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NO. 71298-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARRELL MORGAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Marybeth Dingledy, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

During Darrell Lewis Morgan's trial, Detective Karen Kowalchyk was caught by defense counsel attempting to read Morgan's notes to his lawyer. Despite this egregious conduct, the trial court merely excluded Kowalchyk's testimony but permitted her to remain and assist the prosecutor. Although the trial court eventually admonished Kowalchyk not to speak with any of the State's witnesses, this admonition only came after Kowalchyk had already spoken with Detective Aaron De Folo, who later testified. Because this inadequate remedy did not isolate the misconduct's prejudice, this court must reverse Morgan's conviction and remand with instructions to dismiss this prosecution. At the very least, remand is required for the trial court to determine whether the State met its burden of proving a lack of prejudice beyond a reasonable doubt.

The trial court and the State also were confused about the elements of second degree possession of depictions of a minor engaged in sexually explicit conduct. The evidence showed Cynthia Ocheltree took photographs of her granddaughter showering to use in a scrapbook. The court and State believed that Morgan was guilty if he possessed and was sexually stimulated by those photos. However, to prove a minor is engaged in sexually explicit conduct, the State must prove the creator of the photos created them to sexually stimulate the viewer. Because the evidence was insufficient to

show the photos in Morgan's possession were created for the purpose of sexual stimulation, the evidence did not show the minor depicted in the photographs was engaged in sexually explicit conduct. Because no rational juror could find Morgan guilty of possession of prohibited depictions, this court must accordingly reverse Morgan's conviction and remand for dismissal of the charge with prejudice.

Short of dismissal, Morgan is entitled to a new trial for two reasons. First, the trial court admitted sexually explicit photographs of nonminors in Morgan's possession to demonstrate he possessed the photographs of a nude minor for the purpose of sexual stimulation. But these additional photographs did not establish that photographs of a nude minor were taken for the purpose of the viewer's sexual stimulation and were therefore irrelevant and unduly prejudicial.

Second, the defense theorized the photographs in question were taken for a scrapbook, not sexual stimulation. However, when counsel tried to make this closing argument, the trial court opined that this theory constituted an inaccurate statement of the law and sustained the State's objection. The trial court thereby deprived Morgan of his right to present a defense and to effective counsel.

B. ASSIGNMENTS OF ERROR

1. The State's lead witness, Detective Karen Kowalchyk, was caught looking at Morgan's notes to his attorney as he wrote them during trial. The trial court erred in declining to dismiss this case with prejudice, in permitting Kowalchyk to remain at counsel table to assist the prosecutor, and in untimely instructing Kowalchyk not to communicate with another witness after Kowalchyk had already done so.

2. The trial court failed to consider the remedy for government misconduct under the appropriate standard, which requires the State to prove beyond a reasonable doubt that Morgan was not prejudiced by the detective's misconduct.

3. It was not disputed that Morgan possessed nude photographs of a female minor. But the evidence did not show the photos were taken for the purpose of the viewer's sexual stimulation. Accordingly, there was insufficient evidence that the minor in the photos was engaged in sexually explicit conduct.

4. The trial court erred in admitting exhibits 13, 13A, 17-19, 21, 23, 37-38, and 44 into evidence because this evidence was irrelevant and unduly prejudicial. That Morgan had pornographic images of adults and pictures of clothed children did not tend to demonstrate the photographs at issue were taken for the purpose of sexual stimulation.

5. The trial court erred in sustaining an objection during the defense closing when counsel argued that the photos were taken for a scrapbook, not for the purpose of sexual stimulation.

Issues Pertaining to Assignments of Error

1. When a State's detective attempts to read the defendant's notes to his attorney, does it constitute government misconduct and is the presumptive remedy dismissal with prejudice?

2. The trial court properly found there was government misconduct and properly excluded the detective's testimony. Did the court nonetheless err by allowing the detective to remain in the courtroom and to communicate with another government witness before that witness testified?

3. When the trial court does not fashion a remedy for government misconduct by placing the burden on the State to prove a lack of prejudice beyond a reasonable doubt, is remand required for the trial court to fashion a remedy under the correct standard?

4. Was the evidence insufficient to prove the photos depicted a minor engaged in sexually explicit conduct when the evidence did not show the photos were taken for the purpose of the viewer's sexual stimulation?

5. Can the sex lives and/or sexual preferences of the accused, and the person who takes nude photographs of a minor, provide sufficient evidence that such photographs were taken for the purpose of sexual stimulation of the viewer?

6. Over objection, the trial court allowed the state to admit sexually explicit images of adults, and non-sexually explicit images of children. Did the trial court err when it found that legally possessed images were relevant to the question of whether nude photos were taken for the purpose of sexual stimulation?

