

FILED
Court of Appeals
Division II
State of Washington
1/8/2019 2:14 PM

NO. 52236-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM PERSELL,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christopher Lanese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Persell committed attempted rape of a child.
2. The trial court violated Persell's fundamental right to parent when, as a condition of his sentence, it prohibited all contact with his biological son T.P.
3. The trial court abused its discretion when it prohibited all contact between Persell and his stepson N.P.
4. Persell was denied his constitutional right to effective assistance of counsel when his attorney failed to object to Detective McDonald's opinion testimony about Persell's text message notification tone or to ask for a limiting instruction.

B. ISSUES PRESENTED ON APPEAL

1. Persell only agreed to go to "Hannah's" apartment for a meet and greet, he did not have time to commit any acts of sexual intercourse because he was on his lunch break, and he did not bring any condoms or lubricant with him to the meet and greet despite "Hannah's" rules that condoms and lubricant were required for sexual intercourse. Under those circumstances, did the state fail to prove beyond a reasonable

doubt that Persell intended to have sexual intercourse with “Hannah’s” children on September 9 and that he took a substantial step toward committing sexual intercourse?

2. Whether the trial court violated Persell’s fundamental right to parent when: (a) the sentencing provision prohibits all contact with his biological son T.P., (b) the state failed to identify any potential harm to T.P. that prohibiting contact would prevent; (c) the state failed to present any evidence that prohibiting contact between Persell and T.P. was reasonably necessary to prevent harm to T.P.; and (d) scientific research shows that prohibiting contact with incarcerated parents is detrimental to a child’s development?

3. Whether the trial court abused its discretion when it prohibited all contact between Persell and his stepson N.P. when: (a) there is no evidence Persell molested N.P. or that N.P. was directly related to the crime; (b) the state failed to identify any potential harm to N.P. that prohibiting contact would prevent; (c) Persell presented evidence showing that prohibiting contact with N.P. was harmful to N.P.; (d) scientific research shows that prohibiting contact with incarcerated

parents is detrimental to a child's development?

4. Whether trial counsel was ineffective for failing to object to Detective McDonald's opinion that Persell's text message notification tone played, "whoop hoo haha touch my dick" when: (a) the notification was audible in the video published to the jury and it is equally probable the notification stated, "whoop hoo haha. Text message"; (b) McDonald was walking away as the notification tone played the first time and she did not testify about where she was located in relation to the phone the second and third time it played; and (c) McDonald's testimony was an opinion, by inference, about Persell's intention and, thus, his guilt?

C. STATEMENT OF THE CASE

1. Procedural History

Defendant Adam Persell was charged by information with two counts of First Degree Attempted Rape of a Child (RCW 9A.28.020; 9A.44.073) and one count of Second Degree Attempted Rape of a Child (RCW 9A.28.020, 9A.44.076). CP 5-6. After a jury trial, he was convicted on all three counts. CP 308. Persell timely appeals. CP 318.

2. Substantive Facts

On the evening of September 9, 2016 Adam Persell was at work in Tumwater. Exh. 9 at 23-24. Earlier that day Persell had replied to “Hannah’s” Craigslist ad about family fun time and they began exchanging text messages. Exh. 9. “Hannah” was, in reality, undercover detective Kristyl Pohl. RP 122. Persell and “Hannah” discussed a possible long-term situation in which Persell, “Hannah” and her three children would participate in sexual encounters together as long as he abided by “Hannah’s” rules. RP 130, 132; Exh. 9 at 10, 14. The rules were “no pain, no anal (except for [her] son of course) and condoms and lube [were] required for the girls.” RP 130; Exh. 9 at 10.

“Hannah” wanted to ensure Persell was a “good fit” before they made any long-term plans. Exh. 9 at 14. Persell suggested they meet in a public place, but “Hannah” refused stating it sounded like a set up. Exh. 9 at 18. “Hannah” stated that she had her own system which included exchanging pictures and then directing Persell to take a “selfie” at the minimart near her apartment. Exh. 9 at 18. Then “Hannah” pressed for more details about the kind of sexual experience in which he would like to engage. Exh. 9 at 19. After Persell described a scenario “Hannah” sent one more picture and

then suggested an in person meeting. Exh. 9 at 22-23.

