SUPREME COURT NO. 90430-8
NO. 43585-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN POWELL,

Petitioner.

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

The Honorable Ronald Culpepper, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Steven Powell, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Powell requests review of the Court of Appeals published decision in State v. Steven Powell, Court of Appeals No. 43585-3-II, ___Wn. App. ____, P.3d ____ (2014 WL 2583477, filed June 19, 2014). Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly dismiss the count charging petitioner with violating RCW 9.68A.070(2) finding the State's proffered evidence failed to show photographs depicting a minor engaged in sexually explicit conduct?

2. Did the 2010 amendments to RCW 9.68.011 defining sexually explicit conduct from "Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer" to "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" signal a legislative intent to change the meaning of "for the purpose of sexual stimulation of the viewer?"

3. Where the affidavit is support of probable cause to issue the search warrant failed to show a nexus between the alleged crimes and the items to be seized did the trial court err in denying petitioner's motion to suppress the evidence seized under the warrant?

D. STATEMENT OF THE CASE

Powell was charged in Count XV of the information with violating RCW 9.68A.070(2). CP 1. The trial court dismissed the charge finding the State failed to allege a prima facia showing of the elements of the crime. Slip. Op. at 8. The State appealed and the Court of Appeals reversed the trial court. Slip. Op. at 8, 12.

Powell moved to suppress evidence found during the execution of a search warrant on the basis the affidavit in support of the warrant failed to establish probable cause to justify the search. CP 23-34. The trial court denied the motion. RP 11 (4/24/2012). Powell appealed and the Court of Appeals affirmed the trial court's ruling. Slip. Op. at 8.

The substantive facts are found in Powell's Brief of Appellant, Supplemental Brief of Appellant, and the Court of Appeals decision, all of which are incorporated. Brief of Appellant at 1-10; Supplemental Brief of Appellant at 1-2; Slip. Op. at 1-5.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENTS

1. THE LEGISLATURE'S STATED PURPOSE IN AMENDING RCW 9.68.011 WAS TO WAS TO INCLUDE VIEWING AND DEALING WITH CHILD PORNOGRAPHY VIA THE INTERNET, AND CLARIFY THE UNIT OF PROSECUTION BETWEEN FIRST DEGREE AND SECOND DEGREE OFFENSES AND NOT, AS THE COURT OF APPEALS HOLDS, TO CHANGE THE MEANING OF SEXUALLY EXPLICIT CONDUCT TO INCLUDE POSSESSION OF IMAGES OF MINORS WHERE NO PERSON CONTRIBUTED, INITIATED, CAUSED OR INFLUENCED THE MINOR TO ENGAGE IN THE CONDUCT.

Under RCW 9.68A.070(2), "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)." RCW 9.68A.011(4)(f) defines "sexually explicit conduct" in part as "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."

Under former RCW 9.68.011 sexually explicit conduct was defined as "Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." Former RCW 9.68A.011(3)(e) (Laws of 1984, ch. 32 § 1 (eff. July 23, 1984)). The legislature amended RCW

9.68A.011 in 2010. Part of the 2010 amendment substituted the word "exhibition" in RCW 9.68A.011(3)(e) for the word "depiction" and renumbered it as current RCW 9.68A.011(4)(f). Laws of 2010, ch. 227 § 3 (eff. June 10, 2010).

On more than one occasion courts interpreted the language in former RCW 9.68A.011(3)(e). In State v. Grannis, 84 Wn. App. 546, 930 P.2d 327 (1997), Grannis was charged with violating RCW 9.68A.070. Grannis secretly photographed minor girls on a playground and taking a bath. Because the minors were photographed doing normal activity, and there was no evidence that the defendant initiated, contributed to, or in any way influenced the girls' conduct, the court found that the evidence did not establish the girls were engaged in "sexually explicit conduct" within the meaning of RCW 9.68A.011(3)(e). The court held the language, "for the purpose of sexual stimulation of the viewer" means "the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence." Grannis, 84 Wn. App. at 549-50.

