

NO. 73525-0-I

FILED  
4-25-16  
Court of Appeals  
Division I  
State of Washington

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

STANLEY SADLER,

Appellant.

---

---

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

The Honorable Theresa Doyle, Judge

---

---

BRIEF OF APPELLANT

---

---

JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Substantive Facts</u> .....	3
a. <i>Sadler placed an online ad looking for a sex partner.</i> .....	3
b. <i>A police officer responded, claiming to be a 15-year- old prostitute.</i> .....	4
c. <i>Sadler suspected a fake and tried to verify his correspondent's identity.</i> .....	5
d. <i>A young female officer called Sadler to assuage his suspicions and maintain the ruse.</i> .....	7
f. <i>Sadler refused to pay for sex or break the law.</i> .....	9
g. <i>To maintain the ruse, Holand called Sadler, posing as a satisfied customer.</i> .....	11
h. <i>The morning of the meeting, Sadler remained suspicious.</i>	12
j. <i>At trial, Sadler offered past emails where he tried to identify his correspondent, engage in role-play with an adult, and possibly form a long-term relationship.</i> .....	15
k. <i>Holand testified role-players stop communicating shortly after he claims to be 15 years old.</i> .....	16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
C. <u>ARGUMENT</u> .....	17
1. SADLER’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE COURT EXCLUDED CRUCIAL EVIDENCE OF HIS INTENT. ....	17
a. <u>Absent a Compelling State Interest, the Constitution Guarantees to Accused Persons the Right to Present All Relevant Evidence in Their Defense.</u> .....	18
b. <u>Sadler’s Use of Nearly Identical Ads to Pursue Relationships with Adults Is Relevant to His Intent.</u> .....	19
c. <u>The Court Failed to Identify a Compelling Interest Requiring Exclusion or Show How the Emails Would Disrupt the Fairness of the Trial.</u> .....	24
d. <u>The Violation of Sadler’s Right to Present a Defense Requires Reversal of His Convictions.</u> .....	28
e. <u>Alternatively, the Court Abused Its Discretion in Excluding Essential Defense Evidence.</u> .....	29
2. THE COURT ERRED IN ADMITTING THE OFFICER’S TESTIMONY AMOUNTING TO AN OPINION ON GUILT. ....	31
3. PROSECUTOR MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED SADLER OF A FAIR TRIAL....	35
4. CUMULATIVE ERROR DEPRIVED SADLER OF A FAIR TRIAL.....	40
5. ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR AND COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES ARE THE SAME CRIMINAL CONDUCT. ....	41

**TABLE OF AUTHORITIES (CONT'D)**

	Page
6. THE COURT ERRED IN IMPOSING UNAUTHORIZED AND UNCONSTITUTIONAL CONDITIONS OF COMMUNITY CUSTODY.....	44
a. <u>The Ban on Internet Use Is Not Crime Related and Violates Sadler’s First Amendment Rights</u> .....	45
b. <u>The Ban on Sexual Contact Violates Sadler’s Constitutional Rights to Freedom of Intimate Association</u> .....	47
7. APPEAL COSTS SHOULD NOT BE IMPOSED.....	49
D. <u>CONCLUSION</u> .....	50

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>Carson v. Fine</u> 123 Wn.2d 206, 867 P.2d 610 (1994).....	29
<u>Fenimore v. Donald M. Drake Constr. Co.</u> 87 Wn.2d 85, 549 P.2d 483 (1976).....	20
<u>In re Det. of Pouncy</u> 168 Wn.2d 382, 229 P.3d 678 (2010).....	34
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	35, 38, 39
<u>In re Pers. Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	45
<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	44
<u>Kappelman v. Lutz</u> 167 Wn.2d 1, 217 P.3d 286 (2009).....	19
<u>Slattery v. City of Seattle</u> 169 Wn. 144, 13 P.2d 464 (1932).....	38
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	49
<u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 (1990).....	43
<u>State v. Anderson</u> 92 Wn. App. 54, 960 P.2d 975 (1998).....	41
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007).....	45

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Autrey</u> 136 Wn. App. 460, 150 P.3d 580 (2006).....	47
<u>State v. Babcock</u> 145 Wn. App. 157, 185 P.3d 1213 (2008).....	39
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	46, 49
<u>State v. Bautista–Caldera</u> 56 Wn. App. 186, 783 P.2d 116 (1989).....	36
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	24
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	50
<u>State v. Britton</u> 27 Wash.2d 336, 178 P.2d 341 (1947) .....	34
<u>State v. Burkins</u> 94 Wn. App. 677, 973 P.2d 15 (1999).....	21
<u>State v. Burri</u> 87 Wn.2d 175, 550 P.2d 507 (1976).....	29
<u>State v. Buttry</u> 199 Wn. 228, 90 P.2d 1026 (1939).....	39
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	41
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	19, 24
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	32

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Dent</u> 123 Wn.2d 467, 869 P.2d 39 (1994).....	31
<u>State v. DeVincentis</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	21
<u>State v. Dolen</u> 83 Wn. App. 361, 921 P.2d 590 (1996).....	41
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	38, 39
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	21
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	9, 49
<u>State v. Fuller</u> 169 Wn. App. 797, 282 P.3d 126 (2012) <u>rev. denied</u> , 176 Wn.2d 1006 (2013).....	36
<u>State v. Grantham</u> 84 Wn. App. 854, 932 P.2d 657 (1997).....	42
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	20, 35
<u>State v. Gresham</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	21, 22
<u>State v. Gunderson</u> 181 Wn.2d 916, 337 P.3d 1090 (2014).....	30
<u>State v. Hecht</u> 179 Wn. App. 497, 319 P.3d 836 (2014).....	28
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	19, 24

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Jasper</u> 174 Wn.2d 96, 271 P.3d 876 (2012).....	29
<u>State v. Jones</u> 144 Wn. App. 284, 183 P.3d 307 (2008).....	18, 35
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	18, 27, 29, 40
<u>State v. Keller</u> 98 Wn. App. 381, 990 P.2d 423 (1999).....	22
<u>State v. Kendrick</u> 47 Wn. App. 620, 736 P.2d 1079 (1987).....	30
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	26
<u>State v. Lessley</u> 118 Wn.2d 773, 827 P.2d 996 (1992).....	43
<u>State v. Lough</u> 70 Wn. App. 302, 853 P.2d 920 (1993).....	21, 30
<u>State v. Maupin</u> 128 Wn. 2d 918, 913 P.2d 808 (1996).....	29
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	32, 33
<u>State v. Murray</u> 118 Wn. App. 518, 77 P.3d 1188 (2003).....	45
<u>State v. Paulson</u> 131 Wn. App. 579, 128 P.3d 133 (2006).....	44
<u>State v. Perez-Valdez</u> 172 Wn.2d 808, 265 P.3d 853 (2011).....	20

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Peterson</u> 2 Wn. App. 464, 469 P.2d 980 (1970).....	39
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984).....	26
<u>State v. Quaale</u> 182 Wn.2d 191, 340 P.3d 213 (2014).....	32
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	47
<u>State v. Riley</u> 121 Wn.2d 22, 846 P.2d 1365 (1993).....	45
<u>State v. Rose</u> 62 Wn.2d 309, 382 P.2d 513 (1963).....	39
<u>State v. Sexsmith</u> 138 Wn. App. 497, 157 P.3d 901 (2007).....	22
<u>State v. Starbuck</u> 189 Wn. App. 740, 355 P.3d 1167 (2015).....	29
<u>State v. Stith</u> 71 Wn. App. 14, 856 P.2d 415 (1993).....	38
<u>State v. Sutherby</u> 165 Wn.2d 870, 204 P.3d 916 (2009).....	39
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	35, 37
<u>State v. Tili</u> 139 Wn.2d 107, 985 P.2d 365 (1999).....	41, 42, 43
<u>State v. Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	45

