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COURT OF APPEALS, DIVISION 2

KENNETH PAUL ZIMMERMAN, JR.,
APPELLANT

v.

STATE OF WASHINGTON,
RESPONDENT.

Appeal from the Superior Court of Pierce County
The Honorable Grant Blinn, Department 8
Pierce County Cause No. 15-1-05062-3

CORRECTED OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR:

1. The deputy prosecutor committed misconduct in closing argument.
2. The trial court's failure to properly instruct the jury on "immoral purposes", as proposed in defendant's instruction 15-A, permitted the jury to convict the defendant without any legal definition of that term and thus deprived him of his right to a unanimous jury verdict properly instructed on the applicable law.
3. The trial court's failure to give defendant's proposed jury instructions defining attempted rape of a child in the second degree as well as the intent required to commit that crime denied defendant his right to have the State prove the crime charged beyond a reasonable doubt.
4. The trial court's failure to instruct the jury with defendant's proposed instruction on entrapment for counts 1-4 denied defendant his constitutional right to present a defense.
5. The State failed to prove beyond a reasonable doubt that the defendant committed the crime of attempted rape of a child in the second degree.
6. The State failed to prove beyond a reasonable doubt that the defendant committed the crimes of communication with a minor for immoral purposes, 4 counts.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR:

1. The deputy prosecutor's conduct denied defendant his constitutional right to trial by jury, due process, and fundamental fairness where that conduct deprived defendant of a verdict by the appropriate standard in a criminal case, that is, beyond a reasonable doubt.
2. A criminal defendant has a constitutional right to a unanimous verdict under Wash. Const. art. I, sex. 21r Wash. Const. art. I, § 21 rendered by a rendered by a jury t, at is properly instructed on the applicable law.
3. The trial court's failure to properly instruct the jury regarding the elements of the crime charges denied him his right to trial by jury guaranteed by article I, section 21 of the Washington Constitution
4. A criminal defendant has a constitutional right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, sex. 21 of the Wash. Const.
5. When a criminal defendant presents evidence to support such defense, the trial court must view that evidence most strongly for the defendant and permit him to assert the defense.
6. There was insufficient evidence adduced to sustain defendant's conviction for attempted rape of a child in second degree.
7. The State failed to prove beyond a reasonable doubt that defendant committed the crimes of communication with a minor for immoral purposes, 4 counts.

C. STATEMENT OF THE CASE

1. Procedural Facts.

This case was one of several “net nanny” sting cases charged in Pierce County, Washington, as a result of a Washington State Patrol [WSP] sting operation in December 2015. CP 2-3. In such a sting operation, WSP, assisted by officers from many other police agencies, take out ads on the Casual Encounters section of craigslist and also respond to ads on that site which police believe identify individuals who are interested in sexual activities with minors. RP 548. Prior to the actual sting, there is an operational briefing where task assignments are made. RP 548. In this sting, Richland Police Department Detective John Bickford from the Southeastern Regional Internet Crimes Against Children Task Force [ICAC] and a member of the Washington State Internet Crimes Against Children’s Task Force [ICAC] which worked this sting operation was assigned to chat within individuals about sexual acts with children. RP 600, 603. He conversed using the guise of a 13 year old girl with the moniker “Kaylee¹.” *Id.*

The State of Washington in Pierce County Superior Court case No.15-1-05062-3 charged Kenneth Paul Zimmerman with the crime of attempted rape of a child in the second degree on December 18, 2015. CP 1. The State alleged in its declaration for determination of probable cause that Zimmerman had gone to the residence of the fictional teen-aged victim and that he had been arrested “about a block away from the predetermined location”. CP 2-3. This information was patently false as the predetermined location, to the extent that one may have existed, was a residence and a specific parking spot in a back alley behind a behind a residence on Yakima

¹ For purposes of convenience, appellant will use the moniker “Kaylee” when referring to Bickford’s communications during his undercover conversations as the fictitious teen-ager.

Avenue South in Tacoma. RP 1281-82. Zimmerman never went to that location. RP 1281. In fact, Zimmerman never went down the alley at all. *Id.* He drove down Yakima Avenue, a major north-south avenue in the city from which the fictional teen-aged victim had informed him he could *not* access her residence and he was arrested more than 1.1 miles away, on the other side of Interstate 5². RP25. That declaration for determination was never corrected by the State from December 2016 to the time of trial. *Passim.*

The State allowed the arraigning court to determine probable cause based on false information and never informed the superior court of the erroneous content. RP 28, 29.

Defendant was initially represented by attorney Leslie Tolzin, then by Phillip Thornton and then by Barbara Corey. CP 4, 9, 12. There were numerous continuances of trial before the matter ultimately proceeded to jury trial in October 2017³. CP 6, 7, 8, 10, 11, 13, 14, 90, 91, 112, 114, 115,

[The deputy prosecutor refused to call the police officer who wrote the false report to testify at trial and successfully made a motion to prevent appellant from calling this witness, WSP Det. Sgt. Carlos Rodriguez in the defense case.]

On October 17, 2017, the court arraigned defendant on an amended information adding four counts of communicating with a minor for immoral purposes, class C felonies because the

² There was no street parking in front of the house on Yakima Avenue . RP 592.

³ In June 2017, the case had been called for trial before Judge Elizabeth Martin. That trial resulted in a mistrial on June 26, 2017, because defendant suffered a medical issue and had gone to Allenmore Hospital. Defense provided to the court later that afternoon a one page document from Good Samaritan Hospital confirming his admission for possible mild stroke. Defendant's Supplemental Sentencing Materials Re: Motion for New Trial Under CrR 7.5(a)(2), CP 571-72.

communications were made on electronic devices. CP 118-120. The State earlier had provided notice to defendant in January 2017 that it would amend the information if defendant did not enter a guilty plea. RP 12. Defendant acknowledged receipt of the document, waived formal reading, and maintained his “not guilty” pleas. RP 13.

The State, however, had relied “about a block from the predetermined [meeting] location” in its declaration for determination of probable cause and had never corrected this significant error. *Passim*. The deputy prosecutors who swore out that documents were gang unit prosecutors and were very familiar with the city of Tacoma and would have known from the addresses what was near St. Joseph Hospital at 19th and “J” Street and what was on the other side of the freeway. RP 29-30. Yet they fed this information to the superior court when it determined probable cause at a time when defense would not have had discovery. RP 29-30.

In response to defendant’s motion for production of police training materials regarding how to talk like minor girls, the court held if defendant wanted a court order compelling production of such materials, defendant should brief the issue and the court would review the authority provided. RP 52.

This is a case where defendant posted an ad on the internet and the government responded and urged him to commit sexual acts with an individual who identified herself as 14 years old and repeatedly urged him to engage in sexual acts with her, described herself as “hot”, “horny” and “feeling wet but not knowing why”, having performed various sexual acts, including sexual intercourse, and someone who did not date boys her own age because they thought she was “a slut”. RP 135-136, 146, 147. The detective, acting as fictitious teen-aged victim, asked for a “reward” for participating in sex acts, specifically an iPod. RP 147, 170. When he said he was

“not looking to pay her”, she replied that she “thought she’d try.” RP 170-71. The fictitious teen-aged victim repeatedly asserted that she was home alone and repeatedly urged defendant to come to her house. RP 170, something he never did, repeatedly offering excuses and suggesting that they meet in public places, such as a park. RP 171, 172, 176. Defendant always thought he was talking to an adult on a site that was restricted to persons over the age of 18. RP 173.

Defendant had no criminal history and was using the site exactly as intended. RP 174. Police knew he was leaving the area of the fictitious teen-aged victim’s residence without even going there when they decided to arrest him. RP 175. Defense argued that entrapment is part and parcel of any sting operation because the function of a sting operation is to lure people in. RP 146.

The State elected not to offer defendant’s statements to police in its case. RP 156.

The defendant’s ad was placed in the M4W [man for woman] section. RP 197. It read, “looking for young, little girl for play. Looking for open-minded and obedient. Looking to please and be pleased. Please tell me about you and include a picture. Looking for kinky fun. Put your favorite color in the subject line.” RP 196.

The court granted defendant’s motion to prohibit any police witness from testifying that they believed defendant had taken a substantial step toward any crime. RP 278.

Defense renewed its request for police training materials after Det. Bickford brought two training manuals to court. RP 289. The State previously had informed the court that the manuals were not available because the detective did not have any that he could access because he did not know where they were. RP 47-48. The detective also had informed the prosecutor that he could not hand them over because they were not to be discovery material. RP 48.

Defendant's position was that if the police officer had relied on the training materials to do his job, then defendant was entitled to them just as he was entitled to the materials upon which any other expert relied. RP 290. Defendant also relied upon his constitutional right to confront witnesses under the United States Constitution and the Washington Constitution as well as his right to present a case under *Davis v. Alaska*, 415 U.S. 308, 94 Sc.D. 1105, 39 L.Ed.2d 347 (1974). Defendant also informed the court that he would agree to receive the material under a protection order which prohibited the copying and/or further dissemination of the materials. RP 294.

The prosecutor then argued that defendant had "an obligation to show materiality" rather than relevance. RP 296. The court informed the parties that it wanted authority from both sides. RP 300.

Immediately prior to opening statements the prosecutor informed defense for the first time and the court that there had been an operational briefing prior to this sting operation but that it was "a law enforcement sensitive briefing" and thus not discoverable. RP 308. Defendant requested this document because it showed how this whole operation was run and would greatly assist the defense. RP 309. The court suggested that defendant should have requested this prior to trial but acknowledged that defendant could not have requested something he did not know existed and which the State had withheld. RP 310. When the court requested authority, defendant continued to rely on the federal and state constitutions as well as *Davis v. Alaska, supra*.

During the testimony of Detective John Bickford of the Richland Police Department, the deputy prosecutor asked him about the meaning of the words "young little girl" in the ad posted by defendant. RP 400. The witness responded, "In my experience, the key terms for people who

have an interest in children . . .” *Id.* The deputy prosecutor’s attempt to introduce an impermissible comment on defendant’s guilt was interrupted by a timely defense objection that was sustained. *Id.*

The deputy prosecutor and the court admitted plaintiff’s exhibit 2, a print-out of the entire email exchange between the defendant and Kaylee. RP 402-03.

During his testimony, Bickford testified to the reasons he made many of the “Kaylee” statements. When asked “whether or not Ken was trying to determine if Kaylee was – if the person who was using the moniker Kaylee was someone who was just role playing a teenage girl”, Bickford stated, “It is my belief, based upon the text messages that Mr. Zimmerman believed he was talking to a child. I would be happy to read those text messages that gave me that . . .” RP 623. When asked, “Do you know what he was thinking?”, Bickford suggested that Zimmerman “was indeed believing he was talking with a child.” RP 623-24. Because the witness’s answers took the question into an unintended area, the court took the matter up outside the presence of the jury. RP 627. The court stated the issue and reached the conclusion that Bickford’s testimony about defendant’s actual thought processes were was “problematic and I don’t think admissible.” RP 627. Defendant moved to strike Bickford’s answer that he could determine what was in defendant’s mind. RP

After argument, wherein the court limited defense to 30 seconds and then 10 seconds rebuttal, RP 629, 632, the court denied defendant’s motion to strike Bickford’s opinion testimony on what defendant thought and also precluded any further questions to Bickford about defendant’s thought process. RP 631. Defense counsel had informed the court of its intention to call an expert, Michael Comte, to testify to the inability of Bickford or any person to reach the

conclusions Bickford claimed to have reached based on the training and data he had. RP 629, 632-33. The court reserved ruling on rebuttal evidence. RP 632.

Bickford acknowledged that he had never been deemed an expert on this subject. RP 633.

The trial court sustained the State's objections to defense questions to Bickford about whether officers were required to write reports for their work on this sting operation. RP 759, 760. There was no documentation to support testimony that other officers had observed defendant at the so-called staging areas of the chicken place or gas station. RP 760. Although Bickford testified that he believed that other officers reported having "eyes" on defendant, he did not know the names of any of these officers. *Id.*

The trial court permitted the State to adduce substantial testimony about defendant's arrest and characterize it only as a traffic stop. [testimony of Acala, Poston, and Wood]. When asked for what reason defendant was being arrested, Wood answered, "He was being arrested based upon probable cause for whatever charge the investigating detective had developed." RP 858. It was clear that none of the officers who arrested defendant had any idea why he was being arrested except that he was leaving the area.

Mr. Zimmerman had not committed any traffic violation. RP 864.

When the State rested, the court heard defendant's motion to dismiss as well as the State's motion to prohibit defendant from calling any witnesses in its case, a standard motion made by deputy prosecutor John Neeb. RP 964,

Defendant intended to call Michael Comte to testify regarding Detective Bickford's testimony that he could "tell" from the emails and texts between defendant and "Kaylee" whether defendant believed he was talking to a real child. RP 945-47. The State's first objection was that

the defense could not call a witness who was essentially a rebuttal witness in its case-in-chief. RP 949. The court heard argument regarding Comte's testimony. RP 992 -1005. Defendant had asked Bickford what should have been a simple question, that is, that Bickford did not know if defendant thought that "Kaylee" was role-playing or trying to role-play a teen-age girl. RP 992-93. When Bickford stated that he in fact "knew" what defendant thought based on the texts, emails, and phone conversation, defense counsel had asked Bickford a series of questions about this "expertise." RP 994. Bickford never walked back his testimony that he "knew" what defendant was thinking. *Passim*. This testimony was an unconstitutional and impermissible comment on the defendant's guilt. RP 1005.

Michael Comte, a State certified sexual offender treatment provider who is highly regarded in the criminal justice community and has evaluated thousands of offenders, would testify to the impossibility of Bickford's claim to know another person's thoughts.

Defendant wanted to call Det. Sgt. Rodriguez to testify about the overall sting operation. RP 944-45. The State objected for the reason that defendant had not asked him questions about this during the pretrial interview. RP 951. Defense responded that defense does not ask every question it intends to ask at trial during the pretrial interview. RP 955.

Defendant made a detailed offer of proof: Det. Sgt. Rodriguez would have been able to identify the participants who were assigned to the various teams [surveillance, interview, arrest], identify the individual who made the decision to take down the defendant after it was determined that he was leaving the area instead of going to the "trap house", testified to the location of the pole cameras that Det. Pohl said were located not only outside the residence but also in the streets

– had defendant really been near the chicken store, it is highly likely he would have been captured on film on one of several pole cameras. RP 964-969.

Defendant made a motion to dismiss the charge of attempted child rape in the second degree where the State had failed to prove a prima facie case. RP 1007-18. Defendant argued that in contrast to the reported cases, there was no substantial step taken in this case. There was no agreement to have sex. RP 1008. There was no agreement to meet. RP 1008. There was a lot of talking about around the subject – such as what are we going to do, where we shall meet, when we shall meet – but nothing definite. RP 1008. At most, there was talk, but no substantial step toward having intercourse because defendant did not go near the house, made no definite plans to see “Kaylee”, took no action to meet her, made some statements that he would see her but never followed through on any of them. Nothing that he did satisfied the substantial step requirement of the law. RP 1007-1018.

The trial court trial court queried whether driving into the area could constitute a substantial step. RP 1010-1011. The court denied defendant’s motion. RP 1018-21.

The trial court likewise denied defendant’s motion to dismiss counts 2-5, communicating with a minor for immoral purposes, for the State’s failure to prove a prima facie case. RP 1034, 1035.

The parties again addressed whether defendant would receive a copy of the training manual used by the police in this case. RP 1038. The court continued to request additional authority from defense without saying what kind of authority it wanted. RP 1039. By this point, police officers had testified that they relied upon the manual in conducting the investigation. RP

1039. The prosecutor had stated that he would provide the manual if the court ordered it. RP

1039. The court continued to reserve ruling on it. RP 1040.

The court ruled that Det. Sgt. Rodriguez would not have testimony that was material to the case and granted the State's motion to prevent the defense from calling him as a witness. RP 1071-72, 1074-75.

The court also granted the State's motion to prohibit the testimony of Michael Comte. The court proposed giving an instruction to the jury to disregard any opinion offered by Bickford but was concerned that the language was too broad. RP 1083, 1084-85. The prosecutor argued that Comte's testimony was insignificant and also a waste of time. RP 1081, 1082.

The court ultimately ruled that the defense request for the ICAC manual was untimely and should have been made at the omnibus hearing or the readiness conference. RP 1159-60. The court stated that while the defendant might be given the benefit of the doubt on the constitutional issue had he raised the issue earlier, he had waived it by inaction. RP 1160. The court maintained its ruling not to allow Comte to testify. RP 1161. The court had denied defendant's right to present any defense. RP 1162.

The court had decided to give a curative instruction in lieu of permitting Comte's testimony. That instruction read: "The jury is to disregard any testimony from Detective Bickford regarding his belief or opinion based upon the text messages that Mr. Zimmerman believed he was talking to a child." RP 1166-67. The State did not object to the instruction if it was acceptable to defense and defense's position was that the instruction was better than nothing. RP 1167. Defendant objected to the court's failure to give its proposed instruction no. 9-A, 11-A:

A person commits the crime of attempted rape of a child in the second degree when, with intent to have intercourse, he or she does any act that is a substantial step toward the commission of that crime.

