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Division II
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No. 54670-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CURTIS POUNCY,

Appellant.

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

The Honorable James J. Dixon, Judge
Cause No. 19-1-00338-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported a conviction for attempted rape of a child in the second degree where Pouncy communicated with a person who indicated they were 13 years old by email and text messaging, indicated that he could give her an orgasm, traveled from Aberdeen to Olympia, went to a gas station as directed, and then arrived at the address provided and attempted to kiss the undercover officer posing as the 13 year old.

2. Whether sufficient evidence supported a conviction for communication with a minor for immoral purposes where Pouncy engaged in sexually explicit communications with a person who indicated that they were 13 years old and the jury clearly found Pouncy's testimony that he believed she was older to not be credible.

3. Whether the trial court properly denied a request for an entrapment instruction where the evidence did not demonstrate that law enforcement did more than provide an opportunity to commit an offense and Pouncy testified that he did not believe the person he was talking to was 13 years old.

4. Whether the trial court properly denied a motion to dismiss based on outrageous conduct where the evidence demonstrated

that the State did not engage in egregious conduct to induce the commission of the crimes and outside funding, authorized by RCW 13.60.110, did not give the donator any ability to control the police operations.

5. Whether the trial court properly found that Pouncy impliedly consented to recording of emails and text messages that he set to undercover law enforcement officers.

6. Whether the trial court properly found that recording or retention of messages that Pouncy sent to undercover law enforcement officers did not violate Article 1, § 7 of the Washington State Constitution because the messages were received by the intended recipient.

B. STATEMENT OF THE CASE.

The appellant, Curtis Pouncy, was charged with attempted rape of a child in the second degree and communication with a minor for immoral purposes after he traveled to Olympia to meet with “Alexis”, a fictitious 13 year old girl, who was actually undercover officers of the Washington State Patrol. CP 3. As part of a Net Nanny operation, Trooper Jake Klein created a profile in Skout, a social media dating and social media application. RP 223,

227.¹ Skout requires that a user be 18 years of age but does not conduct background checks. RP 233. For the profile, Trooper Klein took the persona of a 13-year-old female, who he named Alexis Harrison. RP 236.

Using a profile name of “Jeffrey,” Pouncy messaged the “Alexis” profile and stated, “From what - - from I – what I can see, I like it. I would like to see more if – is that possible?” RP 236. Trooper Klein directed the conversation to text messaging at the point. RP 236-237. Soon after the text messaging started, Trooper Klein texted, “are you cool that I’m young?” and indicated that “Alexis” was 13 years old, but mature. EX 3, RP 248. Pouncy continued the conversation asking, “have you done this before.” Ex 3, RP 249.

Pouncy then asked for “Alexis” to send a picture. Ex 3, RP 249-250. After Klein sent Pouncy pictures of an undercover trooper, Trooper Klein texted that “Alexis” was looking for “NSA” or no strings attached fun. Ex 3, RP 250, 258. Pouncy responded by asking “are you a virgin?” Ex 3, RP 258. Pouncy stated, “I don’t

¹ The verbatim report of proceedings occurs in several volumes. The two volumes which include the jury trial which occurred January 28, 29, 30, 2020 and February 3, 2020, are sequentially paginated and collectively referred to herein as RP. All other volumes are referred to by RP (date).

want to get you in trouble, and I really don't want to get in trouble," and then asked if "Alexis" lived at home. Ex 3, RP 259. "Alexis" responded that she did live at home, but her mother was gone at work all night. Ex 3, RP 259. Pouncy then asked about her dad, to which she responded, "he's out of the picture." Ex 3, RP 259.

Pouncy asked to speak to "Alexis" on the phone. Ex. 3. Trooper Jennifer Wilcox played the "Alexis" persona during phone conversations. RP 322. In the first of three phone calls, with "Alexis," Pouncy demonstrated that he knew plans for sex with a 13-year-old were illegal by indicating that he was "scared this is some Joe Walsh shit." RP 326. Trooper Wilcox testified that "Joe Walsh" is the host of America's Most Wanted. RP 328. While talking about coming over to the 13-year old's residence, Pouncy asked about whether her mom would be there. RP 326. Pouncy indicated he would bring condoms and alcohol and agreed with "Alexis" that it would be bad if she got pregnant. RP 326-327.

