616.

f. Reversal of the convictions is required. In Jacobson, the Court concluded that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law and reversed the conviction. 503 U.S. at 554. In the instant case, the trial court refused to allow Mr. Chapman from presenting an entrapment defense. The evidence produced at trial showed that the State lured him into the parking lot under the impression he would have sex with Shannon and the State failed to present any evidence of predisposition. This Court must reverse Mr. Chapman's conviction.

2. THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON MR. CHAPMAN'S PROPOSED ENTRAPMENT JURY INSTRUCTION THEREBY DEPRIVING HIM OF HIS RIGHT TO PRESENT A DEFENSE

a. Mr. Chapman asked for a jury entrapment defense instruction. At the close of evidence, Mr. Chapman proposed an entrapment jury instruction. 2/1/17RP 716. Defense counsel argued again that the conversation between Shannon and Mr.

Chapman between August 26 and 28, 2015 included talk about sex with Shannon attempting to steer the conversation to Mr. Chapman having sex with her daughter Brooke, and Mr. Chapman trying to steer the conversation again to him having sex with Shannon. Id. The conversation ended on August 28, 2015, with Mr. Chapman saying “goodbye” and erasing all the conversation and texts between them. Id. at 716-17. But when Shannon then reinitiated the conversation three days later on August 31, Shannon was suddenly much more interested in Mr. Chapman and agreed to have sex with him over the course of the conversations from August 31 through September 2, 2015. Id. On the date that Mr. Chapman drove out to Kitsap County from Tacoma, the conversation was mostly about sex between Shannon and Mr. Chapman, resulting in Shannon agreeing to have sex with Mr. Chapman. Id. at 717.

Defense counsel pointed out that Mr. Chapman always had an opportunity to meet Shannon during the initial conversations when Shannon did not want to have sex Mr. Chapman. Id. at 718. Despite the repeated invitations to go to her place to have sex with Brooke, Mr. Chapman never appeared. Id.

The State responded that this goes to Chapman’s intent, “not necessarily entrapment.” Id. at 720. For inducement, the State

argued that more than mere invitation or opportunity must be show. Instead, the State argued that Mr. Chapman must “basically have to show governmental misconduct” when it comes to inducement. Id.

Defense counsel argued that what law enforcement used to entrap him was Shannon’s sexuality, an invitation to come have sex with her. Id.

The trial court agreed that the facts did show Shannon coming on to Mr. Chapman more towards the end, especially the day he went to meet her, but ruled the entrapment defense was not established. Id. at 722. The Court found the criminal design did originate with law enforcement, but because Mr. Chapman willingly participated in developing the transaction, there was no entrapment. 2/1/17RP 722-23. The Court conceded that Mr. Chapman had more of an inclination to have sex with Shannon and a tendency towards having sex with Shannon, but his intent to have sex with Shannon does not go to entrapment. Id. at 723. The Court also found Mr. Chapman did have some reluctance about having sex with Brooke during the conversation, but the evidence presented at trial showed that he had a predisposition to commit the offense. Id.

b. The failure to instruct the jury on entrapment violated Mr. Chapman's constitutional right to present a defense.

The jury trial guarantees of the state constitution, operating in conjunction with the due process provisions, give the accused the right to have the jury pass upon every substantive fact going to the question of guilt or innocence. State v. Strasburg, 60 Wn. 106, 118, 110 P. 1020 (1910). This unique language in the state constitution guaranteeing that “the right to trial by jury shall remain inviolate” provides broader protection than does the federal constitution. Id.⁴

“Generally, instructions are sufficient if they properly state the applicable law without misleading the jury and permit each party to argue its theory of the case.” State v. Scherz, 107 Wn. App. 427, 431, 27 P.3d 252 (2001) (citing State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)). A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions only when the theory is supported by substantial evidence. State v. Finley, 97 Wn. App. 129, 134-35, 982 P.2d 681 (1999). Importantly, in order to determine if there is sufficient

⁴ The Washington Supreme Court has previously determined that the state constitutional right to trial by jury is broader than that guaranteed by the federal constitution, so the full analysis developed in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) is not required. See State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).

evidence to support an instruction outlining an affirmative defense, the question is whether “the jury could reasonably infer the existence of the facts needed to use it.” State v. Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). The appellate court must review “the entire record in the light most favorable to the defendant” to determine whether the instruction is appropriate. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (2000).

In a criminal trial, the court must instruct the jury on the law as to any legitimate defense advanced by the defendant when there is evidence to support that theory. State v. Keller, 30 Wn. App. 644, 649, 637 P.2d 985 (1981), citing State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975). “The failure to do so constitutes reversible error.” Keller, 30 Wn. App. at 649, citing State v. Ladiges, 66 Wn.2d 273, 401 P.2d 977 (1965); State v. Birdwell, 6 Wn. App. 284, 492 P.2d 249 (1972).

c. A defendant is entitled to have the jury instructed on the entrapment defense when he can show he was induced by the government and the government cannot show he was predisposed to committing such an offence before the government initiates the sting operation. For an entrapment instruction, the defendant must satisfy both prongs of entrapment and demonstrate that, as a matter of law, the instruction is warranted. State v.

Hansen, 69 Wn. App. 750, 764, 850 P.2d 571 (1993), reversed on other grounds, citing United States v. Fedroff, 874 F.2d 178, 182 (3rd Cir.1989).