Defendant argued that the State was required to prove this specific intent in order to prove the charge because, for example, showing that defendant intended to do anything else would not suffice to prove the charge. RP 1932. Defendant further argued that even in the context of all the other instructions, the instructions did not inform the jury that the intent required was the intent to have sexual intercourse. RP 1933-34, 1938-39. The court declined to give the instruction. RP 1932-33, 1939.

Instead, the court gave instruction no 7, WPIC 10.01: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 291.

Further, the deputy prosecutor’s argument regarding the content of the communication was flatly wrong. The deputy prosecutor argued regarding the charge of communicating with a minor: “Here’s what the law prescribes (sic): The law says you can’t have *sexually charged conversation* with someone who is a minor or who believe is a minor.” RP 2034. Defendant’s objection to the misstatement of the law was overruled. RP 2034. The prosecutor then proceeded to discuss the specific elements of that crime. He likened the definition of “immoral purposes” to the United States Supreme Court definition of pornography, “you’ll know it when you see it.” RP 2035. Defendant objected and against asserted the need for an instruction but was overruled. RP 2035. Throughout closing argument, the prosecutor argued that the defendant committed the crime of communicating with a minor for immoral purposes if he communicated “with someone

they believe to be a minor for immoral purposes.” RP 2035, 2037, 2041 [“you still have to find that the State has proved immoral purpose of a sexual nature.”] The prosecutor continued to argue that a communication was for immoral purposes if it used “nicknames for body parts, discussed sexual toys, discussed all the stuff that you heard that was of a sexual nature.” RP 2035-36.

The deputy prosecutor continued to expound upon the law in Washington as he wished it to be: “There are some things you can tell you kids that no one else can. There are some things that you’ve heard --” RP 2037. When defendant objected that the deputy prosecutor was making up law and instructing the jury on it, the court overruled the objection. RP 2037-38.

The deputy prosecutor argued to the jury that defendant took a substantial step toward committing the crime of attempted rape of a child in the second degree by spending three plus days talking over the internet with “Kaylee” about sexual stuff wherein *she* said *she* really wanted to have sex. RP 2042. The deputy prosecutor continued by arguing that “the defendant never “disavowed” her of her belief and constantly asked about whether her dad was home and when he could come and see her.” RP 2041. The deputy prosecutor referred to the definition of a “substantial step” as “conduct that strongly indicates a criminal purpose and is more than mere preparation.” RP 2043. The deputy prosecutor argued that the defendant’s listening to “Kaylee” discuss her sexual craving and then asking whether her dad was home and when he could come see her was a substantial step. RP 2042.

The deputy prosecutor argued that his next substantial step comprised the following the actions: driving from Puyallup ultimately to the Hilltop, even via stops at Applebees, Fred Meyer, and the Frisko Freeze, and being near St. Joseph Hospital. RP 2043-44. He argued that he “hovered” around a chicken store and the hospital. RP 2043. However, the State presented no

witnesses to establish that defendant was in the area for any appreciable amount of time and the defendant's testimony was to the contrary. The court granted the State's motion to preclude defendant from presenting testimony from Det. Sgt. Carlos Rodriguez, the head of this "net nanny" operation who would have been able to identify the surveillance units who would have seen defendant in the area had he in fact been there.

He further argued that when the defendant asked for her address defendant committed another act toward the substantial step. RP 2043. The prosecutor then stated that although he changed his mind, defendant could not back out of his substantial step and that he had already committed the crime of attempted rape of a child in the second degree. RP 2044.

However, the defendant never went anywhere near the entrance of the house. He drove away while he lied to "Kaylee" that he was on his way over to her house. He had never intended to go to her house.

The prosecutor conceded that there was nothing overtly sexual in the email itself. RP 2046. He argued that the totality of the conversation's defendant had with "Kaylee" after December 14th are evidence of his intent. RP 2047

The deputy prosecutor misstated the law on communicating with a minor when he argued that a person committed that crime by merely using sexual terms with a person who was under-age (RP 2108-09); mis-argued reasonable doubt when he stated that a reasonable doubt was one for which a reason exists and that the jury had to find such a reason (RP 2052, 2053, 2054; and again, in rebuttal 2052, 2053⁴); that the deputy prosecutor improperly instructed the jury on the

⁴ The deputy prosecutor's comments included:

law by telling that an individual cannot abandon an attempt, “The law does not allow do-overs. The law does not allow, I changed my mind at the last minute if you’ve already taken the substantial step. You’ve completed the crime of attempt and there’s no such thing of washing our hands afterwards and saying it never happened.” RP 2044.

At the conclusion of closing arguments, defense moved for a mistrial based on the deputy prosecutor’s misconduct during closing argument. RP 2108-2100. Defense counsel argued that the deputy prosecutor misstated the law on communicating with a minor for immoral purposes such that he encouraged the jury to convict the defendant if it found that he had used sexual terms with someone he was supposed to speak to in that manner. RP 2108-09. Defense also argued that the deputy prosecutor misstated the law on reasonable doubt, improperly instructed the jury on the law by stating that an individual cannot abandon an attempt. RP 2109-1

On November 17, 2017, the jury convicted the defendant as charged.

The court found that Counts 2 was same criminal conduct as to counts 3, 4, and 5. Counts 3, 4, and 5 were all separate criminal conduct to each other but all same criminal conduct as to count 2. RP 43, 44, 45.

The court found that Count 1, attempted rape of a child in the second degree, was not same criminal conduct because it had a different intent. RP48-49.

“A reasonable doubt is one for which a reason exists. A reasonable doubt, a reason exists. Here’s what I’m telling you. I’m not telling you that you have to say here’s my reason to doubt. *Don’t say because he’s presumed innocent. He’s presumed not guilty.* It’s only if the State proves to you beyond a reasonable doubt, you can find him guilty, but the standard of beyond a reasonable doubt, reasonable doubt if defined as one for which there is a reason. So as you deliberate the evidence to determine if you are convinced beyond a reasonable doubt, you have to be keeping in mind a reasonable doubt is one for why a reason exists.” RP 2053 [emphasis added].

The court sentenced the defendant to the high end of the standard range of 180 months to life in the Department of Corrections with lifetime community custody, 29 months on count 2 with 31 months of community custody, 60 months on each of counts 3, 4, and 5. The court also imposed standard legal and financial penalties.

Defendant thereafter timely filed this appeal.

2. Trial Testimony.

Washington State Patrol Lieutenant Mike Eggleston and Sgt. Carlos Rodriguez were supervisors of the operation. **RP 865.**

Detective John Bickford from the Richland Police Department is assigned to the Southeastern Regional Internet Crimes Against Children Task Force. RP 346. Washington State also has an Internet Crimes Against Children Task Force [ICAC] and an Exploited Children Task Force. RP 347. He also is a member of Washington State's Internet Crimes Against Children Task Force which works with such agencies as the Washington State Patrol. RP 347-48.

Prior to any sting, there is an operational briefing. RP 548. At that event, task assignments are made. RP 548. Individuals who engage in chat with persons about sexual acts with children must use care in those conversations. RP 549. Bickford likened the conversation to "putting bait on a line, on a fishing line." RP 549, 659-60. "You put it in the pond and see if the bait is bitten or eaten. We don't – we do not try to get the person to – we don't force anybody to do anything. We just merely cast out bait, for lack of a better term." RP 549. If there had not been sexual talk in the conversation for a period, the government would reintroduce it. RP 55. The government also put repeated statements in the communications from "Kaylee" indicating that she was willing to participate in sex acts. RP 599, 600. Bickford wanted to remind defendant

that “Kaylee” was “available.” RP 600, 603 (“Kaylee” made statements indicating “I’m available to meet for that sexual contact that was described earlier.”); 607, 617, 635, 636, 649, 650, 652, 653, 660, 677, 678-79, 692, 699-700, 702.

He works undercover in sting operations. RP 353. The deputy prosecutor asked Bickford about his training to do undercover operations and Bickford replied that he had been trained, *inter alia*, to ensure that entrapment did not occur. RP 351.

The deputy prosecutor was allowed to ask numerous questions about the detective’s training in undercover operations as well as the number of undercover operations in which he had participated. RP 360-63. He had received training from such entities as the Department of Justice. RP 360, 363. In this particular sting operation, Bickford was not a member of the task force; he was only “on loan” from the Richland Police Department and claimed that he was supposed to be following the policies of the Richland Police Department on this multi-agency operation. RP 729-30.

Bickford’s claimed his training materials were “secret” in that they were not supposed to be disseminated outside law enforcement. RP 721. He did acknowledge that he had been trained that these sting operations can trigger serious legal and ethical considerations because of concerns that inappropriate government conduct can induce an otherwise law-abiding citizen into committing a crime. RP 722. He had received training on “being aware” of leading the suspect to a path for which they would not otherwise commit. RP 723. As a result, he had been trained to allow the suspect to guide the conversation. RP 723.

He claimed to have been trained that once an individual broaches a topic that is a sexual act, then the police officer has the ability to continue talking about other sexual acts. RP 723.

Bickford confirmed that the Craigslist casual encounters site requires the user to affirm that they are over the age of 18. RP 364-65. He also acknowledged that although users are supposed to report illegal ads, he personally has posted ads for sex there on many occasions. RP 365-67.

Police officers in the sting operation obtain as much information as possible on suspects during the course of the sting. RP 557. For example, they check public records such as criminal records, Department of Licensing information, vehicle registrations, and, in Zimmerman's case, a credit report. RP 558-559. Bickford had not requested the credit report and he did not know which sting operation officer had made the request. RP 569, 570.

Bickford participated in the "net nanny" sting in Pierce County in which defendant was arrested. RP 371. He participated in undercover chatter. RP 372. Sergeant Carlos Rodriguez dealt with the day-to-day activity of the operation and also participated in undercover chatter. RP 371-72.

Bickford assumed the persona of a purported 13-year-old girl named Kaylee. RP 373. He had sent photographs of a woman detective from the Kennewick Police Department to the National Center for Missing and Exploited Children where the photos were regressed to look younger. RP 373-74. He then used some of the photos to depict the 13 year-old Kaylee. RP 375-76.

The State offered, and the Court admitted Plaintiff's Exhibit 1,2,3, Appendix A, the communications between Zimmerman and Bickford/"Kaylee", including a screen capture of the ad posted by defendant. RP 3y.92-93.

Bickford explained that he had been trained to talk to subjects so as to give them the opportunity to reconsider their actions, to have a break in the conversation and then reinitiate dialogue. RP 436.

Although the chicken store was used as a “staging area”⁵ in this case, defendant was never directed to go there. RP 543. Bickford testified that he believed “it was indeed implied in the dialogue.” RP 543 “Kaylee” eventually gave defendant directions to “her” house, telling him to proceed from the chicken store down the street and turn right, and it’s like, right there. RP 472. Bickford stated that these directions were not accurate at that time. RP 472-73, 666.

Bickford believed from people from law enforcement had seen defendant in the area of the chicken store but he had no firsthand knowledge of this. RP 544-45. He believed that “surveillance units” were observing the area of the chicken store and located defendant. RP 546. Bickford believed that the sting operation had obtained a driver’s license photo of defendant by that time. RP 668. Bickford did not know which officers were on the surveillance teams. RP 546. He thinks he “probably” talked to somebody there. RP 546. He also “understood” that somebody had observed him in the parking lot at St Joseph Hospital. RP 547. Bickford did not know if there were security cameras at any of these businesses. RP 547.

Bickford did not know the location of the stationary units that he claimed reported to have had eyes on defendant when he was near the chicken place. RP 760.

⁵ A “staging area” is an area where police bring a person being investigated to get surveillance of that person and to verify that they are communicating with that individual. RP 543-44.

However, the surveillance team's job was to identify the person at the "staging area" and then become mobile and follow the person from the staging area to the location of the house. RP 706. There were at least five units doing surveillance that evening. RP 813.

The last message, "meet me in the alley", was never read. RP 930. It was sent at 8:33:45 p.m. RP 930.

No one ever followed defendant into the alley, where he was directed to go to park his car. RP 706. This is because he never went there. *Passim*. Bickford erroneously thought that the surveillance team picked up defendant in the area of the chicken restaurant. RP 706. Bickford believed that from the time defendant was asked to go to the chicken place, officers from the sting operation had eyes on him. RP 757-58. Bickford did not know how many surveillance units had reported observations of defendant. RP 758. Bickford did not have specific information about where defendant had been seen. RP 758. Because it was not his responsibility to document what he heard, he had not done so. RP 760. Bickford did not document his purported conversations with other officers in his reports. RP 762. He did not document the identities of officers with whom he spoke. RP 762.

Bickford testified that officers would not necessarily document this information in reports. RP 759. Bickford also testified that he recalled "very generic details about surveillance units mentioning that they observed somebody talk to who they believed to be Mr. Zimmerman." RP 762. Bickford did not document any of this in his report because "[he] was not on the surveillance team." RP 762. Bickford did not recall the sources of the information as "it was not of particular interest at the time to document that or even make mental note of who may have mentioned that . . ." RP 762

The residence at 1908 South Yakima was referred to as the “trap house.” RP 501. It was selected by Detective Sergeant Rodriguez of the Washington State Patrol or another member of the Missing and Exploited Children Task Force. RP 501.

Agent Angel Acala from Homeland Security Investigations also participated in this sting operation on the surveillance team. RP 772. He was located at the corner of Martin Luther King [MLK] and 19th. RP 772. He recalled the defendant had a black Lincoln Navigator. RP 773. At some point, he learned that the vehicle might be in the emergency room parking lot at St Joseph Hospital. RP 775. From his vantage point, he could see the car moving slowly through the parking lot. RP 777. He drove toward MLK and then realized the car was no longer in the parking lot, but rather driving down the hill on 19th. RP 778. He saw the car turn right on Yakima which drove past the front of the trap house. RP 778-79. Acala had been informed that defendant might be leaving the area and so he radioed, “Looks like he’s leaving.” RP 779. Another undercover vehicle joined Acala. RP 779. That officer, Officer Poston, initiated a traffic stop. RP 780. Defendant pulled over at the first available stop, which was across I-5. RP 780-81. Acala was adamant that defendant’s vehicle was a black Navigator, solid in color until he identified it in photos which showed it to be gray with a black roof and trim. RP 804, 812, Defendant’s Exhibits 23, 24.

Acala was as close as 15’ to the car. RP 813.

When defendant stopped his car, Poston approached him from the driver’s side and Acala, gun drawn, contacted him from the passenger side. RP 809. Acala recalled that the position of his firearm was “down, down or maybe up.” RP 809.

Acala testified that 5-7 minutes elapsed from the time he learned from radio that defendant was in the area of the St Joseph Hospital Emergency Department parking lot and the time of the traffic stop. RP 817. Acala never saw defendant in that parking lot. RP 817.

In terms of directions to the “trap house” from Ezells chicken store, a person proceeding from that on 19th and taking the first right turn would be on MLK, the second right turn would be on “J” Street, the third right turn would be on “I” Street, the fourth right turn would be into an alley, and the fifth right turn would be onto the Yakima Avenue. RP 825-26, 1176.

There is no street parking in front of the house on Yakima Avenue. RP 592.

Bickford did not know who made decision to have defendant arrested on December 17, 2017, but thought he may have made it. RP 756. Acala heard on the radio words to the effect that he’s in the emergency parking lot and there’s a lot of foot traffic, he’s getting nervous and he wants to leave, *and that’s what made us believe he was going to leave the area.*” RP 826. Acala was instructed to pull him over. RP 827. Acala did not know why he was arresting defendant but assumed it would be “for going to the house.” RP 827-28.

WSP Det. Sgt Wood placed the time of arrest at 8:38 p.m., as that was the time he placed handcuffs on defendant. RP 858. Wood had followed defendant as he drove on 19th Avenue and then turned on Yakima Avenue. RP 867-868. Wood first saw defendant “right close to 8:30” and it was 8:38 when he handcuffed him across the freeway at Wright and Thompson. RP 869. After he was arrested, defendant was taken to the “trap house.” RP 872. Wood had some additional time with defendant at the “trap house.” RP 875-876.

Prior to being arrested, defendant had not committed any traffic violation. RP 864.

The distance from the “trap house” to the location where defendant was arrested is just a little over a mile. RP 1177.

Bickford wrote out a document for probable cause the truth of which he affirmed under penalty of perjury. RP 511. He swore, “Zimmerman was arrested without incident about a block away from the predetermined location.” RP 512. Bickford acknowledged that he was not personally present at the arrest but received that information from one of a myriad of people that were at the command post. RP 513. There were “upwards of 30” individuals at the command post that night. RP 513. These included multiple commanders in charge of different elements of the operation. RP 514. These operations included interviewing, surveillance, chatting with suspects, “and so on.” RP 514.

