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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL RYAN GRIFFIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 15-1-02646-3

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant, Daniel Griffin (hereinafter, defendant), was charged with two counts of child molestation in the third degree and ten counts of communication with a minor for immoral purposes. CP 267-73. The prosecutor argued four distinct acts of child molestation: (1) defendant's grope of S.L.'s breast in the living room, (2) defendant's grope of the breast in the bedroom; (3) defendant tying up with Shibari rope in the bedroom and the grabbing of S.L.'s breast in the bedroom; and (4) defendant sucking on S.L.'s breast in the bedroom. 19 RP 2131-32.

Defendant was found not guilty of communication with a minor for immoral purposes in Counts III, VII, and IX. CP 465, 469, 471. Defendant was found guilty of the remaining seven counts. CP 463-64, 466-68, 470, 472-474. The defendant was sentenced to 120 months in custody with the child molestation counts running consecutive to the communicating with a minor counts. CP 532-547. The court found that the two counts of child molestation constituted the same criminal conduct. *Id.* He filed a timely notice of appeal. CP 553.

a. The defendant's Samsumg phone

i. Search warrant signed on July 6, 2015 (physical phone)

On July 6, 2015, a search warrant was issued for the following items: (1) bondage items to include handcuffs, ropes, gags, slings, and restraints, (2) pictures of the victim that appear in any printed format, (3) the defendant's cell phone, (4) documents showing dominion and control of the residence, and (5) general crime scene processing to include photographing, videotaping, and diagraming of the defendant's residence. CP 17-41 (Exhibit A). The warrant specified that the evidence was being sought for an investigation of the crime of child molestation and communicating with a minor for immoral purposes. *Id.* The warrant was served the following day. *Id.* (Exhibit B).

ii. Search warrant signed on July 9, 2015 (cell phone dump)

A second warrant was signed on July 9, 2015, which authorized the search of the defendant's Samsung phone. *Id.* (Exhibit C). That warrant also stated that it was in regard to an investigation for child molestation in the third degree and communicating with a minor, and allowed the following search:

> 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, contained on: 1 Samsung Galaxy S4, containing a microsd memory card and SIM card, identified as belonging to Daniel Griffin.

The warrant was executed on July 29, 2015. *Id.* (Exhibit D).

iii. CrR 3.6 hearing regarding the search and seizure of the defendant's Samsung phone

On November 16, 2016, the parties appeared before the trial court for a CrR 3.6 hearing regarding the seizure and later search of the defendant's cell phone. 11/16/16 RP 3. The defendant argued that the second warrant (hereinafter referred to as the 7/9/15 warrant) lacked the required specificity and was a "general search." 11/16/16 RP 4. The State argued that the affidavits from both search warrants should be considered together, as the warrants were signed within three days of each other. 11/16/16 RP 16. Both warrants were signed by the same judge and all information from both warrants was available to him. *Id.* at 16-17. The State correctly described the first warrant as a warrant that authorized the seizure of the defendant's phone from his residence. *Id.*

The trial court stated that there was nothing in the 7/9/15 warrant that incorporated by reference anything from the earlier warrant. 11/16/16 RP 18. In examining the 7/9/15 warrant in isolation, the trial court found that it was not overbroad. The court found:

> Then we get to the execution of the search warrant. I don't find that it's overbroad. The execution of it results in all this information that's provided. I think there can be challenges to the specific information, if the State intends to introduce it, that's beyond what would be restricted pursuant to the search warrant; but that's not an issue that's really before me. That's something that may come up down the road, and that's get into the whole severance issue.
>
> So, I'm going to deny the motion to suppress the evidence that was found specifically related to this search warrant itself. There may be specific challenges to this as being beyond that, but I don't –I don't have that information in front of me.

11/16/16 RP 30-31.

2. Facts

S.L. was born on October 19, 2000. 12 RP 1127. S.L. testified that she met defendant while her mother was employed with him. 12 RP 1130. S.L. was 13 years old when she first met the defendant. 12 RP 1129-1130. The defendant attended S.L.'s birthday party when she turned 14 years old. 12 RP 1131.

S.L. exchanged text messages with the defendant. 12 RP 1133. She and defendant engaged in electronic conversations about S.L.'s relationship with her parents. 12 RP 1150. S.L.'s conversations with the defendant shifted to more sexual topics, which he told S.L. not to share because he could get in trouble. 12 RP 1142. These topics include discussions about "BDSM." 12 RP 1173. S.L. testified as to what BDSM

meant: "It's an acronym for bondage, discipline, dominance, sadism -- or dominance, submission, sadism and masochism." *Id.*

At some time, it might have been in the Spring of 2015, defendant told S.L. to lock down her cell phone "with as many passwords as possible." 12 RP 1161. Defendant also told S.L. to turn off the location feature contained in her cell phone. *Id.* S.L. did so. *Id.*

June 13, 2015 was the last time S.L. was at defendant's residence. 12 RP 1163. S.L. arrived at about noon and left as the sun was going down. 12 RP 1164. The defendant was home, but his mother[1] was not. 12 RP 1164. The nature of the conversation that occurred between them was mostly sexual. 12 RP 1172. The two were on the couch in the living room watching television with S.L. lying with her head on defendant's lap. 12 RP 1171. While in the living room, S.L. testified that defendant reached under S.L.'s shirt, but over her bra to grope S.L.'s left breast. 12 RP 1174.

The two moved into the bedroom. 12 RP 1177-79. S.L. testified that they were both on the bed. 12 RP 1178-79. Defendant moved S.L.'s shirt and bra so that S.L.'s breasts were exposed. 12 RP 1179-80. Defendant groped and touched S.L.'s breasts. *Id.* Defendant suckled on

[1] Defendant lived with his mother. 12 RP 1136.

one of S.L.'s breasts. 12 RP 1180. Defendant told S.L. that her body was beautiful. *Id.*

Before defendant touched S.L.'s breasts in the bedroom, defendant bound S.L. in a "simple Shibari bind." 12 RP 1180. This was done in the bedroom with ropes taken from a drawer in defendant's room. 12 RP 1168, 1180-82. S.L.'s hands were tied behind her back in the course of this binding. 12 RP 1182. S.L. could not move to free herself. 12 RP 1182. Police later recovered rope and oil from the defendant's residence. 14 RP 1530. The items were recovered from the defendant's dresser. *Id.*

After defendant touched S.L's breasts, and while she was still bound, defendant "pulled down his pants, waistband and underwear to reveal his fully erect penis for her." 12 RP 1183. Defendant said something implying that S.L. had been wanting to see him without his clothes on." 12 RP 1184. S.L. had marks on her from the rope, and the defendant told her that she was lucky to have brought a scarf with her. 12 RP 1185.

S.L. testified about a text conversation, also from Exhibit 46, where defendant stated, "I really shouldn't be finishing a 14 – year old." 12 RP 1241, CP 477-484 (Exhibit #46). S.L. testified that "finishing," in that context, meant getting herself or other fourteen year old girls to orgasm. *Id.* This conversation, which alluded to the legal risk of an adult

engaging with sexually oriented talk with juveniles, was S.L.'s introduction to Wickr from defendant. 12 RP 1241-42. Shortly after that conversation, S.L. installed the Wickr app. 12 RP 1243.

S.L. described the Wickr app. 12 RP 1244. It is a communication app, which allows the exchange of messages. *Id.* The messages sent by the application could not be retrieved after a certain period of time. 12 RP 1245-46. S.L. had multiple conversations with defendant "almost every night" regarding sexual fantasies. 12 RP 1244-47, 12 RP 1277. S.L. testified that defendant told her that he would be upset if S.L. showed those conversations to anyone. 12 RP 1246-47. From November of 2014 to June of 2015, S.L. and the defendant had multiple conversations on Wickr regarding sexual fantasies. 12 RP 1245, 1262.

S.L. testified that Exhibit 27 was a picture of an Amazon listing for a starter set of bondage materials that defendant had shared with her previously. 12 RP 1186. S.L. testified that Exhibit 26 was an Amazon listing for a set of anal plugs that defendant had shown to her via Wickr. 12 RP 1186-87.

S.L. testified that Exhibit 25 was "an Amazon listing for a strap for use in, like, a sexual context." 12 RP 1187-88. This listing was sent to S.L. after defendant touched her and tied her up. *Id.* S.L. testified that the

intention was that "[a]t some point they were either to be kept around or used on me, or for the defendant to use on himself." 12 RP 1189.