7. Was admission of the legally possessed images unduly prejudicial because of the potential to inflame and confuse the jury?

8. Does a trial court, in prohibiting a defense argument that photographs were taken for an innocent purpose, not for the purpose of the viewer's sexual stimulation deprive Morgan of his right to present a defense and right to effective counsel?

C. STATEMENT OF THE CASE

1. Factual background

Morgan's employer, the Boeing Company, began investigating Morgan's Internet and computer activities after it noticed Morgan was using

the Internet at work more than authorized by corporate policy. CP 118; 2RP[1] 363, 427. As part of this investigation, Boeing used monitoring software to observe Morgan's activities. CP 118; 2RP 368-69.

On April 26, 2012, a Boeing investigator monitored Morgan's phone, which was connected to Morgan's computer via the USB port as the "F" drive. The investigator noticed several photos of a nude young female child, A.S., as she showered. CP 117-18; 2RP 372-73. The investigator was alarmed and copied the F drive to preserve the images. 2RP 373.

On the same day, the investigator observed a text conversation between Morgan and his wife, Melissa Morgan. CP 118; 2RP 389. Morgan wrote, "I truly wish you shared some of the dark desires Cyndy[2] and I do." CP 118; 2RP 390. Morgan also asked Melissa, "The corruption of an innocent doesn't hold appeal to you," to which Melissa responded, "No, it doesn't. Sorry." CP 118; 2RP 390-91. Morgan proceeded to describe "shower pics" of an "[i]nnocent" he obtained off a noncommercial site on the Internet. CP 118; 2RP 391. Several hours later, Melissa wrote, "As I said, not personally good with younger than 12, but have no problems with what you two like," to which Morgan replied, "Good." 2RP 392.

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[1] This brief will cite the verbatim reports of proceedings as follows: 1RP – April 26, 2013; 2RP – October 14, 15, 16, 17, and 18, 2013; 3RP – October 18, 2013 (verdict); 4RP – December 16, 2013.

[2] "Cyndy" referred to Cynthia Ocheltree, who took the photos. She was A.S.'s grandmother and Morgan's live-in girlfriend. CP 119; 2RP 498.

On May 2, 2012, Everett Detectives Karen Kowalchyk and Aaron De Folo went to Boeing to interview Morgan regarding the photos. CP 118; 2RP 447. Morgan agreed to a recorded interview. CP 118; 2RP 448. Morgan admitted possessing photos of A.S. CP 118; Ex. 81 (audio recording of interview). Morgan would not say who sent him the photos but "identif[ied] the girl in the photographs as the granddaughter of his girlfriend," Ocheltree. CP 118. Morgan also confirmed that he, his wife Melissa, and Ocheltree were in an intimate relationship with one another. CP 118.

Detective Kowalchyk spoke to Ocheltree by telephone on May 2, 2012. CP 119. Ocheltree confirmed she took the photos. CP 119; 2RP 512. Ocheltree stated she sent the photos to Morgan to free up space on her phone and intended the photos for a Mother's Day scrapbook for A.S.'s mother. CP 119; 2RP 512, 515.

Detective De Folo also interviewed A.S., who was unaware that anyone took photos of her in the shower. CP 119; 2RP 454.

On December 21, 2012, the State charged Morgan with one count of second degree possession of depictions of a minor engaged in sexually explicit conduct pursuant to RCW 9.68A.070(2) and RCW 9.68A.011(4)(f). CP 121.

2. Pretrial proceedings

After a CrR 3.5 hearing, the trial court ruled that Morgan's statements from his interview with Kowalchyk and De Folo were admissible. CP 105; 1RP 49.

Before trial, Morgan moved to dismiss the charges pursuant to Knapstad.[3] CP 106-16. Morgan argued from several cases that the photos had to be created for the purpose of sexual stimulation and that there was no evidence Ocheltree took the photos for the purpose of the viewer's sexual stimulation. The depictions therefore did not constitute sexually explicit conduct as defined by RCW 9.68A.011(4)(f). CP 112; 1RP 7-9.

