

FILED
Court of Appeals
Division III
State of Washington
12/19/2019 4:11 PM

NO. 36250-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ARBOGAST,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

APPELLANT'S AMENDED BRIEF
(limited to 65 pages)

LENELL NUSSBAUM
Attorney for Appellant

Law Office of
Lenell Nussbaum, PLLC
2125 Western Ave., Suite 330
Seattle, WA 98121
(206) 728-0996

TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u>	1
	<u>Issues Pertaining to Assignments of Error</u>	1
B.	<u>STATEMENT OF THE CASE</u>	2
	1. SUBSTANTIVE FACTS	2
	a. <i>The Legislature Acted to Solve Cases of Missing Children.</i>	2
	b. <i>Rather Than Solve Actual Cases of Missing and Exploited Children, WSP Expanded the Mission to Lure In People It Believes Are Willing to Exploit Children.</i>	3
	c. <i>The MECTF Did Not Comply With Mandatory Standards or Their Training In This Operation.</i>	4
	d. <i>The Police Placed an Intentionally Vague Ad in the Adult Woman-Seeks-Man Section of Craigslist's Casual Encounters.</i>	5
	e. <i>Grandfather Douglas Arbogast Sought a Casual Sexual Encounter with an Adult Woman on Craigslist.</i>	7
	f. <i>Evidence After Arrest</i>	22
	g. <i>Additional Trial Evidence</i>	24
	2. PROCEDURAL FACTS	27
	a. <i>Charges</i>	27

TABLE OF CONTENTS (cont'd)

b.	<i>Pretrial Motions</i>	27
	i. <i>Discovery</i>	27
	ii. <i>Denying due process</i>	27
	iii. <i>Excluding evidence and i n s t r u c t i o n s o n entrapment</i>	28
c.	<i>Jury Instructions</i>	30
d.	<i>Motion to Dismiss</i>	30
e.	<i>Verdict and Sentence</i>	30
C.	<u>ARGUMENT</u>	31
1.	THE LAW OF ENTRAPMENT	31
	a. <i>The Elements of Entrapment</i>	33
	b. <i>Washington's Statutory Defense</i>	34
	c. <i>Luring and Inducement Involve Persuasion That Materially Alters the Balance of Risks and Rewards and Changes a Defendant's Decision to Commit an Offense He Otherwise Would Not Have Committed.</i>	35
	i. <i>Luring or inducing involves something more than offering an opportunity to commit a crime.</i>	35
	ii. <i>Here the State lured and induced Mr. Arbogast to agree to "Brandi's" requests.</i>	37
	d. <i>Predisposition Must Exist Before Law Enforcement Tries to Persuade a Suspect to Commit the Unlawful Act.</i>	39

TABLE OF CONTENTS (cont'd)

2.	THIS COURT SHOULD DISMISS THIS CHARGE AS DENYING DUE PROCESS DUE TO OUTRAGEOUS GOVERNMENTAL CONDUCT.	42
3.	THIS COURT SHOULD DISMISS THIS CHARGE BECAUSE ENTRAPMENT WAS PROVEN AS A MATTER OF LAW.	47
4.	THE TRIAL COURT ERRED AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO A JURY TRIAL BY EXCLUDING EVIDENCE OF AND DENYING AN INSTRUCTION ON ENTRAPMENT.	52
	a. <i>The Burden of Producing Evidence to Support an Affirmative Defense Is Prima Facie.</i>	52
	b. <i>Cases Reversed for Denying an Entrapment Instruction</i>	55
	c. <i>As In These Cases, The Evidence Below Established Prima Facie Inducement and Lack of Predisposition Entitling Defendant to an Entrapment Instruction.</i>	58
D.	<u>CONCLUSION</u>	61

TABLE OF AUTHORITIES

WASHINGTON CASES

Cornwell v. Microsoft Corp.,
192 Wn.2d 403, 430 P.3d 229 (2018) 53, 54

Davis v. Cox,
183 Wn.2d 269, 351 P.3d 862 (2015) 53

Floeting v. Group Health Coop,
192 Wn.2d 848, 434 P.3d 39 (2019) 53

Mikkelsen v. PUD No. 1 of Kittitas County,
189 Wn.2d 516, 404 P.3d 464 (2017) 53

Seattle v. Gleiser,
29 Wn.2d 869, 189 P.2d 967 (1948) 37

State v. Cowling,
161 Wash. 519, 297 P. 172 (1931) 37

State v. Gray,
69 Wn.2d 432, 418 P.2d 725 (1966) 37

State v. Johnson,
173 Wn.2d 895, 270 P.3d 591 (2012) 39, 41

State v. Keller,
30 Wn. App. 644, 637 P.2d 985 (1981) . . . 36, 58

State v. Knapstad,
107 Wn.2d 346, 729 P.2d 48 (1986) 52

State v. Littooy,
52 Wash. 87, 100 P. 170 (1909) 37

State v. Lively,
130 Wn.2d 1, 921 P.2d 1035 (1996) . 34, 43-45, 47,
52

State v. Morgan,
9 Wn. App. 757, 515 P.2d 829,
review denied, 83 Wn.2d 1004 (1973) . . 36, 55, 58

State v. Sivins,
138 Wn. App. 52, 155 P.3d 982 (2007) 39

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Smith,
101 Wn.2d 36, 677 P.2d 100 (1984) 36

State v. Swain,
10 Wn. App. 885, 520 P.2d 950 (1974) 54

State v. Townsend,
147 Wn.2d 666, 57 P.3d 255 (2002) 39

State v. Trujillo,
75 Wn. App. 913, 883 P.2d 329 (1994),
review denied, 126 Wn.2d 1008 (1995) 54

State v. Waggoner,
80 Wn.2d 7, 490 P.2d 1308 (1971) 37

OTHER JURISDICTIONS

Evanston v. Myers,
172 Ill. 266, 50 N.E. 204 (1897) 37

Greene v. United States,
454 F.2d 783 (9th Cir. 1971) 43-45

Grimm v. United States,
156 U.S. 604, 15 S. Ct. 470,
39 L. Ed. 550 (1895) 37

Jacobson v. United States,
503 U.S. 540, 112 S. Ct. 1535,
118 L. Ed. 2d 174 (1992) . 32, 33, 35, 36, 38-41,
47, 49, 51, 57, 58, 60, 61

Mathews v. United States,
485 U.S. 58, 108 S. Ct. 883,
99 L. Ed. 2d 54 (1988) 33

People v. Liphardt,
105 Mich. 80, 62 N.W. 1022 (1895) 37

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)

Price v. United States,
165 U.S. 311, 17 S. Ct. 366,
41 L. Ed. 727 (1897) 37

Sherman v. United States,
356 U.S. 369, 78 S. Ct. 819,
2 L. Ed. 2d 848 (1958) 31, 32, 36, 41, 47, 48, 51

Sorrells v. United States,
287 U.S. 435, 53 S. Ct. 210,
77 L. Ed. 413 (1932) 31, 32, 58

United States v. Black,
733 F.3d 294, 301 (9th Cir. 2013),
cert. denied, 135 S. Ct. 267 (2014) 43

United States v. Gamache,
156 F.3d 1 (1st Cir. 1998) 35, 36, 38-41, 50, 51,
55-59

United States v. Poehlman,
217 F.3d 692 (9th Cir. 2000) . . . 32, 38-41, 47,
49-51, 58-60

United States v. Russell,
411 U.S. 423, 93 S. Ct. 1637,
36 L. Ed. 2d 366 (1973) 31, 33

United States v. Twigg,
588 F.2d 373 (3d Cir. 1978) 43-45

TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES

Constitution, art. I, § 3 42, 52

Constitution, art. I, § 21 52

Melissa Cyders & Gregory Smith,
*Emotion-based dispositions to rash action:
Positive and negative urgency*, 134(6),
Psychological Bulletin 807-828 (Nov. 2008),
www.ncbi.nlm.nih.gov/-pmc/articles/PMC2705930/
(last visited 9/14/2019) 18

Missing and Exploited Children Task Force,
<http://www.wsp.wa.-gov/crime/mectf>
(last visited 9/14/2019) 4

RCW 9A.16.070 34, 35, 40, 52

RCW 9A.28.020(1) 27

RCW 9A.44.073 27

RCW 9A.44.076 27

RCW 13.60.100 1

RCW 13.60.110 3

United States Constitution, amend 14 42, 52

United States Constitution, amend. 6 52

A. ASSIGNMENTS OF ERROR

1. Outrageous government conduct denied appellant due process.

2. Appellant assigns error to FF 12:

... [T]he court finds that it does not appear that the conduct is so outrageous that the ends of justice require the defendant's case to be dismissed; and that the government's actions in this case are similar to other government stings cited in the briefs of both the State and defense and which have been upheld; and that such government stings are not repugnant to a sense of justice.

3. The defense proved entrapment as a matter of law.

4. The trial court denied appellant his constitutional rights to present a defense and to a jury trial by excluding evidence of, and denying an instruction on, entrapment.

