Supreme Court No. 101423-6
COA No. 38282-6-III

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL E. CHAMBERS,

Petitioner.

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# PETITION FOR REVIEW

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Judgment in Asotin County Superior Court
Hon. Gary Libey, Presiding
Hon. (Pro Tem) Gary Frazier, Presiding

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## A. IDENTITY OF PETITIONER

Michael Chambers, the appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Section B.

## B. COURT OF APPEALS' DECISION

Mr. Chambers seeks review of the partially published opinion of the Court of Appeals, Division Three, in *State of Washington v. Michael E. Chambers*, No. 38282-6-III, issued on October 4, 2022. A copy is attached in Appendix A.

## C. ISSUES PRESENTED FOR REVIEW

1. For the crimes of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct and Possession of Depictions of Minor Engaged in Sexually Explicit Conduct to be constitutional, there is an implied element that the defendant must either know of the minority status of those depicted or be aware of the general nature of the material he or she possessed or disseminated. *See State v. Rosul*, 95 Wn. App. 175, 974 P.2d 916

(1999). This element was not contained in the information in this case. CP 1-27. Should the convictions be reversed and the charges dismissed without prejudice?

2. Idaho police officers were involved in all aspects of the investigation in this case, including the search of Mr. Chambers' home, interrogating Mr. Chambers and analyzing his computers in Idaho without judicial authorization. Was their involvement unlawful?

3. The police believed that a computer with a specific IP address was sharing illegal files on a particular day. Was there probable cause that Mr. Chambers' computer was using that same IP address on another day?

4. Was the search warrant overbroad in that it allowed the search of many categories of digital devices without restriction?

5. Idaho police detectives used a Peer-to-Peer software program to extract or identify portions of computer files that

allegedly contained sexually explicit images of minors on Mr. Chambers' computer. The parties stipulated to the admission of Mr. Chambers' statement to the police that he did not know that others could obtain files from his computer. Was there sufficient evidence to sustain convictions for dealing in depictions of minors as charged in Counts 1, 2, and 3?

## D. STATEMENT OF THE CASE

By information filed in Asotin County Superior Court on May 25, 2018, the State charged Mr. Chambers with two counts of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree and one count of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree in violation of RCW 9.68A.050(1) & (2), allegedly occurring on September 30, 2017. CP 1-3. The State also charged Mr. Chambers with 24 counts of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the

first degree in violation of RCW 9.68A.070(1), allegedly occurring on December 21, 2017. CP 4-27.

The charges arose after Idaho police used a Peer to Peer ("P2P") file sharing program called "BitTorrent" to access a computer that allegedly was making child pornography available to others. This alleged dissemination was the basis for the distribution counts (Counts 1-3). Using an Idaho administrative subpoena directed to the Arizona internet provider CableOne, Idaho police obtained the IP address for the computer network assigned that IP address on September 30, 2017, which was allegedly connected to Mr. Chamber's home in Clarkston, Washington. After Idaho police confirmed that the WiFi signal coming from Chamber's home was password protected, Washington police obtained a search warrant. RP 62-74; CP 107-140.

Idaho and Washington police (including members of the Washington State Patrol) raided Mr. Chambers' home on

December 21, 2017. An Idaho detective participated in the interrogation of Mr. Chambers. Mr. Chambers told officers that he did not share images with anyone and that he thought he had set up the P2P program so that it was only a "one-way street" whereby he obtained images but did not share them with anyone else. CP 285-286.

The police seized Mr. Chambers' computer equipment. Without obtaining additional judicial permission other than the original warrant, Washington police sent the hardware to Idaho for Idaho police to search. Idaho police found images of child pornography that were the basis for the possession charges in Count 4-27. CP 260-261, 279-287.

Mr. Chambers moved for suppression of evidence on a variety of grounds. CP 86-177, 209-243. Although the judge suppressed some of the evidence (seized in an outbuilding), he denied the motions related to materials seized in Chambers' home. CP 248-254; RP 43-46, 77-78.

On May 4, 2021, Mr. Chambers waived his right to a jury trial, and the parties agreed to submit the case for trial based upon stipulated facts. RP 178-302. The parties entered into an extensive written stipulation to various police reports. On May 5, 2021, the court found Mr. Chambers guilty on all 27 counts. RP 259-302; CP 259-309. On June 24, 2021, the court sentenced Mr. Chambers, a senior citizen with no prior record, to prison. CP 342-357.

Mr. Chambers appealed. On October 4, 2022, the Court of Appeals affirmed the convictions, although remanding to the trial court to modify some conditions of community custody. Appendix A.

## E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### 1. *The Court Should Accept Review of the Defective Information Issue*

Mr. Chambers challenged the sufficiency of the information for the first time on appeal, arguing that it excluded a key essential

element of the charges – that he knew the minority status of those depicted in the images or that he knew the general nature of the materials. This is an element that is constitutionally required under the First and Fourteenth Amendments to the United States Constitution and article I, section 5, of the Washington Constitution. The Court of Appeals rejected this argument under the liberal construction standard of *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). Mr. Chambers seeks review under RAP 13.4(b)(1)-(3).

The Sixth Amendment (as incorporated by the Fourteenth Amendment) and article I, section 22, require that the defendant be given notice of the essential elements of criminal charges. "The information must allege every element of the charged offense." *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). Failure to allege each element means that the charging document "is insufficient to charge a crime and so must be dismissed." *Id*. The essential element rule includes both statutory

elements and court-implied elements. *See State v. Davis*, 119 Wn.2d 657, 662-63, 835 P.2d 1039 (1992); *State v. Kjorsvik*, 117 Wn.2d at 97.

The information in this case simply tracked the literal language of former RCW 9.68A.050 & .070,[1] and only alleged that Mr. Chambers knowingly possessed or disseminated the images. The information did not allege a second *mens rea* element – either that Mr. Chambers knew the people depicted were minors or that he knew the general nature of the materials. CP 1-27.

Yet, knowledge of the minority status of those depicted or knowledge of the general nature of the materials is *the* element that separates criminal conduct from conduct that is constitutionally protected by the First and Fourteenth

[1] In 2019, the statutes were amended to restrict their use to adults over 18. Laws of 2019, ch. 128, §§ 3 & 6.

Amendments and article I, section 5. *See State v. Rosul*, 95 Wn. App. at 184-85.

In *Rosul*, Division One[2] addressed the argument that a jury in a depictions case should have been instructed that Rosul knew the minority status of those depicted in the images he possessed. While disagreeing with that precise argument, the Court of Appeals agreed with Rosul that the statute, as written, was overbroad and thus an *additional* implied non-statutory element was necessary to prevent the statute from being unconstitutional:

> *A natural grammatical reading of RCW 9.68A.070 would apply the scienter requirement to possession, but not to the age of the children depicted*. . . .
>
> . . .
>
> Conviction for possession of child pornography requires a minimum showing that the defendant was aware of the nature and content of the material he or she possessed. [Footnote omitted] Such a showing defeats overbreadth challenges by ensuring that innocent possessors of child pornography do not face

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[2] Division Three in this case inadvertently referred to *Rosul* as a decision of this Court. Slip Op. at 9.

> prosecution. It follows that if a child pornography statute was construed in a way that would not require prosecutors to prove that a defendant had this general knowledge, the statute would be impermissibly overbroad. . . .
>
> . . . .
>
> [W]e *construe RCW 9.68A.070 as requiring a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed*. It is not constitutionally necessary that the State prove a defendant's specific knowledge of the child's age.

*Rosul*, 95 Wn. App. at 182-85 (emphasis added).[3]

The *Rosul* court's construction of Washington's depiction of minors statute followed the United States Supreme Court's similar construction of federal law in *United States v. X-Citement*

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[3] Division One borrowed this language from a New York statute upheld in the New York trial court decision in *People v. Gilmour*, 177 Misc. 2d 250, 678 N.Y.S.2d 436 (1998).

*See also State v. Garbaccio*, 151 Wn. App. 716, 733, 214 P.3d 168 (2009) (applying *Rosul*); *State v. Luther*, 125 Wn. App. 176, 189, 105 P.3d 56 (2005), *aff'd* 157 Wn.2d 63, 134 P.3d 205 (2006) (same).

*Video, Inc*., 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). In *X-Citement Video*, the Court upheld the constitutionality of a federal child pornography statute (former 18 U.S.C. § 2252) by rejecting its "natural grammatical reading" which would apply the mental state of knowledge to "only the surrounding verbs: transports, ships, receives, distributes, or reproduces." *Id*. at 68. Because "the age of the performers [sic] is the crucial element separating legal innocence from wrongful conduct," *id*. at 72, the Court concluded that "the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers." *Id*. at 78.

While the issue in *Rosul* involved jury instructions, and not the charging document, this Court recently rejected the artificial distinction between the essential elements that must be included in jury instructions and those that must be included in charging documents. *See State v. Canela*, 199 Wn.2d 321, 332, 505 P.3d 1166 (2022) ("[E]ssential elements are 'essential' precisely

because the jury must find that they are established by the evidence in order to convict the defendant for a crime. . . . No substantive distinction exists since the essential elements required for to-convict instructions—which must be found by a jury—are typically the essential elements for charging documents.").

This was not a change in the law (as the Court of Appeals claimed Chambers was arguing). Slip Op. at 12. Rather, in *Canela*, the Court simply stated a logical conclusion -- elements are elements, either for purposes of charging documents or for "to convict" instructions.

If, for constitutional reasons, a second *mens rea* element must be implied into the statute, a charging document that excludes this necessary element is not sufficient. Even under the liberal construction test used to test the sufficiency of charging documents challenged for the first time on appeal, a person of "common understanding" would still have to know from reading the information what is intended. *Kjorsvik*, 117 Wn.2d at 110. If

the "natural" reading of the statutory language excludes the required essential element that the defendant knew the minority status of the person depicted or knew the general nature of the material, *a fortiori* a person of common understanding would not know that there is a second *mens rea* element.

