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DIVISION II
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STATE OF WASHINGTON
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No. 41740-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

BRIAN D. KNIGHT,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on June 24, 2009 with one count of Rape of a Child in the First Degree contrary to RCW 9A.44.073 and one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct (Depictions). (CP 1-3). On December 21, 2009, an Amended Information was filed adding an additional count of Child Molestation in the First Degree, and alleging aggravating factors on counts 1 and 2. (CP 28-29).

On November 30, 2009, the defendant's motion to sever the counts was granted and the two charges were tried separately. (CP 27). The defendant was found guilty as charged, as to the depictions charge, on December 8, 2010. (CP 123). The defendant was given a standard range sentence on January 26, 2011. (CP 134-144).

Factual Background

Matthew Owens first met the defendant in June of 2008. (RP at 14). The two were introduced through a mutual acquaintance, Ira Hartford¹, that had a mechanic's shop. (RP at 14). Mr. Hartford wanted Mr. Owens to work as a mechanic, and the defendant was the computer guy at Hartford's shop. (RP at 14). The defendant claimed to do computer work out of his house for a living. (RP at 44). Eventually Mr.

¹ The Report of Proceedings refers to this acquaintance as Ira "Hartwell." However, his last name is Hartford.

Owens and the defendant became friends and Mr. Owens visited the defendant's home often. (RP at 14-15). Mr. Owens stayed overnight at the defendant's home on several occasions, but did not ever live with the defendant. (RP at 14-15).

Mr. Owens is "computer illiterate" and does not use a computer at his home. (RP at 15). The defendant was trying to teach Mr. Owens to do job related computing, such as receipts. (RP at 15). The defendant had a laptop in his kitchen, and the defendant had his personal computer in the bedroom. (RP at 16). The defendant used the computer in his bedroom for work and personal uses. (RP at 16).

Mr. Owens did use the defendant's laptop, but never used it without the defendant being present. (RP at 15, 26). The defendant didn't allow any access to his computer without being present. (RP at 22). Also, the defendant didn't let anyone touch the computer in his bedroom. (RP at 26).

Towards the end of January 2009, the defendant showed Mr. Owens a photograph on his computer of a "five to six year old white Caucasian female with no top on..." (RP at 17). The defendant closed the photograph and Mr. Owens was able to see "a lot of nude picture of children" ranging in age from six to nine years old. (RP at 17). The defendant closed the photos out and said "that's nothing." (RP at 23).

The defendant told Mr. Owens that "...he could push one button and erase anything on the computer, and he can outsmart the chief of

police...he could push one button and erase everything on his computer where nothing can be found..." (RP at 19).

Mr. Owens reported what he saw to the Elma Police Department. (RP at 15-16). Apparently the day before, the defendant had asked Mr. Owens to leave his apartment. (RP at 21). Mr. Owens liked the defendant a lot until he saw the inappropriate photos. (RP at 21). Further, being asked to leave didn't cause Mr. Owens any issues. (RP at 26).

Chief Troumbley of the Elma Police Department investigated the allegations made by Mr. Owens against the defendant. (RP at 27). Chief Troumbley obtained a search warrant for the defendant's computers, based in part on Mr. Owens's statement. (RP at 27-28). The warrant was served on April 24, 2009. (RP at 28).

When Chief Troumbley knocked on the door and told the defendant he had a search warrant, the defendant said "I was expecting you." (RP at 28). The defendant stated that his lawyer had said a search warrant was being obtained. (RP at 28).

The defendant's apartment was a "very small, one-bedroom apartment." (RP at 29). Inside of the defendant's bedroom, the police located a computer tower that was powered up and running. (RP at 29-30). Also, connected to the running computer was a thumb drive (a digital storage device) that was on with its light showing. (RP at 30). An additional thumb drive was seized from the desk in the bedroom as well as two hard drives found in the vicinity of the desk. (RP at 31). Other items

were seized from the residence, but the aforementioned media were the items that were sent to be forensically examined. (RP at 31).

The defendant was arrested on June 25, 2009. (RP at 36). When the defendant was questioned about the charges regarding images on his computer, he stated “it was technically on my computer, so if it was there, you put it there.” (RP at 37). The defendant also claimed that the drives were less than a week old; however, the Chief observed a significant layer of dust on the hard drives. (RP at 37, 39.) The defendant also claimed that the thumb drive was brand-new. (RP at 39).

