NO. 47693-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PAUL A. GILMORE,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgements on four counts of viewing depictions of a minor engaged in sexually explicit conduct because substantial evidence does not support these convictions.

2. Trial counsel's failure to object when (1) the state called upon a witness to give her opinion on the credibility of witnesses and her opinion that the defendant was guilty and then argued from that evidence in closing, (2) when the state introduced irrelevant, prejudicial evidence, and (3) when the state called upon a police officer to give an opinion on a point for which he was not an expert denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

3. The trial court abused its discretion when it refused to allow the defendant to attend the trial in his navy uniform.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgements on counts of viewing depictions of a minor engaged in sexually explicit conduct when substantial evidence does not support these convictions?

2. Does a trial counsel's failure to object when (1) the state calls upon a witness to give her opinion on the credibility of witnesses and her opinion that the defendant was guilty and then argues from that evidence in closing, (2) when the state introduces irrelevant, an opinion on a point for which he was not an expert deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the trial court would have sustained timely objections to all three pieces of evidence and when the admission of this evidence undermines the court's confidence in the fairness of the jury's verdict?

3. Does a trial court abuse its discretion if it refuses to allow an active duty member of the navy to wear his uniform during trial when the state presents evidence to the jury from which it argues that the defendant was on active duty at the time of the offenses?

STATEMENT OF THE CASE

Factual History

For five years prior to November of 2014, the defendant Paul A. Gilmore lived in Kitsap county near Bremerton with his wife Candice, his step-daughter MB and his and Candice's son CG. RP 238-240, 513-514. Although the defendant and Candice had only been married for a few years, they had previously known each other and dated both during and after high school. RP 510-515, 562. Candice is the only child of Kathleen Brooks and her husband, who live in Carlton, Oregon, about four hours south of Bremerton. RP 213-214, MB was born on July 21, 2006, and turned eight-years-old in July of 2014. RP 238-240.

All during and prior to the time the defendant was married to Candice, he was an active member of the United States Navy and he was stationed at the Bangor Naval Base. RP 510-514. He is a submariner and is frequently away on duty. 511-512. Prior to November of 2014 he was reassigned to a duty station in Guam. *Id.* Although MB was initially interested in moving to that location, by October of 2015 she had changed her mind and did not want to leave her school and friends. RP 363-365, 525-526.

Sometime prior to October of 2014 Kathleen Brooks texted her daughter Candice and told her that she was driving up to Bremerton so she could take MB out to dinner as she wanted to talk to her. RP 217-218.

According to Kathleen, her husband had told her that MB had mentioned to him that she had a secret that she didn't want to tell him. RP 214-216. Ms Brooks was worried that there might be a problem and she wanted to talk to MB. *Id.* Once she got to Bremerton she took MB out to dinner. RP 217-218. When she asked MB about her secret MB became upset so Ms Brooks dropped the matter for the time being. *Id.*

Later that evening while Ms Brooks and MB were watching a movie together Ms Brooks again asked what MB's secret was. RP 219-220. Although reluctant to talk, MB responded that her father had touched her when he was naked that he had her watch some videos on his laptop computer dealing with "Daddy's little girl." *Id.* The next day Ms Brooks told her daughter Candice what MB had said. RP 221-223, 244-247. Candice became upset and tried to log onto the defendant's computer. *Id.* When she was unsuccessful, they called MB into the room and asked if she could get onto her father's computer. *Id.* She responded by putting the password into the computer, starting a web browser, bringing up the website "google," and then typing the letters "da" into the search window. *Id.* When she did the "google" screen "auto-populated" to a pornographic site about "daddy's something" and then linked to that page. *Id.* When it did Candice saw pornographic images on the screen and immediately shut the computer. *Id.*

That evening Candice confronted the defendant with MB's claims

when he came off duty. RP 249-250, 529-530. He denied that he had ever inappropriately touched MB, that he had ever shown her pornographic videos or that he had ever looked at child pornography. *Id.* Ultimately, Candice consented to have her mother take MB to Oregon with her. RP 251. A few weeks after returning to Oregon Ms Brooks reported MB's claims to the police. RP 223-224. The Kitsap County Sheriff's office later took three actions in the case. RP 270-280, 262-263, 429-430, 443-446, 530-532, 540. First, they had MB interviewed. RP 270-280. During this interview MB made the same claims she had made to her grandmother. *Id.* Second, Sheriff's deputies executed a search warrant at the defendant's home and seized the defendant's computer and certain sex toys in Candice's night stand. RP 262-263, 429-430. They took this second action because MB had claimed that the defendant had touched her with them. *Id.* Third, they had the defendant detained as he came off duty and took him to the Sheriff's office where he submitted to a recorded interrogation. RP 443-446, 530-532, 540. Following the interrogation the police arrested the defendant and booked him into the Kitsap County jail. *Id.*

A later forensic examination of the defendant's computer did not reveal any images of minors engaged in sexually explicit conduct. RP 499. However, it did reveal that someone using the web browsers on the computer had performed searches using such terms as "incest," "daddy" and

"daughter". RP 400-402. That same evaluation also revealed that someone using the computer had visited Websites such as "Mom-Daughter-sex.com" and "DarkIncest.com." RP 406-414.

