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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON BORSETH AKA FISHELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Is the defendant's claim that the Net Nanny Operation violated the Privacy Act, as currently presented, preserved for appeal?
2. Does the defendant's Privacy Act claim fail because the defendant implicitly consented to the recording of his texts and emails?
3. Was trial counsel ineffective for not raising the current Privacy Act claim where our Supreme Court has held that, by using text or email, a person impliedly consents to the recording of those communications?
4. Is the defendant's outrageous governmental conduct claim preserved where it is raised for the first time on appeal, and, based on the facts in the record, has he demonstrated he is entitled to relief?
5. Was a unanimity instruction necessary where the State requested and the court instructed the jury on only one "means" to commit the crime of attempted commercial sexual abuse of a minor?
6. Whether sufficient evidence exists that the defendant offered to pay a "fee" in exchange for engaging in sexual conduct with a minor?
7. Is the commercial sexual abuse of a minor statute ambiguous?
8. Whether, under ER 404(b), the trial court erred in allowing evidence that the defendant was curious about homosexual intimate relationships where there was no objection to the admission of this evidence?
9. Whether trial counsel was deficient for agreeing to the admissibility of the defendant's curiosity about homosexual relationships where counsel's closing argument establishes a reasonable trial tactic for doing so; and whether, in the absence of a legitimate trial tactic, the court would have excluded the evidence under ER 404(b)?
10. Has the defendant demonstrated the prosecutor's closing argument was flagrant and ill-intentioned such that no curative instruction could have remedied any prejudice, and whether, in any event, counsel engaged in misconduct?

11. Did cumulative error prevent the defendant from having a fair trial?
12. Did the trial court err when it determined that attempted first-degree child rape and attempted commercial sexual abuse of a minor were not the same criminal conduct for purposes of sentencing?
13. Did the trial court err by imposing a 12-month enhancement where the defendant did not receive notice that the State intended to seek the imposition of that enhancement?
14. Was the imposition of the criminal filing fee in error where the court determined the defendant to be indigent?
15. Did the trial court err in imposing the commercial sexual abuse of a minor fee of \$1,650 under RCW 9.68A.105, where recent legislative amendments to Washington's LFO scheme did not alter the mandatory imposition of this fee?

II. STATEMENT OF THE CASE

On July 12, 2016, Jason Borseth was charged in the Spokane County Superior Court with attempted first-degree rape of a child, attempted commercial sexual abuse of a minor, and possession of a controlled substance – methamphetamine. CP 16-17. The matter proceeded to trial.

As a part of a sting operation called Operation Net Nanny, Washington State Patrol Detective Carlos Rodriguez posted an advertisement on Craigslist on July 7, 2016, at 1:46 a.m., which stated:

mommy wants daddy to for son and daughters – w4m¹

¹ The term, “w4m” stands for “women for men” and is used in “casual encounters” advertisements on Craigslist. RP 368.

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,² name, and daddy in the title when you respond so I know you are not a bot.³ we appreciate generosity. If you want a unique fun experience then hmu.⁴

RP 397; Ex. P2.

Approximately two hours later, Borseth responded to the advertisement by email, indicating he was looking to have “some fun”; he included a close-up photograph of his face and a photograph of his fully naked body. RP 399-401; Ex. P3, P37, P38. Posing as the mother, named “Jay,” Rodriguez conversed with Borseth via email, responding on July 7, 2016, at 9:07 a.m. RP 401. “Jay” told Borseth “she” needed to know “what [his] restrictions are,” indicating “young taboo⁵ here,” with “two young girls and a son”; “Jay” stated that “[her] [thing] is watching, so this is only about them.” RP 401. Borseth responded, “How old are they? Got pics?” RP 403.

The two continued their conversation by text message. RP 403. In the texts, “Jay” confirmed that Borseth was not related to law enforcement, again asked the defendant about his restrictions, and stated that “she” grew up in a

² The term, “a/s/l” stands for “age, sex, location.” RP 397.

³ A “bot” is a computer program that attempts to lure internet users to other websites. RP 380.

⁴ The term, “hmu” stands for “hit me up” or “contact me.” RP 386.

⁵ When used on Craigslist, “taboo” usually refers to “something that isn’t generally accepted in society”; like “defecating on somebody...sex, bondage, doing things with animals, pretending to do certain things, [or] sex with children.” RP 378.

“close family”⁶ and was close with her father and brother. Ex. P4 at 1. Borseth asked if “Jay” was affiliated with law enforcement. Ex. P4 at 1. “Jay” asked Borseth if he “like[d] young”; Borseth replied, “never have done it. I like girls. I bet young is tasty. How young?” Ex. P4 at 1. “Jay” told Borseth that the youngest “child” was 6 years old and was “not very active [with] a lot of restrictions”; the oldest “daughter” was almost 12, “very mature and [likes] everything she has tried”; the “son” was 12.⁷ Ex. P4 at 1. Borseth replied, “not [the] little one for sure,” and asked how old the “mother” was. Ex. P4 at 2. “Jay” responded that she was in her 30s, and stated that “unless you are really 12 then [sic] you won’t do it for me.” Ex. P4 at 2. Borseth asked for a picture, and inquired “what has she done?” “Jay” replied “she hasn’t done everything. good with toys...” Ex. P4 at 2.

Borseth asked to meet that night and “Jay” replied, “I’ll need to talk to you first. to go over rules. are you good with gifts or donations???” and she is available tonight...”⁸ Ex. P4 at 2. Borseth asked, “how much?” and “Jay” replied, “depends on what you want and [what] you look like...anything

⁶ In the detective’s training, “close family” refers to sexual relationships with family members. RP 410. By text, Borseth asked Jay, “How close were you with your dad[?]” and “Jay” responded, “very...he taught me about sex from when I was little...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...” Ex. P4 at 6-7.

⁷ “Jay” explained to Borseth that “she” “liked” young boys. Ex. P4 at 1-2.

⁸ “Gifts and donations” are code words for receiving money or other payment in return for the sex act. RP 416.

helps.” Ex. P4 at 2. Borseth asked, “do you get high?...I’ll get you high.” Ex. P4 at 2. The two discussed the types of drugs “Jay” used. Ex. P4 at 2. “Jay” asked, “what are you offering and what do you want[?] be honest or this wont work.” Ex. P4 at 2. “Jay” sent a picture of her “daughter,” who was actually an undercover officer. Ex. P4 at 2; RP 420. Borseth responded, “she’s a cutie.” Ex. P4 at 3. “Jay” told Borseth, “we are [an] open minded family” and stated, “you can’t have sex with just me. This is about my daughter.” Ex. P4 at 3-4. Borseth again asked whether “Jay” was law enforcement, and told her he had cash, methamphetamine, and he was “in it for the adventure.” Ex. P4 at 3-4.

