Filed
Washington State
Court of Appeals
Division Two

February 7, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Personal Restraint of BRYAN EARLE GLANT, Petitioner.	No. 56383-5 II PART PUBLISHED OPINION

GLASGOW, C.J.—Law enforcement made a post on Craigslist suggesting the person posting could arrange sexual contact with children. Bryan Earle Glant responded to the post and texted with an undercover detective about sexual intercourse with her two fictional daughters, ages 11 and 6. He then drove to an apartment with personal lubricant in his pocket to meet "Hannah" and the children, where he was arrested. The State charged him with two counts of attempted first degree rape of a child. Glant was 20 years old at the time.

Glant waived his right to a jury trial and the parties proceeded to a bench trial on stipulated facts. The trial court found Glant guilty of both charges and found that he was not entrapped by law enforcement. At sentencing, the trial court ruled that youthful impulsivity did not contribute to Glant's offenses, and it imposed an indeterminate sentence with a minimum sentence within the standard range and a maximum of life.

Glant appealed and this court affirmed. Glant then filed this timely personal restraint petition (PRP). He argues the State withheld impeachment evidence in violation of *Brady v.*

Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). He contends that his trial counsel provided ineffective assistance by inadequately investigating his case, advising him to waive a jury trial, and failing to raise a same criminal conduct argument at sentencing. He further argues that the trial court misapplied the law of entrapment, that his convictions violate double jeopardy, that his convictions constituted the same criminal conduct, and that the trial court abused its discretion by declining to impose a determinate sentence based on youth.

We deny the PRP. In the published portion of this opinion, we conclude that Glant's conduct supported two convictions for attempted first degree rape of a child and did not violate double jeopardy. We resolve the remainder of the issues Glant raises in the unpublished portion of this opinion.

FACTS

The Washington State Patrol's Missing and Exploited Children Task Force (MECTF), headed by Sergeant Carlos Rodriguez, conducted undercover stings, known as Net Nanny operations. *State v. Glant*, 13 Wn. App. 2d 356, 360, 465 P.3d 382 (2020). In 2016, as part of a Net Nanny operation, a detective made a post on Craigslist titled, "'Family Play Time!?!?—w4m,'" which advertised, "'Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son . . . you get the drift. If you know what I'm talking about hit me up [and] we'll chat more about what I have to offer you.'" Clerk's Papers (CP) at 772. Glant responded, writing, "I'm interested in what you say you have to offer, let's talk more about it?" PRP, App. B.

Glant, a 20-year-old, began e-mailing and then texting with the fictional Hannah, a mother with three children. Glant asked, "What're your rules?" and was told, "[M]y rules depend on what you are looking to do with the kids and which ones, this is where your honesty comes into play."

PRP, App. D at 1. Hannah then told Glant she had a teenaged son and two daughters ages 11 and 6. Glant stated, "I'm primarily interested in the daughters," and that he would like to "[p]robably use toys with them and introduce some touching and then work towards oral." PRP, App. D at 1. When Hannah instructed Glant that her rules were "no pain, no anal," Glant asked, "What about like a finger in the bum though?" PRP, App. D at 2. Hannah responded, "[I]f you promise to bring lube and put lube on your finger, yes you can put one to two fingers in their bum." PRP, App. D at 2. Glant agreed, "Ok no problem." PRP, App. D at 2.

When Hannah asked if he had "any other questions on what you want to try or do," Glant responded, "No I'm fine, but to be frank I'm new to this and don[']t know how to approach this." PRP, App. D at 2. When Hannah suggested they exchange pictures "so we know each[ ]other is real," he agreed. PRP, App. D at 2. Hannah then told Glant that she lived in Tumwater, causing him to reschedule because,"Tumwater is pretty far away." PRP, App. D at 6. He tried to reschedule for the next morning then, at Hannah's suggestion, agreed to meet the following afternoon.

Overall, Glant exchanged messages with Hannah for two days before driving from Mercer Island to an apartment in Thurston County to meet her and the fictional children. He was arrested after entering the apartment. Glant had a bottle of personal lubricant in his pocket when he was arrested. The State charged Glant with two counts of attempted first degree rape of a child.

Glant waived his right to a jury trial and agreed to a bench trial on stipulated facts. The trial court found the elements of two counts of attempted first degree rape of a child were met based on the acts Glant described in texts to Hannah. It found that Glant "took at least one substantial step" toward committing rape of a child "when he drove from Mercer Island to Thurston County and had in his pocket lubricant, which was needed to engage in sexual activity with the daughters, as

referenced in the text messages." CP at 773. The trial court found Glant guilty of both counts of attempted first degree rape of a child.

