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

STATE OF WASHINGTON, RESPONDENT

v.

PAUL A. CARSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 15-1-05048-8

Brief of Respondent

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

1. Did the trial court properly deny defendant's proposed entrapment instruction where the evidence shows defendant was not led to commit a crime that he intended to commit?
2. Does sufficient evidence support a conviction for attempted rape of a child in the first degree where the evidence shows defendant engaged in explicit conversations about having sex with a child and went to the sting house with condoms?
3. Is defendant's standard-range sentence barred from appellate review where the trial court neither refused to exercise its discretion nor relied on an impermissible basis in refusing to impose an exceptional sentence downward?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 17, 2015, defendant was charged with one count of first degree attempted rape of a child. CP 2. Jury trial began December 14, 2016. RP 70. At trial, defendant proposed a jury instruction on entrapment. CP 66. The court declined to give the instruction, finding that insufficient evidence supported an entrapment defense. RP 422. The court stated:

I find that he needed to admit that he intended to have sex with a child . . .there needed to be some testimony and some evidence that that is what his intent was because the crime that's charged is attempted rape of a child, first degree. And that is, you know, having sex with a child, and he has denied that.

RP 423. Defense counsel did not object to the court's ruling. RP 423.

On December 19th, 2016, the jury found defendant guilty beyond a reasonable doubt of one count of attempted rape of a child in the first degree. RP 481. Sentencing was held on March 3, 2017. RP 487. Defendant requested that the court impose an exceptional sentence downward based on various mitigating factors. RP 489. The State objected to an exceptional sentence downward and requested 92.25 months in prison. RP 501. After hearing argument from both parties, the court sentenced defendant within the standard sentencing range to 85 months in prison and the following with regard to legal financial obligations: \$500 crime victim assessment, \$100 DNA database fee, \$200 criminal filing fee, and \$1000 fee payable to the Washington State Patrol's Missing and Exploited Children's Task Force. CP 149-52. Defendant timely filed a notice of appeal. CP 166.

2. FACTS

On December 14, 2015, Washington State Patrol (WSP) Detective Sergeant Carlos Rodriguez posted a Craigslist ad as part of a sting operation, called "Net Nanny," which is run by the Missing and Exploited Children's Task Force (MECTF). RP 135, 213-216. The ad read: "Young family fun, no RP lets meet – w4mw (Tacoma)[.]" Ex. 1; RP 215. 6. "RP" stands for role play. RP 215. The body of the ad stated: "looking for a crazy fun time. only serious need respond. no solicitations. single mom with two daus and one son." Ex. 1; RP 215. "Dau" means daughters. RP 215.

The purpose of the “Net Nanny” operation was to catch people looking to exploit and have sex with young children. RP 130-34.

Defendant responded to the ad two hours after it was posted. RP 222, 228. Defendant exchanged e-mails and text messages with WSP expressing his desire to engage in sex with the fictitious mother’s 11-year-old daughter. RP 227-275. The series of e-mails and text messages are transcribed below:

Date	Time	Method	Sender	Description
12/14/15	11:18 p.m.	E-mail	Defendant	Handsome fatherly figure and I enjoy this naughty RP game. I’m quite adventurous, imaginative, creative, passionate, sensuous, and very very persuasive. I have much I would like to visit about. I am up for a meet. I hope we can visit. Daddy (Ex. 2)
12/14/15	11:22 p.m.	E-mail	WSP	No role play hun. This is only for serious in meeting and getting to know my young family. (Ex. 2)
12/14/15	11:25 p.m.	E-mail	Defendant	Well then let’s visit more, tell me specifically what you are seeking. I am up for nearly any dynamic. what is it exactly you are wanting to happen (Ex. 2)
12/14/15	11:27 p.m.	E-mail	WSP	i am a single mom and want my kids to experience what I did growing up. Not all understand our lifestyle, but that’s ok we have each other. If interested and are serious we can talk more and meet (Ex. 2)
12/14/15	11:32 p.m.	E-mail	Defendant	I am very interested in it, and what would you like to know about myself as I will have

