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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS POUNCY,

Appellant.

On Appeal from the Thurston County Superior Court
Cause No. 19-1-00338-34 (19-1-00338-7)
The Honorable James Dixon, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Curtis Pouncy committed attempted rape of a child.
2. The State failed to prove beyond a reasonable doubt that Curtis Pouncy communicated with a minor for immoral purposes.
3. The trial court erred and deprived Curtis Pouncy of his Sixth and Fourteenth Amendment right to present a defense by denying his request to instruct the jury on the defense of entrapment.
4. The trial court erred in concluding that the officers did not engage in outrageous government conduct by soliciting private donations to fund an online sting operation.
5. The trial court erred in concluding that the officers did not engage in outrageous government conduct while conducting the online sting operation.
6. The trial court erred in entering Finding of Fact No. 9, which stated that Curtis Pouncy “impliedly consented to the recording” of his text messages “given his reasonable knowledge that communications may be retained by the recipient and shown to other people.” (CP 105)

7. The trial court erred in entering Finding of Fact No. 10, which stated that Curtis Pouncy “voluntarily disclosed information to the intended recipient and assumed the risk of being deceived about the recipient’s identity.” (CP 105)
8. The trial court erred in entering Finding of Fact No. 11, which stated that “[t]here was no interception of [Curtis Pouncy’s] communications with undercover officers in this case because [Pouncy] communicated directly with law enforcement.” (CP 105)
9. The trial court erred in concluding that Curtis Pouncy did not have a reasonable expectation of privacy in his electronic communications and that the interception and recording of the messages did not violate his constitutional right to privacy.
10. The trial court erred in concluding that the officers did not intercept Curtis Pouncy’s electronic communications, that Pouncy impliedly consented to the recording of his electronic communications, and that there was no violation of the Washington Privacy Act.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to prove beyond a reasonable doubt that

Curtis Pouncy intended to have sexual intercourse with “Alexis” and that he took a substantial step toward engaging in sexual intercourse with “Alexis,” where: Pouncy responded to “Alexis” dating profile wherein she claimed to be (and in fact was) an adult female; photographs of “Alexis” sent to Pouncy were actually photographs of an adult female; and Pouncy did not bring any condoms or alcohol with him to meet “Alexis” even though she told him he needed to bring these items? (Assignment of Error 1)

2. Did the State fail to prove beyond a reasonable doubt that Curtis Pouncy communicated for immoral purposes with someone he believed to be a minor, where: Pouncy responded to “Alexis” dating profile wherein she claimed to be (and in fact was) an adult female; photographs of “Alexis” sent to Pouncy were actually photographs of an adult female; Pouncy’s telephone conversations were with an adult female; and Pouncy believed, based on the photographs and voice on the telephone, that “Alexis” was an adult who was engaged in role-play and pretending to be a 13 year old girl? (Assignment of Error 2)
3. Did the trial court deny Curtis Pouncy a fair trial by failing to

instruct the jury on the defense of entrapment, where: law enforcement initiated the crime by posting a fictitious ad purporting to be an adult female looking to meet a man; Pouncy was seeking to connect with an adult woman, not a child; and Pouncy was badgered by the undercover adult law enforcement officer to agree to engage in sex acts with her?
(Assignment of Error 3)

4. Did law enforcement officers engage in outrageous government misconduct by unlawfully soliciting and accepting compensation from a private organization (OUR) to perform undercover sting operations in Thurston County?
(Assignment of Error 4)
5. Did law enforcement officers engage in outrageous government misconduct by using fictitious “victims” to lure random, formerly unknown persons into committing a criminal act, without any particularized suspicion?
(Assignment of Error 5)
6. Does the Washington State Constitution and Washington’s Privacy Act protect Curtis Pouncy’s right to privacy in text messages he sent in response to an advertisement placed by a police officer masquerading as an adult woman, when

Pouncy was not a suspect in ongoing criminal activity?

(Assignments of Error 6, 7, 8, 9, 10)

7. Does a person “impliedly consent” to having a third party intercept, share, or retain text messages sent to a specific individual during the course of a personal conversation?

