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Division III  
State of Washington  
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NO. 36230-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JASON LEE BORSETH, aka FISHEL,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
P.O. Box 1019  
Republic, Washington 99166  
(509) 775-0777

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## **ASSIGNMENTS OF ERROR**

1. The Washington State Patrol's (WSP) "Net Nanny" operation violated the Privacy Act (Chapter 9.73 RCW).

2. The WSP's violation of the Privacy Act constitutes outrageous governmental misconduct.

3. The "Net Nanny Operation" violated several criminal laws in its pursuit and arrest of Jason Lee Borseth.

4. The State failed to prove, beyond a reasonable doubt, each and every element of the alternative means crime of attempted commercial sexual abuse of a minor as charged in Count II of the Information. (CP 16)

5. Defense counsel was ineffective when he failed to:

- (a) Challenge ER 404(b) evidence;
- (b) Correctly argue violation of the Privacy Act;
- (c) Challenge the legal financial obligations (LFOs).

6. The prosecuting attorney committed misconduct by commenting upon Mr. Borseth's credibility during closing argument.

7. The trial court, at sentencing, committed the following errors:

- (a) Determined that Counts I and II did not constitute the same criminal conduct;
- (b) Imposed a twelve (12) month enhancement on Count II in contravention of existing notice requirements; and
- (c) Assessed LFOs after having determined that Mr. Borseth was indigent.

8. Cumulative error deprived Mr. Borseth of a constitutionally fair trial in violation of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 22.

### **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the WSP fully comply with all provisions of the Privacy Act in using one (1) party consent for its “Net Nanny” operation?

2. Was the introduction of e-mails and text messages, which were obtained in violation of the Privacy Act, detrimental to Mr. Borseth’s right to a fair trial under the due process clause of the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 7?

3. Is the State’s conduct so outrageous as to require reversal and dismissal of Mr. Borseth’s convictions?

4. Is attempted commercial abuse of a minor an alternative means crime, and, if so, did the State fail to establish, beyond a reasonable doubt, each and every element of the offense of attempted commercial sexual abuse of a minor as set out in Count II?

5. Under the facts and circumstances of the case did the State prove each of the alternative means; and, if not, then does the State’s failure to elect the specific means require reversal of this conviction?

6. (a) Should defense counsel have objected to the proposed ER 404(b) evidence concerning homosexual activity on Craigslist?

(b) Was defense counsel ineffective as to the Privacy Act challenge?

(c) Should defense counsel have objected to the imposition of LFOs?

7. Did the prosecuting attorney's comment upon Mr. Borseth's credibility prejudicially affect the jury in connection with the case as a whole?

8. Do attempted first degree child rape and attempted commercial sexual abuse of a minor constitute the "same criminal conduct" for sentencing purposes?

9. Does the twelve (12) month enhancement set forth in RCW 9.94A.533(9) apply if the State failed to set forth, in either the Information or a separate document, notice that it intended to seek the enhancement?

10. Were certain LFOs improperly imposed by the trial court?

11. Did cumulative error deprive Mr. Borseth of a fair and impartial trial?

### **STATEMENT OF THE CASE**

Members of the Washington State Patrol Missing and Exploited Children's Task Force commenced "Operation Net Nanny" in Spokane on July 5, 2016. (RP 21, ll. 10-20; RP 24, ll. 16-22; RP 28, ll. 9-11)<sup>1</sup>

An ad was placed on Craigslist, in the casual encounters section which stated:

**Mommy wants daddy to for son and daughters - w4m  
(spokane)**

help mommy take care of her young family, send me a pic if you are serious. be sure to send me you're a/s/l, name, and daddy in the title when you respond so i know you are not a bot. we appreciate generosity. if you want a unique fun experience then hmu.

(RP 28, ll. 14-20; RP 29, ll. 18-19; Exhibit P-2)

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<sup>1</sup> All RPs reference Heather Gipson's transcripts

The “Net Nanny” operation involved a single parent with two (2) to three (3) children under the age of eighteen (18). (RP 346, l. 16 to RP 347, l. 1)

The purpose behind the ad was to solicit adults interested in having sex with children. (RP 347, l. 16 to RP 350, l. 9)

The casual encounters section on Craigslist does not specifically reference child sex. (RP 450, ll. 15-21)

The ad does not set out the ages of the children or talk about sex with children. (RP 455, ll. 6-14)

The “Net Nanny” team was composed of undercover officers. They acted as actual participants posing as the mother and children; and also consisted of forensics, surveillance, search warrant, and arrest teams. (RP 354, ll. 14-23)

The ad in question was posted at 1:46 a.m. on July 7, 2016. Mr. Borseth initially responded at 3:47 a.m. Mr. Borseth responded to the ad in an e-mail. After some initial e-mails he switched to text messaging. A later telephone call was recorded and transcribed. The e-mails, text messages and telephone call occurred prior to his arrest after 10:00 p.m. that same date. (RP 33, ll. 17-23; RP 34, l. 25 to RP 35, l. 15; RP 39, ll. 19-25; RP 396, ll. 1-8; RP 396, ll. 7-13; RP 399, ll. 1-6; RP 585, l. 20 to RP 586, l. 2)

Mr. Borseth attached photos of himself to his initial e-mail. One (1) of the photos showed him completely nude. (RP 400, l. 24 to RP 401, l. 13)

The WSP continued to exchange e-mails with Mr. Borseth. One (1) of those e-mails stated, in part: “Young taboo here. I have two young girls and a son. My thing is watching, so this is only about them ....” (RP 401, ll. 21-25)

Mr. Borseth's response was: "How old are they? Got pics ...." (RP 403, l. 3; Exhibit P-3)

The WSP and Mr. Borseth then changed to text messaging. (RP 401, l. 14 to RP 434, l. 9; RP 435, l. 5 to RP 447, l. 13; Exhibit P-4)

During the texting there was a discussion concerning gifts and donations. (RP 416, ll. 2-5; RP 416, l. 22 to RP 417, l. 3)

Shortly after the text messages concerning gifts and donations a telephone call occurred between Mr. Borseth and two (2) of the undercover officers. The undercover officers were impersonating the mother and eleven (11) year-old daughter. (RP 417, ll. 4-19)

The following critical exchanges occurred in the course of the text messages and telephone call:

MOM: "Hey we are chatting about taboo ages here. What's your name, hon?" (RP 407, ll. 2-3)

MOM: "Good. Did we go over ages? This isn't for all." (RP 407, ll. 8-9)

JASON: "Not yet." (RP 407, l. 15)

MOM: "What are your restrictions, and are you affiliated with any type of law enforcement?" (RP 407, ll. 17-18)

MOM: "Do you like young? Also, are you into girls or boys? I have two girls and one boy." (RP 411, ll. 3-4)

JASON: "Never have done it. I like girls. I bet young is tasty. How young?" (RP 411, ll. 10-11)

