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DIVISION II

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STATE OF WASHINGTON
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No. 43568-3-II

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

MARK BESOLA,
Defendant-Appellant.

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

The Honorable RONALD CULPEPPER, VICKI HOGAN and EDMUND MURPHY, Judges

---

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. Because the State did not instruct the jury that RCW 9.68A.070 and RCW 9.68A.050 required that the State prove that Besola knew that the persons depicted were minors, and because the State presented no evidence on that element, Besola's convictions are unconstitutional.

2. The trial court erred in finding that the search warrant addendum in this case described the items to be seized with sufficient particularity because it referenced the statute that criminalizes the possession of child pornography. Reason for Admission III, CP 30.

3. The trial court erred in finding that Kellie Westfall was a citizen informant. Finding of Fact 4, CP 12.

4. The trial court erred in finding that Kellie Westfall gathered her information in a reliable way and from a reliable source. Finding of Fact 5, CP 13.

5. The trial court erred in failing to find that police intentionally or recklessly omitted facts from the search warrant affidavit. Finding of Fact 6, CP 13.

6. The trial court erred in finding that the omitted statements were not material or necessary to a finding of probable cause. Finding of Fact 7, CP 14.

7. The trial judge impermissibly commented on the evidence when he stated on the record that Besola's witness was failing to answer the prosecutor's questions and that he found her "frustrating."

8. There was insufficient evidence for the jury to find Besola guilty of possessing child pornography.

9. There was insufficient evidence for the jury to find Besola guilty of dealing in child pornography.

10. Count 1 and 2 encompass the same criminal conduct.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because RCW 9.68A.070 and RCW 9.68A.050 require the State to prove that Besola knew that the persons depicted were minors, is Besola's conviction unconstitutional because the instructions omitted this element and because the State failed to produce any evidence of this element?

2. Did the trial court err in failing to find that the search of Besola's residence violated the Fourth Amendment because the second warrant, obtained from a different judge pursuant to an "addendum", failed to describe with particularity items for which probable cause existed to search or seize and instead authorized the search and seizure of every videotape, CD, DVD and audio and video media in the house and every

computer hard drive or laptop computer and any memory storage device in the home and all printed pornography?

2. Did the trial court err when it permitted the police to search Besola's residence based upon an uncorroborated tip from a known criminal?

3. Did the trial court err in failing to find that the omissions about Westfall from the search warrant affidavit were intentional or reckless and material?

4. Did the trial judge err when he commented to the jury that Besola's witness was not answering the State's questions and agreed that the witness was "frustrating?"

5. Was there sufficient proof to demonstrate that Besola had actual or constructive possession of the child pornography?

6. Was there sufficient proof to demonstrate that Besola duplicated any child pornography?

7. Was there sufficient proof that Besola was Swenson's accomplice in these crimes?

8. Are possession and duplication of child pornography the "same criminal conduct?"

III.
STATEMENT OF THE CASE

A. THE CHARGES

Dr. Mark L. Besola was charged with dealing in the depictions of minors engaged in sexually explicit conduct, in violation of RCW 9.68A.050(1) and possession of depictions of minors engaged in sexually explicit conduct, in violation of RCW 9.68A.070. CP 33-34.

The charges were based upon evidence seized pursuant to two different warrants signed on April 21, 2009, for the search and seizure of Besola's home in Lake Tapps.

B. THE FIRST SEARCH WARRANT SIGNED AT 5:05 P.M.[1]

On January 20, 2009, the Pierce County prosecutor's office charged Kellie Westfall with possession of a stolen vehicle, possession of methamphetamine, possession of another's identification, third degree driving while license suspended, and obstructing law enforcement. She petitioned for and obtained referral to Drug Court, stipulating to the charged crimes and the underlying facts in the statement of probable cause. She failed to show up for a drug court review hearing on February 25, 2009, and the court issued a warrant for her arrest. On March 26, the

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[1] CP 310.

police took her back into custody, and the court ordered her to be held without bail pending trial.

While in custody on April 19, 2009, Westfall gave a tape-recorded statement to PCSO Det. Sgt. Teresa Berg, Bonney Lake PD Det. Boyle, and PCSO Det. Vance Tjossem.[2] In that interview, Westfall gave information about Dr. Mark Besola and his live-in boyfriend, Jeffrey Swenson. CP 251. She was good friends with Swenson but described him as "way gone" in his methamphetamine addiction. CP 256. She said that Swenson lived with Besola because "he had to do what he had to do to get by in life." CP 249. She said that Besola "just makes me sick." *Id.* She also said Besola did not like her, and she was no longer allowed in his house. She told the police that Swenson would take anything that was not nailed down and "hock it." CP 276.

