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Court of Appeals
Division II
State of Washington
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No. 52594-1-II

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

STATE OF WASHINGTON, Respondent

v.

GABRIEL GARCIA, Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE JUDGE JAMES J. DIXON

BRIEF OF APPELLANT-CORRECTED

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I. ASSIGNMENTS OF ERROR

- A. The evidence cannot sustain a conviction for attempted rape of a child.

LEGAL ISSUE: To sustain a conviction for an attempted crime, the State must produce evidence that a defendant took a substantial step. Was the evidence insufficient where the State cannot show a substantial step?

- B. Mr. Garcia was denied his rights under Criminal Rule 3.2 and Due Process when the court failed to apply the mandatory presumption of release on personal recognizance.

LEGAL ISSUE: Did the trial court violate CrR 3.2 and the presumption of innocence in the imposition of a 100 thousand dollar bail, and where it failed to consider less restrictive alternatives?

- C. The State violated Mr. Garcia's right to effective assistance of counsel by conditioning its plea offer on defense counsel not conducting any investigation into the case.

LEGAL ISSUE: The right to effective assistance of counsel applies to a plea process and a trial. Counsel must conduct

a reasonable investigation to enable a defendant to make an informed choice about a plea offer. Where the State conditions a plea deal on defense counsel not conducting any investigation to evaluate the strength of the State's case, has the State impermissibly interfered with Mr. Garcia's right to effective assistance of counsel?

- D. The trial court erred in concluding the "governmental misconduct" was "not related directly to the law enforcement interactions with the defendants at issue." CP 247
- E. The trial court erred in concluding the private funds which paid for the Net Nanny sting by law enforcement, "do not create a direct enough link to the interactions of law enforcement" with the defendant. CP 247.
- F. The trial court erred in concluding police officers did not control the criminal activity because the record was "devoid of information regarding the landscape of Craigslist at the time of the 'net nanny' operation." CP 248.
- G. The trial court erred in concluding the motivation of police was to protect the public. CP 248.
- H. The trial court erred when it concluded: "No one on the Washington State Patrol violated the law, ...even if there

were technical violations of RCW 13.60.110 or RCW 9A.68.020.” CP 248.

LEGAL ISSUE FOR ERRORS D-H:

Did Sergeant Rodriguez and his team engage in outrageous government misconduct by (a) soliciting and accepting compensation from a private organization to perform police sting operations; (b) devoting that funding to overtime pay for Sgt. Rodriguez and his team as they performed the sting activities; (c) engaging in providing publicity to the private funder against the advice of the Dept. of Justice?

- I. The trial court erred in concluding that Mr. Garcia’s claim of outrageous governmental conduct was more appropriately an entrapment issue. CP 247.

LEGAL ISSUE: Did the trial court err when it concluded Mr. Garcia’s claim of outrageous governmental misconduct was better viewed as an entrapment claim?

- J. The trial court erred when it sentenced Mr. Garcia within the standard range of a completed crime rather than an attempt.

LEGAL ISSUE: Under RCW 9.94A.595, the presumptive sentence for an attempted crime is 75 percent of the standard range. Where the court sentenced Mr. Garcia as if

it were a completed crime, must the matter be remanded for a corrected sentence?

II. STATEMENT OF FACTS

1) Charging, Bail, Pretrial Discovery

Thurston County prosecutors charged Gabriel Garcia with one count of attempted rape of a child in the first degree, and one count of attempted communication with a minor for an immoral purpose. CP 24.

The affidavit of probable cause for charging did not identify the charges involved an imaginary child and was based on a "Net Nanny" sting orchestrated by the Washington State Patrol's Missing and Exploited Children's Task Force. ("MECTF"). CP 1-2. The affidavit instead contained snippets of sexually explicit email and text messages. It wrongly stated Mr. Garcia had "arrived at the victim's residence." CP 2. He was pulled over and arrested in an apartment complex parking lot. 6/20/18 RP 182-183.

Mr. Garcia made a first appearance on September 14, 2016. 9/14/16 RP 3-9. The State requested a bail amount of 250 thousand dollars. 9/14/16 RP 5-6. Defense counsel asked for bail of 20 thousand dollars. 9/14/16 RP 6-7. Mr. Garcia had no criminal

history, no failure to appear, was employed, and willing to surrender his passport. He had recently moved to Washington and lived with his daughter and son-in-law. 9/14/16 RP 6-7.

