

FILED
Court of Appeals
Division II
State of Washington
10/28/2019 11:06 AM

No. 52594-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL A. GARCIA,

Appellant.

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

The Honorable James J. Dixon, The Honorable Mary S. Wilson,
The Honorable Erik Price, The Honorable Chris Lanese
Cause No. 16-1-01605-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence exists to support the jury's finding that Garcia committed attempted rape of a child in the first degree where he communicated with an undercover officer posing as the mother of an 11 year old girl, and posing as the 11 year old girl, described intended sexual intercourse with the 11 year old in explicit detail, followed directions to travel to a Tumwater mini-mart to receive an address and was arrested in the parking lot of the apartment complex where the 11 year old was supposed to be with lubricant and a small sex toy.

2. Whether this Court should consider whether the trial court properly followed CrR 3.2 in setting monetary bail, where the issue is moot, State v. Huckins, 5 Wn. App.2d 457, 463-465, 426 P.3d 797 (2018), provided authoritative guidance for future cases, and the record indicates that the trial court followed CrR 3.2.

3. Whether the State including in a plea offer that the offer must be accepted before witness interviews infringed upon the right to effective assistance of counsel where all of the State's witnesses were law enforcement and the defense was provided copious amounts of discovery.

4. Whether the trial court erred in finding that the Washington State Patrol Missing and Exploited Children's Task Force (MECTF) did not commit outrageous government conduct based on receiving donations from private entities where RCW 13.61.110(4) specifically directs the MECTF to seek funding donations and the trial court properly considered the factors listed in State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996).

5. Whether the trial court properly sentenced Garcia to a minimum term of 90 months where he was convicted of both attempted rape of a child in the first degree and felony communication with a minor for immoral purposes and, therefore, had an offender score of 3 and a 75% standard range of 90 to 120 months.

B. STATEMENT OF THE CASE.

1. Substantive Facts.

The appellant, Gabriel Garcia, responded to an ad on Craigslist "casual encounters" that was titled "family playtime-W4M." 2 RP 33, 93;¹ EX. 6. The add had been placed by law

¹ The State received several volumes of reports of proceedings in this case. The jury trial that occurred June 18-21, 2018, was reported in three volumes and will be referred to as 1 RP, 2 RP and 3 RP. The State notes that the table of contents for volume 2 assumes the pages continued from volume 1, but the page numbers actually began anew. Volume 3 is paginated as though all three

enforcement as part of a Washington State Patrol Missing and Exploited Children's Task Force operation intended to find people who intend to sexually exploit children. 2 RP 26, 42. The ad read

Family Playtime!?!? - W4M. Mommy/daughter, daddy/daughter, daddy/son, mommy/son, you get the drift. You know what I'm talking about. Hit me up. We will chat more about what I have to offer you.

2 RP 198-199, Ex. 6. In the persona of a mother named Hanna, with young children, Detective Kristl Pohl communicated with Garcia electronically. 2 RP 103, EX. 6.

Detective Pohl indicated, "I have a young family and want them to learn about sex the way I did growing up with my dad. I need a man who understands this lifestyle. It is very taboo and must be discrete." 2 RP 103. Detective Pohl also gave a phone number so that the communications could be transferred from Craigslist to text messages. 2 RP 103-104. Garcia responded that he was "very interested." 2 RP 104. As Hannah, Detective Pohl continued chatting with Garcia via text message. EX. 6.

Garcia indicated that he had past experience with a "pack" where people shared everything and wanted to teach to "submit" to the youngest one. Ex. 6, 2 RP 106. Detective Pohl indicated that

volumes were sequentially numbered. For all other cited to transcripts in this brief, the State will refer to each as RP (date of hearing).

she had "two girls, 11 and 6 and a 13 year old boy." 2 RP 107. Garcia asked Hannah to tell him about her sexual education with her father growing up and asked if her daughters were open to the same experience. 2 RP 107-108. Garcia expressed interest in the 11 year old, stating, "Well one is only 6, but the 11 one would be flourishing soon." 2 RP 108.

Garcia indicated he was 45 years old described his experience stating,

we was a group of people who have a leader who shares all his women with the rest and when we have kids in the lifestyle, we normally introduce them to the leader first who was taking her virginity first and after that if they was able to have sex with any guy who asked them.

2 RP 108. Garcia asked if Hannah's daughter was still a virgin. 2 RP 109.

As Hannah, Pohl asked "what would you teach her? She loves trying new things," referring to the persona of the 11 year old girl. 2 RP 110-111. Garcia responded,

Well I can teach her how an old man can touch her; make her suck a cock really good; I'm really good with my hands and tongue; maybe I can lick her pussy, making her feel new sensations, and like the top. I can be the first man inside her.

2 RP 111. Garcia then suggested that he have sex with Hannah in front of the children to make them curious, to which Hannah responded she would not have sex with him unless he was a 13 year old boy. 2 RP 111-112.

Despite having been told he could not have sex with the mother, Garcia continued chatting with Detective Pohl. 2 RP 112. When Hannah asked, "How big are you? She is small and obviously tight, so size is a concern," Garcia responded, "I'm very patient and kind. I know that I can be a good teacher for her. I would like to teach her the right way a guy should treat her, not in a savage way; more in a kind way." 2 RP 113. He then stated, "I'm not too big. I'm five inches only and I will be very careful. I pay attention to the little details. I am a pleaser. Your daughter will enjoy everything with me, but I want you present with us, too." 2 RP 113; Ex. 6.

Garcia followed that with an additional message that said, "BTW, I love eating pussy. I make her cum in my mouth for the first time." 2 RP 113, Ex. 6. As the chats continued, Garcia indicated that he wanted to "create a memorable experience on her like [Hannah's] dad created on [her]." 2 RP 114. Detective Pohl indicated that Hannah was looking for someone long-term and

Garcia responded "I'm totally agreed with you. Maybe in near future if everything goes right, I can move in with you," and added "That way we can keep our secret safe under our house." 2 RP 115.

