69326-3

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NO. 69326-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DARREN BARKER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Darren Barker appeals from a conviction for Child Molestation in the Second Degree following a jury trial. While his wife was out-of-state, under the guise of teaching his thirteen-year-old step-daughter about sex, Darren Barker undressed his step-daughter, groped her breasts and touched her clitoris, vaginal lips and other parts of her sexual organs. Barker contends the trial court erred in allowing an admission he made to a Detective questioning him about the offense that had viewed incest pornography[1]. After weighing the probative value versus prejudice the trial court did not abuse its discretion by admitting the defendant's statement.

Barker also contends a condition for community custody was inappropriately imposed. Where Barker had admitted to viewing incest pornography and the conduct that occurred with his step-daughter amounted to incest, the trial court did not abuse its discretion in setting that condition.

For the foregoing reasons, Barker's conviction must be affirmed.

II. ISSUES

1. Did the trial court abuse its discretion in admitting the defendant's statement to a detective investigating an allegation of incest that he viewed incest pornography on a computer?

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[1] Contrary to Barker's assertion there was no evidence presented that he had possessed "incest-related pornography." Appellant's Opening Brief at pages 1,

2. If the trial court erred, where the defendant had admitted to touching the sexual organs of his step-daughter and there was no contrary evidence to the defendant's conduct, was any claimed error harmless beyond a reasonable doubt?

3. Where the trial court imposed a condition that the defendant may have internet access as approved by the community corrections officer, did it err in placing that condition of community custody?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On November 18, 2010, Darren Barker was charged with Child Molestation in the Second Degree alleged to have occurred in March, 2007. CP 1. Barker was alleged to have viewed pornography on his work computer, which led to a Child Protective Services investigation. CP 3. When interviewed by law enforcement, Barker admitted to searching for nudity on his work computer and in a desire to have his step-daughter get over being uncomfortable about changing clothes, gave the step-daughter a mirror and had her examine herself. CP 4. Barker admitted to holding the mirror at one point. CP 4. The step-daughter was interviewed and stated that Barker had wanted her to try out clothes in front of him. CP 5. She told him she did not want to. CP 5. Barker took his step-daughter to his bedroom and told her to take off her clothes. CP 5. He touched her breasts

and then forced her to remove her underwear. CP 5. He held a mirror to show her between her legs and he touched her clitoris and made her touch it. CP 5. He told her never to let guys touch her like this. CP 5.

Barker was later charged with bail jumping. CP 7-8.

On August 6, 2012, the case proceeded to trial. 8/6/12 RP1 1.[2] The trial court addressed the defense motions in limine. 8/6/12 RP2 3. Defense motion in limine 9 read as follows:

> To exclude evidence that Mr. Barker was fired from a job before the date of violation because of his unauthorized viewing of pornography on his work computer. There is no evidence that Mr. Barker viewed child pornography. Such evidence is not related to the charges here and would not be relevant for any other purpose than showing Mr. Barker. ER 401, 402, 404(a), 404(b).

CP 28. The trial court granted the motion ruling as follows.

> Nine (9) to exclude evidence that Mr. Barker was fired from the job and I think we have already agreed that we're going to grant that. We're not going to into whether there is any evidence about pornography on the computer.

8/6/12 RP2 6. Testimony was taken over the following two days. Toward the close of the evidence, the State sought to admit a confession that Barker

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[2] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

8/6/12 RP1	Trial Day 1 - Initial Jury Selection
8/6/12 RP2	Trial Day 1 – Motions in Limine
8/7/12 RP	Trial Day 2 - Testimony
8/8/12 RP	Trial Day 3 – Testimony (in volume with 8/9 and 8/12)
8/9/12 RP1	Trial Day 4 – Jury Question
8/9/12 RP2	Trial Day 4 – Verdict and Polling (in volume with 8/8 and 8/12)
8/12/12 RP	Sentencing (in volume with 8/8 and 8/9).

had made during an interview with the detective and the following exchange occurred with the Court and counsel.

> MS. KAHOLOKULA: I have one other issue --
> THE COURT: Yes.
> MS. KAHOLOKULA: -- to raise. When Detective Hagglund comes to testify, I want to be sure that we're all on the same page, and that I'm not running afoul of the intent of the motion in limine. The motion in limine that I'm referring to is the one regarding losing his job because of pornography on his computer, which I agreed to.
> THE COURT: Yes.
> MS. KAHOLOKULA: But Mr. Barker also actually admitted to Detective Hagglund that he had been looking at incest-related pornography on the computer, and I think that that comes in.
> MS. RIQUELME: Well, and that's something that I would argue shouldn't come in, because this was in relation to the -- essentially Detective Hagglund was performing an investigation for the Edmonds PD that they were investigating whether there was potentially something criminal on the computer at Mr. Barker's workplace, and eventually that came up, that resulted in no charges.
> THE COURT: Yeah.
> MS. RIQUELME: And so that's not relevant to the investigation here. Obviously, that is what prompted CPS to come and start talking to everybody, but that is of a highly charged and prejudicial nature, and it's not helpful to the jurors in this sort of a case, and that there is this inference of some sort of a character trait of Mr. Barker that I don't think is properly -- properly made by that sort of evidence.
> MS. KAHOLOKULA: Well, the relevance, of course, is that the state has to show sexual gratification, touching for purposes of sexual gratification. And he is in a father role, basically, engaging in incest, and when he is combining incest pornography with that, it's relevant to show sexual gratification. He is interested in incest, and he's carrying it out.
> THE COURT: Tell me again, how it got to Hagglund's knowledge? Did Mr. Barker admit that in his statement?