In interpreting former RCW 9.68A.011(3)(e), the Grannis court reasoned:

> By itself, an exhibition is inanimate and without any purpose of its own. Necessarily, then, its purpose is the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence. The initiator or contributor need not be the accused or the minor whose

> conduct is at issue. Whoever the initiator or contributor is, however, his or her purpose must be to sexually stimulate a viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of RCW 9.68A.011(3)(e).

Grannis, 84 Wn. App. at 549-550.

In State v. Whipple, 144 Wn. App. 654, 183 P.3d 1105 (2008), the court again found the evidence did not establish "sexually explicit conduct" within the meaning of RCW 9.68A.011(3)(e). Whipple photographed his minor stepdaughter undressing, and naked, from outside her bedroom window. No person contributed, initiated, caused or influenced Whipple's stepdaughter to engage in the conduct. 144 Wn. App. at 661. Relying on its decision in Grannis, and this Court's decision in State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997)[1], it held there was insufficient evidence to support Whipple's convictions of possessing depictions of a minor engaged in sexually explicit conduct.

The State argued below and on appeal the holdings in Grannis and Whipple are inapplicable to current RCW 9.68.011(4)(f) because "depiction" was substituted for "exhibition." Brief of Respondent (BOR)

[1] Chester secretly photographed his minor stepdaughter as she exited the shower and dressed herself. Chester, 133 Wn.2d at 17–18. Chester was charged with sexually exploiting a minor under RCW 9.68A.040, which also required proof the minor be engaged in sexually explicit conduct. Id at 20. The Supreme Court held that the legislature did not intend "to criminalize the photographing of a child, where there is no influence by the defendant which results in the child's sexually explicit conduct." Id.

at 21; RP 14-19 (5/7/2012). The trial court rejected the argument. It found the substitution of the word "depiction" for "exhibition" did not change the meaning of "sexually explicit conduct" as interpreted in Grannis and Whipple. RP 67-69.

The Court of Appeals, however, agreed with the State and reversed the trial court's ruling. It held the " 2010 amendment to former RCW 9.68A.011(3)'s (now RCW 9.68A.011(4)(f)) definition of sexually explicit conduct superseded Grannis and its progeny by using 'depiction' in place of 'exhibition'." Slip. Op. at 11. The court reasoned that given the amendment the plain meaning of the statute is that the "person who creates the depiction, rather than the person who creates the exhibition that is depicted, must have he 'purpose of sexual stimulation of the viewer.'" Id. It found "The plain meaning of this language shows that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge." Id.

The Court of Appeals erroneously reads the word depiction in isolation. See, State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) (quoting Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 87–88, 221 P.2d 832 (1950) (a single word in a statute should not be read in isolation, and "the meaning of words may be indicated or controlled by those with which they are associated."). Depiction, like exhibition, is also inanimate and

without any purpose of its own. Its purpose is the purpose of the person who initiates it. The legislature did not change the remaining words in the sentence defining "sexually explicit conduct" in former RCW 9.68A.011(3)(e). The initiator of the "depiction", just as the initiator of the "exhibition", must do so to sexually stimulate the viewer. Contrary to the Court of Appeals decision, the trial court correctly found the substitution of the word "depiction" for "exhibition" did not change the meaning of "sexually explicit conduct" as interpreted in Grannis and Whipple. RP 67-69 (5/8/2012).

The Court of Appeals finding "...that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge" is correct. Slip. Op. at 11. It is incorrect, however, that intent was the purpose for the amendment to the statute. The legislature did criminalize that conduct but not in its 2010 amendment to RCW 9.68A.011. Instead, it criminalized that conduct in 1998, following the ruling in Grannis, by enacting the voyeurism statute. RCW 9A.44.115 (Laws of 1998, ch. 221 § 1 (eff. June 11, 1998)). See, Chester, 133 Wn.2d at 20 n. 3 (noting that Substitute House Bill 1441, which was codified as RCW 9A.44.115, was introduced in response to the

Grannis decision).[2] As the trial court correctly recognized the alleged conduct was classic voyeurism, and "not depictions of minors engaged in sexually explicit conduct..." RP 69 (5/8/2012).

