

FILED
Court of Appeals
Division II
State of Washington
5/25/2018 1:21 PM

NO. 50823-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GRIFFIN,
Appellant.

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

Pierce County Cause No. 15-1-02646-3

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by entering Finding of Fact 4. CP 137.
2. The trial court erred by entering Finding of Fact 5. CP 137-38.
3. The trial court erred by entering Finding of Fact 6. CP 138.
4. The trial court erred by entering Finding of Fact 7. CP 138.
5. The trial court erred by entering Finding of Fact 9. CP 139.
6. The trial court violated Mr. Griffin's rights under the Fourth and Fourteenth Amendments by admitting evidence seized pursuant to an unconstitutionally overbroad search warrant.
7. The trial court violated Mr. Griffin's rights under Wash. Const. art. I, § 7 by admitting evidence seized pursuant to an unconstitutionally overbroad search warrant.
8. The trial court violated Mr. Griffin's rights under the Fourth and Fourteenth Amendments by admitting evidence seized pursuant to a search warrant that was not supported by probable cause.
9. The trial court violated Mr. Griffin's rights under art. I, § 7 by admitting evidence seized pursuant to a search warrant that was not supported by probable cause.
10. The severability doctrine does not apply to save any portion of the warrant in Mr. Griffin's case.
11. The trial court erred by denying Mr. Griffin's motion to suppress the evidence seized from his cellular phone.

ISSUE 1: A warrant to search an individual's cellular phone must adhere to the particularity requirement with "scrupulous exactitude" because of the sensitive nature of the private information stored therein. Did the warrant authorizing the search of Mr. Griffin's cell phone fail under the state and federal constitutions when it granted the police authority to seize any and all data stored on the phone, regardless of whether it was related to the offenses under investigation?

12. The trial court violated Mr. Griffin's Fourteenth Amendment right to due process by failing to instruct the jury on each element required to convict for Communication with a Minor for Immoral Purposes.

13. The trial court violated Mr. Griffin's Wash. Const. art. I, § 22 right to due process by failing to instruct the jury on each element required to convict for Communication with a Minor for Immoral Purposes.
14. The trial court erred by refusing to give (one of) Mr. Griffin's proposed jury instructions clarifying the meaning of "immoral purposes."

ISSUE 2: The statute criminalizing Communication with a Minor for Immoral Purposes only prohibits communications regarding sexual conduct which would be unlawful if committed. Did the trial court violate Mr. Griffin's right to Due Process by refusing to give his proposed instructions, informing the jury of that requirement?

15. RCW 9.98A.090 is unconstitutionally vague as applied to Mr. Griffin's case, in violation of his Fourteenth Amendment right to Due Process.
16. RCW 9.98A.090 is unconstitutionally vague as applied to Mr. Griffin's case, in violation of his Wash. Const. art. I, § 3 right to Due Process.

ISSUE 3: A criminal statute is unconstitutionally vague as applied to conduct that falls outside its "constitutional core" or when the statute fails to provide fair notice of proscribed conduct and allows for arbitrary enforcement. Is the statute criminalizing Communication with a Minor for Immoral Purposes unconstitutionally vague as applied to Mr. Griffin's alleged conduct of discussing sexual topics with S.L., which would not have been unlawful if performed or as applied to the communications that Mr. Griffin received from S.L. unsolicited?

17. The trial court erred by admitting Exhibit 47.
18. The trial court erred by admitting detective testimony recounting the internet browsing activity on Mr. Griffin's phone.
19. Exhibit 47 was inadmissible under ER 402.
20. Exhibit 47 was inadmissible under ER 403.
21. Exhibit 47 was inadmissible under ER 404(b).

22. The detective testimony recounting the internet browsing activity on Mr. Griffin's phone was inadmissible under ER 402.
23. The detective testimony recounting the internet browsing activity on Mr. Griffin's phone was inadmissible under ER 403.
24. The detective testimony recounting the internet browsing activity on Mr. Griffin's phone was inadmissible under ER 404(b).
25. Mr. Griffin was prejudiced by the trial court's evidentiary errors.

ISSUE 4: Evidence is inadmissible when it is irrelevant, when its probative value is outweighed by the danger of unfair prejudice, and when its only purpose is to encourage an impermissible propensity inference on the part of the jury. Did the trial court err by admitting 67-pages worth of sex-related internet browsing history extracted from Mr. Griffin's phone when almost none of it had any relation to the charges against him and which made Mr. Griffin appear to be obsessed with sex and violence?

26. The trial court violated Mr. Griffin's Sixth and Fourteenth Amendment right to present a defense.
27. The trial court violated Mr. Griffin's right to present a defense under art. I, §§ 3 and 22.

ISSUE 5: The constitutional right to present a defense prohibits a trial court from excluding otherwise-admissible evidence that is necessary to the defense theory. Did the trial court violate Mr. Griffin's right to present a defense by prohibiting him from presenting evidence that he discusses sexual topics in an intellectual manner with many people in his life, which was necessary to support his theory that his conversations with S.L. had not occurred "for immoral purposes"?

28. The trial court violated Mr. Griffin's Sixth and Fourteenth Amendment right to counsel.
29. The trial court erred by failing to apply the presumption that Mr. Griffin had been prejudiced by police intrusion into his private emails with his attorney.

30. The trial court erred by failing to require the state to disprove prejudice to Mr. Griffin resulting from police intrusion into his private emails with his attorney beyond a reasonable doubt.

ISSUE 6: When the state intrudes into privileged communications between an attorney and client, prejudice is presumed unless the state can prove harmlessness beyond a reasonable doubt. Did the trial court err by refusing to impose any remedy when the police seized privileged emails between Mr. Griffin and his attorneys without applying the presumption of prejudice and without requiring the state to prove harmlessness beyond a reasonable doubt?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Daniel Griffin talks very frankly about sexual matters with a lot of the people in his life. RP 1898-1903, 1980-81.¹ For example, Mr. Griffin regularly discusses things like fetishes, sexual fantasies, sex toys, and BDSM² with his friends and with his mother. RP 1898-1903, 1980-81. He talks about those topics in an intellectual manner, with no embarrassment. RP 1980. Perhaps for this reason, he has been described as not having “the best social skills.” RP 1981.

Mr. Griffin met fourteen-year-old S.L. when her mother (who works part-time for Mr. Griffin) asked him to tutor S.L. and teach her how to use computers. RP 1134-34, 1595-96. Mr. Griffin taught S.L. how to build a computer tower and how to code websites. RP 1134. In the process, Mr. Griffin and S.L. learned that they had shared interests, including Japanese animation and other fantasy-type characters. RP 1134, 1364, 1359, 1367, 1940. They began exchanging text messages regularly. RP 1370-71.