MOM: “My youngest is six. She is not very active and a lot of restrictions. My oldest girl is almost twelve. She is very mature and likes everything she has tried. My son is twelve. That’s what I like young boys.” (RP 411, ll. 21-24)

JASON: “Not the little one for sure ...” (RP 412, l. 21)

JASON: “Got a pic? What has she done?” (RP 414, l. 3)

MOM: “I will need to talk to you first to go over rules. Are you good with gifts or donations and she is available tonight for sure.” (RP 415, l. 24 to RP 416, l. 1)

JASON: “Like how much?” (RP 416, l. 16)

MOM: “It depends on what you want and what you like. LOL .... We just moved here so anything helps. What did you want to experience? ...” (RP 416, ll. 22-24)

A discussion then ensued concerning drugs and getting high. (RP 417, l. 21 to RP 419, l. 15)

MOM: “So what are you offering, hon, and what do you want? Be honest or this won’t work. Here’s a pic of her.” (RP 419, ll. 24-25)

JASON: “I help out so many people. I’m not sure what. I want to try new things.” (RP 420, ll. 2-3)

JASON: “She is a cutie.” (RP 420, l. 23)

The picture which was sent to Mr. Borseth was of Trooper Anna Gasser when she was sixteen (16) years old. There was never any discussion between Mr. Borseth and Trooper Gasser about sex. (RP 420, ll. 4-12; RP 515, ll. 18-25; RP 520, ll. 4-21; RP 521, ll. 13-23)

MOM: “So before we call need to make sure what you want so I don’t waste my time. Are you offering up some money and the meth or just the meth and you know you can’t have sex with me. This is about my daughter.” (RP 423, ll. 2-5)

JASON: “I have cash, too, and meth, and I’m in for the adventure.” (RP 423, ll. 11-12)

JASON: “How close were you with your dad?” (RP 428, ll. 10-11)

MOM: “Very. He taught me about sex from when I was little.” (RP 428, ll. 13-14)

JASON: “Did you like it?” (RP 428, l. 16)

MOM: “Yeah, it was fun. That’s what I want for my kids to be able to learn from someone who knows what they’re doing and make it fun for them.” (RP 428, ll. 18-20)

JASON: “Good. I hear you.” (RP 428, l. 22)

MOM: “Anna liked the pics. She is excited.” (RP 429, l. 3)

JASON: “Really? What does she want to do?” (RP 429, l. 6)

MOM: “She likes learning new things. She’s had some experience, but will need a lot of direction.” (RP 429, ll. 8-9)

JASON: “Okay. I’ll help.” (RP 429, l. 11)

JASON: “You like getting licked?” (RP 430, l. 25)

MOM: It looks nice and smooth. Though, I like them that big. LOL. Me or Anna?”  
(RP 431, ll. 2-3)

JASON: “You know you could use a good tongue lashing. You hey to her too.”  
(RP 431, ll. 9-10)

MOM: “You’re not for me, hon. Sorry.” (RP 431, l. 12)

JASON: “Just offering.” (RP 431, l. 14)

MOM: "She does. She likes that a lot." (RP 431, l. 16)

JASON: "Oh, good. Me, too." (RP 431, l. 21)

MOM: "She wants to know what your favorite thing is." (RP 431, l. 23)

JASON: "Getting my face and cock rode." (RP 432, l. 2)

MOM: "She's never done either." (RP 432, l. 4)

JASON: "She's about to." (RP 432, l. 6)

MOM: "Anna is bouncing off the walls waiting for you to get here." (RP 439, ll. 23-24)

Mr. Borseth arrived at the home where he was arrested carrying a cellphone; lubricant; drug paraphernalia; his wallet; money; and condoms. He also had two (2) plastic baggies with a white crystal substance that later tested positive for methamphetamine. (RP 531, ll. 8-11; RP 535, ll. 19-22; RP 601, ll. 24-25; RP 603, ll. 13-17; RP 622, ll. 3-4; RP 625, ll. 2-6)

When Mr. Borseth entered the home where "Net Nanny" was operating he was immediately arrested. He was then interviewed. The interview was recorded. (RP 545, ll. 17-20; RP 553, l. 7)

An Information was filed on July 12, 2016 charging Mr. Borseth with one (1) count of attempted first degree child rape; one (1) count of attempted commercial sexual abuse of a minor; and unlawful possession of a controlled substance. (CP 16)

A bail bond in the amount of \$100,000.00 was posted. Multiple scheduling orders were entered. Bench warrants were issued. Bail was increased and bonds posted. (CP 7; CP 24; CP 26; CP 27; CP 28; CP 29; CP 32; CP 33; CP 35; CP 37; CP 38; CP 39; CP 40;

CP 41; CP 42; CP 46; CP 50; CP 51; CP 52; CP 53; CP 54; CP 55; CP 56; CP 59; CP 66;  
CP 71; CP 73; CP 78)

A CrR 3.5 motion was filed on April 17, 2018. The CrR 3.5 hearing was held on April 23, 2018. Defense counsel only challenged the recorded interview with Mr. Borseth. No argument was provided concerning the telephone calls, e-mails or text messages. (CP 79; RP 67, ll. 13-15)

Pre-trial, defense counsel raised the issue of the Privacy Act. The challenge was not to a violation of the act itself; but to lack of probable cause for the offense of commercial sexual abuse of a minor. The trial court denied the motion. (RP 85, l. 25 to RP 86, l. 20; RP 90, l. 15 to RP 91, l. 21)

During a hearing on motions in limine defense counsel advised the court that there was no challenge to potential ER 404(b) evidence. (RP 92, ll. 6-20)

Mr. Borseth testified at trial. He denied that he was going to pay for sex. He denied wanting sex with a minor. He admitted the possession of methamphetamine. (RP 628, ll. 9-10; RP 637, ll. 17-22; RP 639, ll. 8-12)

During his cross-examination Mr. Borseth admitted that he knew the mother was offering Anna as a sexual partner. (RP 655, ll. 5-12; RP 660, l. 8 to RP 661, l. 1)

Mr. Borseth also admitted that he had posted ads on Craigslist for sex with men. (RP 716, l. 12 to RP 717, l. 16)

Defendant's motions to dismiss were denied. (RP 685, l. 24 to RP 691, l. 21; RP 720, l. 1 to RP 721, l. 16)

During the prosecuting attorney's closing argument he commented upon Mr. Borseth's credibility. Defense counsel objected. After a caution from the Court the prosecuting attorney again told the jury that they should not believe Mr. Borseth. (RP 794, ll. 4-15)

The jury determined that Mr. Borseth was guilty of all three (3) offenses. (CP 189; CP 190; CP 191)

Defense counsel submitted a memorandum of authorities asserting that all counts constituted the same criminal conduct. The trial court ruled that none of the offenses constituted the same criminal conduct. (CP 209; RP 831, l. 24 to RP 833, l. 8; RP 837, ll. 4-21)

Judgment and Sentence was entered on July 11, 2018. The trial court imposed concurrent sentences with a one (1) year enhancement on Count II involving attempted commercial sexual abuse of a minor. Defense counsel objected to the one (1) year enhancement. (CP 217; RP 846, ll. 14-23)

The trial court also imposed a fine of \$1,650.00 on Count II; along with \$200.00 court costs.