(Assignments of Error 6, 7, 8, 9, 10)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Curtis Pouncy with one count of attempted second degree rape of a child and one count of communicating with a minor for immoral purposes. (CP 113) The charges arose from an undercover sting operation conducted by the Washington State Patrol Missing and Exploited Children Task Force (MECTF). (01/17/20 RP 52, 55)¹

Pouncy moved to dismiss the charges or, in the alternative, to suppress his text messages with the undercover officers, because the government engaged in outrageous conduct and violated his right to privacy. (CP 6-20; 01/21/20 RP 7-19) The trial court denied the motion. (CP 104-07; 01/21/20 RP 50-66) The trial

¹ The transcripts will be referred to by the date of the proceeding contained therein.

court also denied Pouncy's request to present an entrapment defense. (01/30/20 RP 399; 02/03/20 RP 460-61; CP 151)

A jury found Pouncy guilty as charged. (CP 147-49; 02/03/20 RP 549, 560) The court found that Pouncy was a persistent offender and imposed a sentence of life without the possibility of release. (CP 204-05; 02/12/20 RP 6-7) This timely appeal follows. (CP 189)

B. SUBSTANTIVE FACTS

The Washington State Patrol Missing and Exploited Children Task Force investigates crimes that have to do with the sexual exploitation of a child or human trafficking. (01/29/20 RP 204, 206) Task force supervisor, Sergeant Carlos Rodriguez, created an undercover program called Operation Net Nanny. (01/17/20 RP 52, 55-58) The goal of Net Nanny is to identify people who are "looking to have sex with children." (01/17/20 RP 58; 01/29/20 RP 208) To accomplish this goal, the law enforcement officers pose as underage children interested in having sex with adults, or pose as adults who are offering to allow other adults to use their children as sexual objects. (01/17/20 RP 58) The officers go on to social media websites and applications and create an undercover persona, then wait for individuals to respond. (01/29/20 RP 209-

10)

In September 2016, MECTF conducted a Net Nanny operation in Thurston County. Detective Jake Klein created and posted a profile on an online dating app called Skout. (01/29/20 RP 223) Detective Klein was unable to provide a copy or screenshot of the profile because it was removed by app monitors for engaging in improper behavior soon after it was created. (01/29/20 RP 227, 228, 290) But he recalled that he named the fictitious user “Alexis,” and said something like “young bored HMU.”² Detective Klein did not list an age for “Alexis,” but Skout requires all users to acknowledge that they are at least 18 years old. (02/29/20 RP 233, 291) So anyone viewing “Alexis” profile would have assumed she was at least 18 years old. (01/29/20 RP 233)

Pouncy responded to “Alexis” post. (01/29/20 RP 236) Then Pouncy and Detective Klein, posing as “Alexis,” began a text conversation. (01/29/20 RP 236-37; Exh. 3) At one point, “Alexis” asks Pouncy if he is “cool” with the fact that she “is young.” (Exh. 3 page 1; CP 94) Pouncy asks how young, and “Alexis” texts back that she is 13 years old. (Exh. 3 page 1; CP 94) Pouncy responds,

² “HMU” stands for “hit me up.” (02/29/20 RP 232)

“That is young,” but “Alexis” assures him that “age is just a # [number] lol [lough out loud]. i wont [sic] say shit so nobody will find out.” (Exh. 3 page 1, CP 94)

“Alexis” and Pouncy continued to text, and “Alexis” constantly expressed her enthusiastic willingness to engage in sexual activity with him, and continually asked Pouncy to explain in detail what sex acts they would engage in together. (Exh. 3; CP 94-101) At one point, however, Pouncy tells “Alexis” that it seems like she is not interested in him and that he will “let [her] move on.” (Exh. 3 page 6; CP 99) But instead of ending the conversation and allowing Pouncy to back out, “Alexis” continues to insist that she wants to engage in sexual activity. (Exh. 3 page 6; CP 99) “Alexis” pressures Pouncy to commit to engaging in certain acts, and to bring condoms and alcohol to their meeting. (Exh. 3 page 6, page 7; CP 99-100)

The law enforcement officers also sent Pouncy two photographs of a female, claiming they were of “Alexis.” (Exh. 5, 6; 01/29/20 RP 250-51) Both are photographs of an adult female task force officer, and filters are used to try to make the officer look younger. (01/17/20 RP 31-32; 01/29/20 RP 250-51, Exh. 5, 6,)

Pouncy also spoke on the telephone several times with

Trooper Jennifer Wilcox, a 23-year old female posing as “Alexis.” (01/30/20 RP 322, 340) In those conversations, Pouncy and “Alexis” discussed that he should come over to “Alexis” house when her mother is gone, what acts they would engage in, and that he should bring alcohol and condoms. (01/30/20 RP 326-27, 31-36)

Pouncy came to the house, as agreed, on February 15, 2019. (01/30/20 RP 336) Trooper Wilcox was there to greet him. (01/30/20 RP 336) According to Trooper Wilcox, Pouncy embraced her and tried to give her a kiss, but she stepped away and told Pouncy to wait. (01/30/20 RP 336) Trooper Wilcox then left the room, and other task force officers entered and placed Pouncy under arrest. (01/30/20 RP 336-37, 385) Pouncy did not have any condoms or alcohol with him. (01/30/20 RP 394)

