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STATE OF WASHINGTON
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Supreme Court or Court of Appeals Division II
of the State of Washington

100010-3

State of Washington,
Respondent

v.

Nicolas Aaron Clark,
Petitioner, Pro Se

Petition For Discretionary Review

Brief of Petitioner

7-26-21:
Treated as a petition for review, see Deputy Clerk's 7-26-21 letter.
Supreme Court Clerk's Office

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I. Identity of Petitioner

Nicolas Aaron Clark respectfully asks this court to accept review of the court of Appeals decision terminating review designated in part II of this petition

II. Court of Appeals Decision

Please review the decision of the Court of Appeals which holds that the first warrant was supported by probable cause, make a ruling on whether the independent source doctrine Applies to the later warrant, and make a ruling on whether police officers should be required to attach depections of "suspected child pornography" to the affidavit, thus allowing the judge full discretion in the determination of probable cause in a search warrant. Appeal No. 54069-0-II filed May 13, 2020. Appeal denied in the court of Appeals of the state of Washington Division II on June 22, 2021. A copy of the decision is in the Appendix at pages A-1 through A-18.

III Issues Presented For Review

A. The appellate court erred when it upheld the trial courts decision in denying Mr. Clark's Motion to Suppress because the initial search warrant affidavit was insufficient to establish

probable cause and the independent source doctrine does not apply to the second warrant.

1. The first search warrant affidavit was insufficient to establish probable cause that there was any criminal activity.

2. The independent source doctrine does not apply to the second warrant and the evidence seized should have been suppressed.

B. Has the state erred in not requiring that police officers attach depictions of "suspected child pornography" to the affidavit, thus allowing the magistrate full discretion in the determination of probable cause in search warrants as the legislation intended.

IV Statement of the Case

On August 30, 2018, Vancouver Police Department Sergeant Joe Graff assigned Detective Chadd Nolan an investigative tip from the National Center for Missing and Exploited Children (NCMEC). The tip explained that Tumblr.com, an electronic service provider, submitted information to the NCMEC tip line that an image of suspected child pornography had been uploaded through its servers. Tumblr.com reported "that on or about June 23, 2018, a subject using the Uniform

Resource Locator (URL) funrufus.tumblr.com attempted to or did pass an image of suspected child pornography through their servers." The tip included two Internet Protocol (IP) addresses of the subject at the time of the incident.

Based on this tip, Det. Nolan filed an affidavit for a search warrant on September 26, 2018. The affidavit requested subscriber information from Verizon and Comcast related to the IP addresses, as well as information from Tumblr.com and Yahoo related to the URL and email accounts provided in the tip. Det. Nolan included information describing his experience and training in cybercrime, facts about Tumblr.com and the "funrufus" account as well as the IP addresses. Det. Nolan's affidavit described the image:

> "The suspect image contains a single pre-pubescent female being directed to pose for the camera. The child is clothed in underwear. However, the child has been instructed to pull aside her underwear, exposing her vagina. The child's legs are separated, making the focal point of the picture the vagina area."

Neither the image or the tip from NCMEC was attached to the affidavit.

Based on this affidavit, the trial court granted a search warrant (Sept. 2018 warrant) to collect subscriber information from Verizon related to the suspect IP addresses. Verizon provided data that showed accounts connected to the IP addresses were registered to a Camas address owned by Mr. Clark and his wife, and a business in Vancouver owned and operated by Mr. Clark. Verizon also provided a cellular telephone number associated with the cell phone that matched Mr. Clark's number.

On October 1, 2018, based on the information collected from Verizon, police officers sought and received a second search warrant (Oct. 2018 warrant) to search Mr. Clark's residence and business. The October 2018 warrant included permission to search any electronic devices discovered at the house or business.

On October 5, 2018, one team of police officers searched Mr. Clark's home while another team searched his business. Police officers rang the doorbell at Mr. Clark's home and Mr. Clark answered the door. Officers explained to Mr. Clark that they had a search warrant and asked him to step outside, which he did. Mr. Clark had an iPhone on his belt that officers seized. Officers examined the phone and determined that the number matched the one provided by Verizon. A search of the

contents of the phone revealed more than 1,000 images depicting children engaged in sexual conduct. The phone also contained stored accounts, including a Tumblr.com application, with "funrufus" as the username. Officers arrested Mr. Clark. Subsequent analysis of other electronic devices registered to Mr. Clark and seized from the home revealed other caches of child pornography. Nothing seized from the business had any pornography recorded.

On October 9, 2018, the State charged Mr. Clark with five counts of first degree possession of depictions of a minor engaged in sexually explicit conduct and one count of second degree possession of a minor engaged in sexually explicit conduct. Some images found on Mr. Clark's devices depicted a female child in a pink nightgown touching an adult penis, and other images depicted the hand of an adult male. By comparing bed sheets and underwear located in Mr. Clark's house to those depicted in the photographs, police determined that these images were created at Mr. Clark's residence.

On December 4, 2018, Det. Nolan requested and received a third warrant (Dec. 2018 warrant), based on the comparisons of the photographs, to re-enter the Clark residence to seize clothing and bed sheets observed in the images. Police officers also obtained photographs of Clark's exposed body. Mr. Clark's

wife identified a child in the images as someone she knew and was closely associated with.

On December 6, 2018, the State filed amended information. In addition the the charges of possession of depictions of a minor engaged in sexually explicit conduct, the State added one count of first degree rape of a child, three counts of sexual exploitation of a minor and two counts of first degree child molestation. The State also alleged a sentencing aggravator of using a position of trust or confidence to facilitate the commission of the crimes. RCW 9.94A.535(3)(n).