Procedural History

By information filed December 18, 2014, and later twice amended, the Kitsap County Prosecutor charged the defendant Paul A. Gilmore with one count of child molestation in the first degree, one count of communicating with a minor for immoral purposes, and four counts viewing depictions of minors engaged in sexually explicit conduct. CP 1-7, 21-26, 109-114. The defendant was arraigned while in custody with a trial date set for February 9, 2015, with speedy trial running out on February 17, 2015. CP 8.

On February 6, 2015, three days before trial, the defendant's attorney moved to continue the trial because the crime lab had not finished its analysis on the defendant's computer and he was waiting for the transcription of witness interviews. RP 2/6/15 1-6. The court granted the motion over the defendant's objection and reset trial for February 17, 2015. *Id.* However, on that date the defendant's attorney moved for a second continuance citing the need to prepare to face new charges the state said it was going to file along with the need to review the forensics examination of the computer which was still not complete. RP 2/17/15 1-3. The court also granted this motion over

the defendant's objection and reset trial for March 16, 2015. RP 2/17/15 3-7.

On March 16, 2015, the defendant's attorney moved a third time for a continuance, explaining that he was waiting for his own expert's analysis on the computer and that he was not ready to defend against the added charges of communicating with a minor for immoral purposes and viewing depictions of minors engaged in sexually explicit conduct, which the state had recently added to the information. RP 3/16/15 1-3. Although the state and the defendant both objected to another continuance the court granted the motion and reset the trial for February 4, 2015. RP 3/16/15 3-9.

At the beginning of trial on May 4th, the court held a joint hearing under CrR 3.5 and RCW 9A.44.120 to determine the admissibility of the defendant's statements to the police and the admissibility of MB's statements to her grandmother and to the police investigator who had performed the recorded interview with MB. RP 1-182. Following the presentation of witnesses and argument by counsel, the court held that the defendant's recorded statements to the police were admissible, as were MB's statements to her grandmother Kathleen Brooks and her recorded statements to Alexandra Mangahas, the police investigator. RP 170-182. The court later entered the following findings of fact and conclusions of law on the CrR 3.5 hearing:

FINDINGS OF FACT

I. That on November 19, 2014 Kitsap County Sheriff's Office (KCSO) Detectives Aaron Baker and Lori Blankenship interviewed the Defendant at the Naval Criminal Investigative Services (NCIS) office on the Bangor Naval base in Bremerton, Washington. This interview was audio and video-recorded, and the Defendant was advised of the same at the beginning of the recording.

II. That while the defendant was not placed in formal law enforcement custody, a reasonable person in his position would not have felt free to leave, and thus he was in custody. Dets. Baker and Blankenship"interrogated him as contemplated and defined under *Miranda*.

III. That Det. Baker read the Defendant his *Miranda* rights properly and completely. There was no deficiency in the reading of the *Miranda* rights.

IV. That based on the Defendant's behavior and responses after having been read *Miranda*, he displayed he understood his rights and was voluntarily waiving his rights. This is based on the fact that he immediately began responding to questioning without hesitation, and at the conclusion of the interview, he specifically said, "I'm done talking" and "I want a lawyer." By making those statements he indicated he understood the rights, and the fact that he could exercise the rights at any time.

V. That at the CrR 3.5 hearing the Defendant testified that he could not now remember whether he understood his rights at thetime of the interview. The Defendant's present memory is irrelevant to whether or not he understood his rights at the time of the interview. His responses were appropriate to the questions he was asked and tracked with the questions asked. Based on his responses, and his demeanor shown on the video of the interview, there is othing to suggest that he did not understand his rights or the questions he was being asked.

VI. That the Defendant testified he was tired at the time he was interviewed, and had been awake upwards of forty hours. He testified that fact may have had an affect on his ability to understand. At the end of the recorded interview the Defendant indicated he was tired.

He did not testify his fatigue did affect his ability to understand, and in light of the other evidence, his lack of memory of whether he understood at the time of the interview, and the possibility of him not understanding is not relevant to whether or not he actually did understand. The fact that the Defendant may have been tired does not negate his waiver of the fact that the statements were made knowingly, intelligently and voluntarily. Based on the totality of the evidence, it appeared he understood the questions and his rights.