Nothing in the record indicates the court was aware the charges involved fictitious characters. The court set a 100 thousand-dollar bail based on the allegations and its conclusion that Mr. Garcia was a flight risk. 9/14/16 RP 7-8. Defense counsel asked for reconsideration as similarly situated defendants arraigned earlier that week had bail set at 50 thousand dollars. The court denied reconsideration. 9/14/16 RP 8.

On October 19, 2016, Mr. Garcia motioned for a lower bond amount of 50 thousand dollars. Acknowledging it had to consider factors of residency, criminal history, the involvement of family, and allegations, the court made no analysis. It simply said, "*Although they are just allegations, given the allegations, I'm going to deny the motion.*" 10/19/17 RP 3-4.

On February 2, 2017, Mr. Garcia's attorney withdrew because Mr. Garcia could not pay him. 2/2/17 RP 4-5; CP 15-20. At the omnibus hearing on February 22, 2017, no attorney was present for Mr. Garcia. 2/22/17 RP 3-4. The court finally appointed counsel for him on March 1, 2017. 3/1/17 RP 3-6.

Six weeks later, new counsel asked for a continuance to investigate the case. 4/19/17 RP 4. The State had made an offer to previous counsel with the stipulation that once the defense investigated, the State would revoke the offer. 4/19/17 RP 5. The prosecutor clarified that if any interviews were required, the state's original offer was withdrawn. 4/19/17 RP 5.

Over a year after Mr. Garcia's arrest, defense counsel was still asking for continuances because the State had not complied with discovery requests made in August 2017. Because of the lack of the requested discovery, counsel could not interview any essential witnesses. 10/11/17 RP 4-5. Mr. Garcia remained in jail.

2) Pretrial Litigation

In pretrial litigation, Mr. Garcia joined similarly charged defendants in arguing for dismissal because of outrageous government conduct and egregious constitutional violations. He argued the MECTF violated the law in seeking funding from a private source, providing information to the private funder for publicity purposes, and used the funding to pay for officer overtime, and illicit ads on the internet site craigslist. He also argued that under *State v. Lively*, the State had initiated, controlled, and

directed the activity to such an extent it amounted to entrapment.

CP 39-244; 3/26/18 RP 1-70.

The Court entered written finding of fact and conclusions of law. CP 246-247. The trial court concluded (1) the law provided no authority to approve dismissal under the due process clause for governmental misconduct not related directly to the law enforcement interactions with the defendants at issue; (2) funds which paid for police services did not create a direct enough link to the interactions between defendant and law enforcement to support a dismissal, even if the Washington State Patrol, and/or Detective Sargent Rodriguez violated the law. Third, the court concluded the interactions between an undercover officer and Mr. Garcia went to an entrapment issue but was not so egregious to rise to the level of governmental misconduct; (4) The court held the record was devoid of specific information to allow the court to determine if law enforcement instigated the crime or infiltrated ongoing activity.

Fifth, it found even though Mr. Garcia had expressed reluctance, “there was not an overall reluctance to commit a crime that was overcome by persistent pleas of sympathy, promises of excessive profits, or persistent solicitation.” Sixth, the court held it could not determine whether the government controlled the criminal

activity because “the record being devoid of information regarding the landscape of Craigslist at the time of the ‘Net Nanny’ operation.” The court found the motivation of MECTF was to protect the public.

The court concluded the WSP did not violate the law, but even if there were technical violations of RCW 13.60.100, or RCW 9A.68.020, or another statute, the overall police motive was to prevent crime and protect the public. The court held there was no violation of law by WSP that amounted to criminal activity repugnant to a sense of justice. CP 247-249.

3) Legislative History And Funding Of MECTF

In 1999, Washington State enacted legislation to address the problem of missing children, whether those children had been abducted by a stranger or were missing due to custodial interference or classified as runaways. 6/19/18 RP 24; RCW 13.60.100. “Exploited children” was defined as “children under the age of eighteen who are employed, used, persuaded, induced, enticed, or coerced to engage in, or assist another person to engage in, sexually explicit conduct.” It also meant the rape molestation or use for prostitution of children under the age of eighteen.” RCW 13.60.110(5).

