72407-0

72407-0

No. 72407-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEITH KAYSER,

Appellant.

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

The Honorable Marybeth Dingledy

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Court of Appeals Decisions

United States Constitutional Provisions

Rules

Journals and Treatises

Other Authorities

A. ASSIGNMENTS OF ERROR

1. The admission of images of so-called "child erotica", browsing history, and internet search terms violated Kayser's rights under the First Amendment.

2. The admission of images of so-called "child erotica", browsing history, and internet search terms under a "doctrine of chances" theory, allegedly to prove the element of knowledge, violated ER 404(b) and prevented Kayser from receiving a fair trial, contrary to the Fourteenth Amendment of the United States Constitution.

3. Contrary to Kayser's Sixth Amendment right to present a defense, the trial court erred in refusing to issue the defense-proposed instruction which stated:

> The First Amendment to the United States Constitution protects possession of material depicting a person who "appears to be" "a minor engaging in sexually explicit conduct."

CP 86.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The First Amendment protects an individual's right to access, view, and possess pornographic materials. The First Amendment also protects against government regulation of a person's private thoughts, however repugnant those thoughts may be to society at large. In Kayser's

prosecution for possession of depictions of minors engaged in sexually explicit conduct, the State was permitted to introduce evidence of internet search terms, website names, and so-called "child erotica" which it contended were indicative of a prurient interest in minors, and therefore of guilty knowledge. Where the admission of the evidence had the effect of burdening Kayser's right to free speech, did its use to aid in his criminal prosecution violate his First Amendment rights?

2. ER 404(b) categorically bans the admission of evidence of the defendant's other bad acts to prove his propensity to commit the charged offenses. The trial court found that evidence of internet search terms, browsing history, and so-called "child erotica" was relevant to prove "knowledge." But the court's reasoning was predicated on a theory of admissibility called the "doctrine of chances." The "doctrine of chances" has never been embraced in Washington because it allows juries to consider evidence purely as proof of the defendant's propensity to commit the charged offense. Did the admission of the evidence violate ER 404(b)?

3. Even if evidence is relevant, it must be excluded under ER 404(b) and ER 403 if its probative value is substantially outweighed by its prejudicial effect. Whether Kayser is sexually interested in minors was not an element of the charged offenses. Where the contested evidence

created this highly prejudicial inference, did its prejudicial value substantially outweigh its probative effect?

4. The erroneous admission of evidence may violate an accused person's Fourteenth Amendment right to a fair trial. Evidence of internet search terms, website names, and so-called "child erotica" should have been excluded under the First Amendment and ER 404(b). Where the State's proof that Kayser knowingly possessed the sexually explicit images at issue was equivocal, did the admission of the evidence violate his right to a fair trial?

5. An accused persons's right to have the jury instructed on his theory of defense is protected by the Sixth and Fourteenth Amendments. The court refused to issue a defense-proposed instruction that would have informed the jury of Kayser's First Amendment right to possess images of what appear to be minors engaged in sexually-explicit conduct and helped to dispel the prejudicial taint from the admission of these types of images at trial. Did the court's refusal to give the instruction deny Kayser his right to a defense?

C. STATEMENT OF THE CASE

On May 31, 2014, Microsoft became aware that one of its users was utilizing a Microsoft account to upload four images that were

suspected to be child pornography. RP (6/24/14) 57.[1] The information came from a specific internet protocol (IP) address. Id. at 58. Microsoft reported the information and provided the images of suspected child pornography to the National Center for Missing and Exploited Children (NCMEC), as they were required to do by law. Id. at 56. NCMEC determined that the activity originated in Everett, and relayed the information to the Everett Police Department. Id. at 57-58.

Detective Karen Kowalchyk conducted an investigation and ultimately obtained a search warrant for the home of appellant Keith Kayser. The search warrant was executed on September 8, 2011. Id. at 59-71.