After the phone call, Pouncy continued text messaging with "Alexis." Ex 3, RP 261. When "Alexis" asked if Pouncy was going to come over, Pouncy responded "yes, address." Ex 3, RP 262. Pouncy indicated that he needed two hours to get there. Ex. 3, RP 263. Pouncy sent a photo of himself to "Alexis." RP 263-264. Klein

eventually put the meeting off until the next day, indicating that “Alexis” was tired. Ex 3, RP 265.

The next day, the messaging continued and Pouncy asked, “so are we going to meet tonight?” Ex 3, RP 266. After they discussed meeting at 7,” “Alexis” asked, “are you going to bring condoms and Mike’s Hard like u said,” to which Pouncy responded “Yes.” Ex. 3, RP 266. “Alexis” then said, “so I know we kinda tlkd about it in the call but wut r we gonna do when you get here?” Ex 3, RP 266. Pouncy respond, “well, we just play it by ear and see what happens.” Ex 3, RP 266-267. “Alexis” responded by saying “I’m looking 2 hookup 2nite lol i don’t want 2 waist my time,” to which Pouncy responded, “U won’t waste time.” Ex 3, RP 267.

In a second phone call, when asked what he wanted to do, Pouncy stated, “you know what I want to do,” to which “Alexis” indicated, “I thought you were going to teach me,” and Pouncy responded, “I am.” RP 331-332. After the call, “Alexis” asked Pouncy to say what he was going to do, and Pouncy respond, “You know what your supposed to do.” Ex 3, RP 271. “Alexis” indicated there were things she didn’t want to do because she was small and didn’t like pain, to which Pouncy responded, “Ok you Control the

pace.” Ex 3, RP 271-272. Pouncy later indicated, “I teach you what I can,” and “slow and easy.” Ex 3 RP 273.

The conversation led to a third telephone call. RP 273. That conversation, the undercover officer posing as “Alexis” said, “I don’t know what you want to do or what I should expect. I’m nervous.” RP 334. Pouncy responded, “I will go slow. I will taste you, and you will taste me,” and indicated he would tell “Alexis” how to do that. RP 334. He again told her he would go slow and indicated that “the condoms have lube on them.” RP 335. When he again talked about tasting each other, she asked if he could make her orgasm and Pouncy stated, “yes, I can.” RP 335.

After the conversation returned to text messaging, “Alexis” asked, “if it hurts u promise ull go slower?” and Pouncy responded “I promise.” Ex 3, RP 278. Pouncy again agreed to bring condoms and alcohol. Ex 3 RP 278. Pouncy then followed directions to go to a Texaco gas station and send a selfie prior to getting an undercover address to meet “Alexis.” RP 278-279, 333, 376, 379. He then traveled to the address provided for “Alexis,” parked down the block and walked to the residence. RP 383-384. When Detective Wilcox, posing undercover as “Alexis,” opened the door, Pouncy embraced her and attempted to kiss her. RP 336. Pouncy

was arrested afterwards. He did not have condoms or alcohol on him at the time of his arrest. RP 394.

Prior to trial, Pouncy filed a motion to dismiss and a motion to suppress evidence alleging outrageous government conduct and violations of the Washington Privacy Act and Article I, §7 of the Washington State Constitution. CP 6-20. The State filed a responsive pleading which included chapter 7 of the Missing and Exploited Children's Task Force procedures manual, the 2008 Annual Report of the Missing and Exploited Children's Task Force, the Skout discussion between "Jeffrey" and "Alexis" and the text messages between Trooper Klein and Pouncy. CP 21-101.

During the hearing on the motions, a declaration of Trooper Klein was admitted as well as the text messages and Skout chats. Pretrial Ex 1, 2, 3, RP (1/17/20) 8. The trial court heard testimony from Washington State Patrol Sgt. Carlos Rodriguez and Trooper Wilcox. RP (1/17/20) 10, 51. At the conclusion of the hearing, the trial court denied the motions to suppress and found that there had been no showing of outrageous government conduct. CP 104-107, RP (1/21/20) 57-66.

During trial, Pouncy indicated that he did not believe that "Alexis" was 13 years old and had no intention to have sex with a

13-year-old. RP 411, 413, 414, 416-417. The jury found him guilty of attempted rape of a child in the second degree and communication with a minor for immoral purposes. RP 549. In a subsequent bifurcated proceeding, the jury returned special verdicts indicating that Pouncy had previously been convicted of a felony sexual offense and finding that Pouncy had sent someone he believed to be a minor, an electronic communication for immoral purposes. RP 560.