During the conversation with "Hannah," Garcia stated "I'm not a flake, believe me. Let me send you a dick pic. That way you will see size, that I'm not a cop, and that I'm not a flake. LOL." 2 RP 117. Shortly thereafter, he sent a picture of his genitalia and said, "I hope you like it. I think Anna would love sucking me. LOL." 2 RP 118; Ex. 6. In response to a family photo that Hannah sent, in which 11 year Anna was portrayed by an undercover state trooper, using a cartoon snapchat filter to make her look younger, Garcia stated, "she looks older than 11." 2 RP 118.

After Pohl responded, "she's almost 12," Garcia responded by asking if he and Hannah could be a normal couple too and have sex with each other. 2 RP 119. As Hannah, Pohl responded, "Sorry Gabriel, not with me. We can be besties, LOL, but you're out of my age range, but we can tell people we're besties and roommates," to which Garcia responded, "That's not a problem. At least I hope can have sex with Anna." 2 RP 119.

As the messages continued, Garcia asked, "would you like me take your daughter's virginity?" 2 RP 120. He later added, "I have one extra point. I'm vasectomy safe. That means I can't pregnant her at all unless I reverse everything. LOL." 2 RP 120. Pohl responded, "Perfect. I need you to wear a condom though, until I know you're clean, and lube." 2 RP 120. Garcia responded, "I can get tested. That's not a problem. And I have flavor lube already. LOL." 2 RP 121. Garcia described the lube as green apple flavor. 2 RP 121.

At one point during the conversation, Garcia stated, "I hope she like me. It is going to be an honor for me teach her and be her secret daddy. She is so beautiful. I'm sure I will enjoy her company." 2 RP 121. After indicating that Anna had asked when Garcia was coming over, Pohl asked Garcia, "So what do you think, Want to come over and play? LOL." 2 RP 122. Garcia responded, "Definitely, I'm in." and asked for another picture of Anna and a naked picture of Hannah, so he could be sure she was not law enforcement. 2 RP 122.

Pohl indicated she would not send nudes and said she needed to be "super careful," to which Garcia responded "I understand you, Hannah, but I need to be carefully too BC if

something happens that would rape under law and I can lose everything and go to jail.” 2 RP 123. As the conversation continued, Garcia asked to chat with Anna. 2 RP 123-124.

Detective Pohl took the persona of Anna and continued chatting with Garcia. 2 RP 125. Garcia talked about massages with “Anna” asking her “would you like your massages naked or discrete,” to which Anna responded, “I don’t know what that means.” 2 RP 126. Garcia asked Anna, “Where do you want me to touch you?” 2 RP 127. He later said,

Hon, let me know if you are busy. I don’t want to take your time away. I would like to be your daddy and you my baby girl. I want to teach you about everything if you want.

2 RP 127. He continued and asked her, “Did you like my pics? My dick pic.” 2 RP 127.

As they continued chatting, Garcia said, “Hey, you didn’t say if you liked my cock, just that you liked I’m shaved. LOL,” to which Anna stated “I don’t like hair in my mouth. And yes, it looks yummy. Can we make it taste like green apples?” 2 RP 128. Garcia’s response to the fictitious 11 year old was “LOL. Yes. We can make it taste like green apples. Do you like sucking cock?” 2

RP 128. He later stated, "Do you like when somebody lick your pussy? Did you orgasm from that?" 2 RP 128.

Still posing as Anna, Pohl asked, "When are you going to come play?" and Garcia asked her "When do you want me?" 2 RP 129. Pohl stated, "Now. LOL. I'm all excited," and Garcia asked her "Really? LOL. Do you get wet?" 2 RP 129. He later stated, "I want to see you all wet. LOL." 2 RP 129. After Pohl switched back to the mother persona, Garcia stated, "I really want Anna." 2 RP 129.

After Garcia indicated that he could not come over that weekend, Pohl indicated that Hannah was also chatting with another guy. Garcia stated, "Just give me a few more days. I don't have control about this weekend, but I promise be there after that every time she need me. Just give us a chance. You know we are good fit and I really like her." 2 RP 131. He later said, "your daughter is going to be my thesaurus and my baby girl. I will take good care of her." 2 RP 132.

Later in his text messages, Garcia stated, "I'm really excited thinking about Anna." 2 RP 133. He also stated, "Maybe if everything goes right, I can teach your little one too." 2 RP 133. As the conversation about Anna continued, Garcia told Hannah, "I

want to make her cum on me for first time, her first orgasm.” 2 RP 134. He then indicated that he was “excited and horny for her,” asked for another picture of her, and stated, “I would like to jerk off watching her pic.” 2 RP 134. As Hannah, Pohl stated, “That’s exactly why I’m not sending more pics, in case you are just a flake that wants to jerk off to her pic and never actually shows up.” 2 RP 134-135.

Garcia then suggested, “If I mention that I may jerk off thinking about Anna is BC I tra that she may like knowing somebody is jerking off BC of her. LOL.” 2 RP 135. As the chat continued, Garcia stated, “I will wait to jerk off in front of Anna. LOL.” 2 RP 135.

Garcia chatted with the Anna persona once more. 2 RP 138-140. Later, Garcia continued chatting with “Hannah” and asked for a full body picture of Anna with clothes on and asked Hannah to trust him. 2 RP 142. Garcia later messaged,

But so far you are giving me nothing in return and you are asking me to trust you blinding ant that’s huge BC I can go to jail and lose all. I know you are worried about your family’s safety, but I’m worried about mine, too, BC I can end being somebody bitch in a jail and being a sexual offender and child molester for all my life.

2 RP 142-143. Hannah replied, "WTF, I sent you pics of me and my family. I could lose my kids. I think maybe this is too much for you, Hon, and I should probably keep looking." 2 RP 143. She continued, "I get this isn't for everyone." 2 RP 143.

Detective Pohl testified that she was providing Garcia a way out. 2 RP 143. After "Hannah" stated, "But I'm sorry I wasted my time with you now all effing weekend," Garcia continued chatting with her. 2 RP 144. Detective Pohl sent a picture of a State Trooper posing as "Anna." 2 RP 146.

The conversation continued into a fourth day when Garcia again asked if "Hannah" was law enforcement. 2 RP 247. Garcia eventually stated, "Let's give her a surprise. LOL" and asked Hannah to explain the process for meeting. 2 RP 149. Detective Pohl explained that he would have to go to a mini-mart and take a selfie in front of it, then she would give him the address, which was part of procedures of the WSP operation. 2 RP 149.

