72935-7

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No. 72935-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

State of Washington, Respondent

v.

Nen Phan, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Nen Phan stands convicted of 11 counts of child rape and child molestation, and 4 counts of possession of child pornography. Because these two groups of charges were tried together, and because of several other significant erroneous rulings by the trial court, Mr. Phan did not receive a fair trial. Accordingly, Mr. Phan now appeals and asks this court to reverse his convictions, and remand the case to the trial court for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying defendant's motion to sever possession of child pornography charges from child rape and molestation charges.

2. The trial court erred by denying defendant's motion for a "*Franks*" hearing because the investigating detective intentionally included material misstatements in a search warrant application in order to obscure the fact that information supporting the warrant was stale.

3. The trial court erred by refusing to excuse a potential juror who had stated that she could not be fair in a case involving allegations of child sexual abuse.

4. The trial court erred in limiting the scope of defendant's

cross-examination of one of the alleged victims.

5. The trial court erred in allowing an employee of the Whatcom County Prosecutor's Office to testify as an expert witness on child sexual abuse and in allowing her to testify in generalities about how sex abusers and their victims typically act.

6. The evidence was insufficient to support the jury's verdict of guilty on Count IX, involving AD, because there was no evidence presented as to when the alleged incident supporting that charge took place.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where defendant is charged with 11 counts of child rape and molestation, and he is also charged in the same information with 4 counts of possession of child pornography, does the trial court's denial of defendant's motion for severance of charges deprive defendant of his right to a fair trial? (Pertains to Assignment of Error No. 1).

2. When a detective seeking a search warrant for evidence of child pornography relies on an informant's claim to have seen the evidence in the defendant's house, but the detective fails to inform the magistrate that the informant had not seen the evidence in question for nearly two years, is the defendant entitled to a hearing to establish whether

this misstatement / omission as to timeliness was material and intentional? (Pertains to Assignment of Error No. 2).

3. When a potential juror states that she cannot be fair, given the nature of the charges, does the trial court err by refusing to excuse this potential juror for cause? (Pertains to Assignment of Error No. 3).

4. Where the defendant seeks to establish that a child sex abuse victim had a boyfriend with whom she was sexually active, in order to establish that semen and sperm found on the victim's bed sheets may have come from the boyfriend rather than the defendant, does the trial court err by restricting defendant's cross-examination of the victim on these subjects? (Pertains to Assignment of Error No. 4).

5. Did the trial court err by allowing an employee of the Whatcom County Prosecutor's Office to testify as an expert witness, in generalities, about how sexual abusers and sexual abuse victims typically behave? (Pertains to Assignment of Error No. 5).

6. Where the evidence at trial, even when viewed in the light most favorable to the State, does not include any evidence whatsoever that a certain incident occurred with the charging period (as described in both the Information and the "to convict" jury instruction) is the evidence insufficient to support a verdict of guilt? (Pertains to Assignment of Error No.6).

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On September 30, 2014, the State filed a Fourth Amended Information charging Appellant Nen Phan with fifteen sex-offenses. Clerk's Papers (hereafter "CP"), 188-192. The offenses charged, the alleged victim named for each count, and the alleged dates during which each offense occurred are summarized in the following table:

COUNT No.	**CHARGE**	**VICTIM**	**OFFENSE DATES**
I	Rape of a Child, 1st degree	AP	Mar. 10, 2008 to Mar. 09, 2009
II	Rape of a Child, 1st degree	AP	Mar. 10, 2008 to Mar. 09, 2009
III	Rape of a Child, 1st degree	AP	Mar. 10, 2008 to Mar. 09, 2010
IV	Child Molestation, 1st degree	AP	Mar. 10, 2005 to Mar. 09, 2010
V	Rape of a Child, 3rd degree	AP	Feb. 01, 2013 to Mar. 28, 2013
VI	Rape of a Child, 3rd degree	AP	Feb. 01, 2013 to Mar. 28, 2013
VII	Rape of a Child, 3rd degree	AP	Mar. 14, 2013 Mar. 28, 2013
VIII	Rape of a Child, 3rd degree	AP	Mar. 14, 2013 to Mar. 28, 2013
IX	Child Molestation, 1st degree	AD	Jun. 01, 2008 to Mar. 30, 2013
X	Rape of a Child, 1st degree	KP	Jun. 01, 2008 to Mar. 30, 2015
XI	Rape of a Child, 1st degree	KP	Jun. 01, 2008 to Mar. 20, 2013
XII	Possession of Child Pornography		Mar. 01, 2013 to Mar. 30, 2013

XIII	Possession of Child Pornography		Mar. 01, 2013 to Mar. 30, 2013
XIV	Possession of Child Pornography		Mar. 01, 2013 to Mar. 30, 2013
XV	Possession of Child Pornography		Mar. 01, 2013 to Mar. 30, 2013

CP 188-192.

The State also charged two aggravating factors under RCW 9.94A.535, to wit: (1) that the defendant had committed multiple current offenses and the defendant's high offender score would result in some offenses going unpunished; and (2) that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen, manifested by multiple incidents over a prolonged period of time. CP 191.

Prior to trial, Mr. Phan moved to sever the 4 possession-of-child-pornography counts from the other 11 counts. CP 30-36. This motion was denied. RP 24-25. Shortly before trial, Mr. Phan moved the court to reconsider its denial of the motion to sever counts. CP 64-66. The motion was denied for a second time. The motion to sever counts was renewed a third time at the close of the State's case. RP 1264. The motion was denied for the third and final time. No findings or conclusions on this issue were ever entered by the trial court.

Mr. Phan also moved, prior to trial, for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed.

2d 667 (1978), because material information was knowingly or intentionally omitted from a search warrant application. Specifically, the lead detective was seeking a warrant to search for unlawful pornography in Mr. Phan's home. The probable cause for the search was based on AP's statement that she had seen illegal pornography in the house. However, the detective failed to inform the magistrate that AP had not seen some of this material for two years. AP's information was therefore stale, and did not establish probable cause to believe the things AP said she had seen would still be in the house at the time the detective was seeking to search. CP 37-50. The trial court denied Mr. Phan's request to conduct an evidentiary hearing into this matter. RP 45-46. No written findings and conclusions were ever entered regarding this issue.[1]

The case proceeded to trial before a jury, with the Hon. Deborra Garrett presiding. See generally, RP 9/22/13 – 9/30/13. The jury found Mr. Phan guilty of all 15 counts. CP 254-56. The jury also found the state had proven the two aggravating factors beyond a reasonable doubt. CP 257-259. The trial court imposed an indeterminate sentence with a minimum term of 480 months, a minimum sentence in excess of the

[1] The trial court's failure to enter a written order was an apparent violation of CrR 3.6, which states: "If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

standard range. The maximum sentence imposed was life in prison. CP 278-298.

Mr. Phan filed a timely notice of appeal. CP 299-321.

B. SUBSTANTIVE FACTS

In the beginning of 2013, Defendant, Nen Phan, lived at 1230 Garland Lane, in Bellingham, Washington with his wife, Kim Phan, and their two daughters, AP and KP. RP 495-97. At that time, AP was 15 years old, RP 492; KP was 9 years old, RP 498; and defendant, Nen Phan, was in his 50's. RP 498. Kim Phan's parents also lived in the house. RP 497.