ANALYSIS

To receive relief, a personal restraint petitioner who has filed a timely petition must demonstrate "either a constitutional error that resulted in actual and substantial prejudice" or a nonconstitutional error that is "a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 807, 383 P.3d 454 (2016) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990) (internal quotation marks omitted)).

Glant contends that he was convicted twice for a single unit of prosecution, violating double jeopardy. He compares attempt to solicitation, where the unit of prosecution is "the act of promoting or facilitating a crime rather than the specific crimes the defendant was soliciting," and conspiracy, where the unit of prosecution is "an agreement to engage in a criminal enterprise," not the individual crimes therein. PRP at 23-24. Because an attempt conviction requires a defendant to take a substantial step with the intent to commit a specific crime, Glant reasons that he "engaged in a single and unified course of conduct in his attempt to have sex" with fictional victims. PRP at 25. We disagree.

When there are multiple alleged violations of a single statute, we inquire what unit of prosecution the legislature intended under the statute. *State v. Bobic*, 140 Wn.2d 250, 261, 996 P.2d 610 (2000). "'When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.'" *Id*. (quoting *State v. Adel*, 136 Wn.2d 629, 634,

965 P.2d 1072 (1998)). We will construe any ambiguity in favor of lenity for the defendant. *Id*. at 261-62.

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime," they do any act that is "a substantial step toward the commission of that crime." RCW 9A.28.020(1). "Mere preparation to commit a crime is not an attempt." *State v. Wilson*, 1 Wn. App. 2d 73, 83, 404 P.3d 76 (2017). A substantial step requires conduct that is strongly corroborative of the defendant's criminal purpose. *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995). This court has recognized that where there were two separate attempts involving the same victim and the same crime, the unit of prosecution was "the act necessary to support the inchoate offense, not the underlying crime." *State v. Boswell*, 185 Wn. App. 321, 329, 340 P.3d 971 (2014). For example, in *Boswell*, an attempt to kill by poisoning and an attempt to kill the same victim by shooting were two separate units of prosecution. *Id.* at 332.

The State argues that we should follow a recent Division One case with similar facts, *State v. Canter*, 17 Wn. App. 2d 728, 487 P.3d 916, *review denied*, 198 Wn.2d 1019 (2021). In *Canter*, a Net Nanny case with two fictitious victims, Division One rejected the same double jeopardy argument, concluding instead that the legislature intended for the child molestation statute to protect each child from sexual contact. *Id.* at 739. The *Canter* court held that the facts established two units of prosecution because Canter took substantial steps to have sexual contact with two different, albeit fictional, children. *Id.* We agree that *Canter* is similar and follow Division One's reasoning in that case.

In *Canter*, the defendant relied on *Boswell*'s reasoning that for attempt, the unit of prosecution was the act necessary to support the inchoate offense, not the underlying crime. *Id*. at

738. Canter asserted that the unit of prosecution for his attempted child molestation was "the single substantial step he took toward molesting two children." *Id.*

Division One instead looked to cases involving more than one victim. Division One explained that in *State v. Diaz-Flores*, 148 Wn. App. 911,914, 201 P.3d 1073 (2009), the court found no double jeopardy violation where the defendant was convicted of two counts of voyeurism for peeking into a bedroom window to watch two people having sex. *Canter*, 17 Wn. App. 2d at 739. Diaz-Flores argued the unit of prosecution was his single act of viewing, regardless of the number of victims. *Diaz-Flores*, 148 Wn. App. at 916. The *Diaz-Flores* court examined the statutory language prohibiting the viewing of "another person" and concluded that the legislature intended to protect each individual the voyeur viewed. *Id.* at 917. Thus, the unit of prosecution was the viewing of each victim. *Id.* at 918.