MS. KAHOLOKULA: Well, Detective Hagglund, I believe, would testify that in speaking with Mr. Barker, among other things, Mr. Barker said that he had viewed various incest pornography sites.
MS. RIQUELME: And I believe this was always in the context of his work computer, and not in any sort of pornography viewing that happened at home.
MS. KAHOLOKULA: But I don't think that matters. I mean, I don't think that Detective Hagglund has to say he got fired because he was looking at pornography, including incest. The fact that he's looking at it at work doesn't make it any less relevant to this particular case when we're talking about the same time frame he's engaging in this behavior, having two siblings actually get into a shower together, and looking at incest-related pornography.
THE COURT: I suppose.
MS. RIQUELME: Well, and on the other hand, do we get to talk about every person who's charged with an offense like this every time that they have masturbated or they -- they've looked at somebody, you know -- when Brittany Spears was younger and everybody was -- thought she was the hot young thing, well, that's because she was sexualized when she was under sixteen. I mean, do we get to talk about all of that too in all these cases? That oh, he seems to like Brittany Spears videos or something along those lines? I don't see really the relevance. It's showing some sort of character trait, but not necessarily something that a person is acting on.
THE COURT: Well, it is prejudicial, but everything the state offers to a certain degree is prejudicial. As to whether it's too prejudicial, on a balancing, is it so prejudicial that it overcomes pertinent relevance, relevant reason for giving it to the jury?

In this case it's relevant. We're talking about incest sites visited on a computer, and the nature of the charge involves an allegation of an attempted incestual relationship, so it's relevant there.

Secondly, it is something that Mr. Barker said to the detective in the course of the detective's investigation and in the course of conversation with the detective, so...
MS. RIQUELME: And your Honor, I would just point out that at no point does it look like this was sort of a father-

> daughter, mother-son type of an incest viewing, that these were cousins, nephews, nieces, aunts, uncles, and that the websites had indicators saying that they were -- that that is what their character was, but that, you know, Mr. Barker doesn't know these people or whether that's really the case.
> MS. KAHOLOKULA: It doesn't matter whether it's actually incest. It matters what his view of it is.
> THE COURT: Yeah. I suspect it's -- I suspect it is relevant, and the relevance overcomes the prohibitive prejudicial effect. So the detective may testify as to that statement from Mr. Barker. We're not going any further, are we?
> MS. KAHOLOKULA: No.
> THE COURT: Okay, all right. Okay.

8/7/12 RP 145-149. Detective Hagglund ended up testifying that Barker explained that he had viewed incest-related pornography, but he wasn't certain that it was incest-related, that just the information was from the website. 8/8/12 RP 11.

On August 9, 2012, the jury returned verdicts finding Barker guilty of Child Molestation in the Second Degree and Bail Jumping. 8/9/12 RP2 84, CP 59, 60.

At sentencing, Barker objected to sentence conditions regarding to access to the internet. 8/12/12 RP 91-2. He argued the offense was not one where he met the step-daughter by computer and that the offense did not have enough nexus to computer use. 8/12/12 RP 91.

The prosecutor contended there was sufficient nexus of the computer use related to his conduct and that evidence came forward that he used the

computer to try to control his step-daughter and provide a false letter to her mother to try to get the step-daughter in trouble. 8/12/12 RP 94-5.

The trial court sentenced Barker to 27 months on the Child Molestation charge and 8 months on the Bail Jumping charge. CP 64, 8/12/12 RP 97. The trial court determined there were computer elements throughout the course of the case meriting that condition. 8/12/12 RP 97. The condition imposed reads:

> Do not have access to the Internet, or any social media on the internet, cell phone or other electronic devices without the permission from the Community Corrections Officer.

CP 75.

On September 14, 2012, Barker timely filed his notice of appeal. CP 76.

2. Summary of Trial Testimony

Z.B. was eleven years old at the time of trial and lived with his mother, two sisters and brother. 8/7/12 RP 5-6. C.H. is Z.B.'s older half-sister. 8/7/12 RP 6. Darren Barker was Z.B.'s father. 8/7/12 RP 6. At one time, Z.B. lived in Darrington with her sister C.H. and father. 8/7/12 RP 8. C.H. had her own room. 8/7/12 RP 8. Z.B. recalled an incident when her mother was in Texas, when he heard A.B. crying in Darren's room. 8/7/12 RP 10.

A.B. Barker was fourteen years old at the time of trial. 8/7/12 RP 14. A.B. recalled living in Darrington. 8/7/12 RP 16. While in Darrington, A.B. lived with her siblings, mother and Darren Barker. 8/7/12 RP 17. A.B. drew a diagram and described the layout of the house. 8/7/12 RP 18-20.

A.B. recalled a time when her mother went to Texas for a week and Darren looked after the children. 8/7/12 RP 21. A.B. recalled an incident where Darren and C.H. were upset. 8/7/12 RP 21. Darren was trying to get C.H. to try on a pair of pants, but C.H. refused and started crying. 8/7/12 RP 21. After that they went into Darren's room. 8/7/12 RP 22. C.H. did not want to go. 8/7/12 RP 22. A.B. heard C.H. crying and the door was closed. 8/7/12 RP 22-3. A.B. was concerned for C.H. 8/7/12 RP 23.