Garcia chatted about shaving and stated, "I shaved down there yesterday. LOL." 2 RP 150. As the conversation continued, Garcia stated, "If she want to lose her virginity, I can help her." 2 RP 152-153. He later said, "I'm really horny and excited." 2 RP 153. Hannah responded, "So should I tell her you're coming today

or not, Hon?" to which Garcia stated, "Yes, Baby. I'm coming today." 2 RP 153. When Pohl asked if he was bringing the apple lube, Garcia responded, "Yes, if I don't forget. LOL." 2 RP 154.

Garcia eventually sent a message that said:

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 in this visit. This is only to meet a future roommate and her family. Nothing else is expected.

2 RP 161. Pohl responded, "Holy shit. What is that?" 2 RP 162. Garcia replied, "Don't worry. That is to protect us that this can be used in the wrong hands." 2 RP 162.

Eventually, Garcia went to the 7-Eleven mini-mart as instructed and sent a selfie with a message stating, "I'm here." 2 RP 164. Pohl provided him the address of the operation trap house. 2 RP 166-167. Trooper Jason Roe was working as part of the operation and positioned his vehicle just inside the apartment complex where the address was. 2 RP 181-182. When Roe saw a vehicle go by matching a description of Garcia's vehicle, he conducted a stop of the vehicle inside the complex. 2 RP 182. Roe placed Garcia into custody and searched Garcia and the vehicle. 2 RP 183. Roe located a small bottle of lubricant and a

small plastic or rubber device in Garcia's front left pocket. 2 RP 184, 187.

Detective Sgt. Carlos Rodriguez interviewed Garcia following his arrest. 2 RP 58. Ex. 5, Ex. 2.² While speaking with Rodriguez, Garcia stated, "But I think the mistake for my part was there may be at least one minor was involved." Ex. 2 at 8. Garcia admitted to making statements in the text messages. Ex. 2. He admitted that he has "family type" fantasies. Ex. 2 at 12. When Rodriguez asked about whether Garcia continued to talk about what he wanted to do with the 11 year old, Garcia said, "Yes. That was a mistake." Ex. 2 at 20.

At one point during the interview, Rodriguez asked Garcia why he responded to the ad and he responded, "That's where I am confused too. I have to be honest because like I said, maybe a lot of things combined. Maybe because a fantasy of mine was like a wow, maybe I can do this." Ex. 2 at 28. Garcia said that he wasn't planning on having sex that day, but was there "Just, first to know if that was a real person." Ex. 2 at 29-30.

² Exhibit 5 was the audio/video recording of the interview admitted at trial. 2 RP 59. Exhibit 2 was a transcript of Exhibit 5 admitted for demonstrative purposes. The court reporter did not report the audio of Exhibit 5 when it was played for the jury. 2 RP 60. Citations to exhibit 2 are to the page of the transcript, not counting the evidence tag cover.

When Rodriguez asked what Garcia brought on the day he was arrested, Garcia said, "I bring condoms, I bring the lube and a little toy." Ex. 2 at 47. When asked what those are for, Garcia stated, "Uh, I guess that makes me look like I'm having sex." Ex. 2 at 47. When Rodriguez asked Garcia, "Well what do you think should happen to someone who's in this situation?" Garcia responded, "Go to jail." Ex. 2 at 55.

At trial, Garcia testified that he did not believe any of the offers that Hannah had made. 3 RP 409. He also testified that he did not believe that he was actually talking to a minor and that he did not believe the photographs he received were real. 3 RP 410. Garcia indicated he wanted to meet Hannah in public to see if she was a real person. 3 RP 411. Garcia stated that after Hannah gave him the incorrect address, he decided to stop texting her. 3 RP 412.

When his attorney asked about Trooper Roe finding lube and a vibrator in his car, Garcia explained that they were in the car because he didn't want them in his suitcase where his daughter could find them. 3 RP 413. When asked "So at any point was your intent to have sex with a minor?" Garcia testified, "No. At no

moment that was my intention.” 3 RP 415. He said that he “didn’t think this was a real thing.” 3 RP 416.

During cross examination, Garcia stated that he responded to the ad “to get that person to have the conversation with [him].” 3 RP 419. While the prosecutor went through the text messages with him, Garcia stated, “this is a conversation that I was having with I - - I didn’t think it was a serious conversation. It was a conversation that I was having with a person that was not real.” 3 RP 446.

2. Procedural History.

Following his arrest, Garcia had a preliminary hearing before the Honorable Judge Mary S. Wilson. RP (9/14/2016) 1. During the hearing, Judge Wilson considered the prosecutor’s declaration of probable cause and found probable cause existed to conclude that Garcia had committed attempted rape of a child in the first degree and attempted communication with a minor for immoral purposes. CP 1-2, RP (9/14/2016) 4. The Court then addressed release conditions. The Deputy Prosecutor indicated that the State was concerned about Garcia’s lack of ties to the community, access to minors, and ability to leave the country, as well as the nature of the allegations. RP (9/14/2016) 5. The State recommended bail be set in the amount of \$250,000, that Garcia

provide a verified address to pretrial services prior to release, that he surrender all firearms, and have no contact with minors and no internet access. RP (9/14/2016) 5.

The defense asked the Court to impose \$20,000 cash bail or bond, arguing that Garcia had no criminal history or history of failure to appear, that Garcia would surrender his passport, and that his daughter and son-in-law could provide him an address. RP (9/14/2016) 6-7. After considering those arguments, the Court stated,

So the court will set bail in this amount, and I think it's an appropriate amount in light of the nature of the allegations as well as my conclusion that there is a flight risk here. I understand from the Pretrial Services Information that the defendant has only recently relocated to this area, and so I do recognize that he has a daughter and a son-in-law present, but he doesn't have any local ties that have been here for a long time, and given the nature of the offenses and the seriousness I will – I do find that there is a flight risk and that bail is appropriate so I will establish bail in the amount for cash or bond of a hundred thousand dollars. If bail is made, the defendant will be released to a verified address with the following conditions: No contact with children, no appearance at a location where children are regularly present, surrender his passport. The internet restrictions will be no internet usage.