On February 15, 2019, Mr. Clark filed a motion to suppress all evidence collected during the course of the police investigation, arguing that Det. Nolan's affidavit in support of the September 2018 warrant failed to establish probable cause. In response to Mr. Clark's motion, Sergeant Graff sought an additional warrant (April 2019 warrant) based on an affidavit signed by Sergeant Graff that did not include any information gained as a result of the first warrant. Mr. Clark stipulated that none of the evidence seized following the first warrant was used in Sergeant Graff's affidavit, filed in April 2019, again requested subscriber information from Verizon. The affidavit also included information from the tip regarding NCMEC and Tumblr.com, the information about the "fwsrufies" account, and the IP

address information. Sergeant Graff's affidavit contained a more graphic description of the image provided in the tip and did not refer to the child being directed or instructed to pose in any particular manner. The suspect image was again not attached to the affidavit. The trial court signed the April 2019 search warrant. However, police did not serve the warrant on or seek the information from Verizon.

On August 19, 2019, the trial court held a CrR 3.6 hearing on Mr. Clark's motion to suppress. The State argued that both the September 2018 warrant and the April 2019 warrant were supported by probable cause and that if the trial court disagreed, the evidence would still be admissible under the independent source doctrine. The trial court agreed with the State. In its conclusions of law regarding the September 2018 warrant's probable cause, the trial court concluded:

3.3 The description of the image of the juvenile female in question meets the definition of sexually explicit conduct found in RCW 9.68A.070

3.4 The affidavit's description that suspected child pornography had been uploaded and that the URL funrufus.tumblr.com passed or attempted to pass an image identified as child pornography through their servers is a sufficient description of the defendant's alleged criminal activity.

3.5 While the use of the term "child pornography" may not satisfy the particularity requirement of the Fourteenth Amendment, the detailed description of the photograph found in the search warrant affidavit satisfies the particularity requirement.

3.7... In the case at bench, the focus of the image is on a minor female's vagina with legs spread and underwear pulled aside. The inference is that the child was posed for sexual stimulation

3.8 The search warrant affidavit establishes probable cause.

Likewise, regarding the April 2019 warrant's probable cause the trial court concluded:

4.1 Washington State recognizes the independent source doctrine as an exception to the exclusionary rule. State v. Coates, 107 Wn. 2d 882, 887 (1987)

4.2 The second search warrant affidavit establishes probable cause.

On September 10, 2019, Mr Clark waived his right to a trial by jury and the case proceeded to a bench trial. In Mr Clark's waiver, he stated, "I understand that by waiving my right to a jury trial, I am still presumed innocent but that the Judge alone will decide whether the State has proven my guilt beyond a reasonable doubt" At trial, Mr Clark's wife identified a girl depicted in images recovered by police as Mr & Mrs.

Clark's daughter. She testified that the child would have been eight years old or younger in the images.

Clark's wife was also able to identify Mr. Clark's body parts in the images.

On September 12, 2019 the trial court found Mr. Clark not guilty on the charge of first degree rape of a child. The trial court found Mr. Clark guilty of three counts of sexual exploitation of a minor, two counts of first degree child molestation and six counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court also found Mr. Clark used his position of trust or confidence to facilitate the commission of the crimes and also added the free crime aggravator under RCW 9.94A.535(2)(c). The trial court sentenced Mr. Clark to an exceptional sentence of 258 months based on the aggravating factors. Mr. Clark appealed his judgement and sentence.

V. Argument

A. The appellate court erred when it upheld the trial courts decision in denying Mr. Clark's Motion to Suppress because the initial search warrant affidavit was insufficient to establish probable cause and the independent source doctrine does not apply to the second warrant.

1. The first search warrant affidavit was insufficient to establish probable cause

a. The description of the image of the juvenile female in question does not meet the definition of sexually explicit conduct found in RCW 9.68A.070 because it does not establish that the image was created for the sexual stimulation of the viewer as found in RCW 9.68A.011(4)(f)

b. The affidavit's description that suspected child pornography had been uploaded and that the URL funnutus.tumblr.com passed or attempted to pass an image of suspected child pornography through their servers is not a sufficient description of the defendant's alleged criminal activity because it was not established that the image was being used to sexually stimulate the viewer.

c. The search warrant affidavit does not satisfy the particularity requirement of the Fourteenth Amendment because there is too much speculation on the part of Det. Nolan.

d. Were the focus of the image is is also speculative. Even if the focus is on the minor female's vagina one can not assume that the child was posed for sexual stimulation of the viewer, the image may have been for scientific, medical or educational purposes.

The trial court erred when it denied Mr. Clark's Motion to Suppress because the initial affidavit failed to establish probable cause to search for the subscriber information used to locate Mr. Clark as a suspect. This deficient

affidavit tainted the state's seizure of both the subscriber information and the electronic devices later seized from Mr. Clark's person, home and business.

Washington Constitution Art 1, § 7 requires that the police have the "authority of law" to execute a search or seize evidence. State v. Hatchie, 161 Wn. 2d 390, 397, 166 P. 3d 698 (2007). The "authority of law" is a valid search warrant unless the search falls into one of the narrow exception to the warrant requirement. Hatchie, 161 Wn. 2d at 395, 397.

Appellate review of a search warrant is limited to the four corners of the affidavit in support of probable cause. State v. Neth, 165 Wn. 2d at 182 (citing Murray, 110 Wn. 2d at 709-10). The affidavit must be based on more than mere suspicion or belief that evidence of a crime will be found at the place to be searched. State v. Jackson, 150 Wn. 2d 251, 265, 76 P. 3d 217 (2003) (citing State v. Vickers, 148 Wn. 2d 91, 108, 59 P. 3d 58 (2002)). There must be a nexus between criminal activity and the item to be seized and between that item and the place to be searched. Neth, 165 Wn. 2d at 183 (citing State v. Thein, 138 Wn. 2d 133, 140, 977 P. 2d 582 (1999).

The warrant affidavit must establish circumstances that extend beyond mere suspicion or the officer's

personal belief. State v. Anderson, 105 Wn. App. 223, 229, 19 P. 3d 1094 (2001) (citing State v. Perrone, 119 Wn. 2d 538, 551, 834 P. 2d 611 (1992)). Speculation on the part of the affiant will not support a finding of probable cause. Anderson, 105 Wn. App. at 229 (citing State v. Rangitsch, 40 Wn. App. 771, 780, 700 P. 2d 382 (1985)). In this case, the initial affidavit in support of the search warrant for subscriber information fails to provide sufficient detail to establish probable cause to search. The tip does not even describe what action the user identified as "funrufus" took to generate the tip Tumblr sent to NCMEC. Tumblr allows users to upload and download files, as well as send them to other users, but the affiant only describes an "incedent" where the user either passed or attempted to pass an image of suspected child pornography through Tumblr's servers.