Issues Pertaining to Assignments of Error

1. Police used a "woman" to lure men online, conditioning meeting her on agreeing to be her "children's" sex mentor. The case did not involve missing or exploited children. Police did not follow their own training standards for the sting. Does this outrageous conduct violate due process?

2. Does using a lawful temptation to lure a

person, then conditioning that lawful temptation on agreeing to commit a crime, constitute inducement?

3. Did the evidence establish entrapment as a matter of law?

4. Was appellant entitled to present evidence of entrapment?

5. Was appellant entitled to an entrapment jury instruction?

6. When the defense bears the burden of proving an affirmative defense by a preponderance of the evidence, is the burden of production to present a prima facie case, as for a civil plaintiff who bears the same burden of proof?

7. Must predisposition exist before and independent of police efforts to persuade the defendant to commit the crime to preclude entrapment?

B. STATEMENT OF THE CASE

Oh, what a tangled web we weave
When first we practice to deceive.
-- Sir Walter Scott, "Marmion"

1. SUBSTANTIVE FACTS

a. *The Legislature Acted to Solve Cases of Missing Children.*

In 1999, after a young child went missing, the Legislature found missing and exploited children

was a serious problem needing a concerted state effort to solve. RCW 13.60.100.¹ It created a task force in the Washington state patrol (WSP).

(2) The task force is authorized to assist law enforcement agencies, upon request, **in cases involving missing or exploited children** by:

- (a) Direct assistance and case management;
- (b) Technical assistance;
- (c) Personnel training;
- (d) Referral for assistance from local, state, national, and international agencies; and
- (e) Coordination and information sharing among local, state, interstate, and federal law enforcement and social service agencies.

RCW 13.60.110. This case arises from these statutes. But it does not involve any missing or exploited children. RCW 13.60.110(5).

b. *Rather Than Solve Actual Cases of Missing and Exploited Children, WSP Expanded the Mission to Lure In People It Believes Are Willing to Exploit Children.*

Despite the Legislature's worthy goals of assisting local jurisdictions in solving cases of actual missing and exploited children, the WSP's Missing and Exploited Children's Task Force (MECTF) conducts operations it claims are "aimed at finding

¹ Statutes are quoted in App. A.

and recovering sexually exploited children and apprehending child predators." MECTF, <http://www.wsp.wa.gov/crime/-mectf> (last visited 9/14/2019).

... MECTF runs "Net Nanny Operations" across the state. During these multi-day operations, **undercover detectives lure in would be predators** and arrest them before any exploitation or harm could be done to children.

Id. (emphasis added); Ex. 12; RP 58, 928-29.

This case arises from one such luring in a Net Nanny Operation.

c. *The MECTF Did Not Comply With Mandatory Standards or Their Training In This Operation.*

MECTF is part of the Department of Justice's Internet Crimes Against Children (ICAC) Task Force Program. ICAC has Operational and Investigative Standards for task forces. Among those standards:

- **8.6** Absent prosecutorial input to the contrary, during online dialogue, officers shall allow the Investigative target to set the tone, pace, and subject matter of the online conversation.
- **8.6.2** Members shall familiarize themselves with relevant state and federal law, including but not limited to those regarding the defense of entrapment, and should confer with relevant prosecutors for legal consultation, as needed.

Ex. 16 at 13; RP 964-68.

Det. John Garden and Det. Sgt. Carlos Rodriguez received five days of training in an ICAC course. RP 74, 950, 1099-1100. The MECTF must abide by ICAC standards. RP 952; Ex. 16 at 9. They must let the target lead any communications. RP 75, 968-70. Yet MECTF had no written standards and no review process for wording ads. RP 64-65, 984-85. ICAC standards require detectives to be familiar with local entrapment laws; Det. Garden had no such training. RP 1113, 1121-22. Det. Rodriguez did not review communications to see that his officer led. RP 83-84.

d. *The Police Placed an Intentionally Vague Ad in the Adult Woman-Seeks-Man Section of Craigslist's Casual Encounters.*

Rather than respond to internet ads that involved real exploited children,² Det. Rodriguez posted the following ad on Craigslist in the Casual Encounters section, the adult "Woman for Men:"

***Mommy likes to watch - young family fun
- 420 friendly - w4m (Rich\$land)**
Mommy luvs to watch family fun time.
Looking for that special someone to play
with. 100% I know this is a long shot
but I have been looking for this for a

² Det. Rodriguez testified there are very explicit ads, some even contain child pornography; he creates ads that are not so explicit. RP 78.

long item [sic] and haven't had any luck. looking for something real and taboo. If this is still up then I am still looking. send me your name and your favorite color so I know you are not a bot. i like to watch ddlg daddy/dau, mommy/dau mommy/son.

Ex. 1; RP 66-69. The ad was intentionally cryptic. Det. Rodriguez admitted readers might not know he was offering children for sex. RP 87, 921, 933.³

The ad violated Craigslist terms of use because Det. Rodriguez was pretending to be something he wasn't. RP 69-70,⁴ 883. He explained the ad's abbreviations: "dau" = daughter, RP = role play. He included "key words:" taboo, young family, family fun. RP 77-78, 887-88.

He intended that "mommy likes to watch" would convey that mom would not be sexually involved; "family fun time" meant "incestual relationship with kids," "young family" meant incest, and "taboo" meant child sex. RP 917-20, 926.

³ He testified "ddlg" meant "daddy daughter little girl," but realized a person unfamiliar with the lingo might not recognize what it meant. RP 88, 890-91, 896.

⁴ Det. Rodriguez did not ask Craigslist permission to violate its terms of use or to post this fictitious ad. He had asked permission before for a Net Nanny Operation in Kitsap County, and Craigslist wanted a court order. He did not obtain a court order in this case. RP 88-90.

Det. Rodriguez first saw Mr. Arbogast's response to the ad. Although it gave no indication that he was seeking sex with children, Det. Rodriguez referred it to Det. Garden. RP 970-71. Det. Garden's job was to "chat" with people responding to the ad. He pretended to be Brandi Collins, seeking a man to teach her children about sex. He did all the communications in this case. RP 96-106, 1024-32.

e. *Grandfather Douglas Arbogast Sought a Casual Sexual Encounter with an Adult Woman on Craigslist.*

At age 70, Douglas Arbogast lived a law-abiding life. CP 191. Retired from Hanford, he and his wife of 47 years raised two sons. They have three grandchildren. Due to medical issues, his wife in recent years was no longer receptive to sexual intercourse.⁵ RP 1353-54. Mr. Arbogast turned to the internet to find a sexual outlet with another woman. RP 1354-59; Ex. 21 at 7-10; Exs.

⁵ As he explained to the detective: "And intimacy, no, we're not. We're, you know, we're just old together." Ex. 16 at 25.

22-23.⁶

Mr. Arbogast had sold some items on Craigslist. He noticed the Casual Encounters heading. He responded about six times to ads of Woman For Man. He got a reply once. The woman was hesitant, but he suggested they meet in person and see what they thought, to ease their fears. They met and enjoyed a night of casual sex. That was the last ad he'd responded to. RP 1354-59.

A few weeks later he saw the ad Det. Rodriguez placed. Ex. 1. Mr. Arbogast responded by email, using his real name, and as requested, provided his favorite color. Ex. 2.

Doug and black&white 1:56 PM

He was pleased when he got a reply:

hi doug [smiley face] I am brandi ...
are u a black and white kind of guy? 4:14 PM

He responded:

Yes I am. If guessed photography that is
why. I do B&W Picts So I up for
anything if you are 5:27 PM

Brandi quickly replied:

Lets talk and see if you are interested

⁶ Exs. 22-23 are video of the interview of Mr. Arbogast after his arrest. Both were admitted and shown to the jury. Ex. 21 is a transcript of that interview.

in my situation. would u mind texting me
your name DOUG to 5096202098 so I know
its u...i really woudl rather text than
email. 5:29 PM

Doug responded:

Ok, give me a few to get back at you in
text mode. 5:49 PM

While Mr. Arbogast left his iPad to switch to
text on his cell phone, Brandi sent another email:

I need you to be honest about what you
want, that is best and makes sure we all
get what we want. My girl is 11 and my
boy is 13. She is not totally active,
but still likes to play and is very ready
and mature. My son is 13 and is very
active. I'm single and looking for some
one that is open and free to new ideas.
If this fits you then lets talk and if it
works out we can meet up and have some
fun. 5:54 PM

Ex. 2; RP 921-25, 1030-38. This email alluded to
her children, their ages, that they are "active"
and "playful," but nothing sexual. She expressed
that she, personally, was looking for someone "open
and free to new ideas."

The two exchanged the following texts.⁷ RP
1046. Mr. Arbogast began with a friendly opener:

⁷ This information is from Exhibit 3. For
reasons of space, here "I" indicates the message
was incoming (Arbogast to Brandi), "O" indicates
outgoing (Brandi to Arbogast), from Brandi's phone.
The messages are reproduced here in their entirety
complete with misspellings.

05:54:03 PM I Hi. I'm Doug. What's happening?