				many questions for you too. I am curious about you, age, what you look like and the ages of those you would like to bring into this dynamic. have you attempted to speak with your kids about this? And then how do you see this all taking place, you have undoubtedly given this some thought haven't you? How would you like to see this all unfold (Ex. 2)
12/14/15	11:42 p.m.	E-mail	WSP	I am 39. I absolutely have talked with them. They understand the lifestyle that I grew up in and that is how I choose to raise my kids. They are active and very happy. All that meet them are better for it. I don't have a man in my life to help provide them the same experiences that I had growing up. (Ex. 2)
12/14/15	11:47 p.m.	E-mail	Defendant	Ok so then tell me what you would like to know about myself, I would be up for a visit, a conversation or whatever you have in mind to move towards the next step, what would you like to see happen next? (Ex. 2)
12/14/15	11:55 p.m.	E-mail	WSP	I'm busy for tonight, but have the rest of the week hun. I would need to talk to you on the phone first. Can do that tomorrow or later this week. I have friends already for tonight. If you are serious, we can text more. Tell me what you want to do. There are rules (Ex. 2)
12/14/15	11:58	E-mail	Defendant	As I would have it no other way, rules that is, as I would have them also. Yes, possibly

				we can visit more, do you have a picture? I believe I sent you mine. We will visit later. Ciao (Ex. 2)
12/15/15	12:00 a.m.	E-mail	WSP	Here is one of my oldest (photo attached) (Ex. 2)
12/15/15	12:09 a.m.	E-mail	Defendant	Isn't that interesting, it arrived in a file that I can not find an app to open it with. How about a picture of you? (Ex. 2)
12/15/15	12:19 a.m.	E-mail	WSP	Text me and I'll send it again. (Ex. 2)
12/15/15	12:22 a.m.	E-mail	Defendant	9492288072 (Ex. 2)
12/15/15		Text	WSP	What is your name this is kristl and you were inquiring about my girls (Ex. 3)
12/15/15		Text	Defendant	Hey kristl, my name is paul (Ex. 3)
12/15/15		Text	WSP	Hey. So tell me what you want hun (Ex. 3)
12/15/15		Text	Defendant	Ideally I would want all of u, what else would u like to know? (Ex. 3)
12/15/15		Text	WSP	Sp all three kids and me? (Ex. 3)
12/15/15		Text	Defendant	Eventually yes and yourself isn't that what u want? (Ex. 3)
12/15/15		Text	WSP	This si more for my kids, so if you are just trying to hook up with me then this isn't for you (Ex. 3)
12/15/15		Text	Defendant	You Wouldn't b interested in participating (Ex. 3)
12/15/15		Text	WSP	I watch and if I get excited then I can join if the situation is right (Ex. 3)
12/15/15		Text	Defendant	Absolutely and ideally its what I would like (Ex. 3)
12/15/15		Text	WSP	Well like I siad its more for them so if yo just want me this is the wrong ad to answer. (Ex. 3)

12/15/15		Text	Defendant	Let's get past that as I can we deal w that as it arises. Ok? (Ex. 3)
12/15/15		Text	WSP	Sorry. If yo uarent willing to help me with teaching the my girls and possibly my son, then this isn't for you. (Ex. 3)
12/15/15		Text	Defendant	I am absolutely willing to help with that (Ex. 3)
12/15/15		Text	WSP	What do you desire hun (Ex. 3)
12/15/15		Text	Defendant	I would like to discuss this with u n person (Ex. 3)
12/15/15		Text	WSP	We can talk on the phone tomorrow. I have to feel good aout you first before we meet I have a system so I don't get caught. I cant lose my kids im going to sleep now. (Ex. 3)
12/15/15		Text	Defendant	And that would b fine I realize this is a huge deception decision for u and I understand ur cautiousness (Ex. 3)
12/15/15		Text	WSP	What city are you from will yo travel (Ex. 3)
12/15/15		Text	Defendant	Still waiting the pictures (Ex. 3)
12/15/15		Text	WSP	Oh yeah. (Ex. 3)
12/15/15		Text	Defendant	Oly and ur Tacoma correct? (Ex. 3)
12/15/15		Text	WSP	(photo attachment) this is Lisa. Yes. We can talk tomorrow if that is good for you. All this wee (Ex. 3)
12/15/15		Text	Defendant	Ages (Ex. 3)
12/15/15		Text	WSP	Lisa is nearly 12 but very mature for her age. My boy is 13 and my youngest isn't as active. She is 8 (Ex. 3)
12/15/15		Text	Defendant	Call me tomorrow or when ever u can if im not able to receive ur call. Leave a message! (Ex. 3)