Turning to the child molestation statute, the *Canter* court relied on the language establishing that a person is guilty of first degree child molestation when they have sexual contact with "another person" who is less than 12 years old. 17 Wn. App. 2d at 739. Thus, the "child molestation statute unambiguously protects each child from sexual contact." *Id.* Even though Canter had been charged with attempt, the facts supported two units of prosecution because Canter "took steps to have sexual contact with two separate children." *Id.*

In response to Canter's argument that he only took a single substantial step amounting to only one unit of prosecution, the *Canter* court discussed *State v. Price*, 103 Wn. App. 845, 14 P.3d 841 (2000). 17 Wn. App. 2d at 740. In *Price*, the defendant fired one gunshot into a car with two people inside and was convicted of attempted murder for both victims. 103 Wn. App. at 850. On appeal, Price argued that "his actions did not constitute attempted murder toward each separate

victim because firing one shot into the vehicle could not constitute a substantial step toward the commission of first degree murder for both [victims]." *Id*. at 851. The court concluded that there was sufficient evidence to support two convictions even though there was only a single shot. *Id.* Although *Price* was not a double jeopardy case, Division One found its reasoning helpful. *Canter*, 17 Wn. App. 2d at 740.

The *Canter* court then explained that Canter had communicated to a fictitious mother that he intended to have sexual contact with her 8-year-old daughter, he purchased items she told him to bring to his encounter with the child, and he drove to a location where he thought they lived. *Id.* "Canter took those same substantial steps toward having sexual contact with an 11-year-old girl." *Id.* Because the text exchanges involved two separate children, double jeopardy did not bar Canter's convictions for two counts of attempted child molestation, even where the child victims were fictitious. *See id.* at 740-41.

Finally, the *Canter* court explained that cases addressing the units of prosecution for solicitation and conspiracy did not justify a different result. *Id.* The unit of prosecution for solicitation "is centered on each solicitation regardless of the number of crimes or objects of the solicitation." *State v. Varnell*, 162 Wn.2d 165, 170, 170 P.3d 24 (2007). In *Varnell*, the Supreme Court reversed and vacated three of a defendant's convictions when he solicited the murder of four people in a single conversation. *Id*. at 172. And in *Bobic*, the Supreme Court held that two defendants were each guilty of only one count of conspiracy when their "single agreement to commit a series of crimes" included, stripping, and reselling stolen vehicles. 140 Wn.2d at 266. But unlike in these cases, the prohibition on attempted child molestation "aims to punish a substantial step toward molesting each child." *Canter*, 17 Wn. App. 2d at 740-41.

Like the statute criminalizing child molestation addressed in *Canter*, the statute criminalizing rape of a child at issue in this case focuses on intercourse with each child. A defendant "is guilty of rape of a child in the first degree when the person has sexual intercourse *with another who is less than twelve years old* . . . and the perpetrator is at least twenty-four months older than the victim." Former RCW 9A.44.073(1) (1988) (emphasis added). Thus, applying the reasoning that Division One adopted in *Canter*, the child rape statute also unambiguously protects each child from rape.

Here, like in *Canter*, when Hannah told Glant she had a son and two daughters, he expressed interest in sexual contact with two children when he responded, "I'm primarily interested in the daughters." PRP, App. D at 1. When asked about his intentions, Glant stated that he would "[p]robably use toys with them and introduce some touching and then work towards oral." PRP, App. D at 1. When he asked about anal penetration with fingers, Hannah responded, "[I]f you promise to bring lube and put lube on your finger, yes you can put one to two fingers in their bum." PRP, App. D at 2. Glant agreed. The text conversations addressed performing these acts with two children.

The trial court found that Glant "took at least one substantial step . . . when he drove from Mercer Island to Thurston County and had in his pocket lubricant, which was needed to engage in sexual activity with the daughters, as referenced in the text messages." CP at 773. These are the same substantial steps—texting about specific acts with two children, purchasing necessary items, and driving to a location where he thought the children would be—that Canter took. Thus, applying the *Canter* court's analysis, we conclude that Glant's convictions do not violate double jeopardy.

Glant contends that we should depart from *Canter* and hold instead that where victims are fictitious, the fact that a defendant has expressed an intent to commit the rape of two separate victims is not enough to support two separate convictions under a double jeopardy analysis. Glant emphasizes that the cases the *Canter* court relied upon involved real victims, rather than fake ones, or they involved crimes of general, rather than specific, intent. But factual impossibility is not a defense to an attempt crime, RCW 9A.28.020(2), so it is unclear why the fictitious nature of the children should be determinative. And even though *Price* involved attempted murder, which does not require specific intent to kill the particular victim, Glant does not explain how this distinction is relevant here where Glant expressed clear, specific intent to have oral sex with and anally penetrate two specific children. Glant's argument that we should depart from *Canter* is unconvincing. We follow *Canter* and find no double jeopardy violation occurred here.