The MECTF was established in and under the direction of the Washington State Patrol (WSP). RCW 13.60.110 (1). The multiagency task force authority was limited to assisting other law enforcement agencies only on request. CP 50; RCW 13.60.110(2). The legislation that created MECTF provides “[t]he chief of the state patrol shall seek public and private grants and gifts to support the work of the task force.” CP 60

Detective Sgt. Carlos Rodriguez became the supervisor of the MECTF in 2012. 6/19/18 RP 25. Under Rodriguez, the task force shifted from its original mission of addressing actual child abduction and exploitation across the state to “proactive” investigation stings. 6/19/18 RP 25. The stings were named “Net Nanny.” Under Rodriguez’s supervision, the stings did not involve actual children. Rather, the MECTF used undercover adults who advertised fictitious children to be sexually exploited on Craigslist. 6/19/18 RP 30. The goal was to engage people who answered the ad and “bring them to a location where we can identify them, and then ultimately, we hope to make an arrest.” 6/19/18 RP 26,31.

The WSP budget did not provide funding for the Net Nanny operations. CP 103 (WSP Subpoena 923). Rodriguez, not the Chief, solicited donations from a religious group, Operation

Underground Railroad (OUR). In August 2015, OUR partnered with MECTF. CP 72 (WSP Subpoena 481). By November of 2015, OUR had donated close to 50 thousand dollars. CP 77 (WSP Subpoena 919). The vast majority of the donations were used for overtime hours during operation and a much smaller amount for housing and undercover phones. CP 92; CP 106 (WSP PRA Request 2 -350).

Captain Wilbur of the WSP wrote on December 2015 that 20 individuals had been arrested because of "Net Nanny," and the criminal sentences began at ten years of imprisonment.

"Mathematically in(sic) only cost \$2500 per arrest during this operation! Considering the high level of potential offense, this is a meager investment that pays huge dividends." CP 81 (WSP Subpoena 929).

In 2016, OUR donated another ten thousand dollars. CP 83 (WSP Subpoena 498). In return, OUR continued to want a joint media appearance announcing the results of the operation. CP 84 (WSP Subpoena 499); CP 86 (WSP Subpoena 501). OUR was not donating more financial resources because it had begun prioritizing California sting operations because "our state and local partners conduct these operations during work hours and afterwards, but do not ask OUR to pay overtime, and (2) we continue to receive

prominent media and public exposure from the Sutter County DA's office, without any of the ICAC issues that have proved to be stumbling blocks elsewhere." CP 119 (WSP Subpoena 492).

Rodriguez responded that MECTF was going to send out press releases about support from OUR. CP 118 (WSP Subpoena 491).

In 2016, Rodriguez sent a synopsis to OUR about a third upcoming Net Nanny sting. CP 106 (WSP PRA Request 2-350). However, when requested as discovery by defense counsel for net nanny cases, the synopsis was completely blacked out. CP 108-111.

4) Net Nanny Operation and Arrest of Mr. Garcia

On Craigslist, adult officers used the ruses of several fake personas: a mother looking to have her children sexually exploited, a runaway girl or a young boy. 6/19/18 RP 40. Rodriguez testified the officers wrote cryptic ads because Craigslist prohibited explicit ads. 6/19/18 RP 43. He said a net nanny goal was to move responders from the anonymized email to text messaging because if Craigslist flagged the ad as illegal, officers could no longer communicate through the email system. 6/19/18 RP 44.

On September 9, 2016, Mr. Garcia was seeking an adult relationship with a woman. CP 40. He answered an ad in the casual

encounter section of Craigslist. The ad was one posted as part of the Net Nanny sting in Thurston County. 6/19/18 RP 33. The ad looked as if a woman seeking a personal encounter with a male had placed it. It read:

“Family Play Time!?!?- W4M. 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.”

CP 40; Exh. 6 p.3. “W4M” meant a woman looking for a man. 6/20/18 RP 199.

Mr. Garcia wrote: "Hi, I'm Gabriel from CL. I'm very interested, can you tell me more about your family? I'm very open mind (sic) and discreet." CP 175. (Exh.i 6 at 7). The response email was from "Hannah". CP 175 (Exh. 6 at 8). "Hannah" was gactually Detective Kristl Pohl of the MECTF. 6/19/18 RP 80,84. She said she had three children, a 2 girls 11 and six years of age and a 13-year-old boy and wanted someone to be sexual with her oldest daughter. She portrayed herself as single and her children had no contact with their father. CP. 175; Exh. 6 at 8. Mr. Garcia asked if she was looking for a man who would move in with her eventually and if they could get a house together, and be a normal family. CP 175;205-206,210; Exh. 6 at 9,20,23. He asked if she

would have sex with him, and wanted a picture of her in the nude. Exh. 6 at 14, 16,23,27. He did not want a nude picture of Hannah's "daughter." CP 193,203.

Mr. Garcia wanted to meet in a public place, take her and her family out to dinner, eventually be invited over to her home for a cup of coffee. CP 206. He wanted to look for a house where they could live together as a family. CP 208, 210.