Michelle Hutcheson is C.H.'s mother. 8/7/12 RP 25. Michelle married Darren Barker in 1997 in Las Vegas, Nevada. 8/7/12 RP 26. Michelle and Darren first lived in Texas before moving to Marysville Washington in 2000. 8/7/12 RP 26-7. They moved to Darrington in 2006. 8/7/12 RP 27. Michelle had since divorced Darren. 8/7/12 RP 28.

Michelle took her youngest child to Texas in March of 2007. 8/7/12 RP 30. Her grandmother was dying and Michelle could only afford to take the one child. 8/7/12 RP 30. A.B., Z.B. and C.H. stayed with Darren at the Darrington home. 8/7/12 RP 30. Michelle called home frequently from the

trip. 8/7/12 RP 30. The night before her return, she tried to call home but got no answer at first and Michelle got concerned. 8/7/12 RP 31.

When Darren answered, he first said he was busy and then went on to state that he had screwed up and had talked to C.H. about sex. 8/8/12 RP 31, 56. Michelle had already talked to C.H. about her body and told Darren that he wasn't to talk to her about sex. 8/7/12 RP 29, 31.

Michelle said she wanted to talk to C.H. and called back. 8/8/12 RP 32. C.H. told Michelle she was okay, but her voice told Michelle she was not. 8/8/12 RP 32. C.H. would not say anything about what had happened. 8/8/12 RP 32. Michelle talked to the other kids and then got back on the phone with Darren. 8/8/12 RP 32. Darren told Michelle that he had talked to C.H. about sex, had C.H. look at herself in the mirror and he had gone overboard. 8/8/12 RP 32. He said that he had C.H. look at her clitoris. 8/8/12 RP 32. Darren said that he had been in the room with her. 8/8/12 RP 34. It seemed odd to Michelle. 8/8/12 RP 33.

The next day when she returned home, Michelle had another conversation with Darren. 8/8/12 RP 33. He again said that he had C.H. look at herself in the mirror because he was trying to teach her about sex, but that it was not his place. 8/8/12 RP 33.

When Michelle talked with C.H. she said she was fine, she had looked at herself and that Darren was in the room. 8/8/12 RP 34. However,

she seemed scared and closed up. 8/8/12 RP 34. C.H. stated that her clothes were off. 8/8/12 RP 34. C.H. did reveal things about other incidents as well. 8/8/12 RP 35.

Child Protective Services (CPS) got involved in an investigation in April of 2007, after Darren lost his job and the children began attending elementary school. 8/8/12 RP 50-1. CPS and Michelle entered into a safety plan that Darren was not to have contact with the children. 8/8/12 RP 36. Darren left the home for six months. 8/8/12 RP 36. When Darren moved back in, Michelle described that C.H. changed to be very dark and gothic. 8/8/12 RP 37. Her grades suffered. 8/8/12 RP 38.

Michelle also noticed a change in Darren's behavior towards C.H. 8/8/12 RP 39. He started to say how attractive C.H. was. 8/8/12 RP 39. Darren also bought C.H. gifts including a camera for her computer, candies and feminine products. 8/8/12 RP 40. This was different from how he treated the other children. 8/8/12 RP 40. Darren was working at Best Buy in Burlington at the time on the "Geek Squad" and had helped C.H. get her first job there. 8/8/12 RP 61, 128. C.H. was going to running start at Skagit Valley College at the time. 8/8/12 RP 62, 128. Darren was involved in a seminary program. 8/8/12 RP 62.

In late 2009, Michelle had another conversation with C.H. about whether Darren had touched her and C.H. told her something additional.

8/8/12 RP 40-1. Michelle then took her children, went to Spokane to get her mother and returned to kick Darren out. 8/8/12 RP 41.

Michelle confronted Darren. 8/8/12 RP 41. Michelle told Darren that C.H. said he touched her in 2007. 8/8/12 RP 41-2. Darren said C.H. was lying, but added new information that he had made C.H. look at herself. 8/8/12 RP 42, 65. Darren told Michelle that she was stupid and would never prove anything. 8/8/12 RP 42.

Michelle had also found some of C.H.'s underwear in Darren's drawer and in the bathroom with white residue which appeared to be semen. 8/8/12 RP 44-5. Michelle had confronted Darren about whether he had masturbated into her underwear, which he denied. 8/8/12 RP 45-6. At one point, Michelle had a discussion about whether C.H. would be allowed to have thong underwear. 8/8/12 RP 46. Darren overheard the conversation and Michelle noticed that he had a hard on. 8/8/12 RP 46. Michelle confronted Darren about it and he adjusted himself and told Michelle you don't know nothing. 8/8/12 RP 46.

Michelle had the locks changed on the house and called police. 8/8/12 RP 42. Darren never came back into the house and Michelle pursued a divorce solely based upon this incident. 8/8/12 RP 43. Michelle received nothing from Darren in the divorce. 8/8/12 RP 43.

C.H. testified. 8/8/12 RP 83-144. C.H. was eighteen at the time of trial. 8/8/12 RP 84. C.H.'s birthday was in September and she would have been thirteen in March and April of 2007. 8/8/12 RP 84. She had never been married. 8/8/12 RP 84. Her mother married her stepfather, the defendant, Darren Barker when C.H. was four. 8/8/12 RP 85. C.H. lived with Darren and her mother at a house on Elder Road in Darrington. 8/8/12 RP 86. C.H. was homeschooled from age three to eight. 8/8/12 RP 86. C.H.'s mother had educated her about sex and inappropriate touching at a young age. 8/8/12 RP 117.