06:00:46 PM O thank u so much better to text

06:01:18 PM O did you read my last email. i dont want to waste our time if this isnt for you. i really wnt to find the match

Mr. Arbogast reassured her it was him.

06:07:02 PM I This really is me. I do B&W Picts if this helps

06:08:22 PM O ok are you good with my kids ages?

06:09:01 PM I What are the ages?

06:11:09 PM O thats why i asked if you read the last email i sent. ...its in the email. boy is 13 and my precious baby girl is 11

06:12:58 PM I Ok sorry I missed it. All the replies on top of each other.

06:15:03 PM O i get it...that is why i hate the emails i like texting for that reason

Mr. Arbogast apparently had no issue with hooking up with a woman with children these ages. He asked more about her.

06:17:08 PM I I agree. So tell me more about yourself

06:33:02 PM O I was rased very close to my father. he started sleeping with me when i was young...at first i was scared but really enjoyed it. he was so gentle and loving. my mom knew so it made our home open. i miss

those days. i want my kids to experience the same closeness plus they need a teacher to help them with sex when they get older

06:33:59 PM O I have to be honest. i lost my attraction to men a while back. i cant get enough of young boys about my sons age./ their innocence is amazingly a turn on for me

Mr. Arbogast continued to promote himself to Brandi, suggesting his own qualities to help her regain her attraction to men, including his age, experience, and hair.

06:46:54 PM I Ok Brandi, I am probably a we bit older and know a few things. I can be easy and exploring into everything you might desire. So if you want to try someone older, game on. I d have most of my hair.

06:57:37 PM I So what would you like me to do to help?

Brandi began to explain she was looking for a longer-term involvement, to replace a man who had been in their lives for a year. She referred to him teaching her kids "oral," yet being "the daddy" they need.

07:02:57 PM O we had a very good man in my kids life for a year or so but lost him to a move because of military. i am looking to fill his role in my kids lives. he was bi and very gentle with

hem. taught them oral and other skills. its so hard to find the right guy. i have to be so careful and so do you. i am not interested in men especailly older. sorry my secrete is i am into boys my sons age ... i love their innocense. can you be the daddy my two kids need??

Mr. Arbogast explained he'd never done anything with children, he just wanted to be with the mom.

07:15:42 PM I Well sorry to hear that. I just read that missed mail. Never have done that. I just wanted to be with mom. Don't know if I could help do kids. It's really up to you

07:18:04 PM O thanks for not wasting our time. I am not looking for me. I am looking for someone to be with my kids. good luck with what it is you seek

Rather than lose contact with this woman, Mr. Arbogast began agreeing to her suggestions.

07:19:25 PM I I can be good with them. Just never thought about that way

07:20:45 PM O do you have an attraction to children. i am not looking for a friend. i can find them anywhere. i am looking for their love trainers to give them expearence

07:29:22 PM I I have not tried young kids. I do look at young girls, not so much boys. Would like to try a young lady once.

07:30:57 PM O could you be gentle with my princess or is this not for you?

07:32:18 PM I I would be gentle of course. Has she had any teaching at all?

Brandi explained more about the long-term teaching she was seeking, based on what her family already had experienced. Mr. Arbogast explained his own life's constraints, not sure it would accommodate the sort of commitment Brandi wanted. As he accepted Brandi's "thought," he turned the conversation back to her. He proposed meeting her alone someplace public, for coffee, to see if they were talking about the same thing, and whether she would approve of him.

07:37:15 PM O yes we had a very good man taht was with both my son and daughter for almost half a year. he was married and in military he undestood the lifestyle and was the fatehr figure they needed and like i had. he left because of the military and been looking ever since

07:41:27 PM I Well I am married. Wouldn't be able to spend as much time that I think would be necessary for this training. The thought would be nice to see what would happen

07:49:06 PM I I assume kids are in school, would you like to meet publicly

for a coffee? Could discuss more from there

07:56:35 PM O I am not looking for someone to live with us. come and go when they want. the last guy was married too.

07:57:06 PM O i homeschool my kids. it keeps our secrets and gives me the control.

07:58:14 PM I Ok. And my secret as well if chosen

Brandi was interested enough to request a picture of Mr. Arbogast.

08:06:00 PM O can i get one of your black and white photos of yourself holding up 3 fingers? i want to see what you look like and make sure you are who u say you r

Mr. Arbogast provided the photo. Ex. 4.

08:09:28 PM I Me

08:09:31 PM I Ok

08:09:48 PM I How about some from you?

08:13:18 PM O nice B & W pic i can show the kids if you would like and are serious about this

08:14:00 PM I Go for it.

Brandi was interested enough to return the favor, sending him a photo of her. She smiled at him, wearing only a lacy strap top that appeared to be a bra or a teddy. Her necklace had hearts on a

chain. Ex. 5. The sight of her made Mr. Arbogast renew his offers of tender loving care to Brandi.

08:14:43 PM O he is mine...its a good hair day

08:16:57 PM I Ok. Yes good day. You sure you don't need some talc?

08:18:53 PM O talc???? what is that

08:20:02 PM I Sorry. Fat fingered the letters. TLC

Brandi now suggested she could get involved with Mr. Arbogast. Then she challenged him to change her mind about hooking up.

08:21:35 PM O I could get invloved with you and jake after a few good sessions of you two but i am not into it and dont want to take away from my kids expereince

08:22:26 PM O change my mind about us hooking up?

08:23:23 PM O yes u r but i dont think you could satisfy my kids nor that you want to sexually

Mr. Arbogast explored the specifics of what Brandi wanted him to teach her children. He asked about the frequency and time commitment she sought.

08:23:47 PM I Ok you mean I need to groom the boy alone? What about your princess

08:24:12 PM I Like I say. Never have done kids before

08:26:33 PM I How active are they? Are they like needing a regular meeting a couple times a week?

08:29:16 PM O oh no anna needs her time to. she is very curious and is in the prime time to learn i cant force you to do this nor do i want to.

08:29:49 PM O optimal couple times a week....play dates [smiley face]

Mr. Arbogast again offered to meet her in person. Brandi responded with rules for any actual eventual sexual contact. When she raised the issue of "prego," he assured her he was infertile. She told him "we all get naked" when he arrives. She directed "no anal," yet oddly insisted on condoms "if going to penetrate" her son or daughter. Mr. Arbogast explained he didn't do anal and didn't have condoms or lube.

08:31:00 PM I You know, we should meet and try it out. Both at the same time or separate

08:33:33 PM O up to you but i have rules that must be followed

08:34:09 PM I Tell me the rules then

08:36:34 PM O no pain or anal condoms are a must no prego kid you must stop when if i say so you have to come to our place and when you come in we all get naked cops dont get naked and that way we can rule that out RU ok

with them

08:39:25 PM I Yes. No prego cause I shoot blanks. Never done anal so no worry. Just like doing oral along with regular sex

08:41:29 PM O but you have to wear condoms if going to penetrate anna or jake. there are no exceptions. lube is a must for her too

08:41:53 PM O how big are u

08:44:52 PM I Condoms it is. I don't have them nor lube been a very long while since I have even seen or touched a bare body. Probably won't last but 15 seconds

08:45:45 PM I And I am about average. Nothing big

08:46:38 PM O thats funny...anna is good even at her age and could make that happen. good i dont want a large penis entering her

08:47:04 PM I No worry there

Brandi then offered him a picture of herself, again smiling broadly at him, with her children. She seemed to approve of Mr. Arbogast.

08:48:08 PM O do you want to see a pic of us...you seem legit and ok to trust.

08:48:30 PM I Yes. Send a photo

08:49:01 PM O give me a sec i will get them

08:49:09 PM I K

08:52:32 PM O [photo sent]⁸
08:53:32 PM O thats my whole world. such
good kids
08:53:57 PM I Ok Looking good'

Mr. Arbogast indicated he's willing to meet
and teach. He'll try to meet Brandi's standards.

08:54:23 PM I I'm in if you want an old guy
08:55:36 PM O i have to be clear i am not
involved...so when you say
"you" i dont want you to be
disappointed and especially
dont want my kids disappointed
because u dont want them
08:57:31 PM I Ok. I would try for mo
disappoint. I have a lot to
learn as well

Mr. Arbogast explored possible meeting times.
Brandi pressed him to meet immediately for a short
time.⁹ Since he didn't have the condoms and lube
she required for sexual intercourse, she offered to
be flexible at their first meeting. He suggested

⁸ See Ex. 6. The photographs are not of
children, but of two state troopers in odd
costumes. They do not look like children.

⁹ Creating a sense of urgency is a widely
used sales tactic. It is scientifically linked to
"ill-considered or rash actions." See generally
Melissa Cyders & Gregory Smith, *Emotion-based
dispositions to rash action: Positive and negative
urgency*, 134(6), *Psychological Bulletin* 807-828
(Nov. 2008), available at: [www.ncbi.nlm.nih.gov/
-pmc/articles/PMC2705930/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2705930/) (last visited 9/14/2019).

they just meet and get to know one another.