When a defendant testifies that he was induced to commit an offense and had no predisposition to offend before being pressured to commit the offense, an entrapment jury instruction must be given. In Keller, three deputy sheriffs and an informant drove a substantial distance to the defendant's residence. 30 Wn. App. at 645. The undercover agent asked Mr. Keller for marijuana and received a small amount. Id. But Mr. Keller testified that prior to the agent and informant arriving at his door, Mr. Keller told the informant that he did not sell drugs. Id. at 645-46. He also testified that both the officer and informant "began imploring him to sell them drugs" right away because of how far they had driven, and the only reason Mr. Keller finally did sell the drugs was so that they would just leave. Id. When he returned with the marijuana, Mr. Keller explained it was all he had and for personal use and did not even say that they could purchase it. Id. The undercover officer did not want to return to Vancouver empty-handed and left his money on the table and took the drugs. Id. The defendant proposed an entrapment instruction but the trial court refused. Id.

On appeal, the Court of Appeals ruled that it is not necessary to prove outrageous government conduct, unless there is a due process claim:

First, it is true as the State argues that use by police officials of a normal amount of persuasion to facilitate the commission of a crime does not constitute entrapment. State v. Waggoner, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971). However, it is not necessary to prove outrageous conduct when asserting the statutory defense. That evidence is relevant only if it is contended the conduct violated due process. State v. Walker, 11 Wn. App. 84, 88, 521 P.2d 215 (1974). See e.g., United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); State v. Emerson, 10 Wn. App. 235, 238, 517 P.2d 245 (1973).

Keller, 30 Wn. App. at 647. The Keller decision is still good law.

The government's argument that governmental misconduct was required to get an entrapment instruction was incorrect. In State v. Smith, decided after Keller, the Supreme Court did rule that mere persuasion was insufficient and that there must be some evidence of "misconduct or unfair inducement." Smith, 101 Wn.2d at 43. The defendant need not show government misconduct but can show instead "unfair inducement." Id. The Poehlman Court ruled that inducement is more than a simple opportunity to commit a crime: instead, an inducement is an opportunity combined with either excessive government pressure or the government's taking advantage of an alternative, non-criminal type of motive.

Poehlman, 217 F.3d at 701, citing United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994), quoting Jacobsen, 503 U.S. at 550). Here, there was great pressure by the government to force him to make the substantial step of driving out to Kitsap to have sex with Shannon and Brooke. But also, the government took “advantage of an alternative, non-criminal type of motive,” which in this case was having sex with Shannon, which is legal and really was the force that drove Mr. Chapman to go to Kitsap County.

In Keller, the Court of Appeals also ruled that the defendant's testimony regarding his state of mind is relevant to establishing an entrapment defense:

(T)he defense of entrapment is basically an inquiry into the intention of the defendant, and that intention along with questions of inducement, ready complaisance and other evidence of predisposition, may raise an issue of fact.

30 Wn. App. at 648, citing State v. Swain, 10 Wn. App. 885, 890, 520 P.2d 950 (1974). The Court reasoned that it was the jury's role to determine whether the agent's conduct constituted undue pressure, as proffered by the defendant, and allow the jury to believe either the defendant's testimony concerning entrapment or the law enforcement's testimony. Keller, 30 Wn. App. at 648. The Court ruled, “the court must instruct the jury on the law as to any legitimate defense advanced by the defendant when there is

evidence to support that theory.” Keller, 30 Wn. App. at 649, citing State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975). Because the court failed to instruct the jury on the entrapment defense, this was reversible error and the case was reversed. Keller, 30 Wn. App. at 649, citing State v. Ladiges, 66 Wn.2d 273, 401 P.2d 977 (1965); State v. Birdwell, 6 Wn. App. 284, 492 P.2d 249 (1972).

There are no Washington cases concerning the tactics used by law enforcement in Net Nanny cases. But in United States v. Gamache, the 1st Circuit Court of Appeals considered almost identical facts as the Poehlman case and the instant the case. A string operation concerning child exploitation was placed in the personal section of *Tri-State Swingers* magazine, which stated

FEMALE–TROY, NH; F.F.-female, 31; Single mom, two girls, one boy, seeks male as partner and mentor, seeks fun, enjoys travel and photography, FF P.O. Box 771, Troy, New Hampshire, 03465.

156 F.3d 1, 3 (1st Cir.1998). Mr. Gamache responded to the

advertisement:

Your ad interested me. Being your ad is in a swingers mag— I will assume that you would be willing to swing. With that, I'll describe myself.... I enjoy hunting, fishing & camping. I am looking for someone to join me in the pursuit of happiness. If you are that person, then maybe we should meet & discuss the situation. I can travel or you could come here. Please send photo & tell me about yourself. If I interest you send phone # and I'll call you to set up a date.

Id. The undercover detective posing as the mother “F.F.” who placed the ad, responded, “I am assuming that you responded to my ad in part to be a mentor to my children and you are interested in family fun. I am hoping that you think liberally about sex. My family is very comfortable in front of the camera.” Id.

As in the instant case, the detective testified at trial what he intended the words to mean in the advertisement (Gamache, the word “mentor,” for Chapman, “taboo”). Id. The detective intended “mentor” to find men interested in “inter-generational sexual interaction between adults and children.” Id.