The language in the affidavit establishes that the affiant did not know what action "funrufus" took that is alleged to show he or she was in possession of child pornography. The language of the first affidavit is insufficiently particular to establish probable cause to conclude that the image described in the tip qualified as child pornography. The affiant describes the image Tumblr reported as "suspected child pornography". We don't know if they are unsure if the female depicted in the image is a child or if they are unsure if the image in question qualifies as child pornography. If the image was created for medical, scientific or educational purposes it would not be considered

pornography. Without more information we don't know the intent of the creator or "fewratus".

The Washington State Supreme Court has held that it does not prohibit all nude photographs of children. State v. Farmer, 116 Wn. 2d 414, 805 P. 2d 200 (1991). See also RCW 9.68A.001. The legislature further finds that the protection of children from sexual exploitation can be accomplished without infringing on a constitutionally protected activity. The definition of "sexually explicit conduct" and other operative definitions demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical or educational activities. RCW 9.68A.001.

The affidavit also includes the assertion that the girl in the image is "being directed to pose for the camera" and "has been instructed to pull aside her underwear." These assertions are speculation on the part of the affiant. The only material Tumblr reported was one photograph and it is unclear how the affiant could have determined that the girl in the image was being directed or instructed to do anything when no one else is visible in the photo and there is no audio associated with it. Furthermore, the image does not depict any sexual acts. The affidavit does nothing to establish that the image is sexually explicit or that it was used to sexually stimulate the viewer outside of speculative assertions. The description of the image does not meet the definition of sexually

explicit conduct found in RCW 9.68A.070. Such a photograph would not be illegal to possess because it was not produced to sexually stimulate the viewer. State v. Grannis, 84 Wn. App. 546, 550-51, 930 P. 2d 327 (1997); State v. Chester, 82 Wn. App. 422, 428, 918 P. 2d 514 (1996). "Whoever the initiator or contributor of an exhibition, his or her purpose must be to sexually stimulate the viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of subdivision (3)(e) of this section" State v. Grannis, 84 Wn. App. 546, 930 P. 2d 327, (1997). Superseded by statute as stated in (State v. Powell, 181 Wn. App. 716, 326 P. 3d 859 (2014)).

Because the affiant speculated about; the girl in the photograph being directed to pose in a certain manner, the focal point of the photograph, and the production purpose of the photograph, and because this speculation led himself and the judge to the belief that the image was sexually explicit, it should not have been considered in determing whether the affidavit established probable cause. Anderson, 105 Wn. App at 229. Nevertheless, the speculative assertions in that affidavit were critical in concluding that the image was illegal to possess because it depicted a minor engaging in sexually explicit conduct and was used to sexually stimulate the viewer. The trial court's conclusions of law are based soely on the affiant's mere suspicion or belief

of criminal activity which is evident in his description of the image of the female in question. The trial court's reliance on this description was misplaced because it was not an accurate, fact-based description of the image.

The affiant's description was based only on suspected child pornography, not actual child pornography, and the degree of speculation is unknown. The affiant makes bald assertions based on speculation and his belief that are not supported in the record. Without evidence in the record, the affidavit fails to establish probable cause to search. The circumstances described in the first warrant affidavit fail to rise above the level of mere suspicion or personal belief that the user "funfuns" was engaged in criminal activity. It also fails to establish that the image was sexually explicit, or that it was created or used to sexually stimulate the viewer. 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. Without more detail about the incident the affidavit fails to establish probable cause. Both the trial court and appellate court erred when it concluded that the first warrant was valid.

2. The independent source doctrine does not apply to the second warrant and the evidence seized should have been suppressed.

The exclusionary rule requires that any evidence seized during an illegal search be suppressed at trial. State v. Betancourth, 190 Wn. 2d 357, 364, 413 P. 3d 566 (2018) (citing State v. Gaines, 154 Wn. 2d 711, 716-17, 116 P. 3d 993 (2005)). The rule requires that both the initially seized evidence and any fruit of the poisonous tree be suppressed. Betancourth, 190 Wn. 2d at 364 (citing Gaines, 154 Wn. 2d at 716-17). The exclusionary rule generally serves three purposes: to protect the privacy interests of individuals, to deter the police from acting unlawfully and to preserve the integrity of the judicial system by ensuring all evidence is seized lawfully. Betancourth, 190 Wn. 2d at 364 (citing State v. Bonds, 98 Wn. 2d 1, 11-12, 653 P. 2d 1024 (1982).

One recognized exception to the exclusionary rule is the independent source doctrine. Betancourth, 190 Wn. 2d at 364. Under this doctrine, evidence tainted by unlawful police action is not subject to suppression if the evidence is ultimately obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. Gaines, 154 Wn. 2d at 718. The determinative question in applying the independent source doctrine is whether the challenged evidence was discovered through a source independent of the initial illegality. Betancourth, 190 Wn. 2d at 365 (citing Murray v. United States, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L. Ed. 2d

472 (1998)). Conclusions of law related to the suppression of evidence are reviewed de novo. Betancourth, 190 Wn. 2d at 363 (citing Gaines, 154 Wn. 2d at 716).

In Betancourth, police initially seized the defendant's intangible cellphone records pursuant to an invalid warrant. Betancourth, 190 Wn. 2d at 361. Without relying on illegally obtained information, the police submitted a second affidavit and secured another warrant to cure the defects found in the first one. Betancourth, 190 Wn. 2d at 361-62. The Supreme Court upheld the warrant on narrow grounds and limited its holding to such cases where the second warrant does not rely on any information obtained illegally from the initial, invalid warrant and the challenged evidence is the subject of that initial warrant. Betancourth, 190 Wn. 2d at 372.