CONCLUSION

We deny Glant's PRP on double jeopardy grounds. We address Glant's remaining claims in the unpublished portion of this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

UNPUBLISHED TEXT

ADDITIONAL FACTS

I. PRETRIAL PROCEEDINGS

A. Discovery and Pretrial Motions

Glant made a pretrial public records request to the State Patrol and the prosecutor's office for Net Nanny training materials. When the State Patrol argued that the materials were privileged, Glant moved to compel discovery of the relevant training materials. The trial court granted defense counsel access to the training materials, controlled by a protective order to limit leaks of sensitive material.

Based in part on the records he received, Glant then moved to dismiss the charges based on outrageous government misconduct. Glant argued that the trial court should dismiss the charges because Net Nanny operations were primarily funded by donations from a private organization, Operation Underground Railroad (OUR). Glant also argued that the head of MECTF, Rodriguez, did not have explicit statutory authority to raise funds or solicit donations for Net Nanny operations. The trial court denied the motion to dismiss.

B. Waiver of Jury Trial

Glant then agreed to proceed to a bench trial on stipulated facts. The trial court asked Glant whether he "had an opportunity to discuss with [his] attorney what [a bench trial] means." PRP, App. H at 5. Glant stated that he had talked with his attorney, and he did not need additional time. The trial court explained that Glant was waiving the right to have his case decided by a jury of 12 peers who could find him guilty only if they unanimously agreed that the State had proved his guilt

beyond a reasonable doubt. Glant stated that he understood the constitutional protections he was giving up, and he waived his right to a jury trial. The trial court found the waiver knowing, voluntary, and intelligent.

II. TRIAL

At the bench trial, defense counsel argued that law enforcement entrapped Glant. Counsel asserted that the crime originated in the mind of law enforcement, that Glant had no predisposition toward sexually assaulting children, and that the detectives playing Hannah induced Glant to commit the offenses. The State contended that posting the ad on Craigslist was not direct solicitation of a crime. It argued that Glant's lack of criminal history and young age were insufficient to find entrapment. The State emphasized that Glant responded to the post, "voiced which children he was interested in," "voiced what he wanted to do with them," and "arrived at the apartment." Verbatim Rep. of Proc. (VRP) (Apr. 23, 2018) at 17.

The trial court considered the elements of entrapment and found that Glant failed to establish by a preponderance of the evidence that he was lured to commit his offenses. "The mere fact that there is an opportunity that was presented by law enforcement is insufficient. Some additional action is required . . . there needs to be some element of pressure or an improper inducement or coercion applied to satisfy this requirement." *Id*. at 26-27. The trial court did not view Glant's text message that he was "'new to this and [didn't] know how to approach this'" as proof of reluctance. *Id*. at 27. "At no point here does there appear to be any sort of reluctance expressed by Mr. Glant in this record. Thus, there was no need for law enforcement to go on at any length to attempt to pressure him." *Id*.

The trial court's written conclusions of law explained that under the "opportunity plus" standard, "the mere fact that law enforcement presented an opportunity is insufficient to establish luring or inducement" because "some additional action is required." CP at 774. The trial court further concluded that Glant's assertion that he was "'new to this'" and did not "'know how to approach this'" was "not an indication of reluctance and at no time [did] the defendant express any reluctance, thus there was no inducement or luring by law enforcement." CP at 774.

III. POSTCONVICTION PROCEEDINGS

A. Sentencing

Because Glant was convicted of attempted first degree rape of a child, the Sentencing Reform Act of 1981 required the trial court to impose an indeterminate sentence with a minimum and maximum term. RCW 9.94A.507(1)(a)(i), (iii).[1] The standard range for the minimum term for attempted first degree rape of a child was 90 to 120 months and the maximum possible term was life. The State requested a minimum sentence at the high end of the standard range: 120 months to life. Defense counsel presented testimony from a licensed psychologist who addressed brain development in adolescents and young adults generally, as well as his assessment of Glant's development after an in depth evaluation. Defense counsel requested an exceptional downward determinate sentence of 30 months based on Glant's youth and personal development during his time in jail awaiting trial.

The trial court ruled that an exceptional downward sentence based on youth was not appropriate. It stated that the amount of time Glant texted Hannah before driving to meet her

[1] Because the relevant language has not changed since Glant's sentencing, we cite to the current version of the statute.

