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

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH PAUL ZIMMERMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Grant Blinn

No. 15-1-05062-3

Brief of Respondent

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

1. Whether the trial court violated defendant's right to present a defense when it excluded inadmissible evidence?
2. Whether, viewing the evidence in the light most favorable to the State, sufficient evidence supports defendant's convictions for attempted rape of a child in the second degree and communication with a minor for immoral purposes?
3. Whether defendant fails to show prosecutorial misconduct occurred where the prosecutor's statements during closing argument were neither improper nor prejudicial?
4. Whether the trial court properly rejected defendant's proposed jury instructions which misstated the law, were unnecessary, and were unsupported by sufficient evidence?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 18, 2015, the Pierce County Prosecutor's Office charged Kenneth Zimmerman, hereinafter "defendant," with one count of Attempted Rape of a Child in the Second Degree. CP 1. The State later filed an amended information which added four counts of Communication with a Minor for Immoral Purposes. CP 118-120. *See also*, CP 168-170. The case proceeded to trial before the Honorable Grant Blinn. RP 1. The jury found defendant guilty as charged. CP 308-312; RP 2116-17.

Defendant subsequently filed a motion for arrest of judgment and new trial, which the court denied. CP 346-414; 2/9/18 RP 27. The court sentenced defendant to an indeterminate sentence of 180 months to life on Count I (attempted rape of a child in the second degree), and determinate sentences of 29 and 60 months on Counts II-V (communication with a minor for immoral purposes), with all counts to run concurrently.¹ CP 725-726. Defendant timely appealed. CP 741-757.

2. FACTS

In December of 2015, Detective Jeff Bickford of the Richland Police Department participated in an undercover operation dubbed Operation “Net Nanny” with the Washington State Patrol Missing and Exploited Children Task Force. RP 346, 362, 371. The operation occurred from December 14-18, 2015, in Pierce County, Washington and was based in the Hilltop neighborhood of Tacoma. RP 371, 497-87. Bickford, posing as a 13-year-old girl named “Kaylee,” posted and responded to advertisements on Craigslist in order to “identify persons that were interested in engaging in sexual activity with children.” RP 372-73, 381.

¹ The court found that Counts III and IV were the same criminal conduct as Count II. CP 723; 2/9/18 RP 45-46.

Bickford located such an ad in the Casual Encounters section of Craigslist. RP 392-93, 396. The ad was titled “looking for young little girl – m4w” and read as follows:

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.

Exhibit 1. The ad was posted by defendant, Kenneth Zimmerman. RP 1205, 1305-06. On December 14, 2015, Bickford, posing as Kaylee, responded to defendant’s ad via email and wrote, “im totally bored...what kinda play r u into?” RP 398, 402-03, 405; Exh. 2. Defendant responded just over an hour later with, “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.” Exh. 2; RP 405, 1209-10. Defendant provided his phone number. *Id.*

Bickford ran the name “Ken” and the phone number provided through a search engine and found the name Ken Zimmerman along with a photo.² RP 407-08. Bickford sent an email reply that said, “i don’t know what ur talking about...im almost 14 but act way older...I nvr heard of that stuff though.” Exh. 2; RP 408-09. Defendant asked “Kaylee” for some pictures, and Bickford sent an age regressed photo of a female detective.

² The photo matched defendant. RP 407-08.

Exh. 2; Exh. 4; RP 373-75, 415-16. Bickford also gave defendant a phone number he could text to further communicate with Kaylee. Exh. 2; RP 410. Bickford received a text message from defendant, and the two started exchanging texts. RP 411.

The following are select portions of the emails and text messages between defendant and “Kaylee” as played by Detective Bickford from December 15-17, 2015:

Sender:	Description:³
Defendant	Pretty picture, where are you from you said you just moved here? You should be in school what school do you go to? It was very important question are you affiliated in any way with law enforcement? (Exh. 2)
Kaylee	i don't go to skool here yet...what does affiliat mean? (Exh. 2)
Defendant	So tell me what are you looking for (Exh. 3 at 3)
Kaylee	Idk...didn't ur ad say kinky fun...that sounds cool as long as u don't hurt me (Exh. 3 at 3)
Defendant	So like I asked you before are you a law enforcement officer are you really Kaylee Duncan or are you someway somehow in law enforcement (Exh. 3 at 3)
Kaylee	no I'm not a law enforcer. that sounds cool but handcuffs r scary! (Exh. 3 at 3)
Defendant	So have you ever been with a guy before have you ever had sex before (Exh. 3 at 4)
Kaylee	yea I messed around...it didn't last long tho (Exh. 3 at 4)
Defendant	So why are you interested in some one older. ...I have to have I just want to know (Exh. 3 at 4)
Kaylee	becuz boys my age are totaly dumb and if they new what i wanted everl wuld call me a slut (Exh. 3 at 4)
Defendant	Can you send me a couple pictures of you Maybe we could meet up tomorrow or Thursday (Exh. 3 at 5)
Kaylee	u culd totaly com ovr i guess...u seem cool (Exh. 3 at 5)
Defendant	So how come a pretty girl like you doesn't have any boyfriends So I guess you don't want to do that with boyfriends do (Exh. 3 at 7)

³ Misspellings are in the original texts.

Kaylee	No cuz they'd all call me slut (Exh. 3 at 7)
Defendant	Can I get a couple pictures of you hun I got a busy afternoon so I'll hit you up a little later (Exh. 3 at 9)
Kaylee	Why r u so nice to me (Exh. 3 at 9)
Defendant	Cuz I like you (Exh. 3 at 10)
Kaylee	how much is ur reward...i totally need a new ipod an i just totally wanna have fun...u no (Exh. 3 at 10)
Defendant	No I am not looking to pay for you (Exh. 3 at 10)
Kaylee	Thot I'd try! Lol! I'm all kindza hot now... (Exh. 3 at 10)
Defendant	...So are you trying to meet up with some other guys (Exh. 3 at 11)
Kaylee	Yeah cuz Im hot Don't judge me (Exh. 3 at 11)
Defendant	I am not judging But you have only been with 1 guy before (Exh. 3 at 12)
Kaylee	i hate drama...just wanna have fun (Exh. 3 at 12)
Defendant	I want to see a picture of you (Exh 3 at 13)
Defendant	I wish you send a sexy pic of you Show your tits (Exh. 3 at 15)
Kaylee	i wish i wasn't alon (Exh. 3 at 15)
Defendant	Where is Your Dad (Exh. 3 at 15)
Defendant	I'm going to be free tomorrow night (Exh. 3 at 16)
Kaylee	U shuld totly 2 day (Exh. 3 at 16)
Defendant	I can't today I have a Christmas function (Exh. 3 at 16)
Kaylee	Go late! Lol! I culd be ur date Lol (Exh. 3 at 16)
Defendant	might be a little young to be my date (Exh. 3 at 16)
Kaylee	totly wish u wantd to c me but whatevs if u wanna u totly gotta promise not to hurt me or tel anyl (Exh. 3 at 18)
Defendant	I won't but I have to come see you tomorrow (Exh. 3 at 18)
Defendant	Can you send me any sexy pictures of you maybe with your shirt off (Exh. 3 at 19)
Kaylee	Totly if I had a camra My dad drilled mine (Exh. 3 at 19)
Defendant	Don't you have a camera phone (Exh. 3 at 19)
Defendant	You have the internet you can cam me on Skype (Exh. 3 at 20)
Kaylee	I dnt have a computer cam (Exh. 3 at 20)
Defendant	Don't you have any sexy pictures of you (Exh. 3 at 20)
Kaylee	naaaah way (Exh. 3 at 20)
Defendant	Can I ask how much you weigh what size are you You're very cute I'm just curious (Exh. 3 at 22)
Kaylee	No personal (Exh. 3 at 22)

Defendant	Really You have you ever put your mouth on a cock before (Exh. 3 at 22)
Kaylee	yes (Exh. 3 at 22)
Defendant	Really how many (Exh. 3 at 22)
Kaylee	u r werd (Exh. 3 at 22)
Defendant	Why is that weird I just wanted to know what you experience level was Are you going to be around tomorrow night (Exh. 3 at 23)
Kaylee	ya (Exh. 3 at 23)
Defendant	I can come over tomorrow around 6 (Exh. 3 at 23)
Defendant	Is your dad home now (Exh. 3 at 24)
Kaylee	Yeah he came home yesterday but is sleeping. He going away later (Exh. 3 at 24)
Defendant	Ok later when he leaves (Exh. 3 at 24)
Defendant	So where do you live in Tacoma (Exh. 3 at 25)
Kaylee	I live in a hill by the hospital (Exh. 3 at 26)
Defendant	You have to give me an address Do you have an address (Exh. 3 at 26)
Kaylee	i dnt no it...it's a blue house...u no where the chikn place is by the hospital (Exh. 3 at 26)
Defendant	...if you go outside there's got to be a house number on the outside of the house I wouldn't come over there probably until around 6 or so maybe (Exh. 3 at 27)
Kaylee	thres no house numbe...it was painted...i thik its by 19...theres a chickn plce calls zells or ezls or sumthin (Exh. 3 at 27)
Defendant	Well tell me directions from the place where you're at from that chicken store (Exh. 3 at 28)
Kaylee	its like down the street and turn right and its like rigt ther i culd naybe mmet u thre (Exh. 3 at 28)
Defendant	Yes we could probably meet there what are you going to wear for me tonight (Exh. 3 at 29)
Kaylee	idk (Exh. 3 at 29)
Defendant	Have you had any other guys over there yet (Exh. 3 at 29)
Kaylee	no...jus mved here... im not a slut (Exh. 3 at 29)
Defendant	Do you shave down in your vagina area (Exh. 3 at 29)
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 (Exh. 3 at 29) i no i wantch 2 many movies (Exh. 3 at 30)
Kaylee	so i only had real sex 1 time...is that weird (Exh. 3 at 31)