S.L. testified to the dresses and boots the defendant gave her as gifts. 12 RP 1189-1193. S.L. testified that pictures of a sexual nature were exchanged between herself and defendant. 12 RP 1203. These included pictures of defendant wearing very little clothing, defendant wearing a robe, and a couple videos of a sexual nature. *Id.* These items were sent via Wickr. 12 RP 1204. S.L. testified that in at least one image defendant's erect penis was visible underneath his underwear. 12 RP 1204-05. S.L. testified that she and defendant had a Wickr conversation about that. 12 RP 1205. S.L. testified about her memory of a video the defendant sent her. 12 RP 1207. The video was of the defendant masturbating. 12 RP 1207.

S.L. testified that defendant purchased her a vibrator. 12 RP 1210. S.L. testified that Exhibit 46,[2] messages 2736-2745 and 2760 were a conversation between her and defendant. 12 RP 1212-13. This conversation was about S.L., S.L.'s mother, and the pricing of a new vibrator. *Id.* This exchange included a discussion about the purchase of vibrators and sexual release. 12 RP 1220-1222. S.L. also testified about

[2] Exhibit 46 was a collection of text messages extracted from S.L.'s cell phone. 12 RP 1150.

another exchange on June 2, 2015 about a vibrator that S.L.'s mother was going to purchase for S.L. CP 477-484 (Exhibit 46, messages 2964-73); 12 RP 1222-23.

S.L. testified about Exhibit 46, messages 77-115 which were a sexual fetish discussion with defendant. 12 RP 1224-1227. This conversation referenced "minors" and the way they are treated differently in "role play" (12 RP 1227), participation in a "BDSM convention" (12 RP 1226), and "society" (12 RP 1228). S.L. related a message where she asked defendant, "I wanna hear what perverted "scarey" [sic] thoughts run through your head . . ." and defendant responded, "Not via permanent record. This shizzit tends to show up years down the road." 12 RP 1226.

S.L. related a text conversation of a particular text conversation, about a sexual fantasy, defendant told S.L. (about that fantasy), "I like boobs, pussy and women." 12 RP 1230; CP 477-484 (Exhibit #36, message #162).

Another text conversation between S.L. and defendant, taken from S.L.'s phone, was about which of S.L.'s friends defendant "would choose if you had to take one of us and tie her up, beat her, and then rape her?" 12 RP 1232-33, CP 477-484 (Exhibit #46, message #178). The question was posed by S.L., to which the defendant responded ". . . Saddly, I do

have an answer, but I REALLY shouldn't go down that path...WHHHYY?" *Id.* (message #179).

S.L. testified that another text conversation between S.L. and defendant was about a torture and rape fantasy. 12 RP 1233-34, CP 477-484 (Exhibit 46, #191). There was more testimony about rape and bondage fantasy text conversations. 12 RP 1235-37. S.L. testified about another text conversation, also from Exhibit 46, which was about rape, bondage, sadism, masochism, and masturbation involving defendant, S.L. and S.L.'s friends. 12 RP 1237-39.

S.L. testified regarding a series of text exchanges which addressed the topic of "dark fantasies." 12 RP 1247, CP 477-484 (Exhibit 46). Defendant referenced the "tidbits" he had sent to S.L. the night before then stated:

> I can go way darker. I'm just not sure where your line is, and everybody has some sort of line, even necro-vore cannibals probably have something they are not into. So maybe you ought to explain what isn't too tame for you the next time we chat.

12 RP 1247-48; CP 477-484 (Exhibit #46, messages #420-421). The concept of "guro rape" was included in these discussions. 12 RP 1248-49; CP 477-484 (Exhibit 46, messages 494-96). Detective Graham later testified to the meaning of "guro rape:"

> It's a phrase that people in certain online communities use to describe images of a grotesque nature. It's short for

> grotesque. And it's -- the Japanese will shorten English words in some of their art and pictures so they call it, instead of calling it grotesque rape picture to guro rape picture.

15 RP 1718.

S.L. testified to an exchange between her and the defendant about certain devices used in sexual contact between people:

> A. It starts with the defendant, "So, do your folks have anything particularly interesting? Whips 'n chains, perhaps? Maybe a strapon?" I respond, "No. I'm sure you do, though," and he says, "Nope, just rope and oil." I respond, " *shrugs*, works for me."
>
> Q. And whose parents is he referring to there, if you know? A. He was referring to my dad and stepmother.

12 RP 1259-60; CP 477-484 (Exhibit 46, #1218-1222).

S.L. testified to an exchange where defendant discussed his libido:

> This is from the defendant. "Unfortunately, when I'm depressed, so is my libido, my body never stops generating its supply. Now I'm stuck at work and... nevermind." I say, "eh...brain no comprehendo. Explain."

12 RP 1260; CP 477-484 (Exhibit #46, message #1233). S.L. testified that her exchanges with defendant on Wickr were "more detailed" than this message. 12 RP 1261. S.L. said that she believed that on Wickr "he would have omitted innuendos or would have gone into more detail." 12 RP 1262.

S.L. testified that she recalled conversation about defendant's fetishes "like seeing women's breasts, or like a Cupcake comic, which is a

gore comic." 12 RP 1265. S.L. testified to a communication between herself and defendant:

> It starts with the defendant, "Oh, yeah, I never fully woke up when you called. Your voice, and mental images of you ended up permeating my next dream cycle. That got interesting." And I respond, "doggie style," and then in 1528 he responds with an ellipsis.

12 RP 1268; CP 477-484 (Exhibit 46, #1526-1528).

Exhibit 46, messages 1539-1540, from March 31, 2015, were admitted. 12 RP 1273. Message #1539 (from defendant) said "frogtie" and message 1540 (from S.L.) was an ellipsis followed by a question mark[3]. *Id.* Detective Graham later testified that "frogtie:" means refers to a binding of a sexual nature that allows relatively easy access to the genitals. 14 RP 1519.

S.L. testified to message #2709 of Exhibit 13, which contained texts taken from S.L.'s phone, where defendant texted: "I'm either working, sleeping, masturbating or two of the three." 12 RP 1255, 1288, CP 477-484 (Exhibit #13, message #2709). S.L. testified that defendant told her that he would have an erection from the fantasy conversations they discussed. 13 RP 1311. S.L. testified that she shared with defendant

[3] "Communicate" for purposes of communicating with a minor for immoral purposes does not require that the minor understand the communication. *See* ***State v. Hosier***, 157 Wn.2d 1, 133 P.3d 936 (2006).

one picture of her vagina and one where her breasts were partially covered. 13 RP 1317.

S.L. testified that she and defendant would use computers on the bed together and would take naps together on the bed. 13 RP 1327-29. S.L. testified, "Oftentimes I would like—like, he would lay flat and I would drape myself over him, or do some form like he would wrap his arms around me." 13 RP 1329. S.L. testified that she had once told defendant that she was missing him, but one of them (she didn't remember who) suggested that S.L. receive a pillow. 13 RP 1336. S.L. testified that defendant met her outside her house and gave her some candy and his pillow. 13 RP 1335-36; CP 477-484 (Exhibit #46, message #3462).

Dylan Lippert is S.L.'s father. 11 RP 987. S.L.'s date of birth is October 19, 2000. *Id.* In the time period of 2014-15, Mr. Lippert had approximately a 50/50 custody split with his ex-wife regarding S.L. and her sister. 11 RP 989. Lippert provided S.L. with a cell phone. 11 RP 993.

On June 24, 2015, Lippert had the opportunity to view messages on his S.L.'s cell phone. 11 RP 997, 1000-01. He saw messages between the defendant and S.L. which referred to him as a "jailer.". *Id.* The messages referred to him and S.L.'s mother as stupid and cold, and called his current wife a "Stepford wife." *Id.* Lippert saw comments that he

described as mild innuendo between the defendant and S.L. about their time together. *Id.* Lippert then saw a message where the defendant told S.L. that if she could get Lippert to hit her, then she would win. *Id.*

Lippert and his ex-wife soon talked together with S.L. 11 RP 1004-07. S.L. told Lippert about BDSM, about how she and defendant wanted to live together, about other things that were just "anti-parents," and about physical contact. 11 RP 1006. S.L.'s demeanor through that conversation was "sadness, embarrassment, and then maybe a bit of a release . . . or a relief." 11 RP 1008.

S.L. described the Wickr app to Lippert, who was able to reinstall it on S.L.'s cell phone. *Id.* When asked what information was available on the app, Lippert stated, "Daniel as a contact, and that was pretty much about it. There were no messages. However, during that evening, messages from Daniel started to come in." 11 RP 1010. Lippert, using S.L.'s cell phone and posing as S.L., communicated with defendant. CP 477-484 (Exhibit 1); 11 RP 1014-1020. The exchange took place from about 11:40 p.m. to almost 1:00 in the morning. 11 RP 1018. Lippert took images of some of that exchange. 11 RP 1014. During the texting conversation, Lippert (posing as S.L.) asked defendant to send a picture of himself. 11 RP 1016. Defendant responded, "If I end up sending a pic, and you DO save it, I will consider that to be an irredeemable breach of

trust." CP 477-484 (Exhibit 1, page 44). During another part of the conversation, Lippert texted, "I just wish we were living together *cry*," and the defendant replied, "I know, me too." *Id.*, page 45.

