

NO. 64212-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH PERCY KLINGER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

1. Did the trial court correctly deny a CrR 3.6 motion to suppress evidence found during a search of the defendant's residence?
  - a. Did the trial court correctly find that, after the defendant provided deceptive answers to a polygraph examination, that he was questioned "further" by a Department of Corrections officer?
  - b. Did the trial court correctly apply the "reasonable suspicion" standard for the search of a probationer's residence?
  - c. Did the trial court correctly conclude that there was reasonable suspicion to search the defendant's residence in light of the fact that he was on supervision for a prior sex offense, that he had provided deceptive answers to polygraph questions concerning accessing the internet and viewing pornography, and that he admitted that he had access to a computer that was connected to another computer that was in turn connected to the internet?
2. Did the trial court properly deny the defendant's motion to impeach two State's witnesses pursuant to ER 608?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND.

Kenneth Percy Klinger was charged with one count of possession of depictions of minors engaged in sexually explicit conduct.<sup>1</sup> CP 48. He was convicted by a jury as charged. CP 83. Klinger received a standard range sentence and has filed a timely appeal. CP 114-19, 125.

### B. FACTUAL BACKGROUND.<sup>2</sup>

In February 2008, defendant Kenneth Klinger was under the supervision of the Department of Corrections (“DOC”). 2RP 61-62. Klinger’s Community Corrections Officer (“CCO”) was Jeremy Brown.<sup>3</sup> 2RP 61-62. On February 20, 2008, CCO Jeremy Brown interviewed Klinger and, after consulting with his supervisor, determined that a search of Klinger’s apartment was necessary.<sup>4</sup>

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<sup>1</sup> Amended on the first day of trial from two counts of the same charge in light of the Washington Supreme Court decision in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

<sup>2</sup> The State refers to the Report of Proceedings as follows: 1RP (June 24, 25 & 29, 2009); 2RP (August 3, 2009); 3RP (August 4, September 15 & 23, 2009).

<sup>3</sup> Jeremy Brown’s twin brother, Jeffrey, was also a witness in this case. To avoid confusion, the Browns’ full names will be used.

<sup>4</sup> The jury was not told of the reason for the search. The testimony at the CrR 3.6 hearing, which is the central issue on appeal, is discussed in the argument section of this memorandum.

2RP 59, 62-53. CCO Jeremy Brown did not participate in the search.<sup>5</sup> 2RP 63.

That same day, DOC officers conducted a search of Klinger's residence. 2RP 59. Present during the search was CCO Jeffrey Brown and four other corrections officers. 2RP 67-69. Klinger was present during this search. 2RP 68.

Five computers were seized during the search. 2RP 69-70. Two computers were found in the bedroom and are not specifically at issue in this case. 2RP 70-71, 82-83. Three computers were found in the living room. 2RP 70, 73. These computers were laptops and were lined up in a row on separate computer tables. 2RP 70-71. The three computers were: a blue-topped "Attic," a Toshiba, and a HP "Harmon."<sup>6</sup> 2RP 70-71. The three computers were connected to the same "router"; a device used to connect computers together.<sup>7</sup> 2RP 71.

A search warrant was obtained for all five computers. 2RP 90-92. A forensic search of the computers was conducted by King

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<sup>5</sup> CCO Jeremy Brown, and other witnesses, testified as to the chain of custody of the computers seized during the search. Because chain of custody is not an issue in this appeal, this testimony will not be repeated.

<sup>6</sup> These designations refer to the distinguishing marks on each computer, not the computers' technical names. 2RP 70.

<sup>7</sup> Photos of the computers taken at the scene were subsequently lost. 2RP 72.

County Detective Barry Walden, who is certified by the International Association of Computer Forensic Specialists to conduct such examinations.<sup>8</sup> 2RP 106-18; 3RP 10-12. Only one of the computers, the HP Harmon<sup>9</sup>, contained items of evidentiary interest. 2RP 98; 3RP 15-18, 25.

Det. Walden's examination found fifteen images of child pornography (minors engaged in sexually explicit conduct) on the HP Harmon. 3RP 25, 29. Eight of those images had been "deleted" but were recovered from the "trash" by the forensic software. 3RP 25-28.