"br[oke] the impulsivity chain." VRP (July 17, 2018) at 90. Therefore, the court did not "believe that this case was driven by the factors that would justify an exceptional downward sentence" based on youth. *Id*. The trial court also stated that it was concerned by the young ages of the fictional victims and the abuse of trust in the scenario of a mother marketing her children on the Internet. The trial court did conclude, however, that youth and capacity for growth warranted a lower minimum sentence than the State was requesting within the standard range. The trial court imposed an indeterminate sentence of 108 months to life with lifetime community custody.

B. Direct Appeal

Glant appealed his convictions and sentence. He argued the trial court should have suppressed e-mails and text messages he sent to Hannah, found outrageous government conduct, and imposed an exceptional downward sentence. *Glant*, 13 Wn. App. 2d at 360. This court affirmed Glant's convictions, and we held that Glant could not appeal his standard range sentence because the trial court had expressly exercised discretion as to whether to impose an exceptional sentence based on youth. *Id*. at 375. The Supreme Court denied review and this court issued its mandate on November 18, 2020.

C. PRP

Glant timely filed this PRP. The PRP contains declarations from Glant, trial counsel, and a private investigator.

Glant's declaration discusses his perspective of his trial counsel's performance. He states that his defense team spent most of the time from fall 2016 to early 2018 focused on the issues surrounding the State Patrol's solicitation of money from OUR to support the Net Nany sting operations. He claims his counsel did not discuss trial strategy until after losing the motion to

dismiss. Glant also states, "Because of an apparent history of violations of attorney-client privilege at the Thurston County Jail," he and his attorneys were "reluctant to freely discuss legal matters and trial strategy over the phone." PRP, App. A at 17.

Glant reports learning that his attorneys wanted to proceed to a bench trial on stipulated facts 11 days before the waiver hearing. Trial counsel told him that the State "would make a big show of the text messages to get an emotional response" at a jury trial. PRP, App. A at 23. It would also be easier to have the judge consider entrapment instead of having to seek an instruction and explain the defense to a jury. And counsel told him that possible amendments to the sentencing statutes could substantially reduce his term of community custody, which "played a significant part" in his decision to waive a jury trial. PRP, App. A at 25. Glant "felt pressured to making an immediate decision" because his trial was 16 days away. PRP, App. A at 21. He claims not to have known the risks and benefits of waiving a jury trial. "We had no time for further explanations or discussion regarding the pros or cons of waiving a jury." PRP, App. A at 19.

Glant also states that his attorneys told him he did not need to testify because the trial court would receive a video of his interview with police. Glant argues that because he did not testify, he was deprived of the opportunity to show a "lack of any predilection toward child sexual abuse and the absence of any intent to engage in such conduct." PRP, App. A at 22.

Glant's trial counsel submitted a declaration explaining that the defense team sought media articles about Net Nanny cases, attempted to negotiate a plea deal, contacted other attorneys with Net Nanny cases, met with an expert to evaluate Glant to identify "potential defenses or mitigation," submitted multiple public records requests and subpoenaed the State Patrol regarding Net Nanny trainings and operations, litigated multiple motions to compel discovery and suppress

Glant's e-mails and text messages, and consulted a forensic accountant about the funding of Net Nanny operations. PRP, App. G at 4-11. Counsel interviewed three of the officers who were present at Glant's arrest, including two of the detectives who posed as Hannah, several months before the trial. Counsel also recalls recommending a bench trial on stipulated facts at least three weeks before the waiver hearing took place.

A private investigator who was not involved in the case at trial, also submitted a declaration alleging that trial counsel performed deficiently in several areas. He asserts that counsel should have conducted witness interviews earlier and should have interviewed all 11 officers listed on the State's preliminary witness list. The investigator also contends that counsel should have hired "a seasoned defense investigator" in addition to the forensic accountant and private investigator. PRP, App. I at 14. And he complains that trial counsel did not challenge any of the police "reports, their contents, or authentication." *Id*. at 19.

The investigator also argues that the State's "failure to disclose evidence of the true scope of the relationship" between OUR and law enforcement "was sufficient to undermine confidence" in the trial court's ruling on the motion to dismiss. PRP, App. I at 24-25, 30. The alleged previously undisclosed evidence includes e-mails between OUR and members of the State Patrol discussing fundraising, and other evidence of support for Net Nanny operations such as delivering food.

ANALYSIS

I. *BRADY* EVIDENCE

Glant argues the State failed to disclose material exculpatory and impeachment evidence regarding the relationship between OUR and Washington law enforcement. The trial court "was concerned about the absence of a specific link between OUR and [] Glant's arrest and prosecution,"

and Glant asserts that the new evidence shows "a direct connection between mak[ing] more arrests of men *such as* Mr. Glant and the funding of both." PRP at 77 (emphasis added). We disagree.