Lippert testified that he then asked defendant to "engage in sexting, to tell me about what we would be doing. 11 RP 1019. Defendant texted back:

> In the fantasy, I tie you to the desk, your leg to the desk leg, on both sides.
>
> ...about.
>
> You would have a shoulder harness that would be tied to the front of the desk, holding you securely in place. Your elbows would be tied behind your back, your arms straight, so that they rested on your ass.
>
> *(so that your HANDS rested on your ass, that is).
>
> ...THAT will give me sweet dreams!
>
> I expect you would be a little nervous, as I loomed over you with a perverted smile.
>
> Hmmm. [from Lippert]
>
> I would place a small bottle in one of your hands, and command you to apply the contents to your anus. You would squirm, and insist that *I* be the one to apply it. There would be a moment of silence, followed by several slaps of a flog across your back and thighs.
>
> Shit mom is up. [Mr. Lippert].

CP 477-484 (Exhibit 1, page 41). Lippert terminated the conversation at this point. 11 RP 1020.

Lippert testified that S.L. gave him gifts that defendant had given her, including a formal dress (worn to S.L.'s eighth grade dance), computer equipment, shoes, and defendant's personal bed pillow. 11 RP 1022.

Detective Graham obtained S.L.'s cell phone. CP 477-484 (Exhibit 108); 11 RP 1481-82. Detective Ryan Salmon extracted information from data contained on CDs extracted from two cell phones. 15 RP 1687. There were 8,048 text messages found on S.L's cell phone. 15 RP 1698. Over 3,000 of those messages were between defendant and S.L. *Id.*

Detective Salmon extracted information from the CD of data extracted from both defendant's and S.L.'s cell phones. 15 RP 1690. There was a Wickr app on both phones. *Id.* Detective Salmon testified that he extracted Exhibit 24 from defendant's cell phone. 15 RP 1692. Exhibit 24 was the video of defendant masturbating that was admitted into evidence during S.L.'s testimony. 12 RP 1207-08.

Exhibit 120 was extracted from defendant's cell phone. 15 RP 1692. This was data relating to two pages of images extracted from defendant's cell phone. 15 RP 1693. S.L. testified that one image was "an Amazon listing for a strap for use in like, a sexual context" that defendant sent to S.L. via Wickr. 12 RP 1188. Another image was "an amazon

listing for a set of anal plugs" that defendant showed to S.L. via Wickr. 12 RP 1187. S.L. testified that another image was "a picture of an Amazon listing for a starter set of bondage materials" that defendant had previously shared with her. 12 RP 1186. Two images were pictures of the defendant which had been sent to her. 12 RP 1200-01. Another image was a picture of S.L. which S.L. had sent to defendant. *Id.* S.L. took that picture after she had just gotten out of the shower. *Id.* The images were created on defendant's phone between June 13, 2015 at 10:02 p.m. and June 14, 2015 at 5:48 p.m. 15 RP 1694.

Detective Salmon went through the "web history" of defendant's cell phone. 15 RP 1714. An extract was admitted into evidence as Exhibit 47. Defendant's phone contained web searches for "rape laws, and including the statute of limitations and sex exploitation of children," "indecent exposure, the RCW," "9A.44 RCW sex offenses" "the age of marriage and RCW age of marriage," "is Wickr down," "Trixie, BDSM, Twilight," "Rainbow BDSM Twilight," "My Little Pony bondage," "guro vore," and "guro vore rape," 15 RP 1715-19.

Beverly McCarter is a high school friend of the defendant who was called by the defendant as a witness. 18 RP 1965. McCarter testified that the defendant had previously used a "Shibari bind" on her, and that he was well informed about how to do it. 18 RP 2011. On June 16, 2015,

McCarter received an email[4] from the defendant about S.L. 18 RP 1988.

The email included the following statement from the defendant:

> A week ago, [S.L.] convinced me to tie her up. Clothes on, no laws actually broken, but still. . . it's not something that society as a whole would really condone. I had my reasons, though, not the least of which was your own descriptions of your childhood, and having wished that you had had proper early experience. I was also hoping that she wouldn't like it. I pulled a full body rope harness on her and tied her hands tightly behind her back so she could barely move a muscle. I pushed her around and made sure she understood what it felt like to be helpless. I thought that she would resent the loss of control, but, ah, no, she did not just like the experience, she really liked it. That's where I thought of you again. I'm not sure how much more I can counsel this kid without crossing lines that really shouldn't be crossed. . .

18 RP 2005.

[4] This email was initially admitted in the State's case as exhibit #119. A refined version was later offered and admitted by the defendant as exhibit #99. The defense indicated that McCarter would be able to recognize and authenticate the email as having been the email she received from the defendant. 18 RP 1934. The defense then had McCarter indicate during her testimony that she located this email in her own email account. 18 RP 2000. As discussed further below, this email should be considered untainted evidence separate from the search of the defendant's cell phone because the defense introduced the email and McCarter identified it as having been received by her via an independent source.

C. ARGUMENT.

1. THE DEFENDANT'S SMARTPHONE WAS SEIZED AND ANALYZED PURSUANT TO TWO LAWFULLY ISSUED WARRANTS WHICH ESTABLISHED PROBABLE CAUSE THAT THE DEFENDANT WAS INVOLVED IN CRIMINAL ACTIVITY AND EVIDENCE OF THOSE CRIMES WOULD BE FOUND IN THE DATA OF HIS SMARTPHONE.

A criminal defendant bears the burden of establishing the unreasonableness of a search warrant by a preponderance of the evidence. ***State v. Hopkins***, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); ***United States v. Dozier***, 844 F.2d 701, 705 (9th Cir. 1988) (*citing* ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). In determining whether there was probable cause for issuance of a search warrant, a trial court's review is limited to the four corners of the warrant and supporting affidavit. ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The appellate court reviews the trial court's probable cause and particularity determinations de novo, giving deference to the magistrate's determination. *Id.* While the degree of particularity required depends on the nature of the materials sought and the facts of each case, the warrant and supporting affidavit are both tested in a commonsense, non-hyper technical manner with great deference given to the issuing court's determination of probable cause with all doubts resolved in favor of the warrant's validity. ***State v. Keodara,*** 191 Wn. App. 305, 313, 364

P.3d 777 (2015) *citing* ***State v. Perrone,*** 119 Wn.2d 538, 549, 834 P.2d 611 (1992); ***State v. Chamberlin***, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); ***State v. Chenoweth***, 127 Wn. App. 444, 455, 111 P.3d 1217(2005); ***State v. Tarter***, 111 Wn. App. 336, 341, 44 P.3d 899 (2002). A search warrant is entitled to a presumption of validity. ***State v. Chenoweth***, 160 Wn.2d 454, 477, 158 P.3d 595, 607 (2007).

Probable cause exists if the affidavit sets forth circumstances sufficient to establish a reasonable inference the defendant is probably involved in criminal activity and evidence of the crime can probably be found in the place to be searched. ***State v. McReynolds***, 104 Wn. App. 560, 568-69, 17 P.3d 608 (2001); *see also* ***State v. Thein***, 138 Wn.2d 133, 145-46, 977 P.2d 582 (1999); ***State v. Keodara***, 191 Wn. App. 305, 364 P.3d 777 (2015). In determining whether such a nexus exists, courts are entitled to draw reasonable inferences from the circumstances described in the affidavit. Those inferences are given great deference by a reviewing court. ***State v. Clark***, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001); ***Thein***, 138 Wn.2d at 146, 149 (*citing* ***State v. Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)); ***State v. G.M.V.***, 135 Wn. App. 366, 371-72, 144 P.3d 358 (2006); ***State v. Herzog***, 73 Wn. App. 34, 56, 867 P.2d 648 (1994); ***State v. Condon,*** 72 Wn. App. 638, 642-44, 865 P.2d 521 (1993); ***McReynolds***, 104 Wn. App. at 569. Direct evidence of a particular item's

involvement in a crime is not required. *Id.*; ***United States v. Spearman***, 532 F.2d 132, 133 (9th Cir. 1976). Where officers executing a warrant find evidence not described in the warrant and not constituting contraband or instrumentalities of crime, the officers may seize the evidence if it will aid in a particular apprehension or conviction, or has a sufficient nexus with the crime under investigation. ***State v. Terrovona***, 105 Wn.2d 632, 648, 716 P.2d 295 (1986); ***State v. Turner***, 18 Wn. App. 727, 729, 571 P.2d 955 (1977).

