

FILED
Court of Appeals
Division II
State of Washington

NO. 50656-4-II
4/3/2018 12:15 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE FORLER,

Appellant.

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

Superior Court No. 15-1-01026-1

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

KELLIE L. PENDRAS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Oliver Ross Davis
1511 3rd Ave Ste 701
Seattle, Wa 98101-3647
Email: oliver@washapp.org;
wapofficemail@washapp.org

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

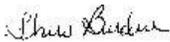
DATED April 3, 2018, Port Orchard, WA 
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID # 91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	2
A. PROCEDURAL HISTORY.....	2
B. FACTS	2
III. ARGUMENT.....	9
A. FORLER WAS NOT DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BECAUSE JUROR 8 DISPLAYED NO ACTUAL BIAS AND WAS PROPERLY SEATED ON THE JURY.	9
B. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING AN INSTRUCTION FOR THE DEFENSE OF ENTRAPMENT BECAUSE THE FACTS OF THE CASE DO NOT WARRANT THAT DEFENSE.	15
1. Forler was not entitled to an instruction on the defense of entrapment.	16
a. There is insufficient evidence for the first prong	18
b. The second prong of the defense is not met	20
2. Counsel was not deficient for not proposing an entrapment instruction.....	22
3. Forler fails to show prejudice.	23
C. THE STING OPERATION WAS NOT OUTRAGEOUS POLICE CONDUCT—IT WAS A PROPERLY EXECUTED OPERATION IN WHICH FORLER WAS A WILLING PARTICIPANT.....	23

D.	THERE WAS NO MANIFEST VIOLATION OF FORLER’S DUE PROCESS RIGHTS BECAUSE IT WAS NOT INSTRUCTIONAL ERROR TO PROVIDE THE JURY WITH THE “TO CONVICT” INSTRUCTION FOR THE COMPLETED CRIMES.....	29
E.	THE COURT IMPOSED NO COMMUNITY CUSTODY CONDITIONS BEYOND ITS AUTHORITY AND ANY ERRORS IN THE JUDGMENT AND SENTENCE WERE SCRIVENER’S ERRORS THAT CAN BE EASILY CORRECTED.....	33
	1. Most of Forler’s contentions are without merit.....	33
	2. Certain scrivener’s errors in the judgment should be corrected.....	35
IV.	CONCLUSION.....	36

TABLE OF AUTHORITIES

CASES

<i>Cheney v. Grunewald</i> , 55 Wn. App. 807, 780 P.2d 1332 (1989).....	12
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	33
<i>State v. Becklin</i> , 163 Wn.2d 519, 182 P.3d 944 (2008).....	29
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	29
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	29
<i>State v. Emerson</i> , 10 Wn. App. 235, 517 P.2d 245 (1973).....	24
<i>State v. Fire</i> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	13, 14
<i>State v. Galisia</i> , 63 Wn. App. 833, 822 P.2d 303 (1992).....	18, 19
<i>State v. Gonzales</i> , 111 Wn. App. 276, 45 P.3d 205 (2002).....	13
<i>State v. Gosser</i> , 33 Wn. App. 428, 656 P.2d 514 (1982).....	12
<i>State v. Grenning</i> , 142 Wn. App. 518, 174 P.3d 706 (2008).....	12
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	16
<i>State v. Hansen</i> , 69 Wn. App. 750, 850 P.2d 571 (1993).....	17
<i>State v. Johnson</i> , 100 Wn.2d 607, 674 P.2d 145 (1983).....	24
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	22
<i>State v. Keller</i> , 30 Wn. App. 644, 637 P.2d 985 (1981).....	18
<i>State v. Kinzle</i> , 181 Wn. App. 774, 326 P.3d 870 (2014).....	34
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	30
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	16
<i>State v. Lively</i> ,	

130 Wn.2d 1, 921 P.2d 1035 (1996).....	17, 24, 25, 27, 28
<i>State v. Lyskoski,</i>	
47 Wn.2d 102, 287 P.2d 114 (1955).....	30
<i>State v. McFarland,</i>	
127 Wn.2d 322, 899 P.2d 1251 (1995).....	30
<i>State v. McFarland,</i>	
127 Wn.2d 322, 899 P.2d 1251 (1998).....	16, 30, 31
<i>State v. Myers,</i>	
102 Wn.2d 548, 689 P.2d 38 (1984).....	24
<i>State v. Noltie,</i>	
116 Wn.2d 831, 809 P.2d 190 (1991).....	11, 12, 14
<i>State v. Norris,</i>	
1 Wn. App. 2d 87, 404 P.3d 83 (2017).....	34
<i>State v. Norris,</i>	
1 Wn. App. 87, 404 P.3d 83 (2017).....	33
<i>State v. O’Hara,</i>	
167 Wn.2d 91, 217 P.3d 756 (2010).....	30
<i>State v. Perez,</i>	
166 Wn. App. 55, 269 P.3d 372 (2012).....	11
<i>State v. Powell,</i>	
150 Wn. App. 139, 206 P.3d 703 (2009).....	22
<i>State v. Sanchez,</i>	
169 Wn.2d 782, 239 P.3d 1059 (2010).....	33
<i>State v. Smith,</i>	
131 Wn.2d 258, 930 P.2d 917 (1997).....	29
<i>State v. Smith,</i>	
93 Wn.2d 329, 610 P.2d 869 (1980).....	18
<i>State v. Stegall,</i>	
124 Wn.2d 719, 881 P.2d 979 (1994).....	17
<i>State v. Thomas,</i>	
109 Wn.2d 222, 743 P.2d 816 (1987).....	15
<i>State v. Trujillo,</i>	
75 Wn. App. 913, 883 P.2d 329 (1994).....	17
<i>State v. White,</i>	
81 Wn.2d 223, 500 P.2d 1242 (1972).....	15
<i>State v. Williams,</i>	
132 Wn.2d 248, 937 P.2d 1052 (1997).....	21, 22
<i>State v. Youde,</i>	
174 Wn. App. 873, 301 P.3d 479 (2013).....	18
<i>Strickland v. Washington,</i>	
466 U.S. 668, 104 S. Ct. 2052 (1984).....	15

United States v. Russell,
411 U.S. 423 (1973)..... 24

United States v. Twigg,
588 F.2d 373 (1978)..... 28

STATUTORY AUTHORITIES

RCW 4.44.170(1)..... 11

RCW 4.44.170(2)..... 11

RCW 9.94A.712(6)(a)(i)..... 33

RCW 9A.16.070..... 16

RULES AND REGULATIONS

RAP 2.5(a) 30

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether it was a manifest abuse of discretion for the trial court to seat Juror 8 when he did not express any actual bias in his responses?