In the spring of 2013, Kim Phan traveled with her parents and her daughter KP to visit their ancestral home in Viet Nam. RP 549. AP remained in Bellingham with her father. RP 549. While Nen Phan and AP were alone together in Bellingham, they had an argument about whether AP would be allowed to visit her boyfriend. RP 550-54. Ultimately, Mr. Phan allowed his daughter to visit her boyfriend, but as a result of this argument, Mr. Phan told his daughter that he "disowned" her, and no longer considered her to be his daughter. RP 574.

A few weeks later, Kim Phan and the rest of the family returned from Viet Nam to Bellingham. For reasons that were not established at

trial, Kim Phan returned from Viet Nam having decided that she wanted to file for divorce from Nen. RP 722-23, 735. Kim and AP went to visit Donald Jones, a family friend who speaks fluent English as well as fluent Vietnamese, to seek Mr. Jones' assistance with completing paperwork to begin the dissolution process. RP 737-38.

As they were filling out this paperwork, and discussing the divorce, AP told her mother and the Joneses that she had been having sexual intercourse with her father, on a regular basis, for over five years. RP 516. Donald Jones, the family friend, heard this disclosure and immediately contacted the police. RP 1105-06.

Officer Landry of the Bellingham Police Department went to the Jones' residence to investigate. RP 835-36. AP repeated her statements to officer Landry. RP 838.

The case was assigned to Bellingham Police Detective Darla Wagner. The following morning, Detective Wagner interviewed AP. AP repeated her statements to Detective Wagner. RP 519, 1197.

AP stated that she had been having intercourse with her father every day, and sometimes twice a day, for over five years. RP 516, 527. She reported incidents of inappropriate touching, RP 526, oral sex, RP 539, anal sex, and the use of sex toys. RP 576-78. She also stated that she had seen her father downloading pornography, including child

pornography. RP 542. AP indicated that she would sometimes watch pornography with her father. RP 543. However, AP told Detective Wagner that she had not seen these items for nearly two years. See Detective Wagner's report entry, CP 50, (attached hereto as Appendix A).

AP indicated that she was concerned that her younger sister KP might also be experiencing similar types of abuse from their father. RP 605-06.

KP was eventually questioned about whether her father had sexually abused her. KP stated that she also had been sexually active with her father, including both intercourse and oral sex, and that this often occurred in the bathtub or shower. RP 635-41.

KP mentioned that her friend, AD, had been sleeping over on one occasion, and defendant Nen Phan had given KP and AD a bath. RP 642. Accordingly, Detective Wagner asked AD's parents if the police could speak with AD about this. Although AD's parents were reluctant, they eventually agreed to allow AD to be interviewed. During this interview, AD stated that on one occasion, defendant Nen Phan had given her a bath, and had inappropriately touched her. RP 663.

However, AD did not establish when this occurred, neither in her testimony in court, nor in her interview with police, nor in discussions with her mother.

Nen Phan was arrested, and the Phan home was thoroughly searched, pursuant to a search warrant. RP 1199-1200. Police seized several computers, cell phones, and compact discs to search for evidence of illegal pornography. RP 1201.

Police also seized the bed sheets, from both AP's bed and from the master bedroom. RP 1199. The sheets were ultimately sent to the Washington State crime lab for testing.

The DNA evidence amounted to testing of two separate areas of two different bed sheets (a total of four samples). RP 1033. All four of these samples tested positive for evidence of semen. RP 1034. When the samples were compared to DNA swabs taken from AP and Nen Phan, the results were as follows:

- Pink sheet Sample 1: Inconclusive as to whether the defendant, Nen Phan, was a contributor to this sample. RP 1039.
- Pink sheet Sample 2: Defendant, Nen Phan, was excluded as a possible contributor to this sample. RP 1040.
- Orange sheet Sample 1: Inconclusive as to whether the defendant, Nen Phan was a contributor to this sample. RP 1041.
- Orange sheet Sample 2: AP was one contributor to this mixed sample. No meaningful comparisons could be made to determine who else contributed to this sample. RP 1042.

The DNA tech also discovered sperm on one of the samples from the pink sheet. RP 1043. This was significant because Mr. Phan had had a vasectomy, and does not produce sperm. RP 1048.

During trial, the defense sought to question AP about the argument AP had with her father immediately prior to her first disclosure; about the cause of the argument being the relationship she had with her boyfriend; and about her father's claim to have "disowned" her as a result of her relationship with her boyfriend. Specifically, the defense sought to inquire whether AP was sexually active with the boyfriend, and whether this was the reason her father had said he wanted to "disown" her. This testimony would have helped the defense to both (1) establish a motive for AP to falsify testimony against her father, and (2) offer an alternative explanation for the presence of semen and sperm on her bed-sheets. The defense was not permitted to inquire into this, because of the trial court's erroneous ruling that the so-called "rape shield statute" (RCW 9A.44.020) precluded this area of cross-examination. RP 563.

V. ARGUMENT

A. The trial court erred by denying defendant's motion to sever possession of child pornography charges from child rape and molestation charges.

CrR 4.4(b) governs severance of offenses. This rule states that

"the court, on application of the defendant . . . shall grant a severance of offenses whenever . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."

The trial court generally considers a motion to sever before trial and before taking any testimony. While it is unusual to consider whether the trial court abused its discretion based on facts it could not have known at the time, Washington cases take into account the entire scope of the trial as it occurred, even after the trial court's ruling, in determining whether it was an abuse of discretion to deny a motion to sever. *State v. Frasquillo*, 161 Wn. App 907, 918, 255 P.3d 813 (2011); *State v. Sutherby*, 165 Wn.2d 870, 885, 204 P.3d 916 (2009).

"Severance of charges is important when there is a risk that the jury will use evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." *State v. Sutherby*, 165 Wn.2d 870, 883-84, 204 P.3d 916 (2009), *citing*, *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). "Joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." *Sutherby*, 165 Wn.2d at 884, *citing*, *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In this context, there is a recognized danger of prejudice to the defendant even if the jury is instructed to consider the crimes separately. *Sutherby*, 165 Wn.2d at 884, *citing*, *State v. Harris*, 36

Wn. App. 746, 750, 677 P.2d 202 (1984).

In *Sutherby*, *supra*, the defendant was charged with rape of a child and multiple counts of possession of child pornography. At trial, defense counsel never moved to sever the two sets of charges. The defendant was ultimately convicted at a single trial where the jury heard evidence of the child rape and molestation as well as evidence of the possession of child pornography.

On appeal, the Supreme Court considered whether defense counsel was ineffective for failing to move for severance of the charges. The court answered in the affirmative, finding that counsel was ineffective for failing to move to sever the charges. The court found that defense counsel's representation was deficient because "**the trial judge likely would have granted a severance under the relevant considerations**, with the result that the outcome at a separate trial on child rape and molestation charges would likely have been different." *Sutherby*, 165 Wn.2d at 884 (emphasis added). Clearly, the *Sutherby* court is instructing Washington trial courts that child pornography charges should generally be severed from charges concerning child rape or child molestation.