Mr. Griffin talked with S.L. about sexual topics in the same manner that he discussed them with other people. They had conversations

¹ Unless otherwise noted, citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes spanning 3/8/17-8/18/17.

² According to the record, BDSM refers to “bondage, dominance, sadism, and masochism.” RP 1173.

about things like masturbation, sex toys, fantasies, and S.L.'s relationship with her girlfriend. *See* Ex. 1, 12, 13, 46, 47, 84, 85, 87, 89, Supp. CP.

Eventually, S.L.'s parents found the messages on her phone and became concerned. RP 997-1001. S.L.'s father, step-mother, and mother called a meeting with her and informed S.L. that Mr. Griffin had been "molesting" her. RP 1004, 1345. Their use of that word "reframed" the situation for S.L. RP 1345. S.L. told her parents that Mr. Griffin had touched her breasts. RP 1035. Her parents called the police. RP 1022.

The police sought and were granted a warrant permitting them to seize the following from Mr. Griffin's cellular (cell) phone:

Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data...
CP 40.

Pursuant to that warrant, the extracted all of the data from Mr. Griffin's cell phone and then translated into a readable format using Cellebrite forensic software. RP 1679, CP 95.

This process provided the police with thousands of pages worth of data from the phone, including, *inter alia*: emails spanning two years, none of which were with S.L.; text messages going back as far as ten years with numerous people; almost 6,000 images, none of which included

sexually explicit images of minors; voluminous internet search history; application use spanning almost three years; call logs covering more than a year; and GPS data showing the phone's location for three years. CP 95.

The state charged Mr. Griffin with two counts of Child Molestation in the third degree and ten counts of Communicating with a Minor for Immoral Purposes (CMIP). CP 267-73.

Mr. Griffin moved to suppress the evidence seized pursuant to the warrant to search his phone, arguing that the warrant was unconstitutionally overbroad and that the officers had seized material – such as the entirety of Mr. Griffin's web search history and his emails with people other than S.L.³ – for which there was no probable cause. *See* CP 17-41, 90-132.

The trial court denied Mr. Griffin's motion to suppress. CP 135-39.

The emails extracted from Mr. Griffin's phone pursuant to the search warrant also included several communications with prospective defense attorneys, with whom he discussed the pending charges, and at least one email with the attorney who represented Mr. Griffin at trial. CP 96.

³ One of the emails that Mr. Griffin sought to suppress was to his friend Beverly McCarter. RP (11/16/16) 6-7. In that email, Mr. Griffin admits to tying S.L. up at her request but insists that he did not break any laws. RP 1713.

The trial court concluded that at least five-pages-worth of the material was protected by attorney-client privilege. RP (10/25/16) 2-7; RP (10/26/16) 2-7. But the court refused to enact any remedy for the state's intrusion into Mr. Griffin's private emails with his attorneys, concluding that Mr. Griffin did not show prejudice because the emails did not include any work product or trial strategy. RP (10/26/16) 5.

Mr. Griffin subsequently moved *in limine* to exclude evidence of the web browsing history extracted from his phone. RP 273. He noted that much of the search history was highly inflammatory. RP 278.

Over this objection, the trial court admitted a 67-page exhibit detailing eight-months-worth of sex-related internet history. RP 274-80, 356-79; Ex. 47, Supp. CP.

The exhibit includes internet activity related to pornography, bondage, BDSM, anal sex, sex paraphernalia, and rape. Ex. 47, Supp. CP. It also lists news articles that had been read on the phone: including those related to the Bill Cosby rape case, rape cases on university campuses, and other specific rape cases. Ex. 47, pp. 3, 5-7, 9-11, 26, 32, Supp. CP. The exhibit details searches made on Mr. Griffin's phone, including "teen pussy" and "can you get pregnant from anal sex?". Ex. 47, pp. 13, 22, Supp. CP. It shows that someone using Mr. Griffin's phone watched a video entitled "The Problem with Affirmative Consent Laws" and read a

story called “Is it Wrong to Try to Pick Up Girls in a Dungeon?” Ex. 47, pp. 40-42, 46-50, Supp. CP.

The exhibit shows that someone using Mr. Griffin’s phone had conducted numerous searches regarding Washington law related to sex offenses and searches for criminal defense attorneys in the Tacoma area. Ex. 47, pp. 14-15, 30-33, 65-67, Supp. CP.

At trial, S.L.’s father testified that, after discovering S.L.’s messages with Mr. Griffin, he used her phone and pretended to be S.L. in an attempt to collect evidence against Mr. Griffin. RP 1040-45. Using Wickr (a private messaging mobile application), S.L.’s father sent a sexually-charged message to Mr. Griffin. Ex. 1, Supp. CP. In response, S.L.’s father received messages describing a fantasy in which S.L. is tied up. Ex. 1, Supp. CP.

S.L. testified that she and Mr. Griffin also communicated using Wickr. *See e.g.* RP 1186-88. She said that Mr. Griffin had proposed that they use Wickr because the application deletes the messages after a set period of time. RP 1009. She said that they limited their sexually explicit messages to Wickr, where they discussed their sexual fantasies. RP 1244-45. As an example, S.L. said that she would propose a fantasy scenario to Mr. Griffin and he would say what he would do in that scenario. RP 1245.

The state admitted voluminous messages exchanged between Mr. Griffin's phone and S.L. *See* Ex. 1, 12, 13, 46, 47, 84, 85, 87, 89, Supp. CP.

Some included juvenile sexual references, like jokes about penis size and about how S.L. should not let her girlfriend rape her. RP 1324-25; Ex. 13, p. 7, Supp. CP.

The messages also included discussions about S.L.'s relationship with her girlfriend. Ex. 46B, p. 3, Supp. CP, *See also* Ex. 84, Supp. CP; RP 1221. Unsolicited, S.L. told Mr. Griffin that her girlfriend was a good kisser. Ex. 46B, p. 3, Supp. CP. She said that her girlfriend had "the perfect mix of skill and dominance" and then implied that she was going to masturbate. Ex. 46B, p. 3, Supp. CP.

S.L. said that she started telling Mr. Griffin about her sexual fantasies, which he did not ask her to do. RP 1397. She said that her fantasies included "dark" things like amputation, self-harm, and rape. RP 1397. S.L. said that she was the one who brought up BDSM. RP 1398. She said that, when they talked about sex, it was because she had brought it up. RP 1434.

