71298-5

71298-5

NO. 71298-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARRELL L. MORGAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was sufficient evidence presented to support the jury finding beyond a reasonable doubt that the nude depictions of a female minor found in defendant's possession where taken for the purpose of sexual stimulation?

2. Were sexually explicit and nude images of adults and images of clothed children found on defendant's phone at the time of the offense properly admitted under the Rules of Evidence?

3. Was the trial court's decisions to exclude the detective's testimony, allow her to remain at counsel table, and prohibit her from discussing the case with other witnesses an abuse of discretion?

4. Was defendant denied the right to effective assistance of counsel and the right to present a defense by the trial court sustaining a State's objection during defense closing argument?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

In April of 2012 the Boeing Company began an internal investigation regarding improper computer use by an employee, Darrell Lewis Morgan, defendant. Every time Boeing employees

log onto their work computers they are advised that the computer is the property of the Boeing Company, can only be used for authorized purposes and that the employees have no right to privacy regarding their use of the company computer. Boeing Forensic Examiner, Charles Roberts, installed software on defendant's work computer to monitor his use of instant messaging, email, and web activity. The software takes a snapshot every six seconds of what defendant is viewing on his work computer screen. When viewing the screen shots of defendant's computer for April 26, 2012, Roberts observed numerous thumbnail images of adult pornography. Among those images Roberts also observed several nude images of a young female child showering. Roberts determined that the images were on a portable device that defendant had connected to his work computer. Roberts made a copy of the portable drive. RP[1] 363-381, 383-387, 424-425.

The screen shots for April 26, 2012, showed the following instant messaging session between defendant and Melissa Morgan:

At 8:17 a.m.,

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[1] RP designates the continuously paginated Verbatim Report of Proceedings for October 14—18, 2013. Other Verbatim Reports of Proceedings are indicated by inclusion of the date, e.g., RP (12/16/13).

Defendant wrote: "I truly wish you shared some of the dark desires Cyndy[2] and I do."

Melissa replied: "I don't interact with her and it feels like she sometimes thinks she is above us even to me." She continued: "I do for some."

Defendant replied: "Yes, some."

At 8:18 a.m.,

Defendant continued: "The corruption of an innocent doesn't hold appeal to you?"

Melissa replied: "No, it doesn't." She continued: "Sorry."

At 8:19 a.m.,

Defendant wrote: "Kinda felt like you were trying to throw me under the bus about the pics on my phone."

Melissa asked: "May I look at your pics today? I truly couldn't see what they were!"

At 8:20 a.m.,

Defendant replied: "Okay, but you're not going to appreciate." He continued: "Just saying."

Melissa replied: "Okay."

Defendant wrote: "Shower pics."

Melissa asked: "Of?"

At 8:21 a.m.,

Defendant replied: "Innocent."

Melissa wrote: "Okay." And asked: "Off Internet?

Defendant replied: "Yes."

Melissa wrote: "Sir, you need to be careful of that!"

Defendant replied: "I know."

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[2] Cynthia Ocheltree goes by Cyndy.

At 8:22 a.m.,

Defendant continued: "If I had not be (sic) referred to there by someone I trust." He continued: "And it is a noncommercial site."

At 8:23 a.m.,

Defendant continued: "Private group."

Melissa replied: "Ah." And continued: "We can discuss later."

Defendant replied: "But very, very careful."

Melissa wrote: "Might be better to put images to CD?"

At 8:24 a.m.,

Defendant replied: "Agreed."

At 8:25 a.m.,

Melissa wrote: "And clean `puter."

Defendant replied: "Not on puter."

At 8:26 a.m.,

Defendant continued: "Straight to phone."

Melissa replied: "Still linked to email."

Defendant replied: "Yes."

Exhibits 13A, 66; RP 389-392.

After the above instant messaging session, defendant selected the five of the nude images of the young female child showering from the Messaging/Stuff folder on his phone and moved those images to a new folder he named "iNC" in the Lifestyle file on his phone. Defendant received the nude images of the young female child from Cynthia Ocheltree. Exhibit 13A; RP 393-403, 421-422, 510-512.

Further viewing of the screen shots for April 26, 2012, showed the following instant messaging session between defendant and Melissa Morgan: At 12:00 p.m., Melissa wrote: "As I said, not personally good with younger than 12, but have no problems with what you two like." Defendant replied: "Good." Exhibit 13A; RP 392-393.

