Supreme Court No. _____
(COA No. 74662-6-I)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARLOS ALBERTO MARTINEZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner Carlos Martinez, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION.

Pursuant to RAP 13.4(b), Mr. Martinez seeks review of the Court of Appeal's published decision in *State v. Carlos Alberto Martinez*, No. 74662-6-I, slip op. (Wash., Jan. 16, 2018). The opinion was filed on January 16, 2018, and is attached as Appendix A to this petition. A Motion for Reconsideration was filed on February 5, 2018, and denied on March 5, 2018. Appendix B.

C. ISSUES PRESENTED FOR REVIEW.

1. The Fourth Amendment and article I, section 7 of the Washington Constitution prohibit warrantless searches of computers and storage devices. In the instant case, Texas agents sent Washington State Patrol a mirror hard drive of Mr. Martinez's laptop and Washington State Patrol searched the hard drive without a search warrant and no search warrant exception existed. Did the search of Mr. Martinez's hard drive without a search warrant violate the Fourth Amendment and article I, section 7 of the Washington Constitution?

2. RCW 5.60.060 is a spousal privilege statute that prevents a former wife from testifying against her husband about communications

made during their marriage. Here, the trial court ruled that the former wife could testify to spousal communications based on evidence that failed to demonstrate the Martinezes had any responsibility over A.K. and A.K. was never in the role as a child under their care. Is reversal required for the trial court's ruling?

D. STATEMENT OF THE CASE.

1. Trial facts. The facts are set forth in the Court of Appeals opinion, pages 2-5, and Appellant's Opening Brief ("AOB"), pages 1-11, and are incorporated by reference herein.

2. Argument on appeal. On appeal, Mr. Martinez challenged the warrantless search of his hard drive by Washington State Patrol under the Fourth Amendment and article 1, section 7 of the Washington Constitution. AOB 20, 23-29. Mr. Martinez argued that the silver platter doctrine did not apply in his case because it was Washington agents that searched Mr. Martinez's hard drive without a warrant in Washington State. AOB 36-39. Because a hard drive contains information about a citizen's entire life, Washington agents were required to have authority of law to search the hard drive. Texas agents had earlier obtained a Texas search warrant that authorized Texas law enforcement to search Mr. Martinez's computer, but after the hard drive was sent to Washington, Washington

agents must obtain a search warrant that provides authority to search the hard drive. AOB 36-37.[1]

Mr. Martinez also argued that the trial court violated Mr. Martinez's spousal privilege by admitting testimony of confidential marital communications. AOB 59-63. Mr. and Mrs. Martinez never stood in the shoes of A.K.'s parents and should not be considered to have an *in loco parentis* status. AOB 62-65.

3. The Court of Appeals Decision. The Court of Appeals affirmed Mr. Martinez's conviction. Slip op. at 1. The Court held that as long as the foreign agent lawfully obtained evidence in the foreign jurisdiction, the evidence can be used in Washington courts as long as foreign agents did not act as agents of Washington Sate Patrol. Slip op. at 7.

Concerning spousal immunity, the Court of Appeals ruled that in order to punish child abusers, Washington courts liberally interpret "guardian" to include a spouse acting *in loco parentis.* Slip op. at 17. The Court found the following facts sufficient to satisfy that the Martinezes acted as guardian: 1) A.K. would come over to the Martinez house when she was not babysitting; 2) A.K. once stayed the night; 3) A.K. occasionally did house chores; 4) A.K. once received a driving lesson; and 5) A.K. would receive occasional help with homework. Slip op. at 19.

[1] Mr. Martinez also argued the search warrant did not satisfy the heightened particularity requirement and erred in denying the appellant's motion to suppress for material omissions in the application for a search warrant. Neither issue is presented on

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Mr. Martinez argues the issues are appropriate for review by the Court under RAP 13.4 (b), because 1) the decision of the Court of Appeals is in conflict with a decision from this Court; 2) the decision of the Court of Appeals is in conflict with another published decision of the Court of Appeals; 3) the issues raised are significant questions of law under the Washington and Federal Constitutions; and 4) the petition involves issues of substantial public interest that must be determined by the Supreme Court.

1. THE COURT OF APPEALS HAS RULED IN A PUBLISHED DECISION THAT THE SILVER PLATTER DOCTRINE ALLOWS WASHINGTON LAW ENFORCEMENT TO VIEW THE CONTENTS OF A CITIZEN'S COMPUTER WITHOUT A SEARCH WARRANT

This court reviews *de novo* conclusions of law from an order pertaining to the suppression of evidence. *State v. Duncan,* 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (citing *State v. Mendez,* 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

a. Citizens of Washington State have greater privacy rights in their home computers and laptops than under federal law. Under the Fourth Amendment, a search warrant issued by a neutral magistrate is required as it 1) allows police to search a home for criminals, while 2) it protects individuals from unlawful intrusions into their right of privacy:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

McDonald v. United States, 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948). More recently, the Court reaffirmed its belief that a search warrant protects citizens from police officers more interested in ferreting out crime than protecting an individual's constitutional rights:

> Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky v. King*, 563 U.S. ——, ——, 131 S.Ct. 1849, 1856–1857, 179 L.Ed.2d 865 (2011).

Riley v. California, 537 U.S. __,134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014). In *Riley*, the Court found that the information stored in electronic devices now can hold "[t]he sum of an individual's life." *Id.* at 2489. The

Court recognized there is "an element of pervasiveness" that distinguishes electronic devices from physical records. *Id.* at 2490.

A greater privacy is found on a personal computer or hard drive of a computer because a personal computer is the "modern day repository of a man's records, reflections and conversations," and the search of a personal computer has both First Amendment implications as well as Fourth Amendment concerns. *State v. Norlund,* 113 Wn. App. 171, 181-82, 53 P.3d 520 (2002). In *United States v. Andrus,* the Tenth Circuit Court of Appeals recognized that "[a] personal computer is often a repository for private information the computer's owner does not intend to share with others. For most people, their computers are their most private spaces." 483 F.3d 711, 718 (10th Cir. 2007) (internal quotation omitted)).