Mr. Borseth filed his Notice of Appeal on July 19, 2018. (CP 235)

### **SUMMARY OF ARGUMENT**

The WSP's "Net Nanny" operation was conducted in violation of the Privacy Act (Chapter 9.73 RCW). The operation not only violated the Act; but also committed felony offenses in violation of Mr. Borseth's constitutional right to privacy.

The WSP's actions in conducting the operation amount to outrageous governmental misconduct requiring reversal and/or dismissal of Counts I and II.

Attempted commercial sexual abuse of a minor is an alternative means offense. The State failed to establish, beyond a reasonable doubt, all of the alternative means charged. The prosecuting attorney did not elect a specific means in closing argument. Count II should be reversed and dismissed.

Defense counsel did not provide effective assistance of counsel as required by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Prosecutorial misconduct deprived Mr. Borseth of a fair and impartial trial.

Multiple sentencing errors need to be corrected in the event Counts I and II are neither reversed nor dismissed.

Cumulative error requires a new trial as to Counts I and II if they are neither reversed nor dismissed.

## **ARGUMENT**

### **I. "OPERATION NET NANNY"**

The WSP set up "Operation Net Nanny" to be conducted in the Spokane area starting July 6, 2016. The "Net Nanny" operation violated a number of laws. Mr. Borseth became embroiled in that operation as a result of the WSP's violation of those laws.

RCW 9.73.210(1) is part of the Privacy Act. It sets out, in part:

- (1) If a police commander or officer above the rank of first line supervisor has reasonable suspicion that the **safety of the consenting party is in danger**, law enforcement personnel may, **for the sole purpose of protecting the**

**safety of the consenting party**, intercept, transmit, or record a private conversation or communication concerning:

- (a) ...
- (b) Person(s) engaging in the commercial sexual abuse of a minor under RCW 9.68A.100 ....

(Emphasis supplied.)

The “Net Nanny” operation involved fictitious individuals. The non-existent individuals were not in any type of danger from Mr. Borseth.

RCW 9.73.210(2) provides, in part:

Before any interception, transmission, or recording of a private conversation or communication pursuant to this section, the police commander or officer making the determination required by subsection (1) of this section shall complete a written authorization which shall include (a) ...; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) ...; and (d) **the reasons for believing the consenting party’s safety will be in danger.**

(Emphasis supplied.)

There is nothing in the record to indicate that the WSP complied with the provisions of RCW 9.73.210(2).

Again, there was no consenting party. There was no individual who would be in danger.

Washington is a two (2) party consent state. In order to record a conversation both parties must give their consent.

RCW 9.73.030 provides, in part:

(1) Except as otherwise provided in this chapter, **it shall be unlawful for any individual ... or the State of Washington, its agencies, and political subdivisions to intercept, or record any:**

- (a) Private communication transmitted by [any] ... device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless of how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
- (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(Emphasis supplied.)

Defense counsel did not raise the proper issue for violation of the Privacy Act. Defense counsel attacked it from the viewpoint that no probable cause existed for the attempted commercial sexual abuse of a minor.

The pertinent issue is the fact that the WSP failed to comply with statutory requirements in order to have one (1) party consent.

Generally, the Privacy Act is implicated when one party records a conversation without the other party's consent. Washington State's Privacy Act is considered one of the most restrictive in the nation. *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002).

*State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014).

Mr. Borseth asserts that there was no consent involved in connection with either the e-mails or text messages involved in his case.

“Washington's privacy act and ‘all-party consent’ rule provide more protection than both the State and Federal constitutions.” *State v. Kipp, supra* at 725.

Mr. Borseth believed that he was e-mailing and texting with the mother of minor children. The telephone conversation that ensued was with the supposed mother and child.

No mention of Mr. Borseth's consent was involved in the text messages, the e-mails or telephone conversation.

The issue of the applicability of the Privacy Act to text messages was resolved in *State v. Roden*, 179 Wn.2d 893, 900-01, 321 P.3d 1183 (2014).

Mr. Borseth contends that testimony concerning the text messages, along with the text messages themselves, should never have been admitted at trial. Defense counsel's failure to object to those text messages constitutes ineffective assistance of counsel. *See: infra.*

Test messages encompass many of the same subjects as phone conversations and e-mails, which have been protected under the act. *See: Faford [State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996)] at 488 ...*

...

We reject the State's argument that a subjective expectation of privacy in a text message conversation is unreasonable because of the possibility that someone could intercept text messages by possessing another person's cell phone. In the context of new communications technology, we have continually held that the mere possibility of intrusion will not strip citizens of their privacy rights. [Citations omitted.]

...

The possibility that an unintended party can intercept a text message due to his or her possession of another's cell phone is not sufficient to destroy a reasonable expectation of privacy in such a message.

*State v. Roden, supra.*

Further support for Mr. Borseth's position can be found in both RCW 9.73.050 and RCW 9.73.210.

RCW 9.73.050 provides, in part:

Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible in any ... criminal case in all courts of general or limited jurisdiction in this state .... *See also: State v. Faford*, 128 Wn.2d 476, 478, 910 P.2d 447 (1996) (the scope of “any information” as set out in RCW 9.73.050 is construed broadly to require exclusion of any simultaneous visual observation, as well as conversations recorded by unauthorized body wire. This includes impeachment purposes).

RCW 9.73.210(4) provides, in part:

- (4) Any information obtained pursuant to this section is inadmissible in any ... criminal case in all courts of general or limited jurisdiction in this state, except:
  - (a) With the permission of the person whose communication or conversation was intercepted, transmitted, or recorded without his or her knowledge; or
  - (b) ...; or
  - (c) In a criminal prosecution, arising out of the same incident for a **serious violent offense as defined in RCW 9.94A.030** in which a party who consented to the interception, transmission, or recording was a victim of the offense.

(Emphasis supplied.)

Mr. Borseth did not give his permission for any recording.

Mr. Borseth was not a victim.

The crimes under consideration are not serious violent offenses.

Furthermore, RCW 9.73.210(7) provides: “Nothing in this section authorizes the interception, recording, or transmission of a telephonic communication or conversation.”

It is clear that the WSP’s non-compliance with RCW 9.73.210 interfered with Mr. Borseth’s privacy rights under both the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

Defense counsel's failure to recognize these implications and his failure to object to the admissibility of the e-mails and text messages is ineffective assistance of counsel. This issue is addressed in a subsequent portion of this brief.

Mr. Borseth acknowledges that the State may rely upon RCW 9.73.210(5) which states: "Nothing in this section bars the admission of testimony of a participant in the communication or conversation unaided by information obtained pursuant to this section."

However, it is Mr. Borseth's position that if the State were to rely upon RCW 9.73.210(5), then, at any subsequent trial an evidentiary hearing would need to be held to determine whether any such testimony exists.