C.H. said she was scared of Darren before the incident in 2007 because he physically abused her. 8/8/12 RP 88. Her mother had stood up to Darren when the physical abuse happened. 8/8/12 RP 141. C.H. did not like to listen to him and did not talk to him about things. 8/8/12 RP 89. If she called him step-dad, she got in trouble. 8/8/12 RP 124.

C.H.'s room had a curtain instead of a door. 8/8/12 RP 91. C.H. wanted people to knock before they entered and her siblings and mother did. 8/8/12 RP 91-2. Darren did not. 8/8/12 RP 91. Due to the poor level of privacy, and because Darren would just walk in on her, C.H. would change her clothes in the bathroom. 8/8/12 RP 92. Sometimes when C.H. was taking a shower, Darren would come into the bathroom and would pull back

the curtain. 8/8/12 RP 93. This occurred before the spring of 2007. 8/8/12 RP 93.

When C.H. was about thirteen and half in about March to April of 2007, her mother went to Texas for a week. 8/8/12 RP 93-4. Darren was left at the house with C.H, her sister A.B., her brother, Z.B.ary, and Darren. 8/8/12 RP 94. One day, Darren asked A.B. to try on some used clothes they got from a friend. 8/8/12 RP 94. C.H. told Darren she wanted to change in the bathroom. 8/8/12 RP 94. He insisted that she had to change in from of him in her room. 8/8/12 RP 94. He said C.H. would get in trouble and her mother would be mad at her. 8/8/12 RP 96. Z.B.ary and A.B. were in the living room watching television. 8/8/12 RP 95.

C.H. finally gave in and started changing into pants and shirts. 8/8/12 RP 96-7. Darren was sitting on the bed watching. 8/8/12 RP 97. C.H. was wearing a bra and underwear underneath. 8/8/12 RP 97. C.H. tried to keep bending over to be more secretive. 8/8/12 RP 97. This went on for about five to ten minutes. 8/8/12 RP 97.

When C.H. was finished, Darren said she was too self-conscious about her body and that he needed to talk to her in private in his bedroom. 8/8/12 RP 97. They went into his bedroom and he closed the door and sat C.H. on the bed. 8/8/12 RP 97. Darren said he wanted to talk to C.H. about

sex. 8/8/12 RP 98. Z.B.ary kept coming in, so Darren locked the door. 8/8/12 RP 98.

Darren told C.H. that she needed to take her shirt off. 8/8/12 RP 98. C.H. refused so he forcibly took it off. 8/8/12 RP 98. Darren then asked C.H. to take off her bra. 8/8/12 RP 99. C.H. refused. 8/8/12 RP 99. So, Darren forcefully took off her bra. 8/8/12 RP 99. C.H. was covering herself. 8/8/12 RP 99. Darren made C.H. touch her own breasts by forcefully grabbing her hands and holding them on her breasts. 8/8/12 RP 99. Then Darren touched her breasts. 8/8/12 RP 99. C.H. was crying throughout the incident and not talking back. 8/8/12 RP 99.

Darren then asked C.H. to take her pants off. 8/8/12 RP 100. C.H. told him no. 8/8/12 RP 100. At this point, she was sitting up in the bed and he grabbed her legs, pulled her down and forcefully took her jeans all the way off. 8/8/12 RP 100. Darren then laid C.H. down. 8/8/12 RP 100. Darren then forcefully took C.H.'s underwear down to her ankles. 8/8/12 RP 101. C.H. was lying down and crying. 8/8/12 RP 101. C.H. happened to be on her period at the time. 8/8/12 RP 101. So, Darren set a towel underneath C.H. 8/8/12 RP 101.

Darren then took a mirror that was on the nightstand by the bed and told C.H. that she needed to watch while he explained her body parts. 8/8/12 RP 102. The mirror was round, blue and about twelve inches wide. 8/8/12

RP 102-3. It was the type that could be used to put on makeup. 8/8/12 RP 103. Darren made C.H. hold the mirror and told her to hold the mirror. 8/8/12 RP 103. Darren was sitting on the bed. 8/8/12 RP 102. C.H.'s knees were bent with her feet on the bed. 8/8/12 RP 103. C.H. put the mirror between her legs. 8/8/12 RP 104.

C.H. described that he would touch a part of her and then explained what it was and what it was for. 8/8/12 RP 104. He described the little lips, the big lips, the clitoris and the pee hole. 8/8/12 RP 104. Darren touched about five parts and he held them each for about five to fifteen seconds while he did so. 8/8/12 RP 104. C.H. was crying and did not want to participate. 8/8/12 RP 105. C.H. did not touch herself. 8/8/12 RP 105.

Darren was fully clothed, wearing jeans and a button-up T-shirt the whole time. 8/8/12 RP 102, 105. C.H. was unable to tell if Darren had an erection because his jeans were so tight. 8/8/12 RP 106.

The phone had been ringing and going to voice mail throughout the time they were in Darren's bedroom. 8/8/12 RP 105-6. When Darren was done, he told C.H. to get dressed and get out in the living room. 8/8/12 RP 105. Darren also told C.H. that only other male family members could look at or touch her. 8/8/12 RP 142-3. Darren finally answered the phone and went into his room. 8/8/12 RP 106. Darren told C.H. to stay in the living room. 8/8/12 RP 106. C.H.'s mother kept calling and demanded to talk to

C.H. and C.H. eventually got to talk to her mother. 8/8/12 RP 107. Her mother said she was worried and asked C.H. if she was okay. 8/8/12 RP 107. C.H. lied and said she was. 8/8/12 RP 107. C.H. lied because she was scared of Darren. 8/8/12 RP 107-8. C.H. also did not tell her mom what happened because she was scared of living without a father. 8/8/12 RP 110. C.H. had lived her life without knowing her father and did not want her siblings to go through that. 8/8/12 RP 110.

