Supreme Court No. 93193-3
COA No. 72407-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH EDWARD KAYSER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Keith Edward Kayser requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Kayser, No. 72407-0-I, filed April 25, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision to admit evidence of internet search terms and browsing history found on Kayser's computer, which suggested he had a prurient interest in minors, where there was no factual nexus between the evidence and Kayser's possession of child pornography?

2. Did the Court of Appeals err in concluding the erroneous admission of evidence of "child erotica" on Kayser's computer was harmless error?

3. The trial 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 appeared 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 of Appeals err in affirming the trial court's refusal to give the instruction?

C. STATEMENT OF THE CASE

Microsoft became aware that one of its users utilized a Microsoft account to upload four images of suspected child pornography. RP (6/24/14) 57. Microsoft reported the information and provided the images to the National Center for Missing and Exploited Children (NCMEC), as they were required to do by law. Id. at 56. NCMEC determined 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 Keith Kayser. The search warrant was executed. Id. at 59-71.

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 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,"[1] had been used 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. He was unaware that any of the persons whose photographs he viewed could be minors because the websites he visited contained disclaimers stating their models were over the age of eighteen. Id. at 36-37.

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[1] Kayser's middle name is Edward.

Kayser was charged and convicted of 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 24-25, 42-44, 135-36; RP (8/21/14) 13.

The Court of Appeals affirmed. The court held admission of evidence of internet search terms and browsing history was not erroneous because it was relevant to rebut Kayser's claim that he unknowingly accessed forbidden images on his computer. Slip Op. at 4. The Court of Appeals agreed with Kayser that admission of evidence of "child erotica" was erroneous because the probative value of the evidence was outweighed by its prejudicial effect, but held admission of the evidence was harmless. Slip Op. at 7. Finally, the Court of Appeals held the trial court did not err in refusing Kayser's proposed instruction regarding the First Amendment. Slip Op. at 9.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The admission of legal erotica and internet search terms, where those searches were not connected to any act of acquiring 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. 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. The trial court ruled that certain search terms 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 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 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 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). The *prospect* of crime, however, does not justify the suppression of *protected* speech, even where society may find that speech offensive. Id. 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 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. Admission of the evidence 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.

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). This explanation makes it plain that the so-called "doctrine of chances" operates purely as a doctrine of propensity.

Here, the evidence was offered to show 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.

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

Even if 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.

c. *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 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.

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 Court of Appeals affirmed. Slip Op. at 9. But the trial court's 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.

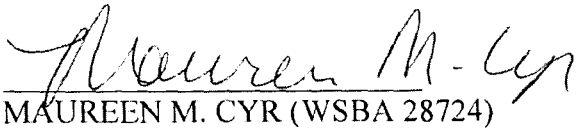
The State bears the burden of proving a constitutional error was harmless. A constitutional error will require reversal unless the court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285, 1292 (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. This Court should grant review and reverse.

E. CONCLUSION

This Court should grant review because evidence found on Kayser's computer of internet search terms and browsing history, and images of "child erotica" was erroneously admitted, in violation of ER 404(b). In addition, the trial court's decision to deny his requested instruction denied his constitutional right to present a defense.

Respectfully submitted this 24th day of May, 2016.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE of WASHINGTON, Respondent, v. KEITH E. KAYSER, Appellant.	)	No. 72407-0-I DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2016

TRICKEY, J. — Evidence of a defendant's prior bad acts is admissible to prove the defendant's knowledge. Here, the State charged Keith Kayser with possession of child pornography. Kayser claimed that he did not know the people in the child pornography were actually minors. The court admitted evidence from a forensic analysis of Kayser's computer, which showed that Kayser had viewed photographs of child erotica and that his Internet search terms and browsing history were suggestive of child pornography. We conclude that Kayser's Internet search terms and browsing history were relevant to prove his knowledge. We also conclude that admitting the child erotica was harmless error. Because Kayser's other contentions are without merit, we affirm.

