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Court of Appeals
Division I
State of Washington

ANO. 73525-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STANLEY SCOTT SADLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Fifty-seven-year-old Stanley Sadler was arrested at a Taco Time where he had arranged to meet a person he had met over the Internet and who he thought was a 15-year-old girl he could have sex with. A jury found Sadler guilty of Attempted Commercial Sexual Abuse of a Minor and Communication with a Minor for Immoral Purposes. CP 335-36. The jury was hung on a count of Tampering with Evidence. CP 334. Sadler received a standard range sentence of 31.5 months. CP 402-06.

1. Has Sadler shown that the trial court violated his due process right to a fair trial when the court applied the rules of evidence and redacted portions of emails he sought to admit at trial?
2. Has Sadler shown that when Detective Tye Holand testified and explained how he works undercover posing as a minor on various Internet websites, he somehow personally opined that Sadler was guilty?
3. Has Sadler shown that the prosecutor committed such egregious and prejudicial misconduct in closing argument that his failure to object should be excused and his conviction reversed?
4. Has Sadler shown that he can avail himself of the cumulative error doctrine?
5. Has Sadler shown that his two convictions do not constitute the “same criminal conduct” for sentencing purposes?

6. Has Sadler shown that the court-imposed community custody limitations on his Internet use and sexual activities are unlawful?

B. STATEMENT OF THE CASE

Part of Vice Detective Tye Holand's job entails posing as a minor on Internet websites in order to apprehend persons who use the Internet to seek out children to have sex with. 5RP¹ 13-15, 18. On July 3, 2014, Detective Holand responded to an ad posted in the "Casual Encounters" section of Craigslist. 5RP 36-37, 42. The ad read:

**Looking for you tight bodied shaved puss...no birth control...
now – m4w (Tacoma)**

I'm 50ish...6'3" tall...228lbs...solidly build and DDF. What to put a thick, hot load of cumseed in your unprotected and fertile pussy. Can you handle that? Do you like that thought that I am trying to get you pregnant??? If you're a hot, young chick that feels that way... contact me now. Open to one time nsa [no strings attached]...or even long term livin if you want to share a child. No games. Be real. Have a place...can host...drinks...food...movies...fucking... stay the night. Make it a regular thing if you like. Skip all the website check bs.

5RP 36-38; Exh 4. Holand chose this ad because of the references to youth. 5RP 38. The ad was one of a hundred or so ads posted by Sadler on sites such as Fling, Social Sex and Fuck Book. 7RP 110; 8RP 79, 83.

Detective Holand's response to the ad stated:

¹ The verbatim report of proceedings is cited as: 1RP-12/5/14, 2RP-2/23/15, 3RP-2/25/15, 4RP-3/2/15 (openings), 5RP-3/2/15, 6RP-3/3/15, 7RP-3/4/15, 8RP-3/5/15, 9RP-3/9/15, 10RP-3/10/15, 11RP-4/17/15, 12RP-5/1/15, & 13RP-5/7/15.

Hey there I saw ur ad. I'm on summer break and looking to make a little \$\$\$\$\$. If ur real and serious, let me know. Very young, fun, and discreet.

Exh 5, § 1 at 1.² The detective used the term "summer break" to indicate that he was a young student, and the dollar signs to show that the sex would be for money. 5RP 42, 47-48. At 7:44 p.m., on July 3rd, Sadler responded:

I like young. Can be generous for the right situation.³ Age, pic? Fertile & not on birth control?

Sadler at 8:30 p.m.: I'm here, interested. Pic? Age? I like very young. Get back to me. Off all night.

Exh 5, § 1 at 2. Sadler attached two photos of himself and one of his penis. Exh 5, § 1 at 2-3; 5RP 49.

Holand at 11:18 p.m.: I'm 15, not on BC. Here I am.

Exh 5, § 1 at 4. The detective attached a photo of a young-looking bikini clad girl on a bed that he found on the Internet. 5RP 49-50.

Sadler at 11:33 p.m.: Like you're not on birth control. You like taking the chance? Feel me cum way up in your lil pussy?

Holand at 11:34: Not on BC

Sadler at 11:35: I know. Like that. You still okay with me cumming way up inside you?

Sadler at 11:38: Want to fuck you bareback. Try and get you pregnant. You game?

² Exhibit 5 contains the entire email exchange between Sadler and Detective Holand as he posed as a 15-year-old girl named Jen. 5RP 40-41. The exhibit contains four sections. Section 1 contains 31 pages. Section 2 contains 13 pages. Section 3 contains 4 pages. Section 4 contains 3 pages.

³ Generous means he was willing to pay. 5RP 48.

Sadler at 11:44: What would you like to do? I can host. Pick u up. Whatever. You have time tonight?

Sadler at 11:45: You in Tacoma?

Holand at 11:49: Ur the one paying. I don't care. I'm serious I hope you are.

Sadler at 11:50: Where you located. want to 420/smoke and drink? Spend some time over here tonight?

Holand at 11:53: I'm free on Saturday

Sadler at 11:54: K... me too actually. Off that day and early evening. No way tonight? Are you in Tacoma?

Holand at 11:58: I'm in Seattle but can get to federal way if u can pick me up there.

Sadler at 12:02 a.m. on July 4: Could do that easily. I know you're just doing ageplay with the 15 thing...because that is below the age of consent and not legal and you have to be over 18 to be on this site. So tell me you're really 18, k? Necessary if we're going to go for this. Love your pic, btw. Great body. Nice tits. Pretty face

Exh 5, § 1 at 4-8. Age-play refers to people who pretend to be a different age on the Internet. 5RP 52.

Sadler at 12:12: k...so look. I need you to be straight with me. That pic is all over "motherless com." So send me a real one and lets seriously talk. I'm real. You be, too

Exh 5, § 1 at 8. A person with good computer skills can determine if a photograph has shown up on other websites. 5RP 52. Detective Holand had pulled the photo from the porn site motherless.com. 5RP 52-53.

Sadler at 12:37: so why the games?? I'm real. You be, too

Holand at 12:42: I'm really 15. I am reluctant to send real pic so here I am for real. Please don't share

Exh 5, § 1 at 9-10. Holand attached a photo of Jami Suedel, a very young-looking police officer. 5RP 53.

Sadler at 12:45: you're beautiful. Much prettier. But you can do better than that pic, can't you? Show me

Sadler at 12:54: tease me and show me that you're real. Take a deep breath...that's it...now show me. Get me hard and wanting you for Saturday

Holand at 12:57: Here. Guessing ur age

Exh 5, § 1 at 10-11. Holand attached a photo of Suedel in a bikini and holding a sign that read "40." 5RP 54-55.

Sadler at 1:00: Cute as hell...but you know you can do MUCH better. You're close enough on the age. Now really show me. We'll be fucking tomorrow so this is nothing

Holand at 1:06: I'm not sending those. I will let you take pics and bids when were having sex if u promise to keep to itself. Here's another so u know I'm real

Exh 5, § 1 at 11-12. Holand attached a photo of Suedel holding a sign that read "wild." 5RP 55.

Sadler at 1:12: so tell me you're over 18 and then you can send me one nude with you pointing to your bare pussy where you want me to put my cum. Need to know you're for real. Then lets set a time for tomorrow. Sound good?

Sadler at 1:21: I'm free all day tomorrow. Get me that one prove yourself pic and lets set a time and place to pick you up. My place ok or would you rather go do this somewhere in the car or outside?

Holand at 1:24: I'm not lying to u. I'm 15 years old. I'm a sophomore in high school, and a cheerleader. I've done this before and never had a problem. I'm very discreet. I'm looking for a regular thing. I'm fine with going back to ur place. Good night

Sadler at 1:29: I'm looking for a regular thing too. No games. serious. Get in touch with me tomorrow and let's set this up. Can you talk by phone?

Holand at 9:03: What time tomorrow. And ur not the cops are u? If not I'm good to play. I do oral sex, regular sex, and anal sex if ur not too huge and u use lube. Price depends on what u want sex wise not time

Sadler at 9:04: I'm not the cops...hell no. I'm worried that YOU are...lol

Holand at 9:08: Last time I checked 15 year old cheerleader prostitutes Are on the do not hire list. LOL. No way am I cops

Sadler at 9:10: Honestly girl...that is exactly what a cop would say. Ever seen 'To catch a predator'. Scary shit. Can you prove you're for real and legit?