Because Pouncy had previously been convicted of rape in the second degree and rape in the first degree, he was sentenced as a persistent offender pursuant to RCW 9.94A.570 for the attempted rape of a child in the second degree count and 60 months concurrent on the communication count. RP (2/12/20) 3-4, 6-7. This appeal follows. Additional facts are included as necessary in the argument sections below.

C. ARGUMENT.

1. Sufficient evidence supported Pouncy's convictions for attempted rape of a child in the second degree and communicating with a minor for immoral purposes.

Evidence is sufficient to support a conviction 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 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)

- a. In a light most favorable to the State, sufficient evidence supported the jury's finding of guilty to the charge of attempted rape of a child in the second degree.

In order to convict Pouncy of attempted rape of a child in the second degree, the State had to prove beyond a reasonable doubt that Pouncy intended to have sexual intercourse and took a substantial step toward having sexual intercourse with a child under the age of 14. RCW 9A.44.076(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).

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, Pouncy continued texting with “Alexis” after having been told that she was 13 years old. RP 248; EX 3. Pouncy texted with the 13-year-old persona asking if she was a virgin, discussed bring condoms and alcohol to meet her, said he could “teach” her, texted “slow and easy,” and promised he would go slower if it hurt. RP 258-259, 265-266, 271-273 ; EX 3. Pouncy also asked about the persona’s parents and whether they were present. RP 259; EX 3. When “Alexis” indicated that she was looking to “hook up”, Pouncy indicated that he wouldn’t waste her time. RP 267, EX 3.

In telephone calls with “Alexis,” Pouncy demonstrated that he knew plans for sex with a 13-year-old were illegal by indicating that he was “scared this is some Joe Walsh shit.” RP 326. Trooper Wilcox testified that “Joe Walsh” is the host of America’s Most Wanted. RP 328. While talking about coming over to the 13-year old’s residence, Pouncy asked about whether her mom would be there. RP 326. Pouncy indicated he would bring condoms and alcohol and agreed with “Alexis” that it would be bad if she got

pregnant. RP 326-327. During another telephone conversation, when asked what he wanted to do, Pouncy stated, “you know what I want to do,” to which “Alexis” indicated, “I thought you were going to teach me,” and Pouncy responded, “I am.” RP 331-332.

In a third phone conversation, the undercover officer posing as “Alexis” said, “I don’t know what you want to do or what I should expect. I’m nervous.” RP 334. Pouncy responded “I will go slow. I will taste you, and you will taste me,” and indicated he would tell “Alexis” how to do that. RP 334. He again told her he would go slow and indicated that “the condoms have lube on them.” RP 335. When he again talked about tasting each other, she asked if he could make her orgasm and Pouncy stated, “yes, I can.” RP 335.

Pouncy followed directions to go to a Texaco gas station and send a selfie prior to getting an undercover address to meet “Alexis.” RP 278-279, 333, 376, 379. He then traveled to the address provided for “Alexis,” parked down the block and walked to the residence. RP 383-384. When Detective Wilcox, posing undercover as “Alexis,” opened the door, Pouncy embraced her and attempted to kiss her. RP 336.

Pouncy’s actions were more than mere preparation. He discussed sexual acts with a person who indicated that they were

13 years old, indicated that he would make her orgasm, traveled from Aberdeen to Olympia, followed directions to go to a gas station to get her address, and went to the residence and embraced and attempted to kiss the person he believed to be “Alexis.” All of these actions demonstrate a substantial step toward committing rape of a child in the second degree. Pouncy argues that the evidence demonstrates that he believed “Alexis” was older, however, the jury clearly did not believe his testimony. It is not the place of this Court to second guess a credibility determination of the jury. Moreover, the discussions about “Alexis” mother not being present supports the conclusion that he believed she was 13. The evidence was sufficient to support the jury’s conclusion.

- b. The evidence presented was sufficient to support the jury’s conclusion that Pouncy was guilty of communicating with a minor for immoral purposes.

A person is guilty of communicating with a minor for immoral purposes if the person “communicates with someone the person believes to be a minor for immoral purposes.” RCW 9.68A.090(1). Communication with a minor for immoral purposes includes communication with children for the predatory purpose of promoting

exposure to and involvement in sexual misconduct. State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993).