The Fourth Amendment protects privacy interests against an unreasonable search and seizure by requiring that a search warrant describe with particularity the place to be searched and the things to be seized. ***State v. McKee***, 3 Wn. App.2d 11, 14, 413 P.3d 1049 (2018). The requirements of particularity are met if the substance to be seized is described with "reasonable particularity" which, in turn, is to be evaluated in light of "the rules of practicality, necessity and common sense." ***Perrone*** at 546, *citing* ***State v. Withers***, 8 Wn. App. 123, 504 P.2d 1151 (1972). "The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague or doubtful bases of fact." ***State v. Besola***, 184 Wn.2d 605, 610, 359 P.3d

799 (2015) *citing* ***Perrone***, at 545. The degree of particularity required depends on the nature of the materials sought and the circumstances of each case. ***Perrone*** at 547, *citing* ***State v Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Therefore, where search warrants are concerned a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit. A generic term or general description is not per se a violation of the particularity requirement. A generic or general description may be sufficient if probable cause is shown and a more specific description is impossible. ***Perrone*** at 616.

The search of a smartphone creates unique issues as it is well accepted that smartphones are minicomputers. They have immense storage capacity, collecting in one place many distinct types of information such as bank statements, emails, videos, pictures, and location. This information can span over years. The reconstruction of the materials obtained from a cellphone can result in providing insight into one's private life, which cannot be gained from a single document or photo. Further, the "apps" on cellphones provide detailed information into one's private life. ***Riley v. California***, 134 S. Ct. 2473, 2489-2491, 189 L. Ed. 2d 430 (2014).

Due to the complex nature of computers and smartphones alike, the courts have consistently held, "[A] computer search may be as

extensive as reasonably required to locate items described in the warrant." ***United States v. Grimmett***, 439 F.3d 1263, 1270 (10th Cir. 2006). Few computers are dedicated to a single purpose; rather, they are well known to perform a variety of functions. Almost every hard drive encountered by law enforcement will contain records that have nothing to do with the investigation. The United States Supreme Court recognizes some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those authorized to be seized. ***Andersen v. Maryland***, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). Exposure to innocuous private information while searching a computer is no different than equally lawful exposure to innocuous private information while searching a home for documentary evidence. *See* ***United States v. Heldt***, 668 F.3d 1238, 1267 (D.C. Cir. 1982); ***United States v. Rude***, 88 F.3d 1538, 1552 (9th Cir. 1996); ***United States v. Giannetta***, 909 F.2d 571, 577 (1st Cir. 1990)("Courts have regularly held that in searches for papers, the police may look through notebooks, journals, briefcases, file cabinets, files and similar items and briefly peruse their contents to determine whether they are among the documentary items to be seized"); ***United States v. Upham***, 168 F.3d 532, 535 (1st Cir.1999) ("a search of a computer and co-located disks ... is not

inherently more intrusive than the physical search of an entire house for a weapon or drugs").

Courts interpreting the particularity requirement recognize in reality people rarely keep files accurately labeled to reflect their incriminating content. This is why generic classifications of computer records is permissible where they cannot be more particularly described due to the absence of specific information about their form. *See* ***State v. Stenson***, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). There is consequently no particularity requirement for predicting the form digital evidence of criminal relationship with a minor will take. Such data may be mislabeled, encrypted, stored in hidden directories, or embedded in unallocated spaces that perusal of specific file listings may miss. *See* ***United States v. Hill***, 459 F.3d 966, 975 (9th Cir. 2006). Particularity simply requires the device searched to be a logical repository for the information described in the warrant. ***United States v. Giberson***, 527 F.3d 882, 887 (9th Cir. 2008).

Sufficient particularity can be achieved through reference to a narrowly drafted criminal statute that unambiguously limits the search to evidence of the cited crime within the places identified by the warrant. ***Besola***, at 614; ***State v. Riley***, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Such references avoid particularity problems by preventing police from

expanding the scope of the authorized search according to subjective notions of the crime under investigation. ***Perrone***, 119 Wn.2d at 553-55. Particularity can also sometimes be achieved where the balance of the warrant's language clarifies vaguely described terms. ***Perrone***, 119 Wn.2d at 554.

In this case, Detective Graham did an initial search warrant on July 6, 2015. CP 17-41 (Exhibit B). The Complaint for Search warrant specifically seeks to search defendant's cell phone for "images and texts sent to the victim." *Id.* (Exhibit A). Once the cell phone was seized, Detective Graham, sought another search warrant on July 9, 2015. *Id.* (Exhibit D). This warrant specifically referenced the original search warrant's language as stated above. *Id.* The Complaint then detailed various categories of data that were to be searched and what evidence was being sought. *Id.* (Exhibit C). The warrant was narrowly focused on data showing the relationship, messages, and photos sent between the suspect and victim.[5] This distinguished the warrant in this case from the warrant in ***McKee***. ***State v. McKee***, 3 Wn. App.2d 11, 413 P.3d 1049 (2018).

[5] Both warrants (including the Complaint for Search Warrant and the Search Warrants, which appear to be one complete document) were signed by the same superior court judge.)

Another factor that distinguishes this case from ***McKee*** is that Detective Graham knew as part of his investigation that the defendant had wanted the victim to delete certain information from her phone so that her father could not locate her via GPS. CP 17-41 (Exhibit A). Additionally, Detective Graham knew that the two were specifically using an application on the phones called Wickr Me[6], an encryption program and a program that allows for the deletion of messages. *Id.* Detective Graham also knew that the victim's father had screenshots of some of the messages, so he knew that the messages existed if they had not yet been deleted. *Id.* Based on this information, which was conveyed to the issuing judge, the breadth of the warrant becomes apparent. The search of the cell phone needed to be done in such a way as to find this information which would have been deleted or hidden. This was not an overbroad warrant due to vague language, but the police needed to be able to search to attempt to recover these messages and photos which might have been deleted or secreted by the defendant.

Even if a search warrant is overbroad or insufficiently particular, "[u]nder the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but

[6] https://wickr.com/products/personal/

does not require suppression of anything seized pursuant to valid parts of the warrant." ***Perrone***, 119 Wn.2d at 556, 834 P.2d 611 (*quoting* ***United States v. Fitzgerald***, 724 F.2d 633, 637 (8th Cir.1983)). The Court examines severability looking at five requirements:

> (1) the warrant must lawfully have authorized entry into the premises
> (2) the warrant must include one or more particularly described items for which there is probable cause
> (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole
> (4) the searching officers must have found and seized the disputed items while executing the valid part of the *431 warrant (i.e., while searching for items supported by probable cause and described with particularity)
> (5) the officers must not have conducted a general search, i.e., a search in which they flagrantly disregarded the warrant's scope.

State v. Maddox, 116 Wn. App. 796, 807–08, 67 P.3d 1135 (2003).

Just because a limitation contained in a warrant is not repeated in a supplemental warrant, the entire warrant is not converted into a general warrant. ***State v. Stenson***, 132 Wn.2d 668, 695-696, 940 P.2d 1239 (1997).

If this Court finds that the search warrants were insufficiently particular, the Court should look at the severability of the warrants and find that the text messages and photos should not be suppressed. As argued above, the warrants were particular that the search was to be limited to images and texts sent to the victim.

2. EVEN IF THIS COURT WERE TO FIND THAT THE SEARCH WARRANTS LACKED SUFFICIENT SPECIFICITY, THERE WAS OVERWHELMING UNTAINTED EVIDENCE OF THE DEFENDANT'S GUILT, MAKING ANY ERROR HARMLESS.

Constitutional errors may be so insignificant as to be harmless. ***State v. Coristine***, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Nonconstitutional evidentiary errors are harmless unless the trial's outcome would have been different had the error not occurred. ***State v. Jackson***, 102 Wn.2d 689, 696, 689 P.2d 76 (1984). The State bears the burden of showing that any error was harmless. ***Coristine***, 177 Wn.2d 370 at 393. Under the "overwhelming untainted evidence" test, this court must determine that the alleged error could not have plausibly been the cause of a guilty verdict from an honest, fair-minded and reasonable jury. *Id.*

Assuming, without conceding, that the search warrants for the defendant's Samsung phone are overbroad and therefore invalid, this court must examine the remaining untainted evidence as it pertains to each count. After any "tainted" evidence is carefully removed, there remains overwhelming evidence as to the defendant's guilt, and therefore this court should affirm.

a. Any error was harmless as to count I and count II[7].