At oral argument on the Knapstad motion, the State noted the statutory definition of "sexually explicit conduct" had changed from "exhibition of the genitals or unclothed pubic or rectal areas of any minor" to "depiction of the genitals or unclothed pubic or rectal areas of any minor." 1RP 14-15. The State asserted this change in language meant the court must "start over again with respect to what does the statute mean," and could not rely on the cases cited in Morgan's Knapstad motion.[4] 2RP 13-14. The trial

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

[4] Morgan cited State v. Whipple, 144 Wn. App. 654, 183 P.3d 1105 (2008), State v. Griffith, 129 Wn. App. 482, 120 P.3d 610 (2005), State v. Grannis, 84 Wn. App. 546, 930 P.2d 327 (1997), abrogated in part by LAWS OF 2010, CH. 227, § 3(4)(f), State v. Chester, 82 Wn. App. 422, 918 P.2d 514 (1996), and State v. Myers, 82 Wn. App. 435, 918 P.2d 183 (1996), in his Knapstad motion for the

court agreed that "depiction has a different meaning." 2RP 18. The trial court also believed "the defense argument is circular, because the defense argument is that it can't be sexually explicit conduct unless it meets the definition, but then goes on to ignore the fact that the definition has been changed." 2RP 18. The trial court concluded, "if we were operating with the word, exhibition, as opposed to depiction, there would be a radically different result" and denied the Knapstad motion. 2RP 18-19. Neither the State nor the trial court made any attempt to interpret the actual language in the amended statute and rested their conclusions solely on the fact that the definition had changed.

3. Trial

The trial established facts generally conforming to the above recitation.

On the trial's second day, defense counsel caught Detective Kowalchyk looking at Morgan's legal pad as he wrote notes to defense counsel. CP 82-83. Defense counsel watched Kowalchyk's eyes scan down the page on which Morgan was writing. CP 83. Based on this misconduct, Morgan moved for dismissal. CP 80-90.

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proposition that Ocheltree had to take the photos for the sexual stimulation of the viewer for the photos to constitute "sexually explicit conduct." CP 108-12. Although one word in the statutory definition of "sexually explicit conduct" has changed, these cases continue to demonstrate the appropriate focus is on whether a depiction of a minor was created for the purpose of sexual stimulation.

The trial court heard Kowalchyk's testimony. She admitted she was looking at defense counsel's table, but claimed she was not trying to read anything and could not read the notes even had she wanted to because she was too far away. 2RP 236-38.

Defense counsel testified in response. 2RP 242-45. She said, "I observed her, to the best of my recollection, scanning the notepad. I watched her eyes move down the notepad. She was not looking at any other part of counsel table." 2RP 247. Counsel "estimate[d] that she looked at that notepad for at least three, maybe more like five or six seconds before she then looked up, saw me watching her and looked away." 2RP 247.

The State recalled Kowalchyk in rebuttal. In response to the State's question about whether there was a valid reason to observe Morgan's demeanor, Kowalchyk said, "being a police officer, I'm always looking at everybody and everything that people are doing. You know, the fact is we're sitting right next to each other. I'm the detective in the case and he's, you know, the subject in the case." 2RP 250-51.

The court was "very concerned" by Kowalchyk's conduct and found "it hard to believe that she wouldn't know she's not supposed to look at a defendant's notebook." 2RP 271. Nonetheless, the court declined to dismiss the case. 2RP 271. Instead, the court thought "an appropriate remedy would be to exclude Detective Kowalchyk from testifying in this case. So that is

my ruling." 2RP 271. However, the trial court permitted Detective Kowalchyk to remain in the courtroom to assist the deputy prosecutor. 2RP 308. The trial court also "indicate[d] . . . that Detective Kowalchyk is not to communicate about . . . the substance of this case with other folks that might be testifying." 2RP 305-06. However, Kowalchyk had already taken an opportunity to communicate with Detective De Folo, who later testified. 2RP 306, 443-61.

During trial, the court admitted several sexually explicit or nude images of adults, and images of clothed children, found on Morgan's phone. Exs. 13, 13A, 17-19, 21, 23, 37-38, 44; 2RP 105, 113, 385, 388, 404-07. Defense counsel objected, arguing they were irrelevant and unfairly prejudicial under ER 401, ER 402, and ER 403. 2RP 104-15, 285-305, 308-31. The State contended the images demonstrated that Morgan and Ocheltree were in a "sexualized relationship" and showed that Morgan stored sexually explicit images in the same place he stored the photos of A.S. 2RP 292-93, 304, 322.

After the close of the State's evidence, Morgan moved for dismissal under Green.[5] CP 64-69; 2RP 520-21. As with the Knapstad motion, Morgan argued there was no evidence Ocheltree took the photos for the purpose of sexual stimulation and therefore the photos did not portray

[5] State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979).

sexually explicit conduct. CP 68-69; 2RP 521. As with the Knapstad motion, the State asserted the 2010 amendment to RCW 9.68A.011 indicates "that that type of proof about the sender or initiator is not required." 2RP 522. The trial court ruled, "I think there's a chance that a rational trier of fact could find that she took these pictures for purposes of sexual gratification and that's why they were sent. So I will deny the Green motion." 2RP 525.