In September 2011, Kayser was sharing an apartment at 629 Casino Road, in Everett, with four other people: his ex-girlfriend, Katherine Parish, Rick Webster, Twyla Jones, and a man named Scott. Id. at 115. Kayser and Parish had moved in a couple of months earlier; before then, they shared a place at 1209 Everett Avenue, where they did not live with other people. Id. at 121.

Pursuant to the search warrant, police seized a Toshiba laptop, an iPod, a CD, and a thumb drive, as well as other miscellaneous computer parts that were later determined to be inoperable and/or did not contain

[1] The verbatim report of proceedings is referenced herein by date followed by page number, e.g., RP (6/24/14) 57.

information relevant to the investigation. RP (6/25/14) 13, 49-50, 54, 84, 103. The materials were forensically processed by Everett detective Chris Roberts.

Roberts found three password-protected accounts on the laptop: TNT, Katie, and a Guest account. Id. at 112. An email address, ticktock64@live.com, associated with the name "Keith Edwards,"[2] had been used on May 31, 2011 to upload twenty to thirty photographs, including the four photographs that initially were detected by Microsoft and sent to NCMEC. Id. at 143. All four of the photographs that were sent to NCMEC were found on Kayser's computer. Id. at 144. Additional images that Roberts believed to be child pornography were also found during the forensic examination of the seized materials.

Kayser cooperated with law enforcement and agreed to participate in a recorded interview with Kowalchyk. RP (6/24/14) 72; RP (6/26/14) 123. In the interview, Kayser admitted to a prurient interest in teenage girls, but insisted that when he viewed pornography, he was careful to ensure that the subjects of the materials he viewed were eighteen or older. Ex. 32 at 26, 31.[3] He was unaware that any of the persons whose photographs he viewed could be minors because the websites he visited

---

[2] Kayser's middle name is Edward.

[3] State's Exhibit 32 is a transcript of Kayser's interview with Kowalchyk.

contained disclaimers stating that their models were over the age of eighteen. Id. at 36-37.

The State prosecuted Kayser by amended information for two counts of possession of depictions of minors engaged in sexually explicit conduct in the first degree, and one count of possession of depictions of minors engaged in sexually explicit conduct in the second degree. CP 135-36. A Snohomish County jury convicted him as charged, and he was sentenced to high-end standard-range concurrent indeterminate sentences of 102 to 120 months of incarceration. RP (8/21/14) 13; CP 24-25, 42-44. This appeal follows. CP 2-18.

D. ARGUMENT

1. **The admission of legal erotica and internet search terms, where those searches were not connected to any act of acquiring possession of depictions of minors engaged in sexually-explicit conduct, impermissibly infringed upon Kayser's First Amendment rights.**

a. Over Kayser's objection, the trial court admitted evidence of legal erotica, internet search terms, and website names.

Pretrial, Kayser moved to prohibit the State from introducing evidence of sexually-suggestive internet search terms and websites accessed from the Toshiba laptop. RP (6/23/14) 37, 43-44. He noted that at trial, the State would not be able to present testimony that the search

terms were connected with any of the items suspected to be child pornography. Id. at 82.[4] Kayser also moved to exclude so-called "child erotica"—i.e., images of minors that some viewers might find sexually provocative, but that did not involve sexually explicit conduct. Id. at 41. He noted that the conduct itself was not illegal, and asserted its admission would violate his First Amendment right. Id. at 41, 82.

In response, the State pointed out that some of the searches were connected with the password-protected account believed to be associated with Kayser. Id. at 83. The State contended the images were relevant to prove "knowledge." Id. at 42, 100. The trial court ruled that certain search terms that the court believed denoted a specific interest in finding images of minors, for example those that contained the word, "preteen," were relevant to the case, as were some of the images of "child erotica." Id. at 85, 100. The images were admitted as Exhibit 33. RP (6/27/14) 8, 33, 36.