At trial, the State admitted into evidence five of these fifteen images (Exhibits 2 through 6). 3RP 47, 55. The creation dates (the date the image was placed on the computer) and the access date (the date the image was last viewed) for each file was also recovered during the forensic examination and presented to the jury. 3RP 40-47.

Joanne Mettler, a registered nurse-practitioner with the Harborview Medical Center and Mary Bridge Children's Hospital,

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<sup>8</sup> The procedures for conducting the forensic evaluation are not challenged on appeal and not repeated here.

<sup>9</sup> "HP" refers to the manufacturer. "Harmon" refers to the brand of the sound system installed on the computer. 3RP 18.

reviewed these images and (based on her experience conducting medical exams of abused children) testified as to the ages of the children in the photographs. 2RP 44-54. One image (Exhibit 2) showed the penis and scrotum of a boy between six and eight years old. 2RP 47-49. Two images (six and five) showed the penis and scrotum of a boy who was between ten and twelve years old. 2RP 50-51. One image (Exhibit 4) showed the penis and scrotum of a boy between seven to nine years old. 2RP 51-52. One image (Exhibit 3) showed the genital area of a girl between six and seven years old. 2RP 52-53. All of the individuals in the images were under the age of thirteen. 2RP 53.

In addition, the State introduced into evidence 48 images of “young men and children involved in sexual activity and some just posing nude with their genitals” found on the HP Harmon. 3RP 58. These images were found by Det. Walden in the “temporary internet folder” of the computer. 3RP 55-57. This file location indicated that the images had been downloaded from the internet. 3RP 60. All of these 48 images had been downloaded on February 13, 2008. 3RP 58-59.

The forensic software used by Det. Walden allowed him to search every letter, or combination of letters, on the computer.

3RP 61-62. Using this feature, Det. Walden located numerous dominion and control documents containing Kenneth Klinger's name and address. These included Klinger's resume as well as bills of sale and letters in his name. These documents were located in the same sub-directory on the computer that contained Exhibits 2 through 6, the child pornography. 3RP 64-71. Similarly, the forensic software located records of "chat room" conversations conducted over the internet using the HP Harmon computer in which the user identified himself as "Ken" and gave Klinger's home address as his own. 3RP 70-74.

### III. ARGUMENT

#### A. **THE TRIAL COURT PROPERLY DENIED KLINGER'S CrR 3.6 MOTION TO SUPPRESS.**

Klinger asserts that the search of his home was illegal because it was based "solely on the results of a polygraph examination." App. Brief, p. 6. This is simply incorrect. Klinger's deceptive answer on a polygraph examination prompted further questioning by a community corrections officer, during which Klinger admitted that he potentially had access to a computer connected to the internet in violation of his conditions of release. There was thus "reasonable suspicion" to search Klinger's home

and the trial court correctly denied Klinger's motion to suppress the computer evidence found during the search.

**1. Relevant facts: basis for search.<sup>10</sup>**

Kenneth Klinger had prior convictions for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct and Attempted Child Molestation in the Second Degree. CP 110 (Finding 2). As a sex offender, Klinger was subject to conditions of supervision imposed by his felony judgment and sentence as well as standard conditions imposed by the Department of Corrections. 1RP 54-58; CP 110 (Finding 3).

Klinger's conditions of supervision included (amongst other requirements): (1) that he not access pornographic materials, (2) that he have internet access only with the permission of his supervising community corrections officer, (3) that he not use computer chat rooms, (4) that he not use a false identity at any time on a computer, (5) that he was subject to polygraph examinations, and (6) that he allow searches or inspection of any computer equipment to which he had regular access. 1RP 58-61; see also

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<sup>10</sup> The CrR 3.6 hearing was combined with a CrR 3.5 hearing in which the State sought to introduce statements made by Klinger in a prior case. Because the trial court ultimately denied the CrR 3.5 motion, this testimony will not be included in this summary.

CP 110, Written CrR 3.6 Findings of Fact and Conclusions of Law

(Findings 3 & 4). These conditions were also imposed by the Department of Corrections. 1RP 62.