Defendant	Really how long ago (Exh. 3 at 31)
Kaylee	lik a few mnths ago but it only was short...it was dumb...i wana be like in the movies u know (Exh. 3 at 31)
Defendant	Tell me what you want (Exh. 3 at 32)
Kaylee	i did...jus don't wan it to hurt...how big r u (Exh. 3 at 32)
Defendant	Remember you said nothing personal info (Exh. 3 at 32)
Kaylee	well i just tryn 2 no if itll hurt (Exh. 3 at 32)
Defendant	It may a little cuz u are not use to it (Exh. 3 at 32)
Kaylee	my frend said she bled...does that happn...kina scard (Exh. 3 at 32)
Defendant	Well that probably should have happened the first time (Exh. 3 at 32)
Defendant	Do you use a vibrator or fingers on your self (Exh. 3 at 33)
Kaylee	i play with my clit sometimes but nothn insid wish i had a dildo...is that a vibratr (Exh. 3 at 33)
Defendant	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 (Exh 3 at 33)
Kaylee	u culd like come now if u wanna...im like totally hot right now (Exh. 3 at 34)
Defendant	I told you earlier to be around 6 or 6:30 nothing's changed when does your dad leave (Exh. 3 at 35)
Kaylee	but u gotta promise me u wont do anything wit my ass...that is jus weerd is it weird that my pants are like wet but i didn't pee...i nvr felt like this b4 (Exh. 3 at 36)
Defendant	I can rub it and spank it lightly, (Exh. 3 at 36)
Kaylee	my ass...that's weird (Exh. 3 at 36)
Defendant	Has he gone to work (Exh. 3 at 38)
Kaylee	like 4 evr ago (Exh. 3 at 38)
Defendant	I'm on my way (Exh. 3 at 39)
Defendant	I was looking on google maps and I found the chicken place do you turn right there between there and the gas station (Exh. 3 at 40)
Kaylee	gona take a showr...u want me to shave (Exh. 3 at 42)
Defendant	That would be nice tell me how to get there (Exh. 3 at 42)
Kaylee	im like wet and i didn't pee my pants i dnt even no wy...im sory (Exh. 3 at 44)
Defendant	That's because your pussy is excited (Exh. 3 at 44)
Defendant	Well I'm already up by the hospital (Exh. 3 at 44)
Kaylee	u promis i wont get preg ...don't condoms break u hav 1 right (Exh. 3 at 45)
Defendant	I'm fixed (Exh. 3 at 45)

Kaylee	i cant get no diseass eithr (Exh. 3 at 45)
Defendant	I am completely disease free and I can't get you pregnant (Exh. 3 at 46)
Kaylee	so like u gotta have a condom if u wana do that tho ok? Up 2 u (Exh. 3 at 46)
Defendant	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 (Exh. 3 at 46)
Kaylee	ye but like if u wana have sex wont i get dises anywayz (Exh. 3 at 46)
Defendant	I don't have any to give you I have no diseases (Exh. 3 at 46)
Defendant	I'm ready I don't got all night what are we going to do (Exh. 3 at 47)
Defendant	...I just don't know where you live... (Exh. 3 at 48)
Kaylee	I think it's 1908 s Yakima (Exh. 3 at 48)
Defendant	...I've been hanging out down here for an hour people have seen my car (Exh. 3 at 49)
Defendant	You told me you lived in a dump at places in a dump (Exh. 3 at 50)
Defendant	I went back down by the hospital where I know its safe There are black guys all over the place in here cars around here circling They've seen me several times and stop me (Exh. 3 at 51)
Defendant	Why don't you walk up to the emergency entrance to the hospital parking lot and I can meet you there... (Exh. 3 at 51)

Defendant sent the last text referenced above on December 17, 2015, at approximately 8:31 p.m. Exh. 3 at 51.

Also on December 17, 2015, at approximately 8:30 p.m., police surveillance observed defendant's vehicle in the area of the trap house. RP 773-75, 841-44. Police observed defendant's vehicle in the emergency room parking lot. RP 774-75. Defendant appeared to be maneuvering through the parking lot slowly. RP 777. Defendant then proceeded to drive past the trap house on Yakima and appeared to be leaving. RP 778-79.

Officers stopped defendant's vehicle and placed defendant under arrest at approximately 8:38 p.m. RP 779-80, 805-10, 853, 857. Police later extracted data from defendant's phone pursuant to a search warrant and found emails and text messages between defendant and Kaylee; Kaylee's contact information; photographs of Kaylee; and defendant's internet search history related to Kaylee's location. RP 768, 889-900, 907-08, 915-16, 920-222; Exh. 6,7, 8, 9, 10.

Defendant testified at trial. He admitted that he posted the ad on Craigslist and sent all of the emails and text messages that were admitted into evidence. RP 1205, 1209-10, 1220, 1305-06, 1325-26. He also admitted that he drove to the area of Kaylee's residence and had no reason to be in that area except to meet Kaylee. RP 1273-74, 1283, 1488-89, 1498. However, defendant claimed that he posted the Craigslist ad because he was looking for young adult woman in her 20s to text and role play with. RP 1206. He denied looking for a sexual partner or minor. RP 1204, 1239, 1280, 1284-85. Defendant testified that he never intended to have sex with Kaylee, never thought Kaylee was a minor, and he never intended to engage in any type of communication with a minor about sex. RP 1212-13 (defendant thought "I'm almost 14" was role play), 1239, 1249, 1280, 1284-85, 1296-98.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE
DEFENDANT’S CONSTITUTIONAL RIGHT TO
PRESENT A DEFENSE.

A criminal defendant has a constitutional right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). However, the right to present a defense is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *Maupin*, 128 Wn.2d at 924-25. The defendant’s right to present a defense is subject to “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

“The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed. 2d 798 (1988). *See also, State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (the right to present a defense does not extend to irrelevant or inadmissible evidence); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (“a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense”). The proponent of the

evidence – here defendant – bears the burden of establishing relevance and materiality.⁴ *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). See ER 401 (definition of relevant evidence); ER 402 (evidence which is not relevant is not admissible); ER 403 (exclusion of relevant evidence based on prejudice, confusion, or waste of time). While a trial court’s evidentiary rulings are generally reviewed for an abuse of discretion, an alleged denial of the constitutional right to present a defense is reviewed de novo. *Jones*, 168 Wn.2d at 719; *State v. Burnam*, 4 Wn. App. 368, 375, 421 P.3d 977 (2018).

Defendant claims the trial court violated his right to present a defense when it (1) prevented him from calling Det. Sgt. Rodriguez as a witness, (2) refused to allow him to call Michael Comte to respond to Det. Bickford’s testimony, and (3) denied him access to the “sting operation” training manuals. Corrected Brief of Appellant (hereinafter “Brf. App.”) at 28-36. As an initial matter, defendant fails to assign error under RAP 10.3 to these alleged trial court errors. See Brf. App. at 1 (Assignments of Error).

RAP 10.3(a)(4) requires an appellant’s brief to contain a concise statement of each asserted trial court error, together with the issues

⁴ If relevant, 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. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

pertaining to the assignments of error. In addition, RAP 10.3(a)(6) requires argument in support of the issues presented for review, together with citations to legal authority. Failure to raise an issue through an assignment of error generally bars review. *State v. Olson*, 74 Wn. App. 126, 128, 872 P.2d 64 (1994), *aff'd*, 126 Wn.2d 315, 893 P.2d 629 (1995) (citing *State v. Fortun*, 94 Wn.2d 754, 756, 626 P.2d 504 (1981)). Review of such issues will only be granted if the failure amounts to a technical violation of the rule as shown by “the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief.” *Id.*; *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981) (quoting *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979)).

While defendant’s claims regarding Rodriguez and Comte are somewhat discernible in the appellate brief, his claim regarding the training manuals (which cuts off mid-sentence) is not. This Court should decline to review defendant’s claims which are not “perfectly clear” and not supported by applicable authority, analysis, or citation to the record.

a. Detective Sergeant Rodriguez

Defendant claims the trial court erroneously prevented him from calling Det. Sgt. Rodriguez as a witness. Brf. App. 29. The trial court did no such thing. The court specifically noted that it was not excluding Rodriguez as a witness but rather denying defendant’s request to question

him regarding subjects of which he had no personal knowledge. CP 700-702; RP 1059-63, 1071-72, 1153-55.

At the beginning of trial, the State indicated it would not be calling Det. Sgt. Rodriguez as a witness. RP 28. Defendant then stated that he wished to call Rodriguez as a witness and filed a witness list that same day. RP 29; CP 116-17. Defendant claimed Rodriguez would provide information regarding how the Net Nanny Operation was run. CP 206-207. *See* RP 944 (defendant wants Rodriguez to testify about the operation, how it was run, and who was doing what), 965 (defendant claims Rodriguez would be familiar with who was doing what at the trap house that night), 966 (defendant wants Rodriguez to testify regarding who else was on surveillance “if he even knows who was on surveillance”), 967 (defendant argues that if Rodriguez does not have personal knowledge of these things then “perhaps he can tell us who does”), 968 (defendant presumes Rodriguez would know about the pole cameras), 989-90 (defendant wants to call Rodriguez to show how the operation worked or did not work).

The State argued that Rodriguez did not have personal knowledge about the particular investigation involving defendant and therefore had no relevance as a witness. *See* RP 943, 951-53, 973-78, 987-89. The trial court considered defendant’s offer of proof and reviewed Rodriguez’s

reports and pretrial interview transcript, *see* Exhibits 26-28, and found the following:

The reports didn't suggest that Detective Sergeant Rodriguez would have anything material to offer... None of this suggests in any way that Detective Sergeant Rodriguez would have personal knowledge as to who might have seen Mr. Zimmerman, or personal knowledge as to where Mr. Zimmerman was prior to his driving by the residence on South Yakima Street.

None of this would suggest that he has personal knowledge as to how long Mr. Zimmerman may or may not have been in the area, and so I don't know if I'm missing anything, but if that's the -- if that's the reason why he would have been called as a witness, there's nothing in the materials that in any way suggests that he would have personal knowledge.

...

Until there's been a showing that Detective Sergeant Rodriguez has personal knowledge of anything that would be relevant and admissible in this case, materiality hasn't been shown, and there's just not been any reason to explain why he would be allowed to testify.

So having said that, if you -- if there's another reason that he can be called to testify regarding something that is relevant and admissible, then, you know, obviously, you're absolutely right; you have a right to put on a defense. You have a right to call witnesses, but it doesn't mean that you can[] call witnesses to testify about matters to which they don't have personal knowledge, and that's really what it comes down to.

...

I want to be very clear about this, it's not -- the Court has not entered an absolute prohibition on the defense calling Detective Sergeant Rodriguez. What the Court has said all along in context is that there has to be something relevant and admissible that he can testify to, and to this point, no such relevant and admissible testimony has been articulated by the defense.

RP 1060-63, 1072, 1153. *See also*, CP 700-702 (court's written order).