Having found counsel's performance deficient for failing to bring a severance motion that "likely would have been granted," the Court went on to discuss whether the defendant was prejudiced by his counsel's

deficient performance.

To determine whether severance of charges is necessary to avoid prejudice to a defendant, a court considers four factors: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; (4) the admissibility of evidence of the other charges if not joined for trial. *Sutherby*, 165 Wn.2d at 885, *citing Russell*, *supra*, 125 Wn.2d at 63. Here, as in *Sutherby*, these considerations indicate that severance was necessary in this case to avoid prejudice to the defendant, and to insure a fair determination of his guilt or innocence of each offense.

First, the evidence on the two different groups of charges was very different in strength. With regard to the rape and molestation charges in the first 11 counts, the State presented the testimony of the three victims, ages 16, 9 and 8. The defendant cross-examined each of the victims, attacking their memories of the events, which were distant in time, and pointing out various motivations for fabrication. The State failed to present any physical evidence to establish an independent basis to corroborate the victims' testimony. Although the jury ultimately convicted the defendant of each of the first eleven counts of the information, these convictions were based only on the testimony of the young victims, each of whom had difficulties remembering precise details and placing them in

time.

The evidence supporting the possession of child pornography charges was stronger. The problematic DVD's were found in Mr. Phan's house, near his computer. These possessory offenses are strict liability offenses. In defense of these charges, Mr. Phan maybe could have argued unwitting possession, an affirmative defense. In reality, however, there really was no defense to the child pornography charges, as they did not depend on the credibility of child witnesses like the other charges did. So the strength of the State's evidence on the two groups of counts was quite different.

Second, Mr. Phan offered different defenses to the two groups of charges. With respect to the child rape and molestation charges, Phan argued that he never engaged in any sexual contact or intercourse with any of the alleged victims, and that his daughters were lying, motivated by their desire to get out from under the thumb of their overly strict and overprotective father. With respect to the possession of child pornography charges, Phan did not really offer any defense. Thus, the defenses Phan presented in response to the two sets of charges were not the same.

Third, although the jury was instructed to consider each group of counts separately, such instructions are not very effective in this type of case. See, *Sutherby*, 165 Wn.2d at 884 (In this context, there is a

recognized danger of prejudice to the defendant even if the jury is instructed to consider the crimes separately").

Fourth, despite the trial court's conclusion to the contrary, the evidence of the child pornography was not admissible in the child rape and molestation trial. The trial court found that the evidence would be cross admissible in separate trials inexplicably relying on the rule of "res gestae":

> All right. First I thought long and hard and read the Sutherby case and a number of other cases applying the Sutherby case on the issue of severance of counts and I find that it is not appropriate to sever the child pornography counts from the abuse counts here. I recognize that the fact pattern is similar to that in the Sutherby case, but I find the Sutherby case differently because my reading of the Sutherby case is that if not the trial court, certainly the State, permitted the evidence of pornography to be used at trial as an indicator of sexual motivation in the defendant's interaction with the victim. That's not the case here. Also in the Sutherby case I think the charges would have been more easily separated than they can in this case given the role that the pornography played in this case in the grooming process. And I note also that the victim in this case alleges that watching pornography together was something that she was required to do and that it often led to sexual encounters or sexual encounters followed the watching of the pornography.
>
> Putting that all together, I think as a factual matter the State argues it that as a matter of res gestae, am I pronouncing that right? And it's a doctrine that I've rarely seen actually apply in a determinative way, but I think it does here. I think it would be very difficult to present the fact background into either the pornography charges or the abuse charges to a jury in a way that did not refer to the other charges in a potentially prejudicial manner and that's simply because of the facts in the case and how that, how the events

> occurred. So I'm not prepared to sever the cases at this point and so this case will go forward with all counts included.

RP 23-24.

This ruling was erroneous. It would have been possible to conduct a separate trial on the child rape and molestation allegations without projecting the most horrific images of child pornography on a movie-sized screen for the jury. Even if AP's testimony in a separate trial would have touched on her exposure to pornography by her father, this would have been far less prejudicial than actually showing images of different pornography to the jury. The disc containing the child pornography, Exhibit No. 61, CP 130-32, is part of the record on this appeal. Mr. Phan urges the Court of Appeals to look at this exhibit and then decide whether any defendant could have received a fair trial on a child rape charge where the jury was asked to view Exhibit 61 projected on a movie-sized screen in the courtroom. See RP 1221.

Prior to trial, the State had argued that the evidence would show that AP watched illegal pornography with her father. This, the court found, made all the child pornography admissible in the child rape trial. See RP 9. However, despite the State's assertion to the contrary, no witness was able to establish that he victim watched the videos that the State sought to admit. The trial court's reliance on the State's promise to

tie the evidence together during trial was misplaced. The state failed to show that the pornography that AP viewed with her father was the same pornography that was seized from the Phan residence and introduced at trial. AP's statement that she watched some pornography with her father at some time in the past did not render all of the pornography evidence discovered in the Phan residence admissible.

If the child pornography charges had been properly severed from the child rape charges, it is highly likely that Phan's alleged possession of child pornography would be excluded in a separate trial for child rape and molestation. Such evidence would have been excluded under ER 403 and 404 because of its extremely prejudicial nature. ER 404(b) prohibits the use of "other acts" evidence to prove the character of a person in order to show that he acted in conformity with that character. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Even evidence that is otherwise relevant can be excluded if it is highly prejudicial. *Id.* at 776. As the Supreme Court has noted, "careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). In cases where admissibility is a close call, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776, (*quoting*, *State v. Bennett*, 36 Wn.

App. 176, 180, 672 P.2d 772 (1983).

In the few cases where evidence of possession pornography has been properly admitted in a trial for sexual assault, the pornography evidence was used to show a defendant's sexual desire for a particular victim. *Sutherby*, 165 Wn.2d at 886, *citing State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Ferguson*, 100 Wn.2d 131, 133-35, 667 P.2d 68 (1983); *State v. Medcalf*, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990). This is not true in the present case. Here, the possession of child pornography evidence would not have been admissible in a separate trial for the child rape and molestation charges. This factor suggests that severance is required here.

In summary, when the relevant case law is applied to the facts of this case, it is apparent that the child rape and molestation charges should have been severed from the possession of child pornography charges, and each set of charges should be set for separate trials before separate juries. The trial court's failure to sever these groups of charges deprived Mr. Phan of a fair trial. Accordingly, this court should reverse his convictions and remand the case to the trial court for separate trials on the two groups of counts.

B. The trial court erred in denying defendant's motion for a *Franks* hearing because the lead detective deliberately mislead the magistrate by misstating and omitting material facts from a search warrant application.

During the investigation of this case, Bellingham Police Detective Darla Wagner sought a warrant to search Nen Phan's residence for evidence of child pornography. The warrant application was telephonic. (The transcript of the telephonic search warrant application is attached hereto as Appendix B).