As to the child molestation counts, the State alleged that the conduct occurred between June 1, 2015 and June 25, 2015. CP 431-462. The basis for counts I and II were the groping of S.L.'s breast in the living room, the groping of S.L.'s breast in bedroom, and the binding and sucking of S.L.'s breast in the bedroom. 19 RP 2131-2132. The State had to prove that during that time frame sexual contact occurred and that S.L. was at least 14 years old and less than 16 years old, and was at least 48 months older than the defendant. CP 431-462 (Instruction #12). Prior to the actual incident, S.L. and the defendant discussed rope. In the text messages recovered from S.L.'s phone, the following exchange occurred:

> Defendant: So, do your folks have anything particularly interesting? Whips 'n chains, perhaps? Maybe a strapon?
>
> S.L.: No
>
> S.L.: I'm sure you do though.
>
> Defendant Nope, just rope and oil.
>
> S.L.: *shrugs* works for me

CP 477-484 (Exhibit #46, messages 1218-1222).

[7] These two counts are being addressed together because the trial court determined that they constituted the same criminal conduct. CP 532-547.

S.L. testified that on June 13, 2015, the defendant used a rope to tie up S.L. 13 RP 1344. The age of S.L. was not in dispute. 19 RP 2170. S.L. testified that the defendant groped her breasts in the living room on June 13th. 12 RP 1174. S.L. described the touching as having occurred under S.L.'s shirt and over her bra. *Id.* During the same evening, the defendant used a rope to tie S.L. in a Shibari bind. 12 RP 1180. She described the defendant removing the ropes from the dresser in his bedroom. 12 RP 1181. Police found the rope in the location S.L. described. 14 RP 1530. S.L. described the knot that went around her neck and chest, down her torso and under her breasts. 12 RP 1181-82. During the "Shibari bind" the defendant moved her shirt and bra to expose S.L.'s breasts. *Id.* The defendant then grabbed S.L.'s breasts in a sexual manner. 12 RP 1179-1180. While her breasts were exposed the defendant told S.L. that she had a beautiful body and he sucked on her breast. *Id.* S.L. described that the defendant pulled down his waistband and underwear to expose his fully erect penis. 12 RP 1183.

S.L.'s testimony about the defendant's conduct is corroborated by other untainted evidence. In addition to the police locating the rope where S.L. indicated it would be, untainted text messages from S.L.'s phone also provide evidence of the defendant's sexual intent. The messages from S.L.'s phone, as outlined above, include text messages from the defendant

of a sexual nature. These include a photo of a vibrator and the statement "you still need to get laid properly though." CP 477-484 (Exhibit #46, message #2972).

Further corroborating evidence came from the defendant himself. He admitted to Beverly McCarter that he did a full body rope harness on S.L. and that "she really liked it." 18 RP 2005. The defendant told McCarther that he was not sure how much he could help S.L. "without crossing lines that really shouldn't be crossed." *Id.* The email the defendant sent to McCarter was recovered by McCarter from her own email account and authenticated by her. 18 RP 2000-2005. Because it was introduced via a separate, independent, source and not as the result of the search of the defendant's phone, this court should consider it to be untainted evidence.

During closing argument, the State made it clear that the jury did not need to agree that each incident of sexual contact occurred, but rather they had to all agree that one of the acts occurred per count. 19 RP 2132. Because there was additional, overwhelming untainted evidence as to the child molestation, including the physical recovery of the rope the defendant used to bind S.L. during the incident and the defendant's own admission that the incident consistent with what S.L. described, this court

should affirm that conviction, even if it were to find that the cell phone warrant in this case was overbroad.

b. Any error was harmless as to count IV, communicating with a minor.

As to count IV, the State alleged that the act occurred between October 1, 2014 and October 31, 2014. During this time frame, ample evidence was recovered from S.L.'s phone. This included text messages #77-258. CP 477-484 (Exhibit #46). During those text message exchanges, the defendant and S.L. discuss a BDSM convention. *Id.* S.L. texted the defendant that she wanted to hear the scary thoughts in the defendant's head. *Id.* He responded, "Not via permanent record. This shizzit tends to show up years down the road." *Id.* The defendant texted S.L. that she needs some "good ol' STRAIGHT porn." *Id.* S.L. asks the defendant which of her friends he would choose to tie up, beat and rape. *Id.* The defendant later responds, "Technically you said 'of all the friends of mine,' which rules you out. Justin's a dude, so no. I haven't actually met Berlin or Katey. That only leaves three choices." *Id.*

During the same charging period, the defendant texts S.L. asking her, "What are your thoughts on latex, ball gags, anal play, suspension, clamps, and/or collars/leashes? For yourself or for use on others?" *Id.*

(message #238). Later, the defendant tells S.L., "BDSM orgy at my place this weekend." *Id.* (message #245).

The defendant texted S.L. that, ". . .Society never condemns the minor...or the girl. You're both." CP 477-484 (Exhibit #46, partial message #119). The defendant told S.L., "I like boobs, pussy, and women." *Id.* (partial message #162). The defendant and S.L. engage in a conversation about masturbation in which the defendant states, "I've already fapped enough today anyway." 12 RP 1239, CP 477-484 (Exhibit #46, partial message #249). S.L. states that "fapping" is masturbation. 12 RP 1239.

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

c. Any error was harmless as to count V communicating with a minor.

As to count V, the State alleged that the act occurred between November 1, 2014 and November 30, 2014. During this time period, text messages #286-496 were recovered from S.L.'s phone. The defendant texted that, ". . . Right now the evidence is that ANYTHING passionate provides needed release." *Id.* (partial message #463). In another text

message, the defendant states, " . . .Speaking of release, d'you want me to do any online shopping for you." *Id.* (partial message #464). S.L. testified that the defendant was referring to online shopping for vibrators or toys. 12 RP 1221.

During the same charging period, the defendant texts, "I really shouldn't be—finishing—a 14 year old." CP 477-484 (Exhibit #46, message #293). S.L. understood "finishing" to mean bringing to orgasm. 12 RP 1241. He then states, "You and your friends don't have to worry about that. I do. I'm willing to be more chatty in person." *Id.* (message #294). The defendant tells S.L. that his "paranoia needs to be addressed" and directs her to the Wickr app. *Id.* He tells S.L that she should show Robert "a bdsm guro rape picture." *Id.* (message #494). Robert is a friend of S.L.'s that is her age. 12 RP 1249.

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

d. <u>Any error was harmless as to count VI, communicating with a minor.</u>

As to count VI, the State alleged that the act occurred between December 1, 2014 and December 31, 2014. During this time period, the

following exchange occurred, which appears to have been taken from S.L.'s phone:

Defendant:	Have fun with that. I'mm'a taken a shower. Hmm, should I test your toy while I'm in there? . . .nah. . .
S.L.:	*huff*
Defendant:	huff?
S.L.	You're being an ass
Defendant:	Hmm, "ass". . . Anyway, I apologize. I DO need to get stuff done today, though.

CP 477-484 (Exhibit #87).

S.L. testified that the "toy" the defendant referenced was the purple vibrator the defendant purchased for her. 12 RP 1220.

The defendant texted S.L. during this time period that he was "'batin, then workin' I guess." CP 477-484 (Exhibit #46, message #679). S.L. understood that "batin" meant masturbating. 12 RP 1250.

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

e. Any error was harmless as to count VIII communicating with a minor.

As to count VIII, the State alleged that the act occurred between March 1, 2015 and March 31, 2015. During this time period text messages from S.L.'s phone show that the defendant texted S.L.: "Os yeah. . . I never fully woke up when you called. Your voice, and mental images of you ended up permeating my next dream cycle. THAT got. . . interesting." CP 477-484 (Exhibit #46, message #1526). S.L. responded to that text with "Doggie style?" *Id.* (message #1527).

During this same time period the defendant texts S.L. the word "frogtie" which is a term for a bondage technique of a sexual nature. 14 RP 1519.

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

f. Any error was harmless as to count X, communicating with a minor.

As to count X, the State alleged that the act occurred between May 1, 2015 and May 31, 2015. Evidence taken from S.L.'s phone established that on May 5, 2015, S.L. texted the defendant that she needed a new mattress. CP 477-484 (Exhibit #46, message #2280). In response, the

defendant stated, "About a dozen reasons for that just flashed through my mind." *Id.* (message #2281). On May 19, 2015, the defendant sent S.L. a text stating, "I'm either working, sleeping, masturbating, or two of the three." CP 477-484 (Exhibit #13, message #2709), 12 RP 1255. During the same time period, defendant texted, "Have fun in Leavenworth. Hope your feet hold together. Don't let Kai rape anybody." *Id.* (message #2803).

Defendant texted S.L., "Your body heat really did relax my shoulder muscles. I was hurting all day up until that point, and the pain faded quickly thereafter." CP 477-484 (Exhibit #46, message #2529). On May 25, 2015, the defendant and S.L. were discussing vibrators. 12 RP 1212-1213; CP 477-484 (Exhibit #46, message #2745). The defendant, referencing the vibrator he already purchased for S.L., texted, "So, more self-help toys. Does she know that you already have one, and that it's not really doing the trick?" *Id.*

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

g. Any error was harmless as to count XI, communicating with a minor.

