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COA No. 50656-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE FORLER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY

The Honorable Jeffrey P. Bassett

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APPELLANT'S OPENING BRIEF

---

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## **A. ASSIGNMENTS OF ERROR**

1. In Mr. Forler's trial for responding to a fake Internet trolling advertisement placed on Craigslist by law enforcement, where he was charged with attempted offenses, the court abrogated the Sixth and Fourteenth Amendments by denying his challenge for cause to Juror 8.<sup>1</sup>

2. Defense counsel was ineffective in violation of the Sixth Amendment for failing to raise the defense of entrapment.<sup>2</sup>

3. The prosecution was premised on outrageous government conduct in violation of Due Process.

4. Instructional error and a violation of the Fourteenth Amendment occurred when the court included full "to-convict" instructions on the completed offenses.

5. The court imposed illegal community custody conditions.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. During *voir dire*, juror no. 8 announced his significant concern about having an inability to be fair in cases involving crimes

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<sup>1</sup> The Sixth Amendment guarantees the right to trial by jury and the Fourteenth Amendment guarantees the right to a fair trial, under Due Process. U.S. Const. amends. 6, 14.

<sup>2</sup> The Sixth Amendment also guarantees the right to effective assistance of counsel. U.S. Const. amend. 6.

against children. In addition to his oral comments, the juror's questionnaire confirmed this very inability to decide the case based on facts, rather than emotion. Did the trial court err by denying Mr. Forler's challenge for cause to juror no. 8?

2. Obtaining a jury instruction on the defense of entrapment requires merely that there be sufficient evidence to merit the instruction. Was defense counsel ineffective for failing to seek a jury instruction on the defense of entrapment, where there was sufficient evidence to merit it, and where the defense would have been completely compatible with Mr. Forler's testimonial account that he went to the "sting" location out of misplaced curiosity, and concern for actual children being in danger?

3. Was the prosecution premised on outrageous government conduct in violation of Due Process, requiring reversal?

4. The trial court included full "to-convict" instructions for the completed offenses of child rape and commercial abuse, telling the jury that it was charged that "on or about August 31, 2015, the defendant had sexual intercourse with a child," and, in count two, that he paid money for sexual conduct. The Washington Pattern Instructions state that the jury in attempt cases should be informed of the *elements* of the

completed crimes, but the instructions in the present case raised the disturbing specter of actual sexual intercourse with a child, wrongly and exponentially prejudicing the defendant's right to a fair trial in a case where the "victim" was fake and instead was an actor posing as a child, in a police sting operation. Was this instructional error, a violation of Due Process, and/or error under RAP 2.5(a)(3), requiring reversal?

5. Did the court impose illegal community custody conditions in the absence of statutory and/or constitutional authority?

### **C. STATEMENT OF THE CASE**

#### **1. Law enforcement conducted a pretense-based "trolling" sting operation seeking attempt convictions based on vehicle travel.**

Officers of the Kitsap Missing and Exploited Childrens Task Force conducted a sting operation during a two-week period in August of 2017, by posting a "Craigslist" advertisement on the internet, hoping to secure attempt convictions. 5/22/17RP at 456-57; CP 5-6. The advertisement appeared to suggest an invitation for any persons

interested in sexual conduct with a family, that included children.<sup>3</sup>

5/22/17RP at 458-59.

Kevin Forler, out of a combination of concern and annoyance with false Craigslist advertisements, fear that actual children might be at risk, and because of misplaced, foolish curiosity, responded to the advertisement by saying he was interested. 5/23-24/17RP at 588-89; 5/22/17RP at 465. The advertisement read:

New to area and interested in new friends. I have a very close young family that is very giving. Incest experience is a plus. Reply if interested. No RP. Only serious that want to meet respond. 43/f/Silverdale. Reply with a/s/l. I can tell you more when you respond. 2 dau 11/7 that are home schooled.

5/22/17RP at 458-59; Supp. CP \_\_\_\_, Sub # 88 (Exhibit list, exhibit 1).

Mr. Forler first sent an “email” to the ad poster through the anonymous, internal Craigslist system. 5/23-24/17RP at 593-96; 5/22/17RP at 462-63, 515-16.

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<sup>3</sup> “Craigslist” is an internet classified advertising website with more than 80 million posts crafted on it per month, which are typically seen by more than 50 million individuals in the United States during that same period. The website is described as “community-moderated” and thus expressly takes no internal interest in regulating the broad swath of false or deceptive material that makes up a percentage of its content. See <https://www.craigslist.org/about/factsheet>; see, e.g., <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-obtains-court-order-against-deceptive-marketers-who-tricked>.

The ad, as Detective Carlos Rodriguez explained, contained language intended to state that the poster did not want “RP,” or “role play,” a phenomenon often sought by internet-using individuals. The detective noted that these individuals merely want to “chat for hours.” 5/22/17RP at 549, 571. The purpose and methodology of the sting operation was to convince people to travel to a fast-food restaurant near an undercover apartment, occupied by officers, and to then invite the person to that exact apartment location, for arrest. 5/22/17RP at 452-53.

On the dates in question, over the course of the evening and then the next day, Mr. Forler did exchange text messages, emails, and ultimately a telephone call with the apparent “mother” who had posted the advertisement. The poster was being played over the telephone by a female officer from the Kitsap Task Force, and a monetary exchange was allegedly negotiated, using alleged internet codewords for money. 5/23-24/17RP at 593-96; 5/22/17RP at 462-63, 515-16.

However, during these communications, Mr. Forler “flagged” the advertisement to Craigslist authorities, which is a method of reporting it as inappropriate. 5/23-24/17RP at 596-97. Detective

Rodriguez testified that he had never encountered a target individual doing this. 5/22/17RP at 500.

At some point, the Task Force undercover operators sent Mr. Forler a photograph of a female state trooper in the Task Force, taken when she was 16 years old. 5/22/17RP at 476-77.

After over a day of conversation and encouragement, Mr. Forler ultimately drove to a restaurant, and then to the sting operation near Bremerton, Washington, where he was arrested when he approached the apartment. 5/22/17RP at 543-44.

As Mr. Forler told the jury, his efforts in driving to the Bremerton area were intended to determine if the persons who placed the advertisement had posted a fake ad, which occurs a lot. If they appeared real when he arrived, he would call law enforcement. 5/23-24/17RP at 603-05. Mr. Forler explained that he could not simply report the ad to police from home, because there might be no people at any real physical location. 5/23-24/17RP at 588-90, 625, 634.

There were condoms and lubricant in the vehicle Mr. Forler was driving, but none of these were on his person as he walked up to the address. 5/23-24/17RP at 575-77, 580-81, 603-04. Mr. Forler noted

that he did travel with these items in case he met a woman.<sup>4</sup> 5/23-24/17RP at 603.

**2. Trial and sentencing.** During the first day of jury selection, the defense unsuccessfully challenged juror no. 8 for cause. 5/15-16/17RP at 115-19. Although there was further questioning of juror no. 8 the next day, the trial court's denial of Mr. Forler's for-cause challenge was a substantive ruling. 5/15-16/17RP at 119.

Defense counsel stated during *in limine* motions that the defense would not raise entrapment, after the State filed a pre-trial brief that asserted the defense could not meet a "burden of production" on the defense. CP 55; 12-51.