In one message, S.L. tells Mr. Griffin that she's "topless" and "could always start walking." Ex. 46B, p. 6, Supp. CP. Mr. Griffin urges S.L. not to walk to his house topless. Ex. 46B, p. 6, Supp. CP. In another,

S.L. tells Mr. Griffin that she is in her underwear and has not showered. RP 1323. She tells him about her sexual fantasy involving two “underage guys” who have twins together. RP 1229.

The messages sent from Mr. Griffin’s phone also discussed masturbation. *See e.g.* RP 1239, 1250, 1261, 1338. For example, one message was sent from Mr. Griffin’s phone telling S.L. that he’s “either working, sleeping masturbating, or two of the three.” RP 1288.

The messages also discuss menstruation, hormones, and pornography. Ex. 46B, p. 11; Ex. 89, Supp. CP; RP 1229. They also discuss BDSM and wanting to be “tortured.” RP 1226-27, 1232-33, 1238-39, 1252; Ex. 46B, pp. 1-2, Supp. CP. For example, S.L. said that she and Mr. Griffin discussed “a BDSM orgy” involving Germany “abusing” Russia. RP 1252.

Mr. Griffin told S.L. about his fantasies involving elves and fictional characters from video games, cartoons, and Japanese anime. RP 1225, 1230-31, 1257, 1264; Ex. 13, p. 1, Supp. CP.

S.L. said that she and Mr. Griffin discussed sex in a philosophical way. RP 1396. She said that he answered her questions without judgment and sometimes did research when she had questions and then got back to her. RP 1396.

S.L. testified that Mr. Griffin sent her a video of himself masturbating. RP 1207; Ex. 24, Supp. CP. She also testified that she sent him pictures of herself in her underwear. RP 1199-2000. S.L. said that Mr. Griffin once bought her a vibrator. RP 1220.

S.L. also testified that once, when she was at Mr. Griffin's house, he groped her breast while they watched TV. RP 1174. Then they moved into Mr. Griffin's bedroom and he tied her up with rope and groped her breasts again. RP 1180-83.

After the state rested, Mr. Griffin sought to introduce testimony through his mother and friend regarding his habit of having open and detailed conversations about sex with many people in his life, including those in whom he has no sexual interest (like his mother). RP 1898-1903, 1980-81. He explained that the evidence was central to his defense theory that his sexual conversations with S.L. were not for "immoral purposes." RP 1900-03, 1980.

But the trial court prohibited Mr. Griffin from presenting that evidence. RP 1898-1903, 1980-81.

Mr. Griffin proposed two (alternative) jury instructions explaining the term "immoral purposes." RP 2046-53. Those instructions would have informed the jury that:

A person commits the crime of communicating with a minor for immoral purposes when he or she communicates with a minor for the predatory purpose of promoting the minor's exposure to and involvement in sexual misconduct. 'Sexual misconduct' is a criminal act of a sexual nature.

Or, that:

A person commits the crime of communicating with a minor for immoral purposes when he or she offers or induces a minor to participate in sexual misconduct. 'Sexual misconduct' is a criminal act of a sexual nature.

Defendant's Proposed Instructions, pp. 2-3, Supp. CP.

But the court refused to give Mr. Griffin's proposed instructions to the jury. RP 2053. Instead, the court instructed the jury that, in order to convict for CMIP, it had to find that Mr. Griffin had communicated with S.L. for "immoral purposes of a sexual nature." CP 451-59.

The jury submitted a question to the court during deliberations, asking for a definition of "immoral purposes." CP 397. Again, the court refused to give Mr. Griffin's proposed instructions clarifying the term. RP 2194-2200.

The jury found Mr. Griffin guilty of the child molestation charges and of seven out of the ten charges for CMIP. CP 463-74. This timely appeal follows. CP 553.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. GRIFFIN’S RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7 BY ADMITTING EVIDENCE THAT HAD BEEN SEIZED PURSUANT TO AN UNCONSTITUTIONAL GENERAL WARRANT.

The search warrant authorized the police to search for and seize the following from Mr. Griffin’s cell phone:

Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data...
CP 40.

The warrant specified that the crimes of which Mr. Griffin was suspected were child molestation in the third degree and communicating with a minor for immoral purposes. CP 40. But the warrant did not limit the items to be seized to those that constituted evidence of those offenses. CP 40-41. Rather, the warrant required the police to search for the evidence listed above as well as any other evidence material to the investigation. CP 40.

The warrant permitted an unconstitutional general search of the private information contained on Mr. Griffin’s cell phone, in violation of the Fourth Amendment and art. I, § 7. *State v. McKee*, No. 73947-6-I, --- Wn. App. ---, 413 P.3d 1049, 1054–55 (March 26, 2018). The trial court

erred by denying Mr. Griffin’s motion to suppress the evidence seized from his cell phone. *Id.*

- A. The warrant permitting search and seizure of all of the data on Mr. Griffin’s cell phone failed to meet the “particularity” requirement under the Fourth Amendment and art. I, § 7.

The Fourth Amendment was designed, specifically, to prohibit “indiscriminate searches and seizures conducted under the authority of ‘general warrants.’” *McKee*, 413 P.3d at 1054–55 (quoting *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). The amendment guards against “general” searches by requiring search warrants to “particularly describe[e] the place to be searched and the persons or things to be seized.” U.S. Const. Amends. IV, XIV; *Id.* (citing *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)); *See also Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). The particularity requirement also serves to “prevent the seizure of one thing under a warrant describing another” and to limit police discretion in executing the warrant. *McKee*, 413 P.3d at 1055 (quoting

Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed 231 (1927); *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992)).⁴

The specificity required for a valid search warrant has two aspects: particularity and breadth. *McKee*, 413 P.3d at 1056 (citing *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993)). The particularity requirement ensures that the warrant clearly state what evidence is sought. *Id.* The breadth requirement ensures that the scope of the warrant be limited by the probable cause on which it is based. *Id.*

The measure of specificity required depends on the circumstances and the items sought. *Id.* The capability of modern cell phones to “store vast amounts of personal information makes the particularity requirement of the Fourth Amendment that much more important.” *Id.* (citing *Riley v. California*, 134 S.Ct. 2473, 2490, 189 L.Ed.2d 430 (2014)).