12/15/15		Text	WSP	I'll text tomorrow efore we talk. I cant waste my minutes that way I know you will be able to talk (Ex. 3)
12/15/15	1:02 a.m.	Text	Defendant	Ok kristl (Ex. 3)
12/15/15		Text	Defendant	Good moaning krystl how r u doing (Ex. 3)
12/15/15		Text	WSP	Morning (Ex. 3)
12/15/15		Text	WSP	Good. Are you interested in meeting us this week? (Ex. 3)
12/15/15		Text	Defendant	Yes I am and I have relatively flexible schedule this week (Ex. 3)
12/15/15		Text	WSP	Tell me what you want hun and if it works for all of us then we can make it happen (Ex. 3)
12/15/15		Text	Defendant	Let's meet for coffee (Ex. 3)
12/15/15		Text	WSP	No thanks hun, I don't have time for that. I have others tha want to play too sweetie (Ex. 3)
12/15/15		Text	Defendant	So what would u like to c happen (Ex. 3)
12/15/15	9:32 a.m.	Text	WSP	I would need to talk on the phone first with you to make sure you are safe. I need to make sure this is what you want as well if you feel better telling me on the phone I get that, you are careful. Im not into being a sex line. Im really straight forward. If you think you can give us what we need then I will tell you how to get to a place near my house and once I see you are safe then you can come to my house. (Ex. 3)
12/15/15		Text	Defendant	Call me when u. Can (Ex. 3)
12/15/15		Text	WSP	I can call in a few hours (Ex. 3)

12/15/15	10:09 a.m.	Text	Defendant	Let me know when, I will b unavailable between 11 and 1 (Ex. 3)
12/15/15	12:52 p.m.	Text	Defendant	Call me when u can (Ex. 3)
12/15/15		Text	Defendant	Missy. Let's talk (Ex. 3)
12/15/15	2:28 p.m.	Text	WSP	Give me a few hun ill text when I can, probably in an hour or less (Ex. 3)
12/15/15	4:12 p.m.	Text	Defendant	Hey (Ex. 3)
12/15/15		Text	Defendant	Where have u disappeared to? (Ex. 3)
12/15/15		Text	WSP	I had an issue. Sorry. Im going to bed. We can alk tomorrow thought if that works how about 1130 or noon? (Ex. 3)
12/16/15	12:19 a.m.	Text	Defendant	That would b fine Earlier would b better if u can (Ex. 3)
12/16/15		Text	WSP	Like when, not sure if I will be awake. (Ex. 3)
12/16/15	1:50 a.m.	Text	Defendant	Ur awake now. Call me (Ex. 3)
12/16/15		Text	WSP	Sorry didn't get this till now. I cant talk till around noon is that okay (Ex. 3)
12/16/15		Text	Defendant	That would b fine text me again when ur. Ready to visit (Ex. 3)
12/16/15		Text	WSP	K, hope you want to meet. If you are not serious the I don't want to call (Ex. 3)
12/16/15		Text	Defendant	I'm still here aren't i? of course I'm serious but I'm also cautious I'm certain u can appreciate that (Ex. 3)
12/16/15	11:13 a.m.	Text	WSP	K will call later than (Ex. 3)
12/16/15	12:21 p.m.	Text	Defendant	Hey the time I have to visit is some what limited. Let's go (Ex. 3)
12/16/15	12:45 p.m.	Text	Defendant	Unfortunately I'm afraid I won't b able to talk on the phone after about 1:15 (Ex. 3)
12/16/15		Text	Defendant	Maybe next time (Ex. 3)
12/16/15		Text	WSP	Oh, I just got this (Ex. 3)
12/16/15		Text	Defendant	Call now if u can (Ex. 3)