FACTS

The Everett Police Department received a cyber-tip from the National Center for Missing and Exploited Children (NCMEC) that someone, identified by an e-mail address and Internet Protocol (IP) address, had uploaded four images suspected to be depictions of minors engaged in sexually explicit conduct. The police traced the IP address and e-mail address to Kayser and obtained a warrant to search his home for evidence associated with possessing child pornography.

The Everett Police Department's Special Assault Unit executed the search warrant on September 8, 2011. In addition to numerous other items, the police seized a Toshiba laptop computer, a USB thumb drive that was plugged into the laptop computer, an iPod, and a compact disc.

A forensic analysis of those four items revealed that each contained suspected child pornography, including the four images that prompted the investigation. Additionally, the laptop computer and other items contained many images of minors, or suspected minors, that were sexually suggestive but not sexually explicit. We, like the trial court and the parties, refer to these images as child erotica. The analysis also uncovered Internet search terms and browsing history that were suggestive of child pornography. The analyst labeled each image, website visited, and string of searches as a numbered "bookmark."[1]

The State charged Kayser with two counts of possession of depictions of a minor engaged in sexually explicit conduct (child pornography) in the first degree, and one count of possession of child pornography in the second degree. The offense requires that the defendant "knowingly" possess the child pornography. RCW 9.68A.070(1)(a).

The case proceeded to a jury trial. At trial, the court admitted a limited number of the bookmarks that contained child erotica, Internet search terms, and browsing history.

The jury convicted Kayser on all counts. Kayser appeals.

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[1] Report of Proceedings (RP) (June 25, 2014) at 104-06.

ANALYSIS

Admission of Evidence of Other Acts

Kayser argues that the court improperly admitted evidence of his Internet search terms and browsing history and photographs of child erotica under ER 404(b). Specifically, he contends that the trial court relied on a theory that is akin to propensity, applied the wrong standard for determining admissibility, and unreasonably weighed the prejudicial effect of the evidence versus its probative value. We disagree with all of these arguments.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . knowledge." ER 404(b). Before admitting evidence of other wrongs, the trial court must

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element 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).

We review evidentiary decisions for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds or reasons. Thang, 145 Wn.2d at 642.

Here, the trial court admitted several of the bookmarks found on Kayser's laptop computer. It admitted Google and Bing search history, browsing history, and photographs of child erotica. The search terms included "child porn," "nude

girls preteen," "naked young girls on beach," "little girls give daddy hand job," and "forbidben pornb [sic]."[2] The websites visited included "nudeyounggirls.net," "sexyyoungporn.com," and "bangmeharddaddy.com."[3] The child erotica was primarily images of teen or preteen girls posing suggestively, wearing nothing or only their underwear.

The trial court concluded that this evidence was relevant to Kayser's knowledge. And it determined that the probative value of the evidence "[s]ubstantially outweighed" the danger of unfair prejudice.[4] The court limited the number of child erotica images admitted and excluded Internet search terms that did not suggest a search for child pornography.

Internet Search Terms and Browsing History

The trial court did not abuse its discretion when it admitted the Internet search terms and browsing history. This evidence was relevant to prove Kayser's knowledge that the child pornography was on his computer. Kayser presented evidence at trial that he did not know the images were on his computer.[5] His expert testified that Kayser's computer could have automatically downloaded some of the images into temporary files without his knowledge. Given Kayser's defense, his Internet search terms and browsing history were relevant to rebut his claim that he unwittingly accessed these images.

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[2] Exhibit (Ex.) 10 at 103-04.
[3] Ex. 10 at 74, 75, and 77.
[4] RP (June 23, 2014) at 75.
[5] Kayser ultimately focused his defense on the idea that he did not know the minors in the child pornography were really minors, but presented evidence to support a claim that someone else had been looking at child pornography on his computer and refused to concede that he "knew these photos or anything were on his computer." RP (Jun. 23, 2014) at 71.