At trial, Roberts testified about forensic "bookmarks" that had been created by the software he used to analyze the seized items. RP (6/25/14) 105. He testified that some search terms were associated with the guest profile on the Toshiba laptop, and some with the TNT profile. Id. at 159. From the guest account, he was able to find evidence of

[4] This was an accurate statement: at trial, Roberts admitted that he did not attempt to figure out where any of the bookmarked images came from. RP (6/26/15) 103.

searches for "underage Lolita", "CP kids", "pussy photos of preteen asian girls", "Lolita Russian porno," "preteen Lolita", "pissing kinder porn", "pedo parent directory", "child porn pics", and "little kid porn." Id. at 172-173, 176. Exhibits showing the bookmarks and similar internet search terms were admitted at trial. See e.g. Ex. 10, Bookmarks 100, 103, 104, 105, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 145.

Roberts also testified about forensic bookmarks from internet "cookies" on Kayser's computer that showed someone using the guest account had accessed websites including: young-nude-celebrities.com; cutennteens.com, nudeyounggirls.net, and sexyyoungporn.com. RP (6/25/14) 171-72. From the unallocated space on the computer, he found a "cookie" for user TNT under bangmeharddaddy.com. Id. at 171.

On cross-examination, Roberts admitted that he did not know if any of the search terms produced sexually explicit images of minors, or what photographs, if any, were downloaded from the sites of the cookies and fragments found in the unallocated space on the computer. RP (6/26/14) 100-01, 103.

b. The First Amendment right to free exchange of ideas protects an individual's right to access, view, and possess pornographic images.

The First Amendment right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969); U.S. Const. amend. I. The protections of the First Amendment take on particular force in the context of an individual's possession of printed or filmed matter in the privacy of his own home. Id. "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Id. at 566.

There are a few narrow categories of speech that states may proscribe without running afoul of the First Amendment. Pornography produced with real children is one such category. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). Specifically, any First Amendment interest that an individual may have in such materials is *de minimis*, and outweighed by the State's interest in protecting the victims of child pornography. Osborne v. Ohio, 495 U.S. 103, 109, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). The *prospect* of crime, however, does not justify the suppression of *protected* speech, even where society may find that speech offensive. Ashcroft, 535 U.S. at 246

at 245. Laws that burden or suppress protected speech contradict basic First Amendment principles. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 812, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

c. Where the State failed to show a factual nexus between Kayser's internet searches and the possession of suspected child pornography, the admission of the internet search terms and website names burdened Kayser's First Amendment rights.

Even though Kayser was prosecuted for only three criminal counts of possessing sexually explicit depictions of minors, at trial, the State was permitted to introduce pornographic website names, images of so-called "child erotica", and dozens of highly prejudicial internet search terms that would likely be offensive to the average juror. The theory of admission was that they denoted an interest in finding images of minors, even though the State did not prove that any of the searches resulted in the downloading of the images the State suspected to be child pornography.

No matter how offensive others may find this conduct, it is not illegal for an individual to have sexually explicit thoughts about minors, to view simulated sexually graphic images of minors, to collect provocative but not sexually explicit photographs of minors, or to look for legal pornography that purports to depict minors engaged in sexually explicit conduct. Ashcroft, 535 U.S. at 251-53.

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

Id. at 253.

Kayser's thoughts and fantasies, however worthy of social opprobrium they may be, are protected by the First Amendment. In the absence of evidence that the searches actually produced sexually explicit images of minors, the admission of the internet search terms and website titles was tantamount to punishing Kayser for his thoughts. Stated differently, the price that Kayser paid for having sexual thoughts about minors was to have those thoughts used against him in a criminal trial. The admission of the evidence thus impermissibly burdened Kayser's First Amendment rights. The evidence should have been excluded.

2. **The admission of the evidence under the so-called "doctrine of chances", allegedly to prove knowledge, violated ER 404(b).**

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The purpose of the rule is to prevent the jury from concluding that the defendant is a "criminal type" and therefore likely to have committed the crime charged. State v.

Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). The potential for prejudice from admitting "other acts" evidence is "at its highest" in sex offense cases. State v. Slocum, 183 Wn. App. 438, 442, 333 P.3d 541 (2014) (citing Gresham, 173 Wn.2d at 433).

Before a court may admit evidence of a person's prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the non-propensity purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an essential ingredient of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Where the danger of undue prejudice outweighs the evidence's probative value, then it must be excluded. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

a. The evidence was offered to prove propensity.

Below, the State relied on a New Hampshire federal district court case to argue the contested evidence was admissible to prove the knowledge element of the charged offenses. RP (6/23/14) 38. In that case, United States v. Tanguay, 982 F.Supp.2d 119 (Dist. N.H. 2013), the Government was allowed to introduce (1) stories graphically describing sexual encounters between children and adults; (2) sexually suggestive but not necessarily pornographic photographs of children; (3) pornographic

photographs of an eighteen-year-old witness; and (4) forensic bookmarks to websites suggestive of sexually explicit material. Id. at 120-23. The theory of admissibility was grounded in the so-called "doctrine of chances." Id. at 122-23.

As explained by Tegland, under the "doctrine of chances,"

> evidence of prior crimes or misconduct is admissible on essentially a probability theory. The rule is based on the belief that the odds against an innocent person being repeatedly involved in similar suspicious circumstances increase with each incident. At some point of recurrence, the similar repeated acts can no longer be viewed as coincidental and become evidence of the crime charged.

Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice §404.30 (5th ed.) (2007).[5] This explanation makes it plain that the so-called "doctrine of chances" operates purely as a doctrine of propensity.

The district court in Tanguay attempted to differentiate its invocation of the "doctrine of chances" from ER 404(b)'s bar on propensity evidence. The court averred that the "probative value emanates from the law of probabilities" and "the commonsense assumption that, under certain circumstances, the facts of the uncharged and charged

[5] Tegland notes that although Washington courts have referenced the doctrine, in these cases other acts evidence has been found admissible under established exceptions to ER 404(b). See e.g. State v. Lough, 70 Wn. App. 302, 321-23, 853 P.2d 920 (1993), aff'd, 125 Wn.2d 827 (1995). The Washington Supreme Court has more recently suggested that the "doctrine of chances" may not provide a basis for admitting other acts evidence independent of ER 404(b). State v. Norlin, 134 Wn.2d 570, 580, 951 P.2d 1131 (1998).

incidents make an innocent state of mind highly unlikely." Tanguay, 982 F. Supp.2d at 122 (citations omitted). But this Court has rejected precisely this rationale:

> Repetition and commonality of features, until a threshold of improbability is reached, are irrelevant, for they may be based on coincidence or they may tend to establish only propensity—the forbidden inference by which a defendant may be deprived of his or her right to a fair trial.

State v. Lough, 70 Wn. App. 302, 322, 853 P.2d 920, 931 (1993) aff'd, 125 Wn. 2d 847 (1995). This Court should conclude that the "doctrine of chances" violates ER 404(b)'s bar on propensity evidence.

Here, the evidence was offered to show that Kayser had a *propensity* to search for and collect *legal* images of minors, and therefore that he was more likely to know that he possessed *illegal* images of minors in the charged incidents. No nexus was shown between the internet search terms, browsing history, and so-called "child erotica" and the sexually explicit images of minors that were the subject of the prosecution, except that they were found on the same devices. The State's expert did not try to source any of the images to particular websites or internet searches, although he conceded that software existed to enable this type of investigation. RP (6/26/14) 101-03.[6]

[6] The defense expert testified that it would be possible create a timeline, using the date and time that various searches occurred, to determine what activity took place

The defense presented evidence that the websites Kayser visited contained disclaimer statements declaring compliance with federal regulations requiring models be over the age of eighteen. See e.g. RP (6/26/14) 25, 33, 35, 76. The defense expert testified that if a website asserts that its photographs are legal to view or possess, then people viewing the site will so assume. Id. at 76. However a jury presented with evidence of Kayser's prurient interest in very young women would be likely to gloss over the lack of a nexus between the charged crimes and the ER 404(b) evidence and convict him simply based on his propensity to engage in similar conduct.

b. *Tanguay* is irrelevant because in that case, the court employed a different test to determine admissibility than Washington courts use to apply ER 404(b).