Moreover, RCW 9.73.230 comes into play insofar as Mr. Borseth's argument is concerned. The statute provides, in part:

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

- (a) At least one party to the conversation or communication has consented to the interception, transmission or recording;
- (b) Probable cause exists to believe that the conversation or communication involves:
  - (i) ...;
  - (ii) **A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100** ....; and
- (c) A written report has been completed as required by subsection (2) of this section.

(Emphasis supplied.)

It appears that this may have been the section of the Privacy Act that was being addressed by defense counsel.

There is no indication in the record of any written report which complies with the requirements of RCW 9.73.230(1) and (2). Moreover, the “Net Nanny” operation was put into effect before any conversation, e-mail or text message was received from Mr. Borseth.

RCW 9.73.230(5) places a limitation on one (1) party consent. It states, in part:

An authorization made under this section is valid for no more than twenty-four hours from the time it is signed by the authorizing officer .... An authorization under this section may be extended not more than twice for an additional consecutive twenty-four hour period based upon the same probable cause regarding the same suspected transaction. ...

Again, there is nothing in the record to indicate compliance by the WSP.

A trial court, considering whether or not to suppress a violation of the Privacy Act under RCW 9.73.230, must comply with subsection (8). It provides:

In any subsequent judicial proceeding, evidence obtained through the interception of a recording of a conversation or communication pursuant to this section shall be admissible **only if:**

- (a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section; or
- (b) The evidence is admitted with the permission of the person whose communication or conversation was intercepted, transmitted, or recorded; or
- (c) The evidence is admitted in a prosecution for a “serious violent offense” as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense; or
- (d) The evidence is admitted in a civil suit ....

Nothing in this subsection bars the admission of testimony of a party or eyewitnesses to the intercepted, transmitted, or

recording conversation or communication when that testimony is unaided by information obtained solely by violation or RCW 9.73.030.

(Emphasis supplied.)

As can be seen the compliance provisions of the Privacy Act are complex and intricate. If they are not complied with, then any evidence obtained during the course of such a violation of the act must be suppressed. The trial court was not given that opportunity due to defense counsel's error.

The scenario used by "Net Nanny" is all about deception. Mr. Borseth points out that the WSP's violation of the Act constitutes a felony. (RP 460, ll. 16-22; RP 461, ll. 5-13)

RCW 9.73.230(10) states:

Any person who intentionally intercepts, transmits, or records or who intentionally authorizes the interception, transmission, or recording of a conversation or communication or communication in violation of this section, is guilty of a class C felony punishable according to Chapter 9A.20 RCW.

It is Mr. Borseth's position that the "Net Nanny" operation constitutes outrageous police conduct requiring dismissal of the charges.

The doctrine of outrageous police conduct must be sparingly applied and used only in the most egregious situations. ... Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. [Citations omitted.]

Practical considerations require that in the performance by police of crime detection duties, at least some deceitful practices and a limited participation in unlawful practices be tolerated and recognized as lawful.

*State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014).

Practical considerations aside, the intent behind the Privacy Act must prevail.

Washington's privacy act, chapter 9.73 RCW, places great value in the privacy of communications. *State v. Christensen*, 153 Wn.2d 186, 199-200, 102 P.3d 789 (2004). The act "tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." *Id.* at 199.

*Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 457, 139 P.3d 1078 (2006).

Whether or not the actions of the WSP in Mr. Borseth's case arise to the level of outrageous conduct depends upon all the facts and circumstances.

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 bar the government from invoking judicial processes to obtain a conviction. *United States v. Russell*, 411 U.S. 423, 431-32, 98 S. Ct. 1637, 36 L. Ed.2d 366 (1973) .... But such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause.

*State v. Markwart, supra*, 348.

Thus, the question becomes whether or not the WSP's "Net Nanny" operation, in violating the Privacy Act and thereby committing a class "C" felony, impinged Mr. Borseth's due process right to be treated fairly in the course of judicial proceedings.

... [T]o aid courts in the evaluation of government misconduct, a court should review several factors:

[(1)] whether the police conduct instigated a crime or merely infiltrated ongoing criminal activities; [(2)] whether the defendant's reluctance to commit a crime was overcome by ... persistent solicitation; [(3)] whether the government controls the criminal activity or simply allows for the criminal activity to occur; [(4)] whether the police motive was to prevent crime or protect the public; [(5)] whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

*Lively*, [*State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996)]  
at 22 (citations omitted.).

*State v. Markwart, supra*, 351.

Mr. Borseth was not engaged in ongoing criminal activity. In fact, there was no criminal activity until the “Net Nanny” operation was put in place.

Mr. Borseth contends that the actions of the WSP in pursuing him was not to prevent a crime, but to induce the commission of a crime.

The WSP was in full control of the situation. It had established all of the criteria for “Net Nanny.”

Once an individual had answered the “Net Nanny” ad there was a persistent solicitation by WSP personnel to keep the person interested/involved.

As previously noted, the WSP was engaged in criminal activity when it violated the Privacy Act.

The WSP also violated RCW 9.68A.101(1) which states:

A person is guilty of promoting commercial sexual abuse of a minor if he ... knowingly advances commercial sexual abuse or a sexually explicit act of a minor ....

RCW 9.68A.101(3)(a) defines “advances commercial sexual abuse of a minor” as:

... if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor ... or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

The WSP was acting to procure or solicit a customer for commercial sexual abuse of a minor through the fake Mom scenario.

The WSP also engaged in conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

“Net Nanny” should not be the type of investigation condoned by the public or by the courts. The violations accruing in Mr. Borseth’s case amounted to outrageous police conduct and Mr. Borseth’s constitutional rights were ignored.

## II. COUNT II

Count II of the Information states:

**ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR**, committed as follows: That the defendant, **JASON LEE FISHEL**, in the State of Washington, on or about July 07, 2016, with intent to commit the crime of **COMMERCIAL SEXUAL ABUSE OF A MINOR** as set out in RCW 9.68A.100(1), committed an act which was a substantial step toward that crime, by attempting to then and there pay or agree to pay a fee to a minor or a third person pursuant to an understanding that in return therefore said minor would engage in sexual conduct with him **and/or** by attempting to then and there solicit [,] offer, and request to engage in sexual onduct [*sic*] with a minor in return for a fee.

Count II is based upon RCW 9.68A.100(1). There are three (3) subsections to the statute. They constitute alternative means of committing the crime. The first subsection is inapplicable and was not charged.

Subsection (b) states:

He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her  
....

Subsection (c) states: “He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.”

Mr. Borseth engaged in e-mails, text messages and a telephone conversation with WSP undercover officers. Those discussions included references to “contributions,” “donations,” “cash,” and “meth.”

No specific agreement was reached during the conversations as to what Mr. Borseth would actually provide. The indications were that he would bring both cash and meth.