Pouncy testified on his own behalf. When he set up his dating profile, he specified that he was interested in single females between the ages of 23 and 42 years. (01/30/20 RP 405-06) He responded to “Alexis” profile because he thought her profile picture, which was of just her eye, seemed clever. (01/30/20 407, 408) Her profile also stated that “Alexis” was 24 years old. (01/30/20 RP 407) Because of this and the dating app’s age

requirement, Pouncy assumed "Alexis" was an adult woman.
(01/30/20 RP 407-08)

Pouncy was surprised when "Alexis" said she was 13 years old, so he asked her to send a photograph so he could make sure she was actually an adult. (01/30/20 RP 409, 410-11; Exh. 3 page 1-2; CP 94-95) Pouncy did not believe the female in the pictures "Alexis" sent was actually 13 years old. (01/30/20 RP 410-11) Even after speaking on the telephone with "Alexis," Pouncy believed, correctly as it turned out, that the female was in her 20s. (01/30/20 RP 411, 414) He assumed that by pretending to be 13 years old, "Alexis" was simply engaging in roleplay or acting out a fantasy. (01/30/20 RP 412, 416, 428)

Pouncy was interested in getting to know "Alexis," so he went to her house to meet and get to know her. He was not planning or expecting to have sex with her that night, as evidenced by the fact that he did not bring condoms or alcohol as "Alexis" requested. (01/30/20 RP 418, 420, 422, 423, 427) And when Trooper Wilcox opened the door, he could see that she was in her 20s, and Pouncy gave her a hug and a kiss simply to be friendly. (01/30/20 RP 427-28)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT POUNCY COMMITTED THE CHARGED CRIMES.

The State failed to prove beyond a reasonable doubt that Pouncy committed attempted rape of a child because the evidence did not show that he intended to have sexual intercourse with a child or that he took a substantial step towards committing the crime.³ The State also failed to prove beyond a reasonable doubt that Pouncy communicated with a minor for immoral purposes because the evidence did not show that he knew or believed he was communicating with a minor.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

³ A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal. *State v. Sweary*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “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.

1. The State did not prove beyond a reasonable doubt that Pouncy committed the crime of attempted rape of a child in the second degree.

“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.” RCW 9A.28.020(1). A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.076(1).

Accordingly, to convict Pouncy of attempted second degree rape of a child, the State had to prove beyond a reasonable doubt that he intended to have sexual intercourse with a child (“Alexis”) and that he took a substantial step toward having sexual intercourse with “Alexis.” RCW 9A.44.076; RCW 9A.28.020. The State failed to prove either of these essential elements.

First, the State did not prove that Pouncy intended to engage

in sexual intercourse with a child. “[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse” with a child. *State v. A.M.*, 163 Wn. App. 414, 423, 260 P.3d 229 (2011) (citing *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996)). The term “sexual intercourse” is very specifically defined, and requires penetration or “sexual contact between persons involving the sex organs of one person and the mouth or anus of another[.]” RCW 9A.44.010(1).

“Alexis” repeatedly stated that she wanted to have sexual intercourse. But, despite continued pressure from “Alexis,” Pouncy never stated that he too wanted to engage in sexual intercourse. Pouncy’s statements indicated an interest in engaging in some sort of sexual contact, but never specifically conduct that would be considered “sexual intercourse.” Additionally, “Alexis” asked Pouncy to bring condoms. (01/30/20 RP 327; Exh. 3 page 7; CP 100) But when he arrived he did not have any condoms, showing that he did not intend to have sexual intercourse. (01/30/20 RP 394, 418) This evidence does not establish, beyond a reasonable doubt, that Pouncy intended to have “sexual intercourse” with “Alexis.”

Furthermore, the Skout dating app required all users to be

18 years or older. (01/29/20 RP 298) In her profile, “Alexis” claimed to be 24 years old. (01/30/20 RP 407) The photographs sent to Pouncy, purporting to be “Alexis,” were photographs of adult women. (01/29/20 RP 250-51; 01/30/20 RP 321) The State cannot establish that, even if Pouncy did intend to have sexual intercourse, he intended to have it with “Alexis” if she was in fact a child.

Second, the State did not prove that Pouncy took a substantial step towards having sexual intercourse with “Alexis.” In order to be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. RCW 9A.28.020(1). A person does not take a substantial step unless his conduct is “strongly corroborative of the actor’s criminal purpose.” *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995); *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978) (citation omitted). Mere preparation to commit a crime is not a substantial step. *Workman*, 90 Wn.2d at 449-50. The attempt statute requires an “overt” act, not just mere preparation. *Workman*, 90 Wn.2d at 449; *State v. Meyer*, 37 Wn.2d 759, 226 P.2d 204 (1951).

