102360-0

Supreme Court No.: _____
Court of Appeals No. 83245-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DALE BEST,

Petitioner.

PETITION FOR REVIEW

KEVIN DALE BEST
Petitioner, #429448, H1B-063L
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. THE DECISION BELOW.....1

C. ISSUES PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....1

E. ARGUMENT IN FAVOR OF REVIEW.....2

1. The Peremptory Strike of Venire Asian Juror (No. 46) constituted a prima facie showing of racial motivation and discrimination.....2

2. The State failed to present sufficient evidence to support the convictions.....12

F. CONCLUSION.....20

G. VERIFICATION AND CERTIFICATE OF COMPLIANCE.....20

TABLE OF AUTHORITIES

Washington Cases — Pages

State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000).....6

State v. Jefferson, 192 Wn.2d 225, 230, 232, 429 P.3d 467 (2018).....6

City of Seattle v. Erickson, 188 Wn.2d 721, 728-730, 398 P.3d 1124 (2017).....6,7,10

State v. Tesfasilasye, 200 Wn.2d 345, 356, 518 P.3d 193 (2022).....7,8

Schroeder v. Excelsior Mgmt. Grp. LLC, 177 Wn.2d 94, 104, 297 P.3d 677 (2013).....7

Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).....7

State v. Sum, 199 Wn.2d 627, 641, 541 P.3d 92 (2022).....8

State v. Orozco, 19 Wn.App.2d 367, 374, 496 P.3d 1215 (2021).....11

State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).....12

State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).....12

State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).....12

State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)..13

State v. Rattana Keo Phuong, 174 Wn.App. 494, 502, 299 P.3d 37 (2013).....14

State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).....14,17

State v. Green, 84 Wn.2d 216, 616 P.2d 628 (1980).....17

U.S. Supreme Court Cases	Pages
Powers v. Ohio, 499 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)	6
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)	6
United States v. Resendiz-Ponce, 549 U.S. 102, 106, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007)	13,17
Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	14,20

Washington Constitution	Pages
Wash. Const. art. I, § 22	5

United States Constitution	Pages
U.S. Const. amend. VI	5
U.S. Const. amend. XIV	14,20

Court Rules	Pages
GR 37	8
RAP 13.4(b)	8,9,11,12,20
Model Penal Code § 5.01	13

A. IDENTITY OF PETITIONER

The Petitioner, Kevin Dale Best, seeks Review by the Washington Supreme Court of the Issues Raised in the Direct Appeal of his Convictions under Snohomish County Superior Court Cause No. 16-1-00594-7.

B. THE DECISION BELOW

The Petitioner seeks Review of the Division One Court of Appeals Unpublished Opinion and Decision to Affirm the Convictions in this case, Filed July 24, 2023. Unpublished Opinion attached as Appendix A. The Petitioner had also Filed a timely Motion for Reconsideration on August 14, 2023, and, the Division One Court of Appeals had Denied Reconsideration via Order on August 22, 2023. Order Denying Motion for Reconsideration attached as Appendix B; Motion for Reconsideration without appendices is attached as Appendic C.

C. ISSUES PRESENTED FOR REVIEW

1. The Peremptory Strike of Venire Asian Juror (No. 46) constituted a prima facie showing of racial motivation and discrimination.
2. The State failed to present sufficient evidence to to support the convictions.

D. STATEMENT OF THE CASE

The Statement of the Case was presented by Appellate Counsel in the Appellant's Opening Brief, Filed October 28,

2022, and is hereby incorporated by reference. Opening Brief, COA No. 83245-0-I, Id. at 6-28.

E. ARGUMENT IN FAVOR OF REVIEW

1. The Peremptory Strike of Venire Asian Juror (No. 46) constituted a prima facie showing of racial motivation and discrimination.

In this case, Mr. Best had raised issue in the Statement of Additional Grounds (SAG), Id. at 2-4, and on Motion for Reconsideration, Id. at 15-44, which had claimed and argued that the Trial Court had committed error by choosing not to engage in a Batson analysis after Defense Counsel had Objected and made a Batson/GR37 Challenge to the State's Peremptory strike of the only confirmed Juror of a racially cognizable minority by the Trial Court, and, before the Jury was sworn or empaneled. 8/18/21 RP 491-492; 8/18/21 508. (The verbatim Report of Proceedings is separated by multiple volumes on different dates and is referenced herein by date and RP #).

The Facts in the Record presented by the Petitioner confirms that Venire Asian Juror No. 46;

(i) was the only confirmed Juror of a racially cognizable minority by the Trial Court (8/18/21 RP 508);

(ii) had raised a Batson concern during Individual Questioning which had then changed the tone and tenor of the State's questioning of Juror 46 (8/17/21 RP 241-242);

(iii) was subjected to an inordinate amount of Constitutional questions that no other Juror was even asked about by the State, had answered that he could be both fair and impartial over 15 times in his responses to the State's convoluted hypothetical constitutional questioning, was mischaracterized and belittled by the State's comments of Juror No. 46, had endured two attempts by the State for removal for cause during both Individual Questioning and Voir Dire (8/17/21 RP 239-260; RP 437-457); and

(iv) was ultimately removed by the State's Peremptory Challenge at the end of a long day in which Juror No. 46 had stood far longer and answered far more questions than any other Juror (8/17/21 RP 481).

As a result of these Facts, Defense Counsel had raised a Batson/GR 37 Challenge as soon as the Trial had resumed the following morning where he stated:

> "And, you know, I didn't raise the...GR 37 issue last night. Everything happened pretty quickly yesterday. Then looking back at my notes I remember that Juror 46 himself brought up the issue in individual questioning when he raised the Supreme Court precedent of Batson. And based on that, I would ask the Court to entertain the GR 37 analysis and note that it's not too late. The The jury hasn't been renumbered. The jury hasn't been sworn. And that juror can be contacted and asked to come back here and inquire whether there's been any tainting or anything since -- since last night. So that's my request and assertion, and that's the issue." 8/18/21 RP 491-492.

Then, after further argument and discussion, the State had argued that its Peremptory Challenge of Juror No. 46 was due to the manner in which Juror No. 46 had responded in questioning and "because his thought process kept lending itself into these long, off-tangent topics, instead of answering the state's actual question." 8/18/21 RP 501-502.

Defense Counsel had responded by informing the Trial Court that the State's reliance on conduct as to the way the Juror responded by claiming that Juror No. 46 had provided unintelligent or confused answers, is a specifically disapproved reason for a peremptory challenge. 8/18/21 RP 502.

Ultimately, however, the Trial Court had Ruled "that the objection is raised after the time required by GR 37(c)." 8/18/21 RP 503. And, the Trial Court would avoid the Required Batson Analysis by claiming;

> "while perhaps the particular issue of whether or not the juror said the word "Batson" was addressed, he did not receive any questions about that, moved on quickly from it, and did not appear to be addressing any other issues." 8/18/21 RP 503.

As a result of these Rulings, although the Trial Court would later confirm that Venire Juror No. 46 was of a racially cognizable minority (8/18/21 RP 508), Juror No. 46 was not recalled and was not on Mr. Best's Jury which had later found Mr. Best Guilty on two of the Charged Crimes.

On Appeal, the Division One Court of Appeals had held

that the Trial Court's Timeliness Ruling is correct where it is consistent with the timeliness provision in GR 37(c). Unpublished Opinion (Appendix A), Id. at 11.

Mr. Best now seeks this Court accept Review, apply the Timeliness Standard in Erickson which the Court of Appeals had ignored in its Opinion, and, on de novo Review, Reverse the Convictions and Remand for Retrial, where, an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge of Juror No. 46, and, where, Mr. Best has established, as Required by Batson, a prima facie case that gives rise to an inference of discriminatory purpose and proves that the State's race-neutral explanation for its Peremptory Challenge on Juror No. 46 is presumptively invalid.

a. Mr. Best has a Constitutional Right to a fair and impartial jury and a Trial process free from discrimination, as defined by Batson, GR 37, and this Court's previously established precedent.

The Constitutions of the United States and the State of Washington both require a fair and impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 22.

Both the Washington Supreme Court and the United States Supreme Court have established precedent requiring the parties and the jurors themselves, have the right to a trial

process free from discrimination. Powers v. Ohio, 499 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000).

While the United States Supreme Court had established the Batson Framework for demonstrating discrimination in a trial process, in April 2018, the Washington Supreme Court had adopted General Rule (GR) 37, which, incorporated GR 37 into state common law by replacing the 3rd step of a Batson Challenge with the standards from the rule. State v. Jefferson, 192 Wn.2d 225, 230, 232, 429 P.3d 467 (2018); City of Seattle v. Erickson, 188 Wn.2d 721, 728-730, 398 P.3d 1124 (2017); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Prior to the adoption of GR 37, the Washington Supreme Court had, in Erickson, established the Precedent that Batson Challenges are Timely if brought forth at the earliest reasonable time while the trial court still has the ability to remedy the wrong. Erickson, 188 Wn.2d at 729.

In Fact, the cases that the Washington Supreme Court had read together when establishing its precedent had contemplated, from numerous Federal and State Precedents, the Timeliness of Batson Challenges along with recognizing that the United States Supreme Court has left it to state courts and legislatures to determine the procedure surrounding

Batson Challenges. Erickson, 188 Wn.2d at 728.

Further, in State v. Tesfasilasye, 200 Wn.2d 345, 356, 518 P.3d 193 (2022), this Court recognized that, "While we have not directly addressed this question, most courts have effectively applied de novo review because the appellate court "stand[s] in the same position as does the trial court" in determining whether an objective observer could conclude that race was a factor in the peremptory strike. Jefferson, 192 Wn.2d at 250." Tesfasilasye, 200 Wn.2d at 356.

In addition, because the trial court in this case had made Rulings as to the Law with regard to the time required by GR 37(c), and, in refusing to engage in a Batson Analysis, then, such questions of law are reviewed de novo. Schroeder v. Excelsior Mgmt. Grp. LLC, 177 Wn.2d 94, 104, 297 P.3d 677 (2013)(citing Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)).

This Court has yet to decide whether the adoption of GR 37 has superceded or overruled the Timeliness Precedent for Batson Challenges previously established in Erickson. Erickson, 188 Wn.2d at 728-730.

However, because the Washington Supreme Court has repeatedly confirmed that Batson was only modified by GR 37 in an attempt to address the shortcomings of Batson, then, Batson is and remains established precedent and the relevant

legal standards which apply to Batson Challenges in the State of Washington also remain established precedent where they have not been overruled or superceded. See, State v. Tesfasilasye, 200 Wn.2d 345, 357, 518 P.3d 193 (2022)(GR 37 was an attempt to address the shortcomings of Batson); State v. Sum, 199 Wn.2d 627, 641, 541 P.3d 92 (2022)(Moreover, in adopting GR 37, we rejected Batson's focus on purposeful discrimination in the exercise of peremptory challenges and, instead, shifted the inquiry [in the 3rd step of Batson] to whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR(e)).