Mr. Clark's case is distinguishable from Betancourth because the evidence challenged at his suppression hearing was not the intangible IP address and subscriber information derived from the initial warrant, but rather the tangible, tainted external hard drives, cellphone and computers seized pursuant to the invalid warrant where the fruits of the initial warrant facilitated the seizure of physical evidence from Mr. Clark's person, home and business. Without the information derived from the initial warrant secured through a deficient

Affidavit, the police would not have been able to narrow their search to Mr. Clark's home or business. This is different from the situation in Betancourth from the situation in Betancourth were the police were able to revise the affidavit, serve it, and seize the exact same evidence the seized pursuant to the deficient warrant because the evidence consisted of static phone records. Betancourth, 190 Wn. 2d at 370-72.

In Mr. Clark's case, the police did not revise the initial affidavit, until after they had already executed a subsequent warrant to search Mr. Clark's person, home and business using the identifying information seized pursuant to the deficient warrant. The subsequent warrant produced by Segeant Graff was never served. The cell phone, hard drives and computers seized from Mr. Clark's home and business are not static records that can be retrieved later in identical form, they are tangible evidence that is tainted because they were located using information derived from an invalid warrant. Thus, the seizure of the electronic devices was not "independent of the initial illegality." Betancourth, 190 Wn. 2d at 365. The initial warrant facilitated the seizure of evidence forming the basis for all of Mr. Clark's convictions. The trial court erred when it concluded that the independent source doctrine applies to this case.

B. Has the state erred in not requiring that police officers attach depictions of "suspected

child pornography" to the affidavit and allowing a magistrate full discretion in the determination of probable cause to search?

Search warrant affidavit's must describe the place to be searched and items to be seized with sufficient particularity to ensure officers do not have unfettered discretion in executing warrants. Perrone, 119 Wn. 2d at 545-46. The particularity requirement for search warrants is necessarily intertwined with the requirement that the affidavit provide facts establishing probable cause. Perrone, 119 Wn. 2d at 548-49. A magistrate may only issue a search warrant if the affidavit in support of that warrant shows probable cause to believe that the defendant is involved in criminal activity and evidence of the criminal activity will be found in the place to be searched. Neth, 165 Wn. 2d at 182 (citing Thein, 138 Wn. 2d at 140). Determining whether an affidavit provides probable cause is a fact-based inquiry that represents a compromise between enforcing the laws and protecting the individual's right to privacy. Neth, 165 Wn. 2d at 182 (citing Jackson, 150 Wn. 2d at 265.

In Mr Clark's case neither the image of "suspected child pornography" nor the tip from NCMEC was attached to either affidavit. This combined with the speculative assumptions in the description of the image in the initial warrant appears to leave the determination of probable cause at the unfettered discretion of the police officer

and thus not fact-based at all, and not in the hands a a neutral and detached magistrate.

The Fourteenth Amendment states that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Is the state of Washington enforcing a law which abridges the immunities of citizens of the United States and at the same time depriving its citizens of life and liberty without due process of the law, or at the least ignoring an oversight in the law?

The Fourth Amendment's "protection consists in requiring that those inferences of probable cause be drawn by a nuetral and detached magistrate instead of being judged by the officer engaged in the often competative enterprise of ferreting out crime." By not attaching the image and the cyber tip from NCMEC to either of the two affidavits the search warrants fall short of the requirement for a neutral and detached magistrate to determine probable cause. How can a magistrate make the accertion to infringe on constitutionally protected rights based solely on a police officer's accurate or inaccurate description of an image.

Should the law require a police officer to attach any image or video used in determing probable cause

to the affidavit? In State v. Grannis, 84 Wn. App. 546 (1997). The state did provide an opportunity for the magistrate to view the image in question in order that the judge be the person that determines probable cause. This should be a requirement.

The decisions of the Washington Supreme Court in State v. Boyd, 160 W. 2d 424, 158 P.3d 54 (2007), and State v. Grenning, 169 Wn. 2d 47, 234 P. 3d 169 (2010), requires prosecutors to duplicate and distribute depictions of a minor engaged in sexually explicit conduct ("child pornography") to the defense attorney and with limited access to the defendant as part of the discovery process in a criminal prosecution. These rulings ensure that the defendant is given a fair trial and an opportunity to mount a meaningful defense. Why is there no requirements for a police officer to attach images, video's and any tips to the affidavit as part of the search warrant process in order to ensure that the magistrate does not act in a "rubber stamp" capacity as condemned in Aguilar v. Texas, and thus protecting the IV Amendment rights of the citizens of the United States to be secure against unlawful search and seizure. As it stands the magistrate may be forced to make inferences based on a misleading or inaccurate affidavit.

Neither police officer attached the image in question or the cyber tip from NCMEC to their affidavits.

There was a vast difference in the disciptions of the image given by the two affiants proving the need for the image(s), video(s) and tips to be attached to the affidavits in order that a magistrate be given the facts he/she needs in the determination of probable cause. We do not allow prosecutors to simply describe depictions of a minor engaged in sexually explicite conduct for a defense attorney, so, why do we allow police officers to describe an image of "suspected child pornography" when our IV Amendment rights are in question? this question should be determined by the Supreme Court of the state of Washington.

VI Conclusion

Mr. Clark respectfully requests this court to accept review for the reasons indicated in part V of this document and to reverse Mr. Clark's convictions as there was no probable cause determination to arrest Mr. Clark. Mr. Clark also respectfully urges the court to consider adjusting the language of the law requiring police officers attach all pertinent information including any picture or video to the affidavit in support of probable cause so that the magistrate alone can determine probable cause for search warrants as was intend by legislation. This situation is a significant question of law under the U.S. Constitution and the Constitution of the state of Washington. It also posses substantial public interest and should be determined

by the Supreme Court of the state of Washington.