Sadler at 9:15: I honestly do love the whole cheerleader/hooker thing though. Very hot

Sadler at 9:21: so while we try to come up with a way to prove you're for real...answer a few things for me. When was your last period? I know you're not on BC. And you know I want to cum in your pussy. We are past that. How much for everything? Or break each down for me. And are you willing to get freaky with this at all? Bondage play? Rough sex? Anything down those lines workable? If so, how much?

Holand at 9:24: Keep this email as proof. I am in no way affiliated with any law enforcement of any kind. Cops don't go to ur house like I said I will. If u don't believe me and don't want to do this then fine. I have others who will play

Sadler at 9:30: k..give me a call now and lets talk the rest of the way off of CL. This leaves a record (253)-283-3533

Holand at 9:36: I erase all emails. I will give u my number Facebook twitter instagram after our first meet. I don't want my number, pic etc out there. If my high school friends find out what I do it would be awful. I know u understand

Sadler at 9:37: I do understand but we have to get past this shit and go on and trust here. I just shot my number off to you on trust. That's a HUGE leap. Let's get OUT of CL

Sadler at 9:39: I obviously don't want this getting out either...you think?

Sadler at 9:39: you or I erasing emails doesn't make a difference. CL keeps all the records. FYI

Holand at 9:41: Is texting cool

Sadler at 9:44: its' something off of here...but please humor me and at least let me hear a female voice, ya know? Just friggin call me. Would like a regular thing as it is too

Exh 5, § 1 at 14-22.

At 10:01 a.m., Detective Holand had Suedel call Sadler. 5RP 61-64; 6RP 15-16. Suedel introduced herself as Jen and told Sadler that she was 15 years old and had been introduced to prostitution through a friend. 6RP 21-22. Sadler told "Jen" that it was good to hear her voice and that she could call him "daddy." 6RP 17, 21.

After Suedel explained that it was \$50 for a blow job, \$150 for vaginal or anal sex, Sadler asked "Jen" if she knew what BDSM was. 6RP 17-18. He explained that it was a bondage thing involving tying a person up. 6RP 18. They agreed on a price of \$150 with the caveat that the price would drop to \$100 if Sadler became a regular customer. 6RP 19-20. "Jen" said she wanted \$50 more for the bondage stuff. Id. Sadler cautioned "Jen" that he could go to prison because of her age. 6RP 21. Sadler asked if they could meet that day. Id. "Jen" said she would email him if she could get a ride. 6RP 24. After the phone conversation, the email exchange continued.

Holand at 10:25: I hope you believe me now. That was the 1st time I called a guy before we met for sex

Sadler at 11:44: I do...& thank u. R we on today sometime soon?

Holand at 10:51: Sorry but no. What time tomorrow. I've been thinking, I've never done the bondage stuff u want. What is it that u want me to do. A little scary. Will I be hurt?

Sadler at 10:59: k...so tomorrow works just as well. No problem, Jen. And don't stress on the bondage stuff. It just spices the sex up. You will NOT be hurt in any way (unless you like something mild that way?). It's just control sexually. Nothing more. I want you excited...not scared, ok?

Sadler at 11:01: just think of it as something new, wild and kinky exciting. That's all it's supposed to be

Sadler at 11:03: You can also use a safeword too. Something besides "NO" or "OH GOD STOP..DON'T CUM IN ME" :) If you get uncomfortable at any point, you use it..everything stops. You're really in control that way, k? You don't need one..but it's an option if you want

Holand at 11:03: Cool. So I'll be like tied up naked and u will be putting stuff in me and spanking and stuff? But u want oral, regular, and anal sex too right. I just have to make sure I'm ready for anal if u know what I mean. Lol. Are u big?

Sadler at 11:06: yep..you got it. Tied up..spread..my little fucktoy..holes exposed. I like to fuck hard..slow at times too..so expect a good fucking. I'm pretty thick, so make sure you're ready for it, k? Will you be ok with that?

Sadler at 11:07: already made the pull for the biz end. Have it in hand btw. Too bad you can't get it today

Holand at 11:09: What's the pull for the biz end? Did not understand that

Sadler at 11:10: biz first? Pleasure after? Lol

Sadler at 11:10: cash machine

Sadler at 11:13: hey...you can email/message me directly at "n10cdom@gmail.com". Can we get out of the Craigslist network? Too risky

Holand at 11:14: I got it. So what did we agree on. \$200 for everything? Oral regular sex and anal along with the bondage stuff

Sadler at 11:14: And I'm SO relieved that you're actually 18. No worries now :)

Sadler at 11:16: Outside of CL, k? Text me all day long if you want. But no detailed discussion in here. It's smart..trust me

Exh 5, § 1 at 22-31. Sadler then switched from communicating via

Craigslist to communicating via personal email. Exh 5, § 2 at 1-13; 5RP 67.

Holand at 11:23: Hey there, I didn't understand the last email u sent. I'm 15. did u just say that in case someone from CL is watching?

Sadler at 11:24: I know you're just doing the ageplay thing. It's sexy and a big turn on. Thanks for telling me earlier that you're really 18. Contact me OUTSIDE of CL, k?

Sadler at 11:25: email to email.. text.. call.. whatever.. Something else

Sadler at 11:27: please just trust me and go with me on the CL thing. You don't want them knowing your biz end of things, ya know?

Holand at 11:29: This is email to email. I'm off cl

Sadler at 11:31: SexyJen16.. thank god we're out of there. Yeah.. CL works with law enforcement. You don't need to get caught up in that. So be smart about what you do in there

Holand at 11:32: so is that why u said i was 18

Sadler at 11:33: well.. since you're EIGHTEEN.. I'm safe too. Thanks for making sure that was clear. :) But you can ageplay 15 all day long if you want. love that. And no.. I'm not crazy.. lol

Holand at 11:36: Ok I'm not following. I'm not age playing. I've been truthful with u. We are no longer on cl so I am not sure what is going on

Sadler at 11:38: I know you've been truthful. Thanks for making sure I know that you're 18.. I really appreciate you looking out for

me there. We can just let it go and talk tomorrow now. So.. on tomorrow.. how do you want to work it out?

Holand at 11:41: What time u want to pick me up

Sadler at 11:47: How bout around noon? You said in Federal Way?

Sadler at 11:52: hey.. did you text me? If so do it again. Lost that one somehow. Sry

Holand at 11:52: Sure. I can meet u at the taco time across from mall. What kind of car u in so when I see u I will just get into car. Do not want people seeing me

Sadler at 11:55: Found the text. Taco time works great

Sadler at 11:57: should be a black Ford Escort. If I change that I'll let you know ahead of time

Sadler at 11:58: yeah.. agree.. if we're both on time it will be fine. How are you getting there?

Sadler at 12:13 p.m.: you going to be able to get there ok?

Holand at 12:14: Yes. No problem

Sadler at 12:21: ok.. for the record here (go with me on this).. I do not pay for sex. But I would be happy to gift you the 150 you need instead. That way our get together is just between two consenting adults. And tell me one more time that you are 18 years old, right? Would you please type it for me? Yeah.. I'm paranoid.. live with it :) having that on the record takes all the stress out of this for me.
Thx

Holand at 12:26: Do u know that ur paranoia is crazy. I told u that I'm 15 for real. Do u know age of consent is 16 not 18. So ur freaking out for no good reason. U still don't trust me after talking to u?

Sadler at 12:35: Its not a matter of trust, Jen. It's the law as you stated so clearly. If you're 15 my whole life is in jeopardy and as much as I'm super attracted to you.. I can't risk it. If you're just pushing the ageplay.. and declare to me that you're 18.. it's all good, I believe you. You look 18 in your pics. I appreciate your pushing the ageplay for me, but need you to declare that you're 18 for me and that the rest is just ageplay. It's that simple. Then we're on totally. If you can't... I'm sorry. Up to you

Sadler at 12:37: and yes.. the age of consent for some things is 16. Others 18. Fine lines that we don't have to get into

Sadler at 12:40: give me a bad time about it later.. I'll take it on the chin.