Indeed, the U.S. Supreme Court noted in *Riley* that a police search of a cell phone would “typically expose the government to far *more* than the most exhaustive search of a house.” *Riley*, 134 S.Ct. at 2491 (emphasis in original). This is because “many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly

⁴ Whether a search warrant meets the particularity requirement is reviewed *de novo*. *McKee*, 413 P.3d at 1055. A trial court’s ruling on a motion to suppress is also reviewed *de novo*. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

every aspect of their lives – from the mundane to the intimate.” *Id.* at 2490 (citing *Ontario v. Quon*, 560 U.S. 746, 760, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010)).

Specifically, the *Riley* court noted that a person’s internet search and browsing history as stored on his/her cell phone could reveal personal details as fundamental as searches for symptoms of diseases. *Id.* at 2490. The court also singled out the potential for a person’s downloaded application software (or “apps”) to reveal detailed information such as political affiliation, religion, budget, romantic life, purchases, and more. *Id.*

For these reasons, The Washington Supreme Court has also held that cell phones qualify as “private affairs” under art. I, § 7 of the state constitution because they “contain intimate details about individuals’ lives.” *Samalia*, 186 Wn.2d at 269; art. I, sec. 7. In such cases:

[A]n intrusion upon the occupant's expectation of privacy in those premises should extend no further than is necessary to find particular objects, and this is reflected in the rule that the described premises may only be searched as long and as intensely as is reasonable to find the things described in the warrant.

Perrone, 119 Wn.2d at 545-46 (cited in *McKee*, 413 P.3d at 1056).

A warrant that covers material protected by the First Amendment also requires a heightened degree of particularity. *McKee*, 413 P.3d at 1056; *Perrone*, 119 Wn.2d at 547; *Stanford v. Texas*, 379 U.S. 476, 483,

85 S.Ct. 506, 13 L.Ed.2d 431 (1965). The particularity requirement must be “accorded the most scrupulous exactitude” in cases implicating protected speech. *Id.*

The *McKee* court found a search warrant authorizing a “physical dump” of all data on a cell phone was unconstitutionally overbroad in circumstances all but identical to those of Mr. Griffin’s case. *McKee*, 413 P.3d at 1058-59.

In *McKee*, the warrant permitted the police to search the phone for all:

Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.

Id. at 1053.

Both the warrant in Mr. Griffin’s case and that in *McKee* permitted the officers to search for and seize, essentially, all personal data stored on the phone. In fact, the police used the same process to do just that in both cases: a “physical dump” using the Cellebrite forensic software. *Id.* at 1053-54; RP 1679.

The *McKee* court held that the complete absence of limiting language in the warrant permitted an unconstitutional “general search” of the data on the phone for two reasons. *Id.* at 1058-59. First, the warrant’s

language was not “carefully tailored to the justification to search.” *Id.*

Second, the language was not limited to the data for which there was probable cause. *Id.* As the court stated:

The language of the search warrant clearly allows search and seizure of data without regard to whether the data is connected to the crime. The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation. . . . There was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to incidents for which the police had probable cause.

Id. at 1058 (quoting *State v. Keodara*, 191 Wn. App. 305, 316, 364 P.3d 777 (2015)).

The same is true of the warrant in Mr. Griffin’s case. Rather than limiting itself to the alleged messages between Mr. Griffin and S.L. or any photos or videos they may have exchanged, the warrant permitted a general search of the phone far beyond the data for which probable cause existed. CP 40. Its language was not tailored in any way to the justification of the search. CP 40. The warrant in Mr. Griffin’s case also provided no objective standard to limit the discretion of the officers executing the warrant. *McKee*, 413 P.3d at 1059. The warrant for the search of Mr. Griffin’s cell phone violated his rights under the Fourth Amendment and art. I, § 7 by failing to describe the items to be searched with sufficient particularity. *Id.*

Even so, the trial court in Mr. Griffin's case found that the warrant's language was limited by its specification of the crimes under investigation. CP 138-39. But that logic has been expressly rejected by the Washington Supreme Court. *See Besola*, 184 Wn.2d at 614-15.

Accordingly, the *McKee* court also rejected the state's argument that the warrant in that case was limited by the reference to the fact that the offenses being investigated were Sexual Exploitation of a Minor and Dealing in depictions of a minor engaged in sexual explicit conduct or the inclusion of the relevant statutory citations. *McKee*, 413 P.3d at 1056-57. Relying on *Besola*, the court held that that language failed to "modify or limit the items listed in the warrant" that "contained broad descriptions of the items to be seized." *Id.* at 1057 (*quoting Besola*, 184 Wn.2d at 609-10).

Besola unambiguously forecloses the logic the trial court used to deny Mr. Griffin's motion to suppress. *Id.*

The trial court in Mr. Griffin's case also relied on the idea that a general search of the cell phone was necessary because cell phone users, generally, sometimes attempt to hide evidence by storing it in an unexpected location on the phone. CP 138. This logic is unavailing for two reasons.

First, the warrant need not have limited the folders (or other storage media) in which the officers could have searched in order to describe what they were actually searching *for* with constitutionally-required particularity. Rather, a warrant whose language permitted the officers to search for the alleged messages between Mr. Griffin and S.L. (and any other evidence for which probable cause had been established) in any location on the phone would likely pass constitutional muster.

Second, the language in the officer's affidavit detailing the manner in which other offenders sometimes attempt to conceal data by storing it in an unanticipated manner is inadequate to establish probable cause that Mr. Griffin, specifically, had done so. *See Keodara*, 191 Wn. App. at 313 (“...blanket inferences and generalities cannot substitute for the required showing of ‘reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.’ (quoting *State v. Thein*, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999)).

The warrant to search Mr. Griffin's phone was unconstitutionally overbroad. *McKee*, 413 P.3d at 1056; *Perrone*, 119 Wn.2d at 547; *Besola*, 184 Wn.2d 605. The court should have suppressed all of the evidence seized pursuant to the warrant. *Id.* Mr. Griffin's convictions must be reversed. *Id.*

B. The severability doctrine does not apply to the general warrant to search everything on Mr. Griffin's cell phone.

Under the severability doctrine, evidence seized pursuant to the non-infirm portions of an overboard warrant may still be admissible if specific criteria are met. *State v. Higgs*, 177 Wn. App. 414, 430, 311 P.3d 1266 (2013), *as amended* (Nov. 5, 2013).