There are two (2) aspects to Mr. Borseth’s argument concerning the viability of RCW 9.68A.100(1) under the facts and circumstances of his case.

Initially, in the absence of a set fee, no contractual agreement of any kind was reached. There were preliminary discussions. Preliminary discussions do not a contract make.

Contracts come in two forms: bilateral and unilateral. The vast majority of contracts are bilateral, where two parties exchange reciprocal promises and one party’s promise provides consideration for that of the other party. *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525(1950). In a unilateral contract, however, only one party makes a promise. The second party may accept that promise and establish a unilateral contract only through performance of her end of the bargain. *Id.*

*Storti v. University of Washington*, 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014).

Under the facts and circumstances of Mr. Borseth’s case the State would have to establish a unilateral contract based upon the charge being an attempt.

“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). The intent required is the intent to accomplish the criminal result of the base crime. *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). We look to the definition of the base crime for the requisite criminal result. *See id.* A substantial step is an act that is “strongly corroborative” of the actor’s criminal purpose. [*State v. Luther*, 157 Wn.2d 63, 134 P.3d 205 (2006)] at 78.

*State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).

The second aspect is whether or not there was a substantial step by Mr. Borseth to perform his end of the agreement.

As previously stated, no specific fee was agreed upon.

Mr. Borseth arrived at the meet location with cash and methamphetamine. He and the fictitious mother were going to smoke the meth. There was no agreement as to a fee for sexual contact with the imaginary minor.

Mr. Borseth's argument gains credence from the fact that LAWS OF 2017, Ch. 231, § 3 amended RCW 9.68A.100(1) removing the word "fee" from the various subsections and substituting the phrase "provides anything of value" in subsection (a), "provides or agrees to provide anything of value" in subsection (b), and in subsection (c) sets out "in return for anything of value."

Methamphetamine is not a fee.

A "fee" is "**1.** a charge or payment for professional services .... **2.** a sum paid or charged for a privilege .... **Syn. 1.** stipend, salary, emolument; honorarium." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

Under RCW 9.68A.100(1)(b) no fee was paid. No agreement as to a fee was reached.

As to subsection (c) the language is ambiguous at best. It appears to mean that the individual must request a fee in order to "engage in sexual conduct with a minor."

No such request was made by Mr. Borseth.

Moreover, under the rule of lenity any ambiguity in a criminal statute must be construed against the State and in favor of the defendant. *See: State v. Baker*, 194 Wn. App. 678, 684, 378 P.3d 243 (2016).

Thus,

... 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*.”

*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

### **III. RCW 9.68A.100(1) - ALTERNATIVE MEANS**

Criminal defendants have the right to a unanimous jury verdict. WASH. CONST. art. I, § 21. In alternative means cases, where the criminal offense can be committed in more than one way, we have announced a rule that an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence. But when insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

*State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015).

As previously noted, Mr. Borseth asserts that RCW 9.68A.100(1) is an alternative means offense. Since it is an alternative means offense, the State was required to prove each of the alternatives set forth in the Information and instructions.

In the event that the State counters that attempted commercial sexual abuse of a minor is not an alternative means crime Mr. Borseth points to the conclusion in *Sandholm* at 734 which states:

... [T]he statutory analysis focuses on whether each alleged alternative describes “*distinct acts* that amount to the same

crime.” [*State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010)] at 770. The more varied the criminal conduct, the more likely the statute describes alternative means.

The State did not make any election in its closing argument. The evidence presented at trial does not establish that subparagraph (c) of RCW 9.68A.100(1) was proven. There was insufficient evidence to indicate that Mr. Borseth was soliciting, offering, or requesting to engage in sexual conduct with a minor in return for receiving a fee.

Rather, what the State established insofar as that alternative is concerned is a violation of RCW 9.68A.101 (promoting commercial sexual abuse of a minor) which was committed by the WSP. (Appendix “A”)

Even though a unanimity instruction is not required in an alternative means case, the State still failed to elect and/or prove beyond a reasonable doubt each alternative means that was charged.

There are ... two alternative approaches to the *Petrich* [*State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)] rule which have relevance in this case. The first is known as the “alternative means” approach, where a single offense may be committed in more than one way. In this situation, there must be jury unanimity as to guilt for the single crime charged. *Kitchen* [*State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988)] at 410. **Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means.** *Kitchen*, at 410. These cases usually involve a charge under a statute which contains several alternative ways of committing one crime, and the defendant has been charged with conduct which may fulfill more than one alternative. [Citations omitted.]

*State v. Crane*, 116 Wn.2d 315, 325-26, 804 P.2d 10 (1991). (Emphasis supplied.)

#### IV. ER 404(b)

Defense counsel's failure to request an ER 404(b) hearing in connection with the State's proposed use of other contacts by Mr. Borseth on Craigslist was ineffective assistance of counsel.

The prior contacts on Craigslist had nothing to do with minor children. It appears that the sole purpose of bringing that evidence into play was to prejudice Mr. Borseth in the minds of the jurors.

Homosexual activity is not readily accepted within most areas of society. No inquiries were made of the jurors concerning their feelings concerning homosexual acts.

Mr. Borseth recognizes that evidentiary errors are not of constitutional magnitude. However, if there is a reasonable probability that they materially have an impact on the outcome of the trial they should be considered. *See: State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Mr. Borseth asserts that this aspect of his appeal needs to be considered in connection with the prosecutorial misconduct in closing argument. The prosecutorial misconduct involved comments upon his credibility. *See: infra*.

Evidence of a criminal defendant's prior bad acts "is objectionable not because it has an appreciable probative value but because it has too much." 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1212 (Peter Tillers rev. ed. 1983). It presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charge, but because of the jury's overreliance on past acts as evidence of his character and propensities. This potential for prejudice from admitting prior acts is "at its highest" in sex offense cases. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)).

*State v. Slocum*, 183 Wn. App. 438, 442, 333 P.3d 541 (2014).

Even though homosexual activity may not be illegal in Washington, the nature of the act itself is prejudicial when looked at in conjunction with attempted first degree child rape. Many people would consider aberrant sexual behavior as a strong indicator of the potential for other aberrant sexual acts.

#### **V. INEFFECTIVE ASSISTANCE OF COUNSEL**

Mr. Borseth asserts that defense counsel was ineffective with regard to the following aspects of his case:

1. Failure to challenge prior misconduct evidence under ER 404(b);
2. Failure to address the correct aspects of the Privacy Act and the limitations contained in it; and
3. Failure to challenge LFOs.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. [Citations omitted.] Competency of counsel is determined based upon the entire record below. [Citations omitted.]

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The failure to challenge the ER 404(b) prior misconduct evidence was highly prejudicial to Mr. Borseth. It painted him as a deviant sexual offender.

Even though this case is a sex offense case, the evidence was propensity evidence which had no relevance to the offenses with which Mr. Borseth was charged.