Due process requires the State to disclose evidence that is both favorable to the defendant and material to guilt or punishment. *Brady*, 373 U.S. at 87. To constitute a *Brady* violation, the evidence must be material or impeaching, the State must have suppressed the evidence, and "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). To demonstrate prejudice, the key question "'is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [they] received a fair trial . . . resulting in a verdict worthy of confidence.'" *Id.* at 289-90 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

Whether the State has engaged in outrageous misconduct is a question of law, not fact. *State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014). More than "a mere demonstration of flagrant police conduct" is required, "the conduct must be so shocking that it violates fundamental fairness," and dismissal is "reserved for only the most egregious circumstances." *State v. Lively*, 130 Wn.2d 1, 19-20, 921 P.2d 1035 (1996). The remedy of dismissal "seems to be limited to the acts of law enforcement officers and informants." *State v. Hand*, 199 Wn. App. 887, 900, 401 P.3d 367 (2017) (declining to dismiss for outrageous government conduct when Western State Hospital delayed admitting defendant for competency restoration for 61 days).

RCW 13.60.110(4) provides, "The chief of the state patrol shall seek public and private grants and gifts to support the work of [MECTF]." "Simply because private supporters help to fund a program does not mean that that program no longer aims to protect the public or prevent crime." *Glant*, 13 Wn. App. 2d at 374-75. In Glant's direct appeal, we explained that MECTF's

funding was "attenuated from Glant's arrest. [OUR]'s funding, along with donations from individuals, generally supported the Net Nanny operations. [OUR] did not direct MECTF to target Glant or control the details of MECTF's operation." *Id.* at 372. We held "that the trial court did not err when determining that there was not a direct link between [OUR]'s funding and Glant's arrest." *Id*.

Glant has not established that there was relevant evidence that was not provided to him before his motion to dismiss that would have impacted the trial court's findings and conclusions or our reasoning on direct appeal. Nor has he pointed to any evidence, even now, that establishes such a direct link. Therefore, Glant has failed to demonstrate that allegedly undisclosed information undermines confidence in the trial court's verdict and he cannot establish a *Brady* violation. We hold that no *Brady* violation occurred.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Glant argues he received ineffective assistance, that trial counsel failed to adequately investigate, and counsel gave deficient advice that he waive his right to a jury trial. Glant contends seeking an entrapment defense was not a legitimate tactic and that he "was erroneously advised" about possible changes to the sentencing statutes. PRP at 61. He also argues that counsel impeded his exercise of his right to testify. We disagree.

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution both guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). "We apply the same prejudice standard to ineffective assistance claims brought in a personal restraint petition as we do on appeal." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). A petitioner must demonstrate that "counsel's

performance fell below an objective standard of reasonableness in light of all the circumstances and that in the absence of counsel's deficiencies, there is a reasonable probability that the result of the proceeding would have been different." *Id*. A failure to establish either prong will end our inquiry. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

We strongly presume that defense counsel provided effective representation. *Id*. Demonstrating deficient performance requires showing, based on the record, that there were no legitimate strategic or tactical reasons for the challenged conduct. *Id.* "At the least, a defendant seeking relief under a 'failure to investigate' theory must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).

A defendant may waive their right to a jury trial as long as they act "knowingly, intelligently, voluntarily, and free from improper influences." *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). "[C]ompetent defendants and experienced counsel may have good reasons to waive a jury trial, believing that their defense would be better understood and evaluated by a judge than by jurors who may be less sympathetic to technical legal contentions." *Id*. at 772. Similarly, waiver of the right to testify need not occur on the record, but the waiver must be knowing, voluntary, and intelligent. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). "Mere allegations" by a petitioner that their attorney prevented them from testifying "are insufficient to justify reconsideration of the defendant's waiver of the right to testify." *State v. Robinson*, 138 Wn.2d 753, 760, 982 P.2d 590 (1999).

Here, defense counsel engaged in a thorough litigation strategy with multiple prongs supported by investigation of the Net Nanny sting operations as well as the facts of Glant's specific

case. Counsel conducted extensive discovery, attempted to negotiate a plea deal, moved to suppress key evidence and to dismiss for outrageous government misconduct, and presented the affirmative defense of entrapment. Glant does not argue that trial counsel failed to investigate alibi witnesses or other possible perpetrators; at most, he has submitted a declaration from a private investigator implying that counsel should have interviewed every law enforcement officer who was present at Glant's arrest. Counsel interviewed three of the officers; Rodriguez and the two of the detectives who e-mailed and texted with Glant under the guise of Hannah, several months before the trial. And video of the arrest and Glant's interview with law enforcement was available.