Respectfully submitted

Nicolas A. Clark

Appellant, Pro Se

Filed
Washington State
Court of Appeals
Division Two

June 22, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICOLAS AARON CLARK, Appellant.	No. 54069-0 II UNPUBLISHED OPINION

WORSWICK, J.—Nicolas Aaron Clark appeals his convictions and sentence for three counts of sexual exploitation of a minor, two counts of first degree child molestation, and six counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. Clark argues that the trial court erred when it denied his motion to suppress evidence seized from his electronic devices. He argues that the affidavit in support of a search warrant was insufficient to establish probable cause. Clark also argues that the independent source doctrine does not apply to another warrant police officers later obtained to cure any defects in the first warrant. Clark also raises several additional arguments in a statement of additional grounds for review (SAG).

We hold that the first warrant was supported by probable cause and, accordingly, we do not reach whether the independent source doctrine applies to the later warrant. We further hold that Clark's SAG claims fail to raise any meritorious issues. Thus, we affirm.

FACTS

I. NCMEC TIP AND FIRST WARRANT

On August 30, 2018, Vancouver Police Department Sergeant Joe Graaff assigned Detective Chadd Nolan an investigative tip from the National Center for Missing and Exploited Children (NCMEC). The tip explained that Tumblr.com, an electronic service provider, submitted information to the NCMEC tip line that an image of suspected child pornography had been uploaded through its servers.[1] Tumblr.com reported "that on or about June 23, 2018, a subject using the Uniform Resource Locator (URL) funrufus.tumblr.com attempted to, or did, pass an image identified as child pornography through their servers." Clerk's Papers (CP) at 235. The tip included two Internet Protocol (IP) addresses of the subject at the time of the incident. Based on the IP addresses, police officers were able to verify that the subject spent time in Vancouver.

Based on this tip, Detective Nolan filed an affidavit for a search warrant on September 26, 2018. The affidavit requested subscriber information from Verizon and Comcast related to the IP addresses, as well as information from Tumblr.com and Yahoo related to the URL and e-mail accounts provided in the tip. Detective Nolan included information describing his experience and training in cybercrime, facts about Tumblr.com and the "funrufus" account, and the IP addresses. Detective Nolan's affidavit described the image:

> The suspect image contains a single pre-pubescent female being directed to pose for the camera. The child is clothed in underwear. However the child has been instructed to pull aside her underwear exposing her vagina. The child's legs are separated making the focal point of the picture the vagina area.

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[1] Tumblr.com is a social network website that allows individuals to share photos, videos, and other media through its platform.

CP at 132. The image was not attached to the affidavit.

Based on this affidavit, the trial court granted a search warrant (September 2018 warrant) to collect subscriber information from Verizon related to the suspect IP addresses. Verizon provided responsive data that showed accounts connected to the IP addresses were registered to a Camas address owned by Clark and his wife, and a business in Vancouver owned and operated by Clark. Verizon also provided a cellular telephone number associated with the suspect cell phone that matched Clark's number.

II. Second Warrant and Arrest

On October 1, 2018, based on the information collected from Verizon, police officers sought and received a second search warrant (October 2018 warrant) to search Clark's residence and business. The October 2018 warrant included permission to search any electronic devices discovered at the house or business.

On October 5, 2018, one team of police officers searched Clark's home while another team searched his business. Police officers rang the doorbell at Clark's home, and Clark answered the door. Officers explained to Clark that they had a search warrant and asked him to step outside, which he did. Clark had an iPhone on his belt that officers seized. Officers examined the phone and determined that the number matched the one provided by Verizon. A search of the contents of the phone revealed more than 1,000 images depicting children engaged in sexual conduct. The phone also contained stored accounts, including a Tumblr.com application, with "funrufus" as the user name. Officers arrested Clark.

Subsequent analysis of other electronic devices registered to Clark and seized from the home, revealed other caches of child pornography. On October 9, 2018, the State charged Clark

with five counts of first degree possession of depictions of a minor engaged in sexually explicit conduct and one count of second degree possession of depiction of a minor engaged in sexually explicit conduct.

Some images found on Clark's devices depicted a female child in a pink nightgown touching an adult penis, and other images depicted the hand of an adult male. By comparing bed sheets and underwear located in Clark's house to those depicted in the photographs, police determined that these images were created at Clark's residence.

III. THIRD WARRANT AND AMENDED INFORMATION

On December 4, 2018, Detective Nolan requested and received a third warrant (December 2018 warrant), based on the comparisons of the photographs, to re-enter the Clark residence to seize clothing and bed sheets observed in the images. Police officers also obtained photographs of Clark's exposed body. During the search, officers seized bed sheets and a nightgown matching those in the images. Clark's wife then identified a child in the images as someone she knew and was closely associated with.

On December 6, 2018, the State filed an amended information. In addition to the charges of possession of depictions of a minor engaged in sexually explicit conduct, the State added one count of first degree rape of a child, three counts of sexual exploitation of a minor, and two counts of first degree child molestation. The State also alleged sentencing aggravators of using a position of trust or confidence to facilitate the commission of the crimes, RCW 9.94A.535(3)(n), and the free crime aggravator under RCW 9.94A.535(2)(c).

IV. Motion to Suppress Evidence and Fourth Warrant

On February 15, 2019, Clark filed a motion to suppress all evidence collected during the course of the police investigation, arguing that Detective Nolan's affidavit in support of the September 2018 warrant failed to establish probable cause. In response to Clark's motion, Sergeant Graaff sought an additional warrant (April 2019 warrant) based on an affidavit signed by Sergeant Graaff that did not include any information gained as a result of the first warrant. Clark stipulated that none of the evidence seized following the first warrant was used in Sergeant Graaff's affidavit.

Sergeant Graaff's affidavit, filed in April 2019, again requested subscriber information from Verizon. The affidavit also included information from the tip regarding NCMEC and Tumblr.com, the information about the "funrufus" account, and the IP address information. Sergeant Graaff's affidavit contained a more graphic description of the image provided in the tip and did not refer to the child being directed or instructed to pose in any particular manner. The trial court signed the April 2019 search warrant. However, police did not serve the warrant on or seek the information from Verizon.