There is no doubt that the Timeliness Standard for Batson Challenges is still established precedent as defined by this Court in Erickson, and, Mr. Best seeks this Court apply the Erickson timeliness standard for his Batson Challenge.

However, should this Court decide the question of whether the time required in GR 37(c) supercedes and overrules the previously established Timeliness Standard for Batson Challenges in Erickson, then, such decision is a significant question of law under the Constitution of the United States and the State of Washington, and, in accordance with RAP 13.4(b)(3) Review must be Accepted.

The Facts in this case also present significant

questions of law with regard to whether Batson/GR 37 challenges should receive de novo review, and/or, whether an informal GR 37 analysis by a Trial Court fully constitutes or replaces the Required Batson Analysis previously established by the United States Supreme Court.

Thus, for all of these reasons, the Petitioner seeks this Court accept review in accordance with RAP 13.4(b).

The Petitioner demonstrates further grounds for review by showing the conflicts between the Division One Court's Decision and established precedent of other Washington Courts.

b. The Division One Court's Decision is in conflict with Published Decisions of the Washington Supreme Court and the Division Three Court of Appeals.

In its Unpublished Opinion, the Division One Court of Appeals had Denied Mr. Best's Batson/GR 37 challenge where it Ruled:

> "The trial court's ruling is consistent with the timeliness provision in GR 37(c), which provides that "[t]he objection must be made before the potential juror is excused, unless new information is discovered." The juror here was excused before Best's counsel asserted a GR 37(c) challenge. Because Best has not shown that new information was discovered that would justify an untimely challenge, the trial court's timeliness ruling is correct." Unpublished Opinion, Id. at 11.

Here, the Division One Court's Decision completely ignores the Erickson Timeliness Standard which applies to

Batson challenges and which Mr. Best had twice argued must be applied in this case. SAG, Id. at 3; Motion for Reconsideration (Appendix C), Id. at 16-20.

In Erickson, the Washington Supreme Court had allowed for Batson Challenges to be brought forth at the earliest reasonable time while the trial court still has the ability to remedy the wrong. Erickson, 188 Wn.2d at 729. In this case Mr. Best's Counsel had raised a Batson/GR 37 Challenge as soon as the Court had reconvened, after having run late the previous evening, and before the Jury was sworn or empaneled. 8/18/21 RP 491-492.

Therefore, because the Washington Supreme Court's Precedent in Erickson has not been overruled or superceded, then, the Division One Court's Decision in this case is in conflict with the Decision of the Washington Supreme Court in Erickson, where it ignored and failed to apply the relevant legal standard in Erickson in order to properly determine the Timeliness of Mr. Best's Batson/GR 37 Challenge, and, had failed to consider the Merits of Mr. Best's Batson/GR 37 Challenge where, in accordance with Erickson, the challenge is Timely.

Thus, where the Petitioner has demonstrated a clear conflict between the Division One Court's decision in its Unpublished Opinion and the decision of the Washington

Supreme Court when it established the Timeliness Standard in Erickson for Batson Challenges, then, such conflict constitutes sufficient grounds for acceptance of Review by this Court in accordance with RAP 13.4(b)(1).

Furthermore, a recent Division Three Court of Appeals case had held that whether an objective observer could view race or ethnicity as a factor in a peremptory strike under GR 37(e), is reviewed de novo. State v. Orozco, 19 Wn.App.2d 367, 374, 496 P.3d 1215 (2021). The Court, in Orozco, had also found no issue as to timeliness where the Batson/GR 37 Challenge was made on the record after the State had exercised its peremptory challenges, including Venire Juror 25, after the Court had excused the Venire, and, after the Court gave the jurors their oath, gave a standard introductory instruction, and took a 10 minute recess. Orozco, 19 Wn.App.2d at 371-372.

The Court, in Orozco, had even recognized the Precedent in Erickson when making its decision as to de novo Review once the objection was made, Id. at 374, and the State did not Appeal the Division Three Court's Published Decision.

Here, the Division One Court's decision did not provide any analysis or reasoned opinion as to whether "We review the third step of Batson and the application of GR 37 de novo." as Orozco, 19 Wn.App.2d at 374, nor did the Division One Court

consider the Relevant Legal Standard in Erickson when making its Timeliness Decision.

Thus, for all these reasons, the Petitioner has demonstrated a clear conflict between the Division One Court's decision in its Unpublished Opinion and the Published Decision of the Division Three Court of Appeals in Orozco, and, as such, has established sufficient grounds for acceptance of Review by the Washington Supreme Court in accordance with RAP 13.4(b)(2).

This Court must, therefore, accept Review of Mr. Best's Batson/GR 37 Issue.

2. The State failed to present sufficient evidence to support the Convictions.

The elements of the crimes charged in this case are attempt crimes, and, to attempt a crime, the defendant must have (1) the intent to commit a specific crime and (2) take a substantial step toward the commission of that crime. RCW 9A.28.020(1). "The intent required is the intent to accomplish the criminal result of the base crime." State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012)(citing State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003)). In addition, conduct constitutes a substantial step toward the commission of a crime if it "is 'strongly corroborative of the actors criminal purpose.'" State v. Townsend, 147 Wn.2d

666, 679, 57 P.3d 255 (2002)(quoting State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)).

Similarly, the United States Supreme Court has established that, "[a]t common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed "some open deed tending to the execution of his intent." 2 W. LaFave, Substantive Criminal Law § 11.2(a), p. 205 (2d ed. 2003)(quoting E. Coke, Third Institute 5 (6th ed. 1680))... More recently, the requisite "open deed" has been described as an "overt act" that constitutes a "substantial step" toward completing the offense. 2 LaFave, Substantive Criminal Law § 11.4; see ALI, Model Penal Code § 5.01(1)(c)(1985) (defining "criminal attempt" to include "an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime")...As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct." United States v. Resendiz-Ponce, 549 U.S. 102, 106, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007).

When the conduct constituting a substantial step is challenged via a Sufficiency of the Evidence Claim, as is the case here, the Washington Supreme Court has established that,

"The purpose of the sufficiency inquiry is to "ensure that the trial court fact finder 'rationally appl[ied]' the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt." State v. Rattana Keo Phuong, 174 Wn.App. 494, 502, 299 P.3d 37 (2013)(alteration in original)(quoting Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979))." State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

The Washington Supreme Court, in Berg, also confirmed that, "We take the State's evidence as true, and our review is de novo." Berg, 181 Wn.2d at 867.

In applying these relevant legal standards to the Facts of this Case, the Evidence proves, in the light most favorable to the State, that Mr. Best had performed the "overt act" of coming to the front door of the house that Kristl (the Mother) had directed him to, and, such act constituted a substantial step toward the commission of getting to know Kristl and her kids. 8/31/21 RP 632-640.

The Evidence presented by the State via the Testimony of Kristl Pohl makes clear that the first meeting between Mr. Best and Kristl and her kids would be nothing more than a meeting for Mr. Best to get to know Kristl and her kids.

8/31/21 RP 632-640. In Fact, when Testifying on Direct Examination as to the Second Phone Call which took place the evening of February 19, 2016, the following Evidence was presented:

"Q. Okay. And can you tell me everything you remember about the -- the second phone call with Mr. Best on February 19th of 2016.
A. We talked about him being in Las Vegas and flying back and his dog. I believe we talked about his dog, that he would pick up his dog when he came back.
Q. Okay. And tell me everything you remember about the context of what he was picking up his dog for that you recall?
A. Before he came to meet the girls.
Q. So he's bringing the dog.
A. Yes.
Q. To the meeting.
A. Yes.
Q. To meet -- and to meet your girls.
A. Yes.
Q. Okay. And did you talk about any sort of plans after he arrived?
A. I don't recall.
...
Q. Okay. Do you recall -- can you tell us what you recall about any statements Mr. Best made about the weekend?
A. I think we did discuss him staying the weekend.
...
Q. Do you recall anything specifically about that conversation?
A. I don't." 8/31/21 632-633.

This Evidence clearly established the Fact that Mr. Best's arrival at the house, which Kristl had directed him to (8/31/21 RP 635), was nothing more than a substantial step toward meeting and getting to know Kristl and her kids.

Kristl Pohl would then confirm that there was no plan

and no agreement to have sex with the children when Mr. best arrived at the front door of the house, by Testifying:

> "Q. (BY MR. PENCE) Ma'am, was there any agreement -- when Mr. Best showed up at the house, that you discussed in the phone calls, was there any agreement that he would have sex with the children when he arrived at the house?
> A. Not that I recall.
> Q. And this was one of most memorable calls you've had in your career. That's what you Testified?
> A. Yes, it is." 8/31/21 RP 640.

The Evidence provided by Kristl Pohl (the Mother) proves there is no Evidence in the Record of any plan or agreement for sex or sexual contact with children between Mr. Best and Kristl, and, the only plan for that weekend was to go shopping, play with the dog, have Starbucks, and get to know Kristl and her kids, none of which actually took place.

The State Prosecutor, in its Closing Rebuttal, had even confirmed that the act of Mr. Best's arrival at the front door of the house was part of the plan to get to know Kristl and her kids, arguing:

> "The substantial step he took -- let's talk about the plan he designed. He told undercover mother, Kinky Kristl, he told her that he wanted to get to know them, that he was going to get comfortable with them. He talks about taking them shopping. He talks about bringing the dog to Lisa, to bring the dog for her. They talk about playing with the dog. And in the chats and the messages, you can see there's a discussion but -- from both of them about making sure their kids are comfortable with the other person. So that's by design." 9/1/21 RP 993.

Here, it is clear from the Evidence, as well as the

State's argument as to the Evidence, that the overt act Best had performed by coming to the front door of the house on February 20, 2016, constituted nothing more that the innocent step toward getting to know Kristl and her kids without actually accomplishing such acts.

Thus, where attempting to meet and get to know Kristl and her kids at their first meeting on February 20, 2016 is not a substantial step toward the commission of Child Molestation or Rape of a Child, then, there is not sufficient evidence to support the Convictions and Reversal of the Convictions with Prejudice is Required. United States v. Resendiz-Ponce, 549 U.S. 102, 106, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007); State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

a. The Division One Court's Decision is in conflict with the Published Decision and established Legal Precedent of the Washington Supreme Court.

In its Unpublished Opinion, the Division One Court of Appeals had Denied Mr. Best's Sufficieny of the Evidence Claim, where it Ruled:

> "The evidence here includes, but is not limited to, the testimony of Sergeant Anna Standiford recounting what Best said during phone calls when he believed he was speaking with 11-year-old "A," text messages in which Best described his physical arousal and intentions

> regarding the fictitious children, and Best's arrival at the fictitious mother's home at the exact time the two of them had agreed upon for a weekend involving sexual contact with the fictitious children. Viewing the evidence in the light most favorable to the State, and drawing all references in the State's favor (as required, see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), there is sufficient evidence to convince a rational juror to find beyond a reasonable doubt that Best took a substantial step toward the commission of attempted second degree rape of a child and attempted first degree child molestation."
> Unpublished Opinion (Appendix A), Id. at 11-12.