Klinger's felony judgment and sentence also stated:

Arrest, Search, and Seizure: I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property if there is reasonable cause on the part of the department of corrections to believe that I have violated the conditions, requirements, or instructions above.

1RP 62; CP 123.

CCO Jeremy Brown supervised level II and III sex offenders, including Klinger, for the DOC. 1RP 52-54. On February 20, 2008, Klinger was subject to a routine polygraph examination. 1RP 62.

CCO Jeremy Brown was not present during the examination. After the examination, the polygraph examiner informed CCO Jeremy Brown that Klinger's answers indicated deception in regard to two questions: (1) "Did you lie to me about looking at any pornography since your last polygraph?" and (2) "Did you lie to me about an occasion that you accessed the internet since your last polygraph?" 1RP 65.

Klinger's potentially deceptive responses were communicated verbally by the polygraph examiner to CCO Jeremy

Brown. 1RP 65-66. Jeremy Brown, after consulting with other DOC staff, questioned Klinger further in order to give him an opportunity to explain his responses on the polygraph examination. 1RP 67.

Klinger told CCO Jeremy Brown that there were two computers at his house. 1RP 68. He said that his wife's computer was connected to the internet. 1RP 68-89. Klinger also said that his computer was connected to her computer, but that he didn't have access to the internet. 1RP 68-89. He claimed that to access her computer required a password and that he did not know what it was. 1RP 68-89. Klinger stated that he used the computer to play role-playing games and that his treatment provider had given him permission to do so. 1RP 69.

Jeremy Brown was aware, based on his own knowledge of computer networking, that if two computers are networked together, then both individuals can view all of the files on both computers. 1RP 70. Thus, Klinger would be able, at a minimum, to view images downloaded from the internet onto his wife's computer. 1RP 70-71.

CCO Jeremy Brown obtained permission from his supervisor to search Klinger's residence. 1RP 69-71, 90. The search was

conducted the same day, with Klinger present, and the five computers described in the factual background section (supra) were recovered.<sup>11</sup> 1RP 100-22.

A search warrant was obtained to conduct a forensic examination of the computers. 1RP 82, 85. This examination uncovered child pornography on the HP Harmon computer as well as dominion and control documents in Klinger's name.

Based on the above testimony, the trial court denied Klinger's motion to suppress the evidence uncovered during the search. The court recognized the general prohibition against warrantless searches in Washington. 1RP 141-42. The court discussed the policy reasons as to why probationers, and in particular sex offenders, give up certain constitutional rights. 1RP 142.

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<sup>11</sup> Other items were found during the search, including pornographic DVD's, that constituted a violation of Klinger's conditions of supervision but were not introduced into evidence at trial. See, e.g., 76.

After the arrest, CCO Jeffrey Brown spoke with Klinger's wife and she – before the search of the forensic examination of the computers was conducted – indicated that there would be pornographic materials (“adult sex movies”) on her computer that she had obtained on-line. 1RP 78. Klinger's wife also stated that the password to her computer was her first name (“Helen”). 1RP 87. Klinger's wife gave CCO Jeffrey Brown permission to log onto the computers to see what was on them. 1RP 111.

The court correctly stated the legal standard for conducting a warrantless search of a probationer's residence is whether there is "reasonable cause" for the search, not the "probable cause standard that is mandated by the Fourth Amendment." 1RP 144. After reviewing the facts, the court found that there was reasonable cause to search Klinger's residence based on his deceptive answers on the polygraph examination as well as his subsequent statements that he had a computer that was connected to his wife's computer, which in turn was connected to the internet. 1RP 143-44. This gave rise to reasonable cause to believe that Klinger's computer could access child pornographic materials which are on the internet. 1RP 144. The court further noted that when DOC officers initially went to the apartment, they intended to seize the two computers identified by Klinger and obtain a warrant to forensically examine them. 1RP 144. When the search of the residence found five computers that "gave them all the more reason to believe that Mr. Klinger was being deceptive, and therefore they took the five [computers]." 1RP 144-45.

