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Division II  
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No. 52236-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ADAM J. PERSELL  
Appellant.

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

The Honorable Chris Lanese, Judge  
Cause No. 16-1-01580-34

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported the jury's guilty verdicts where Persell sent graphic text messages evidencing an intent to have sex with children and followed steps to attend a "fun kind" of meet and greet with the children.
2. Whether Persell's counsel was deficient by not objecting to a detective's testimony regarding Persell's text message ring tone, and if so, whether Persell has demonstrated that the results of the proceedings would have been different if such an objection had been made.
3. Whether a no contact provision prohibiting contact with Persell's biological and legal children is reasonably related to the compelling state interest of protecting children where Persell responded to an ad that read "Family Fun Time," to have sex with children.

## B. STATEMENT OF THE CASE.

The appellant, Adam J. Persell, responded to an ad in the "casual encounters" section of Craigslist. RP 45, 61.1 The ad that Persell responded to was titled, "Family Play Time!?!? – W4M," and read, "Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son...you get the drift. If you know what I'm talking about hit me up we'll chat more about what I have to offer you." Exhibit 7,

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1 The Verbatim Report of Proceedings for the jury trial that took place July 24-26, 2018, appears in two volumes, sequentially number and will be collectively referred to here as RP. The sentencing hearing, August 1, 2018, will be referred to as 2 RP.

RP 114. Persell responded to the message with an email that stated, "Hey, I know and I'm interested." RP 124.

The person Persell was chatting with was Washington State Patrol Detective Kristl Pohl, who was participating in a "Net Nanny" operation conducted by the Missing and Exploited Children's Task Force. RP 120, 121, 124. Detective Pohl was assuming the persona of "Hannah," who indicate that she was the mother of three children, "Anna" age 11, "Sam" age 6, and "Jay," age 13. RP 127. Detective Pohl responded to Persell's initial response, stating, "Hey AJ. I'm a mom with three young kids. This isn't role play. I need a man to help me teach my kids the way I grew up learning about sex from my dad. This isn't for everyone. Text me if you want to chat," and provided a phone number for Persell to initiate a text conversation. RP 124-125.

Persell began a text message conversation with "Hannah," and identified the reason as "CL ad, AJ Smith," and then said, "Family play time?" RP 126. After Detective Pohl told Persell the names and ages of "Hannah's" children, Persell sent two messages saying, "Very nice. Has there been any exploration or experimenting?" and "I am assuming that you will want everyone to be able to play with everyone." RP 127. "Hannah" responded "All

kids have some experience. My son prefers men and just had his first bottom experience which he loved.” RP 128. “Hannah” also told Persell, “Anna has a lot of experience with oral and toys, but has not been fully penetrated yet. Sam has a little experience with toys and oral.” RP 128. Persell responded by asking, “Have you had them all in bed?” RP 129.

“Hannah” continued the conversation, “We’ve all played, but I prefer boys so I help the girls with toys a little bit, and I used to do oral with Jay, but he won’t let me much anymore.” RP 129. Persell responded by asking for “Pics” and a general location. RP 129. “Hannah” asked Persell, “What’s your experience and how do you want to be involved with my family?” and Persell responded, “Was involved with my brother and sister growing up. I want to be involved with you guys in any way that you want. I’m very open and comfortable with sex,” and then again asked for pictures. RP 129.

In her assumed persona, Detective Pohl, stated, “I need to know what you want before I send you any pics.” RP 130. Persell responded, “I’m willing to teach anything that you aren’t able to.” RP 130. “Hannah” responded, “All the kids? What are you into?” and Persell responded, “Yup. Into pretty much everything. No

scat. But open to anything else.” RP 130. “Hannah” then said, “My rule are no pain and no anal (except for my son of course) and condoms and lube are required for the girls.” RP 130.

Persell responded, “Definitely,” and then said, “I’m good with those rules.” RP 130. When “Hannah asked, “So I’m really trying to find someone for Jay too. Are you into boys? He just had his first bottom experience and wants more,” Persell responded, “I’m bi.” RP 130. “Hannah” and Persell exchanged pictures. RP 131-131. The picture that Detective Pohl sent was actually Detective Krista McDonald, in an undercover persona using a Snapchat filter. RP 131. Persell later admitted that the picture he sent was his brother. RP 140.