Here, the Division One Court's Decision is in conflict with the established precedent of the Washington Supreme Court in Berg, where, the Division One Court did not conduct de novo Review of Mr. Best's Sufficiency of the Evidence Claim as evidenced by its materially false statements.

The Evidence in the Record from Sergeant Anna Standiford's Testimony proves that she had only spoke to Best one time (2/17/16) and did not participate in any chats via text messages or use any messaging application to talk to Mr. Best in her role as the 11-year-old character "L". 8/31/21 RP 780. There is also no Evidence anywhere in the Record that Mr. Best had spoken to anyone via chat or over the phone who was portraying the fictitious character "A".

As is obvious, the Division One Court's Materially False Claims as to the Evidence had severely impacted any fair de novo review Mr. Best would have otherwise received.

What's worse, the Division One Court would also make an

egregiously false claim as to the Evidence in the Case where it invented facts not in Evidence by claiming:

> "Best's arrival at the fictitious mother's home at the exact time the two of them had agreed upon for a weekend involving sexual contact with the fictitious children." Id. at 11.

As demonstrated herein, and in the Record on the proper de novo review by this Court, there was no plan or agreement for sex or sexual contact with the children when Mr. Best had arrived at the front door of the house on February 20, 2016. 8/31/21 RP 640.

The Mother (Kristl) had specifically testified that the plan was for Mr. Best to meet the girls, and, the only plans and agreements made or even discussed involved the acts of going shopping, playing with the dog, drinking Starbucks that Kristl had asked Best to purchase, and getting to know Kristl and her kids, none of which had actually taken place. 8/31/21 RP 632-640.

Indeed, to claim there was any agreement for a weekend involving sexual contact is a materially false claim and Mr. Best seeks this Court accept review and conduct an accurate de novo review of his Sufficieny of the Evidence Issue.

Thus, where the Division One Court's Decision in its Unpublished Opinion is in conflict with this Court's

Published Decision in Berg, then, sufficient grounds exist for acceptance of Review by the Washington Supreme Court in accordance with RAP 13.4(b)(1).

To do otherwise only perpetuates the Violation of Best's 14th Amendment Constitutional Rights. Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

F. CONCLUSION

For the foregoing reasons, the Petitioner seeks this Court Grant Review of the Issues Raised herein, and, in so doing, Vacate the Convictions in this case as required by relevant Washington and United States Supreme Court Precedent, and the Constitution of the United States.

G. VERIFICATION AND CERTIFICATE OF COMPLIANCE

I hereby Certify that this Filing complies with the length limitations specified in RAP 18.17 and is 20 pages in length.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Executed on this 8th Day of September, 2023.

Kevin Dale Best
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Stafford Creek Corrections Center
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APPENDIX A
(Unpublished Opinion)

FILED
7/24/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN DALE BEST, Appellant.	No. 83245-0-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — A jury convicted Best of attempted first degree child molestation and attempted second degree rape of a child. Best alleges that multiple errors occurred during the course of his trial. Because the facts of this case are known to the parties, we do not repeat them here except as relevant to the arguments below. We find no reversible error and affirm.

A. Denial of Surrebuttal Closing Argument

Best asserted an entrapment defense at trial. Because Best had the burden of proof on that defense, he requested surrebuttal closing argument. Best argues that the trial court abused its discretion when it denied the request. Br. at 28. "To find abuse of discretion, a court must be convinced that no reasonable person would take the view adopted by the trial court." *L.M. by and*

through Dussault v. Hamilton, 193 Wn.2d 113, 135, 436 P.3d 803 (2019) (internal quotation marks omitted). Here, there was no such abuse of discretion.

This issue is governed by Criminal Rule 6.15(d), which states: "The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal." The rule does not require or even mention surrebuttal closing argument and concludes the description of closing arguments with the prosecution's rebuttal. The trial court did not abuse its discretion by denying closing surrebuttal argument in strict compliance with the rule.

Best cites Civil Rule 51(g) and *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 359 P.3d 919 (2015), for the proposition that when the criminal rules fail to address a specific procedure, the civil rules may be instructive on what procedure to follow. While that is a correct statement of the law, it does not establish an abuse of discretion here because CrR 6.15(d) does not fail to address the specific procedure at issue. To the contrary, the rule provides the exact procedure that the trial court followed.

Our opinion in *State v. Thomas*, 91 Wn. App. 1027 (1998), *aff'd in part on other grounds*, 138 Wn.2d 630, 980 P.2d 1275 (1999), is instructive here.[1] Defense counsel there requested surrebuttal closing argument, citing CR 51(g), because Thomas was asserting an insanity defense for which he carried the burden of proof. This court held: "This assignment of error is not well taken.

[1] Although *State v. Thomas* is an unpublished opinion, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c). We adopt the reasoning of *Thomas* as stated in the text above.

Criminal Rule 6.15(d) takes precedence over CR 51, and provides that the prosecution opens and closes argument." *Thomas* at 5. The same reasoning and result apply here as well.

For these reasons, the trial court did not abuse its discretion when it denied Best's request for surrebuttal closing argument.[2]

B. Ineffective Assistance of Counsel

Best argues that his trial counsel was ineffective because they failed to provide the trial court with legal authority showing that it had discretion to grant surrebuttal closing argument.

To show ineffective assistance of counsel, Best must establish: "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021).

Our Supreme Court has held that "[w]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). While *Tsai* provides strong support for Best's

[2] Our holding might be otherwise if Best's attorney had asked for surrebuttal closing argument again after the prosecution's rebuttal closing argument and had identified specific points that merited a response. But here, the prosecution's rebuttal closing argument regarding the entrapment defense was both brief and unexceptional, and Best does not identify in his appellate briefs anything his trial lawyer would have said in surrebuttal closing argument that was not already said during his lawyer's earlier closing argument.

argument that defense counsel's representation was deficient, Best does not, and cannot, establish prejudice because, as addressed above, the trial court's rulings regarding surrebuttal closing argument are consistent with CrR 6.15(d) and our prior opinion in *Thomas*.

Because Best is unable to establish a reasonable probability that, except for defense counsel's alleged errors, the result of the proceeding would have been different, his ineffective assistance of counsel argument fails.

C. Exceptional Sentence Requests

Best argues that the trial court erred by failing to exercise its discretion to impose an exceptional sentence below the standard range based on: (1) RCW 9.94A.535(1)(d), which states that "[t]he court may impose an exceptional sentence below the standard range if it finds . . . by a preponderance of the evidence . . . [t]he defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;" and (2) RCW 9.94A.535(1)(a), which applies if the trial court finds "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." We reject these arguments.

Starting with RCW 9.94A.535(1)(d), Best argues that the trial court erred by failing to recognize that it had discretion to impose an exceptional sentence below the standard range based on the failed defense of entrapment. While Best correctly argues that a trial court's failure to exercise discretion can itself constitute an abuse of discretion, the trial court here did not fail to exercise discretion nor did it categorically refuse under any circumstances to impose an

exceptional sentence below the standard range. To the contrary, the court carefully reasoned and explained:

> I poured [sic] over those text messages for a variety of hearings for a variety of reasons, and I understand what you are telling me today about what your intentions are. But I cannot find based on your conversation, based on your willingness to engage in discussions about what you wanted to do, I am frankly particularly in your discussion with the fictional child, Lisa, that while perhaps this was not what you originally intended when you responded to the ad, that at the time you had the phone call with a fictional child that you were committed to the scenario and as more than simply fantasy role play. So, for that reason, I cannot grant the request for a downward departure under subsection D.

"[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Because the trial court here appropriately recognized and exercised its discretion, Best's contrary argument fails.

Nor did the trial court err by failing to exercise its discretion to impose an exceptional sentence below the standard range based on RCW 9.94A.535(1)(a). Addressing that issue, the trial court ruled: "as strange as it may seem, [A] and L (sic) were the victims in this case. Even if they had been real children, they based on their ages could not have participated or been initiators or willing participants in the offenses. For that reason, the Court declines a downward departure under subsection A."

The trial court did not abuse its discretion in so ruling. Best provides no authority for his argument that an 8- or 12-year-old victim can be an "initiator, willing participant, aggressor, or provoker of the incident" for purposes of

applying RCW 9.94A.535(1)(a). This, by itself, is dispositive. *See State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Best analogizes this case to *State v. Clemens*, 78 Wn. App. 458, 898 P.2d 324 (1995), but *Clemens* is easily distinguished. In *Clemens*, the perpetrator and the victim were relatively close in age and there was no evidence that the perpetrator was the initiator. *Id.* at 466. Here, at the time when the crime occurred, Best was 42 years old while the "victims" were 8 and 12.[3] Further, Best responded to the advertisement and drove to the location where the offense occurred. On this record, *Clemens* is inapposite.

D. Prosecutorial Misconduct and Motion for Mistrial

Best argues that the prosecutor committed misconduct and that the misconduct warrants a new trial. "The defendant bears the burden to establish prosecutorial misconduct by showing that the challenged conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Markovich*, 19 Wn. App. 2d 157, 170, 492 P.3d 206 (2021), *review denied*, 198 Wn.2d 1036, 501 P.3d 141 (2022). To show prejudice, "the defendant must prove that there is a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

[3] The parties disagree as to whether RCW 9.94A.535(1)(a) is applicable where, as here, the "victim" is fictitious. We need not, and do not, address that issue because, even if RCW 9.94A.535(1)(a) applies here, Best's argument easily fails based on the age of the fictitious victims.

The alleged misconduct at issue here occurred during the trial testimony of Sergeant Carlos Rodriguez, who described how the Net Nanny operation was developed and conducted.[4] During redirect, the prosecutor asked Sergeant Rodriguez, "Is there anything that you're looking for during the course of chatting in that context?" Sergeant Rodriguez responded:

> If someone is talking about a fantasy, it doesn't mean you don't just talk about it, though, because on the training and experience of the cases I've worked, when people detail what their fantasy is, oftentimes that can be a reality, which could be something we'd want to look into in the investigation. We'd want to explore that.

During recross examination, Best's counsel followed up on this answer by asking Sergeant Rodriguez, "is it relevant to you in your assessment as an officer, whether someone has committed this type of crime in the past?" Sergeant Rodriguez responded, "if someone has committed that type of crime in the past, that could mean that they have a history of doing this, so that would be relevant."

Then, during re-redirect, the prosecutor asked the inverse of the question that defense counsel had asked on recross and the following colloquy occurred:

> Q: Is it relevant to you if someone hasn't committed it in the -- it in the past?
>
> MR. PENCE: Objection.
>
> . . . .
>
> THE COURT: Overruled.
>
> . . .
>
> Q: . . . is it relevant to you that someone hasn't committed something like this in their past?
>
> A: No. You don't know -- well, one, people don't always get caught, and there are people that we have arrested or

[4] Best was arrested after he responded to an advertisement that the Washington State Patrol posted on Craigslist as part of an undercover sting operation referred to as "Net Nanny."

