

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY CEL
DEPUTY

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 Richard G. Neighborger)
 (your name))
)
 Appellant.)

No. 50033-7-11

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Richard G. Neighborger, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Please see attached

Additional Ground 2

Please see attached

If there are additional grounds, a brief summary is attached to this statement.

Date: 10 Oct 2017

Signature: [Handwritten Signature]

Additional Ground 1

The trial court erred when it refused Mr. Neighbarger’s attorney the right to interview the accusers.

Additional Ground 2

The trial court erred when it failed to define “pornography” which lead to a violation of the defendant’s 6th amendment right to an impartial jury and ignored his 1st amendment right of freedom of speech.

Much of the prosecution’s case was based on the premise that Mr. Neighbarger watched pornography; however, pornography was never defined for the jury, nor was it ever explained that pornography is protected under the 1st amendment unless it is determined to be legally obscene. This lead the jury to use their own definition of pornography and allowed them to believe that it was illegal causing obvious prejudicial errors.

According to *Black’s Law Dictionary* (Third Pocket Edition pg. 545):

Pornography, n. Material (such as writings, photographs, or movies) depicting sexual activities or erotic behavior in a way that is designed to arouse sexual excitement. Pornography is protected speech under the First amendment unless it is determined to be legally obscene.

Since the court never tried to prove or define pornography, the court should have provided instruction to the jury to believe that pornography the defendant was accused of watching was legal and protected under the 1st amendment of the constitution.

Additional Ground 3

The trial court erred when it ignored the fact the jury admitted it would be a hardship to be on jury duty during the holidays which violated the defendant's 6th amendment right to an impartial jury.

Going into the trial, the court admitted they “have a number of hardship claims given the holiday coming up” (page 24 row 1 of the court transcripts). This hardship easily could have caused the jury to not be impartial due to wanting to rush deliberation to get the trial done with and go one with their lives.

Additional Ground 4

The trial court erred when it disregarded the destruction of evidence by the investigators.

Some occurrences that Mr. Neighbarger was accused of focused on the use of pornography on a laptop. The only laptop that he had was his work laptop. When Mr. Neighbarger was arrested, he had his work laptop in his possession, and it was seized by the Puyallup Police. The police did not keep the laptop; instead, they returned the laptop to Mr. Neighbarger's employers, T-Mobile. This evidence the police had in hand would have proven that he did not have pornography on his laptop, let alone, child pornography. In addition to proving the accusations were false, the laptop also possessed Mr. Neighbarger's history of work schedule—which was in question during trial as well. The laptop had drafts of letters that would have shown his thought process for issues that were in question during trial, including the written contract that was drafted when it was agreed to allow J.N. to move back into the home.

While Washington state does not have an evidence retention statute, the majority of states in the US do have one—as of August 2013, 16 states out of 50 states and District

of Columbia had such statutes according to Brittany Ericksen, Staff Attorney Ilse Knecht, Project Manager, Deputy Director Public Policy). The Puyallup Police department failed to preserve evidence and consequently destroyed it.

In *United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 21, 2010), the FBI failed to preserve evidence and destroyed text messages. In this case, the court imposed jury instruction against the government because it failed to preserve text messages that were sent between FBI agents and a cooperating witness. The jury was instructed to infer the deleted messages were favorable to the defendant. Since a considerable about of the trial focused on the use of a laptop, and there was evidence on the laptop that would prove that much of the accusations were false, the jury in Mr. Neighbarger's case should have had similar instructions. Neglecting the fact that evidence was destroyed even before trial, the jury was allowed to assume the testimony that Mr. Neighbarger did have a laptop with child pornography on it was exceptionally prejudicial.

Additional Ground 5

The trial court erred when it denied submission of evidence by the defendant proving innocence.

While there is an ongoing debate about allowing polygraphs to be submissible in court, the Supreme Court, in 1993, ruled that under the Federal Rule of Evidence 702, expert testimony may not be excluded solely because it is based on scientific theory that has not yet achieved "general acceptance." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Additionally, in a pre-Daubert decision, *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc), the Eleventh Circuit held that polygraph results are admissible (1) when the parties stipulate to admissibility in advance of the test; or (2) when the polygraph results are used to impeach or corroborate the testimony of a witness.

Furthermore, even the United States Army, per Army Regulation 195-6, permits the use of polygraphs for criminal investigations.

In the case of Mr. Neighbarger, the polygraph results would have corroborated the testimony of a witness—the defendant, Mr. Neighbarger; therefore, evidence was withheld improperly from court, denying Mr. Neighbarger a right to a fair trial, and to defend himself properly.