Later in the conversation, Persell asked, “So how many prospects do you have in mind right now? Just curious where I am at in the running,” and “Would this be a live-in situation or a once in a while stop by?” RP 132. “Hanna” responded, “I would love a long-term situation for them, but I can’t afford to support you, hun.” RP 132. “Hannah” told Persell, “Well, if you’re a good fit for us, I would love to have a long-term situation for my family,” to which Persell responded, “Good.” RP 133. Persell asked for pics of the rest of the family, and “Hannah” responded saying, “Sure, but I

keep their faces partially covered, and I don't include my baby girl in pics ever." RP 133. "Hannah" then asked for details of what Persell wanted to do. RP 133. The family picture that included everybody but the six year-old, that was sent was actually Detective McDonald as the mother, Trooper Anna Gasser as the eleven year-old daughter, and Detective Jake Cline, as the son. RP 134.

Persell then asked to meet in public, to which "Hannah" responded that she has a system where Persell would go to a minimart near her house, send her a selfie from there and then be given her address. RP 135. Persell asked, "So how do we find out if I am the right fit?" to which "Hannah" responded, "you still haven't said what you want." RP 135-136. Persell responded, "give me the rundown on the ages again. And yours too if you don't mind." RP 136.

"Hannah" stated, "I'm mid-30's. 13, 11, and 6." RP 136. Persell then said, "Okay. How detailed do you want it?" and continued "So we can start with you on your back with the oldest daughter on her hands and knees licking you. The youngest on her back between your legs," to which "Hannah" responded, "LOL, we can do that without you. We don't need a peeping Tom, ha ha." RP 136. Persell continued, "The boy can be working on me.

Getting me ready for the oldest daughter, “and then said, “Slowly I will slid in until I am full in. The youngest licking my load heavy sack.” RP 136. “Hannah” responded, “That’s hot,” and Persell asked “what are you doing at this point?” Hannah then responded, “Putting the girls in the bath, waiting for you to come over.” RP 136.

Persell stated, “That must be a pretty sight.” RP 137. “Hannah” then stated “And watching of course. Maybe playing with my son if I get hot and he lets me,” to which Persell stated, “Would love to see that.” RP 137. Persell later commented, “I bet he has a cute butt.” RP. 137. After some more chatting, Persell asked for “Butt shots,” and “Hannah” sent a clothed butt picture. RP 136-137. Persell then asked “Would one of the daughter be game for a pic?” and “Hannah” responded, “No more pics, hun. I’m starting to get the feeling that you’re just sitting in a dark room jacking off.” RP 139. Persell responded, “LOL, It’s going to take more than one pic of his clothed butt to get me jacking.” RP 139.

Persell asked, “So where do we go from here?” and “Hannah” responded, “Come over if you want.” RP 139. Persell indicated, “I might be able to sneak away for a bit, lunch and all. Just enough for a meet and greet kinda thing.” RP 139. “Hannah”

responded, "These kind of meet and greets are the fun kind. Jay is especially excited to meet you," to which Persell responded, "Nice. Me too." RP 140.

Persell then admitted that he had previously sent a picture of his brother and provided an actual picture of himself. RP 140. At Detective Pohl's direction, Persell went to a 7-Eleven in Tumwater and sent a picture, after which he was given an apartment address to go to. RP 141.

When Persell arrived at the apartment, he was met at the door by Detective McDonald. RP 116, Exhibit 6. Detective McDonald invited him in, asked him to remove his shoes and then walked to the back saying that she was going to get the girls. RP 117. While walking away from him, Detective McDonald heard a text message alert coming from Persell that she indicated was a laughing sound followed by the words "touch my dick." RP 118, Exhibit 6. The audio from the arrest video is not particularly clear. Exhibit 6, RP 116. Detective Pohl had sent one last "test" text message to him. RP 142.

Persell was placed into custody by an arrest team. RP 62, 118. Persell was charged with two counts of attempted rape of a child in the first degree and one count of attempted rape of a child

in the second degree. CP 5-6. The jury found Persell guilty of each offense. CP 358-360. As part of the judgment and sentence, the trial court ordered that Persell have “no contact with minors, including biological and legal children.” CP 312. The trial court stated,

“I’m not going to allow communication at this time going forward. I will emphasize to Mr. Persell that this is a factor that if you are to try to pursue treatment during your time at the Department of Corrections - - and, again, as Mr. Jefferson (defense counsel) said, I don’t know if they are going to permit that - - but I urge you for everyone’s sake to pursue that anyway, because if that is pursued and goes well, this quite possibly would not come back to me, but I think any judge in any future request to modify those provisions would view that as at least a necessary step to go towards that end.”