The court entered written findings of fact and conclusions of law. CP 109-13, Written CrR 3.6 Findings of Fact and Conclusions of Law (attached as Appendix A).

**2. Legal standard: search of a probationer's residence.**

Article 1, section 7 of the state constitution provides broader protections than the Fourth Amendment. State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986). The purpose of article 1, section 7, is to protect an individual's right to privacy rather than curb governmental actions. State v. Lampman, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986).

However, under both the Fourth Amendment and article 1, section 7, probationers and parolees have a diminished right of privacy permitting a warrantless search if reasonable. State v. Patterson, 51 Wn. App. 202, 204, 752 P.2d 945 (1988); State v. Lampman, 45 Wn. App. 228, 724 P.2d 1092 (1986); State v. Keller, 35 Wn. App. 455, 667 P.2d 139 (1983); State v. Coahran, 27 Wn. App. 664, 620 P.2d 116 (1980). The rationale for excepting parolees and probationers from the general requirement that a residential search be conducted pursuant to a warrant and upon probable cause is that a person judicially sentenced to confinement but released on parole remains in *custodia legis* until expiration of the maximum term of his sentence; that is, he or she is simply serving his time outside the prison walls. Simms, 10 Wn. App.

at 82; see also Keller, 35 Wn. App. at 460, 667 P.2d 139. This exception is also justified in order to effectuate rehabilitation. Simms, 10 Wn. App. at 85; see also State v. Lucas, 56 Wn. App. 236, 239-40, 783 P.2d 121, 124 (1989).

A series of appellate cases thus establish an exception to the warrant requirement for searches of parolees. A warrantless search of a probationer or his residence is reasonable if a police officer or a probation officer has a "well founded suspicion" that a probation violation has occurred. Lampman, at 233, 724 P.2d 1092; State v. Coahran, 27 Wn. App. 664, 666, 620 P.2d 116 (1980); State v. Simms, 10 Wn. App. 75, 516 P.2d 1088 (1973); State v. Patterson, 51 Wn. App. 202, 204-05, 752 P.2d 945 (1988); RCW 9.94A.631; State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984). An officer does not need consent to search a probationer's home if the search falls within the statutory probationer exception. Id.

This standard has also been legislatively codified in RCW 9.94A.631, which provides:

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer. *If*

*there is reasonable cause to believe* that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1) (emphasis added).

A well-founded suspicion is less than probable cause.

Patterson, 51 Wn. App. at 205. It is the same standard required to justify a “stop and frisk” as articulated in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See Simms, 10 Wn. App. at 85. A Terry search is justified if the officer can “point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion.” Terry, 392 U.S. at 21; see also State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). “The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop.” State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

**3. The trial court did not err in entering Finding of Fact No. 7.**

On appeal, Klinger asserts that the trial court erred in entering Finding of Fact No. 7, which states:

As a result of this finding [that Klinger had demonstrated deception about looking at pornography

and accessing the internet] by the polygrapher, Jeremy Brown, Klinger's assigned Community Corrections Officer questioned him further.

CP 110, Written CrR 3.6 Findings of Fact and Conclusions of Law

(Finding 7). Klinger's position seems to be that there was no "further" questioning Klinger and that the entire basis for the search was his deceptive answers during the polygraph examination. Klinger offers no argument in support for this conclusion, which is the lynch pin of his claim on appeal.

Findings of fact are reviewed on appeal for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Here there is substantial evidence that there was further questioning – above and beyond the questioning during the polygraph examination – of Klinger. That is, this is not a situation in which the search was justified simply because a probationer failed a polygraph examination.

CCO Jeremy Brown was given two items of information by the polygraph examiner: that Klinger had given potential deceptive answers in responses to questions about viewing pornography and accessing the internet. Then, in a subsequent conversation with Klinger, Brown received new information that had not been given to the examiner. Specifically, Klinger stated that he had a computer,

that it was connected to another computer that had access to the internet. This information was received after Brown's conversation with the polygraph examiner and after Brown had consulted with other individuals. CCO Jeremy Brown had to question Klinger further to elicit this information. Accordingly, Finding No. 7 is supported by substantial evidence.