2. Whether trial counsel was ineffective for failing to request a jury instruction for the entrapment defense where the facts of the case do not support that instruction?

3. Whether the placement of the ad on Craigslist and subsequent correspondence with Forler amounted to outrageous police conduct where this was a properly executed police operation of which Forler was a willing and active participant?

4. Whether it was a manifest violation of Forler's due process rights to provide the jury with the "to convict" instructions for the completed crimes where the instructions properly conveyed the law and there are no facts on the record to indicate that the jury's decision was affected by these instructions?

5. Whether the trial court imposed community custody conditions that were outside the scope of its authority where the conditions were directly related to Forler's conduct in this case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kevin Lee Forler was charged by information filed in Kitsap County Superior Court with one count of attempted rape of a child in the first degree and one count of attempted commercial sexual abuse of a minor. CP 61-65. He was found guilty of both counts after trial. 5RP 691. He was sentenced to 90 months. CP 170-179.

B. FACTS

Detective Carlos Rodriguez of the Washington State Patrol was in charge of an operation where his team posted an ad on Craigslist in an attempt to find people who would want to sexually abuse children or provide children for that purpose. 4RP 447-450. The main point of the operation was to catch people who preyed on children and to rescue children who might be in an abusive situation. 4RP 451. When someone was caught during one of these operations, the focus would be to find out if there was an actual victim and to identify any other participants. *Id.* In similar operations, Rodriguez had recovered or identified through images 21 children and arrested 86 people. 4RP 450, 481.

The first part of an operation was to post an ad on Craigslist. 4RP 450. Each ad had a unique post ID. 4RP 458. The target of the ads was people who were interested in having sex with children. 4RP 453. The

officers then triage the responses to the ad they received, narrowing it down to people who appeared truly interested. 4RP 452.

The next step was to obtain the suspect's phone number so the conversation could proceed to text messages as soon as possible. *Id.* That goal had two reasons: first, to see if an individual could be identified and second, to allow communications to continue if the Craigslist ad were flagged and subsequently taken down. 4RP 454.

After contact had been established via text message, the messaging progresses to arranging for an in-person meeting. 4RP 452. The suspect would be first sent to a gas station or store where police could see him or her and verify he or she had actually shown up. 4RP 453. After a person had shown up to the first location, they would be directed to the next location where an arrest would be made. *Id.*

When an individual responds to an ad on Craigslist, the response is anonymized so the poster cannot find out who the respondent is. 4RP 453. Nevertheless, during correspondence, the post ID of the particular ad will be included in the response. 4RP 462. Generally, the responses will also have a link back to the posted ad. 4RP 463.

The operation leading to Forler's arrest began in Kitsap County, Washington around August 29, 2015. 4RP 457. The title of the ad was "New to the area. Young fun family. No RP. W4M." 4RP 458. The body read as

follows:

New to the 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. No solicitations but gifts are welcome. 2 dau 11/7 that are home schooled.

4RP 458-59. No “RP” meant no role play while “gifts are welcome” was something that was often on ads for commercial sex; “gifts” was typically payment or something in exchange for a sex act. 4RP 459. “2 dau 11/7” meant that the ad was advertising two daughters who were ages 11 and 7. 4RP 460. “Home schooled” meant the children were taught at home, thus isolating them from others they could tell. *Id.* The ad was cryptic so it did not immediately attract the attention of Craigslist, which would flag and remove inappropriate ads. *Id.* Prior to this ad being flagged and taken down, Rodriguez received eight to ten responses, including Forler. 4RP 457. The purpose of posting the ad was to find people who had a desire to sexually exploit children. 4RP 504.

Forler responded to the ad on August 29, 2015, signing the email as “KF.” 4RP 464. Rodriguez responded to the emails himself, posing as “Shannon Pearsen,” the mother of the two children. 4RP 465. The initial email on August 29, 2015 came in at 12:04 a.m. with the subject line of “I’m interested” and the body message reading “If your real.” *Id. See also* CP 16-41. Rodriguez responded at 12:08 a.m. “Very real. Tell me what you

want and then we can text/call. Available for next hour.” Forler responded at 12:11 a.m. with “Give me a few details” and again at 12:14 a.m. with “I’m a little bit of a distance but I wouldn’t mind the drive under the right circumstances.” 4RP 466. At 12:20 a.m., Forler said “I wouldn’t mind a little home schooling”, at 12:26 a.m. “Still there?”, and at 12:47 a.m. “I’m really interested.” *Id.* Rodriguez responded at 12:52 a.m. with “I’m done for the night. Can chat tomorrow and maybe next week” with Forler responded at 12:54 a.m. with “Yes, I’m definitely interested.” *Id.*

At 12:57 a.m. on August 30, 2015, Forler asked “Got any pics?” and then at 12:58 a.m. “Or anymore details.” 4RP 467. At 2:05 a.m., he said “Still awake” and at 8:47 a.m. “Email me when you check your email.” *Id.* Rodriguez responded at 2:59 p.m. with “Hey” with Forler asking at 3:01 p.m. “what’s up.” *Id.* At 3:03 p.m., Rodriguez asked “what do you want and are you interested in my close family experience? If so tell me what your experience is and I can tell you about my family.” Forler replied at 3:04 p.m. with “Got more details on what you want” and then at 3:05 p.m. “I’m looking for the full family experience.” *Id.* Rodriguez responded “??? What do you mean? More details.” At 3:10 p.m., Forler stated “I’m interested in what you have to offer.” At 3:12 p.m., Rodriguez said “Tell me what and only if you are serious. Who do you want. We can move to text if you are serious. There are rules and I must be very careful.” At 3:13 p.m. Forler

responded “I understand” and then provided a phone number. *Id.* The two then communicated via text next. 4RP 468. Rodriguez noted that Forler was intentionally vague in his responses, consistent with someone who does not want to get in trouble. 4RP 507-08.