Later that day, Borseth and female officers, Kristl Pohl and Anna Gasser, talked by telephone. RP 494. The call was placed by the State Patrol to Borseth, and was recorded. Ex. P8, P9. During that conversation, Detective Pohl, as “Jay,” told Borseth, “this is not something that everybody understands.” Ex. P9 at 3. Pohl then discussed her “rules” for “Anna”; i.e., the experience must be fun and painless, condoms and lubricant must be used, and anal sex was not allowed; she asked Borseth to bring the condoms and lubricant. Ex. P9 at 5. Borseth asked if “Jay” would “play around too” and “Jay” reiterated that she was only interested in young boys. Ex. P9 at 5. “Jay” warned Borseth that “Anna” “hasn’t had full penetration,” and Borseth replied, “I don’t want her to do anything she don’t wanna do.” Ex. P9 at 6.

Again, by text, Borseth sent “Jay” additional nude photos, including one of his erect penis. Ex. P4 at 5-6. “Jay” told Borseth “Anna likes the pics. She’s excited.” Ex. P4 at 7. Borseth asked what “Anna” “wanted to do.” “Jay” told Borseth that “Anna” “likes learning new things...but will need a lot of direction.” Ex. P4 at 7. Borseth offered to help. Ex. P4 at 7. “Jay” said “Anna” wanted to know what Borseth’s “favorite thing is” and Borseth replied, “Getting my face and cock rode.” Ex. P4 at 7. “Jay” said “Anna” had never done either, and Borseth replied, “She’s about to.” Ex. P4 at 7.

Borseth, “Jay” and “Anna” arranged for Borseth to go to the residence where “Jay” and “Anna” lived. Ex. P4 at 9-13. He was arrested when he entered the residence. RP 587. On his person, law enforcement officers found drug syringes, cotton balls, methamphetamine,⁹ \$135 cash, lubricant, condoms,¹⁰ and a “Rhino” pill.¹¹ RP 531.

Borseth agreed to speak with law enforcement after his arrest.¹² RP 548; Ex. P11. He told law enforcement that he did not come to the residence

⁹ Jayne Wilhelm, a forensic scientist with the Washington State Patrol Crime Lab, confirmed this substance to be methamphetamine. RP 622-25.

¹⁰ Surveillance located at a 7-11 store revealed the defendant purchasing the condoms immediately prior to proceeding to “Jay’s” house. RP 582.

¹¹ The Rhino pill indicated “one pill up to seven days” and indicated its use was for “stamina, size and time.” RP 534.

¹² The defendant was advised of his constitutional rights before questioning began, and the Court ruled his statements admissible at trial during a CrR 3.5 hearing. CP 237-240 (Supplemental Designation is being filed contemporaneously herewith

to see the little girl, but rather, to dissuade the mother from engaging her daughter in sexual activity. *E.g.*, Ex. P12¹³ at 6. He claimed that he was interested in having sex with the mother, not the child. *E.g.*, Ex. P12 at 45-46. He claimed that he believed “Jay” was flirting with him.¹⁴ *E.g.* Ex. P12 at 48. When asked about his Craigslist use, among other things, Borseth stated, “I’m curious about guys...I haven’t done nothing, but I had some ads on there (Unintelligible) guys, for guys, you know.” Ex. P12 at 29. The interviewing detective replied, “we live in an age right where it doesn’t really matter. So you’re a little bi-curious, bi-sexual?” Borseth agreed. Ex. P12 at 30. He again denied being “into young girls,”¹⁵ Ex. P12 at 30, but told police that he had met a lot of people online, had hung out with them, but did “not always have sex with them.” Ex. P12 at 27.

designating the Findings of Fact and Conclusions of Law on 3.5 Hearing filed July 11, 2018, along with additional exhibits.)

¹³ Exhibit P12 was admitted for the CrR 3.5 hearing. The jury was not provided this exhibit, but it was identified by the Detective as an accurate copy of the video/audio that was played for the jury at trial. RP 553-55. For the convenience of this Court, the State refers to Exhibit P12 for the statements defendant made during questioning, but also has designated P43, the recording of the interview, for this Court’s review.

¹⁴ Defense counsel inquired on cross-examination about several instances in which Borseth appeared to “be hitting on” “Jay” rather than “Anna.” RP 466-71. In order to avoid arresting individuals who only wish to have sex with the adult “mother,” law enforcement attempts to be very explicit and “cover multiple times” that the offer is only for a sexual relationship with children. RP 513.

¹⁵ Borseth similarly testified at trial that he did not plan on having sex with the purported child, and that he did not intend to pay to have sex with a child. RP 635. He agreed that he possessed methamphetamine at the time of his arrest. RP 637.

Prior to trial, among other things, the defendant moved to suppress the recording of his telephone conversation with “Jay,” based upon a violation of the Washington State Privacy Act. CP 86-93. The trial court denied this motion. RP 91.

The defendant was convicted of all three offenses after a jury trial. CP 189-91. The defendant argued that the three offenses constituted the same criminal conduct for purposes of sentencing. CP 210-11; RP 831-33, 837-37. On July 11, 2018, the trial court sentenced Borseth, declining to find the offenses constituted the same criminal conduct, and imposed a term of total confinement of 108.75 months. CP 219, 222; RP 837.¹⁶ The court imposed 96.75 months on count 1, attempted rape of a child, and an enhancement of 12 months under RCW 9.94A.533(9) for sexual conduct with a minor for a fee. CP 222. It found the defendant to be indigent, and, without objection, imposed legal financial obligations in the amount of \$2,450 (\$500 Crime Victim Assessment, \$200 criminal filing fee, \$100 DNA fee, and \$1,650 commercial sexual abuse of a minor fee under RCW 9.68A.105). CP 224-25. The defendant timely appealed.

III. ARGUMENT

A. THE DEFENDANT’S CLAIM THAT THE NET NANNY OPERATION VIOLATED THE PRIVACY ACT WAS NOT

¹⁶ The offense was subject to indeterminate sentencing under RCW 9.94A.507. RP 829.

PRESERVED; IN ANY EVENT, THE DEFENDANT IMPLICITLY CONSENTED TO THE RECORDING; DEFENSE COUNSEL WAS NOT INEFFECTIVE.

1. The defendant's Privacy Act claim was not preserved.

It is a fundamental rule of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. In *Strine*, the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Strine, 176 Wn.2d at 749-50 (internal citations omitted).

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless, among other things not applicable here, the claim involves a manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants

a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). To establish that the alleged constitutional error is reviewable, the defendant must demonstrate the error is “manifest.” Here, any statutory error relating to a violation of the Privacy Act was not manifest (or constitutional), as required by the rule.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O’Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant’s claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the court below should have *sua sponte* addressed the Privacy Act issue. Perhaps this is why the defendant also claims ineffective assistance of counsel for trial counsel’s failure to “properly argue” the Privacy Act claim.

2. Washington State’s Privacy Act.

Washington State’s Privacy Act provides:

(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,¹⁷ or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other 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 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.

RCW 9.73.030(1)(a)-(b).

A communication is private¹⁸ under the Act “(1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014) (citing *Townsend*, 147 Wn.2d at 673). Proof of subjective intent need not be explicit. *Kipp*, 179 Wn.2d at 729. The reasonable

¹⁷ This is not an interception case – the defendant communicated directly with law enforcement, although he did not know he was doing so.