So important is this private information on electronic devices, that in *Riley v. California,* the Supreme Court ruled that police officers must obtain a search warrant to search a person's cellphone, even when the cell phone was obtained during a search incident to arrest. 134 S.Ct. 2473, 2493, 189 L. Ed. 2d 430 (2014). The Court reasoned,

> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire,* 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Recent technological advances similar to

> those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely*, 569 U.S., at ——, 133 S.Ct., at 1561–1563; *id.*, at ——, 133 S.Ct., at 1573 (ROBERTS, C.J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

134 S.Ct. at 2493. Accordingly, courts must cast a skeptical eye on warrantless intrusions into electronic devices even when an exception to the search warrant requirement exists.

b. Article I, section 7 provides greater privacy protection than the Fourth Amendment prohibiting any privacy invasion without "authority of law." While the Fourth Amendment provides the minimum protection against warrantless searches and seizures, the Washington Constitution provides broader protection under article I, section 7 and evaluation of any expectation of privacy in Washington begins under this provision. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). Contrary to the federal protection under the Fourth Amendment, Washington's exclusionary rule is "'nearly categorical.'" *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

As this Court very recently noted, "because the paramount concern of our state's exclusionary rule is protecting an individual's right to privacy, we have explicitly declined to adopt a good faith or reasonableness expectation to the exclusionary rule under article I, section

7. *State v. Betancourth,* __ Wn.2d __ Slip Op. at 12 (March 22, 2018), citing *Afana,* 169 Wn.2d at 184. Importantly, the *Betancourth* Court recognized

> If a police officer has disturbed a person's "'private affairs,'" we do not ask whether the officer's belief that the disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "'authority of law.'" Under article I, section 7, the requisite "authority of law" is generally a valid search warrant. *State v. Morse,* 156 Wn.d 1, 7, 123 P3d 832 (2005) (quoting *State v. Ladson,* 138 Wn.2d 343, 350, 979 P.2d 833 (1999)).

Slip Op. at 12.

"A search must be conducted pursuant to a warrant, or else meet one of the exceptions to the warrant requirement." *State v. Carter,* 151 Wn.2d 118, 125-26, 85 P.3d 887 (2004) (citations omitted). These exceptions to the search warrant requirement are few and "jealously and carefully drawn." *State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (quoting *State v. Hendrickson,* 129 Wn.2d 61, 70, 917 P.2d 563 (1996)).

c. <u>The Court of Appeals has carved out a new exception to the search warrant requirement, allowing Washington law enforcement to search an individual's computer hard drive without a search warrant under an expansion of the silver platter doctrine</u>. Mr. Martinez had an absolute right to privacy in his laptop, his files, and any storage device generated from his computer and no exception applies. Mr. Martinez did not give

any person consent to search the contents of his computer. No exigent circumstances existed in the instant case. Nor was this a search incident to arrest or a *Terry* stop. Similarly, this is not an inventory search.[2] Lastly, this is not a situation where police entered a house and saw evidence in plain view.

Rather than rule that the Washington State Patrol's warrantless search into Mr. Martinez's hard drive was without authority of law, the trial court ruled that this is a silver platter doctrine case. The court reasoned that Texas law enforcement had a valid Texas search warrant to search the mirror drive, which would allow Washington law enforcement to search the hard drive without a warrant. But the Texas warrant authorized Texas law enforcement to search the contents of the hard drive in Texas – the Texas search warrant did not allow Washington law enforcement to search the hard drive in Washington.

The Court of Appeals ruled that "[u]nder the silver platter doctrine, … evidence lawfully obtained under the laws of another jurisdiction is

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[2] The Washington Supreme Court has ruled,

> Inventory searches, unlike other searches, are not conducted to discover evidence of crime. Accordingly, a routine inventory search does not require a warrant. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The criteria governing the propriety of inventory searches are largely unrelated to the justifications for other exceptions to the warrant requirement. *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5, 96 S.Ct. 3092, 3097 n.5, 49 L.Ed.2d 1000 (1976); *United States v. Bloomfield*, 594 F.2d 1200 (8th Cir. 1979).

State v. Houser, 95 Wn.2d 143, 153–54, 622 P.2d 1218, 1225 (1980).

admissible in Washington courts even if the manner the evidence was obtained would violate Washington Law." App. A at 6, citing *State v. Mezquia,* 129 Wn. App. 118, 132, 118 P.3d 378 (2005).

Mezquia, as well as all other cases concerning the silver platter doctrine in Washington, speak only of allowing evidence to be used in Washington that foreign law enforcement legally obtained but the method used by law enforcement in the foreign jurisdiction would not be legal in Washington. *Mezquia,* 129 Wn. App. at 132-33 (DNA test results from cheek swab obtained in Florida allowed in Washington trial); *see e.g. State v. Brown,* 132 Wn.2d 529, 543, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007 (1997) (while interviewing the defendant, California police recorded statements without the knowledge of the defendant violating Washington's two-party consent rule).

The silver platter doctrine acknowledges that Washington cannot force its laws onto foreign jurisdictions when obtaining evidence. Thus, as long as the material is lawfully obtained in the foreign jurisdiction, Washington courts can utilize that evidence at trial. But the State and the Court of Appeals could not cite a single case where the silver platter doctrine applied to Washington agents who searched and viewed private material, such as a computer hard drive or smart phone, of a Washington citizen without a Washington search warrant or an exception to the search

warrant. Because Mr. Martinez's privacy in his computer has heightened protection under article 1, section 7 of the Washington Constitution, Washington law enforcement must obtain authority of law to search computer hard drives and cellphones.

The case most similar to the facts of this case is this Court's decision in *State v. Eisfelt,* 163 Wn.2d 628, 631-32, 185 P.3d 580 (2008). A repairman inside a house saw a suspected marijuana growing operation and called police. 163 Wn.2d at 631-32. Police arrived, and the repairman let them into the house to show the police the marijuana. *Id.* at 632. After seeing the grow operation, police then obtained a telephonic warrant to search the house. *Id.* Following his conviction, the defendant appealed. The Court of Appeals held no warrant was required for the initial search because it did not go beyond the scope of the private search by the repairman. 163 Wn.2d at 633. This Supreme Court reversed the Court of Appeals.

The Supreme Court began its analysis distinguishing the 4th Amendment and article I, section 7:

> By contrast [to the Fourth Amendment] article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). This is because "[u]nlike in the Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution." *State v. Morse,* 156 Wash.2d 1, 9, 123 P.3d 832 (2005).