Prior to closing arguments, defense counsel said she "still intend[ed] to argue what [she] believe[d] was the correct state of the law, that [a depiction of a nude minor] has to be made for the purpose of sexual stimulation for the viewer." 2RP 545. With this understanding, defense counsel believed she should be able "to argue that [A.S.]'s unclothed depiction of her genitals was not for the purpose of the sexual stimulation of the viewer; that it was for the purpose of a scrapbook." 2RP 547. However, the prosecutor objected, claiming this was "an inaccurate statement of the law." 2RP 545. The State argued, and the trial court agreed, that whether depictions of a minor constituted sexually explicit conduct was "all from the viewer's perspective, not the initiator or the contributor . . . . or the photographer." 2RP 546.

In closing, defense counsel argued, "this is about whether or not [A.S.] was engaged in sexually explicit conduct. This about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and

that wasn't the purpose at all. The purpose was for a scrapbook." 2RP 562. The State objected to this statement as a misstatement of the law, and the trial court sustained the objection. 2RP 562.

4. Conviction, sentence, and appeal

The jury returned a verdict of guilty to the crime of "Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct." CP 40[6]; 3RP 2-3. The trial court sentenced Morgan to a seven-month sentence with the possibility of work release depending on the outcome of a sexual deviancy evaluation. CP 5-6; 4RP 16-17. The trial court also imposed a 12-month term of community custody with several conditions and $600 in legal financial obligations. CP 6, 8, 14-16; 4RP 18-19.

This timely appeal follows. CP 1.

D. ARGUMENT

1. DETECTIVE KOWALCHYK'S EGREGIOUS CONDUCT WARRANTS DISMISSAL WITH PREJUDICE

During trial, Detective Kowalchyk looked at Morgan's legal pad on which he had written notes and questions to his lawyer. This egregious government conduct presumptively prejudiced Morgan. This court should

[6] The verdict form does not indicate the possession of depictions of a minor engaged in sexually explicit conduct was in the second degree. CP 40; 3RP 1. However, the trial court only instructed the jury on the definition of sexually explicit conduct in RCW 9.68A.011(4)(f), which may only lawfully sustain a second degree conviction. CP 51; RCW 9.68A.070(2).

reverse Morgan's conviction and remand for dismissal of the charge with prejudice.

These facts are remarkably similar to those in State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998). There, the State's lead detective was caught looking at the top page of defense counsel's legal pad, which contained notes distilling communications between counsel and Granacki. Id. at 600. The trial court in Granacki, relying on State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), "noted that intrusion by the state into a defendant's privileged communications with counsel violates not only the defendant's right to effective representation by counsel, but his right to be protected against unreasonable searches and to due process of law." Granacki, 90 Wn. App. at 602. Thus, the trial court determined that "where the State intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his [or her] client, the only adequate remedy is dismissal." Id. "This is because there is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted." Id. at 603.

Despite Cory's strong language that dismissal of the prosecution should be the presumptive remedy in cases of government misconduct, the Granacki court analyzed the remedy under an abuse of discretion standard. Granacki, 90 Wn. App. at 604. Given this standard of review, the Granacki

court indicated that "the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion." Id. The court further explained, "Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony[,] and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion." Id.

Turning to Detective Kowalchyk's misconduct, it is more egregious than the conduct at issue in Granacki. Kowalchyk looked not at defense counsel's notes distilling attorney-client communications when the defendant and defense counsel were absent, but directly at the notes Morgan was writing to his lawyer as he wrote them. CP 82-83; 2RP 239-40, 247, 254. Such a direct and personal invasion of Morgan's communications with his attorney necessarily undermined any confidence that his communications would remain free of State intrusion. Moreover, rather than conceding that Kowalchyk's actions constituted misconduct as the State did in Granacki, the deputy prosecutor suggested defense counsel's motion to dismiss was "a tactic with a result in mind, that being a mistrial and all the attendant inefficiencies that are associated with that." 2RP 242. The State's attempt to shift blame for its own serious misconduct is astonishing.

Following the parties' arguments regarding the appropriate remedy, the trial court stated,

> It's extremely concerning to this court that a detective is looking over at a notebook in front of a defendant. Somebody with the experience that Detective Kowalchyk has should know that she can't look at a notebook with defendant's writing on it. And I guess I find it hard to believe that she wouldn't know she's not supposed to look at a defendant's notebook.

2RP 270-71.[7] Nonetheless, the trial court opted not to dismiss the case, but thought "an appropriate remedy would be to exclude Detective Kowalchyk from testifying in this case." 2RP 271. The trial court, however, "allow[ed] her to sit at counsel table and take notes and suggest questions based on her experience . . . ." 2RP 308. And, although the trial court prohibited Detective Kowalchyk from communicating with other witnesses about the case, it only did so after Detective Kowalchyk had already communicated with Detective De Folo, a witness who later testified. 2RP 306, 443-61.