08:58:02 PM O where do u live

08:58:57 PM I Pasco

09:00:05 PM O when can we make this happen.
the sooner the more it makes me
less cautious its not a set up

09:04:22 PM I Ok. I'm not setting you up
cause I just being cautions to.
Tell me times suited for you.
I have to be discreet and time
things just right. Sometimes
mornings work for me. Then of
course getting stuff. Never
done it before

09:06:18 PM O we are flexable. I clean
houses for work and can adjust
my schedule. we could do it
tonight it you would like 15
seconds of fun. it sounds like
u have more problems pick a
time

09:08:48 PM I You are right. I don't have
the required stuff. So we
would have to be flexible for
tonight

09:10:03 PM I Where r u?

09:11:20 PM O kind of new to the area...liv
in richland by the 240 bypass.

09:11:56 PM O what did you have in mind for
play time tonight? what would
u like

09:14:20 PM I I'm easy for it. Just get to
know one another. Are good
with it. Send address

Brandi got more explicit, suggesting a variety
of possible contacts, including a "hand job" or

kissing. Mr. Arbogast said it would not involve penetration. Although she again asked him to get condoms and lube for intercourse, he never did.

09:16:32 PM O can you stop and get condoms and lube. i dont want u to be unprepared if you need them. i have to prep the kids for what it is you want oral, hand job, penetration, kissing. we r night owls so time is good

09:19:42 PM I Like I said have not done this before. Could do almost anything without penetration.

09:21:40 PM O are u interested in both anna and jake? same time or separate

09:22:34 PM I Anna first

09:23:10 PM I I'm leaving now so send address

09:23:23 PM O ok separate is best. i will have to watch to make sure all is safe

09:25:09 PM I K

While Mr. Arbogast drove, Brandi demanded more specifics from him. He acceded to her suggestions.

09:25:17 PM O do you want to start with touching and move to oral or what. help me.....i want to tell anna. do you want her dressed in anything specific

09:26:18 PM I Just under things touching then to oral

09:27:15 PM O you giving or them giving oral or both??

09:28:14 PM I Both

09:29:12 PM I Ok I'm driving. Address please. Can't look at same time

09:29:33 PM O ok...give me 10-15 minutes to prep them and shower anna. i am excited you want to see them. i hope this turns out to be what i am looking for.

09:29:56 PM I Ok

09:30:54 PM I On the road

09:41:22 PM O what clothes u didn't say to put them in. sorry hurrying

09:43:07 PM I Under clothes is good

09:43:48 PM I I'm in town. Just need directions

09:50:24 PM O you have to do one more thing there is a car wash next to our place I have to google the name and address but go there and take a selfie with it in the background holding 3 fingers and send it to me and i will give u my addrss.

09:50:51 PM I Ok

09:51:33 PM O its called liberty car wash 418 riverstone drive

09:51:48 PM I Ok

09:52:29 PM O wow the kids are freaking bouncing around...anna is singing. u will like her underwear [smiley face]

09:59:06 PM I Excited

10:00:10 PM O thanks hun come on over 2513

duportail st E-235 at the moiac
on the river apartment down the
street this will be fun

Ex. 3. Mr. Arbogast got lost. Brandi gave him specific instructions. When he entered her apartment, Brandi (in fact Det. Makayla Morgan) greeted him. She appeared to be alone. She asked that he take off his shoes as she left the room "to get the kids." As he slipped off his shoes, he was arrested. RP 1192-95, 1209-10; Ex. 20.

There was no Brandi, and there were no children. Mr. Arbogast did not have condoms or lube.

f. *Evidence After Arrest*

Mr. Arbogast waived his rights and agreed to talk with detectives. He was candid and cooperative, not evasive. RP 1238, 1266-71; Exs. 21-23. He consented to an unlimited search of his cell phone and his vehicle. "I've got nothing to hide." *Id.* at 4-7, 12-13. There was no child pornography, nothing of evidentiary value except his texts with Det. Garden. RP 971-73. Mr. Arbogast had not responded to any ads regarding children and sex. RP 980, 1272-79.

When asked how he came to be at the apartment,

he explained "it's just the enticement of sex."

Ex. 21 at 13.

DA: ... Like I say, I didn't want to be involved, you know, knowing that kids under 18 are real jailbait. And uh, it's just like no, you know. But I went along a little bit. I just wanted to meet her. ... Her and that was it.

BQ: So your intention was to meet her?

DA: Primarily, yes.

Ex. 21 at 14. Relating their exchange further:

DA: She said that she used to have a live-in Army guy who would take care of them. She wanted to train them sexually. And I thought train them, that's got to be a really weird person for doing that. And uh, uh, she said if you want to have sex with them, you gotta have condoms. (Unintelligible) I don't have any of that stuff, you know. I said, I just wanted to meet you. And she's like no, no, no. She was more primarily into training the kids and that was it.

Id. at 15. Mr. Arbogast explained he offered to just meet the woman for coffee.

AC: What made you get over that hurdle to come here tonight instead of doing the coffee thing?

DA: Oh she said well come on over and you can meet everybody, then you can, we'll talk from there. I said okay.

Id. at 20. From the ad, he only understood she was a single mom. He was very pleased she replied when he responded to the ad. *Id.* at 17, 20.

Mr. Arbogast explained he no longer has sex within his marriage. He is not sexually attracted to children. He does not look at porn sites on line.¹⁰ When he thinks about sex, he imagines having sex with his wife. *Id.* at 23-24. Asked what he "visualized" when thinking about having sex, he responded: "I guess I live in a sheltered life because I don't visualize that." He did not masturbate. *Id.* at 25. "So she just keeps egging on and stuff like that and I just kind of went with the flow and says okay, whatever. Says whatever you want." *Id.* at 16. "But I went along a little bit. I just wanted to meet her." *Id.* at 14.

Mr. Arbogast agreed to take a polygraph that same night. The Kennewick Police Department polygrapher found no deception when he denied ever having sexual contact with anyone under the age of 16. CP 85-86.¹¹

g. *Additional Trial Evidence*

The MECTF began with state funding to find missing children. It then "progressed" to

¹⁰ His consented search of his iPhone corroborated this report. CP 50.

¹¹ The court excluded evidence that Mr. Arbogast passed the polygraph. CP 118-19.

accepting private donations to conduct sting operations. RP 858-59. It received a \$10,000 donation to make this operation possible. After announcing it arrested 26 people in this sting in Benton County, the most it had arrested in one operation, it received more donations, at least \$30,000. Exs. 13-15; RP 935-45, 963-95.

Mr. Arbogast testified he was not sexually attracted to children. He never had been. RP 1353-54. He responded to "Brandi's" ad because he wanted to have sex with a woman. RP 1360-64. Although at some point Brandi said she was not interested, he thought he could keep conversing with her and persuade her. When she kept talking about kids, he thought if he expressed some inclination to what she was suggesting, she'd be more open to having sex with him. He had no intent to follow through with any sexual contact with children. He just said what she wanted to hear. He even suggested meeting Brandi in public for coffee, to talk about the situation. She declined. So he was willing to say he'd do what she wanted, to get on her good side. He figured they would meet and talk at her place. He only intended

sexual activity with her. RP 1364-67, 1419.

She set strict rules: to have sex with the kids, he had to have condoms and lube. He did not get condoms and lube. RP 1367-68. There were many places open on his way to meet her where he could have bought condoms, but he didn't. RP 1377.

She seemed interested when she sent him a photo wearing a teddy. The image excited him. She asked him to change her mind about hooking up. He thought she was inviting him to change her mind, so she would have sex with him. RP 1369, 1393.

When he knocked on the apartment door, he did not intend sexual intercourse with Anna or Jake that night. He did not intend to give or receive oral sex with either child that night. RP 1378, 1392. "Brandi" was not the only one being deceptive. Mr. Arbogast lied to her hoping to have sex with her. RP 1422-23.

Officer John Davis testified in rebuttal. He was called in to the Net Nanny Operation to conduct the polygraph. Although he didn't record his pre-test interview with Mr. Arbogast, he asked him if he intended to be with the children that night, and Mr. Arbogast responded yes. He did not test him on

that question. He did not ask him whether he intended to have sexual intercourse with children that night. RP 1444-60.

2. PROCEDURAL FACTS

a. *Charges*

The State charged Mr. Arbogast with Count I, Attempted Rape of a Child 1°, RCW 9A.44.073, 9A.28.020(1); and Count II, Attempted Rape of a Child 2°, RCW 9A.44.076, 9A.28.020(1). CP 1-2.

b. *Pretrial Motions*

i. *Discovery*

Defense counsel moved to compel discovery of the records of previous Net Nanny Operations. This particular Operation resulted in 26 arrests, although WSP claimed hundreds of responses to its many ads. The defense bears the burden of proving entrapment. The defense needed to prove the MECTF used more than "normal persuasion" here. Counsel sought to establish what was "normal persuasion." The court denied the motion. RP 9-23; CP 227-31.

ii. *Denying due process*

The defense moved to dismiss the charges for outrageous government conduct, denying due process. CP 88-105. The court heard evidence pretrial as

set out above. The court found the state's actions were not sufficient to "overcome [Mr. Arbogast's] free will," the "government did not control the defendant's behavior or his responses," and "the motives of the police were to prevent crime and protect the public from sexual predators of children and people who are willing to have sex with children." It denied the motion. CP 115-17; RP 141-45.

iii. *Excluding evidence and instructions on entrapment*

The defense moved pretrial to instruct the jury on entrapment. CP 36-86. The court reserved this motion to the trial court. RP 33.