VII. That law enforcement made no threats or promises to the Defendant to induce him to talk or waive his rights, and there is no evidence to suggest that the Defendant did not waive his *Miranda* rights and make his statements to law enforcement knowingly, intelligently and voluntarily.

CONCLUSIONS OF LAW

I. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II. That the defendant was "in custody" and "interrogated" by law enforcement when interviewed on November 19, 2015 for purposes of *Miranda*.

III. That the Defendant's *Miranda* rights were properly and completely read.

IV. That the Defendant knowingly, intelligently and voluntarily waived his *Miranda* rights, and knowingly, intelligently and voluntarily made his statements to law enforcement. As such, his statements are admissible.

CP 211-213.

The court also entered the following findings of fact and conclusions of law on the RCW 9A.44.120 hearing:

FINDINGS OF FACT

I. That on May 5, 2015 the Court held a child hearsay hearing to

determine whether statements MLB (the "declarant" for the purposes of the child hearsay statute) made to her grandmother, Kathy Brooks, and the forensic child interviewer, Sasha Mangahas. MLB testified at the hearing as did Ms. Brooks and Ms. Mangahas.

II. That Ms. Mangahas interviewed MLB on November 19, 2014, while MLB was eight years old.

III. That in her testimony at the child hearsay hearing MLB was articulate and demonstrated the understanding of the need to speak the truth. She demonstrated the mental capacity at the time of the occurrence to receive an accurate impression about the matter to which she was testifying and she demonstrated sufficient memory to retain an independent recollection of the occurrences. She also demonstrated she had the capacity to understand and respond to simple questions about the occurrences.

IV. That at times MLB appeared shy, embarrassed or reluctant to answer, this Court does not confuse the reluctance to speak as an inability to receive an accurate impression or be able to relay an accurate impression. There were occasions when she claimed to not remember certain things, but based on her demeanor in court and in the forensic interview, with further questioning she did answer the questions.

V. That the questions asked by Ms. Mangahas in the interview and the State at the child hearsay hearing were open-ended, non-leading questions. The questions did not suggest a particular answer.

VI. That there is no evidence that MLB had a motive to lie about the Defendant's sexual abuse against MLB. MLB disclosed to her grandfather, Richard Brooks, she had a "secret" and that made him think there was a cause for concern for MLB. This disclosure was spontaneous and not prompted by anything or anyone. Ms. Brooks was concerned enough to drive up to Washington from Oregon to question MLB further, although, Ms. Brooks had no idea what the "secret" was, or even the general nature of any concern. Ms. Brooks had no knowledge of the events, thus insufficient information to be able to lead MLB with any questions and did not lead MLB with any questions.

VII. That the night Ms. Brooks arrived in Washington, she took MLB to dinner at the Shari's restaurant. While at the restaurant Ms. Brooks observed MLB appear to be pale and anxious. Ms. Brooks asked MLB to tell Ms. Brooks what was wrong. MLB did not respond, but rather inched herself closer to the window and away from Ms. Brooks appearing to want to avoid the questioning. Even after Ms. Brooks attempted to make the inquiry a few times with non-leading questions, MLB did not reveal anything. When the two returned to MLB's home, she and Ms. Brooks got in bed together to watch a movie, an interaction that was familiar to MLB. Again, Ms. Brooks asked MLB what was wrong. At that point MLB spontaneously told Ms. Brooks very basic information about the sexual abuse.

VIII. That MLB's statements to Ms. Mangahas were also in response to non-leading questions, and also revealed no motive to lie.

IX. That there is no evidence that MLB has a history of dishonesty or a troubled child who would create fantasies. In fact, MLB was very specific and particular in her details, and corrected both Ms. Mangahas and the prosecutor when one of them would get a detail MLB reported incorrect. There is nothing that raises concerns about the truth and/or veracity of MLB's disclosures.

X. That MLB made the statements to more than one person on more than one occasion. She first told her grandfather she had a "secret". It is unclear how long after she made that statement that she talked to her grandmother, but clearly some time had elapsed. More time elapsed and MLB disclosed to Ms. Mangahas on November 19, 2014, and on May 5, 2015, MLB testified regarding the abuse.

XI. That MLB testified the events happened after her eighth birthday. While she testified she was still eight years old, and therefore the timing of the event to the disclosure was recent. There is nothing about the timing of the disclosure and the relationship between MLB and the first person to whom she disclosed that would suggest any fabrication. There was no large lapse of time that would have affected the reliability of the statements.

XII. That MLB was subject to cross-examination, and therefore the Defendant had an opportunity to demonstrate MLB had a lack of

knowledge.

XIII. That her statements to all individuals to whom she disclosed were consistent, and this displays the risk of faulty recollection is remote.