¹⁸ The Court has adopted a dictionary definition of the word “private”: “belonging to one’s self ... secret ...intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.” *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (alterations in original; citations omitted).

expectation standard is determined on a case-by-case basis. *Id.* (citing *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996)). Factors to consider when evaluating whether there was a reasonable expectation of privacy include “the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party.” *Kipp*, 179 Wn.2d at 729 (citing *State v. Clark*, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996)).¹⁹

Courts consider four prongs when analyzing an alleged Privacy Act violation: whether there was “(1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private communication.” *State v. Roden*, 179 Wn.2d 893, 899, 321 P.3d 1183 (2014). When the facts are undisputed, the question of whether a particular communication is private is a matter of law reviewed de novo. *Kipp*, 179 Wn.2d at 722-23.

In *Townsend*, our Supreme Court held a defendant implicitly consents to his e-mail messages being recorded because e-mails must be

¹⁹ The Court has found that information willingly imparted to an unidentified stranger falls outside the protection of the Act. *Clark*, 129 Wn.2d at 228.

recorded in order to be useful. 147 Wn.2d at 676. The Supreme Court adopted the observation of this Court that:

A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer.

Id. at 676.

Because Townsend had to understand that his e-mails would be recorded on the computer of the recipient, he was deemed to have consented to the recording. *Id.* The Court held the same to be true of instant messenger messages. *Id.* In the current appeal, the defendant fails to cite to, or distinguish *Townsend*.

The recent decision in *State v. Racus*, 7 Wn. App. 2d 287, 433 P.3d 830 (2019), involved a sting operation, much like that at issue in Borseth's case. Like Borseth, Racus communicated by emails and texts with an undercover officer posing as a mother who also advertised that she was "[l]ooking for a close family connection." *Id.* at 291. Racus' communications indicated that he was interested in meeting the mother and her children for sex. *Id.* Racus claimed, as Borseth does now, that his email

and text communications were private,²⁰ and that he did not consent to those communications being recorded. *Id.* The trial court determined that Racus had implicitly or impliedly consented to the recording of the communications. *Id.* *Racus* relied heavily on *Townsend* in upholding the trial court’s determination that Racus had impliedly consented to the texts and emails being recorded. *Id.* at 299. Although *Racus* was published a mere month before Borseth filed his opening brief,²¹ defendant fails to distinguish (or mention) that decision.

Here, as in *Racus* and *Townsend*, the defendant implicitly consented to the recording of his text messages and emails – those technologies simply do not function as intended if they do not create a record of the communication. Because the defendant implicitly consented to the recording of the conversations, the Net Nanny operation did not violate the Privacy Act. The defendant’s argument that law enforcement’s conduct violated RCW 9.73.230(10), and amounted to a felony, is also unfounded.

²⁰ The *Racus* court determined that the defendant’s communications were “private” under the WPA. In this case, the State does not concede that Borseth’s messages were “private,” given that “Jay” repeatedly told Borseth that she was sharing them with “Anna.” The presence of a third-party to a conversation undercuts any claim that the conversation was “private.” *See, e.g., Clark*, 129 Wn.2d at 224-27.

²¹ *Racus* was published on January 23, 2019. Mr. Borseth’s opening brief was filed on February 28, 2019.

3. Defense counsel was not ineffective for failing to raise the Privacy Act claim as now raised on appeal.

The defendant raises several claims for the first time on appeal, such as this Privacy Act issue, acknowledging that those claims were not raised below. As a result, the defendant also claims trial counsel was ineffective for failing to address those issues at trial. Because these ineffective assistance claims are inextricably tied to the underlying claim of error, where necessary, this brief will address both issues together.

This Court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A court's scrutiny of defense counsel's performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36. To rebut this presumption, the defendant bears the burden to show the absence of any

“conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel’s deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

Here, trial counsel did not challenge the admissibility of the emails and text messages exchanged between the defendant and “Jay” under the Privacy Act. Instead, defense counsel argued that the telephone conversation between the two should be excluded because there was not probable cause to believe that the defendant was engaging in the commercial sexual abuse of a minor under RCW 9.68.100, and therefore, under the Privacy Act, RCW 9.73.020, could not be recorded absent two-party consent. CP 85-93. Defense counsel was not deficient in this regard.

Townsend was good law at the time of trial. Defense counsel is not deficient for relying on the decisions of our Supreme Court in deciding whether to file a motion on a defendant’s behalf. Furthermore, the defendant’s claim fails because he has not demonstrated that, had counsel filed the Privacy Act motion, the trial court likely would have granted the motion. *See, e.g., State v. D.E.D.*, 200 Wn. App. 484, 490, 402 P.3d 851

(2017) (trial counsel’s performance can only be considered deficient for failure to file a motion if the trial court would likely have granted the motion). As explained above, *Townsend* unambiguously holds that a person implicitly consents to the recording of his or her text and email conversations. *Racus* reiterates this holding. Had counsel filed such a motion, the defendant would not have been afforded any relief. Therefore, this claim fails.

B. THE DEFENDANT’S OUTRAGEOUS GOVERNMENTAL CONDUCT CLAIM FAILS BECAUSE IT WAS NOT PRESERVED AND IS WITHOUT MERIT.

The defendant claims that the alleged violation of the Privacy Act and the claimed felony offense perpetrated by law enforcement by violating the Act, dispensed with above, constituted outrageous governmental misconduct. Br. at 19. This claim is also unpreserved and has no merit.

1. This claim is unpreserved.

As previously discussed, under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right. Despite the fact that an outrageous governmental misconduct claim bears on whether a defendant’s constitutional right to due process and fundamental fairness have been violated, this claim must still be raised in the trial court unless it is “manifest” that the governmental conduct could not and should not be

condoned by any court. The defendant has failed to demonstrate how his outrageous governmental misconduct claim was “manifest,” and should be considered for the first time on appeal.²²

2. The claim of outrageous governmental misconduct has no merit.

A court may dismiss a criminal charge where the State is found to have engaged in outrageous misconduct in violation of a defendant’s due process right to fundamental fairness. *State v. Solomon*, 3 Wn. App. 2d 895, 909, 419 P.3d 436 (2018). The due process clause of the Fourteenth Amendment to the United States Constitution protects against conduct by state actors that is “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). To meet this standard, the conduct “must be so shocking that it violates fundamental fairness.” *State v. Lively*, 130 Wn.2d

²² That this alleged error must be raised in the trial court is supported by CrR 8.3(b) which reads, in relevant part:

The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.

“This rule codifies, in part, the due process requirement that a prosecution be dismissed upon outrageous conduct of law enforcement.” *State v. Markwart*, 182 Wn. App. 335, 348, 329 P.3d 108 (2014). The defendant failed to comply with the court rule requirement that notice of the claim be given, and a hearing in the superior court be held.

1, 19-20, 921 P.2d 1035 (1996). Establishing outrageous conduct requires more than demonstrating deceit, because public policy permits deceitful conduct in order to prevent, detect, and eliminate criminal activity. *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973). In crimes such as prostitution, liquor sales, narcotics sales, and gambling, the use of a paid informer, undercover agents, and deceitful practices, as well as the practice of actually aiding and abetting the commission of a crime by others, or even joining in a conspiracy for that commission, are well-known. *Id.* at 238.