> commit crimes for the first time.
>
> . . . .
>
> MR. PENCE: Objection.
>
> . . . .
>
> THE COURT: [T]he objection I'm considering is whether the answer was nonresponsive. That is sustained. The portion of the answer after "no" is stricken.
>
> Q: Okay. Why is it not relevant to you?
>
> A: It's not relevant to me, because people don't always get caught.
>
> MR. PENCE: Objection.

In addition to objecting, Best moved for a mistrial, asserting that the prosecutor's questions, which ultimately prompted Sergeant Rodriguez to testify "people don't always get caught," were improper because "it's shifting the burden" to the defense to show that Best had not previously committed a sex offense. Because it was late afternoon, the jury was excused for the day while the court addressed these issues.

The trial court heard extensive oral argument regarding Best's objection and motion for mistrial. Because the alleged misconduct occurred on a Friday, Best's counsel also was able to prepare and file a written motion for a mistrial, and the State responded to that motion, before trial resumed on Monday. Following oral argument, the trial court gave the following curative instruction:

> Before we resume with testimony, at the conclusion of the day on Friday, the parties heard an objection. That objection has been sustained, and the jury is instructed to disregard the answer. If you took notes on that, we'll ask you to cross that out of your notepad, and then you may resume taking notes.

Having addressed the alleged misconduct by curative instruction, the trial court ultimately denied Best's motion for mistrial.

Reviewing the prosecutor's conduct in the context of the entire record and the circumstances at trial, as required by precedent, we reject Best's prosecutorial misconduct argument. The prosecutor asked the questions at issue here in response to a previous question by defense counsel regarding the potential relevance to Sergeant Rodriguez's "assessment as an officer, whether someone has committed this type of crime in the past." A prosecuting attorney "is entitled to make a fair response to the arguments of defense counsel." *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). While the trial court concluded that the prosecutor's initial question "was completely inbounds," it nonetheless gave a curative instruction in which it directed the jury to disregard the testimony that included "people don't always get caught." We presume that a jury follows the instructions provided by the court. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015).

Also significant here, the prosecutor appears to have assisted the trial court in curing any prejudice caused by the alleged misconduct. Consistent with the Supreme Court's recognition in *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011), that "[t]he prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated," the prosecutor acknowledged the defense's concerns about improper burden shifting and informed the trial court, "Nor am I going to be arguing that." Then, in closing argument, the prosecutor avoided any improper burden shifting and told the jury, "Best doesn't have any criminal history." Given this unique constellation of facts, and the requirement that we consider "the entire record and the circumstances at

trial" in deciding this issue, we are unable to conclude that Best is entitled to a new trial based on prosecutorial misconduct and, accordingly, reject this argument.

Nor does *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005), cited by Best, require a new trial. In *Jungers*, the prosecutor repeatedly attempted to elicit improper testimony regarding the defendant's credibility. While the trial court struck the improper testimony, the prosecutor commented on the defendant's credibility again during closing argument. *Id*. at 903. We held that a new trial was required because the prosecutor's comments during closing argument improperly reminded the jurors of the stricken testimony regarding Jungers' credibility, which was the central issue in the case, and the trial court did not mitigate this improper argument by reminding the jury to disregard the previously stricken testimony. *Id.* at 905-06.

The facts at issue in this case are materially different from those in *Jungers*. In the instant case, we do not have repeated attempts by a prosecutor to elicit improper testimony. To the contrary, the trial court ruled that the prosecutor's initial question to Sergeant Rodriguez "was completely inbounds. That objection was overruled. You're absolutely permitted to ask the inverse of that question." While the trial court sustained Best's objection and struck a portion of the answer to the initial question, the court did so because the answer was "nonresponsive," which then prompted the prosecutor to follow up with another question. And far from reminding the jury of any improper testimony in

closing argument, the prosecutor told the jury "Best doesn't have any criminal history." On this record, *Jungers* is inapposite.

E. Best's Statement of Additional Grounds

Best asserts three arguments in a Statement of Additional Grounds. First, he argues that the trial court erred by ruling that his GR 37(c) challenge was untimely. The trial court's ruling is consistent with the timeliness provision in GR 37(c), which provides that "[t]he objection must be made before the potential juror is excused, unless new information is discovered." The juror here was excused before Best's counsel asserted a GR 37(c) challenge. Because Best has not shown that new information was discovered that would justify an untimely challenge, the trial court's timeliness ruling is correct.[5]

Second, Best claims that there is insufficient evidence that the "[a]ppellant intended to have sex with the girls on the day he arrived at the house or took a substantial step towards the commission of [h]is offenses." We disagree. The evidence here includes, but is not limited to, the testimony of Sergeant Anna Standiford recounting what Best said during phone calls when he believed he was speaking with 11-year-old "A," text messages in which Best described his physical arousal and intentions regarding the fictitious children, and Best's arrival at the fictitious mother's home at the exact time the two of them had agreed upon for a weekend involving sexual contact with the fictitious children. Viewing the evidence in the light most favorable to the State, and drawing all references in

[5] Because we hold that Best's GR 37(c) challenge is untimely, we deny as moot Best's motion to strike a paragraph in the State's response to Best's Statement of Additional Authorities.

the State's favor (as required, *see State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)), there is sufficient evidence to convince a rational juror to find beyond a reasonable doubt that Best took a substantial step toward the commission of attempted second degree rape of a child and attempted first degree child molestation.

Finally, Best argues that the State was collaterally estopped from trying him for attempted first degree child molestation and attempted second degree rape of a child after a second charge for attempted second degree rape of a child was dismissed for insufficient evidence. Collateral estoppel is the principle "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *State v. Williams*, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997). "The doctrine of collateral estoppel is embodied in the Fifth Amendment guaranty against double jeopardy." *Id.* at 253. To establish collateral estoppel, the proponent must prove the following elements:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Id. at 254. As *Williams* clearly shows, collateral estoppel does not apply in the absence of both a prior litigation and a second (future) litigation, Here, in contrast, there was a *single litigation* involving multiple charges. The State, therefore, was not collaterally estopped from trying Best for attempted first-degree child molestation and attempted second-degree rape of a child after the

second charge for attempted second degree rape of a child was dismissed for insufficient evidence.

We affirm.

Feldman, J.

WE CONCUR:

Chung, J.

Hazelrigg, ACJ

APPENDIX B
(Order Denying Motion for Reconsideration)

FILED
8/22/2023
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. KEVIN DALE BEST, Appellant.	No. 83245-0-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR PERMISSION TO FILE OVERLENGTH MOTION TO RECONSIDER

The appellant, Kevin Best, has filed a motion for reconsideration and a motion for permission to file overlength motion to reconsider. A majority of the panel has determined that the motions should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration and the motion for permission to file overlength motion to reconsider are denied.

Feldman, J.

Judge

APPENDIX C
(Motion for Reconsideration without original Appendices)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KEVIN DALE BEST, Appellant.	))))))))	No. 83245-0-I MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY

COMES NOW the Appellant, Kevin Dale Best, through Counsel, hereby offers this Motion for Reconsideration of the Division One Court of Appeals Opinion filed July 24, 2023.

II. STATEMENT OF RELIEF SOUGHT

So that the ends of justice might be served, the Appellant moves the Court to reconsider its July 24, 2023, opinion, and requests this Court reverse his convictions and sentence.

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III. GROUNDS FOR RELIEF

The Appellant asks this Court to reconsider its July 24, 2023, decision and reverse his convictions.

1. WHEN THE COURT UPHELD BEST'S SENTENCE, THIS COURT MISAPPREHENDED THE SIGNIFICANCE OF THE TRIAL COURT'S RELIANCE ON IMPROPER CONSIDERATIONS WHEN IT DENIED AN EXCEPTIONAL SENTENCE BASED ON A FAILED ENTRAPMENT DEFENSE

a. The Sentencing Reform Act requires the sentencing court to determine a defendant's eligibility for a sentence below the standard range and then use its discretion in imposing a sentence. RCW 9.94A.535 (1)(d) authorizes the Court to "impose an exceptional sentence below the standard range for a failed defense of entrapment, if it finds circumstances were established by a preponderance of the evidence, e.g. that the defendant, with no apparent predisposition to do so, was induced by others to participate in the crime." The Washington Supreme Court recognized that when the entrapment defense at trial falls short of sufficient

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evidence, an exceptional sentence downward can be given where blameworthiness of the defendant's conduct is less than that normally present in such a case. *State v. Jeannotte,* 133 Wn.2d 847, 851, 947 P.2d 1192 (1997).

The *Jeannotte* Court reversed the trial court because it believed a failed entrapment defense could not be considered by a sentencing court where the jury rejected that entrapment defense. *Id.* at 853.

The sentencing court in Best's case refused to consider an exceptional sentence below the standard range in part because

> The jury heard the issue of entrapment;
> The jury received an entrapment instruction;
> The jury deliberated for quite some time;
> Ultimately, the jury did not find that Best was entrapped and convicted Best on both counts.

10/11/21RP 37. Those reasons are impermissible under *Jeannotte.*

In the unpublished decision, this Court ruled that the trial court did not fail to exercise discretion or categorically refuse to

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impose an exceptional sentence. Decision at 4. This Court based that holding on a single passage from the sentencing transcript:

> I poured [sic] over those text messages for a variety of hearings for a variety of reasons, and I understand what you are telling me today about what your intentions are. But I cannot find based on your conversation, based on your willingness to engage in discussions about what you wanted to do, I am frankly particularly in your discussion with the fictional child, Lisa, that while perhaps this was not what you originally intended when you responded to the as, that at the time you had the phone call with a fictional child that you were committed to the scenario and as more than simply fantasy role play. So, for that reason, I cannot grant the request for a downward departure under subsection D.

Id. at 5; 10/11/21RP 35. This Court ruled that the trial court "appropriately recognized and exercised its discretion. *Id.*

This quote alone does not equate to a fair consideration of an exceptional sentence. The passage must be read in context. The sentencing court first impermissibly based her decision on the fact that the jury did not find Best was entrapped. Then the court considered the evidence but only insofar as she was considering whether Best was entrapped.

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Seattle, WA 98104
(206) 332-1280

The record shows that the judge was fixated on the fact that the jury did not find he was entrapped. Based on that belief, the judge continued, "I cannot find enough similarities between other cases in which the Court has found entrapment, or any other departures to find that you were induced by law enforcement to commit a crime that you were not predisposed to commit." *Id.* at 35-36.

The record is clear that the court did not understand that this was a failed entrapment defense argument rather than an entrapment argument. The record demonstrates that the sentencing court was looking at the evidence to see whether he was entrapped rather than whether he provided sufficient evidence for a failed defense mitigating factor.

An exceptional sentence downward can be given where blameworthiness of the defendant's conduct is less than that normally present in such a case. *Jeannotte,* 133 Wn.2d at 851. Here, Best has satisfied that test for the following reasons. First, law enforcement conceived of the scheme. Second, Best had no

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criminal history which tends to show he is not someone who looks for sex with children on the internet. And finally, Mr. Best provided evidence that he was induced to commit the crime. The court noted that law enforcement "certainly continued to redirect you from your interest in fictional mother repeatedly redirected you to the children in this case." 10/11/21RP 36.