The trial court held a CrR 3.6 hearing on Clark's motion to suppress on August 19, 2019. The State argued that both the September 2018 warrant and the April 2019 warrant were supported by probable cause and that if the trial court disagreed, the evidence would still be admissible under the independent source doctrine. The trial court agreed with the State. In its conclusions of law regarding the September 2018 warrant's probable cause, the trial court concluded:

> 3.3 The description of the image of the juvenile female in question meets the definition of sexually explicit conduct found in RCW 9.68A.070.

> 3.4 The affidavit's description that suspected child pornography had been uploaded and that the URL funrufus.tumblr.com passed or attempted to pass an image identified as child pornography through their servers is a sufficient description of the defendant's alleged criminal activity.
>
> 3.5 While the use of the term "child pornography" may not satisfy the particularity requirement of the Fourteenth Amendment, the detailed description of the photograph found in the search warrant affidavit satisfies the particularity requirement.
>
> 3.7 . . . In the case at bench, the focus of the image is on a minor female's vagina with legs spread and underwear pulled aside. The inference is that the child was posed for sexual stimulation.
>
> 3.8 The search warrant affidavit establishes probable cause.

CP at 235-36.

Likewise, regarding the April 2019 warrant's probable cause, the trial court concluded:

> 4.1 Washington [S]tate recognizes the independent source doctrine as an exception to the exclusionary rule. *State v. Coates*, 107 Wn.2d 882, 887 (1987) (explaining that a search warrant may be upheld if the affidavit contains sufficient facts to establish probable cause independent of any illegally obtained information in the affidavit).
>
> 4.2 The second search warrant affidavit establishes probable cause.

CP at 236 (citation omitted).

V. TRIAL AND SENTENCE

Clark waived his right to a trial by jury and the case proceeded to a bench trial on September 10, 2019. In Clark's waiver, he stated, "I understand that by waiving my right to a jury trial, I am still presumed innocent but that the Judge alone will decide whether the State has proven my guilt beyond a reasonable doubt." CP at 233.

At trial, Clark's wife identified a girl depicted in images recovered by police, testifying that she was a child Clark's wife knew and was closely associated with. She testified that the child would have been eight years old or younger in the images. Clark's wife was also able to identify Clark's body parts in the images.

The trial court found Clark guilty of three counts of sexual exploitation of a minor, two counts of first degree child molestation, and six counts of first degree possession of depictions of a minor engaged in sexually explicit conduct.[2] The trial court found Clark not guilty on the charge of first degree rape of a child. The trial court also found Clark used his position of trust or confidence to facilitate the commission of the crimes and also added the free crime aggravator under RCW 9.94A.535(2)(c).[3] The trial court sentenced Clark to an exceptional sentence of 258 months based on the aggravating factors.

Clark appeals his judgment and sentence.

ANALYSIS

I. September 2018 Affidavit

Clark argues that the trial court erred when it denied his motion to suppress because Detective Nolan's affidavit was insufficient to establish probable cause for the September 2018

[2] The State also charged Clark with one count of witness tampering in an amended information on the day of trial. CP at 240. Although the trial court found Clark guilty of witness tampering beyond a reasonable doubt in an oral ruling, the court did not mention this charge at sentencing or include the charge or conviction in the judgment and sentence form or the warrant of commitment to the Department of Corrections. *Compare* Verbatim Report of Proceedings at 318 *and* CP at 364-65, 381-82. It is unclear from the record on appeal whether this omission was intentional or due to oversight.

[3] RCW 9.94A.535(2)(c) applies when the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

warrant. Specifically, he argues that Detective Nolan's affidavit was speculative, that it was impossible to tell from the affidavit if illegal activity took place, and that the image may have been a "'selfie'" that was not illegal to possess. Br. of Appellant at 15. He also argues that the independent source doctrine does not apply to Sergeant Graaff's affidavit supporting the April 2019 warrant. We disagree and hold that Detective Nolan's affidavit was sufficient to support a finding of probable cause. Accordingly, we do not reach the independent source doctrine issue.

A magistrate may issue a warrant only on a showing of "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. "The Constitution requires that a detached and neutral magistrate or judge make the determination of probable cause." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). "We generally review the issuance of a search warrant only for an abuse of discretion." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). During a suppression hearing, a "trial court acts in an appellate-like capacity," reviewing the magistrate's decision. *Neth*, 165 Wn.2d at 182.

We defer to the magistrate's determination on probable cause but review the trial court's legal conclusions de novo. *Neth*, 165 Wn.2d at 182. Our review is limited to the four corners of the affidavit filed in support of the warrant. *Neth*, 165 Wn.2d at 182. A magistrate may issue a search warrant only where the affidavit shows facts and circumstances sufficient for a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of criminal activity will be found at the place to be searched. *Neth*, 165 Wn.2d at 182; *Maddox*, 152 Wn.2d at 509. "It is only the probability of criminal activity, not a prima facie

showing of it, that governs probable cause. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *Maddox*, 152 Wn.2d at 505.

We may take the affiant's experience and expertise into account when determining whether probable cause was established. *Maddox*, 152 Wn.2d at 511. However, the affidavit must be based on more than the affiant's suspicions or beliefs. *Neth*, 165 Wn.2d at 182. We do not review the affidavit "hypertechnically;" we apply a commonsense analysis. *Neth*, 165 Wn.2d at 182. "All doubts are resolved in favor of the warrant's validity." *Maddox*, 152 Wn.2d at 509.

Possession of depictions of a minor engaged in sexually explicit conduct is a crime. RCW 9.68A.070. Under RCW 9.68A.011(4)(f), "sexually explicit conduct" includes:

> [A]ctual or simulated . . . [d]epiction 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.

A commonsense analysis of Detective Nolan's affidavit shows that it set forth facts and circumstances sufficient for a reasonable person to conclude there was a probability of criminal activity. *Neth*, 165 Wn.2d at 182. Detective Nolan described Tumblr.com, explained subscriber information as it related to Verizon, the "funrufus" account, and IP addresses. He included information from Tumblr.com and Yahoo related to the URL and e-mail accounts provided in the tip. Detective Nolan also described his experience and training in cybercrime. Detective Nolan described the image so that the reader could determine that (1) it contained a single pre-pubescent female clothed in underwear, (2) with the underwear pulled aside to expose her vagina, and (3) the child's legs are separated making the focal point of the picture the vagina area.