Defendant, his wife Melissa and Cynthia Ocheltree had an open sexual relationship, the three of them lived together in what they termed a swingers lifestyle. Ocheltree would send pictures, including sexual pictures of herself, to defendant. The images of the nude female child showering found on defendant's phone were taken by Ocheltree of her granddaughter AS. AS was born in 2003. RP 168, 184-185, 487-496.

B. PROCEDURAL HISTORY.

On December 21, 2012, defendant was charged with second degree Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct. CP 117-122.

On April 26, 2013, the court heard defendant's motion to dismiss and a CrR 3.5 motion regarding the admissibility of defendant's statements. The court denied the motion to dismiss

and found that defendant's statements were admissible. RP (4/26/13) 2-54.

On October 14 through 18, 2013, the case proceeded to trial. At the conclusion of trial the jury found defendant guilty as charged. CP 40; RP 2-581; RP (10/18/13) 1-4.

On December 16, 2013, defendant was sentenced. Defendant timely appealed. CP 1-17; RP (12/16/13) 2-25.

III. ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

Defendant argues the evidence was insufficient to support his conviction for second degree possession of depictions of a minor engaged in sexually explicit conduct; specifically, that no rational finder of fact could find that Ocheltree photographed AS for the purpose of sexual stimulation. Brief of Appellant 17-25.

1. Legal Standard.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

2. Possession Of Depictions Of A Minor Engaged In Sexually Explicit Conduct.

RCW 9.68A.070(2)(a) states:

> 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).[3]

Here, it is uncontested that defendant had nude pictures of AS on his phone. The pictures depict the unclothed pubic area and unclothed breasts of AS when she was ten year old or younger. Roberts observed defendant move nude pictures of AS from the "Messing/Stuff" folder to a new file defendant created and labeled "iNC" in the "Messaging/Lifestyle folder on his phone. EX 1-8; RP 104, 167, 194, 205, 372-374, 380-381, 395-403, 498-501. Clearly, defendant knew the nude pictures of AS were on his phone.

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

RCW 9.68A.011(4) provides the definition for seven categories of sexually explicit conduct. The definition applicable in the present case is:

> 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. For 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). "The plain meaning of this language shows that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge." State v. Powell, 181 Wn. App. 716, ____, 326 P.3d 859, 865 (2014) review denied, ____ Wn.2d ____, ____ P.3d ____, 2014 WL 5094194 (Wash. Oct. 8, 2014). The nude pictures of AS on defendant's phone were taken by Ocheltree while AS was showering. AS did not know that Ocheltree was photographing her naked in the shower. Ocheltree did not ask permission to take pictures of AS in the shower. Ocheltree did not ask permission to send the pictures to defendant. EX 1-8; RP 172, 180, 204-205, 207, 220, 500-502.

Further, the statute requires that the photographer must have the "purpose of sexual stimulation of the viewer" when

creating the depiction of the minor. Powell, 326 P.3d at 865. Here, Ocheltree took the nude pictures of AS and sent those pictures to defendant. Ocheltree was involved in an open sexual relationship with defendant and had previously sent sexual pictures of herself to defendant. Defendant stored the nude images of AS on his phone in a file with other sexual images. RP 496-497, 510-512. Viewing the facts and all reasonable inferences from those facts in the light most favorable to the State, supports the conclusion that Ocheltree's purpose in creating the nude images of AS showering was the sexual stimulation of defendant.

3. A Rational Trier Of Fact Could Find The Essential Elements Of The Crime Beyond A Reasonable Doubt.

Based on the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that, on or about April 26, 2012, defendant knowingly possessed 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. Sufficient evidence was presented to show all the elements of second degree possession of depictions of a minor engaged in sexually explicit conduct.

B. OTHER PHOTOGRAPHS DEFENDANT POSSESSED ON HIS PHONE AT THE TIME OF THE OFFENSE WERE PROPERLY ADMITTED UNDER THE RULES OF EVIDENCE.

Defendant claims that the trial court improperly admitted sexually explicit or nude images of adults and images of clothed children found on defendant's phone, citing exhibits 13, 13A, 17-19, 21, 23, 37-38, and 44. Defendant fails to acknowledge that exhibits 19 and 44 were admitted without objection from defense. RP 105, 113, 201, 323, 388, 404. Because defendant waived any objection to the admission of exhibits 19 and 44 it unnecessary for the court to address the question of their admissibility. State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983); State v. Rice, 24 Wn. App. 562, 564, 603 P.2d 835 (1979). Defendant's challenge is based on the Rules of Evidence. He does not claim a "manifest error affecting a constitutional right." RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 98-105, 217 P.3d 756 (2009).