When a judge misunderstands the extent of his or her sentencing discretion, this misinterpretation of the law is a fundamental defect undermining the validity of the sentence imposed. *In re Pers. Restraint of Mullholland,* 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007); When a judge relies on "an impermissible basis for refusing to impose an exceptional sentence," it has misapplied the law and a new sentencing hearing is required. *State v. Khanteechit,* 101 Wn.App. 137, 138, 5 P.3d 727 (2000).

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Seattle, WA 98104
(206) 332-1280

Mr. Best requests this Court reconsider its ruling on the failed entrapment defense mitigating factor and remand for resentencing.

2. IN AFFIRMING BEST'S SENTENCE, THIS COURT MISAPPREHENDED THE SIGNIFICANCE OF THE TRIAL COURT'S FINDING THAT A MITIGATING FACTOR WAS NOT POSSIBLE FOR ATTEMPTED CHILD SEX OFFENSES, BECAUSE A CHILD CANNOT BE A WILLING PARTICIPANT OR INITIATOR UNDER THE LAW

Best requested an exceptional sentence below the standard range under RCW 9.94A.535(1)(a) that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." CP 70-71. At sentencing, Best argued that the "victims" in this case was the general public and not the fictional children Anna and Lisa. 10/11/21RP 22.

The trial court ruled "as strange as it may seem, [A] and L (sic) were the victims in this case. Even if they had been real children, they based on their ages could not have participated or

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Seattle, WA 98104
(206) 332-1280

been initiators or willing participants in the offenses." Decision at 5, 10/11/21RP 38.

This Court ruled that Best provided "no authority for his argument that an 8- or 12-year-old victim can be an 'initiator, willing participant, aggressor, or provoker of the incident' for purposes of applying RCW 9.94A.535(1)(a)." Decision at 6. This Court found this to be dispositive. *Id.,* citing *State v. Logan,* 102 Wn.App. 907, 900 N.1, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

a. Best provided authorities demonstrating in a net nanny case, law enforcement as complaining witness can be the initiator, willing participant, aggressor or provoker. First, Best filed two statements of additional authorities. In the first Statement of Additional Authorities, Best cited *State v. Pamon,* 21 Wash.App.2d 1013, an unpublished Division 1 case, recognizing that it was law enforcement as the complaining

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(206) 332-1280

witness was to a significant degree, an initiator, willing participant, aggressor or provoker of the incident supporting an exceptional downward sentence.

In the Second Statement of Additional Authorities, Best cited the superior court *Pamon* findings for an exceptional sentence. In that document, the superior court found that it was not the fictional children that were the victims, but instead found that "Law enforcement sought out and initiated contact with Pamon." The superior court correctly focused on that fact that while a child victim may or may not have been able to be the initiator or willing participant, law enforcement certainly was in a sting operation.

The *Pamon* findings demonstrate that the term "victim" can logically relate to the person who accuses the defendant of the crime, the complainant and the officers engaged in the sting operation. Here, the "victim" was the undercover officer who portrayed herself as an 11-year-old girl, Anna Standiford (formerly Gasser).

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Seattle, WA 98104
(206) 332-1280

Another "victim" was the fictional mother, who was a willing participant. The fictional mother initiated the sting operation by placing an advertisement in Craigslist; she invited Best to have sex with his daughters; she informed Best that the daughters wanted to have sex with him; and the mother initiated the process and induced him to come to her house. Detective Rodriguez, posing as the mother, informed Best that she was doing all this for her daughters. 08/26/21RP 286. She further informed Best that she told her fictitious daughters about Best and that they were happy, do not have a man figure in their life, and trust their mother. *Id.* at 291-92.

Where a defendant has requested an exceptional sentence downward, the denial of that request can be reviewed if the sentencing court "either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence." *State v. Khanteechit*, 101 Wn.App. 137, 138, 5 P.3d 727 (2000). A sentencing court's failure to consider

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an exceptional sentence is reversible error. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The officer who portrayed fictitious daughter, Anna, further provoked the attempted rape by holding a piece of paper depicting large drop of water in response to Mr. Best's masturbation video and the paper says "I have a fire – come bring your hose." CP 150-151; 07/20/21RP 485. That is the undercover officer, portraying to be a minor, provoking and initiating sex with Mr. Best.

"The 'willing participant' factor is applicable where both the defendant and the victim engaged in the conduct that caused the offense to occur." *State v. Hinds,* 85 Wn.App. 474, 481, 936 P.2d 1135 (1997) (citing David Boerner, SENTENCING IN WASHINGTON, § 9.12, at 9–21 (1985)). The fictional sting characters were represented by Detective Rodriguez, posing as "Kristl" the mother of "Anna" and "Lisa", as well as 25-year-old Detective Anna Standiford, who posed as "Lisa" the fictional 11-year-old daughter. 8/31/21RP 778-79, 797.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

This Court ruled that *State v. Clemens,* 78 Wn.App. 458, 898 P.2d 234 (1995) is inapposite to the facts in Best's case. Decision at 6. The court distinguished the fact that in *Clemens*, the defendant and victim were "relatively close and age and there was no evidence that the perpetrator was the initiator. *Id.* at 6; *Clemens,* 78 Wn.App. at 466. Meanwhile, Best was 42 years old, while the fictitious children were 8 and 12, and he drove to the location where the offense occurred.

First, there is no language in *Clemens* that there must be a similarity in age. But secondly, the victims here (law enforcement) were the initiator. Best never learned of the fictional children until law enforcement placed an advertisement. The mother of the children said the children wanted to have sex with him. The children were not real nor were their ages. What makes *Clemens* important was not the age of the defendant but rather that the child victim admitted to having willful sexual intercourse with the defendant. 78 Wn.App. 458, 463, 898 P.2d 324 (1995).

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Seattle, WA 98104
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While a real child victim under the age of 12 could not consent to having sex, this does not control what should happen in these net nanny cases. Consideration of the scheme dreamt up by police, initiated by police, lured by police and ensnared by police is different than a situation where there is a real victim that could be in danger. Police control all aspects of commission of the offense. They decide the age of the fictional children as well as the number of children involved.

Because the police chose three fictitious children in this case, Mr. Best's standard range sentence would be high for each unit of prosecution. *State v. Canter,* 17 Wn.App.2d 728, 739-40, 487 P.3d 916, *review denied,* 198 Wn.2d 1019, 497 P.3d 375 (2021) (no double jeopardy violating as facts established two units of prosecution for substantial steps to have sexual contact with two different fictional children); *In re Glant,* 523 P.3d 1206, 1209 (Division Two agreeing with *Canter*). With multiple underage fictitious children, Mr. Best with no criminal history faced a standard range sentence of 76.5 to 102 months

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Seattle, WA 98104
(206) 332-1280

for the attempted second degree rape of a child conviction. Allowing a defendant to argue the victim was a willing participant in net nanny cases should be available to a defendant who is ensnared by law enforcement by a scheme of its own invention.

Here, the record shows that the officers, pretending to be fictitious children, were willing participants of the attempted crimes. The sentencing court erred in refusing to consider the mitigating factor, erroneously concluding the factor was not permissible as a matter of law. While a real child cannot consent to having sex, a court can consider the officers as the victims and impose an exceptional sentence below the standard range in these cases.

c. Reversal and remand for resentencing is required. The sentencing court's refusal to consider an exceptional sentence is reversible error. *Grayson,* 154 Wn.2d at 342. Moreover,

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Seattle, WA 98104
(206) 332-1280

> "[a] trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand."

State v. Bunker, 144 Wn.App. at 421. This Court must reverse so that the sentencing court may properly consider whether an exceptional sentence below the standard range is warranted under RCW 9.94A.535(1)(a).

3. THE PEREMPTORY STRIKE OF THE ONLY ASIAN JUROR (JUROR NO. 46) CONSTITUTED A PRIMA FACIE SHOWING OF RACIAL MOTIVATION AND DISCRIMINATION

This Court affirmed Mr. Best's conviction, ruling that GR 37(c) requires a party to object before the potential juror is excused unless new information is discovered:

> The trial court's ruling is consistent with the timeliness provision in GR 37(c), which provides that "[t]he objection must be made before the potential juror is excused, unless new information is discovered." The juror here was excused before Best's counsel asserted a GR 37(c) challenge. Because Best has not shown that new information was discovered that would justify an untimely challenge, the trial court's timeliness ruling is correct.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

Decision at 11. The Court did not rule on the merits of the GR 37 objection. This Court should review Best's GR 37 claim *de novo. State v. Tesfasilasye,* 200 Wn.2d 345, 347, 356, 518 P.3d 193 (2022); *State v. Orozco,* 19 Wn.App.2d 367, 375, 496 P.3d 1215 (2021).

a. Although Best's objection was made after the prospective juror was excused, this Court should rule that defense counsel's objection was timely. Mr. Best argues that the Court should have considered the broad remedial purpose of the rule. Under GR 37(a), entitled "Policy and Purpose" the rule spells out that "The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity."

In, *City of Seattle v. Erickson,* the Washington Supreme Court ruled that even though trial counsel made a *Batson* challenge late, it was before other motions had been filed and no testimony was heard, or evidence admitted, and therefore the Court found the challenge to be timely stating:

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Seattle, WA 98104
(206) 332-1280

> We find that even though Erickson brought his challenge after the jury was empaneled, the trial court still had adequate ability to remedy any error. Therefore, Erickson made a timely challenge.

188 Wn.2d 721, 730, 398 P.3d 1124 (2017). The Court noted that several state and federal jurisdictions allow challenges even after a jury has been selected and sworn in. *Id.* at 728-29. The Court noted that these cases recognized that judges and parties do not have instantaneous reaction time and therefore granted lenience to bring *Batson* challenges after the jury has been sworn in. *Id.* at 729. The Court concluded, "[o]bjections should generally be brought when the trial court has the ability to remedy the error, and allowing some challenges after the swearing in of the jury does not offend that ability. *Id.,* citing *State v. Wike,* 91 Wn.2d 638, 642, 591 P.3d 452 (1979).

GR 37's broad purpose of further ensuring that juries are not discriminated against beyond what *Batson* permitted demonstrates that the timeliness issue allowed in *Batson* cases should apply to GR 37 cases. The Washington Supreme Court's

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Seattle, WA 98104
(206) 332-1280

Precedent in *Erickson* has not been overruled or superseded where it concluded Erickson made a timely challenge "even though Erickson brought his challenge after the jury was empaneled, the trial court still had adequate ability to remedy any error." *Erickson,* 188 Wn.2d at 730.

The Final Report from the Proposed New GR 37 Jury Selection Workgroup in 2018 also addresses the timeliness of GR 37 objections citing *Erickson*:

> Although workgroup members acknowledged that this provision [stating that the objection must be raised before the potential juror is excused] could be perceived to conflict with the ruling in *Erickson*, where the court determined that the objection could be raised after the jury pool has been excused, they agreed that objection before dismissal is preferred. The issue raised in *Erickson,* where the defense claimed the trial court never allowed an opportunity for counsel to make a *Batson* objection, can easily be avoided if, after peremptory challenges have been completed but before any jurors have been released, the court simply asks counsel if there are issues regarding the jury selection process. If any counsel indicate the existence of an issue, the jurors should be escorted from the courtroom before any discussion of the issue.