In the instant case, in the published part of its opinion, Division Three recognized *Rosul* but held that the absence of the constitutionally required *mens rea* from a charging document was not a basis for reversal. Slip Op. at 7-12. The court held that "[t]he State's information mirrors the statute. Where knowledge of the nature of the materials was implied in the statute under the strict statutory interpretation standard, the language sufficiently provides notice of all essential elements under a more liberal construction. The word 'knowingly' in the information modifies the acts of possession and dissemination, and the word 'minor' describes the nature of the images." Slip Op. at 12. *See also* Slip Op. at 11 ("'a transitive verb has an object, listeners in most

contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.'") (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009)).

This holding directly contradicts *Rosul* and *X-Citement Video*. In both cases, the courts held that the "natural grammatical reading" of the pertinent statutes would have only applied the knowledge requirement to the act of possession, but not to the age of the children depicted. *See Rosul*, 95 Wn. App. at 182; *X-Citement Video*, 513 U.S. at 68. This conflict between how Division Three construed the language of the depiction statutes and how Division One and the U.S. Supreme Court construed similar language is grounds for review under RAP 13.4(b)(2) and (3).

Division Three's conclusion also improperly downplays the constitutional importance of the court-implied *mens rea* element

discussed in *Rosul* and *X-Citement Video*. "An essential element is one whose specification is necessary to establish the very illegality of the behavior charged." *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019) (internal quotes and cites omitted). An essential element take on greater importance when it is the "crucial element differentiating between wrongful and innocent conduct." *State v. Moreno*, 198 Wn.2d 737, 751, 499 P.3d 198 (2021) (citing *X-Citement Video* and *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)). *See also State v. Blake*, 197 Wn.2d 170, 183-84, 481 P.3d 521 (2021) (discussing how lack of mental state in VUCSA statute can lead to convictions of wholly innocent behaviors); *Xiulu Ruan v. United States*, ___ U.S. ___, 142 S. Ct. 2370, 2379, 213 L. Ed. 2d 706 (2022) (knowledge that defendant was not authorized to distribute controlled substance was element even though it was not the natural reading because "the statutory clause in question

plays a critical role in separating a defendant's wrongful from innocent conduct.").

In the context of the depiction statutes, the implied mental state of knowledge of the minority status of the people depicted or the general nature of the materials is the key element that separates lawful from unlawful conduct. Accordingly, it is *this* element which needs to be in the charging document.[4]

The cases relied on by the Court of Appeals at page 11 of its opinion -- *State v. Tunney*, 129 Wn.2d 336, 341, 917 P.2d 95 (1996); *State v. Hopper*, 118 Wn.2d 151, 154, 822 P.2d 775 (1992); *Kjorsvik*, 117 Wn.2d at 110 – are distinguishable. These cases address only conventional crimes (third degree assault of a police officer, second degree assault, first degree robbery) that lack a constitutional dimension. There is no constitutional right

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[4] The issue is not just the notice to the defendant, but also notice to the public at large that the defendant actually did something other than innocently knowingly possess or distribute material that happened to contain prohibited images.

to assault anyone (police officer or not) (as in *Tunney* or *Hopper*) nor is there a constitutional right to take property from a baker with force (as in *Kjorsvik*). But, there is a First Amendment right to possess pornography and it is only the court-implied *mens rea* element that makes it constitutional to criminalize someone's possession or distribution of the material that turns out to be depictions of minors engaged in sexually explicit conduct.

Accordingly, under RAP 13.4(b)(1)-(3), the Court should accept review and reverse and remand for dismissal without prejudice.

### 2. *The Court Should Review the Issue of Idaho Police Involvement in this Case*

Idaho police were the driving force behind the initial investigation, the search of Mr. Chambers' home, his interrogation and the seizure of his computer equipment. Washington police then sent the computer equipment to Idaho where Idaho police

conducted the forensic analysis. No warrant authorized sending the equipment to Idaho for Idaho police to search it.

In the trial court, Mr. Chambers' attorneys raised legal arguments regarding the general involvement of Idaho police in the case, but did not litigate the issue of sending of the computer equipment out-of-state for forensic analysis. The trial judge issued a ruling related to Idaho police involvement in the case, but did not address the issue of sending the computer equipment to Idaho. CP 251-52.

Mr. Chambers argued on appeal that sending the computer equipment to Idaho for Idaho police to search it was not authorized by a warrant and thus the search violated the Fourth and Fourteenth Amendments and article I, section 7. The Court of Appeals declined in the published portion of the opinion to consider this challenge because it had not been raised below. Slip Op. at 19-20.

RAP 2.5(a)(3) permits a party to raise a manifest error affecting a constitutional right for the first time on appeal. The issue is whether the record is complete to allow for such consideration. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the record is sufficiently developed "to determine whether a motion to suppress clearly would have been granted or denied," an appellate court "can review the suppression issue, even in the absence of a motion and trial court ruling thereon." *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998).

Here, the record is sufficiently complete to permit for review. The stipulated record documents how Washington police sent Mr. Chambers' computer equipment to Idaho police who then performed the forensic analysis of the equipment. CP 268-69, 270-78, 286-87. Yet, it is undisputed that there was only one search warrant authorizing the search of the contents of the

computer equipment which was directed to "any peace officer in the State of Washington." CP 136.

Washington courts generally do not have the legal power to issue extraterritorial process. *See, e.g.*, Const. art. IV, § 6 (superior court "process shall extend to all parts of the state"); RCW 3.66.100 ("Every district judge having authority to hear a particular case may issue criminal process in and to any place in the state."). Traditionally, warrants authorizing searches "beyond the territorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all — as *ultra vires* and void *ab initio*." *United States v. Krueger*, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring). *See also State v. Davidson*, 26 Wn. App. 623, 625-28, 613 P.2d 564 (1980) (where district court in one county did not have authority to issue warrant for search in another county, search warrant was invalid and suppression was result); *United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir. 2018) ("The weight of authority is clear: a warrant purportedly

authorizing a search beyond the jurisdiction of the issuing magistrate judge is void under the Fourth Amendment."); *State v. Jacob*, 185 Ohio App. 3d 408, 924 N.E.2d 410, 415-16 (2009) ("[a]llowing one state's court to determine when property, residences, and residents of another state may be subject to search and seizure would trample the sovereignty of states").

The Court of Appeals declined to consider this issue because of the lack of a showing of prejudice and thus the error was not "manifest." Slip Op. at 19-20. This conclusion is wrong because "[a]n appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion." *State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011).

Here, Mr. Chambers has shown that the trial court would have suppressed the results of the Idaho forensic computer searches because of the lack of any warrant authorizing such a search. This violated the Fourth and Fourteenth Amendments and

article I, section 7. As a result of the Idaho police officer's illegal search of the seized computer equipment, the State obtained the very evidence that was used to convict Mr. Chambers of the possession charges. Counts 4-27. The State probably would also not have been able to prove Counts 1-3 without the fruits of the illegal search in Idaho. This is sufficient prejudice to consider the issue under RAP 2.5(a)(3).

Review of this issue should be granted under RAP 13.4(b)(1), (2), (3) and (4), and this Court should reverse.

As for the other issues involving the involvement of the Idaho police in searching Mr. Chambers' house and interrogating him, there was simply no statutory authority for Idaho police to be involved. Washington has adopted stringent restrictions on foreign officers operating within Washington State. *See* RCW 10.89.010 (limiting foreign peace officer authority to fresh pursuit); RCW 10.93.070 (mutual assistance between law

enforcement agencies but only with "a general authority Washington peace officer.").

Due to the lack of statutory authority for the Idaho police to investigate in Washington, the Court should accept review under RAP 13.4(b)(4) as an issue of public importance.

### 3. *The Court Should Review Issues Related to Probable Cause*

The warrant authorizing the search of Mr. Chambers' house and seizure of his computer equipment was based upon the claim by police that they had reached into Chambers' computer and found depictions of minors on October 1, 2017. CP 128. Probable cause was based upon the internet provider's (CableOne) assignment of a particular "IP" address to Mr. Chambers' home (174.126.3.13). CP 124.

CableOne's documentation, attached to the warrant, revealed that Mr. Chambers and his address in Clarkston had been registered for IP address 174.126.3.13, but only between 9/29/17,

1:00 a.m., and 9/30/17, 4:58 p.m. CP 130. The problem is that the search warrant affidavit explained that IP addresses can either be static (non-changing) or dynamic (frequently changing). CP 117. Without knowing whether the IP address in this case was dynamic or static, the fact that the address at issue was assigned to Mr. Chambers' house the day before police obtained child pornography from his computer made the information stale.

The warrant therefore was based on a lack of probable cause in violation of the Fourth and Fourteenth Amendments and article I, section 7. *See State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). The Court of Appeals rejected this argument by ruling that Chambers had not raised the issue below. Slip Op. at 29. This is not correct as Chambers made this argument below. CP 210-213.

The court also ruled, "It was reasonable to infer that an IP address assigned to Chambers' computer at 4:58 p.m. on September 30 was not stale at 4:30 a.m. on October 1." Slip Op.

at 30. But where the search warrant affidavit itself describes how computers can have "frequently changed" IP addresses, CP 226, the court's conclusion is wrong.

Court should accept review under RAP 13.4(b)(3) based on the constitutional issues involved and reverse.

#### 4. *The Court Should Review the Overbroad Search Warrant Issue*

The warrant authorizing the search of Mr. Chambers' home found probable cause for violations of four different crimes related to sexually explicit images of children. CP 136. The warrant authorized the seizure and forensic examination of:

> Any evidence of the aforementioned crimes including but not limited to:
>
> 1. Any digital or physical image or movie containing or displaying depictions of a minor engaged in sexually explicit conduct.