Defendant argues that the exhibits were irrelevant to the elements of the crime charged and was therefore irrelevant at trial. Brief of Appellant 3, 26-28. However, the record shows that the trial court properly determined the evidence was relevant and probative, and that its probative value outweighed its prejudicial effect.

1. Evidence Rules 401, 402 And 403.

Admissibility of evidence generally is within the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001). The trial court has wide discretion in determining whether evidence concerning a criminal defendant's constitutionally protected behavior is relevant and admissible. State v. Kendrick, 47 Wn. App. 620, 626-628, 736 P.2d 1079 (1987). The trial court's decision will not be reversed absent an abuse of discretion, which occurs only when no reasonable person would take the view adopted by the trial court. Atsbeha, 142 Wn.2d at 913.

Evidence is relevant when it has "any tendency to make the existence of any 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. In addition, a fact bearing on the credibility or probative value of other evidence is relevant. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). Relevant evidence need only make the existence or nonexistence of a material fact "more or less likely." ER 401; State v. Israel, 113 Wn. App. 243, 267, 54 P.3d 1218 (2002). Relevant evidence is generally admissible. ER 402. The trial court is generally the proper court to weigh the relevance

of evidence. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007). "Once a court has determined that evidence is relevant, the court must weigh any prejudice the evidence will have against its probative effect." ER 403; State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982); Israel, 113 Wn. App. at 268.

In the present case, over 12,000 images were found on defendant's phone. RP 411. The State selected a few of the images.[4] The parties discussed the admission of those images at length with the trial court. The trial court ruled that sixteen of the State's fifty-five proposed exhibits containing images from defendant's phone were inadmissible.[5] CP ___ (sub# 49, List of Exhibits Filed); RP 104-115, 200-207, 280-305, 310-331, 429-430, 464-467, 469-486, 507-509. The trial court clearly considered the relevance of the exhibits and weighed any potential prejudice against the exhibits probative effect.

Exhibit 13 was an illustrative exhibit used during Roberts testimony to explain what was on defendant's computer while he

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[4] The State had eighty-four items marked as exhibits. Fifty-five of those marked exhibits contained images from defendant's phone. Exhibits 13 and 13A contained "screen shots" of defendant's computer captured by Boeing security with thumbnail images from defendant phone. The other fifty-three exhibits contained single images from defendant's phone.

[5] The State did not offer eight of the proposed exhibits.

instant messaging with Melissa.[6] This evidence was relevant to explain Roberts' investigation and what images defendant was viewing. RP 384-386, 402-403. Exhibit 13A was substituted for exhibit 13 to remove duplications. RP 294-295, 329-331, 507-510. Defendant's viewing the nude images of AS and moving those images to a new folder in his lifestyle file showed both defendant's knowledge that he possessed the images and that the purpose of the images was his sexual stimulation. RP 292-296, 551-557.

Exhibit 17 is a non-nude image of an adult woman in a shower. RP 108-111, 403-404. Exhibits 13A and 17 were relevant to defendant's instant messaging with Melissa and necessary to put defendant's explanation regarding the messaging in context. When Detectives Kowalchyk and De Folo asked about this conversation defendant claimed he and Melissa were just chatting. Defendant was asked what he meant by "the corruption of innocence doesn't hold appeal to you?" He said it meant nothing in particular. When the detectives pointed out that the screen shots showed that he was looking at the nude images of AS when he made the statement, defendant replied, "Right, but there's no intent, there's

[6] Exhibit 13 did not go to the jury. Exhibit 13A was substituted for the illustrative exhibit 13. RP 280, 385, 508-509.

no malicious anything, it was just a general conversation and yeah, my phone was probably plugged in at the time. Defendant did not want to say who sent him the nude images of AS because he was worried they would get in trouble, but claimed that Melissa knew absolutely nothing about the nude images of AS. The detectives asked defendant about the part of the instant messaging conversation where he and Melissa are talking about shower pics:

> So what pictures were those? What do you say, "Okay, but you're not going to appreciate, just saying." You say, "Okay." You say, "Shower pics of ..." and you said, "Innocent." What was that a reference to?