The conversation between Mr. Gamache and the detective finally made clear what exactly the alleged mother wanted – a mentor to provide her son and two daughters sex training sessions, claiming she also had an uncle who showed her about sex when she was a young girl. Gamache, 156 F.3d at 4. But the detective also signaled the conversation was going well by no longer using initials but signing her name, “Frances”. Id. Mr. Gamache responded that if all parties are willing to learn about sex and sex is not forced, there is no harm and he would be the mentor. Id.

Frances told Gamache that she showed her children a picture of Mr. Gamache and they were excited about meeting him. 156 F.3d at 5. She told Mr. Gamache how she hoped they would

learn sex like she did when she was young. Id. at 5, 6. Mr. Gamache states that she understands why she is seeking a mentor who would not hurt her children. Id. at 5. Frances responds that she is not interested in finding a partner for herself and only interested in finding a mentor to her children. Id. Mr. Gamache has no problem just being “sex toy” to educate her children. Id. at 6.

Frances sends Mr. Gamache a picture of her, and Mr. Gamache responds that he finds her very attractive, even though she is not interested in him. Id. A meeting is set up and Mr. Gamache tells Frances he is happy to show the children about sex. Gamache, 156 F.3d at 7.

The 1st Circuit Court of Appeals found that the “line and bait” were cast, and the “hook” was Mr. Gamache arriving in his truck waiting for Frances and her children as planned. Id. at 7. When officers observed his arrival, the detective and other officers approached Mr. Gamache and arrested him. Inside the truck, officers discovered candy, bottles of soda, a bottle of wine, a vibrator, a camera loaded and additional film, condoms, and lube. Id. In a subsequent search of the home, officers found no evidence that appellant was interested in, or had a history of, the

exploitation of children or child pornography. Gamache, 156 F.3d at 7.

On appeal, Mr. Gamache argued that the trial court erred for failing to instruct the jury on entrapment. Id. at 34. The 1st Circuit Court of Appeals agreed, ruling the trial court committed reversible error by failing to give the entrapment jury instruction which denied him a fair trial. Id. The Court held that in determining whether the defendant is entitled to the instruction, the trial court should not weigh the evidence, make credibility determinations, or resolve conflicts in the proof, but instead merely examine the evidence on the record and draw inferences to determine “whether the proof, taken in the light most favorable to the defense can *plausibly* support the theory of the defense.” (Emphasis in original). Gamache, 156 F.3d at 9, citing United States v. Montanez, 105 F.3d 36, 39 (1st Cir.1997).

Just like Washington’s entrapment statute, under federal law entrapment occurs “when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.” Gamache, 156 F.3d at 9, quoting Sorrells v. United States, 287 U.S. 435, 442, 53 S.Ct. 210, 77 L.Ed. 413 (1932). As in

Washington State, entrapment has two elements: (1) improper Government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal conduct. Id.

The Gamache Court ruled that “sting” operations are not an improper inducement if they merely provide an opportunity to commit a crime, but proof of opportunity plus “something else” may be adequate to meet a defendant's burden. Gamache, 156 F.3d at 9, citing United States v. Joost, 92 F.3d 7, 12 (1st Cir. 1996). The Court cited examples such as threats, forceful solicitation, dogged insistence, and repeated suggestions that courts have found to be sufficient to satisfy the inducement prong of entrapment. Joost, 92 F.3d at 12.

Importantly, “once the defendant makes a showing of inducement and lack of predisposition, the Government must prove defendant's predisposition to engage in the charged criminal activity, beyond a reasonable doubt.” Gamache, 156 F.3d at 9, citing Waker v. United States, 344 F.2d 795, 796 (1st Cir.1965). The Gamache Court cited the United States Supreme Court Jacobson decision, supra, which ruled that the government had induced Mr. Jacobson to violate the federal ban on child pornography and that Jacobson’s “ready response to [government] solicitations cannot be enough to establish beyond a reasonable

doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime.” Gamache, 156 F.3d at 10, citing Jacobson, 503 U.S. at 553.

In Mr. Gamache’s case, the Court found that although the detective was trying to get the defendant to commit to being a sexual mentor for her children, the defendant was “on a different wavelength” initially and instead interested in having sex with the mother, Frances. Id. at 10. The Court found the defendant had “ultimately became ensnared by the detective's artifice” through “the Government's insistence and artful manipulation of appellant that finally drew him into the web skillfully spun by the detective.” Id. Mr. Gamache testified that all these correspondences of having sex with minors between Frances and the defendant were simply a ruse to have sex with Frances. Id. The Court also found that despite the fact this was disputed by the government, that has no bearing on whether it raised an issue of entrapment to be put before a jury. Id.

Just like Jacobson, supra, the appellant had no criminal record, particularly as to the child molestation, exploitation, or any related matter. The Court also found that for the inducement prong of entrapment, the facts were sufficient since

1. Gamache initially expressed only his desire for a sexual relationship with Frances,

2. the agent here manufactured the aura of a personal relationship between Gamache and “Frances,”
3. the government agent provided justifications for the illicit activity (intergenerational sex) by describing “herself” as glad that Gamache was “liberal” like her, expressing that she, as the mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her.
4. Such solicitations suggested that Gamache ought to be allowed to engage in the illicit activity,
5. Lastly the sting lasted almost 7 months, indicating perseverance to elicit the offense conduct.