XIV. That there is no indication of any misrepresentation of the Defendant's involvement based on surrounding circumstances. MLB's statements to Ms. Brooks were spontaneous and not in response to leading questions.

XV. That there is corroboration of MLB's disclosures that support the reliability of her statements. When MLB disclosed the website to her mother, MLB started typing the website and typed "D-A". The search bar auto-populated with the subject "daddy's little girl giving a blow job." This is a search term MLB disclosed to her grandmother, Ms. Mangahas and this court that the Defendant searched. This is a computer the Defendant used, and by the Defendant's own admission to law enforcement, it would have been unlikely that his wife or MLB would go on that website. MLB disclosed that some images found were fake-looking pictures of adults and children engaged in sexual conduct. This Court reviewed a report from the forensic analysis that revealed a search involving the website "forbiddenincest.com". According to a State's exhibit, that website includes graphic animated pictures of children and adults, consistent with MLB's disclosure. MLB disclosed that the Defendant showed her "sex toys" and this is corroborated by what was found in the search of the Defendant's home. Consistent with MLB's testimony, sex toys were found in her mother's bedside table. In the child hearsay hearing MLB drew one of the items she saw in the table, and the drawing is consistent with one of the items found in the search. MLB's disclosures are also consistent with the Defendant's statements to law enforcement. When law enforcement asked whether the Defendant had ever searched for "child pornography", the Defendant offered, "I might have searched 'Daddy's little girl'." When asked if it could have been "daddy's little girl giving a blow job" the Defendant responded, "possibly" and then "probably."

XVI. That the time, content and circumstances of the statements to Kathy Brooks and Ms. Mangahas provide sufficient indicia of reliability.

CONCLUSIONS OF LAW

I. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II. That MLB was less than ten years old at the time she made the disclosures about the Defendant's sexual contact with her.

III. That the time, content and circumstances of the disclosure provide sufficient indicia of reliability and are therefore admissible at trial.

CP 214-218.

Following the CrR 3.5 and the RCW 9A.44.120 hearing the state moved *in limine* to prevent the defendant from attending the trial in his uniform. RP 7-10. The court granted the motion over defense objection. *Id.* After *voir dire* and opening statements the prosecution presented its case-in-chief by calling six witnesses, including Kathleen Brooks, Candice Gilmore, Alexandra Mangahas, MB, the forensic scientist who examined the defendant's computer, and the Kitsap County Sheriff's Detective who helped interrogate the defendant. RP 213, 238, 270, 300, 389, 424. They testified to the facts included in the preceding factual history. *See* Factual History. In addition, during her testimony Candice Gilmore testified on both direct and redirect that she initially did not know whether to believe MB's allegations or the defendant's protestations of innocence, but that she eventually came to realize that MB was telling the truth. RP 250, 266, 268-268. The following quotes these three exchanges:

Q. Why are you saying you were in between a rock and a hard place?

A. Because something like that, you know, I was trying to give him the benefit of the doubt, while still trying to believe my daughter. And it's just something that' s all – around hard to accept. So it – it took me some time, and then I had my eyes opened and realized what was going on and have not stopped supporting my daughter since.

RP 259.

Q. You indicated that – in your actual direct testimony, that you were struggling with what [MB] had disclosed and what your husband had told you. And I think what you said was that you had a revelation, and at that point has never – you've never stopped supporting your child. What was that revelation?

A. When the sheriffs came to my house.

Q. Okay. Why was that a revelation to you?

A. Because they were asking me questions if I had knowledge of this or that and some of it came directly from what [MB] had told an investigator before the arrest was made.

RP 265-266.

Q. You said that when you got the news from one of the defendant' s family members, when he had been arrested, you were initially upset. Could you describe that a little bit more?

A. I got a call . He' s been arrested and I still didn't really know the whole truth of the scope of the situation. So I was upset that my mom had turned him in. But when the sheriff's department showed up, it cleared a lot of things up and I was not upset any more.

Q. What do you mean "it cleared a lot of things up"?

A. Well , when they came and they told me what she had said about the images in that video –

Q. And "she" being [MB]?

A. Yes, [MB]. Good. He needed to be arrested. If he was showing her things like that and doing some of what was talked about and said, then he needed to be arrested.

RP 269.

The defense made no objection that this evidence was irrelevant, that it constituted an improper opinion of guilt, that it commented upon the credibility of a witness or that it was more prejudicial than probative. RP 259, 265-266, 269. Neither did the defense make any such objections when the state elicited the fact from Candice Gilmore that she is currently in the process of divorcing the defendant. RP 252. Finally the defense made no similar objections when the state commented on this evidence during closing. RP 622-623. The state's argument on this point went as follows:

> But actually her actions make more sense. I wanted to let the dust settle and figure out what was going on here because we have two people that I didn't want to necessarily – I didn't want to believe [MB]. I wanted to believe that this man who I had married, had a child with, had known for 20 years would not do this.
>
> But then when law enforcement came and told her some of the disclosures that [MB] had made, ***it became absolutely clear to her that her daughter was telling the truth. And what she said was, I haven't stopped supporting my daughter since.***

RP 622-623 (bold and italics added).

