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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RYAN GRIFFIN, Appellant.	No. 50823-1-II UNPUBLISHED OPINION

LEE, A.C.J. — Daniel R. Griffin appeals his convictions for one count of third degree child molestation and seven counts of communication with a minor for immoral purposes. He challenges the (1) denial of his motion to suppress evidence found on his cell phone, (2) refusal to give his proposed jury instructions, (3) constitutionality of the communication with a minor for immoral purposes statute as applied to him, (4) admission of his internet browsing history into evidence, (5) exclusion of testimony from two defense witnesses, (6) adequacy of the hearing addressing the State's intrusion into his attorney client communications, and (7) imposition of a $200 criminal filing fee at sentencing.

In a statement of additional grounds (SAG), Griffin challenges the constitutionality of the communication with a minor for immoral purposes statute, the language of the charging document, and the sufficiency of the evidence to support his third degree child molestation conviction.

We agree that the evidence found on Griffin's cell phone should have been suppressed because the search warrant was not sufficiently particular. However, we hold that this error was harmless as to the third degree child molestation conviction and six of the communication with a minor for immoral purposes convictions. We are not persuaded by Griffin's other challenges raised on appeal. Accordingly, we affirm Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions, vacate one of Griffin's communication with a minor for immoral purposes convictions, and remand to the trial court for further proceedings consistent with this opinion.

FACTS

A. INITIAL INVESTIGATION

S.L.[1] met Griffin in August 2014 through her mother's work. At the time, S.L. was 13 years old and Griffin was around 34 years old. The two exchanged cell phone numbers and regularly text messaged each other for the next 10 months. This communication culminated in a June 2015 incident in which Griffin invited S.L. to his home, tied her up with rope, and touched her bare breast with his hands and mouth.

On June 24, 2015, S.L. got into a fight with her stepmother. As punishment, S.L.'s stepmother took away S.L.'s cell phone. Later that evening, S.L.'s stepmother scrolled through S.L.'s text messages and noticed several messages from Griffin. Some of Griffin's messages encouraged S.L. to throw away her antidepressant medication. Other messages discussed

[1] Pursuant to our General Order 2011-1, we use initials for child witnesses in sex crimes.

emancipation, moving into an apartment together, and the size of S.L.'s minor girlfriend's breasts. S.L.'s stepmother contacted S.L.'s father.

S.L.'s father confronted S.L. about her relationship with Griffin, and S.L. admitted that she also communicated with Griffin on a mobile software application. S.L.'s father reinstalled the software application onto S.L.'s phone and began receiving messages from Griffin. S.L.'s father, acting as S.L., responded to Griffin's messages. Eventually, Griffin messaged S.L.'s phone the following:

> In the fantasy, I tie you to the desk, your leg to the desk leg, on both sides.
>
> . . . .
>
> You would have a shoulder harness that would be tied to the front of the desk, holding you securely in place. Your elbows would be tied behind your back, your arms straight, so that they rested on your a**.
>
> . . . .
>
> I expect you would be a little nervous, as I loomed over you with a perverted smile.
>
> . . . .
>
> I would place a small bottle in one of your hands, and command you to apply the contents to your anus. You would squirm, and insist that *I* be the one to apply it. There would be a moment of silence, followed by several slaps of a flog across your back and thighs.

Exhibit 1 at 7-11 (we quote only appellant's texts for ease of readability).

S.L.'s father photographed the messages and contacted law enforcement. He also gave law enforcement S.L.'s cell phone for forensic examination.

B. SEARCH WARRANTS

Detective Bradley Graham of the Tacoma Police Department was assigned to investigate the case. On July 7, Detective Graham obtained a warrant to search Griffin's house for the following evidence:

> Bondage items to include handcuffs, ropes, gags, slings and restraints;
> Pictures of the victim that appear in any printed format;
> The cell phone of Daniel Griffin—phone number 253-***-****;
> Documents showing dominion and control of the residence; and
> General crime scene processing to include photographing, videotaping and diagraming of the residence.

Clerk's Papers (CP) at 33. The search of Griffin's home unearthed rope, massage oil, sex toys, and Griffin's cell phone.

On July 9, Detective Graham submitted an application and affidavit in support of probable cause to obtain a warrant to search Griffin's cell phone for evidence of third degree child molestation and communication with a minor for immoral purposes. The application and affidavit stated in relevant part:

> On June 25th, 2015, Tacoma Police began a child sexual abuse investigation centering on the sexual abuse of 14 year old [S.L.] by Daniel Griffin (an adult male) who was an acquaintance of the family. The allegations were that Griffin fondled and licked the breasts of the victim, tied her up, and sent her sexually explicit text messages and photographs of his nude body. They communicated via cell phones.
>
> . . . .
>
> In the original search warrant, TPD Detective B. Graham asked that the defendant's cell phone be seized "to be forensically searched for the images and texts sent to the victim[.]"[]
>
> After turning the phone over [to] the TPD Cell Phone Forensics Unit, Detective Graham has learned that the seized phone—a Samsung Galaxy S4—is more than a simple cell phone and gives the user the ability to manipulate the data and images on the phone beyond simple storage in the default texting mode. This phone, according to its manufacturer, has numerous ways in which to convey communications. This includes user installed (downloaded) applications that allow non-traditional means to deliver desired content.
>
> . . . .
>
> The identification of any stored data requires a forensic search of the cell phone for:

> Contact/phone list—potentially indicates (confirms) relationship linkage between suspect and victim;
>
> Call history details—potentially indicates communication linkage between suspect and victim during the time frame disclosed by the victim;
>
> Short Message Service (SMS) and Multimedia Message Service (MMS)—potentially could indicate the communication delivery type between the suspect and victim to include attachments (if any) such as video, images or sound files related to the victim's disclosure;
>
> Images—potentially details and/or documents the relationship time frame and supports the charge of communicating for immoral purposes. Note: images can contain data that retains date and time created or accessed;
>
> Video—potentially details and/or documents the relationship time frame and supports the charge of communicating for immoral purposes. Note: videos can contain data that retains date and time created or accessed;
>
> User-installed applications: if installed and implemented, potentially could indicate the delivery of communications between the suspect and victim regarding relationship status to include sexually explicit communication;
>
> Web history and bookmarks—potentially can detail any internet searches which aided in or helped in communicating sexually explicit images or data between the suspect and victim;
>
> Emails—details communications to include attachments which could detail the relationship between the suspect and the victim.

CP at 86-87.

A judge issued a warrant to search Griffin's phone for:

> Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data, contained on: 1 Samsung Galaxy S4, containing a microsd memory card and SIM card, identified as belonging to Daniel Griffin.

CP at 89.

Law enforcement forensically examined Griffin's cell phone and extracted thousands of pages of records, including images, emails, text messages, call logs, GPS location data, and Griffin's internet browsing history. Five of the emails collected were between Griffin and prospective attorneys.

The State charged Griffin with one count of third degree child molestation and four counts of communicating with a minor for immoral purposes.

C. PRETRIAL MOTIONS

Griffin learned that law enforcement had obtained his communications with attorneys through the State's discovery. Griffin informed the trial court at a status conference held on October 25, 2016, that law enforcement had obtained his attorney, client communications. He brought the privileged communications to court and asked the trial court to "review them in-camera today and make a determination and keep the current trial date." Verbatim Report of Proceedings (VRP) (Oct. 25, 2016) at 5.

The trial court conducted an in-camera review of the documents and held a hearing the next day to address the issue. The trial court ruled that the pages were privileged. Griffin addressed the trial court and stated, "So I guess, then, at this point, the question is what to do about it, what the remedy is." VRP (Oct. 26, 2016) at 3. The prosecutor asserted that she had not read the privileged documents. Nonetheless, the trial court ruled that it would "just presume that because they were in [the State's] possession, somebody read them." VRP (Oct. 26, 2016) at 6-7. Based on its review of the documents, the trial court ruled that they were not prejudicial because they did not disclose any work product or trial strategy or tactic. Griffin moved for an order sealing the documents from public view, which the trial court granted.

Griffin subsequently filed a CrR 3.6 motion to suppress the evidence obtained through the search of his cell phone. Griffin argued that the search warrant lacked probable cause and failed to meet the particularity requirement of the Fourth Amendment. The trial court denied the motion.