12/16/15	1:19 p.m.	Text	WSP	K have to get her outr of the shower, give me 5 (Ex. 3)
12/16/15		Text	Defendant	I hope ur excited about the possibilities (Ex. 3)
12/16/15		Text	WSP	She wont stop talking about you tonight is going to be great. We cant wait to see how excited you are in person (Ex. 3)
12/16/15		Text	Defendant	Where exactly do u live Are u hoping for something specific tonight I am (Ex. 3)
12/16/15		Text	WSP	I live near st joes hospital so as yuo know I am careful so I will give you directions to a public place near my house and then once I see that yo match your picture I will have you come over. What do you want that's specific (Ex. 3)
12/16/15		Text	Defendant	I'm hoping with ur guidance we can make her a big girl tonight (Ex. 3)
12/16/15		Text	WSP	I will be there watching for sure. We are excited (Ex. 3)
12/16/15	3:01 p.m.	Text	Defendant	I am kind of hoping that I fuck her, their I've said it (Ex. 3)
12/16/15	3:19 p.m.	Text	WSP	I'm attempting to shuffle things around so that I could free up my evening are u able to meet earlier if I can get out of my previous engagement (Ex. 3)
12/16/15		Text	Defendant	Yes I can hun. I hope you fuck her too ther I said it too (emojis) (Ex. 3)
12/16/15		Text	WSP	Good girl (Ex. 3)
12/16/15		Text	Defendant	Let me know what time. We will e waiting. You sound so sweet (Ex. 3)
12/16/15		Text	Defendant	Give me an idea where u live? I'm thinking 530 to 6 (Ex. 3)
12/16/15		Text	WSP	This is the 76 near my house. Kera 76, 1901 South K Street,

				Tacoma, WA 98405 ill give you directions from there text me when you are close so I can get tehm all clean. Unless you want them dirty (Ex. 3)
12/16/15		Text	Defendant	Who all will b there (Ex. 3)
12/16/15		Text	WSP	Me, lisa and anna, my son is gone unless you want him her but I already told him he can go (Ex. 3)
12/16/15		Text	Defendant	That's fine (Ex. 3)
12/16/15		Text	WSP	Tell me when you are leaving (Ex. 3)
12/16/15		Text	Defendant	I'm leaving oly now (Ex. 3)
12/16/15		Text	WSP	What are you driving hun (Ex. 3)
12/16/15		Text	Defendant	A black Honda (Ex. 3)
12/16/15		Text	WSP	K like car or suv (Ex. 3)
12/16/15		Text	Defendant	Hey is it also known as MLK drive ????? (Ex. 3)
12/16/15		Text	WSP	Martin luther king way not drive did yo figure it out hun (Ex. 3)
12/16/15		Text	WSP	Are you lost. Im going to get them in the shower (Ex. 3)
12/16/15		Text	Defendant	Close (Ex. 3)
12/16/15		Text	WSP	K when you are there I will give you r directions hun text and ill call you are you close (Ex. 3)
12/16/15		Text	Defendant	I'm at the 76 station (Ex. 3)
12/16/15		Text	WSP	K did you ring the condoms if not they have them there can you take a call ill give you directions. (Ex. 3)
12/16/15		Text	Defendant	I'm going to go buy them right now (Ex. 3)
12/16/15		Text	WSP	K can you take a call (Ex. 3)
12/16/15		Text	Defendant	Yes call me (Ex. 3)
12/16/15		Text	WSP	(photo attachment) 1908 S yakima ave Tacoma (emojis) are you on the way?? (Ex. 3)
12/16/15		Text	Defendant	I'm here (Ex. 3)

12/16/15	5:44 p.m.	Text	WSP	K im just drying her off come on up an dknock (Ex. 3)
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RP 227-275. Misspellings are in the original texts.