At the close of the evidence phase, the jury was given a "to-convict" instruction for a charge of the completed crime of rape of a child committed "on or about August 31, 2015," and the same for a charge of a completed crime of commercial sexual abuse of a minor, in addition to "to-convict" instructions for the attempted offenses. CP 117-18, CP 123-24.

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<sup>4</sup> Mr. Forler's psychosexual examination, which was produced by the State but employed by his counsel at sentencing in seeking a lower sentence, determined that Mr. Forler's sexual attraction was indeed solely to adult women. See CP 129 *et seq.*

The jury convicted Mr. Forler of attempted rape of a child and attempted commercial abuse. CP 80. At sentencing, Mr. Forler was represented by new counsel, who sought an exceptional sentence below the standard range. The court rejected the defense argument that a mitigated sentence was legally available under a theory that there was a failed defense of entrapment, reasoning that Mr. Forler did not raise such a defense, and rejected any contention that a lesser sentence was warranted based on a lack of predisposition, under the mitigating factor of RCW 9.94A.535(1)(d). 7/14/17RP at 5-8, 23-24; CP 305-07. The court instead sentenced Mr. Forler to standard range terms for the crimes, including 90 months to Life for the attempted rape. CP 170-79.

#### **D. ARGUMENT**

##### **1. MR. FORLER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY WHEN JUROR 8, WHO HAD EXPRESSED AN INABILITY TO APPLY THE PRESUMPTION OF INNOCENCE, WAS SEATED ON THE JURY PANEL**

**a. Appealability.** After Mr. Forler's for-cause challenge to juror no. 8 was denied by the trial court, the defense then employed peremptory challenges to remove multiple jurors. Juror no. 8 was not removed and sat on the jury during the trial, deliberating to conclusion.

5/15-16/17RP at 25 (allotment of peremptory challenges); 5/18/17RP at 423 (seating of final jury members); 5/23-24/17RP at 682-83 (pre-deliberations selection of alternates); Supp. CP \_\_\_\_, Sub # 76 (five page jury seating charts and selection list).

Mr. Forler may appeal the denial of his challenge for cause to juror no. 8, because juror no. 8 sat on the jury. See, e.g., City of Cheney v. Grunewald, 55 Wn. App. 807, 809, 780 P.2d 1332 (1989) (where trial court denied defendant's for-cause challenge and juror in question was seated on panel after defendant exhausted all peremptory challenges, denial of challenge for cause could be appealed); accord, State v. Hyder, 159 Wn. App. 234, 255, 244 P.3d 454 (2011); see also State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002) (party need not exhaust all peremptory challenges in order to appeal denial of challenge for cause), review denied, 148 Wn.2d 1012 (2003) (citing State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) and United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

**b. Voir dire.** Juror no. 8 was questioned without the other jurors present. After repeatedly being asked if he could be fair and decide the case on the facts, he stated, "I am not confident that I can. I'm just

seeing it as a struggle, and I don't feel right off the bat that I can't be." 5/15-16/17RP at 115-18. The court denied defense counsel's motion to excuse the juror for cause, stating that the court "[d]idn't have an indication from him he could not be fair and impartial one way or the other." 5/15-16/17RP at 119.

However, at that juncture, juror no. 8's gamut of statements in the record had indicated that he could not be fair. Although juror 8 was part of questioning during the subsequent day of jury selection, the challenge should have been granted when made. The defendant had made a challenge for cause, and thereafter, counsel would have had no reason to conclude that seeking reconsideration would be anything other than futile.

Further, challenges for cause are to be assessed on the basis of the juror's responses to the questions posed at that time if they show that his views or beliefs would "substantially impair" the performance of his duties as a juror in accordance with his instructions and his oath. State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

**c. Juror no. 8 should have been excused for cause.** Both the Washington Constitution and the United States Constitution guarantee a defendant the right to a fair trial before an impartial jury. Wash. Const. art. 1 §§ 3, 21, 22; U.S. Const. amends. 6, 14; State v. Hughes, 106 Wn.2d at 180-82; Wainwright v. Witt, 469 U.S. at 421-424. As part of those rights, a defendant is entitled to unprejudiced and unbiased jurors. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000).

Pursuant to Washington statute, a juror must be excused for either “actual” or “implied” bias. RCW 4.44.170; Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010). Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2).

Here, when asked to amplify on what he meant about his difficulty being fair and impartial, juror no. 8 stated that this was not a crime against property like the burglary he had experienced some years previously. Instead, the crimes at issue were against vulnerable people, in this case, children, causing him to lack confidence that he could be fair. 5/15-16/17RP at 116-17.

As the Washington Supreme Court stated in State v. Davis, even “[m]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” State v. Davis, 141 Wn.2d at 824-25 (internal quotation marks omitted).

Accordingly, a defendant’s challenge for cause must be granted where there is a doubt about a juror’s ability to decide the case impartially and free from bias. Morgan v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). A juror may not sit if he has an opinion or a state of mind that could prevent him from fairly trying the case. State v. Moser, 37 Wn.2d 911, 916–17, 226 P.2d 867 (1951); RCW 4.44.170, .190.

**d. The court’s reasoning that it was more likely that the juror could be fair rather than unfair was in error, and the ruling did not protect Mr. Forler’s right to to an unbiased jury because doubts must be resolved in favor of a juror’s removal.** Under the above standard, juror no. 8 should have been excused. There must be no lingering doubt about the fairness of any jurors. But juror no. 8 expressed grave doubt about his own fairness – unlike jurors who often

do not recognize their own inability to be fair, yet nonetheless warrant disqualification.

Importantly, the trial court was incorrect to when it reasoned that the juror had not shown an indication that he would be fair, rather than not fair. During the parties' questioning of juror no. 8 regarding his answers to the juror questionnaire, the juror agreed with the prosecutor's question that he might have a hard time being fair and impartial in this case. 5/15-16/17RP at 116. He gave a reason for his answer, which was that the factual situation of the case was powerful and very emotionally laden to him, involving children as it did. 5/15-16/17RP at 116. Specifically he stated that it was a question in his mind whether he could or could not be fair, rather than him thinking he could not be, but he concluded that he was not confident that he could be fair and decide the case on the facts. 5/15-16/17RP at 117.

This self-assessment by the juror himself was supported by his juror questionnaire answers that gave defense counsel, and indeed the court, so much concern. In the questionnaire, juror 8 stated that it would be challenging for him to separate emotion from fact in a case of this nature, and expressed a belief that this difficulty would be typical. CP 275-76.

The trial court, even as it was denying the challenge, acknowledged that juror 8's questionnaire indicated that he might have difficulty separating emotion from fact, but merely attributed any such difficulty as a typical feeling for a juror. 5/15-16/17RP at 119. This record does not support a ruling that the juror was more likely to be fair, rather than not fair. All of this juror's answers, given by him when asked to speak with completeness and accuracy, fell on the side of the juror *not* being able to be fair. CP 275 (instructing juror that the questionnaire "is a critical part of the jury selection process" and that answers are given "by you under penalty of perjury"); see State v. Beskurt, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013) (juror questionnaires are, broadly, a component part of the juror selection process).