Detective Tony Doughty of the Washington State Patrol conducted the forensic examination of the media seized from the defendant’s bedroom. (RP at 51-55). The detective identified numerous photographs that were recovered from the unallocated space on the media examined. (RP at 59-62). Four images originated on the thumb drive admitted as Exhibit 7. (RP 52, 59-60). Eight images originated on the thumb drive admitted as Exhibit 8. (RP at 53, 60-61). Three images originated on the hard drive admitted as Exhibit 10. (RP at 53-54, 61-62). Two images originated on the hard drive admitted as Exhibit 12. (RP 55, 62).

Images do not download directly into the unallocated space, this is the portion of the computer where deleted files go. (RP at 78).

The detective described that the images in the unallocated space were not viewable without specialized software. (RP at 67-68). The detective opined that the user of the drives he examined was computer

savvy as they contained “programs and things like that the average computer user probably wouldn’t have.” (RP at 68, 76).

The defendant intimates in his brief that a user would have to have “very expensive \$4000 forensic program” to retrieve the images in unallocated space. (Appellant’s Brief at 4). However, the detective explained that there are “probably hundreds of software programs” that could be used to retrieve these files and that there were less expensive options. (RP at 70, 77).

The detective was also able to recover the registry listing the most recently viewed media through Windows Media Player. (RP at 63). The user-created profile that was used to view these files was “Brian D. Knight.” (RP at 64). The actual content was not recovered, but the video titles were telling. (RP at 64). The detective found viewed files with names such as “pedophilia, uncle undresses and rapes 12 year old niece for real, preteen and quality porn, key word cum...” (RP at 65).

These files were downloaded using “eMule.” (RP at 65). The eMule software is a file sharing program that allows users to share files and view files from other user. (RP at 65-66). In order to download these files, the user has to put in a search term and the program will find matches. (RP at 66). The program does not randomly download material not searched for by the user. (RP at 67).

The detective also located email files. (RP at 67). One of these email messages was admitted as Exhibit 9. The email shows that it was

sent from “Brian D. Knight” <bknight@techline.com>. (Exhibit 9). In the email, the defendant describes coming out as a “pedo” (pedophile) to his family and expresses his interest in “young” girls. The defendant describes “pedo-friendly” web sites that he was familiar with. This included “Danish Pedophile Association,” “Pedophile Liberation Front,” and Fresh Petals. (Exhibit 9).

Pediatrician Steve Hutton testified that all of the images, in his opinion, depicted children well under 18 years old. (RP at 79-86).

RESPONSE TO ASSIGNMENTS OF ERROR

I. Sufficiency of the evidence produced at trial.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wash.2d 775, 786, 72 P.3d 735 (2003). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wash.2d 758, 539 P.2d 680 (1975)). The appellate court

must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. *State v. Thomas*, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985)).

To prove a violation of RCW 9.68A.070, the State must prove that the defendant ‘knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct.’ Regarding this statute’s knowledge element, the State need only prove ‘the general nature of the material he or she possessed.’ *State v. Rosul*, 95 Wn.App. 175, 185, 974 P.2d 916 (1999). A defendant’s possession of illegal images can be actual or constructive. The Court evaluates constructive possession by evaluation of the totality of the circumstances. *State v. Summers*, 107 Wn.App. 373, 384, 386-87, 28 P.3d 780 (2001). The Court’s analysis focuses on the quality and nature of the defendant’s possession of illegal images, such as the defendant’s ability to eventually possess the item, his or her knowledge and awareness that the item is nearby or present, and the defendant’s motive to hide an illegal item from police. *Summers*, 107 Wn.App. at 386.

The evidence is sufficient to support the conviction rendered against the defendant.

In *State v. Williams*, the McNeil Island Special Commitment Center (SCC) staff discovered sexually explicit material in Williams’s day planner: *State v. Williams*, 135 Wash.App. 915, 920, 146 P.3d 481 (2006).