The intent for the 2010 amendment to RCW 9.68A.011, on the other hand, was to include viewing and dealing with child pornography via the internet, and to clarify the unit of prosecution between first degree and second degree offenses in response to the holding in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). Laws of 2010, ch. 227 § 1 (eff. June 10, 2010). There is no indication the intent was to change the requirement that a person must initiate the conduct depicted in the photograph or other visual representation for the purpose of sexually stimulating the viewer, or the change was in response to the 1997 decision in Grannis. See, Bob Pearson Constr., Inc. v. First Cmty. Bank of Wash., 111 Wn. App. 174, 179, 43 P.3d 1261 (2002) ("The legislature is presumed to know the case

[2] That statute reads in pertinent part: (2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films: (a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or (b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place. RCW 9A.44.115(2).

law construing statutes and to act consistently with such law unless it clearly intends otherwise.").

Indeed, as the trial court noted, the Court of Appeals interpretation potentially criminalizes any possession of a visual depiction of an unclothed minor. RP 69 (5/8/2012). The Court of Appeals interpretation unconstitutionally criminalizes a person's lewd, prurient or lustful thoughts because the possession of any depiction of a naked child would violate the statute if the person possessing the depiction used, uses or intends to use the depiction for his or her own sexual stimulation. See, Stanley v. Georgia, 394 U.S. 557, 566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (the government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts).

Moreover, the other amendments to Title 9.68A likewise added the word depiction in a number of provisions, including RCW 9.68A.070. Laws of 2010, ch. 227 § 4 (RCW 9.68A.050), § 5 (RCW 9.68A.060), § 6 (RCW 9.68A.070) (eff. June 10, 2010). That lends further support for finding the word change was made to include electronic representations and was not intended to broaden the definition of "sexually explicit conduct."

In sum, if the legislature intended to criminalize the possession of any visual or printed matter depicting "the genitals or unclothed pubic or

rectal areas of any minor, or the unclothed breast of a female minor," used or intended to be used by the possessor for his or her own sexual stimulation, it would have said so. It did not. It did not change the salient language that the "purpose" of the depiction must be for the "sexual stimulation of the viewer."

The decision of the Court of Appeals is the first to interpret the 2010 amendments to RCW 9.68.011. Its analysis directly conflicts with the reasoning and holding in Grannis and what the legislature intended by adopting the amendments. The decision raises the question of whether the statute unconstitutionally criminalize a person's lewd, prurient or lustful thoughts. RAP 13.4(b)(2) and (3). The interpretation of the statute in light of the 2010 amendments is an issue of substantial public importance that should be decided by this Court. RAP 13.4(b)(4).

2. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE.

The federal and state constitutions require search warrants be issued only upon a showing of probable cause. U.S. Const. amend. 4; Const. art. 1, § 7; State v. Patterson, 83 Wn.2d 49, 51-52, 515 P.2d 496 (1973). A search warrant must not issue unless there is probable cause to conduct the search. State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "To

establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." Lyons, 174 Wn.2d at 359. Probable cause to search "requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). To satisfy the nexus requirement, a judge must have "cause to believe that the evidence sought will aid in a particular apprehension or conviction." Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

A search warrant was issued authorizing the search of Powell's residence. CP 64. Police were investigating Powell's son, Joshua Powell, for murder and kidnapping involving his son's wife, Susan Powell, which occurred in 2009. CP 52-54. The affidavit in support of the warrant asserted Powell revealed to the media that journals kept by Susan Powell and written between 1997 and 1999 were in his possession. The affidavit claimed "Steven Powell had announced to the media the importance of these journals to the investigation because Susan Powell describes her relationship with males prior to Joshua Powell; her sexual fantasies, and it shows how unstable Susan Powell really is." CP 60. The affidavit

concluded that information contained in the journals could lead to "additional parties and or eliminate persons of interest...solve the disappearance of Susan Powell and or lead investigators to a specific location where Susan Powell could be recovered." CP 61.