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Wade</u> 98 Wn. App. 328, 989 P.2d 576 (1999).....	21
<u>State v. Walden</u> 69 Wn. App. 183, 847 P.2d 956 (1993).....	42
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	39
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	35
<u>State v. Williams</u> 135 Wn.2d 365, 957 P.2d 216 (1998).....	41, 42
<u>State v. Williams</u> 176 Wn. App. 138, 307 P.3d 819 (2013).....	41
<u>State v. Young</u> 48 Wn. App. 406, 739 P.2d 1170 (1987).....	25
 <u>FEDERAL CASES</u>	
<u>Brown v. Myers</u> 137 F.3d 1154 (9th Cir. 1998) .....	27, 30
<u>Bruton v. United States</u> 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).....	31
<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	18
<u>Dunn v. United States</u> 307 F.2d 883 (5th Cir. 1962) .....	40
<u>Lawrence v. Texas</u> 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).....	48

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Parle v. Runnels</u> 505 F.3d 922 (9th Cir. 2007) .....	41
<u>Rock v. Arkansas</u> 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	19
<u>Thomas v. Chappell</u> 678 F.3d 1086 (9th Cir. 2012) <u>cert. denied</u> , 133 S. Ct. 1239 (2013) .....	27
<u>United States v. Cherer</u> 513 F.3d 1150(9th Cir. 2008) .....	23
<u>United States v. Dennis</u> 625 F.2d 782 (8th Cir. 1980) .....	25
<u>United States v. Gaind</u> 31 F.3d 73 (2d Cir. 1994) .....	26
<u>United States v. Wasman</u> 641 F.2d 326 (5th Cir.1981) .....	25
<u>RULES, STATUES AND AUTHORITIES</u>	
2 John H. Wigmore, <u>Evidence</u> § 240, at 42 (1979).....	21
ER 401 .....	19, 23
ER 403 .....	25, 30
ER 404 .....	16, 21, 22, 23, 28, 30
Karl B. Tegland <u>Washington Practice, Evidence</u> § 105 (2d ed.1982).....	25
M. Graham <u>Federal Evidence</u> § 403.1 (2d ed. 1986) .....	30

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RAP 14.....	49
RAP 15.2.....	50
RCW 9.68A.090 .....	20
RCW 9.68A.100 .....	20
RCW 9.94A.589 .....	41, 42
RCW 9.94A.703 .....	47
RCW 9A.28.020 .....	20
RCW 10.73.160 .....	49
Sentencing Reform Act.....	45
U.S. Const. Amend. I.....	45, 46, 47
U.S. Const. Amend. V .....	18
U.S. Const. Amend. VI.....	18
U.S. Const. Amend. XIV .....	18, 40
Const. art. I, § 3.....	40
Const. art. I, § 5.....	45

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to present a defense by excluding emails showing intent and common scheme or plan.

2. The court erred in admitting an implicit opinion on guilt by a police witness.

3. Appellant's right to a fair trial was violated by prosecutorial misconduct during closing argument.

4. Cumulative error denied appellant a fair trial.

5. The court erred in calculating appellant's offender score because his convictions for attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes are the same criminal conduct.

6. The court erred in imposing a community custody condition prohibiting Internet use without the treatment provider's approval.

7. The court erred in imposing a community custody condition prohibiting sexual contact without the treatment provider's approval.

Issues Pertaining to Assignments of Error

1. Whether excluding appellant's prior emails showing a common scheme or plan to form adult sexual relationships violated his constitutional right to present a defense to charges of attempted

commercial sexual abuse of a minor and communication with a minor for immoral purposes?

2. Whether the detective's testimony was an improper opinion on guilt when appellant testified his only intent was fantasy role play but the detective testified that people who are just playing a game stop responding far sooner to messages claiming to be from a 15-year-old?

3. Whether the prosecutor committed misconduct by appealing to jurors' emotions and disparaging defense counsel when he told jurors they should be worried that appellant was concerned for falsely accused men instead of child victims; told jurors the law does not wait until appellant actually has sex with a child before it's a crime; predicted ridiculous arguments by defense counsel that would describe a "parallel univers", and told the jury, "he's hoping he's smarter than you."

4. Whether the cumulative effects of these trial errors deprived appellant of a fair trial?

5. Whether appellant's convictions for attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes share the same intent and thus are the same criminal conduct for sentencing purposes?

6. Whether the court exceeded its authority and violated appellant's constitutional rights when appellant is not amenable to

treatment but the community custody conditions ban Internet use and sexual contact without a treatment provider's approval?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Stanley Scott Sadler with attempted commercial sexual abuse of a minor, communication with a minor for immoral purposes, and tampering with evidence. CP 288-89. The jury did not reach a verdict on the tampering charge, but found Sadler guilty on the other two charges. CP 333-36. Notice of appeal was timely filed. CP 434.

2. Substantive Facts

a. *Sadler placed an online ad looking for a sex partner.*

Sadler is a 57-year-old man who turned to the Internet to find a sex partner or possible long-term relationship. 7RP<sup>1</sup> 73, 111; Ex. 4. His online ad stated he was "open to . . . long term livin if you want to share a child," and included graphic sexual content. 5RP 39; Ex. 4. He described his desired age as "young" because he is open to all ages, and almost everyone online is younger than he. 5RP 38-39; 7RP 73, 79-80, 99; Ex. 4.

---

<sup>1</sup> There are 13 volumes of Verbatim Report of Proceedings, referenced as follows: 1RP – Dec. 5, 2014; 2RP – Feb. 23, 2015; 3RP – Feb. 25, 2015; 4RP – Mar. 2, 2015 (opening statements); 5RP – Mar. 2, 2015; 6RP – Mar. 3, 2015; 7RP – Mar. 4, 2015; 8RP – Mar. 5, 2015; 9RP – Mar. 9, 2015; 10RP – Mar. 10, 2015; 11RP – Apr. 17, 2015; 12RP – May 1, 2015; 13RP – May 7, 2015.

He placed an ad on the website known as Craigslist, in a section labeled “casual encounters.” 8RP 78. This section is aimed at casual sexual encounters and is host to a significant amount of prostitution. 8RP 78-79. The site is not lawfully accessed by anyone under 18. 5RP 24-25; Ex. 3.

Sadler was wary in dealing with responses to his ad, knowing that people often present themselves falsely online. 7RP 80. He was aware there were minors on Craigslist, despite the age limit. 8RP 98. He was also aware that many people online engage in role-play fantasies, including scenarios involving minors, although persons looking for role-play generally advertise for that expressly. 8RP 28, 106.

*b. A police officer responded, claiming to be a 15-year-old prostitute.*

Seattle Police Detective Tye Holand responded, hoping to catch someone willing to pay for sex with a minor. 5RP 11, 18, 26. His user name was “sexyjen16,” and in his message he claimed to be “on summer break and looking to make a little \$\$\$\$” and “Very young, fun, and discreet.” 5RP 42; Ex. 5 at 1. Sadler responded that he liked young and could be “generous for the right situation.” 5RP 48; Ex. 5 at 3. He sent photographs of himself, including one of his penis. 5RP 49; Ex. 5 at 2-3.

Holand told Sadler, “I’m 15” and sent a photograph of an unknown, young-looking woman in a bikini. 5RP 49-50; Ex. 5 at 4. Sadler responded

by discussing various sexual acts and asked, “You have time tonight?” 5RP 50-51; Ex. 5 at 6. Holand told Sadler, “Ur the one paying. I don’t care,” and “I’m free on Saturday.” 5RP 51; Ex. 5 at 6-7.

*c. Sadler suspected a fake and tried to verify his correspondent’s identity.*

Sadler agreed to meet in Federal Way, and told Holand, “I know you’re just doing age play with the 15 thing . . . because that is below the age of consent and not legal and you have to be over 18 to be on this site. So tell me you’re really 18, k? Necessary if we’re going to go for this.” 5RP 52; Ex. 5 at 7-8. A few minutes later, Sadler told Holand he knew the photograph was a fake because he had found it on another website. 5RP 52; Ex. 5 at 8.

Holand responded, “I’m really 15,” and sent a “real” photograph of Tukwila Police Officer Jamie Suedel, then 27 years old. 5RP 53; 6RP 42; Ex. 5 at 10. When Sadler suggested, “you can do better,” Holand sent a photograph of Suedel on vacation in a bikini top. 5RP 54; Ex. 5 at 11. She was holding a sign that read “40,” and the accompanying message read, “Guessing ur age.” 5RP 54-55; Ex. 5 at 11.