Holand at 12:40: Ok. I will do 1 thing. I am 15 years old a sophomore in high school and a cheerleader. I am not age playing shit. I need u to know that. I don't want anyone doing anything they are not comfortable with. As long as u know this is the truth then I can send another email that is lying to u telling u I'm 16 or 18 or 55 whatever. If that's ok let me know

Sadler at 12:44: guess you don't understand how serious and easy my request was. Now that you said all that.. you put me in the position where I risk at least 5 years in prison and a life time of registering as a sex offender. How do you think I should feel about that kind of risk? Seriously? I would absolutely LOVE to fuck you silly tomorrow.. but wtf?

Holand at 12:47: What do u mean I said I would send an email. I didn't say anything different in that email as I have been saying all along. Do u want me to send the email or not. Whatever will make u feel alright

Sadler at 12:59: fuck girl.. You're smart. Smarter than you're being now. I don't even know what to say now. You put my whole life in jeopardy when you didn't have to

Holand at 1:02: I'm consenting and 18. (u have what u want)

Sadler at 1:13: Well that helps.. but fuck girl. Look.. let's do this another way. For the record - I will meet you tomorrow with the 150 gift. You need it. I'm not agreeing to have sex with you. I'll pick you up at noon and we can just go get to know each other from there. Hang out. No sex involved. No laws broken. Fair enough?

Sadler at 1:15: You good to go with that?

Holand at 1:21: I'm done. I'm no charity case. I did what u wanted and now ur changing it again

Sadler at 1:25: look.. let's meet and talk and hang out. It's not about charity. If you can't appreciate me taking all the stress and risk out of this and giving us the opportunity to sit down and talk in person.. no sex agreed to here or laws broken.. then I guess I can't do

anything more. I would love to meet you tomorrow. I think you're pretty special actually. But up to you

Sadler at 1:27: Let me know. It shouldn't be a big deal at all

Sadler at 1:33: ok?

Holand at 1:36: Its a principle thing. I never call a guy and I did for u. Cops couldn't do that. I'm talking to u on the 4th of July the biggest holiday the cops are off. I send u an email that I'm consenting and 18 and u still want more. Its bullshit. I also sent my pics. And I'm willing to be picked up by u and go to ur house. At first u sounded cool and all but ur like most guys on cl. Talk big, and when they get what they ask for they get scared and run. I was even going to give u the chance to talk to a regular client so he could make ur fears go away. Get back to me if u want to meet for sex otherwise I will say yes to the other guy who wants to play tomorrow

Sadler at 1:44: I made this really simple. If you can't appreciate that then something's wrong, Jen. All we have to do is show up with no stress and talk. I'm not trying to piss you off or come across as some flake. I'm much more than that. Smarter than that. And I don't want endless fucking emails either. If you don't get it.. take your chances with some CL moron. I hope you want to meet tomorrow totally relaxed.. but it's up to you

Exh 5, § 2 at 1-6.

Posing as a client, Detective Holand called Sadler. 5RP 77. He told Sadler that Jen had asked him to call to prove she was legitimate. Id. at 78. He said he had been with Jen on multiple occasions, that she was 15 and would keep quiet about things. Id. at 78-79. Sadler said thanks and that he had wondered if Jen was legit or not. Id.

Sadler at 2:02: ok girl... you made a pretty bold move there. Not that I like having my number given out, but have to give you super credibility on that move. I'll be there at noon tomorrow. Be ready. No more discussion about anything necessary. Agreed?

Sadler at 2:13: I like and trust you Jen. You went out of your way for me. I know that. Several times. Can I get a 'yes' out of you, for god's sake? I've got to get going on shit for the 4th and then work tonight too. Haven't slept in 24 hours. Need to crash

Sadler at 2:24: you hop in.. we go.. ok? I promise you that you won't be disappointed. Noon.. yes or no?

Holand at 2:27: Ok. So \$150 for full service all holes right plus the fun stuff ur going to devirginize me on right. Never did the tie up stuff

Sadler at 2:30: I aim to please girl, and appreciate what you did. It meant a lot to me. I'll see you at noon. No bs or discussions needed. You want to see a pic of what I'm talking about? Or wait and be surprised?

Sadler at 2:34: Fuck.. company at the door. I'll check here as I can. BE THERE AT NOON

Sadler at 2:55: We're on. but confirm you'll be there so I don't waste the drive and time going north otherwise. Thx Scott

Holand at 3:11: Pic

Holand at 3:13: And would u be able to pick me up in Seattle at McDonalds by the stadium on 4th ave s. A lot easier for me to get there. I can stay all day with u

Holand at 3:19: And if u have pics of what I can look forward to, that would be great. Ur tool and the bondage stuff that u are gonna do. Just curious

Sadler at 3:28: about a 40 min drive one way.. but no problem at all for you Jen. I was hoping you'd ask if you needed it. Having all day with you would be perfect. I'm actually off tomorrow night so I don't have to deal with any other shit either. What time should I pick you up at?

Sadler at 3:33: That's my current little play area. Never been used. tie off all over the ceiling so there are dozen of positions possible. All spread and open for use. You ok with this still? Let me know how you feel. Is that the McDonalds down 4th from Safeco towards Lander?

Exh 5, § 2 at 6-10.

To these emails Sadler attached a photo of a whiskey bottle, handcuffs and a rope on a nightstand and a photo of a bondage area Sadler had built in his basement. Id. at 8-9.

Sadler at 3:38: It's intense.. but wickedly incredible with some trust built. I can't go back to straight on your back Mormon missionary boring ass shit.. lol. I like to keep it interesting and get kind of freaky. You want a safeword?

Sadler at 3:41: I also like semi public.. parks.. woods.. on the beach.. under the pier.. behind a building.. bent over the hood of the car.. anywhere that adds some intensity, BDSM. Ageplay. Force Play, etc. Do you have any fetishes, or are you into anything kinky?

Sadler at 3:43: friggin don't give me the silent thing, lol. How does any of the kink make you feel? You game to try it?

Sadler at 3:52: I've got profiles on a lot of the BDSM sites. Mostly Master/slave oriented play and lifestyles. Was going to send you my Fetlife profile but it's pretty intense and I'm throwing a lot at you already. Baby steps I think, yeah. You there?

Holand at 3:55: Phone died sorry. It looks scary but fun

Sadler at 3:56: sounds like you have the feel for it. Does it make you excited to try it or more? What are your limits Jen?

Sadler at 3:59: what are your limits? Obviously no holds barred. My limits are no real or permanent harm to you. No damage to your beauty. But if you'd really like to try something.. like spankings. Ageplay. Rapeplay. Slapping. Whatever. Let me know.

Holand at 3:59: I am excited. So that's the exact bed area I'll be in? Also do u have pics of other girls and what ur doing to them that u plan on doing to me tomorrow so I can see it in action

Holand at 4:04: I'm excited. I don't have any limits that I know of. I actually am excited to be the first girl my age to do this. I don't think any sophomore in hs did this. I'm excited. I don't want bruises to my face other than that I want to experience everything

Sadler at 4:06: that area was just built and has not been used yet. It's your playground now. Jen's fuck dungeon

Sadler at 4:07: Good.. so I can be pretty rough then? Rape you? Slap you around a little? Fuck you like an animal? Hard, fast, deep, pounding fuckings? All holes?

Holand at 4:13: I like it all ways. So the \$150 does include all holes. I need lube for anal though. U will use lube right

Sadler at 4:14: yes.. already in the drawers in your dungeon

Holand at 4:17: Cool. I can get to Federal Way by noon. Friend said she can take me

Sadler at 4:19: Don't have pics of past slaves in bondage that I've owned or used. I have some videos of bondage and rough fucking a slave or two that I can show you here if you want. But a chick has to want to be photographed being used like this.. videotaped while being raped or whatever.. for me to go there. So I'm grabbing some examples of what you'll find yourself in

Holand at 4:20: Cool

Sadler at 4:29: cheerleaders are flexible, right? :)

Exh 5, § 2 at 10-13. At 4:34 p.m., Sadler sent seven photos of naked and bound women engaged in sex acts. Exh 5, § 3 at 1-4.

Sadler at 4:44: We have the house to ourselves all day tomorrow. Top to dungeon bottom. Do you smoke/toke/drink?