Despite Pouncy's claim that he did not believe that "Alexis" was 13 years old, substantial evidence supports the jury's conclusion that he believed she was 13 years old when he communicated with her. In a recent unpublished decision, State v. Hambrick, 2020 Wash. App.LEXIS 2505, this Court stated:

Although Hambrick claimed he did not believe he was communicating with a 13-year-old, the trial court did not find this testimony credible. Therefore, there was substantial evidence to support the trial court's findings that Hambrick was communicating with Julie with the intent to have sex with a 13 year old and, therefore, sufficient evidence supports the trial court's conclusion that Hambrick communicating with a minor person he believed to be a minor for immoral purposes.

At 13-14.² Like the trial court in Hambrick, the jury in Pouncy's case did not find him credible. Sufficient evidence supported the conclusion that he communicated with "Alexis" for immoral purposes, and therefore sufficient evidence supports the conclusion that he committed the crime of communicating with a minor for immoral purposes.

² Unpublished decision offered only for what value the Court deems appropriate. GR 14.1.

The evidence further supported that Pouncy was communicating by electronic means and had a prior felony sex offense, making his crime a class C felony. RCW 9.68A.090(2). All elements of his crime were supported by substantial evidence.

2. The trial court properly denied Pouncy's request for an entrapment instruction.

An appellate court reviews de novo a trial court's refusal to give a requested jury instruction when the refusal is based on a ruling of law. State v. Ponce, 166 Wn. App. 409, 416, 269 P.3d 408 (2012). However, a trial court's factual determination as to whether a jury instruction should be given is reviewed for an abuse of discretion. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). For entrapment to exist, the evidence must show that the defendant lacked the predisposition to commit the crime. State v. Pleasant, 38 Wn. App. 78, 80, 684 P.2d 761 (1984). This means that the defendant must not have any preexisting intent, inclination, or tendency toward commission. State v. Walker, 11 Wn. App. 84, 88, 521 P.2d 215 (1974). Even though a criminal design originates in a police officer's mind, if the defendant willingly participates in a developing transaction, entrapment does not occur. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), *abrogated on*

other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994).

The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime. RCW 9A.16.070(3). The defense bears the burden of establishing the elements of an entrapment defense. Trujillo, 75 Wn. App. at 918. In order to show entrapment, a defendant must show more than mere reluctance on his or her part to violate the law. State v. Enriquez, 45 Wn. App. 580, 585, 725 P.2d 1384 (1986), *review denied*, 107 Wn.2d 1020 (1987).

In this case, the trial court denied the request for an entrapment instruction stating, “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.” RP 460-461. The trial court further noted that in order to instruct on entrapment, “there must be some evidence in the record to suggest that there was some amount of pressure upon the police or the government to induce the defendant to commit the crime.” RP 461.

While law enforcement posted the profile of “Alexis,” there is nothing in the record to support a conclusion that law enforcement

used pressure or otherwise induced Pouncy to commit an offense that he was not predisposed to. When “Alexis” stated she was 13 years old, Pouncy expressed no hesitation in continuing his communications with her. RP 248, EX 3. His only hesitation was his desire to not get in trouble, there was no indication that he was opposed to sex with a 13-year-old. Additionally, Pouncy’s defense was not that he was induced to commit the offense, rather, he testified that he did not believe that “Alexis” was 13 years old and had no intention to have sex with a 13-year-old. RP 411, 413, 414, 416-417.

When determining whether to instruct a jury on the entrapment defense, “the trial court should consider the defendant’s testimony and the inferences that can be drawn from it.” State v. Galisia, 63 Wn. App. at 836; *citing*, State v. Morgan, 9 Wn. App. 757, 759, 515 P.2d 829 (1973). Inducement is “government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.” State v. Hansen, 69 Wn. App. 750, 764 n.9, 850 P.2d 571 (1993). This requires “an opportunity plus something else – typically, excessive pressure by the government upon the defendant or the government’s taking advantage of an alternative, non-criminal type

motive.” United States v. Poehlman, 217 F.3d 692, 701 (9th Cir. 2000). A police officer’s use of “the normal amount of persuasion to overcome the defendant’s expected resistance” to commit the crime “is not entrapment, nor is the use of deception, trickery or artifice by the police.” State v. Trujillo, 75 Wn. App. at 919.