Eisfeldt, 163 Wn.2d at 634-35.

This Court held the "private search doctrine" which allows state law enforcement to view what a private individual had seen was contrary to article I, section 7 of the Washington Constitution. *Eisfeldt,* 163 Wn.2d at 636. The Court rejected the doctrine's rationale that would suggest that "an individual's reasonable expectation of privacy is destroyed when the private actor conducts his search." *Id.*

d. This Court should rule that while the silver platter doctrine can be used for Washington law enforcement to receive pictures and documents from a foreign agent, a computer or computer hard drive requires Washington law enforcement to first obtain a search warrant to search Mr. Martinez's private information. When the Texas Grand Jury decided to file a "no bill" dismissing the charges, Texas authorities contacted the Washington State Patrol. 7/18/14RP at 7. The Washington State Patrol requested a mirror drive of the hard drive be sent to Washington State. *Id.* Washington State Patrol received the mirror hard drive and searched the drive without a search warrant. *Id.* at 8. This is not a silver platter doctrine issue. When Texas law enforcement sent what was a "closed container" or hard drive that came from a citizen's private laptop, Washington State Patrol must get a search warrant from a neutral magistrate to search that hard drive.

This case is unlike *State v. Mezquia*, which allowed Washington law enforcement to use DNA test results obtained in Florida. 129, Wn. App. at 133-34. In Mr. Martinez's case, it is not simple test results or a picture at stake, it is a search of his computer hard drives, which carry all his personal information and has heightened protection. Because Washington citizens have a greater expectation of privacy under article 1, § 7 of the Washington Constitution than under the Fourth Amendment or the Texas Constitution, Mr. Martinez's protected privacy right in his personal computer drives means they cannot be invaded by Washington law enforcement without a search warrant issued by a Washington magistrate. Mr. Martinez requests this Court reverse the Court of Appeals decision to the contrary.

Because the published decision in Mr. Martinez's case is in conflict with this Court's *Eisfeldt* decision, involves a significant question of law under both the Washington State Constitution and Federal Constitution, and involves an issue of substantial public interest, this Court should accept review. RAP 13.4(b)(1), (3), and (4).

2. UNDER THE COURT OF APPEALS PUBLISHED DECISION, THE TERM *IN LOCO PARENTIS* NOW EXTENDS TO ANY PERSON UNDER THE AGE OF 18 THAT COMES INSIDE ANOTHER'S HOUSE

a. A.K. was a paid babysitter and the Martinezes never treated her as if she was their child. RCW 5.60.060(1) prohibits the

examination of a spouse before or after any marriage without the consent of the other spouse for any communication made by one spouse to the other during marriage. An exception exists for a criminal proceeding for a crime against a child for whom the spouse is a parent or guardian. In determining whether the Martinezes were acting *in loco parentis*, the Court of Appeals has expanded *in loco parentis* status to any situation where a person allows a minor guest to come to dinner uninvited, stay overnight a single time, and help them learn how to drive a car. Such conduct does not rise to the level of *in loco parentis* status, because any friend, sibling or neighbor could do the very same acts and in no way be acting as a parent.

The term *in loco parentis* means that a person can be a guardian when he stands as a parent and assumes parental duties and care for the minor, typically in all ways, financially, medically, and through discipline and caregiving. The term *in loco parentis*, in its simplest terms means, "instead of parent." *State ex. Rel. Gilroy v. Superior Court,* 37 Wn.2d 926, 933, 226 P.2d 882 (1951). In order to attain *in loco parentis* status, the person must do more than simply provide limited financial support or a place for the child to stay. *See In re Montell*, 54 Wn. App. 708, 775 P.2d 976 (1989) (court found subjective intent on part of stepparent was required before *in loco parentis* status was attained); *In re Marriage of*

Allen, 28 Wn. App. 637, 626 P.2d 16 (1981) (stepmother who provided for, encouraged and otherwise raised deaf stepson from age 3 on, and who was solely responsible both for child and all family members learning to sign for communication, found to have reached *in loco parentis* status); *Geibe v. Geibe*, 371 N.W.2d 774, 782 (Minn. App. 1997) (finding that *in loco parentis* status required more than child residing with stepparent on weekends and six weeks before summer).

This Court has defined the term "in loco parentis" as a person who stands in place of a parent and assumes parental obligations of a parent:

> The term "in loco parentis" means, "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACKS LAW DICTIONARY 787 (6th ed.1990). It refers to a person who has put himself or herself in the situation of a lawful parent by assuming all obligations incident to the parental relation without going through the formalities of legal adoption and embodies the two ideas of assuming the status and discharging the duties of parenthood.

Zellmer v. Zellmer, 164 Wn.2d 147, 164, 188 P.3d 497 (2008). Washington state courts and the Ninth Circuit have applied the *in loco parentis* exception to the functional equivalent of a child of the domestic partner or spouse. *State v. Modest*, 88 Wn. App. 239, 247-48, 944 P.2d 417 (1997); *United States v. Banks*, 556 F.3d 967, 975 (9th Cir. 2009).

b. <u>The Court of Appeals erroneously that Mr. Martinez and Ms. West had *in loco parentis* status</u>. The Court of Appeals determined that Mr. and Mrs. Martinez stood *in loco parentis*, because A.K. would

come over to the house occasionally when she was not baby-sitting, once stayed overnight, and helped with house chores, that she somehow became a child to Mr. Martinez and Ms. West. App. Slip op. at 18-19. But there was no evidence that the Martinezes assumed any parental control or responsibility over A.K.

The occasions that A.K. came over to the Martinez house demonstrate the Martinezes were nothing more than hosts to a 14-year-old girl. The instant case is not on par with the facts of *Waleczek,* where the girl was only 7 years of age, and the parents took on the responsibilities of waking her up for school, preparing breakfast for her, and driving her to school. In *Waleczek,* the Court believed it was important that there was an agreement between the biological mother and the host parents that they would look out for her, make sure she went to school and was fed.