CP 136 (emphasis deleted). The warrant then listed in detail the statutory definitions of various terms (i.e. sexually explicit conduct. CP 136-137. Following ¶ 1, the warrant listed another

13 paragraphs of items to be searched (¶¶ 2-14), which included various categories of computers, computer hardware, digital devices and photographs. CP 138-140.

This warrant was not sufficiently particular to satisfy the dictates of the Fourth and Fourteenth Amendments and article I, section 7. *See State v. Besola*, 184 Wn.2d 605, 614-17, 359 P.3d 799 (2015); *State v. McKee*, 3 Wn. App. 2d 11, 25-29, 413 P.3d 1049 (2018), *rev'd on other grounds* 193 Wn.2d 271, 438 P.3d 528 (2019). The particularity requirement of the Fourth Amendment must be viewed in light of "most scrupulous exactitude" required when a warrant authorizes the search and seizure of materials protected by the First Amendment. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

Here, the warrant did not explicitly limit the search of the items in ¶¶ 2-14 to the items listed in ¶ 1 and allowed the police

(here, actually out-of-state officers) to search through all of the computer and digital devices without restriction.

The Court of Appeals rejected this argument:

> While we agree that a specific reference back to item 1 would have provided even more exactitude, we conclude that the warrant, taken as a whole, makes it clear that the search of items 2 through 14 is limited to "[a]ny digital or physical image or movie containing or displaying depictions of a minor engaged in sexually explicit conduct" as listed in item 1.

Slip Op. at 37. The Court of Appeals relied on Division Two's opinion in *State v. Vance,* 9 Wn. App. 2d 357, 444 P.3d 1214 (2019). *Id*. at 35-36.

In *Vance*, Division Two only upheld the warrant because it "regularly referred back to the statutory language limiting the evidence that officers could seize and so was sufficiently particular to cover only data and items connected to the crime. . . . The warrant here used sufficiently specific language to authorize the seizure of only illegal materials." *Vance*, 9 Wn. App. 2d at

366. The *Vance* warrant directed that the "Cybercrime Unit" search the devices for files "that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography." *Id*.

No such particularized language was included in the warrant in this case. The warrant was more similar to those invalidated in *Besola* and *McKee*. The search violated the Fourth and Fourteenth Amendments and article I, section 7. Review should be granted under RAP 13.4(b)(1)-(3).

### 5. *The Court Should Review the Sufficiency Issue*

Mr. Chambers did not actively disseminate any depictions of minors to others. Rather, the stipulated facts were that the Idaho police detective used P2P technology to reach into Mr. Chambers' computer and extract portions of computer files that corresponded to known child pornography. CP 262, 265. Mr.

Chambers told the officers that he knew that he had downloaded illegal depictions, but denied knowledge that he was sharing the depictions with others. CP 285. The State agreed that the stipulated facts were an "accurate record of facts." CP 259.

Given the State's stipulation, there was insufficient evidence for Counts 1-3 (distributing depictions) under the protective standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and the Due Process Clauses of the Fourteenth Amendment and article I, section 3.

The Court of Appeals disagreed on the theory that it was up to the trial court to determine whether Mr. Chambers' statements about not knowing he was distributing depictions were credible. Slip Op. at 40, 43. However, this was a stipulated facts trial without any live witnesses. The Court of Appeals' conclusion conflicts with this Court's decisions holding that cases decided upon stipulated facts are reviewed *de novo*. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 209-10, 5 P.3d 691 (2000) ("Because

this case is reviewed on stipulated facts, the issues are solely questions of law and are reviewed de novo."). Whether there is sufficient evidence under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, is also a legal issue, reviewed *de novo*. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010). Review should therefore be granted under RAP 13.4(b)(1).

Mr. Chambers also argued that the evidence was insufficient that he disseminated full files that constituted illegal depictions of minors – the stipulated evidence was only that the Idaho detective extracted portions of digital files (bits and torrents) but not the full files. Without knowing what pieces of the "Daphne" files (those associated with Counts 1-3) were allegedly disseminated or were possessed with intent to disseminate, it cannot be said beyond a reasonable doubt that the

Idaho officer transferred sexually explicit images of minors (as opposed to bits of files of such images).[5]

The Court of Appeals rejected this argument, holding that Mr. Chambers "stipulated that the contents of each exhibit was sufficient to find him guilty." Slip Op. at 44. This is incorrect. Mr. Chambers agreed to submit the case based on stipulated facts, allowing the judge to determine if he was guilty. CP 297. With such a procedure, an appellate court still has the constitutional obligation to determine if the stipulated facts are sufficient under the Due Process Clauses and *Jackson*. *See State v. Drum*, 168 Wn.2d at 33-34.

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[5] *See State v. Rhinehart*, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979) (proof of possession of piece of stolen car was insufficient to prove possession of stolen car); *United States v. Husmann*, 765 F.3d 169, 176 (3d Cir. 2014) ("Based on the ordinary meaning of the word 'distribute,'. . . we hold that the term 'distribute' in § 2252(a)(2) requires evidence that a defendant's child pornography materials were completely transferred to or downloaded by another person.").

This Court should therefore grant review under RAP 13.4(b)(1) and (3), and reverse Counts 1-3.

## F. CONCLUSION

For the above-noted reasons, this Court should accept review and reverse the convictions for dismissal.

DATED this 2nd day of November 2022.

I certify that this pleading contains 4996 words (as calculated with the WordPerfect Word Count function), excluding the categories set out in RAP 18.17.

Respectfully submitted,

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# APPENDIX A

**FILED**
**OCTOBER 4, 2022**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>MICHAEL E. CHAMBERS,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 38282-6-III<br><br><br><br><br>OPINION PUBLISHED IN PART |

STAAB, J. — An internet crime unit investigation in Idaho determined that an internet protocol (IP) address registered to Michael Chambers in nearby Asotin County was downloading and sharing depictions of minors engaged in sexually explicit conduct. Following a stipulated bench trial, Chambers was convicted of 24 counts of first degree possession, two counts of first degree dealing, and one count of second degree dealing in depictions of a minor engaged in sexually explicit conduct. He raises six issues on appeal. In the published portion of this decision, we reject Chambers' postverdict challenge to the adequacy of the information. We also hold that the presence and participation of Idaho police, at the request of a Washington deputy, to aid in the execution of the search warrant was not prohibited by statute and was otherwise

authorized by common law.

In the unpublished portion of the decision, we hold that the search warrant was supported by probable cause and not overbroad. We find that the evidence was sufficient to support a finding of intent to distribute for purposes of counts 1, 2, and 3. We affirm imposition of the polygraph condition as part of Chambers' community custody condition, but strike the overbroad internet condition and remand for reconsideration of this sentencing condition.

## BACKGROUND

We provide a brief overview of the facts and procedure here. Additional details are set forth in the discussion of each issue.

On September 30, 2017, and October 1, 2017, Detective Eric Kjorness of the Moscow Police Department Internet Crimes Against Children (ICAC) unit was using computer peer-to-peer (P2P) file sharing software (often referred to as "BitTorrent") to conduct a broad sweep investigation of internet child pornography trafficking by accessing other BitTorrent users' open and available computer files. Clerk's Papers (CP) at 259. P2P file sharing is a method of communication available to internet users through the use of special software that links their computers through a network and allows for the sharing of digital files directly between users on the network. After obtaining the

software by download, a user can set up file(s) on his/her computer to be shared with others running compatible P2P software.

> BitTorrent, one type of P2P software, sets up its searches by keywords typically on torrent websites. The results of a keyword search are displayed to the user. The website does not contain the files being shared, only file[s] referred to as a "torrent." The user then selects a torrent file(s) from the results for download. . . . The download of a file is achieved through a direct connection between the computer requesting the file and the computer(s) sharing the actual files (not the torrent file but the actual files referenced in the torrent file using any BitTorrent client.).

CP at 112. More than one file can be downloaded at once, and a user may download parts of files from more than one source computer at a time for integration.

This transfer is assisted by reference to a unique IP address expressed as four numbers separated by decimal points assigned to a particular computer during an online session. Every computer attached to the internet is assigned an IP address to assure proper direction of data. Most internet service providers control the range of assigned IP addresses. Some IP addresses are "static" long-term assignments and others have "dynamic" addresses that are frequently changed. CP at 117. "BitTorrent users are able to see the IP address of any computer system sharing files to them or receiving files from them. Investigators log the IP address which were sent files or information regarding files being shared." CP at 113. Using the "American Register of Internet Numbers," investigators can determine the internet service provider assigned that IP address. CP at

113. The specific computer assigned to the IP address can then be obtained from the internet service provider.

During his investigation, Detective Kjorness was able to identify a specific IP address that was downloading and sharing known images of depictions of minors engaged in sexually explicit conduct. The IP address was assigned to an internet provider, CableOne, out of Lewiston, Idaho. Responding to a subpoena, CableOne indicated the IP address was assigned to an account in Chambers' name with an Asotin County address. Based on his findings, Detective Kjorness contacted Detective Brian Birdsell of the Lewiston Police Department, who in turn contacted Detective Jackie Nichols of the Asotin County Sheriff's Office on October 30, 2017. Detective Nichols obtained a search warrant from the Asotin County Superior Court for Chambers' home in Clarkston, Washington.

On December 21, 2017, Detective Nichols executed the warrant with the assistance of law enforcement officers from several agencies including Detective Kjorness of the Moscow, Idaho, police department. Detective Nichols testified at the suppression motion that as a rural officer, she has generalized training, but to fill the void in her experience, she utilizes assistance from outside agencies. She invited Detective

Kjorness to assist with the execution of the Chambers' warrant because the detective is an expert in this field.