Gamache, 156 F.3d at 10-11.

Concerning the predisposition prong, the Court found a reasonable jury could find that Gamache was not predisposed to commit the offense. Id. at 11. The Court held that “[P]roof that [the defendant] engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing.” Gamache, 156 F.3d at 11, citing Jacobson, 503 U.S. at 551 n. 3, 112 S.Ct. 1535.

The Court also dismissed the government’s argument that Gamache's enthusiastic response in conjunction with the lack of coercion and/or affirmative pressure by the Government agent was sufficient to prevent the jury from considering an entrapment defense. Id. at 11. The Court found that “Gamache's stated

willingness to commit the crime, although clearly relevant to the jury's inquiry, is not sufficient by itself to mandate a finding that he was predisposed." Gamache, 156 F.3d at 11-12. The Court cited approval of Judge Posner's explanation from the 7th Circuit Court of Appeals concerning predisposition:

Had the Court in Jacobson believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then Jacobson was predisposed, in which event the Court's reversal of his conviction would be difficult to explain. The government did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. It was not as if the government had had to badger Jacobson for 26 months in order to overcome his resistance to committing a crime. He never resisted.

Gamache, 156 F.3d at 12, citing United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir.1994). The Court found that the State had presented no evidence that the defendant had engaged in similar activities independent of this sting operation. Id. at 12. As the Court found in Poehlman, *supra*,

The jury could have relied on this evidence to find a lack of predisposition because the concept of predisposition has a definite temporal reference: "the inquiry must focus on a defendant's predisposition before contact with government officers or agents." United States v. Brown, 43 F.3d 618, 627 (11th Cir.1995) (citing Jacobson, 503 U.S. at 547 n. 2, 112 S.Ct. 1535); *see also* United States v. Gifford, 17 F.3d 462, 469 (1st Cir.1994) (identifying as "critical" the time "in advance of the government's initial intervention").

Gamache, 156 F.3d at 12. The only evidence in the case was evidence that resulted from the government's sting operation following their initial contact. Id. Importantly, the Gamache Court distinguished the proof of predisposition in order to get an entrapment defense jury instruction and a jury's actual finding of predisposition:

while "ready commission of the criminal act can itself adequately evince an individual's predisposition" and thus provide sufficient evidence to support a *jury's* finding that the defendant was predisposed to commit the offense, Gifford, 17 F.3d at 469, eagerness alone, when coupled with the "extra elements" present in this sting operation, is not sufficient to remove the predisposition question from the jury's purview.

Id. (Emphasis in original). The Court concluded that the defendant had satisfied the entrapment prongs. Id. The Court reversed Mr. Gamache's conviction due to the lack of an entrapment defense jury instruction:

"[E]ven where there are no credibility issues or tensions in the evidence—and some do exist here—entrapment is treated as an issue of fact for a jury." Acosta, 67 F.3d at 338. ... The district court committed reversible error in not giving an instruction on the issue of entrapment. Appellant's conviction is *reversed* and a new trial is ordered.

Gamache, 156 F.3d at 12.

d. The trial court's failure to give the entrapment instruction substantially affected Mr. Chapman's rights to a fair trial.

Mr. Chapman's case is similar to the Gamache case. As in that

case, Detective Rodriguez posed as a mother of two daughters and placed an advertisement in the personals to ensnare persons who might want to have sex with her daughter(s). 1/30/17RP 285-87. Here, “taboo family” was used as a vague term that the detective intended to mean sexual mentor for her daughter. Id. at 286. Det. Rodriguez admitted persons might not understand what the advertisement meant or what it referred to. 1/31/17RP 419.

Mr. Chapman responded to the post with a picture of his penis. 1/31/17RP at 419-20. When “Shannon” responded, “you inquired about my two daughters,” Mr. Chapman responded, “I thought I was playing with the lady in the pic. What did you have in mind for your daughters?” 1/30/17RP 317. Similar to Gamache, Mr. Chapman said he was interested in the advertisement and wanted more information. 1/30/17RP at 291.

While Shannon tried to focus the conversation on Mr. Chapman having sex with her daughter, Mr. Chapman kept steering the conversation to him having sex with Shannon, asking if Shannon could personally demonstrate on him first. Id. at 320. Even when talking about having sex with the daughter, Mr. Chapman continues to see if Shannon is sexually excited and will be watching and be “wet” from being aroused. Id. at 323. This type of conversation occurred for three days, with invitations for Mr.

Chapman to come over, but with Mr. Chapman always finding an excuse why he could not come over. Id. at 329-32.

Like Gamache, “Shannon” explains that she wants a sexual mentor for her daughter which she had as well when she was young. Id. at 331. Even when terms were being discussed about him paying to have sex with Brooke, Mr. Chapman continues to state that Shannon will love his cock. Id. at 333. He ends the conversation completely saying “if you feel like you can’t respect me then you and your family can get lost good bye.” Id. at 336. Detective Rodriguez conceded that he also wanted the conversation to end because it appeared Chapman only wanted to engage in sex chat and trade nude photographs with Shannon and was not focused on Shannon’s daughters. Id. at 431. Mr. Chapman deleted all texts with Shannon from his cellphone. 1/31/17RP at 435-36.