In light of the serious misconduct, the trial court's feeble remedy was an abuse of discretion. The panel in Granacki suggested that, while dismissal was not mandatory, at a minimum the need "to isolate the prejudice resulting from such an intrusion" required exclusion of the detective from the courtroom and a timely prohibition to the detective not to discuss the case with anyone. 90 Wn. App. at 603-04. Because Detective Kowalchyk was allowed to communicate with her partner and remain in the courtroom to assist the prosecutor, the trial court failed to provide Morgan an

[7] Kowalchyk had been an Everett police officer for 25 years and a detective for more than 10 years. 1RP 22.

adequate remedy. This court should grant the only remedy that is appropriate: dismissal with prejudice.

Even if this court opts not to dismiss this prosecution, it still must remand for the trial court to consider the remedy under the appropriate standard. In cases such as these, "the State has the burden to show *beyond a reasonable doubt* that the defendant was not prejudiced." State v. Peña Fuentes, 179 Wn.2d 808, 819-20, 318 P.3d 257 (2014) (emphasis added). Because "[h]ere, the record is unclear as to what standard the trial judge applied" this court must "remand for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt." Id. at 820. If this court determines that dismissal is not required, a remand is nonetheless required.

2. THE STATE'S EVIDENCE WAS INSUFFICIENT TO SHOW THE PHOTOS CONSTITUTED SEXUALLY EXPLICIT CONDUCT

Possessing a photo of a nude minor is not a crime. Deriving sexual stimulation from such an image is not a crime either. Rather, it is a crime to possess depictions of nude minors that were created for the purpose of the viewer's sexual stimulation. The State and the trial court failed to comprehend the elements of the charged offense and there was insufficient evidence that Ocheltree took the photos for the purpose of sexual

stimulation. This court must reverse Morgan's conviction and remand for dismissal.

a. The charged offense requires the depictions to be created for the purpose of sexual stimulation

"A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g)." RCW 9.68A.070(2)(a). Under RCW 9.68A.011(4)(f), "'[s]exually explicit conduct' means actual or simulated: . . . Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer."[8] Furthermore, "[f]or the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it . . . ." RCW 9.68A.011(4)(f).

For criminal liability to attach under these statutes, a person must knowingly possess depictions of an unclothed minor's pubic or rectal areas or a female minor's breast that were created for the purpose of sexual stimulation of the viewer. That is, mere possession and mere sexual stimulation from depictions of naked minors is not enough to prove the

[8] The definition of "sexually explicit conduct" in RCW 9.68A.011(4)(g) is not at issue in this case.

charged offense. The purpose of the depictions' existence determines whether a crime has been committed.

Division Two recently reached this conclusion in State v. Powell, ___ Wn. App. ___, 326 P.3d 859, 864-65 (2014). The court considered 2010 legislative amendments that changed RCW 9.68A.011(4)(f)'s language to define "sexually explicit conduct" as a "depiction of the genitals or unclothed pubic or rectal areas of any minor" rather than as an "exhibition of the genitals or unclothed pubic or rectal areas of any minor." Powell, 326 P.3d at 864-65; compare LAWS OF 2010, ch. 227, § 3(4)(f) (codified as amended at RCW 9.68A.011(4)(f)) with former RCW 9.68A.011(3)(e) (2002). Previously, the Court of Appeals had interpreted former RCW 9.68A.011(3)(e)'s term "exhibition" as

> inanimate and without any purpose of its own. Necessarily, then, its purpose is the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence. The initiator or contributor need not be the accused or the minor whose conduct is at issue. Whoever the initiator or contributor is, however, his or her purpose must be to sexually stimulate a viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of [former] RCW 9.68A.011 (3)(e).

State v. Grannis, 84 Wn. App. 546, 549-50, 930 P.2d 327 (1997) (footnotes omitted), abrogated in part by Powell, 326 P.3d at 364, and by LAWS OF 2010, ch. 227, § 3(4)(f). The question before the Powell court was how to

interpret the legislature's replacement of the word "exhibition" with the word "depiction."

The Powell court answered this question:

> Following this amendment, RCW 9.68A.011(4)(f)'s plain meaning is that *the person who creates the depiction*, rather than the person who creates the exhibition that is depicted, *must have the 'purpose of sexual stimulation of the viewer.'* Stated another way, the creator of the 'exhibition that is depicted' is the minor or one who initiates, contributes to, or influences the minor's conduct, but the creator of the 'depiction' is the *person who creates the image*, such as a photographer.