During that interview, Westfall claimed that she had seen child pornography at Besola's home in October, 2008. She alleged that the CDs/DVDs and computers, which she believed contained child pornography, were still present in the home on March 25, 2009.

In her statement, Westfall claimed that she had both bought and sold drugs to and from Besola. She told law enforcement that Besola was

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[2] The tape suggests that the statement was taken before or during one of Westfall's court appearances. CP 253.

a veterinarian, and that she had seen Vicodin, liquid morphine, and other prescription drugs at Besola's home. She reported seeing syringes, but told law enforcement that Besola is a diabetic. She also stated that the drugs she had seen in the house were actually pharmaceuticals from Besola's veterinary clinic, although she never actually read the labels of the drugs she saw. She also stated that the Valium she saw in the house was for Besola's dog which had cancer.

Westfall said that Besola was very overweight and because of that he "can't make it up and down the stairs." CP 261. Thus, Swenson used the upstairs room "a lot." *Id.*

Westfall offered to continue cooperating with the officers and said she was willing to testify about these matters. In fact, she said that "there were so many things over the months . . . But I'm trying to make sure I don't forget any major ones. But I'm sure I'll think of more." CP 291. She described how she made people comfortable enough to confess to her. CP 295. She clearly offered to do more work for the police stating: "I'm sure there are tons more things I can tell you . . ." CP 294. During her statement, Westfall described herself as a "master manipulator."

Several days after the police had taken her statement, the Pierce County Superior Court issued an order releasing her from custody and ordering her to report back to drug court.

On April 21, 2009, the police applied for a search warrant for evidence of the crimes of Unlawful Possession of Child Pornography, RCW 9.68A.070, and of Unlawful Possession of Controlled Substance, RCW 69.50.401. In their affidavit for search warrant, the police failed to include the following facts from Westfall's statement:

- Westfall had been charged in a five-count information for possession of a stolen vehicle, methamphetamines, and another's identification, driving on a suspended license, and obstructing law enforcement;
- Westfall had entered a drug court petition, and that she stipulated that there were facts sufficient to find her guilty of the charged offenses;
- Westfall had failed to appear for drug court and a warrant had been issued for her arrest;
- Westfall had been booked into Pierce County jail and a no-bail hold had been ordered on March 26, 2009;
- Westfall was incarcerated at the time she gave her April 9 statement to law enforcement;
- Westfall was released from jail on her own recognizance and ordered back to drug court;

- Westfall perceived Besola to be jealous of her friendship with Swenson and was no longer welcome in the house;
- The drugs Westfall saw in the house were actually pharmaceuticals from Besola's veterinary clinic and she never actually saw the labels of the drugs she claimed Besola was taking; and
- The Valium was for Besola's ailing dog.

Given the partial information provided in the search warrant affidavit, Pierce County Superior Court Judge John McCarthy found sufficient evidence to search the Lake Tapps residence for drugs. However, he found that there was insufficient evidence to believe the home contained child pornography because he deleted those provisions from the warrant. The final warrant stated as follows:

> That, on or about March 25, 2009 in Pierce County, Washington, a felony, to-wit: R.C.W. 9.68A.070 Possession of Child Pornography and R.C.W. 69.50.401 Unlawful Possession of Controlled Substances was committed by the act, procurement or omission of another, that the following evidence, to-wit:
>
> 1. Photographs of the exterior and interior of the home, garage, any other structures, and any evidence found;
>
> ~~2. Any and all video tapes, CDs, DVDs, or any other visual and/or audio recordings,~~
>
> ~~3. Any and all printed pornographic materials;~~
>
> ~~4. Any photographs, but particularly~~ of minors;

~~5. Any and all computer hard drives or laptop computers and any memory storage devices;~~

~~6. Any and all documents demonstrating purchase, sale, or transfer of pornographic material;~~

7. Any controlled substances manufactured, distributed, dispensed, acquired or possessed;

8. Equipment, products, and materials of any kind which are used, or intended for use, in the manufacturing, compounding, processing, delivering, or packaging of controlled substances;

9. Books, records, receipts, notes, ledgers, or other documents relating to the possession, purchasing, selling, or delivery of controlled substances;

10. Medical records, receipts, prescriptions, licenses, and/or documents pertaining to any medical condition concerning the use, possession, manufacture, distribution, or sale of controlled substances; and

11. Documents demonstrating dominion and control is material to the investigation or prosecution of the above described felony for the following reasons:

1. To completely document the condition of the residence, property, and evidence;

~~2. To obtain any and all visual and/or audio recordings of the above crimes;~~

~~3. To obtain any and all printed pornographic material that may be related to the above crimes;~~