Probable cause for issuance of the search warrant was based on information obtained from the defendant's daughter, AP. The detective reported to Whatcom County Superior Court Judge Deborra Garrett that sixteen-year-old AP had seen child pornography on computers and other electronic devices in the Phan residence. CP 42-49, Appendix B. However, Detective Wagner intentionally failed to inform Judge Garrett that this information was stale: AP had told the detective that she had last seen some of the pornography two years prior to the warrant application, and that she believed it had been discarded or destroyed. CP 50. By failing to include this material information, Detective Wagner mislead Judge Garrett into a false finding of probable cause to believe these items would be present in the Phan residence at the time the warrant was issued.

In support of the warrant application, and cognizant of the need to

establish probable cause to believe the items sought would still be in the place sought to be searched, the detective intentionally mislead the magistrate about the freshness of the information. Detective Wagner testified to Judge Garett, under oath, as follows:

> [AP] stated that over the course of, like approximately two years ago he had taken pictures of her bare vagina on his cell phone, and **within the last couple of weeks, that phone was still in the phone, and her picture was still on there**. She had requested that he take it off several times and he has refused. She stated she has watched child pornography with him over the course of the five years, **the last time being several months ago**, and that she constantly sees him on his computer when she's in the room with him while he's talking to minors regarding sex and that he often has, well she has seen **within the last week** pictures of juveniles, females, very young looking females, naked on his phone and his ipod and his computer.

CP 45, Appendix B at 4 (emphasis added). Clearly, the detective is indicating that the information is fresh - within the last couple of weeks or a month. Deputy prosecutor Sawyer asked the detective to clarify:

> JEFFREY SAWYER: And did she say how recently she had seen him downloading child pornography in that manner?
>
> DETECTIVE WAGNER: **She has not seen that for a few months but she has seen him watching it and she has seen the still images within the last week and a half**.
>
> JEFFREY SAWYER: And the photograph of the child's bare vagina, you said that that had been taken a couple of years ago, but she has seen it on his phone within the last couple of weeks? Is that right?
>
> DETECTIVE WAGNER: **Yes, within the last three weeks to a month**.

CP 46, Appendix B at 5 (emphasis added).

This testimony was intentionally misleading. Detective Wagner failed to tell Judge Garret that AP had actually reported that she had not seen some of this pornography in nearly two years. See Detective Wagner's report dated March 29, 2013 (CP 50, Attached hereto as Appendix A). ("She said it has been almost two years since she saw some of that pornography.")

The detective intentionally failed to tell the magistrate that AP actually reported seeing the alleged child pornography **nearly two years** before the warrant application. The detective failed to inform the magistrate that the information about alleged child pornography in the Phan residence was stale. This intentional failure to inform the magistrate of this material fact, if developed and proven at a hearing on this matter, would have rendered the search warrant invalid and the evidence seized during its execution subject to suppression.

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the United States Supreme Court held that material factual inaccuracies in a search warrant application would void a warrant if they were made with "deliberate falsehood" or as a result of "reckless disregard for the truth." If the defendant makes a preliminary showing of a material

misstatement recklessly or intentionally included in the warrant application, and at an evidentiary hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation must be stricken from the affidavit and a determination made whether, as modified, the affidavit supports a finding of probable cause. *Franks*, 438 U.S. at 171-72. If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded. *Franks*, supra, cited in *State v. Chenowith*, 160 Wn.2d 454, 469, 158 P.3d 595 (2007).

One of the requirements to the issuance of a search warrant is that there is reason to believe that the items sought are at the place to be searched. *State v. Cockrell*, 689 P.2d 32 (1984). Some time necessarily passes between an informant's observations of criminal activity and the presentation of the warrant affidavit to the magistrate. *State v. Lyons*, 174 Wn.2d 354, 275 P.2d 314 (2012). "The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale. The magistrate makes this determination based on the circumstances of each case." *Lyons*, 174 Wn.2d at 361.

"Common sense is the test for staleness of information in a search warrant affidavit." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987)).

"The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *Maddox*, 152 Wn.2d at 506 (citing *State v. Bohannon*, 62 Wn. App. 462, 470, 814 P.2d (1991)).

Here, Mr. Phan made a preliminary showing that there was a material misstatement or omission in the search warrant application concerning the timing of the observations of illegal material. Detective Wagner reported to the magistrate that AP had seen pornography in the residence. Detective Wagner failed to tell the magistrate that this occurred nearly two years ago, leaving the impression that the AP's observations were recent and that the alleged child pornography would still be found within the residence. This was an intentional material misstatement. Because the material misstatement in the warrant application was intentional, this information cannot be used to support probable cause. *State v. Chenowith, supra*, 160 Wn.2d at 469.

Detective Wagner's failure to inform the magistrate that the information in support of the warrant was two years old was either deliberate, or it demonstrated a reckless disregard for the truth. This information should have been included in the warrant application. If the magistrate had been informed that alleged child pornography had not been

seen in the residence for over two years, the magistrate would not have found probable cause to believe that these items would still be within the house. Accordingly, the magistrate would not have issued the warrant. The erroneous statements about the timeliness of AP's allegations were made either with the deliberate intent to deceive the magistrate, or with a reckless disregard for the truth. The trial court erred by refusing defendant's request for a hearing on this matter.

C. The trial court erred in refusing to excuse a potential juror who had stated that he could not be fair in a case of this nature.

During jury selection, Juror No. 14 stated that she would not be able to be fair to the defendant because of the nature of the charges involved in this case:

> JUROR NO. 14: I just had previously raised my hand that although I would try my hardest to be impartial, I do have some concerns about how impartial I can be I've worked for child advocacy for years. Always been from the perspective of looking at it from a child's point of view. So I feel like that is a big responsibility and I'd do my best to uphold the looking at these factually, but I know that carry that bias. I just want to say that out loud.
>
> [Prosecutor] MR. SAWYER: Okay. Do you think it would be difficult, but possible or impossible for you to set that bias aside?
>
> JUROR NO. 14: I think it would be difficult but possible.

MR. SAWYER: Okay. And similar to No. 26, I think I asked her, is there any situation you can conceive of in which you could vote guilty if you weren't convinced beyond a reasonable doubt that the State has met their burden of proof in a case, if you didn't believe the person was actually guilty you would go ahead and vote guilty anyway's?

JUROR NO. 14: No.

MR. SAWYER: That's wouldn't happen, that's not a concern?

JUROR NO. 14: No.

MR. SAWYER: Okay. Thank you for sharing that.

RP 204-05. Defense counsel then had the following conversation with prospective juror No. 14:

[Defense Attorney] MR. SUBIN: Yes, I just need to follow up with Juror No. 14, I'm sorry. Jeff, Mr. Sawyer asked you, I guess you've indicated it's going to be hard for you to be impartial?

JUROR NO. 14: Uh-huh.

MR. SUBIN: I guess you said maybe you could, or I guess the question he asked you was would something cause you to vote guilty if you were not convinced beyond a reasonable doubt or something like that.

JUROR NO. 14: Yeah.

MR. SUBIN: Do you think that your biases and your views about this subject matter could effect whether you believe the case has been proven beyond a reasonable doubt?

JUROR NO. 14: It's possible.