In the context of similar undercover operations, our Courts have considered the issue of whether a defendant is entitled to an instruction on entrapment. State v. Complita, 2019 Wash. App.LEXIS 2205, 7-8³ (Here, the record shows nothing more than mere opportunity. Although the police engaged in deception and Mr. Complita at times expressed reluctance to engage in sexual activity with a minor, such circumstances are insufficient to support an entrapment claim); State v. Johnson, 12 Wn. App.2d 201, 460 P.3d 1091 (2020). In this case, the trial court did not abuse its discretion by finding that the facts presented at trial did not support an instruction on entrapment. The trial court did not infringe upon the right to present a defense.

3. The trial court did not abuse its discretion by denying the defense motion to dismiss based on outrageous government conduct.

³ Unpublished decision, not for precedential value. GR 14.1.

“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 at 375. "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)).

It is clear that Washington State law authorizes the State Patrol to solicit funds to support the Missing and Exploited Children's task force (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). In fact, the MECTF “IAD Standard Procedures Manual” specifically delegates such a duty to detective supervisors stating that the duties of a Task Force Detective Supervisor include, “initiating budget and grant requests,” and the Task Force Commander shall “secure additional funds” as required. RP (1/17/20) 63.

As Pouncy notes in the Brief of Appellant, this Court recently addressed the issue of outside funding to support Net Nanny operations in State v. Glant, 13 Wn. App.2d 356, ___ P.3d ___ (2020).⁴ In Glant, this Court considered a similar argument to that made by Pouncy regarding the use of outside funding to support the MECTF. The Court stated, “nothing in the record shows that O.U.R. was attempting to overrule or commandeer the Net Nanny operations over the objections of the METCF.” *Id.* at 371. The Court later stated, “O.U.R. merely acted as a funding source. We hold that the trial court did not err when determining that there was not a direct link between O.U.R.’s funding and Glant’s arrest.” *Id.* at 372.

In this case, Sgt. Rodriguez testified regarding the outside funding used to support the operations of the METCF. Rodriguez

⁴ Pouncy correctly notes that Glant filed a petition for review, however, at the time of this brief, the Supreme Court has not ruled on whether it will accept review.

explained how OUR's donations began and indicated that he told them he would prepare a donation letter for the State Patrol. RP (1/17/20) 65-66. He indicated that OUR did not write the law enforcement officers' paychecks, did not have any control over how net nanny operations are conducted, and had no control or influence over the operation involved in this case. RP (1/17/20) 67.

The trial court found:

It's clear to the Court and the Court finds that any contributions made by OUR were limited to monies and/or computers. And it was made clear to OUR that OUR had no input in the day-to-day operations or tactical decisions, or really, any input whatsoever into how the task force conducted its business or its operation. So, there is was no connection between the funds received by the task force and how the task force conducted its business.

RP (1/21/20) 64. The trial court continued:

The Court finds that there is a statute – frankly, I don't have it written down, but I think it's in chapter 13 – that actually requires the chief of the State Patrol to solicit funds. So, it is a directive from the Legislature that the chief has the responsibility and obligation to solicit funds from nongovernmental agencies.

RP (1/21/20) 64-65. The trial court concluded that the conduct involved did not constitute outrageous government conduct. RP (1/21/20) 66, CP 104-107.

Like the trial Court in Glant, the trial court here did not abuse its discretion by denying the defense motion to dismiss based on the funding of the METCF. In addition to the motion regarding funding, Pouncy argued that the actions of law enforcement in this case, other than funding, constituted outrageous conduct. CP 6-20. The trial court properly considered the Lively factors in finding that the actions of the State did not constitute outrageous conduct. CP 104-107, RP (1/21/20) 57-66.

The trial court distinguished this case from the facts of State v. Solomon, 3 Wn. App.2d 895, 419 P.3d 436 (2018), stating:

The language that law enforcement used there was salacious, certainly suggestive if not salacious, and included turning up the heat in every one of their communications with Mr. Solomon. And under the facts of that particular case, it was clear to the Court of Appeals that law enforcement was engaging in conduct that was designed to overcome the resistance of a person who was otherwise not inclined to participate in an unlawful activity. But that's not what happened in the instant case.

RP (1/21/20) 61.

The trial court found that in this case, “there was no showing that law enforcement engaged in any conduct or actions designed to overcome reluctance on the part of Mr. Pouncy. There were no pleas made to Mr. Pouncy. There was no coercion made to Mr.

Pouncy.” RP (1/21/20) 62-63. The trial court also noted that the intent of the operation was “to attempt to identify and ultimately arrest people who might otherwise be endangering children.” RP (1/21/20) 58. Nothing in the record supports a conclusion that the trial court abused its discretion by denying the defense motion to dismiss for outrageous government conduct.