2 RP 10. Persell had previously been convicted of rape of a child in the second degree and, as a result, was sentenced as a persistent offender. 2 RP 11, CP 308-317. This appeal follows.

#### C. ARGUMENT.

1. The evidence presented at trial sufficiently supported the jury’s finding that Persell took a substantial step with the intent of having sexual intercourse with the 6, 11, and 13-year-old children created by the “Net Nanny” operation.

In determining the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the

elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, P.3d 255 (2002). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining the sufficiency of the evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Evidence suffices to support a conviction of attempted rape of a child in the first degree when the State proves beyond a reasonable doubt that the defendant took a substantial step toward having sexual intercourse with a child less than twelve years old and not married to the defendant and when the defendant is at least twenty-four months older than the victim. RCW 9A.28.020; RCW 9A.44.073. In order to prove rape of a child in the second degree, the State must prove beyond a reasonable doubt that the defendant took a substantial step toward having sexual intercourse with a child less than fourteen years old and not married to the defendant and when the defendant is at least thirty-six months older than the victim. RCW 9A.28.020; RCW 9A.44.073. The intent required for attempted rape of a child is the intent to accomplish the criminal

result: to have sexual intercourse. State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

“Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight, and also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another,” and “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.010(1)(a)(b) and (c). A substantial step is conduct that strongly corroborates the actor’s criminal purpose. State v. Townsend, 147 Wn.2d 679.

“Attempt law provides a basis for and makes possible preventative action by the police before the defendant has come dangerously close to committing the intended crime. State v. Nelson, 191 Wn.2d 61, 69, 419 P.2d 410 (2018). “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. State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012); *citing*, State v. Patel, 170 Wn.2d 476, 242 P.3d 856 (2010).

A substantial step need not be an overt act, as long as it is behavior strongly corroborative of the actor’s criminal purpose.

State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). The conduct must go beyond mere preparation. State v. Townsend, 147 Wn.2d at 679. The question of what constitutes a substantial step under the particular facts of the case is clearly for the trier of fact. State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). In Workman, the Court stated, “When preparation ends and an attempt begins, we have held, always depends on the facts of the particular case.” Id. at 449-450. “Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” State v. Price, 103 Wn.App. 845 852, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001).

Here, Persell chatted with “Hannah” regarding having sexual intercourse with her children ages 6, 11, and 13, to the extent that he provided graphic detail regarding what he would do. Exhibit 9, RP 136. He then followed “Hannah’s” directions to travel to her location to meet the children. RP 140-141. When “Hannah” said “these kinds of meet and greets are the fun kind, Jay is especially excited to meet you,” Persell responded “Nice. Me too.” RP 140.

Several cases have discussed what facts are sufficient to support a conviction for attempted rape of a child. In Townsend, the defendant made arrangements to meet a child, who was

actually a detective, and traveled to a prearranged meeting at a motel after stating that he wanted to have sex with the child. 147 Wn.2d at 670-671. The Court held that there was sufficient evidence that Townsend took a substantial step toward the commission of the crime. Id. at 680.

In State v. Silvins, 138 Wn.App. 52, 155 P.3d 982 (2007), a police intern posed as a fictitious 13-year-old girl and the defendant indicated he would like to meet and be “intimate.” Id. at 56-57. The defendant said he wanted to go “as far as you will let me go,” after which the intern asked if he meant “sex” or a “homerun” and he replied, “if that is as far as you will let me go.” Id. at 57. The defendant then checked into a motel room and spoke with a police officer posing as the child, giving her the room number. Id. Evidence that he had brought “condoms, lubricant, alcohol and other items,” was suppressed prior to trial. Id. at 60. Division III of this Court held that “a sufficient quantity of evidence existed to persuade a rational trier of fact of the truth of the allegations.” Id. at 65.

In State v. Wilson, 158 Wn.App. 305, 242 P.3d 19 (2010), a detective posed as a woman who posted an ad on craigslist that she and her daughter would fulfill fantasies for money. Id. at

308. The defendant responded to the ad and was told that the daughter was 13, and agreed to pay \$300 for oral and full sex with the child. Id. at 308, 309-310. The defendant was arrested in front of the agreed meeting location with \$330 in cash in his pocket. Id. at 311. Division I of this Court rejected the defendant's argument that he had not taken a substantial step to completing the offense because he had only gone to a public place and hadn't paid the money. Id. at 316, 318.