Sadler at 4:46: you have other pics of yourself? Wanna bring your cheerleader outfit :)))

Holand at 4:47: I drink. And toke. So the pics are exactly what you plan on doing to me? Wow

Sadler at 4:54: cool on both. And yes plus much more.. lol. Do you have more pics of yourself? I figure we're on solid enough ground now to ask

Sadler at 4:55: bth.. I'm not into hurting you. Unless you want some level of that. I like having you spread, held in place.. totally accessible.. when I'm pounding my cock into your wet, lil hole

Holand at 4:56: I don't have anymore but I do agree if u want to take pics or video tomorrow of our time if u promise to keep it to urself

Sadler at 4:58: of course. But you can't even take a pic with your phone?

Sadler at 5:35: I'm going to get some sleep. Only going to get 4 hours tonight and a few in the morning before I pick you up. You can email/call/text as you wish. I'll check here and there

Exh 5, § 2 at 12-13.

At 5:45 p.m., Holand sent Sadler another photo of Suedel. Id.

Minutes later Sadler responded: Fuck u r beautiful. Exh 5, § 4 at 1. The next day, July 5th, Sadler intended to meet "Jen."

Holand at 10:45 a.m.: See u in federal way at noon

Sadler at 11:10: Hey.. was outside working on the place. Call me now.. no emails

Exh 5, § 4 at 1.

At 11:17 a.m., Suedel called Sadler and reminded him that being only 15 years old, she was inexperienced in BDSM. 6RP 28-29. Sadler reassured her that they would proceed slowly, although Suedel testified that Sadler sounded nervous. 6RP 28-30.

Holand at 11:29: U calmed down now

Sadler at 11:41: So I am not agreeing to have sex. Or PAY for sex. Especially with someone underage. I am NOT going to break any laws. I have never been with an underage person. You contacted me on an 18+ only website where I was looking for 'young'.. but obviously that meant 18ish+ given the requirements of Craigslist and my own adult post. I haven't believed you were really 15 at any time or I wouldn't have continued contact. You act, type, and communicate at an adult level. You even look older

(18+ and absolutely beautiful) in your pics. I'm *very* attracted to the *woman* that contacted me.. yes.. as an adult.. and so I will agree to meet with you.. and we can talk. Thanks for understanding. See you at noon

Sadler at 11:41: much better. See you there

Sadler at 11:43: Shit.. got to get gas on the way. Might be a bit late You good?

Holand at 11:44: I just got ur last email about not wanting sex. So I guess we're off. I will turn around

Sadler at 11:47: Meet me at noon. Or not. Up to you. I won't leave if you're not going to be there

Sadler at 11:48: But tell me now for sure. Getting late

Sadler at 11:51: will you be there or not?

Holand at 11:51: I don't know why u keep playing games. I'm ready for doing what we talked about in the room. U basically have said that's not going to happen. I will only come if it's going to happen. But if all ur going to do is show up, see I'm who I told u I was and then leave me then it doesn't make sense for me to come. I'm almost there

Holand at 11:52: If u can assure me I won't be disappointed then I will come

Sadler at 11:54: fuck.. I have to leave not. Going to be a little late. See you there in 15 mins. I don't get emails on my phone so call if you need. Be there

Sadler at 11:54: Leave now...typo

Holand at 11:55: U in black car

Exh 5, § 4 at 1-3.

Sadler drove a different car than he told "Jen," and he did not drive to the Taco Time. 5RP 106; 6RP 61-62, 103-04. Instead, he parked across the street and walked over to the Taco Time. 5RP 106-07; 6RP 61. While on the phone with "Jen," telling her that he could not wait to meet

her, Sadler was arrested. 5RP 106-07; 6RP 33, 51-52. Along with his cell phone, Sadler had \$216 and a handcuff key on his person. 6RP 56, 65.

In a search of Sadler's home, detectives found where Sadler's "dungeon" had been before Sadler's son took it apart. 5RP 112-15, 122. Sadler's son admitted to having taken apart the dungeon after Sadler had called him from the jail and asked him to. 6RP 113, 116-20. Detectives also found straps, ropes, eyebolts in the ceiling, handcuffs, lubrication jelly, zip ties, black plastic sheeting, and Sadler's computer. 6RP 88-92. A search of the computer showed that someone had conducted a search using the term child molestation in the third degree. 7RP 55, 59.

Sadler's defense -- what he testified to and what his attorney argued in closing, is that he never believed he was dealing with a minor. 7RP 119; 8RP 11; 9RP 64. He knew the person was a "total fake." 7RP 115, 119. His goal, "to expose who this person really is." 8RP 39. It is a "mind game," a "challenge to me to be able to expose these people," Sadler said, and he just got "caught in a snowball rolling downhill." 8RP 38, 100. Sadler professed that he even contemplated reporting the person to the police and that he was determined to find out why they were "misrepresenting themselves" to him. 7RP 115, 119-20, 8RP 98.

Asked why he continued communicating with this person for three days, Sadler claimed he was just "playing along," and trying to get "more

information to try and figure out what's going on." 8RP 4, 25. Sadler then went through every email entry, one by one, and explained why the email did not mean what it appeared to mean. 7RP 110-26; 8RP 2-75. This included explaining the \$200 plus dollars found on Sadler after telling "Jen" that he had withdrawn money from a cash machine to give to her as "a gift." 8RP 25, 35, 93. The money, Sadler testified, was to pay some bills, although he also professed that it would have been perfectly legal to give "Jen" a "gift." 8RP 35, 75, 92.

Everything he did, Sadler testified, was a series of tactics he uses to obtain information from people on the Internet and to weed out the scams. 7RP 83-85. Ultimately, he professed, he never expected anyone to show up at the Taco Time. 8RP 71.

Sadler also explained that when he called his son from jail and instructed him to get rid of the dungeon, he did so because he wanted to use the space for a computer station and to just "get it out of everyone's hair." 8RP 52-55. As for the computer search about child molestation, Sadler testified that he must have conducted the search while looking into an issue about his daughter and her boyfriend. 8RP 3.

C. ARGUMENT

1. THE COURT'S EVIDENTIARY RULINGS DID NOT VIOLATE SADLER'S RIGHT TO DUE PROCESS

Sadler sought to admit a number of Internet ads he had posted, and a number of email strings related to those ads. The court allowed for the admission of a vast majority of the proffered evidence. Sadler now contends that five court-ordered redactions to the emails violated his right to due process. Sadler's claim is without merit. The court's rulings, correct or incorrect, were basic evidential rulings that did not amount to a constitutional violation.

a. Relevant Facts

Sadler sought to admit a plethora of ads he placed on various websites. Exh 56. He also sought to admit 17 email strings containing communications he had with unknown people who had responded to his ads or he had responded to their ads.⁴ No ads were attached to the email strings.

The court went through the 17 email strings one by one to determine whether they were admissible, and if so, whether any redactions needed to be made. 6RP 126-59. Sadler's primary argument was that the emails were admissible under ER 404(b) as prior acts that showed he had a common scheme or plan to enter into a long-term monogamous

⁴ The email strings, numbered 1 through 17, are attached to the Defense Brief in Support of Admission (CP 170-279).

relationship with an adult female, and thus, he possessed the same intent in communicating with “Jen.” Id. The court ruled admissible with no redactions nine of the email strings (2-7, 11, 12); ruled admissible with redactions six email strings (1, 8, 9, 10, 13, 14), and ruled two inadmissible (15 and 17). Id.

Sadler challenges the redactions made to Exhibits 36, 42, 43 and 47 (corresponding to numbers 1, 9, 10 and 14 of Sadler’s Brief in Support of Admission), and the exclusion of number 15. In each case, the court ruled that the excluded material, all hearsay, had little to no relevance and would be confusing to the jury and possibly cumulative. 6RP 128-58.⁵

b. There Was No Constitutional Violation

Sadler does not claim evidentiary error, rather, he asserts that his due process right to put on a defense was violated by the trial court’s rulings, rulings that he claims could only be made if the State showed “a compelling interest” to exclude the evidence. Def. br. at 18. This is merely a failed attempt to turn basic evidentiary rulings into an issue of constitutional magnitude. Sadler’s right to put on a defense was not violated. To accept Sadler’s claim is paramount to finding that the rules of evidence do not apply to defendants if the evidence has even minimal relevance. No case supports this proposition.

⁵ For tactical reasons, defense counsel later withdrew Exhibit 56, the exhibit that contained the approximately 100 ads posted on various websites by Sadler. 8RP 137.