For Sadler, these messages were another sign his correspondent was a fake. 7RP 125-26. He estimated Suedel’s age as mid-twenties. 7RP 122;

8RP 66-67. And the guess of his age was nonsensical, since Sadler's ad said he was 50ish. 5RP 39, 7RP 125-26; Ex. 4.

Sadler requested nude photos in order to verify the person was real. 8RP 6-7. Exhibits corroborated that he had done so on other occasions. 7RP 103-05; Exs. 46, 47. He emailed, "you know you can do MUCH better. . . . Now really show me. We'll be fucking tomorrow so this is nothing." 5RP 55; Ex. 5 at 12. Holand refused and sent another photo of Suedel. 5RP 55; Ex. 5 at 12. Sadler then asked for a "prove yourself pic," telling Holland to, "tell me you're over 18, and . . . send me one nude, with you pointing to your bare pussy. . . ." 5RP 55-56; Ex. 5 at 12-13.

Holand responded, "I'm not lying to u. I'm 15 years old, I'm a sophomore in high school, and a cheerleader. I've done this before and never had a problem." 5RP 56-57; Ex. 5 at 14. He then offered oral, anal, and vaginal sex and told Sadler the price depended on what, specifically, he wanted to do. 5RP 57; Ex. 5 at 15.

Holand also asked Sadler, "ur not the cops, are you?" 5RP 57; Ex. 5 at 15. Sadler responded, "I'm not the cops... hell no. I'm worried that you are... lol." 5RP 57; Ex. 5 at 15. Holand told him, "Last time I checked, 15 year old cheerleader prostitutes are on the do-not-hire list LOL. No way am I cops." 5RP 57; Ex. 5 at 15. Sadler replied, "[T]hat is exactly what a cop would say." 5RP 57; Ex. 5 at 15.

Sadler also asked, “Ever seen ‘To catch a predator’. Scary shit. Can you prove you’re for real and legit?” 5RP 57; Ex. 5 at 15. He testified that “To Catch a Predator” is a television show aimed at catching men trying to have sex with minors. 8RP 11. He testified the program is frightening because a set-up such as the show uses can put a person at risk when the person is only trying to verify an online correspondent’s identity. 8RP 129. Sadler also asked Holand, “How much for everything? Or break each down for me. And are you willing to get freaky with this at all, Bondage play? Rough sex? . . . If so, how much?” 5RP 58; Ex. 5 at 17.

At this point, Sadler began requesting that the correspondence be removed from Craigslist’s message system because “This leaves a record.” 5RP 58; Ex. 5 at 18. He asked for a phone call. 5RP 58; Ex. 5 at 18.

*d. A young female officer called Sadler to assuage his suspicions and maintain the ruse.*

Suedel use a blocked number to call Sadler. 5RP 61-62. She testified she told him her prices for various sex acts, and Sadler told her, “sounds good.” 6RP 17. She claimed he balked at paying an extra \$50 for bondage and domination activities, so she agreed to include that in the original \$150 if he would be a repeat customer. 6RP 19. She claimed she then clarified \$150 for sex, and he said, “Yes.” 6RP 19. Suedel testified she

told Sadler she was 15 but did not disguise her voice. 6RP 21, 42. She claimed he did not mention her age. 6RP 24, 28.

After the phone call, Holand wrote to Sadler, "I hope u believe me now." 5RP 64; Ex. 5 at 22. Sadler replied, "I do... & thank u." 6RP 64; Ex. 5 at 22. Holand then inquired about bondage, so Sadler explained in some detail. 6RP 64-66; Ex. 5 at 23-25. Sadler also wrote, "Already made the pull for the biz end. Have it in hand, by the way. Too bad you can't get it today." 6RP 66; Ex. 5 at 26. When Holand professed confusion, Sadler explained, "cash machine." 6RP 66; Ex. 5 at 27.

*e. Sadler tried to verify that his correspondent was an adult engaging in "age-play."*

Emails crossed as Holand and Sadler wrote at the same time. Sadler wrote, "I'm SO relieved that you're actually 18. No worries now." 5RP 67; Ex. 5 at 29. Holand asked, "So what did we agree on. \$200 for everything? Oral regular sex and anal along with the bondage stuff." 5RP 67; Ex. 5 at 29. For Sadler, this was yet another sign that Holand was a fake; the person sending the emails was unaware of the phone agreement to pay \$150, not \$200. 8RP 26.

Holand then replied via an outside email account, "I didnt understand the last email u sent. I'm 15. did u just say that in case someone from CL is watching?" 5RP 68; Ex. 5 at 1. Sadler responded, "I know you're just doing

the ageplay thing. It's sexy and a big tur non. Thanks for telling me earlier that you're really 18." 5RP 68; Ex. 5 at 1. After realizing their messages were no longer on Craigslist, Sadler said, "thank god we're out of there. Yeah... CL works with law enforcement. You don't need to get caught up in that." 5RP 70; Ex. 5 at 1. Holand then said, "so is that why u said I was 18." 5RP 70; Ex. 5 at 1. Sadler replied, "well...since you're EIGHTEEN...I'm safe too. Thanks for making sure that was clear. ☺ But you an ageplay 15 all day long if you want. Love that." 5RP 70; Ex. 5 at 2. Holand insisted, "OK I'm not following. I'm not age playing. I've been truthfully with u." 5RP 70; Ex. 5 at 2. Sadler's response was, "I know you've been truthful. Thanks for making sure I know that you're 18... I really appreciate you looking out for me there." 5RP 70; Ex. 5 at 2.

Next, the two agreed to meet at a restaurant near the mall; Sadler said he would be in a black Ford Escort. 5RP 71-72; Ex. 5 at 2-3. He also referenced a non-existent text message to try to verify that two different people were involved. 5RP 71; 6RP 42; 8RP 33-34; Ex. 5 at 2-3.

*f. Sadler refused to pay for sex or break the law.*

Sadler then expressly refused to pay for sex, offered a \$150 gift, and requested confirmation that his correspondent was 18:

Ok... for the record here (go with me on this)... I do not pay for sex. But I would be happy to gift you the 150 you need instead. That way our get together is just between two

consenting adults. And tell me one more time that you are 18 years old, right? Would you please type it for me? Yeah... I'm paranoid... live with it ;)

5RP 72; Ex. 5 at 3. Holand responded, "I told u I am 15 for real. Do u know age of consent is 16 not 18," and, "U still don't trust me?" 5RP 72; Ex. 5 at 3. Sadler said it was not about trust, pointing out, "If you're 15 my whole life is in jeopardy," and "I can't risk it." 5RP 72; Ex. 5 at 4. He told her, "If you're just pushing the ageplay... and declare to me that you're 18... It's all good. I believe you. You look 18 in your pics." 5RP 72; Ex. 5 at 4. He asked again, "need you to declare you're 18 for me and the rest is just ageplay." 5RP 73; Ex. 5 at 4. "If you can't," he said, "I'm sorry." 5RP 73; Ex. 5 at 4.

Holand repeated that he was 15, a sophomore in high school, and a cheerleader and "I'm not age playing shit." 5RP 74; Ex. 5 at 4. He offered to send an "email that is lying to u telling u I'm 16 or 18 or 55 or whatever." 5RP 74; Ex. 5 at 4. Sadler responded, "Now that you said all that... you put me in the position where I risk at least 5 years in prison and a life time of registering as a sex offender. How do you think I should feel about that kind of risk? Seriously?" 5RP 74; Ex. 5 at 4. He told her, "You put my whole life in jeopardy when you didn't have to." 5RP 74; Ex. 5 at 5.

Holand answered, "I'm consenting and 18. You have what you want." 5RP 74; Ex. 5 at 5. Sadler then suggested another approach: "For

*the record* – I will meet you tomorrow with 150 gift. ... I'm not agreeing to have sex with you. I'll pick you up at noon and we can just go get to know each other from there. Hang out. No sex involved. No laws broken.”

5RP 74-75; Ex. 5 at 5.