Mr. Garcia had plans for his weekend, and Hannah wrote : "Oh bummer, I didn't know that. I have another guy I've been talking to that I might let come over this weekend." CP 189.

When Mr. Garcia did not follow through on plans to go to her home over the weekend or on Monday, Hannah wrote: "I guess I need to be real with you to. Someone is coming over tomorrow night for us to meet." CP 211. Mr. Garcia responded: "Well if you have a better candidate than me, I guess I can't said (sic) anything? Should I stop looking for a house for us and start looking for something for myself only?" CP 211. Hannah chastised him for not coming over to her house, accusing him of being "all talk." CP 212. Mr. Garcia agreed that maybe he was not the person she was looking for. CP 212. Hannah continued to dangle the idea that she

was meeting with someone else, and Mr. Garcia responded that she was putting pressure on him. CP 222.

The following day Mr. Garcia repeated his wish to live together as a family and agreed to come over later that afternoon. CP 216. Mr. Garcia explicitly said, "Just so you know and for the record, I'm not expecting to have sex with Anna [fictitious daughter]that's why I'm not going to take any condoms with me that way I think we all are going to be a little more relax. What you think?" CP 220. Hannah reminded him to bring a lubricant, and he said, "If I remember." CP 222.

Mr. Garcia specifically wrote: "This is just for legal purpose; anything in this chat can't be used on court without my express permission. I'm not planning to do anything illegal during this visit. This is only to meet a future roommate and her family. Nothing else is expected." CP 224.

On the afternoon of September 13, 2016, Hannah texted the address of the trap house to Mr. Garcia. CP 225-226. Between 7:19 pm and 8:08 pm, Hannah texted Mr. Garcia five times, with no response. CP 226.

Detective Rodriguez instructed Trooper Jason Roe to watch for Mr. Garcia's vehicle. 6/20/18 RP 180. The record is devoid of

any information about how Rodriguez knew what kind of car Mr. Garcia drove. Roe parked in the trap house apartment complex. When he saw Mr. Garcia's car go by, he pulled behind it, activated his lights, and stopped the vehicle. 6/20/18 RP 182.

Once Rodriguez arrived, they drove to the apartment complex where the base of operations was housed. 6/20/18 RP 183. Mr. Garcia was arrested. 6/20/18 RP 184. The matter proceeded to a jury trial. The trial court denied a defense request for an entrapment jury instruction. 6/20/18 RP 503. Mr. Garcia was convicted on both counts and sentenced 90 months to life in prison. 8/27/18 RP 10; CP 351. He makes this timely appeal. CP 361-364.

III. ARGUMENT

A. The Evidence Is Insufficient To Sustain A Conviction For Attempted Rape of A Child In The First Degree.

Sufficiency of the evidence is a question of constitutional law and is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In determining the sufficiency of the evidence, the Court reviews the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750-51, 399 P.3d 507 (2017).

The rape of a child in the first degree is defined by statute:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim. (2) Rape of a child in the first degree is a class A felony. RCW 9A.44.073.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission. RCW 9A.28.020.

Thus, the essential elements of attempted rape of a child in the first degree are (1) intent to have sexual intercourse, and (2) the taking of a substantial step toward the commission of that crime. *State v. Wilson*, 158 Wn.App. 305, 317, 242 P.3d 19 (2010). A substantial step is conduct that strongly corroborates the actor's criminal purpose. *State v. Townsend*, 147 Wn.2d 666, 679, 57

P.3d 255 (2002). Whether conduct constitutes a substantial step is a question of fact. *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991).

Here, Hannah and Mr. Garcia exchanged sexually explicit texts and emails. However, when it came to "reality," Mr. Garcia consistently said he wanted to meet in a public place, get to know the family, maybe be invited over for a cup of coffee. He specifically wrote he had no intention of engaging in sexual activity on the day he drove toward the trap house¹. He did not bring condoms. He did not bring gifts. Most importantly, he did not stop at the apartment complex: the police officer conducted a stop and pulled him over. Mr. Garcia never went to the apartment complex door.

Based on what Mr. Garcia did *not* do, his sexually explicit text messages are insufficient to show he had designs to commit the charged crime. *State v. Wilson*, 158 Wn.App. at 317.

In *Wilson*, the defendant had email exchanges with an undercover officer working with the ICAC. He negotiated for sex with a fictitious 13-year-old, agreed to pay 300 dollars, and drove to

¹ The undercover officer "Hannah" was the one who suggested that Mr. Garcia spend the night at the house. He was concerned with getting back to his home at JBLM. CP 215.

the meeting place with his money. The Court found the evidence sufficient to show his intent to commit a crime. *Id.* at 318.