Although there was no written waiver of Glant's right to a jury trial, the trial court conducted a colloquy before accepting Glant's waiver. The trial court asked Glant if he had an opportunity to discuss what a bench trial on stipulated facts meant for his case. Glant told the court that he had talked with his attorney, and he declined when the court asked if he needed "additional time to discuss that decision with [his] attorney." PRP, App. H at 6. The trial court explained the constitutional protections that Glant was waiving. Glant nevertheless waived his right to a jury trial.

Glant has not demonstrated that trial counsel's performance was deficient. Nothing in the record indicates that trial counsel's investigation was inadequate, that counsel's recommendation to waive trial by jury was outside the realm of legitimate trial strategy, or that Glant was improperly prevented from testifying. There is no evidence that additional investigation would have a reasonable probability of producing a different outcome. Child sex abuse charges can invoke strong emotions from jurors, and recommending that a client facing such charges seek a bench trial does not automatically fall below an objective standard of reasonableness. It was legitimate

strategy to conclude that an entrapment defense might be more successful if tried to a judge rather than a jury. Glant cites no authority indicating that advising a client about a potential change in the law constitutes ineffective assistance. And he provides no evidence that he sought to testify and was rebuffed, except for a hindsight belief that his testimony would have improved his defense. Thus, Glant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness. We hold that Glant received effective assistance from trial counsel.

III. ENTRAPMENT

Glant argues the trial court violated his due process rights by misapplying the law of entrapment in its conclusions of law. We disagree.

Because Glant asserts that his due process rights were violated, a constitutional error, he must demonstrate actual and substantial prejudice. *Swagerty*, 186 Wn.2d at 807.

RCW 9A.16.070 provides:

> (1) In any prosecution for a crime, it is a defense that:
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

Like other affirmative defenses, a defendant must prove entrapment by a preponderance of the evidence. *Lively*, 130 Wn.2d at 13. Entrapment focuses on the defendant's predisposition to commit an offense, unlike an outrageous government misconduct inquiry, which focuses on the State's actions. *Id.* at 19-20. The defendant must expressly show that they were "lured or induced into committing a crime [they] had *no* intention of committing." *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984) (emphasis added).

Police giving a defendant "an opportunity to commit a crime by employing a ruse" does not establish entrapment. *State v. Youde*, 174 Wn. App. 873, 886, 301 P.3d 479 (2013). In *Youde*, Division One held that it was not entrapment for an undercover officer to respond to an ad selling cannabis on Craigslist, then arrest the seller when she delivered the cannabis. *Id*. Because delivering the cannabis "was plainly Youde's intention," the police, "through a ruse, merely gave her an opportunity to deliver it." *Id*. Similarly, law enforcement's use of "'a normal amount of persuasion'" to overcome "'expected resistance'" will not constitute entrapment or justify an entrapment instruction. *Smith*, 101 Wn.2d at 42-43 (quoting *State v. Waggoner*, 80 Wn.2d 7, 11, 490 P.2d 1308 (1971)).

Here, the trial court correctly stated and applied the law. The challenged conclusions of law provide that "the mere fact that law enforcement presented an opportunity is insufficient to establish luring or inducement" because "some additional action is required." CP at 774. The trial court concluded that Glant did not establish the elements of entrapment by a preponderance of the evidence because he failed to demonstrate that he was lured or induced to commit the offense. And the trial court was correct that using a ruse to give a defendant an opportunity to commit a crime does not constitute entrapment. *Youde*, 174 Wn. App. at 886.

To the extent that Glant argues that there was not substantial evidence to support the conclusion that he was not entrapped, the trial court was correct that Glant's sole evidence of reluctance was a single text message stating he was "new to this" and didn't "know how to approach this." PRP, App. D at 2. In response, Hannah suggested that they exchange pictures "so we know each[ ]other is real," and Glant agreed. PRP, App. D at 2. At no point did Glant attempt to terminate the conversation or end the interaction, even after learning that Hannah lived more

than an hour away, which caused him to reschedule their encounter. Moreover, the trial court appropriately relied on the facts that Glant responded to the ad and stated to Hannah the sexual acts he intended to perform with her two children who were under 12. The trial court correctly stated the law, and substantial evidence supported its conclusion that Glant was not entrapped. He has thus failed to demonstrate a constitutional error resulting in actual and substantial prejudice.