Holand, however, refused to accept a gift or a platonic meeting. 5RP 75-76; Ex. 5 at 5-6. Sadler testified this was ridiculous and another sign that Holand was not who he claimed to be. 8RP 41. Sadler explained:

All we have to do is show up with no stress and talk. I'm not trying to piss you off or come across as some flake. I'm much more than that. Smarter than that . . . . If you don't get it, take your chances with some CL moron. I hope you want to meet tomorrow totally relaxed... but its really up to you.

5RP 76; Ex. 5 at 6.

*g. To maintain the ruse, Holand called Sadler, posing as a satisfied customer.*

Holand then called Sadler himself. 5RP 77-78. He claimed to be a former customer of “Jen” and told Sadler she was really 15 and he had been with her several times without a problem. 5RP 78-79. After this conversation, Sadler acknowledged via email, “I have to give you super credibility on that move. I'll be there at noon tomorrow. Be ready. No more discussion about anything necessary. Agreed?” 5RP 80; Ex. 5 at 6. He told Holand, “I promise you that you won't be disappointed. Noon, yes or no?” 5RP 80; Ex. 5 at 6.

Holand responded, “Ok. So \$150 for full service all holes right plus the fun stuff ur going to devirginize me on right. Never did the tie up stuff.” 5RP 81; Ex. 5 at 6. Sadler answered, “I aim to please girl and appreciate what you did. . . . I’ll see you at noon.” 5RP 81; Ex. 5 at 6-7.

Sadler also offered, “You want to see a pic of what I’m talking about? Or wait and be surprised?” 5RP 81; Ex. 5 at 7. Holand answered, “if you have pics of what I can look forward to that would be great. Ur tool and the bondage stuff that u are gonna do.” 5RP 82; Ex. 5 at 7.

Sadler sent the requested photographs: a nightstand with handcuffs, some rope, a shot glass, a bottle of whiskey, and his “play area,” “Jen’s fuck dungeon.” 5RP 82-83, 85; Ex. 5 at 9, 11. He described his taste for “BDSM, age play, force play, etc.,” and asked, “What are your limits?” 5RP 83-84; Ex. 5 at 10. Holand told Sadler he did not want his face bruised but “other than that I want to experience everything.” 5RP 84-85; Ex. 5 at 11. To Sadler, this was another red flag because the comment seemed far bolder than the person in the phone call. 8RP 60-61. Sadler then sent photographs of naked women in restraints having sex. 5RP 85-86; Ex. 5 at 12.

*h. The morning of the meeting, Sadler remained suspicious.*

The next morning, Sadler demanded, “Call me now... no emails.” 5RP 89; Ex. 5 at 1. Suedel called again. 5RP 89. She testified Sadler

sounded nervous and asked why she kept claiming to be 15. 6RP 29. She said she wanted him to know she was inexperienced. 6RP 29. When he told her that was something a cop would say, she said she did not know how the cops worked. 6RP 30. She claimed he seemed reassured. 6RP 30.

Holand emailed to ask, “U calmed down now?” Sadler again expressly refused to pay for sex or even to have sex, especially with someone underage:

So I am NOT agreeing to have sex. Or PAY for sex. Especially with someone underage. I am NOT going to break any laws. I have never been with an underage person. You contacted me on an 18+ only website where I was looking for ‘young’... but obviously that meant 18ish+ given the requirements of Craigslist and my own adult post. I haven’t believed you were really 15 at any time or I wouldn’t have continued contact. You act, type, and communicate at an adult level. You even look older (18+ and absolutely beautiful) in your pics. I’m very attracted to the *woman* that contacted me... yes... as an adult... and so I will agree to meet with you... and we can talk.

5RP 90; Ex. 5 at 1. Holand threatened to call off the meeting if Sadler did not agree to have sex, telling him, “If u can assure me I won’t be disappointed then I will come.” 5RP 93-94; Ex. 5 at 2. Sadler answered, “See you there in about 15 mins.” 5RP 94; Ex. 5 at 3.

Sadler testified he did not see his roommate before he left that morning. 8RP 73. However, the roommate testified Sadler asked him to call before coming home because he was going to have a date over. 7RP 28.

Sadler's son recalled his father intended to have dates over to use the room in the basement, but did not recall any specific plan. 6RP 123.

Sadler and Suedel spoke once more by phone while he was driving. 8RP 71. Sadler told her he just wanted to meet her, and then they could see how things went. 6RP 40-41.

*i. Sadler was arrested at the arranged meeting place.*

Sadler arrived at the mall in a blue Honda and was arrested shortly after walking into, and then out of, the restaurant where he agreed to meet Holand. 6RP 51-53, 61-63; 8RP 92. Sadler told the arresting officer, "I did not make any specific deals to do anything. I was just talking to her." 6RP 56. Police searched his wallet and found identification and \$216 in cash. 6RP 56. Sadler testified he needed this money for bills and did not intend to give it away. 8RP 75. During a formal interview, Sadler again denied agreeing to pay for sex. 5RP 127-28. He said he believed the woman in the photographs he received was between 22 and 26 years old. 8RP 134.

Officers executed a search warrant, seized Sadler's computers, and photographed the remnants of the "play room" in his basement. 5RP 112-16; Ex. 11. Sadler had asked his son to dismantle the room. 8RP 52-55. He believed this was lawful because police told him it was not illegal to have the room or to engage in this type of sex. 5RP 125-27; 8RP 52.

The computers revealed Sadler had, at some point, searched online for Washington laws about child molestation in the third degree and had used a private setting on his Internet browser to do so. 7RP 52, 55. No evidence showed when the search was done, but Sadler said it might have been in response to his concern about his daughter's boyfriend. 7RP 62; 8RP 2-3.

- j. *At trial, Sadler offered past emails where he tried to identify his correspondent, engage in role-play with an adult, and possibly form a long-term relationship.*

Sadler testified he never believed he was dealing with a 15-year-old and never intended to pay for sex. 8RP 76. His entire interaction with Holand was an attempt to verify who he was dealing with, in hopes of meeting the attractive 26 year old in the photograph. 8RP 20-21, 38-39. Sadler thought she might be just very committed to role-play. 8RP 8-15.

The court admitted some past emails showing Sadler's attempts to ferret out online fraud. 6RP 129-30, 132, 143, 154; 7RP 85-108; Exs. 36-47, 53. The ads leading to these prior emails also expressed a desire to meet someone "18ish" or "young." 7RP 99; Ex. 43. In one admitted email, he told a 37-year-old woman she was "young enough." 7RP 98-99; Ex. 40.

However, the court excluded past e-mails showing Sadler was seeking a long-term relationship or children and a family. 6RP 129-30, 132, 143. The court deemed these messages irrelevant and misleading. 6RP 129-

30, 132, 143. Sadler argued they were relevant to his intent and showed a common scheme or plan under ER 404(b). 6RP 131, 149.

The excluded emails resulted from online ads virtually identical to the ad Holand responded to. Exs. 4, 56. All were posted within 6 months of Sadler's correspondence with Holand. Ex. 56. The court excluded the following excerpts:

- “. . . wants to a livein relationship.” 6RP130; CP 185; Ex. 36.
- discussion about fantasy role-play, graphic sexual language, and Sadler's inclination to monogamy in correspondence with a 42-year-old woman. 6RP 143; CP 207, 209-10; Ex. 42.
- “wouldn't mind making a baby with you . . . . I wish I could just zip up to Seattle and take you out to dinner tonight. . . . I think I was born to be an awesome Dad . . . . want that closeness if possible too. Longing to be with her. Missing her even when I'm just at work. Excited to drive home knowing that she's there. Guess that's the hopeless romantic side. . . . interested in the possibility of having a family again... Looking for that special woman to move in asap and have something really incredible together. I'm a hopeless romantic at times, so expect attention and devotion...if you return the same.” 6RP 146-48; CP 220-21, 223; Ex. 43.
- conversation about wanting to be mutually committed and devoted, live together, get married, and start a family. 6RP 152-53; CP 245-48; Ex. 47.
- Discussion of wanting a woman to help set up a home and be in a long term relationship, and belief that sex is better when one cares about the person; mention that at age 29, Sadler's correspondent is “not too old at all.” 6RP 154; CP 255-57.