The State moved in limine to prohibit the defense from revealing to the jury that Mr. Arbogast had no criminal history. It argued it was not relevant unless the defense could establish entrapment and get an instruction. RP 56-75. The court ruled before the defense could present evidence of no criminal history, it must establish evidence of entrapment, e.g., luring. RP 75-78. Nonetheless, it also ruled the State could present evidence that the Craigslist website had a method for flagging improper ads and Mr. Arbogast did not

flag this ad, as relevant to predisposition. RP 97-108.¹²

At the close of the State's case, the trial court found there was evidence of luring, using offers of sex with the adult woman. But not "undue" influence. "I don't see that there is sufficient or any indication of any type of pressure or undue influence[] placed on the defendant to engage in this behavior." RP 1333.

So the Court does not believe it's warranted to give an instruction regarding the entrapment nor to allow evidence regarding whether or not the defendant had engaged in this type of behavior previously to show a lack of predisposition.

RP 1334.

The defense also offered evidence to support the position that Mr. Arbogast was not predisposed to have any sexual contact with children. A life-long friend of Mr. Arbogast's son would testify that he was at their home almost daily throughout his childhood. Lots of children surrounded Mr. Arbogast over those years. The witness never saw any indication whatsoever -- no ogling, touching,

¹² Mr. Arbogast did not know how to "flag" improper ads. Ex. 21 at 18.

leering, untoward requests -- that Mr. Arbogast was sexually attracted to children. RP 1345-49.

The court excluded all evidence of and an instruction on entrapment. RP 1343-44, 1349-50.

c. *Jury Instructions*

The defense took exception to instructions Nos. 10 (substantial step) and 14 (intent), on the grounds they did not require the jury to find the specific intent to engage in sexual intercourse, RP 1471-72, 1474-75, CP 157, 161; and the failure to give his proposed instructions on entrapment. RP 1486; CP 143-44.

d. *Motion to Dismiss*

The defense moved to dismiss Count II on the grounds there was insufficient evidence to prove Mr. Arbogast intended to have sexual intercourse with Jake that same night. The Court denied the motion. RP 1340-44, 1462-65.

e. *Verdict and Sentence*

The jury found Mr. Arbogast guilty of both counts as charged. CP 116-17.

Mr. Arbogast has multiple sclerosis and heart disease. The defense recommended an exceptional minimum term below the range. The defense also

objected to community custody conditions 14-16, and 22. RP(7/25/18) 20-29.

The court sentenced him to life in prison, with minimum terms of 90 and 76.5 months, to run concurrently. It imposed the community custody conditions the State requested. CP 190-203.

C. ARGUMENT

1. THE LAW OF ENTRAPMENT

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

United States v. Russell, 411 U.S. 423, 434-35, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973); *Sherman v. United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 2 L.Ed.2d 848 (1958); *Sorrells v. United States*, 287 U.S. 435, 442, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.

Jacobson v. United States, 503 U.S. 540, 553-54, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). On the other hand,

the fact that officers or employees of the Government merely afford opportunity or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.

Sorrells, 287 U.S. at 441.

The defense of entrapment seeks to reconcile these two, somewhat contradictory, principles.

United States v. Poehlman, 217 F.3d 692, 697 (9th Cir. 2000). The defense evolved at common law. In federal courts it remains a common law defense. Law enforcement may afford opportunities to commit a crime and it may do so with various strategies to catch those already engaged in criminal activity. *Jacobson, supra*, 503 U.S. at 548, citing *Sorrells*, 287 U.S. at 441. However, law enforcement cannot

play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted.

Jacobson, 503 U.S. at 553, citing *Sherman v. United States*, 356 U.S. at 376.

a. *The Elements of Entrapment*

[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. . . . Predisposition, "the principal element in the defense of entrapment," . . . focuses upon whether the defendant was an "unwary innocent" or instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. The question of entrapment is generally one for the jury, rather than for the court.

Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L.Ed.2d 54 (1988) (citations omitted).

The entrapment defense "focuse[s] on the intent or predisposition of the defendant to commit the crime." *Russell*, 411 U.S. at 429.

It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

Russell, 411 U.S. at 436. Importantly, the United States Supreme Court held that a suspect's

ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was **predisposed, prior to the Government acts** intended to create predisposition, to commit the crime.

Jacobson, 503 U.S. at 553 (emphasis added).

b. *Washington's Statutory Defense*

In Washington, since 1975 the defense of entrapment is statutory:

RCW 9A.16.070. Entrapment

(1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

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

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

This statute codified the common law defense.

... Under RCW 9A.16.070, and common law, entrapment occurs when the crime originates in the mind of the police or an informant and the defendant is induced to commit a crime which he was not predisposed to commit. The statute thus constitutes a restatement of the subjective test of entrapment as applied by both the federal and Washington State courts.

State v. Lively, 130 Wn.2d 1, 8-9, 921 P.2d 1035 (1996) (footnote and citations omitted).

Despite the common law, the statute made entrapment an affirmative defense. The defendant bears the burden of producing evidence of entrapment and of proving entrapment by a

preponderance of the evidence. *Id.* at 13. Thus it differs from the federal requirement that the Government prove lack of inducement or predisposition beyond a reasonable doubt. *Jacobson*, 503 U.S. at 553.

There is no question here "the criminal design originated in the mind of law enforcement officials." RCW 9A.16.070(a). The issues here turn on "lured or induced" and lack of predisposition. RCW 9A.16.070(b).

c. *Luring and Inducement Involve Persuasion That Materially Alters the Balance of Risks and Rewards and Changes a Defendant's Decision to Commit an Offense He Otherwise Would Not Have Committed.*

i. *Luring or inducing involves something more than offering an opportunity to commit a crime.*

A sting operation is not improper inducement if it merely provides an opportunity to commit a crime, but proof of opportunity plus "something else" may be adequate to meet a defendant's burden.

United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998). "Luring" generally involves offering an enticement, some reward, beyond an opportunity.

First, the Government's operation "reflected a psychologically 'graduated' set of responses to Jacobson's own noncriminal responses, beginning with innocent lures and progressing to frank

offers. ... Second, the Government's solicitations appealed to alternative motives (i.e., anti-censorship motives), ... which suggested that the illicit conduct was "something the [defendant] ought to be allowed to do."

Jacobson, 503 U.S. at 553, quoted in *Gamache*, 156 F.3d at 10.

Luring requires something more than a sympathetic appeal. *Sherman, supra*, 356 U.S. at 373 (informant appealed to sympathy as fellow addict, but also made repeated requests to overcome defendant's refusal, then evasiveness, then hesitancy, until he achieved capitulation).¹³

In contrast, a government agent merely using a false name to order obscene photos from a dealer is

¹³ See also: *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984) (sympathy not sufficient to "induce" selling marijuana to woman who claimed it was for her dying husband); *State v. Keller*, 30 Wn. App. 644, 637 P.2d 985 (1981) (evidence of inducement sufficient for instruction where informants drove a long way to defendant's remote home, repeatedly asked to buy marijuana for one hour; finally defendant produced 1/14th of an ounce and gave it to them so they would leave; declined to make a second sale); *State v. Morgan*, 9 Wn. App. 757, 515 P.2d 829, review denied, 83 Wn.2d 1004 (1973) (inducement evidence sufficient for instruction where defendant had quit using marijuana, told informant four times he had no idea where she could buy marijuana; informant offered to become his bed partner and trade tranquilizers for marijuana; he finally provided her two left-over joints he had).

not luring. *Grimm v. United States*, 156 U.S. 604, 15 S. Ct. 470, 39 L. Ed. 550 (1895). Merely presenting oneself for dental services at defendant's office was not inducement to practice dentistry without a license. *State v. Littooy*, 52 Wash. 87, 100 P. 170 (1909).¹⁴

ii. Here the State lured and induced Mr. Arbogast to agree to "Brandi's" requests.

In this case, Det. Garden violated ICAC standard 8.6. He set the tone, pace and subject matter of the conversation. He was the first to use the following unique words and phrases: "help them with sex," "oral," "gentle," "princess," "love

¹⁴ See also: *State v. Waggoner*, 80 Wn.2d 7, 490 P.2d 1308 (1971) (expressing interest "from time to time" to purchase marijuana); *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966) (two purchases of marijuana over week); *Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948) (officer posing as hotel patron requested "girl," bellboy accepted \$20, brought woman); *State v. Cowling*, 161 Wash. 519, 297 P. 172 (1931) (befriended couple, welcome to their home; no inducement for maintaining place to sell liquor); *Evanston v. Myers*, 172 Ill. 266, 50 N.E. 204 (1897) (selling beer on request, as had done before); *Price v. United States*, 165 U.S. 311, 315, 17 S. Ct. 366, 41 L. Ed. 727 (1897); *People v. Liphardt*, 105 Mich. 80, 62 N.W. 1022 (1895) (agent suggested third party would be amenable if school board member invited a bribe for his vote; set up room for meeting where witnesses could overhear conversation; bribe given).

trainers," "secrets," "prego," "anal," "condoms," "penetrate" [sic], "lube," "flexable" [sic], "touching," "clothes," and "excited." Mr. Arbogast parroted these words and phrases back to "Brandi." Det. Garden suggested they "do it" tonight.

