101885-1

Supreme Court No. (to be set)
Court of Appeals No. 56498-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Timothy Michael Foley, Appellant

Kitsap County Superior Court

Cause No. 20-1-00277-0

The Honorable Judges Jennifer Forbes and Mathew Clucas

PETITION FOR REVIEW

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Petitioner Timothy Foley asks the Court to review the opinion entered on March 21, 2023.[1] This case presents three issues:

1. Was the first warrant authorizing a search of Mr. Foley's phone invalid because it was premised in part on a statute previously found to be unconstitutional?
2. Were the two cell phone warrants overbroad?
3. Was Mr. Foley improperly sentenced for two offenses that comprised a single unit of prosecution?

STATEMENT OF THE CASE

In December of 2019, Timothy Foley was approached by police officers who had a warrant to seize and search his phone. CP 16-17; RP (12/7/20) 134, 141. The warrant was based on allegations made by Mr. Foley's ex-fiancée, Kim Richardson. CP 20-33. Richardson's accusations stemmed from activity from seven months earlier. CP 20-33.

[1] Attached.

Mr. Foley answered the officers' questions and voluntarily handed over his phone. RP (12/7/20) 136-137, 139, 142.

Although police had a description of the phone and knew its unique identifier,[2] they did not use this information to describe the phone in the warrant. CP 17, 91. The officers believed the warrant authorized a search of the entire phone for a broad range of information. CP 17, 152.

Among other things, the warrant permitted police to search through Mr. Foley's "internet history" without any limitation. CP 17. It allowed police to search for "any data indicating dominion and control" without limitation. CP 17. It directed police to search for "any application being used for

[2] They had obtained the phone's International Mobile Equipment Identity (IMEI), which is a unique 15-digit code that precisely identifies a mobile device. CP 91; *see* Alan Butler, *Get A Warrant: The Supreme Court's New Course for Digital Privacy Rights After Riley v. California*, 10 Duke J. Const. L. & Pub. Pol'y 83, 117 n. 170 (2014).

location sharing and/or geofencing," even though there was no suggestion of physical stalking. CP 17.

Richardson had accused Mr. Foley of cyberstalking[3] and the disclosure of intimate images.[4] CP 17. Police apparently did not know that the relevant portion of the cyberstalking statute had been declared unconstitutional.[5] CP 20-33.

Two communications from May of 2019 formed the basis of the cyberstalking accusation. CP 20-33. First, Richardson alleged that Mr. Foley sent an anonymous Facebook message to the father of her child.[6] CP 21-22. The message suggested that he look for images of Richardson on an adult website. CP 21.

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[3] RCW 9.61.260**Error! Bookmark not defined.**.

[4] RCW 9A.86.010.

[5] *See Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019).

[6] The warrant included limited authority to search for Facebook Messenger activity on the date this man received the anonymous contact. CP 17.

The second message was an email Mr. Foley sent to Richardson. CP 22. The message complained that Richardson hadn't treated him "like a human being," and hinted that some "material" might impact custody, employment, or "social standing." CP 22. It closed with the words "[w]ho knows." CP 22. The warrant did not include an authorization to search for emails. CP 22.

The disclosure charge related to material uploaded to an adult website. CP 20. Before they separated, Mr. Foley and Richardson had participated in a threesome with another person. CP 21, 89. Richardson had consented to being filmed during their encounters. CP 21, 89.

Richardson had also allowed Mr. Foley to upload the material to adult websites, but believed he'd later removed them at her request. CP 21-22. The warrant authorized police to search the phone for any videos and images of Richardson and

the third person, including material that was not sexually explicit.[7] CP 17.

After receiving the phone from Mr. Foley, Detective Swayze drove while Detective Birkenfeld looked at the phone's contents. RP (8/11/21) 69. Birkenfeld had not read the warrant and was unaware of any limitations imposed by it. CP 131-133. During his "cursory search," Birkenfeld found what he believed to be child pornography, and the detectives stopped the car to look at the images. CP 81; RP (8/11/21) 69-70.

Detective Swayze took the phone to his office and spent more time looking at its contents. He reviewed the phone alone for up to an hour. RP (8/12/21) 273; CP 81.

Birkenfeld did not prepare a report outlining how he conducted his search. CP 136. He later acknowledged that his

[7] It also directed police to search for images and data related to Richardson's profile on Xvideos.com and "internet history regarding Xvideos.com." CP 17.

search had not followed the protocol for child pornography cases. RP (8/11/21) 75.

Swayze did not provide details regarding the lengthy search he conducted while alone in his office. CP 81. He, too, admitted that his search did not follow the protocol for child pornography cases. RP (8/12/21) 272.

Based on the images found during these two searches, the officers obtained a second warrant. CP 84-85. The phone was examined further, and child pornography was found. RP (8/12/21) 240-262.

The prosecutor charged Mr. Foley with fourteen counts of possessing depictions of minors engaged in sexually explicit conduct. CP 275-285. Eight of the charges were for first-degree possession; the remaining six were for second-degree possession. CP 275-285.

Mr. Foley moved to suppress the phone and the information seized. CP 1-33. Among other things, he argued that the officers exceeded the scope of the warrant during their

searches in the car and at the station. CP 13, 105-108, 168, 218-232; RP (8/3/20) 3-47; RP (8/21/20) 2-24; RP (10/9/20) 2-8.

The defense also argued that the second warrant was tainted by the first warrant and by data discovered during each officer's search of the phone. RP (8/3/20) 3-47; CP 120-132. The state agreed that if the officers exceeded the scope of the first warrant, then the second warrant "has a big problem." RP (8/3/20) 7-8.

Despite this, the court refused to consider evidence regarding execution of the first warrant unless Mr. Foley provided a basis for a *Franks* hearing.[8] CP 109-119, 157-184; RP (8/3/20) 8-9; RP (8/21/20) 2-24; RP (10/9/20) 5-10. Defense counsel continued to insist that the manner of execution was at issue, but eventually provided some evidence and made an

[8] This would require a material misstatement or omission from the warrant application that was intentional or reckless. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

argument based on *Franks*. CP 105-108, 120-171, 182, 214-236; RP (8/3/20) 2-47; RP (8/21/20) 2-24; RP (10/9/20) 3-5.

The court did not order a *Franks* hearing. CP 181-184. The State did not present any evidence detailing the officers' conduct in executing the search warrant.

The trial judge upheld both warrants and ruled all evidence admissible. RP (9/18/20) 3-15. The defense raised the issue multiple times before trial, but the court did not change its decision. RP (10/9/20) 2-7; RP (7/16/21) 2-11; RP (7/21/21) 3-13; CP 120-128, 156, 214-238.

At trial, the jury viewed the contents of the phone and heard Mr. Foley deny all knowledge of the photos appearing to depict minors. RP (8/12/21) 306-343. Mr. Foley told the jurors that he had multiple roommates who'd had access to the phone, and that he did not have password protection on his phone.[9] RP

[9] Detective Swayze confirmed that the phone did not require a password to access its contents. RP (8/12/21) 243, 267.

(8/13/21) 306-309, 315. The jury convicted Mr. Foley of 11 of the 14 charges. CP 310-314.

To avoid double jeopardy violations, the court dismissed three of the remaining charges, but denied Mr. Foley's motion to dismiss Count XIV, leaving Mr. Foley with eight convictions. CP 384, 405-406. Three of the convictions were determined to be the same criminal conduct. CP 405-406.

Mr. Foley timely appealed. CP 402. The Court of Appeals affirmed his convictions. He now seeks review of that decision.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE FIRST SEARCH WARRANT WAS BASED IN PART ON AN UNCONSTITUTIONAL STATUTE.

The state constitution protects against disturbance of a person's private affairs without "authority of law." Wash. Const. art I, §7. An unconstitutional statute cannot provide "authority of law" under Wash. Const. art. I, §7. *State v. White,* 97 Wn.2d 92, 640 P.2d 1061 (1982).

The portion of the cyberstalking statute applicable to the search warrant "is facially unconstitutional." *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019).

Prior to *Rynearson,* the statute criminalized certain communications made "with intent to harass, intimidate, torment, or embarrass any other person." RCW 9.61.260. The *Rynearson* court invalidated the prohibition against communications made with intent to "embarrass." *Rynearson*, 355 F. Supp. 3d at 972.

Police relied on this unconstitutional provision to search for evidence of cyberstalking on Mr. Foley's phone. CP 16-33. Swayze apparently believed that Mr. Foley's anonymous Facebook message to Richardson's new boyfriend qualified as cyberstalking.[10] CP 20-33. If this message was sent "with intent

[10] The email to Richardson was not cyberstalking; even if sent with requisite intent, it was not the type of communication prohibited under RCW 9.61.260(1)(a)-(c). Furthermore, officers did not seek permission to search for any data related to this email. CP 17, 22.

to… embarrass" Richardson, it fell squarely within the invalid provision. *Id.;* RCW 9.61.260(1)(b).