Juror 8 should have been stricken and removed from the jury at that juncture. His remarks showed actual bias. State v. Gonzales, 111 Wn. App. at 281-82; State v. Gosser, 33 Wn. App. 428, 434, 656 P.2d 514 (1982). For example, in Gonzales, a juror had expressed a belief that the police officer would count more than the defendant claiming innocence, and responded "I don't know" when the prosecutor asked, "So, in your mind, does [the defendant] still have a presumption of

innocence regardless of the fact that it is an officer that has taken the stand to testify?” Gonzales, 111 Wn. App. at 279. The Court of Appeals held that this juror had demonstrated an inability to be fair in the criminal case at hand, where the facts, not emotions, must decide innocence or guilt. See Gonzales, at 282.

Additionally, just like in State v. Fire, juror no. 8 here admitted a specific inability to be fair in a case involving crimes against children. In Fire, a child molestation case, the juror stated that he was “very opinionated” about child sex cases and that persons like the defendant should be “severely punished.” Fire, 145 Wn.2d at 155. The Court held that the juror had demonstrated an inability to be fair. Id at 156–57. The present case is similar, and the trial court erred.

**d. Reversal is required.** Here, juror no. 8 was seated. The error of denying a challenge for cause requires no showing of specific prejudice to secure reversal. Where a juror who should have been dismissed for cause was not, the defendant’s convictions at a jury trial where that juror sat in judgment upon him, must be reversed. Fire, 145 Wn.2d at 158; Martinez-Salazar, 528 U.S. at 316. Mr. Forler’s convictions must be reversed.

**2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT.**

**a. Where there was evidence to support an entrapment**

**instruction, the jury should have been given the opportunity to**

**decide the matter.** Before trial started, the State filed briefing in opposition to Mr. Forler raising a claim of entrapment and moved to preclude the defense. CP 55, 12-51. During motions in limine, defense counsel stated that there was no objection to this motion, and the trial court remarked favorably on the prosecutor's briefing. 5/15-16/17RP at 12-13, 22.

Defense counsel was ineffective for failing to raise the defense and seek the appropriate instruction. The deputy prosecutor's brief contended that Mr. Forler could not meet the necessary "burden of production" for an entrapment instruction. See CP 12-15 (State's *in limine* brief). But the trial evidence is what determines the availability of an entrapment instruction. An entrapment instruction was warranted by what came out at trial, in particular the information regarding law enforcement's creation of a non-existent offense, and the encouragement of Mr. Forler to attempt that crime.

Furthermore, the statements and testimony by Mr. Forler, that he went to the sting location out of misplaced curiosity combined with concern for child endangerment, would not have been incompatible with a defense of entrapment. There is no indication that defense counsel abandoned the idea of an entrapment defense because of anything other than the State's assertion – premature and incorrect as it was – that it could be declared legally unavailable even prior to the evidence phase of trial. However, even if defense counsel might have believed tactically that the defendant could raise one defense to the exclusion of the other, this would have been a wholly unreasonable and deficient decision.

**b. Mr. Forler was entitled to effective assistance of counsel.**

A person charged with a crime has a right to a lawyer who provides effective assistance of counsel. U.S. Const. amend. 6. The case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides the test to determine whether a defendant has been denied this Sixth Amendment right. First, the defendant must show that counsel's performance was deficient – i.e., that counsel made errors so serious that he or she was not functioning as the “counsel” guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to render the outcome of trial unreliable. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

To establish prejudice, a defendant must show a reasonable probability that but for counsel's deficient performance, the outcome would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome" of Mr. Forler's trial Leavitt, 49 Wn. App. at 359.

**c. Entrapment merely requires evidence in support of its requisite elements, that the defendant was lured into a crime designed by law enforcement, which he had not otherwise intended to commit.** The present case was squarely appropriate for an entrapment argument, and to abandon the defense before trial was to close off the most viable defense to the charges. "Entrapment is usually raised in cases where police induce the commission of a crime while acting in an undercover capacity." State v. O'Neill, 91 Wn. App. 978,

988, 967 P.2d 985, 989 (1998) (citing State v. Lively, 130 Wn.2d 1, 9-10, 921 P.2d 1035 (1996)).

Under RCW 9A.16.070, the defense of entrapment 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. Accordingly, the corresponding pattern jury instruction, WPIC 18.05, makes clear that the jury question would be whether there was luring by police, and whether officers used more than mere reasonable persuasion to overcome reluctance on Mr.

Forler's part:

Entrapment is a defense to a charge of (fill in crime) if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The

use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.05 (4th Ed) (October 2016 Update).

The circumstances of this case as a whole show that an entrapment instruction would have been given to Mr. Forler's jury; therefore, the failure of defense counsel to request the instruction was deficient. See generally State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (where ineffective assistance of trial counsel is alleged to be the failure of the lawyer to request a jury instruction, the Court of Appeals must find that the defendant would have been entitled to the instruction).

**d. The defense would have been permitted the entrapment instruction because it was supported by strong evidence that Mr. Forler was lured into a crime he did not otherwise intend to**

**commit.** The evidence at Mr. Forler's trial did not need to meet some uniquely high standard, as the State's trial briefing intimated. The comment to WPIC 18.05 makes clear that the "burden of production" which the State pronounced below as impossible to satisfy is nothing more than the routine rule that a party must be *entitled* to a given jury

instruction. WPIC 18.05 (Comment) (citing State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994)).

As held in Trujillo, in order to secure 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. State v. Trujillo, 75 Wn. App. at 917.

Thus, the burden of production is nothing more than the requirement that a proponent of a jury instruction place before the trier of fact sufficient evidence to warrant the instruction at the end of the case.

***(i) The first prong of the defense was supported by sufficient evidence.***

Here, first, the understood facts, including the Kitsap Task Force's operation and methods used, and the documented communications between the defendant and the sting operation, established more than enough evidence to warrant allowing the jury to assess entrapment. As Detective Carlos Rodriguez testified, the sting that Mr. Forler was caught in was one of the Task Force's special "proactive" operations. 5/22/17RP at 448. There are three methods for seeking out and arresting alleged sexual offenders. 5/22/17RP at 448-

49. Primarily, the Task Force works on the basis of “cyber tips” provided by internet companies or individuals, alerting the police to inappropriate conduct by specific persons. 5/22/17RP at 448-49. A second, additional type of work the Task Force does it that it looks for advertisements online where juveniles are being actually trafficked by a perpetrator. 5/22/17RP at 448-50. The Task Force hunts down both of these types of known criminals or identified suspects.

This case, however, was a different animal entirely – it was the “proactive” scheme, where the Task Force affirmatively posts its own false advertisements on Craigslist and hopes people will answer them by email. 5/22/17RP at 451-53. As Detective Rodriguez explained, a person can send an email to the advertisement’s poster simply by clicking their computer mouse on the ad, which sends a message to the poster using Craigslist’s anonymous message relay system. 5/22/17RP at 453-54.

Without question, the criminal design here originated with law enforcement. The techniques is as follows: the officers arrange locations for people to meet the alleged ad poster, they tell them to drive – often for miles -- to a nearby gas station or a store first, and then, per their plan, they arrest the person for “attempt” when they are

ultimately tempted to drive the final few blocks to the actual apartment.  
5/22/17RP at 452-53.