As noted, in Washington, before a court may admit evidence of other acts under ER 404(b), it must find the evidence satisfies a three-part test. Thang, 145 Wn.2d at 642. The analysis is obligatory and must be conducted on the record. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The Tanguay court used a different, two-part test. See Tanguay, 982 F.Supp.2d at 121. In that test, the court first determines if the proffered evidence has some "special" probative value. Id. (citing United

---

and who may have been at the keyboard, but neither she nor Roberts engaged in this process. RP (6/26/14) 40.

States v. Aguilar-Aranceta, 58 F.3d 796, 798 (1st Cir. 1995)). Evidence is "specially relevant" if it is probative of some non-propensity purpose under Fed. R. Evid. 404(b). Id. If the judge is satisfied that the evidence has "special relevance," then the focus shifts to whether its probative value is substantially outweighed by the danger of unfair prejudice, under Fed. R. Evid. 403. Id.

This test is less demanding than Washington's standard. In Washington, the court must first find the other acts have been proven by a preponderance. Foxhoven, 161 Wn.2d at 175. Then in *addition* to identifying a non-propensity purpose for the evidence, the court must find evidence of other acts "is *relevant* and *necessary* to prove an *essential ingredient* of the crime charged." Saltarelli, 98 Wn.2d at 362 (emphasis added). Only if the court makes this threshold determination does the court reach the third step.

The Tanguay court justified admission of the evidence under a doctrine that has never been embraced in Washington, and used a lesser standard to determine admissibility. The reasoning in that case therefore is irrelevant here.

c. Even if the evidence was relevant for a non-propensity purpose, its prejudicial effect outweighed its probative value.

Even if this Court determines that the evidence had some minimal relevance, its probative value was far outweighed by the potential for unfair prejudice. Washington courts recognize that the danger of unfair prejudice from other acts evidence is highest in sex cases. Gresham, 173 Wn.2d at 433; Slocum, 183 Wn. App. at 442. "'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.'" State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300, 307 (1950) (quoting Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933)); ER 403.

The jury was deluged with dozens—if not hundreds—of search terms, pornographic website names, and images. If nothing else, this evidence showed that Kayser had a singular preoccupation with pornography in general that many jurors might find unseemly. But this was not all that the evidence showed. The evidence strongly suggested that Kayser was sexually attracted to minors, which was not an element of the crimes charged. The jurors were likely to find this inference so distasteful that they overlooked deficiencies in the State's proof. This Court should conclude the evidence should have been excluded because

any minimal relevance was substantially outweighed by the evidence's prejudicial effect.

d. The admission of the evidence denied Kayser a fair trial and requires reversal of his conviction.

The erroneous admission of highly prejudicial evidence may deny an accused person his right to a fair trial protected by the due process clause of the Fourteenth Amendment. Dawson v Delaware, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). Kayser engaged in First-Amendment-protected activity of searching for and viewing pornography and collecting sexually provocative but not explicit images of minors. This activity was not shown to result in the acquisition of any of the images that were the subject of the charged offenses.

The actual images that the State relied upon to prove Kayser's guilt were relatively few in number. A number of these images were found in the unallocated space on Kayser's computer. RP (6/26/14) 42, 108. Others were in temporary internet files, meaning that they had been automatically cached. Id. at 30-31. Other images had been deleted. Id. at 15-16, 42, 46-47. Although the State was able to correlate some of the images to various password-protected accounts on the computer, the State could not show who used the accounts when the images were downloaded. RP (6/26/14) 87, 110. The sheer accumulation of the highly prejudicial

evidence of internet search terms, website names, and "child erotica" was likely to overwhelm the jury and prevent a fair determination of the facts. The admission of the evidence denied Kayser his right to a fair trial. This Court should reverse Kayser's conviction and remand with direction to exclude the evidence.