The Court of Appeals published decision in Mr. Martinez's case is contrary to this Court's decision in *State v. Waleczek,* 90 Wn.2d 746, 585 P.2d 797 (1978). This Court found the defendant and his wife stood as *in loco parentis* to a 7-year-old girl because they

> undertook duties that are normally characterized as parental: They agreed to let Theraesa sleep at their house, wake her up in the morning, provide her with breakfast, and make sure she went to school. In addition, we have no doubt that Theraesa, being only 7 years old would trust, respect, and obey defendant and his wife principally because she had been left in their care by her own mother.

Id. The important consideration was that these adults had talked to the girl's mother and agreed to act in the role of a parent by taking over such duties if only for one night/morning.

In contrast, under the new holding of *Martinez,* any person under the age of 18 that is a guest for dinner or allowed to stay overnight becomes a child to the parents. There is a great distinction between a 7-year-old girl like Theraesa in *Waleczek* and 14-year-old A.K. in the instant case. A.K. can feed herself, can get to school on her own, can bathe herself, and she does not require constant adult supervision to get around town. A.K. was never left in Martinezes care by A.K.'s family and the Martinezes had no financial responsibility or any other parental responsibility over A.K.. She could come and go as she pleased.

The Court of Appeals erred in finding the Martinezes acted *in loco parentis,* because feeding a person who comes over uninvited is not taking on any role of a parent, it is simply having a dinner guest. Mr. Martinez and Ms. West never assumed that they had any obligation to feed A.K. nor did they have any obligations to do any act towards A.K.. Similarly, unlike the child in *Waleczek,* 14-year-old A.K. had mobility and did not need adult supervision to go from place to place. The same is true of helping a person to learn to drive or helping with their homework. This was not the Martinezes assuming the duties or obligations of a parent.

Instead, it is just a friendly gesture towards a girl who was primarily being paid to babysit their children.

Because the Court of Appeals decision is in conflict with this Court's *Waleczek* decision, the Court of Appeals *Modest* decisions, and is a matter that involves a substantial public interest that must be determined by this Court, review should be granted. RAP 13.4(b)(1), (2), and (4).

F. CONCLUSION.

For the reasons stated above, Mr. Martinez respectfully requests this Court grant his petition for review and reverse the trial court and Court of Appeals rulings.

DATED this 2nd day of April, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ian D. Saling, state that on the 2nd Day of April, 2018, I caused the original **Petition for Review** to be filed in the **Washington State Supreme Court** and a true copy of the same to be served on the following in the manner indicated below:

Kathleen Webber	( )	U.S. Mail
Snohomish Co Pros Ofc	( )	Hand Delivery
3000 Rockefeller Ave	(X)	CoA Efiling System
Everett WA 98201-4060	( )	Email
Email: kwebber@co.snohomish.wa.us	( )	_____

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

Name: _____ Date: 4/2/2018

Ian D. Saling
Rule 9 Licensed Legal Intern #9716566
The Law Offices of Gordon & Saunders

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CARLOS ALBERTO MARTINEZ, Appellant.	No. 74662-6-I DIVISION ONE PUBLISHED OPINION FILED: January 16, 2018

LEACH, J. — Carlos Martinez appeals his conviction for possession of depictions of a minor engaged in sexually explicit conduct. Primarily, he challenges the Washington State Patrol's (WSP) warrantless search of a mirror image hard drive. But Texas police lawfully seized the hard drive and were not acting as agents of WSP at the time. The silver platter doctrine allowed the WSP to later examine the hard drive without a warrant.

Martinez also challenges the trial court's admission of his former spouse's testimony about confidential marital communications. Because Martinez acted as a guardian to the victim, the spousal privilege does not apply here. Martinez raises additional arguments related to a warrant and the prosecutor's conduct at trial, but those challenges also fail. We affirm Martinez's conviction.

FACTS

Carlos Martinez began working at the Monroe Police Department in 1989. He worked in several capacities, including as a Drug Abuse Resistance Education (D.A.R.E.) program instructor.[1] While working as a D.A.R.E. instructor, Martinez met A.K., who was in fifth grade at the time.

Beginning in 2001 or 2002, when A.K. was 13 or 14 years old, she began baby-sitting Martinez's two young children.[2] A.K. also came to the Martinezes' house when she was not baby-sitting. She would sometimes show up unannounced. She would help Martinez with chores and do her schoolwork at the house.

A.K. testified that Martinez began touching her in a sexual manner when she was 14. He would come up behind A.K., grab her hips, and push his hips against hers. Once, when she stayed overnight after baby-sitting, Martinez lay down next to her in the bed and touch her breasts and buttocks.

Sometime in late 2003 or early 2004, A.K. told Martinez and Martinez's then-wife, Julie West,[3] that she had accidentally cut herself by running into a knife on the kitchen counter while baby-sitting for another family. West asked

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[1] D.A.R.E. is a program in which police officers instruct elementary school children about the dangers of drugs and violence.

[2] A.K. and Martinez gave conflicting testimony about whether A.K. or Martinez asked if A.K. could baby-sit.

[3] Julie West, formerly Julie Martinez, divorced Martinez in 2011.

A.K. to show her the wound. A.K. refused.

Around April 2004, Martinez set up a video camera in a bathroom. A.K. testified that while West was gone, after she helped Martinez with chores, he would tell her to take a shower. Over about a month, Martinez made several recordings of A.K. getting in and out of the shower. Martinez testified that he did this out of concern for A.K.'s mental health and that he hoped to find out if she was cutting herself.

In May 2004, West went on vacation. While West was gone, A.K. spent time at Martinez's house, helping with chores, doing homework, and watching movies. During this time, Martinez told A.K. to take a shower a number of times after she finished chores. A.K. described one occasion when she and Martinez watched a movie, sitting together in a big chair. A.K. testified that Martinez touched her hair and licked her fingers. A.K. testified that Martinez lay on top of her on the floor, "dry hump[ed]" her, and put her hand on his erection.

When West returned from vacation, she discovered a love note from A.K. to Martinez. She also discovered a video recording that Martinez had made of A.K. getting out of the shower and stored on the family computer. West confronted Martinez about the recording. He said he wanted to see if A.K. had cut herself on the kitchen knife as she had claimed. West claimed that when she asked Martinez why he still had the recording on the computer, he responded

that it was "nice to look at."

