

NO. 45248-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER EGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>City of Auburn v. Hedlund</u> 165 Wn.2d 645, 201 P.3d 315 (2009).....	10
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	13
<u>State v. Gower</u> 179 Wn.2d 851, 321 P.3d 1178 (2014).....	15
<u>State v. Lucas</u> 167 Wn. App. 100, 271 P.3d 394 (2012).....	11
<u>State v. Rosul</u> 95 Wn. App. 175, 974 P.2d 916 <u>review denied</u> , 139 Wn.2d 1006 (1999).....	9
<u>State v. Sargent</u> 40 Wn. App. 340, 698 P.2d 598 (1985) <u>reversed on other grounds</u> , 111 Wn.2d 641 (1988).....	7, 8
 <u>FEDERAL CASES</u>	
<u>Jacobellis v. Ohio</u> 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).....	13
<u>Old Chief v. United States</u> 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).....	8, 9
<u>United States v. Loughry</u> 660 F.3d 965 (7th Cir. 2011)	10
<u>United States v. Merino-Balderrama</u> 146 F.3d 758 (9th Cir. 1998)	8, 9

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>INTRODUCTION</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>ARGUMENT</u>	6
THE TRIAL COURT ERRED BY ADMITTING EXPLICIT PHOTOGRAPHS RATHER THAN ACCEPTING EGER'S STIPULATION THAT THE IMAGES DEPICTED CHILDREN ENGAGING IN SEXUALLY EXPLICIT CONDUCT.....	6
1. <u>The trial court erred under ER 403 by admitting the images</u>	7
2. <u>The images were unfairly prejudicial.</u>	10
3. <u>The error was not harmless</u>	11
E. <u>CONCLUSION</u>	16

A. ASSIGNMENT OF ERROR

The trial court violated ER 403 by admitting sexually explicit photographs of young minors.

Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion under ER 403 by admitting unfairly prejudicial images depicting young minors engaging in sexually explicit conduct?

2. In a close case with a viable defense involving possession of depictions of children engaged in sexually explicit conduct, was the admission of the images, despite appellant Christopher Eger's offer to stipulate that the images found on his and his wife's computers met the statutory definition of "sexually explicit conduct," reversible error.

B. INTRODUCTION

The State charged Eger with possessing images depicting minors engaged in sexually explicit conduct. CP 155. The charge arose after his wife called police while Eger was in Texas and showed them images she claimed came from a home desktop computer. RP 280-81, 349-52. The primary issue at trial was whether Eger knew he possessed the images. RP 981. Eger's main defense was that his wife planted the images. RP 993-1003. Not long before Eger was arrested, his wife, a Chinese native,

threatened to take their two young sons to China and vowed Eger would not see the children at all. RP 995-96. The defense was therefore plausible and the trial court committed reversible error by admitting several of the images even though Eger offered to stipulate they showed children engaged in sexually explicit conduct.

C. STATEMENT OF THE CASE

Christopher Eger and his wife, Di Eger, had two boys together. RP 744. The couple's marriage was rocky; one of Eger's friends once overheard Ms. Eger tell her husband, "You'll get the divorce, but you'll never get the kids." RP 755. Eger relayed this same statement to a police officer. RP 369. Eger later told a physician's assistant he was about to go through a divorce and that Ms. Eger threatened to take the boys to China to be raised by their grandmother. RP 740-41.

On February 4, 2010, Ms. Eger contacted police and reported she had found possible "child pornography" on the home computer. RP 276-77. The term "child pornography" was consistently used by the police, and by Eger, during the investigation of this case. RP 295-96, 299-301, 328, 389, 610-12, 655, 661-62, 686-90. The police did not ask Eger what "child pornography" meant to him. RP 296-97. Nor was Eger asked whether he put images of children engaged in "sexually explicit conduct"

on his computers. RP 300. The jury was not given an instruction defining "child pornography."

A detective visited Eger's home and Ms. Eger showed him photographs of children from a flash drive she plugged into her laptop computer. RP 278, 603-05. The photos depicted "child erotica," which the detective and another officer described as children in provocative poses with their genitalia blurred out. RP 278-79, 414, 603-04. The images did not meet the statutory definition of "sexually explicit conduct."¹ RP 278, 414.