For example, in *State v. Wilson*, 158 Wn. App. 305, 308, 242 P.3d 19 (2010), an undercover detective posed as a mother and

posted an ad on Craigslist offering sex with her and her daughter. Rodney Wilson responded, exchanged photos, and agreed to oral sex with the thirteen-year-old daughter in exchange for \$300. On the day scheduled for the meeting, Wilson drove to Dick's Drive-in near the child's house, where he was supposed to meet the child. 158 Wn. App. at 317. He waited in his car for approximately thirty minutes before being arrested. 158 Wn. App. at 318. On appeal, Wilson argued that insufficient evidence supported his conviction of attempted rape of a child in the second degree. He asserted that the evidence showed mere preparation, not a substantial step, since he only drove to a public location and sat in his vehicle. The appellate court disagreed and found Wilson took a substantial step toward commission of the crime when he exchanged photos with the fictitious mother, obtained the mother's address, drove to the designated location, and had \$300 with him. 158 Wn. App. at 318.

In contrast, Pouncy responded to a dating profile posted on a site for adults only, of a person claiming to be 24 years old. (01/29/20 RP 298; 01/30/20 RP 407) Pouncy and "Alexis" did not agree to engage in a specific act of sexual intercourse, and Pouncy did not arrive with condoms as directed by "Alexis." (Exh. 3; CP 94-101; 01/30/20 RP 394; 418) He simply arrived at the address given

to him by someone he believed was an adult. This is mere preparation, and not an overt act that could prove an attempt to commit the crime of second degree rape of a child.

2. The State did not prove beyond a reasonable doubt that Pouncy committed the crime of communicating with a minor for immoral purposes.

A person is guilty of a crime if that person “communicates with a minor for immoral purposes [or] communicates with someone the person believes to be a minor for immoral purposes.” RCW 9.68A.090. The officers posing as “Alexis” were adults. So Pouncy did not actually communicate with a minor. And the State did not prove that Pouncy believed he was communicating with a minor. The Skout dating app required all users to be 18 years or older, and “Alexis” at first claimed to be 24 years old. (01/29/20 RP 298; 01/30/20 RP 407) The photographs sent to Pouncy, purporting to be “Alexis,” were photographs of adult women, and the person Pouncy spoke to on the telephone was also a grown woman. (01/29/20 RP 250-51; 01/30/20 RP 321, 322, 340) Pouncy correctly believed these individuals were not 13 years old. Pouncy believed “Alexis” was engaging in role-play. (01/30/20 RP 408, 409, 410-11, 414, 416) The State did not establish that Pouncy believed the ruse that “Alexis” was a minor.

3. The State's failure to prove all of the elements of the charged crimes requires that Pouncy's convictions be reversed.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). No rational trier of fact could have found that Pouncy intended to have sexual intercourse with a child and that he took a substantial step towards committing the crime. Pouncy's convictions must be reversed and dismissed.

- B. THE TRIAL COURT DENIED POUNCY HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF ENTRAPMENT.

Pouncy requested a jury instruction on entrapment. (01/30/20 RP 399; 02/03/20 RP 460; CP 150) The trial court denied the request, finding that "there is no evidence in this record to suggest that Mr. Pouncy was not inclined to commit the offense and there was persuasion or efforts on the part of law enforcement to induce or convince Mr. Pouncy to commit the crime." (02/03/20 RP 460-61) The trial court was incorrect because evidence was presented that law enforcement initiated the crime and that Pouncy

was seeking to connect with a woman, not a child. The court's failure to instruct the jury denied Pouncy his right to a fair trial.⁴

The Sixth and Fourteenth Amendments of the United States Constitution and Article I, sections 3 and 22 of the Washington State Constitution “guarantee a criminal defendant a meaningful opportunity to present a defense.” *State v. Ortuno-Perez*, 196 Wn. App. 771, 783-84, 385 P.3d 218 (2016); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. A party is entitled to have the jury instructed on its theory of the case if substantial evidence supports the theory. *State v. O’Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015). Substantial evidence exists when sufficient evidence in the record could persuade a fair-minded, rational person that the accused established the defense. When determining whether the evidence suffices, this court must view the evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Under RCW 9A.16.070(1), entrapment is an affirmative defense to a crime if:

- (a) The criminal design originated in the mind of law enforcement officials, or any person acting

⁴ A defendant does not need to admit the crime charged to be entitled to an entrapment defense. See *State v. Frost*, 160 Wn.2d 765, 776, 161 P.3d 361 (2007).

under their direction, and

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

In *State v. Lively*, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996), the Court found that this statute codified the common law requirement of proof that the defendant was induced to commit the crime and was not predisposed to commit such an offense:

Thus, “[u]nder RCW 9A.16.070 and common law, entrapment occurs when the crime originates in the mind of the police or an informant and the defendant is induced to commit a crime which he was not predisposed to commit.