The defendant in Wilson made a similar argument that that which Persell now makes, citing State v. Grundy, 76 Wn.App. 335, 886 P.2d 208 (1994), to argue that he was still in the "negotiating stage," and therefore had not completed a substantial step toward commission of the offense. Wilson, 158 Wn.App. at 318. The Court rejected that argument, stating, "the evidence established that after Wilson finished negotiating with Jackie to have oral and full sex for \$300 with a 13-year-old-girl, he took actions that strongly corroborated his intent to commit the crime of rape of a child." Id. at 318.

A reviewing court should defer to the trier of fact's decisions with respect to the reasonable inferences to draw from the evidence. State v. Bryant, 89 Wn.App. 857, 869, 950 P.2d 1004

(1998). “A reasonable jury may infer the elements of attempt even without evidence of physical contact or an express statement of intent.” State v. Wilson, 1 Wn.App.2d 73, 85, 404 P.3d 76 (2017).

In this case, Persell clearly expressed his desire to have sexual intercourse with all three children. He took substantial steps in discussing sex with the children with “Hannah,” describing the actions that he would commit, and traveling to a prearranged location for the “fun kind” of meet and greet with the children. RP 140. It is inconsequential that Persell did not have condoms or lubricant on his person at the time he arrived at the prearranged location. While “Hannah” said that the rule was “no pain and no anal (except for my son of course) and condoms and lube are required for the girls,” there was no indication that Persell needed to supply the condoms and lube. RP 130. In fact, “Hannah’s” descriptions regarding the use of toys was suggestive that “Hannah” and the children had the necessary items to complete to acts. RP 128-129.

The facts support the jury’s conclusion that Persell went to the prearranged apartment with the intent of having sexual intercourse with children ages 6, 11, and 13. His actions were more than mere preparation. The first text message was sent at

12:10 PM on September 9, 2016, and the last message was sent at 9:12 PM. Exhibit 9. Persell graphically described what he intended to do with the children, went through the procedures that “Hannah” put in place for him to gain access to the children, and arrived at the residence for the “fun kind” of meet and greet that he acknowledge he was excited about. This Court should defer to the jury’s rational inferences. Taking the evidence in a light most favorable to the State, a rational juror could have found beyond a reasonable doubt that Persell intended to have sex with the children and had taken steps which clearly showed his design to commit the crimes. The evidence was sufficient to support his convictions.

2. Persell’s defense counsel did not render ineffective assistance of counsel by not objecting to Detective McDonald’s testimony regarding Persell’s text message tone because McDonald’s direct observations did not constitute impermissible hearsay and did not actually prejudice the defense.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective

assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted). When an ineffective assistance of counsel claim is based on a failure to object, an appellant must show that the trial court likely would have sustained the objection. State v. Fortun-Cebada, 158 Wn.App. 158, 172, 241 P.3d 800 (2010).

Here, Persell argues that his trial counsel should have objected to the testimony of Detective McDonald regarding the text message tone that came from his person at the time of his arrest, arguing that the testimony was an improper opinion related to Persell's intent. Detective McDonald testified,

“While I was walking away to the back bedroom to get out of the way for the arrest team to come in, a text message alert tone came over the defendant’s phone and it was a laughing sound then with the words touch my dick, and that was the message tone.”

RP 117-118 (internal quotations omitted). Detective McDonald continued

“it was coming from his person, and then the text message tone went off a couple more times, and one of the times that the text message tone alerted from his phone was when the undercover detective sent out a test text to his phone so we would know which phone to seize as evidence that he had been communicating on.”

RP 118. Detective McDonald was present in the apartment where the video was recorded. Exhibit 6, RP 116-118.

A witness may testify to a matter that they have personal knowledge regarding. ER 602. “A lay witness may testify as to observations gleaned from his or her senses as well as to inferences arising from those perceptions.” State v. Blake, 172 Wn.App. 515, 519, 298 P.3d 769 (2012). In Blake, Division I of this Court considered the testimony of two witnesses identifying Blake as assailant in a shooting, despite the fact that the witnesses did not see Blake pull the trigger. Id. The Court stated, “Significantly, case law does not support the contention that the challenged testimony included impermissible opinion on guilt, as opposed to

allowable testimony as to inferences or fact-based observations. Id. at 526.