**4. The trial court did not err in entering Conclusion of Law No. 11: there was reasonable cause to search Klinger's residence.**

Klinger also challenges the validity of Conclusion of Law No. 11, which states:

The totality of the circumstances of the failed polygraph combined with Klinger's answers regarding computers, gave DOC reasonable cause to suspect there was evidence that Klinger had violated conditions of supervision.

CP 110 (Conclusion 11). Conclusions of law relating to the suppression of evidence are reviewed *de novo*. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The evidence presented at the CrR 3.6 hearing unequivocally supports the court's legal conclusion that the search was justified by reasonable suspicion.

Reasonable cause for the search was established by four pieces of information: (1) Klinger's admission that he had a computer, (2) Klinger's admission that the computer was linked to

another computer that was in turn connected to the internet, (3) the fact that Klinger was prohibited from having internet access absent the permission of his supervising community corrections, and (4) the fact that his polygraph showed deception as to both accessing the internet and viewing pornography. The rationale inference from these facts, taken together, was that Klinger was in violation of his conditions of supervision.

Contrary to Klinger's argument on appeal, this is not a situation in which the only basis for the search was a failed polygraph. The deceptive answers to the polygraph questions in addition to Klinger's own admissions that he had access to a computer that was connected to the internet justified the search. Simply put, the State agrees in the abstract that a polygraph examination, by itself, might not be sufficient to search a probationer's residence; but this case does not present that factual scenario.

**5. "Probable cause" is not the correct standard.**

Klinger also argues because the residence may have been jointly owned by his wife, the court should have applied a "probable cause" standard for evaluating whether the search was justified. This argument is without merit.

First, and most basically, Klinger has completely failed to establish that the search was not of his residence. Klinger offered no facts below to support the suggestion that the residence was solely that of his wife. Indeed, the undisputed findings of fact establish that the search was of Klinger's residence. See, e.g., Written CrR 3.6 Findings of Fact and Conclusions of Law, CP 110 (FF 9: "When asked about the computers at his house. . . "; FF 15: "Klinger was transported to his house. . . "; FF 16: "On the way to [Klinger's] residence . . . "; FF 17: "Once inside the residence. . . "; FF 21: "Klinger stated that he was not aware of any other computers in the residence. . ."). These unchallenged findings of fact are verities on appeal. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Thus, the DOC officers unequivocally conducted a search of Klinger's residence. Moreover, there is no suggestion in the record that the CCO's did not have probable cause to believe it was Klinger's residence.

Second, the Washington criminal code, Title 9A RCW, does not define the term "residence." "In the absence of a specific statutory definition, words in a statute are given their ordinary meaning." State v. Pray, 96 Wn. App. 25, 29, 980 P.2d 240 (1999). In past cases discussing the meaning of "residence" in the context

of the sex offender registration statute, courts have adopted a dictionary definition. Pray, 96 Wn. App. at 29, 980 P.2d 240; State v. Pickett, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). Webster's Dictionary defines "residence" as:

**1 a:** the act or fact of abiding or dwelling in a place for some time: an act of making one's home in a place ...  
**2 a:** (1): the place where one actually lives or has his home as distinguished from his technical domicile  
(2): a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit

Webster's Third New International Dictionary Unabridged 1931

(1969). Thus, "[r]esidence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit." Pickett, 95 Wn. App. at 478. Significantly – and consistent with common sense – the fact that the place searched may also have been the residence of Klinger's wife does not mean that it was not Klinger's residence as well.

Third, as discussed previously, the "reasonable suspicion" standard applies to searches of a probationer's residence. Indeed, this standard is specifically adopted by case law and codified by

statute. The residence searched was Klinger's and the search is justified if it was supported by "reasonable suspicion."