Lively, 130 Wn.2d at 9-10 (citing *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984)).

Law enforcement may afford opportunities to commit an offense and it may do so with various strategies to catch those engaged in criminal activity. *Jacobson v. United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992) (citing *Sorrells v. United States*, 287 U.S. 435, 441, 53 S. Ct. 210, 77 L. Ed. 413 413 (1932)). However, law enforcement may not originate a criminal design, implant the disposition to commit a criminal act in an innocent person’s mind, and then induce the commission of that crime so that law enforcement may then prosecute that person.

Jacobson, 503 U.S. at 549. Law enforcement cannot “play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted.” *Jacobson*, 503 U.S. at 553 (citing *Sherman v. United States*, 356 U.S. 369, 376, 78 S. Ct. 819, 372 2 L. Ed. 2d 848 (1958)). A suspect’s “ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime.” *Jacobson*, 503 U.S. at 553.

The trial court’s refusal to instruct if based on factual reasons is reviewed for an abuse of discretion. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). It is not for the judge to weigh evidence and evaluate credibility; that is a task exclusively for the jury. *See State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) (counsel was ineffective for failing to request instruction on affirmative defense in rape case, where conflicting evidence “created weight and credibility issues for the jury to determine”). Indeed, “[t]he defense of entrapment is basically an inquiry into the intention of the defendant, and that intention along with questions of inducement, ready complaisance and other evidence of

predisposition, may raise an issue of fact.” *State v. Keller*, 30 Wn. App. 644, 648, 637 P.2d 985 (1981) (reversing for failure to give entrapment instruction).

The judge here was unconvinced that Pouncy was not predisposed to commit the offense or that he was lured or induced to commit the crime, but the judge is not the trier of fact. Pouncy was not required to prove the defense to the judge. An instruction on an affirmative defense must be given where there is “evidence that, *if believed by the jury*, would support [the] defense.” *State v. Harvill*, 169 Wn.2d 254, 257 n.1, 234 P.3d 1166 (2010) (addressing duress defense).

The evidence presented showed Pouncy responded to an ad placed by law enforcement on a dating app that only adults are permitted to use. (01/29/20 RP 298) The person who posted the profile was in fact an adult, and described herself as a 24 year old woman, not a girl. (01/29/20 RP 250-51, 298; 01/30/20 RP 321, 322, 340, 407) Only after hooking Pouncy did “Alexis” claim to be 13 years old. (Exh. 3 page 1; CP 94) And Pouncy testified he did not believe the person in the photographs and communicating with him was an actual child; he believed the exchange was a role-play game. (01/30/20 RP 408, 409, 410-11, 414, 416) Whenever

Pouncy expressed concern over the possibility that “Alexis” was actually 13 years old, law enforcement would reassure him that he would not get into trouble and encourage him to continue their flirtation. (Exh. 3 page 1, page 2; CP 94, 95) And when Pouncy at one point told “Alexis” that he was going to let her “move on,” law enforcement did not let him move on but instead continued to persuade him to come to “Alexis” house. (Exh. 3 page 6; CP 99)

Thus, there was evidence that, if believed by the jury, showed that the criminal act originated in the mind of law enforcement, that Pouncy was not predisposed to commit this crime, and that he was induced to consider the illegal act by pressure from law enforcement. Pouncy was entitled to have the jury instructed on his defense, and the trial court erred in refusing to provide the instruction.

The trial court denied Pouncy a fair trial by failing to instruct the jury on the defense of entrapment. Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory, and failure to do so when appropriate is reversible error. *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997). Because the trial court failed to instruct the jury on the legitimate defense of entrapment despite evidence to support

the theory, this Court should reverse Pouncy's convictions and remand for a new trial.

C. THE TRIAL COURT ERRED WHEN IT DENIED POUNCY'S MOTION TO DISMISS OR SUPPRESS EVIDENCE BECAUSE THE OFFICERS VIOLATED HIS PRIVACY RIGHTS AND ENGAGED IN OUTRAGEOUS GOVERNMENT MISCONDUCT.