But the severability doctrine does not apply to unconstitutional general warrants like the one in Mr. Griffin's case. *McKee*, 413 P.3d at 1059 n. 13; *See also Perrone*, 119 Wn.2d at 558–59. This because the application of the severability doctrine to a general warrant would “render meaningless the standards of particularity which ensure the avoidance of general searches and the controlled exercise of discretion by the executing officer.” *Perrone*, 119 Wn.2d at 558. The *Perrone* court held that to decide otherwise would permit the doctrine of severability to “become a means for defeating the particularity requirement.” *Id.*

The severability doctrine does not apply to the general warrant in Mr. Griffin's case. *Id.* All of the evidence seized from his cell phone pursuant to the unconstitutional warrant must be suppressed and his convictions must be reversed. *Id.*⁵

⁵ In the alternative, even if the severability doctrine did apply to Mr. Griffin's case, the error would still require a new trial. This is because the state cannot demonstrate beyond a reasonable doubt that the evidence seized pursuant to the warrant and admitted at trial for which there was no probable cause – e.g. the web search history and self-incriminating

(Continued)

II. THE TRIAL COURT VIOLATED MR. GRIFFIN’S RIGHT TO DUE PROCESS BY REFUSING TO GIVE HIS PROPOSED INSTRUCTIONS, WHICH WOULD HAVE INFORMED THE JURY THAT A COMMUNICATION ONLY QUALIFIES AS “IMMORAL” IF IT IS MEANT TO PROMOTE A MINOR’S INVOLVEMENT IN SEXUAL MISCONDUCT.

The state’s evidence demonstrated that Mr. Griffin had many frank conversations with S.L. via text message. He talked to her about her girlfriend. Ex. 46B, p. 3, Supp. CP; Ex. 84, Supp. CP; RP 1221. He talked to her about masturbation and the use of sex toys like vibrators. *See e.g.* RP 1239, 1250, 1261, 1338. They exchanged juvenile jokes about penis size. RP 1324-25. They told each other about their fantasies, which often involved fictional characters or orgies involving geographical nations. RP 1225, 1230-31 1252, 1257, 1264; Ex. 13, p. 1, Supp. CP.

In order to inform the jury that it could not convict him of Communicating with a Minor for Immoral Purposes (CMIP) based on these types of conversations, Mr. Griffin proposed two alternative jury instructions, which would have clarified that a communication only qualified under the statute if it promoted the minor’s involvement in sexual misconduct, which would have been a crime if it had occurred.

emails with Beverly McCarter – was harmless. *State v. Chambers*, 197 Wn. App. 96, 128, 387 P.3d 1108 (2016), *review denied*, 188 Wn.2d 1010, 394 P.3d 1004 (2017) (reversal required unless the state can establish beyond a reasonable doubt that the admission of unconstitutionally-seized evidence did not affect the outcome of trial).

Defendant's Proposed Instructions, Supp. CP; RP 2046-53. If they had been given, the instructions would have specified for the jury that:

a person commits the crime of communicating with a minor for immoral purposes when he or she communicates with a minor for the predatory purpose of promoting the minor's exposure to and involvement in sexual misconduct. 'Sexual misconduct' is a criminal act of a sexual nature.

Or, that:

A person commits the crime of communication with a minor for immoral purposes when he or she offers or induces a minor to participate in sexual misconduct. 'Sexual misconduct' is a criminal act of a sexual nature.

Defendant's Proposed Instructions, pp. 2-3, Supp. CP.

But the court refused to give Mr. Griffin's proposed instructions. RP 2053. Instead, the judge simply instructed the jury that it should find guilt if it found that Mr. Griffin had communicated with S.L. for "immoral purposes of a sexual nature." CP 451-59.

The jury struggled with this issue, as evidenced by its submission of a question to the court during deliberations asking for a definition of "immoral purposes." CP 397. At that point, Mr. Griffin again moved the court to provide his proposed instructions to the jury, but the court refused. RP 2194-2200.

A trial court violates an accused person's right to Due Process by failing to instruct the jury regarding each element of an offense because

doing so relieves the state of its burden to prove each element beyond a reasonable doubt. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007); U.S. Const. Amend. XIV; art. I, § 22.

The CMIP statute criminalizes communication with a minor or with someone the person believes to be a minor “for immoral purposes.” RCW 9.68A.090(b).⁶

Appellate courts may infer elements of an offense, even when they are not explicitly detailed by statute, when necessary to clarify an ambiguous statute. *See e.g. State v. Bash*, 130 Wn.2d 594, 605, 925 P.2d 978 (1996); *See also State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000); *State v. Williams*, 158 Wn.2d 904, 148 P.3d 993 (2006).

The CMIP statute is ambiguous because it could be read to prohibit any communication of an immoral sexual nature, regardless of its criminality; or it could be read “only to prohibit communications about immoral sexual conduct that would be criminal if actually performed.” *State v. Luther*, 65 Wn. App. 424, 427, 830 P.2d 674 (1992).

Applying the rule of lenity and other canons of statutory construction, the *Luther* court concluded that the CMIP statute at RCW 9.68A.090 was intended only to criminalize communications regarding

⁶ While CMIP is generally a gross misdemeanor, it was charged as a felony in Mr. Griffin’s case because the alleged communications took place via text message. CP 267-73.

immoral sexual conduct that would be criminal if performed. *Id.* The court also noted that such a construction was necessary to render the statute constitutional. *Id.* at 427-28.

Other appellate courts have followed *Luther's* lead – thereby saving the CMIP statute from numerous constitutional challenges -- by reading the statute to only prohibit communication regarding conduct that would be criminal if it was performed, rather than any speech that the jury may deem “immoral.” *See e.g. State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993); *State v. Pietrzak*, 100 Wn. App. 291, 297, 997 P.2d 947 (2000); *Schoening v. McKenna*, 636 F. Supp. 2d 1154 (2009); *See also State v. Schimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979) (reading the CMIP statute to prohibit only “sexual misconduct”).

The *Schoening* court noted that, unless construed in this manner, the statute could be applied to criminalize speech that is protected by the First Amendment, such as conversations with minors regarding sexual health and education. *Schoening*, 636 F. Supp. 2d at 1157.

The trial court violated Mr. Griffin's right to due process and relieved the state of its burden of proof by refusing to instruct the jury that, in order to convict, the state was required to prove that he had communicated with S.L. regarding sexual conduct that would have been

illegal (or at least constituted “misconduct”) if performed. *Luther*, 65 Wn. App. at 427; *O'Donnell*, 142 Wn. App. at 322.