Similarly, in *Townsend*, the Court found the evidence sufficient, where a defendant corresponded with an undercover detective and arranged to meet at a hotel room to have sex with a 13-year-old girl. He went to the room, knocked on the door, and asked to see the child. *State v. Townsend*, 147 Wn.2d at 670.

In *State v. Sivins*, the defendant participated in sex talk over the internet with a police officer he thought was 13 years old. *State v. Sivins*, 138 Wn.App. 52, 155 P.3d 982 (2007). He told her he wanted to meet her, bring her pizza and vodka, and have sex if she wanted it. He drove several hours, rented a motel room, and waited for her. The Court held that his behavior was strongly corroborative of his intent and affirmed the conviction. *Id.* at 64.

To constitute a substantial step, the conduct must go beyond mere preparation. *Townsend*, 147 Wn.2d at 679. Unlike *Sivins*, *Townsend*, and *Wilson*, Mr. Garcia did not park his car in the apartment complex, nor did he go to the apartment door.

The State's evidence is insufficient to prove that he took an action that could be considered something beyond mere preparation. On September 14, 2016, a Special Agent of the U.S.

Army completed a five-page report about the incident which included the following:

Operation Net Nanny is a joint law enforcement operation conducted by the Missing and Exploited Children's Task Force (MECTF) of the Washington State Patrol and is being conducted in collaboration with the Thurston County Prosecutor's Office (TCPO). *TCPO and MECTF have indicated that they will not continue to investigative activity or take judicial action upon Mr. Garcia since he did not appear at the undercover residence where he would have been arrested.* TCPO and MECTF have thus released investigative responsibility to Army CID.

CP 41. (emphasis added).

Where the evidence is insufficient, the conviction must be reversed and vacated. *State v. Hickman*, 135 Wn.2d 97, 103, 95 P.2d 900 (1998).

- B. Mr. Garcia Was Denied His Rights Under Criminal Rule 3.2 When The Trial Court Failed To Follow The Rule Guidelines And Failed To Apply The Presumption Of Release Without Conditions.

The right to freedom before conviction permits an unhampered preparation of a defense and prevents punishment prior to conviction. *Stack v. Boyle*, 342 U.S. 1, 3, 72 S.Ct. 1, 96 L.Ed.3 (1951). Washington encoded this principle in CrR 3.2.

CrR 3.2 provides that an individual who is not charged with a capital offense has a presumption of release, without any

conditions pretrial. CrR 3.2(a). There are predicates which must be met before a trial court can overcome the presumption of release: (1) the court determines such recognizance will not reasonably assure the accused's appearance, or (2) there is shown a likely danger that the accused will (a) commit a violent crime, or (b) seek to intimidate witnesses or otherwise unlawfully interfere with the administration of justice.

A trial court's determination of whether a defendant is likely to flee or pose a substantial danger to the community is reviewed for abuse of discretion. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). If the trial court's decision falls outside the range of acceptable choices, its decision is unsupported by the record, or the court applies an incorrect legal standard, it has abused its discretion. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Here, the court's decision is unsupported by the record, and the court did not apply the correct legal standard under CrR 3.2.

The relevant factors in determining whether conditions of release will reasonably assure the accused appearance, the court shall consider the following: (1) his history of response to the legal process, particularly court orders to appear; (2) His employment status and history (3) His family ties and relationships (4) His

reputation, character, and mental condition (5) The length of his residence in the community (6) His criminal record (7) Willingness of responsible members of the community to vouch for his reliability and assist him in complying with conditions of release (8) The nature of the charge, if relevant to the risk of nonappearance (9) Any other factors indicating his ties to the community. CrR 3.2(c)

Here, the affidavit information, accusing Mr. Garcia of attempted rape of a child, was remarkably skewed so as to be misleading. Nowhere in the document did the facts alert the court that the "child victim" was not a real person. The trial court knew only of the sexually explicit text messages and the charges. The State asked for a 250-thousand-dollar bail and told the court it was "extremely concerned" about the nature of the allegations, his employment, access to minors, no ties to the community, and he was a flight risk. (9/14/16 RP 5).

There are two disturbing facts: first, Mr. Garcia had no criminal history or failure to appear. He lived with his daughter at JBLM, worked for the federal government and had been transferred to Washington recently. His daughter and son in law were in court to vouch for him. He offered to surrender his passport.