It was Detective Rodriguez that then re-initiated the conversation three days later. 1/30/17RP at 337. As in Gamache Shannon becomes less formal and started to talk about having sex with Mr. Chapman. Shannon finally convinced Mr. Chapman to come to her apartment. 1/30/17RP at 340. He told Shannon that he would bring wine for her and asked her what would excite her. Id. at 341. Shannon said having sex with Brooke would make her

excited and she would join in. Id. at 342. When Shannon asked if he was interested in sex with her or Brooke, he does not answer. Id. Shannon said she liked to have sex doggie style but that Brooke did not have a favorite position for sex. 1/30/17RP at 346.

On the day of the arrest, Shannon called Mr. Chapman “Bae” which means boyfriend. 1/31/17RP at 440-42. Before he heads over, Shannon informed Mr. Chapman that Brooke is not at the apartment. 1/31/17RP at 443. The talk turns very sexual between Mr. Chapman and Shannon, with Shannon stating she is “soaking” and would join him in smoking some marijuana and drinking wine. 1/31/17RP 444-47. She asks Mr. Chapman what he will do to keep her wet and asks what is in his pants. Id. at 448-49. She says she is “dripping,” “moaning,” and “soaked” and MR. Chapman asks her to promise he can cum deep in her vagina twice. 1/31/17RP at 451-52, 455. Even when Chapman drives all the way from Tacoma to Kitsap County and is near the ampm and her apartment, Shannon informs Mr. Chapman Brooke still is not home. 1/31/17RP at 452.

When he arrives at the complex, Shannon says she is excited for Mr. Chapman’s “big cock.” Id. at 456. Detective Pohl pretends to be Shannon to give him instruction to her apartment and invites him up. Id. at 459. Mr. Chapman refuses to go up and

demands that Shannon come down to his car. Id. When police are satisfied he will not go up to her apartment, they arrest him in the parking lot. Id.

As in Gamache, Mr. Chapman testified he only said he would have sex with Brooke as a ruse to keep Shannon interested and hope to have sex with her. 2/1/17RP at 618. He said that when he thought Shannon was only interested in him having sex with Brooke, he was not interested and said goodbye. Id. at 620-22. Mr. Chapman testified it was her using phrases like “bae” and showing interest in having sex with him and how she was wet and excited that took him to Kitsap County. Id. at 623-24. Mr. Chapman testified he only wanted to have sex with Shannon and not the daughters. Id. at 625. With the children not in the apartment, Mr. Chapman thought it was a good time to have sex with Shannon. Id. 628.

He also testified that had Shannon come downstairs and turned out to be ugly, he would have left in his car. Id. at 631. He also testified if she did not come downstairs, he would have left. Id.

As in Gamache, Mr. Chapman was entitled to an entrapment defense instruction. Mr. Chapman proffered he went to Shannon’s apartment to have sex with her and not Brooke. 2/1/17RP 625.

The State’s argument that this intent does “not necessarily

entrapment” is incorrect. *Id.* at 720. The Keller Court ruled that an entrapment defense is actually an inquiry into the *intention* of the defendant, along with questions of inducement, ready complaisance and evidence of predisposition. 30 Wn. App. at 648.

The charged offense and the crime of conviction in this case was *Attempted* 1st Degree Rape of a Child, *Attempted* Commercial Sexual Abuse of a Minor, and Communicating with a Minor for Immoral Purposes. CP 47-50; CP 428. For an attempt conviction, a person need only commit an act that is a substantial step toward the commission of the crime. RCW 9A.28.020(1). Here, the State presented evidence that Mr. Chapman took such steps as agreeing to bring gifts and money to have sex with Brooke, agreeing to come to Kitsap County, and driving to the apartment complex. Mr. Chapman testified he was not going to have sex with Brooke but instead have sex with Shannon and just told Shannon what she wanted to hear so that she would finally relent and allow him to have sex with him. That argument is consistent with the evidence shown at trial in the texts between Shannon and Mr. Chapman. The intent of why he took those steps and how they are responses to the inducement that Shannon provided to take those steps do go to an entrapment defense.

The Keller Court made it clear that an entrapment instruction is necessary so that a jury can decide whether law enforcement's conduct constituted undue pressure and inducement and allow a jury determine whether or not this was entrapment. 30 Wn. App. at 648.

Mr. Chapman satisfied the inducement prong of entrapment. The State also argued that inducement cannot be proven without showing governmental misconduct. 2/1/17RP at 720. The State is incorrect. The Gamache Court ruled inducement is proved by showing opportunity plus something else such as threats, forceful solicitation, dogged insistence, and repeated suggestions. 156 F.3d at 9; citing Joost, 92 F.3d at 12. The Gamache Court found this same scenario where the defendant is agreeing to be a sexual mentor to the children as a ruse to have a relationship with the mother. Compare testimony of Chapman 2/1/17RP at 618 with Gamache, 156 F.3d at 10.