D. RELEVANT PORTIONS OF TRIAL

Prior to trial, the State filed an amended information, adding an additional count of third degree child molestation and six additional counts of communication with a minor for immoral purposes. The 10 allegations of communication with a minor for immoral purposes were divided by monthly time periods beginning in September 2014 and ending in June 2015, with no charges filed for February and June divided into two separate charging periods.

1. Trial Testimony

At trial, S.L.'s father, stepmother, and Detective Graham testified to the facts discussed above. The trial court also admitted the photographs of Griffin's messages on S.L.'s cell phone that S.L.'s father had photographed.

S.L. testified that she spent an afternoon in June 2015 at Griffin's home. Griffin and S.L. were seated in the living room watching television when Griffin reached under S.L.'s shirt and grabbed one of her breasts over her bra. Griffin and S.L. moved to Griffin's bedroom, where Griffin "tied [S.L.] up" with rope and moved her shirt and bra underneath her breasts. VRP (Jun. 19, 2017) at 1180. Griffin then touched S.L.'s bare breasts with his hands and mouth. Griffin told S.L. that her "body was beautiful," pulled down his pants, and exposed his erect penis to S.L. VRP (Jun. 19, 2017) at 1180.

S.L. also identified a video found on Griffin's cell phone, which depicted him masturbating. S.L. testified that Griffin sent her the video sometime after June 13. Law

enforcement later testified that the masturbation video found on Griffin's cell phone had a creation date of June 15, 2015.

S.L.'s testimony also detailed hundreds of text messages Griffin had sent to her between October 2014 and June 2015. The trial court admitted several exhibits containing these messages, which were collected from the forensic search of S.L.'s cell phone. These exhibits showed that in October 2014, Griffin messaged S.L. about his sexual fantasies, masturbation, and BDSM[2] conventions. These October messages included:

> Sometimes, a nip-slip will do it for me.
> . . . .
> I need to get you into some good ol' STRAIGHT porn!
> . . . .
> So does a regular d***ing.
> . . . .
> I like boobs, p****, and women.
> . . . .
> I like yuri/sex, usually via BDSM.
> . . . .
> What are your thoughts on latex, ball gags, anal play, suspen[s]ion, clamps, and/or collars/leashes? For yourself or for use on others?
> . . . .
> BDSM orgy at my place this weekend. hehehe.

Exhibit 46 at 1, 5, 8, 9. Griffin and S.L. also texted about which of S.L.'s friends Griffin would choose to tie up, beat, and rape.

[2] At trial, S.L. testified that "BDSM" was an acronym for "bondage, discipline, dominance, sadism—or dominance, submission, sadism and masochism." VRP (Jun. 19, 2017) at 1173.

In November, Griffin messaged S.L., "I really shouldn't be—finishing—a 14 year old," "You should show [S.L.'s friend] a bdsm guro rape picture," and "maybe YOU ought to explain what ISN'T too tame for you the next time we chat." Exhibit 46 at 11, 12, 14. S.L. texted Griffin that S.L.'s minor girlfriend was "an awesome kisser," and Griffin responded, "I'm not convinced that she's all that good. Right now the evidence is that ANYTHING passionate provides needed release." Exhibit 46B at 3, Exhibit 46 at 13.

At some point, Griffin purchased S.L. a vibrator. In December, Griffin texted S.L., "I'mm'a take a shower. Hmm, should I test your toy while I'm in there?" Exhibit 87. Later that month, Griffin messaged S.L. that he was masturbating and the two discussed a BDSM orgy.

In March 2015, Griffin texted S.L., "So, do your folks have anything particularly interesting? Whips 'n chains, perhaps? Maybe a strapon?" Exhibit 46 at19. Griffin also texted that he had rope and oil. He also messaged S.L., "Unfortunately, when I'm depressed, so is my libido, but my body never stops generating it's 'supply[.]' Now I'm stuck at work, and . . . nevermind." Exhibit 46 at 20. At the end of March, Griffin messaged S.L., "Os yeah. . . I never fully woke up when you called. Your voice, and mental images of you ended up permeating my next dream cycle. THAT got . . . interesting." Exhibit 46 at 23.

In May, Griffin and S.L. discussed vibrators and Griffin messaged S.L., "So, more self-help toys. Does she know that you already have one, and that it's not really doing the trick?" Exhibit 46 at 35. Later, he messaged S.L., "How's the toy discussion going?" Exhibit 46 at 36. At the beginning of June, Griffin and S.L. again discussed vibrators. S.L. sent Griffin a picture of the vibrator she wanted to purchase, to which Griffin replied, "Huh. I figured you'd want something with more . . . bulk." Exhibit 46 at 38. Griffin also texted, "Now you'll have a surface

vibe and a deep vibe. Sounds fun," and "You still need to get laid properly though."[3] Exhibit 46 at 38.

Griffin's defense at trial was that he did not communicate with S.L. for immoral purposes because he openly discussed sex with many people in his life. To support this theory, Griffin called his mother and a childhood friend, Beverly McCarter, to testify on his behalf. Griffin attempted to elicit testimony from his mother that they had open discussions about sex. He also wanted his mother to testify that she had discussed "sexual experiences or sexual interests" with Griffin. VRP (Jun. 26, 2017) at 1899. The trial court ruled that this testimony was not relevant.

However, the trial court allowed Griffin's mother to testify that Griffin was raised to be "open and frank" about sex. VRP (Jun. 26, 2017) at 1903. Griffin's mother testified that she raised Griffin to be open about issues of sex and sexuality and to discuss them frankly. She also testified that it was "another subject matter to us." VRP (Jun. 26, 2017) at 1904.

McCarter testified that she met Griffin when the two were in high school. Griffin attempted to elicit testimony from McCarter regarding a sexual relationship between Griffin and McCarter as adults. This proffered testimony encompassed the use of ropes and sex toys when the two were in a sexual relationship and the specific conversations that Griffin and McCarter had about sex. The proffered testimony also included McCarter testifying about her own "sexual issues back in high school;" "a medical condition which caused her to have an insatiable, elevated sexual drive;" and that she and Griffin discussed "the subject of sexuality . . . very frankly, very openly, intellectualized." VRP (Jun. 27, 2017) at 1971, 1980.

[3] Other sexually explicit messages Griffin texted to S.L. between October 2014 and June 2015 are outlined in Appendix A, which is attached to and incorporated by reference into this opinion.

The trial court ruled that McCarter's proffered testimony was not relevant because "[t]here is a difference of talking with your friends who are adults, and talking with minors." VRP (Jun. 27, 2017) at 1981. However, the trial court allowed McCarter to testify to several emails that Griffin had sent to her discussing S.L. In one email, Griffin asked McCarter for "'guidance'" as to how he could convince S.L. "'to keep her libido to herself.'" VRP (Jun. 27, 2017) at 1993. This email also referenced the "'parallels'" between McCarter and S.L.'s sexual proclivities and Griffin's desire to "'keep [S.L.] out of trouble'" in coping with her "'high libido.'" VRP (Jun. 27, 2017) at 1992-93. In another email, Griffin described himself as S.L.'s sex counselor and stated that out of concern for S.L., he was considering informing S.L.'s mother of S.L.'s sexual proclivities. In a final email, Griffin admitted to McCarter that he had tied up S.L. in a full body harness, but assured McCarter that "no laws [were] actually broken." VRP (Jun. 27, 2017) at 2005. Griffin also explained that he tied S.L. up because he thought the experience would deter S.L. from the sexual desires she had communicated with him about. Griffin informed McCarter that he was "not sure how much more [he] [could] counsel this kid without crossing lines that really shouldn't be crossed." VRP (Jun. 27, 2017) at 2005.

Also, despite the trial court's ruling, McCarter testified to the sexual issues she experienced as an adolescent. She testified, without objection, that she often discussed her "uncontrollable" sex drive with Griffin during high school and described her own sex drive as "more intense than [her] peers." VRP (Jun. 27, 2017) at 1985.

2. Internet Browsing History

The State notified Griffin that it intended to introduce an exhibit at trial containing his internet browsing history from November 2014 through July 2015, which was obtained through

the search of his cell phone. Griffin made a motion in limine to suppress the exhibit under Evidence Rules 401 and 403. The State argued to the trial court that it only intended to introduce the searches that related to topics S.L. and Griffin discussed, including emancipation laws, sex toys, pornography, and the software application they used to communicate.