Pouncy moved to dismiss the charges, or alternatively to suppress his text messages, based on several arguments. (CP 9-14) He asserted that the criminal charges should be dismissed on the grounds of outrageous government conduct because: (1) the MECTF and Operation Net Nanny are funded by donations from a private organization, and those funds are personally solicited by Sergeant Rodriguez and used to pay his own overtime compensation; and (2) the Net Nanny sting operations use fictitious "victims" to lure random, formerly unknown persons into committing a criminal act, without any particularized suspicion. (CP 9-14)

Pouncy also asserted that the text messages should be suppressed because the interception of Pouncy's private messages violated his privacy rights under the Washington State constitution

and the Washington Privacy Act (WPA). (CP 14-16)⁵

The trial court rejected these arguments. (01/21/20 RP 50-66; CP 104-07) The court found that the government's conduct in soliciting and using private money to fund the Operation Net Nanny stings was not outrageous, and that the officers' conduct in carrying out the sting operation was also not outrageous. (01/21/20 RP 60-62, 64-66; CP 107) The court also found that Pouncy impliedly consented to the recording and preservation of his text messages, that the messages were not "intercepted" because they were received by the intended recipient, and that there was no trespass into Pouncy's private affairs. (01/21/20 RP 53-54; CP 105-06)

The trial court erred in failing to dismiss the charges because Rodriguez's solicitation and use of private money to fund Operation Net Nanny, and to personally compensate himself, was outrageous and violated the rules requiring law enforcement objectivity. The court also erred in finding that the MECTF officers' conduct did not constitute outrageous governmental conduct because the totality of

⁵ Pouncy's arguments were based on those made in another Operation Net Nanny case, *State v. Glant*. This Court recently rejected Glant's arguments and affirmed Glant's convictions. See *State v. Glant*, ___ Wn.2d ___; 465 P.3d 382 (2020). However, Glant has filed a Petition for Review with the State Supreme Court. See Case No. 98778-5. Accordingly, these issues are being raised and briefed in Pouncy's appeal in the event that the Supreme Court grants Glant's petition and reverses this Court's decision.

the circumstances clearly establish otherwise.

The court also erred in failing to suppress the text messages because the officers violated the WPA by inexplicably failing to comply with a one-party consent exception, in violation of RCW 9.73.230. And finally, the trial court erred in failing to apply the correct Washington authority recognizing a privacy interest in private text messages sufficient to warrant protection under Article I, section 7 of the Washington Constitution.

1. The trial court erred in failing to dismiss the case under the doctrine of outrageous government misconduct when Pouncy showed that the Net Nanny operation which led to his arrest was funded by a private third party.

The sting in which Pouncy was arrested was made possible by money and equipment donated by a private organization, Operation Underground Railroad (OUR). (01/17/20 RP 64-67) The rule of law, and the rule of law enforcement objectivity, prohibits such an arrangement.

Dismissal of criminal charges is proper where the state engages in conduct “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Lively*, 130 Wn.2d at 19; *State v. Solomon*, 3 Wn. App. 2d 895, 909-10, 419 P.3d 436 (2018).

Private funding of Net Nanny by a major donor, where the detective who unlawfully sought the funding personally benefitted, is outrageous.

A police officer, as an officer of the state, must have no private interest in the arrest of any person. The police must ensure that the law is impartially enforced, and their actions are unprejudiced by any motives of private gain. Other states have identified the problem with private funding of prosecutions. In *State v. Berg*, 236 Kan. 562, 694 P.2d 427 (1985), the court held that, despite a statute allowing a prosecution witness to provide at her own expense an attorney to assist the prosecutor, that private attorney may not prosecute over the wishes of the prosecutor, as “the national tradition ... requires that the person representing the state in a criminal proceeding must be a law-trained, independent public prosecutor rather than a vengeful persecutor.” The same must be true of police officers as well.

Second, the court erred in failing to properly apply the statute that rendered Rodriguez’ actions unlawful when it found that RCW 13.60.110 allows the State Patrol Chief to delegate the solicitation of private donations. (CP 107; 01/20/20 RP 64-66) RCW 13.60.110(4) states that only the “chief of the state patrol

shall seek public and private grants and gifts to support the work of” MECTF. It was undisputed that Rodriguez, rather than the WSP Chief, repeatedly sought funding from OUR. (01/17/20 RP 63-64, 65-66)

2. The trial court erred in failing to dismiss the case because Pouncy showed that the law enforcement officers engaged in outrageous government misconduct during the Net Nanny sting operation.

Pouncy established that the way the Net Nanny stings operate, and the behavior that the MECTF officers engage in to obtain arrests and convictions, constitutes outrageous government conduct.

Outrageous governmental misconduct is evaluated based on the “totality of the circumstances,” and the court may consider the following factors:

[W]hether 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.”