As to count XI, the State alleged that the act occurred between June 1, 2015 and June 24, 2015. As stated above, during this time period, text messages *from S.L. 's phone* established that she sent the defendant a photo of a vibrator and the defendant responded that he thought she would want something with more "bulk." He told her that, "Now you'll have a surface vibe and a deep vibe. Sounds fun." CP 477-484 (Exhibit #46, message #2970). The defendant told S.L. that, "You still need to get laid properly though. :P." *Id.*

Because all of these text messages were recovered from S.L.'s phone, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

h. Any error was harmless as to count XII, communicating with a minor.

As to count XII, the State alleged that the act occurred between June 24, 2015 and June 30, 2015. The basis for this count is the text messages retrieved from S.L.'s phone by her father. 11 RP 997. Those messages were documented by Lippert and came *from S.L. 's phone*. In the messages sent from the defendant to Lippert (posing as S.L.) the defendant states:

> In the fantasy, I tie you to the desk, your leg to the desk leg, on both sides. . . You would have a shoulder harness that would be tied to the front of the desk, holding you securely in place. Your elbows would be tied behind your back, your arms straight, so that they rested on your ass. . . I expect you would be a little nervous, as I loomed over you with a perverted smile. . .I would place a small bottle in one of your hands, and command you to apply the contents to your anus. You would squirm, and insist that *I* be the one to apply it. There would be a moment of silence, followed by several slaps of a flog across your back and thighs. . .

CP 477-484 (Exhibit 1).

This evidence was sent by the defendant and he believed he was communicating with S.L. It is evidence that was recovered from Lippert, and therefore is untainted, overwhelming evidence of the defendant's guilt. Because all of these text messages were recovered from S.L.'s phone and provided by Lippert, it is untainted evidence and is overwhelming evidence that the defendant communicated with S.L. for immoral purposes of a sexual nature. Therefore, this court should affirm and find any error harmless.

3. ASSUMING THAT THIS COURT FINDS THAT THE WARRANT FOR THE DEFENDANT'S PHONE TO BE VALID, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING WEB SEARCH HISTORY OF THE DEFENDANT ON THE BASIS THAT IT CORROBORATED THE VICTIM'S ACCOUNT OF HER CONVERSATIONS WITH THE DEFENDANT.[8]

In general, evidence of other crimes, wrongs, or acts is inadmissible to show action in conformity therewith. ER 404(b) (2010), ***State v. Everybodytalksabout***, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). The purpose of Evidence Rule 404(b) is to prohibit admission of evidence designed simply to prove bad character, it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case. ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Such evidence may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). They are also admissible to show lustful disposition toward the victim. ***State v. Ray***, 116 Wn.2d 531, 546-48, 806 P.2d 1220 (1991); ***State v. Camarillo***, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); ***State v. Ferguson***, 100 Wn.2d 131, 133, 134, 667 P.2d 68 (1983); ***State v. Medcalf***, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990).

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[8] As argued above, if this court finds either that the warrants for the defendant's smartphone were invalid, or that the trial court erred in admitting evidence from the smartphone, the other evidence was overwhelming and this court should still affirm.

In general, to admit evidence of other acts, the trial court must engage in the following four steps:

> (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 charge[d], and (4) weigh the probative value against the prejudicial effect.

State v. Thach, 126 Wn. App. 297, 310, 106 P.3d 782, 789 (2005), quoting ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In considering the fourth step, a court must not admit the evidence if it's relevance is outweighed by the prejudice to the defendant. *See* ***State v. Terry***, 10 Wn. App. 874, 520 P.2d 1297 (1974) *overruled on other grounds* ***State v. Young***, 160 Wn.2d 799, 161 P.3d 967 (2007). This amounts to a Rule 403 balancing test. *See* ***State v. Womac***, 130 Wn. App. 450, 123 P.3d 528 (2005) *overruled on other grounds* ***State v. Womac***, 160 Wn.2d 643, 160 P.3d 40 (2007). A trial court's decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.*

Here, the defendant argues generally that the trial court failed to conduct a thorough analysis. This argument ignores the full record. The State's argument in support of this evidence correctly argued that the

evidence of the defendant's browsing history supported S.L.'s account of her conversations with the defendant. 3/13/17 RP 276. The web history also indicated photos of items that were sent to S.L. *Id.* The web history included searching for My Little Pony characters, a topic that was of shared interested with S.L., which he considered highly sexualized. *Id.* The defendant communicated with S.L. about sex, My Little Pony, bondage, anal sex, emancipation, and child sex statutes, therefore linking his search history with his crimes.

The court agreed with the State, ruling as follows:

> This is a challenging motion for the Court because I don't have the evidence before me, and I'm getting verbal recitations as to what it may or may not be. So I guess I would couch a decision in that language from the standpoint of adult pornography, obviously, isn't relevant. Any sex toy that isn't described by the alleged victim or used in a communication between the defendant and the alleged victim isn't relevant. But my understanding is there were discussions, and perhaps even some conduct, that would be along the lines of BDSM that's been described and searches in that area I think may be relevant. My Little Pony it sounds like may be relevant.
>
> The specific search for the words, "teen pussy" would be relevant as well. Teen can be anyone that is a teenager. That is 13 and up. So I can't say that it doesn't apply to children as young as the alleged victim in this case. So as far as the search history, I think what has been described by the State in its response at No. 11, to pages 10 to 11 of the State's response, or the State's motions in limine, outlines evidence that would be admissible in this type of case. But again, it's difficult for the Court, not knowing the

> testimony of the complaining witness and all of those details. And so that's the best I can do at this point.

3/13/17 RP 280.

The trial court ratified its decision in a written ruling filed on April 25, 2017. That written ruling stated, in relevant part:

> The defendant, in his Trial Brief of March 1, 2017, also made a motion in limine (#11) to exclude the defendant's internet search history, pursuant to Evidence Rules 401 and 403. The State responded that it intended to introduce the web search history of the defendant regarding subject matters that were discussed by SL; namely emancipation laws, bondage kits, butt plug kits, butt plug tails, easy access portable thigh restraint sling for fetish sex bondage unisex, the status of Wickr, My Little Pony pornography and sex toys, and a search for "teen pussy" and child rap statutes in the State of Washington. The Court denied the defendant's motion in limine on March 13, 2017, and the defendant subsequently filed what must be considered a motion to reconsider on March 22, 2017. The Court has read the defendant's motion dated March 22, 2017, and has heard the argument of counsel. The Court has also reviewed images associated with the internet search history alleged conducted by the defendant, which has been marked as Exhibit 4 for purposes of the pre-trial motions. The defendant's motion for reconsideration is denied.

CP 359-360.

The web history was limited in nature to those areas explicitly discussed with the victim, and was therefore properly admitted. In fact, the jury was specifically instructed to disregard portions of the web history that were not directly relevant to topics he discussed with S.L. 15 RP 1736. The defendant's assertion that the trial court failed to conduct the

required analysis on the record is misplaced. The trial court gave a provisional ruling, having not been provided the exhibit for review. After having reviewed the proposed evidence in full, the trial court correctly found that the offered web history was limited in nature to topics explicitly discussed between the defendant and S.L. and therefore relevant.

As stated above, before ER 404(b) evidence can be admitted, the trial must weigh the probative value against the prejudicial effect. A trial court is vested with broad discretion in administering ER 403, and its judgment in the balancing process should be overturned only for manifest abuse of discretion. ***State v. Kendrick***, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987). An abuse of discretion exists when the discretion is manifestly unreasonable or based upon untenable grounds or reasons. ***State v. Dye***, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). There is no set formula for what the trial court must consider in the balancing process. ***Kendrick***, 47 Wn. App. at 628. "Where the record reflects that the trial court has adopted the express arguments of one of the parties as to the relative weights of probative value and prejudice, there is…no error." ***State v. Carleton***, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (citing ***State v. Pirtle***, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)).

Here, the trial court heard the arguments of both counsel and observed the internet search history the State sought to admit. The trial

court had already determined that the offered evidence is directly relevant—it involved topics discussed with S.L. and photos that were sent to her. Topics that were not discussed with S.L. were excluded by the court. This indicates that a balancing was done, with only the probative material being admitted and the unduly prejudicial material being excluded. The evidence that was admitted was based upon the fact that the defendant was proactively engaging in conversations with S.L. on a variety of sexual topics while searching the internet for information on those topics. The trial court expressly adopted the State's argument; therefore, there was no error in admitting the internet search history.