Powell, 326 P.3d at 864-65 (emphasis added). Thus, for criminal liability to attach, the creator of the depiction must create the depiction to sexually stimulate the depiction's future viewer. Id. at 865 n.7 ("The . . . premise that the purpose of the possessor controls [is inaccurate]. To the contrary, the purpose of the depiction's creator controls."). In other words, where a photographer of a nude child does not intend the depiction to sexually stimulate anyone, the depiction does not meet the definition of sexually explicit conduct, and thus the possessor—irrespective of whether the depiction actually sexually stimulates the possessor—cannot be guilty of second degree possession of a minor engaged in sexually explicit conduct.

b. No rational juror could have found beyond a reasonable doubt that Ocheltree photographed A.S. in the nude for the purpose of sexual stimulation

A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

The State repeatedly focused on whether Morgan possessed the nude depictions of A.S. for his own sexual stimulation. But whether Morgan was stimulated is beside the point. For Morgan to be criminally liable, Ocheltree, the creator of the depiction, had to have taken the photos for the purpose of the viewer's sexual stimulation. Because the State mistakenly based its case on Morgan's alleged sexual stimulation, the State failed to put forth evidence that could convince a juror beyond a reasonable doubt that Ocheltree's creation of the depiction was for sexual stimulation.

Ocheltree's testimony shows the depictions were not created for a sexual purpose. 2RP 512. She did not take the photos to send them to

Morgan or because she thought Morgan would like them. 2RP 512. She took the photographs while she was drying her hair in the same bathroom in which A.S. showered. She and A.S. frequently got ready in the bathroom together, and she wanted the photographs for a mother-daughter scrapbook she was making for A.S.'s mother. 2RP 511-13. Ocheltree sent the photos to Morgan simply to free up more space on her phone. 2RP 512, 515. Thus, Ocheltree's testimony did not provide any evidence she took the photos for anyone's sexual stimulation.

The State theorized a juror could infer that Ocheltree must have taken the photos for the prohibited purpose because Ocheltree and Morgan were engaged in a sexual relationship. 1RP 16, 2RP 16-17, 304, 477-78. The State made its theory clear before Ocheltree's testimony: "the extent to which the relationship between Cynthia Ocheltree and Darrell Morgan is a very sexualized one, it's critical to the jury's understanding of the nature of their communications and the nature of the intent behind the pictures." 2RP 477-78. During the State's examination of Ocheltree, the State focused on the open sexual relationship between Morgan, his wife Melissa, and Ocheltree. 2RP 488-89. The State also attempted to portray sexuality and a "swinging lifestyle" as a cornerstone of Ocheltree's and Morgan's lives. 2RP 490-93. The State also questioned Ocheltree regarding several nude images of Ocheltree on Morgan's phone. 2RP 496. Thus, under the State's

logic, the nontraditional sexual relationship between Ocheltree and Morgan supported an inference that Ocheltree took nude photos of her granddaughter for Morgan's sexual stimulation.

The State's focus on Ocheltree's and Morgan's sexuality and the sexual nature of their relationship does not support a reasonable inference that Ocheltree took the photos for the purpose of sexual stimulation. Were it otherwise, courts would allow any juror to infer that a mother who shows her partner a photo of their naked child in the bathtub does so for the partner's sexual stimulation simply because they have a sexual relationship. Contrary to the State's suggestion at trial, the fact that two or more persons have sex with each other (or with several other people) does not support a reasonable inference that everything they do is "sexualized" or must be motivated by sexual stimulation.

More problematic, the State's focus on Ocheltree's and Morgan's polyamorous sexual relationships suggests the State believes a juror could reasonably find that anyone outside the state's view of the "sexual mainstream" is more likely to be criminally liable for possessing photos of a minor's genitals, pubic or rectal areas, or breast. The government cannot rely on a person's private, perfectly legal, yet perhaps unconventional sex life to support an inference that the person is more likely to commit sex offenses. Such misdirected arguments echo the all too recent experiences of

State-sanctioned homophobic oppression. The State's proposed inference is both meritless and offensive and this court should reject it.

Aside from evidence of Ocheltree's and Morgan's relationship, the remaining circumstantial evidence is an April 26, 2012 instant message (IM) conversation between Morgan and his wife Melissa. Charles Roberts, a forensic examiner at Boeing who discovered the IM string, recited this conversation to the jury. 2RP 390-93. The first portion of the conversation, beginning at 8:17 a.m., consisted of Morgan stating, "I truly wish you shared some of the dark desires Cyndy[9] and I do." 2RP 390. The conversation then turned to "[t]he corruption of an innocent" and Morgan explaining he had "[s]hower pics" that Melissa would not appreciate. 2RP 391. However, Morgan expressly stated to Melissa that he obtained these "[s]hower pics" from a private Internet group, and there was no indication that the picture to which Morgan referred depicted a minor. 2RP 391-92. Thus, without speculation, it is impossible to infer that Morgan was referring to the photographs of A.S. in the shower.