The *Rynearson* decision was available to the police (and to the magistrate) at the time the warrant was issued. CP 16; *Id.* Because the only basis to seek evidence of cyberstalking rested on an invalid provision of RCW 9.61.260, the allegations in the warrant did not supply probable cause. *Id.*

One court has since imposed a limiting construction on the statute. *State v. Mireles*, 16 Wn.App.2d 641, 655, 482 P.3d 942, 951, *review denied*, 198 Wn.2d 1018, 497 P.3d 373 (2021). But the validity of a search rests on the law at the time of the search. *See, e.g., State v. Afana*, 169 Wn.2d 169, 183, 233 P.3d 879 (2010).

Further, the construction adopted by the *Mireles* court cannot save the warrant here. The search warrant affidavit relied on a single anonymous Facebook communication based on intent to "embarrass." CP 21. The "embarrass" prong of the statute is the one invalidated by *Rynearson.* Thus, even after

Mireles, the authorization to search for evidence of cyberstalking rested squarely on the provision found to be unconstitutional. *Rynearson,* 355 F. Supp. 3d at 972.

The Court of Appeals erroneously concluded that Mr. Foley had not preserved his challenge to the warrant based on the statute's unconstitutionality. Opinion, pp. 21-22. Even if the error were not preserved by arguments made in the trial court, it qualifies for review under RAP 2.5(a)(3).

Mr. Foley's constitutional claim is a "manifest error" affecting his constitutional rights under the Fourth Amendment and Wash. Const. art. I, §7. *See* RAP 2.5(a)(3). Error is manifest if it "resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

The "focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara,* 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). An error is

manifest if the facts necessary to adjudicate the error appear in the record. *Id.*

The Court of Appeals departed from this standard, focusing on the impact of the error, rather than whether it was manifest. Opinion, p. 22. The court should have focused on the *facts* known to the trial court.

The error is manifest because the necessary facts appear in the record. *O'Hara,* 167 Wn.2d at 100. The record includes the warrant affidavit and the warrant itself. CP 16-32. The court could have corrected the error, and it may be reviewed for the first time on appeal. *Id.;* RAP 2.5(a)(3).

According to the Court of Appeals, police only searched for images on Mr. Foley's phone. Opinion, p. 22. The record does not support this claim. Although Birkenfeld searched only images, Swayze did not provide information regarding the lengthy search he conducted within the privacy of his office. RP (8/12/21) 273; CP 81. Furthermore, even if the search were

limited, this cannot cure an invalid warrant. *See State v. Higgins*, 136 Wn. App. 87, 91, 147 P.3d 649 (2006).

The warrant did not provide the "authority of law" justifying a search for information related to cyberstalking, and the evidence must be suppressed. *White*, 97 Wn.2d at 112; Wash. Const. art. I, §7. The Supreme Court should grant review under RAP 13.4(b)(3), as it presents a significant issue under the state and federal constitutions.

II. BOTH SEARCH WARRANTS WERE OVERBROAD.

A search warrant can be overbroad "either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist." *State v. Gudgell*, 20 Wn.App.2d 162, 180, 499 P.3d 229 (2021).

The probable cause and particularity requirements are "closely intertwined." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Together, they prohibit the "unbridled

authority of a general warrant." *See Stanford v. State of Tex.*, 379 U.S. 476, 486, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with both requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545. In such cases, including warrants targeting child pornography, the particularity requirement must "'be accorded the most scrupulous exactitude.'" *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485).

The need for heightened standards is especially acute where police seek authorization to search a cell phone. *See State v. Fairley*, 12 Wn.App.2d 315, 320, 457 P.3d 1150 *review denied*, 195 Wn.2d 1027, 466 P.3d 777 (2020); *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) .

The materials outlined in the first search warrant are protected by the First Amendment. *Fairley*, 12 Wn.App.2d at 323. The warrant is therefore subject to close scrutiny to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

A. The first search warrant authorized police to search for and seize information that was not supported by probable cause.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552.

To establish probable cause, the warrant application "must set forth sufficient facts to convince a reasonable person of the probability… that evidence of criminal activity can be found at the place to be searched." *Lyons*, 174 Wn.2d at 359.

By itself, an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64.

Here, the first search warrant authorized police to search for and seize information for which they lacked probable cause.

Cyberstalking allegations. Police claimed that Mr. Foley engaged in cyberstalking by sending one email to Richardson and one anonymous Facebook message to her new boyfriend. CP 21, 22. Assuming these two communications qualified as cyberstalking, they did not provide probable cause for two broad categories of information sought from Mr. Foley's cell phone.

First, nothing about the email or the Facebook message suggested that evidence of cyberstalking would be found in Mr. Foley's "internet history." CP 17. A person's "internet history" includes every search conducted and every website viewed. There is no indication that Mr. Foley's "internet history" had any relationship to the cyberstalking allegations.

Second, the cyberstalking allegations did not provide a basis to search "any application being used for location sharing, and/or geofencing used to notify when arriving or leaving a location." CP 17. Nothing suggested that Mr. Foley was physically stalking Richardson or monitoring her movements. CP 19-33.

The Court of Appeals failed to address this argument.

Disclosure of intimate images. The "revenge porn" allegations did not provide probable cause to search for some items listed in the warrant. As with the cyberstalking allegations, the claim that Mr. Foley improperly uploaded intimate images and videos does not support a search of his "internet history" or of "any application" relating to location sharing or geofencing.[11] CP 17.

The Court of Appeals did not explain why the allegations justified a search of Mr. Foley's internet history. Instead, the

[11] The "revenge porn" allegations did not provide a basis to search Facebook Messenger. CP 17.

court made only a conclusory allegation that the search for "internet history" was permissible because Mr. Foley contacted another person using "a Facebook account tied to [a certain] email account." Opinion, p. 14.

In addition, there was no basis to search the phone for non-sexual "videos and images" of Richardson and her boyfriend. CP 17. Mr. Foley and Richardson were engaged for 3 ½ years; it is likely that he had many G-rated photos of her taken during those years. CP 20. These would not be evidence of improper disclosure of intimate material, nor would non-sexual photos of Richardson's boyfriend. They should not have been included in the warrant.

Staleness. Stale information cannot establish probable cause. *Lyons*, 174 Wn.2d at 359-363. When assessing staleness, courts consider the time elapsed since the known criminal activity and "the nature and scope of the suspected activity." *Lyons*, 174 Wn.2d at 361; *see also United States v. Zimmerman*, 277 F.3d 426, 434 (3d Cir. 2002).

More than seven months elapsed between the alleged criminal activity and the issuance of the search warrant. CP 17-33. During that time, Mr. Foley had no contact with Richardson, and there was no allegation of cyberstalking. CP 17-33, 91. Furthermore, nothing suggested that he'd inappropriately shared additional images with anyone during those seven months. CP 20-31, 91.

Given the nature of the evidence sought, the information claimed to justify the search was stale. *Id.* Nothing in the affidavit shows that Mr. Foley had the same phone over those seven months. CP 20-33. Nor was there any reason to think that he kept information relating to Richards months after their relationship ended. The information from May 2019 did not provide probable cause to believe evidence of a crime would be found on Mr. Foley's phone in December 2019. *Zimmerman*, 277 F.3d at 434.

In addition, "the nature and scope of the suspected

activity"[12] did not make the warrant application timely. It consisted of a single Facebook message and uploads of a few dozen videos and images.[13] CP 20-33. Nothing in the warrant application suggests a high volume of illegal activity over a prolonged period. CP 20-33.

The Court of Appeals erroneously concluded that the information was not stale. According to the court, "police investigated Foley diligently." Opinion, p. 23.

But diligence does not factor into the staleness analysis. *Lyons*, 174 Wn.2d at 359-363; Opinion, p. 22 (citing *State v. Garbaccio*, 151 Wn. App. 716, 728, 214 P.3d 168 (2009)). Nor does the record support the appellate court's assertion: no explanation was provided for the months during which police did nothing to investigate the case.

Given the "nature and scope" of the activity, the affidavit

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[12] *Lyons*, 174 Wn.2d at 361.

[13] As noted, the email to Richardson could not qualify as cyberstalking.

does not "provide sufficient support for the magistrate's finding of *timely* probable cause." *Lyons*, 174 Wn.2d at 368 (emphasis added). Because the first search warrant was overbroad, Mr. Foley's convictions must be reversed, and the evidence suppressed.[14] *Perrone*, 119 Wn.2d 538, 551-552.

B. Both warrants included provisions that were insufficiently particular to satisfy the Fourth Amendment and Wash. Const. art. I, §7.

A search warrant must particularly describe the place to be searched and the things to be seized. U.S. Const. Amend. IV; Wash. Const. art. I, §7; *Perrone*, 119 Wn.2d at 545. In general, "a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits." *Id.*, at 547.

Description of phone. Given the available information, the first search warrant did not provide a sufficiently particular

[14] In addition, evidence seized from the first warrant tainted the second warrant. *See State v. Magneson*, 107 Wn.App. 221, 26 P.3d 986 (2001).

description of the phone. A "more specific description" was not "impossible." *Perrone,* 119 Wn.2d at 547.