Not long after this, A.K. and her family moved from Monroe to Eastern Washington. Martinez and A.K. kept in touch. Martinez claims that in February 2007 they began a consensual sexual relationship when A.K. was 18 years old. In fall 2009, the Army recalled Martinez to active duty and stationed him in San Antonio, Texas. A.K. moved to Texas to be with him. They lived together for a short time.

After their relationship deteriorated in October or November 2011, Martinez gave A.K. the video recordings that he made of her in his bathroom in 2004. A.K. testified that Martinez told her he wanted to watch the tapes one last time and masturbate to them. She claimed he asked her to touch him as well.

A short time later, A.K. contacted the Texas police to turn over the tapes. She also told the Texas police that she began an intimate relationship with Martinez some time before she was 16. She later contacted WSP.

The Texas police obtained a warrant to search Martinez's home and seize his laptop computer and digital media storage devices. Then, a grand jury was convened in Texas to consider a possession of child pornography charge. But the grand jury refused to indict, returning a "no bill." The case was dismissed.

Texas police made a mirror image of Martinez's computer hard drive and, at WSP's request, sent it to WSP. Without obtaining a separate warrant, WSP

searched this mirror image hard drive. Texas police also sent WSP two actual laptop computers and hard drives seized from Martinez. After obtaining a warrant, WSP searched those items.

The State initially charged Martinez with two counts of voyeurism, two counts of child molestation, one count of rape of a child in the third degree, and one count of possession of depictions of a minor engaged in sexually explicit conduct. Later, the State dismissed the molestation and rape charges. It tried Martinez on only one count of voyeurism and one count of possession of depictions of a minor engaged in sexually explicit conduct.

The jury found Martinez guilty on both counts. Because the voyeurism charge occurred outside the statute of limitations, the trial court dismissed that count and convicted him on only the possession count.

ANALYSIS

Warrantless Search

Martinez contends that the trial court should have suppressed evidence found on the mirror image hard drive because WSP searched it without a warrant. When an appellate court reviews the trial court's decision on a suppression motion, it determines whether substantial evidence supports any challenged findings of fact and whether the findings of fact support the trial

court's conclusions of law.[4] An appellate court treats the trial court's unchallenged findings of fact as true.[5] Martinez challenges only the trial court's conclusions of law, which this court reviews de novo.[6]

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." If a government action intrudes upon an individual's "reasonable expectation of privacy," a search occurs under the Fourth Amendment.[7] The Washington Constitution provides greater protection of a person's privacy rights than does the Fourth Amendment.[8] Article 1, section 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article 1, section 7 "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."[9]

Under the silver platter doctrine, however, evidence lawfully obtained under the laws of another jurisdiction is admissible in Washington courts even if the manner the evidence was obtained would violate Washington law.[10]

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[4] State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).
[5] State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).
[6] Garvin, 166 Wn.2d at 249.
[7] Katz v. United States, 389 U.S. 347, 360-61, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).
[8] State v. Cheatam, 150 Wn.2d 626, 642, 81 P.3d 830 (2003).
[9] State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).
[10] State v. Mezquia, 129 Wn. App. 118, 132, 118 P.3d 378 (2005).

"Evidence is admissible under this doctrine when (1) the foreign jurisdiction lawfully obtained evidence and (2) the forum state's officers did not act as agents or cooperate or assist the foreign jurisdiction."[11] Martinez does not dispute that Texas lawfully obtained the hard drive. And he does not challenge the trial court's findings that "WSP had no involvement in obtaining or serving the Texas warrant" and "Texas police did not act as agents of WSP when they obtained or served the warrant." Thus, under the silver platter doctrine, the evidence is admissible.

Martinez contends that the silver platter doctrine does not apply here because the Texas officers did not conduct any search that would be unlawful in Washington.[12] But Martinez mistakenly asserts that this doctrine requires that the search be unlawful in Washington. The doctrine requires that the State show only two things: (1) the search was lawful in Texas and (2) the Washington officers did not act as agents for Texas or cooperate or assist Texas in any way. Because the State proved this, the doctrine applies.

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[11] Mezquia, 129 Wn. App. at 132.

[12] Martinez provides a lengthy discussion of the history of the silver platter doctrine and disapproves of Washington's decision to apply the doctrine. But he does not provide any argument for why Washington should abandon the rule.

Particularity

Next, Martinez contends that the warrant issued in Washington allowing the WSP to search his laptop computers and hard drives was overbroad.[13] The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The search warrant particularity requirement helps prevent general searches, the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and the issuance of warrants on loose, vague, or doubtful bases of fact.[14] When a search warrant authorizes a search for materials protected by the First Amendment, a greater degree of particularity is required, and we employ a more stringent test.[15] While the First Amendment presumptively protects obscene books and films,[16] it does not protect child pornography involving actual minors.[17] We review whether a warrant meets the particularity requirement de novo.[18]

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[13] The State contends that Martinez failed to preserve this challenge but because the warrant was not overbroad, we do not consider whether Martinez preserved this claim of error.

[14] State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

[15] Perrone, 119 Wn.2d at 550.

[16] Perrone, 119 Wn.2d at 547-48.

[17] State v. Luther, 157 Wn.2d 63, 70-71, 134 P.3d 205 (2006).

[18] State v. Reep, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007).

Martinez claims the warrant is overbroad because its language gives too much discretion to the officer executing the warrant. The warrant authorizes seizure of

> [a]ny photographs, pictures, albums of photographs, books, newspapers, magazines, and other writings on the subject of sexual activities involving children, pictures and/or drawings depicting children under the age of eighteen years who may be victims of the aforementioned offenses, and photographs and/or pictures depicting minors under the age of eighteen years engaged in sexually explicit conduct as defined in RCW 9.68A.011(3).

Martinez relies on State v. Perrone[19] where the Supreme Court held that the term "child pornography" is insufficiently particular because, like the term "obscenity," it leaves too much discretion to the officer in deciding what to seize under the warrant. The court noted that using the language of RCW 9.68A.011 could have easily made the warrant more particular.[20] The warrant here does not use the overbroad term "child pornography." Instead, as suggested by the Perrone court, it uses the language of the statute: "sexually explicit conduct." Martinez points out that in State v. Besola[21] our Supreme Court rejected an argument that a citation to the child pornography statute cured overbreadth. But the warrant here does more than simply cite to the statute, it uses the language "sexually explicit

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[19] 119 Wn.2d 538, 553, 834 P.2d 611 (1992).
[20] Perrone, 119 Wn.2d at 553-54.
[21] 184 Wn.2d 605, 614, 359 P.3d 799 (2015).

conduct as defined in RCW 9.68A.011(3)."[22] This language provides law enforcement with an objective standard to determine what should be seized.