The gave rise to concerns that Williams may have additional pornographic materials on his computer, it was seized from Williams's room without his permission. *Williams*, 135 Wash.App. at 920. The SCC examined the computer and found a secondary non-factory-installed hard drive (that was contraband). The computer's hard drives had a total of 16,613 stored picture files, including a depiction of a female significantly under 18 years old. *Williams* at 920.

The *Williams* court summarized the case as follows:

Here, in a folder next to some music files on Williams' computer's unauthorized secondary hard drive, SCC staff discovered a photograph of a minor female engaged in a sexually explicit act with a male. An SCC information technology employee determined that the file had been created on November 18, 2004, about one month after a document personal to Williams had been created on the same hard drive. Although evidence did not reveal when the file had last been accessed and other testimony suggested that prohibited file, software, and hardware sharing is common among SCC residents, we note that the computer was in Williams' room, to which no other resident had access, and we defer to the trier of fact on persuasiveness of the evidence. *See Thomas*, 150 Wash.2d at 874–75, 83 P.3d 970. Based on the evidence, a reasonable trier of fact could have found beyond a reasonable doubt that Williams knew that the illegal photograph was stored on his computer.

Williams at 926-927.

The State disagrees somewhat with the appellant's analysis of the *Williams* case. The appellant contends that "there was no dispute that Williams alone had access to this computer and the file was available to him alone." Appellant's Brief at 6. However, as the court's analysis shows, "prohibited file, software, and hardware sharing is common among

SCC residents.” However, the court found it more persuasive that the drive was located in the defendant’s room, to which no other inmate had access.

The facts are similar in the case at bar. While Mr. Owens perhaps had limited access to the defendant’s laptop. However, no one but the appellant was allowed access or use of the computer in the appellant’s bedroom. It was in the bedroom where all of the depictions charged were found. The defendant clearly had actual possession of the drives at issue, giving him dominion and control of the images contained therein.

The appellant chooses to continue his analysis with firearm possession cases. However, the State believes that other depictions cases are more on point.

In *State v. Mobley*, the defendant’s step-daughter accused him of sexually molesting and raping her. *State v. Mobley*, 129 Wash.App. 378, 380, 118 P.3d 413 (2005). She also related that Mobley made her look at “bad pictures” of naked children and adults on the computer in their home. *State v. Mobley*, 129 Wash.App. 382. During the course of the investigation, two hard drives were seized from a computer in the defendant’s bedroom “Although much of the space on the hard drives was empty, the State’s forensic expert was able to recover three pictures of young, naked girls from one of the hard drives.” *Williams* at 381.

At trial:

Detective Jason Sprowl testified he was able to pull a partial internet history from one of the hard drives seized

from Mr. Mobley, which began in September 2002. He said the internet history indicated a program called, "History Kill" had been downloaded in November 2002, which is designed to eliminate internet history. The available internet history included approximately six hits for "Lolita" internet sites, which he testified are associated with child pornography.

Although **the majority of the photo images on the second hard drive had previously been deleted**, Detective Sprowl was able to retrieve several images of adult pornography, as well as three images of naked, prepubescent children. One of the photos was captioned, "Free Lolita pictures." He testified he was familiar with one of the photos from a previous child pornography investigation. Detective Sprowl related he **could not determine how long the images had been on the hard drive or how long these images were viewed before they were deleted**. However, he stated that the images were "downloaded or purposefully put on the computer." He also related **these images were no longer viewable to the "everyday user,"** because there was no operating system and the pictures had been deleted.

Mobley at 382 (emphasis added, RP cites omitted).

Mobley contended that he purchased the drives used. Further, he admitted to looking at adult pornography, he denied intentionally visiting or downloading anything from child pornography sites. *Mobley* at 384. The defendant's essential argument was that because he could not access the images, he did not have control over them. *Id.* at 384.