Before her mother came home, there was also an incident involving a shower. 8/8/12 RP 108. Darren told C.H. that her brother needed to shower with her. 8/8/12 RP 108. Darren opened up the shower curtain while C.H. was already in the shower. 8/8/12 RP 109. Darren said it was to save time. 8/8/12 RP 109. C.H. told him no and that they have two bathrooms. 8/8/12 RP 109. But Darren put Z.B.ary in the shower with her and the curtain open. 8/8/12 RP 109. Darren watched them shower. 8/8/12 RP 109. Z.B.ary looked confused, did not like showers and had never showered before with her. 8/8/12 RP 109-10.

C.H.'s mother came home a day or two later. 8/8/12 RP 108. C.H. did not feel comfortable enough to tell her mother exactly what happened. 8/8/12 RP 110. She was also concerned because Darren made C.H. feel that her mother was on his side. 8/8/12 RP 110.

A few weeks after the incident, C.H. talked to a social worker. 8/8/12 RP 111, 118. The social worker asked if C.H. had been touched, and C.H. stated only that Darren had talked to her. 8/8/12 RP 111. C.H. thought the social worker already knew what happened and felt people could tell by looking hat her. 8/8/12 RP 112. C.H. did not tell the social worker for the same reasons she did not tell her mother. 8/8/12 RP 112.

After they spoke with the social worker, Darren moved out for about six months. 8/8/12 RP 112. C.H. said after she was molested she was depressed and changed her appearance by wearing dark clothes. 8/8/12 RP 87, 113. Her grades suffered at the time. 8/8/12 RP 87.

When Darren returned to the house, his behavior changed. 8/8/12 RP 113. Darren would rub up against C.H. with his privates, would rub her back like he was trying to feel her bra, and would walk in on her in the bathroom. 8/8/12 RP 114. He did not touch A.B. or Z.B.ary in those ways. 8/8/12 RP 114. Darren started giving C.H. gifts her siblings did not get and would touch her and make comments that she was a very attractive woman. 8/8/12 RP 115. C.H. became worried for A.B.'s safety because she was about to turn age twelve. 8/8/12 RP 115. C.H. was concerned that something might happen again. 8/8/12 RP 116.

C.H.'s relationship improved with her mother. 8/8/12 RP 116. One day C.H. was having a discussion with her mother about underwear and

noticed that Darren came out of his room to listen and had an erection. 8/8/12 RP 116. Around that time, she disclosed to her mother what happened. 8/8/12 RP 116. After she disclosed, she could not participate in running start and lost her job due to no longer having a vehicle. 8/8/12 RP 142.

Detective Hagglund of the Sheriff's Office testified. 8/8/12 RP 6. Hagglund took the report from the CPS caseworker and followed up by speaking with Michelle Barker and C.H. 8/8/12 RP 5-6.

Hagglund also interviewed the defendant, Darren Barker, at a small room in the office complex of C.H.'s school. 8/8/12 RP 7. Barker told Hagglund that on the day of the incident, C.H. had been trying on clothes to see what fit. 8/8/12 RP 8. When C.H. was in front of her siblings, she was uncomfortable. 8/8/12 RP 8. Barker said he got mad at her about getting upset and took her into his room. 8/8/12 RP 8. Barker had her take her shirt and bra off and examine herself. 8/8/12 RP 9. Barker said that she then replaced that clothing and he had he take offer her pants and underwear. 8/8/12 RP 9. Barker said he provided her a mirror so she could examine herself. 8/8/12 RP 9. Barker told Hagglund that he had held the mirror himself from the side. 8/8/12 RP 9. Barker denied that he had C.H. touch herself, that he touched C.H. or that he was aroused. 8/8/12 RP 10, 12-3.

Barker told Hagglund that he called his wife immediately afterward and described it as a mistake and said that he was naïve. 8/8/12 RP 10.

The prosecutor then asked whether after Barker talked about this incident with his step-daughter whether Hagglund had a conversation with Barker regarding incest-related pornography. 8/8/12 RP 10. Barker explained that he had viewed incest-related pornography, but he wasn't certain that it was incest-related, that just the information was from the website. 8/8/12 RP 11.

Darren Barker testified solely as to the bail jumping charges. 8/8/12 RP 14-21. Barker contended that he communicated with his counsel by e-mail and occasional phone calls. 8/8/12 RP 18. Barker said he would get documents sent to him that he would sign, scan and send back. 8/8/12 RP 18. Barker contended that he had not been notified before January 28, 2011, that his attorney was no longer representing him. 8/8/12 RP 18. He also claimed he did not know he was ordered by the Court to appear on January 28, 2011. 8/8/12 RP 18-9. He admitted he did not appear that day and thought that his counsel would have represented him and claimed that he was given the impression by his counsel that he was not expected to appear. 8/8/12 RP 19.

On cross-examination, Barker admitted to signing the court order for him to appear on January 28th. 8/8/12 RP 20. Barker also admitted that he

stayed in Texas for six months and did not come back to court to deal with the bail jumping charge until July of 2011. 8/8/12 RP 21.

Barker had is prior attorney, Richard Sybrandy, testify solely as to the bail jumping charge. 8/8/12 RP 70-83.

IV. ARGUMENT

1. Admission of the defendant's statement admitting to interest in incest was not error.

i. The motion in limine was to exclude evidence that the defendant had been fired for viewing pornography on his work computer.