*k. Holand testified role-players stop communicating shortly after he claims to be 15 years old.*

Pre-trial, Sadler moved to exclude any opinions on guilt or credibility. 4RP 66-70. He specifically objected to profile evidence of what defendants in Holand's cases say or do. 4RP 66-70. The court agreed profile evidence was inappropriate but reserved ruling until objections arose to specific testimony. 4RP 70-72.

Holand often poses as an underage prostitute online. 5RP 18. He told the jury he always states immediately that he is 15 years old and making money. 5RP 30. He estimated that of 100 initial responses, 50 stop communicating immediately. 5RP 30. Of the remaining 50, he testified, "30 . . . are kind of just playing a game. They'll communicate for a little while, they'll stop communicating." 5RP 30. The remainder will be "continually communicating." 5RP 31. In these cases, Holand arranges a meeting and arrests those who show up. 5RP 33, 36. The court overruled the objection Sadler's objection. 5RP 29-30.

Additional facts regarding closing arguments and sentencing will be discussed in the argument sections to which they pertain.

C. ARGUMENT

1. SADLER'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE COURT EXCLUDED CRUCIAL EVIDENCE OF HIS INTENT.

Sadler's attempt to find a sex partner on Craigslist led to charges of attempted commercial sexual abuse of a minor and communication with a

minor for immoral purposes. Since he admitted placing the ads and sending the subsequent emails, the only disputed issue was his mental state. He sought to admit emails resulting from virtually identical online ads he had recently posted. The purpose was to show that his intent, in the instant case as in those cases, was a sexual relationship, possibly long-term and committed, with an adult partner. The court violated Sadler's constitutional right to present a defense when it excluded this crucial defense evidence.

- a. Absent a Compelling State Interest, the Constitution Guarantees to Accused Persons the Right to Present All Relevant Evidence in Their Defense.

Criminal defendants have the constitutional right to present evidence in their defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV. In light of this essential constitutional due process protection, the trial court's exclusion of defense evidence is subjected to a high level of scrutiny. Jones, 168 Wn.2d at 719-20. Courts review de novo whether exclusion of defense evidence violated the right to present a defense. Id.

To protect the right of accused persons to defend themselves, relevant defense evidence must be admitted unless the State can show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621,

41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). If the court believes defense evidence is barred by evidentiary rules, “the court must evaluate whether the interests served by the rule justify the limitation.” Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Id. When the evidence is even minimally relevant, the jury must be allowed to hear it unless it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Darden, 145 Wn.2d at 622.

Here, the court violated Sadler’s constitutional right to present a defense by excluding evidence showing a common scheme, plan, or intent to engage in lawful conduct. The evidence was relevant to Sadler’s mental state and neither the Court nor the State identified any compelling reason why admission would have disrupted the fairness of the trial.

b. Sadler’s Use of Nearly Identical Ads to Pursue Relationships with Adults Is Relevant to His Intent.

Sadler’s prior emails were relevant to the mental state required to prove the charged offenses. Evidence is relevant when it has any tendency to make any fact at issue more or less likely. ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. Kappelman v. Lutz, 167 Wn.2d 1, 9, 217 P.3d 286 (2009)

(citing State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006)). ““All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant.”” State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)).

Here, the State accused Sadler of attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes. CP 288-89. The elements of commercial sexual abuse of a minor are that a person pays or agrees, offers, or solicits payment in exchange for sexual conduct by a minor. RCW 9.68A.100. Thus, to prove an attempt, the State needed to prove both intent and a substantial step towards making such an agreement or offer. RCW 9A.28.020. For count two, the State was required to prove communication for immoral purposes with someone Sadler believed to be a minor. RCW 9.68A.090. The trial court excluded parts of Sadler’s prior email exchanges showing his intent to form a long-term, adult sexual relationship. 6RP 129-30, 132, 143.

These emails are evidence that, in the recent past, Sadler used ads and emails nearly identical to the one in this case to pursue long-term sexual relationships with adult women. This was relevant to prove that his intent on this occasion was the same: a mutually satisfying sexual relationship with an adult, not a sex-for-pay situation with a minor.

ER 404(b) shows the relevance of the excluded emails. ER 404(b) prohibits using prior acts to show a propensity to act in a given manner. But the rule's exceptions list other purposes for which prior acts may be relevant, such as showing intent or a common scheme or plan. ER 404(b); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). When other acts evidence satisfies one of the exceptions in ER 404(b), it is relevant.

The relevance of prior acts to show a common scheme or plan rests on the similarity of the charged incident to the prior incident. State v. Burkins, 94 Wn. App. 677, 689-90, 973 P.2d 15 (1999). The past act must have more in common with the charged act than just the identity of the person. State v. Wade, 98 Wn. App. 328, 335, 989 P.2d 576 (1999). The similarities need not amount to a unique method so long as the prior act is sufficiently similar to show a logical nexus. State v. DeVincentis, 150 Wn.2d 11, 20-21, 74 P.3d 119 (2003); Burkins, 94 Wn. App. at 689 (discussing 2 John H. Wigmore, Evidence § 240, at 42 (1979) and State v. Lough, 70 Wn. App. 302, 322-23, 853 P.2d 920 (1993)). This standard is met when the prior and current incidents can be explained as separate occasions on which the person implemented the same plan. State v. Gresham, 173 Wn.2d 405, 421-22, 269 P.3d 207 (2012); Burkins, 94 Wn. App. at 689. Evidence also shows a common scheme or plan when the

similarities indicate “conduct created by design” rather than coincidence. State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007).

Gresham illustrates the low level of similarity needed for a common scheme or plan. Scherner was convicted of child molestation based on evidence he fondled his granddaughter’s genitals on a family trip. Gresham, 173 Wn.2d at 414-15. Evidence was admitted under ER 404(b) that he had done the same to another granddaughter and a family friend while on trips and to two nieces while their families were staying in his home. Id. In each case, the incidents occurred while other adults in the home were asleep. Id. The court found this similarity sufficient to admit the prior incidents. Id. at 422-23. Small differences, such as whether there was oral sex in addition to the fondling, or whether the incidents occurred at home or on a trip, did not overcome the similarities. Id. at 423.

Sadler’s prior Craigslist ads on are virtually identical to the ad that resulted in the current convictions. Exs. 4, 56. This is far more similarity than existed in Gresham. Sadler’s use of the same language shows the same plan was in use. When the legislature uses the same words, it is a canon of statutory interpretation that the legislature likely intended the same result. State v. Keller, 98 Wn. App. 381, 383-84, 990 P.2d 423 (1999). The same is true of individuals. On the prior occasions, Sadler’s intent appeared to be to achieve a mutually-satisfying, possibly long-term,

sexual relationship with an adult. See exs. 36, 42, 43, 47; CP 256-57. The prior emails make it more likely that he had the same intent when he corresponded with Holand. This greater likelihood of innocent intent makes the excluded emails relevant under ER 401 and ER 404(b).

The Ninth Circuit came to a similar conclusion in United States v. Cherer, 513 F.3d 1150, 1158 (9th Cir. 2008). In that case, the court admitted prior complaints about Cherer's offensive online communication and concluded the prior communications showed the same intent because the language was similar to that used in the case before it. Id. In prior communications, Cherer had asked "[E]ver given a blow job?" and offered two hundred dollars in exchange for oral sex. Id. In the case at hand, Cherer had asked, "[E]ver given a BJ?" and offered to buy thong underwear in exchange for oral sex. Id. The court concluded that, "the complaints tend to prove Cherer's intent and plan to use AOL to make enticing, sexually graphic communications." Id. As in Cherer, Sadler's prior similar communications were relevant to his intent in the instant case.

Even if the evidence were not initially relevant, the State made it so by accusing Sadler of "trolling" the Internet for minors. 4RP 2. Sadler was entitled to rebut this claim by showing his overall plan to engage with adult sexual partners. The open door doctrine permits admission even of

otherwise inadmissible evidence in order to correct a false impression created by the other party. State v. Berg, 147 Wn. App. 923, 938-40, 198 P.3d 529 (2008). “[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” Berg, 147 Wn. App. at 939. This is so even if the evidence would otherwise be irrelevant or inadmissible. See id. at 939-40 (admitting police officer’s testimony about mother of victim’s failure to report to police in unrelated case). The court erred in denying Sadler the ability to rebut the State’s assertion that he was using the Internet to troll for underage sexual partners.