Defense counsel was also ineffective by not recognizing the correct areas of the Privacy Act which should have been addressed. The cases of *State v. Roden, supra*, and *State v. Kipp, supra*, involving text messages, constitute valid precedent that should have been argued. These two (2) cases, along with *State v. Faford, supra*, are equally applicable to e-mails.

Trial counsel's failure to appropriately address these issues again highly prejudiced Mr. Borseth's defense. *See also: State v. Estes*, 188 Wn.2d 450, 460-62, 395 P.3d 1045 (2017) (defense counsel's duty to provide effective assistance includes a duty to research relevant statutes and failure to conduct that research falls below an objective standard of reasonableness when the matter is at the heart of the case); *Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 100, 351 P.3d 138 (2015) (defense counsel has a basic duty to know and apply relevant statutes and professional norms and an unreasonable failure to fulfill that duty is a constitutionally deficient performance); *Personal Restraint of Mockovak*, 194 Wn. App. 310, 322, 377 P.3d 231 (2016) (defense counsel's misunderstanding of the law supports deficient performance only where the misunderstanding results in acts or omissions adverse to the defendant); *State v. Ermert*, 94 Wn.2d 839, 850, 621 P.2d 121 (1980) (failure to cite appropriate caselaw amounts to ineffective assistance of counsel if it does not go to the theory of the case or trial tactics).

## **VI. PROSECUTORIAL MISCONDUCT**

During closing argument the prosecuting attorney attacked Mr. Borseth's credibility. Defense counsel initially objected and the trial court advised the jury that the argument of the attorneys did not constitute evidence.

... [W]hat I'm going to ask you to do when you go back to that jury room, know that Mr. Borseth told the truth in this case. He told it once when he was going through the text message, the phone call, the e-mail, and that's the only time he told the truth in this case --

MR. COMPTON: I'm going to object to that, Your Honor.

THE COURT: I'm going to remind the jury that this is closing arguments. What the attorneys say are not evidence or instructions.

MR. MARTIN: The evidence shows that you should not believe Mr. Borseth. Believe what he did, not what he said here in court.

(RP 794, ll. 3-15)

Mr. Borseth takes the position that the attack on his credibility, in conjunction with the other trial errors, served to further poison the fairness of the trial itself.

Although prosecutors have wide latitude during closing argument to draw inferences from the evidence ... it is impermissible for a prosecutor to express a personal opinion as to the credibility of the witness or the guilt of the defendant. ... To determine whether the prosecutor's expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context:

"It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument,

and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing inference from the evidence, but is expressing a personal opinion."

*Personal Restraint of Lui*, 188 Wn.2d 525, 560-61, 397 P.3d 90 (2017), citing *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006).

In this case, defense counsel having objected, and the trial court having cautioned the jury, the prosecuting attorney immediately returned to giving an opinion on Mr. Borseth's credibility. The act should not be condoned.

## **VII. SENTENCING ISSUES**

### **A. "Same Criminal Conduct"**

Two crimes manifest the "same criminal conduct" only if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." [RCW 9.94A.589(1)(a)]. As part of this analysis, courts also look to whether one crime furthered another. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); see also *State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

*State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

Counts I and II involve the same victim. Either the public is the victim or the imaginary/non-existent child is the victim.

Counts I and II also involve the same criminal intent. The alleged intent is to have sexual contact/sexual intercourse with a minor child. Each offense appears to be a strict liability offense.

The trial court indicated that the offenses did not occur at the same time and place. (RP 837, ll. 4-21) The trial court is in error. The attempted rape of a child occurred when

Mr. Borseth arrived at the location. He arrived with money and methamphetamine. The money and the methamphetamine were to be exchanged at that time for the sexual act.

The trial court indicated that the events relating to Count II occurred during the text messaging and telephone conversation. Yet, the substantial step for the alleged attempt did not occur until upon arrival.

The underlying facts relating to Count II furthered Count I.

Mr. Borseth recognizes that “[t]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *State v. Aldana Graciano, supra*, quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

As the Court noted in *State v. Garza Villarreal, supra*, 46-47:

In *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987) ... we directed:

(I)n deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next .... [P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.

*Dunaway*, 109 Wn.2d at 215. In *Dunaway*, we also required concurrent offenses involving the same victim to be classified as the same criminal conduct. *Dunaway*, 109 Wn.2d at 215 (overruling *State v. Edwards*, 45 Wn. App. 378, 725 P.2d 442 (1986)). We reaffirmed the *Dunaway* furtherance test in *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

The trial court also indicated that Mr. Borseth’s intent was not the same as to each crime. Again, the trial court is in error. The intent for each offense was a specific intent based upon the offenses being charged as attempts.

Count I was the specific intent to rape a minor child.

Count II was the specific intent to pay for the opportunity to have sexual contact with a minor child.

Sexual conduct, as relates to Count II encompasses both sexual contact and sexual intercourse. (Instruction 17; Appendix “B”)

### **B. Enhancement**

The trial court imposed a twelve (12) month enhancement on Count II pursuant to RCW 9.94A.533(9) which provides, in part:

... If the offender is being sentenced for an anticipatory offense for the felony crime of RCW 9A.44.073 ... and the offender attempted ... to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, “sexual conduct” means sexual intercourse or sexual contact, both as defined in Chapter 9A.44 RCW.

The problem with imposition of the enhancement is that Mr. Borseth was never given notice that the State was going to seek it.

Due process requires that appropriate notice be given to a criminal defendant. Due process requires that a defendant be notified of all essential elements of a crime.

The State violated Mr. Borseth’s constitutional rights under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22.

No notice was included in the Information.

No notice was provided separately from the Information.

Sentencing enhancements ... must be included in the information. *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981). When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an “element” of a greater offense than the one covered by the

jury's guilty verdict. [Citation omitted.] ... Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements. See *State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information).

*State v. Recuenco*, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008).

The twelve (12) month enhancement was erroneously imposed by the trial court.

### **C. Legal Financial Obligations (LFOs)**

The Legislature enacted LAWS OF 2018, Ch. 269 effective June 7, 2018. The enactment related to LFOs. Significant changes occurred as a result of the enactment. Mr. Borseth contends that the trial court imposed two (2) fees that are no longer authorized. The first of those fees was the \$200.00 criminal filing fee. The filing fee can no longer be imposed on an indigent criminal defendant.

LAWS OF 2018, Ch. 269, § 17 provides:

Clerks of superior courts shall collect the following fees for their official services ... (h) Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).

The trial court determined that Mr. Borseth was indigent. The \$200.00 fee must be removed from the judgment and sentence.

The other cost imposed by the trial court is set forth in RCW 9.68A.105(1)(a) which states:

In addition to penalties set forth in RCW 9.68A.100, 9.68A.101, and 9.68A.102, an adult offender who was either convicted or given a deferred sentence or a deferred prosecution or who has entered into a statutory or non-statutory diversion agreement as a result of an arrest for violating

RCW 9.68A.100, 9.68A.101, or 9.68A.102, or a comparable county or municipal ordinance shall be assessed a five thousand dollar fee.