The Court of Appeals ruled the affidavit established a nexus between Susan Powell's disappearance and the journals. Slip. Op. at 8. It affirmed the trial court's denial of Powell's suppression motion. Id. The Court of Appeals analysis does not show the required nexus.[3]

The Court of Appeals ruling hinges on its finding that police did not know when the journals were written, but only that Powell informed the media that the entries in the journal were important to the investigation of Susan Powell's disappearance. Slip. Op. at 7. It concluded this fact established a reasonable inference the journals would provide information as to the relationship problems between Joshua Powell, who was a "person of interest", and Susan Powell. Slip. Op. at 7.

The finding police did not know when the journals were written has no factual support. Powell revealed he possessed journals written between 1997 and 1999. CP 59-60. There is no other information in the affidavit that suggests the existence of any journals written after 1999, and

[3] When reviewing the denial of a suppression motion, no deference is owed to the trial court where, as here, the factual record consists solely of documents. State v. Neff, 163 Wn.2d 453, 461-62, 181 P.3d 819 (2008).

there is nothing in the affidavit to reasonably infer the journals Powell claimed he possessed were written after 1999. Because the journals were written before Susan and Joshua Powell were married, it is not reasonable to infer their contents would provide any information about relationship problems between the two that would connect Joshua Powell with Susan Powell's disappearance ten years later.

The Court of Appeals also found the because Powell told the media the journals discussed Susan Powell's prior "romantic relationships" and her "state of mind" the journals could have assisted police in explaining whether the circumstances of her disappearance constituted kidnapping and murder or whether any additional persons were involved. Slip. Op. at 8. That is nothing more than rank speculation.

Probable cause cannot be supported by conclusory affidavits. Thein, 138 Wn.2d at 140; State v. Helmka, 86 Wn.2d 91, 92, 542 P.2d 115 (1975)). The affidavit must state the facts or information forming the basis of the officer s belief so the magistrate can make an independent determination of probable cause. State v. Johnson, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995); see, United States v. Dubrofsky, 581 F.2d 208, 212 (9th Cir.1978) ("A search warrant may not rest upon mere affirmance or belief without disclosure of supporting facts or circumstances."). "[T]he record must show the existence of objective criteria going beyond personal

beliefs and suspicions of the applicants for the warrant." State v. Patterson, 83 Wn.2d 49, 61, 515 P.2d 496 (1973)).

The affidavit merely asserts Powell announced to the media the journals in his possession describe Susan Powell's relationships "prior to Joshua Powell" and her mental instability. CP 60. Susan Powell's relationships a decade earlier and her state of mind at that time are too distant from her 2009 disappearance to show any requisite nexus to the alleged crimes. The affidavit does not contain any objective facts to support the conclusion Susan Powell's journals discussing her long-ago relationships and state of mind could in anyway assist police in their investigation of her disappearance. That unsupported conclusion is unreasonable at best.

When a search warrant is issued without probable cause, any evidence gathered must be suppressed. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Crawley, 61 Wn. App. 29, 33-34, 808 P.2d 773 (1991). Because there was no probable cause to support the warrant the evidence gathered during the search should have been suppressed.

The affidavit in support of the search warrant failed to show the requisite nexus between the alleged crimes and Susan Powell's journals. The Court of Appeals decision conflicts with a long line of cases holding

such a nexus is necessary to establish probable cause justifying the issuance of a search warrant and raises a significant question of constitutional law. This Court should accept review and reverse that part of the Court of Appeals decision. RAP 13.4(b)(2) and (3).

F. CONCLUSION

For the above reasons, this Court should accept review. This Court should reverse the Court of Appeals decision and hold the trial court correctly dismissed the count charging Powell with violating RCW 9.68A.070(2). This Court should also reverse the Court Appeals decision and hold there was no probable cause to support the issuance of the search warrant.