The trial court denied Griffin's motion, ruling that "what has been described by the State . . . outlines evidence that would be admissible in this type of a case." VRP (Mar. 13, 2017) at 280. The trial court further stated, "But again, it's difficult for the Court, not knowing the testimony of the complaining witness and all of those details. And so that's the best I can do at this point." VRP (Mar. 13, 2017) at 280.

The parties addressed this issue again closer to trial. Griffin moved to exclude the internet searches "related to pornography or that would be likely to prejudice the jury because they object on moral grounds." VRP (Mar. 23, 2017) at 360. Griffin specifically objected to the searches related to teen pornography. Griffin argued that this evidence was exactly the type that "[ER] 404(b) is designed to exclude." VRP (Mar. 23, 2017) at 362.

The State argued that the teen searches were conducted within a month of the child molestation charge, and thus were relevant to show that Griffin touched S.L.'s sexual or intimate body parts for the purposes of gratifying sexual desire. The State also argued that several of the pornographic subjects in Griffin's internet browsing history were a topic of conversation between Griffin and S.L. The trial court reviewed the images associated with the browser history and denied Griffin's motion to exclude the exhibit.

The trial court admitted a 67 page exhibit detailing Griffin's internet browsing history from November 11, 2014 to July 3, 2015. The exhibit showed numerous searches for sex toys, BDSM

pornography, and teen pornography. The exhibit also showed that Griffin had read numerous articles about famous rape cases, searched for "box of rape," and watched a video entitled "The Problems with Affirmative Consent Laws." Exhibit 47 at 6, 42. There were also several searches for Washington child rape laws, indecent exposure, and the age of marriage in Washington. The last three pages of the exhibit showed 15 searches for criminal defense lawyers in Tacoma.

3. Proposed Jury Instructions

Griffin proposed two jury instructions defining the crime of communication with a minor for immoral purposes. The first proposed instructions stated:

> A person commits the crime of communication with a minor with immoral purposes when he or she communicates with a minor for the predatory purpose of promoting the minor's exposure to and involvement in sexual misconduct. "Sexual misconduct" is a criminal act of a sexual nature.

CP at 563 (footnotes omitted). The second proposed instruction stated:

> A person commits the crime of communication with a minor with immoral purposes when he or she offers or induces a minor to participate in sexual misconduct. "Sexual misconduct" is a criminal act of a sexual nature.

CP at 564 (footnotes omitted).

The trial court declined to give Griffin's proposed instructions, and instead provided the jury the State's proposed instruction. The court instructed the jury that:

> A person commits the crime of communication with a minor for immoral purposes when he communicates with a minor or someone the person believes to be a minor for immoral purposes of a sexual nature and that person communicates with a minor or someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.
>
> Communication may be by words or conduct.

CP at 446.

During deliberations, the jury submitted a question to the trial court, asking, "Please define 'immoral purpose,' as described in Instruction No. 13 (if possible)." CP at 397. The trial court again refused to provide Griffin's proposed instruction and instead responded to the jury question with "You have the Court's instructions." CP at 397.

E. VERDICT AND SENTENCE

The jury found Griffin guilty of both counts of third degree child molestation and seven counts of communication with a minor for immoral purposes. The jury found Griffin not guilty on three counts communication with a minor for immoral purposes. After the verdicts, the trial court found that the two child molestation convictions constituted same criminal conduct.

The court sentenced Griffin to 120 months total confinement, and imposed on Griffin a $500 crime victim assessment fee, $100 DNA database fee, and $200 criminal filing fee. The court also entered an order of indigency for appeals purposes.

Griffin appeals.

ANALYSIS

A. SEARCH WARRANT

Griffin argues that the warrant authoring a search of his cell phone failed to meet the particularity requirement of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. We agree.

1. Legal Principles

Search warrants must describe with particularity "the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The purpose of the particularity requirement is to prevent general searches and guard against "the danger of unlimited discretion in the executing

officer's determination of what to seize." *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992).

Warrants that authorize the search for materials protected by the First Amendment demand a heightened degree of particularity and must be "'accorded the most scrupulous exactitude.'" *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015) (internal quotation marks omitted) (quoting *Perrone*, 119 Wn.2d at 548). However, even when the constitution demands scrupulous exactitude, "'[s]earch warrants are to be tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense.'" *Id.* at 615 (alteration in original) (quoting *Perrone*, 119 Wn.2d at 549). We review whether a warrant meets the particularity requirement de novo. *State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007).

2. The Warrant was not Sufficiently Particular

Cell phones and the data that they contain are "'private affairs'" under article I, section 7 of the Washington Constitution. *State v. Samalia*¸186 Wn.2d 262, 272, 375 P.3d 1082 (2016). Thus, law enforcement must first obtain a warrant to search cell phones unless a valid exception to the warrant requirement applies. *Id.* This holding was based in part on the special nature of cell phones and the United States Supreme Court's reasoning that modern cell phones represent more than "just another technological convenience." *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). "With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886)).

Division One of this Court recently held that a warrant authorizing the search of someone's cell phone must be carefully tailored to the justification of the search and limited to the data for

which there is probable cause. *State v. McKee*, 3 Wn. App. 2d 11, 29, 413 P.3d 1049, *rev'd on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019). In *McKee*, the warrant authorized law enforcement to search "all images, videos, documents, calendars, text messages, data, Internet usage, and 'any other electronic data'" on the defendant's phone. *Id.* Because this language allowed police to search general categories of data with no objective standard or guidance, it provided unlimited discretion of the police as to what to seize. *Id.* Therefore, the warrant violated the particularity requirement of the Fourth Amendment. *Id.*

Griffin relies on *McKee* to argue that the warrant authorizing the search of his cell phone violated the particularity requirement. Griffin maintains that the search warrant here similarly failed to include any language limiting the search of his phone to data for which there was probable cause. We agree.

The warrant authorizing the search of Griffin's cell phone was analogous to the warrant in *McKee*. Here, the warrant allowed officers to search "[a]ny and all stored data," including call details, images, sound files, music files, web and internet browsing history. CP at 89. As in *McKee*, the warrant allowed law enforcement to search general categories of data with no objective standard or guidance. The warrant did not contain any language limiting the topics of information for which law enforcement could search, nor did the warrant place any temporal limitation on the private information that officers could seize.[4] As in *McKee*, "'there was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information

[4] *Cf. State v. Vance*, No. 50664-5-II, slip op. at 9 (Wash. Ct. App. July 2, 2019), http://www.courts.wa.gov/opinions/pdf/D2%2050664-5-II%20Published%20Opinion.pdf (distinguishing *McKee* where the warrant regularly referred back to the statutory language and limited the evidence that could be seized to data and items connected to the crime).

generated close in time to incidents for which the police had probable cause.'" 3 Wn. App.2d at 29 (quoting *State v. Keodara*, 191 Wn. App. 305, 316, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028 (2016)).

The State argues that the warrant was sufficiently particular because it (1) referenced the crimes under investigation at the top of the warrant, (2) was supported by Detective Graham's affidavit, and (3) identified information that could have been deleted or hidden. We find these arguments unpersuasive.

In *Besola*, our Supreme Court rejected a similar argument that citation to a statute at the top of a warrant modifies or limits the items listed in the warrant. 184 Wn.2d at 614. There, the warrant identified the crime of "'Possession of Child Pornography R.C.W. 9.68A.070,'" but allowed police to search and seize broad categories of data, including:

> "1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
> 2. Any and all printed pornographic materials;
> 3. Any photographs, but particularly of minors;
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material."

Id. at 608-09. The *Besola* court held that the search warrant would likely have been sufficiently particular had the warrant used the language of the statute to describe the materials sought. *Id.* at 614. However, "[t]he name of the felony at the top of the warrant does not modify or limit the list of items that can be seized via the warrant." *Id.*

Here, as in *Besola*, the warrant did not use the language in the statutes to describe the data sought, and the names of the felonies at the top of the warrant did not modify or limit the list of

items that could be seized. Like in *Besola*, the warrant merely referenced the crimes of third degree child molestation and communicating with a minor for immoral purposes at the top of the warrant. Thus, the State's reliance on the reference to the crimes under investigation at the top of the warrant as sufficient is misplaced.