Defendant testified at trial. RP 1197. He acknowledged that he went to the “casual encounters” site on Craigslist in December 2015, a time when he was experiencing depression in his life. RP 1201-03. He knew it was an adult site and he checked the box that he was an adult when he used it. RP 1204.

It never really occurred to him that anyone would “cheat” and under it against the rules. RP 1204. Defendant was not looking for a sexual partner, rather he was looking for a someone to converse with and to role play. RP 1204. He acknowledged the content of his post, noting that he wrote: “Looking for young little girl. Man for woman.” RP 1205. He wanted to find “a younger lady like in her 20’s, who was little, not a BBW.” RP 1206. A BBW is a “big beautiful woman.” RP 1206. He wanted someone to role play. RP 1207. His ad included other terms related to role-playing he wanted to engage in, such as “obedient”, “looking to please” and “be pleased”, “kinky fun”. RP 1027-08. The ad said nothing about sexual intercourse. RP 1208.

When the individual who responded to his ad stated. "I's almost 14 but way older", he thought perhaps they wanted to role play in that fashion. RP 1212. He thought that on "this site you're supposed to be 18." RP 1213. He later requested a received a photo of a young woman who wore make-up and showed some exposed cleavage. RP 1214. She looked like somebody who could be around 20 years old. RP 1215. He received a second photo of the purported individual posing in a bedroom that was furnished with items that defendant believed were more fitting for an older person. RP 1216-17. Over the course of their conversations, defendant concluded that the person with whom he was chatting was "someone portraying somebody else." RP 1223.

The police officer portraying the child repeatedly invited defendant to her house. RP 1225, 1234,1239-40,1241, 1242, 1249

Defendant in fact never planned to meet her. RP 1243, 1244. When the police officer portraying the child asked how much the reward would be, defendant thought he might be talking to a prostitute. RP 1223.

When the police officer portraying the child repeatedly told defendant how sexually available she was. RP 1233 ("crazy hot right now"); 1234 ("I'm all kinds of hot now"); 1235 ("Cuz I'm hot"); 1263 ("You could come over ---you could come now if you wanna. I'm like totally hot right now."); 1265 (Oh my god, O wish you could come now. I'm totally hot. It's weird like, nerves and tingling and everything."); 1266 ("You've gotta promise me you won't do anything with my ass. That's just weird."); 1266-67 ("Isn't it weird that my pants are like wet, but I didn't pee? I've never felt like this before."). Defendant noted that "Kaylee" brought up sex "all the time" and "was always alluding to sexual things." RP 1480.

On December 15, at 5 p.m., defendant did not believe he was communicating with the individual that “Kaylee” was portraying herself to be. RP 1245.

On December 17, 2015, defendant left his home in Puyallup in the early evening to drive to the Applebee’s at Hosmer and I-5 to meet some friends to watch a college football game. RP 1250, 1639, 1640. He arrived there around 7 p.m. but no one turned up so he decided to go to Fred Meyers off 19th to look for a Christmas gift for his wife. RP 2150-41, 1640-41. The store did not have the item he wanted and so he drove on 19th towards downtown Tacoma. RP 1252, 1643-43. As he drove, he texted with the person with whom he had been chatting. RP 1252, 1643.

At 7:08 p.m., he left Applebee’s at 72nd and Hosmer. RP 1268-69. At 7:10. He looked up the chicken store on Google maps. RP 1269. He sent a text to “Kaylee” who offered to go to the gas station. RP 1270. She responded at 7:22 and gave him directions to her house. RP 1270, 1271. Then at 7:24, “Kaylee” said she would meet him at the chicken place. RP 127. At 7:33, he was up by St. Joe’s Hospital near 16th Street, parked out past the out patient facility. RP 1274, 1276. After a short period of time, he decided to drive to Frisko Freeze on Sixth Avenue to get a milk shake. RP 1276-77. Their milk shake machine was broken and so he ordered a pop, which he drank while sitting in his car there. RP 1277. At 7:45, “Kaylee” told him that she was getting into the shower. RP 1279. At 8:10, “Kaylee” gave him the address of her house, instructing him that he had to approach by the alley and could entry only through the back door after parking his car in the alley. RP 1281-82.

Defendant never went into the alley, never went anywhere near the back door, never stopped his car near the back entry way, and was never seen there. RP 1281. Defendant went to the gas station. RP 1647. Defendant never went to the chicken store. RP 1647. Defendant was down by St Joe’s Hospital all

of this time. RP 1282 At 8:31, he sent her a text, asking her to walk up to the emergency entrance of the hospital. RP 1282-83. “Kaylee” told him to come to the alley. RP 1283.

Defendant circled around the emergency parking lot one time, exited on 19th Street, drove down the hill to Yakima, turned right and headed to 38th Street to jump on I-5. RP 1657. However, before he reached I-5, he saw blue lights of the police car and so he crossed I-5 to Wright and Thompson where he pulled over and stopped. RP 1658. When that message was sent to him, it was 8:33:43 and he had left the area, and was on Yakima and Wright, on the other side of I-5. RP 1283.

Defendant’s phone contained also contained two photos of him with a newborn grandson as well as three-four photos of defendant with another grandson. RP 1286.

Defendant believed that from the content of “Kaylee’s” answers and language, she was an adult. RP 1343. He did not believe he was conversing with a minor. RP 1395. When he received a voice message from her on his phone, she sounded like a 40 or 50 year old woman. RP 1410. He did not know the identity of the person with whom he was chatting – he thought it could be anyone, a man or a woman, a prostitute, a 50 year old woman pretending to be 13. RP 1455.

During the course of their texts and communications, defendant never asked “Kaylee” to engage in sexual intercourse with him. RP 1752. He never asked if he could touch her intimate parts. RP 1753. He never asked her to touch his intimate parts. RP 1753. He never told her he was sexually aroused. RP 1753.

Defendant referred to the person with whom he was chatting as “Kaylee” only one time during the course of all their 360 exchanges. RP 1902.

Defendant in several statements to “Kaylee” said that he “could” come over at on designated days or “come out that way.” RP 1804, 1805, 1806. However, defendant never stated that he would go to her house at a certain time on a certain date. At most, he wanted to see her in public. RP 1814-15.

D. LAW AND ARGUMENT

1. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

The *Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution* guarantee a criminal defendant a meaningful opportunity to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This right, however, is not absolute. It may, “in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,” *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), including the exclusion of evidence considered irrelevant or otherwise inadmissible. *State v. Strizheus*, 163 Wn.App. 820, 830, 262 P.3d 100 (2011) (“Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence.”) *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (“[T]he scope of that right does not extend to the introduction of otherwise inadmissible evidence.”).

If the defendant seeks to admit relevant evidence, then the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720. The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.” *Id.* The court emphasized that for evidence of high probative value “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and *Const. art. 1, § 22.*” *Id.*

In this case, the trial court denied defendant his ability to present a defense when it prevented him for calling Det. Sgt. Rodriguez as a witness RP 1071-72, 1074-75. The court found that this witness did not have testimony that was material to the case and therefore granted the State's motion to prevent the defendant from presenting its case. *Id.* The trial court abused its discretion, applied the incorrect legal standard and the State failed to establish that its interest in excluding the evidence outweighed the defendant's need for the information sought. *Jones, supra.* This is so because Rodriguez was a supervisor of this "sting operation." RP 934. He had been on duty the night of Zimmerman's arrest and in fact swore out erroneous language used by prosecutors in their declaration for determination of probable cause that averring that he was arrested "about a block from the predetermined location." CP 2-3; RP 934. As a supervisor of the "sting operation", Rodriguez would have been able to testify to the many moving parts of the sting: some officers are tasked with communicating on-line messages with possible suspects (RP 865); some officers make phone calls to possible suspects (RP 865); other officers are radio operators (RP 865); arrest teams are available and ready at the trap house (RP 865); other officers gather intelligence and write search warrants (RP 865); certain officers are assigned to prepare for suspect interviews (RP 865); other officers are placed in the field to conduct surveillance on suspects. (RP 865). Rodriguez would have been able to testify regarding the deployment of the surveillance units in this case, a critical fact, since Zimmerman disputed how long he had been on the hilltop prior to his arrest and where he had been.

Bickford, the detective who played "Kaylee" "understood" that some units had observed Zimmerman prior to his arrest at various locations on the hilltop, including near Ezells chicken store. RP 546, 547, 760 762. The trial court, over defense objection, allowed Bickford to testify to his hearsay knowledge that someone from a surveillance unit had observed Zimmerman in the area of Ezells chicken store although he had no actual knowledge of the composition of the surveillance units. RP545-46. He

speculated that he “probably” did talk to somebody that was there but he had no idea who that might have been, RP 546-547. However, he did not know the identities of the individuals on the five surveillance units that were in the area that night. RP 762, 813. He did not know if anyone had attempted to get business security camera videos. RP 548. He knew that Rodriguez had selected the location of the “trap house” and was a supervisor of the sting. RP 501. Of course, the “sting operation” supervisor would have been able to answer questions about composition of the surveillance team, efforts to obtain business security videos, etc. Defendant was prevented from obtaining this highly relevant and probative evidence by motion of the State which was granted by the trial court contrary to fundamental constitutional principles and due process.

Zimmerman testified at trial that he had not been in the hilltop area very long before he left the area on December 17, 2015. He had arrived there after arranging to meet some friends at Hosmer and I-5 to watch a football game at Applebee’s. RP 2140-41, 1640-41. When they did not show up, he went to Fred Meyer on 19th near Cheney Stadium to look for a Christmas present for his wife. *Id.* He then went up to the hilltop as he had thought he might meet “Kaylee” in a public venue. She offered to meet him at the gas station but then at 7:22 p.m. gave him directions to her house. RP 1270-71. At 7:24, she said she would meet him at the chicken place. RP 1270. At 7:33, he was near St. Joseph Hospital by the outpatient facility near 16th street. RP 1274, 1276. After a short period of time, he drove to Frisko Freeze on Sixth Avenue near Multicare to get a milkshake. RP 1276-77. Their milkshake machine was broken and so he ordered a pop, which he drank while sitting in his car there. RP 1277, At 7:45, “Kaylee” told him she was getting into the shower. RO 1279. At 8:10, she gave him the address of her house, instructing him that he had to approach by the back alley and could enter only through the back door after parking his car in a specific spot in the alley. RP 1281-82.

Defendant never went into the alley, never went anywhere near the back door never stopped his car near the back entry and was never seen there. RP 1281. Defendant never went to the gas station or the chicken store. RP 1647.

When he returned to the hilltop, he drove through the parking lot one time at the emergency department at St. Joseph Hospital, exited on 19th Street, drove down South Yakima, turned right and headed to South 38th Street to jump onto 38th Street to get onto I-5. RP 1657. However, before he reached I-5, he saw blue lights of the police car and continued across I-5 to Wright and Thompson where he pulled over and stopped. RP 1658. When he reached a text message from “Kaylee” telling him to come to the alley, it was 8:33 and he was on Yakima and Wright. RP 12183/7.

Defense obviously wanted to call Rodriguez because he was a critical defense witness. He knew who the participants in the sting were and who the surveillance units were, where they were, whether there were reports of any sightings of defendant. The deputy prosecutor argued to the court that defense should not be allowed to call Rodriguez because they had not asked these questions in a brief pretrial interview with him, RP 951 Of course, there is no authority for this novel argument. It is an unfortunate system where the prosecutors control the defense access to pretrial interviews and then preclude pretrial contact between defendant and the witness.⁶

Further, although defense had properly served Rodriguez with a trial subpoena, he had not responded to defense. RP 942-43, 944-45. Instead, the deputy prosecutor had informed defense that the State did not intend to call Rodriguez in its case. RP 943. It seems unlikely that an experienced detective

⁶ Defendant had properly subpoenaed Det. Sgt. Rodriguez who never responded to defendant. Rather the deputy prosecutor informed defense that Rodriguez had some vacations planned and would be unavailable. RP ___. The trial court declined to find Det. Sgt. Rodriguez’ testimony relevant and also to assist defendant in securing his presence for trial.

sergeant with the Washington State Patrol would not know how to respond to a subpoena from the defense but would have the wherewithal to inform the deputy prosecutor to that he would be out of state and on vacation during the time defense wanted him to testify. RP 943. ABA Standards on Criminal Justice Sex 3-3.1(d) (3d ed. 1993) provides that the prosecutor should not discourage or obstruct communication between prospective witness and defense counsel.

Det. Sgt. Rodriguez's testimony was important because it would have corroborated Zimmerman's testimony that had he in fact been up on the hilltop during the period when the State claimed he was and had sting officers observed him, then there would have been some police witnesses who could have corroborated this.

Defendant was not allowed to explain to the jury how organized and well-run this sting was and how there were at least five surveillance units in the area where he supposedly was.

The trial court also denied defendant his constitutional right to present a defense when it refused to allow him to call Michael Comte, a highly regarded licensed sexual offender treatment provider, to respond to Det. Bickford's unfounded, initially unresponsive and potentially extremely damaging testimony that he "knew" that Zimmerman believed he was communicating with a minor in his emails, texts, and communications with "Kaylee."

(2) testimony from Michael Comte;

Richland Police Department Det. Bickford testified that he could discern Zimmerman's belief that he was talking to a minor based solely on the content of his emails and texts.

Q: It's fair to say, isn't it, that you don't know if Ken thought that this Kaylee was someone who was role playing?

A: The dialogue here is consistent with other people in my experience that did not believe there was a role play involved here.

Q: Move to the strike the answer as non-responsive.

The Court: Sustained. . . . [VRP 10/26/17 – Excerpt of cross-examination of Detective Jeff Bickford, page 10] Attachment B

.
Q: *Do you know whether or not Ken was trying to determine if Kaylee was - - if the person who was using the moniker Kaylee was someone who was just role playing as a teenage girl?*

DPA Neeb: Object to questions that call for what the defendant was thinking.

The Court: *Overruled. The question is geared towards whether the detective has - - essentially, whether the detective has knowledge as to what he was thinking.*

A: It is my belief, based upon the text messages, that Mr. Zimmerman believed he was talking to a child. I would be happy to read those text messages that gave me that - -

Q: Do you know what he was thinking?

A: I'm sorry?

DPA Neeb: Judge, I object to Ms. Corey interrupting Detective Bickford and I ask that he be allowed to finish.

The Court: Detective Bickford, you may finish your answer. The objection is sustained.

A: If you're asking me what my belief is, I would be happy to read the text messages that made me believe he was not role-playing and that he was indeed believing he was talking to with a child. [VRP 10/26/17 – Excerpt of cross-examination of Detective Jeff Bickford, pages 11-12] Attachment B.

.
Q: *And do you believe that you have the expertise to distinguish between someone who is role playing and someone who is not role paying, "yes" or "no"?*

A: I don't believe that question is accurately answered in a "yes" or "no."

[VRP 10/26/17 – Excerpt of cross-examination of Detective Jeff Bickford, page 13] Attachment B.

His answer did not respond to the question whether he knew if Ken was trying to determine if Kaylee – if the person who was using the moniker Kaylee was someone who was just role playing as a teen age girl. This court overruled the prosecutor's objection to the question and the witness proceeded to give an unresponsive answer. [VRP 10/26/17 11-12]. Attachment B. Instead of answering responsively, "yes", "no", "I don't know", Bickford evaded a direct answer and wanted to leap to what he perceived to be incriminating text messages. [VRP 10/26/17 11]. Attachment B. When the answer was given, counsel asked him some foundational questions regarding the basis for his opinion. [VRP 10/26/17 12] Attachment

B. Although acknowledging he had never qualified as an expert on this subject in a court of law, he professed himself “as having worked in this field for a number of years and I’ve investigated and came [sic] in contact with many people engaged in such activity.” [VRP 10/26/17 13]. Attachment B.

The court permitted Detective Bickford’s answer to stand, that is, that he could determine and had determined Zimmerman’s mind set based on reading the text messages and that it was not consistent with role playing.

“To the extent that the Court overruled an objection about whether the defendant’s actions were consistent with a certain thought process, I – my memory is I had sustained that objection. To the extent that my memory is incorrect, then, I should have sustained that.” [VRP 10/25/17 19] Attachment B.

The court then ruled that there would be no further questions to Bickford about the defendant’s thought process. [VRP 10/25/17 19-20]. Attachment B.

Defendant moved to strike the testimony or, alternatively, defendant notified the court and the prosecutor that a psychologist would be added to the defense witness list to rebut Bickford’s testimony. [VRP 10/25/17 20]. Attachment B. The court denied the motion and revised its holding to state that the answer was responsive to the question. *Id.*

Defense moved to strike Bickford’s answer/opinion [denied] and then endorsed as an expert Michael Comte, a highly credentialed and State certified treatment expert in psychosexual examinations. [VRP 10/26/17 20] Attachment B. Comte, who is familiar with this case already and examined Zimmerman more than a year ago, would testify, without referring to this case, that no expert would render such an opinion based on the limited data available to Bickford.

This court ultimately excluded Comte and instructed the jury to disregard Bickford’s opinion testimony, without identifying what opinion he had given that should be disregarded.