DATED this 24 day of June 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. STEVEN CRAIG POWELL, Appellant/Cross-Respondent.	No. 43585-3-II PUBLISHED OPINION

WORSWICK, J. — Steven Powell appeals his convictions for 12 counts of voyeurism, arguing that the trial court erred by denying his CrR 3.6 motion to suppress evidence seized pursuant to an invalid search warrant. The State cross appeals the trial court's *Knapstad*[1] dismissal of the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct.

Powell argues that the trial court erred by failing to make written findings of fact and conclusions of law as required by CrR 3.6, and ruling that the affidavit supporting the search warrant established probable cause to issue the warrant. In its cross appeal, the State argues that the legislature's 2010 amendment[2] to former RCW 9.68A.011(3) (2002) expanded the definition of sexually explicit conduct to include the conduct depicted within the images that Powell possessed.

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[1] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986); CrR 8.3(c).

[2] LAWS OF 2010, ch. 227, § 3.

Because the trial court was not required to enter written findings and conclusions in this case and the supporting affidavit established probable cause to issue the search warrant, we affirm the trial court's denial of Powell's CrR 3.6 motion. But because the legislature's 2010 amendment to the definition of sexually explicit conduct expanded the definition to include the conduct depicted within the images in Powell's possession, we reverse the trial court's *Knapstad* dismissal of the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct and remand for further proceedings.

FACTS

A. *The Affidavit*

Joshua Powell was married to Susan Powell, who disappeared under suspicious circumstances. The State investigated Susan's disappearance as a kidnapping and murder; Joshua was a person of interest in her disappearance.[3] During the investigation, Joshua and his father Steven Powell stated that they had over 2,000 pages of Susan's journal entries.[4]

The State requested a search warrant to search Powell's house and to seize physical and digital copies of Susan's journal entries (collectively Susan's journals). The request stated:

> That, on or about the 6th day of December, 2009 in West Valley, Utah, felonies, to-wit: Murder in the First Degree, a violation of R.C.W. 9A.32.030, Kidnapping, a violation of R.C.W. 9A[.]40.020, and Obstructing a Public Servant, a violation of R.C.W. 9A.76.020, were committed by the act, procurement or omission of another, that the following evidence, to-wit:
>
> 1. Journals belonging to Susan Powell.

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[3] We refer to Joshua and Susan Powell by their first names for clarity. We intend no disrespect.

[4] Joshua and Powell lived together in Powell's house.

> 2. Digital media to include but not limited to laptop computers, traditional tower desk top computers, any type of device that could store digital media such as electronic and or digital copies of Susan Powell's journals.
>
> . . . .
>
> [I]s material to the investigation or prosecution of the above described felony.

Clerk's Papers (CP) at 52-53. The affidavit supporting the search warrant provided the following facts:

> Your Affiant was told by Detective Maxwell, that assisting detectives recovered a journal belonging to Susan Powell from her place of employment . . . . Detective Maxwell reviewed this journal and advised your Affiant of the following information. . . . Susan articulates when she was 19 years of age she was engaged to Joshua Powell. This journal also contains writings from Susan Powell describing marital discord between her and Joshua Powell from 2005 through and to her last entry on October 26, 2009.
>
> Detective Maxwell described to your Affiant that . . . Joshua Powell and Steven Powell appeared on the NBC Today Show. The following facts were broadcasted on national television. Joshua and Steven Powell admitted to possessing 2000 pages of journal entries belonging to Susan Powell.
>
> Steven Powell has announced to the media the importance of these journals to the investigation because Susan Powell describes her relationships with males prior to Joshua Powell; her sexual[] fantasies, and it shows how unstable Susan Powell really is. Steven Powell also announced that he and Joshua Powell plan on sharing/releasing more journal entries in the coming weeks using the susanpowell.org website. . . . The statement that they plan on releasing more journal entries leads your Affiant to believe that they have, and are in the act of, or will be scanning and digitally storing additional copies of Susan Powell's journals on their computers and or digital media devices.

CP at 58-60.