The description of the image, when taken together with the affidavit's description of the Tumblr.com site, Detective Nolan's experience, and the other information from the NCMEC tip is sufficient to make a reasonable inference that criminal activity would be found by a search. *Maddox*, 152 Wn.2d at 505, 509. The image described meets the statutory definition of a "depiction of a minor engaged in sexually explicit conduct" under RCW 9.68A.070 and 9.68A.011(4)(f). Because Tumblr.com is used to share photos, and because the image was passed through Tumblr.com's servers from an IP address located in Vancouver, it is reasonable to infer from the affidavit that a person in Vancouver was involved in criminal activity. Thus, the September 2018 warrant was supported by sufficient probable cause.

Clark argues that Detective Nolan's affidavit was speculative. He argues that the affidavit was impermissibly based on Detective Nolan's suspicions and beliefs. *See Neth*, 165 Wn.2d at 183. Clark bases this argument on Detective Nolan's description of the image, which stated that the child depicted was "directed" to pose in a certain manner and that the child was "instructed" to pull aside her underwear, even though there is no information in the still image that suggests direction or instruction. Br. of Appellant at 15-16. Clark argues that those speculations were critical to the magistrate's determination. Furthermore, he argues that because the description was "based only on *suspected* child pornography, not actual child pornography," it was insufficient to support probable cause. Br. of Appellant at 16 (emphasis added). We disagree.

As explained above, it is possible to infer from the description of the image that it contained a depiction of a minor engaged in sexually explicit conduct. The "directed" and "instructed" terms used, even assuming they are speculative, contribute nothing to a reasonable

person making an inference that the image might contain child pornography. Moreover, that the image may have been only *suspected* child pornography does not weaken the inference of criminal activity because the affiant need create only the reasonable inference of the probability of criminal activity, not a prima facie showing of it. *Neth*, 165 Wn.2d at 182; *Maddox*, 152 Wn.2d at 505.

Clark also argues that it is impossible to tell from the affidavit "whether the user was uploading or downloading the image, sending it to someone, or having it sent to them by someone else." But it does not matter. The suspected crime was one of possession. RCW 9.68A.070. It would not matter which of the actions the defendant was taking; any or all may have established possession.

Finally, Clark argues that the image may be a "'selfie'" photograph taken by the girl and as such would not be illegal to possess. Br. of Appellant at 15. To support this argument, Clark cites to *State v. Grannis*, 84 Wn. App. 546, 550-51, 930 P.2d 327 (1997) and *State v. Chester*, 82 Wn. App. 422, 428, 918 P.2d 514 (1996), *aff'd*, 133 Wn.2d 15, 940 P.2d 1374 (1997). This argument is flawed.

Grannis and *Chester* interpreted former RCW 9.68A.011(3)(c) (1989), which stated that an image became explicit only when the behavior of the subject in a given image was "'for the purpose of sexual stimulation of the viewer.'" *Grannis*, 84 Wn. App. at 549 (quoting former RCW 9.68A.011(3)(c)); *Chester*, 82 Wn. App. at 425 (quoting former RCW 9.68A.011(3)(c)). In 2010, the legislature revised the statute to delete that language and created RCW 9.68A.011(4)(f) as it reads today. ENGROSSED SUBSTITUTE H.B. 2424, 61st Leg., Reg. Sess. (Wash. 2010); *State v Powell*, 181 Wn. App. 716, 728, 326 P.3d 859 (2014).

We explained the change in *Powell*:

> 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.

181 Wn. App. at 728 (quoting RCW 9.68A.011(4)(f)).

Thus, for the purposes of supporting probable cause here, the description of the image and other facts in the affidavit were sufficient to raise a reasonable inference that illegal conduct took place. Even assuming that it was impossible to tell whether or not the child took the image as a selfie, the description of the image and the facts surrounding its transmission through Internet servers on a social media platform is enough for a reasonable person to conclude that there was a probability of illegal activity. RCW 9.68A.011(4)(f). Accordingly, we hold that Detective Nolan's affidavit was sufficient to establish probable cause for the September 2018 warrant. Thus, we need not reach whether Sergeant Graaff's affidavit established probable cause under the independent source doctrine for the April 2019 warrant.

II. Statement of Additional Grounds for Review

Clark raises eight additional issues in his SAG. Clark raises multiple issues for the first time on appeal, reaches outside the record, re-raises issues argued in his brief, and he raises no issue meriting reversal.

A. *Legal Principles*

A SAG must adequately "inform us of the nature and occurrence of the alleged errors." *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013). We do not review matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Issues involving facts outside of the record are properly raised in a personal restraint petition, rather than a SAG. *Calvin*, 176 Wn. App. at 26.

B. *Sixth Amendment Right to Face Accuser*

Clark argues he was denied his right to face his accuser under the Sixth Amendment to the United States Constitution. Clark argues that a Tumblr.com employee who submitted the tip was his accuser and that he was denied the opportunity to examine the declarant in violation of the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We do not reach this argument because Clark did not object below and did not preserve the issue for appeal.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. But an objection must be made in the trial court to preserve the error for appeal. *State v. O'Cain*, 169 Wn. App. 228, 235, 279 P.3d 926 (2012) ("[T]he right to confrontation must be asserted at or before trial or be lost."); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 313-14, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (claim of error premised on the confrontation clause must be asserted at or before trial or be lost).

Here, Clark knew that the State intended to use the Tumblr.com tip against him because it was part of the September 2018 affidavit and search warrant. To preserve this issue, Clark then

had to object and request the Tumblr.com employee to appear at trial. Because he failed to do so, Clark has waived the right to assign error here.

C. *Fifth Amendment Right against Self-Incrimination and Sixth Amendment Right to Counsel*

Clark argues that police officers violated his rights under the Fifth and Sixth Amendments to the United States Constitution by coercing him into revealing the password to his cell phone and computer. Clark did not raise this error in the trial court and he draws on facts outside the record on appeal to make this argument. Because Clark raises this issue for the first time on appeal, we do not consider it.