At 3:16 p.m., Rodriguez texted the number Forler had provided “You answered my ad. Please tell me what you are interested in so I know if this is right for you. No RP. No chat for hours. I am interested in meeting.” Two minutes later Forler responded “Home schooling. Tell me where and I’ll meet.” 4RP 471-72. The two continued to correspond, with Rodriguez asking Forler if he was a cop, and Forler being concerned that it was a “sting” operation. Forler then asked Rodriguez to call him, to which the detective said “maybe tomorrow.” 4RP 472. Forler requested that the detective keep texting him because he was “bored and excited at the possibilities.” 4RP 472-73. The two exchanged more messages, and then Forler told Rodriguez that he flagged the Craigslist ad so it wouldn’t stay up long. The conversation ended at 3:48 p.m. 4RP 473.

At 11:43 p.m. that same day, Forler texted “You awake,” at 2:23 p.m. the next day, “You there,” and at 4:19 pm “Hello.” Rodriguez responded at 7:25 p.m. telling Forler that he was camping, had spotty service, and that he would be back in a day or so. Forler said to get back to him any time. 4RP 474.

Rodriguez again contacted Forler on August 31 at 11:46 a.m., asking “Are you still interested? I can talk around 1-2.” Forler responded “sounds good.” Rodriguez replied, “Be soon, but I will want to hear what you want first so I’m not wasting my time.” Forler said “I want to be a family friend. Are you looking for money or enjoyment?” Rodriguez responded, “Who doesn’t like money but I don’t want to talk about that in text. I want enjoyment for my kids, and I like to watch to make sure the rules are followed.” 4RP 474-75. Forler responded “I understand. I would not want anything to do with bringing harm to a child, mental or physical. What are some of your rules?” Rodriguez then said “Good. So you want them to experience enjoyment.” Forler responded “Definitely.” 4RP 475. Rodriguez then sent Forler the “rules,” which were “no anal and no pain. Condoms are a must. I don’t need a pregnant 11 yo.” Forler responded “Ok.” *Id.* They then made arrangements for Forler to call.

Forler called and spoke with Detective Krista McDonald. 4RP 534. During the conversation, the two went over the rules, reiterating what Rodriguez had told him over text messages. 4RP 515-16. McDonald also asked Forler how large his genitals were and whether or not he had any STDs. 4RP 516. McDonald told him that she did not want her 11 year old to come down with an STD because that would be hard to explain to the child’s doctor. *Id.* The two also discussed how many “roses” each child

would be; the seven-year old was going to cost 200 roses and the 11-year old was going to cost 150 roses. 4RP 535. "Roses" is a term that is used instead of dollars in the commercial sex business. 4RP 486, 534. Forler indicated that he understood with and agreed to the rules. 4RP 517.

Rodriguez asked Forler to send him a picture and Forler requested that he send him a family picture. *Id.* Rodriguez sent Forler a picture of two children's outfits and asked him to pick one, which Forler did. He then sent Forler a picture of a trooper from when the trooper was 16. Forler responded, "Gorgeous." He told Forler to first go to a Burger King that was near where Rodriguez was stationed. 4RP 476-77. Forler went there where an officer photographed it. 4RP 539-540. Forler called and again spoke with McDonald, who gave him the address for an apartment. 4RP 519. Forler proceeded to the apartment where he was arrested. 4RP 483-84.

Detective Tony Garden obtained a search warrant for Forler's vehicle. 5RP 573-574. In it, Garden located a plastic bag on the front seat of the car. Inside the bag were eight different brands of condoms and a bottle of Astroglide. 5RP 575. Astroglide was a lubricant that was used for sexual intercourse to make it more comfortable for the female. *Id.* It was common for individuals in these situations to bring condoms to the scene and to leave them in the car to retrieve later once they determined that the scene was safe. 5RP 581-82.

Forler testified at trial and did not deny that he answered the ad, claiming that he did so because he wanted to see what was really going on and was concerned that real children might be involved. 5RP 588-89, 627. He stated the comment that he would not mind a little “home-schooling” was mocking the ad, but that the sarcasm did not come across in the email. 5RP 590. He asserted that he continued to correspond with Rodriguez because he wanted to see if real children were involved. 5RP 593. He admitted to knowing that the ad talked about incest and that it involved sex with young children. 5RP 606-07. He said that he understood home-schooling to mean that the children were isolated to keep teachers from identifying forms of abuse. 5RP 607. He also admitted to knowing what the rules were and that even after knowing what was being advertised, he drove to the location. 5RP 628-630. Forler said that even after he obtained the address of the apartment, he did not contact law enforcement. 5RP 630.

III. ARGUMENT

A. FORLER WAS NOT DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BECAUSE JUROR 8 DISPLAYED NO ACTUAL BIAS AND WAS PROPERLY SEATED ON THE JURY.

Forler argues that he was denied his right to a fair and impartial jury when Juror 8 was seated on the jury panel. This claim is without merit because Juror 8 did not express actual bias and it was not a manifest abuse

of discretion to seat him.