Defendant replied that they were different pictures with a person who was not a minor. Defendant claimed that he used the term "innocent" for a virgin, and that the shower pictures were of an underdeveloped adult male. Defendant claimed that he and Melissa were talking about Melissa's interest in younger looking men. The detectives asked why defendant said, "Okay, but you're not going to appreciate, just saying." Defendant claimed that they were discussing totally different pictures of him in a shower with another woman. CP ___, (sub# 58, Transcript of Exhibit 80) at 16-18, 22-25, 28-38; EX 81. The evidence of what defendant was looking at while messaging with Melissa and the picture of a

woman in a shower are relevant because they bear on the probative value of defendant's explanation.

Exhibit 18 is a non-nude image of an adult woman with young girl sitting on her lap. The young girl is touching the woman's breast with a caption, "Someday Suzie. Someday." This image shows defendant's predilection to images portraying children in sexual situations. RP 108-111, 404. Exhibit 21 is a non-nude image of four young girls. This image shows defendant's predilection to images portraying young girls. RP 105-108, 404-405. The evidence that defendant had these images on his phone is relevant because it bears on the probative value of the nude images of AS that defendant had on his phone.

Exhibit 37 is an image of a nude woman kneeling of a bed found in the Kat folder in the lifestyle file on defendant's phone. Exhibit 38 is an image of a non-nude woman in lingerie kneeling found in the Polly folder in the lifestyle file on defendant's phone. Defendant had three folders, Kat, Polly, and iNC, for three people who held a special places in the Lifestyle section of his phone. He stored the nude images of AS in the iNC folder. Exhibits 37 and 38 were relevant to the significance defendant gave to these images. RP 292-293, 296, 322-323, 401-403, 406-407, 553-554, 556-557.

The evidence that defendant had three designated folders in the lifestyle file on his phone for images of specific females is relevant because it bears on the probative value on the purpose of Ocheltree taking and sending the images of AS to defendant.

Exhibit 19 is a photograph of AS that Ocheltree sent to defendant. It was admitted without defendant's objection. RP 105, 201, 304, 404, 495. Exhibit 23 is a non-nude image of Cynthia and Tim Ocheltree. It was offered for the jury to put a face to names that had been testified about. RP 202, 309. Exhibit 44 is a non-nude image of defendant, Melissa, Ocheltree, and another woman with a snowmobile. It was admitted without defendant's objection. RP 113, 323, 388.

Facts tending to establish a party's theory of the case are generally found to be relevant. Rice, 48 Wn. App. at 11-12. The State's theory was that the nude images of AS were part of the "dark desires" defendant and Ocheltree shared involving the corruption of an innocent. RP 550-551. The record shows that the trial court satisfied the balancing test of ER 403, weighing the probative value against the prejudice, and concluded that the exhibits were more probative than prejudicial. ER 403; Saltarelli, 98 Wn.2d at 361. It is not an abuse of discretion when the trial

court correctly interprets the rules of evidence. State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012); Foxhoven, 161 Wn.2d at 174. The trial court did not abuse its discretion in admitting exhibits 13, 13A, 17-19, 21, 23, 37-38, and 44.

C. EXCLUDING DETECTIVE KOWALCHYK'S TESTIMONY, ALLOWING HER TO REMAIN AT COUNSEL TABLE, AND PROHIBITING HER FROM DISCUSSING THE CASE WITH OTHER WITNESSES WERE NOT AN ABUSE OF DISCRETION.

Defendant claims that the trial court erred by (1) declining to dismiss the case for egregious misconduct, (2) allowing the State's managing witness to remain at counsel table, and (3) untimely instructing the managing witness to not communicate with other witnesses. Brief of Appellant 3, 13-17.

1. There Was No Finding Of Egregious Conduct Prejudicial To Defendant.

Here, when the matter of Detective Kowalchyk's conduct was brought to the court's attention, the court conducted a hearing taking testimony from Detective Kowalchyk and defense counsel regarding what happened. The prosecutor requested the court

review defendant's notes in camera to determine the legibility and content.[7] Defendant objected and the court denied the State's motion.[8] RP 250-257. The court found: (1) the courtroom setup presents difficulties where both defense and prosecution sit at the same table with no separation; (2) defense counsel chose to sit at the left end of the table with defendant on her right next to the prosecution; (3) Detective Kowalchyk was looking at the defense end of the table for a few seconds when there was a note pad in front of defendant; (4) defense counsel believed that Detective Kowalchyk was scanning the note pad in front of defendant; (5) Detective Kowalchyk was unable to read anything on the note pad; and (6) both Detective Kowalchyk and defense counsel were credible. Since the court was unable to conclude that Detective Kowalchyk read anything on the note pad, it denied defendant's motion to dismiss. Applying Granacki, the court excluded Detective

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[7] In Cory the trial court ordered that the tapes in question be played for the defendant and his counsel, and directed that the prosecutor also hear the recordings. State v. Cory, 62 Wn.2d 371, 372, 382 P.2d 1019 (1963); see also, CrR 4.7(h)(6).