RCW 9.68A.105(1) continues and under subsection (b) provides:

The court may not reduce, waive, or suspend payment of all or part of the fee assessed unless it finds, on the record, that the adult offender does not have the ability to pay in which case it may reduce the fee by an amount up to two-thirds of the maximum allowable fee.

One-third of five thousand dollars is one thousand six hundred and fifty dollars.

This is the amount imposed by the trial court.

The fee set forth in RCW 9.68A.105(1)(a) does not amount to restitution. It is equivalent to a cost/fine. A telling fact why it is equivalent to a cost/fine is set out in RCW 9.68A.105(2) which provides, in part:

Fees assessed under this section shall be collected by the clerk of the court and remitted to the treasurer of the county where the offense occurred for deposit in the county general fund .... Revenue from the fees must be used for local efforts to reduce the commercial sale of sex including, but not limited to, increasing enforcement of commercial sex laws.

Moreover, subparagraph (2)(c) of RCW 9.68A.105 directs that the revenues from the fees are not subject to “RCW 3.50.100, 3.62.020, 3.62.040, 10.82.070, or 35.20.220.”

LAWS OF 2018, Ch. 269, § 6 amended RCW 10.01.060 and stated in subsection (3):

The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).

This language is repeated throughout LAWS OF 2018, Ch. 269.

Even though the enactment does not specifically address RCW 9.68A.105, the intent behind the enactment must be given effect. The intent is to relieve convicted indigent

defendants from the unnecessary burden of LFOs with minor exceptions. The exceptions being the \$500.00 crime victim assessment and the \$100.00 DNA fee.

In addition, the trial court did not comply with the mandate of *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). The mandate requires that the trial court, at sentencing, make an adequate individualized inquiry into the defendant's ability to pay LFOs. *See: State v. Ramirez*, 191 Wn.2d 732 (2018).

### **VIII. CUMULATIVE ERROR**

It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. [Citations omitted.] Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. [Citations omitted.] Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. [Citations omitted.] Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. [Citations omitted.]

*State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Mr. Borseth asserts that both constitutional and nonconstitutional error occurred.

The error(s) consisted of:

1. Outrageous conduct by law enforcement;
2. Violation of Chapter 9.73 RCW (Privacy Act);
3. Admission of improper ER 404(b) prior misconduct evidence;
4. Failure to prove a charged alternative means;
5. Ineffective assistance of counsel; and
6. Prosecutorial misconduct in closing argument.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

*State v. Moses*, 193 Wn. App. 341, 367, 372 P.3d 147 (2016).

## CONCLUSION

Jason Lee Borseth was improperly convicted of attempted first degree child rape and attempted commercial sexual abuse of a minor.

The evidence adduced at trial derives from the State's violation of the Privacy Act. In the absence of the e-mails and text messages the State's case lacked sufficient evidence to prove either offense beyond a reasonable doubt.

WSP's gathering of the evidence constitutes outrageous governmental misconduct in violation of Mr. Borseth's constitutional rights under the Fourth and Fourteenth Amendments, as well as Const. art. I, §§ 7 and 22.

Mr. Borseth was denied effective assistance of counsel under the Sixth Amendment and Const. art. I, § 22. Defense counsel's performance fell short of that required of a reasonably competent attorney presented with the same set of facts and circumstances. The failure of defense counsel to recognize the Privacy Act violations; to challenge ER 404(b) prior misconduct evidence; and allowing improper assessment of LFOs all served to prejudice Mr. Borseth's right to a fair and impartial trial, including his right to privacy.

The prosecuting attorney's closing argument was detrimental to Mr. Borseth's defense when he made repeated comments on Mr. Borseth's credibility.

Cumulative error deprived Mr. Borseth of a fair and impartial trial.

In the event Mr. Borseth's convictions on Counts I and II are not reversed or dismissed, then multiple sentencing errors must be corrected.

DATED this 28<sup>th</sup> day of February, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

## **APPENDIX “A”**

Effective date—2013 c 302: See note following RCW 9.68A.090.

Findings—Intent—1999 c 327: See note following RCW 9A.88.130.

### Historical and Statutory Notes

#### 2010 Legislation

Laws 2010, ch. 289, § 13, in subsec. (2), substituted “class B felony” for “class C felony”.

#### 2013 Legislation

Laws 2013, ch. 302, § 2, inserted subsec. (4) and redesignated former subsec. (4) as subsec. (5).

#### 2017 Legislation

Laws 2017, ch. 231, § 3, in subsec. (1)(a), substituted “provides anything of value” for “pays a fee”; in subsec. (1)(b), substituted “provides or agrees to provide anything of value” for “pays or agrees to pay a fee”; and in subsec. (1)(c), substituted “anything of value” for “a fee”.

### Cross References

Limitation of actions, see § 9A.04.080.

### Law Review and Journal Commentaries

Free Lolita! The contradictory legal status of Seattle’s prostituted youth. Omeara Harrington, 9 Seattle J. for Soc. Just. 401 (2010).

### Research References

#### Treatises and Practice Aids

11 Washington Practice Series WPIC 48.20, Commercial Sexual Abuse of a Minor-Definition.  
11 Washington Practice Series WPIC 48.21, Commercial Sexual Abuse of a Minor-Elements.  
13B Washington Practice Series § 2501, Statutory Definitions-Crimes.

13B Washington Practice Series § 2502, Additional Statutory Definitions.

16A Washington Practice Series § 27:22, Remedies and Procedure.

### Notes of Decisions

Construction with other laws ½ 305, 242 P.3d 19. Infants ⇌ 1006(12); Sex Offenses ⇌ 16

#### ½. Construction with other laws

Statute prohibiting commercial sexual abuse of a minor was not concurrent with statute prohibiting rape of a child in the second degree, as would require State to charge defendant under the more specific statute; a person can violate the commercial sexual abuse of a minor statute by paying for sexual contact that does not fall within the definition of “sexual intercourse” and in violation of the rape of a child in the second degree statute. State v. Wilson (2010) 158 Wash.App.

#### 1. Elements of offense

State was incapable of violating statute criminalizing commercial sexual abuse of a minor, and thus state could not be held civilly liable under statute for alleged sexual exploitation of minor; statute required engaging in or an intent to engage in “sexual conduct” with a minor, yet the state could not engage in sexual intercourse or sexual contact because state was incapable of penetration, as state did not have sex organs, nor anything that could “contact” another’s sex organs, nor could anyone be “the same or opposite sex” as the

state. Ohnemus v. State (2016) 195 Wash.App. 135, 379 P.3d 142, review denied 186 Wash.2d 1031, 385 P.3d 111. Infants ⇌ 1589; Sex Offenses ⇌ 131; States ⇌ 112.2(2)

### 9.68A.101. Promoting commercial sexual abuse of a minor—Penalty—Consent of minor does not constitute defense

(1) A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act.

(2) Promoting commercial sexual abuse of a minor is a class A felony.