The second disturbing fact raised by defense counsel was that other defendants who had been accused of the same crimes were all subject to a 50-thousand-dollar bail amount.

The court decided to impose a 100-thousand-dollar bail based on the nature of the allegations and its conclusion he was a flight risk. The court was clearly most concerned about the nature of the allegations, since Mr. Garcia lived with family, was employed by the federal government, had no criminal history, and was willing to surrender his passport.

At the second hearing, Mr. Garcia requested a change in the bail amount. This time the court explicitly stated it was keeping the bail at the same amount because of the allegations. In *Boyle*, the Supreme Court held “to infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.” *Stack v. Boyle*, 342 U.S. at 5. Fixing the bail amount higher than any other similarly situated accused person and relying on the nature of the allegations for that higher amount violates both the constitutional standards for admission to bail and specifically, the rules by which trial courts are to set bail. *Id.* at 6.

Further, if the court were to impose bail to ensure the safety of the public or Mr. Garcia’s appearance, it was also required to

consider less restrictive alternatives and Mr. Garcia's financial resources. CrR 3.2(b)(7), (d)(6). The record is devoid of any information the court did either. The court erred by imposing the 100 thousand dollar bail amount.

This issue is moot because this Court can no longer provide relief for him. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). However, this Court may consider a moot issue that involves matters of continuing and substantial public interest. *State v. Granath*, 190 Wn.2d 548, 550 n.1, 415 P.3d 1179 (2018). The Court determines whether a case presents an issue of continuing and substantial public interest by considering (1) the public or private nature of the issue, (2) whether guidance for public officers on the issue is desirable, (3) the likelihood that the issue will recur. *State v. Cruz*, 189 Wn.2d, 588, 598, 404 P.3d 70 (2017).

The setting of bail is an issue of a public nature. *State v. Huckins*, 5 Wn.App.2d 457, 463, 426 P.3d 797 (2018); *State v. Barton*, 181 Wn.2d 148, 152, 331 P.3d 50 (2014). Washington Courts have recognized the "issue of bail is one which escapes review because the facts of the controversy are short-lived: an arrestee will be detained only pending a preliminary appearance." *Huckins*, 5 Wn.App. 2d at 464.

The trial court failed, on two occasions, to follow the directives of CrR 3.2 before imposing the 100-thousand-dollar bail amount. It failed to consider the less restrictive alternatives mandated in CrR 3.2. He had been found indigent. He remained jailed for 713 days because he was unable to pay to be freed. He respectfully asks this Court to hold the trial court abused its discretion, to hold trial courts to CrR 3.2, and to direct lower courts to uphold the right to the presumption of innocence.

C. The State Interfered With Mr. Garcia's Right To Effective Assistance Of Counsel By Conditioning Its Plea Offer On Defense Counsel Not Conducting An Investigation.

No defendant is constitutionally entitled to a plea bargain. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981); *Lafler v. Cooper*, 566 U.S. 156, 180, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). However, a defendant is entitled to counsel in a plea negotiation and the plea process, under the Sixth Amendment and Article 1, § 22 of the Washington State constitution. *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980).

To that end, where the State offers a plea deal, counsel has a duty to discuss the offer with his client. *State v. James*, 48

Wn.App. 353, 739 P.2d 1161 (1987); Rules of Professional Conduct 1.2. To be effective, counsel must “actually and substantially assist his client in deciding whether to plead guilty.” *Id.* at 362. He must know the strengths and weaknesses of the case and communicate that information so the defendant can make an informed decision about whether to plead guilty. *Id.*

Defense counsel is required, at a minimum, to conduct a reasonable investigation enabling him to make an informed decision about how to best represent his client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). A prejudicial error can flow from ineffective plea advice. *Lafley*, 132 S.Ct. 1387-88.

State v. A.N.J., 168 Wn.2d 91, 102, 225 P.3d 956 (2010), is instructive in assessing the duties of defense counsel in the context of a plea deal. There, defense counsel conducted no independent investigation, did not review the plea agreement carefully, and did not consult with experts. On review, the Court determined the defendant had received ineffective assistance of counsel because “*at the very least*, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case

proceeds to trial so that the defendant can make a meaningful decision...". *Id.* at 109, 111-12.

Here, the State interfered with Mr. Garcia's right to effective assistance of counsel when it conditioned the plea on Mr. Garcia forfeiting his right to any investigation. The "investigation" the State objected to was interviews of law enforcement witnesses. A prosecutor's discretion to engage in plea bargaining is not without limits: the State's discretionary authority may not be exercised in a manner that constitutes a violation of due process rights. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003).