In evaluating such a claim, the court reviews the totality of the circumstances, looking at five factors: (1) whether the police instigated the criminal activity or infiltrated it, (2) whether the defendant's reluctance was overcome by pleas of sympathy, promises of excessive profit, or persistent solicitation, (3) whether the government controls the activity or simply allows it to occur, (4) whether the motive was to prevent crime or protect the public, and (5) whether the government conduct itself amounts to criminal conduct or is repugnant to a sense of justice.²³ *Lively*, 130 Wn.2d at 22.

²³ A trial court's ruling regarding outrageous governmental misconduct is reviewed for an abuse of discretion. *Solomon*, 3 Wn. App. 2d at 909. Of course, here, there are no findings to review because this claim was not raised below. This Court should also decline to review this claim because the record is inadequately developed for review. While certain relevant facts were adduced at trial, the

From the record developed at trial, it is apparent that the defendant's reluctance to commit a crime was not overcome by persistent police solicitation. Law enforcement did not induce Borseth to engage in any conduct he was not already willing to perform; in fact, law enforcement gave the defendant opportunities to back out of the transaction.²⁴ The police did not promise profits or plead for sympathy. Despite defendant's claims to the contrary, law enforcement's conduct in "recording" his communications did not amount to criminal conduct, and was not repugnant to a sense of justice. Sting operations such as this are routinely used and accepted. The sting operation was a proactive criminal investigation. RP 340-41. This claim fails, both because it was not raised below, and because it is without merit.

C. A UNANIMITY INSTRUCTION WAS UNNECESSARY AS THE JURY WAS INSTRUCTED ON ONLY ONE "MEANS" OF COMMITTING THE CRIME; SUFFICIENT EVIDENCE EXISTED SUPPORTING THAT "MEANS."

Contending that the trial court violated his right to a unanimous verdict on the attempted commercial sexual abuse of a minor charge because, Borseth asserts insufficient evidence supported one of the

absence of a hearing on this specific issue deprived the parties of the opportunity to present additional evidence in support or in defense of this claim.

²⁴ *See, e.g.*, "Did we go over ages? This isn't for all." Ex. P4 at 1. "What are you offering hun, and what do you want. Be honest or this won't work." Ex. P4 at 2.

alternative means considered by the jury and the court gave no unanimity instruction.²⁵

1. The jury's verdict was unanimous.

When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial evidence. *State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017). If the evidence is insufficient to support each means, either the prosecutor must elect the means supported by the evidence, or the court must instruct the jury to rely on that means during deliberations. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Borseth was *charged* with an attempt²⁶ to violate RCW 9.68A.100(1)²⁷ either under subsection (b) which requires a defendant pay

²⁵ As discussed below and apparently undiscovered by appellant, the jury was only instructed on one means to commit the crime.

²⁶ Neither legal nor factual impossibility is a defense to an attempt to commit a crime. *See, e.g., State v. Wilson*, 158 Wn. App. 305, 320 n.7, 242 P.3d 19 (2010).

²⁷ Former RCW 9.68A.100(1) (2013) provides:

A person is guilty of commercial sexual abuse of a minor if:

...

(b) 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; or

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

or agree to pay a fee²⁸ 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; and/or subsection (c) which requires the defendant to solicit, offer, or request to engage in sexual conduct with a minor in return for a fee. CP 16.

Defendant represents on appeal that the jury was instructed on these “alternative means”²⁹ and that the “State did not make any election.” Br. at 24-25 (“Since it is an alternative means offense, the state was required to prove each of the means set forth in the Information and instructions”). However, contrary to defendant’s assertion, the State requested the jury only be instructed on subsection (c). CP 113; *and see, generally* CP 111-14. The court only instructed the jury on subsection (c). CP 177; *and see, generally* CP 176-82. Therefore, the jury was only asked to consider whether the defendant took a substantial step toward soliciting, offering, or requesting to engage in sexual conduct with a minor in return for a fee.³⁰

²⁸ In 2017, the legislature amended the “pays a fee” language in each subsection of RCW 9.68A.100 to prohibit “provid[ing] anything of value.” Laws of 2017, ch. 231, §3.

²⁹ The State does not concede that commercial sexual abuse of a minor is an alternative means crime. However, because the jury was instructed only as to one “means,” it is unnecessary for this Court to decide whether the statute creates alternative means, or whether, the statute sets forth three “facets” of the same conduct. *See, State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015).

³⁰ The defendant does not contend that the words “solicit,” “offer” and “request” as used in RCW 9.68A.030(1)(c) create, in and of themselves, alternative means.

Simply put, even if RCW 9.68A.100(1) creates alternative means, the jury was only asked to decide whether *one* of those specific means had been committed. By proposing an instruction on only one “means,” the State elected to pursue proving only one “means” at trial. The jury’s verdict was a “particularized expression”³¹ of unanimity, because the jury was not given the option to consider any other “means” of committing the crime. There is no unanimity error here.

2. Sufficient evidence existed supporting the jury’s verdict.

In sufficiency of the evidence review, appellate courts assume the truth of the State’s evidence; view reasonable inferences from the evidence in the light most favorable to the State; and deem circumstantial and direct evidence equally reliable. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). The credibility of witnesses is also the exclusive

³¹ See *Woodlyn*, 188 Wn.2d at 164 (“[I]f the jury is instructed on one or more alternative means that is not supported by sufficient evidence, a ‘particularized expression’ of jury unanimity as to the supported means is required”).

function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989).

The defendant contends that the evidence presented supporting the attempted commercial sexual abuse of a minor charge was insufficient. He argues the evidence was insufficient to demonstrate “a contractual agreement of any kind was reached.” Br. at 22. He also asserts that the defendant did not take a substantial step toward commission of the crime “to perform his end of the agreement”; and “no agreement as to a fee was reached.”³² Defendant’s argument misapprehends what is required under RCW 9.68A.100(1)(c) to sustain a conviction. As previously indicated, a person commits the crime of commercial sexual abuse of a minor under RCW 9.68A.100(1)(c) if “he or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.”

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

³² RCW 9.68A.100(1)(b) requires an “agreement to pay a fee ... pursuant to an understanding that in return” the minor will engage in sexual conduct with him or her. But, as discussed above, the State did not elect to prove this “means” of committing the crime. Thus, this Court need not address these two arguments.

toward the commission of that crime. RCW 9A.28.020(1). The requisite intent is the intent to accomplish the criminal result of the base crime. *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). A substantial step is an act that is strongly corroborative of the actor's criminal purpose. *Id.* "The attempt statute focuses on the actor's criminal intent, rather than the impossibility of convicting the defendant of the completed crime. *Id.* (quoting *Townsend*, 147 Wn.2d at 679). Therefore, here, the State elected to prove that the defendant, with the intent to commit a specific crime, took a substantial step toward soliciting, offering, or requesting to engage in sexual conduct with a minor for a fee under RCW 9.68A.100(1)(c). Substantial evidence exists to support the jury's verdict.