The fictitious mother greeted defendant at the door when he arrived.

RP 91. She told defendant to take off his shoes while she went to get Lisa; thereafter defendant was arrested. RP 92, 102.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S PROPOSED ENTRAPMENT INSTRUCTION WHERE DEFENDANT DENIED THAT HE COMMITTED THE ACTS CHARGED.

An instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994) (citing *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992)). To be entitled to an entrapment instruction, “a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence.” *Trujillo*, 75 Wn. App. at 917.

Washington’s entrapment defense is defined as follows:

- (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 (Emphasis added). The court “need not give an entrapment instruction unless the defendant has satisfied both prongs of the analysis and shows that, as a matter of law, the instruction is warranted.” *State v. Hansen*, 69 Wn. App. 750, 764, 850 P.2d 571 (1993).

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

The defendant must produce “sufficient evidence to persuade a reasonable jury that he has established the defense by a preponderance of the evidence.” *Trujillo*, 75 Wn. App. 917-18. An entrapment defense is not allowed when the evidence merely indicates that the defendant was given an opportunity to commit the crime with which he is charged. *State v. Morgan*, 9 Wn. App. 757, 759, 515 P.2d 829 (1973) (quoting *State v. Gray*, 69 Wn.2d 432, 434, 418 P.2d 725 (1966)).

Entrapment occurs only where the criminal design originated in the mind of the police officer and the defendant is accused or lured or induced into committing a crime he had no intention of committing. *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984). Thus, establishing entrapment requires proof of two distinct elements. First, defendant must show he was tricked or induced into committing the crime by acts of trickery by law

enforcement agents. *Hansen*, 69 Wn. App. at 764. Inducement is “government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizens would commit the offense.” *Id.* Repeated requests to commit a crime are not sufficient to constitute inducement by the State. *See State v. Trujillo*, 75 Wn. App. at 918-919. An officer’s use of “the normal amount of persuasion to overcome the defendant’s expected resistance” to commit the crime “is not entrapment, nor is the use of deception, trickery, or artifice by the police.” *Trujillo*, 75 Wn. App. at 919.

In determining the second prong, the evidence must address “the intent or predisposition of the defendant to commit the crime.” *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984). In determining whether to instruct a jury on the defense of entrapment, the trial court “should consider the defendant’s testimony and the inferences that can be drawn from it.” *Galicia*, 63 Wn. App. at 836 (citing *Morgan*.) Defendant’s testimony regarding his state of mind is relevant to establishing defense of entrapment. *State v. Keller*, 30 Wn. App. 644, 648, 637 P.2d 985 (1981).

Defendant fails to meet either prong of the entrapment defense. First, defendant was not lured to commit the crime by trickery. While the ad was placed by a police officer, defendant was not targeted. RP 205. Defendant initiated contact with the officer. RP 221. The casual encounters

section on Craigslist contains 169 ads specifically advertising role play. RP 356. There was ample opportunity for defendant to meet with an adult woman through Craigslist and engage in role play. RP 356. In fact, in the past, defendant had a good success rate in finding role play partners via Craigslist. RP 356. Yet, defendant answered an advertisement that specifically stated this was not role play. RP 215, 221.

Second, defendant was predisposed to commit the crime. During the exchange of e-mails and text messages, defendant was told numerous times that this was a situation involving real children, not role play with adults pretending to be children. RP 226, 385. Despite this, defendant reinitiated contact with the fictitious mother. RP 385. The conversation spanned three days. *See* series of e-mails and text messages *supra*. Considering all of the communications between defendant and WSP produced above, the evidence shows that defendant was not led to commit a crime he was not otherwise predisposed to attempt to commit. Rather, WSP merely afforded defendant the opportunity to commit a crime, which is insufficient for an entrapment instruction.