4. The trial court correctly found that the retention of text messages by law enforcement did not violate the Washington Privacy Act.

The Washington Privacy Act (WPA), prohibits the intercepting and recording of private electronic communications, including email and text messages. RCW Chapter 9.73. There are four prongs the court considers when analyzing alleged violations of the Privacy Act. State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 789 (2004) (citing RCW 9.73.030(1)(a)). There must have been (1) a private conversation transmitted by a device that was (2) intercepted or recorded by use of (3) a device designated to record and/or transmit (4) without the consent of all parties to the private communication. *Id.*; State v. Townsend, 147 Wn.2d 666, 672-73, 57 P.3d 255 (2002); RCW 9.73.030. Alleged violations of the Privacy Act are reviewed by the court de novo. State v. Kipp, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014).

In State v. Townsend, our Supreme Court held that in the context of the privacy act, a person may impliedly consent to the recording within the meaning of the privacy act. The Court stated, “a communicating party will be deemed to have consented to having his or her communication recorded when the party knows the messages will be recorded.” *Id.* at 675-676. The rationale of the Court was:

Because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

Id. at 676. The Court concluded that “the saving of messages is inherent in an e-mail and ICQ messaging” and that through his use of such communication mechanisms, Townsend had impliedly consented to the recording of such messages. *Id.* at 678.

Private communications include conversations that are 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 consents when they explicitly announce their intention to engage in the communication. RCW 9.73.030(3). A person also consents 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 (2019). When a person sends an email or text messages, they do so with the understanding that the messages would be available to the receiving party for reading or printing. *Id.* at 299.

In Racus, a detective posed as a fictitious mother offering her children for sex. *Id.* at 291. This Court held that the emails and text messages sent by Racus to the detective did not violate the privacy act because the defendant provided implied consent. *Id.* at 299-300. The defendant chose to communicate with the detective through email and text messages, understanding that the messages would be available to the receiving party for recording. *Id.* This Court reached the same conclusion in State v. Glant. 13 Wn. App.2d at 365-366.

In this case, the trial court relied on Racus, and found:

In this case, consent is implied, because a party to this type of a communication, texting, reasonably knows that text messages may be retained by the person or persons on the receiving end. Here, Mr. Pouncy knew that the text messages might be retained and in fact shown to other people.

RP (1/21/20) 53. The trial court's ruling was consistent with the existing case law and correctly found that the recording of messages by law enforcement did not violate the privacy act.

Like the defendant in Glant, Pouncy further argues that RCW 9.73.230 required the police to obtain authorization. RCW 9.73.230(1) allows the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor to authorize the interception, transmission, or recording of a conversation or communications by officers when at least one-party consents and probable cause exists to believe that the communication involves certain controlled substance act violations or commercial sexual abuse of a minor. RCW 9.73.230(1)(a) and (b). RCW 9.73.230 acts as an exception to the general rule that private communications cannot be intercepted or recorded without the consent of all parties. RCW 9.73.030(1); State v. Salinas, 119 Wn.2d 192, 829 P2d 1068 (1992).

In Glant, this Court noted that RCW 9.73.230 was not applicable because Glant impliedly consented to the recording. 13 Wn. App.2d at 367. The trial court in this case correctly ruled that there was no interception in this case because Pouncy directly communicated with law enforcement and "impliedly consented to

the recording or retention of those conversations.” RP (1/21/20) 55. The trial court’s ruling is consistent with case law. The trial court did not abuse its discretion by finding that there was no violation of the privacy act.

Additionally, RCW 9.73.230 applies to commercial sexual abuse of a minor. There was no indication in this case that there was arrangement for a fee or other facts that would qualify as commercial sexual abuse. In Glant, this Court stated, “Moreover, even if RCW 9.73.230 did apply, the record does not support that commercial sexual abuse of a minor was at issue in this case.” Glant, 13 Wn. App.2d at 367. Similarly, even if the statute did apply in this context, the record likewise does not support its application.

Since Townsend, our Courts have consistently upheld the doctrine of implied consent in the context of the privacy act. State v. Smith, 189 Wn.2d 655; State v. Roden, 179 Wn.2d 893, 321 P.3d 1183 (2014); State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014). Pouncy argues that Hinton places the Townsend holding on infirm ground, however, that argument ignores the facts of Hinton. Roden and Hinton were companion cases. In both of those cases, the court found the defendants had a privacy interest in the content of their sent messages, even on the recipient’s phone. That holding

resulted specifically, however, from the fact that law enforcement read those messages and engaged the defendants in additional text messages after physically seizing the recipient's cell phone. This qualifies as interception. Roden, 179 Wn.2d at 896; Hinton, 179 Wn.2d at 865.