Yet this was a crime that could not possibly be committed in completed form. The crime of taking a step toward an impossible act was one that was created by the Task Force – by dint of great effort. For proactive operations, the Task Force sometimes spends as many as six (6) days communicating with people who answer the Craigslist advertisements, then attempts to triage the scores of people who click and send a message. 5/22/17RP at 452. Rodriguez explained how the officers then focus on chosen persons, and try to “get” them to begin using standard email, or better yet, “get someone” to give the police an actual telephone number. 5/22/17RP at 454.

The design of the crime was created by the officers, who lured individuals who might merely wish to discuss potentially improper conduct, and then enticed them further. Rodriguez described with surprising frankness the degree to which the advertisements that the officers fabricate are purposely crafted with language that mentions sexual matters but remains cryptic so that the advertisement does not seem blatant enough to be taken down, or “flagged” by persons online as improper. 5/22/17RP at 460-63. Frequently, the Task Force officers

encounter many, many people who are interested only in talking. 5/22/17RP at 463, 471. But those who can be lured into foolishly driving to the location, by discussion of proposed sexual conduct, are then tempted further to drive to the nearby address, and then arrested. There was sufficient evidence that the officers designed a crime – and further, it was one that Mr. Forler had harbored no pre-existing intention of committing.

***(ii) The second prong of the defense was supported by sufficient evidence.***

The foregoing were also pivotal facts in favor of the defendant being enticed into a crime not otherwise intended. The entrapment defense requires that there be sufficient evidence that law enforcement encouraged the defendant into a crime not otherwise intended. Here, the moment Mr. Forler responded to the advertisement, the officers engaged in communications with him to encourage him into committing enough conduct to establish an “attempt.” When Mr. Forler sent an email to the poster of the false advertisement, he said he was “interested” if the poster was “real.” 5/22/17RP at 465. From that point on, there was evidence that these communications were never going to cease on the officers’ part. Exhibits 2, 3. Detective Rodriguez

immediately responded and followed the Task Force's pre-fashioned plan of attempting to persuade the person to conduct communications outside the Craigslist system, such as by text or phone call. The detective emphasized in his ("her") email response to Mr. Forler that he should reply within the hour. 5/22/17RP at 466.

Over the course of subsequent messaging that night and the next day, Detective Rodriguez was unsuccessful at prodding Mr. Forler to state a specific interest in under-age children and sexual conduct; rather, Forler merely repeated language used by the detective in the *purposefully* cryptic advertisement the officer posted. 5/22/17RP at 466-72. Only after over 24 hours of prodding does Forler seem to implicitly acknowledge that the discussion is now about sexual conduct with an 11 year-old. 5/22/17RP at 472-75.

Yet the the trial record contains evidence contradicting the State's description of these electronic interactions as including "opportunities [given to Forler by the officers] to discontinue the conversation[s]." CP 15; see Exhibits 2, 3. At one juncture, the officer, acting as the ad poster, tells the defendant he is not being "specific enough" about why he is interacting. Exhibit 3 (message of August 29, 2015 at 3:19 pm). When the officer tells Mr. Forler, "[i]t's best we

don't go further," the defendant does respond, but he is merely continuing with yet another entry of the ongoing conversation about being careful -- and the officer shortly replies to that message by seeking a telephone conversation. Exhibit 3 (messages of August 29, 2015 at 3:27, 3:28, and 3:30 pm).

Next, when Forler tells the officer that he has "never done this before," and sends additional messages, the officer sends Forler a message asking, "[A]re you still interested[?]" Exhibit 3 (messages of August 29, 2015 at 3:48 pm and August 30, 2015, at 11:46 am).

There was sufficient evidence to show that this was more than mere encouragement by the Task Force, and instead was actual enticement by *threatening* – falsely -- to cease the conversation if Forler continued to be merely one of those people who like to "chat for hours," or who engage in mere internet "RP" ("role play") about sexually forbidden topics.

Forler was similarly reluctant to speak on the actual telephone, but eventually he did speak by voice with a female member of the Task Force, Detective Krista McDonald, who was posing as the adult female poster of the ad. 5/22/17RP at 516. McDonald testified that she and Mr. Forler discussed sexual intercourse with condoms regarding her

alleged 11 year old daughter. 5/22/17RP at 516-18. They also discussed “roses,” which the witness said was a euphemism for dollars. 5/22/17RP at 518-19, 535.

Detective McDonald eventually convinced Mr. Forler to drive to the Bremerton/Silverdale area. 5/22/17RP at 519, 522. Yet, as Detective McDonald explained, the officers purposefully arranged for Mr. Forler to drive to, and stop at, a Burger-King or AM/PM-type fast-food establishment – and *then* invited him to travel a final short distance to the “sting” apartment complex. 5/22/17RP at 477.

This staged, step-by-step reeling-in was described as a way of police maintaining control of the timing of when a suspect came to the complex. Perhaps so. Yet, in combination with Forler’s expressions of reluctance and his statement that he had “never done this before,” the operation’s methods and techniques plainly enticed Forler by encouraging him to drive a long distance to the general area, then having him stop, and then encouraging him to commit the crime of attempt by coming to the area of the apartment – now a short drive mere minutes away at most -- and walking up to the door. 5/22/17RP at 478-79.

There was more than sufficient evidence that this was a crime that Mr. Forler did not otherwise intend to commit, until such time as the prospect was repeatedly dangled in front of him at close range after officers engaged him in hours of “chat.” However repugnant the topic of those conversations were, Mr. Forler’s ultimate conduct was induced, cleverly, by experts in the craft.

**e. Mr. Forler’s own testimony further supported entitlement to an entrapment instruction.** Mr. Forler’s own testimony contradicted much of the Detectives’ characterizations about his thought process and the meaning of the parties’ conversations, and thus further supported the defense’s entitlement to an entrapment instruction. As Mr. Forler described it, he had never responded in substance to any sort of advertisement like this before, and he merely did so in this instance because he wanted to see “what was really going on.” 5/23/17RP at 587-88. On the one hand, he had been curious about what people were “into” when they seemed to mention “taboo or this or that.” 5/23/17RP at 588.

At the same time, Forler explained, his foolish but not criminal reasons for conversing about this advertisement were a result of midlife boredom and also a desire to see if this was a fake or “spam’

advertisement, or if indeed there were children being abused.

5/23/17RP at 587-89. Mr. Forler pasted the words “I’m interested,” and pushed the keyboard button to send that message into the Craigslist system. He often used this one-click pasting method to see if various ads, including this one, were a “bot” -- a “computer-generated program that makes up an ad” so they can obtain your email address. 5/23/17RP at 589.

After a series of exchanges over the course of a day and night and next day, during which the person who placed the fake ad always affirmed and encouraged Mr. Forler’s misplaced curiosity, Forler did decide to drive to the Bremerton area. 5/23/17RP at 600-01. He parked at the fast-food convenience store as directed, and was then given the address of an apartment complex. 5/23/17RP at 601-02. He drove there, approached the building on foot, and knocked on the apartment door, whereupon he was arrested. 5/23/17RP at 603-04.