This instruction was not satisfactory because it failed to inform the jury that no the available data failed to provide a sufficient basis for the formation of any such opinion by anyone.

Comte would have testified that it is well-nigh impossible to discern the precise thoughts of another individual at any point in time and that there are no standard measures in the field for doing that.

The resulting prejudice to Zimmerman was extreme because that the prosecutor then argued to the jury in closing that they could use only Zimmerman's words in the emails and texts to determine his beliefs – that is, whether he was talking to a minor, whether he was interested in having sex with her. That is, that the jury could and should disregard his testimony from the stand. The prosecutor encouraged the jury to use the "Bickford test" to come up with the same opinion he did. Comte's testimony would have assisted the jury in competently evaluating the evidence and thus helped ensure that Zimmerman received his constitutional rights to due process and fundamental fairness.

Third, the trial court also denied defendant his right to present a defense when it denied defense access to the "sting operation" training manuals. On October 24, 2017, defense asked for a copy of the ICAC [Internet Crimes Against Children] Manual. The State's only objection to releasing the manual was that it wanted the court to sign an order authorizing the release. Bickford interview, page 9. Attachment C. However, the court repeatedly asked defense for legal authority for the release and the defense continued to provide it. The State never argued against release.

After asking for additional authority and receiving additional authority to federal and state cases construing defendant's constitutional right to present a defense, the court ultimately declined to rule on defendant's constitutional legal authorities. Rather the court sought safe harbor in ruling that defense's request was untimely and should have been as part of discovery. Construing defendant's constitutional right to present a defense, the court ultimately declined to rule on defendant's constitutional legal

authorities. Rather the court sought safe harbor in ruling that defense's request was untimely and should have been as part of discovery.

Defense customarily received training manuals in DUI cases and other cases where law enforcement has training manuals that govern their actions. When they

2. THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

To prevail on a prosecutorial misconduct claim, a defendant must show that the prosecutor's conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175 Wn.2d at 704. A defendant who failed to object at trial must also establish "that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Id.*

However, in *State v. Lindsay*, 180 Wn.2d 423, 441, 326 P.3d 125 (2014), Washington Supreme Court held that defendant's motion for mistrial made immediately after the State concluded its rebuttal was sufficient to preserve objections to the State's conduct in closings. The court's ruling derived from *United States v. Prantil*, 764 F.2d 548, 555 n. 4 (1985), wherein the court recognized that a defense counsel entering "objections to the language and tenor of the prosecutor's closing remarks by way of a mistrial motion after the government finished its summation" is "an acceptable mechanism by which to preserve challenges to prosecutorial conduct in a closing argument in lieu of repeated interruptions to the closing arguments."

(a) *The deputy prosecutor committed misconduct when he personally vouched for the credibility of witnesses, expressed his opinion of the guilt of the defendant, and spoke in the first person throughout the argument, thus presenting the entire argument as his personal views.*

It is well-settled that a prosecutor enjoys “wide latitude to argue reasonable inferences from the evidence” but “must seek convictions based only on probative evidence and sound reason.”

Glasmann, 175 Wn.2d at 703-04, quoting *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). A prosecutor, furthermore, “should not use arguments calculated to inflame the passions or prejudices of the jury.” *Glasmann*, 175 Wn.2d at 704 (quoting Am. Bar Ass'n, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)).

Further, a prosecutor who “throws the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused deprives the defendant of the constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

A prosecutor may not vouch for the credibility of the State’s witnesses or the opine on the guilt of the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). A prosecutor likewise may not state his personal opinion regarding the defendant’s guilt. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 561-61, 397 P.3d 90 (2017).

In this case, defendant made numerous motions in limine before closing argument to preclude the prosecutor from making impermissible arguments. Defendant did so because the deputy prosecutor had been reversed many times in the appellate courts⁷ and defendant wanted to prevent prosecutorial misconduct during closings.

⁷ Deputy prosecuting attorney John Martin Neeb represented the State of Washington in the following cases that were reversed for misconduct in closing argument. E.g., *State v. Gregory*, 158 Wn.2d 759, 866, 147 P.3d 1201 (2006); *State v. Walker*, 2013 Wash. App. LEXIS 373.

The court granted many of defendant's motions on November 16, 2017.

However, the experienced deputy prosecutor⁸ nevertheless found a way to violate no. ___ from the beginning of closing argument:

The second warning is that I'm going to use the word "I" repeatedly, and I speak for the State of Washington. Nothing you've heard so far and nothing you're going to hear for the rest of this case is my personal opinion, and you should not expect it to be. I represent the State of Washington. It's just easier to speak in the first person when you're talking than speaking in the third person.

The next thing I want to tell you in advance is, *I will not misstate the evidence that you heard in this case. You've all been taking notes. Your collective decision of what you heard is what the evidence is, but I will not misrepresent what you heard from this witness stand and what you have seen in the exhibits. This will not happen, and I will not misstate the law as it applies to these facts during closing argument, and I would ask you in advance to hold both sides to that standard.* (emphasis added). RP 2026-27.)

The deputy prosecutor gave this caveat but one time and then proceeded to merits of the case, which he discussed as his own opinions and beliefs. As the deputy prosecutor noted during defense counsel's motion for mistrial immediately after closings, the trial court overruled 14 of her 15 objections. RP 2110. Thus, as a matter of tactics trial counsel elected to make the motion for mistrial rather than make every meritorious objection. The trial court's pattern of overrule objections had not changed much from the trial.

Thus, the deputy prosecutor began giving his personal opinions minutes into the State's closing argument and never stopped: "I'm going to suggest to you now that the evidence show that the defendant is guilty . . ." RP 2028. "I'm going to suggest to you that there are some conversations can have between members of the same sex . . ." RP 2036. ". . .if you guys believe he went to Frisko

⁸ John Martin Neeb was admitted to practice in Washington in 1991 and has tried many criminal cases, including death penalty cases and other serious matters. Although many of closing arguments have been the subject of appellate opinions, the use of the word "I" rather than "the State" appears to be a new argument.

Freeze for a chocolate shake, you can believe it; *I can't stop you from doing that . . .*”RP 2043 (emphasis added). “He doesn’t know what BDSM means. He just put it in his advertisement response, he didn’t know what it meant. Do you buy that? *I can't stop you.*” RP 2046-47 (emphasis added). In rebuttal, the prosecutor opined, “*I want you to believe Mr. Zimmerman, I want you to believe Mr. Zimmerman, the Mr. Zimmerman who shows up in Exhibits 1, 2, and 3. That’s the guy who I want you to believe* because everything he said wasn’t motivated by his current desire to pull something over on the twelve of you who are going to decide what he did.” RP 2097-98 (emphasis added). “*I want you to believe Mr. Zimmerman who said that at 7:22, 7:33 . . .*” RP 2100 (emphasis added). The deputy prosecutor concluded his rebuttal with a personal plea for conviction, “*I would ask you to find this defendant guilty . . .*” RP 2104.

- b. *The deputy prosecutor committed misconduct by repeatedly instructing the law on a defendant’s inability to abandon an attempt when the trial court had given no such instruction.*

The trial court has the duty to provide the jury with instructions that accurately state the law, *State v. Ng*, 110 Wn.2d 32, 42-44, 750 P.2d 632 (1988). Jury instructions are given to the jury by the trial court and are not provided sua sponte by the parties.

In this case, the deputy prosecutor also violated the well-settled rule that the trial court instructs the jury on the applicable law. The attorneys are not allowed to orally add instructions during their arguments. “In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason..” *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). As the Washington courts have stated many times, “[T]he prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds.” *Id.* The arguments described above were

clearly improper based on well-established case law. The State has a responsibility to put a stop to such conduct and must demand careful and dignified conduct from its representatives in court.” *State v. Neidigh*, 78 Wn.App. 71, 79, 895 P.2d 423 (1995).

In this case, the trial court did not give any instruction stating that a criminal defendant could not abandon an attempt because, of course, a defendant can do so. In order to enhance its chance of a conviction on the thin facts of this case, the deputy prosecutor sua sponte elected to augment the trial court’s instructions by telling the jury that Mr. Zimmerman had already completed the crime of attempted rape of a child in the second degree when he decided not to go to “Kaylee’s” house but rather to go home because the law does not allow a person to abandon an attempt. RP 20144:

Now, here’s the other thing you have to know. A substantial step. Crime of attempt is this: intent to commit the crime, substantial step. The law does not allow do-overs. *The law does not allow, I changed my mind at the last minute if you’ve already taken the substantial step. You’ve completed the crime of attempt*, and there’s no such thing of washing your hands afterwards and saying it never happened. This defendant said I – well, kinda said, I changed my mind. I finally gave up on trying to meet up with her, and I just drove home and decided I shouldn’t be there. Too bad, so sad. He’s already committed the crime of Attempt Rape Child 2 when he drives.

Of course, that argument begs the question because it assumes that defendant had already committed the crime of attempted rape of a child in the second degree. The State’s argument simply wanted the jury to believe that because defendant was in the general neighborhood of “Kaylee’s” house and had texted her, he had committed the crime already. Of course, that is not the law and the prosecutor blurred over the both the law and the facts when he made that argument to the jury. His argument was buttressed by his own egregious error of providing an

additional jury instruction. The government is not allowed to provide additional instructions to the jury. Defense counsel properly preserved this issue in the post-trial motion for mistrial.

c. The deputy prosecutor committed misconduct by repeatedly misarguing “reasonable doubt.”

The deputy prosecutor, having been previously chastised by the appellate courts for making the “fill in the blank” reasonable doubt argument in *State v. Walker*, made a variation on that argument here. The deputy prosecutor repeatedly argued that reasonable doubt is one for which a reason exists . . . so beyond a reasonable doubt is beyond a doubt which has a reason. RP 2052. After the court sustained defendant’s objection to that argument, the prosecutor continued, “A reasonable doubt is one for which a reason exists. A reasonable doubt, reason exists. I’m not telling you that you have to say here’s my reason to doubt. . . you have to keep in mind that reasonable doubt is one is one for which a reason exists. . . . the instruction also tells you that a reasonable doubt is one for which a reason exists.” RP 2053.

The deputy prosecutor’s argument trivialized the State’s burden of proof by telling that the jury that if they could not identify a reason to doubt the State’s evidence, they were convinced beyond a reasonable doubt. However, the State’s burden of proof is the highest burden of proof in the legal system. The mere fact that a jury may not be able to articulate specific reasons to doubt the evidence does not mean that the State has met the burden. The State’s case may simply be too weak. The jury might want more confident, more compelling witnesses. The prosecutor trivialized his duty.

Similarly, the prosecutor committed misconduct when he discussed the abiding belief concept. He argued that if a juror believed he did the right thing, he had an abiding belief in the

truth of the charge. A belief that one has done the right thing is different from a belief that the State has proven the charge beyond a reasonable doubt. This argument diminishes the State's burden to prove all of the elements of every offense charged. Thus, this case is similar to *State v. McCreven*, 170 Wn.App. 444, 473, 284 P.3d 793 (2012), *rev. denied*, 176 Wn.2d 1015 (2013), where the court held that argument that jurors "must "determine if [they] have an abiding belief in the truth of the charge . . . truth in what each of these defendants did" was improper."

The term "abiding" from "abiding belief" was defined by the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d (1994). The Court determined that "[t]he word "abiding" here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." *Id.* As a result, the term "abiding belief" encouraged jurors "to reach a subjective state of near certitude of the guilt of the accused." *511 U.S. at 14-15.*

Because the prosecutor's argument trivialized the burden of proof and denied defendant his constitutional right to have the State prove the charges against him beyond a reasonable doubt, this court should reverse his convictions.

d. The deputy prosecutor committed misconduct by misarguing the elements of communication with a minor for immoral purposes.

The deputy prosecutor began his argument on the State's proof of the crime of communication with a minor for immoral purposes [CMIP] by stating, "you don't necessarily have find a specific nasty comment on the 16th for that conversation to be for an immoral purpose.... You can look at the totality of the communication - - - You can look at the totality of the evidence to see whether or not the communication of the 16th and the 17th continued to be for immoral purposes." RP 2029-30. The deputy prosecutor acknowledged that although our society

rarely criminalizes speech, in the crime of communicating with a minor for immoral purposes the law “says you can’t even talk about some things with people without subjecting yourself to criminal liability.” RP 2030.

The deputy prosecutor emphasized to the jury that words “immoral purpose” have not been defined for them in any instruction. RP 2035⁹. The State obviously wanted the court to leave the term undefined for the factfinder because it lessened the State’s burden of proof. In the absence of any jury instruction, the deputy prosecutor argued to the jury that they could consider what kinds of communications were communications for immoral purposes. The deputy prosecutor’s arguments included:

“I’d suggest to you that there are some conversations that individuals can have between members of the same sex, if you were adults; conversation, other, that you can have in mixed company of adults, conversation that you can have a mixed company with children there, and then conversations that you can only have in mixed company with you children there. Because as parents, you will decide what your kids can and cannot hear when they are too young to hear everything. . . RP 2036.

The point is that what the defendant did was he engaged “Kaylee” in a conversation about sexual activity. He used words cock, pussy, dildo, vibrator. He used oral – he said – used sex, he used all kinds of stuff that when you’re a parent, if another person talks to your 11 year old child about that, your 13 year old child about that, there is going to be a problem, and that’s what it means to communicate with someone for an immoral purpose. There are some things you can tell your kinds that no one else can. There are some things that you’ve heard -- RP 2037

The deputy prosecutor argued that because defendant had not defended by saying that his communication with “Kaylee” were appropriate and moral, but only that he did not think she was a minor, he had conceded that the communications were of a sexual nature. RP 2041. Of course, that was not true. Defendant testified that he wanted to “role play”. The defendant’s ad included

⁹ The State proposed no instruction. The trial court refused to give defendant’s instruction, proposed 15-A, and argued in assignment of error no. 3.

the phrase “m4w” which means “man for woman”. Exhibit 1. Defendant made it clear that he was seeking an adult. “Kaylee” introduced the subject of “dildo” into the conversation and also invited the use of the word “pussy” when she asked defendant why she was wet between her legs when she had not peed there. These are but two examples of statements elicited by Det. Bickford as he attempted to get sexual comments from defendant.

The State acknowledges that “Kaylee” said she “really wanted to have sex.” RP 2042. The defendant “never disavowed her of her belief.” RP 2042.

Without arguing specifics, the deputy prosecutors relied on base assertions,

“The 15th, the comments that he made; the 16th, the comments that he made, and the 17th, the comments that he made all explicitly sexual in nature.” RP 2047.

Because the deputy prosecutor encouraged the jury to determine its own standards for what communications violated the CMIP statute, the deputy prosecutor led the jury to believe that it was permissible to convict the defendant of CMIP if they believed that the content of the emails was simply not an appropriate conversation for a nonparent to have with someone else’s child¹⁰. This is not the evil that the CMIP statute seeks to criminalize.

The State’s argument was contrary to law.

In *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993), the court held that the statute prohibiting communication with minor for immoral purposes did not only contemplate

¹⁰ The trial court did not think it was lawful for a 57-year-old man to ask a 13-year-old-girl, “have you ever ---” or more accurately a jury could determine it’s not lawful, and the Court can determine it’s not First Amendment protected speech under the facts of this case for a 57-year-old man to ask a 13-year-old girl, for example, ‘Have you ever put your moth on a cock’ or ‘That’s because our pussy is excited’, ‘do you shave your vagina?’ [note: defendant asked her whether she shaved without naming any body parts]- RP 1980. The court declined to find that this mere speech was forbidden by the statute. RP 1981.

participation by minors in sexual acts for a fee, on appearance on film or in live performance while engaged in sexually explicit conduct, but also prohibited communication with children for predatory purpose of promoting exposure to and involvement in sexual misconduct. These convictions stem from events occurring on March 6, 1990, when McNallie drove into a Bellingham apartment complex and accosted three young girls, C.L.1, age 11, C.L.2, age 10, and E.A., age 11. The girls testified that as they were returning home from school, McNallie drove past them into the complex then turned his truck around and stopped, facing the exit. When the girls approached, McNallie asked them if there was anyone in the area who gave "hand jobs". All three girls testified that McNallie suggested people could earn money for performing such an act. There was also testimony that McNallie handled his penis in view of at least two of the girls. This conduct was sufficient to satisfy the elements of the crime.

In *State v. Wissing*, 66 Wn.App. 745, 833 P.2d 424 (1992), the court rejected the argument that the statute prohibits communication with a minor for purposes of any sexual misconduct, even if that conduct is not itself illegal. The court held that the defendant's request that a 12-year-old boy expose his pubic hair did not come within the definition of the statute because it did not constitute a live performance.

The prosecutor misargued the definition of communications with a minor, consistent with the flawed instruction, led the jury to believe that it could convict defendant if any of the statements were in any way offensive.

2. THE TRIAL COURT ERRED WHEN IN FAILING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION ON ENTRAPMENT FOR COUNTS 1-4, COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.