Persell agreed to meet "Hannah" at her apartment for a "meet and greet" during his lunch break. Exh. 9 at 24. When Persell arrived at "Hannah's" apartment Detective McDonald opened the door and invited him in. RP 117; Exh. 1. As Detective McDonald walked away Persell's cell phone played a text message notification tone. Exh. 6.

Law enforcement arrested and interviewed Persell. Exh. 1, 6. During the interview Persell stated that he went to the apartment to meet "Hannah". RP 87; Exh. 1. Persell was expected to return to work to finish his shift and during the interview he was worried his employer would wonder why he did not return. Exh. 6. The state did not present any evidence Persell had condoms or lubricant on his person.

At trial, the state published to the jury a video that showed Persell's arrival and arrest. RP 116; Exh. 6. The text message notification tone was audible in the video, but the words were not entirely clear. Exh. 6. Detective Mc Donald testified that she heard Persell's text notification tone play, "woo-hoo ha-ha touch my dick." RP 118. However, the words also sounded like, "woo-hoo haha. Text message." Exh. 6. Defense counsel did not object or ask the court to

instruct the jury that the video was the actual evidence and should speak for itself. RP 118.

During closing argument the prosecutor stated the following:

It's clear that Mr. Persell wanted to have sex with those kids. You have his words. You have his actions. You can also get into his mind a little bit when you look at - I haven't counted how many messages there are, but I think it's fair to say that there's dozens exchanged back and forth between him sending and receiving. What does he set up as his text message ring tone statement to ring every time he gets a message? "Woo-hoo, ha-ha, touch my dick." What's his intent as he's talking about everything he wants to do to these children, how to get them ready? He keeps hearing, "Woo-hoo, ha-ha, touch my dick." RP 251-52.

The jury convicted Persell on all counts on July 26, 2018. RP 255-56. Between July 26 to Persell's sentencing hearing on August 1, the trial court allowed Persell to have written contact with both his five-year-old biological son T.P. and his sixteen-year-old stepson N.P. RP 262. Before the court allowed this brief period of contact, five-year-old T.P. asked whether his father was dead. CP 305.

At sentencing, Persell submitted letters from his wife and stepson stating that not being able to have contact with Persell would have a negative effect on both boys. CP 305-07. Persell is the only father N.P. has ever known. CP 307. Sixteen-year-old N.P. requested contact on his own behalf and on behalf of his younger

brother. CP 307. N.P. described the absence of contact with Persell as the “worst” and “lowest points” of his life. CP 307. N.P. described finally having written contact with Persell, even for a week, as “great” and “refreshing” and N.P. stated that he “really needed it.” CP 307.

Following sentencing the trial court prohibited all contact between Persell and his sons. CP 312; RP 10 (8/1/18).

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ENTERED A NO CONTACT ORDER AS A CONDITION OF SENTENCING WHICH INLCUDED PERSELL’S MINOR BIOLOGICAL CHILD AND HIS MINOR STEPSON

The trial court erred when it entered a no contact order as a condition of sentencing which included Persell’s minor biological child and his minor stepson.

As a part of any sentence, the court may impose a crime-related prohibition or condition during the term of the maximum sentence. RCW 9.94A.505(9) (West) (2015). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime” and are usually upheld if reasonably crime related. RCW 9.94A.030(10); *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246

(2001)

This court reviews sentencing conditions for abuse of discretion. *Ancira*, 107 Wn. App. 653 (citing *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)). Abuse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ancira*, 107 Wn. App. at 653 (citation omitted).

A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard, it is based on untenable grounds if the factual findings are not supported by the record, and it is based on untenable reasons if it applies an incorrect standard or the facts do not meet the requirements of the correct standard. *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997)).