> MR. SUBIN: So would that be fair to my client if you were letting your bias or your predisposition or your views about child rape and so forth determine whether the State had met its burden if you are relying on that to say yes, they proved it, would that be fair?
>
> JUROR NO. 14: Hopefully I wouldn't be relying on just that.
>
> MR. SUBIN: Well, if you relied on that at all would it be fair?
>
> JUROR NO. 14: I think we're all relying on that.
>
> MR. SUBIN: Well, I hope we're relying on the facts and evidence that's introduced into this trial, right?
>
> JUROR NO. 14: Uh-huh.
>
> MR. SUBIN: Do you think you would be able to rely on the facts and the evidence and not rely on your own personal views about the nature of these charges and this issue in general and your past experience with childhood sex abuse and so forth?
>
> JUROR NO. 14: I would hope so. I have never been in this position before so.

RP 206-208.

Mr. Phan challenged Juror No. 14 for cause based on this exchange. The trial court denied the for-cause challenge. The trial court's denial of Mr. Phan's challenge of Juror No. 14 for cause was erroneous.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to trial by an impartial jury. *State v. Gonzales*, 111 Wn. App. 276, 277, 45 P.3d 205

(2002).

Additionally, RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

CrR 6.5 states, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 impose on the trial court a continuing obligation to excuse any juror who is unfit to serve on the jury. *State v. Jorden*, 103Wn. Ap. 221, 227, 11 P.3d 866 (2000). The key inquiry for the trial court in deciding whether to excuse a juror for cause is "whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." *Hough v. Stockbridge*, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009).

Here, the record demonstrates "actual bias" on the part of the challenged juror. "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2); CrR 6.4(c)(2). A party challenging a

juror for actual bias has the burden of demonstrating such bias by a preponderance of the evidence. *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn. App. 746, 754, 812 P.2d 133 (1991). "To sustain the challenge ... the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; CrR 6.4(c)(2).

Here, the record shows that the juror could not decide the case impartially; indeed, the juror states this in her own words, and she was unable to commit to deciding the case impartially, based on the facts introduced at trial. See RP 206-08. The trial court erred by refusing to excuse this juror for cause.

D. The trial court erred in restricting defendant's cross-examination of the victim.

A trial court violates defendant's right to confront witnesses if it impermissibly limits the scope of cross-examination. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). "The right to confrontation, and the associate right to cross-examine adverse witnesses, is limited by general considerations of relevance." *State v. O'Connor*, 155 Wn.2d 336, 348-49, 119 P.3d 806 (2005). Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the

action more probable or less probable." ER 401. A reviewing court should review rulings on the "scope of cross-examination for an abuse of discretion. *Garcia, supra*, 179 Wn.2d at 844. Here, the trial court abused its discussion by cutting limiting the scope of defendant's cross-examination of the victim.

During cross-examination of the victim, AP, the defense sought to inquire whether AP had a boyfriend, and whether she had been sexually active with the boyfriend. This evidence was crucial to the defense because AP's relationship with her boyfriend was forbidden by her father, and her sexual activity (presumably with the boyfriend) was the reason her father claimed that he wanted to "disown" her. Furthermore, evidence about AP's sexual activity with her boyfriend would have allowed the defense to offer the jury an alternative explanation for unidentified semen and sperm that was found on AP's bed sheets. See RP 1034-1048. However, the trial court precluded defense counsel from inquiring about AP's relationship with her boyfriend. The following colloquy occurred prior to the cross-examination:

> COURT: I'll permit the defense to ask the witness what her testimony was on direct. In other words to ask the question "and you testified in direct you've never had sex with your boyfriend, right, or you testified on direct that your father kept asking you if you had sex with your boyfriend but you never had". In other words, you may ask her what her testimony was, you may not ask her whether she had sex with her boyfriend.

MR. SUBIN: That was what her testimony was.

THE COURT: Uh-huh, right. And that's what you want to bring out, right?

MR. SUBIN: Well, I think she testified she never had sex with her boyfriend so can I ask her whether she testified to that?

THE COURT: Yes.

MR. SUBIN: Okay.

THE COURT: But that's all you can ask her. You can't ask her whether her testimony was true or, in other words you can go into the substantive issue about sex with the boyfriend, you can only ask whether she testified that she had not had sex.

MR. SUBIN: Respectfully, I don't understand the basis for the Court's ruling prohibiting from going into that.

THE COURT: You've persuaded me it's important and will be connected up later for her testimony to clearly indicate that she didn't have sex with the boyfriend. This ruling permits you to make that point without inquiring into her sexual history, which is not before the Court.

MR. SUBIN: But you're allowing me to ask whether she testified she didn't have sex with her boyfriend, but I can't ask whether that was true or not or whether she actually had sex with the boyfriend?

THE COURT: That's right.

MR. SUBIN: Well, Your Honor, I mean I think that is unfairly cutting off my cross-examination with this witness.

MR. SAWYER: Which indicates to me he planning to further than what he's saying that he plans to do. That's the basis for the Rape Shield Statute, that's why it shouldn't be addressed at all.

> MR. SUBIN: The Rape Shield Statute has nothing to do with this issue, nothing to do with this issue at all.
>
> THE COURT: I think it's asking the victim about her sexual history and so the Rape Shield Statute applies in the Court's view. I mean there are many ways of asking about DNA on the sheets, but I don't think that inquiring about Miss Phan's sexual history is among them.

RP 566-568.

The trial court's ruling that RCW 9A.44.020 precluded inquiry into whether AP was sexually active with her boyfriend was erroneous and deprived Mr. Phan of his constitutional right to present a defense. This area of proposed cross-examination did not fall within the so-called "rape shield statute."

RCW 9A.44.020 states that

> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards **is inadmissible on the issue of credibility** and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.
>
> (3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity,

> nonchastity, or sexual mores contrary to community standards is **not admissible if offered to attack the credibility of the victim** . . .

The trial court erred by relying on RCW 9A.44.020 to curtail Mr. Phan's cross-examination of AP. Mr. Phan did not seek to attack AP's credibility by demonstrating promiscuity or unchaste sexual mores. Mr. Phan's purpose in seeking to establish that AP was sexually active with her boyfriend was to offer the jury an explanation for an alternative source for semen that was found on AP's bed-sheets. Evidence of AP's sexual activity with her boyfriend was not being offered to show consent (which is irrelevant in a child rape case), it was being offered to show that someone other than the defendant was responsible for the semen and sperm found in AP's bed. Without this testimony, the defense case was gutted. Nor was this evidence being offered to attack AP's credibility or establish a reputation for promiscuity. Rather, the questions about AP's sexual activity with her boyfriend would have offered the jury an explanation for the presence of sperm on AP's bed-sheets that did not come from the defendant as well as a possible reason for AP to be so angry with her father that she would fabricate these allegations. The trial court's restriction of Mr. Phan's cross-examination of AP was erroneous and deprived Mr. Phan of his Sixth Amendment right to a fair trial.

E. The trial court erred in allowing an employee of the Whatcom County Prosecutor's Office to testify as an expert witness on child sexual abuse.

The State's first witness at trial was Joan Gaaslund-Smith, an employee of the Whatcom County Prosecutor's Office, and a purported "expert" on child sexual abuse. The defense objected both to her qualifications as an expert on this topic, and to the lack of relevance of the subject matter of her testimony. RP 459-461, 464. The trial court allowed Ms. Gaaslund-Smith to testify as an expert witness despite the defense objections. RP 455 et seq.