The defendant responded to an advertisement requesting a "daddy" for a son and daughter. Ex. P2. The subsequent email exchange between Borseth and "Jay" made clear that the advertisement related to taboo activities with children, and the "mother's" only interest "is watching[,] so this is all about them." Ex. P3. The defendant stated, "I like girls[.] I bet young is tasty, and asked "how young" the kids were. When told that one girl was six and one was twelve, the defendant replied, "not the[] little one for sure." When asked if he was "good with gifts or donations," the defendant replied, "like how much!?" and offered to "get [Jay] high." Ex. P4 at 1-2. "Jay" later asked, "are you offering up some money and the meth

or just the meth” to which the defendant replied, “I have cash too. And meth. And I’m in it for the adventure.” When asked what his favorite thing was, he replied, “Getting my face and my cock rode” and when told “Anna” had done neither, Borseth said, “she’s about to.” When he was arrested, he had both methamphetamine and cash on his person.

These facts establish that the defendant offered to pay “a fee” to “Jay” in exchange for engaging in sexual conduct with “Anna.” The defendant’s claim that methamphetamine is not a fee is irrelevant because the defendant offered to pay in both methamphetamine and cash. Contrary to the defendant’s assertion, the statute does not require the parties to establish a set fee in order for a criminal act to occur. And, even assuming the defendant had only offered methamphetamine, that offer would still constitute a “fee.”³³

³³ In *State v. Palomo*, 256 Or. App. 498, 301 P.3d 439 (2013), an Oregon court interpreted the meaning of the word “fee” in Oregon’s anti-prostitution statute, which prohibits a person from “engag[ing] in, or offer[ing] or agree[ing] to engage in, sexual conduct or sexual contact in return for a fee.” *See*, ORS 167.007(1)(a).

Fee is defined as “compensation often in the form of a fixed charge for a professional service or for special and requested exercise of talent or of skill.” *Webster’s Third New Int’l Dictionary* 833 (unabridged ed. 2002). The legal definition of fee is a “charge for labor or services, esp. professional services.” *Black’s Law Dictionary* 647 (8th ed. 2004). Those definitions support the agreement by defendant and the state that a fee, as a charge or compensation for services, has economic value and involves a commercial transaction.

301 P.3d at 442. The court further determined that “[t]here is no doubt that certain things, *such as money and drugs*, constitute a fee.” *Id.* (emphasis added).

3. The statute unambiguously prohibits a person from offering to pay to have sex with a minor.

In a single sentence, the defendant contends that RCW 9.68A.100(1)(c) is ambiguous and “appears to mean that the individual must request a fee in order to ‘engage in sexual conduct with a minor.’” Br. at 23. The defendant fails to support this contention with any law or analysis. Further, this interpretation is contrary to the plain language of the statute and the legislature’s intent.

The meaning of a statute is a question of law reviewed by the court de novo. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The court’s purpose in construing a statute is to determine and effectuate the intent of the legislature. *Id.*; *Dep’t of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 961, 275 P.3d 367 (2012). “The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, [the court] give[s] effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). In determining a provision’s plain

Our legislature’s recent change to the language of the statute, which amended the “in return for a fee” language to “in return for anything of value” supports this interpretation; perhaps our legislature became aware that individuals, such as Mr. Borseth, were challenging the language used in prior versions of this statute, and in order to clarify its intent, the legislature amended the statute to even more clearly prohibit the payment of “anything of value” in exchange for engaging in sexual conduct with a child.

meaning, the court looks to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.*

When a statute is unambiguous, “[t]here is no room for judicial interpretation...beyond the plain language of the statute.” *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000). The fact that two interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

In interpreting this statute, this Court should look at the other provisions of RCW 9.68A.100. Both (a) and (b) prohibit an individual from *paying* a fee in order to engage in sexual conduct with a minor – neither prohibit *receiving* a fee in exchange for engaging in sexual conduct with a minor. The language of subsection (c) should be interpreted in like manner. Further, the defendant’s contention that subsection (c) is ambiguous is undercut by the legislative intent of the statute. In enacting the crime of commercial sexual abuse of a minor, the legislature specifically found:

[C]hildren engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse. Approximately eighty to ninety percent of children engaged in sexual activity for financial compensation have a history of sexual abuse victimization. It is the intent of the legislature to encourage these children to engage in prevention and intervention services and *to hold those who pay to*

engage in the sexual abuse of children accountable for the trauma they inflict on children.

RCW 9.68A.001(emphasis added).

Thus, it was the legislature's intent to punish those who pay to engage in the sexual abuse of children. It was not the intent of the legislature to punish those who seek to engage in sexual conduct with a minor AND request or receive a fee to do so, as defendant contends. The plain language of RCW 9.68A.100(1)(c) prohibits a person from soliciting, offering or requesting to engage in sexual conduct with a minor, in exchange for that person paying a fee to do so.³⁴ As demonstrated above, sufficient evidence supports the defendant's conviction for attempted commercial sexual abuse of a minor.

D. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE DEFENDANT WAS CURIOUS ABOUT HOMOSEXUAL INTIMATE RELATIONSHIPS WHERE THERE WAS NO OBJECTION TO THIS EVIDENCE; DEFENSE COUNSEL TACTICALLY SOUGHT THE ADMISSION OF THIS EVIDENCE.

³⁴ *But see, State v. Wilbur*, 110 Wn.2d 16, 749 P.2d 1295 (1988) (statute defining the crime of prostitution, RCW 9A.88.030, which stated, "A person is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee," did not apply to the patron of the prostitute, but rather, only to the recipient of the fee"). Although the language is similar, the legislative intents of the statutes differ, and the statutes are found in different titles of the Revised Code of Washington. As such, they need not be afforded the same interpretation. *See, e.g., State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017) (declining to use definition of "motor vehicle" found in the traffic code (Title 46) to interpret the same term found within the criminal code (Title 9A)).

Evidence Rule 404(b) provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” This list is not exhaustive or exclusive.

An ER 404(b) issue, like any evidentiary challenge, must be raised in the trial court by objection or it is waived. ER 103; RAP 2.5; *see also*, *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (error in admitting evidence under ER 404(b) is not of constitutional magnitude and is subject to harmless error analysis); *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (a party may not raise an issue on appeal based on an evidentiary rule not raised at trial). Here, defendant concedes that no objection was made below to the admission of evidence that the defendant “expressed curiosity about intimate relations with the same sex” during his interview with law enforcement immediately after his arrest. RP 72; Ex. P12 at 29-30. Specifically, trial counsel indicated, “we’re not going to be seeking to suppress the fact that Mr. Borseth has used Craigslist for other liaisons. We don’t have any objection to that.” RP 92. Therefore, this issue, as an evidentiary issue, has been affirmatively waived.

Thus, the remaining question is whether trial counsel was ineffective for failing to object to this evidence. Counsel cannot be found deficient if there is a conceivable tactical explanation for counsel's performance. Additionally, as indicated above, trial counsel is only deficient for failing to seek suppression of evidence if this Court determines that the trial court would have granted the motion, had it been filed.