It is arguably unethical and a violation of Mr. Garcia's right to effective assistance of counsel where the State conditions the deal on defense counsel not conducting any investigation into the case. The prosecutor is only required to provide prompt disclosure of evidence, both incriminating and mitigating, so defense counsel may evaluate the case. *State v. Hofstetter*, 75 Wn.App. 390, 878 P.2d 474 (1994). The bare minimum duty of the prosecutor does not address the duty of defense counsel to conduct his own investigation in order to provide a defendant with a better assessment of the weakness or strength of the State's case.

Washington Courts have held that a condition insisted on by the State that requires a defendant to give up a constitutional right, does not by itself, violate due process. See *Moen*, 150 Wn.2d at 231. However, where that constitutional right, in this case, effective assistance of counsel, is absolutely essential to being able to make a knowing, voluntary, and intelligent plea or reject an offer, due process is violated.

Where the prosecutor interferes with violates a defendant's constitutional right to effective assistance of counsel, dismissal is the remedy.

D. The Trial Court Erred In Failing To Dismiss The Case Under The Doctrine of Outrageous Government Conduct When Mr. Garcia Showed The "Net Nanny" Operation Which Led To His Arrest Was Funding By A Private Third Party.

The private funding solicited and used for law enforcement undercover operations and payment for overtime for the operations constitutes outrageous government conduct. Where the State engages in conduct so "outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, dismissal of criminal charges is demanded. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996).

Three main errors committed by the trial court demand review and a reversal of the conviction.

First, the court incorrectly concluded the statute which authorized the Chief of the WSP to solicit donations and grants for the MECTF, also authorized him to delegate that duty to Det. Rodriguez. RCW 13.60.110(4)². The court's justification for this conclusion was its reliance on RCW 70.77.250. That statute directs the Chief of WSP, through the director of fire protection, to administer and delegate certain duties. The chapter has nothing to do with solicitation of funding for MECTF; it does, however, prove that when the Legislature intends to delegate the Chief's authority, it does so expressly.

Second, the trial court erred when it found no "direct link" between MECTF receipt of funds from OUR and the investigation. It concluded, "[t]he overlay of the interactions of the defendants with the undercover officer more appropriately goes to an entrapment issue." CP 247. The court's analysis was flawed, and the evidence contradicts its conclusion.

² The chief of the state patrol shall seek public and private grants and gifts to support the work of the task force.

The emails and press releases from MECTF claimed the task force would not have been able to conduct the Thurston County net nanny sting without funding from OUR. OUR funds were used to pay substantial amounts of overtime. Rodriguez solicited the funds, and his overtime was paid directly from those funds. CP 92. OUR received information about stings before they occurred. CP 92, 106. OUR wanted video footage of the arrests to be used for publicity to solicit more donations from OUR donors. CP 113, 122,135. The link between misconduct of soliciting funds from which the officer was directly paid, and the arrest is straightforward.

E. The Conduct of Law Enforcement Was Outrageous
Governmental Misconduct

Outrageous conduct is founded on the notion that the conduct of law enforcement officers may be “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain the conviction. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). The focus is on the State’s behavior, not the accused predisposition to commit an offense. *Id.* at 22.

Whether the State has engaged in outrageous conduct is a matter of law. *Id.* at 19. A court evaluates such conduct based on

the totality of the circumstances. Under *Lively*, the court may consider the following factors:

(1) Whether the police instigated a crime or merely infiltrated ongoing criminal activity.

(2) Whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation. The emotional reliance of the defendant on the communicator can be an integral part

(3) Whether the government conduct controls the criminal activity or simply allows for it to occur. The more immediate the impact of the government's conduct upon the defendant, the more vigorously the test for constitutional impropriety must be applied.

(4) Whether the police motive was to prevent further crime or protect the public. Did the government conduct demonstrate a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior?

(5) Did the government conduct amount to criminal activity or other "improper conduct repugnant to a sense of justice?"

See *Lively*, 130 Wn.2d at 22.