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

- b. Defendant is not entitled to an entrapment instruction where he denied committing the acts charged.

Entrapment is an affirmative defense. “An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so.” *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). It is well settled by the clear weight of authority that the defense of entrapment is not available to one who denies that he committed the *act* charged. *State v. Draper*, 10 Wn. App. 802, 806, 521 P.2d 53 (1974). The defense of entrapment does not necessarily require the defendant to admit the *crime* that is charged, provided “the defendant admit[s] acts which, if proved, would constitute the crime.” *State v. Galisia*, 63 Wn. App. 833, 836-37, 822 P.2d 303 (1992).

Defendant claims that he is not required to make any admission at all in order to receive an entrapment jury instruction.¹ Appellant’s Brief at 8. However, this claim fails as it is contrary to Washington case law. In order to be entitled to an entrapment defense in Washington, defendant must admit to the acts that, if proved, would constitute the crime. *Galisia*, 63 Wn. App. at 836-37. Thus, here defendant would have to admit to driving to the house and buying condoms with the intention of having sex with 11-year-old Lisa.

¹ This assertion is based on case law from other jurisdictions.

Defendant claims that he admitted most of the elements and constituent actions necessary to forming intent in his communications with the trooper. Appellant's Brief at 8. However, the court considers the defendant's testimony, rather than his communications with the trooper, when determining whether a defendant is entitled to an entrapment instruction. *Galisia*, 63 Wn. App. at 836; *State v. Keller*, 30 Wn. App. 644, 648, 637 P.2d 985 (1981).

Based on the defendant's testimony, the court found insufficient evidence to support an entrapment instruction where defendant failed to provide evidence that he intended to have sex with a child. RP 422. Defendant repeatedly denied any intent to engage in sexual intercourse with a child. RP 385. At trial, defendant only testified that he was engaging in fantasy role play conversation with a consenting adult woman about engaging in sexual acts with other adults pretending to be children. RP 385. He maintained this stance even though "Kristl" told defendant at least twice over the course of their communications that this was real and not role play. RP 323, 374.

None of the acts admitted to by defendant constitute a crime at all, let alone the crime of attempted rape of a child first degree. Defendant explicitly denied the acts which, if proved, would constitute the crime: communicating with "Kristl," purchasing condoms, and driving to the sting

house with the intent of having sex with 11-year-old Lisa. RP 343-44, 393-95. Because defendant denied the acts charged, the trial court correctly denied defendant's proposed entrapment instruction.

2. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT DEFENDANT TOOK A SUBSTANTIAL STEP TOWARDS COMMITTING FIRST DEGREE RAPE OF A CHILD WHERE DEFENDANT ENGAGED IN EXPLICIT CONVERSATIONS ABOUT HAVING SEX WITH A CHILD AND ARRIVED AT THE STING HOUSE WITH A PACKAGE OF CONDOMS.

Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). A conviction will not be overturned if any rational fact finder could find the crime's essential elements beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007, 1008-09 (2009). A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Boyle*, 183 Wn. App. 1, 6-7, 335 P.3d 954 (2014) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

Circumstantial and direct evidence are equally reliable in determining the sufficiency of evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470, 477 (2010). A sufficiency claim admits the truth of the State's evidence with all inferences reasonably drawn therefrom. *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are not reviewable. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

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

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

Here, defendant engaged in a series of e-mails and text messages with a stranger from Craigslist whom he believed was an adult mother

offering her three young children for sex. *See* series of e-mails and text messages *supra*. The person posing as the mother was actually Det. Sgt. Rodriguez of the WSP. RP 204.

Throughout their conversation, defendant made it clear he was looking to engage in sexual intercourse with 11-year-old Lisa. *See* series of e-mails and text messages *supra*. At the beginning of their communications, defendant did indicate that he was interested in role play. RP 221. However, the fictitious mother told defendant numerous times over the course of their communications that this was for real and not about role play. RP 323, 374. She also repeatedly stated that her kids meant everything to her and she could not lose them. RP 374. Despite this, defendant pursued the relationship and chased after Kristl. RP 381. The day they were to meet, defendant stated that he was hoping he “could make [Lisa] a big girl tonight.” RP 268. He also blatantly stated, “I am kind of hoping that I fuck her, their [sic] I’ve said it.” RP 269.