The jury had to decide whether Sadler believed he was communicating with a minor and actually intended to have sex with her or was instead seeking an adult sexual relationship. His prior attempts – in exchanges pursuant to virtually identical online ads – to establish a long-term relationship with an adult are relevant to that question.

c. The Court Failed to Identify a Compelling Interest Requiring Exclusion or Show How the Emails Would Disrupt the Fairness of the Trial.

When a piece of defense evidence is even minimally relevant, it must be admitted unless a compelling state interest requires exclusion such that admission would disrupt the fairness of the trial. Darden, 145 Wn.2d at 621-22; Hudlow, 99 Wn.2d at 15-16. The court declared the emails in question were not relevant and would confuse or mislead the jury. 5RP

129-30, 132, 143. This ruling was presumably based on ER 403, permitting the court to exclude evidence when the probative value of is outweighed by the danger of unfair prejudice or confusing or misleading the jury, or wasting time. But viewed in the context of this case, these concerns do not justify excluding crucial defense evidence.

First, ER 403 does not permit exclusion of evidence that is crucial to a valid defense. State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed.1982); United States v. Wasman, 641 F.2d 326 (5th Cir.1981)). When courts weigh evidence under ER 403, the balance must be struck in favor of admitting defense evidence. Young, 48 Wn. App. at 413 (citing United States v. Dennis, 625 F.2d 782 (8th Cir. 1980)).

The prior emails were crucial to the central contention of Sadler's defense. His defense was that any apparent agreement was contingent on confirming that he was actually dealing with the adult female shown in the photographs Holand sent him. 8RP 75-76. There were two aspects to this defense. First, prior emails would show his lack of belief in and attempts to verify the identity of online correspondents. Second, prior emails would show his intent to form a sexual relationship, possibly long-term, with an adult that may include role playing. 6RP 126-29, 139-43.

The court admitted the first category of evidence but failed to appreciate that the second category was even more crucial to Sadler's defense. Without the second category of evidence, of intent to form an adult sexual relationship, the first category of evidence, of identity verification, could backfire and create the appearance that Sadler was trying to verify that Holand was actually a 15-year-old girl. The State attempted to portray Sadler as trolling on line for underage prostitutes. 4RP 2. Evidence showing his contrary intent was crucial.

The evidence was also essential to corroborate Sadler's testimony because his credibility was under attack. Corroborating evidence is justified when there is an attack, "however slight" on the witness' credibility. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) holding modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); see also United States v. Gaind, 31 F.3d 73, 78 (2d Cir. 1994) (government permitted to introduce truth-telling provisions of prosecution witnesses' agreements after Gaind's opening statement attacked the credibility of the witnesses). The jury's decision in this case rested on its assessment of Sadler's credibility. He presented one interpretation of his email exchange with Holand, and the State presented another. The court's exclusion of the emails prevented Sadler from corroborating his

interpretation by showing it was consistent with his conduct on prior similar occasions.

Corroboration may be key to creating reasonable doubt. Thomas v. Chappell, 678 F.3d 1086, 1106 (9th Cir. 2012) cert. denied, 133 S. Ct. 1239 (2013); see also Brown v. Myers, 137 F.3d 1154, 1158 (9th Cir. 1998)) (without corroboration even a defendant's own testimony is not an effective defense). Thomas illustrates the importance of corroboration. In that case, defense counsel was ineffective for not interviewing a person who could have corroborated the existence of the man a defense witness identified as another suspect. Id. The court declared, "Corroboration is always helpful. But it was critical here because by itself, [the defense witness]'s testimony was not particularly believable." Id.

As in Thomas, Sadler's description of his mental state was likely to be viewed as self-serving and fabricated. Indeed, the State made that very argument in closing and argued Sadler's claim that he was looking for a long-term relationship on Craigslist was akin to saying he was reading Playboy for the articles. 9RP 59-61, 95-96. Objective evidence corroborating Sadler's testimony was crucial to his defense.

When evidence is crucial to the central contention of the defense, almost no justification can outweigh the defense's need for the evidence. See Jones, 168 Wn.2d at 720 ("[F]or evidence of high probative value 'it

appears no state interest can be compelling enough to preclude its introduction.”). The court’s concern that the jury could be confused or misled was misplaced. 6RP 129-30, 143, 154. Juries are not so easily led astray.

Juries are often required to distinguish past incidents from charged conduct when past acts are admitted under ER 404(b). Any concerns for confusion or misuse of such evidence are generally put to rest by the use of a limiting instruction. See, e.g., State v. Hecht, 179 Wn. App. 497, 509, 319 P.3d 836 (2014) (“The trial court repeatedly cautioned the jury that its consideration of the testimony was limited to the issue of a common scheme or plan. Jurors are presumed to follow the court’s limiting instructions.”). Juries are presumed able to understand and correctly apply limiting instructions regarding common scheme or plan evidence. Id. The court here did not explain how the jury would be confused or misled any more than in other cases of ER 404(b) evidence. 6RP 129-54. The simple expedient of a limiting instruction could have preserved Sadler’s right to present his defense. Hecht, 179 Wn. App. at 509.

d. The Violation of Sadler’s Right to Present a Defense Requires Reversal of His Convictions.

Courts must safeguard the right to present a defense ““with meticulous care.”” State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808

(1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

The trial court failed to apply that meticulous care in this case.

Denial of the right to present a defense is constitutional error and presumed prejudicial unless the State shows beyond a reasonable doubt that the error could not have contributed to the verdict. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012); State v. Starbuck, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015). That is not the case here. The excluded email exchanges would have provided a concrete reason to doubt whether Sadler had the required mental state for either offense. The State cannot meet its burden to show, beyond a reasonable doubt, that the violation of Sadler's constitutional right to present his defense did not contribute to the verdict. Sadler's conviction should be reversed.

e. Alternatively, the Court Abused Its Discretion in Excluding Essential Defense Evidence.

Because Sadler's constitutional right to present a defense was violated, review is de novo. Jones, 168 Wn.2d at 719-20. However, even under an abuse of discretion standard of review, the exclusion of this evidence was error. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090

(2014). “The discretion conferred upon the trial judge is not arbitrary” and “is to be used with great caution to avoid prejudicing defendants.” Lough, 70 Wn. App. at 313.

In deciding whether to exclude evidence under ER 403, courts should consider the strength and length of the chain of inferences between the evidence and the material questions at trial, whether the evidence relates to a disputed issue, the availability of alternative means of proof, and the likely effectiveness of a limiting instruction. State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987) (citing M. Graham, Federal Evidence § 403.1, at 180–81 (2d ed. 1986)). Each of these factors weighs in favor of admitting the evidence in this case.

The common scheme or plan exception to ER 404(b) shows a short and relatively strong chain of inference linking the prior emails to the emails at issue in this case. The evidence goes directly to the only disputed issue at trial. Because the disputed issue is a mental state, there is virtually no direct evidence available except Sadler’s own testimony, which is likely to be discounted without corroboration. See Brown, 137 F.3d at 1158 (without corroboration, defendant’s testimony is not effective defense). Finally, as discussed above, the law presumes a limiting instruction would be effective absent extreme circumstances such as a co-defendant’s confession. State v.

Dent, 123 Wn.2d 467, 486, 869 P.2d 39 (1994) (discussing Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

Additionally, it was manifestly unreasonable to distinguish between the prior emails supporting one part of Sadler's defense, while excluding those supporting another part. The court recognized the prior emails were relevant to show Sadler's intent to detect frauds and verify the identity of his correspondents. 6RP 132, 138, 143. It is no less relevant to show his intent to seek an adult sexual relationship. And the possibility of confusing or misleading the jury is no greater in the excluded emails than in the admitted portions.