Here, there are several levels of increasingly outrageous conduct. First, the MECTF was created to rescue missing and

exploited children. The solicited donations to support Net Nanny were used by law enforcement, not to investigate ongoing criminal activity. Instead, officers instigated crimes by placing a deliberately vague luring ad online to encourage text communications with individuals who thought they were involved in an adult casual encounter

Second, Mr. Garcia relied on "Hannah" emotionally. He was lonely. He wanted to live like a normal family. Within the space of 4 days, Mr. Garcia was looking for housing for "Hannah" and her children, even though they had never met or talked on the telephone. It was "Hannah" who put pressure on him to commit to come to the house. He tried to back out several times, saying maybe he was not the person for her, and perhaps she should pursue other opportunities. She encouraged him by saying he was probably the right one for their family, and then chastised him by accusingly saying she had wasted her time on him, and he was "all talk."

MECTF controlled and directed the alleged crime. Officers knew any ad they posted had to be cryptic or Craigslist would take it down. They also knew their goal was to move the respondent from anonymized email to text messaging; otherwise, Craigslist

would mark the activity illegal and cut it off. The MECTF were trained and knew full well how to control and direct the situation. 6/19/18 RP 47.

The online ad read "Family Play Time" W4M, and then listed roles daddy/daughter, etc. The ad could easily have been read to have meant a woman who wanted to role play with a male during a casual sexual encounter. This is precisely what the officers wanted, as it kept them free from Craigslist pulling it down. The detective gave the ages of the children. The ages, like the "children," were completely fictitious but were obviously used to trigger the child rape in the first-degree statute. This meant that if found guilty of attempting to rape a fictitious child, Mr. Garcia's would potentially spend a lifetime in prison.

Here, the trial court erred when it found the police motive was to protect the public. This is surprising for several reasons. First, Mr. Garcia had no criminal history, and the State presented no evidence that Mr. Garcia was involved in child pornography or any crimes against real children.

Second, the obligation of MECTF to OUR is significant in evaluating the police motive. First, the Department of Justice and ICAC were upset with OUR for approaching ICAC affiliated groups.

ICAC was concerned about Rodriguez's requests for donations to OUR and the media appearances. Captain Edwards of the Seattle Police Department cautioned against working with OUR because it was "a serious breach of the directives and signed agreements for being part of the national program." CP 140-154. The obvious concern was that OUR was directing the agenda and paying for law enforcement to carry it out.

Nevertheless, in exchange for money, MECTF obligated itself to find or create a video of sting arrests for OUR to use in its publicity campaign. On a WSP media release, the WSP lauded OUR and directed the public to OUR's website. CP 113-114. Rodriguez himself earned thousands of dollars in overtime over the course of two years. CP 106,157.

It should disturb this Court and must be seriously questioned if the motive is to protect the public when police create and investigate crimes, are paid overtime by solicited donations, and generate publicity by recounting the arrests they have made protecting fictitious children.

Finally, the police most certainly violated the law. Rodriguez solicited donations in violation of the statute authorizing only the WSP Chief to seek grants and gifts. Officers cleverly posted what

they knew were illegal ads on Craigslist, essentially advertising fictional children available for sexual assault.

In viewing the evidence in a totality of the circumstances, MECTF and Rodriguez engaged in outrageous misconduct. Officers profited from overtime Net Nanny pay. Over 100 people were tricked by police tactics and arrested. Those arrests were used to generate publicity. Equally disturbing is the Net Nanny stings would not have been possible through normal state government funding channels, and were it not for OUR receiving publicity the funding would have been discontinued. This amounts to private organizational funding of public law enforcement for specific operations the organization was interested in. This should be prohibited. This Court should find the trial court erred and reverse Mr. Garcia's convictions.

F. The Trial Court Incorrectly Imposed Sentence On Mr. Garcia

RCW 9.94A.595 provides that persons convicted of criminal attempt the standard range sentence is defined by the appropriate offender score, seriousness level of the crime and multiplying the range by 75 percent.

Mr. Garcia had an offender score of “0”. The seriousness level of the crime was “12”. The standard range should have been 93-123 months, with a midrange of 108 months. Because he was convicted of an attempted crime, the standard range should have been 69.75- 92.25 months with a midrange of 81 months.

The court here imposed what it believed was the low end of the range, 90 months, but it was imposed without reference to the 75 percent rule under RCW 9.94A.595. This matter should be remanded for a correction of sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Garcia respectfully asks this Court to reverse his convictions, vacate his sentence and remand to the trial court to dismiss all charges with prejudice. In the alternative, this Court should vacate Mr. Garcia’s sentence and remand for resentencing.

Respectfully submitted this 29th day of August 2019.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style with a distinct loop at the end of the last name.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on August 29, 2019, I mailed to the following US Postal Service first-class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to Thurston County Prosecuting Attorney at paoappeals@co.thurston.wa.us and to Gabriel Garcia/DOC#408992, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

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