We will not generally review an error not raised in the trial court. RAP 2.5(a). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." The error must be both manifest and truly of constitutional magnitude. *In re Det. of Reyes*, 176 Wn. App. 821, 842, 309 P.3d 745, 315 P.3d 532 (2013). A claim is manifest if the facts in the record show that the constitutional error prejudiced the defendant's trial. *McFarland*, 127 Wn.2d at 333. Where a party claims constitutional error, we preview the merits of the claim to determine whether the argument is likely to succeed. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). However, if the necessary facts are not in the record, "no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333.

Here, Clark reaches outside the record to argue that police officers coerced him into revealing his passwords. Because the facts he draws on are not in the record, he does not show prejudice and cannot show a manifest error. Thus, under RAP 2.5, we do not consider his claim.

D. *Neutral and Detached Magistrate*

Clark argues that the magistrate who issued the September 2018 search warrant was not neutral and detached in her finding of probable cause. We disagree.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require that a neutral and detached magistrate make the determination of probable cause to issue a warrant. *Maddox*, 152 Wn.2d at 505; *State v. Byrd*, 178 Wn.2d 611, 629,310 P.3d 793 (2013). This protection exists to ensure the decision is based on facts presented to the magistrate, instead of being made by police officers involved in the investigation. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012).

We review the magistrate's decision to ensure the magistrate did "'not serve merely as a rubber stamp for the police.'" *Lyons*, 174 Wn.2d at 360 (quoting *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). The party challenging the neutrality of a magistrate must show that the judge did not provide independent judgment over the police request and that the subsequent decision was not totally divorced from the investigation. *See Staats v. Brown*, 139 Wn.2d 757, 777, 991 P.2d 615 (2000); *State v. Smith*, 16 Wn. App. 425, 427-28, 558 P.2d 265 (1976).

Here, Clark makes no showing that the magistrate's function was not totally divorced from the police officers' search. There is nothing in the record on appeal that suggests the reviewing magistrate provided anything other than independent judgment over the affidavit and warrant decision. Thus, Clark's argument fails.

E. *Probable Cause*

Clark re-raises the argument from his brief that Detective Nolan's affidavit arising from the NCMEC and Tumblr.com tip was insufficient to support probable cause. For the reasons explained above, this argument fails.

F. *Independent Source Doctrine*

Clark re-raises the argument from his brief that the independent source doctrine does not apply to the affidavit Sergeant Graaff issued to cure any faults with the September 2018 warrant. Because we hold that Detective Nolan's affidavit supports probable cause, we do not reach this argument.

G. *Witness Tampering: Sufficiency of the Evidence*

Clark argues that there was insufficient evidence to convict him of witness tampering. Under RAP 2.2(a)(1), a party may appeal only from a final judgment entered below. Under RAP 2.4(a), we review the decision designated in the notice of appeal. Here, neither the final judgment below nor Clark's notice of appeal include a conviction for witness tampering. Accordingly, we do not consider this argument.

H. *Offender Score Calculation*

Clark argues that the trial court incorrectly calculated his offender score. He argues that the trial court based his score on his current convictions but that the trial court should have based it only on the score of his past convictions. We disagree.

We review a trial court's offender score calculation de novo. *State v. Schwartz*, 194 Wn.2d 432, 438, 450 P.3d 141 (2019). Trial courts must calculate offender scores by

determining a defendant's criminal history based on his or her prior convictions under the formula in RCW 9.94A.525. *Schwartz*, 194 Wn.2d at 438.

RCW 9.94A.525(1) provides: "Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Under RCW 9.94A.589(1)(a), "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score." The Sentencing Reform Act of 1981, chapter 9.94A RCW, does not define "current offense," but our Supreme Court has defined it "functionally as convictions entered or sentenced on the same day." *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013). Indeed, our courts have repeatedly held that current offenses are treated as prior convictions when calculating an offender score, especially when imposing an exceptional sentence. *State v. France*, 176 Wn. App. 463, 468, 308 P.3d 812 (2013) (citing RCW 9.94A.525(1)); *State v. Newlun*, 142 Wn. App. 730, 742, 176 P.3d 529 (2008) ("[F]or purposes of computing the offender score in relation to the imposition of an exceptional consecutive sentence, the legislature has determined that current offenses are to be treated as 'prior convictions.'").

Here, Clark had no known prior felony convictions before his conviction in this case. However, the trial court convicted Clark of 11 felonies. Based on these current offenses, the trial court correctly calculated Clark's offender score.

I. *Right to Jury Trial on Sentencing Enhancements*

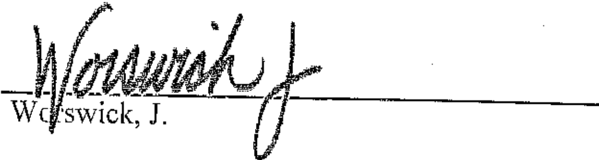
Clark argues that he was denied a jury trial during sentencing when the trial court added the free crime aggravator. He argues that the trial court was required to hold a jury trial to find

facts that increase penalties beyond a statutory maximum under *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But Clark waived his right to a trial by jury, stating, "I understand that by waiving my right to a jury trial, I am still presumed innocent but that the Judge alone will decide whether the State has proven my guilt beyond a reasonable doubt." CP at 233. Accordingly, Clark waived his right to trial by jury and therefore the trial court at the bench trial properly considered the facts for Clark's sentencing.

CONCLUSION

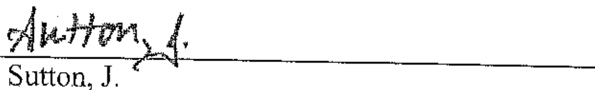
We hold that the September 2018 warrant was supported by probable cause, and we do not reach the independent source doctrine question. We further hold that Clark's SAG claims fail to raise any meritorious issues. Accordingly, we affirm.

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.


Worswick, J.

We concur:

Lee, C.J.


Sutton, J.

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