During execution of the search warrant, Detective Kjorness questioned Chambers about his technical expertise and the presence of child pornography on his system and performed preliminary searches of two tower computers. Detective Nichols was present when Detective Kjorness spoke to Chambers. Chambers made significant incriminating statements during the execution of the search warrant particularly that he installed and used a BitTorrent program called "Azureus," downloaded sexually explicit images of children, saw them, and did not delete them because he was trying to help the police investigate. CP at 31-33. He knew that he should not be doing it. He did not turn anything over to police because he did not think that he had anything helpful.

Chambers claimed to not be sharing images but when confronted with a claim that he had made them available over his BitTorrent program, he responded that he "thought he 'had the outgoing totally shut down.'" CP at 38. He commented, "'Wow. My bad there.'" CP at 38. He admitted to going to online sources that he knew contained sexual images of children. He repeatedly denied distributing any images.

Detective Nichols delivered all of the digital devices seized from the home to Detective Birdsell for forensic analysis on December 26, 2017. The evidence was

returned to Asotin County on May 9, 2018. Detective Birdsell identified a large quantity of sexually explicit images depicting children (6,314), and confirmed that Chambers' computer hard drives used by default the same MAC (media access control) address listed on the CableOne record.

Asotin County charged Chambers with two counts of "Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree" and one count of "Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree" in violation of RCW 9.68A.050(1) and (2). CP at 1-3. He was also charged with 24 counts of "Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree" in violation of RCW 9.68A.070(1). CP at 4-27.

Chambers filed several motions to suppress evidence. Ultimately, the trial judge denied his motions to suppress evidence seized from the house, but granted the motions to suppress evidence seized from an adjacent shop that was not described in the affidavit or included in the search warrant. Following the court's decision, Chambers elected to proceed to a bench trial on stipulated facts.

The stipulated evidence included 28 digital files retrieved from computers located in Chambers' home. Explicit descriptions of these videos and images were provided by

Detective Birdsell and included in the stipulated evidence. Chambers stipulated that Detective Birdsell's descriptions were accurate and sufficient.

Chambers was found guilty on all counts and sentenced. His judgment and sentence contained conditions prohibiting internet access and submission to polygraph tests. The precise wording is included below.

During his sentencing statement, Chambers admitted to intentionally setting his BitTorrent upload speed to slow, indicating his knowledge that he was disseminating, and described himself as a "hacker" capable of hex editing. CP at 330-31.

Chambers timely appealed.

## ANALYSIS

### A. POSTVERDICT CHALLENGE TO THE INFORMATION

In his first issue on appeal, Chambers challenges the sufficiency of the information charging him with 3 counts of disseminating, and 24 counts of possession of images depicting a minor engaged in sexually explicit conduct. Chambers argues these offenses require not only that the State prove knowledge of the act (possession or disseminating) but also knowledge of the nature of the depictions. He contends that the charging information failed to allege the second scienter element. We review this legal challenge de novo. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016).

An information must allege each essential element, statutory and otherwise, to apprise the accused of the charges against him or her and to allow for preparation of a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The information must do more than merely list the offense, but it need not restate the precise language of the criminal statute. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). "[I]t is sufficient if words conveying the same meaning and import are used." *State v. Kjorsvik*, 117 Wn.2d 93, 108, 812 P.2d 86 (1991).

Chambers did not challenge the information before a verdict was reached. While a constitutional challenge to the charging document can be raised for the first time on appeal, the late objection changes the level of deference we apply. *Id.* at 102. "When, as in this case, a charging document is challenged for the first time on appeal, we construe it liberally." *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019). Under this standard, we consider the charging document as a whole and in a commonsense manner to determine if the implied element can be fairly inferred through a liberal construction in favor of its validity. *Kjorsvik*, 117 Wn.2d at 110-11. Under the two-pronged test developed by *Kjorsvik*, our first question is whether the essential elements appear in any form or by fair construction can be found. *Id*. at 105. If so, we consider whether the defendant can show actual prejudice by language used that caused a lack of notice. *Id*. at

106. However, if the information fails to meet the first prong, prejudice is presumed and requires reversal. *State v. Zillyette*, 178 Wn.2d 153, 162, 307 P.3d 712 (2013).

The State's charging information used the verbatim language of the statutes, RCW 9.68A.050 and RCW 9.68A.070. As to the disseminating charges, counts 1 through 3, the information charged that Chambers "knowingly developed, duplicated, published, disseminated, or exchanged or possessed with intent to develop, duplicate, publish, disseminate, or exchange visual or printed matter depicting a minor engaged in sexually explicit conduct . . . ." CP at 1-3; *see* RCW 9.68A.050(1)(a)(i). Similarly, with respect to the possession charges, the information alleged that Chambers "knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct . . . ." CP at 4-27; *see* RCW 9.68A.070(1)(a).

Chambers contends the statutory language used in the information has already been found to be constitutionally insufficient. In *State v. Rosul*, the Supreme Court addressed the defendant's overbreadth challenge to the child pornography statutes. 95 Wn. App. 175, 182, 974 P.2d 916 (1999). Against this First Amendment to the United States Constitution backdrop, the court found that "[a] natural grammatical reading of RCW 9.68A.070 would apply the scienter requirement to possession, but not to the age of the children depicted." *Id*. After finding that such a scienter requirement was necessary

to preserve the constitutionality of the statute, the court construed the statute to require a showing that the defendant was aware of the general nature of the material he possessed. *Id*. at 185. Following *Rosul*, the statutes are now construed to require "a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed." *Id*.

Chambers argues that *Rosul*'s "natural reading" of the statute is binding for purposes of challenging the language of the information postverdict. His argument, however, fails to acknowledge the more lenient standard of construction that is applied when there is a late challenge to the information. Notably, *Rosul* held that the statutory language implied knowledge of the nature of the materials under the stricter statutory interpretation standard.[1] Chambers does not cite any authority that prevents us from applying a more liberal reading to the information in this case.

In this case, the information alleged that Chambers "knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct . . . ." CP at 4-27. Under the liberal construction rule, the knowledge element can be fairly imputed to not only the verb but the entire direct object following the verb. "In ordinary English, where

[1] Criminal statutes are strictly construed. *State v. Larson*, 119 Wash. 123, 125, 204 P. 1041 (1922).

a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009).

Under a more liberal construction, our Supreme Court has found a charging document sufficient even when it omits a common law element of knowledge. In *State v. Tunney*, the information failed to allege knowledge that the victim was a police officer. 129 Wn.2d 336, 339, 917 P.2d 95 (1996). Specifically, the information alleged the defendant did "'assault Officer David Shelton of the Seattle Police Department, a law enforcement officer who was performing official duties at the time of the assault.'" *Id*. at 338. The court held that under a liberal construction, the missing element could be fairly imputed from the information. *Id*. at 341. "When the crime is defined by an act and result, as in this case, the mental element relates to the result as well as the act." *Id.*; *see also State v. Hopper*, 118 Wn.2d 151, 154, 822 P.2d 775 (1992) (element of "knowingly" can be imputed from word "assault" in the information because the term "assault" implies knowing conduct); *Kjorsvik*, 117 Wn.2d at 110 (nonstatutory intent to steal element can be fairly implied from allegation that defendant "unlawfully, with force, and against the baker's will, took the money while armed with a deadly weapon").

Chambers argues that in order to be sufficient, the charging document must track the language of the to-convict jury instruction. In support of this argument, Chambers contends that the Supreme Court recently rejected the "artificial distinction between the essential elements that must be included in jury instructions and those that must be included in charging documents," citing *State v. Canela*, 199 Wn.2d 321, 332, 505 P.3d 1166 (2022). Reply Br. of Appellant at 5. We disagree that *Canela* implicitly overruled significant precedent to hold that a charging document must always contain the same language as the to-convict jury instruction. Instead, *Canela* recognized that "to-convict instructions can provide guidelines for the essential elements required in charging documents." *Id*.

The State's information mirrors the statute. Where knowledge of the nature of the materials was implied in the statute under the strict statutory interpretation standard, the language sufficiently provides notice of all essential elements under a more liberal construction. The word "knowingly" in the information modifies the acts of possession and dissemination, and the word "minor" describes the nature of the images. Chambers does not allege any prejudice from unartful language and was informed of the nature of charges and able to mount his defense.

B. INVOLVEMENT OF OUT-OF-STATE LAW ENFORCEMENT IN THE EXECUTION OF THE SEARCH WARRANT

The second issue we address in the published portion of this opinion is whether Detective Nichols was authorized to request the assistance of out-of-state law enforcement during execution of the search warrant.[2] The State responds that common law allows neighboring agencies to assist in the execution of a search warrant as subject matter experts and these outside agencies did not take over the investigation but instead took direction from Detective Nichols.

The trial court denied Chambers' motion to suppress evidence based on this theory. The trial court's unchallenged findings provide:

> Suppression hearing evidence established that Moscow Police Department Detective Eric Kjorness and two members of the Lewiston Police Department assisted in executing the search warrant at Defendant's Clarkston residence. Detective Kjorness was also involved in interviewing the Defendant at the scene and in providing technical expertise as to computer and internet issues. Defendant argues that these out-of-state officers lacked authority to be involved in the Washington search and investigation. There is no evidence of any written agreement between Washington and Idaho law enforcement agencies that would be relevant to this case.

[2] Chambers also suggests that by sitting outside his house to check access to his WiFi, Idaho Detective Birdsell was acting illegally. Opening Br. of Appellant at 61. Chambers challenged this conduct below but the court found that checking to see if nearby WiFi was secured by a password is not a search. Chambers does not assign error to this decision, nor does he posit how checking for available WiFi is illegal.