In the questionnaire that jurors filled out prior to general voir dire, a question asked “Is there any reason you could not be a fair juror in a criminal case?” Juror 8 responded “No” and stated, “however, a case of this nature will be a challenge to separate my emotion from fact. This could be typical of a juror experience.” CP 276.

Juror 8 was then brought in for individual questioning. When asked if he would have a hard time being fair and impartial, the juror responded “Yeah. I mean, I’m—this is powerful. It’s just a very emotionally laden situation involving children.” 1RP 116. When asked to explain the answer, Juror 8 noted that it was a crime “against vulnerable people, in this case children. So everything that is debated or presented as far as facts in this situation addresses whether something of that nature did or did not occur.” 1RP 116-17. Juror 8 stated that while it was a question in his mind whether or not he could be fair and impartial, he was “projecting that, if I’m on the jury, I’m going to have to struggle with the ramifications of how the facts are going to be presented. There’s a lot at stake here. There’s a lot at stake here so it’s really important to try and make the decision as charged, when I think it has to do with judging on the facts.” 1RP 117. When asked if he or she could make a decision based solely on the facts of the case, juror 8 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." 1RP 118. The court denied the challenge for cause, noting that it did not have a clear indication of whether or not the juror was not going to be fair and impartial and that it did not know, based on Juror 8's answers, which side he might be favoring. The court further noted that while the juror indicating he might have an issue separating emotion from fact may be concerning, it was not unusual in this type of case. 1RP 119. Forler did not exercise a general preemptory challenge against Juror 8 and used only seven of his eight challenges. 3RP 422-26. He then accepted the panel with Juror 8 on it. 3RP 426.

There are three kinds of challenges for cause that can be exercised during trial, including implied bias and health reasons. RCW 4.44.170(1) & (3). The one at issue here is subsection (2), which permits a juror to be challenged for cause:

For 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, and which is known in this code as actual bias.

RCW 4.44.170(2). The trial judge is in the best position to determine whether or not to excuse a juror for cause because he or she can observe the demeanor of the juror and evaluate his or her responses. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). The trial court's decision is reviewed for manifest abuse of discretion. *State v. Perez*, 166 Wn. App. 55, 269 P.3d

372 (2012). Forler must show that there was more than a mere possibility that the juror was prejudiced to successfully challenge a denial for cause on appeal. *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706 (2008). If a juror should have been excused for actual bias but was not, the remedy is reversal. *State v. Gosser*, 33 Wn. App. 428, 656 P.2d 514 (1982). A juror's equivocal answers on their own do not justify his or her removal for cause. *State v. Grenning*, 142 Wn. App. at 518. The question that the trial court must resolve is whether or not a jury with preconceived ideas can set them aside. *Noltie*, 116 Wn.2d at 839.

In *Noltie*, the defense challenged a juror for cause because she indicated that she had concerns that it might be difficult for her to be a juror where children were testifying about being sexually abused, but said several times that she would try to be fair. *Noltie*, 116 Wn.2d at 836. The trial court denied the challenge for cause. *Id.* The Washington Supreme Court upheld the decision, noting that at most, the juror demonstrated a mere possibility of prejudice, and that it was not a manifest abuse of discretion for the trial court to deny the challenge. *Id.* at 840. The Court noted that factually, this was a different case than *Cheney v. Grunewald*, 55 Wn. App. 807, 780 P.2d 1332 (1989), where there one of the juror's family members "had actually been a victim of the same time of crime as that on which he was being asked to sit in judgment." *Noltie*, 116 Wn.2d at 838.

Forler argues that Juror 8 expressed “grave doubt about his own fairness,” and that the trial court was therefore “incorrect when it reasoned that the juror had not shown an indication that he would be fair, rather than not fair.” Brief of Appellant, at 12-13. He claims that the juror’s remarks showed actual bias, asserting that the situation was akin to those presented in *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), and *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). Forler’s argument is misplaced.

In *Gonzales*, the juror said that she would have a “very difficult” time disbelieving a police offer and she was not sure if she could give the defendant the presumption of innocence; no rehabilitation was done. *Gonzales*, 111 Wn. App. at 282. The court further noted that at no time did the juror “express confidence in her ability to deliberate fairly or to follow the judge’s instructions regarding the presumption of innocence.” *Id.* In *Fire*, the Court of Appeals found that the juror’s responses indicated actual bias. *Fire*, 145 Wn.2d at 156-57. There, the defendant was charged with three counts of child molestation in the first degree. *Fire*, 145 Wn.2d at 154. The juror indicated that he had very strong feelings about that type of criminal activity, stating that in a case of that nature, he would consider him a “baby raper and it should be severely punished.” *Fire*, 145 Wn.2d at 155. He further indicated that he was leaning to the accusation, but indicated that he could follow the court’s instructions and the law. *Id.*

The circumstances presented in *Gonzales* and *Fire* differ from the situation below. Juror 8 noted that in a case of this nature, it would be a challenge to separate emotion from fact. The juror indicated that it was a really important decision, and that he had to make it based on the facts of the case, noting that it would be a “struggle.” 1RP 117-18. While the juror’s answers may reflect the mere possibility of bias, they do not equate to actual bias. As the trial court noted in its ruling, Juror 8 was not clear on which side he was favoring, and that it was not unusual in cases like this to have concerns about the emotions that might arise. But the juror’s answers were equivocal, and equivocal answers do not equal actual bias. In both *Gonzales* and *Fire*, the jurors were unequivocal in their answers indicating they had a clear preference for one side over the other. Such is not the case here.

The present case is more like the situation in *Noltie*, where the juror indicated that while she might have difficulty in a case where a child was testifying about sexual abuse, she could still be fair. Here, Juror 8, while concerned about the emotions that might arise, also indicated that he would make his decision based on the facts. The trial court did not manifestly abuse its discretion when it denied the motion to strike Juror 8 for cause.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING AN INSTRUCTION FOR THE DEFENSE OF ENTRAPMENT BECAUSE THE FACTS OF THE CASE DO NOT WARRANT THAT DEFENSE.