In addition, during the Detective Baker's testimony he told the jury that a number of months after the defendant's computer was seized and

analyzed he performed some web browser searches using some of the search terms that were in the cache of the defendant's computer and he was able to link to web sites that had some pictures of young women that he believed were under 16-years of age. RP 453-456, 496-497, 498-503. He also testified that after the defendant's computer was seized and analyzed he linked to some of the websites listed in the cache on the defendant's computer and he saw some pictures of unclothed young women he believed were under 16-years of age although the majority of the women appeared to be older. RP 454-464, 496-497, 498-503, 506. Although he testified that he was not expert on assigning ages to persons shown in pictures and that it was months after the defendant's arrest that he made the web searches he performed and linked to the web sites in the cache on the defendant's computer, the defense made no objection that this testimony constituted an improper opinion as to the age of the people shown on the websites, or that his web searches made months after the defendant's computer was seized were irrelevant or more prejudicial than probative. *Id.* On cross-examination Detective Baker did testify that no images of child pornography were found on the defendant's computer. RP 499.

Following the close of the state's case the defendant took the stand on his own behalf. RP 509-566. The defense then closed its case, after which the court instructed the jury without objection from either party. RP 573,

575-594, CP 117-145. At this point the parties presented their closing arguments and the jury retired for deliberation. RP 594-652. The jury eventually returned guilty verdicts on all counts as well as finding that the state had proven two aggravators alleged in the second amended information. RP 659-667, CP 146-151. The court later sentenced the defendant within the standard range on all counts. CP 219-230, 231-232. The defendant thereafter filed timely notice of appeal. CP 247.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S FOUR CONVICTIONS FOR VIEWING DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the state charged the defendant in the second amended information with four counts of viewing depictions of a minor engaged in sexually explicit conduct (counts III, IV, V and VI) under RCW 9.68A.075(1). This statute provides:

> (1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter 9A.20 RCW.
>
> (2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.
>
> (3) For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter

depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

(4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

RCW 9.68A.075.

Under this statute the gravamen of the offense is to "intentionally view[] over the internet visual or printed matter" of a "minor" engaged in "sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e)." The statute itself defines both the word "minor" as "any person under eighteen years of age." *See* RCW 9.68A.011(5). The phrase "sexually explicit conduct" is defined under RCW 9.68A.011(4)(a) through (e)" as follows:

(4) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

RCW 9.68A.011(4)(a) through (e).

In the case at bar Detective Keays and Detective Baker admitted that there were no images of minors engaged in sexually explicit conduct on the defendant's computer. *See* RP 419-420, 499. Neither did Detective Baker claim that he knew what the images were on the websites that had been accessed from the defendant's computer a number of months prior to the Detective having accessed those websites. Rather, the only thing he was able to say was that when he accessed those websites months later there were a few images displayed out of many images shown that in his opinion showed person's under the age of eighteen engaged in sexually explicit conduct. He admitted that he had no evidence that months prior these same images were even on those websites much less that the defendant had viewed them.

In addition, Detective Baker also admitted that by using the same search terms that were saved in the cache on the defendant's computer he was able to perform web searches that linked him to some websites that displayed some images that he believed to be minors engaged in sexually explicit conduct. He did not claim that those same images were on those websites

months prior to his search or even that the defendant had linked to those search results. Thus, in this case, the evidence Detective Baker gave concerning his web searches months after particular search terms were used and months after certain websites were accessed is hopelessly speculative. This evidence did not prove that the defendant had actually viewed the few images of child pornography that the detective claimed he was able to find months later. Consequently, the evidence presented at trial did not prove that the defendant committed the conduct alleged in counts III, IV, V and VI of the second amended information. As a result, this court should vacate those convictions and remand with instructions to dismiss those counts and resentence the defendant on the remaining two counts.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN (1) THE STATE CALLED UPON A WITNESS TO GIVE HER OPINION ON THE CREDIBILITY OF WITNESSES, HER OPINION THAT THE DEFENDANT WAS GUILTY AND THEN ARGUED FROM THAT EVIDENCE IN CLOSING, (2) WHEN THE STATE INTRODUCED IRRELEVANT, PREJUDICIAL EVIDENCE, AND (3) WHEN THE STATE CALLED UPON A POLICE OFFICER TO GIVE AN OPINION ON A POINT FOR WHICH HE WAS NOT AN EXPERT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth

Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when (1) the state called upon a witness

to give her opinion that the defendant was guilty and then argued from that evidence in closing, (2) when the state introduced irrelevant, prejudicial evidence, and (3) when the state called upon a police officer to give an opinion on a point for which is was not an expert. The following sets out these arguments.