The Court cited to several illustrative cases. See, State v. Mason, 160 Wn.2d 910,932, 162 P.3d 396 (2007) (death certificate from medical examiner admissible because based on specific observations and evidence referenced death rather than guilt); City of Seattle v. Heatley, 70 Wn.App. 753, 577, 854 P.2d 658 (1993) (officer's testimony regarding intoxication was admissible because it was based on direct observation, was helpful to the jury, and was not framed in conclusory terms that parroted a legal standard.); State v. Sanders, 66 Wn.App. 380, 388-89, 832 P.2d 1326 (1992) (officer's inference based on experience and physical evidence was admissible because it did not prevent the jury from rejecting the testimony and finding defendant not guilty).

A lay witness may give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge. ER 701; State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Even if Detective McDonald's testimony could be characterized as an opinion, it would have been admissible even in the face of an objection.

“In determining whether such statements are inadmissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.”

Id. at 591.

In Montgomery, the witness testified that they believed chemicals that the defendant had were for the production of methamphetamine, which the Court found was an impermissible personal opinion of an element of the offense of possession of pseudoephedrine with intent to manufacture methamphetamine. Id. at 588, 595. In this case, Detective McDonald testified regarding what she heard to be a text message ring tone. Her opinion, if it can be described as such, was regarding the contents of the tone. She made no legal conclusions regarding Persell’s intent, and gave no opinion that the ring tone was indicative of his intent.

The defense theory of the case revolved around whether or not Persell had intent to have the sex with the children that day, but did not argue that Persell had no interest in sex with children. Persell’s statements, “The boy can be working on me. Getting me ready for the oldest daughter,” and then said, “Slowly I will slid in until I am full in. The youngest licking my load heavy sack,” were

far more indicative of his intent than testimony regarding his ring tone. RP 136. Even if an objection had been made, it is unlikely that the trial court would have found it to be impermissible opinion testimony.

Persell's reliance on State v. George, 150 Wn.App. 110, 206 P.3d 697 (2009), is misplaced as the facts are easily distinguishable from the testimony presented in this trial. In George, an officer positively identified the defendant's as the robbers from a surveillance video of poor quality. Id. at 112, 115. This Court held that the officer did not know enough about the defendants to express an opinion that they were the robbers shown on the "very poor quality video." Id. at 118. Unlike the officer in George, Detective McDonald was actually present when the video was made. She was in a position to better hear the sounds that are not clear in Exhibit 6 than the jury. Again, under these facts, it is unlikely that an objection would have been granted. Moreover, given that the jury heard the video, defense counsel's decision not to object may have been a strategic attempt not to emphasize Detective McDonald's testimony. See, State v. Day, 51 Wn.App. 544, 553, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988) (when counsel's conduct can be characterized as a legitimate trial

strategy, it cannot provide a basis for an ineffective assistance of counsel claim).

Even if Detective McDonald's testimony was improper and incorrect, the evidence was minor in the overall context of the case. See, State v. Yates, 161 Wn.2d 714, 764, 168 P.3d 359 (2007). In order to demonstrate the prejudice prong of the ineffective assistance of counsel test, the appellant must show that the likelihood of a different result is substantial, not just conceivable. In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017).

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (proper jury instructions regarding credibility of witnesses negated prejudice from testimony as to credibility of a child witness). The jury in this case was similarly instructed, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness" and that they could consider the "reasonableness of the witness's statements in the context of all other evidence." RP 207-208; CP 339-340. The Montgomery Court also concluded that

proper instructions negated the prejudice in finding that the officer's improper opinion testimony did not constitute actual prejudice.

Persell argues that he was prejudiced because the text message tone testimony was a large part of the State's case regarding his intent to have sexual intercourse with the children and the only evidence of his intent was his "meet and greet." Brief of Appellant, at 31. Contrary to this assertion, the evidence overwhelmingly supported the conclusion that Persell intended to have sexual intercourse with the children. As noted above, Persell's text messages indicated, "The boy can be working on me. Getting me ready for the oldest daughter, " and then said, "Slowly I will slid in until I am full in. The youngest licking my load heavy sack." RP 136.

In the defense closing argument, defense counsel argued "And so the person said, I'm interested in sex with children. The person says, hey, I'm looking for a long-term thing. That doesn't mean you have to take advantage of this opportunity this evening." RP 238-239. The argument was not that Persell had no interest in sex with children, rather, that he did not take a substantial step toward accomplishing sex with children on the day of his arrest. Whether his text message tone said, "touch my dick" or "text

message” has little importance in the entire context of the text message conversation that took place. It was clear that Persell was interested in sex with children, regardless of what his text message tone stated.