Next, the State argues that the warrant was sufficiently particular because Detective Graham's supporting affidavit referenced the language of the first warrant requesting to search Griffin's phone for "'images and texts sent to the victim.'" Br. of Resp't at 27. The State is correct that the detailed allegations in Detective Graham's supporting affidavit could meet the particularity requirement because it narrowed the search of data to information showing a relationship between Griffin and S.L. However, "an affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference.'" *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993) (quoting *Bloom v. State*, 283 So. 2d 134, 136 (Fla. Dist. Ct. App. 1973)).

Here, the record does not show that Detective Graham's affidavit was physically attached to the warrant. The State claims that the affidavit and warrant "appear to be one complete document" and were signed by the same superior court judge. Br. of Resp't at 27, n. 5. It is true that the State included the warrant and affidavit in the same appendix in support of its response to Griffin's motion to suppress. However, this alone does not show that the warrant and affidavit were physically attached to one another when the warrant was issued. And even if the warrant and affidavit were physically attached when the warrant was issued, the warrant does not expressly incorporate Detective Graham's affidavit with suitable words of reference Instead, the warrant merely identifies that Detective Graham had "made complaint on oath," without any words of

reference incorporating the affidavit therein. CP at 89. Therefore, our determination of the particularity requirement is limited to the warrant.

Finally, the State argues that the warrant here was distinguishable from *McKee* because Detective Graham knew, as part of his investigation, that the data contained on Griffin's cell phone was likely to be deleted or hidden. This argument fails because the record does not show that Detective Graham's affidavit, which detailed the risk that Griffin's cell phone data could be deleted, was physically attached to the warrant or incorporated into the warrant with suitable words of reference.

And even if the affidavit was incorporated into the warrant, the State provides no support for its argument that a warrant need not meet the particularity requirement if the items to be seized are capable of destruction. Allowing police unbridled discretion to search general categories of data simply because that data might be hidden or destroyed contravenes the purpose of the particularity requirement, which is to guard against "the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, 119 Wn.2d at 546.

The warrant authorizing the search of Griffin's cell phone allowed the police to search general categories of data with no objective standard or guidance. Therefore, it failed to meet the particularity requirement. As a result, the evidence seized from Griffin's phone, which included the evidence of his internet browser history and the video of him masturbating, should have been suppressed.

3. Severability

The State argues that even if parts of the warrant were overbroad, the images and text message seized from Griffin's phone should not be suppressed because the portion of the warrant related to those items were still valid. We disagree.

"Under the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." *Perrone*, 119 Wn.2d at 556 (quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984)). This doctrine applies when "a 'meaningful separation'" can be made between items that are described with particularity and items that are not. *State v. Higgs*, 177 Wn. App. 414, 430, 311 P.3d 1266 (2013) (internal quotation marks omitted) (quoting *State v. Maddox*, 116 Wn. App. 769, 806, 67 P.3d 1135 (2003)). When the warrant concerns material presumptively protected by the First Amendment, "the severance doctrine should only be applied where discrete parts of the warrant may be severed," not when "extensive 'editing' throughout the clauses of the warrant is required to obtain potentially valid parts." *Perrone*, 119 Wn.2d at 560.

Here, Detective Graham's affidavit specifically referred to "sexually explicit text messages and photographs" of Griffin's "nude body" that were sent to S.L. CP at 86. However, as explained above, the record does not show that this affidavit was physically attached to the warrant or incorporated into the warrant with suitable words of reference. Thus, the search for messages and photographs cannot be severed from the general warrant based on the limiting language contained in Detective Graham's affidavit.

4. Harmless Error

The State argues that even if the evidence seized from Griffin's cell phone should have been suppressed, any error was harmless beyond a reasonable doubt. We agree that the error was harmless as to Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions. However, we hold that the error was not harmless as to the communication with a minor for immoral purposes conviction based on Griffin's conduct between June 1, 2015 and June 24, 2015.

Admission of evidence seized in violation of the state or federal constitution is an error of constitutional magnitude. *Keodara*, 191 Wn. App. at 317.Constitutional errors can be harmless "'if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.'" *Id.* (internal quotation marks omitted) (quoting *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010)). We presume a constitutional error is prejudicial, and the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *Id.*at 317-18. In reviewing constitutional harmless error, we look only at the untainted evidence "to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt." *Id.* at 318.

Here, even without the evidence obtained from Griffin's cell phone, the evidence supporting Griffin's third degree child molestation conviction and six communication with a minor for immoral purposes convictions was overwhelming. S.L. testified in detail how Griffin tied her up, touched her breasts, and exposed his erect penis to her. Her testimony was corroborated by the rope that law enforcement found in Griffin's bedroom, a picture of which was admitted into evidence. Thus, even if Griffin's internet browsing history and the masturbation video was

suppressed, the error was harmless beyond a reasonable doubt as to Griffin's third degree child molestation conviction.

As to Griffin's communication with a minor for immoral purposes convictions, S.L. testified to the dozens of sexually explicit messages Griffin sent her, which were retrieved from S.L.'s cell phone. All of these messages were entered into evidence. S.L. further testified that over the course of their electronic communications, Griffin had sent multiple images of himself in a robe, shirtless, or else with no clothes on. Even without the text messages and internet browsing history obtained from Griffin's cell phone, the totality of evidence from S.L.'s testimony and cell phone was so overwhelming that it necessarily leads to a finding of guilt as to six of the communication with a minor for immoral purposes convictions.

However, the video of Griffin masturbating was discovered on his cell phone with a time stamp of June 15, 2015. S.L. testified that Griffin sent her "a video of himself fully erect and masturbating" sometime after June 13, but this testimony did not place the video in the June 1 to June 24 charging period. VRP (Jun. 19, 2017) at 1207. Though the State presented other evidence of communication Griffin had with S.L. during the June 1 to June 24 charging period, the State also offered the masturbation video as evidence to support this charge. The jury was instructed that it must unanimously agree as to which act has been proved beyond a reasonable doubt to support each of the communication with a minor for immoral purposes charges. Because the jury may have relied on the masturbation video to support the conviction based on the June 1 to June

24 charging period, we find that the error is not harmless beyond a reasonable doubt and that conviction should be vacated.[5]

B. JURY INSTRUCTION

Next, Griffin argues that the trial court erred by refusing to provide his proposed jury instructions defining sexual misconduct as a criminal act of a sexual nature. He also argues that omission of his proposed instructions relieved the State of its burden of proof. We disagree.

1. Legal Principles

We review a trial court's refusal to give proposed jury instructions for an abuse of discretion. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012). A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). In order to find an abuse of discretion, we must be convinced that "'*no reasonable person* would take the view adopted by the trial court.'" *Id.* (internal quotation marks omitted) (quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000)).

Jury instructions are improper if they mislead the jury, fail to inform the jury of the applicable law, or do not allow the defendant to argue his theory of the case. *Ehrhardt*, 167 Wn. App. at 939. Automatic reversal is required when an instruction relieves the State of its burden to prove every element of a crime. *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010).

[5] Griffin also separately challenges the admission of his internet browsing history at trial, which was found as the result of the search of Griffin's cellphone. We do not address this assignment of error because we hold that this evidence should have been suppressed because of an improper warrant.

2. No Abuse of Discretion

Here, the trial court instructed the jury that a person commits the crime of communication with a minor for immoral purposes when he or she communicates with a minor "for immoral purposes of a sexual nature." CP at 446. An identical instruction was upheld by our Supreme Court in *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). It cannot be said that providing a definition expressly approved of by our Supreme Court, rather than Griffin's proposed instruction, is a view that no reasonable person would take. The trial court's ruling was not manifestly unreasonable, and Griffin's assignment of error on this basis fails.

3. State Not Relieved of Its Burden of Proof

Griffin's argument that the trial court's instruction relieved the State of its burden of proof is also without merit. Griffin maintains that the jury should have been instructed that the State was required to prove that he had communicated with S.L. "regarding sexual conduct that would have been illegal (or at least constituted 'misconduct') if performed." Br. of Appellant at 26-27. Griffin relies on *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992), to argue that an essential element to the crime of communicating with a minor for immoral purposes is communication about sexual acts that are unlawful. But *Luther* is distinguishable.