> It was Idaho police officers that initially discovered and investigated the crimes now being alleged. When they discovered that the depictions of minors engaged in sexually explicit conduct were being downloaded and shared on an IP address assigned to a Clarkston address, the case was referred to the Asotin County Sheriff's Office. From that point on, Asotin County Sheriff Detective Jackie Nichols took the lead in the Washington investigation. She obtained the search warrant and directed it [sic] execution. While she sought and obtained the presence and assistance of the Idaho officers in the search and in her investigation, Defendant cites no authority for the proposition that out-of-state officers are prohibited from providing such assistance.

CP at 251-52.

The legal issue presented is whether a Washington deputy sheriff can authorize the presence and participation of out-of-state law enforcement officers during the execution of a search warrant. As a conclusion of law set forth in an evidence suppression order, we review this legal question de novo. *State v. Rawley*, 13 Wn. App. 2d 474, 478, 466 P.3d 784 (2020).

Chambers grounds his argument in the lack of statutory authority for the Idaho officers to provide law enforcement assistance in a Washington investigation. The State contends that under common law, officers are authorized to use subject matter experts to assist in a search, even if those experts are law enforcement officers from another jurisdiction.

As the parties seem to agree, the statutes do not authorize nor do they prohibit the presence of law enforcement from other jurisdictions during a search. In certain circumstances, that do not apply here, out-of-state officers have authority to seize a person in Washington. *See* Washington Mutual Aid Peace Officer Powers Act of 1985 (chapter 10.93 RCW) and the Uniform Act on Fresh Pursuit (chapter 10.89 RCW). RCW 10.93.070 provides exceptions to the general rule that an officer's authority is restricted to his or her territorial jurisdiction. While this statute does not grant out-of-state officers the authority to act inside Washington, subsection (3) of the statute authorizes Washington peace officers to enforce the criminal laws of the state outside their territorial bounds "in response to the request of a peace officer with enforcement authority."
RCW 10.93.070(3). If the assistance is not requested, however, the presence of an officer from another jurisdiction who is tagging along for his own purposes can undermine the seizure. *State v. Bartholomew*, 56 Wn. App. 617, 622, 784 P.2d 1276 (1990).

In *Bartholomew*, Division One of this court held that a Seattle officer's presence outside his territorial jurisdiction during a warrantless felony arrest by Tacoma police could not be justified under RCW 10.93.070 where the Seattle officer was looking for evidence of a separate crime without a warrant. 56 Wn. App. at 620-25. Critically,

nothing in the record indicated that the Tacoma police needed assistance to execute a search warrant for items in the home. *Id*. at 621.

In dicta, Division One discussed situations where the presence of the Seattle officer would have been justified such as when executing a warrant where the expertise and assistance of experienced officers was requested. *Id*. at 621-22. For example, the court described participation of drug enforcement officers in executing the search of a drug manufacturing operation where safe confiscation and identification required expertise that a small rural community officer might be inadequate. *Id*. In support of that hypothetical, the court compared several federal cases analyzing 18 U.S.C. § 3105[3] to support the premise that federal officers were authorized when genuinely requested for assistance. *Id*. at 622-23; *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982) (Federal Bureau of Alcohol, Tobacco, and Firearms officer executing federal search warrant properly requested state officer assistance.). The case before us presents this hypothetical.

[3] 18 U.S.C. § 3105: "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

In *State v. Kern*, Division One approved the use of civilian experts to aid in the execution of a search warrant. 81 Wn. App. 308, 315, 914 P.2d 114 (1996). In *Kern*, an officer served a search warrant on a bank and instructed the bank employees to provide him with the designated records. *Id*. The bank employees participated in the record search without unnecessary supervision especially where the officer was not trained to retrieve and preserve the records in question. *Id*. The court found the delegation proper where the civilians were disinterested third parties with little possibility of exceeding the scope of the warrant. *Id*. at 316. Additionally, the court held that "[a]bsent constitutional considerations, the rules for execution and return of a warrant are essentially ministerial in nature." *Id*. at 311.

Although Chambers does not raise a constitutional argument, the United States Supreme Court has held that "it is a violation of the Fourth Amendment for police to bring . . . third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). In *Wilson*, police invited the press on a media ride-along during the execution of a warrant. The Court held that the presence of the reporters violated the defendant's Fourth Amendment rights because their "presence . . . inside the home was not related to the objectives of the

authorized intrusion." *Id*. at 611. Similar to the holding in *Bartholomew*, the Court distinguished situations where a third party "directly aided in the execution of the warrant," recognizing that such conduct "has long been approved by this Court and our common-law tradition." *Id*. at 611-12.

Here, Chambers does not dispute that Detective Kjorness was aiding Detective Nichols in the execution of the search warrant. Instead, he argues that Idaho police were "deeply involved" in the case, suggesting that they took over the search and investigation. Opening Br. of Appellant at 61. This argument is contrary to the trial court's finding that Detective Nichols was the lead investigator in this case and that she obtained the warrant and directed its execution. Chambers does not dispute this finding and there is no evidence that the Idaho officers exerted independent authority during the search. When the warrant needed to be expanded, Detective Kjorness stopped his search and Detective Nichols contacted a judicial officer to amend the warrant.

Otherwise, Chambers' argument focuses on extrajudicial issuance of warrants outside a court's jurisdiction and unauthorized arrests outside an officer's jurisdiction. Neither of these factual situations occurred here. There is no indication that the Idaho officers arrested Chambers or enforced the laws. Instead, they participated in the

execution of a search warrant at the direction of the lead investigator, Detective Nichols, and provided her with technical expertise.

For the first time on appeal, Chambers challenges the use of Idaho law enforcement experts to forensically examine the materials seized during execution of the search warrant. Chambers did not raise this challenge in his motions to suppress and did not object at the stipulated facts trial to the introduction of evidence obtained from the forensic examination by Idaho police. Citing RAP 2.5(a), the State objects to consideration of this issue because the record is undeveloped. Br. of Resp't at 66. Chambers replies that since the use of an outside agency violates his Fourth Amendment rights, the issue can be addressed as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

We decline to address this issue. The exception provided in RAP 2.5(a)(3) is narrow and does not permit all asserted constitutional claims to be raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Instead, a manifest error requires a showing of actual prejudice. *Id*. at 935. "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted." *Id*.

Here, Chambers' attempts at showing prejudice are speculative. He contends that "[g]iven the importance that Washington courts place on strict guidelines for searches of items protected by the First Amendment and article I, section 5, one cannot assume that an officer not trained in Washington procedures would conduct the search with 'the most scrupulous exactitude.'" Opening Br. of Appellant at 67-68 (quoting *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015)). And yet, had Chambers raised this issue below, the facts surrounding the procedures used to forensically examine the equipment would be fully developed and part of the record. Because this issue was not preserved below and the record on appeal is insufficient, we decline to address it for the first time on appeal.

Under circumstances where the out-of-state officers were not arresting a suspect or otherwise enforcing the law, but rather acting at the direction of the lead Washington deputy to aid her in the execution of a search warrant, the presence and involvement of Detective Kjorness was not prohibited by statute and otherwise authorized by common law. The trial court properly concluded that the involvement of the Idaho officers did not require suppression of evidence.

We affirm the convictions but remand for consideration of the community custody conditions.

In the unpublished portion of the opinion, we consider challenges to the search warrant, the sufficiency of the evidence, and the community custody conditions imposed at sentencing.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

C. PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT

Chambers argues that the search warrant authorizing the search of his home lacked probable cause. He contends that the search warrant affidavit failed to establish a nexus between his computer and the IP address on the date the IP address was linked to the dissemination of depictions of minors engaged in sexually explicit conduct.

Detective Nichols from the Asotin County Sheriff's Office applied for a warrant to search Chambers' residence and electronic devices. Within her affidavit, Detective Nichols summarized that Detective Kjorness had discovered a specific IP address that was sharing images and videos of minors engaged in sexually explicit conduct and sent the information to Detective Birdsell of the Lewiston Police Department. After determining that the IP address was registered to CableOne in Lewiston, Idaho, Detective

Birdsell served CableOne with an administrative subpoena. CableOne responded with a report showing that the registered subscriber for the IP address was Michael Chambers with an address in Asotin County. Detective Nichols also averred that "Detective Birdsell went to the area near the residence. He was able to determine that access to the internet access (wifi) associated with IP address 174.126.3.13 was secured with a password." CP at 124.

Detective Nichols attached several documents to the search warrant affidavit including a police report from Detective Birdsell and the report from CableOne. Detective Nichols' affidavit did not include dates when the IP address was disseminating the illicit materials, but Detective Birdsell's report indicated that within the materials provided by Detective Kjorness, a "log showed on 10-1-2017 at 0430:56 am that IP Address 174.126.3.13" had pieces of known images of child pornography. CP at 128. Detective Birdsell's report goes on to summarize the report from CableOne as showing that the IP address "for the times 9-30-2017 to 10-1-2017" was assigned to Chambers. CP at 128.

The one-page record from CableOne indicated:


| | |
|---|---|
| **Name** | MIKE CHAMBERS |
| **Address** | 1865 RESERVOIR RD, CLARKSTON, WA 99403 |
| **Phone No.** | (509)295-1510 |
| **Account No.** | 105028062 |
| **User ID** | N/A |
| **Email Address** | N/A |
| **Customer Status** | Active |
| **Creation Date** | 3/21/02 12:00 AM |
| **IP Address** | 174.126.3.13 |
| **MAC Address** | 9c:3d:cf:3c:a8:8e |
| **Lease Start** | 9/29/17 1:00 AM |
| **Lease End** | 9/30/17 4:58 PM |
| **Type of Service** | Residential A La Carte HSD:Active<br>14:5B:D1:34:35:C7:HSD Service:Active |

CP at 130. The CableOne record contains some ambiguous terms. Although the record indicates that the customer status is "Active" and the creation date is "3/21/02," it also includes the terms "Lease Start 9/29/17 1:00 AM" and "Lease End 9/30/17 4:58 PM." CP at 130.