The right to a fair trial includes the right to present a defense. The Sixth and Fourteenth Amendments to the United States Constitution and article I, sec. 21 of the Wash. Const. guarantee the right to trial by jury and to defend against the State's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 35 L.Ed.2R 297 (1973); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

A trial court must instruct on a party's theory if the law and evidence support it; failing to do so is reversible error. *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956, *rev. denied*, 142 Wn.2d 1004, 11 P.3d 825 (2000). In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility. *May*, 100 Wn.App. at 482. If there are justifiable differences upon which reasonable minds might reach different conclusions that would sustain a verdict, then the question is for the jury, not for the court. *Mayer v. Clark*, 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

In Washington, the defense of entrapment is defined by statute:

- (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 that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

Zimmerman need only have presented some evidence to support an instruction on the affirmative defense. *State v. Galisia*, 833, 836, 822 P.2d 303, 305 (1992), *abrogated by State v. Trujillo*, 75 Wn.App. 913, 883 P.2d 329 (1994). In determining whether the evidence supports giving the instruction, court should consider the defendant's testimony and the inferences that can be drawn from it. *State v. Morgan*, 9 Wn.App. 757, 759-60, 515 P.2d 829, *rev. denied*, 83 Wn.2d 1004 (1973). Failure to give an instruction is reversible error if there was evidence to support the defense. *State v. Ladiges*, 66 Wn.2d 273, 276-77, 401 P.2d 977 (1965).

Contrary to what the court and the State persistently contended, an entrapment defense does not require the defendant to either admit the crime itself or all elements of a crime before being entitled to the instruction. It is enough that a defendant admits acts which, if proved, would constitute the crime, *Galisia*, 63 Wn.App. at 837. Zimmerman did that in his testimony.

The trial court erred in two ways. First he erred in determining there were not "some" facts to support entrapment. The police here not investigating on-going criminal activity. They were seeking out individuals and engaging them in conversations while police lied about who they were. Police assumed the personae of a young teen called "Kaylee." and made many sexual overtures to Zimmerman, including telling him she was "really hot", "wet down there and not because she had peed on herself", "so excited", "not a slut", "wanted him now." Det. Bickford, who played "Kaylee", candidly explained that it was his job to put out the bait and reel in the suspects. That sounds like entrapment.

There was sufficient evidence to put this issue to the jury. Zimmerman's conviction must be reversed.

3. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE DEFENDANT'S PROPOSED INSTRUCTION NO. 15-A, THE DEFINITION OF "IMMORAL PURPOSES."

Defendant's proposed jury instruction 15-A¹¹ stated: "Immoral purposes means unlawful sexual conduct." This instruction was based on WPIC 47.05¹². Defendant proposed this instruction because nearly all of the communication in this case was about general conversation about "Kaylee", her moving to Tacoma, her family, sex, sexual experience, and whether/when/how she and defendant might meet up. Exhibits 1, 2, 3.

The trial court declined to give the instruction because it did not cover situations such as those in the instant case which the trial court found distasteful and "unlawful." For example, the trial court stated, "I don't think it's lawful for a 57-year-old man to ask a 13-year-old-girl, 'have you ever ---'" *or more accurately a jury could determine its not lawful*, and the Court can determine it's not First Amendment protected Speech under the facts of this case for a 57-year-old man to ask a 13-year-old girl, for example, 'have you ever put your mouth on a cock' or 'that's because your pussy is excited', 'do you shave your vagina'". RP 1980. The court agreed that the caselaw appears to discuss cases where defendants propose acts that are specifically unlawful rather than acts that would be lawful if performed. *Id.* The court did not believe that lewd statements should be treated differently than, for example, sending pornography to a seven-year-old. RP 1981.

The court, when questioned, stated that it could envision situations, such as educational settings, where the questions in the preceding paragraph would be protected speech and thus lawful. RP 1982.

¹¹ There is no question but that defendant submitted a packet of jury instructions to the court and the superior court clerk. They are discussed at length on the record. RP 1965-1998.

¹² A person commits the crime of communication with a minor for immoral purposes when he or she communicates with a minor or someone the person believes to be a minor for immoral purposes of a sexual nature.

Defendant was concerned that without his proposed instruction, the jury would have no guidance as to what statements met the definition of communication with a minor for immoral purposes and therefore criminal conduct versus protected speech. *Id.* After all, we live in a nation where every school child likely has heard the President discuss the ease with which he grabs pussy and knows that he refers not to catching kittens. It is so confusing. Further, when “Kaylee” asked questions such as “Why am I wet between my legs, I didn’t pee and I’m all excited”, why is it illegal to say, “That’s because your pussy is excited? He could have said, well you know, you’re sexually aroused. Would that have been illegal?” RP 1282-83. The court did not answer that question.

The difficulty with failing to instruct the jury on “immoral purposes” meant that the defendant was not convicted of any defined crime. Rather the jury was free to decide what the law was and to apply their own standards as to whether what was said was for “immoral purposes.” It would be contrary to the law to allow the jury to criminalize their own morality, which is what the trial court apparently believed would be appropriate.

In Washington the State is required to provide notice to criminal defendant of the charges against them and the elements of the charges. Such formal notice to the accused is required to satisfy the *Sixth Amendment* and *art.I, sec. 22. State v. Clark*, 129 Wn.2d 805, 811, 920 P.2d 187 (1996).

The trial court committed reversible error by failing to give defendant’s proposed instruction 15-A.

4. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE DEFENDANT’S PROPOSED JURY INSTRUCTIONS DEFINING ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE.

In *State v. Wilson*, 158 Wn.App.305, 242 P.3d 19 (2010), the court held the essential elements of attempted rape of a child in the second degree are (1) the intent to have sexual intercourse and (2) the

taking of a substantial step toward the commission of that crime. 158 Wn.App. at 316. The court stated, “[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse”, citing *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

In this case, defendant proposed instructions incorporating the language proposed by the caselaw. Defendant excepted to the court’s failure to give these instructions. RP 1941, 1966.

In a more recent case, also named *State v. Wilson*, 1 Wn.App.2d 73, 404 P.3d 76 (2017), the court reversed defendant’s conviction for attempted rape of a child in the first degree and rape of a child in the first degree because the jury was not properly instructed on the elements of attempt. 1 Wn.App. 76.

The court noted that failure to instruct the jury on every element of the crime charged resulted in constitutional error. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1994). Due process requires that the jury must be informed of all elements of the offense and instructed that each element of the offense must be established by proof beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1992). The failure to instruct the jury that intent is an element of attempted rape is an error of constitutional magnitude. *Aumick*, 126 Wn.2d at 430; *State v. Jackson*, 62 Wn.App. 53, 59, 8183 P.2d 156 (1991). The *Wilson* court cited *State v. Stewart*:

Although it is not necessary to give an instruction defining an element whose meaning is one of common understanding, we cannot say that the average juror knows as a matter of common knowledge that “attempt” contains the two separate elements. The court’s failure to set out these elements was an error of constitutional magnitude.

35 Wn.App. 552, 555, 667 P.2d 1139 (1983) (citations omitted). In *Wilson*, the State conceded the instructional error, the court agreed and reversed defendant’s convictions.

The *Wilson* court correctly noted that attempt consists of two elements: (1) intent and (2) a substantial step. RCW 9A.28.020(1). That court found the instructions constitutionally deficient because although there was an instruction defining “substantial step”, no instruction connected that concept to the offense of rape of a child. 1 Wn.App. at 80.

In this case, the trial court’s failure to properly instruct the jury on the intent required to commit the crime of attempted rape of a child in the second degree was similarly flawed. The jury did not know that the State had to prove beyond a reasonable doubt that the defendant intended to commit the crime of rape of a child in the second degree. Rather, the State proposed, and the trial court gave an instruction that referred to, “the crime.” The jury was free to speculate on what crime that might be and was not required to be unanimous on it.

5. THE TRIAL COURT’S JURY INSTRUCTIONS MISSTATED THE LAW AND LOWERED THE STATE’S BURDEN OF PROOF.

In every criminal prosecution, due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *State v. Winship*, 397 U.S. 358, 364 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013). When there is insufficient evidence to sustain a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of second degree child rape “when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the

perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.076(1). “Sexual intercourse” is defined as (a) has its ordinary meaning and occurs upon any penetration, however slight, and (b) also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and (c) also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.”

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). While the underlying crime of child rape requires no proof of intent, there is an intent element in attempted child rape. *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). “when coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.” *Id.*; see also, *State v. Johnson*, 173 Wn.2d 895, 908, 270 P.3d 591 (2012) (noting that defendant must intend to have sexual intercourse with a child).

Thus, the elements of attempted second degree child rape are: (1) with intent to have sexual intercourse, (2) the accused took a substantial step towards having sexual intercourse with a child over the age of 12 and under the age of 14/ the substantial step must be an overt act that convincingly demonstrates “a firm purpose to commit a crime.” *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978) (quoting *State v. Woods*, 357 N.E. 2d 1059, 48 Ohio 127, 132 (1976)). The conduct must be “strongly corroborative of the actor’s purpose.” *Id.* Mere preparation to commit is not sufficient. *State v. Jackson*, 62 Wn.App. 53, 56, 813 P.2d 156 (1991).

The failure to instruct the jury that intent is an element of attempted rape is an error of constitutional magnitude. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). In cases where intent is not so specific as in attempted child rape, it is not necessary to give an instruction defining an element whose meaning is one of common understanding.

6. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THE CRIMES OF ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE AND COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.

In every criminal prosecution, due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *State v. Winship*, 397 U.S. 358, 364 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013). When there is insufficient evidence to sustain a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). A person is guilty of second-degree child rape “when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.076(1). “Sexual intercourse” is defined as (a) has its ordinary meaning and occurs upon any penetration, however slight, and (b) also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and (c) also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.”

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). While the underlying crime of child rape requires no proof of intent, there is an intent element in attempted child rape. *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). “when coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.” *Id.*; see also, *State v. Johnson*, 173 Wn.2d 895, 908, 270 P.3d 591 (2012) (noting that defendant must intend to have sexual intercourse with a child).

Thus, the elements of attempted second degree child rape are: (1) with intent to have sexual intercourse, (2) the accused took a substantial step towards having sexual intercourse with a child over the age of 12 and under the age of 14/ the substantial step must be an overt act that convincingly demonstrates “a firm purpose to commit a crime.” *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978) (quoting *State v. Woods*, 357 N.E. 2d 1059, 48 Ohio 127, 132 (1976)). The conduct must be “strongly corroborative of the actor’s purpose.” *Id.* Mere preparation to commit is not sufficient. *State v. Jackson*, 62 Wn.App. 53, 56, 813 P.2d 156 (1991).

The failure to instruct the jury that intent is an element of attempted rape is an error of constitutional magnitude. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). In cases where intent is not so specific as in attempted child rape, it is not necessary to give an instruction defining an element whose meaning is one of common understanding.

In *State v. Wilson*, 1 Wn.App 2d. 73, 80, 404 P.3d 76 (2018), the State conceded and the Court of Appeals – Division One agreed that the trial court’s failure to instruct the jury that intent was an element of attempted rape was an error of constitutional magnitude requiring reversal. *Aumick*, 126 Wn.2d at 430;

see also State v. Jackson, 62 Wn. App. 53, 59, 813 P.2d 156 (1991). As THE COURT we held in *State v. Stewart*:

Although it is not necessary to give an instruction defining an element whose meaning is one of common understanding, we cannot say that the average juror knows as a matter of common knowledge that “attempt” contains the two separate elements. The court's failure to set out these elements was an error of constitutional magnitude.

35 Wn. App. 552, 555, 667 P.2d 1139 (1983) (citation omitted).

Accordingly, the State concedes, and we agree, that the instructional error requires reversal of Wilson's attempted rape conviction.

In *State v. Jackson*, 62 Wn.App 57, the court held that there was insufficient evidence to sustain defendant's conviction for attempted second rape of Z by forcible compulsion. Jackson commanded Z to go into her mother's bedroom, followed her into her into the room, approached her, and then ordered her to lift her skirt. *Id.* at 58.

In contrast, the appellate court affirmed a defendant's conviction for attempted child rape in a “net nanny” case on different facts. In *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), Donald Townsend communicated via e-mail and instant messenger with a person he believed to be a thirteen-year-old girl. Townsend told the teenager he desired sex with her, and the two planned to encounter at a hotel. When Townsend knocked at the hotel room and asked for the girl, a detective arrested him. This court held that the defendant took a substantial step because his actions indicated he intended to have sexual intercourse with the child.

Likewise, in *State v. Wilson*, 158 Wn.App. 305, 308, 242 P.3d 19 (2010), an undercover detective posed as a mother and posted an ad on Craigslist offering sex with her and her daughter. Rodney Wilson

responded, exchanged photos, and agreed to oral sex with the thirteen-year-old daughter in exchange for \$300. On the day scheduled for the meeting, as agreed, Wilson drove to Dick's Drive-in near the child's house. He waited in his car for approximately thirty minutes before being arrested. On appeal, Wilson argued that insufficient evidence supported his conviction of attempted rape of a child in the second degree. He asserted that the evidence showed mere preparation, not a substantial step, since he only drove to a public location and sat in his vehicle. This court disagreed and found Wilson took a substantial step toward commission of the crime when he exchanged photos with the fictitious mother, obtained the mother's address, and drove to the designated location with money he agreed to pay for sex.

The instant case differs markedly from both Townsend and Wilson [158 Wn.App. 305] because those defendants had planned encounters to meet their presumed victims for sex acts at definite times and locations. They went to those locations. Defendant Zimmerman did not have any agreement to meet "Kaylee" anywhere at any time for any purpose. They dithered and talked about meeting but nothing was agreed upon. Zimmerman left the area and the police knew it. Police radioed, "he's leaving" and knew he did not intend to have any contact with "Kaylee." They decided to arrest him anyway and then lie in their statement of probable cause that they had arrested him a couple of blocks from her apartment when in fact he was arrested more than a mile away on the other side on Interstate 5. The Pierce County Prosecutor's Office adopted that lie in its declaration for determination of probable cause undoubtedly to persuade the court that the State had a case of attempted rape of child in the second degree against him.

Once a substantial step has been taken, and the crime of attempt is complete, the crime cannot be abandoned. *Workman*, 90 Wn.2d at 450.

The State argued that defendant committed a substantial step because he got his car keys and drove to the Hilltop and "you hover around the Hilltop." RP 2042. He told "Kaylee" he was up there for

an hour, asked for her address, tried to get to her house, tried to hook up with her, tried to meet, and the only purpose he could have had was to have sex with her.” RP 2043.

However, the evidence established that defendant wanted to meet her in public to see what she looked like. They discussed meeting at the gas station, the chicken store, or even the St. Joseph Hospital parking lot. That did not happen. Even after he received very detailed directions to her house, including details that her portion of the house was accessible only by the alley *and not the front of the house* and that he would need to park in the back alley, defendant never went there. He never intended to go there. He was not truthful with “Kaylee” about this and he was talking to her about being on his way over there while he was driving away from the area, as he was about to be arrested by police who knew that he was leaving the area where the sting was occurring. The State failed to prove beyond a reasonable doubt that defendant took a substantial step toward the commission of the crime of attempted rape of a child in the second degree because it failed to prove that the defendant took a substantial step toward having substantial step towards having sexual intercourse with a child over the age of twelve and under the age of 14 and the substantial step must be an overt act that convincingly demonstrates “a firm purpose to commit a crime.” *Workman, id.*

Viewing the evidence in the light most favorable to the State, which defendant of course does not concede, the State proved that Zimmerman communicated with Bickford AKA “Kaylee” about sexual matters and that they discussed meeting at various places, which never occurred because Zimmerman did not want to meet her. Although “Kaylee” repeatedly expressed her eagerness to engage in sexual intercourse with Zimmerman and asked him numerous questions about his penis size, whether he could

impregnate her, whether he had sexually transmitted diseases,¹³ “Kaylee” was always the initiating party on this topic. Zimmerman never went to her house even though Kaylee had provided detailed, specific directions regarding which door to use [door on the back alley] and where to park his car [in the back alley].

The State failed to prove the crime of attempted child rape in the second degree. It therefore must be dismissed with prejudice. If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Id.*

Likewise, the State failed to prove the charges of CMIP, Counts II, III, IV, and V beyond a reasonable doubt. Although the State urged the jury to consider the charges together in determining they had been proven, jury instruction no. ___ instructed them that the charges were separate counts and the verdict count should not affect the verdict on another count.

Count II referred to texts between Zimmerman and “Kaylee” on December 15, 2015¹⁴. Although they talk around the subject of guys and sex and Zimmerman asks her if she has ever been with a guy before. Pages 1-13. On December 16, 2015, he asked for “sexy picture, including one with her shirt off, it is apparent that he does not think she is a child as he tells her that she sounds older than her stated age on the phone¹⁵; he also asks her about her sexual experience. Pages 14-23. On December 17, 2015, “Kaylee” began the discussion by telling Zimmerman how “excited” she was. He proposed going to a park, a drive, or meeting in public. “Kaylee” offered that she had only had “real sex” once time. She also stated that she

¹⁴Exhibit 3.