In *Luther*, a 16 year old boy asked a 16 year old girl to perform fellatio on him. 65 Wn. App. at 425. The court held that this communication did not constitute communication with a minor for immoral purposes because the legislative intent of the statute was not to proscribe communications about sexual conduct that would be legal if performed. *Id.* at 428. Consensual oral sex between two 16 year olds was not unlawful. *Id.* at 427-28.

Following *Luther*, our Supreme Court in *McNallie* clarified that "the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." 120 Wn.2d at 933. The defendant in *McNallie* engaged in such proscribed conduct when he approached a group of minor girls and asked if "anyone" in the area gave "'hand jobs.'" *Id.* at 926. Despite the defendant's use of the word "anyone," the *McNallie* court held that such communication represented a predatory undertaking. *Id.* at 933.

Our Supreme Court later adhered to its holding in *McNallie* and "made clear" that the statute "is designed to prohibit 'communication *with children* for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006) (quoting *McNallie*, 120 Wn.2d at 933). Our Supreme Court has never narrowed the content of the communication to descriptions of unlawful sexual acts. It is the communication with children for the predatory purpose of exposing and involving them in sexual misconduct that makes the communication unlawful.

Despite Griffin's repeated claims, describing his sexual fantasies to a 14 year old girl, purchasing sex toys for her, offering to "test" her sex toy in the shower, sending a video of himself masturbating, and texting her that "ANYTHING passionate provides needed release" are all communications with a minor for the predatory purpose of promoting that minor's exposure to and involvement in sexual misconduct. Exhibit 87, Exhibit 46 at 13. The jury instructions provided here did not relieve the State of its burden of proof because the State was not required to prove that Griffin's messages specifically described unlawful sexual acts, and Griffin's challenge on this basis fails.

C. VAGUENESS

Griffin argues that RCW 68A.090 is unconstitutionally vague as applied to him because the messages he sent to S.L. about masturbation, sexual fantasies, sex toys, and S.L.'s minor girlfriend were not sexual topics proscribed by law. Griffin's claim is without merit.

1. Legal Principles

We review a challenge to the constitutionality of a statute de novo. *State v. Brosius*, 154 Wn. App. 714, 718, 225 P.3d 1049 (2010). A statute is presumed to be constitutional and the challenger bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Id.* A party who makes an as-applied challenge to the constitutional validity of a statute is claiming that application of the statute in the specific context of his actions is unconstitutional. *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012).

The guarantee of due process, afforded by the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires citizens to have fair warning of the proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it (1) fails to define the criminal conduct with sufficient definiteness so that ordinary persons can understand what conduct is proscribed, or (2) "'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). "'[V]agueness in the constitutional sense is not mere uncertainty.'" *Id.* at 7 (alterations in original) (internal quotation marks omitted) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). A statute is sufficiently definite

so long as "persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 Wn.2d at 179.

Under RCW 9.68A.090(1), "a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor."[6] "'[C]ommunicate'" includes both words and conduct, and "'immoral purpose'" refers to sexual misconduct. *Hosier*, 157 Wn.2d at 11 (quoting former RCW 9.68A.090). As explained above, the statute prohibits "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 933.

2. RCW 9.68A.090 Is Not Unconstitutionally Vague

Contrary to Griffin's repeated assertions, his communications with S.L. were not "innocuous" and did not fall outside the constitutional core of RCW 9.68A.090. Br. of Appellant at 31. In determining whether the language of a statute provides fair warning of the conduct proscribed, we consider the context of the entire enactment. *Douglass*, 115 Wn.2d at 180. A statute is not unconstitutionally vague merely because some terms in an enactment are undefined. *Id.* "For clarification, citizens may resort to the statements of law contained in both statutes and in court rulings which are '[p]resumptively available to all citizens.'" *Id.* (quoting *State v. Smith*, 111 Wn.2d 1, 7, 759 P.2d 372 (1988)).

[6] Misdemeanor communication with a minor for immoral purposes is elevated to a felony when the person has previously been convicted under this section or of a felony sexual offense. RCW 9.68A.090(2).

In enacting the communication with a minor for immoral purposes statute, the legislature found that "the protection of children from sexual exploitation can be accomplished without infringing on a constitutionally protected activity." RCW 9.68A.001. The legislative findings further state that the "definition of 'sexually explicit conduct' and other operative definitions demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities." RCW 9.68A.001. Thus, the legislative findings sufficiently limit the communication proscribed by the statute and exclude sexually explicit material that furthers legitimate scientific, medical, and educational activities. RCW 9.68A.001.

Here, the statute is not unconstitutionally vague as applied to the messages that Griffin sent S.L. A person of ordinary intelligence need not guess that describing his sexual fantasies to a 14 year old girl, discussing whether she would have a "surface vibe and a deep vibe" from a vibrator, telling her that "she still needed to get laid properly," stating that she could benefit from a "regular d***ing," and commenting on which of her minor friends he would choose to tie up, beat, and rape, are proscribed by RCW 9.68A.090. Exhibit 46 at 5, 38. The numerous sexually explicit messages Griffin sent to S.L. over a period of 10 months, some of which contemplated S.L.'s participation in anal sex and BDSM, amply show that he communicated with S.L. for the predatory purpose of exposing her to sexual misconduct. The words "immoral purposes" were sufficiently defined so that a person of common understanding could understand that Griffin's communications here were proscribed by the statute.

Griffin also appears to bring a facial challenge to the constitutionality of RCW 9.68A.090, which he describes as "the traditional inquiry." Br. of Appellant at 31. Griffin maintains that the

statute as written, could impermissibly encompass merely receiving a sexually explicit message from a minor. This argument fails.

As our Supreme Court explained in *Hosier*, "[u]nless a person's message is both transmitted by the person and received by the minor, the person has not communicated 'with children.'" 157 Wn.2d at 9. Therefore, Griffin's claim that the statute is unconstitutionally vague because it punishes someone who inadvertently received a sexually explicit message from a minor is without merit. Griffin's constitutional vagueness challenge to RCW 9.68A.090 fails.

D. CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Next, Griffin argues that the trial court violated his constitutional right to present a defense when it excluded the testimony of his mother and McCarter that he regularly discussed sexual topics with them. We disagree.

1. Legal Principles

The confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. CONST. amend. VI. Article I, section 22 of the Washington Constitution also guarantees the right of a defendant to "meet the witnesses against him face to face." We review alleged violations of constitutional rights de novo. *State v. Tyler*, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007).

Criminal defendants also have a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, this right and the right to confrontation are not absolute. *State v. Arredondo*, 188 Wn.2d 244, 265, 394 P.3d 348 (2017). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise

inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The defendant's right to present a defense is subject to "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015) (quoting *State. v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967, *cert. denied*, 528 U.S. 927 (1999)).

Evidence that a defendant seeks to introduce must be at least minimally relevant. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A defendant does not have a constitutional right to present irrelevant evidence. *Id.* If the proffered evidence is relevant, then "'the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

We review an evidentiary ruling made by the trial court for an abuse of discretion. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). We will reverse a trial court's evidentiary ruling "'only when no reasonable person would take the view adopted by the trial court.'" *Id.* (internal quotation marks omitted) (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). "Allegations that a ruling violated the defendant's right to a fair trial does not change the standard of review." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). We first look at whether the trial court abused its discretion in excluding the evidence. *State v. Blair*, 3 Wn. App. 2d 343, 353, 415 P.3d 1232 (2018). If the trial court did not abuse its discretion, then our inquiry ends. *Id.* If the trial court abused its discretion, then we review the constitutional challenge de novo. *Id.*

2. Griffin's Mother's Testimony

Griffin contends that the trial court erred by prohibiting him from eliciting testimony from his mother that he regularly discussed sexual topics with her. This assertion is not supported by the record.