Like Gamache, this Court should find the inducement prong is satisfied because Mr. Chapman showed at first his desire was to have sex with Shannon, Shannon "manufactured the aura of a personal relationship between [them]," law enforcement "provided justifications for the illicit activity (intergenerational sex)" by "expressing that she, as the mother of the children, strongly

approved of the illegal activity and explaining that she had engaged in this conduct as a child and found it beneficial” (which in turn suggested that Mr. Chapman ought to be allowed to engage in the illicit activity) and that the pressure to do this act continued even when Mr. Chapman repeatedly tried to steer the conversation to sex between Shannon and Mr. Chapman and it was only the officer’s re-initiation of the conversation along with a new promise to have sex with Mr. Chapman, talking about being sexually aroused and sex positions, and becoming more familiar with him than before that forced him to come to the parking lot where he was arrested. Gamache, 156 F.3d at 10-11 (list of parallel inducement findings). Like Gamache, this Court should find that Mr. Chapman had “ultimately became ensnared by the detective's artifice” through “the Government's insistence and artful manipulation of appellant that finally drew him into the web skillfully spun by the detective.” 156 F.3d at 10.

This Court should also find that Mr. Chapman had no predisposition to commit the offense. Gamache, Poehlman, and Jacobson all stand for the proposition that predisposition evidence must be evidence of something about the defendant before the intervention of the sting operation. Gamache, 156 F.3d at 11,

Hollingsworth, 27 F.3d at 1199; Poehlman, 217 F.3d at 703, Jacobson, 503 U.S. at 549 (“prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”) (quoting United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C.Cir. 1991)).

As the Poehlman Court correctly reasoned, “obviously, by the time a defendant actually commits the crime, he will have become disposed to do so.” 217 F.3d at 703. Thus, the time frame for determining whether the defendant is predisposed comes before he has had any contact with law enforcement, “which is doubtless why it’s called *predisposition*.” Id. at 703, citing Jacobson, 503 U.S. at 549 (Emphasis in original). Here, the only evidence in the case that Mr. Chapman was disposed to commit the crime was evidence that resulted from the government’s sting operation following their initial contact. Id. The Gamache Court distinguished the proof of predisposition in order to get an entrapment defense jury instruction and a jury’s actual finding of predisposition:

while “ready commission of the criminal act can itself adequately evince an individual’s predisposition” and thus provide sufficient evidence to support a *jury’s* finding that the defendant was predisposed to commit the offense, Gifford, 17 F.3d at 469, eagerness alone, when coupled with the “extra elements” present in this sting operation, is not

sufficient to remove the predisposition question from the jury's purview.

156 F.3d at 12 (Emphasis in original). Mr. Chapman requests this Court reverse his convictions and remand for a new trial.

Gamache, 156 F.3d at 12; Keller, 30 Wn. App. at 649.

3. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO FILE AN AFFIDAVIT OF PREJUDICE TO PREVENT JUDGE HOUSER FROM HEARING MR. CHAPMAN'S CASE AFTER HE HAD MADE A DISCRETIONARY RULING IN MR. CHAPMAN'S CASE

- a. Mr. Chapman and the State requested Judge

Houser make a discretionary ruling on Mr. Chapman's conditions of release pending trial. RCW 4.12.050 permits a party or attorney who believes he or she cannot receive a fair or impartial trial before a particular judge to file an affidavit of prejudice to disqualify that judge from hearing the party or attorney's case. The affidavit must be filed prior to that judge making a ruling involving discretion in the case. Former RCW 4.12.050(1). This statute also states that some judicial actions that arguably involve discretion, such as arraignment and the fixing of bail, do not involve discretion within the meaning of the statute. Id.

The Washington Supreme Court has never fixed the precise parameters of the term "fixing of bail" within the meaning of RCW 4.12.050. However, the Washington Supreme Court has

consistently held that the trial court's discretion is invoked in almost any situation in which the judge may grant or deny a party's motion. State v. Lile, No. 93035-0, 2017 WL 3139265, at *6 (Wash. Sup. Ct. July 20, 2017) ("to either 'grant or deny a motion involves discretion' and the substance of the request, rather than its form, controls"). The Washington Supreme Court held that even motions that are unopposed or might otherwise be considered formalities nevertheless invoke judicial discretion. Lile, 2017 3139265, at *4 (unopposed motions or stipulated agreements can be discretionary rulings); State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993) (unopposed discovery motions brought under CrR 4.7(b) were discretionary); State v. Dennison, 115 Wn.2d 609, 620, 801 P.2d 193 (1990) (defendant's waiver of his right to counsel is discretionary ruling, despite defendant's unqualified right to waive counsel found in CrR 4.1(d)(1)).

The Washington Supreme Court has also interpreted other non-discretionary rulings listed in RCW 4.12.050(1) narrowly. In Lile, for example, the Court specifically rejected the argument that an unopposed motion to continue fell within the "calendar matter" exception in RCW 4.12.050(1). Lile, 2017 WL 3139265, at *6. Mr. Chapman argues this Court should follow Lile and interpret

the phrase “fixing of bail” narrowly to include only the setting of the actual bail amount and not the setting of other release conditions.

A narrow interpretation of the term “fixing of bail” is also logically consistent with the implementation of Article I, § 20 of the Washington State Constitution and CrR 3.2. Art. I, § 20 and CrR 3.2 provide that all criminal defendants not charged with a capital offense or offenses punishable by life in prison are entitled to bail. The fixing of bail is thus not a discretionary ruling where the trial court judge can either “grant or deny” a criminal defendant’s request. The trial court must grant the defendant bail; the only question is what amount of bail the trial judge may set. In contrast, judicial rulings on conditions of release pending trial face no such restrictions. CrR 3.2(b)(7) states that a judge may “[i]mpose any condition other than detention deemed reasonably necessary to assure appearance as required.”