Despite Det. Garden's efforts, Mr. Arbogast redirected the conversation back to having sex with Brandi at least three times. He repeatedly - six times - denied having ever done anything with kids -- a conversational tactic of resistance. When Brandi conditioned ongoing contact with her on agreeing to sex with the kids, he agreed. As in *Jacobson*, "she" made a "psychologically graduated set of responses" to Mr. Arbogast's noncriminal responses, progressing from innocent lures to frank offers, appealing to alternative motives suggesting the illicit conduct should be allowed. *Jacobson, supra*, 503 U.S. at 553.

This case is thus very like *Poehlman, supra*, and *Gamache, supra*. In both cases, the male defendant sought an adult female sexual partner. They responded to ads ostensibly from women, and communicated with a male detective posing as an adult female. As here, the "woman" eventually

persuaded them to agree to be her children's "sexual mentor." In *Poehlman*, where the jury rejected entrapment, the Court of Appeals reversed, holding entrapment was proven as a matter of law. In *Gamache*, the trial court denied an entrapment instruction. The Court of Appeals reversed and remanded to present the issue to the jury.

As here, the role of the adult woman, in whom the defendant repeatedly expressed interest, was "something extra" for inducement. The lure of the adult woman, with whom sex was not illegal, went beyond tempting solely with the criminal act.¹⁵

As in *Jacobson*, *Poehlman* and *Gamache*, the evidence here established luring and inducement.

d. *Predisposition Must Exist Before Law Enforcement Tries to Persuade a Suspect to Commit the Unlawful Act.*

The entrapment statute defines the element of

¹⁵ In contrast, *State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007), involved police posing as a 13-year-old girl in a teenaged chat room. Thus the sting's "bait" was the minor in a place where minors belonged, not where an innocent man would go to look for an adult sex partner. See also: *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (police posed as 13-year-old girl in teen chat room; all communications were with the "girl," no adult woman to attract the defendant); *State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591 (2012) (police posed as 17-year-old girls to attract active pimps).

predisposition as:

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

RCW 9A.16.070(1)(b) (emphasis added). By using the past-perfect tense ("had not ... intended"), the statute grammatically refers to a time past -- before the actor was "lured or induced." Thus the timeframe for determining whether a defendant is predisposed comes before he had contact with law enforcement, "which is doubtless why it's called **predisposition**." *Poehlman*, 217 F.2d at 703 (court's emphasis). See also *Jacobson*, 503 U.S. at 549 (prosecution must prove the defendant was disposed to commit the criminal act prior to first being approached by Government agents).

[T]he concept of predisposition has a definite temporal reference: "the inquiry must focus on a defendant's predisposition before contact with government officers or agents.

Gamache, 156 F.3d at 12.¹⁶

Both *Jacobson* and *Poehlman* rejected the Government's argument that predisposition was

¹⁶ The United States Department of Justice recognizes that predisposition must be proved by acts prior to the offense itself. See: U.S. Department of Justice, Justice Manual, Criminal Resource Manual § 647 (2018), quoted in Appendix B.

proved by a defendant's "ready complaisance" to agree to have sex with a minor after the agent suggested it. *Accord: Sherman, supra*, 356 U.S. at 373 (no evidence defendant was in the drug trade, no narcotics found at home, no profit from providing to agent out of sympathy).

In *Jacobson*, the Government's search of Mr. Jacobson's home revealed no evidence of predisposition toward child pornography. In *Poehlman*, a thorough search of defendant's home found no e-mails, chat room postings, letters, tapes, magazines, or photographs expressing any interest in sexual activity with children. In *Gamache*, a search of the defendant's home similarly produced no such evidence.

Here, the State admitted it had no evidence whatsoever that Mr. Arbogast ever had improper contact with children. RP 95-96.¹⁷

As here, in *Poehlman* the wording of the ad was not at all clear. Even when Sharon told Poehlman she wanted him to be a sexual mentor to the

¹⁷ In contrast, in *Johnson, supra*, the defendants approached the two decoy "17-year-old girls" and explained they were already making money illegally with girls working for them.

children, he still tried to revert the conversation to a non-sexual matter and to sex with Sharon. Poehlman's reluctance made Sharon even more aggressive in her suggestions, further supporting his claim of inducement. 217 F.3d at 704.

The e-mails thus tell us what Poehlman's disposition was once the government had implanted in his mind the idea of sex with Sharon's children, but not whether Poehlman would have engaged in such conduct had he not been pushed in that direction by the government. In short, Poehlman's erotic e-mails cannot provide proof of predisposition because nothing he says in them helps differentiate his state of mind prior to the government's intervention from that afterwards.

217 F.3d at 704. Here Mr. Arbogast kept reverting to persuading "Brandi" to meet him, accept his "TLC," or even meet for coffee or when the children were at school. Nothing he said or offered exhibits a predisposition toward children.

2. THIS COURT SHOULD DISMISS THIS CHARGE AS DENYING DUE PROCESS DUE TO OUTRAGEOUS GOVERNMENTAL CONDUCT.

No State shall ... deprive any person of life, liberty, or property without due process of law

U . S . C o n s t . , a m e n d . 1 4 .

§ 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Const., art. I, § 3.

When the government itself creates crimes to unfairly entice otherwise innocent individuals of committing offenses they were not predisposed to commit, the conduct can be so outrageous as to deny due process. *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *State v. Lively*, *supra*.

We review de novo the district court's denial of a motion to dismiss an indictment due to outrageous government conduct.

United States v. Black, 733 F.3d 294, 301 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 267 (2014). Every case must be resolved on its own particular facts, but the Court has some ground rules.

For example, it is outrageous for government agents to "engineer[] and direct[] a criminal enterprise from start to finish, ... or for the government to use "excessive physical or mental coercion" to convince an individual to commit a crime, It is also outrageous for the government to "generat[e] ... new crimes merely for the sake of pressing criminal charges." ... It is not outrageous, however, to infiltrate a criminal organization, to approach individuals who are already involved in or contemplating a criminal act, or to provide necessary items to a conspiracy. ... Nor is it outrageous for the government to "use 'artifice and stratagem to ferret out [ongoing] criminal activity.'" "

Id., 733 F.3d at 302 (citations omitted).

In *Greene*, an agent approached two former bootleggers to set up a new still, offering the location, equipment, an operator, and 2,000 pounds of sugar. When they eventually produced liquor, the agent was the only purchaser. The Ninth Circuit reversed and dismissed.

In *Twigg*, the agent offered to raise capital and distribute product if defendant set up a meth lab. The agent then provided a farmhouse, essential chemicals, some equipment, and money for the rest. The agent created the crime. The Court of Appeals reversed and dismissed.

[A]lthough proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was "outrageous." ... Where the facts can easily be resolved, the validity of the defense is to be decided by the trial court.

Twigg, 588 F.2d at 378-79.

In *Lively*, the informant infiltrated an AA/NA meeting to target a very young and vulnerable woman with no criminal background. He courted her, proposed to her and moved her into his home. Then he pressured her to obtain drugs for an agent. She finally agreed because of her emotional reliance on

him.

Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. ...

Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind "proper law enforcement objectives--the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness."

Lively, at 19, 21.

[I]n this instance, the government conduct demonstrates a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior.

Id. The Court concluded:

To condone the police conduct in this case is contrary to public policy and to basic principles of human decency.

Id. at 27.

As in *Greene*, *Twigg*, and *Lively*, the police conduct here was outrageous. The MECTF placed the ad as an adult woman looking for a man. All communications were with an "adult woman." She provided a flirty photograph of herself. Despite Mr. Arbogast's clear inclination toward her, his "evasiveness" and repeated efforts to turn the conversation away from the children (repeatedly telling her he'd "never done kids"), she would only

meet her if he agreed to sexual contact with the children at some time. She then spurred the urgency by suggesting they meet that same night.

The police had no information suggesting Mr. Arbogast was involved in any criminal activity. The Net Nanny Operation cast a net into the broad sea of men who might respond to an ad of adult Women Seeking Men for casual sexual encounters. The ad was intentionally vague so it would not be rejected from the website. Its secret codes were not plain to those lacking the detective's special training. Mr. Arbogast understood a single mom was looking for a man. When Brandi replied to his response, he did his best to arrange an in-person meeting with her, the adult woman, the one who sent him her photograph, smiling big in a lacy-strapped bra or teddy. She promised to get naked when he arrived. As she repeatedly spoke in code about her children, then became more explicit, he proposed meeting her alone in public for coffee. When he finally acceded to her wishes to meet her children, she pressured him to come tonight. He didn't have the required condoms and lube for sex with the kids, but agreed to come "just to get to know one

another."