Both the admitted and the excluded portions tend to suggest a different intent than the one posited by the State. Merely because a piece of evidence contradicts the State's theory of the case does not make it misleading. The exclusion of these emails was manifestly unreasonable and arbitrary and was likely to impact the jury's decision. Even under an abuse of discretion standard, the erroneous exclusion of this crucial defense evidence requires reversal.

2. THE COURT ERRED IN ADMITTING THE OFFICER'S TESTIMONY AMOUNTING TO AN OPINION ON GUILT.

By testifying that he only arrests people who continue to communicate and progress to an in-person meeting during his ruse, Holand

invaded the province of the jury and implicitly asserted his opinion as a police officer that Sadler was guilty. Even by mere inference, witness opinions as to the defendant's guilt, violate the right to a jury trial by intruding on the jury's role. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Courts consider five factors in determining whether opinion testimony improperly invades the province of the jury: (1) the type of witness involved, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Here, the type of witness was a police detective. Testimony by police officers carries with it an “aura of reliability” and is particularly likely to unfairly influence the jury. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). A jury might assume the police believe a person is guilty, but that does not excuse admitting opinion testimony. See Montgomery, 163 Wn.2d at 595 (“The State argues the officers’ opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit opinions on intent.”).

The nature of the testimony, the charges, and Sadler's defense also indicate this testimony invaded the province of the jury. Sadler was charged with attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes. The only disputed issue in both counts was his mental state. Sadler's defense was that he was not seeking an actual minor but could be interested in a fantasy role-play about a younger person. 8RP 65-66, 100. Holand's testimony directly addressed Sadler's intent. When intent is the only disputed issue, an opinion on intent amounts to an opinion on guilt. Montgomery, 163 Wn.2d at 594.

Holand testified that when he poses as an underage prostitute online, roughly half of responders immediately cease contact when he claims to be 15. 5RP 18, 30. Another third eventually stop contacting him after limited communication. 5RP 30. He described this second group as those who were just playing a game. 5RP 30. For those who continue communicating, Holand arranges a meeting and arrests the person. 5RP 33. This testimony drew a contrast between the presumably innocent persons who eventually stop contact because they are "just playing a game," with the guilty who do not and are subsequently arrested. 5RP 30-33.

The other evidence in this case includes Sadler's testimony that he believed he was playing along with a role-playing game. In the context of this other evidence, Holand's testimony amounted to an opinion that Sadler fit the "profile" of guilty people who are not engaged in lawful online sexual role playing. The court had determined pre-trial that profile-type testimony comparing Sadler with other cases would not be permitted. 4RP 70. The court erred in failing to adhere to its pre-trial ruling and in overruling Sadler's two objections. 5RP 29-30, 33.

Holand's improper opinion testimony that invaded the province of the jury requires reversal of Sadler's conviction. An error may not be deemed harmless unless it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." In re Det. of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting State v. Britton, 27 Wash.2d 336, 341, 178 P.2d 341 (1947)). An error cannot be harmless when a reasonable possibility exists that, without it, the verdict might have been more favorable. Id. Without an officer's opinion appearing to debunk Sadler's defense, the jury would have been far more likely to believe him or find that his testimony created a reasonable doubt. The admission of Holand's implicit opinion on guilt requires reversal.

3. PROSECUTOR MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED SADLER OF A FAIR TRIAL.

A prosecutor is a quasi-judicial officer whose zealous advocacy must be tempered by the responsibility to ensure that every accused person receives a fair trial. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor who subverts or evades the constitutional safeguards protecting the rights of the accused can render a trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts look not to isolated phrases or incidents, but the context of the entire trial. Id. at 704.

Prosecutors step outside the bounds of fair trial conduct when they disparage the role of defense counsel or appeal to the passion and prejudice of the jury. Id.; State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). ““The State can take no action which will unnecessarily chill or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.”” Gregory, 158 Wn.2d at 806 (quoting Z). Additionally, “the State commits misconduct by asking the jury to convict based on their emotions, rather than the evidence.” State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126

(2012) rev. denied, 176 Wn.2d 1006 (2013) (citing State v. Bautista-Caldera, 56 Wn. App. 186, 194–95, 783 P.2d 116 (1989)).

In this case, the prosecutor twice made comments designed to appeal to the jury's passion or emotions, specifically the fear and loathing of sexual child predators. First, the prosecutor argued, "the law is not going to stand by and wait until Mr. Sadler's actually having sex with a kid, before it's a crime." 9RP 63. This argument raised the specter of far more serious sex crimes against children and urged the jury to convict Sadler to prevent those other crimes. Second, the prosecutor referred to Sadler's testimony expressing concern that persons like himself, who were only attempting to verify the identity of an online correspondent, could be unfairly caught up in the traps laid by programs such as "To Catch a Predator." 8RP 129. The prosecutor told the jury it seemed Sadler was concerned only about men like himself, not about children caught up in sexual abuse. He then told the jury, "If that doesn't worry you, it should." 9RP 98-99. This argument was also designed to pander to the jury's fear of sexual predators.

The prosecutor also disparaged counsel's role of zealously representing his client and presenting the case in the light most favorable to him. During closing argument, prosecutors may not suggest that defense attorneys are unethical or deceptive when they are merely

performing their constitutionally mandated duty to their clients. See, e.g., Thorgerson, 172 Wn.2d at 451-52 (improper to imply deception by referring to counsel's arguments as "bogus" or "sleight of hand"). Here, the prosecutor described defense counsel's argument as "a story about a parallel universe."

In few minutes you'll hear a very coherent, compelling, internally consistent story about what the defendant did. It will be a story about a parallel universe, in which he asked you to come to completely the opposite conclusion about everything he said and it will be wrapped up in a neat package that Mr. Sadler will ask you to file under the label of reasonable doubt. He's not only smart, folks, he's hoping that he's smarter than you.

9RP 59-60.

The prosecutor then purported to predict that defense counsel would make an argument that was both ridiculous and unsupported by the evidence: "And you know what's coming next? The defendant will say that Mr. Bowlin was upset about having something stolen from him by James Sadler, so he came in here and committed perjury, just because he's upset with the defendant's son."<sup>2</sup> 9RP 60. Both of these arguments depicted defense counsel as deceptive and were improper.

The comments appealing to the jury's fear and impugning defense counsel's integrity require reversal of Sadler's convictions. Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal

---

<sup>2</sup> Defense counsel made no such argument.

of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. Even without an objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the prejudice could be cured than on the prosecutor's intent. State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

The prejudicial effect of misconduct is determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Although the jury is presumed to follow the court's instructions, misconduct can be so prejudicial that instruction cannot cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). “The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they,

under the circumstances of the particular case, probably influenced by these remarks.” State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939)).

Courts consider the cumulative impact of repeated misconduct. See State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) (improper comments used to develop theme in closing argument impervious to curative instruction). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; Walker, 164 Wn. App. at 737. The prejudice to Sadler’s case could not be cured.

Inflammatory comments designed to appeal to the fear and loathing of child molesters are not curable by instruction. See, e.g., State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916 (2009) (holding counsel was ineffective for failing to move to sever child molestation and rape charges noting inflammatory and prejudicial nature of those crimes); State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008) (“no guarantee the jury could effectively disregard” highly prejudicial hearsay evidence of prior child sex abuse); State v. Peterson, 2 Wn. App. 464, 466-467, 469 P.2d 980 (1970) (discussing jurors’ “natural instincts and laudable sentiments” in child sex abuse cases). Improper arguments that inflame the jury’s passion can cause prejudice that is incurable by instruction. Emery, 174 Wn.2d at 762-63. Here, the prosecutor’s argument caused

incurable prejudice by subtly tapping into and making use of the jury's natural inclination towards hatred and fear of the child molester.

The comments about defense counsel were also likely to cause deep-seated mistrust that could pervade the jury's deliberations on a subconscious level. The jury was particularly likely to be influenced by disparagement of defense counsel's integrity, regardless of any instruction, because the case hinged on credibility, which often comes down to a gut feeling of who is believable rather than a rational application of the rules. "[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

"A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial." Jones, 144 Wn. App. at 295 (citing Huson, 73 Wn.2d at 663). The prosecutor failed in this duty and Sadler's conviction should be reversed.