In the instant case, Judge Houser heard argument on Mr. Chapman’s conditions of release and granted two conditions the defendant was requesting – that he be permitted to have supervised contact with his minor daughter and that he be permitted to attend religious services where minors would be present. 9/10/15RP at 6-10. Judge Chapman granted the defendant’s request that he have contact with his daughter and be

permitted to attend religious services where minors were present with supervision of another adult. 9/10/15RP at 8-9.

Judge Houser had discretion under CrR 3.2 to either grant or deny Mr. Chapman's requests. His rulings on Mr. Chapman's release conditions were therefore discretionary within the meaning of RCW 4.12.050 and are not covered by the "fixing the bail" exception.

b. The legislature's failure to release conditions within the list of exceptions stated in RCW 4.12.050 means that the legislature intended to exclude it from the list of judicial rulings that are non-discretionary under RCW 4.12.050. In the 2017 revision to RCW 4.12.050, among other changes the legislature modified the statute to add "preliminary proceedings under CrR 3.2.1" and "presiding over juvenile detention and release hearings under JuCR 7.3 and 7.4" to the list of judicial actions which do not involve discretion within the meaning of the statute. RCW 4.12.050(2). The legislature left the "fixing of bail" language intact.

Well-established rules of statutory construction require the intent of the legislature regarding the scope of the statute be determined from the language of the statute itself. State v. Williams, 70 Wn. App. 567, 569, 853 P.2d 1388 (1993). Moreover, under the rule of *expressio unius est exclusio alterius* – specific

inclusions exclude implication – the list of exceptions in RCW 4.12.050 are exclusive. See State v. Sommerville, 111 Wn.2d 524, 535, 760 P.2d 932 (1988). Had the Legislature intended the list be non-exclusive, the statute would have included language of non-exclusivity. See RCW 9.94A.390 (providing “[t]he following are illustrative factors which the court may consider . . .”). The Legislature has demonstrated they will use specific language to indicate their list is non-exclusive, and they used no such language here. The fact that the legislature expressly included proceedings under CrR 3.2.1 and JuCR 7.3 and 7.4 in RCW 4.12.050 indicates that the legislature understood the scope of these exceptions to be different than the scope of the exception for the “fixing of bail.”

Indeed, CrR 3.2.1 and JuCR 7.3 and 7.4 include many considerations besides the fixing of bail, including the establishment of release conditions for adult defendants at preliminary hearings (CrR 3.2.1) and juvenile defendants at detention hearings (JuCR 7.3 and 7.4). CrR 3.2.1 explicitly and repeatedly refers to judicial determination of release conditions at the preliminary hearing.⁵ Similarly, JuCR 7.3 and 7.4 both make

⁵ *E.g.* CrR 3.2.1(b) (“If the court finds that release without bail should be denied or that conditions should attach to the release on personal recognizance...”); CrR 3.2.1(d)(1) (“any defendant whether detained in jail or subjected to court-authorized conditions of release shall be brought before the superior court as soon as practicable after the detention is commenced, the conditions of release are imposed or the order is entered...”); CrR 3.2.1(e)(2) (“If the court finds that

reference to judicial consideration of release conditions.⁶ Clearly rulings on release conditions are non-discretionary within the meaning of RCW 4.12.050 in hearings held under CrR 3.2.1 and JuCR 7.3 and 7.4.

The legislature's decision not to change the "fixing of bail" language is evidence that the legislature intended this term to be narrowly construed to mean *only* "fixing of bail". Had the legislature intended to include more than the setting of the actual bail amount they could easily have modified the statute to reflect this. The legislature could have modified RCW 4.12.050 to expressly include proceedings under CrR 3.2 as an additional exception, as they did for proceedings under CrR 3.2.1 and JuCR 7.3 and 7.4. The fact that the legislature did not so amend the statute indicates the legislature intended only for "fixing of bail" to be a non-discretionary ruling within the meaning of RCW 4.12.050. The rule of *expression unius est exclusion alterius* precludes the court from implying consideration of release conditions into the "fixing of bail" exception where the legislature has not explicitly included it.

release should be denied or that conditions should attach to release on personal recognizance...").

⁶ JuCR 7.3(a) ("A juvenile who has been taken into custody without a warrant and who is to be detained or released on any conditions other than the promise to appear in court at subsequent hearings..."); JuCR 7.4(e) ("If the court at the detention hearing determines that continued detention is not necessary, the juvenile shall be ordered released on personal recognizance. The court may impose conditions on the release...").

c. Mr. Chapman's release conditions were not imposed in lieu of bail. The purpose of bail is to ensure that the defendant appears at future court dates. CrR 3.2(b). Even if the Court concludes that the "fixing of bail" necessarily includes some consideration of release conditions, not all release conditions are imposed to ensure the defendant's future appearance. Under CrR 3.2(d) the trial court may impose release conditions upon a showing that the defendant poses a substantial danger to commit a violent crime, intimidate witnesses, or otherwise interfere with the administration of justice. A defendant who the court determines is not at risk for failure to appear may nonetheless have conditions of release imposed in order to protect the community during the pendency of the trial.