The *Mobley* court found the evidence sufficient to support the defendant's conviction, and it analyzed the issue as follows:

The level of proof necessary to show knowing possession of child pornography where images have been viewed on the internet, stored on a hard drive, and then deleted has been analyzed in *United States v. Tucker*, 305 F.3d 1193, 1204 (10th Cir.2002), cert. denied, 537 U.S. 1223, 123

S.Ct. 1335, 154 L.Ed.2d 1082 (2003). The defendant in Tucker argued he did not possess child pornography, but merely viewed these images on his Web browser. *Id.* The court concluded the defendant had sufficient control over the images in his Web browser's cache files, noting among other things, that he had reached out for the images by visiting child pornography websites. *Id.*

In *United States v. Perez*, 247 F.Supp.2d 459, 484 n. 12 (S.D.N.Y.2003), the court addressed the quantity of evidence needed to prove knowing possession of child pornography under similar circumstances. The court noted, “one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image.” *Id.*

When synthesized with Washington's constructive possession law, the core question seems to be whether the totality of the circumstances establishes that a defendant reached out for and exercised dominion and control over the images at issue. *See Id.*; *see also Tucker*, 305 F.3d at 1204; *Callahan*, 77 Wash.2d at 29, 459 P.2d 400. This approach recognizes and promotes the purposes behind Washington's child pornography statute, to protect children by discouraging their sexual exploitation for commercial gain and personal satisfaction. See RCW 9.68A.001. Therefore, evidence of “reaching out for” and “controlling” child pornographic images is incriminating, while inadvertent viewing questions are left to the fact finder.

Here, **Detective Sprowl retrieved three images of naked adolescents from unallocated space** on Mr. Mobley's hard drive, indicating the images had been twice deleted. Detective Sprowl found six instances on Mr. Mobley's internet history for “Lolita” sites, indicative of child pornography web site use. RP at 570–72. One photo was labeled: “Free Lolita pictures,” and Detective Sprowl recognized one picture as internet child pornography from a previous child molestation investigation. RP at 570. Detective Sprowl testified the images had been “downloaded or purposefully put on the computer.” RP at 582. And, S.E. testified Mr. Mobley made her look at “bad pictures” of naked children on the computer when he was living with her family. RP at 211–12.

Although Mr. Mobley testified he inadvertently viewed the child pornography and suggested the images may have been on the hard drives when he bought them, other evidence was sufficient for the jury to find he sought out these images, controlled them by downloading and/or saving them on his computer. Further, the jury could find he showed them to S.E. before deleting them from the hard drive. From circumstantial evidence, the jury could infer Mr. Mobley possessed the images of naked children in Benton County during the time he lived there with S.E., when it was alleged he showed her the images.

Mobley at 384-386 (emphasis added).

The facts of *Mobley* are quite similar to the facts in the case at bar. Mr. Owens was shown depictions of minors by the defendant, and, when reported and investigated, contraband images were found in the unallocated space of the drives in the defendant's possession.

Also, as in *Mobley*, the testimony showed that these images were not inadvertently downloaded directly into the unallocated space. Instead, they had to have purposefully been put onto the hard drives and then twice deleted from the hard drives to end up in the unallocated space. On the thumb drives, the images would have to be purposefully transferred on to the thumb drive and then deleted to place them into unallocated space.

In this case, a witness established that the appellant had exclusive dominion and control over the drives in question. Further, the "computer savvy" appellant had forewarning that the police would be serving a search warrant on his computers. Previously, the defendant had boasted that "...he could push one button and erase anything on the computer, and he can outsmart the chief of police...he could push one button and erase

everything on his computer where nothing can be found...” (RP at 19).

It then makes sense that all the images would be in unallocated space as the appellant had sufficient time and warning to delete the images from his drives prior to the police arriving. Two of the drives were on and running when the police arrived. The totality of the circumstances indicate that the appellant intentionally sought out the depictions and kept them on his computers until he feared investigation by the police. At that time, he deleted the images and they were sent to the unallocated space.

Further, with the appellant’s apparent computer skills, it would not have taken much effort for him to recover the images if the drives were returned to him by the police.

II. Exclusion of purported bias evidence at trial.

Supplemental Facts

There are two incidents that the appellant wished to inquire about at trial. The first was from March 27, 2009, when the appellant and Mr. Owens allegedly got into a verbal argument at the Texaco gas station in Elma. (CP 102-115). This occurred after Mr. Owens made his February 2009 statement in regards to the charge at issue in this case, and has no apparent connection to the charges at bar. (RP at 20).