Under these facts, the defense of entrapment should have been requested, and would have been a jury question that would have changed the result of trial, or at least rendered the outcome unreliable under the effective assistance prejudice test. Where an instruction on entrapment is requested to be given, there need simply be sufficient

evidence to do so. As a general proposition, a defendant is entitled to any instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); 4 C. Torcia, Wharton's Criminal Procedure § 538, p. 11 (12th ed. 1976).

As to entrapment, the issue is a factual question, here supported by abundant evidence to place it before the jury, but one that the defense wrongly abandoned prior to trial. See United States v. Sorto-Enamorado, 544 F. App'x 298, 299–300 (5th Cir. 2013) (issue of entitlement to entrapment instruction in internet predator sting case would turn on factual issues such as whether law enforcement baited defendant with picture of an older looking female, and whether defendant demonstrated zeal from the beginning as soon as knowing alleged minor child's age, and history of pedophilia).

Crucially, in conducting the analysis whether a defense-requested instruction is required, the evidence should be viewed in the light most favorable to the defendant. State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009) (citing State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000)).

In the present case, Mr. Forler's foolish clicking of web pages and his vague, internet talk of sexual matters, based on an advertisement that used language that was at least ambiguous as to whether it merely invited deeply distasteful but physically harmless discussion on taboo topics, reasonably showed lack of predisposition. Mr. Forler's answers to an invitation to discuss these topics were purposefully evolved by the police into a crime of conduct. This case was one in which a defense of entrapment should have been placed before the jury. However, the jury was not allowed to address the merit or result of these facts, because it was not given an entrapment instruction. Ultimately, a jury faced with the facts of the sting operation and the defendant's un-completed conduct, would more likely have not convicted Mr. Forler.

**f. The defense of entrapment would have changed the outcome of trial and would have been entirely consistent with Mr. Forler's explanation that he had no history or interest in sexual behavior with underage children and that he went to the sting location to determine if it was real.** The defense that Mr. Forler attested to – that of him being annoyed by wrongful ads, and concerned for the possibility of an actual crime occurring – was not inconsistent

with a legal defense of entrapment. As with any jury question, countervailing facts are for the jury to contemplate and weigh – not a basis to deny an instruction altogether. This is in accord with the general rule that an instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. State v. Davis, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992).

Thus there could be no reasonable tactical decision made by counsel to not raise entrapment. Certainly, both the Washington Supreme Court and the United States Supreme Court have made it clear that a defendant does not need to admit, one way or the other, the *actus reus* or the wrongful mental state of the crime charged to be entitled to an entrapment defense. State v. Morgan, 9 Wn. App. 757, 759, 515 P.2d 829 (1973) (stating that the defense of entrapment necessarily assumes that the act charged was committed); United States v. Hendricks, 456 F.2d 167, 169 (9th Cir. 1972) (same).

[We] do not require a defendant to admit either the crime itself or all the elements of a crime before being entitled to an entrapment instruction. It is enough that a defendant admit acts which, if proved, would constitute the crime.

State v. Galisia, 63 Wn. App. 833, 836-37, 822 P.2d 303 (1992), review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992), abrogated on other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994)). See, e.g., State v Frost, 160 Wn.2d 765, 161 P.3d 361 (2007) (even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment).

Thus, if there is some theoretical tactical decision to which the determination to not raise entrapment could be attributed, it would be an unreasonable, deficient one. See State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (unreasonable trial strategy or tactics can constitute deficient performance). Mr. Forler's counsel was ineffective for failure to raise this affirmative defense, and had counsel done so, the outcome of the jury trial would have been different. See, e.g., State v. Mylan, \_\_\_ P.3d \_\_\_, 192 Wn. App. 1077 (Div. II, March 5, 2016) (unpublished; cited pursuant to GR 14.1(a) (ineffective to fail to raise necessity defense)).

**g. Reversal is required.** The remedy for a trial conducted with the prejudicial ineffective assistance of counsel is for the case to be

remanded for a new trial. State v. Ermert, 94 Wn.2d 839, 851, 621 P.2d 121 (1980); U.S. Const. amend. 6.

### **3. THE STING OPERATION CONSTITUTED OUTRAGEOUS POLICE CONDUCT VIOLATING DUE PROCESS.**

**a. Appealability.** The sting operation run by the Task Force constituted outrageous government conduct in violation of Due Process. Outrageous police conduct that shocks the universal sense of fairness violates Due Process and bars the government from invoking the judicial branch to obtain a conviction. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Because this issue implicates constitutional Due Process, it may be raised for the first time on appeal. Id. at 19; U.S. Const. amend. 14. It is a question of law considered by the Court *de novo*. Lively, 130 Wn.2d at 19.

**b. The government cannot prosecute for offenses procured by law enforcement conduct that violates a fundamental sense of fairness.** A claim of outrageous government conduct “is founded on the principle that the conduct of law enforcement officers and informants may be ‘so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction’” based thereon. Lively, *supra*, 130 Wn.2d at 19

(quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973)). Police conduct violates Due Process when it shocks a universal sense of fairness, and in contrast to entrapment, the focus is closely on the government's behavior, not the issue of the defendant's predisposition. Lively, 130 Wn.2d at 21.

To decide whether the government's conduct offends Due Process, the Court reviews the totality of the circumstances. Lively, 130 Wn.2d at 19 (citing New York v. Isaacson, 378 N.E.2d 78, 83 (N.Y. 1978)). Several factors are considered: (i) whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, (ii) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (iii) whether the government controls the criminal activity or simply allows it to occur, (iv) whether law enforcement's motive was to prevent crime or protect the public, and (v) whether the government's conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. Lively, 130 Wn.2d at 22.

Here, the police conduct was outrageous. The Task Force instigated the crime, and it is on the record of trial and sentencing that

this was not an infiltration of ongoing criminal activity by Mr. Forler – he had never done anything such as this before. The defendant’s reluctance to commit the crime was overcome by the officers’ persistent communication and solicitation of Mr. Forler’s engagement in the proffered activity. The government controlled, and indeed created the conduct via Craigslist, rather than merely allowing it to occur. The motive was neither to prevent a crime that was going to occur, nor to protect the public, because the police actions protected no one but a fictional victim existing only in the ether of the internet. Further, the officer’s conduct in purporting to offer sexual conduct with a family’s daughter, for a fee, amounted to criminal activity, of variants the same as the RCW crimes charged and other Washington offenses, and in the whole was repugnant to a sense of fairness and justice. See Lively, 130 Wn.2d at 22; see Part D.2, supra.

This was, in *toto* therefore, outrageous conduct. “Generally, the government may not manufacture a crime from whole cloth and then prosecute a defendant for becoming ensnared in the government’s scheme.” United States v. Harris, 997 F.2d 812, 816 (10th Cir. 1993). For example, in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), “the government assisted and encouraged the defendant to set up a

methamphetamine lab. The government provided the essential supplies and technical expertise, and when the defendants encountered difficulties in consummating the crime, the government readily assisted in finding solutions.” Harris, 997 F.2d at 816. “[T]he nature and extent of police involvement in th[e] crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law.” Twigg, 588 F.2d at 377.

That is exactly what occurred here. Like in Twigg, law enforcement directed the criminal notion from start to finish, having created the circumstances where the defendant acted precisely as the police cleverly devised to engineer him to do. Harris, 997 F.2d at 816.