From T-Mobile, officers knew the IMEI[15] of the phone Mr. Foley used in May of 2019. CP 91. Despite this, the officers did not use the IMEI to describe the phone they sought. CP 16-33. Police could have used the IMEI to determine the brand and model of the phone. They already had Richardson's description of Mr. Foley's phone as "a Samsung Galaxy 8 cell phone with a black Otterbox case." CP 91.

The Court of Appeals found the warrant sufficient because it referenced the phone number associated with Facebook messages and the disclosure of intimate images. Opinion, p. 14. This ignores *Perrone's* directive that the description must be as particular as possible. Without reference to the phone's IMEI or any physical description, the warrant did not meet the particularity requirement. *Id.*

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[15] An IMEI is a cell phone's unique identifier. Butler, 10 Duke J. Const. L. & Pub. Pol'y at 117 n. 170.

Search of internet history. The first warrant permitted police to rummage through all of Mr. Foley's internet history, with no guidelines as to the information sought or how it related to the crimes under investigation. CP 17. A "more specific description" was possible. *Id.* The warrant should have limited the officers' authority to explore Mr. Foley's "internet history."

The first warrant also authorized police to search for "videos and images" of Richardson and her boyfriend. CP 17. It provided no additional parameters to limit the search, nor did it restrict officers to images and videos created before or during the period under investigation. CP 17. The Court of Appeals did not address this failure. Opinion, p. 14. As with the other unrestricted searches authorized by the warrant, the directive to search for "videos and images" was insufficiently particular. CP 17.

Search of "any applications" using location sharing and geofencing. When they applied for the first search warrant, the officers did not outline any need for location sharing or

geofencing data.[16] CP 20-33. Assuming there could be proper articulable purpose for finding such information, the search should have been limited to data that would address that specific purpose. Instead, it allowed examination of "any applications," permitting police to rummage through all data associated with apps such as Facebook, Snapchat, Tinder, Grindr, and others. There was no conceivable justification for this, and the Court of Appeals' Opinion does not provide one. The authorization to search should have been closely tied to the specific reason for the search, whatever it might have been.

Dominion and control. Police did not need evidence of dominion and control beyond the information they had when they applied for either warrant. Police had a description of the phone Mr. Foley used in March of 2019, and T-Mobile's records included the IMEI for Mr. Foley's phone and the

[16] Unlike the other authorizations, this provision did not suggest that the information sought was "related to" the offenses being investigated. CP 17.

number associated with his account. CP 91. Nothing in either affidavit suggested that Mr. Foley lacked dominion and control over his own phone.

Furthermore, the directive to obtain "any data indicating dominion and control" was insufficiently particular. CP 17, 85. Providing broad authority to search any apps or storage areas, it did not include a temporal limitation, and it did not limit the kind of data sought.

This transformed the warrant into a general warrant. *See Stanford*, 379 U.S. at 486. It was not "impossible" to describe items that would establish dominion and control with greater particularity. *Id.*

The Court of Appeals did not attempt to justify the authorization to search for evidence of dominion and control. An authorization of this breadth may not violate the Fourth Amendment, but it is wholly inconsistent with respect for Mr. Foley's "private affairs" under the state constitution. Wash. Const. art. I, §7.

Reference to statutes. Lack of particularity cannot be cured by naming the crime being investigated and citing the statute, nor by claiming the evidence is "material to the investigation." *State v. Besola*, 184 Wn.2d 605, 614-615, 359 P.3d 799 (2015); *see also State v. McKee*, 3 Wn.App.2d 11, 26, 413 P.3d 1049 (2018), *rev'd and remanded on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019).

Here, as in *Besola*, the first warrant did no more than name the crimes under investigation with statutory citations. CP 17. These references did not "add any actual information that would be helpful to the reader, such as the statutory definition" of each offense. *Besola*, 184 Wn.2d at 614. They are insufficient to solve the particularity problems described above. *Id.*

Furthermore, the statement that the evidence sought was "related to" the crimes under investigation "did not limit the evidence to be seized by referencing the felony." *Id.*, at 614-615. Instead, like the deficient phrase in *Besola*, this language

"merely says that the evidence… is '[related]' to" cyberstalking and revenge porn. *Id.*, at 615 (alteration added).

The Court of Appeals did not address this issue. As in *Besola*, naming the offenses and citing their statutes placed no limits on the information police could look for. *Id.* Nor did it "inform the person subject to the search what items the officers were authorized to seize." *Id.*, at 617.

The second warrant was overbroad. It did not provide the "authority of law" required for the search of Mr. Foley's phone. *Id.* His convictions must be reversed, and the evidence suppressed.

C. The invalid portions of each warrant were not severable.

The Court of Appeals erroneously concluded that the search warrant was severable. Opinion, p. 17. This is incorrect, because there is not a meaningful separation between any valid parts and those that are overbroad.

A warrant may not be severed unless five requirements are met: "(1) the warrant must lawfully have authorized entry

into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search in flagrant disregard of the warrant's scope." *See Gudgell*, 20 Wn.App.2d at 180-181.

Here, the first three factors do not support severance. As outlined above, the items listed in the warrant are not particularly described and are not supported by probable cause. The invalid portions authorized police to search for and seize a vast quantity of information. Any valid portions of the warrant were not significant by comparison.

The record does not support the fourth and fifth factors. At the State's urging, the court declined Mr. Foley's request to hold a hearing on the execution of the warrant. Had the court

held a hearing, the State would have had the opportunity to address the fourth and fifth factors.

The Supreme Court should grant review under RAP 13.4(b)(4). This case presents a significant issue of constitutional law.

III. THE TRIAL COURT INFRINGED MR. FOLEY'S DOUBLE JEOPARDY RIGHTS.

The constitution protects an accused person "from being twice put in jeopardy for the same offense." *Turner*, 169 Wn.2d at 454; U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. art. I, §9. This prohibits courts from "imposing multiple punishments for the same criminal conduct." *Id.*

Where multiple penalties are imposed for violation of a single statute, courts must determine the applicable "unit of prosecution." *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014); *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When more than one conviction is entered for a single unit of prosecution, [t]he remedy… is to

vacate any multiplicious convictions." *State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008).

As with other double jeopardy issues, "analyzing the unit of prosecution is an issue of statutory construction and legislative intent." *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). Here, the statute is unambiguous: it includes specific provisions outlining the unit of prosecution for possession of child pornography. RCW 9.68A.070(1)(c) and (2)(c).

For first-degree possession, the unit of prosecution turns on the number of images possessed. RCW 9.68A.070(1)(c). For second-degree possession, the unit of prosecution turns on "each incident of possession." RCW 9.68A.070(2)(c). The legislature intended to separately punish first-degree offenses on a per-image basis, but took a different approach to concurrent second-degree offenses. RCW 9.68A.070(1)(c), (2)(c).

The evidence here showed only one "incident of possession." Under the plain language of the statute, Mr. Foley could not be convicted of second-degree possession, given that he was convicted of seven other charges for the same "incident of possession."[17] RCW 9.68A.070(2)(c).

The Court of Appeals did not engage with this argument. Opinion, pp. 26-27. Mr. Foley's eight convictions for possession of child pornography under RCW 9.68A.070 are multiplicitous. The second-degree conviction must be vacated, and the charge dismissed with prejudice. *Id.* The Supreme Court should grant review. This case presents a significant issue of constitutional law. RAP 13.4(b)(3).

CONCLUSION

The evidence against Mr. Foley was illegally obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7. His convictions must be reversed, the evidence suppressed, and

[17] By contrast, each image justified a separate conviction for first-degree possession. RCW 9.68A.070(1)(c).

the charges dismissed with prejudice. If the charges are not dismissed, the case must be remanded with instructions to vacate the conviction for second-degree possession of child pornography.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4989 words, as calculated by our word processing software.

Respectfully submitted April 11, 2023.

BACKLUND AND MISTRY

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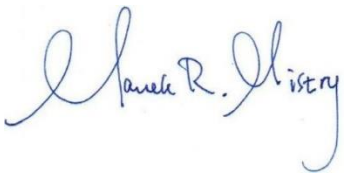

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Timothy Foley
Kitsap County Jail
614 Division Street, MS-33
Port Orchard, WA 98366

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on April 11, 2023.

_____
Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

March 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. TIMOTHY MICHAEL FOLEY, Appellant.	No. 56498-0-II UNPUBLISHED OPINION

GLASGOW, C.J.—KR told police that her ex-fiancé, Timothy Michael Foley, was harassing her by phone and social media, and police obtained a warrant to search Foley's cell phone for certain evidence. When executing the search warrant, two officers saw material that appeared to be depictions of minors engaged in sexually explicit conduct.[1] Police obtained a second search warrant and seized evidence that Foley possessed such depictions.

The State charged Foley with multiple counts of possession of depictions of minors engaged in sexually explicit conduct. At trial, Foley unsuccessfully moved to suppress the evidence recovered from his cell phone.