The Sixth Amendment and article I, section 22 include the right to present a defense. State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). It is well-settled, however, that the right to present a defense is not absolute. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); Maupin, at 924. For example, the right to present a defense does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Even where confrontation clause rights are implicated, a trial judge still retains wide latitude and may exclude prejudicial evidence or evidence that may confuse the issues. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986); also Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed. 798 (1988) (an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence -- court properly excluded defense witness for a willful discovery violation); United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve -- rule excluding polygraph evidence proper exercise of legitimate State interest in ensuring that only reliable evidence is presented at trial).

To amount to a constitutional violation, the exclusion of evidence must constitute a complete deprivation of the ability to present evidence on a particular and critical theory of the case. E.g., Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (rule precluded the defendant from offering evidence that another person repeatedly confessed to the murder). In Chambers, the Court stated that it was not establishing a new principle of constitutional law, but the exclusion of critical evidence of another man's multiple confessions in the case resulted in a trial that violated traditional, fundamental standards of due process. 410 U.S. at 302, see also Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (evidence rule excluding post-hypnotic testimony prevented defendant from testifying as to critical issues).

Here, the court's evidentiary rulings did not prevent Sadler from putting on a defense or arguing his theory of the case. At most, it prevented him from presenting collateral evidence of minimal if any relevance.

Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

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 that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.” Here, Sadler attempted to admit prior “good” acts to show he did not have the intent necessary for the charged crimes.

Referred to as the “common scheme or plan” exception, when an issue exists as to whether a crime actually occurred (as opposed to the identity of the person who committed the crime), the existence of a similar plan or scheme by a defendant as to a prior similar act may be admissible under ER 404(b) as probative of whether the current crime occurred. State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003).

To admit common scheme or plan evidence, the prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). In regards to step three, the court must find that the prior acts “show a pattern or plan with marked similarities to the facts in the case before it.” DeVincentis, at 13. If the court finds the existence of a prior similar plan,

this past behavior is probative as to the issue of whether the crime occurred. Id., at 17. Accordingly, the prior acts must be similar enough to be naturally explained as individual manifestations of an identifiable plan. Id.

Sadler argues that his prior Internet conversations with adult women show that he acted in the same manner here – that he was seeking a long-term relationship with an adult female. However, Sadler’s own testimony shows the fallacy in his argument.

Although Sadler did testify that he was interested in finding a person for a long-term monogamous relationship, he also testified that he had a strong interest in casual sexual encounters. 7RP 74-75, 78-79. He admitted to placing 100 or so Internet ads, all looking for sex with a person around 18ish. 8RP 83. He also professed that while not looking for a prostitute, if one responded to his ads, he would consider it. 8RP 84-85.

In regards to the ad the detective responded to, Sadler admitted he posted the ad in the “Casual Encounters” section of Craigslist used by prostitutes and persons looking for casual sexual encounters. 8RP 78-79. The ad itself referred to “fucking,” “stay[ing] the night,” and “nsa” (no strings attached). Exh 4. The ad said nothing about wanting a long-term monogamous relationship. What Sadler’s testimony demonstrates is that

he possessed no “common scheme or plan,” he was admittedly open to virtually anything that came his way.

In addition, there are no “marked similarities” between the redacted email strings and the facts of this case. There were no corresponding ads attached to the email strings, and thus there is no way of knowing what Sadler stated in the ads, i.e., whether the ads stated he was seeking a long-term relationship or a one night stand. Further, there are no “marked similarities” between the text of the redacted conversations and the conversation Sadler had with “Jen.” None of the emails dealt with a person “role playing” as a minor wherein Sadler sought a long-term monogamous adult relationship. In essence, Sadler simply wanted to introduce other emails wherein he was not overtly attempting to obtain sex with a minor. This is akin to a bank robber introducing evidence that he has previously gone into banks without robbing them.

The trial court was correct; the email strings had little to no relevance and introducing them could confuse the jury as to why they were admitted into evidence. As an evidentiary ruling, this Court cannot say that “no reasonable judge would have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014, 1020 (1989).

Further, having little to no relevance, under either an evidentiary harmless

error standard⁶ or a constitutional harmless error standard,⁷ redacting portions of the emails made no difference in this case.

2. DETECTIVE HOLAND DID NOT PERSONALLY OPINE THAT SADLER WAS GUILTY

Sadler contends that his conviction must be reversed because, in his opinion, when Detective Holand was explaining how undercover Internet sting operations work, he personally opined that Sadler was guilty. This claim has no merit. Detective Holand did nothing more than explain how sting operations work. In any event, any error was harmless.

a. The Relevant Facts

Prior to trial, defense counsel moved to prohibit Detective Holand from introducing evidence of profiling⁸ or having him opine as to Sadler's guilt. 2RP 67-72. At the same time, counsel acknowledged that Detective Holand possessed "quite a bit of experience in these sorts of cases" and "he's entitled to talk about his procedures, process, the steps he does and

⁶ Under a non-constitutional error standard, a defendant must show that within reasonable probabilities the outcome of trial would have been different but for the error. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986).

⁷ A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182, 1191 (1985).

⁸ Profiling is the comparing of similar characteristics of a defendant with the characteristics of members of a particular group, with the intent of showing that the defendant fits the "profile" of members of the group and therefore likely committed the charged crime. 5B Wash. Prac., Evidence Law and Practice § 702.43 (5th ed.). For example, United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989) an officer testified to specific characteristics used by airport security officers to spot a typical "drug courier."

maybe some general background.” 2RP 67. The State concurred. 2RP 69-70. The parties recognized that what constitutes permissible and impermissible testimony is not always clear, and thus the parties would have to deal with the issue in the context of the trial. 2RP 72.

At trial Detective Holand testified about how he works in an undercover capacity on the Internet. 5RP 12-18. He testified that he goes to sites such as Craigslist or Fet-Life and either posts ads or responds to ads. 5RP 19-20. He used three exhibits to demonstrate how a person navigates through Craigslist to either post or respond to an ad. 5RP 20-23.

Detective Holand discussed how a user simply has to press a key acknowledging that they are at least 18 years old to get to the “Casual Encounters” section on Craigslist. 5RP 24-25. When asked how he determines which ads to respond, Detective Holand said that with hundreds of ads posted each day, he would look for ads that contained such things as a dollar symbol or “looking for a car date,” indications that the person was looking to pay for sex, or terms such as “young,” “teen,” or “school girl,” as opposed to ads stating “looking for granny.” 5RP 27-28.

Once contact is made with a person on the Internet, the detective was asked how he determines whether to keep communications going or not. 5RP 29. The detective responded that it is really up to the other party. 5RP 29. The detective then asked if he could give an example. Id.

Defense counsel objected, “402, 403, pretrial motions.” Id. The prosecutor stated that the detective would speak in a general sense to explain how the process works. 5RP 29-30. The court allowed the detective to provide an example. 5RP 30.

The detective testified that if he posted an ad, for example, he might get 100 responses. Id. He would respond to all of them indicating that he was 15 years old and would engage in sex for money. Id. A “certain section of that pool” the detective testified would go “[w]ell, I don’t want to communicate.” Id. It might be that it is “not what they’re into or whatever.” Id. Maybe 30 of the remaining 50, the detective said, were “kind of playing a game. They’ll communicate for a little while, they’ll stop communicating, you won’t hear from them.” Id. So now there are 15 or 20 left and “that’s how it worked.” 5RP 30-31.

The detective testified that prostitutes would use various websites, as well as persons who were not looking to pay money for sex. Id. He testified that there are bots on the Internet, computer programs that generate responses as if a real person and asking that the person click on another website under the ruse of verifying a person’s age. 5RP 31-32. The website would then get advertising revenue based on the amount of traffic directed to the site. 5RP 32.

Detective Holand testified that ultimately he works towards meeting a suspect in person. 5RP 33. When asked how long that might take, the defense objected, “402, 403, matters litigated pretrial.” Id. The objection was overruled. Id. The detective testified that the quickest it has occurred was two hours, the longest, four years. Id. The prosecutor interposed “[s]o there’s no particular generalization that you can make about that?” The detective responded “none.” Id. He testified that he has no control over when or if someone wants to meet and many times the person may break off contact and reinitiate contact at a later date. 5RP 34.