Forler next claims that Defense counsel was ineffective for failing to request a jury instruction on the defense of entrapment. He argues that an entrapment instruction was warranted because of law enforcement's creation of a non-existent offense and the encouragement for Forler to commit the crime. Brief of Appellant, at 16. This claim is without merit because Forler was not entitled to an instruction for entrapment and therefore it was not ineffective assistance for trial counsel not to pursue that defense.

For the court to find that defense counsel was ineffective, Forler must show two things: (1) that defense counsel's representation was deficient, falling below an objective standard of reasonableness based on all of the circumstances; and (2) there is a reasonable probability that but for defense counsel's deficient representation, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226-27, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The entire record below is examined to determine whether or not counsel was competent. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). In order to demonstrate that defense counsel's performance was deficient,

Forler must meet a high threshold; to prevail, he must overcome a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Performance is not deficient if defense counsel’s decisions can be characterized as legitimate trial strategy. *Id.* at 863. For example, the decision of defense counsel on whether or not to propose a lesser included jury instruction is a tactical decision for which counsel is given significant latitude. *State v. Grier*, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011). The burden is on Forler to establish that defense counsel was deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1998).

1. Forler was not entitled to an instruction on the defense of entrapment.

Washington has codified the entrapment defense 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. From that statute comes the entrapment jury instruction:

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.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

WIPC 18.05.

To establish the defense of entrapment, Forler must demonstrate that he was tricked or induced to commit the crimes by acts of trickery by law enforcement and that he would not otherwise have committed the crime. *State v. Lively*, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996). *Lively* places the burden on the defendant to demonstrate that he was improperly induced to commit a criminal act that he otherwise would not have committed. *Lively*, 130 Wn.2d at 13. Forler must show more than reluctance on his part to violate the law. *State v. Trujillo*, 75 Wn. App. 913, 918, 883 P.2d 329 (1994). A defendant's predisposition to commit the crime may be shown, in part, by his ready responses to the inducement offer. *State v. Hansen*, 69 Wn. App. 750, 764 n.9, 850 P.2d 571 (1993), *reversed on other grounds sub nom. State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994). Law enforcement's use of a normal amount of persuasion to facilitate the

commission of a crime does not constitute entrapment. *State v. Keller*, 30 Wn. App. 644, 647, 637 P.2d 985 (1981), *review denied* 100 Wn.2d 1023 (1983). When law enforcement merely gives a defendant an opportunity to commit a crime by employing a ruse, entrapment has not been established. *State v. Youde*, 174 Wn. App. 873, 886, 301 P.3d 479 (2013). Indeed, “[i]n affording a suspect with an opportunity to violate the law, police may use some subterfuge. For example, an officer may pose as a drug dealer, fence, or prostitute.” *State v. Smith*, 93 Wn.2d 329, 350, 610 P.2d 869 (1980). The defendant must prove the defense of entrapment by a preponderance of evidence. *State v. Trujillo*, 75 Wn. App. at 917. Forler claims that both parts of the entrapment defense were supported by sufficient evidence. His assertion fails.

a. There is insufficient evidence for the first prong

Here, law enforcement used deception and artifice in inducing Forler to come to Bremerton ready to have sex with two young girls. But these actions do not establish the defense and the point of the exercise, both by law enforcement actions and in legal analysis, is that Forler did just that. Moreover, “even if the criminal design originated in an officer's mind, a defendant may become a willing actor in [the offense] and, thus, defeat an entrapment defense.” *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). “This occurs when he or she continues participating in the developing transaction and willingly associates himself or herself with it.”

Id. Forler’s actions of communicating and negotiating under these circumstances tends to show he was not “tricked.”

Further, Rodriguez used no more than a “normal” amount of persuasion; he essentially just said that the sex was there if Forler wanted it. *Keller*, 30 Wn. App. at 647. It did not take long to convince Forler to drive to the designated location—the conversations between him and Rodriguez only went on for about a day before Forler drove to the site. CP 16-41. Forler chose to continue to respond to the messages, often initiating the correspondence and even requesting a photo early on. 4RP 67.

Forler chose to drive about two hours to the suggested location. He also chose to bring condoms and lubricant with him, the latter of which was not suggested by law enforcement. Forler was clearly a willing participant in the crime, one who was well aware of what was being offered. 5RP 606-07. He appeared to understand the purposefully cryptic language in the ad, often using it in his responses. He was also the one who brought up the idea of how much this endeavor would cost and even agreed on a price. 4RP 474-75, 516. These were not the actions of someone who was being lured and tricked into committing a crime; rather, these are the actions of an active participant who knew exactly what he was doing.

There did not appear to be a need to “trick” Forler because he responded to the ad and continued to communicate with Rodriguez while

knowing exactly what was being offered—sex with two young girls. *Keller*, 30 Wn. App. at 647 (“The defense will not be allowed when the evidence indicates merely that the defendant was given an opportunity to commit the crime with which he is charged.”). Much of the communication between Forler and Rodriguez showed his willingness to take advantage of the opportunity that was being provided. His intent was manifest at the beginning: Forler read an ad that spoke of sex with a young family, that said that experience with incest was a plus, and that said there were two daughters involved, and responded with an email stating, “I’m interested” “if your real.” 4RP 465. In any event, Forler’s argued reluctance does not establish the defense—he was clearly not tricked or induced to commit the crimes.

b. The second prong of the defense is not met

Forler also argues that he would not otherwise have committed these crimes, but all of his actions refute that contention. Forler claims that he was simply acting to see if the ad was real and whether there were real children involved. Yet his activities demonstrate he clearly knew what was being offered and that he wanted to take Rodriguez up on that offer. He often initiated the conversation, and seemed upset that Rodriguez went silent for a period of time. 4RP 466, 474. Forler willingly provided his phone number and even chose an outfit for the girl to wear when he got there. He drove

almost two hours to the site, and spoke on the phone with McDonald, who he thought was the mother of the girls. He went to the first location, got the address for the second location, and drove there too, exiting his car to look for the correct apartment. He also brought condoms and lubricant to the engagement. It took very little enticement on the part of Rodriguez to get Forler to commit these crimes. Forler also demonstrated an awareness that what he was doing was wrong—he asked if this was a sting operation, and worried that Rodriguez was a law enforcement officer and not the mother he claimed to be.