A jury found Foley guilty of seven counts of first degree possession of depictions of minors engaged in sexually explicit conduct and four counts of second degree possession of such depictions. When the trial court sentenced Foley, it dismissed without prejudice three counts of

[1] We recognize that many organizations advocating for survivors of sexual abuse use the term "child sexual abuse material." We use the term "minors engaged in sexually explicit conduct" to mirror the language in RCW 9.68A.070, the statute that criminalizes possessing such depictions.

second degree possession of depictions of minors engaged in sexually explicit conduct to prevent double jeopardy violations. The court imposed a total of 102 months of confinement.

Foley argues that the trial court improperly denied his suppression motion. He also contends that one conviction violated double jeopardy because the court entered eight convictions when Foley committed seven units of prosecution. He assigns error to the trial court's entry of several community custody conditions.

We affirm the trial court's denial of Foley's suppression motion and hold that no double jeopardy violation occurred. We also hold that the community custody conditions prohibiting Foley from accessing sexually exploitative materials and information pertaining to minors are unconstitutionally vague or overbroad. We remand for the trial court to revise or strike them, direct the trial court to strike the condition requiring breath tests and the imposition of community supervision fees, and otherwise affirm the judgment and sentence.

FACTS

I. BACKGROUND

On May 20, 2019, KR called the police. She told an officer that Foley, her ex-fiancé, had been harassing her by phone and social media. She had received an e-mail from Foley dated May 19, 2019. In the e-mail, Foley wrote, "I'm sorry you chose for it to be this way[.] Maybe none of this material will impact custody, employment, Watson Furniture or social standing." Clerk's Papers (CP) at 22. KR had a young son and KR's boyfriend, KJ, worked at Watson Furniture when she received the e-mail.

KR said that the day after Foley sent the e-mail, she got a phone call from SW, her son's father. SW informed her about a "strange" Facebook message from an anonymous user. CP at 21.

The message said SW "might want to search the name [KR] on [Xvideos.com] and similar sites." *Id.* Foley later admitted to sending the Facebook message.

KR told the officer that she searched her name on Xvideos.com and found a pornographic video of herself and her current boyfriend, KJ. When KR and Foley were in a relationship, Foley "enjoyed watching videos of her having sexual encounters with other people." *Id.* KR said the video on Xvideos.com was taken on her phone more than a year ago and that only Foley and KJ "would have had access to it with her permission." CP at 21-22. She did not give anyone permission to post the video and she was confident Foley had posted it.

Later that day, KR contacted the officer again. She said that when she typed her name into Xvideos.com, she found a profile—created that day—with sexually explicit pictures of herself, recordings of herself engaging in sexual acts, and private information about her, including her relationship with KJ. She also saw pictures taken from her Facebook profile. KR said Foley appeared to be actively uploading pictures to the Xvideos.com profile.

In May 2019, with SW's approval, law enforcement got a search warrant for SW's Facebook account. They found the conversation with the anonymous user who pointed SW to Xvideos.com. After identifying the anonymous user's Facebook account, law enforcement obtained a search warrant for the account the following month. Facebook responded that same month with records for the account, which showed that it was created using an email address referencing KR's name and birth date and a phone number similar to the one law enforcement had on file for Foley. Using these records, law enforcement also determined that the person who sent the anonymous message to SW did so from a location close to Foley's apartment.

II. SEARCH WARRANTS INVOLVING FOLEY'S CELL PHONE

A. First Search Warrant

On December 26, 2019, a superior court judge issued a warrant to seize the cell phone associated with Foley's number. The warrant authorized a search of the cell phone for evidence of cyberstalking and disclosing intimate images. The warrant authorized officers to search and seize the following:

> 1. Cellular telephone assigned phone number [ending in 4877];
> 2. A forensic search of the cellular phone referenced above for: internet history, Facebook, and Facebook Messenger account activity associated with [the email address with KR's name and birth date] between 5/18/2019 04:54:48 UTC and 5/20/2019 05:21:19 UTC, *videos and images of [KR and/or KJ], images and any data related to [Xvideos.com] profile [KR]*, internet history regarding Xvideos.com, any data indicating dominion and control of the cellular phone, all related to RCW 9.61.260 Cyberstalking & RCW 9A.86.010 Disclosing intimate images;
> 3. Authorize examination of any application being used for location sharing, and/or geofencing used to notify when arriving or leaving a location;
> 4. Authorize technical assistance by agents and/or employees of any outside experts deemed necessary to assist in obtaining the above described information.

CP at 17 (emphasis added).

The next day, Detectives Gerald Swayze and Chad Birkenfeld went to Foley's home and asked to speak with him. The officers spoke with Foley in an unmarked police car. Swayze asked if the phone number ending in 4877 was Foley's phone number and Foley said it was. Swayze then said he had a search warrant for Foley's cell phone. Foley gave Swayze the cell phone and said he had no password. Birkenfeld asked Foley "if there was anything on the phone that shouldn't be on there," including depictions of minors engaged in sexually explicit conduct. CP at 92. Foley said he did not think so.

Once they finished speaking with Foley, Swayze and Birkenfeld drove away. While Birkenfeld was in the front passenger seat, he asked Swayze what the warrant encompassed and what items needed to be searched. Swayze told him to search for photos and videos of KR, describing KR's appearance. Birkenfeld began a search of the cell phone that lasted roughly five minutes. At that point, Birkenfeld had not read the warrant himself. In a file titled "downloads," Birkenfeld saw a sexually explicit image of a girl who appeared to be between the ages of 8 and 10. *Id.* Birkenfeld immediately stopped his review of images on the phone.

After Swayze and Birkenfeld returned to the sheriff's office, Swayze searched Foley's cell phone. Swayze was in his office alone when he did so. In an interview with defense counsel, Swayze described the search:

> When you go through a phone . . . and you're looking at images, there are thumbnails . . . and I was looking for images of [KR and KJ], and I didn't see any of them, but I made it a point to not click on any of the thumbnails that I suspected to be [depictions of minors engaged in sexually explicit conduct] because I planned on getting an additional warrant for that.

CP at 154-55. Swayze estimated that the search lasted less than an hour.

B. Second Search Warrant and Charges for Possessing Depictions of Minors Engaged in Sexually Explicit Conduct

In January 2020, a superior court judge issued a second warrant to search and seize from Foley's cell phone any depictions of minors engaged in sexually explicit conduct. The warrant authorized officers to search for and seize the following:

> 1. A forensic search of the cellular phone referenced above for: depictions of minors engaged in sexually explicit conduct as defined in RCW 9.68A.070;
> 2. Any data indicating dominion and control of the cellular phone;
> 3. Authorize technical assistance by agents and/or employees of any outside experts deemed necessary to assist in obtaining the above described information.

CP at 85. Pursuant to this second warrant, the officers found multiple images that formed the basis of Foley's prosecution.

In a fourth amended information, Foley was eventually charged with eight counts of first degree possession of depictions of minors engaged in sexually explicit conduct and six counts of second degree possession of such depictions.

III. PRETRIAL MOTIONS

A. Suppression Motion

Prior to trial, Foley moved "to suppress the Samsung cell phone seized on December 27, 2019 and all of [its] contents." CP at 1. He argued that the first warrant failed to provide probable cause for the seizure of the phone because it did not reliably connect Foley to the phone number and address listed. While he conceded that the first search warrant was "very particular and narrow in its breadth," he argued that Swayze and Birkenfeld "employed no procedural safeguards designed to limit the scope of the search" and reviewed the cell phone "without limitation." CP at 13-14. He further argued that Birkenfeld's search in the car was "clearly a pretext" for finding depictions of minors engaged in sexually explicit conduct. CP at 14. He contended that the officers should have employed "outside experts" and instructed them "to ignore all data not enumerated in the warrant." *Id.*

When Foley indicated that he might want to bring in witnesses, the State responded that "to get outside of the corners of that second warrant . . . [Foley] would have to raise a *Franks* issue and brief that." Verbatim Rep. of Proc. (VRP) (Aug. 3, 2020) at 8. *Franks v. Delaware* holds that a defendant is entitled to a hearing where they make "a substantial preliminary showing" that an affiant knowingly and intentionally, or with reckless disregard for the truth, included a false

statement in a warrant affidavit and the statement is necessary for a finding of probable cause. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The trial court explained that Foley would need a *Franks* hearing "to talk about what happened prior to the issuance of that second warrant . . . to determine if it's a valid warrant or not." VRP (Aug. 21, 2020) at 18. If Foley could make an offer of proof that created "a reasonable argument . . . that the initial search . . . was improper," the court would give him a *Franks* hearing and take testimony. *Id.* Foley asked to interview Swayze and Birkenfeld. The trial court granted this request and indicated that it would issue an interim order and refrain from addressing the *Franks* issue until Foley's counsel interviewed the detectives.