Kayser also filed a "Notice of Defense" before trial, informing the State that he would argue that he had no reason to know the individuals in the images were actually minors.[6] To support that argument, Kayser's expert testified that some of the child pornography websites from which Kayser viewed the child pornography contained statements claiming that the sites complied with federal law, meaning that the images depicted only adults.

Kayser's Internet search terms and browsing history suggests that he did not limit his search to sites with these legal compliance statements. Instead, his search terms demonstrate that he was seeking all types of child pornography. Thus, Kayser's Internet search terms and browsing history were also relevant to rebut the defense that he did not know that that the child pornography he possessed depicted real minors.

Moreover, as the trial court properly concluded, the probative value of this evidence outweighed its prejudicial effect. Kayser argues that the sheer volume of admitted prejudicial bookmarks was overwhelming and likely to prevent the jury from fairly determining the facts. But the court already lessened the prejudicial effect of the evidence by excluding irrelevant Internet search terms and browsing history.

Kayser argues that because there was no evidence that he obtained any of the child pornography from any of the admitted websites or through any of the admitted searches, his Internet search terms and browsing history are irrelevant to his knowledge that those specific images were truly child pornography. Instead,

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[6] CP at 149 (capitalization omitted).

he argues, the real purpose of the evidence was to show his propensity to view child pornography. But Kayser's search terms and browsing history show that he was searching for child pornography. Even absent evidence tying this activity directly to specific images, the evidence is relevant to his knowledge that he possessed child pornography.

Kayser bases his next two arguments on the fact that the State offered, and the court considered, the case United States v. Tanguay, 982 F. Supp. 2d 119, 122 (Dist. N.H. 2013). First, Kayser contends that the court here, like the court in Tanguay, relied on a theory of admissibility known as "the doctrine of chances." 982 F. Supp.2d at 122. Kayser alleges this would have been improper because that doctrine "operates purely as a doctrine of propensity."[7] But there is no evidence in this record that the trial court relied on the doctrine of chances.[8] Accordingly, we reject this argument.

Second, Kayser argues that, because the court considered Tanguay, it admitted the evidence under a less demanding test followed in that case. We disagree. The court explicitly identified the purpose of the evidence and decided that its probative value outweighed the prejudicial effect. In short, the record shows that the court considered all the factors in Thang.

Child Erotica

In contrast to the Internet search terms and browsing history, we conclude that the probative value of the child erotica is outweighed by its prejudicial effect.

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[7] Br. of Appellant at 13.

[8] The State cited to a case that relied on the doctrine of chances several times during the pretrial motions. But neither the State nor the trial court ever mentioned the doctrine of chances. RP (Jun. 23, 2014) at 38, 74, and 81.

In its brief to this court, the State argued that all three categories of this evidence (child erotica, search terms, and browsing history) were relevant to knowledge because "'[i]f [Kayser] is going out and looking for it, he clearly has knowledge that he's possessing it as well.'"[9] This argument does not apply to possessing child erotica. At oral argument, the State suggested the images of child erotica were relevant to Kayser's knowledge that the images were of real minors because they showed his familiarity with this subject. The probative value of evidence that Kayser should have known what children look like is low. It does not outweigh the risk of prejudice. Admitting the child erotica for the purpose of proving knowledge was error. But it was harmless error.

A non-constitutional evidentiary error is harmless "if the evidence is of minor significance compared to the overall evidence." State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). We reverse only when there is a reasonable probability that the outcome of the trial would have been materially different without the improperly admitted evidence. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, there is not a reasonable probability that the outcome of the trial would have been different if the child erotica had been excluded, given the nature of Kayser's defense and the evidence presented at trial. Kayser admitted his sexual attraction to underage females as part of his defense that he thought he possessed sexually explicit images of adults *appearing* to be children.