Martinez also contends that the warrant was overbroad because it allowed seizure of lawful items. Specifically, the warrant authorized seizure of materials "on the subject of sexual activity involving children." The question of whether material is inherently illegal can be relevant to the degree of particularity required.[23] But lawful materials also can be relevant to a crime. The fact that the warrant authorizes seizure of lawful materials does not automatically make the warrant overbroad. Here, possession of materials about sexuality involving children is relevant to the charged offense. The warrant is not overbroad for authorizing seizure of these relevant materials.

Last, Martinez asserts that the warrant is overbroad because it does not clearly identify the victim of the charged offenses. But, as the State points out, the affidavit, which was attached to the warrant and incorporated by reference, indicated that A.K. was the victim. Thus, the warrant documents contained enough information for law enforcement to decide what to seize.

The warrant was sufficiently particular.

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[22] Cf. Besola, 184 Wn.2d at 614 (noting that if the warrant had used the statutory language, it would likely have been sufficiently particular).

[23] State v. Chambers, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997).

Warrant Validity

Next, Martinez contends that the trial court erred when it denied his motion to suppress evidence after a Franks[24] hearing. Specifically, he asserts that the warrant is invalid because Sergeant Detective Rodriguez left out material facts in his supporting affidavit.

"A search warrant may be issued only upon a determination of probable cause."[25] A court may invalidate a warrant and suppressed the fruits of the search if the person making the supporting affidavit recklessly or intentionally omits material information.[26] An omission does not invalidate a search warrant simply because it tends to negate probable cause.[27] Instead, the omitted information must be such that an affidavit including it could not have supported probable cause.[28] A defendant can show recklessness with evidence that "the affiant 'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit."[29] "[S]erious doubts can be shown by (1) actual deliberation on the

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[24] Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[25] State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003).

[26] State v. Chenoweth, 160 Wn.2d 454, 477, 479, 158 P.3d 595 (2007) (holding that "under article I, section 7, only material falsehoods or omissions made recklessly or intentionally will invalidate a search warrant").

[27] State v. Garrison, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992).

[28] Garrison, 118 Wn.2d at 874-75.

[29] State v. O'Connor, 39 Wn. App. 113, 117, 692 P.2d 208 (1984) (internal quotation marks omitted) (quoting United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979)).

part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[30] Although an appellate court generally reviews the issuance of a warrant for abuse of discretion and defers to the magistrate's determination, the appellate court reviews a trial court's assessment of probable cause, which is a legal conclusion, de novo.[31] The appellate court treats all unchallenged findings of fact made by a trial court at a suppression hearing as true on appeal.[32]

Martinez asserts that the warrant is invalid because the supporting affidavit failed to state (1) that a Texas grand jury refused to indict him on charges of possession of child pornography, (2) that A.K. at one time stated that her first alleged sexual contact with Martinez occurred after she had reached the age of consent, and (3) certain statements made to A.K.'s school counselor.

First, information about the Texas "no bill" is not material. The trial court found, "There are a number of reasons a grand jury could return a 'no bill.' Such proceedings are secret and the Court does not know the underlying reasons for the decision." That a grand jury in Texas, for an unknown reason, chose not to indict Martinez for a Texas crime in Texas is not material to whether probable cause existed to investigate a Washington crime in Washington.

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[30] O'Connor, 39 Wn. App. at 117.

[31] State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) ("Normally we give great deference to the issuing judge or magistrate.").

[32] State v. Gentry, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995).

Second, Martinez does not show that the officer deliberately or recklessly omitted A.K.'s statement that she first had sex with Martinez when she was 17. Sergeant Detective Rodriguez testified that although A.K. initially told a WSP investigator that she did not have intercourse with Martinez until she was 17, she ultimately said that she had sex with him when she was 15. Sergeant Detective Rodriguez did not think her initial statement was important and believed she first had sex with Martinez when she was 15. He explained that victims commonly do not tell the truth immediately, but he believed that her story progressed to the truth. Because Martinez does not show that Sergeant Detective Rodriguez entertained serious doubts as to the truth of the facts included in the affidavit, this omission does not invalidate the warrant.

Third, Martinez does not show that Sergeant Detective Rodriguez deliberately or recklessly omitted A.K.'s statement to her school counselor. After West found the love note from A.K., she told A.K.'s school counselor. The counselor asked A.K. whether she was having an affair with Martinez. A.K. denied any sexual contact between her and Martinez and said she was disgusted by the thought. The counselor told a detective about this conversation. Sergeant Detective Rodriguez did not review this material before he prepared his affidavit, but he stated that he knew of several reasons why a child might deny sexual abuse. He said that in his experience, it was not unusual for children to deny the

occurrence of sexual abuse. Detective Sergeant Rodriguez's explanation shows that he did not intentionally omit this information and that he did not believe it to be important. Thus, he did not deliberately or recklessly omit it.

Martinez fails to show that any of these omissions were material and deliberately or recklessly made. The warrant is not invalid because Sergeant Detective Rodriguez failed to include them.

Martinez makes another argument about Sergeant Detective Rodriguez's affidavit. He contends that the affidavit did not show a required connection between the criminal activity and the place to be searched.[33] "'[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'"[34] The facts in the warrant adequately establish a connection to possession.[35] The boilerplate in the search warrant about what collectors of child pornography do generally is not the only evidence in the affidavit to connect the crime to Martinez's computer. The affidavit describes A.K.'s statements that Martinez stored sexually explicit images on his computer and that Martinez had several bank accounts to conceal

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[33] The State does not respond to this argument. Martinez raised this argument below.

[34] State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

[35] Martinez also contends that the boilerplate language in the affidavit does not contain facts to show that Martinez engaged in trading or trafficking child pornography. But the State charged Martinez with possession, not trafficking child pornography.

things from West. In addition, the affidavit stated that Martinez sent sexually explicit messages over e-mail while posing as A.K. Thus, the affidavit included facts to show that relevant evidence could be found by searching Martinez's hard drives and online accounts.