~~4. To obtain any photographs of possible minor victims and to aid in any victim identification;~~

~~5. To obtain any computers, computer equipment, or memory storage devices used to facilitate the above crimes;~~

~~6. To obtain any documents verifying any purchase, sale, or transfer of pornographic materials;~~

7. To obtain any controlled substances;

8. To obtain any related equipment or materials used in the above described crimes;

9. To obtain any documents or records relating to the above described crimes;

10. To obtain any medical records, licenses, and similar documentation to demonstrate any legal possession of controlled substances;

11. To demonstrate who has possession and control of the home and any evidence found; and

12. To obtain evidence of the above described crimes

CP 307 (strikethroughs in original).

Officer Kevin Johnson arrived at the house with 6 or 7 deputies along with "patrol people" at 6:45 p.m. RP 362, 374. He testified that the house was very cluttered. RP 524. *See also* Exhibits 72, 121, 130-131, 134, 135-136, 138-142. He stated that during this entry he observed DVDs and CDs primarily in the upstairs master bedroom. RP 525, 364-365. He seized many of them. RP 365-382.

On April 23, 2009, Johnson went back to seize "some handwriting examples." RP 392.

He was asked when he started searching for child pornography. RP 534. He said that before Detective Reigle arrived with the addendum,"

> we were walking around looking at stuff, but at that time our search was focused on something else, so I did not start looking at any of the disks until after that.

RP 534. He allowed, however, that he was not watching everyone else and that:

> I think some things were probably being photographed. I don't know if anybody was marking anything at that point.

RP 534.

Michael Heffy arrived at 6:40 p.m. RP 565. He too seized DVDs and CDs. RP 569-70. He left the residence at 11:45 p.m. RP 578. He did not read the search warrant but rather relied on a "briefing." RP 580. He understood, however, that he was not allowed to search for pornography until after 10:00 p.m. Nonetheless, his search and seizure of CD's and DVDs began well before that time. RP 582.

Deputy Bryon Brockway arrived at 6:40 p.m. RP 596. He entered the front room and immediately seized DVDs and CDs. RP 598.

Deputy Mark Collier also arrived just after 6:30 p.m. and appears to have started seizing CDs immediately. RP 654.

C. THE SEARCH WARRANT "ADDENDUM" SIGNED AT 10:17 P.M.[3]

Detective Reigle was part of the police sex crimes unit. She arrived at 8:00 p.m. because she received word that one or more of the police at the residence had seen DVDs with titles they deemed suspicious. RP 625. Shortly after she got there, Swenson gave a statement to the police indicating that there was child pornography in the house. RP 627. He said that he had viewed the items. RP 550.

Detective Reigle wrote an affidavit in support of a broader search warrant. RP 630-33. She drove about one hour to another judge's house to get an addendum to the initial search warrant signed. RP 636. In the affidavit for the addendum she stated that the police had a search warrant to search for evidence of the crime of Unlawful Possession of Controlled Substance. CP 314. But, during the search of the master bedroom, Detective Hefty located CD/DVD cases in a cardboard box next to the entertainment center. Inside the CD/DVD cases there were numerous writeable CDs or DVDs with handwritten titles which appeared to be "pornographic." *Id.* She also stated that Swenson told the officers that there was child pornography in the house. *Id.*

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[3] CP 313.

As a result, Judge Larkin signed an "addendum" to the first warrant. The addendum stated that there was probable cause to believe the crime of "Possession of Child Pornography, RCW 9.68A.070" was being committed. CP 322. And it gave the police permission to seize:

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

CP 312.

During the trial, the prosecutor complained about the defense asking officers what they were searching for and at what time. RP 584. She said that in the original warrant "Judge Murphy" had authorized the police to "look at media storage devices and computers and all that stuff." *Id.*

Defense counsel noted that the search was completed at 11:30 p.m. RP 586. He stated that he did not believe that the officers could have seized the multitude of evidence regarding the child pornography charge in just one hour. Defense counsel pointed out that even if there were some justification for opening CD cases to look for bindles of drugs, many of

the CDs seized were on spindles. RP 591. He stated that the officers had been every imprecise and "we haven't been able to litigate any of this because Judge Hogan took no oral argument on the 3.6 motion." RP 588. Judge Culpepper said: "I'm not sure there is anything I can do about Judge Hogan's ruling." RP 588.

D. THE TRIAL

There was no dispute that of the thousands of items seized from the Lake Tapps residence, 41 contained child pornography. RP 832. The majority were found in the room where Swenson was living. A good deal of the State's case was devoted to the foundation for and introduction of the various items seized from the Lake Tapps residence.