¹ "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 for the purpose of sexual stimulation of the viewer;
- (e) Exhibition 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;
- (f) Defecation or urination for the purpose of sexual stimulation of the viewer; and

About a week later Ms. Eger called police again with the same complaint. RP 281. Ms. Eger showed an officer 16 images she claimed she found on a desktop computer in the garage. RP 349-51. She said her husband was in Texas on business at the time. RP 339. Officers testified the images qualified as "child pornography." RP 280-81, 349-52.

The officer seized the computer, flash drive and external hard drives. RP 340-42, 353-59. He provided this information to a detective, who obtained a search warrant for the computers. RP 281. The warrant authorized search of the computers and drives taken from the home as well as a laptop believed to be owned by and in the possession of Eger. CP 116-17.

The following evening, officers met Eger as he stepped out of an airport shuttle. RP 281. The officers seized Eger's laptop. RP 282-83, 605. In a statement to police, Eger said there was "child pornography" on his computers and provided the access code for the laptop. RP 283-84, 611-16. He admitted downloading "child pornography" and encrypting the files with a password. RP 328, 617-19.

(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.

Former RCW 9.68A.011(3) (2002).

Eger also told a pretrial release officer he was upset about a pretrial release order prohibiting contact with his sons. The officer told Eger the charges he faced were very serious. Eger became emotional when the officer said he had to enforce the order. While emotionally upset, Eger said, "She knows that's where I go, she knows that's what I do. I can't help it." RP 834-35.

Police searched the computers and discovered 287 images depicting "child pornography" on Eger's laptop and the home desktop. RP 418-22, 432-36, 457-75, 540-46, 563-71. An encrypted folder containing two videos depicting children engaged in "sexual acts" was created and/or last accessed on Sunday, January 24, 2010. RP 425-33. Police made still shots from the videos that the prosecutor admitted as exhibits. RP 424-36.

On January 24, Eger and his friend went on an all-day hike. RP 757-62. Eger's friend did not see Eger use a computer during the hike. RP 763. On the day police seized the desktop, Eger was in Texas.

Eger's trial defense was that the State failed to prove him guilty beyond a reasonable doubt because (1) Ms. Eger was motivated to frame Eger by her desire to have custody of their sons; (2) Ms. Eger, who was frequently on a computer, was a savvy computer user; (3) Ms. Eger was the source of the evidence that began the investigation; (4) Ms. Eger knew

her husband's password; (5) Eger was immediately arrested and engaged in a convoluted discussion about "child pornography"; and (6) police conducted a shoddy investigation by not searching the additional data storage devices. RP 992-1032.

The jury disagreed, finding Eger guilty of possessing depictions of minors engaging in sexually explicit conduct. CP 251. Eger filed a motion in arrest of judgment and for a new trial, contending the State failed to prove he possessed the images found on the home computer because he was in Texas when the computer was seized. CP 254, RP 1091-93. The trial court denied the motion. RP 1094. The court imposed a standard range sentence of 13 months incarceration. CP 259-77.

D. ARGUMENT

THE TRIAL COURT ERRED BY ADMITTING EXPLICIT PHOTOGRAPHS RATHER THAN ACCEPTING EGER'S STIPULATION THAT THE IMAGES DEPICTED CHILDREN ENGAGING IN SEXUALLY EXPLICIT CONDUCT.

Eger offered to stipulate before trial that the images showed children engaged in sexually explicit conduct. This would avoid unfairly inflaming the jury by admitting the images. RP 183-85. The prosecutor refused to accept the stipulation, stating, "I want to present the crime that this man committed, allegedly, and I think I have the right to do that." RP

185. The trial court rejected Eger's proposed stipulation, observing the prosecutor had a right to present the State's case. RP 234-36.

1. The trial court erred under ER 403 by admitting the images.

The trial court admitted 10 photographs depicting young children in sexually explicit positions. RP 431-36, 457-73, 517-22. Eger had offered to stipulate the images he possessed met the statutory definition of sexually explicit conduct, but the State refused. RP 183-86, 234-36. Admission of the images was unfairly prejudicial when weighed against its minimal probative value and constituted reversible error.

State v. Sargent² is instructive. The trial court admitted four autopsy photos to show Sargent acted with premeditation. The reviewing court found whatever marginal relevance one photo had was outweighed by the prejudicial effect of the others. The trial court also admitted two photos of the deceased's body on a waterbed. The appellate court held firefighters' testimony provided the same information gleaned from the photos. And according to the court, diagrams could have displayed the same information as the photographs in a non-prejudicial manner. 40 Wn.