Further, “[w]here the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself.” United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir. 1986), vacated in part on hearing on other grounds by United States v. Wingender, 790 F.2d 802 (9th Cir. 1986). The government here prevented nothing, and cured nothing. There was no gain, only a

phenomena of tossing a target pigeon into the air, shooting it, and then claiming a public service of ridding the area of a pesky bird.<sup>5</sup>

**c. The government's conduct here offends fundamental fairness because the police instigated and controlled the activity, the police used persistence to overcome reluctance on Forler's part, and law enforcement's conduct was repugnant to a sense of justice.**

The totality of the circumstances demonstrates that the government's conduct was outrageous. The first factor, whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, points towards outrageous conduct because the government had no basis to suspect or target Forler prior to this operation. See Lively, 130 Wn.2d at 22-24. There was no evidence that Kevin Forler was involved in committing any actual illegal activity of this sort prior to Officer Rodriguez's fake advertisement. Lively, 130 Wn.2d at 23

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<sup>5</sup> The Respondent will inevitably claim that the sting operation netted a person with propensity for actual sexual crimes before an actual future possible rape of a child occurred. But that hypothesis does not serve as a justification for outrageous government conduct by police officers using public resources to create attempt offenses where they did not exist. However, this argument by the State is revealing -- the specter of an actual rape of a child was a useful notion for the State to place before the lay jury in this 'fake Craigslist ad' case, which is why the prosecutor insisted on giving the jury "to-convict" jury instructions for the *completed* crimes of rape of a child and commercial abuse. See Part D.3, infra.

(police aware of no prior criminal activity). The trolling advertisement in a classified advertisement website is worse than the police conduct in Lively, where police had information that drugs were sold during addiction recovery meetings. Lively, 130 Wn.2d at 33 (Durham, C.J., concurring in part, dissenting in part); see Twigg, 588 F.2d at 379-80 (distinguishing between situations where police approach defendant to initiate criminal activity and those where the criminal plan is formulated and initiated by the defendant and the government joins the ongoing criminal activity after the defendant began implementing it). This factor accordingly weighs in favor of a violation of fundamental fairness.

The police also used persistent communication and solicitation to keep Forler interested in the proffered activity, despite his repeated expressions of reluctance. This factor therefore weighs heavily in favor of outrageous government conduct. In Lively, the Court held that the government controlled the criminal activity because the police conduct was “so closely related” to the defendant’s actions. Lively, 130 Wn.2d at 25-26. The same is true here. Law enforcement posted the advertisement that prompted Forler’s initially perfunctory, “cut and paste” response, and it outlined the terms of conduct that it sought to

procure in order to achieve an attempt conviction. In fact, more than in Lively, where the police were working through an informant over whom they had limited control, here the entreaties to wrongful activity were entirely conducted by police officers themselves, personally. See, e.g., Lively, 130 Wn.2d at 33-34.

The next factor looks at whether law enforcement's motive was to prevent crime or protect the public. In Lively, the Court found the government conduct demonstrated greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior because law enforcement targeted a recovering drug addict who had no known prior connection to the sale of drugs or any other known criminal predisposition. Lively, 130 Wn.2d at 26. That is the correct analysis. Here, too, the government's conduct, viewed objectively, created crimes to prosecute. By definition, the conduct targeted individuals with no known criminal history and no known predisposition. See Drew, Kristen, "WSP arrests 9 in child exploitation operation in Kitsap Co.," KOMO News, <http://komonews.com/news/local/wsp-arrests-9-in-child-exploitation-operation-in-kitsap-co-11-21-2015> (Sept. 4, 2015) ("According to the prosecuting attorney, none of the suspects arrested in 'Operation Net

Nanny’ have any prior felony convictions.”). The Task Force’s conduct puts the police in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing. Twigg, 588 F.2d at 379 (quoting United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975)).

The final factor considers whether the government’s conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. The police placed vague advertisements on a free website pursuing anyone who they might actually be able to entice to show up. In this case, the police distributed false information about children of young ages, and enticed continuing interest using a photograph of a legal age, but young-looking future officer. Significantly, the Task Force completely controlled the age of the fictitious minor, thereby directing the degree of crime with which Forler could eventually be charged. Task Force officers were more than enmeshed in criminal activity, they commenced and created it, and any civilian offering the activity on the internet would be prosecuted. See Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971)).

On the whole, the government's conduct was so outrageous that it violates our common sense of fundamental fairness. Kevin Forler's convictions should be reversed because they violated Due Process.

**3. GIVING THE JURY "TO-CONVICT" INSTRUCTIONS FOR THE COMPLETED OFFENSES WAS INSTRUCTIONAL ERROR, AND A MANIFEST VIOLATION OF DUE PROCESS.**

**a. The instructional issue was preserved.** Mr. Forler's proposed jury instructions, submitted following the prosecutor's demand that the defense submit its own comprehensive packet of proposed jury instructions in accord with Kitsap County Local Rule 51, included to-convict instructions for the attempted crimes. However, in marked contrast to the State's packet, the defense packet solely included instructions listing the generic elements of each completed offense, per the guidance of WPIC 100.02 (Note on use) (Comment). CP 87 (citing WPIC 44.10), CP 96 (citing WPIC 48.20); CP 52 (Prosecutor's Motion *in Limine*).

After the trial court stated that it would indeed be giving the jury the instructions generically defining the elements (CP 111, 112), defense counsel indicated that she was "fine with the instructions up to this point." 5/23-24/17RP at 640-42.

Next, however, the court questioned the prosecutor as to why “to-convict” instructions were necessary for the completed offenses, as proposed in the State’s packet. The prosecutor responded that such instructions were necessary because the State, to prove attempt, had to prove that the defendant, for example, “intended to commit rape of a child.” 5/23-24/17RP at 642. The court agreed, although it described the State’s desired instructions as repetitive to the definitional instructions. Id., at 643.

Although the State was correct in so far as the prosecution is required to prove intent in the context of sex offenses involving putative children, see State v. Johnson, 173 Wn. 2d 895, 901-02, 270 P.3d 591 (2012) (discussing State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) and State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996)), neither the argument nor the court’s ruling had any bearing on the issue whether full “to-convict” instructions were necessary, rather than the generic definitions of the crimes proposed by Mr. Forler. Defense counsel later answered in the negative, when the court sought exceptions by asking if either side had any “additional instructions or any objections to those instructions in the order that I’ve proposed.” 5/23-24/17RP at 644. But defense counsel had already proposed the

correct series of definitional instructions and to-convict instructions, delineated by the Pattern Instructions, and did so in accord with the Local Rule. The court instead employed the prosecutor's set of instructions. The instructional error was preserved for appeal. RAP 2.5.

**b. Mr. Forler was not charged with the completed offenses, and it was not only instructional error to provide the jury with to-convict instructions regarding those offenses, but it was also a violation of Due Process.** An alleged error in jury instructions is reviewed *de novo*. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). However, jury instructions, to be adequate, must do more than merely adequately convey the law. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Rather, the instructions must make the applicable legal tests of the case “manifestly apparent to the average juror.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (citing State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

Furthermore, it is prejudicial instructional error to submit an issue to the jury when there is not substantial evidence concerning it. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The jury

should presume each instruction has meaning. State v. Hutchinson, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998).