Lively, 130 Wn.2d at 22 (internal citations omitted). Analyzing

MECTF's use of OUR funds and their conduct during the sting, under the *Lively* factors, shows how uniquely "outrageous" the misconduct was.

First, there was no suspected criminal activity being investigated. Instead, the Net Nanny stings were an ongoing "proactive" attempt to get involved before criminal activity occurs. (01/17/20 RP 59, 88-89) The officers invented and instigated the crime, by creating a fictitious dating app "profile" available for anyone to see, then waiting for someone to respond. (01/17/20 RP 70, 98) These apps require users to be over 18 years of age, so anyone who did respond would have been under the impression that they were contacting an adult, and therefore would not have responded with the intent to commit a crime. (01/17/20 RP 93-94)

Second, Detective Klein, posing as Alexis, continually pressed for Pouncy to come over to her house, and encouraged him to tell her what sex acts they would do together when he got there, even when Pouncy expressed reluctance. (Exh. 3; CP 94-101)

Third, MECTF controlled every detail of the "crime." They created and posted the profile, and chose the age of the pretend "victim" to ensure that it falls within the age range for rape in the

second degree. Then the officers chose photographs to share with the target, and used filters to make the adult subject appear younger in order to match the age of the pretend victim. (01/17/20 RP 31-32)

Fourth, even if the police motive was to “protect the public,” there is a competing motive of personal monetary compensation that calls into question the purpose of Operation Net Nanny. And any protection of the public was extremely attenuated.

Finally, the police engaged in criminal activity in multiple ways. First, they offered up fictional children for sexual assault. Second, they violated the section of the WPA that makes it a crime to record or intercept private conversations without legal authority. Third, Rodriguez solicited donations in violation of the statute restricting these solicitations to the WSP chief. RCW 13.60.110(4).

The totality of circumstances reveals that by choosing to partner with OUR and using those funds to pay themselves for Net Nanny work, Rodriguez and MECTF have engaged in misconduct that is unprecedented under Washington law. Due process forbids such an arrangement, and its harm is readily apparent here. Through its coupling with OUR, police generate multiple arrests of persons who are otherwise law abiding but succumb to the police

tactics. But the public has not allocated funds for these kinds of stings. Instead, the funding is controlled by OUR - though it could be any organization with any organizational goal - who is willing to pay.

Private funding of law enforcement is contrary to the rule of law and must be prohibited. This Court should find the trial court erred and reverse Pouncy's convictions.

3. The trial court erred in holding that the police interception of Pouncy's private text messages did not violate the Washington Privacy Act.

The trial court found that the officers did not "intercept" the messages to the undercover officers, and that Pouncy nevertheless impliedly consented to the interception and recording of his messages. (CP 106) The trial court was incorrect because the Washington Privacy Act requires an interception or recording authorization, and he did not impliedly consent to the recording of his messages.

The WPA prohibits a person or agency from obtaining communications between individuals if (1) a private communication transmitted by a device was (2) recorded or intercepted by (3) a recording or transmittal device (4) without the consent of all parties. RCW 9.73.030; *State v. Townsend*, 147 Wn.2d 666, 672-73, 57

P.3d 255 (2002). Private communications include conversations transmitted through telephones, computers, and other devices that are designed to record or transmit communication. RCW 9.73.030(1)(a); *Townsend*, 147 Wn.2d at 672. A person may consent by choosing to communicate through a device in which the person knows the information will be recorded. *State v. Racus*, 7 Wn. App. 2d 287, 299-300, 433 P.3d 830, *review denied*, 193 Wn.2d 1014, 441 P.3d 828 (2019). When a person sends e-mail or text messages they do so with the understanding that the messages would be available to the receiving party for reading or printing. *Racus*, 7 Wn. App. 2d at 299.

In *State v. Racus*, the court held that a defendant provided implied consent regarding e-mail and text conversations because he understood that these messages would be recorded. 7 Wn. App. 2d at 299-300. Thus, the law enforcement officers did not violate the WPA even though the conversations were private and obtained without authorization. 7 Wn. App. 2d at 299-300.

In *Townsend*, the police had received tips from a citizen informant that Townsend was trying to use his computer to arrange sexual liaisons with young girls before they used a ruse to engage him in text exchanges. 147 Wn.2d at 676. There is no indication

that the Court would reach the same conclusion in a case in which the police invented the crime and then used a vague advertisement or dating profile to troll the internet for individuals who were not actively seeking to engage in illegal conduct with children.