The trial court then entered findings of fact and conclusions of law otherwise denying Foley's suppression motion. The findings were consistent with the description of the facts related to the search warrants provided above. The findings explained that in a months-long investigation, detectives were able to determine that the Facebook message used to alert SW to KR's images on the pornographic website originated from a cell phone at or near Foley's address. The trial court also found that the downloads folder on Foley's phone was within the scope of the search authorized by the first warrant. The trial court found that all of the evidence seized from the phone was seized pursuant to judicial authorization provided in one of the warrants.

The trial court held that Foley "failed to meet his burden" of showing that the first warrant lacked probable cause or sufficient particularity. CP at 166-67. It further held that the officers executing the first warrant did not exceed the warrant's scope. Regarding the second warrant, the trial court noted that the "issuing magistrate was made aware of the [detectives'] actions before authorizing the [second warrant] and had the ability to inquire as he deemed appropriate." CP at

169. The trial court held that the second warrant was facially valid and that Foley failed to establish that the trial court lacked probable cause to issue it.

B. Motion for a *Franks* Hearing

Foley then filed a supplemental memorandum in support of suppression and a motion for a *Franks* hearing. He argued that "the second search warrant intentionally or recklessly omitted material facts that undercut . . . probable cause." CP at 121. Based on interviews with Birkenfeld and Swayze, he alleged that the following material facts were left out:

> Detective Birkenfeld had never read the first search warrant. He was not guided by any date or time parameters during the cursory search. He was not told that the warrant concerned internet history with [Xvideos.com]. He was not looking for the name '[KR,]' although he was looking for photographs that matched her description. Upon arriving at the sheriff's office, Detective Swayze took over the search. He looked through the phone for "at least an hour" while alone in his office. During that search, he continued to find suspected [depictions of minors engaged in sexually explicit conduct].

Id. (citation omitted).

Foley also continued to challenge the first warrant's validity. Stating that he and the State interpreted the warrant differently, he argued that either the warrant was sufficiently particular and Birkenfeld's search exceeded its scope or the warrant authorized the search of Foley's entire Internet history and it was overbroad. Finally, Foley argued that the "procurement of the second search warrant [did] not cure the illegal first search." CP at 125.

The trial court ruled that Foley was not entitled to a *Franks* hearing. It stated that a "defendant is only entitled to a *Franks* hearing if" the defendant complains of omissions from an affidavit that "are material to probable cause and there are allegations of deliberate falsehood or omission or of a reckless disregard for the truth." CP at 183. The trial court held that the details of Birkenfeld's search in the car and Swayze's search in his office were not material to probable

cause for the second warrant, so Foley "failed to make an adequate showing of a material omission." *Id.* And it held that even if the alleged omissions were material, Foley had "nonetheless failed to meet his burden on the intentionality prong under *Franks*." CP at 184. Foley brought a motion for reconsideration, which the trial court also denied.

IV. TRIAL

Birkenfeld and Swayze testified at trial consistent with the facts as described above. On cross-examination, Foley's counsel asked Birkenfeld, if he had been investigating Foley for possession of depictions of minors engaged in sexually explicit conduct from the start, would he have put Foley's phone in airplane mode, secured it, and sent it to a crime lab rather than searching it himself? Birkenfeld answered affirmatively.

Swayze testified that when an investigation for possession of depictions of minors engaged in sexually explicit conduct involves a digital device, it is generally standard practice to refrain from searching the device before getting a mirror image of it. He also testified that when he began searching Foley's phone on his own, he knew the case would likely evolve into such an investigation but he did not get a mirror image of the phone first.

Foley also testified. He said he did not know how the images of minors engaged in sexually explicit conduct got onto his cell phone. He explained that he lived in an apartment with other people and his phone was not password protected.

The jury found Foley guilty of seven counts of first degree possession of depictions of minors engaged in sexually explicit conduct and four counts of second degree possession of such depictions.

V. POSTTRIAL MOTION AND SENTENCING

Foley moved to dismiss two convictions for first degree possession of depictions of minors engaged in sexually explicit conduct and all convictions for second degree possession of such depictions, alleging violations of double jeopardy. He argued that because he was convicted of first degree possession of such depictions, he could not be simultaneously convicted of second degree possession of such depictions. He contended that the trial court should therefore dismiss his second degree convictions.

In its response, the State conceded that under the double jeopardy clause, Foley could only be convicted of one count of second degree possession of depictions of minors engaged in sexually explicit conduct because "multiple [s]econd [d]egree images possessed at the same time [comprise] a single unit of prosecution." CP at 329. The State asked the trial court to dismiss the other three convictions for second degree possession of such depictions. However, it argued that Foley's motion to dismiss the remaining conviction for second degree possession of such depictions should be denied because first degree possession and second degree possession are separate crimes.

The trial court dismissed without prejudice three convictions for second degree possession of depictions of minors engaged in sexually explicit conduct "for the reasons stated in the [prosecution's] motion to dismiss." CP at 384. It sentenced Foley to a total of 102 months of confinement. The trial court imposed community custody conditions, including refraining from possessing or accessing "sexually exploitative materials" as defined by Foley's treating therapist or community corrections officer; refraining from possessing or accessing "sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet);" submitting to

breath tests; and completing a psychosexual evaluation and following through with all treatment recommended by Foley's community corrections officer and/or treatment provider. CP at 411. In an appendix to the judgment and sentence, the trial court clarified the term "sexually explicit materials," prohibiting Foley from accessing "sexually explicit materials that are intended for sexual gratification," listing examples of such materials, and noting that works "of art or of anthropological significance" are not included. CP at 420. The trial court struck a provision that said, "Possess or consume no alcohol." CP at 411.

The trial court also imposed legal financial obligations, including a "[Department of Corrections] monthly supervision assessment." *Id.* During Foley's sentencing hearing, the trial court stated that it was satisfied that it had imposed the lowest amount of legal financial obligations possible. On the same day, the trial court entered an order finding Foley indigent for purposes of appeal.

Foley appeals.

ANALYSIS

I. SUPPRESSION OF EVIDENCE

Foley argues that the trial court erred by failing to suppress evidence seized pursuant to the first and second search warrants. We disagree.

When a trial court denies a motion to suppress evidence, we review that court's legal conclusions de novo. *State v. Budd*, 185 Wn.2d 566, 571-72, 374 P.3d 137 (2016); *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

A. Search Pursuant to the First Warrant

Foley contends that we must suppress images obtained pursuant to the first warrant because the officers' first search of his phone was improper. We disagree. Probable cause supported the portions of the first warrant authorizing the search for the images, and the officers' execution of the warrant did not exceed its scope.

1. Probable cause

A warrant is supported by probable cause if the affidavit accompanying the warrant "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can [be] found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exists or because it describes, particularly or otherwise, items for which probable cause does not exist." *State v. Gudgell*, 20 Wn. App. 2d 162, 180, 499 P.3d 229 (2021). To be sufficiently particular, a warrant must make it possible for the searcher to reasonably identify the things they are authorized to seize. *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015).

The "search of computers or other electronic storage devices gives rise to heightened particularity concerns." *State v. Keodara*, 191 Wn. App. 305, 314, 364 P.3d 777 (2015). A "cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley v. California*, 573 U.S. 373, 396, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). And where the content on a cell phone, like pictures or videos, forms the basis for seizure, that cell phone content is presumptively protected by the First Amendment to the United States Constitution. *See State v. Perrone*, 119 Wn.2d 538, 550, 834 P.2d 611 (1992) ("Books, films, and

the like are *presumptively* protected by the First Amendment where their content is the basis for seizure."). In a warrant for materials presumptively protected by the First Amendment, "the particularity requirement must be 'accorded the most scrupulous exactitude.'" *Besola*, 184 Wn.2d at 611 (internal quotation marks omitted) (quoting *Perrone*, 119 Wn.2d at 548)).

A warrant targeting a cell phone must be "carefully tailored to the justification to search" and it must be "limited to data for which there was probable cause." *State v. McKee*, 3 Wn. App. 2d 11, 29, 413 P.3d 1049 (2018) *rev'd on other grounds involving remedy*, 193 Wn.2d 271, 438 P3d. 528 (2019). For example, a warrant may contain temporal or topical limits on the information officers can search for and seize. *See id.*

In *McKee*, Division One reviewed a warrant allowing officers to seize "[i]mages, video, documents . . . and any other electronic data from" a cell phone. *Id.* at 19. The court held that the warrant violated the particularity requirement because it gave "police the right to search the contents of the cell phone and seize private information with no temporal or other limitation." *Id.* at 29.

Moreover, in *Keodara*, the court held that a warrant "failed to satisfy the Fourth Amendment's particularity requirement" where it authorized an extensive search of a defendant's phone after police suspected him of assault, drug dealing, and unlawful firearm possession. 191 Wn. App. at 317. The court reasoned that "[t]here was no limit on the topics of information for which the police could search," and that the warrant did not "limit the search to information generated close in time to incidents for which the police had probable cause." *Id.* at 316.