A trial court’s failure to instruct the jury on each element of an offense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). The state cannot meet this burden when the evidence and instructions “leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Id.*

Absent Mr. Griffin’s proposed instruction, the jury was very likely to convict him based on the evidence of communications regarding sexual conduct that was not actually unlawful. For example, the jury could have found that his conversations with S.L. about masturbation, sex toys, and fantasies involving fictional characters were “immoral” and “of a sexual nature” even though they did not involve anything that would have been illegal if performed. Likewise, the jury could have believed that homosexuality was “immoral” and, accordingly, convicted based on Mr. Griffin’s general conversations with S.L. about her relationship with her girlfriend. Given the evidence in this case, the state cannot establish beyond a reasonable doubt that the court’s refusal to give Mr. Griffin’s proposed instructions did not contribute to the verdict. *Id.*

The trial court violated Mr. Griffin's right to due process by failing to instruct the jury on each element of Communicating with a Minor for Immoral Purposes. *Luther*, 65 Wn. App. at 427; *O'Donnell*, 142 Wn. App. at 322. Mr. Griffin's CMIP convictions must be reversed. *Id.*

III. THE STATUTE CRIMINALIZING COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. GRIFFIN'S CASE.

The vagueness doctrine of the Due Process Clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); *Giacco v. Pennsylvania*,

382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); U.S. Const. Amend. XIV; art. I, § 3.⁷

A criminal statute is unconstitutionally vague if either it does not ensure that “citizens have fair warning of proscribed conduct” or if it permits for arbitrary enforcement. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010).

When a statute is challenged as unconstitutionally vague *as applied* to a certain case, the court must look to the accused person’s alleged conduct. *State v. Danforth*, 56 Wn. App. 133, 135–36, 782 P.2d 1091 (1989), *overruled on other grounds by McNallie*, 120 Wn.2d 925⁸. This is because the statute may be unconstitutionally vague as to some conduct while still passing constitutional muster when applied to “one whose conduct clearly falls within the constitutional ‘core’ of the statute.” *Id.* (citing *State v. Zuanich*, 92 Wn.2d 61, 593 P.2d 1314 (1979)).

The *Danforth* court found that a previous version of the CMIP statute was unconstitutionally vague when applied to alleged

⁷ A constitutional vagueness challenge can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); RAP 2.5(a)(3). Constitutional issues are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017).

⁸ The *McNallie* court overruled *Danforth* “insofar as it requires reference to the individual sections of chapter 9.68A RCW to define the “immoral purposes” for which communication with minors is legislatively prohibited.” *McNallie*, 120 Wn.2d at 933. Notably, that holding in *McNallie* strengthens Mr. Griffin’s vagueness claim by holding the CMIP statute to provide even less clear “ascertainable standards” of guilt. *Grayned*, 408 U.S. at 108.

communications inviting 16- and 17-year-olds to participate in consensual group sex because the underlying conduct had not been made illegal by the legislature. *Id.* at 135-37. Accordingly, the communications fell outside the constitutional “core” of the statute, which focused on protecting minors from sexual exploitation and abuse. *Id.* at 136-37 (noting that a contrary holding would require the court to impose its own standards of “morality” upon the conduct of the accused).

Conversely, the CMIP statute is not unconstitutionally vague as applied to communications regarding taking nude photographs of a 16-year-old as part of a *quid pro quo*. *Pietrzak*, 100 Wn. App. at 296. This is because taking such photos is clearly proscribed by law, such that a person of ordinary intelligence need not guess as to whether the communications would fall into the ambit of the CMIP statute. *Id.* at 295-93.

Mr. Griffin’s case involved numerous communications regarding sexual topics that were not proscribed by law, such as: S.L.’s relationship with her girlfriend, masturbation, the use of vibrators, and sexual fantasies involving fictional characters. *See e.g.* Ex. 13, p. 1; Ex. 46B, p. 3, Ex. 84, Supp. CP; RP 1221, 1225, 1230-31, 1257, 1264. S.L. also sent messages to Mr. Griffin describing her fantasies, unsolicited. RP 1229, 1252, 1397-98, 1434. Mr. Griffin’s receipt of those messages, technically, qualifies as

“communicating” with S.L., as proscribed by the language of the CMIP statute.

Many of the allegations in Mr. Griffin’s case were far more innocuous – and further afield from the goals of protecting children from abuse -- than those at issue in *Danforth*. Those allegations fell outside of the constitutional “core” of the CMIP statute. *Danforth*, 56 Wn. App. at 135–36.

The statute is also unconstitutionally vague as applied to Mr. Griffin under the traditional inquiry. First, the statute fails to provide citizens with fair notice of whether it criminalizes discussions with minors regarding conduct that does not violate the law, if carried out. Likewise, statute encompasses any “communicating,” without clarifying whether it is also criminal to *receive* a sexually-explicit message from a minor. Second, the statute fails to guard against arbitrary enforcement against people who, like Mr. Griffin, are particularly frank when it comes to matters of sex. *Valencia*, 169 Wn.2d at 791. It also invites “unfettered latitude” in enforcement because it could be read to proscribe strict liability for anyone who receives an offending message from a minor, regardless of whether it was solicited or desired. *Goguen*, 415 U.S. at 578.

If this court holds that the trial court did not err by failing to give Mr. Griffin’s proposed jury instructions, then, in the alternative, reversal

of Mr. Griffin's CMIP convictions is still required because the statute is unconstitutionally vague as applied to the facts of his case. *Id.*; *Danforth*, 56 Wn. App. at 135–36.

IV. THE TRIAL COURT ERRED BY ADMITTING AN EXHIBIT, DETAILING EIGHT-MONTHS-WORTH OF SEX-RELATED INTERNET BROWSING HISTORY EXTRACTED FROM MR. GRIFFIN'S PHONE, WHICH WAS INADMISSIBLE UNDER ER 401, 403 AND 404(B).

Over Mr. Griffin's objection, the trial court admitted a 67-page exhibit detailing eight-months-worth of his phone's sex-related internet browsing history. RP 274-80, 356-79; Ex. 47, Supp. CP.

The exhibit included dozens of pages of the phone's internet activity related to pornography, bondage, BDSM, anal sex, sex paraphernalia, and rape. Ex. 47, Supp. CP. It listed news articles that had been read on the phone: including those related to the Bill Cosby rape case and other specific rape cases. Ex. 47, pp. 3, 5-7, 9-11, 26, 32, Supp. CP. The exhibit details searches made on Mr. Griffin's phone, including one for "teen pussy." Ex. 47, pp. 13, 22, Supp. CP. It shows that someone using Mr. Griffin's phone watched a video entitled "The Problem with Affirmative Consent Laws" and read a story called "Is it Wrong to Try to Pick Up Girls in a Dungeon?". Ex. 47, pp. 40-42, 46-50, Supp. CP.