When a sentencing condition interferes with a fundamental constitutional right, such as the care custody and management of one's children, it is subject to strict scrutiny. *State v. Johnson*, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (strict scrutiny applies when a law affects a fundamental right); See *Santosky v. Kramer*,

455 U.S. 745, 753, 102 S.Ct. 1388 (1982) (a parent has a liberty interest in the care, custody and management of their child).

To survive strict scrutiny a statute must be narrowly tailored to achieve a compelling governmental interest. *State v. Sieyes*, 168 Wn.2d 276, 294, 225 P.3d 995 (2010). In the context of a sentencing condition, the fundamental right to parent can only be restricted by a sentencing condition if that condition is “reasonably necessary to accomplish the essential needs of the State.” *Ancira*, 107 Wn. App. at 654; *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998).

In *Ancira*, the Court of Appeals struck the portion of Ancira’s sentencing order prohibiting Ancira from all contact with his children because it was not reasonably necessary to protect his children from witnessing domestic violence. *Ancira*, 107 Wn. App. at 654, 657.

Ancira was charged with a felony violation of a domestic violence no contact order between Ancira and his wife. *Ancira*, 107 Wn. App. at 652. Although there was no doubt that witnessing domestic violence is harmful to children, a broad assertion that it is harmful, standing alone, is not a sufficient basis for the extreme degree of interference with fundamental parental rights. *Ancira*, 107 Wn. App. at 654.

In *State v. Letourneau*, 100 Wn. App. 424, 427, 997 P.2d 436 (2000), as amended (June 8, 2000), the Court of Appeals struck a similar provision of Letourneau's judgment and sentence that required supervised in person contact with her own minor children because it was not reasonably necessary to prevent Letourneau from sexually molesting her children. *Letourneau*, 100 Wn. App. at 427.

Even though Letourneau pled guilty to having sexual intercourse with 13-year-old V.F., there was no evidence Letourneau sexually molested any of her children. *Letourneau*, 100 Wn. App. at 439. An evaluator's concern that Letourneau would "mold" her children's minds causing them to see wrong as right was insufficient evidence that Letourneau posed a danger of harm to her own children or that supervised visits were reasonably necessary to prevent any harm. *Letourneau*, 100 Wn. App. at 440-41.

Prevention of harm to children is a compelling state interest. *Ancira*, 107 Wn. App. at 654. But the presumption that contact with an incarcerated parent is harmful is incorrect. In fact, researchers have found that one of the two "major determinants of child adjustment during the period of parental incarceration" is the

opportunit[y] to maintain contact with the absent parent.” See Ross D. Parke and K. Alison Clark-Steward, From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities, December 12, 2001 available at <https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children#Visitation> (last visited 1/7/19).

Ongoing contact with incarcerated parents is important for the “development of secure attachments and other competencies.” Julie Poehlmann, Danielle Dallaire, Ann Booker Loper, and Leslie D. Shear, Children’s Contact With Their Incarcerated Parents: Research Findings and Recommendations. *Am Psychol.* 2010 Sep; 65(6): 575-598 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4229080/> (last visited 1/7/19) (citing Julie Poehlmann, Representations of attachment relationships in children of incarcerated mothers, *Child Dev.* 2005 May-Jun; 76(3):679-96).

The long-term effect of parental incarceration on children depends on a variety of factors, including the developmental level of the child. However, young children (ages 2-6 years) exhibit both internalizing and externalizing behaviors such as anxiety,

withdrawal, hypervigilance, depression, shame and guilt, anger, aggression, and hostility toward caregivers and siblings. Ross D. Parke and K. Alison Clark-Steward, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities*, December 12, 2001 (citing Bloom & Steinhart, 1993; Dressler et al., 1992; Fishman, 1983; Gaudin, 1984; Johnston, 1995; Jose-Kampfner, 1995; Sack et al.1976)).