Here, there was probable cause to support the provisions of the first warrant allowing a search for Internet history and Facebook account activity during a two-day period. The affidavit

alleged that around May 19, 2019, Foley contacted KR and SW, telling them he posted an explicit recording of KR and KJ on Xvideos.com. When Foley contacted SW, he did so using a Facebook account tied to an email address with KR's email and birth date. These allegations established probable cause to search for "internet history, Facebook, and Facebook Messenger account activity associated with" the email address "between 5/18/2019 04:54:48 UTC and 5/20/2019 05:21:19 UTC." CP at 17. This description is sufficiently particular, providing a temporal limit on activity associated with an email address Foley used in contacting SW.

There was also probable cause to support the provision in the first warrant allowing a search for images of KR and KJ. The affidavit further alleged that Foley created a fake profile of KR on Xvideos.com, which, in addition to the recording of KR and KJ, displayed explicit pictures and recordings of KR and nonexplicit pictures of KR. If officers had found copies of these recordings and images on Foley's phone, those files would have linked Foley to the profile, providing evidence to support a conviction for disclosing intimate images.

In sum, there was probable cause to search for "videos and images of" KR and KJ, "images and any data related to" KR's fake Xvideos.com profile, and Internet "history regarding Xvideos.com." *Id.* And this description is sufficiently particular, allowing only the seizure of information directly related to the alleged crime, disclosure of intimate images.

Foley contends that "the first search warrant did not provide a sufficiently particular description of the phone." Appellant's Opening Br. at 34. But we interpret warrants "in a commonsense, practical manner, rather than in a hypertechnical sense." *Perrone*, 119 Wn.2d at 549. The warrant affidavit included evidence that the Facebook messages and the disclosure of intimate images occurred using a phone associated with a number ending in 4877. There was thus

probable cause to search for a "[c]ellular telephone assigned" to that phone number. CP at 17. Moreover, this provision is sufficiently particular. Putting it in context shows that it identifies the phone to be searched, with subsequent provisions putting limits on what data and applications officers could search and seize.

2. Warrant execution

The record supports the trial court's finding that the detectives did not exceed the scope of the first warrant. When Foley gave the detectives his phone, Birkenfeld asked him if there were depictions of minors engaged in sexually explicit conduct on the device, but there is evidence in the record that Swayze and Birkenfeld would ask this question "on a regular basis" when executing search warrants for cell phones. *See* CP at 147 ("We ask that on a regular basis of people when we take their phones pursuant to a warrant . . . ."). While Birkenfeld did not read the warrant before searching Foley's cell phone, he asked Swayze what the warrant encompassed. Swayze told him to search for photos and videos of KR, giving a description of KR's appearance. When defense counsel conducted an interview, Birkenfeld explained that he followed Swayze's instructions. Defense counsel asked whether Birkenfeld was looking for any reference to KR's name when he came across a depiction of a minor engaged in sexually explicit conduct, and Birkenfeld replied:

> Detective Sgt. Chad Birkenfeld:
> I was looking more for images . . . . So looking at the images that pertain to [KR] based off that description is kind of where I was looking.
>
> [Defense Counsel]:
> Okay. Are you looking for any internet history that referenced [Xvideos.com]?
>
> Detective Sgt. Chad Birkenfeld:
> I was not. No.
>
> [Defense Counsel]:
> Okay. Did you get into Facebook at all?

> Detective Sgt. Chad Birkenfeld:
> No, sir.
>
> [Defense Counsel]:
> How long do you think this cursory search lasted?
>
> Detective Sgt. Chad Birkenfeld:
> A couple of minutes. Again, I remember seeing the image and being, "Hey, this appears to be [a depiction of a minor engaged in sexually explicit conduct]. I'm done looking at the phone." I let Detective Swayze know, and I think we even discussed about expanding or getting a separate warrant.
>
> [Defense Counsel]:
> Okay. So five minutes or less.
>
> Detective Sgt. Chad Birkenfeld:
> At the most five minutes.

CP at 134-35. In other words, Birkenfeld searched only for images of KR, which the warrant authorized.

When Swayze later searched the phone, his search also complied with the warrant. Swayze said that he similarly searched for images of KR and KJ and specifically avoided clicking thumbnails that might have depicted minors engaged in sexually explicit conduct because he planned to get an additional warrant.

Foley argues that under article I, section 7 of the Washington Constitution, when a defendant "raises the possibility that the search exceeded the warrant's authority, the burden shifts to the State to show that the warrant was properly executed." Appellant's Opening Br. at 48-49. He assigns error to the fact that after he challenged officers' execution of the first search warrant, the trial court "refused to hold a hearing on the issue, and the State did not present any evidence showing that the warrant was properly executed." *Id.* at 46. He contends that absent "such evidence, the convictions must be reversed, the evidence suppressed, and the case dismissed with

prejudice." *Id.* But Foley cites no cases standing for the proposition that article I, section 7 requires the State to prove that a warrant was properly executed after a defendant challenges a warrant's execution. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

In sum, both detectives reviewed images on Foley's phone to look for photos and videos of KR. The first warrant plainly authorized this search. And probable cause supported the portion of the warrant authorizing a search for images of KR and KJ. The detectives did not search for depictions of minors engaged in sexually explicit conduct until they got the second warrant authorizing that search. Foley does not present any evidence to the contrary.

B. Severability of Other Portions of the First Warrant

Foley further argues that we must suppress images obtained pursuant to the first warrant because it was overbroad, allowing "officers to rummage through and seize almost any data contained on the phone." Appellant's Opening Br. at 22. We disagree. Even if Foley were correct that some of the portions of the warrant were invalid, an issue we need not decide, police relied on valid portions of the warrant and the other portions were severable. Thus, suppression was not required.

Where "a warrant includes both items that are supported by probable cause and described with particularity and items that are not," we apply the severability doctrine and require suppression only where police seized evidence based on an invalid part of the warrant. *State v. Higgs*, 177 Wn. App. 414, 430, 311 P.3d 1266 (2013). A warrant is severable where there is a meaningful separation between its valid and invalid parts. *State v. Moses*, 22 Wn. App. 2d 550, 562, 512 P.3d 600, *review denied*, 200 Wn.2d 1010 (2022).

"We consider five factors in determining whether a court can sever invalid parts of a warrant." *Id.* The severability doctrine applies if (1) the warrant lawfully "'authorized entry into the premises,'" (2) the warrant included "'one or more particularly described items for which there is probable cause,'" (3) "'the part of the warrant that includes particularly described items supported by probable cause'" is "'significant when compared to the warrant as a whole,'" (4) the searching officers "'found and seized the disputed items while executing the valid part of the warrant,'" and (5) the officers did not conduct "'a general search . . . in which they "flagrantly disregarded" the warrant's scope.'" *Higgs*, 177 Wn. App. at 430-31 (quoting *State v. Maddox*, 116 Wn. App. 796, 807-08, 67 P.3d 1135 (2003) (*Maddox* I), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (*Maddox* II).

Here, the first warrant authorized the search of the cell phone for "internet history, Facebook, and Facebook Messenger account activity associated with" the email address with KR's name and birth date for a two-day period, "videos and images of [KR and/or KJ], images and any data related to [Xvideos.com] profile [KR], internet history regarding Xvideos.com, any data indicating dominion and control of the cellular phone, all related to RCW 9.61.260 Cyberstalking & RCW 9A.86.010 Disclosing intimate images." CP at 17. The warrant also authorized "examination of any application being used for location sharing, and/or geofencing used to notify when arriving or leaving a location." *Id.*

Foley argues the invalid portions of the warrant included the provision allowing a search for any data indicating dominion and control of the cellular phone, and the portion authorizing officers to search "any application being used for location sharing" or "geofencing." *Id.* However,

police did not seize any evidence based on these provisions; they only seized evidence based on the warrant's valid authorization to search for images of KR and KJ.

Applying the severability test, first, the warrant lawfully authorized police to search the cell phone listed because the warrant affidavit included facts sufficient to support the commonsense inference that it belonged to Foley. Second, as explained above, the warrant included several particularly described items supported by probable cause that Foley disclosed intimate images of KR and KJ through a profile he created on Xvideos.com without their consent. Third, the valid portions of the warrant consisting of particularly described items supported by probable cause were significant when compared to the portions Foley argues were invalid. The warrant validly authorized police to search for images of KR and KJ and for certain Internet history and Facebook activity, and these portions constituted the bulk of the relevant search authorizations.

Fourth, Birkenfeld and Swayze saw suspected depictions of minors engaged in sexually explicit conduct while executing the valid part of the warrant. Birkenfeld was searching for images of KR based on Swayze's description of her when he came across an explicit image of a minor. Swayze was also searching for images of KR when he found suspected depictions of minors engaged in sexually explicit conduct. Fifth, as explained above, officers did not conduct a general search, nor did they disregard the warrant's scope.

In sum, we need not determine whether Foley is correct that some of the provisions in the warrant were invalid because police seized evidence from Foley's phone pursuant to plainly valid parts of the first warrant, and the valid parts are severable from any invalid portions. The trial court did not err in declining to grant the suppression motion based on a challenge to its validity.