At the point where there has been an agreement to meet -- and the meeting place could be anywhere from a hotel to a 7-11, the detective would bring in a team of officers, each with specific tasks, from surveillance, photography, interviewers and arrest team officers. 5RP 35-36. If the person does not show up, the detective testified, he does not make an effort to track them down. 5RP 35-36.

b. The General Evidence Rules

Evidence Rule 701 allows testimony by a lay witness as to “opinions or inferences which are rationally based on the perception of the witness, and helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Evidence Rule 702 allows expert witnesses to offer opinion testimony as long as the witness qualifies as an

expert and the testimony would be helpful to the jury. Evidence Rule 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

Case law establishes that when a witness testifies in the form of an opinion regarding guilt of the defendant, such an opinion “invas[es] the exclusive province of the jury.” State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, testimony that “is based on inferences from the evidence is not improper opinion testimony.” City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994). “The fact that an opinion supports a finding of guilt ... does not make the opinion improper.” State v. Collins, 152 Wn. App. 429, 436, 216 P.3d 463 (2009), rev. denied, 168 Wn.2d 1020 (2010).

A trial court’s decision to admit or exclude testimony will not be overturned absent an abuse of discretion. Demery, 144 Wn.2d at 758. While reasonable minds might disagree with the trial court’s evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. Hopson, 113 Wn.2d at 284.

c. There Was No Opinion Or Profiling Testimony

The defendant begins his argument by applying the test used to determine whether opinion testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue.” See State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) (the determination will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact). However, the defendant skips the first question that must be answered – did Detective Holand express an opinion at all? The answer is no.

An opinion is defined as “a view, judgment or appraisal formed in the mind about a particular matter” or “an expression of judgment.” Merriam-Webster’s Collegiate Dictionary 870 (11th ed. 2003). “Opinion testimony” is “testimony based on one’s belief or idea.” Demery, 144 Wn.2d at 759. As discussed supra, profiling is the comparing of similar characteristics of the person on trial with the characteristics of members of a particular group, with the intent of showing that the person on trial fits the “profile” of the group and therefore likely committed the charged crime. 5B Wash. Prac., Evidence Law and Practice § 702.43 (5th ed.).

Here, Detective Holand did not testify that there were any specific characteristics of the defendant that were similar to known pedophiles or persons who use the Internet to procure sex with minors. To the contrary, Detective Holand testified that there were no specifics that could be drawn from his experiences. The example he used – and the jury was made aware that it was an example, dealt with Detective Holand placing an ad and how he goes through the process of investigation to the point of making an arrest. This is the opposite of what happened in the defendant’s case, where Detective Holand was responding to another person’s posted ad. 5RP 36-37; Exh 4.

A good example of the permissible nature of Detective Holand’s testimony is found in State v. Cruz, 77 Wn. App. 811, 894 P.2d 573 (1995). In Cruz, a delivery of heroin case, a ten-year veteran of the Drug Enforcement Unit testified regarding how much heroin is typically involved in a transaction, why informants are used, what is a controlled buy, where do heroin transactions commonly take place, why do they commonly take place in public areas, why do heroin suppliers commonly hide the drugs outside, and how does a typical heroin transaction proceed after the parties agree to meet. Cruz, at 813-14.

This Court found that the detective’s testimony was not an opinion on guilt, nor was it “inferential testimony that leaves no other conclusion

but that a defendant is guilty.” Cruz, at 815-16. The court noted that the testimony consisted solely of the detective’s knowledge of the typical heroin transaction, and that the jury still had to decide whether to believe the police in regards to the facts of the crime and the ultimate issue of whether the other evidence presented demonstrated Cruz’s guilt. Id.

Here, Sadler argues that when Detective Holand testified that many times he ends up arresting an individual, this was improper opinion testimony because he also arrested the defendant, ergo, it can be inferred that Detective Holand was opining that Sadler was guilty. This argument fails for many reasons. First, it is a quantum leap from “police arrest other persons during sting operations,” “the jury will assume all other persons arrested were in fact guilty,” “Detective Holand arrested Sadler,” and therefore, Detective Holand by telling us this fact, he was expressing his personal opinion that Sadler is guilty. However, in almost every criminal case, the defendant sitting at trial has been arrested, and in many of those cases, jurors are made aware of that fact (especially in any case, like a drug case for example, where evidence is found on the defendant’s person). The jury learning that an arrest has been made after a police investigation is not an opinion on guilt.

Further, this case is unlike other cases where eliciting the facts of an arrest has been considered improper. For example, in State v.

Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), Montgomery and his friend Biby were followed by detectives as they made purchases at various stores. The car the two were driving was subsequently stopped, the two arrested and their car searched. Montgomery was convicted of possession of pseudoephedrine with intent to manufacture methamphetamine. In discussing the defendant's shopping trip, the prosecutor asked the detective whether he had formed any conclusions. The detective replied, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it ...I'd seen those actions several times before." Montgomery, at 587-88. Another detective responded "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location." Id. He added that "those items were purchased for manufacturing." Id.

The Supreme Court was asked to determine "how far" the State's witnesses could go in expressing their opinions. Id. at 589. The Court recognized that the jury learning about the fact of arrest was unavoidable but this did not allow the State to elicit opinion testimony. Id.; see also State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009) (improper for officer

to testify he is trained on the elements of reckless driving and King's conduct met those elements).

Here, no officer opined about the defendant's guilt or *mens rea* based on his arrest. And unlike some cases where the fact of arrest or the location of the arrest is not relevant, it was here. Sadler was not arrested by happenstance. He drove to Federal Way and was walking to Taco Time where he was arrested while talking on the phone with "Jen." This was direct relevant evidence of Sadler's intent to meet an underage girl for sex – consistent with the email exchanged.⁹

In any event, any error was harmless. An important determination of whether improper opinion testimony was prejudicial is whether the jury was properly instructed. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (no prejudice where jurors instructed that they were "the sole triers of fact," "the sole judges of the credibility of witnesses," and "of what weight is to be given to the testimony of each"). The jurors in Kirkland were also instructed that they were not bound by any opinion testimony and that it was for the jurors to determine the credibility and weight of any opinion evidence. Id. Identical instructions were given in this case. CP 339, 345. The court will "presume the jury followed the

⁹ This is also similar to evidence of flight wherein a defendant's conduct in fleeing creates a reasonable inference of guilt. State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971).

court's instructions absent evidence to the contrary." State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Considering the limited nature of the challenged testimony and the jury having been properly instructed, the testimony in no way undermined the jury's independent determination of the facts.

3. SADLER FAILS TO SHOW MISCONDUCT

Sadler asserts that the prosecutor committed such flagrant and egregious misconduct in closing argument that his failure to object should be excused and his conviction reversed. Specifically, Sadler contends that the prosecutor pandered to the emotions of the jury and disparaged defense counsel. Sadler is mistaken. The record shows that the prosecutor appropriately discussed the law and applied the law to the prosecutor's case and the defense's case. In any event, Sadler cannot show how a simple objection and request for a curative instruction would not have stopped the misconduct and obviated any prejudice. And finally, Sadler cannot show that but for the alleged misconduct there is a substantial likelihood the results of his trial would have been different.

When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both the impropriety of the prosecutor's arguments and that there was a "substantial likelihood" that the challenged comments affected

the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The prejudicial effect of alleged improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudicial error does not occur until such time as it is “*clear and unmistakable*” that counsel has committed misconduct. Id., at 53.

Along with a defendant’s requirement to prove “clear and unmistakable” misconduct is the acknowledgment that greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). When a prosecutor does no more than make reasonable arguments and inferences based on the facts in evidence, no misconduct occurs. State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), rev. denied, 121 Wn.2d 1020 (1993). This includes a prosecutor being able to comment on the credibility of witnesses – including the defendant. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), rev. denied, 129 Wn.2d 1012 (1996).¹⁰ And it is not misconduct for a prosecutor to argue that the

¹⁰ In Millante, the defendant asserted that he was denied a fair trial by the prosecutor characterizing him as someone who had lied about the circumstances surrounding the victim’s murder. Millante, at 250. The court disagreed. The “evidence show[ed] that

evidence does not support the defense theory of the case. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

a. The Relevant Facts In Context

During closing, the prosecutor discussed “the issue of credibility” and Sadler’s testimony. 9RP 58-59. The prosecutor noted that the facts were really not in dispute but that Sadler wanted the jury to interpret those facts differently than the State and how those facts might appear when first read. Id. The prosecutor said that Sadler was “uncommonly smart,” “that every word [of each email was] explained,” and that he had “prepared a story that explains every piece of evidence in his favor and is internally consistent.” Id. Counsel follow by saying:

And in a few minutes I expect you’re going to hear a very coherent, compelling, internally consistent story about what the defendant did. It will be a story about a parallel universe, in which he asked you to come to completely the opposite conclusion about everything he said, and it will be wrapped up in a neat package, that Mr. Sadler will ask you to file under the label of reasonable doubt. He’s not only smart, folks, he’s hoping that he’s smarter than you.