Fourth, Klinger's reliance on State v. Winterstein, 167 Wn.2d 620, 630-31, 220 P.3d 1226, 1230 (2009), is misplaced. Winterstein did not hold that the Department of Corrections needs probable cause to search a probationer's residence simply because someone else lives there. Rather, the Supreme Court stated: we "hold that probation officers are required to have probable cause to believe that their *probationers live at the residences* they seek to search." Winterstein, 167 Wn.2d at 630 (emphasis added).<sup>12</sup> Unlike Winterstein, there is no evidence that suggests that Klinger had moved or changed his residence or that the officers were searching an old, or abandoned, residence. As outlined above, the record establishes that the place searched by the CCO's was Klinger's residence. This being undisputed, a heightened standard of review of the warrantless search is not required.

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<sup>12</sup> The Court in Winterstein went on to state: "In this context, probable cause exists when an officer has information that would lead a person of reasonable caution to believe that the probationer lives at the place to be searched. The information known to the officer must be reasonably trustworthy. Only facts and knowledge available to the officer at the time of the search should be considered." Winterstein, 167 Wn.2d at 631.

In short, corrections officers need probable cause to believe that a probationer lives at a certain place before they may search that location. They also need reasonable suspicion to actually conduct the search. In this case, the record unequivocally establishes that the location searched was Klinger's residence, and thus the probable cause standard was satisfied. The record also establishes that there was reasonable suspicion to conclude that Klinger had violated his condition of supervision, and thus the search itself was justified.

Finally, if Klinger is suggesting that a heightened standard of review was required to search the computer because it belonged to his wife, the argument is without merit. First, Klinger told the officers that the Harmon computer belonged to him. 1RP 107-08. Second, Klinger's wife gave permission to search the computers. 1RP 111. Third, a warrant was obtained to search the Harmon computer, which Klinger did not challenge below or on appeal. 2RP 90-92.

**B. THE TRIAL COURT PROPERLY EXCLUDED ALLEGED "IMPEACHMENT" EVIDENCE.**

Klinger argues that the trial court erred in refusing to allow him to impeach the credibility of Jeremy and Jeffrey Brown by

cross-examining them on an unrelated disciplinary matter. The trial court's ruling on this issue was correct because the alleged impeachment was on collateral matters and there was no basis under the evidence rules for its admissibility.

**1. Factual background: alleged ER 608 evidence.**

Prior to trial, Klinger sought permission to impeach CCO's Jeffrey and Jeremy Brown with an instance of prior misconduct. 1RP 9-13. Klinger provided supporting materials on this collateral matter, which were reviewed by the trial court. 1RP 146.

CCO's Jeffrey and Jeremy Brown are twin brothers. 1RP 147. One evening in 2004, they were at a nightclub and became intoxicated. An altercation followed and the police were called. The Browns identified themselves as DOC officers and sought "special treatment" from the police because of their connection with the DOC and the DOC's connection to the Seattle Police Department. 1RP 147. The Browns' actions were brought to the attention of the DOC and a disciplinary proceeding was held. The Browns were found to have abused their offices and to have acted in a way to discredit DOC. They were "docked about \$2,000 worth of pay," demoted over a four- to five-month period, and had letters of discipline inserted in their files. 1RP 147.

After reviewing this information, the trial court denied Klinger's request to use this extrinsic evidence to impeach the Browns' credibility as witnesses. The court concluded: "I don't think these incidents directly impact credibility. As a result, I don't think these incidents should be admitted." 1RP 147-48. The court indicated that it would be willing to revisit the issue if the Browns' testimony opened the door to this evidence (for example, if they testified that they were "exemplary officers and never had any kinds of problems conducting their job"). 1RP 148.

After the motion was denied, Klinger briefly suggested an alternate basis for impeaching CCO Jeremy Brown. 1RP 148-49. Apparently, Jeremy Brown had admitted in a deposition that he had received an admonishment by the DOC because he had used his office computer to send out an e-mail asking why the union was not "stepping in" in the context of a budgetary dispute within the DOC. 1RP 149. The trial court also concluded that this was not a basis for impeachment and could not be introduced by Klinger for that reason. 1RP 149. The court stated: "I don't see how this has any bearing on credibility. There's no information that he was asked to pay back any county fund which he misappropriated or anything like that, so I don't see how it would impact on honesty." It might

have been bad judgment for him to do so, but that doesn't implicate credibility." 1RP 150.