The trial court's decision did not deny defendant his Sixth Amendment right to present a defense. The court properly limited Rodriguez's testimony for several reasons. First, ER 602 prohibits a witness from testifying about a matter if the witness lacks personal knowledge of the matter. Personal knowledge means facts the witness has personally observed. *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). The rule has a low threshold for what constitutes personal knowledge and only requires that evidence "sufficient to support a finding" of personal knowledge be introduced. *Id.* at 611.

Under ER 602, Rodriguez was not competent to testify regarding the subjects proffered by defendant, because he did not have personal knowledge of relevant facts involving defendant's case. During his pretrial interview, Rodriguez stated that he did not have communication with defendant, did not know who seized defendant's phone (or when), did not monitor the "side channels" the night of defendant's arrest (and did not know who was monitoring them), did not know where defendant was arrested, and was not present for defendant's interview. Exh. 28 at 15, 16, 18, 22-23, 25 ("I'm not even the one who...communicated with Mr. Zimmerman, so I'm trying to understand why I'm being asked all these questions"), 27, 31. He repeatedly stated that he would have to refer to

other officers' reports to answer questions. Exh. 28. He also confirmed that it was Det. Bickford who prepared the statement of probable cause. *Id.* at 18-19. *See* Exh. 14 and 14-A. Rodriguez did not appear to have any direct involvement in defendant's case the night of defendant's arrest. Given the above, "no trier of fact could reasonably find that the witness had firsthand knowledge," *Vaughn*, 101 Wn.2d at 611-12, and therefore his testimony was inadmissible under ER 602.

Second, ER 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. It is not error to exclude cumulative evidence. *Saldivar v. Momah*, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008). As noted by the trial court, defendant's suggestion that Rodriguez perhaps knew "who did what" was cumulative, as others had already testified at trial regarding "who did what" as part of the operation. CP 701. *See, e.g.*, RP 371-72, 767, 772-74, 779-80, 808-10, 838-40, 865-66, 889-90, 934 (testimony of those involved in Net Nanny Operation involving defendant).

Finally, the two supplemental reports attributed to Rodriguez, Exhibits 26 and 27, concerned matters which were irrelevant and/or collateral to defendant's charges. *See* RP 988-89. The substance of the documents was not admissible. For these reasons, defendant's

constitutional right to present a defense was not violated. This Court should affirm.

However, even if the trial court did violate defendant's right to present a defense in limiting Rodriguez's testimony, any error was harmless. An error of constitutional magnitude is deemed harmless if the appellate court is able to say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Accord State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, even if Rodriguez were to testify regarding "the many moving parts of the sting," Brf. App. 29, the overwhelming untainted evidence consisting of the emails and text messages established defendant's guilt. Defendant admitted to posting the Craigslist ad and sending all of the emails and text messages that were introduced into evidence. He admitted he drove to the area of Kaylee's residence. Police observed defendant's vehicle near that location. Defendant had no other reason to be in the area than to meet Kaylee. The plain language of the ad, emails and text messages demonstrated his intent to have sexual intercourse with a 13-year-old girl. Thus, any error was harmless beyond a reasonable doubt.

b. Michael Comte

Defendant claims the trial court violated his right to present a defense when it refused to allow defendant to call Michael Comte, a sexual offender treatment provider, as a witness to respond to Det. Bickford's testimony. Brf. App. 32. The following exchange occurred during defendant's cross examination of Det. Bickford:

[Defendant:] 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?

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

[Defendant:] Move to strike answer as non-responsive.

[Court:] Sustained.

...

[Defendant:] 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?

[State:] Object to questions that call for what the defendant was thinking.

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

[Bickford:] 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...If you're asking me what my belief is, I would be happy to read the text messages that made me believe that he was not role playing and that he was indeed believing he was talking with a child.

RP 622-24. Defendant proceeded to question Bickford regarding his training and “expertise.” RP 624-25. Outside the presence of the jury, defendant asked the court to strike Bickford’s “unqualified testimony” about his opinion that defendant could not have been role playing based on his psychological training, otherwise defendant would call a psychologist as a witness in response. RP 632. *See also*, RP 627-29. The court denied defendant’s motion to strike Bickford’s answer. RP 632. Defendant subsequently added Michael Comte to his witness list for the purpose of rebutting Bickford’s testimony. CP 166-167; RP 632-33, 942, 945-46.

After reexamining Bickford’s challenged testimony, RP 992-97, the trial court indicated, “The answer may have been responsive to the question as the witness understood it. It was not responsive to the question as the Court understood it, and...had the Court understood the question in the way that the witness understood it, the Court would have sustained the objection.” RP 1003. The court suggested three different options as a remedy and reserved its ruling after defendant indicated he wanted to call Comte as a witness. RP 1003-05.

The trial court later revisited the issue and decided to instruct the jury to disregard Bickford’s testimony regarding his personal belief. RP 1076-78, 1092. The court also ruled that it would not allow defendant to

call Comte as a witness.⁵ RP 1078-81. *See also*, RP 1160-61, 1164-65.

The court entered a written order reflecting the same. CP 706-719.

The court gave the following instruction to the jury, “The jury is ordered 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 1169-70. Comte did not testify for defense.

First, defendant is precluded from raising this issue on appeal because of the invited error doctrine. Under the invited error doctrine, a party who sets up an error at trial cannot claim that very action as an error on appeal and receive a new trial. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Here, defendant is the one who asked Bickford the question which called for his personal opinion as to defendant’s thought process. Defendant created the situation which necessitated a remedial response.

Second, the trial court’s ruling did not violate defendant’s right to present a defense. Defendant had initially asked the court to strike Bickford’s testimony regarding his belief that defendant believed he was

⁵ The court explained, “If Michael Comte is allowed to testify, then this will become a trial unto itself, and we’ll have cross examination about goal-directed behavior, we’ll have cross examination about if he knew X and Y and Z would your opinion change, and it’s a rabbit hole that I don’t care to go down because it’s -- it will be confusing for the jury. It will be a waste of time. It will be, to some extent, misleading.” RP 1080-81.

talking to a child. RP 632. The court ultimately instructed the jury to disregard Bickford's challenged testimony. Juries are presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The language of the instruction was specific enough to direct the jury to the testimony at issue. Defendant got the remedy he originally wanted. Once the jury was so instructed, Comte's testimony became unnecessary and irrelevant. There was nothing for Comte to respond to. The right to present a defense does not extend to inadmissible evidence under the rules of evidence. *Taylor*, 484 U.S. at 410; *Jones*, 168 Wn.2d at 720. *See* ER 402 (evidence that is not relevant is not admissible); ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by...confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Any testimony by Comte would have been confusing and a waste of time after the jury was specifically instructed to disregard Bickford's opinion testimony. There was no error, and this Court should affirm defendant's convictions.

c. Training Manuals

Defendant claims the court denied his right to present a defense when it denied his access to the "sting operation" training materials. Brf. App. 35. Defendant fails to support his claim with citations to authority or

meaningful analysis. In fact, defendant's argument cuts off mid-sentence in his brief. Brf. App. 36.

Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)). *See also, Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011 (2015) (an appellate court will not consider a claim of error that a party fails to support with legal argument in opening brief); *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by* 170 Wn.2d 117 (2010) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review”). This Court should decline to review defendant's claim where he fails to assign error and fails to provide sufficient argument to allow for meaningful review.

Even if this Court were to review defendant's unsupported claim, it would still fail. At the beginning of trial, defendant asked the court to

order the State to produce law enforcement's training materials. *See* RP 46-52; CP 100-101. The trial court asked defendant to brief the issue and provide relevant authority. RP 52. A few days later, the State indicated that Det. Bickford brought two ICAC training manuals with him to court and defendant could look through the manuals before cross examination. RP 290, 306. Due to their sensitive nature, the State did not want the materials to be copied unless the court found they were discoverable. RP 290, 294-95. The court reiterated that it wanted to see legal authority from both parties. RP 290-91, 293, 300, 314.

The next day, defense counsel advised the court that she had obtained a copy of the training manual and intended to use it during cross examination. RP 461, 496. *See also*, RP 541-42; Exh. 21. Defendant attempted to ask Det. Bickford about the manual during cross examination. RP 726-31. Bickford testified that he had not seen the document before and he was not a member of the applicable task force. RP 726-27, 729. The State objected to defendant's continued use of the manual during Bickford's cross examination, and the trial court sustained the State's objection, finding, "This is a document that doesn't pertain to him. He has no familiarity with it. You're not going to ask him any further questions about a document that he has no familiarity with and it doesn't govern his actions." RP 731.

Defendant later requested a copy of the other manual in Bickford's possession. RP 1041. The court again reminded defendant that it wanted legal authority. RP 1038-39. Defendant filed a written motion claiming, "The material is relevant to the anticipated of the defense of entrapment. The case authority provided herein as well as ER 401, 402, 607, 608." CP 207. The court denied defendant's motion to compel production, noting there was insufficient evidence at that point in time to demonstrate the defense of entrapment, the manuals did not appear to be relevant, and defendant's request was untimely. RP 1155-57, 1159-60. The court invited defendant to revisit the issue if able to "set forth an offer of proof or set forth actual evidence or testimony tending to establish entrapment such that the jury would be entitled to consider it." RP 1161.

Defendant claimed he needed the manual(s) to support his defense of entrapment. As argued below (*see* section 4(a)), defendant failed to demonstrate that he was entitled to a jury instruction on the defense of entrapment. Because defendant failed to demonstrate he was entitled to an entrapment instruction, the manuals were not relevant. The right to present a defense does not extend to irrelevant or inadmissible evidence. *Jones*, 168 Wn.2d at 720. The trial court did not violate defendant's right to present a defense by denying compelled production of the training

manuals, one of which defendant had already obtained. This Court should affirm.

2. DEFENDANT’S CONVICTIONS FOR ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE AND COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES ARE SUPPORTED BY SUFFICIENT EVIDENCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Thus, sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d

971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Criminal intent may be inferred from conduct where “it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Circumstantial and direct evidence are considered equally reliable. *Salinas*, 119 Wn.2d at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Here, viewing the evidence in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to find that defendant committed attempted rape of a child in the second degree and four counts of communicating with a minor for immoral purposes.

- a. The evidence was sufficient for a rational trier of fact to find defendant guilty of Attempted Rape of a Child in the Second Degree.