According to an earlier study over 50% of school age children of incarcerated parents who participated in the study experienced poor grades and participated in instances of aggression. Id. (citing Sack et al., 1976). In addition, children are sometimes teased or ostracized by other children as a result of their parent's incarceration. Id. (citing Jose-Kampfner, 1991). As children reach adolescence suspension and dropout rates are higher for children of incarcerated parents. Id. (citing Trice, 1997). Boys are more likely to exhibit externalizing behavior problems such as anger, aggression, and hostility. Id. (citing Cowan et al., 1994; Cummings, Davies, & Campbell, 2000).

However, allowing a child to maintain contact with the incarcerated parent can combat some of these adjustment problems

and contact with an incarcerated parent is a major determinant of child adjustment during the period of parental incarceration. Ross D. Parke and K. Alison Clark-Steward, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities*, December 12, 2001.

Even when some children experience excitability and hyperactivity after a visit with an incarcerated parent it is relatively short-lived and there is no evidence of long-term negative responses. *Id.* In fact, visiting an incarcerated parent “can calm children’s fears about their parent’s welfare as well as their concerns about the parent’s feelings for them.” *Id.* (citing Sack, 1977). Persell’s sons expressed their need to have contact with their father and the damage they would suffer without contact. CP 305-07.

- a. The trial court violated Persell’s fundamental right to parent when it prohibited all contact with his biological son and N.P.

The trial court violated Persell’s fundamental right to parent when it prohibited all contact with his biological son and N.P.

Here, as in *Ancira*, the trial court imposed an extreme degree of interference with Persell’s fundamental right to parent by prohibiting all contact. CP 312. Similar to *Ancira*, the state made a

broad assertion that “given the nature of this case” and the “nature of his prior” that “it would be highly inappropriate and dangerous to the children to have communication, especially in person or through visits, but even through writing.” RP 5 (8/1/18). This is even less evidence than in *Ancira* where the state argued that the prohibition against contact was reasonably necessary to keep the children safe- because here the state simply asserted that the contact itself was harmful.

The state’s assertion that contact alone is harmful is not supported by the record or by studies of children of incarcerated parents. The letters presented to the court from Persell’s wife and stepson demonstrated the harm that prohibiting contact with Persell caused T.P. T.P. thought his father was dead and he was only assuaged of that fear when he was allowed written contact for one week. RP 9-10 (8/1/18); CP 305-06.

N.P.’s letter and scientific research shows that prohibiting contact with Persell is harmful to N.P. and T.P, the only father either boy has ever known. CP 306-07. When N.P. was unable to contact Persell, he described feeling at his worst and lowest point in life. N.P. also described feeling refreshed when he was finally able to contact

Persell for a week between the trial and sentencing. CP 306.

Without contact with Persell, N.P. is at a higher risk of school suspension or even dropping out of school. He is at risk of engaging in externalizing behaviors such as anger, aggression, and hostility. Ross D. Parke and K. Alison Clark-Steward, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities*, December 12, 2001. These risks can be reduced by simply allowing contact with Persell.

The Court of Appeals suggested in *Ancira* that Ancira's children were directly connected to the circumstances of the crime but noted that did not ameliorate the constitutional problems. *Ancira*, 107 Wn. App. at 656. Here, unlike in *Ancira*, N.P. and T.P. were not directly connected to the circumstances of the crime. N.P. and T.P. were not witnesses to the crime and there is no evidence Persell molested or attempted to molest either boy.

Here, the trial court violated Persell's constitutional right to parent and abused its discretion by prohibiting contact with his sons because the sentencing condition prohibiting contact with N.P. and T.P. was not reasonably necessary to prevent harm to T.P. and N.P. and it was not reasonably related to Persell's crime. Accordingly, the

provision prohibiting all contact between Persell and T.P. and N.P. must be stricken. *Letourneau*, 100 Wn. App. at 442; *Ancira*, 107 Wn. App. at 657.