**2. Legal standard: ER 608 evidence.**

Evidence of a witness's character, trait of character, or other wrongs or acts are "not admissible for the purpose of proving action in conformity therewith on a particular occasion" except as provided in ER 607, 608, and 609. See ER 404(a)(3).

ER 608 provides that specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, may *not* be proved by extrinsic evidence, but may "*in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness. . . concerning the witness's character for truthfulness or untruthfulness.*" See ER 608(b) (emphasis added).

In exercising its discretion under ER 608(b), the trial court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial.<sup>13</sup> State v. Griswold,

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<sup>13</sup> Discretion is abused when a decision is manifestly unreasonable or based upon untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court should be reversed only if no reasonable person would have decided the matter as the trial court did. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

98 Wn. App. 817, 830-31, 991 P.2d 657 (2000) (the witness's prior false statement was "clearly collateral" and "not germane to the guilt issues here"); State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991) ("Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.") (quoting State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980)); see generally State v. O'Connor, 155 Wn.2d 335, 349-50, 119 P.3d 806, 813 (2005).

Significantly, the York court (from which the Wilson court drew its rule) *first* evaluated "whether [the] evidence [at issue] was merely collateral to the questions presented." York, 28 Wn. App. at 35, 621 P.2d 784. Thus, the York, Wilson, and Griswold line of cases contemplates consideration of whether the evidence sought to be explored during cross-examination under ER 608(b) is *relevant* to the issue at hand. O'Connor, 155 Wn.2d at 349-50.

Prohibiting the trial court from considering the issue of "germaneness" to the issue at hand when exercising its discretion under ER 608 could result in a system under which a trial court is *required* to admit *any* instance of a key witness's prior misconduct. But, the Supreme Court has observed, this result would be clearly contrary to ER 608, which grants trial courts discretion to make

such determinations. Id. Indeed, Washington courts have been clear that not every instance of a witness's (even a key witness's) misconduct is probative of a witness's truthfulness or untruthfulness under ER 608(b). See, e.g., State v. Benn, 120 Wn.2d 631, 651, 845 P.2d 289 (1993) (witness's drug dealing "did not impact [his] ability to relate his discussions with Benn on the witness stand"); State v. Cochran, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000); State v. Kunze, 97 Wn. App. 832, 859-60, 988 P.2d 977 (1999) ("Specific instances of lying may be admitted whether sworn or unsworn, but their admission is *highly discretionary* under ER 608(b).") (emphasis added).

Klinger emphasizes that the Supreme Court has stated that "[f]ailing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." See State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). However, the Supreme Court has also noted that Clark relied on York to support this reasoning and that York stressed the crucial nature of the witness's testimony but also explained that the subject of cross-examination needed to be "germane to the issue" on trial.

See State v. O'Connor, 155 Wn.2d 335, 350-51, 119 P.3d 806 (2005).

**3. The trial court correctly denied the motion to introduce ER 608(b) evidence.**

Klinger's argument as to prejudice on appeal hinges on the assertion that Jeremy Brown's testimony was the "core of the State's proof of the charges of unlawful possession of images" and that the "only evidence that Mr. Klinger possessed these images came from the testimony of. . . DOC community corrections officer, Jeffrey Brown, who was not a computer expert who testified that the defendant's and his wife's computers were linked together electronically at home." Klinger's argument, however, misstates the nature of the evidence and testimony in this case.

Jeffrey Brown was not a star witness on the issue of whether Klinger possessed child pornography. Klinger's summary on appeal appears to suggest that Jeffrey Brown's testimony somehow established that it was Klinger who downloaded the sexually explicit images of children and that it was his testimony that established that Klinger possessed the images in question. In fact, Jeffrey Brown simply testified that he observed a router connecting two of the computers in the living room. Accordingly, the trial court

correctly concluded that the alleged impeachment evidence was not relevant or particularly germane to the true issue presented at trial.

Here is the full extent of Jeffrey Brown's testimony on this issue on direct examination:

**Q.** Was there any sort of – going back to the living room computers, was there any sort of configuration of those computers when you went there as far as the way that they were attached or plugged in?