IV. SENTENCING

A. Same Criminal Conduct

If a trial court finds that some or all of a defendant's crimes encompass the same criminal conduct, the court must count those offenses as a single crime for purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* We construe the statute narrowly and the burden is on the defendant to show two convictions amount to same criminal conduct. *Canter*, 17 Wn. App. 2d at 741.

Glant argues that his two convictions constituted the same criminal conduct. He argues the offenses occurred simultaneously and required the same criminal intent. Because the victims were fictional, Glant reasons there was also "not more than one victim." PRP at 37. We disagree.

The State contends that Glant waived this issue by failing to raise it at sentencing. But Glant also argues that his counsel's failure to raise same criminal conduct at sentencing was constitutionally deficient. Regardless of whether Glant waived this issue, we address the merits for the purpose of Glant's ineffective assistance argument.

Multiple crimes affecting multiple victims cannot be considered the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 779, 827 P.2d 996 (1992). Canter made similar arguments in that

case, claiming where there are fictitious victims, for purpose of sentencing, the victim is the general public. *Canter*, 17 Wn. App. 2d at 742. Division One found these arguments unpersuasive. *Id.* at 742-43. Had the situation been as Canter believed it to be, he would have had sexual contact with two different victims. *Id.* at 743. Because Canter intended to inflict harm on two different victims, his two counts of attempted child molestation were not the same criminal conduct. *Id.*

We follow the same reasoning here. Had the facts been as Glant believed them to be, he would have had intercourse with two children more than 24 months younger than himself, and factual impossibility is not a defense to an attempt crime. RCW 9A.28.020(2). The record shows Glant intended to rape two separate child victims. Because the offenses were not the same criminal conduct, it was not ineffective assistance for trial counsel to fail to raise this argument at sentencing.

B. Discretion to Impose a Determinate Sentence

Glant argues that the trial court mistakenly "believed its discretion in sentencing Glant was limited by the mandatory language of RCW 9.94A.507," which requires indeterminate sentences for specified sex offenses. PRP at 17-18. Glant contends that trial courts have discretion to impose determinate sentences and are not obligated to impose a maximum sentence of life for juvenile defendants. He reasons that the trial court had to expressly consider a determinate sentence based on his youth under article I, section 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution. He contends that he was prejudiced because we should not presume a trial court would have imposed the same sentence if it knew it had absolute discretion not to impose an indeterminate sentence with a maximum of life.

Recently, in *Forcha-Williams*, the Washington Supreme Court held that judges have "the discretion to impose a sentence below the minimum term in an indeterminate sentence but not the discretion to alter the maximum punishment chosen by the legislature or to impose a determinate sentence in lieu of an indeterminate sentence." *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 584-85, 520 P.3d 939, 942 (2022). The Supreme Court's holding resolves the issue here. The trial court did not have the discretion to alter the maximum punishment or impose a determinate sentence in lieu of an indeterminate one. Thus, Glant's argument fails.

Glant also relies on *In re Personal Restraint of Monschke*, which held that the cruel punishment prohibition in article I, section 14 requires trial courts to exercise their discretion to consider the mitigating qualities of youth for young adult defendants convicted of aggravated murder. 197 Wn.2d 305, 311, 482 P.3d 276 (2021) (lead opinion). Thus, the aggravated murder statute, which required a mandatory sentence of life without parole, was unconstitutional as applied to youthful defendants. *Id*. at 326. But recent Supreme Court cases have expressly limited *Monschke*'s holding to youthful defendants sentenced under the mandatory provisions of the aggravated murder statute. *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 84, 514 P.3d 653 (2022) (distinguishing Monschke's sentence under aggravated murder statute from Davis's sentence under first and second degree murder statutes); *In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 24, 513 P.3d 769 (2022) (distinguishing *Monschke* because Kennedy was sentenced for homicide by abuse under a statute "that allows for discretion and does not implicate the same concerns under the Eighth Amendment or article I, section 14" as the aggravated murder statute).

We decline to grant Glant's PRP on the basis that the trial court did not expressly consider a determinate sentence.

CONCLUSION

We deny Glant's PRP.

Glasgow, C.J.

We concur:

Maxa, J.

Veljacic, J.