Over defense objection, Ms Gaaslund-Smith testified to the following:

> Q: Ms. Gaasland-Smith, I think you indicated that it was common for children to avoid or delay disclosure after sexual abuse?
>
> A. Yes.
>
> Q. And why is that?
>
> A. They don't want to think about it. And there are a number of issues, a lot of fears, **sometimes the perpetrator will tell a child that it's their fault that the abuse is going on**.
>
> MR. SUBIN: Your Honor, I'm going to object again. There's no evidence that Mr. Phan told anything in this case and for her to put on that evidence about what offenders usually do is inappropriate and highly prejudicial.
>
> THE COURT: All right. I will note that is not the testimony here and that, indicated that is stated by some evidence in this case will

spoke Mr. Sawyer, do you intend to ask the witness about the specific facts of this case?

MR. SAWYER: No, she is not a factual witness in this case. She is only testifying as an expert witness as she has done numerous times in various –

THE COURT: She will be testifying simply to the phenomena of sexual abuse rather than to any specific facts in this case?

MR. SAWYER: And primarily as to how kids react to this and disclose, yes.

THE COURT: All right. I will ask you to focus your questions on children's reactions and I will clarify for the jury if it needs clarifying that the purpose of this witness's testimony is simply to testify about her experience and knowledge about the reactions of children to sexual abuse and specifically regarding their reporting or disclosure of that.

Anything the witness has said thus far about other perpetrators or about people who have been accused in other cases, in fact, any remark the witness has made about perpetrators you should know that that is in, that's background information, it's not about Mr. Phan, who is not a perpetrator, has not been established to be a perpetrator in this case or any case, that is the presumption of innocence still applies. So understand the witness's testimony, please, as being general background information on the issues of disclosure rather than any facts about this particular case and with that admonition I'll note your objection for the record. Is there anything more you'd like to say?

MR. SUBIN: No, Your Honor. I would like to make the record clear I want a standing objection to this witness's testimony about disclosure, about children's quote unquote normal or usual or typical reactions failure to disclose. I think that it's irrelevant and it is highly prejudicial for this witness to testify in these types of generalities about what her experiences have been as an employee of the prosecutor's office.

THE COURT: Thank you, Mr. Subin, your objection is noted and carefully considered. It's a difficult issue but I will stand with the ruling that I've made and, as I say, Mr. Sawyer, would you confine your questions to issues of children and disclosure. You indicated that that was the area.

MR. SAWYER: That is the primary issue. There may be other issues I'd like to go into. Although I think Mr. Subin's standing objection will cover those as well.

THE COURT: That's true, although Mr. Subin, if other areas are explored that you believe are objectionable I will entertain an additional objection for you with any other reasoning you'd like to share with the Court. Okay, please proceed, Mr. Sawyer.

RP 463-466. (Emphasis supplied). The irrelevant and objectionable testimony continued:

Q: And what are some common reasons why a child will not tell anyone at all?

A. Most kids just want to be normal. They don't want to be different, they may feel responsible for what's going on, they may feel guilty, they may feel --

MR. SUBIN: Your Honor, again, I'm going to object to generality being "what most children will feel". Also I don't believe that this is expert testimony about a novel scientific theory, these ideas are common. I mean I don't think that is an area where we need expert testimony, I think it's irrelevant, I think it's prejudicial.

THE COURT: Thank you, counsel.

MR. SAWYER: If I could, Your Honor, she can't testify other than as to generalities as an exert witness in this area, that's all she can do. She can't testify as to specifics with respect to Mr. Phan.

THE COURT: Yes, and **the Court has instructed the jury and I'll remind them that this testimony is general testimony about children who have been abused in a variety of contexts, it's**

> **nothing, you shouldn't make any inferences from this testimony** about the facts of this case because the facts of this case may or may not be different and in any event the facts of this case have to be proved to you beyond a reasonable doubt before you can make a fact finding. So with that clarification I'll permit the witness to continue.
>
> MR. SUBIN: Your Honor, if I may, I mean, if the jury is being instructed not draw any inference from this testimony, the testimony is irrelevant. A relevant testimony is testimony that has an influence on something that's at issue in the case. The jury has now been instructed to not draw any inferences from this testimony, it's not related to the facts of the case.
>
> THE COURT: No, what I've asked the jury to do is not draw any conclusions about the facts of this case and reporting in this case because they have not yet heard any evidence on that. The witness's testimony is specifically addressing the larger phenomena of children in this situation, not the, not anything regarding the children in this case. Now, if that changes, it changes. But at this point in time witness's testimony is not about the facts of this case and I want to be sure that the jury understands that the testimony is relevant because it's designed to help the jury assess the reports of the children if and when those reports are received in evidence in this cause, but it's not a substitute for the reports of any witness with personal knowledge. And so it's admitted for the general purpose of understanding family dynamics as they relate to child disclosure in sex abuse cases and not to tell the jury anything about what happened in this case.

RP 470-473 (emphasis supplied).

The trial court erred by allowing Ms. Gaaslund-Smith, an employee of the prosecutor's office to testify as an expert on child sexual abuse. Ms. Gaaslund-Smith's testimony was about what sex offenders "sometimes" say to their victims, or what "most" child victims of sexual abuse do or feel, was irrelevant and prejudicial and should have been

excluded after defendant's timely objection. The trial court's decision to permit this testimony was erroneous and deprived Mr. Phan of his right to a fair trial.

Under ER 702, the court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony 'will assist the trier of fact.'" Admissibility under this rule involves a two-part inquiry: (1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact. Because these requirements are in the conjunctive, the absence of either is fatal. A witness may be qualified as an expert by knowledge, skill, experience, training, or education. An expert may not testify about information outside his area of expertise. *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990).

Here, Ms. Gaaslund-Smith was not qualified as an expert to discuss the subjects of how sex abusers and sexual abuse victims usually behave. Her training, as a social worker, and her experience, as an employee of the Whatcom County Prosecutors office, do not establish her qualifications to testify about the characteristics of child abusers and their victims. Even if the subject matter of her testimony had been appropriate subject matter for an expert witness, she was not sufficiently qualified to be that expert witness. Moreover, as set forth below, her testimony about

how sexual abusers and their victims "typically" behave was prejudicial and should have been excluded.

Our courts have held that "expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim. *State v. Stevens*, 58 Wn. App. 478, 496-98, 794 P.2d 38 (1990), *citing*, *State v.Ciskie*, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988); *State v. Madison*, 53 Wn. App. 754, 764-65, 770 P.2d 662 (1989). However, perpetrator profile testimony is improper because it "clearly carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act, and therefore did it in this case too." *State Braham*, 67 Wn. App. 930, 939 n.6., 841 P.2d 785 (1992).

Gaasland-Smith's line of testimony about what perpetrators "sometimes" do, and how "most" victims of sexual abuse behave should have been cut off when the objection was first raised. Her testimony about how sexual predators in general behave towards their victims was irrelevant, unfairly prejudicial, and invaded the province of the jury. The erroneous admission of this testimony deprived Mr. Phan of his constitutional right to a fair trial.