1000 Second Ave Ste 3140
Seattle, WA 98104
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Proposed New Rule General Rule 37 — Jury Selection (Wash. Apr. 5, 2018). It is important to note that the workgroup noted that an objection before dismissal is preferred but not mandatory.

Based upon the *Erickson* Court and Jury Selection Workgroups statements, the Division One Court of Appeals should have granted leniency in the timeliness of a GR 37 objection that was raised the very beginning of the very next day, before any other substantive proceedings.

In *State v. Orozco,* a GR 37 challenge was made after the Court excused the venire. 19 Wn.App.2d at 371-72. The GR 37 challenge was after the court gave the jurors their oath, gave a standard introductory instruction, and after a short recess. *Id.* It was after the recess that the trial court reconvened and asked the parties to address *Batson* and GR 37 challenges. *Id.*

On August 17, 2021, the parties made their peremptory challenges at the very end of the day. 08/17/21RP 479-482. That included the State's challenge to Juror 46. *Id.* at 481. The

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Seattle, WA 98104
(206) 332-1280

very next morning and right when the case was called, defense counsel challenged the State's peremptory of Juror 46. 08/18/21RP 491. Mr. Best's trial counsel raised the GR 37 challenge before the court gave jurors their oath. 08/18/21RP 490. Trial counsel pointed out there were no cases that held trial counsel waives a GR 37 challenge after the juror is excused. 8/18/21 at 497-98.

This Court should follow the reasoning of *Erickson* and *Orozco* and rule that the objection was timely.

b. Defense counsel challenged the State's peremptory challenge of Juror 46. Defense counsel's objection was made on the basis that "Juror 46 was the only person of Asian descent – who appeared to be of Asian descent on the panel." and "The State's questioning of that potential juror was different than other jurors." 08/18/21RP 491.

During individual questioning, Juror 46 was brought in by the Court regarding his answers on the Jury Questionnaire regarding a friend who works in the UW police department.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

Juror 46 also indicated he wanted to talk outside the presence of other jurors. 08/17/21RP 239-254

When asked whether it would be a hardship if this trial lasted through September 3rd, Juror 46 responded:

> PROSPECTIVE JUROR NO. 46: Not necessarily the hardship, but whether if I -- if I would be able to perform my duties as a juror regardless of, I guess, how I perceived the law or something along that line. While I think I can, I will still feel conflicted if the law was somehow violated constitutional rights were violated, whether its inherent or not.

08/17/21RP 241.

The court then asked if Juror 46 was thinking of a particular circumstance when he thinks about that, to which, Juror 46 responded:

> "No particular circumstances. Just in terms of at least the most recent example that was brought up to me is sort of revolving around the *Batson* role where eliminating certain jurors could lead to discrimination in that sort of regards. So while not intentional, but can result in something that is discriminatory in nature. While I can see past that, it will still feel conflicting if something like that arises and I find that it can be used or seen as something discriminatory or sexist or anything of that nature." 08/17/21RP 242.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

In response to these answers by Juror 46, the court asked the State for any follow up 08/17/21RP 242, and rather than address the concern of whether the juror could perform his duties regardless of how he "perceived the law" or, "around the *Batson* role where eliminating certain jurors could lead to discrimination" 08/17/21RP 241-242, the State asked:

> If you were to hear that this case involved a sting operation, undercover law enforcement, do you feel like that might give rise to some sort of idea in your mind that there's some sort of constitutional issue?

8/17/21RP 242.

Here, the State chose to pose questions about constitutional issues, rather than address the discrimination concern, and, after Juror 46 answered that he tends to look at it in a more objective way, regarding photographic or surveillance evidence which could invoke privacy concerns. Juror 46 went on to agree with the State when Ms. Saracino stated, "Your role as a juror isn't to determine the constitutionality of the underlying principles or even consider them." 08/17/21RP 243.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

The State asked some more questions, and Juror 46 responded, "So I would probably put my duty as a jury person foremost." 8/17/21 244. The State asked whether he could return a verdict at the end of the presentation of evidence and return a verdict of guilty if he was convinced the State had proved its case. Juror 46 responded, "Right. If – if and – you guys have said that the responsibility of the juror is to operate in that realm, then, yes, I can definitely do that." *Id.* at 245. As a result of this line of questioning, however, the State asked that Juror 46 be excused, and Defense Counsel objected. 08/17/21RP 245.

Defense Counsel asked Juror 46 "if the State proves the case beyond a reasonable doubt, would you be able to return a verdict of guilty?" Juror 46 responded "yes." *Id.*

Defense Counsel, in its individual questioning, went on to confirm three more times that Juror 46 would convict if the State proved its case according to the Instructions and acquit if

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

the State failed to prove its case according to the judge's instructions. 08/17/21RP 246-247.

Defense Counsel even asked some follow up questions regarding entrapment and confirmed, again, that Juror 46 would follow the instructions on the law and do the job that the judge is asking him to do and that he would take an oath to do. 08/17/21RP 249.

In its follow-up questioning, the State again posed questions about constitutional issues:

> Do you have privacy or constitutional concerns about that issue of the government's action that would prohibit you from being able to find the defendant guilty because of that argument?

08/17/21RP 250. Rather than address the *Batson* discrimination concern that Juror 46 brought up at the beginning, the State instead used hypotheticals to then make convoluted questioning and forcing the juror to answer questions he had not raised.

The State continued to pose convoluted questions regarding evidence about government actions and the

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

defendant's text messages or statements, ultimately leading to the following exchange:

> PROSPECTIVE JUROR NO. 46: So it's nothing like I personally think it's constitutional, if I led you to believe that I have a deep issue with privacy and whatnot. But back to your question. If that was an argument made and a -- and required me to make a decision based with that -- that argument, then, yes, it seems like it's my duty as a juror to take that into consideration.
> MS. SARACINO: The privacy and constitutional concerns? PROSPECTIVE JUROR NO. 46: The part of -- again, if that was brought up as part of the argument itself.
> MS. SARACINO: So what would you take into consideration is what I'm trying to -- you said I would take that into consideration. What do you mean by that?
> PROSPECTIVE JUROR NO. 46: If the privacy was taken or brought in as part of the argument, then that is something I would consider, first and foremost, whoever presented it. Does that make any sense?
> MS. SARACINO: No. Can you help clarify that for me?
> PROSPECTIVE JUROR NO. 46: So you're --
> MR. PENCE: I object, Your Honor. The State's badgering the juror and asking him to render opinions regarding information and facts and evidence that have not been presented to him. He has repeatedly tried to say he's going to be thoughtful and consider what information
> MS. SARACINO: Your Honor, I'm going to object to counsel --
> THE COURT: Sustained.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

MS. SARACINO: -- disparaging. This is a reasonable follow up of questions regarding his, quote, instruction of entrapment.
THE COURT: All right. Do you have any other questions? I think there was some confusion as to the way the last question was phrased because it was not clear, although the Court understands you may have been saying if you're not told to consider this argument, would you consider it anyway. I don't think that that was clear. So let me ask, Juror Number 46. You're going to get instructions on the law. You're going to be told what you can consider. You are going to be told what evidence is and that the arguments of the attorneys are not evidence.
PROSPECTIVE JUROR NO. 46: Uh-huh.
THE COURT: Are you able to go back and find the facts based on the testimony and the evidence admitted and then apply the law as I give it to you, even if you don't think that should be the law?
PROSPECTIVE JUROR NO. 46: Yes.

08/17/21RP 252-254.

c. Following individualized questioning, the State continued to pose convoluted questions solely to Juror 46 during voir dire but Juror 46 maintained throughout that he would be fair and impartial and follow the court's instructions as to the law. During Voir Dire, Prospective Juror No. 46 responded to the State's request to the entire jury pool for

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

follow up comment on the concept of sting operations like "To catch a Predator". 08/17/21RP 436-437.

> "MS. SARACINO: Okay. So I just want to be clear. If you heard some sort of evidence that law enforcement put something out there, is that going to automatically -- are you going to discount law enforcement's testimony and everything you heard after that, every engagement they might have with the party, because you are saying, well, they've put the bait out there? I can't -- I can't see past that?
>
> PROSPECTIVE JUROR NO. 46: So if -- if I can --
>
> MS. SARACINO: So I'm going to ask you: Is that a yes or a no?
>
> MR. PENCE: I object. This line of questioning has posed a series of hypotheticals and analogies on the juror, and to force him to answer a yes-or-no question is not fair. The juror seems to be indicating that he's going to consider all of the evidence and the law, and I would object to forcing him to answer a question that seems designed to create a challenge.
>
> THE COURT: All right. Sustained to the yes-or-no question. I'll allow the juror to answer.

08/17/21RP 442-443.

As with individualized questioning, Juror 46 repeated that he could be fair and impartial and disregard the legality of a

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

sting operation if it's not part of the case and can put that aside. *Id.* at 441.

Following this exchange, the State raised another hypothetical question to Juror 46, who again answered he did not have a problem with government actions in the State's hypothetical scenario. *Id.* at 444. Defense counsel challenged the State's continued convoluted hypothetical questioning of Juror No. 46:

> 'MR. PENCE: I'll object to the hypothetical as suggestive in a way that's misleading for this case. And also that this line of inquiry with this juror seems to have been exhausted, Your Honor.
>
> THE COURT: All right. Well, she's free to use her time as she wishes. The objection to the hypothetical is overruled in the context of the hypothetical.

Id. at 444.

Following this exchange, the State continued to pose hypothetical questions only to Juror No. 46. *Id.* at 244-246.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

The State then had the following questions for Juror 46, to which Juror 46 repeated that he would base his verdict solely on the facts presented and the court's instructions on the law:

> MS. SARACINO: So even if you felt it was unjust, if the state proves its case beyond a reasonable doubt, can you find Mr. Best guilty?
> PROSPECTIVE JUROR NO. 46: Yes.
> MS. SARACINO: Okay. And the inverse?
> PROSPECTIVE JUROR NO. 46: Yes.
> MS. SARACINO: Even if you think the operation was solid and just and legal and all of those things, if the state doesn't meet its burden, can you also find him not guilty?
> PROSPECTIVE JUROR NO. 46: Yes.
> MS. SARACINO: Okay. I have no other questions. I am moving to excuse this juror for cause, though, Your Honor, based on the record before this Court as well as yesterday. I'm happy to clarify the record later. I don't, frankly, want to put all the specifics on the record at this time, if that's okay.
> THE COURT: Okay. Mr. Pence?
> MR. PENCE: I object. I think there is no basis for a for-cause challenge for this juror. He's indicated he's going to follow the court's instructions and the law.
> MS. SARACINO: Your Honor, I -- maybe I'll articulate. I have concerns about the fact that he continually goes back to the legality, the constitutionally, which are not matters for the jurors to determine. It's matters of law for the court to determine. We're at trial, and I'm concerned that some of those articulations, as well as some of the questions counsel has said in front of the -- some of the discussion yesterday or this morning -- I don't remember what day -- I am concerned about his ability to be fair

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

> and impartial, as well as some of those outlying questions, Your Honor.