At trial, defendant claimed that his communications were fantasy and he solely intended to engage in “daddy-daughter” role play, rather than have sex with a child. Appellant’s Brief at 11. However, the evidence shows that defendant discussed specific conduct he intended to engage in and made a plan to execute said conduct. During their conversations, defendant told the mother he planned on having sexual intercourse with Lisa. RP 268-69.

He also agreed to abide by the mother's "rules." RP 239. Defendant asked the mother for an address and told her he would head her way around 5:30 p.m. - 6:00 p.m. RP 269. Defendant drove from Olympia, about 45 minutes away, to meet the mother in Tacoma. RP 270. The mother directed him to a nearby 76 station, where defendant purchased condoms. RP 269, 273. The mother sent defendant her address, at which he arrived at 5:43 p.m. RP 275.

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

and drove to the agreed upon location with the \$300 he agreed to pay for sex. *Id.* at 318.

In *State v. Townsend*, the defendant communicated via e-mail and instant messenger with who he believed to be a 13-year-old girl. 147 Wn.2d 666, 670, 57 P.3d 255 (2002). The defendant told her he wanted to have sex with her, and the two planned to meet at a hotel. *Id.* at 671. When he arrived at the hotel room and asked to see the girl, he was arrested. *Id.* The Supreme Court rejected defendant's impossibility argument. *Id.* at 679. Instead, it held that the defendant took a substantial step because his actions indicated he intended to have sexual intercourse with the child. *Id.*

Similarly, in *State v. Sivins*, the court found that the defendant took a substantial step towards rape of a child by engaging in sexually graphic internet communications with a fictitious 13-year-old, driving five hours to Pullman, and securing a hotel room for the two. 138 Wn. App. 52, 64, 155 P.3d 982 (2007).

In contrast, in *State v. Grundy*, the court of appeals found insufficient evidence to support a finding that a substantial step was taken towards possession of a controlled substance where the defendant's words, "without more," did not constitute the requisite overt act. 76 Wn. App. 335, 337, 886 P.2d 208 (1994).

Here, defendant clearly engaged in conduct that went far beyond the mere exchange of words. Defendant not only exchanged photos with the fictitious mother, obtained her address, and arrived at the address with a newly-purchased package of condoms, he also got out of his car, walked up to the door of the house, stepped inside, and began taking off his shoes. RP 91-92, 339, 392. He drove from Olympia to Tacoma, a 45 minute – hour long drive. RP 392. He did all of this to fulfill his plan of making 11-year-old Lisa a “big girl,” by “fuck[ing] her.” RP 338. Review of the numerous e-mails and text messages shows that defendant intended to have sex with 11-year-old Lisa. *See* series of e-mails and text messages *supra*. Defendant’s written expressions of his intent to have sex with Lisa, combined with the physical steps he took to carry out that crime, support the conclusion that defendant took a substantial step towards the completion of first degree child rape.

3. DEFENDANT’S STANDARD-RANGE SENTENCE IS NOT SUBJECT TO APPELLATE REVIEW WHERE THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

The law is well-settled that generally a defendant cannot appeal a standard-range sentence. *See* RCW 9.94A.585(1); *State v. Williams*, 148 Wn.2d 143, 146, 65 P.3d 1214 (2003). This rule arises from the notion that,

so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length. *State v. Williams*, 148 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). However, this standard is not an absolute prohibition of the right to appeal. *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000) (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 328-29, 944 P.2d 1104 (1997)).