F. The evidence was insufficient to support the jury's verdict of guilty on Count IX because there was no evidence presented as to when that alleged incident took place.

Count IX of the Fourth Amended Information charged child molestation in the first degree, with the named victim being AD. The Information charged that the offense occurred "on or about the 1st day of June, 2008 to the 30th day of March, 2013." CP 188-192. The Court instructed the jury that in order to convict, they would have to find that "between the 1st day of June 2008 and the 30th day of March 2013, the defendant had sexual contact with AD." CP 195-246 (Instruction No. 31). Although the jury found Mr. Phan guilty of Count IX, the evidence, even when considered in the light most favorable to the state, is insufficient to establish that this offense took place within the charging period.

AD testified at trial. She could not establish when the offense occurred. AD testified she did not now how long she lived at her current residence. RP 653. Annie was unable to state anything definitive about when the alleged incident occurred. When asked several times about the timing of the incident, she responded as follows:

Q. Okay. When's the last time you spent the night at Kayla's house?

A. I'm not sure. I think at, I think I spent at Kayla's house at the age eight or nine.

Q. Okay. And you don't think you've spent the night

there since?

A. No.

RP 656. (AD was not asked, and she did not testify about, the date of the first time she slept at the Phan residence).

Q. Okay. And did you take a bath at KP's house at some point?

A. Yeah, sometimes.

RP 658-59.

Q. And how many times did you take a bath in that bathtub, do you know?

A. No.

Q. Okay. Was it, you said you took baths sometimes over there, so was it more than once?

A. Yeah.

RP 659.

Q. Okay. And do you remember a time when he [the defendant] was in the bathtub with you and KP?

A. No.

RP 661.

Q. Okay. Did he ever touch you at any other time than in this bathtub?

A. No.

Q. Okay. So it only happened the one time?

A. Yeah.

RP 663-64.

Q. Okay. Did he ever kiss you?

A. Yeah.

Q. When did that happen?

A. I don't know, a couple of times.

Q. Okay.

A. But I'm not sure when it happened.

RP 666.

Q. Okay. And this kind of touching in the bathtub, that only happened just the one time?

A. Yes.

RP 667.

AD was also unable to establish a time frame for the alleged sexual abuse during her discussions with the police:

Q. And did AD tell you whether or touching had happened more than once?

A. AD told me it happened one time.

Q. Is the one time at KP's residence with KP's father?

A. Yes. And she, I asked her where it happened. And she said it was in KP's mom and dad's bathroom and that there was two sinks in the bathroom.

Q. Was she able to tell you when that happened?

A. No, she just said it was a long time ago. She didn't remember.

RP 779 (emphasis supplied).

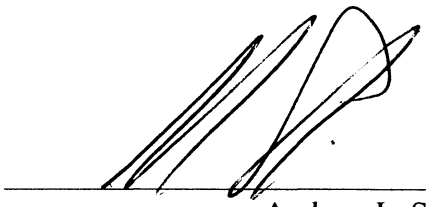
AD's mother, Csi Nguyen, was also unable to establish a time frame for the incident. RP 673-680.

Even viewing this evidence in the light most favorable to the state, it is insufficient to establish when the alleged incident occurred. Accordingly, the evidence was insufficient to establish that the facts alleged in Count IX occurred within the charging period. Mr. Phan's conviction on this count should be overturned and dismissed.

VI. CONCLUSION

For the foregoing reasons, this court should reverse defendant conviction and remand this case to the trial court for a new trial.

Respectfully submitted this 19th day of May 2015.



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APPENDIX A

APPENDIX B

Bellingham Police Department

CASE SUMMARY/PROBABLE CAUSE

Since that time frame A-1 NEN PHAN, according to his daughter, has had an ongoing sexual relationship with her. She said it is almost an everyday occurrence, sometimes twice a day. She said he would bribe her with things she wanted and he would buy them for her if she continued to sleep with him, he would tell her that it was ok for them to be having sex because that is what dad's and daughters do in America, and as the years went on he would tell her that if she told anyone she would be shamed and disgraced, disowned by him and their community. She said he also told her that he loved her, that his wife would not have sex with him, and eventually within the last year started telling her to call him 'husband' in Vietnamese when they were being intimate together.

V-1 AMY said from a very young age, around 7yo, that her father had her watching pornography with him. She said at times while watching it on the computer in the guest room that he would fondle her genitals under her clothing while they were watching. When she was older, after 10yo, she said once they would watch pornography it would often lead to them having sex. She described that she has definitely watched what she observed to be child pornography with her father. She said she has seen every kind she could think of from child pornography, to video with humans and animals, to adult porn etc. She said it has been almost two years since she saw some of that pornography as her mother had confronted him about his watching it. V-1 AMY said she has observed her father conversing over the internet with under aged females, and this too concerns her.

V-1 AMY said that she and her father have been bathing and showering together for her whole life. She said they have bathed together as recently as the last couple of weeks. She said they would take baths in the Master bathroom, as well as showers together, just the two of them. She said for about the first couple of years, of her father having sex with her, they would have sex while in the bathtub and shower. She said later it progressed to bathing together and then having sex afterward. She said he would wash her and always touched her whole body, every part, when they bathed.

V-1 AMY said her father required her to greet him when he came home in a loving, wifely way, by hugging and kissing him. She said she would have to act like she wanted to have sex with him, and most days when he arrived home from work they would either go to her bedroom or his bedroom and he would have sexual intercourse with her. She said if she did not greet him in this manner or act like she wanted to have sex with him or bathe with him that he would be mean, he would act hurt, refuse to eat, treat her rudely, acting mad and hurt towards her. She said he would do this to get her to feel badly and to then have sex with him.

V-1 Amy said that very early on in her abuse by her father, 10-11yo, that he would want her to give him a blow job. She described this as putting her mouth on his penis. She said she did do this for him but hated it always. She said he did not come during blow jobs. She said within the last few weeks she was lying on her bed on her back after her dad had removed her clothes and he proceeded to try to force his penis into her mouth, but she said she turned away and kept her mouth closed and refused. V-1Amy said her father has had oral sex on her where he licks her vaginal area. She said he has done this often over the years but cannot recall at this time exactly when that particular act began.

V-1 AMY said her father also made her give him a 'hand job', and would do this by grabbing her hand and forcing her to touch his penis. He would direct her to hold it and rub it.

REPORTING OFFICER: D. Wy 204	REVIEWING OFFICERS SIGNATURE: C. MURPHY 176

APPENDIX B

Appendix A

Transcript of Search Warrant Application

JUDGE GARRETT: Can you tell me the detective's name please?

JEFFREY SAWYER: Yes, the tape recorder is now on. This is detective Darla Wagner of the Bellingham Police Department is with me. This is Jeffrey D. Sawyer from the Whatcom County Prosecutor's Office. It is currently 9:31 pm on the third of April, 2013, and we are speaking to Judge Garrett, Debora Garret, superior court Judge in Whatcom County and we are asking for a search warrant. Is there anything else you want me to put on before we get started Judge Garrett?

JUDGE GARRETT: No. That's a correct description of what we're doing counsel and good evening Ms. Wagner.