Evidence is sufficient to support a conviction of Attempted Rape of a Child in the Second Degree when the State has proven beyond a reasonable doubt that the defendant intended to have sexual intercourse with a child who is at least 12 years old but less than 14 years old and not married to the defendant and who is at least 36 months younger than the defendant, and the defendant took a “substantial step” toward the commission of that crime. RCW 9A.28.020; RCW 9A.44.076. *See also*, RCW 9A.44.010(1) (definition of “sexual intercourse”). *See* CP 290, 292; Washington Pattern Jury Instruction – Criminal (WPIC) 44.12, 100.01. “The intent required is the intent to accomplish the criminal result of the base crime.” *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). The intent required for attempted rape of a child is the intent to have sexual intercourse with a child (here, a child at least 12 years old but less than 14 years old). *See State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003); *Johnson*, 173 Wn.2d at 908. In the case of a fictitious child

victim, the State must show the defendant knew the perceived victim's age. *Johnson*, 173 Wn.2d at 908.

A substantial step is an act that is “strongly corroborative” of the actor's criminal purpose. *Johnson*, 173 Wn.2d at 899 (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)); *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). “[I]t makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur.” *Luther*, 157 Wn.2d at 74. However, more than mere preparation to commit a crime is required for a substantial step. *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978)). *See also*, CP 295; WPIC 100.05.

Neither factual nor legal impossibility is a defense to criminal attempt. RCW 9A.28.020(2). “[A] defendant who intends to have sexual intercourse with a fictitious underage person and takes a substantial step in that direction can be convicted of attempted rape of a child.” *Johnson*, 173 Wn.2d at 904. *See also*, *Townsend*, 147 Wn.2d at 679 (defendant took a substantial step toward rape of a 13-year-old child that he met in an on-line chat room even though the victim was actually a male detective pretending to be a 13-year-old girl).

Here, the defendant intended to have sexual intercourse with fictitious 13-year-old Kaylee. Kaylee told defendant she was “almost 14

but act way older.” Exh. 2. “Almost 14” means 13 years old. *See* RP 1340, 1454 (defendant admits Kaylee told him she was 13). At the time of trial in 2017, defendant was 59 years old and married to the same wife for 25 years. RP 1197-98. He obviously was not married to fictitious Kaylee. Defendant intended to have sexual intercourse as shown through his email and text messages. First, defendant posted the ad in the Casual Encounters Section of Craigslist looking for “a young little girl for play” and “kinky fun.” Exh. 1; RP 1205, 1305-06, 1319-20 (meaning of “kinky”). After Kaylee responded to his ad, defendant proceeded to ask for pictures, including “sexy” pictures that showed her “tits.” Exh. 2; Exh. 3 at 15, 19. Defendant asked Kaylee if she had “ever had sex before,” thus showing his interest in finding out the minor child’s sexual experience. Exh. 3 at 4. After he found out she had some sexual experience, defendant proposed meeting up. Exh. 3 at 4-5. When Kaylee asked, “how much is ur reward...i totally need a new ipod,” defendant responded with “No I am not looking to pay for you.” Exh. 3 at 10. Defendant wanted sex with Kaylee for free. He promised not to hurt Kaylee and said, “I have to come see you tomorrow.” Exh. 3 at 18.

Defendant asked Kaylee if she had ever put her “mouth on a cock before,” which indicated his interest in having Kaylee perform oral sex on him. Exh. 3 at 22, 23 (defendant explains “I just wanted to know what

you[r] experience level was”). He asked if Kaylee shaved her vagina area, thereby indicating his desire to see her naked and engage in sexual contact. Exh. 3 at 29. Kaylee asked defendant “how big r u...just tryn 2 no if itll hurt.” Exh. 3 at 32. This question indicated Kaylee wanted to know the size of defendant’s penis and whether “it” meaning penetration would hurt and cause her to bleed. Defendant responded with, “It may a little cuz u are not use to it.” Exh. 3 at 32. This exchange on its own demonstrates defendant’s intent to have sexual intercourse with Kaylee.

Defendant told Kaylee her “pussy [was] excited,” assured her that he could not get her pregnant because he was “fixed,” and told her he could not transmit any diseases (i.e., STDs) because he was “completely disease free.” Exh. 3 at 44-46. Defendant said he did not need to use a condom. Exh. 3 at 46. The only way for Kaylee to get pregnant or potentially contract a sexually transmitted disease would be to have unprotected sexual intercourse with defendant. Defendant’s assurances to Kaylee demonstrate his intent to have sexual intercourse with her.

Viewed in the light most favorable to the State, there was sufficient evidence to establish that defendant intended to have sexual intercourse with a 13-year-old girl.

Finally, the State presented sufficient evidence to establish that defendant took a substantial step toward the commission of the crime of

rape of a child in the second degree. In similar cases involving sting operations, courts have held that a substantial step was completed when the defendant took steps beyond mere words, such as arriving at the place where the crime was planned to occur.

In *State v. Wilson*, an undercover detective, posing as a mother, posted an ad on Craigslist offering sex with her and her daughter. 158 Wn. App. 305, 308, 242 P.3d 19, 27 (2010). The defendant responded, exchanged pictures, and arranged to have oral sex with the 13-year-old daughter in exchange for \$300. *Id.* at 317. The defendant drove to a Dick's Drive-In near the child's house and waited in his car for approximately 30 minutes before he was arrested. *Id.* at 317-18. The defendant argued that the evidence only established mere preparation. *Id.* at 316. On appeal, the court disagreed. *Id.* at 320. The defendant exchanged photos with the fictitious mother, obtained the mother's address, and drove to the agreed upon location with the \$300 he agreed to pay for sex. *Id.* at 318. These facts showed that defendant took a substantial step towards the commission of second degree rape of a child. *Id.* at 318-20.

In *State v. Townsend*, the defendant communicated via e-mail and instant messenger with someone he believed to be a 13-year-old girl. 147 Wn.2d 666, 670, 57 P.3d 255 (2002). The defendant told her he wanted to have sex with her, and the two of them planned to meet at a hotel. *Id.* at

671. When the defendant arrived at the hotel room and asked to see the girl, he was arrested. *Id.* The court rejected the defendant's impossibility argument. *Id.* at 679. Instead, it held that the defendant took a substantial step because his actions showed he intended to have sexual intercourse with the child. *Id.*

Similarly, in *State v. Sivins*, the court found that the defendant took a substantial step toward rape of a child when he engaged in sexually graphic internet communications with a fictitious 13-year-old and when he drove five hours to Pullman and secured a motel room for two. 138 Wn. App. 52, 64, 155 P.3d 982 (2007).

In contrast, in *State v. Grundy*, an undercover officer posing as a drug dealer approached the defendant and asked what he wanted. 76 Wn. App. 335, 336, 886 P.2d 208 (1994). The defendant said he wanted "20." *Id.* The officer asked, "20 what?" *Id.* The defendant replied, "20 of coke." *Id.* The officer asked to see the defendant's money and the defendant replied he wanted to see the drugs first. *Id.* Thereafter, the defendant was arrested. *Id.* Defendant argued on appeal that there was insufficient evidence to support a finding that a substantial step was taken toward possession of a controlled substance. *Id.* at 337. The court of appeals agreed, holding the defendant's words, "without more," were insufficient "to constitute the requisite overt act." *Id.*

Defendant here took a substantial step as the defendants did in *Wilson, Townsend, and Sivins, supra*. On December 16, 2015, defendant told Kaylee he could “come over tomorrow around 6.” Exh. 3 at 23. The next day, he repeatedly asked Kaylee if her dad was home. Exh. 3 at 24, 35, 38, 41. He asked Kaylee for her address and for directions to her house. Exh. 3 at 25-28, 31, 41-43. He asked Kaylee what she was going to wear for him that night, thus indicating his intention to meet. Exh. 3 at 29.

At 7:08 p.m., defendant texted Kaylee that he was on his way. Exh. 3 at 39. He searched for the “chicken place” on Google maps. Exh. 3 at 40; Exh. 9; RP 920-21. Defendant told Kaylee he was “already up by the hospital.” Exh. 3 at 44. *See also*, Exh. 18 (map of area); RP 792-93. He grew impatient and asked Kaylee again for her address. Exh. 3 at 47-48 (“I’m ready I don’t got all night what are we going to do...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”). Defendant said he had “been hanging out down here for an hour.” Exh. 3 at 49. Kaylee provided her address and described her residence for defendant. Exh. 3 at 48-49. Defendant texted, “you told me you lived in a dump,” which indicated defendant saw Kaylee’s house. Exh. 3 at 50. Defendant finally told Kaylee he drove back to the hospital where it was “safe” and asked her to meet him there. Exh. 3 at 51.

Police surveillance observed defendant's vehicle in the area by the hospital. RP 773-78, 844-47. Defendant drove past Kaylee's house and was stopped by police shortly thereafter. RP 778-80. Defendant admitted during trial that he drove to the hospital that night and looked up the location of Ezelle's Chicken as well as Kaylee's address via Google. RP 1273-75, 1506, 1518-19, 1653. *See also*, RP 1466 (defendant admits he was on the street right next to Ezelle's). He also admitted that he had no other reason to be in the area except to meet Kaylee. RP 1488-89, 1498. *See also*, RP 1198 (defendant lived in South Hill Puyallup).

Here, defendant engaged in conduct that went far beyond mere words. His above actions were in order to fulfill his plan of having sexual intercourse with a 13-year-old girl. He asked for photos of Kaylee, drove to her location, obtained her address, and asked her to meet him. *See Wilson*, 158 Wn. App. at 318-20. The State presented sufficient evidence to establish that defendant took a substantial step toward the commission of the crime of rape of a child in the second degree. This Court should affirm defendant's conviction.

- b. The evidence was sufficient for a rational trier of fact to find defendant guilty of four counts of Communication with a Minor for Immoral Purposes.

Evidence is sufficient to support a conviction of Communication with a Minor for Immoral Purposes when the State has proven beyond a reasonable doubt that the defendant communicated with someone the defendant believed to be a minor for immoral purposes of a sexual nature through the sending of an electronic communication. RCW 9.68A.090(2), (3); RCW 9.61.260(5) (definition of “electronic communication”). *See also*, CP 298-303; WPIC 47.05, 47.06. The crime of communicating with a minor for an immoral purpose is intended to prohibit “communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993).