Here, the provision of to-convict instructions for the uncharged offenses of sexual intercourse with a child, and actual commercial sexual exploitation, was error. Generally, “[i]f the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime.” (Emphasis added.) State v. DeRyke, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003) (quoting WPIC 100.02, Note on use). An elements instruction delineating the elements of the attempted offense is not the equivalent of to-convict instructions that allege, as the improper instructions did here, that the defendant committed the actual completed crimes against an actual child. Furthermore, because there was not substantial evidence Mr. Forler committed either of the crimes in completed form, the court committed prejudicial error by providing the jury with to-convict instructions for the completed offenses. See Hughes, 106 Wn.2d at 191.

**c. The error was constitutional, and manifest, and requires reversal.** By providing extraneous to-convict instructions, the court diluted the value of the proper to-convict instructions on the crimes charged. The instructions reduced the State’s burden of proof, in

violation of Due Process. See U.S. Const. amend. 14; Wash. Const. art. I, § 3; State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

The prejudicial nature of this sort of error rendered it manifest, and further appealable on that basis. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The general rule that an assignment of error must be preserved by specific objection includes an exception when the claimed error is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3).

Here, if the defense proposal of proper instructions, countering the erroneous State’s packet, was inadequate, the error is still truly of manifest, constitutional dimension. See State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). By placing the notion before the jury that a real child could have been subjected to sexual intercourse on that given date of August 15, the instruction served to focus the jury on the specter of horrific conduct that could possibly have occurred under different facts. This made it easier for the jury to convict Mr. Forler of the crime charged, that crime seeming, in comparison, to be less grave than what might have happened. But the jury was not supposed to decide based on other, hypothetical facts. Nor was the jury to convict

Mr. Forler based on his character or propensity or by reasoning that conviction for the attempt was needed to prevent harm to a real child in the future. This constitutional error of fundamental unfairness in violation of the Due Process clause was thoroughly apparent in the trial court record, and thus the record is manifest, i.e., sufficient to determine the merits of the claim. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Similar examples of manifest constitutional errors in jury instructions include:

directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. On their face, each of these instructional errors obviously affect a defendant’s constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict. . . . In each of those instances, one can imagine justifications for defense counsel’s failure to object or where the jury could still come to the correct conclusion.

State v. O’Hara, 167 Wn. 2d 91, 103, 217 P.3d 756 (2009).

The instructional error worked a fundamental unfairness in the context of the trial, because the instructions indeed served to shore up the glaring weakness in the State’s case – the fact that no actual child

was actually harmed, nor was any actual child ever at any risk of being harmed. It is true that, as WPIC 100.02 notes, RCW 9A.28.020(2) provides that factual impossibility is not pertinent to a charge of attempt. See State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); see also State v. Walsh, 123 Wn.2d 741, 870 P.2d 974 (1994).

However, this legal statement is immaterial to the manifest prejudice resulting from the error in this case with a lay jury as the finder of fact. Extreme prejudice resulted because the instructional error allowed the jury to offer what, for it, likely seemed a compromise between the harm that might have occurred, had a real child been involved, and the reality that no harm occurred, because the defendant's crime was primarily one of wrongful desire with no person ever being in harm's way. For all of these reasons, the instructional error may certainly be appealed.

Further, instructional error requires reversal unless it is trivial, or merely academic. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984); State v. Hoffman, 35 Wn. App. 13, 664 P.2d 1259 (1983).

Where a reasonable jury's verdict could have been affected by erroneous instructions, the error requires reversal. State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997) (citing State v. Williams, 81 Wn. App. 738, 742-44, 916 P.2d 445 (1996)). Here, by focusing the

fact-finder on uncharged, completed offenses that were never at any risk of occurring, the jury instructions distracted the jury from its actual mission, which is always a narrow one, in a manner that compelled it to convict on the basis of fear and emotion. Reversal is required.

**5. THE COURT IMPOSED COMMUNITY CUSTODY CONDITIONS OUTSIDE THE SCOPE OF ITS AUTHORITY, AND OTHER CONDITIONS ARE SCRIVENER'S ERRORS THAT ARE CONTRARY TO THE TRIAL COURT'S EXPRESS RULINGS AT THE SENTENCING HEARING.**

a. **The sentencing court can only impose community custody conditions within its statutory and constitutional authority.** A court can only impose a sentence that is within its legal authority, and illegal or erroneous sentences, which exceed that authority, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A court's sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

On appeal, the Washington Courts will reverse conditions if they are manifestly unreasonable exercises of that discretion. State v. Irwin, 191 Wn. App. 655, 652, 364 P.3d 830 (2015); State v. Sanchez

Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010)). However, a court categorically abuses its discretion if it imposes an illegal, or an unconstitutional condition. In re PRP of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); Irwin, 191 Wn. App. at 652; see RCW 9.94A.703. Crime-related prohibitions on conduct are permissible. RCW 9.94A.703(3)(f); State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000).<sup>6</sup>

If a question is presented regarding the meaning of a statute purportedly authorizing a condition of post-incarceration supervision, issues of statutory interpretation are determined *de novo*. State v. Jones, 151 Wn. App. 186, 190, 210 P.3d 1068 (2009) (citing State v. Alvarado, 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008)), aff'd, 172 Wn.2d 236 (2011).

Mr. Forler challenges several conditions as unauthorized. In addition, there are community custody conditions listed in a form section within the judgment document that do not reflect the court's express rulings at sentencing regarding Appendix F, which should be

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<sup>6</sup> By statute, a sentencing court may choose to prohibit alcohol use, even if the prohibition is not crime-related. RCW 9.94A.703(3)(e); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

corrected as scrivener's errors pursuant to RAP 7.2(e). See generally State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's errors).

**b. The defendant's judgment and Appendix F thereto imposed multiple conditions of community custody which Mr. Forler challenges.** At the sentencing hearing, the court took care to specifically address Appendix F to the judgment, which was presented to the court as requiring separate signature. 7/14/17RP at 25-26; CP 180 (Appendix F). In reviewing the Appendix, the court sua sponte told the parties it was striking conditions 3, 4 and 5, involving legal drug use and alcohol use and consumption, and entry into taverns, bars and the like. 7/14/17RP at 26; see CP 180. The court stated that the condition to "obey all laws" adequately covered a proper prohibition on use of illegal drugs. 7/14/17RP at 27.

In addition, the court struck out condition 14 of the Appendix, which prohibited contact with the "victim or the family of the victim," likely in reference to a discussion earlier at the hearing that there was no person actually involved, and the victim of the crime could at best be considered the State of Washington. 7/14/17RP at 27; CP 181.

The court also modified the provision prohibiting the possessing or accessing of sexually explicit materials, striking out the language prohibiting the defendant from “frequent[ing] adult bookstores, arcades or places where sexual entertainment is provided,” and interlineating instead, “depicting minors.” 7/14/17RP at 26-27; see CP 181. Finally, the court added the modifying phrase “involving minors” to the prohibition that stated, “Do not access sexually explicit materials that are intended for sexual gratification.” 7/14/17RP at 26-27; see CP 181.