Additional Ground 6

The trial court erred when it allowed hearsay to be submitted as evidence by the prosecution, thus ignoring the Federal Rules of Evidence article VIII on hearsay.

A substantial amount of the prosecution’s argument was based on the testimony of detectives Ms. Wilcox and Ms. Pihl, and Child Protective Services (CPS) Ms. Lopez-Silver. These three countlessly provided testimony that was hearsay. The entire testimony of all three was hearsay when it came to what was said from Mrs. Neighbarger. None of the interactions between the detectives, the CPS worker, and Mrs. Neighbarger was recorded or documented at the time of interaction.

According to Ms. Lopez-Silver, Mrs. Neighbarger told her that “Mr. Neighbarger had choked the kids” (page 326 rows 11-12 of the court transcripts). Ms. Lopez-Silver continued and stated that Mrs. Neighbarger said that “J.N. spit in Mr. Neighbarger’s face, and that he had grabbed him and choked him by the throat” (page 326 rows 17-19 of the court transcripts). However, Detective Wilcox when asked about the same instance, responded that “Sarah’s response was it wasn’t choked” and the word choked came from Ms. Lopez-Silver (page 289 rows 12-17 of the court transcripts).

Detective Wilcox was allowed to provide her opinion on how Mrs. Neighbarger reacted when she was informed of the charges. She stated that Mrs. Neighbarger

“appeared to be kind of cold” to Z.N., not taking inconsideration that she may have just been in shock by learning of the accusations” (page 280 row 1 of the court transcripts).

Furthermore, Detective Pihl was able to use irreversibly damaging hearsay when she responded to her understanding of why Mrs. Neighbarger required the Puyallup Police to acquire a search warrant for Z.N.’s cell phone. Detective Pihl stated that Mrs. Neighbarger “said she didn’t want to do something—or consent to something that may incriminate her husband” (page 344 rows 2-3 of the court transcripts).

With this combined allowance of hearsay, the jury received prejudiced evidence. Since the witnesses were professionals, an inappropriate amount of credibility was placed on the testimony. Which holistically discredited the testimony of Mrs. Neighbarger that was not hearsay.

Additional Ground 7

The trial court erred when it allowed the prosecutor to lie to the jury during closing arguments which lead the jury to the wrong conclusion and added excessive emotions to drive the sentencing of the defendant

The final statement the jury heard during Mr. Neighbarger’s trial was an outright lie that was formulated to trigger the emotional response from the jury. The prosecutor’s final words:

What did we find out from the defendant’s testimony? What’s planned when he gets back? A boys’ getaway. Just him and Zachery off to Leavenworth for the weekend. It made every sense in the world to come forward when he did. Thank you (pages 722-723 rows 24-3 of the court transcripts).

While the defendant did testify that “Zach and I were supposed to go on a run in Leavenworth when I got back from Texas” (page 589 rows 7-9 of the court transcripts), and when cross examined by the prosecutor confirmed that “yes, we were

going to go to Leavenworth and run the Leavenworth Marathon...He was quite excited and even bought Lederhosen for both of us” (page 617 rows 22-25 of the court transcripts. However, Mr. Neighbarger never said that it would be just the two of them in Leavenworth for the weekend as the prosecutor stated in her closing. The fact was there was going to be 5 people going for the weekend trip to Leavenworth—Mrs. Neighbarger, Mr. Neighbarger, Z.N., Mikel Pardue, and JoAnne Pardue. It was just the men that were running and the women were going to watch.

The way the prosecutor twisted Mr. Neighbarger’s testimony erroneously caused prejudice by the jury thinking the reason that Z.N. came forward with his story was because he was afraid of having a weekend alone with his father.

In closing, the trial court had multiple reversible errors that misleadingly lead the jury to convict Mr. Neighbarger. Many of his constitutional rights were violated during this trial, and the conviction should be overturned. It is easy to see manifest constitutional errors in all seven identified errors. The most noticeable errors existing in disregarding the destruction of evidence, denying submission of evidence by the defendant, and allowing the prosecution to use hearsay as evidence. The court had plain error when it failed to define pornography, ignored the fact the jury admitted it would be a hardship, disregarded the destruction of evidence, allowed hearsay as credible evidence, and allowed the prosecutor to lie to the jury—the errors were so obvious and prejudicial that an appellate court should address it despite the parties’ possible failure to raise proper objections. Mr. Neighbarger’s 1st, 5th, 6th, and 14th amendment constitutional rights were violated. He did not have adequate legal representation, his free speech was violated, and he had far from an impartial jury.

The court should reverse the conviction because of the multiple errors that caused Mr. Neighbarger to be mistakenly convicted.