Here, the defendant was found guilty of four counts of communication with a minor for immoral purposes. CP 309-312. Count II concerned defendant’s email communications from December 14-16, 2015. CP 300; RP 2029. Counts III through V concerned defendant’s text messages dated December 15, 16, and 17, 2015, respectively. CP 301-303; RP 2029. Viewed in the light most favorable to the State, sufficient evidence supports each count.

Again, defendant posted the ad on Craigslist looking for a “young little girl for play” and “kinky fun.” Exh. 1. Kaylee, a fictitious 13-year-old girl, responded to his ad via email. Exh. 2; RP 402-03 (Exhibit 2 is printout of email exchange). When “young little girl” Kaylee emailed, “im totally bored...what kinda play r u into,” defendant responded that he was “very open in play,” a “Dom,” and he liked “bdsm, dirty talk, pda and whatever you like.” Exh. 2. Detective Bickford testified that “Dom” means someone engaged in dominant sexual activity, and “BDSM” stands for bondage, dominance, sadomasochism. RP 406. Defendant thus communicated his sexual interests. After Kaylee confirmed her age, defendant asked for Kaylee’s sexual interests (“What are you looking for”), he asked for pictures, and he continued to engage with her via email and text message. Exh. 2; Exh. 3.

On December 15, 2015, defendant asked Kaylee if she had ever had sex before, asked her to send him pictures, and indicated that he was “not looking to pay” for her sexually. Exh. 3 at 4-5, 10. *See* RP 412 (Exhibit 3 is printout of text messages). On December 16, 2015, defendant texted Kaylee asking her to send him “a sexy pic of you...Show your tits.” Exh. 3 at 15. He again asked for “any sexy pictures of you maybe with your shirt off” and “can you cam me on Skype.” Exh. 3 at 19-20. And, he

asked Kaylee, “[H]ave you ever put your mouth on a cock before... how many.” Exh. 3 at 22.

On December 17, 2015, defendant asked Kaylee if she shaved her vagina area and told it would be “nice” if she shaved. Exh. 3 at 29, 42. He indicated that sex with him might hurt a little because she was not used to it. Exh. 3 at 32. He then asked Kaylee, “Do you use a vibrator or fingers on your self,” and proceeded to describe the difference between a dildo and vibrator. Exh. 3 at 33. When Kaylee told him not to do anything with her “ass,” defendant responded that he could “rub it and spank it lightly...Just like the movies.” Exh. 3 at 36-37. When Kaylee indicated that she was wet but didn’t pee her pants, defendant responded, “That’s because your pussy is excited.” Exh. 3 at 44. Finally, defendant assured Kaylee that he could not get her pregnant because he was “fixed,” he was “completely disease free,” and he did not need a condom. Exh. 3 at 45-46. Defendant therefore discussed engaging in sexual intercourse with Kaylee.

Here, there is sufficient evidence in the record to permit a rational trier of fact to find beyond a reasonable doubt that defendant communicated with Kaylee for immoral purposes of a sexual nature. Defendant expressed his sexual interests, asked Kaylee about her sexual experience, asked her to send “sexy” pictures of her topless, asked if she shaved her vagina area, discussed sexual intercourse, and talked about sex

toys. Defendant's communications with Kaylee clearly show a sexual nature and show intent to have Kaylee engage in sexual misconduct. Viewed in the light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that defendant communicated with Kaylee for the "predatory purpose of promoting [her] exposure to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 933. Accordingly, the State presented sufficient evidence to support defendant's convictions for communicating with a minor for immoral purposes.

3. DEFENDANT FAILS TO SHOW PROSECUTORIAL MISCONDUCT OCCURRED.

To prove that a prosecutor's actions constitute misconduct, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a

substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). A prosecutor is, however, allowed to argue that the

evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also*, *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). “Accordingly, reviewing courts focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice

could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the deputy prosecutor committed multiple acts of prosecutorial misconduct during closing argument and rebuttal. Each claim will be addressed in turn below.

- a. The State argued permissible inferences as to witness credibility and did not express personal opinions.

Defendant first argues the deputy prosecutor committed misconduct by personally vouching for the credibility of witnesses, expressing his personal views, and expressing his opinion of defendant’s guilt. Brf. App. 37-39. It is improper for a prosecutor to personally vouch for the credibility of a witness. *Warren*, 165 Wn.2d at 30; *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Vouching occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness’s testimony. *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2011). Additionally, “a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant’s guilt, independent of the evidence actually in the case.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012).

However, it is not improper for a prosecutor to draw inferences from the evidence as to why the jury would want to believe one witness over the other. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009); *Warren*, 165 Wn.2d at 30 (a prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility). On appeal, the court will not find prejudicial error “unless it is clear and unmistakable that counsel is expressing a personal opinion.” *Warren*, 165 Wn.2d at 30. *See also*, *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (“Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.”) (internal quotation marks omitted).⁶ *See, e.g.*, *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (prosecutor improperly stated personal belief by telling the jury, “I believe [the witness]. I believe him”).

Here, the prosecutor stated during closing argument,

I want to give you a couple caveats or warnings at the beginning of my closing argument... I'm going to use the word "I" repeatedly, and I speak for the State of Washington. Nothing that you've heard so far and nothing that you're going to hear for the rest of this case is my

⁶ “It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.” *McKenzie*, 157 Wn.2d at 53-54.

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.

RP 2026-27. The prosecutor then remarked he would not misstate the evidence or the law and asked the jury to hold both sides to that standard.⁷

RP 2027.

The prosecutor proceeded to use phrases such as “I’m going to suggest to you,” “I can’t stop you,” and “I want you to believe” during his closing argument, which defendant claims was improper. *See* RP 2028 (“I’m going to suggest to you now that the evidence shows defendant is guilty”); 2036 (“I’m going to suggest to you that there are some conversations that individuals can have...”); 2043 (“if you guys believe he went to Frisko Freeze for a chocolate shake, you can believe it; I can’t stop you from doing that”); 2046-47 (“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 from it.”); 2097-98 (“I want you

⁷ It is not clear if defendant claims these remarks were improper. To the extent that the remarks are part of defendant’s prosecutorial misconduct argument, that argument fails. The prosecutor’s remarks were simply a promise to follow the rules (as shown by asking the jury to hold both sides to that standard). Defendant has not shown the prosecutor in fact misrepresented the evidence or misstated the law. Moreover, defendant did not object to the prosecutor’s remarks and fails to show (or argue) they were so flagrant and ill-intentioned that no curative instruction could have alleviated the prejudice. The court instructed the jury that the lawyer’s statements are not evidence, the evidence is the testimony and exhibits, the law is contained in the court’s instruction, and the jury is to disregard any remark or statement not supported by the evidence or law in the instructions. CP 284. The jury is presumed to have followed this instruction.

to believe Mr. Zimmerman. I want you to believe...the Mr. Zimmerman who shows up in Exhibits 1, 2 and 3. That's the guy who I want you to believe because everything that he said wasn't motivated by his current desire to pull something over on the 12 of you"); 2100 ("You guys decide what you heard about that and what you didn't and all that other kind of stuff, but I want you to believe Mr. Zimmerman who said that at 7:22, 7:33 'I'm at the hospital'"); and 2104 ("The evidence is there. It fits into the law, and I would ask you to find this defendant guilty as charged"). Defendant did not object at the time these statements were made.

The prosecutor's arguments were not improper. First, the prosecutor did not expressly state his personal opinion as to the credibility of a witness. A reviewing court will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion." *Warren*, 165 Wn.2d at 30. Second, prosecutors have wide latitude to argue reasonable inferences from the evidence concerning witness credibility. *Warren*, 165 Wn.2d at 30; *Stenson*, 132 Wn.2d at 727. The prosecutor here confined his comments regarding the credibility of defendant to his testimony and the evidence introduced at trial. And, the prosecutor reminded the jury that it was the sole judge of witness credibility. RP 2050.

The prosecutor's use of the phrases "I'm going to suggest to you," "I can't stop you," and "I want you to believe" was just another way of saying, "I'm arguing to you." A prosecutor is obviously allowed to make arguments during closing argument. These phrases were not an expression of the prosecutor's personal opinion as to the defendant's guilt or the weight of the evidence. Rather, in light of the total argument, they merely signaled that the prosecutor was trying to convince the jury of facts and conclusions to be drawn from the evidence. *See McKenzie*, 157 Wn.2d at 53-54. The prosecutor's arguments were proper.

Because defendant did not object to any of the prosecutor's remarks, he waived any error unless the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Here, any prejudice could have been cured by a timely objection and curative instruction. Moreover, the court instructed the jury that they were the "sole judges of the credibility of each witness" and the "sole judges of the value or weight to be given to the testimony of each witness." CP 284. Juries are presumed to follow their instructions. *Stein*, 144 Wn.2d at 247. And again, there was no explicit statement of personal opinion, so no prejudicial error occurred. Defendant's claim of prosecutorial misconduct accordingly fails.

b. The State properly argued the concept of a substantial step during closing argument.

Defendant claims the deputy prosecutor committed misconduct by arguing that defendant could not abandon the crime of attempt where the trial court had not given such an instruction to the jury. Brf. App. at 39-41. Without citation to authority, defendant argues, “Jury instructions...are not provided sua sponte by the parties...The attorneys are not allowed to orally add instructions during their arguments.” *Id.* at 39.

“A prosecuting attorney commits misconduct by misstating the law.” *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015). *See also, State v. Davenport*, 100 Wn.2d 757, 763, 657 P.2d 1213 (1984) (misstating the law is improper and has the potential to mislead the jury). However, it follows that a prosecuting attorney does *not* commit misconduct by *correctly* stating the law.

Here, the deputy prosecutor argued during closing,

Now, here's the other thing you have to know. A substantial step. The 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 away.

RP 2044. Defendant did not object at the time the argument was made but asked for a curative instruction at the conclusion of closing arguments. *See* RP 2109-10 (“The Court did not give an instruction on abandoning an attempt, and so he’s instructed the jury beyond the scope of the law that’s been put in front of them, and I think that is improper and I would ask the Court to…give a corrective instruction to the jury that the prosecutor’s statements of the law are not the law.”). The trial court denied defendant’s motion. RP 2112-13.