An additional report by Detective Kjorness was attached to the search warrant affidavit. Detective Kjorness indicated that he continued to monitor the specific IP address 174.126.3.13 during the month of October 2017. During that time, the detective's computer made 22 additional direct connects with the suspect. During that time, "[t]he

suspect was using the BitTorrent program Vuze to access the BitTorrent network." CP at 132. On October 30, 2017, between 2146 and 2327 hours, the suspect had distributed three partial movies to the detective's computer that contained files of interest to child pornography investigations. By examining the log file generated by the detective's software, he was able to determine that a suspect at this IP address was in possession of a large number of videos suggesting they contained child pornography.

At the suppression hearing, Chambers argued that the search warrant affidavit failed to establish probable cause because the term "Lease End" must be read as indicating that Chambers' association with this IP address ended on September 30. He further argued that the search warrant affidavit did not link the IP address to the illicit materials until the next day, October 1.

The trial court denied Chambers' motion to suppress. In doing so, the court found

> It is unclear from the record provided to the issuing magistrate what was meant by the "Lease Start" and "Lease End" dates on the CableOne report. The report makes it very clear, however, that Defendant was the subscriber for "Residential A La Carte" service for this IP address, that his account was created on March 21, 2002, and that the service was active on the date the report was provided to Detective Birdsell, October 26, 2017. Detective Nichols further stated in her affidavit that after the CableOne report was received, Detective Birdsell went to the residence identified in the report, and was able to determine that there was internet access at the location for this IP address, and that access was protected by a password. It is not logical under these circumstances to construe the "Lease Start,["] "Lease End" language in the CableOne report to mean that Defendant was

> only a subscriber to the service at this IP address for 40 hours, or that he was not a subscriber on October 1, 2017.

CP at 249.

Similar to the trial court, we give great deference to a magistrate's determination of probable cause and review the issuance of a warrant for abuse of discretion. *State v. Denham*, 197 Wn.2d 759, 767, 489 P.3d 1138 (2021). The ultimate determination of probable cause is reviewed de novo. *Id*.

The United States Constitution prohibits unreasonable searches and seizures; our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs. U.S. CONST. amend. IV; CONST. art. I, § 7. A warrant may issue only upon probable cause. *Id*. An affidavit establishes probable cause to support a search warrant if it sets forth facts sufficient to allow a reasonable person to conclude that there is a probability that the defendant is involved in specific criminal activity and that evidence of the crime can be found at the place to be searched. *Id*. In assessing the affidavit, the court is entitled to make reasonable inferences from the total facts and circumstances of the affidavit. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

In order to demonstrate probable cause, the search warrant affidavit must establish "a nexus between criminal activity and the item to be seized and between that item and

the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). Here, the trial court found that given the other information provided in the report and affidavit, it was reasonable to infer that a computer assigned to a particular IP address on September 30 at 4:58 p.m. would have the same IP address 12 hours later on October 1 at 4:30 a.m. By the same token, the court rejected Chambers' interpretation of the term "Lease End" and found it would be illogical to assume that the terms "Lease Start" and "Lease End" meant that Chambers "was only a subscriber to the service at this IP address for 40 hours, or that he was not a subscriber on October 1, 2017." CP at 249.

These inferences are reasonable and not an abuse of discretion. *See Denham*, 197 Wn.2d at 770 (judge did not abuse her discretion in making reasonable inferences to find a nexus between defendant's cell phone location and evidence of a burglary). While it is not clear that the CableOne report connected Chambers' computer to the IP address on October 1, it is reasonable to infer that this nexus existed on September 30 at 4:58 p.m. It is also reasonable, given the information provided in the CableOne report and the search warrant affidavit, to infer that Chambers' internet connection had the same IP address 12 hours later. As the court noted, Chambers' account had been active for a considerable time and was noted as still active in the report. Detective Kjorness also provided consistency by indicating that throughout the entire month of October, his computer

continued to connect with the same IP address, using the same BitTorrent program to access the BitTorrent network.

Nor was the finding of probable cause legal error. Probable cause, as the name implies, concerns probabilities, not certainties. *Denham*, 197 Wn.2d at 769. It is determined from the totality of facts set before the judge in the affidavit and is based on commonsense conclusions. *Id*. In support of his argument on probable cause, Chambers makes several arguments that we decline to address on appeal, either because he fails to assign error to the trial court's decision, or he failed to make the argument below sufficient for the court to determine relevant facts.

First, Chambers suggests in his briefing that Detective Nichols made two false statements in her affidavit.[4] He argues that the second "misrepresentation violated

[4] Chambers contends that Detective Nichols makes a false statement in her affidavit when she claims that the CableOne report indicates that the IP address was assigned to Chambers' computer on October 1. Opening Br. of Appellant at 40. Chambers also contends that this statement is false: "'Detective Birdsell went to the area near the residence [and] was able to determine that access to the internet access (wifi) associated with IP address 174.126.3.13 was secured with a password.'" Opening Br. of Appellant at 39.

*Franks*."[5] Opening Br. of Appellant at 49.

Chambers did not preserve a *Franks* issue on appeal. Prior to trial, Chambers made the same claim of false statements and moved for a *Franks* hearing. The trial court denied his request, concluding that any misrepresentations were not intentional or in reckless disregard for the truth. Chambers then filed a second motion to suppress, arguing that the search warrant affidavit failed to establish probable cause. The trial court denied this motion in a separate opinion.

While Chambers assigns error to the court's denial of his second motion to suppress, he did not assign error to the court's decision to deny a *Franks* hearing. RAP 10.3. Nor does he clearly set out that the trial court erred in denying his request for a *Franks* hearing. Instead, in his reply brief, Chambers argues that the *Franks* issue is a "subsidiary issue[ ]" of his probable cause argument. Reply Br. of Appellant at 18-19. He fails to cite any authority for this argument, therefore, we assume that none exists and decline to consider his argument. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122,

[5] At the defendant's request, the court must hold a *Franks* hearing if the defendant makes a preliminary showing that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

126, 372 P.2d 193 (1962); RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Next, Chambers argues that even if the last connection between his computer and the IP address was at 4:58 p.m. on September 30, this connection was almost instantly stale because the search warrant affidavit fails to indicate whether the IP address is static or dynamic. Chambers failed to make this argument below as a basis for challenging probable cause. Had he done so, the trial court would have entered findings of fact and conclusions of law on the issue of staleness. CrR 3.6(b). Findings are especially important when considering factual issues. Whether information is stale for purposes of probable cause is a factual determination. *Maddox*, 152 Wn.2d at 505-06 (In determining whether information is stale, the court looks to the totality of circumstances and applies a commonsense approach.). Generally, we will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a).

Even if we were to consider the staleness issue, however, we would conclude that the magistrate did not abuse her discretion in determining that the information contained in the search warrant affidavit was not stale. Chambers argues that the difference of one day made the information stale. In reality, the difference was at most 12 hours. In addition, Detective Kjorness' report indicates that consistent information continued to be

exchanged with the same IP address for the entire month of October, suggesting that even if this was a dynamic IP address, it did not change on a frequent or daily basis. It was reasonable to infer that an IP address assigned to Chambers' computer at 4:58 p.m. on September 30 was not stale at 4:30 a.m. on October 1.

The magistrate judge did not abuse her discretion in finding a sufficient nexus existed between the IP address associated with child pornography and Chambers' computers. Nor did the magistrate err in concluding there was probable cause to issue a search warrant.

D. PARTICULARITY AND BREADTH OF THE WARRANT

Next, Chambers contends that even if the warrant was supported by probable cause, the warrant nonetheless violates the Fourth Amendment's requirement for particularity and is overbroad. Our review of this issue is de novo. *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

After finding probable cause that Chambers was dealing in depictions of minors engaged in sexually explicit conduct, the superior court issued a search warrant for his person and home in Asotin County, Washington. The introductory paragraph of the warrant indicates that there is probable cause to believe four crimes have been committed and that evidence of these crimes is concealed on or within certain property. The warrant

identifies the crimes as dealing, sending, viewing, and possessing "depictions of minor[s] engaged in sexually explicit conduct" and recites the applicable statutes. CP at 136. The warrant authorized law enforcement to "Seize and Forensically Search and Examine, if located, the following: Any evidence of the aforementioned crimes including but not limited to:" and then lists 14 items. CP at 137.

Item 1 authorized law enforcement to search for evidence of the aforementioned crimes including "[a]ny digital or physical image or movie containing or displaying depictions of a minor engaged in sexually explicit conduct." CP at 137 (boldface omitted). Below this first item, the warrant sets forth verbatim statutory definitions of numerous terms such as "internet session," "photograph," "[v]isual or printed matter," "[s]exually explicit conduct," "[m]inor," and "[l]ive performance." CP at 137-38.

Items 2 through 7, as well as items 9 through 11 authorize the search and seizure of devices and equipment including computers, computer networks and systems, computer programs and software, digital storage media, cell or mobile phones, cameras, printers, portable digital devices and peripheral computer equipment.

Item 8 specifies "[a]ny developed film, slides, or printed photographs, which include evidence of depictions of minors engaged in sexually explicit conduct as well as images of possible child victims." CP at 139 (boldface omitted).

Items 12 through 14 include the search for items showing identity, ownership, or control of the devices.

Chambers argues that the warrant was overbroad because it did not explicitly limit the search of devices in items 2 through 14 for evidence related to the crimes involving minors engaged in sexually explicit conduct as specifically defined in item 1. Opening Br. of Appellant at 53. We disagree.

A warrant based on probable cause must specifically describe the places to be searched and the items to be seized. U.S. CONST. amend. IV; *State v. Besola*, 184 Wn.2d 605, 609, 359 P.3d 799 (2015). The requirement for specificity includes particularity and breadth. *State v. McKee*, 3 Wn. App. 2d 11, 22, 413 P.3d 1049 (2018), *rev'd on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019). "'"Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."'" *Id*. at 23 (quoting *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993) (quoting *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-57 (9th Cir. 1991))).