B. *Search of Powell's House, Seizure of the Computer Disk, and CrR 3.6 Motion*

The warrant to search Powell's house and seize Susan's journals was issued and the police searched Powell's house. During the search, the police seized a computer disk from Powell's bedroom, and later searched its contents. The disk contained photographic images of female minors bathing and using the bathroom. Some of these images zoomed in on the minors'

genitalia and breasts, covered and uncovered. The images were photographed from Powell's bedroom, through the window of a neighboring house.

Based on these images, the State charged Powell with fourteen counts of voyeurism[5] and one count of second degree possession of depictions of a minor engaged in sexually explicit conduct.[6] In the State's declaration for a determination of probable cause for the charges, the State alleged that the police found images of unclothed minors bathing and using the bathroom in Powell's home, and that these images were "stored with . . . images of Steven Powell himself [that] are sexual in nature and include images of him naked, images of his genitals, and images of him masturbating." CP at 11.

Powell made a CrR 3.6 motion to suppress the images on grounds that the search warrant was issued without probable cause. At the motion hearing, the attorneys argued the motion's merits, but did not present testimony or additional evidence. The trial court ruled that the affidavit established probable cause to issue the search warrant, and denied Powell's CrR 3.6 motion. The trial court did not enter written findings or conclusions.

C. *Powell's Knapstad Motion*

Powell made a *Knapstad* motion to dismiss the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct. Citing this court's pre-2010 interpretations of former RCW 9.68A.011(3)'s definition of "sexually explicit conduct," Powell argued that the minors in the images were not engaged in sexually explicit conduct. The State argued that the legislature's 2010 amendment to the definition of sexually explicit conduct

[5] RCW 9A.44.115.

[6] RCW 9.68A.070(2).

expanded the definition to encompass the conduct depicted in the images. Based upon our pre-2010 interpretations of the statutory definition of sexually explicit conduct, the trial court dismissed the charge.

D. *Convictions and Appeal*

The jury convicted Powell of 14 counts of voyeurism, two of which the trial court vacated on double jeopardy grounds. Powell appeals the trial court's denial of his CrR 3.6 motion. The State cross appeals the trial court's *Knapstad* dismissal of the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct.

ANALYSIS

I. FINDINGS AND CONCLUSIONS ON POWELL'S CrR 3.6 MOTION

Powell argues that the trial court erred by failing to enter written findings of fact and conclusions of law upon dismissing his CrR 3.6 motion. The State argues that CrR 3.6 did not require the trial court to enter written findings and conclusions because it did not conduct an evidentiary hearing. We agree with the State.

We review a court rule's construction de novo. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). CrR 3.6 states:

> (a) **Pleadings.** Motions to suppress . . . shall be in writing supported by an affidavit or document . . . . The court shall determine whether an evidentiary hearing is required based upon the moving papers.
>
> (b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

Under CrR 3.6(b), the trial court is required to enter written findings and conclusions only if the trial court decided to hold an evidentiary hearing on the CrR 3.6 motion.

Here, the trial court did not hold an evidentiary hearing. The CrR 3.6 hearing was limited to argument, and did not involve the admission or consideration of evidence. Because the trial court did not conduct an evidentiary hearing on Powell's CrR 3.6 motion, it did not violate CrR 3.6(b) by not entering written findings of fact and conclusions of law.

II. PROBABLE CAUSE FOR SEARCH WARRANT

Powell next argues that the affidavit supporting the search warrant did not establish probable cause because the affidavit failed to establish a nexus between criminal activity (Susan's kidnapping and murder) and the items to be seized (Susan's journals). We disagree.

A. *Standard of Review*

We review de novo the trial court's legal conclusion of whether evidence meets the probable cause standard. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). But our de novo review gives great deference to the issuing judge's assessment of probable cause and resolves any doubts in favor of the search warrant's validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). The issuing judge "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

A search warrant may be issued only if the affidavit shows probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). To establish probable cause, the affidavit supporting the search warrant must "set[] 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." *Thein*, 138 Wn.2d at 140. The affidavit must establish "'a nexus between criminal activity and the item to be seized, and also a

nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). When reviewing the issuing judge's decision to issue a search warrant, our review is limited to the four corners of the affidavit. *Neth*, 165 Wn.2d at 182.