1. Trial tactics.

Defense counsel specifically considered the potential ER 404(b) evidence and expressly told the court that Borseth was not objecting³⁵ to its admission. Defense counsel sought to use Borseth's admitted curiosity in same-sex sexual encounters to Borseth's advantage. Defense argued that the "casual encounters" area of Craigslist is for "no strings attached sex between adults." RP 801. Defense counsel argued that it was this no strings attached sex between adults that interested Borseth – whether it be with the fictitious mother, or his curiosity about homosexual encounters. RP 809. Defense counsel argued that Borseth was willing to admit to possession of methamphetamine, was willing to allow a search of his cell phone and

³⁵ Trial counsel, Jeff Compton, who, according to WSBA records, was admitted to the Washington State Bar in 1994, clearly knew how to object to questions, testimony, and argument because he did so several times at trial. RP 527, 573, 574, 625, 714, 794; *see*, https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000024082 (WSBA website).

tablet, and was willing to disclose very private information about himself – his curiosity about homosexual intimate relationships; yet, during the nearly two-hour interview with police, the defendant never conceded that he responded to the advertisement in an attempt to have a sexual encounter with a minor. Rather, as defense counsel argued, his communications pointed toward an interest with the fictitious mother, rather than with her child. Defense counsel argued, in closing, “nowhere in [these instructions] does it say that you can convict Mr. Borseth if you don’t agree with his view of sexual morality.” RP 797. This was a reasonable trial strategy – to admit Borseth’s private adult sexual curiosities, but to remain steadfast in his denial of any sexual interest in children.

2. The trial court would not likely have excluded the evidence.

In order to succeed in his ineffective assistance of counsel claim (in the absence of reasonable trial tactics), the defendant must demonstrate the trial court would have suppressed this evidence had suppression been requested. He has not done so.

Before admitting evidence under ER 404(b), the trial court is required to (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the

prejudicial effect. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Under this test, the evidence of the defendant’s use of Craigslist for other liaisons would likely have been admitted.

The evidence introduced at trial was that the defendant had previously sought out other liaisons in the “casual encounters” section of Craigslist, to include homosexual liaisons. First, the State disagrees that this is even an “other crime, wrong or act” used to prove the character of the defendant in order to show conformity with that act. Seeking a consenting, adult relationship, whether heterosexual or homosexual, is neither unlawful nor wrongful.³⁶ This “act” was not used to prove that, the current instance,

³⁶ Defendant asserts that “homosexual activity is not readily accepted within most areas of society” and “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.” Br. at 26-27.

These sweeping assertions that homosexuality is “aberrant” and not “readily accepted” are not based in law or in fact, and are certainly not based on any fact within the record. As of 2011, an estimated 9 million Americans (3.5% of the adult population) identified as LGBT. An estimated 19 million Americans (8.2% of the adult population) reported engaging in same-sex behavior, and 25.6 million Americans (11% of the adult population) acknowledged some same-sex attraction. See Gary J. Gates, *How many people are lesbian, gay, bisexual and transgender?*, The Williams Institute, UCLA School of Law (April 2011) available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. In Washington, voters (not the legislature) approved a referendum legalizing same sex marriage by a 54% to 46% margin in 2012. Joel Connelly, Washington approves same-sex marriage, *Seattle Post-Intelligencer*, November 8, 2012 available at <https://www.seattlepi.com/local/connelly/article/Washington-approves-same-sex-marriage-4018058.php>.

the defendant acted in conformity with the prior act. This case had nothing to do, whatsoever, with seeking a consenting adult relationship (whether heterosexual or homosexual) on Craigslist.

Even assuming this evidence is ER 404(b) evidence, under the rule, it would be admissible for another purpose, to demonstrate *res gestae* or lack of mistake. Regarding the former, *res gestae*, the defendant's prior use of Craigslist to find intimate liaisons demonstrates his knowledge and familiarity with Craigslist, its use, and perhaps, the terminology used by frequent users, i.e., "w4m," "m4m," "taboo," etc. It also could be used to demonstrate his lack of mistake: defendant claimed that, at least initially, he did not fully understand that "Jay" sought to engage her "children" in sexual conduct – the defendant's frequent use of Craigslist for casual encounters and his familiarity with the terms utilized by its users could undercut his claim of mistake.³⁷

Thus, not only did trial counsel have a legitimate, tactical basis for desiring this evidence to be admitted, but also, even had there been an objection, the evidence would likely have been admitted. Counsel was not

³⁷ During rebuttal closing argument, the State argued, "Mr. Borseth was not naïve about Craigslist. He had met women before. He had sex with women before. He knew what those ads meant. He even posted on Craigslist before. So he's not a novice going into this..." RP 815.

ineffective for his conscious decision to agree to the admissibility of this evidence.³⁸

E. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT DURING CLOSING ARGUMENT.

The defendant next claims that the prosecutor improperly gave an opinion as to his credibility. Br. at 30. To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant meets this burden, the court may reverse the defendant's conviction. *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). If a defendant establishes the prosecutor's conduct was improper, the court must determine whether the defendant was prejudiced. 174 Wn.2d at 760. A defendant establishes prejudice when "there is a substantial likelihood [that] the ... misconduct affected the jury's verdict." *Thorgerson*, 172 Wn.2d at 443 (first alteration in original) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Where a defendant fails to object to alleged prosecutorial misconduct, he is deemed to have waived any error unless he shows the

³⁸ Even assuming this evidence was erroneously admitted, it is subject to harmless error analysis, and regarding the ineffective assistance of counsel claim, defendant must demonstrate he was prejudiced by its erroneous admission. Other than speculation, defendant has not demonstrated how, in the context of the entire trial, this evidence prejudiced him.

misconduct was so flagrant and ill-intentioned that an instruction from the trial court could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. To meet this heightened standard, the defendant must show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Id.* at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

In reviewing a prosecutor’s comments during closing argument, this Court looks to the context of the total argument, the issues presented in the case, the evidence addressed in the argument, and the jury instructions. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). A prosecutor may not express a personal opinion about the credibility of a witness or the guilt of a defendant. *See, e.g., State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). However, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury during closing argument. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

As discussed above, defendant’s claim at trial (and during the police interrogation) was that he only intended to have sex with “Jay,” not “Anna,” but that he intended to dissuade “Jay” from engaging her children in sexual conduct. Here, the prosecutor’s closing argument was lengthy and

addressed that claim in light of the other evidence presented at trial – the defendant’s own text messages and emails. The prosecutor began addressing the jury by stating,

When a person tells you what he wants, you really should believe him. In this case, Mr. Borseth plainly and repeatedly told Anna’s mother what he wanted. He wanted to have sex with...Anna, herself, an 11 year old girl. Every chance Mr. Borseth had during this entire investigation, to show something different, he instead took the step not away from Anna, but toward her.

I don’t have to make any complex legal arguments in this case. I don’t have to be eloquent in any way. All I have to do in this case to prove it is to quote Mr. Borseth himself and then convince you folks that you ought to believe what he said.