Harmless Error

Even if the court improperly admitted evidence obtained from the search of Martinez's hard drives, the error was harmless. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless."[36] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[37] If the evidence untainted by the error is so overwhelming that it necessarily leads to a finding of guilt, the appellate court should uphold the conviction.[38]

The State introduced two pieces of evidence obtained from Martinez's hard drives: (1) screenshots that showed a Facebook message that Martinez sent to A.K.'s sister and (2) Internet searches for laws in Washington about voyeurism, Washington's statute of limitations for criminal prosecutions, and the ability of one state to extradite a person to another state. This evidence, while

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[36] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).
[37] Guloy, 104 Wn.2d at 425.
[38] Guloy, 104 Wn.2d at 426.

relevant to the charged offenses, was not essential to Martinez's conviction or necessary for law enforcement to have probable cause to arrest him.

To convict Martinez of possession of depictions of minors engaged in sexually explicit conduct, the State needed to prove that he knowingly possessed material showing depictions of the genitals or unclothed pubic or rectal areas of a minor or the unclothed breast of a female minor for the purpose of sexual stimulation of the viewer.[39] Significantly here, the police received the video recordings containing this material directly from A.K. Martinez himself testified that he recorded A.K. when she was a minor and kept the tapes until he gave them to A.K. years later. A.K.'s testimony about the times Martinez touched her in a sexual manner around the time Martinez made the recordings indicates he made the tapes for the purpose of sexual stimulation. And her testimony that he masturbated to the tapes shows that he watched the tapes for the purpose of sexual stimulation. In addition, West testified that Martinez had told her that he kept the tapes because they were "nice to look at." This evidence overwhelmingly supports Martinez's conviction.

Spousal Privilege

Martinez also challenges the trial court's admission of West's testimony about confidential marital communications.

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[39] RCW 9.68A.011(4)(f), .070.

Generally, a current or former spouse cannot be examined about confidential communications made during the marriage without the consent of the other spouse.[40] This rule tries to "encourage between husband and wife that free interchange of confidences that is necessary for mutual understanding and trust."[41] But "in some situations the policies that underlie the right to invoke a testimonial privilege are outweighed by the suppression of truth that may result."[42] Thus, this spousal privilege does not apply in a criminal proceeding for a crime committed against a child for whom the spouse is a parent or guardian.[43] In light of the legislative intent to punish child abusers and protect children from further mistreatment, Washington courts have liberally interpreted "guardian" to include a spouse acting in loco parentis, meaning functionally as a parent or

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[40] RCW 5.60.060(1) ("A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.").

[41] State v. Thorne, 43 Wn.2d 47, 55, 260 P.2d 331 (1953).

[42] State v. Wood, 52 Wn. App. 159, 164, 758 P.2d 530 (1988); see also State v. Waleczek, 90 Wn.2d 746, 751, 585 P.2d 797 (1978) (opining that "the husband-wife privileges contained in RCW 5.60.060(1) are also subordinated to the overriding and paramount legislative intent to protect children from physical and sexual abuse"); State v. Sanders, 66 Wn. App. 878, 884, 833 P.2d 452 (1992) (noting the strong public policy of ensuring effective prosecutions for crimes of sexual abuse against children).

[43] RCW 5.60.060(1).

guardian, even briefly.[44] Whether a person is a parent or guardian depends on the particular facts and circumstances of the case.[45] We review the trial court's decision that a spouse acted as a guardian for substantial evidence.[46] "Evidence is 'substantial' if it is sufficient to persuade a fair-minded, rational person that the finding is true."[47]

Here, the trial court initially excluded West's testimony about confidential communications between Martinez and West during their marriage because insufficient evidence showed Martinez acted as A.K.'s guardian. The next day, the court reconsidered and concluded that based on West's testimony about the household and A.K.'s role in the household, Martinez at times acted as A.K.'s guardian. The court then permitted West to testify about confidential communications that took place during her marriage to Martinez.

Martinez contends that he was not a guardian of A.K. He claims she was merely a baby-sitter for his children. But West's testimony shows that the relationship went beyond this. West testified that they hired A.K. as a baby-sitter, but that she came over when she was not baby-sitting. A.K. would ask to visit, and West or Martinez would pick her up. At times, A.K. would show up at the

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[44] State v. Chenoweth, 188 Wn. App. 521, 529, 354 P.3d 13, review denied, 184 Wn.2d 1023 (2015); State v. Modest, 88 Wn. App. 239, 247-48, 944 P.2d 417 (1997).

[45] Waleczek, 90 Wn.2d at 753.

[46] See Waleczek, 90 Wn.2d at 753.

[47] State v. Jones, 186 Wn. App. 786, 789, 347 P.3d 483 (2015).

house, uninvited. On one occasion, she stayed at their house overnight and West explained that "[s]he wasn't really babysitting." West testified that they were responsible for A.K.'s care during the time she stayed with them. West testified that A.K. would help Martinez with house chores and he would help her with her homework. Martinez also helped A.K. learn to drive a car. A.K. ate meals with the family and "was invited to go on outings when a babysitter was not needed." This evidence is sufficient to support a finding that Martinez acted as A.K.'s guardian. This finding supports the trial court's decision to admit West's testimony about confidential marital communications.

Martinez attempts to distinguish this case, claiming that in cases where a court found a nonrelative to be acting in loco parentis, the child was very young.[48] But courts liberally construe the meaning of "guardian" under the marital communications statute.[49] Thus, courts have applied the guardian exception to cases with older children[50] and cases where the defendant acted as a guardian for the child for only a brief period of time.[51] Although the age of the child and the extent of the care are factors that courts consider, the exception to spousal

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[48] Waleczek, 90 Wn.2d at 748; Wood, 52 Wn. App. at 165.

[49] Waleczek, 90 Wn.2d at 751; Sanders, 66 Wn. App. at 884; Wood, 52 Wn. App. at 164-65.

[50] Modest, 88 Wn. App. at 248.

[51] Waleczek, 90 Wn.2d at 748.

privilege has not been reserved for cases where the defendant has assumed all parental duties of a young child.