Conduct that may be indicative of a substantial step includes obtaining the victim’s address and driving to the agreed upon location to meet for sex. *See State v. Wilson*, 158 Wn. App. 305, 318-20, 242 P.3d 19 (2010). *See also, State v. Townsend*, 105 Wn. App. 622, 631-32, 20 P.3d 1027 (2001), *affirmed*, 147 Wn.2d 666, 57 P.3d 255 (2002). Once a substantial step is taken, the crime of attempt has occurred, and abandonment cannot be a defense. *State v. Workman*, 90 Wn.2d 443, 450, 584 P.2d 382 (1978). Here, the deputy prosecutor appropriately argued that once defendant took a substantial step and the crime of attempt was accomplished, defendant could not have abandoned that crime. *See Workman*, 90 Wn.2d at 450. The prosecutor’s argument did not amount to a misstatement of the law. The prosecutor had wide latitude to draw and

express reasonable inferences from the evidence when he argued defendant had already committed the crime of attempted rape of a child when he decided to drive away. *See State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Accordingly, defendant fails to show that the prosecutor's statements were improper.

However, even if improper, defendant cannot establish the requisite prejudice. Defendant requested a curative instruction that "the prosecutor's statements of the law are not the law." The court had already instructed the jury,

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence... The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 284. *See also*, RP 2040. Juries are presumed to follow the court's instructions. *Stein*, 144 Wn.2d at 247. Moreover, defendant never proffered abandonment as a defense, *see* RP 2112, so there is no likelihood the prosecutor's brief argument affected the jury's verdict. The prosecutor's argument boiled down to: once a substantial step is taken towards the commission of the intended crime, the crime of attempt is completed. *See* RP 2112-13; CP 290, 295. As a result, even if the deputy prosecutor's statements were improper, reversal is not required.

- c. The State properly discussed the reasonable doubt standard during closing argument.

Defendant next argues the deputy prosecutor trivialized the State's burden of proof during closing argument. Brf. App. at 41. A prosecutor who addresses the reasonable doubt standard in closing argument acts improperly by "trivializ[ing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant]." *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). A prosecutor also acts improperly by arguing to the jury that it must find the defendant guilty if it cannot articulate a specific reason for its doubt as to guilt. *State v. Johnson*, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010). In essence, the State acts improperly when it mischaracterizes the standard as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt. *See State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995).

Here, the deputy prosecutor argued,

Burden of proof in a criminal case is beyond a reasonable doubt. It is the highest burden that we hold any party to in a court of law. It's the burden that the State has, the State accepts, that the State has met and exceeded in this case.

The beyond a reasonable doubt instruction says to you, "A reasonable doubt is one for which a reason exists and may arise from the evidence or the lack of evidence." The reasonable -- so beyond a reasonable doubt is beyond a doubt which has a reason.

CP 2052. Defendant objected, and the court sustained the defendant's objection. RP 2052. *See also*, RP 2109-13 (court denies defendant's post-argument motion for a mistrial). The deputy prosecutor continued,

So let me try and word it a different way.
A reasonable doubt is one for which a reason exists. A reasonable doubt, reason exists. *Here's what I'm not telling you. I'm not telling you that you have to say here's my reason to doubt...* 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 is 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 which a reason exists. It's what the instruction tells you.

RP 2052-53 (emphasis added).

To the extent the deputy prosecutor's initial statement – “so beyond a reasonable doubt is beyond a doubt which has a reason” – was awkwardly worded, defendant promptly objected and the court sustained. The deputy prosecutor then clarified his statement by telling the jury, “Here's what I'm not telling you. I'm not telling you that you have to say here's my reason to doubt.” RP 2053. He reiterated that “[a] reasonable doubt is one for which a reason exists.” These statements corresponded with the trial court's reasonable doubt instruction and were proper. CP 286 (“A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.”); WPIC 4.01. Moreover, the deputy

prosecutor reminded the jury that the State's burden of proof is beyond a reasonable doubt which is "the highest burden that we hold any party to in a court of law." RP 2052. The State did not trivialize its burden of proof. Viewing the prosecutor's challenged statements in the context of the whole argument, the arguments were proper. *See Russell*, 125 Wn.2d at 85-86.

Even if the initial objected-to statement was improper, defendant cannot possibly show the statement had a substantial likelihood of affecting the jury's verdict, where the court sustained defendant's objection and the prosecutor clarified his argument by parroting the court's reasonable doubt instruction to the jury. Additionally, the court instructed the jury to disregard any statement or argument not supported by the law in the court's instructions. CP 284. Juries are presumed to follow the court's instructions. *Stein*, 144 Wn.2d at 247.

Defendant also claims the deputy prosecutor committed misconduct when discussing the "abiding belief" language of the reasonable doubt instruction. Brf. App. 41-42. *See* CP 286 ("If, from such consideration, you have an abiding belief in the truth of the charge, you

are satisfied beyond a reasonable doubt.”). Defendant first discussed the concept of “abiding belief” during defense’s closing argument:⁸

Abiding belief. Abiding. What does that mean? It means a lasting belief, an enduring belief. This is kind of almost, on the face of it, mystifying language because you have to hold the presumption of innocence in your mind all through your deliberations unless -- unless you find that the State has proven the charge beyond a reasonable doubt, unless -- then, if you find that they have, you have to have a lasting belief. You have to have that in the jury room. Okay? Because if you have an abiding belief, and it's not in the jury room, you haven't met the instruction.

You can't have this abiding belief, you know, the next night when you're sitting in your recliner at home because it doesn't comport with the instruction. It would be wrong to require it then, because, say, you rendered a verdict and you thought, Well, I will have an abiding belief maybe later and you go and you find you never had an abiding belief, you can't come in and say, Judge Blinn, I never actually did achieve this abiding belief, and I want to change my verdict. Do you think that you can do that? No, you can't.

RP 2067-68.

The deputy prosecutor responded during rebuttal,

[T]he reasonable doubt instruction has language in there that says, "If after your deliberation you have an abiding belief in the truth of the charge, then you are convinced beyond a reasonable doubt." And it's been suggested to you that that abiding belief is a lasting and enduring belief, and that's probably true. What that means is that when you go back into your deliberations and you start to deliberate all of the evidence and you look at everything that there is that establishes the defendant's guilt and then after your deliberations you say to your own individual selves, yep, he's guilty, you take a vote, and

⁸ It should be noted that defendant previously moved to limit “abiding belief” arguments during closing. CP 218-219, 698; RP 2006-11.

there's 12 of you, and then people say, Well, what about this or what about that? And they pick it apart and you keep to yourself and you say, Doesn't change my mind, that's an abiding belief. And it's not true that that abiding belief doesn't last for a while. That's the whole purpose of abiding belief.

What it means is, when you are released from the instruction the judge has given you about not talking to your friends and family about this case and when they ask you, What was that trial about and you tell them, it was a sting operation, guy who tried to have sex with a 12-year-old, 13-year-old kid and some text messages. Well, did you reach the right decision? You bet we did... That's continuing your abiding belief in the truth. And a couple years from now when you get your next subpoena for jury duty, and you open it up because you remember to yourself, Oh, boy, I remember what happened the last time, but then you think back and they say -- and someone says to you have you been on a jury before, and you say, yeah, I was, I was on a jury for a lot longer than they told me I was going to be on a jury, did you reach the right decision? You bet we did. That's an abiding belief in the truth of the charge.

RP 2102-03. Defendant objected to the prosecutor's argument, and the court overruled the objection. RP 2103.

Defendant claims the deputy prosecutor's abiding belief argument was improper, because "[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." Brf. App. 42. Defendant cites *State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012), in support. *Id.*

In *McCreven*, the prosecutor argued, “[T]he law says that you have to determine if you have an abiding belief in the truth of the charge. You have to do that. The truth, and what happened that night, truth in what each of these defendants did that night... .” 170 Wn. App. at 472. The court held that the trial court erred in not sustaining the defense counsel’s objection to the prosecutor’s closing argument, because the prosecutor improperly equated a juror’s abiding belief with a juror doing the right thing and declaring the truth. *Id.* at 473.

Here, on the other hand, the prosecutor described for the jury what the term “abiding belief” means and did not imply or tell the jury that they only need to have an abiding belief in the truth of the charge to find defendant guilty. The prosecutor never invited the jury to find out the truth of what happened, and so *McCreven* is distinguishable. The prosecutor here also highlighted the State’s burden of proof and how high it was. RP 2026, 2052-53. Additionally, the prosecutor’s statements were in fair response to defendant’s abiding belief argument. *See Russell*, 125 Wn.2d at 86-87.

The State did not diminish its burden of proof. The prosecutor’s arguments were proper. *See, e.g., State v. Racus*, 7 Wn. App. 287, ¶¶ 70-74, 433 P.3d 830 (2019) (unpublished portion of opinion upholding a

similar “abiding belief” argument).⁹ Furthermore, even if the State did commit error, defendant has failed to show a substantial likelihood the misconduct affected the jury’s verdict. *See Russell*, 125 Wn.2d at 86 (remarks of prosecutor, even if improper, are not grounds for reversal if invited or provoked by defense counsel and in pertinent reply); CP 284 (instructing the jury to disregard any statement not supported by the court’s instructions). This Court should affirm.

- d. The State properly discussed the elements of communication with a minor for immoral purposes during closing argument.

Defendant claims the deputy prosecutor committed misconduct by “misarguing the elements of communication with a minor for immoral purposes.” Brf. App. 42. The deputy prosecutor argued the following during closing argument,

So we'll talk about the text messages as a whole because I'm going to suggest to you that what you folks should do is you should consider the defendant's communication with Kaylee as a whole -- the ad, e-mails, text messages, the phone calls -- all of it as a whole in deciding his guilt on each individual count [of communicating with a minor].

What I mean by that is when the defendant has spoken sexually and immorally through text messages with Kaylee on the 15th, you don't necessarily have to find a specific nasty comment on the 16th for that conversation to continue to be for an immoral

⁹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished portion of the decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

purpose... You can look at the totality of the evidence to see whether or not the communication ongoing on the 16th and the 17th continued to be for an immoral purpose.

Ordinarily, in our society, we criminalize behavior. We rarely criminalize speech. In this case, we have a crime of communicating with a minor for immoral purpose which says you can't even talk about some things with some people without subjecting yourself to criminal liability. (RP 2029-30)

...

Now, you'll notice that the words "immoral purpose" are not defined for you legally. There are some phrases that have their common meaning. So, you know, there was a Supreme Court case a long time ago that said pornography is, you'll know it when you see it. That's the definition of pornography. You know it when you see it. In some respects, "immoral purposes" are the same thing, not exactly, but... A person commits the crime of communicating with a minor with an immoral purpose if they communicate with someone they believe to be a minor for immoral purposes of a sexual nature. I'm going to suggest to you that we really don't have to waste a lot of time discussing whether the communications were of a sexual nature. He used nicknames for body parts. He discussed sexual activity. He discussed sexual toys. He discussed all the stuff that you heard repeatedly that was of a sexual nature. The question is, was it an immoral purpose.