I’m going to go you through some of his clearest statements that spoke about his intentions, and you’re going to hear from the man, himself, at least by message there on the screen, and he’s going to have the opportunity to show you who he really was and what he really wanted.

RP 743-44.

Here, after the prosecutor nearly completed his closing argument, during which he recounted each of the text messages sent by the defendant, and how those messages and his other pre-arrest conduct manifested his intent to engage in sexual conduct with “Anna,” RP 744-93, he stated:

... you’ve sat through a very long closing argument from me, which I apologize for, but what 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 –

RP 793-94.

Defense counsel objected, and the court instructed the jury that “this is closing arguments. What the attorneys say are not evidence or instructions.” The prosecutor resumed, saying: “*The evidence shows* that you should not believe Mr. Borseth. Believe what he did, not what he said here in court.” RP 794 (emphasis added). The defendant did not object again. RP 794. Then, in rebuttal argument, the prosecutor reiterated, “*Look at the evidence in this case.* Look at what Mr. Borseth told you, not only in his words, but in his actions...” RP 816 (emphasis added). There was no objection to this argument either.

The primary issue in this case was whether the defendant's text messages, emails and telephone conversation manifested his intent to commit the crimes charged.³⁹ The prosecutor's argument emphasized that the jury should look at the evidence – both the defendant's words and actions – when deciding whether the communications established the requisite criminal intent, or whether, as defendant claimed at trial, he only wanted a liason with “Jay.” There is nothing improper about such an

³⁹ And, of course, whether his subsequent acts (such as bringing lubricant and condoms to the residence) also manifested that intent.

argument. The prosecutor's words do not express any personal opinion about the defendant's guilt or truthfulness; instead, the prosecutor told the jury that it should look to the evidence to make this determination.

Additionally, the defense did not object to the prosecutor's argument that "the evidence shows that you should not believe Mr. Borseth. Believe what he did, not what he said here in court" and "look at the evidence in this case. Look at what Mr. Borseth told you, not only in his words, but in his actions." Thus, the defendant did not give the trial court the opportunity to correct any conceivable impropriety in these arguments. He has failed to demonstrate how these arguments are flagrant and ill-intentioned, where, as here, the arguments are clearly tied to the evidence, rather than any personal opinion. The defendant's prosecutorial misconduct claim fails.

F. THE DEFENDANT'S CUMULATIVE ERROR CLAIM FAILS.

The cumulative error doctrine applies when a trial is affected by "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant's conviction, the court considers whether the totality of circumstances substantially prejudiced the defendant. The totality of the circumstances does not substantially prejudice the defendant where the evidence is overwhelming against the defendant.

In re Cross, 180 Wn.2d 664, 691, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Additionally, the cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Here, as explained above, the trial errors alleged are either unpreserved or lack merit (or both). Additionally, despite the defendant's claims that he only intended to "romance" the fictitious "mother," his texts to "her" overwhelmingly demonstrate that he sought "an adventure" and intended to engage in sexual conduct with a minor. This cumulative error argument fails.

G. CLAIMED SENTENCING ERRORS: THE OFFENSES WERE NOT THE SAME COURSE OF CONDUCT; THE ENHANCEMENT SHOULD NOT HAVE BEEN IMPOSED; THE \$200 FILING FEE ISSUE IS UNPRESERVED BUT SHOULD NOT HAVE BEEN IMPOSED; THE SEXUAL CONDUCT WITH A MINOR FEE WAS PROPERLY REDUCED.

1. The trial court did not err in determining the offenses were not the same course of conduct.

Borseth claims the trial court erred by not treating his convictions for attempted first degree child rape, attempted commercial sexual abuse of a minor, and possession of a controlled substance as the same criminal conduct for purposes of sentencing.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Because this finding favors the defendant by lowering his offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme-and the burden-could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Id. at 540 (emphasis in original).

Offenses are the same criminal conduct 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). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012 (2013). Rather, it means the defendant's "objective criminal purpose in committing

the crime.” *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540 (citing *Porter*, 133 Wn.2d at 181).

Here, the trial court found that the three offenses were not the same criminal conduct. The court determined that the crimes did not occur at the same time or location because the attempted commercial sexual abuse of a minor occurred “while he’s texting at work and making these arrangements” and the attempted rape of a child occurred when he appeared at the house. RP 837. The court also agreed with the State that the offenses had different criminal intents. *Id.* The criminal intent required for attempted commercial sexual abuse of a minor is the intent to pay to engage a minor in sexual conduct. The criminal intent for attempted first degree rape of a child is the intent to have sexual intercourse with a person under the age of 12. And, the

criminal intent required for possession of a controlled substance is simply to possess a controlled substance, here, for personal use or use with “Jay.”

Additionally, the sentencing court was justified in rejecting the defendant’s argument that the attempted commercial sexual abuse of a minor and possession of a controlled substance did not further the crime of attempted first degree rape of a child. The defendant was arrested with the anticipated cash and methamphetamine on his person. The court could find, under these facts, that the defendant merely intended to “get high” with Jay, but pay for sexual conduct with Anna by use of the cash.

As indicated above, the trial court’s decision that these offenses did not constitute the same criminal conduct for sentencing purposes is reviewed for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard, it is based on untenable grounds if the factual findings are not supported by the record, and it is based on untenable reasons if it applies an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). This broad standard means that courts can reasonably reach different conclusions. *L.M. by and through Dussault v. Hamilton*, 193

Wn.2d 113, 134-35, 436 P.3d 803 (2019). Therefore, this Court should not reverse the decision of the trial court, even if it would decide the case differently, unless this Court finds that no other court could reasonably adopt the view of the trial court. *Id.* (If the issue “is ‘fairly debatable,’ a court will not disturb the trial court’s ruling.”) The trial court provided legitimate reasons for its decision which should not be disturbed on appeal.

2. The State agrees that the defendant was not given notice of the State’s intent to seek a 12-month enhancement.

RCW 9.94A.533(9) provides, in pertinent part:

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee ... If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired 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...

RCW 9.94A.839 provides the procedure for alleging such an enhancement, and permits the State to file a special allegation that the defendant engaged, agreed, attempted, solicited another, or conspired to engage the victim in the sexual conduct in return for a fee. That statute also provides that “[o]nce a special allegation has been made..., the state has the burden to prove beyond a reasonable doubt” that the defendant engaged in

that conduct. If the matter is considered by a jury, there must be a special verdict by the jury regarding this enhancement. RCW 9.94A.839(2).

The defendant claims that the State failed to provide notice that it intended to prove this enhancement, either by inclusion of notice within the information, or by filing a separate notice. The defendant is correct. The State is unable to discern from any of the pleadings that it provided the defendant notice that it intended to prove this enhancement. This is error. *See State v. Recuenco*, 163 Wn.2d 428, 434-40, 180 P.3d 1276 (2008). Here, as in *Recuenco*, Borseth was entitled to have notice that he could be sentenced with this enhancement. *Id.* at 440 (“Recuenco lacked any notice that he could be sentenced under the firearm enhancement. An accused has a constitutionally protected right to be informed of the criminal charge against him...notice of the charge on which a defendant will be tried must be given logically at some point prior to opening statements”). The matter should be remanded to the trial court to strike the imposition of 12 months for an enhancement for which no notice was provided.