And, in *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), the Supreme Court significantly undermined the reasoning in *Townsend*. It concluded that forcing citizens to assume the risk that they are exchanging information with a undercover police detective who is recording and saving their text messages tips the balance too far toward law enforcement at the expense of the right to privacy. *Hinton*, 179 Wn.2d at 873. *Townsend's* finding that one can “impliedly consent” to the recording of text messages sent during a ruse is no longer on firm ground.

After *Townsend*, the Legislature adopted a mechanism for the police to obtain authorization for one-party consent if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony. See RCW 9.73.230. This is also evidence that the notion of “implied consent” in these types of cases is no longer a sound legal theory.

This Court should conclude that the officers intercepted and retained Pouncy’s text messages in violation of the WPA, and that

he did not impliedly consent to this interception and retention.

4. The trial court erred in holding that the police interception of Pouncy's private text messages did not violate Article 1, section 7 of the Washington Constitution.

Pouncy argued below that intercepting and recording his text messages violated Article 1, section 7 of the Washington Constitution. The trial court disagreed, finding that that there was no "trespass into [Pouncy's] private affairs, and that Pouncy "impliedly consented" to the recording of his messages. (CP 106) The trial court was incorrect.

Article I, section 7 protects against warrantless searches of a citizen's private affairs. As a result, a warrantless search is per se unreasonable unless it falls under one of Washington's recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Private affairs are those "interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (plurality opinion) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In determining whether a certain interest is a private affair deserving Article I, section 7 protection, a central consideration is the nature

of the information sought - that is, whether the information obtained by the governmental trespass reveals intimate or discrete details of a person's life. See *State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); *Maxfield*, 133 Wn.2d at 341, 354; *State v. Young*, 123 Wn.2d 173, 183-84, 867 P.2d 593 (1994); *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990).

But what a person seeks to preserve as private, even in an area accessible to the public or the police, may be constitutionally protected. In analyzing this issue, the Washington Supreme Court has considered whether, even when an area is accessible to others, there are historical privacy protections. *McKinney*, 148 Wn.2d at 27. And where the issue involves the gathering of personal information by the government, the Court has also considered the purpose for which the information sought is kept, and by whom it is kept. *McKinney*, 148 Wn.2d at 32. The Court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition. See *Maxfield*, 133 Wn.2d at 341; *Jackson*, 150 Wn.2d at 267; *Young*, 123 Wn.2d at 186-87 (expressing concern over an investigatory technique that

“eviscerate[d] the traditional requirement that police identify a particular suspect prior to initiating a search”); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 455 n.1, 755 P.2d 775 (1988) (program involving random sobriety checkpoints invalidated under Article I, section 7 because it lacked particularized and individualized suspicion).

Applying this analysis, our Supreme Court has held that citizens of this state have a privacy interest in (and a warrant is required to search) hotel registries, *State v. Jordan*, 160 Wn.2d 121, 126-27, 156 P.3d 893 (2007), records of telephone numbers called held by the phone company, *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986), personal trash cans put on the curb in front of a home, *Boland*, 115 Wn.2d 571, and electric consumption records held by a public utility district, *Maxfield*, 133 Wn.2d at 338.

Application of the Supreme Court’s analysis in those cases to the Net Nanny operation shows that the trial court erred in concluding that, simply because a text could be received by a police officer acting under a ruse, Pouncy had no protection under the State Constitution.

Historically, Washington citizens have had a reasonable expectation of privacy in their telephone communication with

others. See, e.g., *Gunwall*, 106 Wn.2d at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)) (“A telephone subscriber has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion.”). This interest is not diminished simply because people now use the texting function, instead of verbal communication, as a primary means of communication.

Text messages are also a new technological form of telephone communication. Thus, it is reasonable to conclude, as the Court did in *Hinton*, that text messages are private communications even if exposed to a third party. 179 Wn.2d at 873.

Pouncy believed that he was engaging in a private exchange. But his expectation was thwarted because of secretive police action. And the police thought no authorization or warrant was required. But a “thoughtful and purposeful” choice is to protect citizens like Pouncy.

This Court should conclude that electronic forms of communication like text messages are worthy of privacy protection even though they are exposed to a third party. See, e.g., *United States v. Warshak*, 631 F.3d 266, 274 (6th Cir. 2010) (holding that

subscriber had a reasonable expectation of privacy in his emails even though they were held by his internet service provider); *State v. Clampitt*, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012) (same as to text messages).

V. CONCLUSION

This Court should reverse and dismiss with prejudice Pouncy's convictions for insufficient evidence. In the alternative this Court should remand his case for a new trial without the improperly obtained evidence and with an entrapment jury instruction.

DATED: July 27, 2020



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Curtis Pouncy

CERTIFICATE OF MAILING

I certify that on 07/27/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Curtis Pouncy, DOC# 632564, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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