The State also presented the testimony of John Crawford, a forensic computer examiner. RP 759. The police found three computers at the residence but only one was hooked up and running. RP 762. There was a CD burner hooked up to the working computer. RP 766. There were four child pornography video clips on that computer. RP 773-774.

The State also presented evidence that Besola's handwriting was on only one CD.

Brent Waller testified that he rented an apartment on the Lake Tapps property for about six years. RP 849, 860. He was living on the property during the charging period. RP 860. He said that he knew

Swenson and traded pornography with him once a week. RP 850. He said that Swenson brought lots of other people to the property, some of whom were drug addicts. RP 853, 854. When Besola knew of these people, he kicked them off the property. RP 855. Even though Besola changed the locks on the doors and the security codes Swenson could still manage to get into the house. He also said that Besola was "never around." RP 874.

Randall Karstetter, a forensic computer analyst, testified that he examined the computer hard drive that contained the child pornography videos. He found no evidence that the dates or times that the video were placed on the computer had been manipulated. RP 906-908. All four of the video files had been copied onto the computer on September 26-27, 2008. RP 913. The files were not downloaded but rather transferred from CDs to the computer. Based upon his analysis the computer user had been using the keyboard on the computer continually from the night of the 26th to the early afternoon of the 27th – about 16 hours. RP 924, 927. None of the child pornography files had been accessed again after that date. RP 930-31. In addition, although the files were downloaded, they were not viewed at that time. RP 933-34.

Amelia Besola, Dr. Besola's sister testified that on September 26, 2008, Besola was with her at work at their veterinary clinic. RP 1024. In the evening they went with their mother to a movie. RP 1027. Besola

then spent the night at his sister's house. RP 1028. On the 27th, they went to work in the morning and then took their mother to Lopez Island where they all stayed until the next day. RP 1030-31. She produced Exhibit 208, a record of Besola's transactions at the clinic on September 28, 2008. RP 1050-51.

Amelia knew Swenson because he had lived with Besola on and off for ten years or more. RP 1046-47. He had also worked at the clinic. RP 1031. During that time she saw him copying Besola's handwriting. RP 1032. She stated that he was practicing how to forge Besola's signature. RP 1045. She stated that her brother often fell prey to other people. RP 1054.

She saw Swenson within hours of the search. He was distraught and told her that the child pornography belonged to him. RP 1033-34.

During Amelia Besola's testimony, the prosecutor repeatedly asked if she could tell from certain credit card receipts whether she or her brother performed the services. Amelia said that she could identify her clients from the names on the receipts. RP 1059. Apparently the prosecutor did not understand the answer because the following exchange occurred:

> Ms. Seivers: Your honor, I would ask you to direct the witness to answer the question.

> The Court: I don't know how to do that, Ms. Seivers. They're very simple questions. Ms. Besola seems to be having trouble answering these simple questions. Listen to the questions. What's the next question Ms. Seivers?
>
> Ms. Seivers: That's fine; I'll move on.
>
> The Court: I do understand your frustration, Ms. Seivers.

RP 1059.

Besola testified that he did not download or view any of the child pornography in his home. In 2008, his mother was very ill and he was helping to take care of her. RP 1073-74. In addition, in the spring of 2008, the Lake Tapps house was virtually uninhabitable because of an extensive remodeling project. RP 1076. Thus, Besola moved in with his sister. RP 1077, 1080.

He explained that he was usually at his clinic between 8:00 a.m. and 7:00 p.m. RP 1082. On September 28, 2008, he and his mother and sister were on Lopez Island. RP 1084.

According to Besola, Swenson stayed in the second floor master bedroom. RP 1086. Besola slept on the couch downstairs. RP 1086. Swenson was undeterred by Besola's efforts to keep Swenson and his friends off the property. RP 1088. Swenson brought strangers around when Besola was not there. RP 1089.

Swenson had access to all of the house, including the computers. RP 1091. There was 4,200 square feet of living space. RP 1121. Besola

had no idea that there was child pornography on the computer in the living room or in his home. RP 1092-94. He also testified that the computer found in the living room in April 2009 had just been moved downstairs. RP 1108. He said that he was unaware that there was a CD copier attached to the computer. RP 1113.

E. CLOSING ARGUMENTS

In closing, the prosecutor argued that Besola was guilty either as an accomplice or on a theory of constructive possession. She said:

> Mark Besola provided the home where this occurred, the computer and the Internet access. He paid the bills, so he provided all those accesses. There was also a duplicator that was attached to the computer and the files that were copied.