9RP 59-60. The prosecutor followed with examples, such as Sadler asserting that the money on his person was to pay bills, not for sex; and

Millante lied to the police when first questioned.” Id. The prosecutor appropriately argued that “this untruthful behavior indicated Millante was not a credible witness,” and that he could have lied about other things related to the murder. Id. “Read in context,” the court held, “it is clear that the prosecutor’s statements were proper comments on credibility based on evidence in the record.” Id.

that the computer search about child molestation was about his daughter and boyfriend, not about “Jen” being 15. 9RP 60-61.

As the Supreme Court has stated, “[i]n courts of law, it is not uncommon for two sides to offer starkly contrasting versions of the same events.” State v. Montgomery, 163 Wn.2d 577, 584, 183 P.3d 267 (2008). The prosecutor’s argument did not disparage defense counsel, rather, the argument addressed the fact that Sadler took the same facts that the State argued showed he wanted to have sex with a child and attached an innocent explanation to every fact. A prosecutor is free to “argue that evidence does not support a defense theory,” and “entitled to make a fair response to the arguments of defense counsel.” State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

In another challenge comment, the prosecutor explained to the jury that the charges did not require a completed act, a fact not necessarily intuitive to jurors.

And all we have to prove is he was trying to set that up. Now, maybe you’re thinking, but he didn’t actually pay for anything. It doesn’t matter. Even the completed crime doesn’t require that you actually pay, just that you make that offer. And that’s because the law is not going to stand by and wait until Mr. Sadler’s actually having sex with a kid before it’s a crime. The defendant was looking for young and he found it. He did everything he could to get her, while trying to protect himself and cover his track, and he got caught.

9RP 63-64. The underlined portion is the sentence Sadler quotes in isolation. Def. br. at 36. Taken in context, it is clear the prosecutor was explaining the law in relation to the facts of the case.

Next Sadler refers to the prosecutor's discussion of the show "To Catch a Predator," why Sadler was so scared and that the jury should be concerned about that. Def. br. at 36; 9RP 98-99. However, Sadler provided the basis for this argument when he emailed "Jen" saying "Honestly girl...that is exactly what a cop would say. Ever seen 'To catch a predator'. Scary shit." Exh 5, § 1 at 15. This was permissible argument based on the evidence, telling the jurors that they should consider Sadler's stated reaction to the show as evidence of his guilty mind.

There was one comment that technically was misconduct although, if anything, it inured in Sadler's favor. Without objection the prosecutor told the jury that "[t]he defendant will say that Mr. Bowlin was upset about having something stolen from him by James Sadler, so he [Bowlin] came in here and committed perjury, just because he's upset with the defendant's son." 9RP 60.¹¹ This apparently referred to facts that the prosecutor thought had come into evidence but had not. However, the prosecutor was essentially telling the jury that Bowlin may have had a

¹¹ James Bowlin was Sadler's roommate. His testimony consisted of saying that on the morning Sadler was arrested, Sadler told him that he was going to have a date over and to not come home without calling or texting first. 7RP 25-29.

motive to lie, a fact that could only benefit Sadler. In addition, by the prosecutor making this factually unsupported statement, the prosecutor's credibility could only be diminished in the jurors' eyes.

In any event, Sadler's failure to object to any of the alleged misconduct constitutes waiver unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice, incurable by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In other words, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. Russell, 125 Wn.2d at 857. If Sadler believed the prosecutor was committing misconduct, he has not identified anything about the alleged misconduct that was so prejudicial, or would so impact the minds of the jurors, that a objection, admonishment to the prosecutor and instruction to disregard would not have been sufficient. Montgomery, 163 Wn.2d at 596 (jurors are presumed to follow the court's instructions). This issue has been waived. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) ("counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal").

While the absence of an objection waives the issue, it also indicates that the comments did not strike trial counsel or the defendant as

improper or prejudicial. Swan, at 661. For Sadler to prevail, he must prove that there was a “substantial likelihood” that the challenged comments affected the verdict. Russell, 125 Wn.2d at 86. The allegedly improper remarks must be viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Brown, 132 Wn.2d at 561. None of the challenged comments here were of such significance or of such gravity that Sadler can show that but for the comments, he likely would not have been found guilty. This is especially true when one considers the fact that the jurors were specifically instructed that “the lawyers’ statements are not evidence” and that “[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law.” CP 338-41.

4. SADLER’S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT

Sadler contends that the cumulative effect of multiple trial errors warrants reversal even if they do not justify a reversal individually. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (an accumulation of errors that do not individually require reversal may still deny a defendant a fair trial). However, reversals due to cumulative error are justified only in rather extraordinary circumstances. See State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426, rev. denied, 133 Wn.2d 1019

(1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). And it is axiomatic that to seek reversal pursuant to the “accumulated error” doctrine, a defendant must establish the presence of multiple trial errors *and* that the accumulated prejudice affected the verdict. Neither has been shown here.

5. SADLER’S TWO CONVICTIONS DO NOT CONSTITUTE THE SAME CRIMINAL CONDUCT

Sadler contends that his two convictions constitute the “same criminal conduct” for scoring purposes. This claim should be rejected. The court correctly applied the law and facts in rejecting Sadler’s claim.

Whenever a defendant is sentenced for two or more current offenses, the sentencing range for each current offense is determined by using all other current and prior convictions as if they were prior convictions for the purpose of computing a defendant’s offender score. RCW 9.94A.589(1)(a). A limited exception exists where the sentencing court finds that some or all of the current offenses encompass the “same criminal conduct.” Id. When a court makes a finding that the current offenses constitute the same criminal conduct, those current offenses are counted as one crime. Id. For convictions to constitute the “same criminal conduct,” (1) the crimes must require the same criminal intent, (2) the crimes must have occurred at the same time and place, and (3) the

crimes must have involved the same victim. RCW 9.94A.589(1)(a). Unless all three elements are met, the offenses are counted separately. State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016).

The Legislature intended the phrase “same criminal conduct” to be construed narrowly. State v. Hernandez, 95 Wn. App. 480, 485-86, 976 P.2d 165 (1999). A determination as to whether crimes constitute the same criminal conduct is partly a factual determination. Chenoweth, 370 P.3d at 8. At sentencing, it is the defendant’s burden to prove same criminal conduct. State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). On appeal, it is a defendant’s burden to show that the trial court abused its discretion or misapplied the law. Chenoweth, 370 P.3d at 8.

At sentencing, Sadler argued that he possessed the same intent when he committed the two charged crimes. 12RP 8-10. By written order, the trial court disagreed, finding that the crimes “each had a different statutory and factual criminal intent.” C.¹² CP 400.

In determining whether two convictions involve the same criminal intent, the first step is to determine whether the statutes contain the same objective intent. Chenoweth, 370 P.3d at 9-10. If the statutory intent is different, the analysis is over and the convictions do not constitute the

¹² On appeal, Sadler asserts that the parties agreed that the two offenses were committed at the same time and place. Def. br. at 42. This is incorrect. While the trial court’s order was limited to the intent issue, the State also argued that the crimes did not occur at the same time. See CP ____, sub # 84.

same criminal conduct. Id. Where one crime has a statutory intent element and the other does not, the two crimes do not constitute the same criminal conduct. Hernandez, 95 Wn. App. at 485-86.

In Chenoweth, the defendant argued that his conviction for first-degree incest for raping his daughter, and his conviction for third-degree rape of a child based on the same act, constituted the same criminal conduct. Similar to the argument made by the defendant here, Chenoweth claimed that his criminal intent was to have sex with his daughter, and thus, the two crimes required the same intent. Id. at 9. The Supreme Court rejected Chenoweth's argument, stating that "objectively viewed, under the statutes, the two crimes involve separate intent." Id. "The intent to have sex with someone related to you [incest]," the Court said, "differs from the intent to have sex with a child [rape of a child]." Id. Thus, the sentencing court correctly counted the crimes separately. Id.