¹⁵ Det. Bickford had another detective, a woman, leave a message on Zimmerman’s voice, thus the voice was that of an adult woman.

wished she had a dildo and asked how a dildo and a vibrator differed. “Kaylee” repeated that she was “totally hot right now”, “it’s weird like nerves and tingly and everything”, “is it weird that my pants are like wet but I didn’t pee . . . I never felt like this b4”. Pages 24-51.

Close examination of the ad, emails, and texts establishes that there was no CMIP committed on December 15, 2015. There is no CMIP committed on December 16, 2017, although there may have been what some people would consider inappropriate conversation about sexual experience. Zimmerman concedes that December 17, 2017, is a closer question, but given the trial court’s failure to properly instruct the jury regarding the State’s burden of proof on “for immoral purposes”, Zimmerman contends that this court cannot tell upon what evidence the jury relied conviction.

Thus, Zimmerman urges this court to find that there was insufficient evidence to convict on Counts II, III, IV, and to dismiss those counts with prejudice. Regarding Count V, Zimmerman asks this court also to dismiss the count with prejudice for insufficient evidence. Alternatively, where the court’s instruction on “immoral purposes” was fatally flawed and, unlike in the other counts, there was some arguable evidence to support the State’s case, this court could reverse that count.

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D. CONCLUSION

For the foregoing reasons, Kenneth Paul Zimmerman respectfully asks this court to grant the relief requested herein.

DATED this 7th day of January, 2019

/s/BARBARA COREY
BARBARA COREY WSBA #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via filing portal a copy of this Document to: Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and via USPS to Kenneth Zimmerman

1/7/19

/S/ WILLIAM DUMMITT
William Dummitt

APPENDIX A

CL Ad-Posted by Zimmerman

Tuesday, December 15, 2015 10:38 AM

CL [seattle](#) > [tacoma](#) > [personals](#) > [casual encounters](#)

[[account](#)] [post](#)

[reply](#)

[prohibited](#) ^[2]

Posted: [15 days ago](#)

[print](#)

looking for young little girl - m4w (Pierce and King County)

Hello, I am looking for a young little girl for play

Looking for open minded and obedient. Looking to pleased abs be pleased. Please tell me about you and include a picture. Looking for kinky fun. Put your favorite color in the subject line.

- do NOT contact me with unsolicited services or offers

post id: 5339577480

posted: [2015-11-30 9:58pm](#)

updated: [2015-12-14 12:05pm](#)

[email to friend](#)

[best of](#) ^[2]

12/15/2015 10:39 AM - Screen Clipping



Kaylee Duncan <kayleejane42@gmail.com>

looking for young little girl - m4w

15 messages

Kaylee Duncan <kayleejane42@gmail.com>

Mon, Dec 14, 2015 at 4:07 PM

To: xmssj-5339577480@pers.craigslist.org

im totally bored...what kinda play r u into?

<http://seattle.craigslist.org/tac/cas/5339577480.html>

craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Mon, Dec 14, 2015 at 5:31 PM

To: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org

Hello, I am b very open in play. I am a Dom.
I like bdsm, dirty talk, pda and whatever you like.
My name is Ken. Hit me up let's text a little and go from there.
253 381 5275

Sent from XFINITY Connect Mobile App

-----Original Message-----

From: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org
To: xmssj-5339577480@pers.craigslist.org
Cc:
Sent: 2015-12-14 16:08:10 GMT
Subject: looking for young little girl - m4w

im totally bored...what kinda play r u into?

<http://seattle.craigslist.org/tac/cas/5339577480.html>

Original craigslist post:
<http://seattle.craigslist.org/tac/cas/5339577480.html>
About craigslist mail:
<http://craigslist.org/about/help/email-relay>
Please flag unwanted messages (spam, scam, other):
<http://craigslist.org/mf/ff5bc405575a30ad32bf4ce088e37e7237de1734.4>

Original craigslist post:
<http://seattle.craigslist.org/tac/cas/5339577480.html>
About craigslist mail:
<http://craigslist.org/about/help/email-relay>
Please flag unwanted messages (spam, scam, other):

<http://craigslist.org/mf/041ee6bbb7d8526a397542ab867038f0ef5c6b59.1>

Kaylee Duncan <kayleejane42@gmail.com>
To: craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Mon, Dec 14, 2015 at 8:46 PM

i dont no what ur talking about...im almost 14 but act way older...i nvr herd of that stuff though
[Quoted text hidden]

craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>
To: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org

Mon, Dec 14, 2015 at 9:41 PM

What are you looking for and can I get some pictures of you

Sent from XFINITY Connect Mobile App

-----Original Message-----

From: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org
To: xmssj-5339577480@pers.craigslist.org
Cc:
Sent: 2015-12-14 20:46:21 GMT
Subject: Re: looking for young little girl - m4w
[Quoted text hidden]

[Quoted text hidden]
<http://craigslist.org/mf/109bb5d889f8de9102574b13b6c7ecdf2ce8699d.41>

Original craigslist post:
<http://seattle.craigslist.org/tac/cas/5339577480.html>
About craigslist mail:
<http://craigslist.org/about/help/email-relay>
Please flag unwanted messages (spam, scam, other):
<http://craigslist.org/mf/8056f06bf854fb6c7aab400d845db4fafd1856f6.1>

Kaylee Duncan <kayleejane42@gmail.com>
To: craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Mon, Dec 14, 2015 at 10:00 PM

IDK...just want it 2 be like the movies
[Quoted text hidden]

Kaylee Duncan <kayleejane42@gmail.com>
To: craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Mon, Dec 14, 2015 at 10:35 PM

u culd tex me if u want 208 503 6117.
[Quoted text hidden]

craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Tue, Dec 15, 2015 at 1:11 AM

To: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org

I really want to see pictures of you so I know if you are real and also tell me the area in which you live.

Sent from XFINITY Connect Mobile App

-----Original Message-----

From: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org
To: xmssj-5339577480@pers.craigslist.org
Cc:
Sent: 2015-12-14 22:35:58 GMT
Subject: Re: looking for young little girl - m4w

u culd tex me if u want 208 503 6117.

[Quoted text hidden]

[Quoted text hidden]

<http://craigslist.org/mf/beb7f2e164c7a6c269cb462fb67d32c1138e4260.15>

Original craigslist post:

<http://seattle.craigslist.org/tac/cas/5339577480.html>

About craigslist mail:

<http://craigslist.org/about/help/email-relay>

Please flag unwanted messages (spam, scam, other):

<http://craigslist.org/mf/cb12f48ea8421022cd2e45eb82f7ecaa1b6389b5.1>

Kaylee Duncan <kayleejane42@gmail.com>
To: craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>

Tue, Dec 15, 2015 at 8:37 AM

i am in tacoma on a hill by the hospital. i dnt no my way around here very good. we just moved.

[Quoted text hidden]

craigslist 5339577480 <xmssj-5339577480@pers.craigslist.org>
To: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org

Tue, Dec 15, 2015 at 9:01 AM

Do you have pictures of you just regular pictures of you

Sent from XFINITY Connect Mobile App

-----Original Message-----

From: c361eb4d39e732d78879303f4fdcff24@reply.craigslist.org
To: xmssj-5339577480@pers.craigslist.org
Cc:
Sent: 2015-12-15 08:38:01 GMT

[Quoted text hidden]

State v. Kenneth Zimmerman

Pierce Co. Cause No. 15-1-05062-3

DECEMBER 15, 2015

Ken Zimmerman: *Hello Kaylee*
(Dec. 15, 2015 10:24:57 a.m.)

Kaylee: *Hi. Whos this*
(Dec. 15, 2015, 10:25:23 a.m.)

Ken Zimmerman: *Ken*
(Dec. 15, 2015, 10:25:41 a.m.)

Ken Zimmerman: *Where are you from you said you just moved here*
(Dec. 15, 2015, 10:25:54 a.m.)

Kaylee: *i moved from richland ... i talked to a lot of guys ... which I r u?*
(Dec. 15, 2015, 10:26:49 a.m.)

Kaylee: *i nvr new id get so many people to talk to me ... craigslist is cool!*
(Dec. 15, 2015, 10:27:17 a.m.)

Kaylee: *i remember ... lol!*
(Dec. 15, 2015, 10:29:02 a.m.)

Ken Zimmerman: *So why are you talking with so many guys*

(Dec. 15, 2015, 10:33:36 a.m.)

Ken Zimmerman: *Did you put an ad on there you answered my ad I believe*

(Dec. 15, 2015, 10:33:49 a.m.)

Kaylee: *i talked to a few people who had cool ads*

(Dec. 15, 2015, 10:34:59 a.m.)

Ken Zimmerman: *So tell me what are you looking for*

(Dec. 15, 2015, 10:42:51 a.m.)

Kaylee: *idk ... didn't ur ad say kinky fun ... that sounds cool as long as u dont hurt me*

(Dec. 15, 2015, 10:46:38 a.m.)

Ken Zimmerman: *So like I asked you before are you a law officer are you really Kaylee Duncan*

or are you someway somehow in law enforcement

(Dec. 15, 2015, 10:58:01 a.m.)

Kaylee: *no I'm not a law enforcer. that sounds cool but handcuffs r scary!*

(Dec. 15, 2015, 11:03:34 a.m.)

Ken Zimmerman: *So how come you're not in school and have you ever been sexual before*
(Dec. 15, 2015, 11:06:28 a.m.)

Kaylee: *cuz we just moved here the other day. im gonna probly get in school afr Christmas.*
(Dec. 15, 2015, 11:07:25 a.m.)

Ken Zimmerman: *So have you ever been with a guy before have you ever had sex before*
(Dec. 15, 2015, 11:11:53 a.m.)

Kaylee: *yea I messed around ... it didnt last long tho*
(Dec. 15, 2015, 11:13:58 a.m.)

Ken Zimmerman: *So why are you interested in some one older.*
... I have to have I just want to know
(Dec. 15, 2015, 11:20:31 a.m.)

Kaylee: *becuz boys my age are totaly dumb and if they new what i wanted ever I wuld call me a slut*
(Dec. 15, 2015, 11:21:32 a.m.)

Ken Zimmerman: *Can you send me a couple of pictures of you*
(Dec. 15, 2015, 11:36:41 a.m.)

Ken Zimmerman: *Maybe we could meet up tomorrow or Thursday*
(Dec. 15, 2015, 11:36:53 a.m.)

Kaylee: *u culd totally com ovr i guess ... u seem cool*
(Dec. 15, 2015, 11:38:29 a.m.)

Ken Zimmerman: *Isn't your mom and dad home how many brothers and sisters do you have*
(Dec. 15, 2015, 11:44:21 a.m.)

Kaylee: *Dads sleeping and I have a sister ... she lives with mom*
(Dec. 15, 2015, 11:45:17 a.m.)

Ken Zimmerman: *Where's your mom live and sister*
(Dec. 15, 2015, 11:56:32 a.m.)

Kaylee: *Richland*
(Dec. 15, 2015, 11:57:13 a.m.)

Ken Zimmerman: *So how come you're here and they're there
how come your mom didn't come to Tacoma*

(Dec. 15, 2015, 11:58:05 a.m.)

Kaylee: *Cuz they fight all the time*

(Dec. 15, 2015, 11:58:48 a.m.)

Ken Zimmerman: *Well did your dad move here for work*

(Dec. 15, 2015, 11:59:07 a.m.)

Ken Zimmerman: *How long have you been here do you have any friends yet*

(Dec. 15, 2015, 11:59:25 a.m.)

Kaylee: *yea ... we may move here 4 good but i don't no ... we didnt bring
much stuff and live in a crappy house ... not sure yet*

(Dec. 15, 2015, 11:59:58 a.m.)

Kaylee: *we came last week . dad gets busy at christmass*

(Dec. 15, 2015, 12:00:23 p.m.)

Ken Zimmerman: *What does he do for work*

(Dec. 15, 2015, 12:10:20 p.m.)

Kaylee: *Ups*

(Dec. 15, 2015, 12:17:13 p.m.)

Ken Zimmerman: *So how come a pretty girl like you doesn't have any boyfriends*

(Dec. 15, 2015, 12:22:06 p.m.)

Ken Zimmerman: *So I guess you don't want to do that with boyfriends do*

(Dec. 15, 2015, 12:22:18 p.m.)

Kaylee: *No cuz they'd all call me slut*

(Dec. 15, 2015, 1:00:39 p.m.)

Ken Zimmerman: *I understand*

(Dec. 15, 2015, 1:03:01 p.m.)

Kaylee: *And i jus move here and dnt no anyl*

(Dec. 15, 2015, 1:03:29 p.m.)

Kaylee: *Gawd! I can't wait til dad leaves ... keeps nagin me*
(Dec. 15, 2015, 1:04:00 p.m.)

Ken Zimmerman: *What's he nagging you about*
(Dec. 15, 2015, 1:04:40 p.m.)

Kaylee: *All the stupid sht he wants me to do when hes gone*
(Dec. 15, 2015, 1:05:11 p.m.)

Ken Zimmerman: *Some chores*
(Dec. 15, 2015, 1:23:04 p.m.)

Ken Zimmerman: *What school are you going to be going to*
(Dec. 15, 2015, 1:23:20 p.m.)

Kaylee: *I dnt no ... yet*
(Dec. 15, 2015, 1:23:43 p.m.)

Kaylee: *We jus got here like a couple days ago ... don't no any1 here yet*
(Dec. 15, 2015, 1:24:56 p.m.)

Kaylee: *Or schools*
(Dec. 15, 2015, 1:25:02 p.m.)

Ken Zimmerman: *No worries*
(Dec. 15, 2015, 1:30:19 p.m.)

Ken Zimmerman: *Can I get a couple pictures of you hun*
(Dec. 15, 2015, 1:33:02 p.m.)

Ken Zimmerman: *I got a busy afternoon so I'll hit you up a little later*
(Dec. 15, 2015, 1:44:58 p.m.)

Kaylee: *Why r u so nice to me*
(Dec. 15, 2015, 2:14:36 p.m.)

Kaylee: *the azz is about to leave*
(Dec. 15, 2015, 2:15:43 p.m.)

Kaylee: *my dad left ... freeeee dom!*
(Dec. 15, 2015, 3:17:10 p.m.)

Ken Zimmerman: *Awesome*
(Dec. 15, 2015, 3:21:45 p.m.)

Ken Zimmerman: *Cuz I like you*
(Dec. 15, 2015, 3:22:03 p.m.)

Kaylee: *u seem soo nice*
(Dec. 15, 2015, 3:22:40 p.m.)

Ken Zimmerman: *Cuz I am*
(Dec. 15, 2015, 3:22:56 p.m.)

Kaylee: *how much is ur reward ... i totaly need a new ipod*
(Dec. 15, 2015, 3:24:47 p.m.)

Kaylee: *an i just totaly wanna have fun ... u no ;0)*
(Dec. 15, 2015, 3:30:22 p.m.)

Ken Zimmerman: *No I am not looking to pay for you*
(Dec. 15, 2015, 3:56:32 p.m.)

Kaylee: *Thot I'd try! Lol! I'm all kindza hot now ...*
(Dec. 15, 2015, 3:57:57 p.m.)

Ken Zimmerman: *How's your night going*

(Dec. 15, 2015, 6:14:48 p.m.)

Ken Zimmerman: *Well that happens sometimes*

(Dec. 15, 2015, 6:17:40 p.m.)

Ken Zimmerman: *Sorry I have some stuff planned tonight*

(Dec. 15, 2015, 6:18:20 p.m.)

Ken Zimmerman: *Lol nope sorry. So are you trying to meet up with some other guys*

(Dec. 15, 2015, 6:44:52 p.m.)

Kaylee: *Boring*

(Dec. 15, 2015, 6:16:52 p.m.)

Kaylee: *Wish I wasn't by myself*

(Dec. 15, 2015, 6:17:55 p.m.)

Kaylee: *With me lol!*

(Dec. 15, 2015, 6:25:20 p.m.)

Kaylee: *Yeah cuz Im hot*

(Dec. 15, 2015, 6:45:29 p.m.)

Kaylee: *Don't judge me!*

(Dec. 15, 2016, 6:45:36 p.m.)

Ken Zimmerman: *I am not judging*

(Dec. 15, 2015, 6:57:29 p.m.)

Ken Zimmerman: *But you have only been with 1 guy before*

(Dec. 15, 2015, 6:57:52 p.m.)

Ken Zimmerman: *I gotcha*

(Dec. 15, 2015, 7:00:57 p.m.)

Ken Zimmerman: *Maybe another time*

(Dec. 15, 2015, 7:18:52 p.m.)

Ken Zimmerman: *Hey*

(Dec. 15, 2015, 9:53:24 p.m.)

Ken Zimmerman: *You must be sleeping. Good night*

(Dec. 15, 2015, 11:00:31 p.m.)

Kaylee: *i hate drama ... just wanna have fun*

(Dec. 15, 2015, 6:59:38 p.m.)