Here the police did not infiltrate a criminal organization or approach someone already involved in crime. Rather they generated a new crime merely for the sake of pressing criminal charges, using an enticement that was lawful but conditioning it on agreeing to commit a crime. This operation overstepped the line between setting a trap for the unwary innocent and the unwary criminal. As in the cases above, this Court should reverse and dismiss these charges.

3. THIS COURT SHOULD DISMISS THIS CHARGE BECAUSE ENTRAPMENT WAS PROVEN AS A MATTER OF LAW.

The United States Supreme Court has not yet dismissed an entrapment case for outrageous government misconduct violating due process. Yet it and the Court of Appeals have reached the same result by concluding either the evidence proved entrapment as a matter of law, or there was insufficient evidence to disprove predisposition. *Sherman, supra; Jacobson, supra; Poehlman, supra.*

In *Sherman*, as in *Lively*, the informant preyed on a fellow patient in addiction treatment. After befriending him, he later told him the treatment

wasn't working for him. He asked him to find a good source for drugs. Mr. Sherman avoided the issue, but after repeated requests and apparent suffering, he obtained drugs for the informant, eventually relapsing himself. The Supreme Court reversed and dismissed, holding entrapment was established as a matter of law from the undisputed prosecution's witnesses.

To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.

Sherman, 356 U.S. at 372. As here, the agent's repeated requests overcame first a refusal, then evasiveness, then hesitancy, until "she" achieved capitulation.

The Government sought to overcome the defense of entrapment by claiming that petitioner evinced a "ready complaisance" to accede to Kalchinian's request. Aside from a record of past convictions ... the Government's case is unsupported. There is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian. The Government's characterization of petitioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void.

Id. at 375.

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. . . . Law enforcement does not require methods such as this.

Id. at 376.

In *Jacobson*, postal inspectors repeatedly solicited a 56-year-old veteran-turned farmer who supported his elderly father in Nebraska, to order child pornography. The sent him surveys regarding interest in young people's sexuality, then pamphlets supposedly from groups trying to change the laws, complaining about censorship. When he finally ordered a magazine and was arrested, a search of his home found no other evidence of child porn. The Supreme Court held he was entrapped as a matter of law. *Jacobson*, 503 U.S. at 542.

In *Poehlman, supra*, the defendant was a cross-dresser and foot-fetishist rejected by his wife and other women. He sought other adults with similar interests on "alternative lifestyle" discussion groups. As here, police posed as a woman seeking someone to understand her family's "unique needs" for a "special man teacher" for her children. As here, Mr. Poehlman reiterated his interest in the mom, offering to teach the children proper morals.

When he finally understood she wanted him to teach the children about sex, he agreed so he could meet her. The Court of Appeals reversed, holding entrapment was proven as a matter of law. *Poehlman*, 217 F.3d at 697, 705.

The Court noted the decoy induced Mr. Poehlman by providing moral cover to alleviate his perception that the act she sought was wrong:

This is particularly so where the parent does not merely consent but casts the activity as an act of parental responsibility and the selection of a sexual mentor as an expression of friendship and confidence. Not only did this diminish the risk of detection, it also allayed fears defendant might have had that the activities would be harmful, distasteful or inappropriate, particularly since Sharon claimed to have herself benefitted from such experiences. See *United States v. Gamache*, 156 F.3d 1, 11 (1st Cir. 1998) ("[T]he government agent provided justifications for the illicit activity (intergenerational sex) by describing 'herself' as glad that Gamache was 'liberal' like her, expressing that she, as the mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her.").

Poehlman, 217 F.3d at 702. As here,

The record is clear that it was the Government's insistence and artful manipulation of appellant that finally drew him into the web skillfully spun by the detective.

Id., citing *Gamache*, 156 F.3d at 10.

As in *Sherman, Jacobson, and Poehlman*, this Court should hold Mr. Arbogast established entrapment as a matter of law and dismiss the charges.

As in those cases, here the adult woman's inducements overcame Mr. Arbogast's refusal, evasiveness, and hesitancy. *Sherman*, 356 U.S. at 373. Police proposed and created this entire "crime." They then required Mr. Arbogast to agree to it as a condition of meeting the woman he wanted to meet. Rather than pursue internet ads that advertised real children or offered genuine exploitation, here the police created the crime from whole cloth. The police effectively offered an adult woman for immediate sexual activity, providing and accepting adult photographs, then added criminal elements as a condition to meet her. Inducement is established by a preponderance of the evidence. RCW 9.16.070.

The State had no evidence existing before Mr. Arbogast responded to the ad that he had committed or shown interest in any sort of crime. Thus he established lack of predisposition by a

preponderance of the evidence.

This Court should dismiss the charges.

4. THE TRIAL COURT ERRED AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO A JURY TRIAL BY EXCLUDING EVIDENCE OF AND DENYING AN INSTRUCTION ON ENTRAPMENT.

a. *The Burden of Producing Evidence to Support an Affirmative Defense Is Prima Facie.*

A defendant ultimately bears the burden of proving entrapment by a preponderance of the evidence. *Lively, supra*; RCW 9A.16.070. Only a jury can decide whether he met that burden. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21.

The burden of production, however, is a different standard. *Lively* did not address the burden of production.

The State bears the burden of proving every element of a criminal charge beyond a reasonable doubt. To take the case to a jury, however, it need only produce **prima facie** evidence of the elements. In *State v. Knapstad*, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986).

Every civil plaintiff bears the same standard for producing evidence in civil cases. Plaintiffs bear the burden of proof by a preponderance of the

evidence -- the same as for an entrapment defense. To survive summary judgment and get to a jury, the plaintiff need only produce a **prima facie** case.

We reverse the Court of Appeals. Cornwell has presented sufficient evidence to make a **prima facie** case that Microsoft retaliated against her in violation of WLAD. ...

At the summary judgment stage, the plaintiff's burden is one of production, not persuasion.

Cornwell v. Microsoft Corp., 192 Wn.2d 403, 410-13, 430 P.3d 229 (2018) (emphasis added); *Floeting v. Group Health Coop*, 192 Wn.2d 848, 434 P.3d 39 (2019); *Mikkelsen v. PUD No. 1 of Kittitas County*, 189 Wn.2d 516, 525-27, 404 P.3d 464 (2017).

Due process and the right to a jury trial cannot require more for a criminal defendant to put an entrapment defense before the jury. An "anti-SLAPP" statute increased the burden of production to "clear and convincing evidence" to survive a dismissal motion. The Court held the statute violated the right to a jury trial. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015) (striking down anti-SLAPP statute). "Such a procedure invades the jury's essential role of deciding debatable questions of fact." *Id.* at 294.

The standard announced in *State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994), review denied, 126 Wn.2d 1008 (1995), is erroneous. Obtaining an instruction does not require first meeting the ultimate burden of proof. *Trujillo* required more than a "scintilla" of evidence, and settled on a preponderance; yet it did not consider the *prima facie* standard, nor did it consider the comparable burdens in civil cases or *Knapstad*.¹⁸

Thus even for an affirmative defense, the defendant's burden of production for a jury instruction is a *prima facie* case. This Court's standard of review of the trial court's decision on this issue is the same as for summary judgment.

We review a trial court's grant of summary judgment de novo. ... We must also "consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party."

Cornwell, 192 Wn.2d at 410. Here that party is the defendant.

¹⁸ The State cited *State v. Swain*, 10 Wn. App. 885, 886, 520 P.2d 950 (1974), below. The issue there was whether the defendant was entrapped as a matter of law, not whether he was entitled to an instruction.

b. *Cases Reversed for Denying an Entrapment Instruction*

In *State v. Morgan*, 9 Wn. App. 757, 515 P.2d 829, review denied, 83 Wn.2d 1004 (1973), the defendant had recently quit using marijuana, was fully employed, lived with his mother, and had two leftover joints at his girlfriend's. A pair of informants badgered him for a week to sell them marijuana; he declined. The female informant offered to be his bed partner and trade tranquilizers for weed. Having trouble sleeping, he provided the two joints. The trial court denied entrapment instructions; the Court of Appeals reversed.

United States v. Gamache, supra, is very like this case. As part of "a sting operation aimed at uncovering child exploitation," a New Hampshire male detective placed a classified ad:

FEMALE-TROY, NH; F.F.-female, 31; Single mom, two girls, one boy, seeks male as partner and mentor, seeks fun, enjoys travel and photography, FF P.O. Box 771, Troy, New Hampshire, 03465.

Mr. Gamache responded, asking the mom to send a photo and "tell me about yourself." "Frances" replied she sought "family fun," hoped he would be a mentor to her children, and that he thinks

"liberally about sex." He responded he could be a mentor and provide family fun with camping, hunting and fishing. *Id.*, 156 F.3d at 1-3.