3. **The trial court denied Kayser his Sixth Amendment right to present a defense when it refused to instruct the jury regarding his First Amendment right to possess simulated images of minors.**

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 638, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). This right is grounded in both the Sixth Amendment and the due process clause of the Fourteenth Amendment. Id.

The right to a defense includes the right to have the jury instructed on the defense theory of the case. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287, 293 (2010). Thus, "the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by evidence." Id. (emphasis in original).

a. Kayser's proposed jury instruction was necessary to his defense.

Kayser requested the jury be instructed:

> The First Amendment to the United States Constitution protects possession of material depicting a person who "appears to be" "a minor engaging in sexually explicit conduct."

CP 86.

This proposed instruction would have served two important purposes. First, it would have reminded the jurors that they could not convict Kayser unless they were satisfied beyond a reasonable doubt that the persons depicted in the images at issue were in fact minors. Second, it would have diffused some of the extreme prejudice occasioned by the admission of the internet search terms, website names, and "child erotica."

The trial court ruled that the proposed instruction was not a "proper instruction" and on this basis declined to give it. RP (6/27/14) 26. The ruling was erroneous.

The defense proposed instruction was consistent with the holding in Ashcroft. Additionally, it filled a gap in the limiting instruction that was given with regard to the "child erotica" in Exhibit 33. The limiting instruction issued by the court stated:

> Certain evidence has been admitted in this case for only a limited purpose. Exhibit 33 may be considered by you only for the purpose of determining knowledge. You may not

> consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 70.

In Tanguay, the court issued a limiting instruction that was far more specific and prescriptive with regard to the risk of unfair prejudice. The district court instructed the jury

> that they could not use the evidence of "stories with sexual themes, bookmarks to websites, and photographs in a folder labeled 'Jared' ... against the defendant because you disapprove of such items, or as a basis to conclude that the defendant is the kind of person who is more likely to unlawfully possess child pornography."

Tanguay, 982 F. Supp. 2d at 127.

Like the instruction in Tanguay, the defense-proposed instruction in this case would have similarly informed the jury that however distasteful they might find the collected images in Exhibit 33, the internet search terms, and the browsing history, they could not use them against Kayser because his right to collect them was protected by the First Amendment. The refusal to give the instruction violated Kayser's right to a defense.

b. The constitutional error in denying the instruction was prejudicial.

The State bears the burden of proving a constitutional error was harmless. A constitutional error will require reversal unless the court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285, 1292 (1996); Chapman v. California, 386 U.S. 18, 25, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

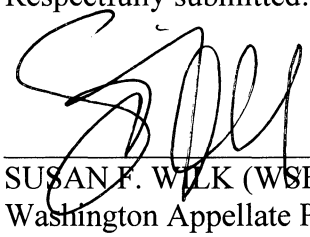
The admission of the evidence of internet search terms, website names, and "child erotica," resulted in a substantial and pervasive taint to the fairness of the proceedings. If this evidence was properly admitted, then Kayser should have been entitled to inform the jury of his First Amendment right to neutralize the taint and argue his defense theory. Because the State's evidence otherwise was not compelling, the error in refusing the instruction was prejudicial. Kayser's convictions should be reversed, and this matter remanded for a new trial.

E. CONCLUSION

This Court should conclude that evidentiary errors denied Kayser his Fourteenth Amendment right to a fair trial, and that the failure to give the jury his proposed instruction violated his Sixth and Fourteenth Amendment right to a defense. Kayser is entitled to a new trial.

DATED this 10th day of March, 2015.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72407-0-I
	)	
	)	
KEITH KAYSER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	KEITH KAYSER 755600 MCC-WASHINGTON STATE REFORMATORY PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF MARCH, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711