At trial, Griffin attempted to elicit testimony from his mother that they had open discussions about sex. He also wanted his mother to testify that she had discussed "sexual experiences or sexual interests" with Griffin. VRP (Jun. 26, 2017) at 1899. While the trial court did not allow Griffin to elicit testimony about the specific sexual experiences and topics that Griffin and his mother shared, the trial court did allow her to testify as to whether Griffin was raised having "open and frank" discussions about sex. VRP (Jun. 26, 2017) at 1903. And based on the trial court's ruling, Griffin's mother testified that she raised Griffin to be open about sex and sexuality and that the topics of sex and sexuality were just "another subject matter" in Griffin's household growing up. VRP (Jun. 26, 2017) at 1904. Thus, the record does not support Griffin's claim that the trial court prohibited Griffin's mother from testifying that Griffin regularly discussed sexual topics with her and his challenge on this basis fails.

3. McCarter's Testimony

Griffin also attempted to elicit testimony from McCarter regarding a sexual relationship between Griffin and McCarter as adults, McCarter's own "sexual issues back in high school," and the way Griffin and McCarter discussed "the subject of sexuality . . . very frankly, very openly, intellectualized." VRP (Jun. 27, 2017) at 1971, 1980. Griffin argues that this testimony was central to his defense that he did not communicate with S.L. for immoral purposes because he

considered these types of conversations to be normal, and the trial court erred by excluding the testimony. We find this argument unpersuasive.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Whether Griffin discussed his sexual fantasies and BDSM with McCarter, a 37 year old consenting adult, did not have any tendency to make it more or less probable that he communicated with S.L., a 13 to 14 year old girl, with the predatory purpose of promoting S.L.'s exposure to and involvement in sexual misconduct. Evidence of McCarter's sexual proclivities when she was young similarly did not have any tendency to make the existence of a fact at issue here more or less probable. We hold that the trial court's ruling to exclude this evidence was not a view that no reasonable person would take, and it was not an abuse of discretion.[7]

E. RIGHT TO COUNSEL

The Sixth Amendment guarantee to the right of assistance of counsel to criminal defendants includes the right to confer privately with counsel. U.S. CONST. amend. VI; *State v. Peña Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). Even though eavesdropping on a criminal defendant's conversation with his attorney "is an egregious violation of a defendant's constitutional rights,"

[7] Even if the trial court abused its discretion in barring this testimony, the exclusion of this evidence did not violate Griffin's constitutional right to present a defense. Despite the trial court's ruling, McCarter testified, without objection, that she often discussed her "uncontrollable" sex drive with Griffin during high school. VRP (Jun. 27, 2017) at 1985. The trial court also allowed McCarter to read several letters to the jury that Griffin had sent her asking for "'guidance'" as to how he could convince S.L. "'to keep her libido to herself.'" VRP (Jun. 27, 2017) at 1993. Thus, Griffin elicited considerable evidence through McCarter about the types of sexual topics he discussed with others and the purposes for which he discussed sex with S.L.

dismissal of the charges is not warranted "when there is no possibility of prejudice." *Id.* at 819. Invasion by a State actor into a defendant's attorney-client communications is presumptively prejudicial, and the State bears the burden to rebut the presumption of prejudice beyond a reasonable doubt. *Id.* at 819-20.

Griffin contends that the trial court violated his right to counsel by failing to presume that the he had been prejudiced when law enforcement extracted five pages of attorney-client communications from the search of his cell phone. We disagree because the record does not support this contention.

When Griffin brought this issue to the trial court's attention, he asked the trial court to "review them in-camera . . . and make a determination and keep the current trial date." VRP (Oct. 25, 2016) at 5. The next day, Griffin provided the trial court with the five pages he believed were privileged and stated, "[s]o I guess, then, at this point, the question is what to do about it, what the remedy is." VRP (Oct. 26, 2016) at 3. The trial court ruled that the documents were privileged, presumed the State had read them, and then assessed the prejudice to Griffin. Therefore, Griffin's contention that the trial court violated his right to counsel by failing to presume prejudice is without merit because record does not support Griffin's claim that the trial court failed to apply any presumption of prejudice.[8]

[8] Although the invasion into Griffin's attorney-client communications was presumptively prejudicial, this presumption was rebuttable. *See Peña Fuentes*, 179 Wn.2d at 819-20. Here, the State agreed to an in-camera review by the trial court. After reviewing the documents, the trial court ruled that there was no prejudice to Griffin because the documents did not contain work product or communication regarding trial strategy or tactic. Therefore, the presumption of prejudice was rebutted beyond a reasonable doubt through the trial court's in-camera review proceeding.

Griffin's assertion that the trial court "refused to enact any remedy" is also unsupported by the record. Br. of Appellant at 42. The trial court granted Griffin's motion to seal the documents from the public.

F. LFOs

Griffin filed a supplemental brief regarding the imposition of LFOs in light of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Griffin argues that we should remand to the sentencing court to strike the $200 criminal filing fee from his judgment and sentence. The State agrees that the $200 criminal filing fee should be stricken.

The legislature recently amended former RCW 36.18.020, and as of June 7, 2018, sentencing courts are prohibited from imposing a criminal filing fee on indigent defendants. RCW 36.18.020(2)(h); *Ramirez*, 191 Wn.2d at 747. Our Supreme Court recently held that the 2018 legislative amendments to the LFO statutes apply prospectively apply to cases pending on appeal. *Id*. Because we vacate one of Griffin's convictions for communication with a minor for immoral purposes and remand for resentencing, we instruct the trial court to address on remand the criminal filing fee consistent with the 2018 legislative amendments and *Ramirez*.

G. STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds (SAG), Griffin challenges (1) the constitutionality of the communication with a minor for immoral purposes statute, (2) the sufficiency of the charging document, and (3) the sufficiency of the evidence to support his third degree child molestation conviction. We hold that each of these claims fail.

1. Constitutional Challenges

Griffin argues that RCW 9.68A.090 is unconstitutionally overbroad and infringes on constitutionally protected areas of speech. He also argues that the communication with a minor for immoral purposes statute is unconstitutionally vague because it allows for arbitrary enforcement and the term "immoral purposes" should be narrowed to only proscribe commercial communications. We disagree on both accounts.

a. Standard of review

Again, we presume a statute is constitutional and the challenger must prove it is unconstitutional beyond a reasonable doubt. *State v. Aljutily*, 149 Wn. App. 286, 292, 202 P.3d 1004 (2009), *review denied*, 166 Wn.2d 1026 (2009). "'Therefore, the presumption in favor of a law's constitutionality should be overcome only in exceptional cases.'" *Id.* (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988)).

b. Overbreadth

"A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment." *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). The First Amendment overbreadth doctrine is intended to prevent the chilling of speech and expression. *Aljutily*, 149 Wn. App. at 292.

When a statute regulates behavior, rather than pure speech, it will not be overturned unless the challenger can show that the overbreadth is "'both real and substantial in relation to the ordinance's plainly legitimate sweep.'" *Id.* at 293 (internal quotation marks omitted) (quoting *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908

(1991)). We will only overturn a statute on overbreadth grounds if we are "unable to place a sufficiently limiting construction upon the statute." *Id.*

Griffin argues that the statute is impermissibly overbroad because it should be narrowed to proscribe only commercial speech. However, as our Supreme Court explained, the legislative findings contained in RCW 9.68A.001 "reflect legislative concern with adults who exploit children for personal gratification." *Hosier*, 157 Wn.2d at 11. Thus, the statute is not intended to narrowly proscribe only commercial speech.

The *Hosier* court also defined the word "communicate" as transmission to and reception of a communication by a minor. 157 Wn.2d at 9. And it narrowed "immoral purposes" to communication with a child "'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Id.* (quoting *McNallie*, 120 Wn.2d at 933). Therefore, our Supreme Court has placed sufficient limiting constructions on the statute to ensure that a substantial amount of protected speech is not deterred. The statute does not reach a substantial amount of protected speech and Griffin's challenge on this basis fails.

c. Vagueness

"The due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." *Watson*, 160 Wn.2d at 6. Because "'[s]ome measure of vagueness is inherent in the use of language,'" we do not require "'impossible standards of specificity or absolute agreement.'" *Id.* at 7 (alteration in original) (internal quotation marks omitted) (quoting *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991); *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). A statute is not unconstitutionally vague "[i]f persons of ordinary intelligence can understand what the

ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 Wn.2d at 179.