2. THE STATE FAILED TO PROVE
BEYOND A REASONABLE DOUBT
THAT PERSELL COMMITTED
ATTEMPTED RAPE OF A CHILD

The state failed to prove beyond a reasonable doubt that Persell committed attempted rape of a child because Persell arrived at the apartment after agreeing to :Hannah’s” terms, he did not bring lubricant, which was one of Hannah’s a conditions and he told “Hannah” that he was on his lunch break and only wanted a meet and greet. This evidence is insufficient to prove beyond a reasonable doubt that Persell attempted to have intercourse with the children on September 9.

In a criminal prosecution, the state must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

This Court must reverse the conviction if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d

496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

It is well established that attempt consists of two elements: (1) intent, and (2) a substantial step. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995) (internal citations omitted). Both the substantial step and the intent must be established beyond a reasonable doubt. *Aumick*, 126 Wn.2d at 429-30.

a. The state failed to prove beyond a reasonable doubt the elements of intent

To convict Persell of attempted rape of a child the state had to prove that Persell, with intent to commit a specific crime, took a substantial step toward the commission of that crime. *State v. A.M.*, 163 Wn. App. 414, 423, 260 P.3d 229 (2011) (citing RCW 9A.28.020(1)). A person commits rape of a child when the person has sexual intercourse with a child. RCW 9A.44.073, .076, and .079. First and second-degree rape of a child are distinguished only by the

age of the child and the defendant. RCW 9A.44.073, .076.

The defendant must have the requisite intent to commit rape at the time he took a substantial step. RCW 9A.28.020(1). This is well-established by Washington case law. “When coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse.” *A.M.*, 163 Wn. App. at 423 (citing *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996)).

Here, the state had to prove beyond a reasonable doubt that Persell intended to have sexual intercourse with “Jay”, “Anna”, and “Sam” when he arrived at “Hannah’s” apartment on September 9. The only evidence the state offered to show Persell’s intent to engage in sexual intercourse on September 9 was the fact that Persell went to the apartment. But the intent element is separate from the substantial step element and both must be proved beyond a reasonable doubt. *Aumick*, 126 Wn.2d at 429-30.

A.M., 163 Wn. App. at 423 is illustrative. In *A.M.*, the Court of Appeals refused to remand *A.M.*’s case for entry of a conviction for attempted first degree child rape after it found the evidence was insufficient to support *A.M.*’s conviction for first degree child rape.

A.M., 163 Wn. App. at 422-23. Although the trial court found that A.M. “put his penis inside Doe’s buttocks” it also found that there was “penetration of the buttocks, but not the anus.” Because penetration of the buttocks alone is not an act of sexual intercourse, A.M. did not act with the objective to participate in sexual intercourse. Therefore, A.M.’s conduct did not prove he intended to have sexual intercourse with R.D. when he put his penis in R.D.’s buttocks. *A.M.*, 163 Wn. App. at 423.

Because a meet and greet was part of the preliminary negotiation prior to an agreement to have sex, it does not provide proof beyond a reasonable doubt of an intent to have sexual conduct with children. This Court must reverse and remand for dismissal with prejudice. *A.M.*, 163 Wn. App. at 426; *State v. Grundy*, 76 Wn. App 335, 338, 886 P.2d 208 (1994).

- b. The state failed to prove beyond a reasonable doubt that Persell took a substantial step because Persell’s actions did not strongly corroborate an intent to have sexual intercourse with the children on September 9

The state failed to prove beyond a reasonable doubt that Persell took a substantial step because Persell’s actions did not strongly corroborate an intent to have sexual intercourse with the

children on September 9.

A substantial step is an act that is “strongly corroborative” of the actor's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978); *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012) (Johnson II). The line between preparation and an attempt depends on the facts of each case. *State v. Nicholson*, 77 Wn.2d 415, 463 P.2d 633 (1969). However, in reviewing cases in which the Court of Appeals has found sufficient evidence of a substantial step, the evidence of the defendant’s intent is close in time to the attempted act.