Forler argues that his testimony further supported the entrapment instruction because it contradicted much of the detectives' assertions about what had occurred. Brief of Appellant, at 28. But this is simply not the case. In his testimony, Forler admitted to knowing that an 11 year old girl was being offered for sex and to knowing the rules about that encounter. 5 RP 628-30. He admitted to the correspondence and to driving to the scene, as well as bringing the condoms and Astroglide. Forler claimed that he simply went through with the plan in order to determine whether or not any “real” children were in danger. However, he also admitted that he never called law enforcement at any point. 5RP 630.

A defendant has a right to present his defense to the jury. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). However, a

defendant may only have the jury instructed on an affirmative defense if he offers sufficient admissible evidence to justify the giving of the instruction. *Williams*, 132 Wn.2d at 259-60. Forler has failed to satisfy his burden. The defense of entrapment was properly not put before the trial court.

2. Counsel was not deficient for not proposing an entrapment instruction.

When ineffective assistance is alleged to have been caused by failure to request a jury instruction, the Court must find that the defendant was entitled to that instruction. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). To determine whether or not defense counsel was deficient for not requesting the entrapment instruction, the Court should examine if the evidence supported the instruction; if defense counsel effectively argued the statutory defense; and if the statutory defense was consistent with the defendant's theory of the case. *State v. Powell*, 150 Wn. App. 139, 155, 206 P.3d 703 (2009).

Here, it was clearly a tactical decision by counsel to not propose the entrapment instruction. First, as discussed above, the instruction was not supported by the evidence. Second, in her closing, defense counsel did not argue entrapment. Instead, she argued that Forler never intended to go to the house to have sex with children, he was simply going there to find out what was going on. 5RP 673-74. She also claimed that he did not take a substantial step because he never had a plan to have sex with children. 5RP

675. Entrapment was not consistent with her theory of the case and therefore it was not deficient for her to not request the instruction.

3. Forler fails to show prejudice.

Even if the Court were to determine that defense counsel should have requested the instruction, Forler cannot demonstrate that his case was prejudiced by this decision. The jury heard all of the evidence in the case, including Forler's claim that he simply responded to the ad because he was "bored" and wanted to see if it involved real children. The jury also heard about Forler's activities and had a chance to examine the conversations that he had with Rodriguez. Clearly, they found the State's evidence more persuasive than Forler's own claim. Forler has failed to meet his burden to show that trial counsel was ineffective.

C. THE STING OPERATION WAS NOT OUTRAGEOUS POLICE CONDUCT—IT WAS A PROPERLY EXECUTED OPERATION IN WHICH FORLER WAS A WILLING PARTICIPANT.

Forler next claims that the sting operation constituted outrageous police conduct that violated due process. This claim is without merit because this was a properly executed police operation of which Forler was a willing and active participant.

This issue is raised for the first time in Forler's brief. However, constitutional error may be raised for the first time on appeal, particularly

where the error affects “fundamental aspects of due process.” *State v. Johnson*, 100 Wn.2d 607, 614, 674 P.2d 145 (1983). Outrageous government conduct is founded “on the principle that the conduct of law enforcement officers and informants may be ‘so outrageous that due process principle would absolutely bar the government from invoking judicial processes to obtain a conviction.’” *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). For police conduct to violate due process, it must be so shocking that it violates fundamental fairness and must be more than a mere demonstration of flagrant police conduct. *State v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984). Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate police activity. *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973). Dismissal is saved for only the most egregious circumstances. *Lively*, 130 Wn.2d at 20. The court should evaluate the conduct based on the totality of circumstances and the focus should be on the behavior of the State. *Lively*, 130 Wn.2d at 21.

There are five factors for the court to consider in determining whether or not police conduct violates due process: whether the police conduct instigated a crime or merely infiltrated on-going criminal activity; where the defendant’s reluctance to commit a crime was overcome by pleas

of sympathy, persistent solicitation, or promises of excessive profits; whether the government controls the criminal activity or simply allows for it to occur; whether the motive was to prevent crime or protect the public; and whether the conduct itself amounted to criminal activity or conduct repugnant to justice. *Lively*, 130 Wn.2d at 21.

Here, the factors all favor the State. The police operation was not designed to target Forler specifically; rather, the ad was placed in an attempt to find people who would want to sexually abuse children or provide children for that purpose. 4RP 447-450. The ad was posted on Craigslist where such activity and ads were not uncommon—there is even a link for people to report “suspected exploitation of minors,” which takes the individual to the website for the National Center for Missing and Exploited Children. 4RP 456. Forler was familiar with Craigslist and would frequent the ads for single women. He would respond to a lot of ads, most of which he said were spam or people playing games. 5RP 587. Forler chose to respond to the ad placed by Rodriguez even though he knew that it was advertising sex with children. He was precisely the type of person that the operation was targeting.

Second, Forler expressed very little reluctance to commit the crime; rather, his main concern was getting caught in a sting operation. 4RP 472. He was the one who responded to the ad and he was the one who persistently

corresponded with Rodriguez to reiterate his interest. 4RP 467-75. Forler stated his outfit preference for the little girl and called her picture “gorgeous.” 4RP 517. While Rodriguez engaged in conversation with Forler, it was clearly a conversation that was dictated by Forler’s interest. Forler also drove to two different places to meet the young girls and called and spoke to McDonald, acting as the mother. 4RP 534. Forler needed little to no persuasion to commit these crimes.