**c. Numerous conditions of community custody are scrivener’s errors considering the court’s rulings at the sentencing hearing.** Under CrR 7.8(a) and RAP 7.2(e), scrivener’s or clerical errors in judgments, orders, or other parts of the record that do not reflect the order of the court may be corrected by the court at any time on its own initiative or on the motion of any party.

Within the judgment and sentence there is a pre-printed section that contains community custody conditions, a number of which conflict with the court’s express findings and rulings on custody

conditions. CP 174 (judgment and sentence).<sup>7</sup> In addition, portions of Appendix F contain additional restrictions that conflict with the court's rulings as other conditions in the Appendix. CP 181.

First, the pre-printed section orders that Mr. Forler consume no alcohol, if so directed by the CCO, is in conflict with the court's sentencing ruling. CP 174; 7/14/17RP at 27; see CP 181. It is a scrivener's error that must be corrected.

The pre-printed section also orders that Mr. Forler not have contact with the victim or victim's family, which conflicts with the court's ruling regarding this crime of factual impossibility, and the striking of the similar provision. CP 174; 7/14/17RP at 26; see CP 180. It is a scrivener's error that must be corrected.

Next, the section additionally orders generally that Mr. Forler "[p]ossess/access no sexually exploitative materials (as defined by Defendant's treating therapist or CCO)." CP 174.

This conflicts with the court's rulings regarding sexual materials and sexual entertainment, because it is not delimited with the

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<sup>7</sup> The sections of the form judgment are pre-printed with erroneous numbering; section 4.5 containing the community custody conditions appears before section 4.1 regarding legal financial obligations. CP 173-75.

“involving minors” and “depicting minors” limitation that the court placed on similar restrictions in the Appendix. 7/14/17RP at 26-27; see CP 181. For similar reasons, the section’s general prohibition on adult book stores, arcades, or places providing sexual entertainment, and the Appendix’s condition 26, on the use of “900” telephone numbers and the provision of telephone records to show non-use of such numbers, must be stricken in their entirety, in accord with the sentencing court’s rulings limiting restrictions on access to sexual materials and information to materials and information involving minors. CP 174; 7/14/17RP at 26-27; CP 181.

This Court should remand to correct these errors in the judgment and sentence. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remedy for clerical or scrivener’s errors in judgment and sentence forms is remand to the trial court for correction).

**d. In addition, a number of the conditions exceed the trial court’s sentencing and/or constitutional authority.** Regarding the provisions as to sexual material and entertainment, further, broad prohibitions on adult, non-minor sexual materials and entertainment is not crime-related in general. State v. Bruno, No. 74647-2-I, 2017 WL 5127781, at \*10 (Wash. Ct. App. Nov. 6, 2017) (unpublished, cited for

informational purposes only under GR 14.1(a) (finding that “broad prohibition on all sexually explicit material is not sufficiently related to the circumstances of Bruno’s crime” of second degree rape of his 12-year-old daughter) (disapproving State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016), where Court of Appeals, in case of offender who committed third degree rape of a child, affirmed similar conditions regarding adult sexual materials and entertainment).

Next, the section’s condition that states as follows presents several problems:

Possess/access no sexually explicit materials,  
and/or information pertaining to minors via  
computer.

CP 174. First, to the extent the condition prohibits adult sexually explicit materials, it is a scrivener’s error in conflict with the court’s prior rulings, and Bruno. 7/14/17RP at 26-27; see CP 181. It must be stricken under either rationale.

Second, to the extent that the condition prohibits possession/access of non-sexual, non-explicit, and thus mere “information pertaining to minors,” the condition is not statutorily authorized because it is not crime-related. The SRA allows imposition of non-enumerated conditions that are crime-related as shown by

substantial evidence. Irwin, supra, 191 Wn. App. at 656. The possession of non-sexual, non-explicit information about children on the internet bears no factual relationship to the present case and this condition that exceeds the court’s authority must be stricken. State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Relatedly, the condition is unconstitutionally vague. Under Due Process vagueness doctrine of the Fourteenth Amendment and article I, section 3, restrictions must (1) provide ordinary people fair warning of proscribed conduct, these laws must also (2) have standards that are definite enough to “protect against arbitrary enforcement.” Irwin, 191 Wn. App. at 652-53 (quoting State v. Bahl, 164 Wn.2d at 744. The terminology used -- information pertaining to minors via computer -- might or might now allow DOC sanction for visiting the Netflix website and viewing the movie, “The Swiss Family Robinson,” or any episode of the Brady Bunch. Unlike statutes, conditions of community custody are not presumed valid. Bahl, 164 Wn.2d at 753. The condition must be stricken and modified as argued.

Further, Appendix F’s condition 26, on the use of “900” telephone numbers and the provision of telephone records to show non-use of such numbers, must be stricken, because it is not crime-related,

where it was not modified to limit the prohibition on access to sexual materials and information to materials and information involving minors. CP 181.

And, finally, the telephone restriction and rule above, and the blanket restriction on internet usage in Appendix F is not crime-related and is overly broad. CP 181. Neither is crime-related, as the crime did not involve 900 numbers, or general internet usage.

In general, the First Amendment<sup>8</sup> prevents the government from proscribing speech or expressive conduct. State v. Halstien, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). Individuals on community custody have a right to access and transmit material protected by the First Amendment. See Bahl, 164 Wn.2d at 753. A condition of community custody is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment, and the Court carefully scrutinizes sentencing conditions that interfere with fundamental constitutional rights. Rainey, 168 Wn.2d at 374. Conditions that interfere with fundamental rights must be “sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the

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<sup>8</sup> The First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech.”

State and public order.” Id. They must be narrowly drawn and there must be no reasonable alternative way to achieve the State’s interest. State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

The telephone (Appendix F, condition 26) and the internet (condition 25) are unquestionably critical mediums for transmitting and receiving communications and expressive materials that are protected by the First Amendment. CP 181. They “enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850, 117 S. Ct. 2329, 138 L. Ed. 874 (1997) (regarding the internet). Thus, the government may not regulate access in a manner that silences speakers whose messages are entitled to constitutional protection, unless it meets the heavy burden of demonstrating a compelling governmental need that could not be achieved through a less restrictive provision. Reno v. Am. Civil Liberties Union, at 874, 879.

Modern cellular phones, telephones, likewise, are now essentially also internet devices. Riley v. California, \_\_ U.S. \_\_\_, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014). The conditions of community custody barring Mr. Forler using the internet and requiring

production of telephone records are overly broad in violation of his First Amendment rights. See also Packingham v. North Carolina, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1730, 1735, \_\_\_ L. Ed. 2d \_\_\_ (2017) (Supreme Court, holding unconstitutional a North Carolina statute that barred sex offenders from accessing social media sites); United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (striking a condition of supervised release that banned the defendant from using any online computer service without his probation officer's written approval because the condition was overly broad). The conditions must be stricken.

#### **E. CONCLUSION**

For the foregoing reasons, Mr. Kevin Forler respectfully requests that this Court reverse his convictions and his sentence.

DATED this 6<sup>th</sup> day of February, 2018.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 50656-4-II
v.	)	
	)	
KEVIN FORLER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF FEBRUARY, 2018, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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614 DIVISION ST., MSC 35		
PORT ORCHARD, WA 98366-4681		

**SIGNED** IN SEATTLE, WASHINGTON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2018.

X \_\_\_\_\_



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