Similarly, at noon on April 26, 2012, Melissa wrote, "As I said, not personally good with younger than 12, but have no problems with what you two like," to which Morgan replied, "Good." 2RP 392-93. While an inference from this evidence might be drawn that Morgan liked children

[9] Cynthia Ocheltree goes by the name Cyndy.

"younger than 12," it is speculation to conclude that Melissa was referring to Ocheltree in an IM conversation that took place nearly four hours later. Thus, even if the jury could infer from Melissa's statement that Morgan was sexually attracted to children younger than 12, the same cannot be said of Ocheltree. And, even if Melissa was referencing Ocheltree's attraction to children younger than 12, there is still nothing on which to base a reasonable inference that Ocheltree took the photos of A.S. for the purpose of sexual stimulation. See Vasquez, 178 Wn.2d at 17 (even assuming that defendant must have used forged documents to obtain employment, there was no evidence that defendant used the specific documents seized by officers to do so). Without anything to connect Melissa's statements to the specific photos of A.S., any inference that Ocheltree's purpose of taking the photographs of A.S. was for sexual stimulation would constitute pure speculation, not reasonable inference. Id. at 16.

The State presented insufficient evidence that Ocheltree took nude photos of A.S. for the purpose of sexual stimulation. The State's focus on whether Morgan was actually sexually stimulated by the photographs was not what it needed to prove. The state's effort to infer criminal liability from speculation or nontraditional but noncriminal sexual relationships is meritless. Accordingly, this court must reverse Morgan's conviction and remand with instructions to dismiss the charge with prejudice.

3. EVIDENCE THAT MORGAN POSSESSED NUDE IMAGES OF ADULTS WAS IRRELEVANT AND UNDULY PREJUDICIAL

The trial court admitted sexually explicit or nude images of adults and images of clothed children found on Morgan's phone. Exs. 13, 13A, 17-19, 21, 23, 37-38, 44; 2RP 105, 113, 385, 388, 404-07. Defense counsel objected to the admission of these images as irrelevant and prejudicial under ER 401, ER 402, and ER 403, and the exhibits were subject to lengthy argument at trial. 2RP 104-15, 285-305, 308-31. As discussed above, the State asserted these images were relevant because they demonstrated that Morgan and Ocheltree were in a "sexualized relationship" and showed that Morgan electronically stored sexually explicit images in the same place as the photos of A.S., suggesting that Morgan was sexually stimulated by the images of A.S. 2RP 292-93, 304, 322.

Because Morgan's sexual proclivities did not tend to demonstrate that Ocheltree took the photos for the purpose of sexual stimulation, the admitted images were irrelevant. "'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is admissible, but evidence that is not relevant is not admissible. ER 402. The fact that was of consequence was whether Ocheltree took the photos for the purpose of the

viewer's sexual stimulation. The fact that Morgan might have possessed other clothed pictures of children, images of nude adults, and naked photos of Ocheltree simply does not have any tendency to demonstrate Ocheltree's purpose in taking photos of A.S. was sexual stimulation. Accordingly, these images were irrelevant and should not have been admitted.

Given the State's and the trial court's confusion about the meaning of sexually explicit conduct, the images the trial court admitted were also unduly prejudicial. ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Even assuming for the sake of argument the images' relevance, the risk of prejudice and confusion posed by other photographs in Morgan's possession was extremely high. The State, introducing these images, encouraged the jury not to determine whether Ocheltree took the photos to sexually stimulate the viewer, but to sit in judgment of Morgan for possession of unrelated sexually explicit materials. Thus, the admission of this evidence unduly prejudiced Morgan, was inadmissible, and should have been rejected.

When, as here, trial courts admit evidence in error, on review the error is prejudicial if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Because

the admission of other sexually explicit images encouraged the jury to render a verdict based on Morgan's sexual interests and his sexual relationship with Ocheltree rather than on Ocheltree's purpose in taking the photographs of A.S., it is likely that the jury would have reached a different conclusion had the trial court not admitted this evidence. Throughout trial, the State's mistaken theory of this case was that Morgan possessed the images of A.S. for his own sexual gratification. But, as discussed, whether Morgan was sexually stimulated by the depictions of A.S. or by any other depictions, is not the basis for criminal liability under RCW 9.68A.070(2). Unfortunately though, the trial court suggested to the jury that Morgan's sexual stimulation was germane to Morgan's guilt by admitting the irrelevant and prejudicial evidence. This error undoubtedly materially affected the outcome of trial. This court must accordingly reverse.