RP (9/14/2016) 7-8. Defense counsel asked the Court for reconsideration, which was denied. RP (9/14/2016) 8-9. The ruling

on conditions on release was memorialized in a written order. Supp CP __. The Court specifically found that Garcia did not qualify for appointment of counsel at that time but left open the possibility for re-screening. CP 4, RP (9/14/2016) 4.

Garcia was charged with attempted rape of a child in the first degree and attempted communication with a minor for immoral purposes. CP 8. Through counsel, Garcia filed a motion to modify conditions of release asking the court to reduce the amount of bail to \$50,000. CP 9-10. The Honorable Judge Erik Price considered that motion on October 27, 2016. RP (10/27/2016) 1. The State opposed the motion arguing that there had not been a change in circumstances from the original hearing. RP (10/27/2016) 4. Judge Price ruled

So it was not this judicial officer who made the initial decision. I will say that criminal rule does require the Court to consider several things, including residency, criminal history, involvement of family. It does also require the Court to consider the allegations. Although they are just allegations, given the allegations, I'm going to deny the motion.

RP (10/27/2016).

After his original attorney withdrew, Garcia was appointed counsel. CP 20, 22. Garcia's new counsel filed a motion to dismiss, incorporating a motion to dismiss that had been filed in a

different case, State v. Glant. CP 39. A hearing on that motion was held on March 26, 2018, along with similar motions in State v. Glant, State v. Persell, and State v. Jackson. RP (3/26/2016) 1. The motion was considered by the Honorable Judge Chris Lanese. RP (3/26/2016) 1.

The four defendants collectively argued that the Washington State Patrol Missing and Exploited Children's Task Force committed outrageous government conduct by accepting donations from a private organization. RP (3/26/2018) 12. Speaking on Garcia's behalf during the hearing, Garcia's attorney incorporated the arguments of Glant and Persell's attorneys. RP (3/26/2018) 38. He then focused on whether "Hannah" had encouraged Garcia to talk about the children. RP (3/26/2018) 38. Ultimately, Garcia's counsel argued, "we believe but for the State's improper action here, Mr. Garcia would not be here, and so we join the motion to dismiss." RP (3/26/18) 39. Glant's attorney later indicated, "There's similarities, but the factors in Lively necessarily bump against entrapment, but we're not making an entrapment argument." RP (3/26/2018) 57. When asked if he had anything to add, Garcia's counsel stated, "I'll just incorporate counsel's argument." RP (3/26/2018) 60.

Judge Lanese considered the briefing in all of the cases. RP (3/26/2018) 62. Judge Lanese noted that “to the extent that there are unique circumstances for these defendants of varying degrees of strength, that that would more properly go to an entrapment issue, which is not directly before this Court on this motion.” RP (3/26/18) 62.

The trial court then considered the factors of State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996), and found that the record was neutral regarding whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity because the record did not have enough information regarding the landscape of Craigslist at the time. RP (3/26/2018) 63-64. The trial court then considered whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation and found that the factor favored the State. RP (3/26/2018) 64. Judge Lanese stated

However, as the case as a whole must be looked at with the totality of the circumstances, so too must the text message conversations as a whole, and when viewing those text message conversations as a whole, it is clear that there was not overall reluctance to commit a crime that was overcome by a persistent plea of sympathy, promises of excessive profits, or persistent solicitation.

RP (3/26/2018) 64-65. Judge Lanese then noted that the record was neutral as to the third *Lively* factor, whether the government controls the criminal activity or simply allows for the criminal activity to occur. RP (3/26/2018) 65.

While considering the fourth factor, whether the police motive was to prevent crime or protect the public, Judge Lanese found that the “motivation of the State Patrol, and the task force more specifically, in these circumstances is to protect the public.” RP (3/26/2018) 65. Judge Lanese then considered the allegations of unlawful conduct by the State Patrol, noting that two had been raised. RP (3/26/2018) 65. Judge Lanese stated,

The first is whether or not anyone other the Chief, him or herself, may personally solicit the donations needed to fund the task force. Given that the statute itself calls for the solicitation of such donations, the comments that it might be odd that law enforcement is soliciting external private donations might be an odd circumstance. It might or might not be, but the statute as passed by the legislature specifically calls for it. That wasn't what the alleged unlawful conduct was though.

RP (3/26/2018) 65-66. Judge Lanese then discussed the specific allegation that it was unlawful for Sgt. Rodriguez to solicit funds rather than Chief Batiste, stating

I do not find that the statute was violated in this case. I believe that, although there isn't an explicit as to this

provision delegation provision that allows the Chief to delegate those authorities, there also isn't a statement that the Chief must personally do that without an ability to delegate, and I don't believe that our statutory scheme under the Revised Code of Washington envisions secretaries or directors or chiefs of large State agencies to only delegate those authorities when there is an explicit delegation provision.

RP (3/26/2018) 66.

Judge Lanese then looked at the allegations of a felony by Sgt. Rodriguez, stating "I do not believe that the elements of the crime articulated in that statute are met in this case." RP (3/26/2018) 67. Therefore, Judge Lanese concluded that "no one violated the law from the Washington State Patrol side." RP (3/26/2018) 67. He then noted, "However, even if there were technical violations of those statutes, I would still find overall that the police motive was to prevent and to protect the public." RP (3/26/2018) 67. Ultimately, Judge Lanese concluded, "even if it were criminal activity, I do not believe that that is sufficient in this case to justify the dismissal given the standards that apply." RP (3/26/2018) 68. Judge Lanese entered written findings and conclusions denying Garcia's motion. CP 246-249.

The State amended the information to allege one count of attempted rape of a child in the first degree and one count of

communication with a minor for immoral purposes by electronic means. CP 24. Trial occurred June 18-21, 2018, with the Honorable Judge James J. Dixon presiding. See *generally*, 1 RP; 2 RP; 3 RP. At the conclusion of the evidence, the defense requested a jury instruction on entrapment. 3 RP 494. The trial court denied the request indicating “The defense is normally available or is available - - gross oversimplification - - when there are admissions to the facts that constitute a crime. In the instant case, Mr. Garcia via his testimony has denied the salient allegations that give rise to the charge, that charge being attempted rape of a child.” 3 RP 500.