“[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *Garcia-Martinez*, 88 Wn. App. at 330. “A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range.” *Id.* at 330. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if, for example, it takes the position that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion. *Id.* Even in those instances, however, it is the refusal to exercise

discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. *Id.*

In *State v. Cole*, 117 Wn. App. 879, 880, 73 P.3d 411 (2003), the defendant unsuccessfully requested a below-range sentence and later challenged the court's refusal to impose an exceptional sentence on appeal. The court held the defendant could not appeal from a standard-range sentence where the trial court considered the defendant's request for the application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. *Id.* at 881. Similarly, in *Garcia-Martinez*, which involved an equal protection challenge to a standard-range sentence, the court held that a trial court that has considered the facts and concluded no basis exists for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. 88 Wn. App. at 330.

In the present case, defendant cannot appeal from his standard-range sentence where the trial court exercised its discretion in denying his request for an exceptional sentence downward. Even though it was not required to do so, the sentencing court considered a downward departure from defendant's presumptive sentence. RP 510. Defendant argued that he was entitled to an exceptional sentence downward because: (1) WSP was the initiator; (2) he committed the crime under duress, coercion, threat,

compulsion; (3) with no apparent predisposition to do so, he was induced by others to participate in the crime; (4) he is a low risk to reoffend per the psychosexual evaluation; (5) he is amenable to treatment; and (6) no victim exists in this case. RP 489-92.

The State responded that: (1) defendant had no legal or factual basis for arguing that the victim initiated or provoked the incident because there is no victim in this case; (2) he did not commit the crime under duress, or coercion where he went internet surfing, found an advertisement of interest, and pursued a relationship with an 11 year old girl and an eight year old girl; (3) similarly, defendant was not induced by others where he pursued the relationship: he found and answered an ad randomly placed by WSP and engaged in multiple means of communication with who he thought was the mother of an eleven and eight year old girls; (4) and (5) the psychosexual evaluation stating that defendant is a low risk offender and amenable to treatment lacks credibility where the evaluator did not have a full factual background and erroneously reported defendant as SOSA-eligible; and (6) defendant exhibited predatory behavior in pursuing what he thought was an actual victim. RP 497-99.

After hearing extensive argument from both sides, the court determined that no extenuating or exceptional circumstances existed to

deviate from the standard range. RP 510. Thus, similar to both *Cole* and *Garcia-Martinez*, the court clearly exercised its discretion here.

Moreover, the sentencing court did not rely on an impermissible basis in declining to impose an exceptional sentence downward. Under the Sentencing Reform Act of 1981 (SRA), a sentencing court generally must impose a sentence within the standard sentencing range. RCW 9.94A.505(2)(a)(i). However, the SRA authorizes a departure from the standard range in some circumstances. *See* RCW 9.94A.535. The language in RCW 9.94A.535 is discretionary, as it provides that:

The court *may* impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.535 (emphasis added). While the sentencing court has broad discretion to consider a downward departure in light of mitigating factors, the court is “in no way required to depart from the presumptive sentence.” *State v. Korum*, 157 Wn.2d 614, 636-37, 141 P.3d 13 (2006) (citing RCW 9.94A.535(1)).

Nothing in the record indicates that the court either refused to exercise its discretion or relied on any impermissible basis in rejecting the request for an exceptional sentence. The trial court based its refusal to impose an exceptional sentence on its understanding of the facts and its review of the relevant case law, ultimately concluding that there was no

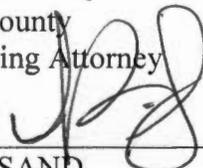
basis to deviate from the standard range. RP 510. This is an appropriate exercise of sentencing discretion. See *Garcia-Martinez*, 88 Wn. App. at 330. Because the trial court properly exercised its discretion in refusing to impose an exceptional sentence below the standard range, defendant's standard-range sentence is not subject to appellate review.

D. CONCLUSION.

For all of the above-stated reasons, the State respectfully requests this Court affirm the defendant's conviction of Attempted Rape of a Child in the First Degree and affirm defendant's standard-range sentence.

DATED: January 8, 2018.

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SANAA NAGI
Rule 9 Intern

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

1/8/17 Meun Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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