Even if this court were to find that the web search history was admitted in error, any error was harmless. Evidentiary errors under ER 404 are not of constitutional magnitude. ***State v. Jackson***, 102 Wn.2d 689, 695 P.2d 76 (1984). Therefore, the court must determine if the outcome of the trial would have been different if not for the error. *Id.* In the present matter, the outcome would not have been different. As outlined in detail above, the text messages obtained from S.L.'s phone, and S.L.'s testimony establish that she and the defendant engaged in frequent conversations on sex related topics. S.L. testified that the defendant purchased her a vibrator and offered to purchase more sex related items. She testified that they discussed sexual fantasies, My Little

Pony, anal sex, emancipation, consent laws, and bondage. The fact that a web history was introduced showing that the defendant conducted internet searches on those topics is merely surplusage to the other admitted evidence and therefore harmless.

Therefore, even if the court had not admitted the internet search history, there would have been no change in the verdict. The jury was presented with the direct testimony from the victim as well as text messages obtained from the victim's phone. The defendant admitted to the conduct of providing "counseling" to S.L. and engaging in bondage with her in his email to Beverly McCarter. Thus, any error in admitting the evidence was harmless.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S FIRST[9] PROPOSED JURY INSTRUCTION DEFINING "COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES" BECAUSE IT MISSTATED THE LAW.

This court reviews a trial court's refusal to give a jury instruction for abuse of discretion. ***State v. Walker***, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The court need not define words or expressions that are of ordinary understanding. ***State v. Brown***, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997).

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[9] Supp CP 563.

Defendant proposed the following jury instruction defining communicating with a minor for immoral purposes:

> 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.

Supp. CP 563. That statement is far too narrow. RCW 9.68A.090 requires the predatory purpose of promoting a minor's exposure and involvement in sexual misconduct. ***State v. McNallie***, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). Defendant's proposed instruction is erroneous because it would preclude communication with a minor for immoral purposes predicated upon exposure of the minor to a criminal act of a sexual nature.

Defendant's proposed instruction would have only allowed defendant to be convicted of communication with a minor for immoral purposes if defendant offered or induced a child to be a "participant" in a "criminal act." S.L. was a victim in this case not a participant in a criminal act.

Moreover, defendant's proposed instruction requires the actual commission of "a criminal act of a sexual nature" before defendant could be convicted of communication with a minor for immoral purposes. That is plainly not required. ***State v. McNallie***, *supra*.

The trial court properly rejected this proposed jury instruction for each of these three alternative reasons. "[T]he trial court has no duty to rewrite incorrect or inaccurate statements of law contained in proposed instructions. If the instructions are incorrect in any material particular, which they were in the instant case, it is not error for the trial court to refuse them." ***State v. Robinson***, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S FIRST[10] PROPOSED JURY INSTRUCTION DEFINING "COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES" BECAUSE IT MISSTATED THE LAW.

Defendant proposed the following jury instruction defining communicating with a minor for immoral purposes:

> 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.

Supp. CP. 564. Defendant's proposed instruction required the jury to determine whether the "sexual misconduct" under consideration in this case was "a criminal act of a sexual nature." *Id.* Defendant's proposed instruction would have left the jury free to guess at what constitutes a

[10] Supp CP 564.

"criminal act of a sexual nature." The trial court did not err when it refused to provide the jury with this vague and indefinite instruction. ***State v. Robinson***, *supra.*

Alternatively, the trial court did not error when it rejected defendant's overly narrow definition of communication with a minor for immoral purposes. Defendant takes part of his instruction from ***State v. McNallie***, 120 Wn.2d at 933:

> Rather, the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.

Defendant's proposed instruction then narrows the Supreme Court's language substantially by defining "sexual misconduct" as a "criminal act of a sexual nature." CP 564. In ***State v. McNallie*** and ***State v. Schimmelpfennig***, the Supreme Court held that "immoral purposes" refers to the broad category "sexual misconduct." ***State v. McNallie***, 120 Wn.2d at 932; ***State v. Schimmelpfennig***, 92 Wn.2d 95, 102, 594 P.2d 442 (1979). Furthermore, ***State v. Schimmelpfennig*** "expressly rejected a detailed delineation of the requisite misconduct and led to a holding that 'sexual misconduct' was a sufficient context for the 'immoral purposes' contemplated by the communications with a minor statute." ***State v. McNallie***, 120 Wn.2d at 932-33. Defendant argues that ***State v. Luther***, 65 Wn. App. 424, 427, 830 P.2d 674 (1992) should play a central role in

this analysis but ***Luther*** was decided in the year *before* ***McNallie***'s broad construction of "sexual misconduct." The trial court did not err when it failed to give this unduly narrow instruction. ***State v. Robinson***, *supra.*

6. COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES IS NOT UNCONSTITUTIONALLY VAGUE AND THE DEFENDANT IS NOT ENTITLED TO RELIEF.

The standard for finding a statute unconstitutionally vague is high. ***State v. Watson***, 160 Wn.2d 1, 11, 154 P.3d 909 (2007). A reviewing court assumes that a statute is constitutional. *Id.* A challenging party bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional. ***City of Spokane v. Douglass***, 115 Wn.2d 171, 177, 795 P.2d 693 (1990). In order for a statute to be voided for vagueness under the due process clause of the Fourteenth Amendment either: (1) the statute does not define the criminal offense with sufficient definiteness that an ordinary person can understand the proscribed conduct; or (2) the statute does not provide ascertainable standards of guilt to protect against the arbitrary enforcement of the statute. ***State v. Williams***, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (quoting ***City of Bellevue v. Lorang***, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)) (remaining citations omitted). The constitutionality of a statute is reviewed *de novo*. ***Watson***, 160 Wn.2d at 5.

A statute is not void for vagueness merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited by the statute. ***City of Seattle v. Eze***, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). "One who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." ***State v. Evans***, 177 Wn.2d 186, 203, 298 P.3d 724 (2013), *quoting* ***Boyce Motor Lines, Inc. v. United States***, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952). Specifically, Washington's communicating with a minor statute, RCW 9.68A.090, has been held to not be facially overbroad. ***Schoening v. McKenna***, 636 F.Supp.2d 1154 (2009).

For the first time on appeal, defendant challenges the constitutionality of the communication with a minor for immoral purposes statute, claiming that the statute is void for vagueness. Defendant's void for vagueness challenge must "identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." ***State v. McFarland,*** 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In this case, the defendant crossed the line into prohibited conduct during his communications with S.L. Defendant alleges that the following

communications between himself and S.L., the fourteen year old girl that he molested, cannot be proscribed by RCW 9.68A.090:

> 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, sexual fantasies involving fictional characters.

Appellant's Brief at 30. Each of those statements made by defendant to S.L. was made "for the predatory purpose of promoting" S.L.'s "exposure to and involvement in" child molestation. ***McNallie***, 120 Wn.2d at 933.[11] This ready inference is further highlighted by defendant's efforts to undermine parental authority over S.L. S.L.'s testified to conversations about S.L. escaping from her parents. 12 RP 1150-51. Lippert testified to the communication from defendant where defendant urged S.L. to get Mr. Lippert to hit her "and then you will win." 11 RP 1001. Ms. Pena, S.L.'s stepmother, also testified that defendant's text messages to S.L. asserted that S.L.'s parents were drugging her. 11 RP 1077. Defense counsel explored this behavior also. 11 RP 1029-32. S.L. testified to defendant's efforts to alienate her from her parents. 13 RP 1336-37.

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[11] Defendant also asserts that unspecified and unsolicited statements made by S.L. to defendant were somehow also immoral communications. Appellant's Brief at 30-31. That argument is not supported by the facts. Communication with a minor for immoral purposes required the defendant's communication with the other person. Jury Instruction 13, CP 446. The State presented closing argument consistent with this interpretation and did not argue that S.L.'s texts were sufficient to convict the defendant.

As outlined above, the defendant's communications with S.L. were far from "innocuous" as the defendant now asserts. The defendant communicated with S.L. on a variety of sexual topics done for the purposes if a sexual nature. His attempt to reclassify himself to McCarter as a "sex counselor" is unfounded and it is clear from his text messages to S.L. that he had concerns about leaving a "permanent record" of their interactions. An ordinary person would understand that, at best, the defendant's conduct was "perilously close to the area of proscribed conduct" and therefore his void for vagueness claim fails.

7. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED IRRELEVANT EVIDENCE THAT THE DEFENDANT ENGAGED IN COMMUNICATIONS ABOUT SEX WITH ADULTS.

Trial court rulings admitting or excluding evidence are reviewed for an abuse of discretion. ***State v. Fisher***, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. ***State v. Dye***, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Trial courts have wide discretion to determine the admissibility of evidence. ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.2d 1278 (2001) (citing ***State v. Rivers***, 129 Wn.2d 697, 709-710, 921 P.2d (1996)).