For example, in *State v. Wilson*, 1 Wn. App. 2d 73, 84, 404 P.3d 76 (2017), Wilson directed 5-year-old B.E. to have sexual contact with him and he told her to “suck it like a sucker” and to “go ahead.” The Court of Appeals found that a rational juror could infer from the immediacy of Wilson’s directives that Wilson was prepared for sexual contact at that moment. *Wilson*, 1 Wn. App. 2d at 84.

Again in *State v. Sivins*, 138 Wn. App. 52, 64, 155 P.3d 982 (2007) the defendant drove five hours to meet a 13-year-old-girl and then secured a hotel room when he arrived.

Similarly in *State v. Wilson*, 158 Wn. App. 305, 317–18, 242

P.3d 19 (2010) (*Wilson II*), a police detective posed online as a 38-year-old mother with a 13-year-old daughter that would “fulfill your fantasies but it won't be cheap.” *Wilson II*, 158 Wn. App. at 308. The defendant emailed the mother saying he was interested and arranged with her to meet the daughter and then go back to their home to have sex for \$300. *Wilson*, 158 Wn. App. at 309. The defendant went to the meeting location with \$300. *Wilson II*, 158 Wn. App. at 311. The defendant was then arrested and convicted of attempted second degree child rape. *Wilson II*, 158 Wn. App. at 311-12. On appeal, the court held that negotiations had concluded and that the defendant's exchanging of photographs with the mother, obtaining her address, and driving to the agreed location with the money he agreed to pay for sex constituted a substantial step. *Id.* at 318. Thus, the court affirmed the conviction. *Wilson II*, 158 Wn. App. at 320.

Here, unlike *Wilson II*, Persell, did not have an agreed upon plan to have sexual contact with children. There was in fact no agreement whatsoever other than to meet and greet. This distinguishes Persell's case from *Wilson II*, and *Sivins*, where the sex acts were agreed upon and the meeting was the first step in

furtherance of those acts. The plan for sex was not set and therefore, the meet and greet was not the first step towards fulfilling that plan.

Grundy, 76 Wn. App. 335, is more closely on point. In *Grundy*, an officer posed as a drug runner, approached the defendant, and asked him what he wanted. *Grundy*, 76 Wn. App. at 336. In response, the defendant said he wanted cocaine. *Grundy*, 76 Wn. App. at 337. The officer asked to see the money, but the defendant asked to see the drugs first. *Grundy*, 76 Wn. App. at 336. The defendant was then arrested and charged with attempted possession of cocaine. *Grundy*, 76 Wn. App. at 336. The court held that although the defendant's "words evidenced an intent to acquire possession of cocaine, they are insufficient, without more, to constitute the requisite overt act." *Grundy*, 76 Wn. App. at 337. The court held that the "parties were still in the negotiation stage." *Grundy*, 76 Wn. App. at 338.

Similarly here, Persell was still in the negotiation state. He acted with the objective to participate in a "meet and greet" as part of the initial negotiation to decide if the terms were acceptable. This is not the same as in *Wilson II*, where the defendant agreed to have sexual contact and then began the process with a meeting to "break

the ice". When Persell drove to "Hannah's" apartment on September 9 he had not agreed to have sex with anyone. Rather as in *Grundy*, he began the negotiation process with limited time where he was not prepared with condoms or lubricant. RP 62, 116-17; Exh. 1, 9. A meet and greet for the purpose of determining whether this situation was a "good fit" is not an act of sexual intercourse.

In the light most favorable to the state, the evidence only showed that Persell went to the apartment for a "meet and greet" to determine whether Persell was a "good fit" and to make plans for the future. At best, it shows he acted with the objective of meeting the children to determine if he was interested in participating in sexual intercourse at some date in the future not on September 9. Participating in a meet and greet does not strongly corroborate substantial step toward engaging in sexual intercourse with children on September 9, rather it is a preliminary negation like that in *Grundy*. Therefore, the state's evidence was insufficient to prove beyond a reasonable doubt that prove committed attempted rape of a child with Jay, Anna, and Sam.

3. PERSELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO MCDONALD'S OPINION TESTIMONY ABOUT PERSELL'S TEXT MESSAGE NOTIFICATION TONE OR TO ASK FOR A LIMITING INSTRUCTION

Persell was denied his constitutional right to effective assistance of counsel when his attorney failed to object to McDonald's opinion testimony identifying Persell's text message notification or to request a limiting instruction.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22. The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten*, 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Counsel's performance is not deficient if it can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33. To establish actual prejudice, Persell must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

- a. McDonald's opinion testimony was inadmissible because it violated Persell's Sixth Amendment right to fair trial before an impartial trier of fact and had defense counsel objected to McDonald's testimony it would not have been admitted

Both the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution, guarantee the right to a fair trial before an impartial trier of fact. The jury's role is "inviolable" under Washington's constitution. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); U.S. Const. Amend. VI; Wash. Const. art. I §§ 21, 22.

The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Montgomery*, 163 Wn.2d at 590

(citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)). Under the constitution the jury has “the ultimate power to weigh the evidence and determine the facts.” *Montgomery*, 163 Wn.2d at 590 (citing *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). It is the jury's responsibility to determine the defendant's guilt or innocence. *State v. Farr-Lenzini*, 93 Wn. App. 453, 459–60, 970 P.2d 313 (1999) (*superseded by statute on other grounds*, *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009) (citing ER 602, 701).

However, some areas are “clearly inappropriate for opinion testimony in criminal trials.” *Montgomery*, 163 Wn.2d at 591. These areas include the intent of the accused (*Montgomery*, 163 Wn.2d at 591 (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)) whether by direct statement or by inference (*Black*, 109 Wn.2d at 348).

If a lay opinion relates to a core element the state must prove,

there must be a substantial factual basis supporting the opinion. *Farr-Lenzini*, 93 Wn. App. at 463. This is because an opinion on evidence the jury can see and hear for itself runs “the risk of invading the province of the jury and unfairly prejudicing [the defendant].” See *George*, 150 Wn. App. at 118 (Opinion testimony identifying individuals in a surveillance photo runs “the risk of invading the province of the jury and unfairly prejudicing [the defendant].) (quoting *United States v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir.1993) (finding that officer's identification testimony was not helpful to the jury because the officer had never seen the defendant in person)).

The more overwhelming the evidence against the defendant, the less likely the defendant will be prejudiced by improperly admitted evidence. *George*, 150 Wn. App. at 119; *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008)).

For example, in *George*, the Court of Appeals found that an officer's testimony identifying two co-defendants from a poor quality surveillance video where the officer had insufficient contact to make a positive identification, was inadmissible, but given the evidence

against each defendant the inadmissible testimony only prejudiced one of the defendants- Wahsise. *George* 150 Wn. App. at 119.

Here, like in *George*, the jury viewed a video. RP 116; Exh. 6. Instead of identifying Persell in the video, McDonald identified his text message notification, which was partially audible in the video. RP 118; Exh. 6. But because the audio is poor quality it is difficult to hear what the notification actually states. It is equally probable the notification tone states, “whoo hoo haha. Text Message.” Exh. 6. This was a question of fact, within the province of the jury, that spoke directly to Persell’s state of mind.

Similarly in *Farr-Lenzini*, the Court of Appeals reversed Farr-Lenzini’s conviction because the trooper testified to the defendant’s intent without providing an adequate factual basis for his opinion. *Farr-Lenzini*, 93 Wn. App. at 465.

Farr-Lenzini was charged with attempting to elude under former RCW 46.61.024, which contained an element of willfulness. *Farr-Lenzini*, 93 Wn. App. at 458. At trial, the trooper testified the person driving the vehicle was attempting to escape from him and the driver knew the trooper was behind him but refused to stop. *Farr-Lenzini*, 93 Wn. App. at 458. This testimony was inadmissible

because the trooper only interpreted the defendant's acts instead of providing facts that would support a finding that the defendant was trying to elude him. *Farr-Lenzini*, 93 Wn. App. at 464.