Even if the trial court incorrectly admitted West's testimony about confidential communications, the error was harmless.[52] "Error that is not of constitutional magnitude is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial."[53]

The statement at issue—that Martinez kept the recording because it was "nice to look at"—relates to whether the recordings served "the purpose of sexual stimulation of the viewer."[54] The State asserts that any error is not prejudicial in light of the other evidence that showed that Martinez kept the recordings of A.K. for the purpose of sexual stimulation. In particular, the State points out that Martinez kept the video for years after he recorded it before he finally gave it to A.K. And when he gave her the tapes, he told her he wanted to masturbate to the recordings "one last time" and then have A.K. touch him. Martinez asserts

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[52] Martinez asserts that the court should not consider whether the testimony prejudiced his trial because accused persons are entitled to rely on the spousal privilege in preparing their defense and trial strategy. State v. White, 50 Wn. App. 858, 862, 751 P.2d 1202 (1988). But courts properly consider prejudice in examining whether there was a violation of the marital communications privilege. State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257 (1992) (deciding that any error in admitting a statement protected by the marital communications privilege was harmless).

[53] Webb, 64 Wn. App. at 488.

[54] RCW 9.68A.011(4)(f), .070.

that the testimony is particularly prejudicial because it came from the defendant's wife. That a spouse believes an accusation can be highly prejudicial.[55] But here, West merely repeated statements by Martinez and did not comment about her belief in Martinez's guilt. We agree that these facts are sufficient for the jury to conclude that Martinez kept the recording for the purpose of sexual stimulation and that West's testimony that Martinez said the recording was "nice to look at" could not have materially affected the outcome of the trial.

Prosecutorial Misconduct

Next, Martinez claims prosecutorial misconduct denied him a fair trial. A defendant claiming prosecutorial misconduct bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial.[56] Because Martinez failed to object to the prosecutor's conduct at trial, he waived this error unless the misconduct was so flagrant and ill intentioned that a trial court instruction could not have cured the prejudice.

Martinez contends that the prosecutor committed misconduct when she presented evidence and argument to show that Martinez was psychologically controlling A.K. Martinez claims the prosecutor made improper statements both in eliciting witness testimony and in comments in closing argument. First, the prosecutor asked A.K. about her reasons for moving to Texas, to which she

[55] State v. Johnson, 152 Wn. App. 924, 933-34, 219 P.3d 958 (2009).
[56] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

responded that she felt "forced and persuaded" by Martinez. The prosecutor later asked A.K. to explain if Martinez was sad at their last meeting. She responded that she was "breaking away and he was losing control." In closing argument, the prosecutor referred to Martinez as A.K.'s "Svengali" and explained "that's a literary figure whose name is synonymous with the manipulation of a young girl for the sexual desires of her master." The prosecutor then said that Martinez "chained [A.K.] to him. Not literally, but emotionally and psychologically, and it took her many years to break free."

First, Martinez fails to show misconduct because, contrary to Martinez's contention, the prosecutor did not directly violate a court order. A prosecutor's violation of a trial court's evidentiary ruling can constitute misconduct.[57] But Martinez misrepresents the court's rulings. The court initially ruled that specific evidence related to psychological control during their adult relationship was admissible because it was relevant to the molestation and rape charges. But when the State dropped those charges, the court reconsidered its prior ruling and excluded the evidence of prior bad acts under ER 404(b). The court's ruling excluded evidence that was intended to show psychological control during their adult relationship but did not exclude other evidence of psychological control.

[57] State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

The prosecutor's general references to psychological control did not violate this ruling.

Even assuming Martinez has shown that the prosecutor's statements were improper, he still fails to show prejudice. Because Martinez failed to object to the claimed misconduct, he must show that the alleged misconduct was so flagrant and ill intentioned that an instruction would not have cured it.[58] Martinez must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"[59] "Jurors are presumed to follow the court's instructions."[60] Here, the claimed misconduct did not involve evidence of specific bad acts that might prejudice the minds of the jurors despite a curative instruction. The jury could have followed an instruction to disregard the general evidence about psychological control. Further, evidence of psychological control is not particularly relevant to the charge on which the jury found Martinez guilty. Thus, general references were unlikely to have affected the jury's verdict in light of the other incriminating evidence. Martinez's prosecutorial misconduct claim fails.

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[58] Emery, 174 Wn.2d at 760-61.

[59] Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[60] State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

Ineffective Assistance

Finally, Martinez contends that if this court rejects his prosecutorial misconduct claim, then he received ineffective assistance of counsel. To succeed in an ineffective assistance claim, Martinez must show his attorney's performance fell below an objective standard of reasonableness and that deficient performance prejudiced him.[61] Courts give defense counsel's performance a great deal of deference and the defendant must overcome a strong presumption of reasonableness.[62]

First, Martinez does not show that his counsel's failure to object was unreasonable. The reasonableness inquiry requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[63] "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions."[64] Martinez does not show that his counsel's decision not to object to the prosecutor's conduct was not strategic.

Even if the conduct did fall below an objective standard of reasonableness, Martinez does not show prejudice.[65] As explained above, he

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[61] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[62] State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

[63] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[64] State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

[65] The State claims that Martinez's argument that the prosecutor's misconduct prejudiced him (that no instruction could have cured it) conflicts with his argument that his counsel's ineffective assistance prejudiced him (that his

does not show that the prosecutor's conduct was improper. Thus, he does not show that his counsel's failure to object prejudiced him.

CONCLUSION

We affirm Martinez's conviction.

Leach, J.

WE CONCUR:

Spearman, J.

Schindler, J.

counsel's timely objection and instruction could have cured the prejudice). These arguments are inconsistent. But defendants are generally permitted to argue inconsistent defenses. State v. Frost, 160 Wn.2d 765, 772, 161 P.3d 361 (2007).

APPENDIX B

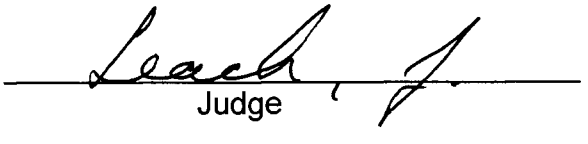
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CARLOS ALBERTO MARTINEZ, Appellant.	)	No. 74662-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Carlos Alberto Martinez, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

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