² 40 Wn. App. 340, 698 P.2d 598 (1985), reversed on other grounds, 111 Wn.2d 641 (1988).

App. at 349. This Court reversed Sargent's conviction. 40 Wn. App. at 353.

Eger's offer to stipulate that the images depicted minors engaged in sexually explicit conduct is critical. The Ninth Circuit was swayed by a similar stipulation in United States v. Merino-Balderrama, 146 F.3d 758 (9th Cir. 1998). In that case, an officer during a traffic stop discovered seven films depicting children engaged in explicit sexual conduct. Each film was boxed separately, and the cover of each box bore photos of children engaged in sexual conduct. 146 F.3d at 760.

The accused offered to stipulate that the films were child pornography and had traveled in interstate commerce. The offer was a concession and thus conclusive of two elements of the charged offense. 146 F.3d at 762 (citing Old Chief v. United States, 519 U.S. 172, 186, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), for proposition that offered admission is conclusive evidence of element).³ Merino-Balderrama, 146 F.3d at 762.

³ The Court in Old Chief held,

If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

The prosecution was thus left only to prove the accused knew the materials showed minors engaged in sexually explicit conduct. 146 F.3d at 761.⁴ The court held the films were less probative of scienter than were the box covers because there was no evidence the accused ever saw the images on the films. 146 F.3d at 762. Without direct or circumstantial evidence of scienter, the films were less probative of that element than were their covers, which the accused did see. And the films were likely more unfairly prejudicial than the boxes. Showing the films was therefore error. 146 F.3d at 762-63.

The same is true here. Depriving the State of the photographs as evidence of knowledge would not have prejudiced the State. See Merino-Balderrama, 146 F.3d at 762-63 n.5 (articulating examples of how the State could show the required scienter). Eger admitted the officers would find "child pornography" on the computers. The trial court erred by admitting the photographs.

This demonstrates the State's purpose for seeking admission of the evidence was to unfairly turn the jury against Eger and to invite it to

519 U.S. at 182-83.

⁴ Eger's charge contained the same knowledge element. CP 248 (instruction 16, "to-convict" instruction); State v. Rosul, 95 Wn. App. 175, 184, 974 P.2d 916, review denied, 139 Wn.2d 1006 (1999).

irrationally reach a verdict based on emotion rather than reasoned judgment. This is the very definition of prejudice under ER 403. See City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) ("[U]nfair prejudice is commonly caused by emotion."). Under ER 403, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The photographic evidence was unfairly prejudicial here.

2. *The images were unfairly prejudicial.*

Graphic evidence of children depicted of engaging in sexually explicit conduct can cause disgust in a jury. See United States v. Loughry, 660 F.3d 965, 974 (7th Cir. 2011) ("The 'hard core' video excerpts shown to the jury in this case displayed men raping and ejaculating in the genitals of prepubescent girls, as well as young girls engaging in sexual acts with each other. Such displays have a strong tendency to produce intense disgust.").

To add to the unfair prejudice, one of the officers testified all of the images he reviewed depicted prepubescent girls and did not include possible teenagers. RP 568-69. And over defense objection that the exhibits speak for themselves, the trial court permitted testimony that Exhibit 4 "shows a vaginal area of a young girl with a penis inserted into

the vaginal area." RP 519. Jurors also learned Exhibit 2 says, "Jack off to Baby J," and Exhibit 6 shows a very young girl "perched on the penis of a white male" RP 519.

Another officer described Exhibit 10 as depicting a prepubescent nude female with an adult male hand touching her vagina, and Exhibit 11 as depicting a child with a penis in her mouth and what appears to be ejaculate on her face. RP 457-61. Exhibit 12, according to the officer, showed a three- to five-year-old girl with a penis in her vagina. Exhibit 13 depicted a young girl on her hands and knees with her buttocks facing the camera with her vagina and anus exposed. RP 466-67. Another girl of the same age was depicted in exhibit 14 lying on her back with an adult male hand touching her vagina. Exhibit 16 was a photo of a young girl with a penis in front of her face, while exhibit 17 showed a girl leaning back with her legs spread, pulling her vagina open. RP 471-75. The court thus erred by admitting the unfairly inflammatory evidence.