Third, the police did not control the criminal activity here. This was activity already occurring on Craigslist. The aim of law enforcement was to catch those looking to sexually exploit children. Forler responded to the ad on his own, willingly provided his phone number, spoke with a woman he thought was the mother, and drove almost two hours to two different sites at the request of the detectives, bringing condoms and Astroglide. Although Forler claimed that he was only responding to the ad to see if it was real and to help “save the children,” at no time did he contact law enforcement on his own. He was also free to stop corresponding with Rodriguez at any time or to turn his car around and go home. Forler chose not to do that and was obviously in control over his own actions.

Fourth, the motive of the police operation was to protect the public. The main point of the operation was to catch people who would seek to prey on children and to rescue children who might be in an abusive situation.

4RP 451. When someone is caught during one of these operations, the focus is on finding out if there is an actual victim or other people that they have done with this before. *Id.* In the operations that Rodriguez had done, he recovered or identified through images 21 children and arrested 86 people. 4RP 481. It is undoubtedly in the public's interest to stop the sexual exploitation of children and to rescue any children who are being exploited.

Finally, the conduct of law enforcement here did not amount to criminal activity or conduct repugnant to justice. The ad placed by Rodriguez was part of a criminal investigation to catch those who wanted to sexually exploit children. The ad was simply the bait—Forler chose to respond to the ad, correspond with Rodriguez, drive to the scene, and bring supplies to have sex with a child. Forler's actions were not directed by Rodriguez; he acted of his own accord and made his own decisions. Nothing in the conduct of the detectives was repugnant to criminal justice.

This situation is clearly distinguishable from that presented in *Lively*. There, the police sent a confidential information (CI) to an AA/NA meeting and targeted a young, vulnerable, recovering addict who became emotionally dependent on the CI. *Lively*, 130 Wn.2d at 7. The defendant only helped facilitate the sale of drugs to the CI at his insistence—she had no predisposition to do so prior to his persistent requests. *Id.* The Court found that the CI established a relationship with the defendant for the

purpose of instigating a crime, noting that the defendant's emotional reliance on him was integral to the CI's control of the situation. *Lively*, 130 Wn.2d at 23-24. The Court noted that the conduct in *Lively* was completely contrary to the public policy and focus on the preference for the treatment and rehabilitation of drug users. *Lively*, 130 Wn.2d at 26-27.

The present case is also distinct from *United States v. Twigg*, 588 F.2d 373 (1978). There, the informant working for the Drug Enforcement Agency suggested the creation of a speed laboratory. The informant (via the government) supplied all of the materials to create the lab and he ran the lab. *Twigg*, 588 F.2d at 380-81. The court found that the informant planted the idea of committing the crime in the defendant's head and completely directed the operation. *Twigg*, 588 F.2d at 381.

There is no such emotional reliance or direction here. This was not a relationship that lasted over a long period of time—this was an exchange of messages in response to an ad advertising sex with children over the course of about a day, with Forler persistently initiating the continued contact and speaking the language of someone who wanted to have sex with children, but did not want to be caught. The ad was vague and designed to catch those who understood the language and understood what was being offered. Forler clearly did. Forler made the choice to drive to the site of the alleged sexual encounter with a child and brought condoms and money as

instructed. He also brought his own addition to the rendezvous, Astroglide. This is an individual who acted of his own volition and was well aware of what he was doing when he responded to the ad and corresponded with Rodriguez. This sting operation was not outrageous police conduct and did not violate Forler's due process rights.

D. THERE WAS NO MANIFEST VIOLATION OF FORLER'S DUE PROCESS RIGHTS BECAUSE IT WAS NOT INSTRUCTIONAL ERROR TO PROVIDE THE JURY WITH THE "TO CONVICT" INSTRUCTION FOR THE COMPLETED CRIMES.

Forler next claims that providing the jury with the "to convict" instructions for the completed crimes was instructional error and therefore a manifest violation of due process. This claim is without merit because the instructions properly conveyed the law and did not violate Forler's due process.

The State must prove every essential element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). A "to convict" jury instruction must contain all elements of the crime. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). "An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). An alleged error in jury instructions is reviewed de novo. *State v.*

Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008).

It is a long-standing rule that an appellate court may refuse to review “any claim of error which was not raised in the trial court.” *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). The exception to this rule is when the error claimed is one that is a “manifest error affecting a constitutional right.” RAP 2.5(a). This requires that the appellant “identify a constitutional error and show how the alleged error actually affected the [appellant’s] rights at trial.” *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). If a court finds that the error is one of constitutional magnitude, it must next determine whether the error was “manifest”; manifest requires an actual showing of prejudice. *Kirkman*, 159 Wn.2d at 935. Actual prejudice is a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial.” *Id.* If the facts are not in the appeal record, no actual prejudice is shown and the error is not manifest. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The focus is on whether the error is so obvious on the error that it warrants appellate review. *Id.* The appellate court “must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2010). If the court determines that the claim raises a manifest constitutional error, “it may still be subject to a harmless error

analysis.” *McFarland*, 127 Wn.2d at 333.

Here, the State proposed the “to convict” instructions for the completed crimes as well as the attempted crimes. The State noted that it had to prove that the “defendant intended to commit rape of a child in order to prove that he attempted to commit rape of a child.” 5RP 642. In permitting the instructions, the court noted that the definition of attempted rape referred back to a substantial step towards the commission of it, referring back to the completed crime. 5RP 643. Forler did not object to these instructions. *See* 5RP 643-44.

Forler argues that by providing extraneous to convict instructions, the court diluted the power of the proper to convict instructions on the attempted crimes, thus reducing the State’s burden of proof. Brief of Appellant, at 45. He claims that by exposing the jury to the horrors of what *could* have happened, it was easier for the jury to convict Forler of a less serious crime. Brief of Appellant, at 46. Forler’s argument is not supported by the record.