DETECTIVE WAGNER: Good evening.

JEFFREY SAWYER: Did you want to place the detective under oath?

JUDGE GARRETT: Yes please. Detective Wagner, would you raise your right hand please? Do you swear that the testimony you are about to give in this matter will be true and correct to the best of your knowledge?

DETECTIVE WAGNER: I do.

JUDGE GARRETT: Thank you.

JEFFREY SAWYER: Detective could you please state your name nd spell your last name for the record?

DETECTIVE WAGNER: Detective Darla Wagner. The last name is W-A-G-N-E-R.

JEFFREY SAWYER: And you're a detective with the Bellingham Police Department, is that right?

DETECTIVE WAGNER: Yes

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JEFFREY SAWYER: How long have you been with the Bellingham Police Department and how long have you been a detective?

DETECTIVE WAGNER: I have been with Bellingham Police Department approximately 14-and-a-half years, and with the investigation unit for two years [unintelligible].

JEFFREY SAWYER: And you are asking for a search warrant to assist with your investigation?

DETECTIVE WAGNER: Yes.

JEFFREY SAWYER: What is the event number of this investigation?

DETECTIVE WAGNER: 13B-11425

JEFFREY SAWYER: And is there a suspect in this investigation?

DETECTIVE WAGNER: Yes.

JEFFREY SAWYER: Could you identify that suspect?

DETECTIVE WAGNER: The suspect is last of PHAN P-H-A-N, first of NEN, N-E-N, [unintelligible].

JEFFREY SAWYER: What is the nature of your investigation?

DETECTIVE WAGNER: There is on-going investigation is rape of a child first and child molestation.

JEFFREY SAWYER: A single count, or multiple counts?

DETECTIVE WAGNER: Multiple counts

JEFFREY SAWYER: And who is the alleged victim in the case?

DETECTIVE WAGNER: The victim is his biological daughter, last of PHAN, P-H-A-N, first of Amy, born 3/10 of 98.

JEFFREY SAWYER: Can you please describe the beginning of this investigation?

DETECTIVE WAGNER: Yes, on Thursday, March 29, I believe it was, Amy disclosed that she's been having an on-going sexual relationship with her father since the age of ten in their home at 1230 Garland Lane in Bellingham and that he's been requesting sex from her on a daily basis, sometime twice a day, on-going for five years and it would include vaginal-penile sex, anal sex and oral sex within their home.

JEFFREY SAWYER: And during this investigation have you previously requested search warrants for the residence at 1230 Garland Lane in Bellingham?

DETECTIVE WAGNER: I did.

JEFFREY SAWYER: And were those search warrants granted?

DETECTIVE WAGNER: Yes.

JEFFREY SAWYER: And what were you searching for at that time?

DETECTIVE WAGNER: At that time it was bedding on the daughter's bed and the parent's bed, where she had indicated they had last had sexual intercourse, and any sex toys and lubricants in the home.

JEFFREY SAWYER: And what was the basis for asking for sex toys and lubricants?

DETECTIVE WAGNER: She said that her father had purchased these sex toys for her, for her to use, with him. And she had hid them underneath her desk in a small black bag [unintelligible]

JEFFREY SAWYER: And they matched the description she gave you in addition to being located where she told you they would be?

DETECTIVE WAGNER: Correct.

JEFFREY SAWYER: As a result of the investigation, did that result in the arrest of Mr. Phan?

DETECTIVE WAGNER: Yes it did.

JEFFREY SAWYER: When did that occur?

DETECTIVE WAGNER: That occurred on Friday, March 30th.

JEFFREY SAWYER: And is he still in custody to the best of your knowledge?

DETECTIVE WAGNER: Yes, he is.

JEFFREY SAWYER: You yourself had done an interview, prior to the original search warrant, with Amy, the victim, is that correct?

DETECTIVE WAGNER: Yes, I did.

JEFFREY SAWYER: And you recently spoke with her again?

DETECTIVE WAGNER: Yes, I did.

JEFFREY SAWYER: What did you learn during the second interview?

DETECTIVE WAGNER: Well during, actually both times in speaking to Amy, she discussed having her father from a very early age was watching child pornography with her, that he would ask her to come in and watch it so she could learn and then they would perform sexual acts while watching that or subsequently thereafter. She stated that over the course of, like approximately two years ago he had taken pictures of her bare vagina on his cell phone, and within the last couple of weeks, that phone was still in the phone, and her picture was still on there. She had requested that he take it off several times and he has refused. She stated she has watched child pornography with him over the course of the five years, the last time being several months ago, and that she constantly sees him on his computer when she's in the room with him while he's talking to minors regarding sex and that he often has, well she has seen within the last week pictures of juveniles, females, very young looking females, naked on his phone and his ipod and his computer. She has observed him downloading child pornography onto discs in the home, and what he has told her is he typically gives them to his friends and makes money that way.

JEFFREY SAWYER: So she told you that she herself has seen him download child pornography onto what kind of media?

DETECTIVE WAGNER: Onto DVD discs.

JEFFREY SAWYER: And that he has told her that he gives those to his friends?

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DETECTIVE WAGNER: Yeah.

JEFFREY SAWYER: And did she say how recently she had seen him downloading child pornography in that manner?

DETECTIVE WAGNER: She has not seen that for a few months but she has seen him watching it and she has seen the still images within the last week and a half.

JEFFREY SAWYER: And the photograph of the child's bare vagina, you said that that had been taken a couple of years ago, but she has seen it on his phone within the last couple of weeks? Is that right?

DETECTIVE WAGNER: Yes, within the last three weeks to a month.

JEFFREY SAWYER: OK.

JUDGE GARRETT: Still there?

JEFFREY SAWYER: Yes, we're still here, sorry.

JUDGE GARRETT: Ok, thanks. Can I just chime in with one question for detective Wagner?

JEFFREY SAWYER: Absolutely.

JUDGE GARRETT: You indicated, I think, that the father told his daughter that when he would give the, the reproductions, that he would make of this pornography to his friends, did he do that simply as gifts or was any money exchanged?

DETECTIVE WAGNER: She stated he did it to make money.

JUDGE GARRETT: OK.

DETECTIVE WAGNER: And he told me, I spoke with him, and he stated that he does download movies and sell them to his friends and give them to his friends, but he did not discern the nature of those films.

JUDGE GARRETT: I think, OK. And he told you also that he did this for money from his friends?

DETECTIVE WAGNER: He did.

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PROOF OF SERVICE

I, Andrew Subin, hereby certify that on the 19th day of May 2015, I caused a true and correct copy of this Brief of Appellant to be served on the following parties in the manner indicated below:

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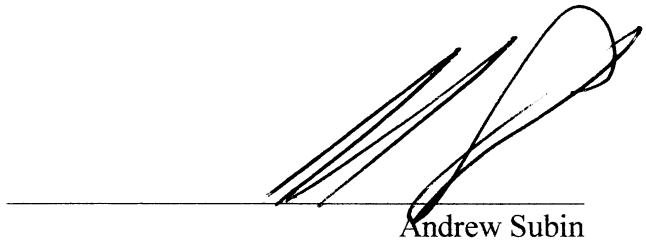

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