Therefore, showing the jury Kayser's legal images of underage females was

[9] Br. of Resp't at 14 (quoting RP (June 23, 2014) at 35).

not overly prejudicial because it was consistent with his defense. Moreover, the trial court reduced the impact of the child erotica by limiting the number of images the State presented to the jury and instructing the jury to consider the images only to evaluate Kayser's knowledge. Finally, the evidence of Kayser's guilt was compelling. Kayser admitted, during questioning by the police, to having viewed child pornography on the laptop computer he owned. He acknowledged that the websites he visited, despite advertising that everyone pictured is over 18 years old, might have some images of real minors.

In short, the trial court did not err in admitting evidence of Kayser's Internet search terms and browsing history, and the error in admitting child erotica was harmless.

Kayser also argues that admission of all this evidence burdens his First Amendment rights because the evidence implicates constitutionally protected behavior. He is mistaken. The search terms, browsing history, and child erotica may be evidence of constitutionally protected behavior, but admission of this evidence does not transform this evidentiary claim into a constitutional one. When evidence is otherwise admissible, the constitutional implications of the evidence do not prohibit its use. State v. Hoffman, 116 Wn.2d 51, 92, 804 P.2d 577 (1991); see also State v. Luther, 157 Wn.2d 63, 75-76, 134 P.3d 205 (2006) (holding that admission of sexually suggestive images, possessed by the defendant, was permissible because it was relevant to the defendant's intent to attempt to possess child pornography).

Jury Instruction

Kayser contends the court abused its discretion by refusing to give his proposed jury instruction on the First Amendment. He asserts that the court's refusal denied him the opportunity to present a defense. Because Kayser's instruction misstated the law and because Kayser was able to argue his theory of the case without it, we disagree.

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). But, "[a] trial court is not required to give an instruction which is erroneous in any respect." Hoffman, 116 Wn.2d at 110-11 (footnotes omitted). When presented with an erroneous instruction, "[i]t is not incumbent upon the trial court to rewrite an incorrect statement of the law." State v. Camp, 67 Wn.2d 363, 369, 407 P.2d 824 (1965).

We review a trial court's refusal to give a jury instruction for an abuse of discretion. State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136, review denied, 335 P.3d 940 (2014).

Kayser's requested instruction reads, "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.'"[10] The court

[10] CP at 80 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)).

rejected it as not "a proper instruction."[11]

Contrary to Kayser's claim, his instruction was not an accurate statement of the holding in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). As written, the proposed instruction claims First Amendment protections for *all* depictions that appear to include minors engaged in sexually explicit conduct, including depictions that *are* minors engaged in sexually explicit conduct. Ashcroft sanctions possession only of depictions that appear to be of minors, but are *not actually* depictions of minors. 535 U.S. at 241. Thus, Kayser's instruction misstated the law.

Kayser compares the rejection of his instruction to the trial court's rejection of a defendant's instruction in Koch. 157 Wn. App. at 35. There, the trial court refused to instruct the jury on the defendant's theory of the case because it believed that the proposed instruction was an incomplete statement of a complex area of the law. Koch, 157 Wn. App. at 35. The Court of Appeals disagreed, holding that the "proposed instruction was sufficiently complete and as correct as possible." Koch, 157 Wn. App. at 35. Kayser's instruction, on the other hand, was not correct.

Kayser also claims he needed this instruction to argue his theory of the case. But Kayser forcefully argued his theory of the case under the instructions given. Defense counsel began closing argument with a quote from Noam Chomsky about freedom of speech and then explained to the jury: "It's not illegal to possess pictures that may look like they're minors if they're not actually

[11] RP (June 27, 2014) at 26.

minors."[12]

Finally, Kayser argues that the jury instruction was necessary to reduce the potential for prejudice created by the admission of Kayser's Internet history and child erotica. He compares his instruction to the one used in Tanguay. There, the instruction identified specific evidence admitted under ER 404(b) and advised jury members they were not to use that evidence against the defendant because they disapproved of the evidence 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. In contrast, Kayser's instruction did not specify the evidence to which it referred and contained no instruction about how to use the evidence.

We affirm the judgment and sentence.

Trickey, J

WE CONCUR:

[12] RP (June 27, 2014) at 59.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72407-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 24, 2016
Washington Appellate Project