The trial court further indicated, “the defense is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime. That’s what happened in the instant case.” 3 RP 501. The trial court later stated

But suffice it to say that law enforcement officers through the use of trickery or deception or a ruse communicated with Mr. Garcia and provided him with the opportunity. It was not coercive, it was not - - it did not do anything other than provide the opportunity to Mr. Garcia, and in fact, the evidence is clear that Mr. Garcia was given ample opportunity to cease the communications with law enforcement. He chose not to. The evidence in this case is that it was Mr. Garcia

who both initiated and furthered the communications with respect to specific sexual activity between himself and the minor child.

3 RP 502. The trial court ultimately found, “the defendant has not established by a preponderance of the evidence that any rational trier of fact, meaning a jury, could find that the defense of entrapment applies. Accordingly, the Court will not issue an instruction on entrapment.” 3 RP 503.3

The jury found Garcia guilty of both charged offenses. 3 RP 563-564, CP 304-305. Garcia was sentenced to a total term of 90 months to life. CP 332; RP (8/27/18) 10-11. This appeal follows. Additional facts are included as necessary in the argument sections below.

C. ARGUMENT.

1. The jury’s finding that Garcia took a substantial step toward the commission of rape of a child in the first degree was based on sufficient evidence.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier

³ Garcia assigned error only to Judge Lanese’s indication that the issue raised was more of an entrapment argument than an outrageous conduct argument, but did not assign error to Judge Dixon’s ruling regarding an entrapment instruction. Denial of the instruction was appropriate for the reasons stated by Judge Dixon, unlike State v. Chapman, 2019 Wash.App.LEXIS 184, No. 50089-2-II, unpublished, GR 14.1, the undercover detective did not entice Garcia to come by saying the mother would also have sex with him.

of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

In order to establish that Garcia committed attempted rape of a child in the first degree, the State had to prove beyond a reasonable doubt that Garcia intended to have sexual intercourse and took a substantial step toward having sexual intercourse with a child under the age of 12. RCW 9A.44.073(1); RCW 9A.28.020(1); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A substantial step is an act that is strongly corroborative of the actor's criminal purpose. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2002). 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).

Garcia cites to several cases for his proposition that the State failed to demonstrate a substantial step. Contrary to his position, the cases he cites demonstrate that there was sufficient evidence to show that Garcia took a substantial step. In State v. Wilson, 158 Wn. App. 305, 312, 317, 242 P.3d 19 (2010), Division I of this Court found that the defendant chatting with an undercover Internet Crimes Against Children detective posing as a woman who was offering her daughter for sex in exchange for money, negotiating sex with a 13 year old, and then being arrested in his car while waiting in a drive-in parking lot with \$330 in cash was sufficient to support a conviction for attempted rape of a child in the second degree.

In State v. Townsend, 147 Wn.2d 666, 671, 679, 57 P.3d 255 (2002), our State Supreme Court upheld a conviction for attempted rape of a child where the defendant communicated with an undercover detective posing as a minor, agreed to meet in a motel for sex, and was arrested when he went to the motel. The Court noted, "The attempt statute focuses on the actor's criminal intent, rather than the impossibility of convicting the defendant of the completed crime." Id. at 679.

In State v. Silvins, 138 Wn. App. 52, 64, 155 P.3d 982 (2007), Division III of this Court found sufficient evidence existed for attempted rape of a child where a defendant engaged in sexual graphic internet communications with a law enforcement officer who he believed was a 13 year old girl, told her he would have sex with her, enticed her with promises of pizza and vodka, drove several hours to the town she was in and rented a motel room to wait for her.

In this case, Garcia engaged in sexually graphic internet conversations with Hannah for approximately four days, graphically described what he intended to do with the person he believed to be 11 year old Anna, drove to Tumwater to the 7-Eleven as directed by the undercover officer, then traveled to the apartment complex where Anna was supposed to be and was arrested in the parking lot with lubricant and a small vibrator. Viewing the evidence in a light most favorable to the State, a rational juror could find that Garcia not only intended to have sexual intercourse with an 11 year old girl, but he took a substantial step towards doing so. This was not mere preparation. The evidence was sufficient to support the jury's finding. This Court recently found that similar facts, including an arrest in a parking lot, supported probable cause for an arrest for

attempted rape of a child in the first degree. State v. Chapman, 2019 Wash.App. LEXIS 184, No. 50089-2-II, at 21.⁴ In another unpublished decision, this Court found that a defendant who was arrested outside the agreed upon gas station with condoms, lube, and candy on his person was sufficient to support a conviction for attempted rape of a child. State v. Jacobson, 2018 Wash.App. LEXIS 1161, No. 49887-1-II at 58-59.⁵

Garcia's argument that an Army CID document indicated that the State was not going to charge the case because Garcia did not go in the residence is not relevant to this Court's determination of whether or not sufficient evidence was presented at trial. CP 41, Brief of Appellant at 19. The language referenced was placed in the argument section of Garcia's pretrial motion to dismiss. CP 41. It doesn't appear as though any such document was even attached to the motion to dismiss, let alone presented during trial. CP 39-244. The paragraph included in Garcia's motion to dismiss does not negate the fact that sufficient evidence was presented at trial to support Garcia's conviction.

⁴ This is an unpublished decision with no precedential value. GR 14.1. It may be given whatever persuasive value the Court deems appropriate.

⁵ This is an unpublished decision with no precedential value. GR 14.1. It may be given whatever persuasive value the Court deems appropriate.

2. Garcia correctly notes that the issue regarding conditions of release has been rendered moot by his conviction; however, the trial court correctly considered CrR 3.2 in determining appropriate release conditions.

Garcia argues that the trial court abused its discretion by imposing bail during his initial hearing and by declining to modify that decision. This Court should decline to consider the issue because the issue is moot.

An issue on appeal is moot if the reviewing court can no longer provide effective relief. State v. Cruz, 189 Wn.2d 588, 597, 404 P.3d 70 (2017). The appellate courts generally do not consider questions that are purely academic. State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). Following Garcia's conviction, he is no longer subject to pretrial release conditions, therefore, this Court cannot offer an effective remedy even if the Court were to find that the trial court erred.