C. Validity of the Second Warrant

Foley contends that "the second warrant was tainted by the invalid first warrant." Appellant's Opening Br. at 53. This argument fails.

As discussed above, the first warrant is severable and police lawfully seized evidence based on the valid part of the warrant, so it did not taint the second warrant.

The second warrant affidavit established that the phone listed belonged to Foley based on the first warrant affidavit. The warrant particularly described the items to be searched by indicating that the images had to depict "minors engaged in sexually explicit conduct as defined in RCW 9.68A.070." CP at 85. There was probable cause to believe such depictions would be found on the cell phone because officers had already found images that appeared to show minors engaged in sexually explicit conduct. This valid provision constituted the heart of the warrant. Finally, while the record lacks details on the search following the second warrant, at trial, the State only relied on alleged depictions of minors engaged in sexually explicit conduct and technical information about Foley's cell phone. It did not rely on other content, such as notes, texts, e-mails, or innocuous images Foley had saved.

Because the first warrant did not taint the second warrant and because the second warrant lawfully authorized police to search Foley's phone for images depicting minors engaged in sexually explicit conduct, suppression of the evidence yielded from the second warrant is not required. Foley identifies no other evidence police found and presented at trial as a result of the search of his phone.

There is no basis for us to reverse the trial court's denial of the motion to suppress.

II. IMPROPERLY RAISED ARGUMENTS FOR SUPPRESSION OF EVIDENCE

A. Errors Not Raised Below

Foley makes two arguments for the first time on appeal. First, he contends that the first search warrant was partly based on an unconstitutional statute because a Washington federal court struck down a portion of former RCW 9.61.260 (2004), *recodified as* RCW 9A.90.120, which criminalized cyberstalking. Second, he contends that the first warrant was not supported by probable cause because it was based on stale information. Foley's arguments fail.

We "may refuse to review any claim of error [that] was not raised in the trial court." RAP 2.5(a). "However, a party may raise" a "manifest error affecting a constitutional right" for the first time on appeal. *Id.* To establish that an error is manifest, an appellant must make a plausible showing that it had practical and identifiable consequences in the trial. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). An error is manifest if the trial court could have corrected it when it occurred despite the parties' failure to raise the issue. *See id.* We conclude that neither assertion of error warrants review for the first time on appeal.

1. Unconstitutional statute

The first warrant authorized a search of Foley's cell phone for specific types of data related to former RCW 9.61.260, the statute that criminalized cyberstalking, and RCW 9A.86.010, the statute criminalizing the disclosure of intimate images. "In instances where a warrant is facially insufficient or an arrest is based on an unconstitutional statute, a constitutional violation clearly exists because of the demonstrable absence of 'authority of law' to justify the search or arrest." *State v. Chenoweth*, 160 Wn.2d 454, 472-73, 158 P.3d 595 (2007). However, the warrant relied on

both the former cyberstalking statute and the statute criminalizing the disclosure of intimate images.

Here, police properly relied on the portions of the warrant that were based on disclosure of intimate images to execute their search. Their search was limited to a search for images on the phone.

Even assuming the former cyberstalking statute was at least partly unconstitutional, police seized evidence pursuant only to the valid parts of the warrant, so there were no practical and identifiable consequences stemming from the fact that the warrant listed the statute. Therefore, reference to cyberstalking in the warrant was not a manifest error affecting a constitutional right.

2. Stale information

The Fourth Amendment to the United States Constitution requires that warrants be issued based on a showing of probable cause. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (*Maddox* II). "In some situations, the evidence relied upon in support of a warrant application may become stale so that probable cause no longer exists." *State v. Garbaccio*, 151 Wn. App. 716, 728, 214 P.3d 168 (2009). One factor to consider in assessing staleness is the time between the gathering of the evidence and the issuing of the warrant, but the passage of time is not controlling. *Id.* Other factors include the nature of the alleged crime, the nature of the person alleged to have committed it, the type of evidence police expected to seize, and the type of place or object police intended to search. *Id.*

For example, in *Garbaccio*, a detective found that a depiction of minors engaged in sexually explicit conduct was available for download from the Internet Protocol address assigned to the defendant's home computer. *Id.* at 721. The detective waited five months to obtain a warrant

to search the defendant's home and "seize various computer hardware and software." *Id.* at 722. Division One held that the "issuing judge properly found the existence of probable cause," reasoning that the five-month delay in applying for the warrant was reasonable "in light of the nature of the offense and of the contraband sought to be seized." *Id.* at 730.

Here, the information relied on to obtain the first search warrant was not stale. First, the record indicates that police investigated Foley diligently. The trial court found that police engaged in a months-long investigation after KR contacted them, and there has not been adequate argument to support reversing this finding. Second, while Foley allegedly disclosed an intimate video of KR in May 2019, modern cell phones have significant storage capacity, and it was reasonable for police to determine that Foley likely retained intimate images of KR and KJ on his phone several months later. Thus, the alleged staleness of the evidence supporting the warrant was not a manifest error affecting a constitutional right.

B. Waiver of Assignments of Error Challenging Findings of Fact

Foley assigns error to the trial court's adoption of several findings of fact. He supports these assignments of error only with conclusory arguments in footnotes.We therefore decline to consider them.

"Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996). And we may decline to address the merits of a claim where a party supports it in a footnote without meaningfully addressing it in the text. *See State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

Here, Foley challenged the trial court's findings of fact in footnotes but not in the text of his opening brief. His arguments are conclusory and he gave these assignments of error passing

treatment, so we decline to address them and reject his challenges to the trial court's findings of fact.

III. DOUBLE JEOPARDY

Foley argues that the trial court infringed on his right to be free from double jeopardy. First, he contends that the trial court erred because his convictions on counts 11 through 13 should have been dismissed with prejudice rather than without prejudice. Second, he contends that the trial court improperly "entered eight convictions even though Mr. Foley committed only seven units of prosecution." Appellant's Opening Br. at 57. We disagree.

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit double jeopardy. *State v. Classen*, 4 Wn. App. 2d 520, 531, 422 P.3d 489 (2018). "The prohibition on double jeopardy disallows a person from being prosecuted for the same offense after being acquitted, being prosecuted for the same offense after being convicted, or receiving multiple punishments for the same offense." *Id.* "We review double jeopardy claims de novo." *Id.*

A. Dismissal Without Prejudice

Foley argues that the trial court should have vacated his convictions on counts 11 through 13 with prejudice. He cites *State v. Turner* for the proposition that "a court violates double jeopardy by vacating a conviction 'while directing, in some form or another, that the conviction nonetheless remains valid.'" Appellant's Opening Br. at 56 (quoting *Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010)). He then argues that we must remand this case "with instructions to strike the 'Order of Dismissal' entered on September 27, 2021, and substitute an order vacating [his convictions on

counts 11 through 13], without any reference to the continuing validity of the convictions." *Id.* at 57.

However, *Turner* is distinguishable. *Turner* concerned "conditional vacations . . . in which a judge expressly rules . . . that a conviction that violates double jeopardy is nevertheless 'valid' for purposes of possible reinstatement at sentencing." 169 Wn.2d at 461. In the two cases *Turner* examined, the trial courts "sought to expressly hold the defendants' lesser convictions 'in abeyance' lest their other convictions failed on appeal, declaring in each case that the conviction retained validity.'" *Id.* at 463 (internal quotation marks omitted) (quoting .*State v. Womac*, 160 Wn.2d 643, 659, 160 P.3d 40 (2007)).

Nothing in this record shows that the trial court made a similar declaration in this case. And Foley has not established that dismissal "without prejudice" is the equivalent of an order "directing, in some form or another, that the conviction nonetheless remains valid." *Id.* at 464. Foley's argument fails.

B. Units of Prosecution

When there are multiple violations of a single statute, we inquire what unit of prosecution the legislature intended under the statute. *State v. Bobic*, 140 Wn.2d 250, 261, 996 P.2d 610 (2000). "'When the [l]egislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.'" *Id*. (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). We will construe any ambiguity in favor of lenity for the defendant. *Id*. at 261-62.

To commit first degree possession of depictions of minors engaged in sexually explicit conduct, "a person must knowingly possess a visual or printed matter depicting a minor engaged

in sexually explicit conduct as defined by RCW 9.68A.011(4)(a) through (e)."[2] *State v. Polk*, 187 Wn. App. 380, 391, 348 P.3d 1255 (2015). This conduct is sexual intercourse, penetration "of the vagina or rectum by any object," masturbation, sadomasochistic abuse, and defection "or urination for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(a)-(e). "For the purposes of determining the unit of prosecution for [first degree possession], each depiction or image constitutes a separate offense." *Polk*, 187 Wn. App. at 391.

To commit second degree possession of depictions of minors engaged in sexually explicit conduct, a person must knowingly possess "any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g)." *Id.* at 392. The depictions are "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" and the touching "of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(f)-(g). "'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.'" *Polk*, 187 Wn. App. at 392 (quoting former RCW 9.68A.070(2)(c) (2010)).