The second was an assertion made by the appellant for the first time on the morning of trial. The defense claimed that “Mr. Knight caught Mr. Owens taking Mr. Knight’s prescription narcotic medication and selling it to an underage person in the apartment.” (RP at 10).

Appellant's failure to object at trial to exclusion of possible bias evidence at trial constituted a waiver

When no objection is made to the evidence at trial, an evidentiary error is not preserved for appeal. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). An issue may not be raised for the first time on appeal unless it amounts to “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The admission or exclusion of evidence is reviewed under an abuse of discretion standard and thus it is regarded as evidential error, not constitutional error. *State v. Russell*, 104 Wn.App. 422, 434, 16 P.3d 664 (2001) (*citing State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997); *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)).

To preserve an issue, a party must bring a specific objection at trial to allow the trial court “an opportunity to correct any error.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). For appeals arising from a trial court's rulings on motions in limine, a waiver of the right to appeal depends on whether the trial court made a final ruling. If the trial court makes a final ruling, “the losing party is deemed to have a standing objection ... ‘[u]nless the trial court indicates that further objections at trial are required.’ “ *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984),

overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). If the ruling is tentative, “ ‘the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.’ ” *Powell*, 126 Wn.2d at 256 (quoting *Koloske*, 100 Wn.2d at 896).

“Although orders on motions in limine are sometimes characterized as tentative and advisory, it has been held that, when the trial court enters a pretrial order regarding the admissibility of evidence, and the order appears to be a final ruling and on a complete record, the fact that appellant does not renew his objection to the ruling at trial does not preclude review by the appellate court.” 2A Karl B. Tegland, *Washington Practice: Rules Practice RAP 2.5 author's cmts.* at 230 (6th ed.2004).

The Washington Supreme Court explained the difference between final ruling and those that are only tentative or advisory:

If a trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

Koloske, 100 Wash.2d at 896, 676 P.2d 456. “[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” *State v. Carlson*, 61 Wash.App. 865, 875, 812 P.2d 536 (1991),

review denied, 120 Wash.2d 1022, 844 P.2d 1017 (1993).

In the case at bar, the only time the supposed bias evidence was addressed by the court was via a pre-trial motion in limine. No written order was ever entered by the court as to either issue. Regarding the gas station confrontation, the judge told counsel:

I understand the concerns. I have read your motion, and I have read the State's trial brief, which responds to both of those motions. And while **I will certainly listen to objections made at the time**, it appears to me that the incident involving Mr. Owens outside the gas station in Elma simply is not relevant. Any minimal relevance there may be is certainly outweighed by the prejudicial effect. I do not believe that shows bias regarding his testimony in this case, but **if something happens between now and then, I will listen to it.**

(RP at 8, emphasis added).

This ruling was not a final ruling. The court certainly left the door open for reconsidering its position, basically stating that it was a tentative decision that would be revisited depending on how the evidence developed at trial.

Regarding the allegation that Mr. Owens was kicked out by the appellant for taking prescription medication, the court stated:

Given the timing of the decision by Mr. Knight to kick Mr. Owens out of the apartment, **I would be inclined to allow evidence that happened**, but not for the underlying reason that you have described. So, you may [elicit] testimony that Mr. Owens was ordered to leave Mr. Knight's apartment, and that was over a dispute, but I would not want any testimony regarding the allegations that there were prescription medications being used or distributed improperly.

...[Defense response]...

[Counsel], do you wish to be heard on this? **I didn't rule. I would be inclined to rule that way.** I don't want to preclude you from being heard on this matter.

...[State's response]...

All right. We will be back at about 10:45.

(RP at 11-12, emphasis added). Again, this was not a final ruling. In fact, the Court specifically stated that it “didn't rule” leaving the door open for the issue to be revisited during the course of the trial.

During the cross-examination of Mr. Owens, defense counsel didn't make any offers, or objections to the exclusion, of the gas station incident. He also did not revisit the allegations regarding the reasons Mr. Owens was asked to leave by the appellant. (RP at 20-26). In fact, defense counsel didn't even go as far as the court's tentative ruling would have allowed. Mr. Owens was asked if “Mr. Knight asked [him] to leave his apartment?” (RP at 20). He was further asked about the timing of his statement to police. (RP at 20). However, he did not attempt to elicit testimony about any dispute that caused the appellant to ask Mr. Owens to leave.