Barker contends the trial court erred in allowing the admission of the information about Barker's admission to an interest in incest after initially excluding that evidence in a motion in limine.

However, the motion in limine was actually a motion to exclude the fact that the defendant had been fired for viewing child pornography on his work computer. In the motion, there was no mention of the defendant's statement that he had admitted to viewing what was represented to be incest pornography.

Defense motion in limine 9 read as follows:

> To exclude evidence that Mr. Barker was fired from a job before the date of violation because of his unauthorized viewing of pornography on his work computer. There is no evidence that Mr. Barker viewed child pornography. Such evidence is not related to the charges here and would not be

> relevant for any other purpose than showing Mr. Barker. ER 401, 402, 404(a), 404(b).

CP 28. The trial court granted the motion ruling as follows.

> Nine (9) to exclude evidence that Mr. Barker was fired from the job and I think we have already agreed that we're going to grant that. We're not going to into whether there is any evidence about pornography on the computer.

8/6/12 RP2 6. The State made no comment relating to the trial court's ruling and did not seek to admit the fact that the defendant had been fired, or the reason. However, since it was part of the same conversation, prior to questioning the detective, the prosecutor sought to address with the trial court the admission of the defendant's statement to viewing what was represented to him to be incest pornography.

The evidence was that Barker had admitted to the investigating detective to viewing incest-related pornography during the same time frame of the alleged sexual conduct with his step-daughter. 8/7/12 RP 145-7.

Viewed in this context, the trial court's determination was a proper balancing analysis under ER 404(b).

ii. The trial court did not abuse its discretion in allowing the defendant's admission showing an interest in incest which he was alleged to have committed.

The viewing of incest related pornography admitted to during the interview by the detective investigating the molestation, was relevant to the issue of whether Barker had the intent to engage in sexual contact with his

step-daughter. This admission goes to show the defendant's acknowledgement of the wrongfulness of the conduct with his step-daughter and as result is an admission to the crime.

ER 404(b) allows admission of other acts to show intent.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. **It may, however, be admissible for other purposes, such as proof** of motive, opportunity, **intent**, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404 (emphasis added). Intent is an element of child molestation because proof of sexual contact is required which by definition requires sexual gratification.

> A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, **sexual contact** with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.086 (emphasis added).

> (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010.

> In order to prove "sexual contact," the State must establish the defendant acted with a purpose of sexual gratification. Thus, while sexual gratification is not an explicit element of second degree child molestation, **the State must prove a defendant acted for the purpose of sexual gratification. Intent is relevant to the crime of second degree child**

> **molestation because it is necessary to prove the element of sexual contact.**

State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Here, the trial court evaluated whether the defendant's admission to viewing incest-related pornography was evidence of proof of intent and whether the probative value outweighed prejudice. As a result evaluation of the trial court's decision is reviewed for abuse of discretion.

> We review the trial court's interpretation of ER 404(b) de novo as a matter of law. Foxhoven, 161 Wn.2d at 174, 163 P.3d 786. If the trial court interprets ER 404(b) correctly, we review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937, 946 (2009) *citing* State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007).

The record before the trial court showed that the trial court did the proper weighing under ER 404(b).

> THE COURT: Well, it is prejudicial, but everything the state offers to a certain degree is prejudicial. As to whether it's too prejudicial, on a balancing, is it so prejudicial that it overcomes pertinent relevance, relevant reason for giving it to the jury?
>
> In this case it's relevant. We're talking about incest sites visited on a computer, and the nature of the charge involves an allegation of an attempted incestual relationship, so it's relevant there.
>
> Secondly, it is something that Mr. Barker said to the detective in the course of the detective's investigation and in the course of conversation with the detective, so...
>
> ...

> and the relevance overcomes the prohibitive prejudicial effect. ...

8/7/12 RP 147-8. The trial court did the requisite weighing and determine the probative value as to the issue of intent exceeded the prejudicial effect.

In State v. Mutchler, the trial court admitted testimony from another female who had been stalked in the days prior to the incident and saw the defendant staring at her crotch as proof of intent to commit an assault on the victim. The Court of Appeals indicated that the evidence that the defendant had followed the other woman and had stared at her crotch was probative of his intent to commit rape or indecent liberties. State v. Mutchler, 53 Wn. App. 898 at 904. The Court went on to note that the prejudicial effect was minimal as the prior "bad acts" were ambiguous and did not show a propensity to rape. Id.

> We therefore conclude that the probative value of the evidence outweighs any unfair prejudicial effect. Thus, the evidence is admissible under ER 404(b) on the issue of whether Mutchler intended to commit rape or indecent liberties on the victim.

State v. Mutchler, 53 Wash. App. 898 at 904.

Thus, the courts of this State have recognized that the second sentence of ER 404(b) must be viewed in evaluating whether there was a proper trial court ruling.

Some federal court rulings have recognized that prior sexual conduct with a minor can be admissible to show motive and intent under the equivalent federal rule.

> "Prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children." U.S. v. Sebolt, 460 F.3d 910, 917 (7th Cir.2006) (*citing* U.S. v. Cunningham, 103 F.3d 553, 556 (7th Cir.1996)); *see* Zahursky, 580 F.3d at 524.

U.S. v. Chambers, 642 F.3d 588, 595 (7th Cir. 2011) (admission of images of pornography on child's computer were admissible to show motive and intent on charges of attempting to entice minor to engage in sexual activity and knowingly transporting child pornography).

iii. The case law regarding other sexual offenses does not support that error occurred here.