As here, Frances sent him a photo of "herself." With further exchanges, Mr. Gamache eventually came to understand "Frances" wanted him to engage in sexual activity with her children. Still he continued to express an interest in "Frances," noting she was very attractive in her photo. Eventually he agreed to do what she requested, and they arranged to meet. Police arrested Mr. Gamache in the motel parking lot. His truck contained many condoms and lube (unlike Mr. Arbogast). However, other than the letters from Frances, a search of his home produced no evidence that appellant was interested in, or had a history of, the exploitation of children or child pornography. *Id.* at 6-7.

The trial court refused an instruction on entrapment. The Court of Appeals reversed.

It is undisputed that the Government initiated this victimless incident with its advertisement. Thereafter, a stream of correspondence followed even after it became apparent, from the initial letters, that appellant was on a different wavelength than the detective. Appellant was interested in having sex

with the adult "Frances." ... The record is clear that it was the Government's insistence and artful manipulation of appellant that finally drew him into the web skillfully spun by the detective. ... [I]t was appellant's contention, and he so testified, that all of his correspondence about sex with minors was a ruse to have sex with "Frances," who was his target from the time that he answered the ad. **Although this version is obviously disputed by the Government, that is irrelevant to the question of whether it raises an issue of entrapment to be put before the jury.**

Id., 156 F.3d at 10 (emphases added).

After noting the Government had no evidence whatsoever of any predisposition toward sex with children, the Court reviewed the correspondence:

It was the Government that first mentioned the "children" as sex objects; it was the Government that first used sexually explicit language involving the "children"; it was the Government that escalated the subject of sex with children; and it was the Government that first brought up the use of photographic equipment.

Id. at 10-11. The court held the evidence was sufficient of inducement to submit entrapment to the jury, comparing it to *Jacobson*.

Furthermore, as we have noted, there was no evidence presented that Gamache had engaged in similar activities independent of this sting operation. The jury could have relied on this evidence to find a lack of predisposition because the concept of predisposition has a definite temporal reference: "the

inquiry must focus on a defendant's predisposition before contact with government officers or agents."

Gamache, at 12, citing *Jacobson*, *supra*, *inter alia*. The Court of Appeals reversed and remanded to permit a jury to consider entrapment.

See also: *Sorrells v. United States*, *supra* (agent posing as tourist visited fellow war veteran at his home, asked to buy liquor; after two refusals, shared war stories; on third request, defendant left and returned with liquor; no evidence had ever possessed or sold liquor before; Supreme Court reversed for denial of entrapment instruction).

c. *As In These Cases, The Evidence Below Established Prima Facie Inducement and Lack of Predisposition Entitling Defendant to an Entrapment Instruction.*

Keller and *Morgan* involved no more inducement than was used in this case. They required an entrapment instruction.

As in *Gamache* and *Poehlman*, this sting operation also involved a government agent placing an advertisement in a personals section meant for adult women to meet adult men. Mr. Arbogast looked at the Craigslist ads under woman seeking man to

find an adult woman to have sex with. It had worked for him before: he responded to an ad, the woman was hesitant, but agreed to meet him in person, after which he persuaded her to have an enjoyable night of sexual activity.

As in *Gamache* and *Poehlman*, the ad Det. Rodriguez placed was deliberately unclear as to what "Brandi" wanted, which was the same as what "Frances" and "Sharon" wanted there. As in *Gamache* and *Poehlman*, Mr. Arbogast thought the ad was an adult woman wanting to have sex with a man. Only after persuading Mr. Arbogast to switch to texting did "Brandi" explain she wanted a sexual mentor for her children like she had had when she was young. Mr. Arbogast testified that sometimes women on Craigslist claim things but really are role-playing, and he wasn't sure that children even existed. (As it happens, of course, they didn't.)

The kind and amount of inducement by "Brandi" mirrors what "Frances" and "Sharon" inflicted on Mr. Gamache and Mr. Poehlman. The State used the very same tactics of posting a vaguely worded ad in an adult personal section, then wanting a sexual mentor for the children because the adult

woman/mother had the same experience when she was young. The First and Ninth Circuits recognized this as inducement. These facts were more than an invitation to have a sexual relationship with a child; it was a condition for any continued interest from the adult female. *Poehlman*, 217 F.3d at 699-700. The courts also recognized it was inducement to lure the target into the web by becoming increasingly more friendly, intimate, and sexually explicit. *Id.* at 700. Brandi's statement that she had decided sexual mentors would benefit her children because they had been good for her can affect the suspect's self-struggle to resist ordinary temptations, and provides a moral cover to lessen the thought that it was wrong. *Id.*, 217 F.3d at 702.

The defendant had a right for a jury to decide if this sting operation "overstepped the line between setting a trap for the unwary innocent and the unwary criminal." *Jacobson*, 503 U.S. at 542.

Like Mr. Jacobson, Mr. Gamache, Mr. Poehlman, and the many defendants in state cases discussed above, Mr. Arbogast had no previous criminal history. The State acknowledged it had no evidence

that he had any prior improper contact with minors. RP 95-96. Mr. Arbogast responded to a vague advertisement under the heading "woman for man" section. His later communications firmly established, as with Mr. Gamache, that he and Det. Garden were on a "different wavelength" regarding what they were looking for. Before his texts with "Brandi," there is no evidence he had any predisposition toward sexual activity with children.

This Court must reverse these convictions and remand for a new trial where the jury may hear evidence and argument, and consider the defense, of entrapment.

D. CONCLUSION

When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.

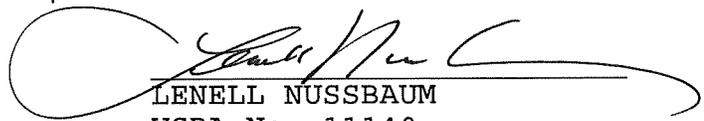
Jacobson v. United States, 503 U.S. at 553-54.

For the reasons stated above, this Court should reverse these convictions and dismiss the charges.

In the alternative, it should reverse the convictions and remand for a new trial.

DATED this 19th day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lenell Nussbaum", written over a horizontal line.

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant
Mr. Arbogast

APPENDIX A

STATUTES

The legislature finds a compelling need to address the problem of missing children, whether those children have been abducted by a stranger, are missing due to custodial interference, or are classified as runaways. Washington state ranks twelfth in the nation for active cases of missing juveniles and, at any given time, more than one thousand eight hundred Washington children are reported as missing. The potential for physical and psychological trauma to these children is extreme. Therefore, the legislature finds that it is paramount for the safety of these children that there be **a concerted effort to resolve cases of missing and exploited children.**

Due to the complexity of many child abduction cases, most law enforcement personnel are unprepared and lack adequate resources to successfully and efficiently investigate these crimes. **Therefore, it is the intent of the legislature that a multiagency task force be established within the Washington state patrol, to be available to assist local jurisdictions in missing child cases through referrals, on-site assistance, case management, and training. The legislature intends that the task force will increase the effectiveness of a specific case investigation by drawing from the combined resources, knowledge, and technical expertise of the members of the task force.**

RCW 13.60.100 (emphases added).

(2) The task force is authorized to assist law enforcement agencies, upon request, **in cases involving missing or exploited children** by:

- (a) Direct assistance and case management;
- (b) Technical assistance;
- (c) Personnel training;
- (d) Referral for assistance from local, state, national, and international agencies; and
- (e) Coordination and information sharing among local, state, interstate, and federal law enforcement and social service agencies.

...
(5) For the purposes of this chapter, "exploited children" means children under the age of eighteen who are employed, used, persuaded, induced, enticed, or coerced to engage in, or assist another person to engage in, sexually explicit conduct. "Exploited children" also means the rape, molestation, or use for prostitution of children under the age of eighteen.

RCW 13.60.110 (emphases added).

APPENDIX B

Entrapment - Proving Predisposition:

A defendant who claims that he was entrapped opens himself to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells v. United States*, 287 U.S. 435, 451 (1932). Thus, predisposition may be shown by evidence of other crimes that might not otherwise be admissible. And, although *Jacobson's* focus on the government's duty to show that the defendant was disposed to commit the crime "prior to first being approached by [g]overnment agents" (*Jacobson v. United States*, 503 U.S. 540, 549 (1992)) seems to cast doubt on the admissibility of evidence of subsequent crimes to show predisposition ... it is fair to argue that such evidence is admissible under *Jacobson* as long as the subsequent crimes were "independent and not the product of the attention that the [g]overnment had directed" at the defendant (503 U.S. at 550).

U.S. Department of Justice, Justice Manual,
Criminal Resource Manual § 647 (2018).

LAW OFFICE OF LENELL NUSSBAUM PLLC

December 19, 2019 - 4:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36250-7
Appellate Court Case Title: State of Washington v. Douglas Virgil Arbogast
Superior Court Case Number: 17-1-00752-1

The following documents have been uploaded:

- 362507_Briefs_20191219160819D3662857_4911.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was Appellants Amended Brief.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- prosecuting@co.benton.wa.us

Comments:

Sender Name: Lenell Nussbaum - Email: lenell@nussbaumdefense.com

Address:

2125 WESTERN AVE STE 330

SEATTLE, WA, 98121-3573

Phone: 206-728-0996

Note: The Filing Id is 20191219160819D3662857