3. The defendant did not object to the imposition of his legal financial obligations; however, the filing fee was imposed in error but the commercial abuse of a minor fee was properly imposed but reduced.

The defendant challenges the imposition of two of the legal financial obligations ordered at sentencing. He challenges both the \$200 criminal filing fee and the \$1,650 commercial sexual abuse of a minor fee, arguing

that neither should have been imposed because of his indigency. The court found the defendant to be indigent at the time of sentencing.⁴⁰ CP 225.

a. The criminal filing fee was imposed in error.

Despite the lack of objection to the imposition of the criminal filing fee, the State agrees that the trial court should not have imposed the \$200 filing fee. In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, § 17 (2)(h). As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, “Effective Date of Laws.”

The defendant was sentenced in July 2018. Therefore, the State agrees that, pursuant to the amendment, which was already in effect, it was error for the court to both find the defendant to be indigent and impose the criminal filing fee. The matter should be remanded to strike this fee; this may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48,

⁴⁰ The court made this finding despite evidence that he had a job at the time of the offense and “has been a pretty productive member of society.” RP 838. The court determined the defendant was indigent “since [he was] going to be incarcerated.” RP 841.

246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).⁴¹

b. The commercial sexual abuse of a minor fee assessment was properly reduced based upon the defendant's indigency.

The defendant failed to object to the imposition of the commercial sexual abuse of a minor fee at the time of sentencing. RP 825-48. Therefore, he failed to preserve the matter for appeal. RAP 2.5. No constitutional issue is involved. *State v. Blazina*, 182 Wn.2d 827, 840, 344 P.3d 680 (2015) (Fairhurst, J. concurring in result). This Court may decline to address this issue because it was not raised below.

In the event this Court does consider this issue, the trial court did not err in imposing this fee, and therefore, under an ineffective assistance of counsel analysis, counsel did not provide deficient performance by failing to object. RCW 9.68A.105 provides:

(1)(a) In addition to penalties set forth in RCW 9.68A.100, ... an adult offender who is either convicted or given a deferred sentence or a deferred prosecution or who has entered into a statutory or nonstatutory diversion agreement as a result of an arrest for violating RCW 9.68A.100 ... *shall be assessed a five thousand dollar fee.*

(b) 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

⁴¹ Because the State concedes it was error for the court to impose this fee, the Court need not address defendant's contention that it was ineffective assistance of counsel to not object to its imposition.

the fee by an amount up to two-thirds of the maximum allowable fee.

(Emphasis added).

The use of the word “shall” in a statute imposes a mandatory requirement unless a contrary legislative intent is apparent. *See, e.g., State v. Gonzales*, 198 Wn. App. 151, 155, 392 P.3d 1158, *review denied*, 188 Wn.2d 1022 (2017). The legislative intent to mandate this assessment, by its use of the word “shall,” is supported by RCW 9.68A.105(b) which prohibits a court from reducing, waiving, or suspending payment of this fee unless the defendant is indigent; under that circumstance, the legislature has authorized the court only to reduce the fee by up to two-thirds. There is no evidence that the legislature intended any contrary interpretation.

The defendant claims that this fee is a “cost” within the meaning of RCW 10.01.160(3), which, after June 2018, prohibits the court from imposing “costs” on indigent defendants. The defendant is incorrect. RCW 10.01.160 provides that costs are limited to expenses specially incurred by the State in prosecuting the defendant or in administering a deferred prosecution program.⁴² Unlike the “costs” defined in RCW 10.01.160,

⁴² Specifically listed are warrant fees, jury fees, pretrial services fees, and the cost of incarceration. RCW 10.01.160(2).

which pay for the cost of a specific criminal prosecution,⁴³ revenues from the commercial sexual abuse of a minor fee assessment must be used for local efforts to reduce the commercial sale of sex, including, but not limited to, increasing enforcement of commercial sex laws. RCW 9.68A.105(2).⁴⁴ This requirement has nothing to do, whatsoever, with the prosecution of the defendant, but rather, for future preventative and rehabilitative measures. It is not a “cost” within the meaning of RCW 10.01.160(3). Instead, under RCW 9.94A.030(31), which defines “legal financial obligations,” this fee would likely be included within the catch-all phrase, “any other financial obligation that is assessed to the offender as a result of a felony conviction.”

RCW 9.68A.105 was last amended in 2015. Laws of 2015, ch. 265, § 13. The 2015 amendment made the statute only applicable to adult offenders. A previous amendment, in 2010, increased the penalty from \$500 to \$5000 and provided that “the court may not suspend payment of all or part of the fee unless it finds that the person does not have the ability to pay.” *See* Laws of 2010, ch. 289, § 15. Had the legislature desired to include

⁴³ *See State v. Clark*, 191 Wn. App. 369, 362 P.3d 309 (2015) (distinguishing costs and fines – the former, “[a] statutory allowance[] to a party for his expenses incurred in an action,” and the latter, “a sum of money exacted, as a pecuniary punishment.”)

⁴⁴ At least 50% of the amount collected must be spent on prevention, education programs for offenders, and rehabilitative services for victims, including counseling, training, education, and housing relief. RCW 9.68A.105(2)(a).

the commercial sex abuse of a minor assessment within its sweeping legal financial obligation reform in 2018, by providing it must be waived for indigent defendants, it could have done so.⁴⁵ It did not, and this Court should not assume that it intended to do so.

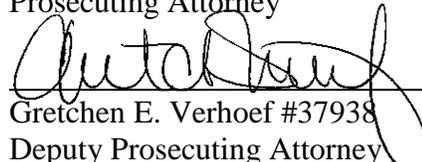
Here, the court imposed this assessment in the amount of \$1,650. That amount is one-third of the \$5,000 assessment. The court properly reduced the assessment based upon its finding that the defendant was indigent.

IV. CONCLUSION

For the reasons discussed above, the State respectfully requests this Court affirm the lower court and jury verdicts; however, the State agrees that this Court must remand to the trial court to strike the 12-month enhancement and the \$200 filing fee.

Dated this 28 day of May, 2019.

LAWRENCE H. HASKELL
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Deputy Prosecuting Attorney
Attorney for Respondent

⁴⁵ Other provisions enacted during the 2018 LFO reform would apply to this assessment. For instance, RCW 10.01.170 now provides a court must grant permission for an indigent defendant to make payments on assessments and fees, and RCW 10.82.090 now provides that no interest shall bear on nonrestitution legal financial obligations. fs

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

STATE OF WASHINGTON,

Respondent,

v.

JASON BORSETH, a/k/a JASON
FISHEL,

Appellant.

NO. 36230-2-III

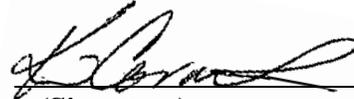
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 28, 2019, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

5/28/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

May 28, 2019 - 10:27 AM

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