The degree of specificity required in describing and identifying the items to be seized and searched varies according to the circumstances and the type of items involved. *Id*. at 23-24. When the items to be seized and searched implicate materials protected by

the First Amendment, the court must apply "'scrupulous exactitude'" to the Fourth Amendment's particularity requirement. *Perrone*, 119 Wn.2d at 550. But even under this stricter standard, warrants are tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense. *Id*. at 549.

A warrant is overbroad if its description of contraband encompasses materials that are lawful to possess, such as adult pornography. *Besola*, 184 Wn.2d at 610. In *Besola*, the court found that the "Search Warrant Provisions Related to Print Materials" was overbroad. *Id*. at 611 (emphasis omitted). Although the warrant identified the crimes being investigated, the warrant authorized the search of printed pornographic materials and photographs, "but particularly of minors." *Id*. at 608-09. While the warrant listed the statutory definition of the crime, the warrant did not use this definition to describe the materials being sought. *Id*. at 614. As the court noted, if the citation to the statute was intended as a limitation on the materials to be seized, then it would have been unnecessary to include the modifier "but particularly of minors" when describing the photographs to be seized. *Id*. at 615. Instead, the items could have been described with more particularity by simply using the precise statutory language to describe the materials being sought. *Id*. at 610.

A search warrant authorizing the seizure and search of nonprint materials, such as computers and cell phones can also be overbroad, although the degree of specificity in describing these items is different. As *Besola* implied, print materials are different.[6] Print materials can be seen and immediately identified as evidence of a crime. Therefore, an officer searching a home can look at print material and seize it if it is relevant or leave it if it is not.

On the other hand, items stored on digital devices are not immediately identifiable and searching them for evidence usually requires someone with forensic equipment and special skills.

> If a magistrate reasonably finds it probable that an individual has engaged in criminal dealings with child pornography and that digital evidence of those dealings is likely to be found in devices located in his or her home, the most reasonable approach would appear to be to authorize seizure of all reasonably suspect devices, but with a particularized protocol for searching the devices following the seizure.

*State v. Friedrich*, 4 Wn. App. 2d 945, 963, 425 P.3d 518 (2018). Although it is reasonable to allow computers and digital storage devices to be seized, as *Friedrich*

[6] Although the warrant in *Besola* also authorized the seizure and search of equipment such as computer and memory storage devices, the court's overbreadth decision was specifically limited to the print materials identified in the warrant. *Besola*, 184 Wn.2d at 611.

suggests, the subsequent forensic search of these items must still be limited to looking for evidence of the crimes.

In *McKee*, the warrant indicated there was probable cause to believe the defendant had committed the crimes of dealing and possession of depictions of minors engaged in sexually explicit conduct and authorized police to seize his cell phone without limitation. 3 Wn. App. 2d at 29. While the warrant cited the criminal statutes being investigated, similar to *Besola*, the language of the statute was not used to limit the description of the data sought from the cell phone. Instead of limiting the search of the phone to depictions of minors engaged in sexually explicit conduct, the warrant authorized police to look through text messages, call logs, and calendars "without regard to whether the data is connected to the crime." *McKee*, 3 Wn. App. 2d at 29.

In *State v. Vance*, Division Two considered the constitutionality of a warrant authorizing the seizure of digital storage equipment upon probable cause that the defendant was possessing and dealing in depictions of minors engaged in sexually explicit conduct. 9 Wn. App. 2d 357, 444 P.3d 1214 (2019). The warrant included citation to the criminal statutes being investigated and then described the electronic devices to be seized including a list of devices and media "'capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband,

fruits, or instrumentalities of such crimes.'" *Id*. at 361. Upon seizure, the warrant authorized the items to be transferred to the Cybercrime Unit "'for the examination . . . of data . . . to include: graphic/image files[,] . . . emails, spreadsheets, databases . . . that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography.'" *Id*. (emphasis omitted).

The court found the warrant to be valid and not overbroad. Not only did the warrant explain that there was probable cause to search for the identified crimes, but the electronic items to be seized were limited to devices capable of committing or storing evidence of the crimes. *Id*. at 365-66. Finally, the forensic search was limited to particular types of data that were specifically related to the crimes as described. *Id*. at 366. While the court recognized that it would have been helpful had the warrant included the statutory definition of "sexually explicit conduct," the regular references within the warrant to crimes being investigated limited the property that officers could seize. *Id*.

In this case, the warrant specifically cites the statutes and identifies the crimes being investigated. The warrant goes on to authorize the seizure of any evidence of the identified crimes including item 1: "Any digital or physical image or movie containing or displaying depictions of a minor engaged in sexually explicit conduct." CP at 137

(boldface omitted). Following this description are the statutory definition of every relevant term, including "'[s]exually explicit conduct.'" CP at 137. The warrant then goes on to list electronic devices to be seized including computers, cell phones, software, and storage media. CP at 138-39.

Unlike the warrants in *Besola*, *McKee*, and *Vance*, the warrant here uses specific statutory terms and then provides the statutory definitions for these terms. By using these well-defined terms, the warrant limits the search of items seized to data specifically connected to the crime.

Chambers argues that the warrant found valid in *Vance* is distinguishable from the warrant in this case. Specifically, Chambers contends that items 2 through 14 are listed without specific limitation or reference back to the particularized description in item 1. While we agree that a specific reference back to item 1 would have provided even more exactitude, we conclude that the warrant, taken as a whole, makes it clear that the search of items 2 through 14 is limited to "[a]ny digital or physical image or movie containing or displaying depictions of a minor engaged in sexually explicit conduct" as listed in item 1. CP at 137.

Borrowing from the logic applied in *Besola*, Chambers also argues that if the limitations set out in item 1 were meant to apply to items 2 through 14, then it would be

unnecessary for item 8 to modify the search of "developed film, slides, or printed photographs," to "evidence of depictions of minors in sexually explicit conduct as well as images of possible child victims." CP at 139 (boldface omitted). This analogy fails because, as we noted above, print material is different. Item 8 in this search warrant identified print material that is immediately recognizable as illegal. Unlike electronic equipment that must be seized and then searched offsite, print material that does not depict minors engaged in sexually explicit conduct is not unlawful to possess and should not be seized.

Contrary to Chambers' hypertechnical argument, a commonsense reading of the warrant in this case identified equipment that probably contained evidence of the crimes and then limits the forensic search of this equipment to evidence of the crimes listed in the warrant as specifically defined in the first item. *See Besola*, 184 Wn.2d at 615 ("Even where the constitution requires scrupulous exactitude, '[s]earch warrants are to be tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense.'") (quoting *Perrone,* 119 Wn.2d at 549) (alteration in original)).

E. SUFFICIENCY OF THE EVIDENCE FOR COUNTS 1, 2, AND 3

In the next issue, Chambers argues that the facts are insufficient to support convictions for three counts of dealing in depictions of child pornography, two counts in

the first degree and one count in the second degree (counts 1, 2, and 3). Specifically, he contends that making images available on a peer-to-peer network does not constitute publishing, disseminating, or exchanging said images. Instead, Chambers argues that the detective in this case essentially reached into his computer and took the files. He contends that the stipulated facts do not demonstrate that he knew these files were available for sharing. Finally, Chambers argues that his shared network contained partial files that cannot be definitively said to contain sexually explicit images of minors despite their matching "hash" to identified child pornography electronic files.

The parties in this case waived a jury trial and stipulated to the admission of police reports as evidence.[7] Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). We review challenges to a trial court's conclusions of law de novo. *Id*. at 106. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.*

[7] In lieu of a trial brief, the State presented the court with jury instructions, and the trial court filled in jury verdict forms instead of entering findings of fact and conclusions of law as required by CrR 6.1(d). We do not condone this procedure.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence and inferences from it in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State's evidence. *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), *abrogated on other grounds by State v. Crossguns*, 199 Wn.2d 282, 291, 505 P.3d 529 (2022). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 875, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In determining the sufficiency of the evidence, we do not consider circumstantial evidence any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

We first consider whether storing images or videos on a shared directory on a peer-to-peer network is sufficient to support a conviction for dealing in depictions of child pornography. For purposes of this issue, the State was required to prove that Chambers knowingly "published, disseminated, or exchanged" three visual or printed images or

videos of child pornography.[8] RP at 219; RCW 9.68A.050. Chambers argues that these verbs require active behavior as opposed to passive behavior. He makes no attempt to argue statutory interpretation, fails to suggest any definitions for these three verbs to support his argument, and fails to provide any supporting authority.

We find his argument unpersuasive. The plain, ordinary meaning of the word "publish," includes "to disseminate to the public." MERRIAM-WEBSTER ONLINE DICTIONARY (available at https://www.merriam-webster.com/dictionary/publish (last visited Sept. 29, 2022). The evidence presented to the trial court indicated that the program used by Chambers required the user to make files on their own computers available to others. In other words, the user must take an affirmative step to make material available for sharing. This is legally sufficient to support a finding that Chambers published the illicit images and videos.

Under similar federal statutes, federal courts have repeatedly determined that making files available in a shared directory is sufficient to support a conviction for dealing in child pornography. *See United States v. Budziak*, 697 F.3d 1105, 1109 (9th Cir. 2012) (evidence sufficient to find defendant distributed digital files by maintaining

[8] The only difference between first and second degree charges is the nature of the matter depicted which is not an issue in this case.

them in a shared folder accessible to other users of his LimeWire software, despite his assertion that he disabled the sharing function on the software); *United States v. Shaffer*, 472 F.3d 1219, 1223-24 (10th Cir. 2007) ("distribution" in the federal child pornography statute included defendant's allowance of third parties access to his computer files for download regardless of whether or not he actively "pushed" files to other users of the file sharing software).