The same is true here. While Sadler's ultimate goal may have been to have sex with an underage girl, his criminal intent was different under each statute.

As convicted here, a person is guilty of commercial sexual abuse of a minor when he pays or agrees to pay a fee to a minor pursuant to an understanding that in return the minor will engage in sexual conduct with him or he solicits, offers or requests to engage in sexual conduct with a

minor in return for a fee. RCW 9.68A.100(1)(b) & (c); CP 351, 355. A person is guilty of a criminal attempt crime if “*with intent to commit a specific crime*, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020 (emphasis added). Thus, Sadler was found to have committed an act that was a substantial step towards his intent to pay a fee for procurement of sex with a minor.

As convicted here, a person is guilty of communication with a minor for immoral purposes if through the sending of an electronic communication, that person communicates for immoral purposes with someone the person believes to be a minor. RCW 9.68A.090(2); CP 289, 359, 360. The word “communicate” is given its ordinary meaning. State v. Schimmelpfennig, 92 Wn.2d 95, 103-04, 594 P.2d 442 (1979). “Immoral purposes” means sexual misconduct. Schimmelpfennig, 92 Wn.2d at 100. A person is guilty of the crime if he “invites or induces the minor to engage in prohibited conduct.” State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006). The statute “is designed to prohibit communication with children for predatory purposes of promoting their exposure to and involvement in sexual misconduct.” State v. Hosier, 157 Wn.2d 1, 9, 133 P.3d 936 (2006).

Sadler’s intent under the two statutes was different. See, e.g., State v. Farmer, 116 Wn.2d 414, 427-28, 805 P.2d 200 (1991), amended on

denial of reconsideration, 812 P.2d 858 (1991) (While Farmer's "ultimate motive" may have been sexual gratification, his criminal intent in patronizing a juvenile prostitute (to solicit sexual services of a minor for a fee) and his criminal intent in sexual exploitation of a minor (to photograph minors engaged in sexual acts) were different). While the court in Farmer termed it his "ultimate motive," the more apt term would be his "goal." "Goal" is defined as "the end toward which effort is directed." Merriam-Webster's Collegiate Dictionary 536 (11th ed. 2003). "Intent" is defined as the state of mind with which an act is done. Merriam-Webster's Collegiate Dictionary 651 (11th ed. 2003). Thus, the defendant's ultimate goal may have been to have sexual intercourse with a 15-year-old girl, but his intent to enter into a contractual, albeit illegal, sexual arrangement for money, and his intent to communicate electronically his sexual desires with a person he thought was a minor, were different.

In addition, the crimes did not occur at the same time. Sadler communicated with "Jen" for nearly three days. In some emails, there were discussions about sex for money. However, in many of the emails, the discussions had nothing to do with money, but instead, the exchanges were focused on sex acts, bondage, etc. While it is true that acts do not need to occur at the precise time, they do need to occur close in time. For

example, in State v. Tili, the court found Tili's three rapes of his victim constituted the same criminal conduct because they were "nearly simultaneous in time." 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The acts were "continuous, uninterrupted, and committed within ... approximately two minutes." Id. at 124. In contrast, in State v. Grantham, the defendant raped his victim, after which the victim began kicking and yelling, and asked to be taken home. Grantham then forced her to perform oral sex. The court resolved that the second act was not the same criminal conduct as the first rape because he had formed a new objective intent: he "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." 84 Wn. App. 854, 859, 932 P.2d 657 (1997). This is the case here. Between any of his communications, and certainly between his communications about sex for money and his communications about sex acts, Sadler had time to pause and reflect and he could have ceased his criminal activity.

Because the two crimes had different intents and occurred at different times, Sadler cannot show that no reasonable person would have taken the position adopted by the trial court, or that the trial court applied the wrong legal standard. Chenoweth, at 8.

**6. THE COURT IMPOSED APPROPRIATE AND
LAWFUL CONDITIONS OF SENTENCE**

As a condition of his community custody, the court imposed limitations on Sadler's use of the Internet and his sexual relationships. Sadler argues these conditions are not "crime related" and infringe on his constitutional rights. The conditions are lawful and appropriate.

Pursuant to RCW 9.94A.701(1)(a),¹³ the court imposed a 36-month term of community custody. CP 404. Pursuant to RCW 9.94A.703(3)(f), the court had the discretion to impose "any crime-related prohibitions." Not challenged here, the court ordered that Sadler "obtain a sexual deviancy evaluation...and follow through with all recommendations of the evaluator." CP 409 (special condition # 4). Challenged here, the court also imposed the following two conditions:

Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

The defendant shall not visit any internet websites or chat rooms where escort or prostitution services are advertised or provided. No use of internet with[out] approval of treatment provider.

CP 408-09 (special conditions # 5 & 27).

¹³ All references are to the 2014 version of the sentencing statutes, the date of the charged offenses. RCW 9.94A.345 (any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed).

A crime-related prohibition prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). “Directly related” includes conditions that are “reasonably related” to the crime. Id. (citing State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870, rev. denied, 181 Wn.2d 1019 (2014)).

When a sentencing court exercises its discretion in imposing a crime-related prohibition, that decision will be upheld unless a reviewing court finding that the decision was manifestly unreasonable or based on untenable grounds. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). An appellate court reviews the factual bases for crime-related conditions for substantial evidence. Irwin, 191 Wn. App. at 656.

The court had before it all of the facts of the current case along with the presentence report of the Department of Corrections. CP 413-32. Sadler used his computer skills to post approximately 100 ads seeking deviant sexual contacts, DBSM, etc., particularly directed to minors and young adults. As his testimony clearly demonstrated, his knowledge of the sex trade via the Internet is expansive. Also, as can be seen in his testimony and from his prior history, Sadler has obsessive and perverted sexual tendencies and appears to obtain most if not all of his sexual partners and/or victims via the Internet. Restricting his use of the Internet

and restricting his sexual relationships – with the condition that they be approved by his treatment provider are clearly crime related. See, e.g. State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006) (condition requiring prior approval of adult sexual conduct was reasonably related to child sex crimes “because potential romantic partners may be responsible for the safety of live-in or visiting minors,” thus public is protected and the defendant has opportunity for self-improvement); State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870, rev. denied, 181 Wn.2d 1019 (2014) (child molestation case, lawful to prohibit dating relationships without CCO approval where children involved); Irwin, supra (defendant lawfully prohibited from possessing or accessing a computer unless authorized by CCO after convictions for child molestation and depictions), contrast, State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition that prohibited Internet use where “no evidence” Internet access contributed in any way to the rape).

Along with being “crime-related,” the two conditions do not violate Sadler’s constitutional rights.

Limitations upon a convicted felon’s fundamental rights “are permissible, provided they are imposed sensitively.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (after computer trespass conviction, prohibition on Riley possessing a computer and communicating with

computer bulletin boards was found constitutional). The limitations may be a complete bar. See State v. Krzeszowski, 106 Wn. App. 638, 24 P.3d 485 (2001) (constitutional to completely bar convicted felons from possessing a firearm) (citing Caron v. United States, 524 U.S. 308, 316-17, 118 S. Ct. 2007, 141 L. Ed. 2d 303 (1998)). Conditions that restrict free speech may be imposed if reasonably necessary and sensitively imposed. Bahl, 164 Wn.2d at 757; Riley, at 37-38. In State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), convicted of child rape, it was lawful for Riles to be prohibited from contacting *any* child.

Here, the conditions do not absolutely bar any conduct by Sadler. Rather, the conditions depend on disclosure, openness and approval, all conditions intended to protect the public and allow Sadler to make marked changes in his behavior. In addition, as Sadler has shown his ability and willingness to manipulate, it is not an abuse of discretion to have inclusion of adult sexual relationships *with approval* of a treatment provider included in the conditions of community custody. The “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” State v. Farmer, 116 Wn.2d 414, 422, 805 P.2d 200 (1991) (quoting New York v. Ferber, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 8 day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert of Nielsen, Broman & Koch, PLLC, containing a copy of the Brief of Respondent, in STATE V. SADLER, Cause No. 73525-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name
Done in Seattle, Washington

08-08-16
Date