**A.** Yes. They were all connected to a router.

**Q.** What's that router? I mean if you know generally?

**A.** It is a device that you would utilize to connect several computers together.

**Q.** And was there anything permanent about the way the computers were connected here. Was it cemented in or locked in? Did you take it apart?

2RP 71-72.

What Klinger utterly fails to discuss in his appellate brief is that it was not the testimony of Jeffrey (or Jeremy) Brown that established Klinger's possession of the child pornography, but that of Det. Barry Walden, the computer forensics expert. Indeed, it was Walden who was the State's "star witness" on the issue of possession and it was his testimony alone – together with the basic and undisputed fact that the computer had been found in Klinger's residence – that established that Klinger possessed these images.

First, it was Det. Walden who discovered the images of child pornography on the HP Harmon.

Second, Det. Walden described for the jury where on the computer – that is, in what “directory” – these images were located.

Third, Det. Walden discovered documents of dominion and control all bearing Klinger’s name and address on the computer. These documents were all found in the same directory in which the child pornography was located. Det. Walden testified further that this sort of directory was not one that is automatically set up by the computer operating system, but had to be manually created by the user.

It was these basic facts that established that Klinger possessed the pornography; not the testimony that the HP Harmon may have been connected by a router to another computer. In fact, from the testimony offered by Jeffrey Brown during the State’s case-in-chief, it is completely unclear what a router is or might actually do.

In any event, it is ultimately irrelevant from how the images came to be on the computer; that is, whether they were actually transferred to the computer via the router. Det. Walden testified that the images could just have easily been downloaded or

transferred from a digital disk or camera. The point is that the images were found on a computer and in the same directory accessed by Klinger. Neither Jeremy nor Jeffrey Brown had any testimony to offer on that issue.

However, if for whatever reason the focus is on the question of whether Klinger had access to the internet (or, to put it another way, whether the images had been downloaded from the internet), Det. Walden's testimony answered that question as well.

Det. Walden testified that he found explicit images of child pornography in a "temporary internet folder" of the computer. 3RP 55-57. This file location indicated that the images had in fact been downloaded from the internet. 3RP 60. All of these 48 images had been downloaded on February 13, 2008. 3RP 58-59. Thus, to the extent there was an issue as to whether the HP Harmon could access the internet, Det. Walden's unchallenged testimony established that it had in fact done so, and done so for the purpose of downloading sexually explicit images of children.

In sum, contrary to Klinger's claim on appeal, CCO Jeffrey Brown's testimony was of essentially no moment in establishing possession of the images in question or even whether the computer could access the internet. Thus, the entire premise of Klinger's

argument is flawed: neither the testimony of Jeffrey nor Jeremy Brown was essential or critical to the State's case. The court ruled pre-trial that the search was proper, and the jury heard none of those background facts. CCO Jeffrey Brown testified briefly about finding the computers in Klinger's residence and that the computers were connected to a router.

Furthermore, the trial court correctly concluded that none of the alleged instances of misconduct actually implicated the Browns' credibility and were thus not admissible under ER 608(b). At best, both specific instances of prior misconduct that the defense sought to introduce – the bar incident and the e-mail incident – demonstrate a lack of sound judgment, not a lack of credibility or truthfulness. As such, these instances are simply the sort of generalized "bad act" the introduction of which is prohibited by ER 404(b). The prior instances of specific conduct, even if true, were not prohibitive of the Browns' truthfulness. The trial court did not abuse its discretion in determining that cross-examination on these issues was not proper.

**IV. CONCLUSION**

The State of Washington respectfully requests that Kenneth Klinger's conviction for one count of possession of depictions of minors engaged in sexually explicit conduct be affirmed.

DATED this 24<sup>th</sup> day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

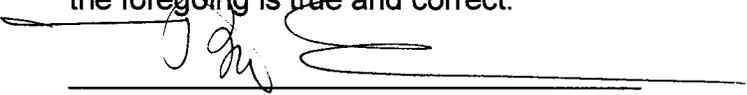
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to OLIVER DAVIS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE v. KENNETH KLINGER, Cause No. 64212-0-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington



Date

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