Although Forler claims that the jury was likely affected by the additional to convict instructions such that it made their verdict easier, he can point to no facts in the record to justify this assumption. It is pure speculation that the jury decided this case on “hypothetical” facts. He asserts that the instructions allowed the State “to shore up a glaring

weakness in its case—the fact that there was no actual child.” Brief of Appellant, at 47-48. But the State made no attempt to hide this fact. It was clear from Rodriguez’s testimony that this was a sting operation, a fear reflected in Forler’s own statements, and the crimes charged were that of attempt. The jury had to decide whether or not Forler took a substantial step towards the commission of these crimes and it was clear from his actions that he did. There is no evidence in the record that the jury based its decision on fear and emotion; rather, the record demonstrates that the State had ample evidence to convict Forler of the crimes.

All the court did here was provide the jury with additional instructions—it was not missing any instructions nor did it eliminate any of the necessary elements in the to-convict instructions for the attempted crimes. Such an action is not error and even if it were, it would not be one of constitutional magnitude. Even if the Court were to find that the submission of extra jury instructions was a constitutional error, Forler cannot demonstrate actual prejudice—he cannot point to any practicable or identifiable consequences at trial that are readily discernable on the record. His argument here fails.

E. THE COURT IMPOSED NO COMMUNITY CUSTODY CONDITIONS BEYOND ITS AUTHORITY AND ANY ERRORS IN THE JUDGMENT AND SENTENCE WERE SCRIVENER'S ERRORS THAT CAN BE EASILY CORRECTED.

Forler next claims that the trial court imposed community custody conditions that were outside the scope of its authority. The State agrees that there are some inconsistencies between the Judgment and Sentence and Appendix, but disagrees that the Court imposed community custody conditions outside of its authority.

1. Most of Forler's contentions are without merit.

Sentencing courts are required to impose certain community custody conditions in some specified circumstances and may impose others. RCW 9.94A.712(6)(a)(i). A court has the statutory authority to impose crime-related prohibitions. *State v. Norris*, 1 Wn. App. 87, 90, 404 P.3d 83 (2017). When a community custody condition is challenged for vagueness, a court's sentencing conditions are reviewed for abuse of discretion. *State v. Sanchez*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). Imposing "conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable." *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Forler first argues that broad prohibitions on adult, non-minor sexual

materials is generally not crime related. This Court has noted that there must be a nexus between the crime and the condition—in general, categorical bans simply because the crime was sex-related are discouraged. *State v. Norris*, 1 Wn. App. 2d 87, 97-98, 404 P.3d 83 (2017). There should be evidence in the record showing that frequenting sex-related businesses is reasonably related to the circumstances of the crime. *Norris*, 1 Wn. App. 2d at 98.

Forler takes issue with the condition that he “[p]ossess/access no sexually explicit materials, and/or information pertaining to minors via computer” arguing that it was scrivener’s error and must be stricken based on this. The State disagrees. First, that condition is crime related. The condition need only be “reasonably” related to the charged offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Forler admitted to being a frequent user of Craigslist. 5RP 597. He responded to an ad for sex with children. There is certainly a reasonable connection between Forler’s conduct and sexually explicit online materials. Further, the trial court did not strike conditions similar to this—it modified them to include the words “involving” or “depicting” minors. That can also be done here.

Second, the condition is not unconstitutionally vague. Forler claims that the term “information pertaining to minors via computer” may allow

the Department of Corrections to sanction him for watching a youth oriented movie on Netflix. That is clearly not what the condition is trying to prohibit. Rather, this offense involved Forler responding to a Craigslist ad that advertised two minor children for sex. He clearly used a computer to attempt to commit a crime against a minor and was subsequently convicted of such. This condition is not vague and is crime related.

Forler also challenges condition number 25 of “no internet usage unless authorized by treatment provider and Community Corrections Officer” (CP 181) as a condition that is too broad and not crime related. Again, the State disagrees. This was a crime that began by Forler responding to an ad advertising children for sex and involved him both emailing and texting the detective before driving to the location to meet what he thought was a mom and her two young daughters. There is a clear nexus between the use of the internet and the crime. Moreover, the condition is not too broad. It does not ban all internet use forever—rather, it allows the treatment provider and community corrections officer to control the types of websites Forler accesses. This is not an overly broad ban in light of the crime committed.

2. Certain scrivener’s errors in the judgment should be corrected.

Forler also argues that there are scrivener’s errors in the judgment and sentence—community custody conditions in the pre-printed section that

should have been stricken based on the court's express rulings. CP 174. The State agrees that the conditions of "no alcohol" and "no contact with the victim or victim's family" should be stricken in the judgment and sentence. The State also agrees that the section's general prohibition on adult book stores, arcades, or places providing sexual entertainment and condition 26 in the Appendix (CP 180) regarding 900 numbers should be stricken. The State concurs that the section in the judgment and sentence about "possessing/accessing sexually explicit" materials should be modified to add the phrase "involving/depicting minors" consistent with the trial court's ruling at sentencing.

IV. CONCLUSION

For the foregoing reasons, Forler's conviction and sentence should be affirmed and the cause remanded for correction of the scrivener's errors identified above. .

DATED April 3, 2018.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney



KELLIE L. PENDRAS
WSBA No. 34155
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

April 03, 2018 - 12:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50656-4
Appellate Court Case Title: State of Washington, Respondent v. Kevin Lee Forler, Appellant
Superior Court Case Number: 15-1-01026-1

The following documents have been uploaded:

- 506564_Briefs_20180403121434D2258608_5752.pdf
This File Contains:
Briefs - Respondents
The Original File Name was State of Washington v Kevin Lee Forler 50656-4-II.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- oliver@washapp.org
- rsutton@co.kitsap.wa.us
- trrobins@co.kitsap.wa.us
- wapofficemail@washapp.org

Comments:

Sender Name: Sheri Burdue - Email: siburdue@co.kitsap.wa.us

Filing on Behalf of: Randall Avery Sutton - Email: rsutton@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20180403121434D2258608