4. CUMULATIVE ERROR DEPRIVED SADLER OF A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State

v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

The accumulation of errors discussed above affected the outcome and produced an unfair trial in Sadler's case. These errors include (1) improper exclusion of relevant defense evidence; (2) improper opinion testimony by a police detective; and (3) prosecutorial misconduct in closing argument. Taken together, these errors deprived Sadler of a fair trial and placed a thumb on the scales of justice. Sadler's convictions should be reversed.

5. ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR AND COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES ARE THE SAME CRIMINAL CONDUCT.

When two offenses constitute the same criminal conduct, they are treated as one crime for calculating the sentence. RCW 9.94A.589(1)(a); State v. Williams, 176 Wn. App. 138, 141, 307 P.3d 819 (2013). The trial court's determination of what constitutes same criminal conduct is reversed for an abuse of discretion or misapplication of the law. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998); State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996).

Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The “same time” requirement is not one of strict simultaneity. It is sufficient if the crimes were part of a continuous uninterrupted sequence of conduct over a short period of time. State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998).

At sentencing, the parties appeared to agree that the two offenses in this case were committed at the same time and place and involved the same victim. 12RP 12-13. The only dispute was whether the offenses shared the same criminal intent.

The intent inquiry focuses on whether the intent, viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. Tili, 139 Wn.2d at 123. Closely related crimes that are continuous or simultaneous tend to involve the same intent, whereas crimes that are sequential often involve separate intent. Id. at 123-24 (discussing State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997)). Two crimes are the same criminal conduct when they “further[] a single criminal purpose.” Id. (quoting State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993)).

“Intent,” as used in the “same criminal conduct” inquiry, is not the particular mens rea element of the crime “but rather the offender’s objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). For example, the objective criminal intent of murder is to kill a person; the intent of robbery is to acquire property. Id. When one crime furthers another in the same time and place, the criminal intent does not change and the offenses are the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Under Adame, Tili, and Lessley, Sadler’s offenses are the same criminal conduct. The offenses were based on the same chain of emails between Holand and Sadler. The entire exchange contains ongoing negotiations about the terms under which the two would meet. Ex. 5. Sadler’s intent did not change from when he placed the ad, to the beginning of his correspondence with Holand, to the end of that correspondence. Assuming the State is correct, the entire communication with the fictitious minor was in service of the goal of commercial sexual abuse. Any grooming or habituating that occurred, i.e. by sending photographs of graphic sexual activity, was part and parcel of the alleged attempt to engage in sexual activity for pay with the fictitious 15-year-old portrayed by Holand.

Sadler's two convictions are for the same criminal conduct and should not be counted against each other in calculating his offender score. When the two offenses are properly categorized as the same criminal conduct, Sadler's score is zero. This Court should remand for resentencing under the correct offender score.

6. THE COURT ERRED IN IMPOSING UNAUTHORIZED AND UNCONSTITUTIONAL CONDITIONS OF COMMUNITY CUSTODY.

At sentencing, the State argued Sadler is not amenable to treatment. 13RP 7. This is likely true since he maintains his innocence. Nevertheless, as conditions of community custody, the court ordered Sadler to obtain a sexual deviancy evaluation and obtain any recommended treatment. CP 409. It also ordered him not to access the Internet or engage in sexual activity without the approval of his treatment provider. CP 409. Because he is not amenable to treatment, he will not have a treatment provider, and the bans on Internet use and sexual activity amount to a complete prohibition. These conditions are unauthorized by law and in violation of Sadler's constitutional rights.

A trial court may impose only a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Reviewing courts apply careful scrutiny when a community custody condition infringes on a fundamental constitutional right. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). Community custody conditions are generally reviewed for abuse of discretion and may be reversed if manifestly unreasonable. State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010); State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The imposition of an unconstitutional condition is manifestly unreasonable. Valencia, 169 Wn.2d at 792. Unlike statutes enacted by the legislature, community custody conditions are not presumed constitutional. Id. at 792-93.

a. The Ban on Internet Use Is Not Crime Related and Violates Sadler's First Amendment Rights.

The condition prohibiting Internet use without approval of a treatment provider violates Sadler's rights to freedom of expression under the First Amendment and article I, section 5 of Washington's constitution

and is, therefore, manifestly unreasonable. The condition is also not sufficiently crime-related.

More and more, modern communication and commerce occurs predominantly by means of the Internet. Thus, a ban on Internet use is akin to a ban on public speech and participation in the public life of the community. The condition prohibiting all Internet access without a treatment provider's approval is essentially a prior restraint on speech. CP 409 (Condition #27). At best, it is a restriction on the time, manner, and place of his speech.

Moreover, it is likely that the ban will be total. The State argued Sadler is not amenable to treatment. 13RP 7. If the treatment provider agrees, then no treatment ensue and he will have no provider to approve of innocent and appropriate Internet use. He will be unable to view news stories of current events, purchase items for delivery, or share his views on the many public forums that the Internet provides. This total ban on Sadler's participation in the world of the Internet is overbroad in violation of the First Amendment and Article I, Section 5 of the Washington Constitution.

A community custody condition restricting First Amendment rights must be "narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678, 687 (2008). Such conditions must be

“sensitively imposed.” Id. A community custody condition that restricts a significant amount of protected speech is unconstitutionally overbroad. State v. Riles, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998). The condition that is likely to result in a three-year total ban on accessing the Internet for any purpose is unconstitutionally overbroad. It is neither narrowly tailored nor sensitively imposed. It restricts virtually all speech and association via the medium that is becoming the default mode of communication.

In addition to violating Sadler’s First Amendment rights, this condition is void because it is not authorized by statute. Trial courts may impose “crime-related prohibitions” as a condition of a sentence. RCW 9.94A.703(3)(f). “A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). A total ban on Internet use is not crime related because it includes lawful use of the Internet to express opinions on current events or purchase books or groceries. Such conduct has no bearing on the offenses in this case. Because the condition, as imposed, would also include many lawful uses of the Internet, the condition is neither crime-related nor statutorily authorized.

- b. The Ban on Sexual Contact Violates Sadler’s Constitutional Rights to Freedom of Intimate Association.

For the three years of his community custody, Sadler is also required by court order to abstain from sexual contact except as approved by his treatment provider. CP 409 (Condition #5). As with the Internet ban discussed above, this is likely to amount to a total ban if he is deemed not amenable to treatment and therefore has no treatment provider.

Substantive due process protects fundamental liberties such as the right to freedom of intimate expression and sexual conduct. See generally Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508 (2003) (striking down Texas statute criminalizing sodomy and holding, “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

The total ban on sexual activity is not sensitively imposed or narrowly tailored to avoid infringing on Sadler’s substantive due process right to liberty in intimate expression. The total ban includes entirely lawful sexual activity with consenting adults. Because of its extreme breadth, the complete ban on sexual contact in relationships without his treatment provider’s approval is also unauthorized by statute because much of the prohibited conduct is unrelated to Sadler’s offense.

“[I]llegal or erroneous sentences may be challenged for the first time on appeal.” Bahl, 164 Wn.2d at 744 (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Washington courts routinely consider preenforcement challenges to sentencing conditions. Bahl, 164 Wn.2d at 745–46. The bans on Internet use and sexual conduct are not authorized by statute and violate Sadler’s constitutional rights to freedom of expression and freedom in private sexual conduct. Sadler, therefore, asks this Court to strike the conditions of community custody prohibiting him from accessing the Internet or having sexual contact without approval of a treatment provider.

7. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Sadler indigent and entitled to appointment of appellate counsel at public expense. CP 447-48. If Sadler does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v.

Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Sadler’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, and reduced the mandatory fine as permitted by statute due to indigency. 13RP 16. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Sadler has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, Sadler requests this Court reverse his convictions or, alternatively, remand for resentencing.

DATED this 25<sup>th</sup> day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73525-0-1
	)	
STANLEY SADLER,	)	
	)	
Appellant.	)	

---

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 25<sup>TH</sup> DAY OF APRIL, 2016, 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.

[X] STANLEY SADLER  
DOC NO. 895135  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF APRIL, 2016.

X *Patrick Mayovsky*