[8] After the court denied defendant's motion to dismiss, but excluded Detective Kowalchyk's testimony, the prosecutor requested that the note pad be preserved under seal, even if was not review by the court. The court granted the motion. Defense counsel said that she would make photo copies for her file and provide defendant's notes to the court that afternoon. The following day defense counsel informed the court that she was going through defendant's notes trying to determine which page was on top during the incident based on content not her personal knowledge. The notes were provided at the end of the day after closing argument. RP 274-276, 439-440, 505-506, 572-574.

Kowalchyk from testifying at trial. The court based its ruling on the fact that Detective Kowalchyk looked at the note pad, not on her having intercepted the actual content. RP 269-270, 275-276.

The cases cited by defendant all involved actual interception of communications. In State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), jail officers eavesdropped on conversations between the defendant and his attorney. In State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), a police detective intentionally read a legal pad containing privileged notes between the defendant and his attorney. In State v. Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), the police detective eavesdropped on attorney-client conversations after the trial was complete and the jury had found the defendant guilty. Defendant's reliance on these cases is misplaced because the facts here do not involve obtaining actual attorney-client communications. State v. Athan, 160 Wn.2d 354, 369-370, 158 P.3d 27 (2007). The trial court's determination that Detective Kowalchyk was credible defeats defendant's claims of purposeful intrusion and presumed prejudice. Credibility determinations are not reviewable on appeal. In re Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004).

On this record, there was no way for the trial court to know what was on the note pad in front of defendant at the moment Detective Kowalchyk looked over at the table. The matter was not brought to the court's attention when it happened. Rather, defense counsel waited until the next morning to bring the matter to the court's attention. Further, the court denied the prosecutor's request for an in camera review of defendant's notes to determine the legibility and content. Based on its evaluation of all the circumstances, including Detective Kowalchyk's credibility, the trial court found that Detective Kowalchyk's conduct was not egregious. The court did not find that Detective Kowalchyk's conduct prejudiced a constitutional right of defendant. The court's sanction, excluded Detective Kowalchyk's from testifying and prohibited her from discussing the substance of case with anyone, was not an abuse of its discretion. Granacki, 90 Wn. App. at 604.

Misconduct does not require dismissal absent actual prejudice to the defendant. Granacki, 90 Wn. App. at 604; State v. Koerber, 85 Wn. App. 1, 3-4, 931 P.2d 904 (1996). The Court has expressly rejected a per se prejudice rule. State v. Fuentes, 179 Wn.2d 808, 819, 318 P.3d 257 (2014); Weatherford v. Bursey, 429 U.S. 545, 557–558, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (holding

that when an eavesdropper did not communicate the topic of the overheard conversations and thereby create "at least a realistic possibility of injury to [the defendant] or benefit to the State, there can be no Sixth Amendment violation."). While eavesdropping on attorney-client conversations is an egregious violation of a defendant's constitutional rights and cannot be permitted, where there is no possibility of prejudice to the defendant the extreme remedy of dismissing the charges is not required. Fuentes, 179 Wn.2d at 819. Prejudice cannot adhere when there is no nexus between official misconduct and a right of the accused. State v. Baker, 78 Wn.2d 327, 333, 474 P.2d 254 (1970). It is within the trial court discretion to impose a lesser sanction. Granacki, 90 Wn. App. at 604.

2. Allowing The State's Managing Witness To Remain At Counsel Table Was Not An Abuse Of Discretion.

The prosecutor informed the court that the State could proceed without Detective Kowalchyk's testimony, and would have Detective De Folo testify instead. However, Detective De Folo had been out sick and the prosecutor did not know when he would be available. Detective Kowalchyk contacted Detective De Folo and learned that he was still sick and not available that day, but that he

thought he could be available the next day. Defense counsel inquired about whether Detective Kowalchyk could remain at counsel table. The court allowed Detective Kowalchyk to remain at counsel table to assist the prosecutor during trial. When asked, defense did not have any desire to change the seating arrangements. On the last day of trial Detective De Folo was substituted as the State managing witness without objection. RP 268-269, 271-273, 277-278, 305-306, 355-356, 430.