3. *The error was not harmless.*

An evidentiary error is not harmless if within reasonable probability, the error materially affected the verdict. State v. Lucas, 167 Wn. App. 100, 111, 271 P.3d 394 (2012). The court's error was not harmless in Eger's case.

The defense that Eger's wife planted the images was plausible. Ms. Eger had access to the computers and knew Eger's password. Furthermore, Ms. Eger did not show the officers where she had obtained the images she showed them. Instead, she stored the images on a flash drive that she plugged into her own laptop. RP 347-49.

The lead detective acknowledged some of the cases she had investigated arose from underlying domestic strife. RP 304. Domestic problems existed in the Eger home. Eger told the detective his wife once left him and moved to China for a year. RP 312-13. A physician's assistant testified he met with Eger in early January 2010, and discussed "anxiety and depression symptoms with relation to marital problems." RP 740. Eger feared he was about to go through dissolution proceedings. And Ms. Eger threatened to have their two boys sent to China to live with her mother. RP 740-41.

Eger's counsel emphasized his client's marital discord and resulting anxiety and depression, including his wife's stay in China alone for one year and her threat that Eger would never get his children after a divorce. RP 993-94. A reasonable jury could therefore conclude Ms. Eger's expressed desire to get custody of the children after a divorce could have motivated her to plant the evidence.

Eger anticipates the State will emphasize the statements he made about "child pornography" after his arrest. The lead detective, however, never asked what Eger meant by the term and admitted child porn can mean different things to different people. RP 295-98. As Justice Potter Stewart famously said about the term "hard-core pornography," "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring) (emphasis added).

Washington courts have found the term "child pornography" unconstitutionally vague. In State v. Bahl, 164 Wn.2d 739, 761-62, 193 P.3d 678 (2008), the court held a community custody condition prohibiting Bahl from accessing or possessing pornographic materials was unconstitutionally vague. In State v. Reep, 161 Wn.2d 808, 167 P.3d 1156 (2007), a search warrant authorizing seizure of any evidence supporting the suspected criminal activity of "child sex" "allows the officer unbridled discretion to decide what things to seize and most critically, permits the seizure of items which may be constitutionally protected, such as

pornographic drawings of children." Id. at 815. The warrant thus failed for insufficient particularity. Id.

If in these cases *warrants* – which are reviewed by a judge schooled in the law – are insufficiently particular if they authorize seizure of images depicting "child sex" or "erotica,"⁵ then surely those terms are at least as vague and standardless here. Eger also said he downloaded things that were "illegal," but was not asked what he meant by "illegal." RP 330. He mentioned a specific website that contained what he believed was "child pornography." He explained he considered "child pornography" to involve children up to age 12, which he was not interested in. RP 298-99.

The detective did not ask Eger if he put images of children involved in *sexually explicit conduct* on his computer. RP 300-01, 330. Eger explained during the interview that when he downloaded adult pornography he would see thumbnails of what he thought might be child pornography. RP 301. A reasonable juror could have concluded Eger was

⁵ The "erotica," according to the lead detective, consisted of images of girls aged about 12 years old to 14 years old in provocative poses. RP 278. The lead detective testified erotica does not fall within the statute's prohibition on possessing images of minors engaged in sexually explicit conduct. RP 278-79. "Erotica, like art, is found in the eye of the beholder[.]" Bahl, 164 Wn.2d at 764.

confused by the officers' legal terminology and did not know what the officer's meant by "child pornography" and did not know the definition of sexually explicit conduct. Indeed, like his wife, Eger may have believed possession of child erotica was illegal and constituted "pornography."

Eger's statement to the pretrial release officer was even more vague. Eger was upset about a release order prohibiting contact with his sons. The officer emphasized that he faced very serious charges. Eger became emotional when the officer said he had to enforce the order. While emotionally upset, Eger said, "She knows that's where I go, she knows that's what I do. I can't help it. RP 834-35. Without further clarification, which was not forthcoming, concluding Eger was admitting he viewed children engaging in sexually explicit conduct would be pure speculation. The statement adds little to nothing to the State's case.

Here there is a reasonable probability the trial court's erroneous admission of prejudicial evidence affected the verdict. State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). The trial court's admission of the inflammatory images was not harmless. This Court should reverse Eger's conviction.

E. CONCLUSION

This Court should reverse Eger's conviction and remand for a new trial.

DATED this 5 day of June, 2013.

Respectfully submitted,

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)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] CHRISTOPHER EAGER
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SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JUNE 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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