Despite evidence that the images and videos on Chambers' computer had been made available for sharing on a peer-to-peer network, Chambers argues there is insufficient evidence that he knowingly disseminated these files. Instead, he argues that the evidence presented to the court shows that he did not realize or believe that his files were available for sharing and that he was not good at computers. The State responds that while it is true that Chambers said these things, the court did not have to believe Chambers. Instead, there was sufficient competing evidence for the court to find that Chambers' exculpatory statements to law enforcement were not credible. Both parties point to Chambers' comment that he thought he had the "'outgoing totally shut down.'" CP at 38.

The parties stipulated to the evidence presented to the court and indicated as part of the stipulation that the evidence submitted was "an accurate record of [the] facts."

CP at 259. The evidence reflects testimony supporting both the State's charges and Chambers' defenses. Although the facts were stipulated, as the fact finder, the judge weighed any disputed evidence and engaged in credibility determinations. A bench trial on stipulated facts is still a trial. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). By stipulation, the parties agree that what the State presents is what the witnesses would say. *State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985). However, the State must still prove the charges beyond a reasonable doubt and the defendant is not precluded from offering contrary evidence. *Id*.

Here the trial court weighed the evidence and ultimately rejected Chambers' exculpatory explanations for his use of peer-to-peer software and his claim of ignorant accidental configuration. Chambers' comment demonstrates that he knew how to shut down outgoing files so that they were not sharable. It is reasonable to infer that he knew how to make them shareable. Taken in the light most favorable to the State, there is sufficient evidence that Chambers intended to make the files shareable. The BitTorrent program requires a user to actively designate files to be available for upload by others, and the detective was able to upload files from Chambers' computer. Intent can be inferred from the software setting and the availability of the files for distribution.

Chambers also suggests that the evidence was insufficient because Detective Kjorness was only able to download a partial file from Chambers' computer. This argument fails because Chambers stipulated that the contents of each exhibit was sufficient to find him guilty.

F. COMMUNITY CUSTODY CONDITIONS

In his final issue on appeal, Chambers challenges two of the community custody conditions imposed as part of his sentence. Chambers was convicted of using his computer to possess and disseminate depictions of minors engaged in sexually explicit conduct. Within the judgment and sentence, the trial court included numerous restrictions and requirements including treatment. The court also required that Chambers "[s]ubmit to and pay for any polygraph examination, as directed by his Supervising Officer or the sexual deviancy treatment provider." CP at 356. The court limited his ability to access the internet: "No access or use of the internet or any device which has the ability to access the internet without specific written permission from his Supervising Officer." CP at 356.

Chambers challenges these two provisions asserting that they are both constitutionally overbroad in violation of his First Amendment rights. The State concedes his right to relief in the case of the internet access restriction and requests remand for the trial court to narrow the language.

Generally, community custody conditions are reviewed for an abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Where Chambers failed to object to community custody conditions at the trial court level, it must first be determined whether his challenge involves manifest constitutional error. Appellate courts may consider claims of manifest constitutional error raised for the first time on appeal provided that an adequate record exists to consider the claim. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "[F]or an objection to a community custody condition to be entitled to review for the first time on appeal, (1) it must be manifest constitutional error or a sentencing condition that . . . is 'illegal or erroneous' as a matter of law and (2) it must be ripe. If it is ineligible for review for one reason, we need not consider the other." *State v. Peters*, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019).[9] A raised issue is ripe if it is primarily legal, does not require further factual development, and the challenged action is final. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). Imposition of an unconstitutional community custody

[9] Chambers primarily challenges the broadness of the conditions, but for the first time in his reply he appears to assert a vagueness challenge as to the future actions of his probation officer that would be unripe. Reply Br. of Appellant at 34; *Cowiche Canyon Conservancy*, 118 Wn.2d at 809 ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

condition is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

Discretionary community custody conditions must comply with statutory requirements and not excessively burden a defendant's constitutional rights. *State v. Johnson*, 197 Wn.2d 740, 746-49, 487 P.3d 893 (2021). A judge abuses their discretion in imposing community custody conditions in violation of the legal parameters set by RCW 9.94A.703. *State v. Geyer*, 19 Wn. App. 2d 321, 326, 496 P.3d 322 (2021). Only after statutory and constitutional requirements are met does the abuse of discretion standard require deference to the trial court. *Id.*

The complete prohibition of Chambers' use of the internet without prior permission of his community corrections supervisor is similar to restrictions found overbroad in *Geyer*. In that case, this court held that restricting the use of any computer or electronic device capable of connecting to the internet without prior permission was unnecessarily broad and impermissibly burdened his freedom of speech. *Id*. at 329; U.S. CONST. amend. I; WASH. CONST. art. I, § 5. For this reason, we accept the State's concession and agree that this provision is overbroad.

We deny Chambers' challenge to the polygraph condition. On a number of occasions, Washington courts have previously found polygraph testing constitutional.

Polygraph testing may be utilized to monitor compliance with the requirement of making reasonable progress in treatment or with other special conditions of community supervision. *State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000) (citing *State v. Riles*, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998), *abrogated on other grounds by Valencia*, 169 Wn.2d at 792-93.). Chambers' challenge is not so much focused on the polygraph testing itself but his interpretation of the word "any" in the condition phrase "Submit to and pay for any polygraph examination . . . ." CP at 356. Much like the defendants in both the *Combs* and *Riles* cases, he is concerned with limitation of the purpose and subject matter of the examinations.

In *Combs*, the trial court ordered unlimited polygraph testing in order to monitor James Combs' compliance with his other conditions of community placement. 102 Wn. App. at 952. This court concluded "that the language of Mr. Combs's judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present." *Id*. at 952-53. To arrive at this holding, the court discussed and found persuasive the Division One holding in *Riles* that "although the challenged portion of the community placement order did not expressly limit the scope of the polygraph testing, a sufficient limitation was implicitly imposed,

considering the context of the entire order." *Id*. at 952 (citing *State v. Riles*, 86 Wn. App. 10, 16-17, 936 P.2d 11 (1997), *aff'd*, 135 Wn.2d 326.

Likewise, in this case, given the language used and the conditions imposed including treatment, we can infer that the polygraph testing is to be limited to monitoring compliance. The polygraph condition is not an abuse of discretion and not a manifest constitutional error. If the community custody officer subjects Chambers to improper questioning during a later polygraph examination, Chambers may challenge at that time when such issue is ripe. *State v. Vant*, 145 Wn. App. 592, 603, 186 P.3d 1149 (2008).

We accept the State's concession, strike the internet restriction from the community custody conditions, and remand so that the trial court can consider a modified restriction. While the polygraph condition language implies a limitation to community custody purposes, since we are remanding for the court to consider internet conditions, it may be appropriate for the trial court to explicitly clarify the polygraph on remand.

We affirm the convictions but remand for reconsideration of the community custody conditions.

Staab, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Fearing, J.

# STATUTORY APPENDIX

18 U.S.C. § 2252 (1988 ed. and Supp. V) provided in part:

> (a) Any person who --
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
> . . . .

shall be punished as provided in subsection (b) of this section.

RAP 2.5 provides in part:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RAP 13.4 provides in part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 3.66.100 provides in part:

> (1) Every district judge having authority to hear a particular case may issue criminal process in and to any place in the state.

RCW 9.68A.011 provides:

> Unless the context clearly indicates otherwise, the definitions in this section apply throughout this chapter.
>
> (1) An "internet session" means a period of time during which an internet user, using a specific internet protocol address, visits or is logged into an internet site for an uninterrupted period of time.
>
> (2) To "photograph" means to make a print, negative, slide, digital image, motion picture, or videotape. A "photograph" means anything tangible or intangible produced by photographing.
>
> (3) "Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph.
>
> (4) "Sexually explicit conduct" means actual or simulated:
>
> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

(5) "Minor" means any person under eighteen years of age.

(6) "Live performance" means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration

Former RCW 9.68A.050 (2017) provided:

> (1)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e); or
>
> (ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).
>
> (b) Dealing in depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.
>
> (c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.
>
> (2)(a) A person commits the crime of dealing in depictions of a minor engaged in

sexually explicit conduct in the second degree when he or she:

(i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g); or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

(b) Dealing in depictions of a minor engaged in sexually explicit conduct in the second degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each incident of dealing in one or more depictions or images of visual or printed matter constitutes a separate offense.

Former RCW 9.68A.070 (2017) provided:

(1)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when

he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.

(2)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

RCW 10.89.010 provides:

> Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that he or she is believed to have committed a felony in such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving shall have the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he or she is believed to have committed a felony or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving in this state.

RCW 10.93.070 provides:

> In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial

bounds of this state, under the following enumerated circumstances:

(1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;

(2) In response to an emergency involving an immediate threat to human life or property;

(3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;

(4) When the officer is transporting a prisoner;

(5) When the officer is executing an arrest warrant or search warrant; or

(6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 7 provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Const. art. 1, § 22 (Amendment 10) provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . .

Wash. Const. art. IV, § 6 provides:

> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto,

review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

*Certificate of Service*

I, Alex Fast, certify that on November 2, 2022, I served the attached Petition for Review on counsel for the Respondent by filing it through the Portal.

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

DATED this 2nd day of November 2022, at Seattle, Washington.

s/ Alex Fast
Legal Assistant
Law Office of Neil Fox PLLC
2125 Western Ave. Suite 330
Seattle, WA, 98121

Tel: 206-728-5440

## LAW OFFICE OF NEIL FOX PLLC

## November 02, 2022 - 10:10 AM

## Transmittal Information

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|---|---|
| **Filed with Court:** | Court of Appeals Division III |
| **Appellate Court Case Number:** | 38282-6 |
| **Appellate Court Case Title:** | State of Washington v. Michael E. Chambers |
| **Superior Court Case Number:** | 18-1-00085-0 |

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