While the issue of setting bail may be an issue of continuing and substantial public interest, this Court has recently provided guidance for application of CrR 3.2. State v. Huckins, 5 Wn. App.2d 457, 463-465, 426 P.3d 797 (2018). In Huckins, this Court held that the trial court failed to consider whether a less restrictive

condition or combination of conditions would reasonably assure the safety of the community. Id. at 469.

In this case, the trial court properly found that there was a flight risk based on the circumstances and Garcia's lack of recent ties to the community. RP (9/14/2016) 7-8. "The determination of whether the defendant is likely to flee the state or pose a substantial danger to the community is a factual determination involving the exercise of sound discretion of the trial judge." State v. Smith, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). "A trial court abuses its discretion if its decision is manifestly unreasonable, meaning it falls outside the range of acceptable choices, its decision is based on untenable grounds, meaning its findings are unsupported by the record, or its decision is based on untenable reasons, meaning it applied an incorrect legal standard." Huckins, 5 Wn. App. at 466, *citing*, State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1193 (2013).

The trial court here considered the declaration of probable cause offered by the State and information from pretrial services in making its decision. RP (9/14/2016) 7-8. The declaration of probable cause was not misleading. While it did not state that the arrest was part of a net nanny operation, the facts included in the

declaration were supported by the record. CP 1-2. Garcia clearly communicated his interest in having sexual intercourse with a minor child, and he was arrested in the parking lot of the apartment complex where he was told the child was located. 2 RP 182.

In considering whether a defendant poses a flight risk, the trial court must consider the factors listed in CrR 3.2(c). It is clear that the trial court did so by stating

I understand from the Pretrial Services Information that the defendant has only recently relocated to this area, and so I do recognize that he has a daughter and a son-in-law present, but he doesn't have any local ties that have been here for a long time, and given the nature of the offenses and the seriousness I will – I do find that there is a flight risk and that bail is appropriate.

RP (9/14/2016) 7-8. The pretrial services report indicated that Garcia had only recently moved to Washington State from Texas. Supp. CP ___.

If the trial court committed any error in this case, it was not specifically noting that no less restrictive alternatives existed to bail. CrR 3.2(b) provides a list of possible alternative combinations. The record implicitly demonstrates that the trial court considered these because it imposed a number of the conditions including bond, travel restrictions, and a verified address. RP (9/14/2016) 7-8.

Electronic home monitoring is not available for sex offenses if the defendant's release was not secured by bail. RCW 10.21.090. Further the record supports that the trial court considered the defendant's financial resources because the trial court considered whether Garcia qualified for appointed counsel. CP 4, 7, RP (9/14/2016) 4. The record sufficiently demonstrates that the trial court properly applied CrR 3.2.

Judge Price did not abuse his discretion by denying the motion for reconsideration. A judicial officer *may* amend the order on release conditions at any time. RCW 10.21.030. There is no requirement that the judicial officer do so, and certainly no requirement that a second judicial officer second guess the first in the absence of a change of circumstances.

As stated above, if there was any error, it was by not specifically stating that no less restrictive alternative existed. Huckins, 5 Wn. App.2d at 469. However, given that Huckins provides an authoritative determination for future guidance on the issue, Garcia cannot demonstrate that the issue is of substantial public interest such that this Court should consider it. State v. Cruz, 189 Wn.2d at 598.

3. The State did not condition its plea offer on defense counsel not conducting any investigation into the case nor did the State intrude upon Garcia's right to effective assistance of counsel by requiring that a plea offer be accepted prior to witness interviews of law enforcement witnesses.

Garcia argues that the State interfered with his right to effective counsel by conditioning a plea offer on defense counsel not investigating the case. Brief of Appellant, at 6, 24. The only citation to the record for this assertion is to a motion for continuance hearing that occurred on April 19, 2017. Brief of Appellant, at 6. During that hearing, Garcia's counsel requested a continuance of the trial date and stated

The reason for that is that I'm the third attorney on this case and there's been no investigation done as of yet. That was pursuant to the offer which essentially said that once the defense began an investigation that the offer would be revoked. Yesterday, Mr. Garcia rejected that offer, so that means we are going to be going forward with trial. I'm going to need to do an investigation in this case; otherwise, I would be ineffective.

RP (4/19/2017) 4-5. The prosecutor responded

I would disagree with Mr. Cabrera's classification of not permitting any type of investigation pursuant to the offer. We did indicate that if any interviews were required it would negate the State's original offer. However, again, this is a matter that's been going on a long time. This is not a victim based per se case. This is what we have been commonly referring to as the Net Nanny cases. It's all law enforcement based.

There are copious amounts of discovery that's been provided to Mr. Cabrera...

RP (4/19/2017) 5. Cabrera then clarified that he received the file on March 7th, and then had to wait for discovery from the previous attorney. RP (4/19/2017) 6.

The record supports that Garcia's counsel had advised him about the plea offer and in fact the case was set for a change of plea. RP (1/18/2017) 4. Nothing in the State's offer infringed upon the effective representation of counsel. "[T]he hallmark of a Sixth Amendment ineffective assistance of counsel claim is based on the substandard performance of the criminal defendant's attorney, not on the actions of third parties." Accordingly, a prosecutor's failure to provide discovery does not render counsel constitutionally ineffective. State v. Greiff, 141 Wn.2d 910, 925, 10 P.3d 390 (2000.

Both federal and state courts have upheld similar policies by prosecutors. The United States Supreme Court has held that prosecutors can properly require, as a condition of a plea agreement, that defendants waive their right to receive impeachment materials or information concerning affirmative {defenses. Such a policy does not render a plea involuntary:

Of course, the more information the defendant has, the more aware he is of the likely consequences of a

plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances - even though the defendant may not know the *specific detailed* consequences of invoking it.

United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (court's emphasis, citations omitted).

Similarly, the Washington Supreme Court has upheld a prosecutor's policy of refusing to plea bargain with defendants who demanded disclosure of the identity of a confidential informant. The court recognized the State's "legitimate interest in protecting confidential informants." The prosecutor's plea-bargaining policy was a proper effort to protect that interest. State v. Moen, 150 Wn.2d 221, 230-31, 76 P.3d 721 (2003). Relying on Moen, this court held that such a policy did not preclude defense counsel from providing effective assistance. State v. Shelmidine, 166 Wn. App. 107, 115-16, 269 P.3d 362, review denied, 174 Wn.2d 1006 (2012).