(1) Trial Counsel's Failure to Object When the State Called upon a Witness to Give Her Opinion on the Credibility of Witnesses and Her Opinion That the Defendant Was Guilty and Then Argued from That Evidence in Closing Fell Below the Standard of a Reasonably Prudent Attorney..

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the

> defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an

ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

> A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wn.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:
>
> > Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.
>
> This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).
>
> So the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492.

In the case at bar the jury repeatedly heard Candice Brooks' opinion on the credibility of the defendant and her daughter as well has her opinion that the defendant was guilty of the crime charged. As the following exchanges demonstrate, the state specifically elicited this improper evidence on the credibility of witnesses as well as this improper opinion on guilt.

Q. Why are you saying you were in between a rock and a hard place?

A. Because something like that, you know, I was trying to give him the benefit of the doubt, while still trying to believe my daughter. And it's just something that' s all – around hard to accept. So it – it took me some time, and then I had my eyes opened and realized what was going on and have not stopped supporting my daughter since.

RP 259.

Q. You indicated that – in your actual direct testimony, that you were struggling with what [MB] had disclosed and what your husband had told you. And I think what you said was that you had a revelation, and at that point has never – you've never stopped supporting your child. What was that revelation?

A. When the sheriffs came to my house.

Q. Okay. Why was that a revelation to you?

A. Because they were asking me questions if I had knowledge of this or that and some of it came directly from what [MB] had told an investigator before the arrest was made.

RP 265-266.

Q. You said that when you got the news from one of the defendant' s family members, when he had been arrested, you were initially upset. Could you describe that a little bit more?

A. I got a call . He' s been arrested and I still didn't really know the whole truth of the scope of the situation. So I was upset that my mom had turned him in. But when the sheriff's department showed up, it cleared a lot of things up and I was not upset any more.

Q. What do you mean "it cleared a lot of things up"?

A. Well , when they came and they told me what she had said about the images in that video –

Q. And "she" being [MB]?

A. Yes, [MB]. Good. He needed to be arrested. If he was showing her things like that and doing some of what was talked about and said, then he needed to be arrested.

RP 269.

Initially it should be noted that Candice Brooks' testimony that she believed her daughter, that she did not believe her husband, why she believed her daughter and why she didn't believe her husband had no relevance other than its improper effect, which was to ask the jury to find the defendant guilty based upon Candice Brook's opinion that her daughter was telling the truth, that her husband was lying, and that he was guilty of the crimes charged. As the courts noted in the cases just cited, asking a jury to convict a defendant based upon an opinion of guilt by a witness violates the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. Further review of the record reveals that the state exacerbated this fundamental constitutional error by arguing in closing that the jury should convict based upon Candice Brooks' opinion on credibility and guilt. The state's argument on this point went as follows:

But actually her actions make more sense. I wanted to let the dust settle and figure out what was going on here because we have two people that I didn't want to necessarily – I didn't want to believe [MB]. I wanted to believe that this man who I had married, had a child with, had known for 20 years would not do this.

But then when law enforcement came and told her some of the

> disclosures that [MB] had made, ***it became absolutely clear to her that her daughter was telling the truth. And what she said was, I haven't stopped supporting my daughter since.***

RP 622-623 (bold and italics added).

This argument was improper and violated the defendant's right to a fair trial. There was absolutely no possible tactical reason to fail to object to both the testimony as well as this argument. As a result, counsel's failure to object fell below the standard of a reasonably prudent attorney.

(2) Trial Counsel's Failure to Object When the State Introduced Irrelevant, Prejudicial Evidence Fell Below the Standard of a Reasonably Prudent Attorney.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from irrelevant, inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). They also guarantee a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

Under ER 401, "relevance" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, for evidence to be relevant, there must be a "logical nexus" between the evidence and the fact to be established.

State v. Whalon, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a "tendency" to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. In addition, under ER 403, the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although 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.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is

> offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In this case the state sought to introduce printed images of what it claimed to be underage children engaged in sexually explicit conduct. However the state did not claim that it found these images on the defendant's computer. Rather, it claimed that months after the defendant's computer was seized, a detective was able to find pornographic images on the internet using search terms and website Uniform Resource Locators (URLs) from the cache from the defendant's computer, and then find illegal images out of the thousands of images accessed. The connection between these exhibits, numbered 21-24, and the defendant's actual conduct were so speculative as

to make them irrelevant. As with the evidence on the credibility of witnesses and the evidence of opinion of guilt, there was no possible tactical reason to refrain from objecting to the admission of these exhibits into evidence. As a result, counsel's failure to object to the admission of these exhibits also fell below the standard of a reasonably prudent attorney.