This was certainly a delicate matter of trial strategy. One of the issues that would have come with getting into these matters was Mr. Owens's knowledge of the Child Rape and Molestation allegations that had been made by the appellant's daughter.

By failing to object to the exclusion of the purported bias evidence

as it developed at trial, the appellant waived the issue on appeal. If the Court finds that this issue was properly preserved, the conviction should still be affirmed as follows.

The exclusion of the purported bias testimony was not an abuse of discretion.

The standard of review for an evidentiary ruling is an abuse of discretion. *State v. Demos*, 94 Wash.2d at 736, 619 P.2d 968; *State v. Mendez*, 29 Wash.App. 610, 611, 630 P.2d 476 (1981). A trial judge is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence. *See State v. Taylor*, 60 Wash.2d 32, 40, 371 P.2d 617 (1962). The trial judge abused his discretion if the decision to exclude evidence, regarding potential bias evidence, was based on untenable grounds or was manifestly unreasonable. *State v. Wade*, 138 Wash.2d 460, 464, 979 P.2d 850 (1999).

The deferential abuse of discretion standard gives a trial judge wide latitude on a variety of trial questions, including the admission or exclusion of evidence, the wording of instructions, the order and sequence of witnesses, and many other trial related matters. *State v. Marks*, 90 Wash.App. at 984, 955 P.2d 406. That is because the trial judge is in the middle of, and part of, the ongoing drama that is a jury trial. An appellate court, on the other hand, reads a record. Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L.Rev.. 277, 280 (1995/96). The role of the appellate court is to review of

questions which can best be characterized as questions of law. *See State v. Lough*, 125 Wash.2d 847, 861, 889 P.2d 487 (1995). Therefore, so long as the trial court's grounds for its decision are reasonable or tenable, they should not be disturbed on appeal. *Lough* at 861, 889 P.2d 487.

A party has the right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome of the case (hereinafter referred to simply as bias). *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Although such cross-examination is available as a matter of right, the trial court retains discretion to control the exact scope of cross-examination; i.e., to determine what is relevant to show bias on a case-by-case basis. *State v. Jones*, 67 Wn.2d 506, 408 P.2d 247 (1965) (limitations on cross-examination affirmed). The court may exclude evidence that is too ambiguous or remote.

Example–Inadmissible. In *State v. Lubers*, 81, Wn.App. 614, 915 P.2d 1157 (1996), a prosecution for rape, the appellant maintained that the alleged victim fabricated her complaint in retaliation for a feud she and her family were having with the appellant's girlfriend. At trial, the court properly refused to allow the appellant to call his girlfriend as a witness, to testify that members of the alleged victim's family "beat her [the girlfriend] up, threw rocks at her, and talked behind her back." The Court of Appeals acknowledged that in prosecutions for rape, the courts are generally receptive to evidence offered by the defense to show that the alleged victim had a motive to lie. However, the court said that in the present case, the trial court acted within its discretion in excluding the evidence because the defense never explained how the alleged feud "translated into a desire to frame" the appellant. The court said the appellant's theory seemed "wholly speculative."

Example–Admissible. In *State v. McDaniel*, 37 Wn.App.

768, 683 P.2d 231 (1984), a prosecution for indecent liberties and statutory rape, the State was properly allowed to show that a defense witness had made a threatening gesture towards the victim's mother during a court recess. The court stated, "Bias may be shown by the witness's conduct."

See Karl B. Tegland, *Courtroom Handbook on Washington Evidence 2010-2011 Edition*, 317-319, 323 (2010).

This case can be distinguished from *McDaniel*. In *McDaniel*, the threatening gesture happened during the trial and there was a clear inference that could be drawn that the witness making the gesture was biased. However, in the case at bar, the proposed event at the gas station happened over a year and a half prior to the trial and any bias, like *Lubers*, is "wholly speculative." Without some further showing by the appellant, the proposed evidence was too ambiguous and remote to the charge at bar and was properly excluded.