Here, the State provided copious amounts of discovery and only conditioned the plea offer on the requirement that the State not be required to schedule and conduct interviews of the law

enforcement officers who wrote the reports. Washington Courts have found that the counsel may provide effective representation in the face of similar restrictions in a plea offer. See, State v. Cox, 2015 Wash.App.LEXIS 490, No. 70927-5-1 (considering a Snohomish County police regarding interviewing witnesses in sexual assault cases);⁶ State v. Leonard, 2016 Wash.App.LEXIS 1659, No. 33698-1-III at 16 (finding that a restriction on when an offer must be accepted did not infringe on the right to effective assistance of counsel).⁷ Nothing about the State's offer infringed upon Garcia's right to effective assistance of counsel.

Garcia further alleges that the State did not timely provide all discovery, thus delaying the proceedings. Brief of Appellant, at 6. In support, Garcia cites to a November 11, 2017, motion to continue the trial date. During that hearing, Garcia's defense counsel indicated that he had made a discovery request on August 17th that had not yet been fulfilled. RP (10/11/2017) 5. Cabrera noted that there had been agreement in the pretrial omnibus order that discovery be completed by November 9, and noted that would

⁶ This is an unpublished decision with no precedential value. The Court may grant it whatever weight it deems appropriate. GR 14.1.

⁷ This is an unpublished decision with no precedential value. The Court may grant it whatever weight it deems appropriate. GR 14.1.

be “a month from now.” RP (10/11/2017) 5. The covering prosecutor indicated that she would address the issue with the assigned prosecutor, however, “my notes indicate that the discovery has been provided.” RP (10/11/2017) 6.

The record is unclear as to what discovery Mr. Cabrera was inquiring regarding. However, Cabrera’s supplemental motion for discovery dated August 17, 2017, requested training materials from ICAC and MECTF, not materials directly related to the charges against Garcia. CP 29. The parties entered an agreed protective order regarding the materials shortly after the October 11, 2017 hearing. CP 31-33. The citation to that hearing does nothing to support Garcia’s claim that the State’s plea offer interfered with his right to effective assistance of counsel.

4. The trial court correctly found that the Washington State Patrol Missing and Exploited Children’s Task Force did not engage in outrageous government misconduct by soliciting private funding.

“Outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” State v. Lively 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). For police

conduct to violate due process, “the conduct must be so shocking that it violates fundamental fairness.” Id. Examples of outrageous conduct include “those cases where the government conduct is so integrally involved in the offense that the government agents direct the crime from the beginning to end, or where the crime is fabricated by the police to obtain a defendant’s conviction, rather than to protect the public from criminal behavior.” Id. at 21.

“Public policy allows for some deceitful conduct and a violation of criminal laws by the police in order to detect and eliminate criminal activity.” Id. at 20. “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances.” Id. In reviewing a claim of outrageous government conduct, the court evaluates the totality of the circumstances. Id. at 21. Factors that a court must consider when determining whether police conduct offends due process are

. . . whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or simply allows for the criminal activity to occur, whether the police motive was to prevent crime or protect the public, and whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.

Id. at 22. A trial court's order on a motion to dismiss on the basis of outrageous governmental misconduct is reviewed "under an abuse of discretion standard." State v. Athan, 160 Wn.2d 354, 375, 158 P.3d 27. "Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons." Id. at 375-76 "A trial court abuses its discretion when its decision adopts a view that no reasonable person would take." State v. Solomon, 3 Wn. App.2d 895, 910, 419 P.3d 436, 444 (2018) (citing State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)).

Here, the trial court meticulously considered the Lively factors in concluding that Garcia had failed to demonstrate outrageous government conduct. RP (03/26/18) 61-68. It is clear from the record that the trial court's conclusion that "the overall police motive was to prevent crime and to protect the public," was correct. RP (03/26/18) 67; CP 248. The MECTF is "aimed at finding and recovering sexually exploited children and apprehending child predators. www.wsp.wa.gov/crime/mectf/.

Additionally, it is clear that Washington State law authorizes the State Patrol to solicit funds to support the MECTF. RCW

13.61.110. That statute is the governing statute for the MECTF. Section (4) provides that the chief of the state patrol *shall* seek public and private grants and gifts to support the work of the task force. (Emphasis added). Contrary to Garcia's argument, there is no provision in the law that prohibits the chief of the state patrol from delegating this authority. In fact, Chapter 7 of the MECTF "IAD standard procedures manual" specifically delegates such a duty to detective supervisors stating that the duties of a Task Force Detective Supervisor includes, "initiating budget and grant requests," and the task force commander shall "secure additional funds" as required. State v. Bryan Glant, Thurston County cause no. 16-1-01567-34, State's Response to Motion to Dismiss, Exhibit B at 3, Supp CP ___.

As argued by the State during the hearing on this issue, to require the chief of the state patrol to handle every task specifically assigned to him by statute without delegation would be absurd. The example that State provided is RCW 43.43.035, which following Garcia's logic would require the chief of the state patrol to personally provide security for the governor. RP (03/26/18) 53. Neither Detective Sgt. Rodriguez nor the MECTF violated the law by soliciting private donations for funding. Even if there were minor

defects in compliance with funding statutes, the trial court correctly noted that no Washington case has applied the doctrine of outrageous conduct to a funding issue. RP (03/26/18)

Garcia's contention that Detective Sgt. Rodriguez somehow violated RCW 9A.68.020 is without merit. The trial court's conclusion as such was absolutely correct. CP 248. Under that statute, "a public servant is guilty of requesting unlawful compensation if he or she requests a pecuniary benefit for the performance of an official act knowing that he or she is required to perform that action without compensation." RCW 9A.68.020(1). The MECTF did not request funds under the table to arrest Garcia. To the contrary, the record demonstrates that the MECTF accepts donations to fund its programs, as is specifically contemplated by RCW 13.60.110(4). Its officers conduct the operations of those programs and are paid their hourly salary for doing so. Nothing in the record indicates a violation of the law.