Defendant sought to introduce testimony from McCarter that he engaged in "communications about sex" with other people "within his friend group." 18 RP 1965, 1980. The trial court sustained an objection to that testimony:

> There is a difference of talking with your friends who are adults, and talking with minors. The statute has pointed that out, so that is not relevant. I'm not going to allow that.

18 RP 1981.

Defendant's proffered trait for communicating openly about sex with adults "without embarrassment" does not make it more or less likely that defendant communicated at different times with a minor for immoral purposes involving sex. It is clear from the defendant's text messages to S.L. that he was aware he was conversing with a minor. CP 477-484 (Exhibit #46, message #100 "I'm pretty sure they don't allow minors, dear"; message #119 "society never condemns the minor", message #293 "I really shouldn't be –finishing—a 14 year old", message #1614 "you are an independent 14 year old human"). The defendant admitted to McCarter that his "little 14 year old" was a project and that he has been acting as her sex counselor. CP 477-484 (Exhibit 119). The defendant tells McCarter that he has not broken any actual laws with S.L. but wants her help. *Id.* These admissions, combined with the text messages from S.L.'s phone establish that the defendant's conduct was not merely a product of poor

social skills, as the defendant's trial attorney argued. *See* 18 RP 1981. Rather, the proffered evidence was irrelevant and the trial court properly exercised its discretion in excluding it.

8. THE DEFENDANT HAS NOT PROPERLY PRESENTED A 6TH AMENDMENT CLAIM FOR THIS COURT TO REVIEW, AND EVEN IF IT WAS PROPERLY PRESENTED, THE TRIAL COURT APPLIED THE CORRECT STANDARD AND FOUND THAT THERE WAS AN ABSENCE OF PREJUDICE.

On October 25, 2016, the parties came before the trial court for a joint motion for in camera review and determination of claims of attorney-client privilege. 10/25/16 RP. The prosecutor advised the court that she had not seen any attorney-client privilege material.

In a pretrial motion, the prosecutor stated that 15,000 pages of information had been extracted from defendant's cell phone. 10/25/16 RP 2. The prosecutor stated that defense counsel had informed her that attorney-client privilege material was contained in those pages. *Id.* Defense counsel stated that she did know which material was privileged. 10/25/16 RP 4. She identified five pages of records that would be subject to a claim of privilege. 10/25/16 RP 5.[12] Defense counsel brought those messages to court. *Id.*

[12] Defense counsel's subsequent review confirmed this. 10/26/16 RP 4.

The trial court considered the assertion of attorney-client privilege the next day. 10/26/16 RP. The court found that the five pages of material presented by defense counsel did contain attorney-client privilege material. 10/26/16 RP 2.

When addressing the remedy for the seized attorney client privilege material, the court presumed that the attorney-client material had been read by the prosecution. 10/26/16 RP 6-7. The prosecution presented no contrary evidence. 10/26/16 RP 4. Defendant objected, stating, "the State has the burden of proving beyond a reasonable doubt a lack of prejudice to the defendant, and prejudice can arise from discretionary decisions that are made by the prosecuting attorney's office or investigative steps that are taken by the law enforcement agency subsequent to reviewing the documents." *Id.* The trial court stated that, assuming the documents had been read by the State, he found no prejudice.

The trial court ordered that the five pages of attorney client records should be sealed. 10/26/16 RP 8-10; CP 46. Defendant has not provided those documents to this Court for appellate review.

a. Defendant has failed to present a record sufficient for review.

Defendant has not provided this Court with the attorney-client privileged documents which form the basis of his claim of error. *See* ***State v. Tracy***, 128 Wn. App. 388, 115 P.3d 381 (2005), *aff'd* 158 Wn.2d 683, 147 P.3d 559 (2006).

b. The doctrine of invited error precludes further review.

"This court will deem an error waived if the party asserting such error materially contributed thereto." ***In re Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132, 1141 (1995). In this case, the State initially raised with the court the issue that there may have been privileged communications contained in the cell phone dump. The defendant identified the pages that he believed to be privileged, but never requested a remedy. Defense states, "So I guess, then, at this point, the question is what to do about it, what the remedy is." 10/26/16 RP 3. Defense counsel never asked for a remedy, presumably finding the court's remedy of an in camera review, filing the documents under seal, and exclusion to be adequate.

c. The trial court applied the correct standard and found a lack of prejudice beyond a reasonable doubt.

In assessing an alleged 6th amendment violation, the following inquiry must be done:

> (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)?

State v. Irby, 3 Wn. App. 2d 247, 252-253, 415 P.3d 611 (2018).

Infringing on attorney-client conversations is presumptively prejudicial. ***State v. Fuentes***, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). As the court affirmed in ***Irby***, *supra*, the State bears the burden of proving the absence of prejudice beyond a reasonable double. ***Irby***, 3 Wn. App. 247 at 263. The trial court abuses its discretion if its decision is based on unreasonable or untenable grounds. ***State v. Wilson***, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

In this case, 15,000 pages of records were obtained from the defendant's cell phone, of which there were five pages that the trial court

determined to be privileged communications between the defendant and his attorney. 10/25/16 RP 2; 10/26/18 RP 5-6. The trial court conducted an in camera review of the five pages identified by the defense as being privileged communications. 10/25/16 RP 4; 10/26/18 RP 4. The prosecutor asserted to the court that she had not reviewed the five pages in question. 10/26/16 RP 5. The court made the following ruling following the in camera review:

> Okay. Let me—there is two parts to this, okay, just so you understand. One is, I have ruled that those pages are privileged; therefore, they are not admissible for purposes of trial or any hearing.
>
> The other part of this, also, the second part, of the analysis is if—is the defendant prejudiced if they were in possession of the prosecutors for—I guess since the case began? Ms. Kooiman has indicated, as an officer of the Court, she hasn't seen those pages. She doesn't know what they are.
>
> I can tell you that, although I have indicated to the parties that they are privileged, they do not reveal either work product or trial strategy such that the State would have some sort of advantage here if, in other words, they were disclosed to them. You understand what I am saying?
>
> As you can tell, when you read them—and you've read them—there is nothing there that, number one has to be—is admissible, and two, that indicates any kind of strategy, tactics or the like. So I guess what I am saying about this is, as far as determining whether they being in the possession of the prosecutors thus far and maybe someone else in that office or the detective reading them, I don't think that there is prejudice here to the defendant based on what is contained in there. Do you want to be heard on that?

. . .

> What I am indicating to you is, I don't find them to be prejudicial. In other words, they are not disclosing either work product or any tactics or trial strategy here by any of the counsel, any of the attorneys that's listed in there. So that's what I am saying, is that's the second part of the analysis. Even though they had possession of these to begin with, I will presume somebody read them within the prosecution team.

6 RP 5-6.

Defendant's argument[13] that the trial court "refused to enact any remedy" regarding this privileged material is not correct. The trial court sealed the attorney client privileged copies in the courts possession and directed the parties to proceed without the five pages of data. This was a fully appropriate remedy, given the trial court's finding of no prejudice.

The defendant asserts that the trial court applied the incorrect standard in failing to apply a presumption of prejudice. Brief of Appellant page 42. Such argument is contrary to the record here, which shows that the court carefully reviewed all five pages, and found that based on the content, there is no prejudice regardless of a starting presumption of prejudice. The court went so far as to assume that someone in the prosecutor's office had seen the pages. 10/26/16 RP 7. Even assuming that the data had been viewed, the court found no prejudice of any kind,

[13] Brief of Appellant, page 42.

given that they did not contain any trial tactic, trial strategy or beneficial information. *Id.* The State had the burden and responded to the burden by the assigned prosecutor stating that she had not seen the pages and brought this matter to the court's attention. The trial court crafted the appropriate remedy by filing the documents under seal and suppressing their content from being used in the trial.

9. THIS COURT SHOULD REMAND FOR A CORRECTION OF THE JUDGMENT AND SENTENCE TO STRIKE THE $200.00 CRIMINAL FILING FEE.

In this case, the trial court found the defendant to be indigent. CP 82 - 83. The defendant's direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the $200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in ***State v. Ramirez***, __ Wn.2d __, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. The State agrees that the criminal filing fee of $200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on nonrestitution legal financial obligations.

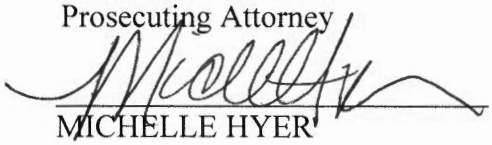
The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the $200.00 criminal filing fee should be stricken.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: December 7, 2018

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

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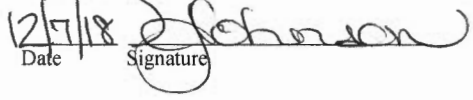
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ EFile or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/7/18 
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PIERCE COUNTY PROSECUTING ATTORNEY

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