As to the allegations regarding Mr. Owens and the appellant's prescription medication. This was also properly excluded. The court gave the defense latitude to establish that there had been a dispute between the two. The underlying reason for Mr. Owens ouster from the apartment is not relevant. Further, Mr. Owens denied there being any issue between himself and the appellant. Therefore, other than counsel's oral assertion, there is nothing in the record to support this as being valid. Mr. Owens's testimony clearly indicates he did not believe there to be any issue between himself and the appellant other than the criminal issues faced by the

appellant.

When asked, “And is it fair to say that you don’t like Mr. Knight?” Mr. Owens responded, “ I actually liked him a lot. He was a really good friend of mine until what I seen.” (RP at 21).

Any error regarding exclusion of the purported bias evidence was harmless error.

Erroneous exclusion of evidence is harmless if, ‘within reasonable probabilities,’ it did not affect the trial outcome. *State v. Russell*, 104 Wn.App. 422, 434, 16 P.3d 664 (2001) (citing *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997); *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)). To determine whether an evidential error probably affected the outcome of a trial, the Court must exclude the improperly admitted evidence and examine the evidence that remains. *State v. Myers*, 49 Wn.App. 243, 250, 742 P.2d 180 (1987) (citing *State v. Tharp*, 96 Wn .2d 591, 599, 637 P.2d 961 (1981)). If the excluded evidence is of minor significance when compared to the evidence that remains, the error is harmless. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In this case, it is hard to imagine that testimony of the confrontation between Mr. Owens and the appellant would have had any significant sway over the jury. The incident happened after Mr. Owens had gone to the police and a year and a half prior to the trial. Further, Mr. Owens was appalled by the depictions he had seen and he was aware that

the appellant was facing charges for raping his daughter.

No reasonable jury would have bootstrapped such a remote incident into bias such that it would change a guilty verdict in this case.

As to the supposed underlying reason for Mr. Owens being asked to leave the appellant's apartment. The State believes it is highly unlikely that defense counsel would have elicited the testimony he was hoping to. Prior to trial, Mr. Owens indicated to the State that there was no truth to this allegation and he testified that he did not live with the appellant. (RP at 12, 14-15).

Even if defense counsel was able to elicit the testimony he hoped regarding both incidents, it would have a minor, if any, impact on the jury's decision. The State's case did not rely only on Mr. Owens testimony. Even without Mr. Owens's testimony, the State still had 5 drives admitted into evidence that were seized from the appellant's bedroom. From these drives, the State introduced 17 images that were to be considered as depictions of minors engaged in sexually explicit conduct.

The appellant lied to the police, stating that the drives were brand new. The hard drives had a layer of dust on them that made this obviously untrue. Further, unused drives would not have anything in the unallocated space because they would have no content on them to be deleted.

The appellant was computer savvy, and had forewarning that the search warrant was being obtained. Also, when the appellant was

questioned about the charges regarding images on his computer, he stated “it was technically on my computer, so if it was there, you put it there.” This indicates a knowledge that something was “technically” on the computer. Also, the forensic examination found the viewed video registry in a directory named “Brian D. Knight.” The detective also located a 2006 email sent by “Brian D. Knight” expressing his interest in young girls and pedophile web sites.

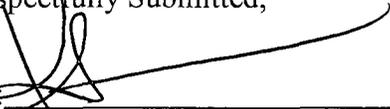
Even without Mr. Owens’s testimony there is sufficient circumstantial evidence for a jury to find the appellant guilty beyond a reasonable doubt. The appellant had actual possession of the drives and the circumstantial evidence establishes that he knew the images were contained on the drives.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm the decisions of the trial court and the verdict of the jury.

DATED this 18th day of January, 2012.

Respectfully Submitted,

By: 

KATHERINE L. SVOBODA
Senior Deputy Prosecuting Attorney
WSBA # 34097

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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 41740-5-II

v.

DECLARATION OF MAILING

BRIAN D. KNIGHT,

Appellant.

DECLARATION

I, Bandi M. Touya hereby declare as follows:

On the 18th day of January, 2012, I mailed a copy of the Brief of Respondent and Designation of Clerk's Papers and Exhibits to Lise Ellner, Attorney at Law, P. O. Box 2711, Vashon, WA 98070, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18th day of January, 2012, at Montesano, Washington.

[Signature: Bandi M. Touya]