Perhaps most troublingly, the exhibit showed that someone using Mr. Griffin's phone had conducted numerous searches regarding

Washington law related to sex offenses and searches for criminal defense attorneys in the Tacoma area. Ex. 47, pp. 14-15, 30-33, 65-67, Supp. CP. One of the detectives also emphasized the searches related to Washington law on sex offenses and pornography during his testimony. RP 1715-20, 1737-38.

The trial court did not clarify the purpose for which the evidence was admissible or weigh the probative value against the prejudicial effect on the record. RP 274-80, 356-79.

In the alternative, if this court does not suppress the evidence of Mr. Griffin's web search history because, as argued above, it was seized pursuant to an unconstitutional warrant, then Mr. Griffin's convictions must still be reversed based on this sweeping evidentiary error. *Id.*

First, the evidence of the internet browsing history extracted from Mr. Griffin's phone was inadmissible because not relevant to any element of the charges against him.

Evidence is not relevant unless 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. Irrelevant evidence is inadmissible. ER 402.

To be relevant, evidence must: "(1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the

outcome of the case.” *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)). In a criminal case, this includes “facts which offer direct or circumstantial evidence of any element of a claim or defense.” *Id.*

In Mr. Griffin’s case, there was no evidence that the material in the lengthy exhibits recounting the sex-related internet activity had been communicated to S.L. in any way. *See RP generally*. It did not tend to prove or disprove any element of any of the charges against him. *Id.* The evidence was irrelevant and should have been excluded. *Id.*; ER 401, 402.

Second, the evidence was inadmissible under ER 403 because it had virtually no probative value but carried a very high risk of unfair prejudice to Mr. Griffin’s defense. ER 403.

Even if it is relevant, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Here, if this court finds that the evidence of the sex-related internet history was relevant, it was still inadmissible because any probative value was outweighed by the danger of unfair prejudice. ER 403.

Indeed, the jury was very likely to rely on the exhibit to conclude that Mr. Griffin was obsessed with sex and violence and, accordingly, must have been guilty of the charges against him. The evidence

encouraged the jury to make an impermissible propensity inference and to convict Mr. Griffin on that basis. *See State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012) (recounting the general rule against propensity evidence). Worse yet, the jury could have interpreted the searches for Washington sex-offense law and for defense attorneys as admissions of guilt to a sex offense. The evidence was inadmissible under ER 403.

Finally, insofar as they can be determined to constitute misconduct, the searches on Mr. Griffin's phone for things like "teen pussy" and rape-related pornography should also have been excluded under ER 404(b).

Mr. Griffin argued in trial court for the exclusion of the "teen pussy" search, pointing out that not all teens are minors, so it could not be determined to constitute a search for child pornography but was still highly prejudicial and likely to inflame the jury. RP 276, 278, 280. Mr. Griffin also noted that he was not charged with any offense related to child pornography, so the evidence was not relevant to any of the charges against him, regardless. RP 278, 362.

In response, the trial court simply noted that the term "teen" includes anyone aged thirteen to nineteen and found the evidence admissible. RP 280. The court did not identify the purpose for which the

evidence could be admitted or conduct any of the rest of the required inquiry under ER 404(b). *See* RP 274-80, 356-79.

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b) must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438 448, 333 P.3d 541 (2015).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144

Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted, the court must give a limiting instruction to the jury. *Gunderson*, 181 Wn.2d at 923.

Here, the trial court failed to identify a proper purpose for which the evidence was admitted, failed to conduct the necessary inquiry on the record, and failed to give the required limiting instruction to the jury. *Id.*; *Slocum*, 183 Wn. App. at 448; *McCreven*, 170 Wn. App. at 458.

Had the court conducted the inquiry, it would have found that evidence that someone using Mr. Griffin's phone had searched for rape-related pornography and for "teen pussy" was not relevant to any of the charges against him and was not offered for any of the proper purposes permitted by ER 404(b). The evidence should have been excluded.

Mr. Griffin was prejudiced by the improper admission of voluminous evidence regarding sex-related internet browsing that had occurred on his phone – none of which was relevant to establish any element of the charges against him. *State v. Sanford*, 128 Wn. App. 280, 288, 115 P.3d 368 (2005). The evidence demonstrated an interest in BDSM and pornography involving violence. It also showed that someone using Mr. Griffin's phone had conduct searches related to famous rape cases, Washington state law on sex offenses, and criminal defense attorneys in the Tacoma area. *See Ex. 47*, Supp. CP. The jury likely used

the evidence (at the very least) to infer that Mr. Griffin had a propensity to commit sex crimes. At the worst, the jury could have concluded that some of the searches demonstrated consciousness of guilt or even and admission of guilt. There is a reasonable probability that the improper admission of the evidence affected the verdict at Mr. Griffin's trial. *Id.*

The trial court erred by admitting an exhibit documenting eight-months-worth of sex-related internet browsing history extracted from Mr. Griffin's phone. ER 401, 402, 403, 404(b). Mr. Griffin's convictions must be reversed. *Id.*

V. THE TRIAL COURT VIOLATED MR. GRIFFIN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Mr. Griffin attempted to present evidence that he talks frankly about sex – including about intimate topics like sex toys, fantasies, fetishes, and BDSM – with many people. He sought to demonstrate to the jury that he discussed those subjects in an intellectual manner, not for “immoral purposes.” RP 1980. Mr. Griffin's defense attorney described him as not having “the best social skills.” RP 1981. Specifically, he attempted to introduce testimony from his mother and one of his friends that he discussed such topics regularly, with no embarrassment. RP 1898-1903, 1980-81.

Mr. Griffin explained to the trial court that the evidence was central to his defense because it demonstrated that he discussed the topics he was alleged to have discussed with S.L. with many people, including those in whom he had no sexual interest, like his mother. RP 1900-03.

But the trial court prohibited Mr. Griffin from eliciting that testimony. RP 1898-1903, 1980-81. The trial court violated Mr. Griffin's constitutional right to present relevant evidence in his defense.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§ 3 and 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The right to present a defense includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720.

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

If there are questions of the strength or accuracy of evidence that is critical to the defense, those weaknesses must be established by cross-examination, not by exclusion:

[T]he trial court should admit probative evidence [offered by the defense], even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281 (2017)

(emphasis in original).

The exclusion of evidence offered by the defense violates the Sixth Amendment right to present a defense when “the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist.” *Id.* at 326 (citing *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006)).