Finally, the record made it clear that the government merely infiltrated the already existing world of child sexual exploitation by putting an ad on Craigslist. It was Garcia who responded, and Garcia who informed the undercover officer what he wished to do with the fictitious 11 year old Anna. CP 178. Nothing in the funding

mechanisms for the MECTF caused Garcia to indicate that he wanted to make a child “suck cock real good” or “be her first man inside her.” CP 178. The trial court properly applied the Lively factors and did not abuse its discretion by denying Garcia’s motion to dismiss.

Garcia argues that he wanted to live like a normal family and relied on “Hannah” emotionally, as support for his contention that the stated engaged in outrageous conduct. However, the record of the messages demonstrates that Garcia had several opportunities to back out before taking further steps to engage in sex with children. Right at the beginning of the text messages, Garcia stated that he had “some past experience but not with family,” stating, “we was more like a pack where we all shared everything and we teach to submit to the youngest one.” CP 175. He suggested that the “11 one would be flourishing soon.” CP 176.

Garcia then talked about his history in Kansas where a group took kids into the lifestyle and “the leader” would take “her virginity first and after that they was (sic) able to have sex with any guy who ask (sic) them.” CP 176. Garcia asked about the daughter, stating, “Does she still virgin? (sic)” CP 177. When “Hannah” asked “what would you teach her?” Garcia stated

Well I can teach her how a old grow man can touch her, make her suck cock real good, I'm really good with my hands and tongue, maybe I can lick her pussy making her feel new sensations and like the top, I can be her first man inside her.

CP 178. When "Hannah" clarified that she was not going to have sex with him, he responded, "Ok I understand lol." CP 178. Garcia continued stating what he would do with the 11 year old, including the size of his penis and stating, "BTW I love eating pussy...I may make her cum in my mouth for first time." CP 179.

Garcia discussed getting a house, so it could be more private. CP 181. When "Hannah" again said that she would not have sex with Garcia, he responded, "That's not a problem at least I hope can have sex with Anna." CP 182. Garcia informed Hannah, "I'm vasectomy safe that mean I can't pregnant her at all." CP 183. Garcia brought up the use of green apple lubricant. CP 183.

During text messages, supposedly with 11 year old Anna, Garcia asked if she liked a "dick pic" he had sent. CP 187. He also asked her if she liked "sucking cock." CP 187. In further discussions with "Hannah" Garcia stated, "I want to make her cum on me for first time. Her first orgasm." CP 192. He also stated,

"I'm all excited and horny for her," and indicated, "I would like to jerk off watching her pic." CP 192-193.

When Garcia asked for more pictures, Hannah responded, "I get it this isn't for everyone," and stated "but im (sic) sorry I wasted my time with you...all fing weekend." CP 204. At that point, Garcia could have stopped communicating with Hannah. He chose to continue talking. CP 205. As they continued communicating, Hannah stated, "you are the one who is all talk so far." CP 212. Again, Garcia could have ceased contact with Hannah, but he continued communicating with her. CP 212. Nothing that law enforcement did caused Garcia to seek out sex with an 11 year old girl. The trial court did not abuse its discretion in finding that the state had not engaged in outrageous conduct.

5. The State agrees that the standard range should be reduced to 75 % because Garcia was convicted of attempted rape of a child in the first degree; however, Garcia was correctly sentenced because the Count 2, communication with a minor for immoral purposes counted as 3 points.

Garcia was charged with two counts. Count 1 was attempted rape of a child in the first degree and Count 2 was communication with a minor for immoral purposes with the specific allegation that the communication was committed by electronic

means. CP 24. The elements that the jury was instructed to consider included the electronic nature of the communication. CP 300. A person who communicates with a minor for immoral purposes is guilty of a class c felony "if the person communicates with a minor or someone the person believes to be a minor for immoral purposes,..., through the sending of an electronic communication." RCW 9.68A.090(2).

As such, Garcia was convicted of not one, but two felony sex offenses. Each offense scored as three points toward the other. RCW 9.94A.525(17). As Garcia correctly notes, rape of a child in the first degree has a seriousness level of 12. RCW 9.94A.515. With an offender score of 3, counting the communicating with a minor for immoral purposes, the standard range for the completed offense was 120-160 months. RCW 9.94A.510. The standard range is reduced by multiplying the standard range by 75 percent due to the fact that Garcia was charged with and convicted of an attempted rape of a child. RCW 9.94A.595. Therefore, the standard range for count 1, is properly calculated as 90-120 months in Garcia's case.

During the sentencing hearing the prosecutor pointed out that the pre-sentence investigation report incorrectly noted the

communicating charge as a gross misdemeanor. RP (08/27/2018) at 4-5. The Defense Sentencing Memorandum also noted the correct range of 90-120 months. CP 316. The only error was a scrivener's error in the judgment and sentence listing the offender score as 0. CP 329. Garcia had no prior offenses, but his current offenses counted against each other. His offender score was 3, he was sentenced to the correct range. The State does not oppose entry of an order correcting the scrivener's error, but Garcia is not entitled to resentencing.

D. CONCLUSION.

Sufficient evidence supported the jury's finding that Garcia took a substantial step toward committing the crime of rape of a child in the first degree. The Washington State Patrol's Missing and Exploited Children's Task Force did not engage in outrageous conduct by soliciting funding or in any manner related to Garcia's case. The issue of whether the trial court followed CrR 3.2 when it set monetary bail is moot and this Court has recently provided guidance in the application of CrR 3.2 making it impossible for Garcia to demonstrate a continuing public interest, therefore this Court should decline to address the issue. The State did not infringe upon Garcia's right to counsel. The record demonstrates

that Garcia was adequately and competently represented. Finally, while the Judgment and Sentence contained scrivener's errors regarding the offender score, Garcia was properly sentenced to the correct range. The State respectfully requests that this Court affirm Garcia's convictions and sentence in all aspects. The State does not oppose remand for the sole purpose of correcting scrivener's errors in the Judgment and Sentence.

Respectfully submitted this 28th day of October, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 28, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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Appellate Court Case Number: 52594-1
Appellate Court Case Title: State of Washington, Respondent v. Gabriel Augusto Garcia, Appellant
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Note: The Filing Id is 20191028110605D2190521