Barker relies primarily on three cases to support his contention that the trial court improperly admitted his admission showing an interest in incest. The State contends those cases do not support error occurred in the present case. In the present case, it was the defendant's admission of viewing incest pornography to the investigating detective. This is markedly different from those cases involving the admission of actual pornography.

In State v. Sutherby, the defendant was tried jointly on charges of rape of child, child molestation and possession of child pornography. State

v. Sutherby, 165 Wn.2d 870, 876, 204 P.3d 916 (2009). Sutherby was convicted and appealed contending his counsel was ineffective for failing to move to sever the child pornography charges. State v. Sutherby, 165 Wn.2d 870 at 883. The consideration involved whether there was deficient performance and whether the defendant was prejudiced. In reaching the decision on prejudice, the court evaluated whether there was a reasonable probability of whether the outcome would be different. In the four areas considered, the Supreme Court believed it was "likely" the evidence of the child pornography charges would not have been admissible.

> Based on the inflammatory nature of the crimes, we think it likely that the evidence of the child pornography would not have been admissible at a separate trial for child rape and molestation. Neither would the evidence of the child rape and molestation have been admissible at a separate trial for possession of child pornography. A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity. State v. Goebel, 36 Wn.2d 367, 368–69, 218 P.2d 300 (1950).

State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916 (2009). To support that position the Court cited to three cases in which evidence of possession of pornography was allowed to show sexual desire toward a particular victim. State v. Ray, 116 Wn. 2d 531, 547, 806 P.2d 1220 (1991) (prior sexual acts toward victim were evidence supporting a showing of sexual intent), State v. Ferguson, 100 Wn.2d 131, 133–34, 667 P.2d 68 (1983)

(photographs of prior sexual encounter with minor were admissible showed lustful disposition toward the victim); State v. Medcalf, 58 Wn. App. 817, 822–23, 795 P.2d 158 (1990) (misconduct directly connected to the offended female and does not just reveal defendant's general sexual proclivities, was admissible). However, those cases only stand for the proposition that showing lustful disposition is one proper purpose for admitting ER 404(b) evidence. When the Court in Sutherby stated it was "likely that the evidence of the child pornography would not have been admissible seemed to leave" it left open the possibility that the evidence would have been admissible. The Supreme Court has appeared to gloss over the portion of the ER 404(b) analysis which allows admission of evidence to show intent.[3] Where the State is required to prove sexual intent to prove child molestation, the evidence showing sexual intent towards a minor child does not fall

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[3] The dissent in Sutherby noted that the Court had not evaluated whether the evidence would be admissible under ER 404(b) to show the other factors of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

> The majority assumes that, because our prior cases involving evidence of possession of child pornography have only dealt with the lustful disposition exception to ER 404(b), ipso facto other ER 404(b) exceptions do not apply to such evidence. This ignores the plain language of ER 404(b) and has no support in our case law. It is also inconsistent with child sexual assault cases where we have explicitly approved admission of ER 404(b) evidence for other purposes. *See, e.g.,* State v. DeVincentis, 150 Wn.2d 11, 17–23, 74 P.3d 119 (2003) (common scheme or plan); State v. Kilgore, 147 Wash.2d 288, 295, 53 P.3d 974 (2002) (motive and opportunity); State v. Elmore, 139 Wash.2d 250, 286, 985 P.2d 289 (1999) (res gestae).

State v. Sutherby, 165 Wn.2d 870, 894, 204 P.3d 916 (2009) (Johnson dissenting.

within the portion of ER 404(b) which prevents admission of "to prove the character of a person in order to show action in conformity therewith."

Barker also discusses the analysis from State v. Saltarelli, 98 Wn. 2d 358, 655 P.2d 697 (1982). The court there held that evidence of the defendant's assault on a woman was not relevant to the issue of the defendant's motive for raping a different woman almost five years later where there was no similarity shown between conduct. That is so dissimilar that the legal analysis from that case is of little benefit to the analysis here.

In State v. Medcalf, 58 Wn. App. 817, 795 P.2d 158 (1990), the defendant was charged with second degree statutory rape. The trial court admitted testimony that the defendant had possession of X-rated video tapes. The State had argued the evidence because the movies could be used to entice children. State v. Medcalf, 58 Wn. App. 817 823. However there was no evidence that the defendant had actually been to the defendant's apartment to watch movies or that she watched any. Id. The Court ruled the trial court had erred in admission of the evidence because it was not admissible to show other motive or intent.

> ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith. While this kind of evidence may be admissible to establish motive, intent, preparation, or plan, evidence showing lustful disposition should be admitted in a sex offense case only when it tends to show such lustful inclination toward the

> offended female. State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983); State v. Bernson, 40 Wn. App. 729, 737–38, 700 P.2d 758 (1985). The evidence in this case does not. These video tapes have no connection with Gigi. The admission of Officer Emm's testimony about them was, therefore, improper

State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158, 161 (1990). Notably, since Medcalf involved statutory rape, there was no requirement that the State prove the defendant had sexual intent and furthermore there was no evidence that the conduct pertained to a child.

The State contends that these cases did not complete the analysis done here by the trial court in weighing admissibility of proof of intent under ER 404(b).

2. Any error in admitting the testimony regarding the defendant's statement regarding incest pornography would be harmless.

Without conceding error in admission of the testimony regarding the defendant's admission to viewing incest pornography, the State contends that any error should be considered harmless in light of the evidence presented.

> Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thomas, 150 Wn.2d at 871, 83 P.3d 970.