Notably, one possible release condition specifically enumerated under CrR 3.2(d) but that does not appear in CrR 3.2(b) is that the trial court may "[p]rohibit the accused from approaching or communicating in any manner with particular persons or classes of persons." CrR 3.2(d)(1). This condition is imposed not to ensure the defendant's appearance, as bail is, but rather to protect the community while the defendant is free pending trial. Even if the court were inclined to imply consideration of some release conditions into the "fixing of bail" under RCW 4.12.050

(such as those release conditions identified in CrR 3.2(b)), there is no basis under which a no contact order against a class of persons can be considered a part of setting bail under either RCW 4.12.050 or CrR 3.2(b).

Mr. Chapman's release condition prohibiting minor contact squarely falls within the community safety release conditions under CrR 3.2(d). The prosecutor specifically stated at arraignment that the State was requesting the no contact with minors release condition to protect the community.⁷ There was no mention of the condition being requested to ensure Mr. Chapman's future appearance. Imposition of this condition was unrelated to the request for bail in Mr. Chapman's case and cannot be considered a part of the "fixing of bail" exception under RCW 4.12.050. Furthermore, Judge Houser was called upon to exercise his discretion to grant or deny three different proposals for this release condition – a strict no contact with any minors condition requested by the State, a request by the defense that the Court not impose the condition at all, and a no contact with minors with exceptions request by the defense that was ultimately granted. 9/10/15RP at 5-10. This exercise of discretion rendered the State's affidavit of prejudice two months later untimely.

d. Mr. Chapman's attorney was not required to object in order to preserve the affidavit of prejudice issue for appeal. Mr. Chapman's trial attorney did not file an objection or opposition to the State's affidavit of prejudice. The Washington Supreme Court has not addressed the issue of whether an objection is required in order to preserve this issue for appeal. However, "[a] party has the right to disqualify a trial judge for prejudice, without substantiating the claim, if the requirements of RCW 4.12.050 are met." Lile, 2017 WL 3139265, at *6. The Washington Supreme Court has repeatedly emphasized that an affidavit of prejudice is a "mandatory, nondiscretionary rule." E.g. Dennison, 115 Wn.2d at 619; see also Parra, 122 Wn.2d at 595. Because the affidavit functions automatically and the claim of bias in the affidavit does not need to be substantiated, there is no opportunity for the opposing party to object and no basis for the opposing party to do so.

Mr. Chapman requests this Court reverse his convictions.

E. CONCLUSION.

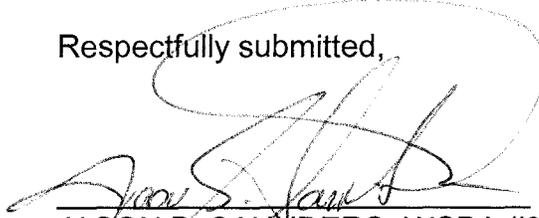
Mr. Chapman was denied a fair trial when the trial court erroneously denied him his constitutional right to present a defense. The trial court also erred in refusing to instruct the jury on

⁷ "MS. SCHNEPF: Your Honor, given the age of the children that the defendant was attempting to engage in sexual contact with, the State has significant

the entrapment defense. Lastly, Judge Houser had already made a discretionary ruling, making the State's affidavit of prejudice untimely. Mr. Chapman requests this Court reverse his convictions.

DATED this 20th day of September, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason B. Saunders", is written over a horizontal line. The signature is stylized and somewhat cursive.

JASON B. SAUNDERS, WSBA #24963
Gordon & Saunders, PLLC
Attorney for Kenneth Chapman

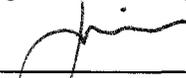
CERTIFICATE OF SERVICE

I, Ian D. Saling, state that on the 20th Day of September, 2017, I caused the original **Appellant's Opening Brief** to be filed in the **Court of Appeals – Division One** and a true copy of the same to be served on the following in the manner indicated below:

Randall Avery Sutton	()	U.S. Mail
Kitsap County Prosecutor's Office	()	Hand Delivery
614 Division St.	(X)	Email
Port Orchard, WA 98366-4614	()	_____
Email: rsutton@co.kitsap.wa.us		

Kenneth W. Chapman	(X)	U.S. Mail
DOC #396847	()	Hand Delivery
Stafford Creek Corrections Center	()	Email
191 Constantine Way	()	_____
Aberdeen, WA 98520		

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name:  _____ Date: 9/20/17
Ian D. Saling
Rule 9 Licensed Legal Intern #9716566
The Law Offices of Gordon & Saunders

GORDON & SAUNDERS PLLC

September 20, 2017 - 3:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50089-2
Appellate Court Case Title: State of Washington, Respondent v Kenneth Wesley Chapman, Jr. Appellant
Superior Court Case Number: 15-1-01040-7

The following documents have been uploaded:

- 5-500892_Briefs_20170920150951D2046837_8382.pdf
This File Contains:
Briefs - Appellants
The Original File Name was CHAPMAN.AOB.pdf
- 5-500892_Motion_20170920150951D2046837_5828.pdf
This File Contains:
Motion 1 - Waive - Page Limitation
The Original File Name was Chapman Motion for Overlength.pdf

A copy of the uploaded files will be sent to:

- ian@gordonsaunderslaw.com
- kcpa@co.kitsap.wa.us
- robert@gordonsaunderslaw.com
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Jason Saunders - Email: jason@gordonsaunderslaw.com
Address:
1111 3RD AVE STE 2220
SEATTLE, WA, 98101-3213
Phone: 206-332-1280

Note: The Filing Id is 20170920150951D2046837