Powell does not challenge that the affidavit (1) set forth facts and circumstances sufficient to establish a reasonable inference that Joshua was probably involved in Susan's kidnapping and murder, and (2) established a nexus between the items to be seized and the place to be searched. The affidavit indisputably accomplished both tasks. Thus, the singular issue before us is whether the affidavit established a nexus between criminal activity and the items to be seized.

B. *Nexus Between Susan's Kidnapping and Murder and Susan's Journals*

Powell argues that the affidavit failed to establish a nexus between Susan's kidnapping and murder and Susan's journals. We disagree for three reasons.

First, the affidavit stated that the one journal in police custody discussed Susan's marital problems with Joshua, who was a person of interest in Susan's kidnapping and murder. Powell and Joshua had admitted to possessing other journal entries consisting of over 2,000 pages. The police did not know the dates Susan wrote the pages of journal entries in Powell and Joshua's custody, but they knew that Powell had announced that these entries were important as to the investigation of Susan's disappearance. These facts establish a reasonable inference that Susan's journals would have provided further information as to the relationship problems between Susan and Joshua, a person of interest in Susan's kidnapping and murder.

Second, the affidavit stated that Powell announced to the media that Susan's journals provided information as to Susan's state of mind. Information about Susan's state of mind would have provided critical evidence explaining the circumstances of Susan's disappearance, and whether those circumstances constitute kidnapping and murder.

Third, Powell announced to the media that Susan's journals discussed her prior romantic relationships. Information about Susan's prior romantic relationships would have assisted the police in determining the existence of any additional persons of interest involved in Susan's kidnapping and murder.

The affidavit established a nexus between criminal activity (Susan's kidnapping and murder) and the items to be seized (Susan's journals). Thus, we affirm the trial court's denial of Powell's CrR 3.6 motion.

III. Cross Appeal: Dismissal of Charges

The State argues that the trial court erroneously applied an outdated statutory definition of sexually explicit conduct to dismiss the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct under *Knapstad*. We agree.

The trial court may dismiss a charge without prejudice on a *Knapstad* motion when the State's pleadings fail to support a prima facie showing of all the elements of the crime charged. *State v. Snedden*, 112 Wn. App. 122, 127, 47 P.3d 184 (2002) (citing *State v. Knapstad*, 107 Wn.2d 346, 352, 729 P.2d 48 (1986)). We review a trial court's *Knapstad* dismissal de novo, viewing the facts and all reasonable inferences from those facts in the light most favorable to the State. *State v. O'Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008).

We review issues involving statutory interpretation de novo and we interpret statutes to give effect to the legislature's intent. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). When interpreting a statute, we first examine the statute's plain meaning. *Bunker*, 169 Wn.2d at 578. We generally give all statutory language effect so that no portion is rendered meaningless or superfluous. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

RCW 9.68A.070(2)(a) states:

> 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.

Former RCW 9.68A.011(3) provided the definition of sexually explicit conduct that applied to RCW 9.68A.070(2)(a). This definition provided seven categories of sexually explicit conduct. Former RCW 9.68A.011(3)(a)–(g). The category considered by the trial court was codified at former RCW 9.68A.011(3):

> Sexually explicit conduct means actual or simulated:
> . . . ;
> (e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.

We interpreted former RCW 9.68A.011(3)(e) in *State v. Grannis*, 84 Wn. App. 546, 930 P.2d 327, *review denied* 133 Wn.2d 1018 (1997). In *Grannis*, we held that for a minor within a depiction to be engaged in sexually explicit conduct under former RCW 9.68A.011(3)(e), either the minor whose conduct created the exhibition, or one who initiated, contributed to, or influenced that minor's conduct, had to have the purpose of sexually stimulating a viewer:

> By itself, an exhibition is inanimate and without any purpose of its own. Necessarily, then, its purpose is the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence. The initiator or contributor

> need not be the accused or the minor whose conduct is at issue. Whoever the initiator or contributor is, however, his or her purpose must be to sexually stimulate a viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of [former] RCW 9.68A.011(3)(e).