Evidentiary rulings concerning evidence offered by the defense are reviewed for an abuse of discretion. *Id.* at 317. But “the more the exclusion of that evidence prejudices an articulated defense theory, the more likely [an appellate court] will find that the trial court abused its discretion. *Id.* (citing *Jones I*, 168 Wn.2d at 720).

The trial court violated Mr. Griffin’s constitutional right to present a defense by prohibiting him from eliciting evidence that he had the types of conversations he was alleged to have had with S.L. with many people,

including his own mother. *Id.* This evidence was critical to the defense theory, which was that Mr. Griffin did not participate in those conversations for “immoral purposes,” as required for conviction. RP 1900-03. In the context of the entire record, the omitted evidence would have raised a reasonable doubt that did not otherwise exist. *Id.* at 316.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. The state cannot meet that burden here. The jury in Mr. Griffin’s case clearly did not find all of the state’s evidence credible, because it acquitted Mr. Griffin of three of the CMIP charges. CP 465, 469, 471. In this context, the added explanation that Mr. Griffin considered the conversations like the ones he allegedly had with S.L. to be normal could have resulted in his acquittal of the other charges as well. The violation of Mr. Griffin’s constitutional right to present a defense requires reversal of his convictions. *Id.*

The trial court violated Mr. Griffin’s constitutional right to present a defense by prohibiting him from eliciting evidence that was critical to his defense theory. *Jones*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 321. Mr. Griffin’s convictions must be reversed. *Id.*

VI. THE TRIAL COURT VIOLATED MR. GRIFFIN'S RIGHT TO COUNSEL BY FAILING TO PRESUME THAT HE HAD BEEN PREJUDICED BY POLICE INTRUSION INTO HIS PRIVILEGED COMMUNICATION WITH HIS ATTORNEY.

When the police searched the entirety of the data contained on Mr. Griffin's cell phone, they extracted at least five pages worth of documents that included communications that were protected by attorney-client privilege. *See* RP (10/25/16) 2-7; RP (10/26/16) 2-7.

After reviewing the documents, the trial court concluded that they were protected by the privilege. RP (10/26/16) 2. Nonetheless, the court refused to enact any remedy based on the cursory conclusion that Mr. Griffin was not prejudiced because the communications did not include any work product or trial strategy. RP (10/26/16) 5.

The trial court violated Mr. Griffin's right to counsel by failing to apply a presumption that Mr. Griffin's defense had been prejudiced and requiring the state to rebut that presumption, if possible. *See State v. Pena Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014).

The Sixth Amendment right to counsel includes the right to confer privately with counsel. *Id.*; U.S. Const. Amends. VI, XIV. State intrusion onto an attorney-client conversation "is a blatant violation of a foundational right." *Id.* Such intrusion is presumed to be prejudicial to the accused and the supreme court has vacated criminal convictions based

upon it, when necessary. *Id.* (citing *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963)); see also *State v. Irby*, No. 75901-9-I, --- Wn. App. ---, 415 P.3d 611, 616 (April 16, 2018).

When the state pries into privileged attorney-client communication, the state must prove that the defendant was not prejudiced beyond a reasonable doubt. *Pena Fuentes*, 179 Wn.2d at 819-20. This is because the right to private communication with one's attorney is foundational and "the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned." *Id.*; See also *Irby*, 415 P.3d at 618.

When the state intrudes upon privileged attorney-client communication, the court must conduct a four-step inquiry, asking each of the following questions:

1. Did a State actor participate in the infringing conduct alleged by the defendant?
2. If so, did the State actor(s) infringe upon a Sixth Amendment right of the defendant?
3. If so, was there prejudice to the defendant? That is, did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt?
4. If so, what is the appropriate remedy to select and apply, considering the totality of the circumstances present, including the degree of prejudice to the defendant's right to a fair trial and the degree of nefariousness of the conduct by the State actor(s)?

Irby, 415 P.3d at 615.

In *Irby*, the defendant presented evidence that jail guards had opened and read his letters to his defense attorney. *Id.* 614. The trial court agreed that the guards had violated his right to counsel but denied Irby's motion to dismiss the charges against him based on the conclusion that there was no evidence that the intrusion would have prejudiced him even if they had been read by someone at the prosecutor's office. *Id.* at 618.

The court of appeals reversed, noting that there was no indication that the trial court had applied the presumption of prejudice or held the state to its burden to demonstrate harmlessness beyond a reasonable doubt. *Id.* The court held that it was impossible to determine what the trial court would have concluded if it had properly applied the presumption and the correct standard of proof. *Id.*

The same is true of Mr. Griffin's case. The trial court simply stated that Mr. Griffin had not been prejudiced by the police intrusion into his privileged communications with his attorney. RP (10/26/16) 5. It does not appear as though the court applied the presumption of prejudice or held the state to its burden to prove the absence of prejudice beyond a reasonable doubt. RP (10/26/16) 1-5.

The *Irby* court remanded the case for an evidentiary hearing in the trial court to determine whether the state could overcome the presumption

of prejudice beyond a reasonable doubt. *Id.* at 620. The same remedy is necessary in Mr. Griffin's case. *Id.*

The trial court erred by failing to apply the presumption of prejudice and failing to hold the state to prove harmlessness beyond a reasonable doubt after determining that the police had intruded into Mr. Griffin's privileged communications with his attorney. *Id.* at 618. Mr. Griffin's case must be remanded to determine whether the state can meet that burden. *Id.* at 620.

CONCLUSION

The trial court erred by denying Mr. Griffin's motion to suppress the evidence seized from his cell phone, which was discovered pursuant to an unconstitutionally overbroad search warrant. The trial court erred by refusing to give Mr. Griffin's proposed jury instructions regarding the crime of Communicating with a Minor for Immoral Purposes (CMIP). The CMIP statute is unconstitutionally vague as applied to Mr. Griffin's case. The trial court violated Mr. Griffin's constitutional right to present a defense by excluding evidence critical to his defense theory. The trial court erred by admitting highly prejudicial evidence that was inadmissible under ER 401, 402, 403, and 404(b). Mr. Griffin's convictions must be reversed.

In the alternative, the trial court erred by failing to apply the presumption that Mr. Griffin had been prejudiced by the state's intrusion into his privileged communications with his attorney and failing to hold the state to its burden to prove harmlessness beyond a reasonable doubt. Mr. Griffin's case must be remanded to determine whether the state can meet that burden when the presumption is properly applied.

Respectfully submitted on May 25, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Daniel Griffin/DOC#400418
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 25, 2018.



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LAW OFFICE OF SKYLAR BRETT

May 25, 2018 - 1:21 PM

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