I'm going to suggest to you that there are some conversations that individuals can have between members of the same sex, if you were adults; conversations, other, that you can have in mixed company of adults; conversations that you can have in mixed company with children there, and then conversations that you can only have in mixed company with your own children there. Because as parents, you will decide what your kids can and cannot hear when they are too young to hear everything. This case involves a girl who said she was 13 -- by the way, I'm going to say this once and I'm not going to say it again. The instruction tells you legal impossibility is not a defense. Bickford is a 13-year-old girl in this case...not a man. (RP 2035-36)

Bickford is a 13-year-old girl for purposes of whether the communications were of an immoral purpose for a sexual nature. Haven't hid from the fact that he thought she was 13. Haven't hid from that. We're going to talk about that in detail in a minute. The point is that what the defendant did was he engaged Kaylee in a conversation about sexual activity. He used the 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 13-year-old child about that, your 13-year-old girl about that, there is going to be a problem, and that's what it means to communicate with someone for an immoral purpose of a sexual nature. There are some things that you can tell your kids that no one else can. (RP 2036)

...
So the point of what I'm talking about at this point in the closing argument is this: The defendant pled not guilty, and he chose his defense and his defense was, Didn't know that she was 13; I didn't believe that she was 13. He is not telling you, I thought the conversation was appropriate; I thought the conversation was moral, I didn't think that the conversation was for sexual purposes; I didn't think it was immoral purpose of a sexual nature. He said, I didn't believe it was a kid; that's why I'm not guilty. And that's what his defense was. So you still have to find that the State has proved immoral purpose of a sexual nature in the communications, but you have to do that in the context of what his defense is to each of these counts. So what we're talking about on the communicating charges is, did he believe she was a minor? A minor is anyone under 18. (RP 2040-41).

The deputy prosecutor proceeded to discuss the evidence that established defendant believed Kaylee was a minor and his communications with her were explicitly sexual in nature. RP 2044-47. Defendant objected to the prosecutor's above arguments and was overruled. RP 2030, 2035-41.

Defendant argues the State's closing argument was contrary to law and "encouraged the jury to determine its own standards for what communications violated the CMIP statute." Brf. App. 44. Defendant fails to show the prosecutor's statements were improper.

The court instructed the jury that "[a] person commits the crime of Communication with a Minor for Immoral Purposes when he communicates with someone he believes to be a minor for immoral purposes of a sexual nature." CP 298. The same language defining "immoral purposes" as "immoral purposes of a sexual nature" was upheld in *State v. McNallie*, 120 Wn.2d 925, 929-34, 846 P.2d 1358 (1993). The prosecutor referred to this language during his closing argument and argued defendant's own words demonstrated his sexually charged communications were for immoral purposes. The prosecutor never argued, as defendant suggests, that the jury could find defendant guilty if the communications were simply inappropriate for a nonparent to have with someone else's child.

Again, a prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. *Hoffman*, 116 Wn.2d at 94-95. The prosecutor here had wide latitude to express reasonable inferences from the evidence that defendant communicated with Kaylee for immoral purposes of a sexual nature. Defendant admitted

during trial that he was interested in role play and sexting, admitted that he brought up the subject of “kinky fun” in his ad and brought up the subject of sex during his text message exchange, admitted he brought up the subject of sex toys, and admitted that he engaged in sexual discussion with Kaylee each of the three days. RP 1204, 1207, 1368, 1396, 1414, 1428, 1471-72, 1510-11, 1654, 1785-89, 1825-26. *See also*, Exh. 1-3. Defendant did not deny that his conversations were of a sexual nature, nor could he based on the plain language of the messages. In context, the prosecutor’s argument that “[t]here are some things that you can tell your kids that no one else can” was a simpler way of arguing that communicating with a minor for immoral purposes prohibits “communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *McNallie*, 120 Wn.2d at 933.

Defendant fails to show the prosecutor’s statements were improper or had a substantial likelihood of affecting the jury’s verdict. Accordingly, this Court should affirm.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO GIVE DEFENDANT’S PROPOSED JURY INSTRUCTIONS.

Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*,

146 Wn.2d 237, 249, 44 P.3d 845 (2002) (*quoting Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). The court reviews alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). Likewise, the trial court's refusal to give a jury instruction is also reviewed for an abuse of discretion. *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009); *Picard*, 90 Wn. App. at 902. *See also, State v. Walker*, 136 Wn.2d 767, 772-72, 966 P.2d 883 (1998) (court reviews trial court's determination that the facts of a case do not support a requested instruction for abuse of discretion).

Here, defendant claims the trial court erred in refusing to give several of his proposed jury instructions. Each proposed instruction at issue will be addressed in turn below.

- a. The trial court did not err by refusing to instruct the jury on entrapment, where defendant failed to show by a preponderance of the evidence that he was entitled to a jury instruction on entrapment.

Defendant argues that the trial court erred by refusing to instruct the jury on the defense of entrapment as to the charges of communicating

with a minor for immoral purposes. *See* Brf. App. at 46-47.¹⁰ “A defendant ‘is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error.’” *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (quoting *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)).

The defense of entrapment, codified in RCW 9A.16.070, states,

(1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

See also, Washington Pattern Jury Instruction – Criminal (WPIC) 18.05.

¹⁰ Defendant originally proposed an entrapment instruction for attempted rape of a child in the second degree as well as communicating with a minor for immoral purposes. *See* CP 48-78; RP 1735-38. However, defendant later withdrew his request for an entrapment instruction as to the attempted rape of a child charge. RP 1986, 1990. By withdrawing his request for the instruction, he waived any argument that the trial court erred in failing to instruct the jury on entrapment as to attempted rape of a child in the second degree. *State v. Huynh*, 175 Wn. App. 896, 911, 307 P.3d 788 (2013). *See also*, *State v. Lynch*, 178 Wn.2d 487, 491-94, 309 P.3d 482 (2013) (a trial court cannot give an affirmative defense instruction over a defendant’s objection). It should also be noted that defendant’s proposed entrapment instruction is not contained within the appellate record. An appellant bears the burden of perfecting the record for appellate review. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d (2012) (a party presenting an issue for review has the burden of providing an adequate record to establish error). *See also*, CrR 6.15(a).

Entrapment is an affirmative defense, and the defendant bears the burden of proving entrapment by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996). A defendant must show that he committed a crime, that the State or a State actor lured or induced him to commit the crime, and that the defendant lacked the disposition to commit the crime. *Lively*, 130 Wn.2d at 9; RCW 9A.16.070. Failure to prove either of these prongs forecloses the defense of entrapment. *See Lively*, 130 Wn.2d at 9-10.

To be entitled to an instruction on the defense of entrapment, “a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence.” *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994), *review denied*, 126 Wn.2d 1008 (1995); *Lively*, 130 Wn.2d at 13 (“Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed.”).

Entrapment is a defense that admits that the defendant committed the crime and seeks to excuse the unlawful conduct. *State v. Buford*, 93 Wn. App. 149, 152, 967 P.2d 548 (1998). An entrapment instruction is not appropriate unless the defendant admits acts which, if proved, would constitute the crime. *State v. Galisia*, 63 Wn. App. 833, 836-37, 822 P.2d

303 (1992), *abrogated on other grounds by Trujillo*, 75 Wn. App. 913; *State v. Hansen*, 69 Wn. App. 750, 765, 850 P.2d 571 (1993), *reversed on other grounds by, sub nom., State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994).

Law enforcement's use of a "normal amount of persuasion to overcome the defendant's expected resistance" is not entrapment. *Trujillo*, 75 Wn. App. at 918. Police may also use deception, trickery, or artifice. *Id.* And solicitations "'made in connection with an appeal to sympathy or to friendship' does not, by itself, constitute entrapment." *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984). "In order to show entrapment, a defendant must show more than mere reluctance on his or her part to violate the law." *Trujillo*, 75 Wn. App. at 918.

Here, defendant was not entitled to an instruction on the defense of entrapment. Defendant insisted that he thought Kaylee was an adult. RP 1369. He testified repeatedly that he never believed Kaylee was 13 years old (or a minor), never intended to communicate with a minor, and never intended to have sexual intercourse with Kaylee (or anyone who responded to his ad). RP 1204, 1208, 1212-13, 1231, 1239, 1249, 1280, 1284-85, 1296, 1297-98, 1300, 1302, 1355, 1396, 1657, 1780-81, 1784. Thus, defendant did not admit acts that, if proved, would constitute the crime of communication with a minor for immoral purposes. *Galisia*, 63

Wn. App. at 836-37; *Hansen*, 69 Wn. App. at 765. Defendant affirmatively denied that he communicated with someone he believed to be a minor. RP 1231, 1284-85, 1296. *See* RCW 9.68A.090 (criminalizing communication with someone the person *believes* to be a minor for immoral purposes); CP 298. The trial court noted the same in its ruling denying the entrapment instruction. *See* RP 1993-94 (“Mr. Zimmerman has not admitted acts which, if proved, would constitute the crime...[H]e’s indicating, I didn’t believe she was a minor, never intended to meet certainly never intended to have sex.”). The trial court properly denied the proposed entrapment instruction.

Moreover, defendant is the one who posted the ad on Craigslist looking for a “young little girl for play” and “kinky fun.” Exh. 1. He described his preferred play as “bdsm, dirty talk, pda and whatever you like.” Exh. 2. Defendant initiated questions regarding Kaylee’s sexual experience. Exh. 3 at 4, 12. He initiated sexual talk on December 16th by asking Kaylee to send a “sexy pic” and “show your tits.” Exh. 3 at 14-15. He continued to ask for sexy pictures. Exh. 3 at 19-20. He proceeded to ask Kaylee, “[H]ave you ever put your mouth on a cock before.” Exh. 3 at 22. Defendant justified this question by texting, “I just wanted to know what you[r] experience level was.” Exh. 3 at 23. Defendant initiated explicit sexual communication on December 17th by asking Kaylee if she

shaved her vagina. Exh. 3 at 29. Defendant brought up the topic of sex toys. Exh. 3 at 33; RP 1471-72. Law enforcement merely responded to defendant's advertisement, answered defendant's sexual questions, and engaged with defendant via deception. Defendant admitted he initiated sexual conversation with Kaylee. RP 1510-11. The criminal design originated in defendant's mind (i.e., his Craigslist advertisement). He asked Kaylee early on if she was affiliated with law enforcement, thus signaling his desire to engage in criminal conduct and not get caught. Exh. 2; Exh. 3 at 3. Defendant was not "lured or induced to commit a crime which the actor had not otherwise intended to commit." RCW 9A.16.070. Defendant did not lack the disposition to commit the crime. Rather, he sought out sexual communication with a child and kept that communication going over multiple days. *See* Exh. 1-3.