08/17/21RP 446-447. Even though the juror continued to correctly answer that he would be fair, the State did not want Juror 46 on the panel. The State's claim that Juror 46 was concerned about constitutional issues and could not be fair was a false claim.

Defense counsel brought up the fact that the State mischaracterized Juror 46's initial question:

> But this was a juror who A, brought up *Batson,* starts talking about issue that are relevant to, like, the issues that – of being an open-minded juror, of bringing in experiences from the community and completely changed the tone and tenor of [the State's] questioning. I think that's relevant to the record, and so I wanted to point that out.

08/17/21RP 257.

The record fully demonstrates that the State did not question any other juror about "constitutional" concerns other than Juror 46. This is despite the fact that the only time juror 46 had brought up a "constitutional" concern was when he

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

initially stated he would feel conflicted if "constitutional rights were violated," and, when asked by the Court if the juror had a particular circumstance in mind, the only concern Juror No. 46 provided was a concern "revolving around the *Batson* role where eliminating certain jurors could lead to discrimination." *Id.* at 241-42.

The State posed "constitutional" questions to Juror No. 46 at least seven times in individual questioning, and then in voir dire repeatedly tried to falsely assert that Juror No. 46 continually returned to constitutional issues, when the record shows Juror No. 46 was only answering the convoluted hypothetical constitutional questions posed by the State.

Defense counsel argued that the State's comments were unsubstantiated:

> I don't think that it's appropriate to repeatedly ask hypothetical questions and personal opinions of a juror and then attempt to characterize that as his inability to answer -- or to disregard what he says that he's able to follow the facts and the law.

08/17/21RP 448.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

The court asked Juror No. 46 that putting hypotheticals aside, the court would give instructions on the law and would not be explaining that the operation was legal, would you be able to render a fair and impartial verdict without such assurances? *Id.* at 450. Juror No. 46 confirmed that if it is required as a juror to put whether something is legal or not aside, "then that is what I would do. Sorry for the delay. I had to think of how to phrase my answer." *Id.* 450. The court ruled that the challenge for cause was denied. *Id.*

The State proceeded to repeat the question posed by the court to which Juror 46 answered, "So if I'm required to just base it solely on the evidence, then I'll base it solely on the evidence and not on the legality of it." *Id.* at 451.

The record shows that despite the State's badgering of Juror 46 with convoluted hypothetical scenarios, Juror 46 remained firm that he would render a verdict based only on the evidence presented and the court's instructions on the law.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

The State mischaracterized Juror 46's answers:

> "PROSPECTIVE JUROR NO. 46: So you had asked -- you had said what if there is no instructions and --
> MS. SARACINO: I said what if there is no instruction from the Court assuring you that actions on behalf of law enforcement are legal or within the bounds as you had talked about.
> PROSPECTIVE JUROR NO. 46: Right. And that to me sounds like that is not something to take into consideration if there is no instruction to do so. Right?
> MS. SARACINO: Okay. Okay. Is there anything about this exchange between myself, Mr. Pence, the Court, and you that you would hold against either party in rendering a verdict if you're a juror on this case?
> PROSPECTIVE JUROR NO. 46: No.

Id. 452-453. After this answer, after having stood before the jury far longer than any other juror, the State finally allowed Juror No. 46 to sit down.

The record fully reflects that any objective observer could conclude that race was a factor in the State's repeated attempts to remove Juror No. 46. Relying on the facts herein, any objective observer would conclude:

(1) The State posed significantly more convoluted hypothetical questions to Juror No. 46 than to any other juror;
(2) Juror No. 46 was the only juror asked about "constitutional" questions, and

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

(3) The State repeatedly made false assertions that Juror No. 46 had continually brought up constitutional concerns when the record demonstrates Juror No. 46 only brought up a constitutional concern at the very beginning "revolving around the *Batson* role where eliminating certain jurors could lead to discrimination."

Id. 242.

The record is clear that substantial facts have been established and as a result of this questioning and rulings by the court:

(1) the court sustained Defense' objection as to the badgering by the State of Juror No. 46;

(2) the court agreed that there was confusion as to the phrasing of the question posed to Juror No. 46 by the State;

(3) it was the State, not Juror 46, who continued to bring up constitutional concerns. 08/17/21RP 242-244, 250-252.

(4) Juror No. 46 only once mentioned he would feel conflicted if "constitutional rights were violated." 08/17/21RP 241 He even specified, when asked by the court, that there was a concern "revolving around the *Batson* role where

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

eliminating certain jurors could lead to discrimination." 08/17/21RP 242;

(5) the State, in its questioning of Juror No. 46, whether through unconscious bias or purposeful discrimination, failed to address the concern of whether the juror could perform his duties regardless of how he perceived the law, given the concern expressed around the *Batson* role 08/17/21RP 241-242; and

(6) Juror No. 46 repeatedly and consistently answered that he would be able to find the facts based on testimony and evidence and apply the law according to the court's instructions. 08/17/21RP 239-254

In response to the peremptory challenge, the State argued it had excused Juror No. 46 on grounds of "his ability to reach a verdict." 08/18/21RP 493. But Juror 46 made it clear by repeatedly answering that he could reach a verdict based on the evidence presented and the court's instructions. 08/17/21RP 239-254.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

GR 37(g)(i) is a consideration the trial court must make in determining whether a peremptory challenge should be denied, which includes.:

> the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it.

Here, Juror 46 expressed concern about *Batson* and discrimination. But that was never addressed by the State. 08/18/21RP 503-504. Instead, the State posed confusing hypothetical constitutional questions to Juror 46, unlike any other juror. These facts meet the criteria set in GR 37(g)(i) and (ii). Any objective observer could view race as a factor in the State's attempt to remove Juror 46 when he repeatedly answered that he would put any of concerns aside and render a verdict based solely on the evidence presented and the court's instructions on the law. Reversal is required.

d. <u>This Court should rule that the peremptory challenge should have been denied and reverse Best's</u>

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

convictions. The State used one of its peremptory challenges on Juror 46. *Id.* at 481. Had the State not used this challenge, Juror 46 would have been a member of the jury. Defense Counsel argued that the record showed Juror No. 46 was subjected to hypothetical questions of a qualitatively and quantitatively different nature than any other juror, that, "He [Juror 46] repeatedly came back to, yes, I can reach a verdict; yes, I can follow the law. I object to his being recused without at least a robust GR 37 analysis." 08/18/21RP 499.

The State countered that the juror's "answers were non-conclusory, unless and until we ask the ultimate question." *Id.* at 500. The State insisted that the juror would consider legality and the constitutionality concerns. *Id.* The State insisted that Juror 46's "thought processing kept lending itself into these long, off-tangent topics, instead of answering the State's actual question." *Id.* at 501.

Defense counsel objected to the State's characterization of Juror 46:

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

> The Court rule is very clear that reliance on conduct, meaning the way that the juror responded, provided unintelligent or confused answer[s] is specifically disapproved because it is historically associated with improper discrimination in the jury selection in Washington State.

Id. at 502, citing GR 37(i).

GR 37(i) provides:

> Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Here, the State never provided reasonable notice to the court or to defense counsel so the behavior can be verified and addressed in a timely manner. Accordingly, the State's peremptory challenge of Juror No. 46 is presumptively invalid.

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

The record shows that Juror 46 did not provide unintelligent answers. Instead, Juror 46 provided intelligent and competent answers given the convoluted hypothetical constitutional questions which were repeatedly posed by the State and appeared to be designed to create a challenge. In its GR 37 analysis, the trial court admitted that the "answers were not unintelligent or confused." *Id.* at 507.

Mr. Best's case is similar to *State v. Tesfasilasye.* The Court ruled that "Racial bias has long infected our jury selection process." 200 Wn.2d at 347, citing *State v. Jefferson,* 192 Wn.2d 225, 240, 429 P.3d 467 (2018). As part of our efforts to reduce racial bias in the judicial system, this court enacted GR 37, which directs trial judges to deny a peremptory challenge when an objective observer could view race as a factor on its use." *Tesfasilasye,* 200 Wn.2d at 347.

In *Tesfasilasye,* the State brought a peremptory challenge against Juror 3. Juror 3 spoke up when another juror had concerns about convicting a defendant of a victimless crime. *Id.*

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

at 351. Juror 3 stated that she was a person from an immigrant family, knew that there was institutional racism and would have to manage that in her brain. *Id.* The State asked whether Juror 3 could convict if the evidence was sufficiently presented. *Id.* Although the juror that she would have a difficult time. *Id.* The State sought to strike Juror 3 because of the juror's need for "concrete evidence." *Id.* at 354. The trial court allowed the peremptory. *Id.* at 355. The trial court denied a GR 37 challenge, concluding that it did not believe an objective observer "would think" that it was a race-based challenge. 200 Wn.2d at 361.

The Washington Supreme Court reversed. 200 Wn.2d at 361-62. The Court ruled that Juror 3 said that if he was provided with the definition of reasonable doubt, he would follow the court's instruction, apply the definition, and render a guilty verdict if he believed the State's evidence met the definition. *Id.* at 360-61. The Court agreed with Tesfasilasye that the State had misrepresented that Juror 3 needed an

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

eyewitness in order to convict. *Id.* at 361. The Court also noted that the test was not whether an objective observer "would think" that this was a race based challenge, but instead whether an objective observer "could" view race as a factor. *Id.*

Juror 25 said in her initial written questionnaire that she was not sure she could be fair. 200 Wn.2d at 347-48. She was then interviewed individually. 200 Wn.2d at 348. The juror was a nurse with experience in sexual assault investigation. *Id.* When asked whether she could reach a guilty verdict if she believed the law was wrong, Juror 25 responded that she could. *Id.* at 349. The Washington Supreme Court found that juror 25 had repeatedly indicated she could be fair and impartial. *Id.* at 359.

The juror who had been excused in *Tesfasilasye* also repeatedly answered that they would be able to find the facts based on testimony and evidence and apply the law according to the court's instructions, which is similar to Mr. Best's case. 200 Wn.2d at 347-349. In *Tesfasilasye,* the Court determined

1000 Second Ave Ste 3140
Seattle, WA 98104
(206) 332-1280

that both peremptory challenges should have been denied because an objective observer could view race as a factor for striking both juror 25 and juror 3. *Id.* at 360-62. "Under GR 37, if "an objective observer could view race or ethnicity as a factor in the use of [a] peremptory challenge, then the peremptory challenge shall be denied." GR 37(e)." *Tesfasilasye*, 200 Wn.2d at 357.