4. THE TRIAL COURT'S ERRONEOUS VIEW OF THE LAW DEPRIVED MORGAN OF HIS RIGHTS TO PRESENT A DEFENSE AND TO COUNSEL

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The defendant, "though counsel, ha[s] a right to be heard in summation of the evidence from the point of view most favorable to

him." Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); State v. Woolfolk, 95 Wn. App. 541, 449-50, 977 P.2d 1 (1999).

Prior to closing argument, defense counsel wished to clarify that she could argue from the to-convict instruction "what [she] believe[d] was the correct state of the law, that [a depiction] has to be made for the purpose of sexual stimulation for the viewer." 2RP 545.[10] Defense counsel raised this issue "to clarify right now if that's going to draw and objection from the State and whether or not the Court will sustain that." 2RP 545. Defense counsel also made clear that the way she read the to-convict instruction

> is that the genitals of the unclothed minor are for the purposes of sexual stimulation of the viewer, which I believe would allow me to argue that [A.S.]'s unclothed depiction of her genitals was not for the purpose of the sexual stimulation of the viewer; that it was for the purpose of a scrapbook.

2RP 547. In response to the defense arguments, the State indicated "the record would establish that any argument in that nature would be an inaccurate statement of the law and therefore, [it] would object." 2RP 545. The trial court agreed with the State that the proposed defense argument was not an accurate statement of the law. 2RP 545-46. The trial court once again wholly adopted the State's erroneous view of the law that "it's all from the

[10] The defense proposed its own jury instruction that the depiction's creator must have the purpose of sexual stimulation of the viewer, which the trial court refused to give. CP 70-71; 2RP 534-35, 539. However, the trial court's jury instructions, standing alone, adequately indicated the State bore the burden to prove beyond a reasonable doubt that the depictions were for the purpose of sexual stimulation of the viewer. CP 50-51.

viewer's perspective, not the initiator or the contributor . . . . or the photographer." 2RP 546.

During closing arguments, defense counsel asserted, "this is about whether or not [A.S.] was engaged in sexually explicit conduct. This is about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and that wasn't the purpose at all. The purpose was for a scrapbook." 2RP 562. The court sustained the state's objection that this was a "[m]isstatement of the law." 2RP 562.

The trial court clearly erred. See Powell, 326 P.3d at 864-65. Morgan's defense was that the depictions of A.S. were not made for the purpose of sexual stimulation. From this, Morgan could legitimately argue that the depiction did not constitute sexually explicit conduct under RCW 9.68A.011(4)(f) and that he therefore could not be guilty of the charged offense. RCW 9.68A.070(2).

This defense was supported by Ocheltree's testimony that she had not photographed A.S. for a sexual purpose but had intended to use the photos to make a grandmother-mother-daughter scrapbook. 2RP 512-13. Because the trial court wrongly insisted that Ocheltree's purpose was inconsequential and that Morgan could be criminally liable merely by deriving sexual stimulation from the images, the trial court deprived Morgan of his right to present a summation of the evidence most favorable to him.

Cf. Herring, 422 U.S. at 864; Woolfolk, 95 Wn. App. at 550. Moreover, given that the trial court sustained the State's objection, the jury was left with no choice but to conclude that Ocheltree's purpose in photographing A.S. did not matter and that it could convict Morgan based only on evidence of his own sexual stimulation. See State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (noting erroneous failure to sustain objection lent court's imprimatur to State's remarks).

At the State's insistence, the trial court employed a completely erroneous understanding of the law to deprive Morgan of his primary defense. Because this defense was substantial and went to the very elements the State had to prove, the State cannot show the error is harmless beyond a reasonable doubt. See Woolfolk, 95 Wn. App. at 551. This court must reverse.

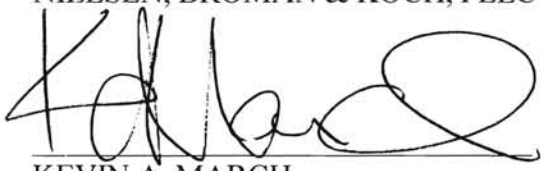
E. CONCLUSION

This court should reverse Morgan's convictions and dismiss this case with prejudice given the egregious government misconduct and the insufficiency of the evidence. Alternatively, this court should remand for retrial given the trial court's errors in admitting irrelevant and unfairly prejudicial evidence and in depriving Morgan of presenting his theory of the case to the jury.

DATED this 11th day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71298-5-I
	)	
DARRELL MORGAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] DARRELL MORGAN
C/O OF SNOHOMISH COUNTY SHERIFF'S CORRECTION FACILITY
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EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JULY 2014.

X Patrick Mayovsky