84 Wn. App. at 549-50 (footnotes omitted). This court further explained:

> Here, [the count] is based on photographs showing the conduct of minor girls on a playground, and the conduct of one minor girl taking a bath. *It is obvious and undisputed that none of the girls had a purpose of sexually stimulating a viewer, and there is no evidence that Grannis initiated, contributed to, or in any way influenced the girls' conduct.* Thus, the evidence does not show an exhibition of the genitals or breasts for the purpose of sexually stimulating a viewer, or that the girls engaged in sexually explicit conduct within the meaning of [former] RCW 9.68A.011(3).
>
> Nothing said herein means that the Legislature could or could not criminalize conduct of the sort at issue in this case. We hold only that it did not do so.

84 Wn. App. at 551-52 (emphasis added) (footnotes omitted). In *State v. Whipple*, we reaffirmed the holding in *Grannis* on very similar facts. 144 Wn. App. 654, 659-60, 183 P.3d 1105 (2008)).

In 2010, following *Grannis* and *Whipple*, the legislature passed ENGROSSED SUBSTITUTE H.B. 2424, 61st Leg., Reg. Sess. (Wash. 2010), which amended former RCW 9.68A.011(3)'s definition of sexually explicit conduct:

> (((~~(3)~~))) (4) "Sexually explicit conduct" means actual or simulated:
> . . . ;
> (e) ~~Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;~~
> ~~(f)~~))) . . . ;
> (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.*

(Emphasis added.)

The legislature's 2010 amendment to former RCW 9.68A.011(3)'s definition of sexually explicit conduct superseded *Grannis* and its progeny, by using "depiction" in place of "exhibition." Following this amendment, RCW 9.68A.011(4)(f)'s plain meaning is that the person who creates the depiction, rather than the person who creates the exhibition that is depicted, must have the "purpose of sexual stimulation of the viewer." Stated another way, the creator of the "exhibition that is depicted" is the minor or one who initiates, contributes to, or influences the minor's conduct, but the creator of the "depiction" is the person who creates the image, such as a photographer.

RCW 9.68A.011(4)(f) lends further support to this interpretation with the added language stating that "it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it." The plain meaning of this language shows that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge.[7]

Here, a State pleading, namely the declaration for determination of probable cause for the charges against Powell, states that the police found images in Powell's home of unclothed minors bathing and using the bathroom, and that these images were "stored with . . . images of Steven Powell himself [that] are sexual in nature and include images of him naked, images of his genitals, and images of him masturbating." CP at 11. Viewing the facts and all reasonable inferences from those facts in the light most favorable to the State, this pleading supports a prima facie showing of all the elements of second degree possession of depictions of a minor engaged

[7] Powell argues that this interpretation will unconstitutionally punish the sexual thoughts of the possessor of a depiction of an unclothed child, regardless of how "innocent" the depiction. Powell's argument is based on the inaccurate premise that the purpose of the possessor controls. To the contrary, the purpose of the depiction's creator controls.

in sexually explicit conduct. The State's pleadings support a prima facie showing that Powell, the creator of the depictions in Powell's possession, had the purpose of sexual stimulation of the viewer (Powell). Thus, we reverse the trial court's *Knapstad* dismissal of the charge of second degree possession of a minor engaged in sexually explicit conduct and remand for reinstatement of this charge and further proceedings.

Affirmed in part, reversed in part, and remanded.

Worswick, J.

We concur:

Hunt, P.J.

Melnick, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. STEVEN POWELL, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 43585-3-II

DECLARATION OF SERVICE

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

THAT ON THE 25TH DAY OF JUNE, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN POWELL
2510 FAWCETT #3
TACOMA, WA 98402

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JUNE, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 25, 2014 - 3:17 PM

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