(3) Trial Counsel's Failure to Object When the State Called upon a Police Officer to Give an Opinion on a Point for Which He Was Not an Expert Fell Below the Standard of a Reasonably Prudent Attorney.

As previously stated, while due process does not guarantee every person a perfect trial, *Bruton v. United States*, *supra*, both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, *supra*. In this case, the defendant argues that the trial court violated his right to a fair trial when it allowed the state to elicit opinion evidence from a police officer that photographs admitted into evidence depicted persons probably 16-years of age or younger because the Officer was not qualified to render such an opinion and the question was not outside the cognizance of the jury. The following sets out this argument.

Under ER 702, expert testimony is admissible when the witness qualifies as an expert, the opinion is based on an explanatory theory generally recognized in the scientific community, and the testimony would help the

trier of fact better understand the evidence presented at trial. *State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999). The court rule states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

By contrast, the opinion of a witness without sufficient training or experience to satisfy the requirements of ER 702 is mere speculation and should not be admitted into evidence. *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 177, 817 P.2d 861 (1991). While appellate court's review a trial court's decision to admit or exclude expert testimony on an abuse of discretion standard, a court that admits expert testimony unsupported by an adequate foundation automatically abuses its discretion. *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001).

Prior to the admission of expert evidence under this rule, the court is required to go through a two-step process. The first is determining whether or not the proposed expert is qualified to render an opinion on the proposed subject. The second is determining whether or not the evidence will assist the trier of fact to understand the evidence or determine a fact at issue. *In re Det. of Pouncy*, 144 Wn.App. 609, 624, 184 P.3d 651 (2008), *aff'd*, 168 Wn.2d 382, 229 P.3d 678 (2010). Expert testimony is helpful to the trier of fact "if

it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." *State v. Thomas*, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004). However, where jurors are as competent as an expert to reach a decision on the facts presented without an expert's opinion, the expert's opinion is not helpful because it does not offer the jurors any insight that they would not otherwise have. *State v. Smissaert*, 41 Wn.App. 813, 815, 706 P.2d 647 (1985) ("If the issue involves a matter of common knowledge (like the effects of alcohol) about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony.")

For example, in *State v. Maule*, 35 Wn.App. 287, 669 P.2d 96 (1983), the defendant was charged with sexually abusing the two young daughters of his live-in girlfriend. At trial, the trail court allowed a state's expert to testify that in the majority of child sex abuse cases, the perpetrator is either the biological father or a "male parent-figure." Following conviction, the defendant appealed, arguing *inter alia* that the trial court erred when it allowed the state's expert to testify concerning an area in which she was not qualified. The Court of Appeals agreed and reversed, stating as follows:

> The State does not contend that sexual abuse committed by father figures differs so materially from sexual abuse committed by persons who are not father figures that an expert in the cases of the latter type might be thought less qualified to identify examples of the former type. The State identifies no reason for establishing [the

> expert's] credentials in a sub-field of child sexual abuse by biological fathers as opposed to all other father figures. The relevancy of this evidence is not discernible.

State v. Maule, 35 Wn.App. at 293.

Having found the expert unqualified to render an opinion in this issue, the court then addressed the issue of prejudice, holding as follows:

> We consider equally prejudicial the admission of "expert" testimony that the majority of child sexual abuse cases involve "a male parent-figure, and of those cases that would involve a father-figure, biological parents are in the majority" in a prosecution of a defendant who is the father figure of one of the alleged victims and the father of the other. Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime. Admission of this testimony was reversible error.

State v. Maule, 35 Wn.App. at 293.

In the case at bar, the state called upon Detective Baker to give an expert opinion on a subject to which he was not qualified: the age of the person's shown in the images admitted into evidence. The detective did not claim to be a medical doctor or a person specially training in some how looking at a photograph and then being able to divine the age of the person shown in the photograph. Rather, he was simply rendering an opinion on a subject that was as much within the jury's ken as was in his. Consequently he was not qualified to give an opinion on this subject under ER 702. Once again, there was no tactical reason for the defendant's attorney to fail to

object to this evidence. Thus, this failure also fell below the standard of a reasonable prudent attorney.

(4) Trial Counsel's Failures to Object Caused Prejudice.