(3) For the purposes of this section:

(a) A person “advances commercial sexual abuse of a minor” if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

(b) A person “profits from commercial sexual abuse of a minor” if, acting other than as a minor receiving compensation for personally rendered sexual conduct, he or she accepts or receives money or anything of value pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor.

(c) A person “advances a sexually explicit act of a minor” if he or she causes or aids a sexually explicit act of a minor, procures or solicits customers for a sexually explicit act of a minor, provides persons or premises for the purposes of a sexually explicit act of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate a sexually explicit act of a minor.

(d) A “sexually explicit act” is a public, private, or live photographed, recorded, or videotaped act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons and for which anything of value is given or received.

(e) A “patron” is a person who provides or agrees to provide anything of value to another person as compensation for a sexually explicit act of a minor or who solicits or requests a sexually explicit act of a minor in return for a fee.

(4) Consent of a minor to the sexually explicit act or sexual conduct does not constitute a defense to any offense listed in this section.

(5) For purposes of this section, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW. [2017 c 231 § 4, eff. July 23, 2017; 2013 c 302 § 3, eff. Aug. 1, 2013; 2012 c 144 § 1, eff. June 7, 2012; 2010 c 289 § 14, eff. June 10, 2010; 2007 c 368 § 4, eff. July 22, 2007.]

**Official Notes**

**Finding**—2017 c 231: See note following RCW 9A.04.080.

**Effective date**—2013 c 302: See note following RCW 9.68A.090.

**Historical and Statutory Notes**

**2010 Legislation**

Laws 2010, ch. 289, § 14, in subsec. (2), substituted "class A felony" for "class B felony".

**2012 Legislation**

Laws 2012, ch. 144, § 1, in subsec. (1), twice inserted "or a sexually explicit act"; in subsec. (3), added the definitions of "advances a sexually explicit act of a minor", "sexually explicit act", and "patron".

**2013 Legislation**

Laws 2013, ch. 302, § 3, inserted subsec. (4) and redesignated former subsec. (4) as subsec. (5).

**2017 Legislation**

Laws 2017, ch. 231, § 4, in subsec. (3)(b), substituted "anything of value" for "other property"; in subsec. (3)(d), substituted "anything" for "something"; and in subsec. (3)(e), substituted "provides or agrees to provide anything of value" for "pays or agrees to pay a fee".

**Cross References**

Limitation of actions, see § 9A.04.080.

Trafficking, see § 9A.40.100.

**Law Review and Journal Commentaries**

Free Lolita! The contradictory legal status of Seattle's prostituted youth. Omeara Harrington, 9 Seattle J. for Soc. Just. 401 (2010).

**Research References**

**Treatises and Practice Aids**

11 Washington Practice Series WPIC 48.04.01, Promoting Prostitution-First Degree-Person Under 18-Elements.

11 Washington Practice Series WPIC 48.22, Promoting Commercial Sexual Abuse of a Minor-Definition.

11 Washington Practice Series WPIC 48.23, Promoting Commercial Sexual Abuse of a Minor-Elements.

11 Washington Practice Series WPIC 48.24, Advances Commer-

cial Sexual Abuse of a Minor-Definition.

11 Washington Practice Series WPIC 48.25, Advances a Sexually Explicit Act of a Minor-Definition.

11 Washington Practice Series WPIC 48.26, Sexually Explicit Act-Definition.

11 Washington Practice Series WPIC 48.27, Patron-Definition.

11 Washington Practice Series WPIC 48.28, Profits from Commercial Sexual Abuse of a Minor-Definition.

11 Washington Practice Series WPIC 49A.09, Sexually Explicit Conduct-Definition.

13A Washington Practice Series § 2101, Statutory Definitions-Crimes.

13B Washington Practice Series § 2501, Statutory Definitions-Crimes.

13B Washington Practice Series § 2502, Additional Statutory Definitions.

16A Washington Practice Series § 27:22, Remedies and Procedure.

**Notes of Decisions**

**Weight and sufficiency of evidence**

1

**1. Weight and sufficiency of evidence**

Evidence was sufficient to show that defendant knowingly advanced or profited from a minor engaged in sexual conduct, so as to support a conviction for promoting commercial sexual abuse, even though victim denied that defendant was her pimp; victim was 15 years old when she first met defendant, witness testified that victim was working as a prostitute for defendant when witness was doing the same, that victim would contact defendant each time she had a customer, and that witness saw victim give defendant the money she made from prostitution, two other witnesses also testified to the prostitution and the giving of money, and

exhibits, including text messages, also showed the victim worked as a prostitute for defendant. State v. Clark (2012) 170 Wash.App. 166, 283 P.3d 1116, review denied 176 Wash.2d 1028, 301 P.3d 1048. Infants ⇌ 1748

Evidence was sufficient to support conviction for attempted promotion of commercial sexual abuse of a minor; evidence showed that defendant asked undercover officers how old they were, that each officer told defendant that she was 17 years old, that defendant acknowledged that each officer said that she was 17, that defendant asked one officer if she was interested in working for him as a "ho," and that defendant explained to officer that her job as a "ho" was to pleasure men for money and bring money back to him. State v. Johnson (2012) 173 Wash.2d 895, 270 P.3d 591. Infants ⇌ 1590

**9.68A.102. Promoting travel for commercial sexual abuse of a minor—Penalty—Consent of minor does not constitute defense**

(1) A person commits the offense of promoting travel for commercial sexual abuse of a minor if he or she knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in what would be commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor, if occurring in this state.

(2) Promoting travel for commercial sexual abuse of a minor is a class C felony.

(3) Consent of a minor to the travel for commercial sexual abuse, or the sexually explicit act or sexual conduct itself, does not constitute a defense to any offense listed in this section.

(4) For purposes of this section, "travel services" has the same meaning as defined in RCW 19.138.021.

[2013 c 302 § 4, eff. Aug. 1, 2013; 2007 c 368 § 5, eff. July 22, 2007.]

## **APPENDIX “B”**

INSTRUCTION NO. 17

Sexual conduct means sexual contact or sexual intercourse.

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

**NO. 36230-2-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	SPOKANE COUNTY
Plaintiff,	)	NO. 16 1 02613 4
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
JASON LEE BORSETH, AKA FISHEL,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 28<sup>th</sup> day of February, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Spokane, WA 99201

E-FILE

SPOKANE COUNTY PROSECUTOR'S OFFICE

Attn: Brian O'Brian

[SCPAAppeals@spokanecounty.org](mailto:SCPAAppeals@spokanecounty.org)

E-FILE

JASON LEE BORSETH, aka FISHEL #408650

Coyote Ridge Correction Center

PO Box 769

Connell, Washington 99326

U. S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99169

Phone: (509) 775-0777

Fax: (509) 775-0776

[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

**February 28, 2019 - 11:15 AM**

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**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36230-2  
**Appellate Court Case Title:** State of Washington v. Jason Lee Borseth aka Fishel  
**Superior Court Case Number:** 16-1-02613-4

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