Kaylee: *guez so*

(Dec. 15, 2015, 7:33:00 p.m.)

Kaylee: *sory. fel asleep*
(Dec. 16, 2015, 12:53:23 a.m.)

Ken Zimmerman: *Bad girl*
(Dec. 16, 2015, 12:57:47 a.m.)

Ken Zimmerman: *Did not mean to wake you*
(Dec. 16, 2015, 1:04:40 a.m.)

Kaylee: *its kool*
(Dec. 16, 2015, 1:07:56 a.m.)

Ken Zimmerman: *Wyd*
(Dec. 16, 2015, 1:17:06 a.m.)

Ken Zimmerman: *I want to see a picture of you*
(Dec. 16, 2015, 1:19:34 a.m.)

DECEMBER 16, 2015

Ken Zimmerman: *Good morning*

(Dec. 16, 2015, 11:10:17 a.m.)

Ken Zimmerman: *Hey you*

(Dec. 16, 2015, 11:52:17 a.m.)

Ken Zimmerman: *Hey nice pics*

(Dec. 16, 2015, 1:18:40 p.m.)

Ken Zimmerman: *Wyd*

(Dec. 16, 2015, 1:25:07 p.m.)

Ken Zimmerman: *Bored hun*

(Dec. 16, 2015, 1:27:03 p.m.)

Kaylee: *OMG! Hi!*

(Dec. 16, 2015, 12:25:38 p.m.)

Kaylee: *thx*

(Dec. 16, 2015, 1:24:51 p.m.)

Kaylee: *playn on internet*

(Dec. 16, 2015, 1:25:54 p.m.)

Kaylee: *yup*

(Dec. 16, 2015, 1:27:20 p.m.)

Ken Zimmerman: *I wish you send a sexy pic of you*
(Dec. 16, 2015, 1:27:36 p.m.)

Ken Zimmerman: *Show your tits*
(Dec. 16, 2015, 1:28:06 p.m.)

Ken Zimmerman: *Where is Your Dad*
(Dec. 16, 2015, 1:30:13 p.m.)

Ken Zimmerman: *Hey you how you doing*
(Dec. 16, 2015, 2:47:30 p.m.)

Ken Zimmerman: *I hear you*
(Dec. 16, 2015, 3:10:56 p.m.)

Kaylee: *i wish i wasn't alon*
(Dec. 16, 2015, 1:29:24 p.m.)

Kaylee: *hes sleepin ... gona leave 4 work in a cuple hrs ...
i feel like im alwayz alone*
(Dec. 16, 2015, 1:34:36 p.m.)

Kaylee: *hi*
(Dec. 16, 2015, 2:32:49 p.m.)

Kaylee: *just hangin out*
(Dec. 16, 2015, 2:47:51 p.m.)

Ken Zimmerman: *I'm going to be free tomorrow night*

(Dec. 16, 2015, 3:10:59 p.m.)

Ken Zimmerman: *I can't today I have a Christmas function*

(Dec. 16, 2015, 3:13:51 p.m.)

Ken Zimmerman: *I thought the Christmas function was tomorrow night but it's tonight*

(Dec. 16, 2015, 3:15:41 p.m.)

Ken Zimmerman: *might be a little young to be my date*

(Dec. 16, 2015, 3:17:10 p.m.)

Kaylee: *U shuld totly 2 day*

(Dec. 16, 2015, 3:12:59 p.m.)

Kaylee: *Be4 ... but whatever*

(Dec. 16, 2015, 3:14:09 p.m.)

Kaylee: *Go late! Lol!*

(Dec. 16, 2015, 3:16:05 p.m.)

Kaylee: *I culd be ur date*

(Dec. 16, 2015, 3:16:20 p.m.)

Kaylee: *Lol*

(Dec. 16, 2015, 3:16:40 p.m.)

Ken Zimmerman: *Can you talk on the phone*

(Dec. 16, 2015, 3:18:17 p.m.)

Ken Zimmerman: *Hello*

(Dec. 16, 2015, 3:23:10 p.m.)

Kaylee: *Hi*

(Dec. 16, 2015, 3:23:25 p.m.)

Ken Zimmerman: *Can you talk hun*

(Dec. 16, 2015, 3:23:45 p.m.)

Kaylee: *Why u don't my wanna come anywaze*

(Dec. 16, 2015, 3:24:07 p.m.)

Ken Zimmerman: *I want to talk with you*

(Dec. 16, 2015, 3:27:27 p.m.)

Ken Zimmerman: *I tried calling you*
(Dec. 16, 2015, 4:02:18 p.m.)

Kaylee: *i called u but i ran out mins*
(Dec. 16, 2015, 4:06:09 p.m.)

Ken Zimmerman: *Can you take a call if I call u*
(Dec. 16, 2015, 4:11:53 p.m.)

Kaylee: *i dont have any mins*
(Dec. 16, 2015, 4:13:13 p.m.)

Kaylee: *tolly wish u wantd to c me but whatevs*
(Dec. 16, 2015, 4:15:50 p.m.)

Kaylee: *if u wanna u toly gotta promis not to hurt me or tel anyl*
(Dec. 16, 2015, 4:18:09 p.m.)

Ken Zimmerman: *I won't but I have to come see you tomorrow*
(Dec. 16, 2015, 4:28:32 p.m.)

Ken Zimmerman: *Can you send me any sexy pictures of you maybe with your shirt off*
(Dec. 16, 2015, 4:28:45 p.m.)

Ken Zimmerman: *I already have a commitment it is what it is.*
I have to do it at the same business function
(Dec. 16, 2015, 4:29:21 p.m.)

Ken Zimmerman: *Don't you have a camera phone*
(Dec. 16, 2015, 4:34:40 p.m.)

Kaylee: *sucky*
(Dec. 16, 2015, 4:28:48 p.m.)

Kaylee: *Totly if I had a camra*
(Dec. 16, 2015, 4:29:32 p.m.)

Kaylee: *My dad drilled mine*
(Dec. 16, 2015, 4:29:27 p.m.)

Kaylee: *he drilled it*
(Dec. 16, 2015, 4:37:28 p.m.)

Kaylee: *why i wanted a ipod*
(Dec. 16, 2015, 4:37:44 p.m.)

Kaylee: *I totly wanna camra*
(Dec. 16, 2015, 4:46:09 p.m.)

Ken Zimmerman: *You have the internet you can cam me on Skype*
(Dec. 16, 2015, 4:56:58 p.m.)

Kaylee: *I dnt have a computer cam*
(Dec. 16, 2015, 5:31:03 p.m.)

Ken Zimmerman: *Don't you have any sexy pictures of you*
(Dec. 16, 2015, 6:55:26 p.m.)

Kaylee: *naaaah way*
(Dec. 16, 2015, 7:12:10 p.m.)

Ken Zimmerman: *Your voice kind of sounded older on the phone*
(Dec. 16, 2015, 7:15:55 p.m.)

Kaylee: *Kinda gotta cold idk*
(Dec. 16, 2015, 7:17:24 p.m.)

Ken Zimmerman: *Hey you*
(Dec. 16, 2015, 8:39:17 p.m.)

Ken Zimmerman: *You got a cold*

(Dec. 16, 2015, 8:39:22 p.m.)

Kaylee: *Yeah like a little I*
(Dec. 16, 2015, 8:39:53 p.m.)

Ken Zimmerman: *How tall are you*

(Dec. 16, 2015, 8:41:18 p.m.)

Ken Zimmerman: *What size do you wear*

(Dec. 16, 2015, 8:41:31 p.m.)

Ken Zimmerman: *Hey are you busy*

(Dec. 16, 2015, 8:48:35 p.m.)

Ken Zimmerman: *Okay maybe I'll try you tomorrow*

(Dec. 16, 2015, 9:03:13 p.m.)

Kaylee: *That's weird! I'm taller than my friends ... I*
(Dec. 16, 2015, 9:16:27 p.m.)

Ken Zimmerman: *How tall are you*

(Dec. 16, 2015, 9:18:10 p.m.)

Kaylee: *Like 5'*
(Dec. 16, 2015, 9:18:55 p.m.)

Ken Zimmerman: *Can I ask how much you weigh what size you are*

(Dec. 16, 2015, 9:19:29 p.m.)

Ken Zimmerman: *You're very cute I'm just curious*

(Dec. 16, 2015, 9:19:38 p.m.)

Kaylee: *No personal*
(Dec. 16, 2015, 9:19:52 p.m.)

Ken Zimmerman: *Really*

(Dec. 16, 2015, 9:20:14 p.m.)

Ken Zimmerman: *You have you ever put your mouth on a cock before*

(Dec. 16, 2015, 9:22:02 p.m.)

Kaylee: *yes*
(Dec. 16, 2015, 9:24:28 p.m.)

Ken Zimmerman: *Really how many*

(Dec. 16, 2015, 9:25:11 p.m.)

Kaylee: *u r werd*
(Dec. 16, 2015, 9:25:41 p.m.)

Ken Zimmerman: *Why is that weird I just wanted to know what you experience level was*
(Dec. 16, 2015, 9:25:59 p.m.)

Ken Zimmerman: *Are you going to be around tomorrow night*
(Dec. 16, 2015, 9:26:48 p.m.)

Kaylee: *ya*
(Dec. 16, 2015, 9:39:27 p.m.)

Kaylee: *u culd totly com ovr 2 nite*
(Dec. 16, 2015, 9:45:40 p.m.)

Ken Zimmerman: *I can come over tomorrow around 6*
(Dec. 16, 2015, 9:53:44 p.m.)

Ken Zimmerman: *Talk to you tomorrow*
(Dec. 16, 2015, 9:57:59 p.m.)

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Kaylee: *Hi*

(Dec. 17, 2015, 9:58:30 a.m.)

Ken Zimmerman: *Hey you*

(Dec. 17, 2015, 10:15:03 a.m.)

Kaylee: *Omg! Hi*

(Dec. 17, 2015, 10:15:54 a.m.)

Ken Zimmerman: *What is omg for*

(Dec. 17, 2015, 10:16:09 a.m.)

Kaylee: *O My God ... like excited! lol*

(Dec. 17, 2015, 10:16:44 a.m.)

Ken Zimmerman: *I know that what are you excited about*

(Dec. 17, 2015, 10:17:10 a.m.)

Kaylee: *Like u said u culd come ovr!*

(Dec. 17, 2015, 10:18:14 a.m.)

Ken Zimmerman: *Is your dad home now*

(Dec. 17, 2015, 10:27:09 a.m.)

Kaylee: *Yeah he came home yesterday but is sleeping. He going away later*

(Dec. 17, 2015, 10:45:56 a.m.)

Ken Zimmerman: *Ok later when he leaves*

(Dec. 17, 2015, 10:48:51 a.m.)

Ken Zimmerman: *Hey*
(Dec. 17, 2015, 11:13:53 a.m.)

Kaylee: *Yeah*
(Dec. 17, 2015, 11:29:24 a.m.)

Ken Zimmerman: *Maybe we can go to the park or drive today*
(Dec. 17, 2015, 11:31:22 a.m.)

Ken Zimmerman: *Let me know*
(Dec. 17, 2015, 11:59:33 a.m.)

Kaylee: *maybe we could just hang at my house and u no:)*
(Dec. 17, 2015, 12:06:30 p.m.)

Ken Zimmerman: *Would you like to meet in public first*
(Dec. 17, 2015, 12:33:20 p.m.)

Kaylee: *i gues ... but i feel safr here cus u could like kidnap me or sumthin*
(Dec. 17, 2015, 12:51:55 p.m.)

Ken Zimmerman: *So where do you live in Tacoma*
(Dec. 17, 2015, 12:54:57 p.m.)

Ken Zimmerman: *I don't know who you are neither*
(Dec. 17, 2015, 12:55:11 p.m.)

Kaylee: *Im kaylee*
(Dec. 17, 2015, 12:55:27 p.m.)

Kaylee: *I live in a hill by the hospital*
(Dec. 17, 2015, 12:55:44 p.m.)

Ken Zimmerman: *I know that but I don't know you and I don't know if you are real
or not I assume so but I don't know*
(Dec. 17, 2015, 12:56:05 p.m.)

Ken Zimmerman: *You have to give an address*
(Dec. 17, 2015, 12:56:13 p.m.)

Ken Zimmerman: *Do you have an address*
(Dec. 17, 2015, 12:58:19 p.m.)

Kaylee: *i dnt no it ... it's a blu house ... u no where the chikn place is by the hospital*
(Dec. 17, 2015, 1:19:28 p.m.)

Kaylee: *dadz not gone til like 3 hrs*
(Dec. 17, 2015, 1:21:52 p.m.)

Kaylee: *or 2 or sumth*
(Dec. 17, 2015, 1:22:00 p.m.)

Ken Zimmerman: *I don't know which hospital you talking about but if you go outside
there's got to be a house number on the outside of the house*
(Dec. 17, 2015, 1:24:27 p.m.)

Ken Zimmerman: *I wouldn't come over there probably until around 6 or so maybe*
(Dec. 17, 2015, 1:24:51 p.m.)

Kaylee: *thres no house numbe ... it was painted ... i thik its by 19 ...
theres a chickn plce calls zells or ezls or sumthin*
(Dec. 17, 2015, 1:28:43 p.m.)

Ken Zimmerman: *Where are you at from there*

(Dec. 17, 2015, 1:51:48 p.m.)

Kaylee: *like by ther ... i culd give u dircton when u get thre if u want*

(Dec. 17, 2015, 1:52:35 p.m.)

Kaylee: *i dnt realy no my strets*

(Dec. 17, 2015, 1:56:14 p.m.)

Ken Zimmerman: *Have you eaten there*

(Dec. 17, 2015, 1:56:21 p.m.)

Ken Zimmerman: *Well tell me directions from the place where you're at from that chicken store*

(Dec. 17, 2015, 1:57:04 p.m.)

Kaylee: *i dnt like frid chkn*

(Dec. 17, 2015, 1:57:28 p.m.)

Kaylee: *its like down the street and turn right and its like rigt ther*

(Dec. 17, 2015, 1:58:06 p.m.)

Kaylee: *i culd maybe mmet u thre*

(Dec. 17, 2015, 1:58:34 p.m.)

Ken Zimmerman: *Yes we could probably meet there what are you going to wear for me tonight*

(Dec. 17, 2015, 1:59:43 p.m.)

Kaylee: *idk*

(Dec. 17, 2015, 2:00:09 p.m.)

Ken Zimmerman: *Have you had any other guys over there yet*

(Dec. 17, 2015, 2:01:31 p.m.)

Kaylee: *no ... jus mved here ...*

(Dec. 17, 2015, 2:01:58 p.m.)

Kaylee: *im not a slut*

(Dec. 17, 2015, 2:02:10 p.m.)

Ken Zimmerman: *I never said you were I would just ask the question*

(Dec. 17, 2015, 2:02:30 p.m.)

Ken Zimmerman: *Do you shave down in your vagina area*

(Dec. 17, 2015, 2:03:00 p.m.)

Kaylee: *gawd ... i wnt this sooo bad but am kinda scard ur like a
psyco baby rapist or kidnapper or murndrer or sumethin else weird*

(Dec. 17, 2015, 2:05:21 p.m.)

Kaylee: *i no i wantch 2 many movies*
(Dec. 17, 2015, 2:05:37 p.m.)

Ken Zimmerman: *Yes too many movies*
(Dec. 17, 2015, 2:06:37 p.m.)

Ken Zimmerman: *What kind of phone do you have*
(Dec. 17, 2015, 2:06:42 p.m.)

Kaylee: *io fucked up ipod ... i can only tex on it ...*
my dad drilled the stupid camra lens
(Dec. 17, 2015, 2:09:42 p.m.)

Ken Zimmerman: *How old were those pictures that you gave me*
(Dec. 17, 2015, 2:21:25 p.m.)

Ken Zimmerman: *How long ago were those pictures you gave me love you*
(Dec. 17, 2015, 2:27:49 p.m.)

Kaylee: *like a month thre the computr*
(Dec. 17, 2015, 2:28:01 p.m.)

Ken Zimmerman: *That's a pretty nice bedroom you left behind*

(Dec. 17, 2015, 2:30:41 p.m.)

Ken Zimmerman: *So you go to the street where the chicken places that turn right and you're down that street correct? Which side of the street as I'm driving down right or left*

(Dec. 17, 2015, 2:33:29 p.m.)

Kaylee: *kinda ... jus go to the place and i can try to giv u betr dirctns*

(Dec. 17, 2015, 2:36:12 p.m.)

Kaylee: *so i only had real sex 1 time ... is that weird*

(Dec. 17, 2015, 2:36:50 p.m.)

Ken Zimmerman: *Really how long ago*

(Dec. 17, 2015, 2:38:42 p.m.)

Kaylee: *lik a few mnths ago but it only was short ... it was dumb ... i wana be like in the movies u know*

(Dec. 17, 2015, 2:39:37 p.m.)