Griffin argues that the communications with a minor for immoral purposes statute is unconstitutionally vague because the term "immoral purposes" is arbitrary. This argument fails because, as explained above, the term has been sufficiently narrowed to only proscribe communication with a minor "'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Hosier*, 157 Wn.2d at 9 (quoting *McNallie*, 120 Wn.2d at 933). And the legislative findings narrow the definition of "'sexually explicit conduct'" to "demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities." RCW 9.68A.001. Thus, persons of ordinary intelligence can understand what the statute proscribes, even if there remains some possible areas of disagreement.

Griffin also argues that the statute is unconstitutional because "the morality of the majority cannot be the sole basis for criminal law." SAG at 18. As explained above, the rationale for the law is to protect children from adults who exploit children for their personal gratification, not the morality of the majority. RCW 9.68A.001; *Hosier*, 157 Wn.2d at 11. And again, contrary to Griffin's argument, the statute is not "supposed to be entirely commercial in nature." SAG at 24. The statute is not unconstitutionally vague, and Griffin's challenge on this basis fails.

Griffin also contends that part of E.S.S.B 5669, 63rd Leg., Reg. Sess. (Wash. 2013), which amended the communication with a minor for immoral purposes statute, is unconstitutional because the bill violates the single subject requirement in article II, section 19 of the Washington State Constitution. We disagree.

Under article II, section19 of the Washington Constitution, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." "'The single-subject requirement seeks to prevent grouping of incompatible measures as well as pushing through unpopular legislation by attaching it to popular or necessary legislation.'" *State v. Haviland*, 186 Wn. App. 214, 218, 345 P.3d 831 (quoting *Pierce County v. State*, 144 Wn. App. 783, 819, 185 P.3d 594 (2008)), *review denied*, 183 Wn.2d 1012 (2015).

To determine whether the legislature violated the single subject requirement of article II, section 19, we must first determine whether the title of the bill is general or restrictive. *Id.* at 219. "'A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow.'" *Pierce County*, 144 Wn. App. at 820 (quoting *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001)). "'A few well-chosen words, suggestive of the general topic stated, are all that is necessary.'" *Id.* (quoting *Kiga*, 144 Wn.2d at 825). If the bill contains a general title, then it "'may constitutionally include all matters that are reasonably connected with it and all measures that may facilitate the accomplishment of the purpose stated.'" *Haviland*, 186 Wn. App. at 219 (quoting *Pierce County*, 144 Wn. App. at 821).

"The second step in analyzing the single-subject requirement is to determine the connection between the general subject and the incidental subjects of the enactment." *Id* at 219-20. "Where a general title is used, all that is required is rational unity between the general subject and the incidental subjects." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209, 11 P.3d 762 (2000).

RCW 9.68A.090, the communication with a minor for immoral purposes statute, was amended in 2013 as part of E.S.S.B. 5669. The bill is titled, "An ACT Relating to trafficking;

amending RCW 9.68A.090, 9.68A.100, 9.68A.101, 9.68A.102, 9.68A.103, 9A.44.020, 9A.44.128, 9A.44.150, 9A.82.010, and 13.34.132; reenacting and amending RCW 9A.40.100; prescribing penalties; and providing an effective date." LAWS of 2013 ch. 302. The title is broad, comprehensive, and generic, rather than specific and narrow. It, therefore, contains a general title and may constitutionally include all matters that are reasonably connected with it, or all measures that facilitate the accomplishment of the purpose stated. *See Haviland*, 186 Wn. App. at 219. E.S.S.B 5669 amended the communication with a minor for immoral purposes statute to include the purchase or sale of commercial sex acts and sex trafficking, and to define "electronic communication" as including "electronic mail, internet-based communications, pager service, and electronic text messaging." LAWS of 2013, ch. 302 at 1; RCW 9.61.260(5). These amendments are rationally related to the general subject of the bill relating to trafficking. Therefore, we hold that there is rational unity among the subjects in the bill and Griffin fails to show beyond a reasonable doubt that E.S.S.B. 5669 violated the single-subject rule of article II, section 19 of the Washington Constitution.

2. Charging Document

Next, Griffin challenges the sufficiency of the charging document regarding his communication with a minor for immoral purposes charges. This challenge fails.

"'All essential elements of a crime . . . must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.'" *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (alteration in original) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). This rule is rooted in the Sixth Amendment to

the United States Constitution and article I, section 22 of the Washington Constitution. *Id.* We review alleged constitutional violations de novo. *Id.*

The purpose of the essential element rule is to provide the accused notice "'of the nature of the crime that he or she must be prepared to defend against.'" *Id.* at 158-59 (quoting *Kjorsvik*, 117 Wn.2d at 101). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). However, there is a difference between an essential element of a charged crime and a definition of an element. *State v. Porter*, 186 Wn.2d 85, 91, 375 P.3d 664 (2016). The "'State need not include definitions of elements in the information.'" *Id.* (quoting *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014)). For example, in *Porter*, our Supreme Court held that the information charging the defendant with unlawful possession of a stolen vehicle did not need to include a definition of "'possess'" because the definition only defined and limited the scope of the essential elements of the crime. *Id.*

Where, as here, the defendant challenges the information in the charging document for the first time on appeal, we liberally construes the document in favor of validity. *Kjorsvik*, 117 Wn.2d at 105. We ask (1) whether the necessary facts appear in the information, or else can be found by fair construction, and (2) if so, whether the defendant was nonetheless prejudiced by the language of the information. *Id.* at 105-06.

Here, the information had the required specificity to provide Griffin notice as to the illegality of the behavior charged. The document accused Griffin of communicating with someone under the age of 18, during a particular time frame, for immoral purposes through the sending of

electronic communication. The term "sexual nature" is not an essential element of the crime, but instead is a definition of "immoral purposes" that defines and limits the scope of the essential elements of communication with a minor for immoral purposes. RCW 9.68A.090. Because the term "sexual nature" only defines and limits the scope of "immoral communication," it did not need to be included in the charging document. Therefore, the charging document contained the essential elements of the charged crimes and Griffin's challenge on this basis fails.

3. Third Degree Child Molestation Conviction

Finally, Griffin maintains that his third degree child molestation rests on insufficient evidence. We disagree.

a. Standard of review

We review a challenge to the sufficiency of the evidence de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* All such inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Direct and circumstantial evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). And we defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

b. The evidence was sufficient

A person is guilty of third degree child molestation if he "has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.089(1). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Griffin argues that insufficient evidence supports his third degree child molestation conviction because the evidence against him was circumstantial and speculative. But S.L.'s testimony was direct evidence of the crime based on her personal knowledge and experience.

S.L. testified that in June 2015, Griffin tied her up, touched her bare breasts with his mouth and hands, and exposed his erect penis to her. Griffin also told her that her "body was beautiful." VRP (Jun. 19, 2017) at 1180. Viewing this evidence in the light most favorable to the State, the jury could easily have found beyond a reasonable doubt that Griffin touched S.L.'s sexual or intimate body parts for the purposes of satisfying his sexual desire. Griffin's challenge to the sufficiency of the evidence fails.

CONCLUSION

We hold that the warrant authorizing the search of Griffin's cell phone violated the particularity requirement of the Fourth Amendment and the evidence resulting from that search should have been suppressed. However, we hold that this error was harmless beyond a reasonable doubt as to Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions. We also hold that Griffin's other challenges on appeal

fail. Accordingly, we affirm Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions, but vacate Griffin's communication with a minor for immoral purposes based on the June 1, 2015 and June 24, 2015 charging period and remand to the trial court for further proceedings consistent with this opinion. We also instruct the trial court to address on remand the criminal filing fee consistent with the 2018 legislative amendments to the LFO statutes and *Ramirez*.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

I concur:

Cruser, J.

WORSWICK, J. (concurring) — I agree with the resolution of this case. However, I write separately because I disagree with the majority's analysis regarding Daniel Griffin's argument that the trial court violated his constitutional right to present a defense. For all the reasons stated in my concurrence in *State v. Blair*, 3 Wn. App. 2d 343, 355-57, 415 P.3d 1232 (2018), I believe that the majority has failed to conduct a proper constitutional examination of Griffin's argument.

The majority states, "If the trial court did not abuse its discretion, then our inquiry ends," thus turning our constitutional inquiry into a search for mere abuse of discretion. Majority at 30. This approach is in conflict with *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), and other Washington Supreme Court cases specifically examining a criminal defendant's constitutional right to present a defense.