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

The case of State v. Medcalf cited by Barker supports the contention that any error here would be harmless. The Court determined as follows.

> However, because of the weight of the evidence against Medcalf, we are persuaded that this error does not require reversal. Error in admitting evidence is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).
>
> Gigi testified with a great deal of certainty and in significant detail about what had happened. Her claims were corroborated by the presence of semen stains on the men's undershorts and the towel which she had described and on her own underpants. There was no evidence suggesting that she had a motive to lie and no innocent explanation for her knowledge that the undershorts and towel had been used to clean up seminal fluid. The only rebuttal of all of this evidence was Medcalf's own implausible version of events. Under these circumstances, there is no reasonable possibility that the verdict would have been different had the jury not known about the video tapes.

State v. Medcalf, 58 Wn. App. 817, 823-24, 795 P.2d 158 (1990).

Similarly to the victim in Medcalf here the victim testified with great certainty and detail about what happened. Her testimony was corroborated by testimony by her siblings about the timing of the event, her reaction, as well as her mother's testimony. There was no meaningful evidence suggesting a motive to lie, since she herself was prevented from going to running start and work after Barker left the house. Since the defendant did not testify and only short statements of denials to others were admitted, there

was no plausible explanation by Barker. And Barker admitted to having gone too far. The day after the touching, Barker directed his son and step-daughter to shower together and watched. He was also observed by his step-daughter and wife to have had an erection after over hearing a conversation between the two about the step-daughter's underwear. Furthermore, after the incident, Barker gave C.H. more gifts than he gave his own children and began touching her and rubbing up against her with his crotch.

In the context of the prior trial, and given that the prosecutor did not even mention the defendant's admission to the detective during the closing argument, the impact of the evidence was minimal. Weighed in the context of all the evidence, within reasonable probabilities, the outcome of the trial would not have been materially affected.

3. Where the defendant had admitted to viewing incest-related pornography around the time of the molestation, the trial court did not abuse its discretion in requiring community corrections officer approval of use of the internet.

Barker appeals the trial court imposition of a condition of community custody regarding use of computers and the internet. What Barker has characterized as a "bar" was actually a requirement that any computer or internet use be approved by a community corrections officer. Appellant's Opening Brief at pages 19, 25-6, CP 75. The State contends the trial court did not abuse its discretion in imposing the condition.

At sentencing, Barker objected to sentence conditions regarding access to the internet. 8/12/12 RP 91-2. He argued the offense was not one where he met the step-daughter by computer and that the offense did not have enough nexus to computer use. 8/12/12 RP 91.

The prosecutor contended there was sufficient nexus of the computer use related to his conduct and that evidence came forward that he used the computer to try to control his step-daughter and provide a false letter to her mother to try to get the step-daughter in trouble. 8/12/12 RP 94-5. The trial court determined there were computer elements throughout the course of the case meriting that condition. 8/12/12 RP 97.

The condition imposed reads:

> Do not have access to the Internet, or any social media on the internet, cell phone or other electronic devices without the permission from the Community Corrections Officer.

CP 75.

The trial court has the authority to impose crime-related conditions. RCW 9.94A.703.

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030 (10).

Although the conditions of sentencing "must be directly related to the crime" for which the defendant was convicted, they "need not be causally related to the crime." State v. Autrey, 136 Wn.App. 460, 467, 150 P.3d 580 (2006) (*quoting* State v. Letourneau, 100 Wn.App. 424, 432, 997 P.2d 436 (2000)).

Conditions related to use of computers or internet must relate to the offense. State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) (prohibitions owning a computer, associating with other computer hackers, and communicating with computer bulletin boards were held to be crime-related following convictions for computer trespass), State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008) (condition requiring no accessing the internet without prior approval from his community custody officer or treatment provider was determined not to be crime-related since there was no evidence the defendant had accessed the internet before the rape or in any way contributed to the crime (noting that access may be limited if recommended by sex offender treatment provider))

Conditions which are not part of the crime but related to the actual events of the case are permissible. State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) (order prohibiting contact with defendant's wife was crime-related where the wife was mother of victims, she testified against him and his controlling behavior including having children avoid

subpoenas at defendant's direction); State v. Acrey, 135 Wn. App. 938, 146 P.3d 1215 (2006) (condition forbidding acting as a caretaker for elderly or disabled people is crime-related to retirement savings of elderly man), State v. Combs, 102 Wn. App. 949, 10 P.3d 1101 (2000) (PSI report revealing use of computer to show pornographic images to victim support restriction on use of computer during community custody and did not violate his First Amendment rights), State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239, 243 (1992) (associating with individuals who use, possess, or deal with controlled substances is conduct intrinsic to the crime of possession with intent to deliver), State v. Parramore, 53 Wn. App. 527, 768 P.2d 530 (1989) (community supervision condition requiring defendant convicted of selling marijuana to submit to urinalysis was directly related to his drug conviction despite absence of evidence on whether defendant smoked marijuana).

The question thus presented is whether the defendant's acts in viewing incest-related pornography relate to the circumstances of the offense involving molestation of a step-daughter. In addition, after the commission of the offense to control the victim, the defendant used his knowledge of computers to try to get his step-daughter in trouble with her mother. CP 4-5. The State contends that the trial court did not abuse its

discretion since the use of the computers and internet encouraged and furthered the offenses.

V. CONCLUSION

For the foregoing reasons, the judgment and sentence herein must be affirmed.

DATED this 14th day of October, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Maureen Cyr, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 15th day of October, 2013.

_____

KAREN R. WALLACE, DECLARANT