Ken Zimmerman: *Tell me tell me what you want*

(Dec. 17, 2015, 2:40:36 p.m.)

Kaylee: *i did ... jus dont wan it to hurt ... how big r u*

(Dec. 17, 2015, 2:47:30 p.m.)

Ken Zimmerman: *Remember you said nothing personal info*

(Dec. 17, 2015, 2:55:20 p.m.)

Kaylee: *well i jus tryn 2 no if itll hurt*

(Dec. 17, 2015, 2:58:40 p.m.)

Ken Zimmerman: *It may a little cuz u are not use to it*

(Dec. 17, 2015, 3:02:02 p.m.)

Kaylee: *my frend said she bled ... does that happn ... kina scard*

(Dec. 17, 2015, 3:06:31 p.m.)

Ken Zimmerman: *Well that probably should have happened the first time.*

(Dec. 17, 2015, 3:07:35 p.m.)

Ken Zimmerman: *Do you use a vibrator or fingers on your self*
(Dec. 17, 2015, 3:07:57 p.m.)

Kaylee: *it barly hapend for like a second ... it want like i hoped*
(Dec. 17, 2015, 3:08:22 p.m.)

Kaylee: *i play with my clit sometimes but nothn insid*
(Dec. 17, 2015, 3:08:59 p.m.)

Kaylee: *wish i had a dildo ... is that a vibratr*
(Dec. 17, 2015, 3:10:18 p.m.)

Kaylee: *same?*
(Dec. 17, 2015, 3:10:24 p.m.)

Ken Zimmerman: *No dildo is made out of hard rubber looks like a cock
and a vibrator usually hard plastic can be soft plastic
with the motor inside of it that will vibrate to stimulate you*
(Dec. 17, 2015, 3:13:02 p.m.)

Kaylee: *Ohhhhh!*
(Dec. 17, 2015, 3:14:26 p.m.)

Kaylee: *u culd like come now if u wanna ... im like totaly hot right now*
(Dec. 17, 2015, 3:28:12 p.m.)

Kaylee: *cept i dont evn no what u look like*
(Dec. 17, 2015, 3:28:52 p.m.)

Ken Zimmerman: *Can't yet*
(Dec. 17, 2015, 3:32:42 p.m.)

Kaylee: *Cant what send me pic? Or come*
(Dec. 17, 2015, 3:33:23 p.m.)

Ken Zimmerman: *Don't have a picture don't have a picture hun*
(Dec. 17, 2015, 3:40:07 p.m.)

Kaylee: *what ... lame ... how do i no i want to be with u ...
u gona use a vibratr on me or u ... will the vibratr not hurt as much*
(Dec. 17, 2015, 3:42:13 p.m.)

Ken Zimmerman: *I told you earlier to be around 6 or 6:30
nothing's changed when does your dad leave*
(Dec. 17, 2015, 3:43:04 p.m.)

Kaylee: *OMG i wish u culd come NOW ... im totly hot ...
it's weird like nervs and tingly and evrythng*
(Dec. 17, 2015, 3:43:22 p.m.)

Kaylee: *i dnt wanna bleed tho im totly scard bout that*
(Dec. 17, 2015, 3:44:12 p.m.)

Ken Zimmerman: *Be patient*
(Dec. 17, 2015, 3:51:37 p.m.)

Kaylee: *patint sux*
(Dec. 17, 2015, 4:49:54 p.m.)

Ken Zimmerman: *Hey you*
(Dec. 17, 2015, 5:34:51 p.m.)

Kaylee: *OMG*
(Dec. 17, 2015, 5:35:03 p.m.)

Kaylee: *HI*
(Dec. 17, 2015, 5:35:26 p.m.)

Ken Zimmerman: *Excited again*
(Dec. 17, 2015, 5:36:26 p.m.)

Kaylee: *u shuld totly com ovr then*
(Dec. 17, 2015, 5:37:18 p.m.)

Kaylee: *but u gotta promise me u wont do anything wit my ass ... that is jus weerd*
(Dec. 17, 2015, 5:39:19 p.m.)

Kaylee: *is it weird that my pants are like wet but i didnt pee ... i nvr felt like this b4*
(Dec. 17, 2015, 5:44:38 p.m.)

Ken Zimmerman: *I can rub it and spank it lightly,*
(Dec. 17, 2015, 5:48:56 p.m.)

Kaylee: *my ass ... thats weird*
(Dec. 17, 2015, 5:49:32 p.m.)

Ken Zimmerman: *Just like the movies*

(Dec. 17, 2015, 5:51:17 p.m.)

Ken Zimmerman: *Have you ever lived in Idaho*

(Dec. 17, 2015, 5:51:41 p.m.)

Kaylee: *dad used to live by clarkston*

(Dec. 17, 2015, 5:53:37 p.m.)

Ken Zimmerman: *Your number is a Idaho number*

(Dec. 17, 2015, 5:54:08 p.m.)

Kaylee: *yea its like up by there or sumthin ... its like lewston i thnk*

(Dec. 17, 2015, 5:55:36 p.m.)

Kaylee: *i dnt want u to spank my ass ... thats werd*

(Dec. 17, 2015, 5:56:23 p.m.)

Ken Zimmerman: *Has he gone to work*

(Dec. 17, 2015, 5:57:10 p.m.)

Kaylee: *like 4 evr ago*

(Dec. 17, 2015, 5:57:25 p.m.)

Kaylee: *im hungry*

(Dec. 17, 2015, 5:57:35 p.m.)

Kaylee: *gona eat*

(Dec. 17, 2015, 5:57:50 p.m.)

Ken Zimmerman: *Ok*

(Dec. 17, 2015, 5:59:44 p.m.)

Ken Zimmerman: *Hey you*

(Dec. 17, 2015, 6:55:00 p.m.)

Ken Zimmerman: *Hey*

(Dec. 17, 2015, 6:57:29 p.m.)

Ken Zimmerman: *Did you fall asleep*

(Dec. 17, 2015, 7:00:13 p.m.)

Ken Zimmerman: *Hey you*
(Dec. 17, 2015, 7:06:35 p.m.)

Ken Zimmerman: *Did you fall asleep*
(Dec. 17, 2015, 7:08:28 p.m.)

Ken Zimmerman: *Why*
(Dec. 17, 2015, 7:08:45 p.m.)

Ken Zimmerman: *I'm on my way*
(Dec. 17, 2015, 7:08:59 p.m.)

Kaylee: *Hi*
(Dec. 17, 2015, 7:08:07 p.m.)

Kaylee: *U make me mad*
(Dec. 17, 2015, 7:08:34 p.m.)

Kaylee: *How far away r u*
(Dec. 217, 2015, 7:09:29 p.m.)

Ken Zimmerman: *With the traffic probably about 15 minutes traffic was bad hard to get home*
(Dec. 17, 2015, 7:10:28 p.m.)

Ken Zimmerman: *I was looking on google maps and I found the chicken place
do you turn right right there between there and the gas station*
(Dec. 17, 2015, 7:10:46 p.m.)

Kaylee: *I can go to gas station*
(Dec. 17, 2015, 7:11:13 p.m.)

Kaylee: *How I no its u*
(Dec. 17, 2015, 7:11:22 p.m.)

Kaylee: *U nvr even sent me pic ...*
(Dec. 17, 2015, 7:12:02 p.m.)

Kaylee: *R u cute*
(Dec. 17, 2015, 7:12:08 p.m.)

Ken Zimmerman: *Well I thought you were going to tell me which house to go to do you turn right there*

(Dec. 17, 2015, 7:12:11 p.m.)

Kaylee: *Or gross*

(Dec. 17, 2015, 7:12:17 p.m.)

Ken Zimmerman: *I'm nice looking but im older just like my ad said*

(Dec. 17, 2015, 7:12:25 p.m.)

Kaylee: *Wish u sent me a pic so I no ur not gross*

(Dec. 17, 2015, 7:12:52 p.m.)

Ken Zimmerman: *I am NOT gross at all girls tell me I'm very handsome all the time*

(Dec. 17, 2015, 7:13:10 p.m.)

Ken Zimmerman: *Are you home alone now*

(Dec. 17, 2015, 7:14:19 p.m.)

Kaylee: *yea*

(Dec. 17, 2015, 7:14:55 p.m.)

Ken Zimmerman: *So do I go to the chicken place and turn right*
(Dec. 17, 2015, 7:16:12 p.m.)

Ken Zimmerman: *Hello*
(Dec. 17, 2015, 7:18:10 p.m.)

Ken Zimmerman: *You've been telling me you want this all day long talk to me*
(Dec. 17, 2015, 7:18:45 p.m.)

Ken Zimmerman: *If you're not going to talk to me then your mind
supposed to turn around and go back home*
(Dec. 17, 2015, 7:20:04 p.m.)

Ken Zimmerman: *You wanted me to come on over I know you're
there are you going to answer*
(Dec. 17, 2015, 7:21:19 p.m.)

Kaylee: *gona take a showr ... u want me to shave*
(Dec. 17, 2015, 7:22:22 p.m.)

Ken Zimmerman: *That would be nice tell me how to get there*
(Dec. 17, 2015, 7:22:44 p.m.)

Ken Zimmerman: *From the chicken place tell me where to go turn right at the chicken place by the gas station go down the road and you're in a blue house on the right or left when is it dark blue or light blue*

(Dec. 17, 2015, 7:23:55 p.m.)

Kaylee: *i meet u at the ckn place ... but i dnt evn no who im lookn 4 .. no way can u come to my huse ... u culd be like a rapist ...*

i wanna get down but not hurt

(Dec. 17, 2015, 7:24:13 p.m.)

Ken Zimmerman: *I'm not going to hurt you silly you want you can run out to my car meet me there*

(Dec. 17, 2015, 7:25:31 p.m.)

Kaylee: *is it not gonna hurt bad if i shave*

(Dec. 17, 2015, 7:30:48 p.m.)

Kaylee: *like do hairs hurt or sumthn*

(Dec. 17, 2015, 7:30:58 p.m.)

Kaylee: *bout to show rim nervis like sweaty ...*

(Dec. 17, 2015, 7:31:21 p.m.)

Ken Zimmerman: *You don't have to shave if you don't want to*

(Dec. 17, 2015, 7:31:35 p.m.)

Kaylee: *im like wet and i didnt pee my pants i dnt even no wy ... im sorry*

(Dec. 17, 2015, 7:31:44 p.m.)

Ken Zimmerman: *That's because your pussy is excited*

(Dec. 17, 2015, 7:32:28 p.m.)

Kaylee: *i dnt even no why*

(Dec. 17, 2015, 7:32:32 p.m.)

Ken Zimmerman: *Well I'm already up by the hospital so*

(Dec. 17, 2015, 7:33:04 p.m.)

Kaylee: *i dnt want it to hurt ...*

(Dec. 17, 7:33:43 p.m.)

Kaylee: *like nervs*

(Dec. 17, 2015, 7:33:49 p.m.)

Kaylee: *u promis i wont get preg*
(Dec. 17, 2015, 7:34:11 p.m.)

Kaylee: *im get in shwr*
(Dec. 17, 2015, 7:34:17 p.m.)

Kaylee: *don't condoms break*
(Dec. 17, 2015, 7:35:13 p.m.)

Kaylee: *u hav 1 right*
(Dec. 17, 2015, 7:35:21 p.m.)

Kaylee: *sory for the q's just like nervis*
(Dec. 17, 2015, 7:35:34 p.m.)

Ken Zimmerman: *I'm fixed*
(Dec. 17, 2015, 7:36:32 p.m.)

Kaylee: *i cant get no diseass*
(Dec. 17, 2015, 7:37:14 p.m.)

Kaylee: *eithr*
(Dec. 17, 2015, 7:37:47 p.m.)

Ken Zimmerman: *I am completely disease free and I can't get you pregnant*

(Dec. 17, 2015, 7:38:09 p.m.)

Kaylee: *so like u gotta have a condom if u wana do that tho ok? Up 2 u*

(Dec. 17, 2015, 7:38:55 p.m.)

Ken Zimmerman: *I don't need one like I said I can't get you pregnant*

*I just had a physical about 3-4 weeks ago and completely
disease free I don't mess around*

(Dec. 17, 2015, 7:39:50 p.m.)

Ken Zimmerman: *Are you going to tell me how to get to your house if you're in the shower*

(Dec. 17, 2015, 7:40:24 p.m.)

Kaylee: *ye but like if u wana have sex wont i get 1 dises anywayz*

(Dec. 17, 2015, 7:40:44 p.m.)

Ken Zimmerman: *I don't have any to give you I have no diseases*

(Dec. 17, 2015, 7:42:04 p.m.)

Kaylee: *just got my clothes clen ... gona get in shwr ... wana have diiner*
(Dec. 17, 2015, 7:44:05 p.m.)

Ken Zimmerman: *I'm ready I don't got all night what are we going to do*
(Dec. 17, 2015, 7:45:55 p.m.)

Ken Zimmerman: *30 minutes ago you said you were getting in the shower*
(Dec. 17, 2015, 7:46:28 p.m.)

Ken Zimmerman: *Well I don't know what to tell you*
(Dec. 17, 2015, 8:00:38 p.m.)

Kaylee: *Just got out shower*
(Dec. 17, 2015, 8:01:40 p.m.)

Kaylee: *U promise u don't have stds ima run there.*
(Dec. 17, 2015, 8:05:00 p.m.)

Kaylee: *Promise*
(Dec. 17, 2015, 8:05:09 p.m.)

Ken Zimmerman: *I promise I just don't know where you live there's
a guy here that just stop me wanting to know what
I was doing in this neighborhood*

(Dec. 17, 2015, 8:07:40 p.m.)

Ken Zimmerman: *Kind of scary*

(Dec. 17, 2015, 8:08:49 p.m.)

Kaylee: *I think it's 1908 s Yakima*

(Dec. 17, 2015, 8:10:07 p.m.)

Kaylee: *its like a big blue house apartment thing and the only place to park on back
by ally thng ... u gotta park by ally ... it's the top floor like by a bridge walkway*

(Dec. 17, 2015, 8:11:46 p.m.)

Kaylee: *U gota park by slvr car cause*

(Dec. 17, 2015, 8:12:14 p.m.)

Kaylee: *It's my dad's spot*

(Dec. 17, 2015, 8:12:24 p.m.)

Kaylee: *Im hungry*
(Dec. 17, 2015, 8:14:45 p.m.)

Kaylee: *U gotta go to the back cuz other people live downstairs*
(Dec. 17, 2015, 8:15:44 p.m.)

Kaylee: *It's like a big apartment house thing*
(Dec. 17, 2015, 8:15:59 p.m.)

Ken Zimmerman: *That guy kinda spooked me*
(Dec. 17, 2015, 8:17:49 p.m.)

Kaylee: *Wat?*
(Dec. 17, 2015, 8:21:12 p.m.)

Kaylee: *U r weird*
(Dec. 17, 2015, 8:21:42 p.m.)

Ken Zimmerman: *Why am i weird I've been hanging out down here
for an hour people have seen my car*
(Dec. 17, 2015, 8:22:16 p.m.)

Kaylee: *R u almost here*
(Dec. 17, 2015, 8:22:26 p.m.)

Ken Zimmerman: *You told me you lived in a dump at places in a dump*
(Dec. 17, 2015, 8:22:29 p.m.)

Kaylee: *I live in a old Blu house .. it's a apartment now*
(Dec. 17, 2015, 8:23:11 p.m.)

Kaylee: *Like there like a silver car and like paint cans by it in ally that how u get here*
(Dec. 17, 2015, 8:23:49 p.m.)

Ken Zimmerman: *Is is safe up here*
(Dec. 17, 2015, 8:24:27 p.m.)

Kaylee: *Yes in the house*
(Dec. 17, 2015, 8:24:42 p.m.)

Kaylee: *I just went in aly but didnt see anyl*
(Dec. 17, 2015, 8:25:36 p.m.)

Kaylee: *R u trying trick me*
(Dec. 17, 2015, 8:25:44 p.m.)

Ken Zimmerman: *I went back down by the hospital where I know its safe*

(Dec. 17, 2015, 8:26:56 p.m.)

Ken Zimmerman: *There are black guys all over the place in here cars around here circling*

(Dec. 17, 2015, 8:27:08 p.m.)

Ken Zimmerman: *They've seen me several times and stop me*

(Dec. 17, 2015, 8:27:17 p.m.)

Kaylee: *Go dwn the aly by hospital lot park by slvr car and go to Blu house*

(Dec. 17, 2015, 8:28:15 p.m.)

Kaylee: *Omg where r u*

(Dec. 17, 2015, 8:29:34 p.m.)

Ken Zimmerman: *Why don't you walk up to the emergency entrance
to the hospital parking lot and I can meet you there
I feel safer doing that*

(Dec. 17, 2015, 8:31:23 p.m.)

Kaylee: *Idk no where that is*

(Dec. 17, 2015, 8:33:10 p.m.)

Kaylee: *Just come to aly*

(Dec. 17, 2015, 8:33:43 p.m.)

BARBARA COREY, ATTORNEY AT LAW

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