Regardless, I concur in the result because my examination of the record convinces me that Griffin's constitutional rights were not violated.

Worswick, J.

Communication with Minor for Immoral Purposes Counts	**Evidence**
Count IV: between October 1, 2014 and October 31, 2014	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [10/26/14] Here's the thing: My fetishes depend on how recently I've cleansed myself of impure thoughts. If I haven't partaken in a few days, the[n] I don't need any mental stimulation at all. If I'm chain-cleansing, then . . . . [10/26/14] They don't HAVE a rating for what I dream up. Some of my ideas involve impossible magics, body shapes, and things you couldn't help me with if you genetically remodeled your body from the ground up. . . . . [10/26/14] Sometimes, a nip-slip will do it for me. Other times, I might read the Cupcakes comic for inspiration. . . . . [10/26/14] I already have one person that wants me to take them to a BDSM convention. . . . . [10/27/14] There seems to be a theme of underage sex going on. . . . Although, I guess from your point of view, it's just 'sex', huh? . . . . [10/27/14] *sigh* I need to get you into some good ol' STRAIGHT porn! . . . .

	[10/27/14] So does a regular d***ing. . . . . [10/27/14] 'Pegging' is NOT on my list. . . . . [10/27/14] I like boobs, p****, and women. Yuri is twice the eye candy with none of the sausage. . . . . [10/27/14] To be clear: I'm not a fan of yuri/romance. I like yuri/sex, usually via BDSM. . . . . [10/27/14] Sometimes, I don't think you're a bi-girl as much as a gay-dude in a girl's body. . . . . [10/27/14] Is it 'torture' if the pleasure is greater? Crazy though[t]? Yeah, I suppose you could say that. . . . . [10/30/14] What are your thoughts on latex, ball gags, anal play, suspen[s]ion, clamps, and/or collars/leashes? For yourself or for use on others? . . . . [10/30/14] BDSM orgy at my place this weekend. hehehe. . . . .

	[10/30/14] I'mm'a get back to my video games. I've already fapped enough today anyway. Exhibit 46 at 1-2, 4-9. **S.L.'s testimony:** "'Pegging'" in the 10/27/14 message referred to "homosexual male sex," and "'yuri'" is "an anime form of homosexual female sex." VRP (Jun. 19, 2017) at 1230-31. "'[F]apped'" in the 10/30/14 message meant masturbation. VRP (Jun. 19, 2017) at 1239.
Count V: between November 1, 2014 and November 30, 2014	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [11/05/14] I really shouldn't be –finishing- a 14 year old . . . You and your friends don't have to worry about that. I do. I'm willing to be more chatty in person. . . . . [11/18/14] I can go darker, of course. I can go WAY darker. I'm just not sure where you[r] line is, and EVERYBODY has some sort of line, even necro-vore cannibals probably have SOMETHING they're not into. . . . . [11/19/14] Ironically, I was in the shower when you thanked me for 'being there' for you. :P I'm happy to help out. You're a person who's worth knowing. . . . . [11/19/14] Not everybody wants to shove a medical tube down a person's throat and piss directly into their stomach[] just to see t[he] look of horror in their eyes.

	. . . . [11/20/14] *eyeroll* I'm not convinced that [S.L.'s girlfriend]'s all that good. Right now the evidence is that ANYTHING passionate provides needed release. . . . . [11/20/14] Speaking of release, d'you want me to do any online shopping for you? . . . . [11/22/14] You should show [S.L.'s minor friend] a bdsm guro rape picture . . . Exhibit 46 at 11-14; Exhibit 46B at 2. **S.L.'s testimony**: "'[R]elease'" in the 11/20/14 message referred to sexual release. VRP (Jun. 19, 2017) at 1221. And the online shopping message on 11/20/14 referred to shopping online for vibrators or toys. "'[F]inishing a 14-year-old'" meant "getting [S.L.] or other 14-years-old to orgasm." VRP (Jun. 19, 2017) at 1241.
Count VI: between December 1, 2014 and December 31, 2014	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [12/06/14] Have fun with that. I'mm'a take a shower. Hmm, should I test your toy while I'm in there? . . . nah . . . . [12/12/14] 'batin, then workin', I guess. . . . . [12/14/14] bdsm immortal HETALIA orgy??

	Exhibit 87; Exhibit 46 at 15-16. **S.L.'s testimony:** The "'toy'" reference in the 12/06/14 message referred to a vibrator Griffin had bought her. VRP (Jun. 19, 2017) at 1219-20. "'[B]atin'" was an abbreviation for masturbation. VRP (Jun. 19, 2017) at 1250.
Count VIII: between March 1, 2015 and March 31, 2015	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [03/11/15] So, do your folks have anything particularly interesting? Whips 'n chains, perhaps? Maybe a strapon? . . . . [03/11/15] Nope, just rope and oil. . . . . [03/11/15] Unfortunately, when I'm depressed, so is my libido, but my body never stops generating [it's] 'supply.' Now I'm stuck at work, and . . . never[ ]mind. . . . . [03/22/15] Your lack of response worries me. Do NOT walk to my house topless. Put a jacket on first. . . . . [03/28/15] So, a sleepover IS a possibility, but you'll have to earn the privile[g]e by honoring your promises, and not asking for too many 'special favors.' . . . .

	[03/31/15] Os yeah . . . I never fully woke up when you called. Your voice, and mental images of you ended up permeating my next dream cycle. THAT got . . . interesting. . . . . [03/31/15] frogtie [03/31/15] . . . ? Exhibit 46 at 19-20, 22, 23; Exhibit 46B at 6; Exhibit 13 at 2. **S.L.'s testimony:** The 03/11/15 message about Griffin's body generating "'supply'" meant that Griffin's "body won't stop producing sperm, but because his mind didn't want to." VRP (Jun. 19, 2017) at 1261. And "'stuck at work'" referred to Griffin feeling "like he needs to masturbate and he is at work, and he doesn't want to when he is at work." VRP (Jun. 19, 2017) at 1261. **Detective Graham testimony:** The term "'frogtie'" refers to a sexual position that "allows relatively easy access to the genitals." VRP (Jun. 21, 2017) at 1519.
Count X: between May 1, 2015 and May 31, 2015	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [05/19/15] I'm either working, sleeping, masturbating or two of the three. . . . . [05/25/15] So, more self-help toys. Does she know that you already have one, and that it's not really doing the trick? . . . . [05/25/15] How's the toy discussion going?

	. . . . [05/29/15] Have fun in Leavenworth. Hope your feet hold together. Don't let [S.L.'s girlfriend] rape anybody. . . . . [05/29/15] Either you or this chick . . . [S.L.'s girlfriend] likes big tits apparently. Exhibit 13 at 6-7; Exhibit 46 at 35-36. **S.L.'s testimony:** The "'self-help toys'" message Griffin sent on 5/25/15 was in reference to the vibrator he had purchased her. VRP (Jun. 19, 2017) at 1213.
Count XI: between June 1, 2015 and June 24, 2015	**Text messages from Griffin to S.L., retrieved from S.L.'s phone:** [06/02/15] [responding to message S.L. sent of vibrator picture] Huh. I figured you'd want something with more . . . bulk. . . . . [06/02/15] Now you'll have a surface vibe and a deep vibe. Sounds fun. . . . . [06/02/15] You still need to get laid properly though. :P Exhibit 46 at 38. **Testimony regarding masturbation video:** Detective Salmon testified that the video was found on Griffin's phone and had a creation date of June 15, 2015.

	S.L. identified video and testified that it was sent to her sometime after June 13.
Count XII: between June 24, 2015 and June 30, 2015	**Griffin's message sent to S.L.'s father (acting as S.L.) on June 24, 2015:** In the fantasy, I tie you to the desk, your leg to the desk leg, on both sides. . . . . You would have a shoulder harness that would be tied to the front of the desk, holding you securely in place. Your elbows would be tied behind your back, your arms straight, so that they rested on your a** . . . . I expect you would be a little nervous, as I loomed over you with a perverted smile. . . . . I would place a small bottle in one of your hands, and command you to apply the contents to your anus. You would squirm, and insist that *I* be the one to apply it. There would be a moment of silence, followed by several slaps of a flog across your back and thighs. Exhibit 1 at 7-11.