3. The Court Timely Instructed Detective Kowalchyk To Not Discuss The Substance Of The Case With Other Witnesses.

After excluding Detective Kowalchyk from testifying, the court directed that she was to not communicate with any other witness regarding the substance of the case. Additionally, at the start of trial, the court granted defendant's motion in limine that all witnesses be instructed to not discuss the substance of their testimony with other witnesses. RP 40-41. The court found that Detective Kowalchyk's calling Detective De Folo to inquire about his availability did not concern the substance of any testimony. RP 305-306.

The trial court's decisions to exclude Detective Kowalchyk's testimony, allow her to remain at counsel table, and to prohibit her

from discussing the case with other witnesses were not an abuse of discretion.

D. DEFENDANT WAS NOT DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL OR TO PRESENT A DEFENSE DURING CLOSING ARGUMENT NOR WAS HE PROHIBITED FROM ARGUING THE NUDE IMAGES OF AS WERE TAKEN FOR AN INNOCENT PURPOSE.

Defendant argues that by sustaining a State's objection during defense closing argument, the trial court (1) denied him the right to effective assistance of counsel by denying him the right to present a defense, and (2) prohibited defense counsel from arguing that Ocheltree took the nude photographs of AS for an innocent purpose. Brief of Appellant 5, 28-31.

1. Defendant Has Not Shown Ineffective Assistance of Counsel.

To demonstrate ineffective assistance of counsel, defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced petitioner, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987)

(applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Here, defendant complaint is that the court's conduct in sustaining the State's objection precluded defense counsel from providing competent representation. The hallmark an ineffective assistance of counsel is that the claim must be based on the substandard performance of the criminal defendant's attorney, not on the actions of third parties. State v. Greiff, 141 Wn.2d 910, 925, 10 P.3d 390 (2000). Defendant cites no authority to support his argument that ineffective assistance of counsel can be based on acts of the court. Appellate courts generally will not consider arguments that are unsupported by pertinent authority or meaningful analysis. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficient argument); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority); RAP 10.3(a)(6).

Additionally, defendant simply presumes prejudice, he has not shown that but for counsel's performance it is reasonably probable that the result would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's performance. Therefore, petitioner has not demonstrated ineffective assistance of counsel.

2. Defendant Was Allowed To Argue That The Photographs Of AS Were Taken For An Innocent Purpose.

Defendant proposed three jury instructions dealing with the definition of sexually explicit conduct. CP 71, 75, 76; RP 529-536, 539-543. The court included one of those in its instructions to the jury. CP 51 (Instruction No. 8, WPIC 49A.09). Defense counsel asked the court for clarification regarding Instruction No. 8 stating her intention to argue that the depiction must be made for the purpose of sexual stimulation of the viewer. The court responded that counsel was permitted to make that argument. RP 545-547.

During closing argument defense counsel said:

> [T]his is about whether or not [AS] 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.

The State's objection was sustained. Defense counsel continued:

> This was a misunderstanding based on the other images that were on Mr. Morgan's phone. He may not have used the best judgment that day in plugging his phone into his computer, but he certainly did not commit a crime. Those pictures certainly do not contain sexually explicit conduct, and that why I'm asking you to find him not guilty.

The prosecutor's rebuttal closing argument began with the statement:

> The reason that objection was sustained is because the definition of sexually explicit conduct does not require you to find what [AS] was thinking about these pictures. In fact, you've heard testimony that she didn't even know they were taken.

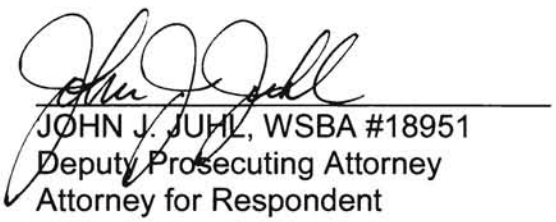
CP 562-563. The record shows the court correctly sustained the objection to defendant's argument that the jury focus on what AS was thinking or doing when the photographs were taken. RCW 9.68A.011(4)(f) clearly states that "it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it." The record also shows that defendant argued the nude pictures of AS were taken for a scrapbook, not for the sexual stimulation of the viewer.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on October 29, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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