As was mentioned above, it is not enough to show that trial counsel's conduct fell below the standard of a reasonably prudent attorney. Rather, to prove ineffective assistance, the defense must also show that these failures caused prejudice. *Strickland*, 466 U.S. at 687. In other words, the defense must show that "there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different." *Church v. Kinchelse*, 767 F.2d at 643. This "reasonable probability" is one that is "sufficient to undermine confidence in the outcome" of the trial. *Id.*

In this case a careful review of the evidence presented at trial reveals a case on Counts I and II which turned solely on the credibility of the complaining witness and the defendant. In such a case the admission of opinion evidence of guilt, opinion evidence on credibility, and unqualified expert evidence does undermine the outcome of this case. As a result, trial counsel's failures did cause prejudice and deny the defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should vacate the defendant's convictions and remand for a new trial.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE DEFENDANT TO ATTEND THE TRIAL IN HIS NAVY UNIFORM.

The decision whether or not a trial court abuses its discretion if it precludes an active duty service member from attending his or her trial in uniform has yet to be decided by the court's of this state. However, there is case law from other states indicating that a trial court's order prohibiting an active duty service member from attending trial in uniform does constitute an abuse of discretion. In *Johnson v. Commonwealth*, 19 Va.App. 163, 449 S.E.2d 819 (Va.Ct.App.1994) the court held:

> The Commonwealth argued, and the trial court ruled, that the (Navy) uniform supplied an inference of good character. Certainly, military service is an honorable function. However, we perceive no basis to hold that a military uniform affords an unrealistic suggestion of good character any more than do neat and clean attire and good grooming. It is inappropriate for a trial court to deny a courtroom participant the right to present himself in his best posture.

Johnson v. Commonwealth, 19 Va.App. at 165.

The logic behind this decision would appear to be sound. One well might ask if a trial court would abuse its discretion if it prohibited a male defendant from attending trial in a business suit or in a tie or in a white shirt. By the same token an active duty member of the armed service should not be prohibited from wearing his or her uniform at trial no more than the court would prohibit a police officer from wearing his or her uniform at trial. Thus, in this case the trial court abused its discretion when it prohibited the

defendant from attending the trial in his uniform.

As the court in *Johnson v. Commonwealth, supra,* goes on to note, an abuse of discretion in prohibiting an active duty service member from attending trial in uniform is evaluated under an harmless error analysis. Under the harmless error standard a trial court's error of a non-constitutional magnitude do not warrant reversal of a conviction unless the defendant can show a reasonable probability that but for the errors, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Absent such a showing, the error is deemed harmless. *Id.*

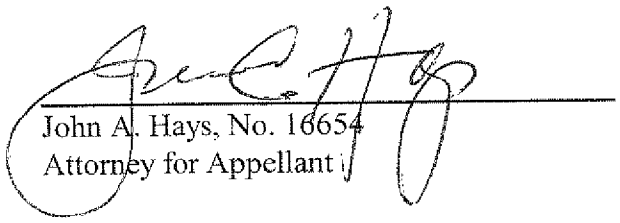
As was discussed in the preceding argument in this brief, in this case Counts I and II turned almost solely upon an issue of credibility between the defendant and his step-daughter. No physical evidence supported the state's claims and the defendant consistently denied having viewed any images of child pornography. In this type of a case there is a reasonable probability that the outcome of the trial court have been different but for the trial court's erroneous ruling prohibiting the defendant from attending trial in his uniform. As a result, this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

Substantial evidence does not support the defendant's convictions for viewing images of minors engaged in sexually explicit conduct. Consequently these convictions should be reversed and the case remanded for dismissal of these charges. In addition, this court should vacate the defendant's remaining convictions and remand for a new trial based upon ineffective assistance of counsel and the trial court's abuse of discretion in refusing to allow the defendant to attend his trial in uniform.

DATED this 14th day of December, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9.68A.011
Definitions

Unless the context clearly indicates otherwise, the definitions in this section apply throughout this chapter.

(1) An "internet session" means a period of time during which an internet user, using a specific internet protocol address, visits or is logged into an internet site for an uninterrupted period of time.

(2) To "photograph" means to make a print, negative, slide, digital image, motion picture, or videotape. A "photograph" means anything tangible or intangible produced by photographing.

(3) "Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph.

(4) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

(5) "Minor" means any person under eighteen years of age.

(6) "Live performance" means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

RCW 9.68A.075
Viewing Depictions of a Minor
Engaged in Sexually Explicit Conduct

(1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter 9A.20 RCW.

(2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.

(3) For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

(4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **PAUL A. GILMORE,** **Appellant.**	**NO. 47693-2-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Tina R. Robinson
   Kitsap County Prosecuting Attorney
   614 Division Street
   Port Orchard, WA 98366
   kcpa@co.kitsap.wa.us

2. Paul A. Gilmore, No.382868
   Stafford Creek Corrections Center
   191 Constantine Way
   Aberdeen, WA 98520

Dated this 14th day of December, 2015, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

December 14, 2015 - 3:40 PM

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kcpa@co.kitsap.wa.us