Here, Foley committed eight units of prosecution, so he was not punished twice for the same offense in violation of double jeopardy. His seven counts of first degree possession are based on having five separate depictions of sexual intercourse and two separate depictions of penetration. His one count of second degree possession is based on having depictions of unclothed minors that

[2] *Polk* interpreted an older version of the statute that criminalized possessing depictions of minors engaged in sexually explicit conduct. However, the subsequent changes to the statute are not material to our analysis.

were distinct from the depictions relied on for the first degree possession convictions. Therefore, the trial court did not err when it entered eight convictions on Foley's judgment and sentence.

IV. COMMUNITY CUSTODY CONDITIONS

A. Vague, Overbroad, and Non-Crime-Related Conditions

Foley argues that the trial court "adopted conditions of community custody that were vague, overbroad, and insufficiently related to the circumstances of [his] crime." Appellant's Opening Br. at 60. Specifically, Foley contends that the requirement that he refrain from possessing or accessing sexually exploitative materials is unconstitutionally vague; that the requirement that he refrain from possessing or accessing sexually explicit materials is overbroad;[3] and that the requirement that he refrain from possessing or accessing information pertaining to minors is unconstitutionally vague, overbroad, and insufficiently crime-related. We hold that, in this context, the terms "sexually exploitative materials" and "information pertaining to minors" are unconstitutionally vague. Foley's argument that the term "sexually explicit materials" is overbroad fails.

We review "community custody conditions for abuse of discretion." *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). "A trial court abuses its discretion if it imposes an unconstitutional condition." *Id.*

1. Sexually exploitative materials

A community custody condition "is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does

[3] Foley initially argued this condition was not crime-related, but he withdrew that argument in his reply. Appellant's Reply Br. at 27, n.9.

not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Id.* When determining whether a term is vague, we consider statutes and court opinions that define the term. *See State v. Bahl*, 164 Wn.2d 739, 756, 193 P.3d 678 (2008).

A "vague condition infringing on protected First Amendment speech can chill the exercise of those protected freedoms." *Padilla*, 190 Wn.2d at 677-78. "Accordingly, a restriction implicating First Amendment rights demands a greater degree of specificity and must be reasonably necessary to accomplish the essential needs of the state and public order." *Id.* at 678.

For example, in *Bahl*, the court held that a "restriction on accessing or possessing pornographic materials [was] unconstitutionally vague." *Bahl*, 164 Wn.2d at 758. It reasoned that where a statute criminalizing the promotion of pornography referenced a separate statute defining "lewd matter," an ordinary person would not have been able to understand the meaning of "pornography." *Id.* at 756-57. In contrast, in *State v. Nguyen*, the court held that a community custody condition prohibiting the probationer from accessing sexually explicit materials as defined in RCW 9.68.130 was not vague. 191 Wn.2d 671, 680-81, 425 P.3d 847 (2018).

The State concedes that the prohibition on sexually exploitative materials is currently "vague as written." Br. of Resp't at 44. The State suggests that "the crime of sexual exploitation of a minor," as defined in RCW 9.68A.040, "can provide content to such a prohibition." *Id.*

In light of the State's concession, we remand for the trial court to clarify the condition by referencing the crime of sexual exploitation of a minor, as defined in RCW 9.68A.040, as well as the definition of sexually explicit conduct in RCW 9.68A.011(4), a term that is referenced in RCW 9.68A.040.

2. Sexually explicit materials

A community custody condition "that encompasses constitutionally protected speech activities within its prohibitions may be overbroad and violate the First Amendment." *See State v. Johnson*, 12 Wn. App. 2d 201, 214, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021). However, a court may restrict a defendant's exercise of their First Amendment rights if the restriction is sensitively imposed and reasonably necessary to accomplish government needs. *Id.*

Here, the community custody condition is sufficiently narrowly drawn. The condition only prohibits possession of "sexually explicit materials that are intended for sexual gratification." CP at 420. The condition then provides a long list of examples. Finally, the condition carves out works of art or works of anthropological significance, which are not considered sexually explicit materials. The Washington Supreme Court has approved a similar condition where the defendant was convicted of child rape and molestation, even though the prohibition was not limited to sexually explicit materials involving children. *Nguyen*, 191 Wn.2d at 675, 686. And the *Nguyen* court concluded a person of ordinary intelligence could determine the difference between sexually explicit materials and works of art or works with anthropological significance. *Id*. at 680-81. The condition imposed here was not unconstitutionally overbroad.

3. Information pertaining to minors

A community custody condition is unconstitutionally vague where it has the potential to "encompass a wide range of everyday items" and therefore provides insufficient protection against arbitrary enforcement. *State v. Valencia*, 169 Wn.2d 782, 794, 239 P.3d 1059 (2010). For example,

in *Valencia*, the court held that a community custody condition prohibiting the possession of any paraphernalia that could be used for the ingestion, processing, or sale of drugs was unconstitutionally vague. *Id.* at 785, 794. The court reasoned that "an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper." *Id.* at 794 (internal quotation marks omitted).

Here, there is no statutory definition of "information pertaining to minors," and the term encompasses a wide variety of innocuous, everyday information, a problem that the Washington Supreme Court has held could easily lead to arbitrary enforcement. *Id.* It could cover a movie review that mentions a child actor or a news article related to a disease outbreak among children, for example. This community custody condition provides insufficient protection against arbitrary enforcement. We remand for the trial court to clarify this prohibition.

B. Breath Tests

Foley argues that the trial court exceeded its authority by ordering him to submit to breath tests at his own expense. The State concedes this requirement must be stricken. We agree.

When a trial court sentences a person to a term of community custody, it may order the probationer to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."[4] Former RCW 9.94A.703(3)(d) (2021).

[4] We cite to the version of the statute that was in effect at the time of Foley's sentencing. The quoted language is identical to the language in the current version of the statute.

Here, nothing in the record suggests that alcohol played any role in Foley's offenses. In fact, the trial court declined to require that Foley refrain from possessing or consuming alcohol. We therefore accept the State's concession. The trial court must strike this provision on remand.

C. Compliance with Treatment

Foley argues that the trial court erred in ordering him to comply with all treatment recommended by his community corrections officer. He argues that the "improper delegation to [the Department of Corrections] violated the separation of powers." Appellant's Opening Br. at 72. We disagree.

The Department may require a person under community supervision "to participate in rehabilitative programs, or otherwise perform affirmative conduct."[5] Former RCW 9.94A.704(4) (2019). The Department's "authority to impose conditions of community custody is . . . broader than the sentencing court's authority." *State v. Ortega*, 21 Wn. App. 2d 488, 495, 506 P.3d 1287 (2022). For example, in *Ortega*, the court affirmed a condition requiring a probationer to "comply with any crime-related prohibitions" per the community corrections officer, reasoning that the condition simply communicated the Department's statutory authority to impose conditions of community custody. *Id.* at 492 (internal quotation marks omitted).

Here, the condition Foley challenges is narrower than the condition in *Ortega*. In imposing it, the trial court merely recognized the Department's existing authority to recommend additional treatment. We hold that the trial court did not abuse its discretion.

[5] We cite to the version of the statute that was in effect at the time of Foley's sentencing. The quoted language is identical to the language in the current version of the statute.

V. CLERICAL ERROR

Foley contends that the trial court erroneously "left in place a boilerplate provision directing [him] to 'Pay [the Department of Corrections] monthly supervision assessment.'" Appellant's Opening Br. at 73 (quoting CP at 411). He argues that the circumstances of his sentencing show that the trial court meant to strike this provision. The State concedes, stating that the "record supports the trial court's knowledge that Foley was indigent." Br. of Resp't at 51. We accept the State's concession.

Community supervision fees are discretionary legal financial obligations. *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). Where the record shows that the sentencing court intended to waive all discretionary legal financial obligations, we may find its imposition of such an obligation inadvertent. *See State v. Geyer*, 19 Wn. App. 2d 321, 332, 496 P.3d 322 (2021).

Here, the trial court found Foley indigent and explicitly stated that it intended to impose the lowest amount of legal financial obligations possible. Moreover, the challenged provision was in a dense portion of a printed judgment and sentence form. We therefore remand for the trial court to strike the requirement that Foley pay community supervision fees.

CONCLUSION

We affirm the trial court's denial of Foley's motion to suppress evidence based on the first and second search warrants. We also find that no double jeopardy violation occurred here.

We hold that the community custody conditions prohibiting Foley from accessing sexually exploitative materials and information pertaining to minors are unconstitutionally vague and remand to the trial court to either strike or clarify these conditions. We direct the trial court to

strike the condition requiring Foley to submit to breath tests at his own expense and the provision requiring Foley to pay community supervision fees. We otherwise affirm the judgment and sentence.

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

Glasgow, C.J.

We concur:

Lee, J.

Price, J.

BACKLUND & MISTRY

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