Because defendant denied committing acts that, if proved, would constitute the crime, and because he failed to show by a preponderance of the evidence that (1) the criminal design originated in the mind of law enforcement or (2) he was lured or induced to commit a crime which he had not otherwise intended to commit, the trial court did not err by refusing to instruct the jury on entrapment.

However, should this Court disagree and find the trial court erred in failing to give the proposed entrapment instruction, then any error was

harmless. Instructional error is presumed prejudicial but can be shown to be harmless. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An instructional error is harmless if, beyond a reasonable doubt, the error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Here, the evidence establishing defendant's guilt was overwhelming. He admitted to posting the ad on Craigslist looking for a "young little girl" (RP 1202, 1205, 1298-99), admitted to sending all the emails and text messages attributed to him (RP 1325-26, 1434), admitted Kaylee told him she was 13 years old (RP 1340, 1454), and admitted that he initiated some of the sexual communication and repeatedly engaged in sexually explicit talk (RP 1510-11, 1787-89, 1825-26). *See also*, Exh. 1-3. Even if instructed on entrapment, the jury would necessarily have found defendant guilty of communication with a minor for immoral purposes. Any error was thus harmless beyond a reasonable doubt, and this Court should affirm.

- b. The trial court properly denied defendant's proposed instruction defining "immoral purposes."

Defendant claims the trial court erred in refusing to give his proposed instruction defining "immoral purposes." Brf. App. at 48-49. *See* CP 229. First, defendant fails to provide citation to authority to support his position that the trial court committed reversible error. Arguments

unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon*, 118 Wn.2d at 809; *Elliott*, 114 Wn.2d at 15; *Saunders*, 113 Wn.2d at 345; RAP 10.3(a). This Court should decline to address defendant's unsupported claim.

However, even if this Court were to consider defendant's claim of error, it would still fail. Defendant's proposed instruction stated, "'Immoral purposes' means unlawful sexual conduct." CP 229. This proposed instruction was not based on a WPIC. There is no WPIC definition of "immoral purposes." The trial court did instruct the jury regarding the definition of communication with a minor for immoral purposes. CP 298; WPIC 47.05. The court's instruction read, in part, "A person commits the crime of Communication with a Minor for Immoral Purposes when he communicates with someone he believes to be a minor for *immoral purposes of a sexual nature*." CP 298 (emphasis added).¹¹

Defendant seems to claim the instruction as given by the trial court was unconstitutionally vague and required further instruction. *See* Brf. App. at 49. "The vagueness standard ... [asks] whether persons of common intelligence and understanding have fair notice of the conduct prohibited, and ascertainable standards by which to guide their conduct." *State v.*

¹¹ The trial court declined to give defendant's proposed instruction and noted there was no affirmative evidence that defendant believed Kaylee was 17. RP 1971-74, 1979-83.

Schimmelpfennig, 92 Wn.2d 95, 102, 594 P.2d 442 (1979). “[W]hen [“immoral purposes”] is read in context with RCW 9.68A, it clearly provides persons of common intelligence and understanding with fair notice of and ascertainable standards of the conduct sought to be prohibited.” *State v. Danforth*, 56 Wn. App. 133, 136, 782 P.2d 1091 (1989), *overruled on other grounds in State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

Moreover, “[a] trial judge may exercise discretion in determining whether words used in instructing the jury require definition.”

Schimmelpfennig, 92 Wn.2d at 100. Instructions must set forth the elements of the crimes that are before the jury. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). There is no need to define those elements that are commonly understood. *Id.* However, when the elements have technical definitions, the definitional instruction must be given when requested. *Id.* at 358, 361–362. *See also, State v. Brown*, 132 Wn.2d 529, 589-90, 940 P.2d 546 (1997).

In *State v. McNallie*, 120 Wn.2d 925, 929-34, 846 P.2d 1358 (1993), the Washington Supreme court upheld the adequacy of the instruction given by the trial court in this case. “The instruction which told the jury that ‘immoral purposes’ could be defined as ‘immoral purposes of

a sexual nature' was adequate. There was no instructional error in McNallie's trial." *Id.* at 933.

Here, the jury was properly instructed on the definition and elements of communicating with a minor for immoral purposes. CP 298, 300-303. The court instructed the jury that "immoral purposes" means "immoral purposes of a sexual nature." *Id.* The court in *McNallie* upheld an identically worded instruction. 120 Wn.2d at 933. Thus, the court's jury instruction defining "immoral purposes" was not unconstitutionally vague, and the trial court properly exercised its discretion in refusing to give defendant's unnecessary proposed instruction.

The proposed instruction was unnecessary and unwarranted, because there was nothing in the record to suggest defendant believed Kaylee was a minor who was also the age of consent (meaning any sexual acts discussed would not have been unlawful if performed). For example, in *State v. Luther*, 65 Wn. App. 424, 425, 830 P.2d 674 (1992), the 16-year-old male defendant "engaged in two acts of fellatio" with a 16-year-old girl. Before "each act, Luther asked the girl whether she was going to perform fellatio as she had previously offered." *Luther*, 65 Wn. App. at 425. The court held that the communication with a minor for immoral purposes statute did not apply to communications regarding sexual

conduct which would be legal if performed (i.e., a consensual sexual act between two minors). *Id.* at 427-28.

Here, on the other hand, there is no question that the sexual communications between defendant – an adult male – and Kaylee – a 13-year-old girl – would be illegal if performed. It was unnecessary to define immoral purposes as “unlawful sexual conduct,” because every communication by defendant to Kaylee of a sexual nature was unlawful. The State argued as such below in opposing defendant’s proposed instruction. RP 1967-70. Defendant never claimed he thought Kaylee was a 16 or 17-year-old girl. Rather, he remained adamant that he never intended to communicate with a minor, never believed Kaylee was 13 years old (or even under the age of 18), and he assumed Kaylee was an adult. *See* RP 1231, 1284-85, 1296, 1355, 1369, 1784. As a result, the trial court properly denied giving defendant’s proposed instruction, and this Court should affirm.

- c. The trial court properly refused to give defendant’s proposed instructions which misstated the law regarding attempted rape of a child in the second degree.

Finally, defendant claims the trial court erred in failing to give its proposed jury instructions defining attempted rape of a child in the second

degree and intent. Brf. App. at 49-53. *See* CP 227-228. Defendant’s proposed instructions read,

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

The intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.

CP 227-228. The trial court declined to give these proposed instructions.

RP 1932-33, 1939-41. The trial court instead gave the following instructions to the jury:

A person commits the crime of Attempted Rape of Child in the Second Degree when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 290-291. *See also*, WPIC 100.01, WPIC 10.01.

First, “[a] defendant is not entitled to jury instructions that misstate the law.” *State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001).

The court in *State v. Johnson*, 173 Wn.2d 895, 908, 270 P.3d 591 (2012),¹² held, “Accordingly, it is clear that the age of the victim of child rape—

¹² *Johnson* disapproved of *State v. Chhom*, 128 Wn.2d 739, 911 P.2d 1014 (1996), which was cited by defendant in his proposed instructions. CP 227-228.

either the child victim's actual age or the defendant's belief in a fictitious victim's age—is material to proving the specific intent element of attempted child rape. The State must prove the age of the intended victim to prove that the defendant intended to have sexual intercourse with a child.” Defendant’s proposed instructions did not include the age of the intended victim. Rather, they limited the intent element of attempted child rape to the intent to have sexual intercourse. CP 227-228. Defendant’s proposed instructions thus misstated the law and were appropriately denied.

In support of his position, defendant relies on *State v. Wilson*, 158 Wn. App. 305, 316-17, 242 P.3d 19 (2010) to argue the essential elements of attempted rape of a child are (1) the intent to have sexual intercourse and (2) the taking of a substantial step toward the commission of that crime. Brf. App. at 49-50. However, *Wilson* relied on *Chhom*, which, as discussed above, was disapproved of by the Washington Supreme Court in *Johnson*. Defendant’s reliance on *Wilson*, 158 Wn. App. 305, is thus misplaced.

Defendant also relies on *State v. Wilson*, 1 Wn. App.2d 73, 404 P.3d 76 (2017), to argue the jury was not properly instructed on the elements of criminal attempt. Brf. App. at 50. In that case, however, the jury instructions did not define attempt and did not inform the jury that

attempt consists of (1) intent and (2) a substantial step. *Wilson*, 1 Wn. App.2d at 80. Here, however, the jury was properly instructed that the crime of attempted rape of a child in the second degree consists of intent to commit that crime and a substantial step. CP 290, 296. *Wilson*, 1 Wn. App.2d 73, is thus distinguishable.

Defendant proceeds to claim “[t]he 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.” Brf. App. 51. However, individual jury instructions are to be read in the context of the instructions as a whole. *State v. Tyler*, 191 Wn.2d 205, 216, 422 P.3d 436 (2018). Here, the court instructed the jury that “a person commits the crime of Attempted Rape of a Child in the Second Degree when, with *intent to commit that crime*, he does any act which is a substantial step toward the commission of that crime.” CP 290 (emphasis added). “That crime” obviously refers to rape of a child in the second degree. This instruction was followed by instructions defining intent and rape of a child in the second degree. CP 291-292. The latter instruction included the required definition regarding the intended victim’s age. CP 292; *Johnson*, 173 Wn.2d 895, 908. Finally, the “to convict” instruction specifically provided, “To convict the defendant of the crime of Attempted Rape of a Child in the Second Degree...each of the following elements of the crime

must be proved beyond a reasonable doubt...(2) That the act was done with the *intent to commit Rape of a Child in the Second Degree*[.]” CP 296 (emphasis added). Read as a whole, the jury instructions properly informed the jury of the required elements regarding the crime of attempted rape of a child in the second degree. Defendant’s claim of error accordingly fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant’s convictions.

DATED: July 18, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

Certificate of Service:

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

7-18-19 _____
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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