The evidence demonstrated that Persell went to the apartment for the “fun kind” of meet and greet. RP 140. The inclusion of the phrase “touch my dick” in the State’s rebuttal closing argument was minimal, and was in the context of content of the text message conversation as whole. RP 251-252. Even if his attorney had successfully objected to Detective McDonald’s testimony, the outcome of the verdicts would not have differed. For the reasons stated above, Persell has failed to meet his heavy burden of proving that his counsel’s performance was deficient, and that his case was prejudiced by that deficient performance.

3. The trial court carefully considered the fundamental right to parent and properly imposed a restriction that Persell have no contact with minors including his legal and biological children.

The Sentencing Reform Act (SRA) authorizes the court to impose crime related prohibitions as a condition of a sentence. RCW 9.94A.505(9). A “crime related prohibition” prohibits “conduct that directly relates to the circumstances of the crime for which the

offender has been convicted.” RCW 9.94A.030(10). The imposition of crime related prohibitions is reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). A condition will be upheld if it is reasonably related to the crime; however, when a sentencing condition affects a constitutional right and interferes with a fundamental constitutional right, such as the right to parent, a more careful review is required. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The condition must be reasonably necessary to accomplish the essential needs of the State. State v. Ancira, 107 Wn.App. 650, 656, 27 P.3d 1246 (2001).

When a sentencing condition affects a constitutional right, strict scrutiny is applied; however, because the trial judge has the opportunity for in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion. Rainey, 168 Wn.2d at 374-375. No contact orders are not limited to the victims of the crime. State v. Navarro, 188 Wn.App. 550, 556, 354 P.3d 22 (2015). “Prevention of harm to children is a compelling state interest.” State v. Aguilar, 176 Wn.App. 264, 277, 308 P.3d 778 (2013).

Here, the record indicates that both Persell's biological son and his step-son are in the same class of persons as the intended victims of his crimes. 2 RP 9-10, CP 305-306. Moreover, his arrangements to engage in sexual intercourse with children in this case were done in writing. The ad that Persell responded to was for "Family Play Time," and included the terms "daddy/daughter" and "daddy/son." Exhibit 7. The facts are distinguishable from State v. Letourneau, 100 Wn.App. 424, 997 P.2d 436 (2000), where the Court rejected a prohibition against unsupervised contact with the defendant's biological children because there was no indication that Letourneau might offend against her children. Persell actively sought out "daddy/son" "Family Play Time."

The trial court's ruling prohibiting contact with minors was reasonably related to the State's interest in protecting children. The trial court recognized the importance of the parent-child relationship when it discussed the possibility of modifying the order if Persell seeks treatment during his incarceration. 2 RP 10. The court stated, "You are the type of person who is the reason we have persistent offender laws, because you obviously are in dire need of treatment and were/are a risk to the children in the community." 2

RP 11. The trial court did not abuse its discretion by imposing the challenged restrictions.

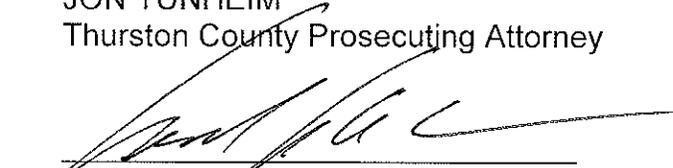
#### D. CONCLUSION.

Sufficient evidence supported the jury's conclusion that Persell took a substantial step toward engaging in sexual intercourse with three children, ages 6, 11, and 13. The text conversations clearly demonstrated that he intended to have sex with children and his excitement at the notion of a "fun kind" of meet and greet supported the jury's finding that he intended to have sexual intercourse with the children. It is unlikely that the trial court would have granted an objection to Detective McDonald's testimony regarding the text message ring tone, and even if it had, the result of the proceedings would have been no different. Persell has failed to carry his burden of proving either prong of the Strickland test for ineffective assistance of counsel. The trial court properly considered the imposition of a no contact condition which included Persell's biological and legal children, and the prohibition was reasonably related to a compelling state interest. The State

respectfully request that this Court affirm Persell's convictions and sentence in all aspects.

Respectfully submitted this 6<sup>th</sup> day of March, 2019.

JON TUNHEIM  
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Joseph J.A. Jackson, WSBA# 37306  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5<sup>th</sup> day of MARCH, 2019, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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