Both Roden and Hinton relied on the holding of Townsend, in their discussion of whether or not the State had intercepted the messages. 179 Wn.2d at 903-904; 179 Wn.2d at 872-873. Important to both of those cases was the fact that the officer was not the intended recipient of the messages. Here, the officer was the intended recipient. The trial court did not abuse its discretion by following the holdings of Townsend and Racus.

5. Law enforcement did not violate Article I, § 7 of the Washington State Constitution.

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1, §7. As noted above, the actions of the MECTF were lawful pursuant to the Washington Privacy Act. A claimed violation of §7 requires a two-step analysis: “Was there a disturbance of one’s private affairs and, if so, was the disturbance authorized by law.” State v. Athan, 160 Wn.2d 354, 365-366, 158 P.3d 27 (2006). In Athan, the State

Supreme Court upheld the use of a ruse, where law enforcement posed as a law firm to get the defendant to mail them an envelope which they later removed saliva from to obtain a DNA sample. *Id.* at 370. The Court specifically addressed State v. Townsend, stating “In upholding his conviction, we found the communications private, but that Townsend impliedly consented to the recording of his private email conversations because it was reasonable to infer Townsend was aware it was possible to record the messages.” Athan, 160 Wn.2d at 370-371.

The Athan Court rejected the article 1, § 7 claim noting that the detective on the letterhead was the intended recipient and concluding “Athan’s private affairs were not disturbed under article 1, section 7.” *Id.* at 372. For the same reasons as in Townsend, there was no disturbance of Pouncy’s private affairs in violation of article 1, §7. Pouncy implicitly consented to the recording of his messages.

When a person voluntarily communicates with a stranger, that person assumes the risk that the conversation will not be confidential. State v. Goucher, 124 Wn.2d 778, 786-87, 881 P.2d 210 (1994). In that case, our Supreme Court stated, “We do not see how the conversation between the Defendant and the detective

constituted an unreasonable intrusion into the Defendant's private affairs and thus we find no violation of the State constitution." Id. at 787.

In this case, the trial court noted that, "The Defense does not argue in any appreciable manner the argument related to Article I, section 7 of the state constitution or the Fourth Amendment to the federal constitution." RP (1/21/20) 55-56. The Court then found:

In the instant case, the Court finds that there's really no privacy interest at stake. Nothing was seized from Mr. Pouncy. In other words, as it relates to the issue before the court, no physical or tangible item of property was seized by Mr. Pouncy and then searched absent a warrant or any of the exceptions to the warrant.

RP (1/21/20) 56. The trial court concluded:

But there's no privacy argument that is compelling to the Court. And just in an abundance of caution, the Court notes again that any messages that were arguably seized by law enforcement, if those messages fall within the gambit of a privacy interest that gives rise to a Fourth Amendment protection or an Article I, section 7, interest, Mr. Pouncy waived such interest because he voluntarily exchanged that information with law enforcement.

RP (1/21/20) 56-57.

The trial court's decision was consistent with Townsend, Athan, and Goucher. Pouncy chose to communicate with a stranger and voluntarily took the risk that the communication was not

private. Law enforcement was the intended recipient of Pouncy's communications. There was no violation of Article I, §7. In Glant, this Court addressed nearly the same argument and found that the "the trial court did not err when it denied Glant's motion to suppress." State v. Glant, 13 Wn. App.2d at 369. The trial court in this case did not err when it denied Pouncy's motion to suppress.

D. CONCLUSION.

Sufficient evidence supported the jury's findings that Pouncy committed attempted rape of a child in the second degree and communication with a minor for immoral purposes. The trial court properly found that the facts elicited at trial did not support an entrapment jury instruction. The trial court did not abuse its discretion by denying Pouncy's motion to dismiss and motion to suppress. There was no outrageous government conduct which justified dismissal and there was no violation of the Washington Privacy Act or Article I, §7 of the Washington State Constitution. The State respectfully requests that this Court affirm the convictions and sentence.

Respectfully submitted this 24th day of September, 2020.



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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 Appellate Courts' 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: September 24, 2020

Signature: _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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