Here, McDonald's testimony regarding the notification tone implied that Persell possessed the requisite intent and, thus, implied his guilt. It is clear this was the implication because the prosecutor used McDonald's testimony to tell the jury it could "get into his mind a little bit" and they could infer his intent because "as he's talking about everything he wants to do to these children" he keeps hearing "Woo-hoo, ha-ha, touch my dick." RP 252. Just like the trooper's impermissible testimony in *Farr-Lenzini*, McDonald's testimony spoke directly to the defendant's state of mind.

McDonald did not present a sufficient factual basis to support her opinion due to insufficient contact with the notification tone to support her opinion that it said, "Whoo hoo haha. Touch my dick." Therefore, her testimony improperly invaded the province of the jury and it was inadmissible. *George*, 150 Wn. App. at 118-19. Just as in *George*, and *Farr-Lenzini* the trial court erred by admitting this evidence against Persell. RP 117; Exh. 6. *George*, 150 Wn. App. 119; *Farr-Lenzini*, 93 Wn. App. at 464.

Had defense counsel objected, the court would likely have sustained the objection or given a limiting instruction explaining that the video itself is the evidence and that the jury is the sole trier of fact.

b. Defense counsel's failure to object to McDonald's testimony prejudiced the defendant

Actual prejudice means that the error was not harmless. *In re Creace*, 174 Wn.2d 835, 844, 280 P.3d 1102 (2012). "When evidence is improperly admitted, the trial court's error is harmless if it is minor in reference to the overall, overwhelming evidence as a whole. *George*, 150 Wn. App. at 119 (citing *Yates*, 161 Wn.2d at 764).

Therefore, the Court of Appeals' harmless error analysis in *George* is analogous. *George*, 150 Wn. App. at 120. The improper admission of Detective Rackley's testimony was harmless against defendant George because the other evidence against him was overwhelming and, thus, the erroneous testimony did not affect the jury's verdict. *George*, 150 Wn. App. at 119. The eyewitness identified George as the gunman, George was driving the getaway vehicle, and George fled the scene when Rackley stopped the vehicle. *George*, 150 Wn. App. at 119-20.

In contrast, the erroneous testimony was not harmless against defendant Wahsise because the other evidence against Wahsise was not overwhelming, thus, the improper testimony could have affected the jury's verdict. *George*, 150 Wn. App. at 120.

Here, the evidence against Persell is more similar to the evidence against co-defendant Wahsise in the *George* case. *George* 150 Wn. App. at 120. The state's case against Persell centered on his intent to have sexual intercourse with "Hannah's" children on September 9. The only evidence to support the state's assertion that Persell intended to engage in sexual intercourse on September 9 was his "meet and greet". This is not overwhelming evidence.

The text message notification was a large part of the state's case. Further, the prosecutor referred to the text message notification tone three times in her closing argument and specifically told the jury it could rely on the notification to infer Persell's intent. RP 251-52. But for defense counsel's error, the jury could have made its own determination about what the notification stated. Without McDonald's testimony the jury could have found the notification stated "whoo hoo haha text message" and would have found no evidence to support the element of intent. Therefore, defense

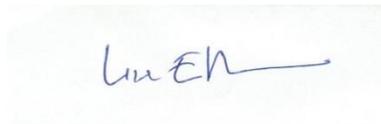
counsel's failure to object likely affected the jury's verdict, resulted in actual prejudice to Persell, and was not harmless error. *George*, 150 Wn. App. at 120.

E. CONCLUSION

Adam Persell respectfully requests this Court reverse and dismiss with prejudice his convictions for First and Second Degree Attempted Rape of a Child for insufficient evidence. In the alternative Persell respectfully requests this Court remand for a new trial.

DATED this 8th day of January 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Erin Sperger", is written on a light-colored rectangular background.

ERIN SPERGER, WSBA No. 45931
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and Adam Persell/DOC#838791, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on January 8, 2019. Service was made by electronically to the prosecutor and Adam Persell by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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