In the instant case, Best has demonstrated that the peremptory challenge should have been denied. First, the State's basis for the peremptory challenge was that Juror 46 had provided unintelligent or confused answers. Because the State never provided notice in order for the behavior to be verified and addressed, the peremptory challenge is presumptively invalid. GR 37(i). The trial court noted that there was confusion as to the State's phrasing in its questioning of Juror 46.

Second, because there was no corroboration by the judge or opposing counsel verifying the behavior, invalidates the given reason for the peremptory challenge. GR 37(i).

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Third, Juror 46 answered a total of 25 times that he would be able to base his verdict on the facts based on the testimony and the evidence admitted and then apply the law according to the court's Instructions.

Fourth, under GR 37(g)(i), the State, in its questioning of Juror No. 46, had failed to address the concern "around the *Batson* role where eliminating certain jurors could lead to discrimination." 08/17/21RP 241-42.

Fifth, under GR 37(g)(ii), the State posed significantly more convoluted hypothetical questions to Juror No. 46 than to any other Juror.

Sixth, under GR 37(g)(ii), the State asked only Juror No. 46 constitutional questions.

Seventh, the State repeatedly made false assertions that Juror No. 46 continually brought up constitutional concerns, when the record shows that the juror brought up only a single constitutional concern, when he initially stated he would feel conflicted if "constitutional rights were violated." 08/17/21RP

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Seattle, WA 98104
(206) 332-1280

241. When asked by the court if the Juror had a particular circumstance in mind, the only concern Juror 46 had provided was a concern "revolving around the Batson role where eliminating certain jurors could lead to discrimination." *Id.* at 242.

The trial court ruled that it did not find anything in the questions or answer that implicated race in relation to the answers and insufficient evidence for any observer to determine whether an objective observer could determine race or ethnicity as a factor in the peremptory challenge. That is not the test. The fact that Juror 46 was the only Asian person in the venire and the only person repeatedly asked convoluted constitutional questions could lead an objective observer to believe race was a factor.

This Court should rule that the trial court should have denied the peremptory and reverse Mr. Best's convictions.

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4. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

The elements of the crimes charged in this case are attempt crimes, and, to attempt a crime, the defendant must have (1) the intent to commit a specific crime and (2) take a substantial step toward the commission of that crime. RCW 9A.28.020(1). "The intent required is the intent to accomplish the criminal result of the base crime." *State v. Johnson,* 173 Wn.2d 895, 899, 270 P.3d 591 (2012), citing *State v. DeRyke,* 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).

Conduct constitutes a substantial step toward the commission of a crime if it "is 'strongly corroborative of the actors criminal purpose.'" *Townsend*, 147 Wn.2d at 679 (quoting *State v. Aumick,* 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)). Also, "any act done in furtherance of the crime constitutes an attempt if it clearly shows the design of the defendant to commit the crime." *State v. Wilson,* 158 Wn.App. 305, 317, 242 P.3d 19 (2010). But "[m]ere preparation to

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commit a crime is not a substantial step." *Townsend,* 147 Wn.2d at 679.

This Court reviews the record to determine whether sufficient evidence was presented to support the conviction. *State v. Griepsma,* 17 Wn. App. 2d 606, 615, 490 P.3d 239, 245, *review denied,* 198 Wn.2d 1016, 495 P.3d 844 (2021).

In Mr. Best's case, this Court ruled that the State presented sufficient evidence to support Best's convictions:

> Second, Best claims that there is insufficient evidence that the "[a]ppellant intended to have sex with the girls on the day he arrived at the house or took a substantial step towards the commission of [h]is offenses." We disagree. The evidence here includes, but is not limited to, the testimony of Sergeant Anna Standiford recounting what Best said during phone calls when he believed he was speaking with 11-year-old "A," text messages in which Best described his physical arousal and intentions regarding the fictitious children, and Best's arrival at the fictitious mother's home at the exact time the two of them had agreed upon for a weekend involving sexual contact with the fictitious children. Viewing the evidence in the light most favorable to the State, and drawing all references in the State's favor (as required, see *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)), there is sufficient evidence to convince a rational juror to find beyond a reasonable doubt that Best took a substantial step toward the commission of attempted second degree

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Seattle, WA 98104
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rape of a child and attempted first degree child molestation.

Opinion at 11-12.

Mr. Best concedes that he went to the house on February 20, 2016. But the record does not show that he intended to have sex with the fictitious children that day or that weekend. In fact, the last texts from February 16, 2021 to February 20, 2021, only concerned Best visiting so that the children could get to know him. There were texts of Best bringing his dog, taking the girls shopping at Walmart, and bringing drinks from Starbucks for everyone. 08/31/21RP 632-33, 635. There was no sexual innuendo for the days preceding February 20 or any plan to meet for the weekend for sex.

Visiting with the family and getting to know the family is not a substantial step towards the commission of child molestation or rape of a child. *State v. Townsend,* 147 Wn.2d 666, 679, 57 P.3d 255 (2002), is instructive as to what is a substantial step. In that case, the Washington Supreme Court

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Seattle, WA 98104
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considered whether there was sufficient evidence in a sting operation to prove that the defendant took a substantial step toward the commission of second degree rape. 147 Wn.2d at 679. The Court affirmed the conviction because of the following substantial steps Mr. Townsend took:

(1) The night before the scheduled meeting, Townsend sent Amber an ICQ message in which he stated "he wanted to have sex with [her]" the following day.
(2) About an hour before the arranged meeting, Townsend sent his last ICQ message to Amber indicating that "he still wanted to have sex" with her.
(3) Townsend went to the motel at the appointed time and knocked on the door of the room in which he believed Amber was located.
(4) After asking to see Amber, he was arrested.

147 Wn.2d at 671. Importantly, it was the expression of the intent to have sex with the fictitious young girl that Townsend agreed to and then followed through with. The Court found that in the light most favorable to the State, Townsend committed an act which was a substantial step toward the crime of second degree rape.

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While Mr. Townsend repeatedly confirmed that the "plan" was to have sex with Amber on June 4, 1999, upon arriving at the motel room, the opposite occurred in Best's case. Here, the "plan" was to get to know and get comfortable being around Kristl and her kids upon arriving at the house on February 20, 2016.

In the text and phone conversations with the mother Kristl which occurred leading to the first meeting on February 20, 2016, Mr. Best and Kristl planned for Mr. Best to meet and get to know Kristl and her kids, and, to get Mr. Best and the kids comfortable with being around each other, by making plans to take them shopping, by bringing his dog for the kids to play with, and bringing drinks from Starbucks for everyone. 08/31/21RP 632-633, 08/31/21RP 635. On the night before the arrest, February 19, 2016, the conversation was solely about getting to know each other. Best stated, "COOL sounds good I'm excited to take you guys shopping tomorrow," after having discussed the arrangements to meet and get comfortable with

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the children after arriving back from Vegas on February 20, 2016. 08/31/21RP 880-895.

Later that same date (February 19, 2016), Detective Kristl Pohl called Best. In her testimony about the call, Kristl Pohl testified that she and Best "talked about him being in Las Vegas and flying back and his dog. I believe we talked about his dog, that he would pick up his dog when he came back." 08/31/21RP 632. Pohl confirmed that Best was bringing the dog to the meeting and to meet the girls. 08/31/21RP 632-633.

When specifically asked about the plans for that weekend, Pohl testified, "I think we did discuss him staying the weekend." 08/31/21RP 633. When asked whether she recalled anything specifically about that conversation, Pohl answered, "I don't." 08/31/21RP 833.

On cross-examination, trial counsel asked Pohl several questions regarding the agreement and plan for when Best showed up at the house on February 20, 2016. 08/31/21RP 639.

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Q. Ma'am, was there any agreement -- when Mr. Best showed up at the house, that you discussed in the phone calls, was there any agreement that he would have sex with the children when he arrived at the house?

A. Not that I recall.

08/31/21RP 640.

The State even argued that the plan was for Best to meet the family and get comfortable with each other. In its closing rebuttal, the State specifically argued:

> The substantial step he took -- let's talk about the plan he designed. He told undercover mother, Kinky Kristl, he told her that he wanted to get to know them, that he was going to get comfortable with them. He talks about taking them shopping. He talks about bringing the dog to Lisa, to bring the dog for her. They talk about playing with the dog. And in the chats and the messages, you can see there's a discussion but -- from both of them about making sure their kids are comfortable with the other person. So that's by design.

09/01/21RP 993.

Mr. Best requests this Court reverse his conviction because the record does not show that he intended to commit the offense when he arrived at the house or that weekend.

Jackson, 443 U.S. at 319; *Green*, 94 Wn.2d 216 (1980).

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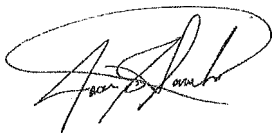
IV. CONCLUSION

For the foregoing reasons, Mr. Best requests this Court reconsider its decision and reverse his convictions and sentence.

Per RAP 18.17 and RAP 10.8(b), I certify that this document was prepared using word processing software and that the body of the statement contains 9,053 words.

DATED this 14th day of August, 2023.



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CERTIFICATE OF SERVICE

I, Cole Hoglund, state that on the 14th Day of August, 2023, I caused the original **Motion for Reconsideration** to be filed in the **Court of Appeals – Division One** and a true copy of the same to be served on the following in the manner indicated below:

Matthew R. Pittman	( )	U.S. Mail
Snohomish Co Pros Ofc	( )	Hand Delivery
3000 Rockefeller Avenue, M/S 504	( )	Email
Everett, WA 98201	(X)	COA E-service
Matthew.pittman@snoco.org	( )	_____

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name: */s/ Cole Hoglund* Date: 8/14/2023

Cole Hoglund
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TABLE OF APPENDICES

Appendix A, Unpublished Opinion.....1-14

Appendix B, Excerpts from 7/20/21 RP 2-16

Appendix C, Excerpts from 8/17/21 RP.....17-58

Appendix D, Excerpts from 8/18/21 RP.....59-74

Appendix E, Excerpts from 8/26/21 RP.....75-83

Appendix F, Excerpts from 8/31/21 RP.....84-116

Appendix G, Excerpts from 9/1/21 RP.....117-135

Appendix H, Excerpts from 10/11/21 RP.....136-141

Declaration of Filing and Service

Court of Appeals No. 83245-0-I

I, Kevin Dale Best, declare that, on September 8, 2023, I completed the Petition for Review.

Accordingly, the Petitioner had presented the above referenced document for E-Filing as required to effectuate Service in accordance with the Rules of Appellate Procedure (RAP) 18.5, and, in Filing the above referenced document using the CM/ECF E-Filing System, the CM/ECF System will send Notification and Serve the same on the following parties:

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State of Washington

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State of Washington, Div. I

Snohomish County Prosecutor
3000 Rockefeller Ave., M/S 504
Everett, WA 98201

Jason B. Saunders
Former Counsel of Petitioner
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Seattle, WA 98104

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Executed on this 8th Day of September, 2023.

Kevin Dale Best
Petitioner, #429448, H1B-063L
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

INMATE

September 8, 2023 - 10:30 AM

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Superior Court Case Number:	16-1-00594-7

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