RP 1149. She argued that by owning the home in which the pornography was found, Besola had "possession" of it:

> These things, all the contraband that was seized, all the child pornography that was seized, was found in the home that was owned by Mark Besola, where Jeffrey Swenson lived and had lived for several years, so both of them had the ability to take possession of the items in the house, to exclude others and they had dominion and control over those premises. They were living there. They could move things as they wanted, take things from the house. Both of them had the ability to possess the items that were in the house.

RP 1155. She repeated this argument at RP 1166.

As to accomplice liability, she stated:

> Both of them could have done this.. . . So the defendants could have worked together as accomplices to make this happen. I could have been one of them. It could have been both of them. But it's a computer in the house where they both live.

CP 1150.

She also argued:

> Amelia Besola, first she couldn't give us straight answers. She didn't want to.

RP 1168.

The jury convicted Besola of both counts. CP 1168.

F. SENTENCING

At sentencing, Besola's criminal history was 3 and his standard range was 31 to 41 months in prison. 6/8/12 RP 4. The court imposed a sentence of 35 months in prison. 6/8/12 RP 20.

IV.
ARGUMENT

A. BECAUSE THE STATE DID NOT INSTRUCT THE JURY THAT RCW 9.68A.070 AND RCW 9.68.050 REQUIRE THAT BESOLA KNEW THAT THE PERSONS DEPICTED WERE MINORS, HIS CONVICTION IS UNCONSTITUTIONAL

In 1999, the Court of Appeals held that Washington's statutory scheme prohibiting possession of child pornography does not require as an element of the crime that a defendant know the age of the persons depicted in the material he is charged with possessing. *State v. Rosul*, 95 Wn. App.

175, 177, 974 P.2d 916, 918, *review denied*, 139 Wn.2d 1006, 989 P.2d 1142 (1999). In *Rosul*, the court held as follows:

> [W]e construe RCW 9.68A.070 as requiring a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed. It is not constitutionally necessary that the State prove a defendant's specific knowledge of the child's age.

But the *Rosul* decision was incorrect.

The government may not impose criminal penalties upon an individual for expression that is protected by the constitution. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); U.S. Const. amend. I; Wash. Const. Art. I, § 5.2. Content-based restrictions on speech must satisfy the court's strict scrutiny, requiring the government have a compelling state interest in regulating the speech and use the least restrictive means available to achieve its objective. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Protected speech does not become unprotected merely because it resembles the latter. *Free Speech*, 535 U.S. at 255.

Sexual expression that is indecent but not obscene is protected by the First Amendment. *Sable Communications*, 492 U.S. at 126. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court ruled for the first time that the First Amendment does not

protect a person's freedom to sell pornography involving children even where the images do not meet the legal standard for obscenity. The *Ferber* Court based its decision upon the harmful sexual abuse that occurs to the actual children used to make the pornography. *Id.* at 756-58. However, the *Ferber* Court carefully delineated the breadth of its holding, ruling that "Where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Free Speech*, 535 U.S. at 251 (citing *Ferber*, at 764-65).

In 1996, Congress tried to expand the reach of child pornography laws by criminalizing the possession or production of an image that "is, or appears to be, of a minor ...." *Free Speech*, 535 U.S. at 241. The government urged the Supreme Court to uphold the constitutionality of this law by claiming that pornography that appeared to contain a minor encouraged child pornography and could lead to sexual abuse of actual minors. *Id.*

The Supreme Court rejected the government's rationale for criminalizing pornography that only appears to contain a minor. *Id.* at 251. The Court ruled that the possibility of harm to minors from the sexual images of people who merely appear to be minors was too tenuous and indirect to be permitted under the rigorous rules applied when the government suppresses speech. *Id.* at 250-54.

The *Free Speech Court* also relied upon the well-established tenet that sexual expression may be indecent, but that does not make it obscene and therefore a legitimate subject of criminal sanctions. *Free Speech*, 535 U.S. at 245; *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech,* 535 U.S. at 255. Moreover, depictions of what appears to be a minor engaging in sexually explicit acts have legitimate and historical uses in art, literature, movies, and other forums and thus may not be made illegal solely based on the low value of the speech. *Id.* at 248-49.

As a result of the *Free Speech* decision, in *State v. Luther*, 157 Wn.2d 63, 71, 134 P.3d 205, 210, *cert. denied*, 549 U.S. 978, 127 S.Ct. 440, 166 L.Ed.2d 312 (2006), our Supreme Court held that RCW 9.68A.070 prohibits only possession of child pornography involving actual minors, and the statute contains a "knowingly" scienter element. By importing that element, the court held that RCW 9.68A.070 met First Amendment requirements, and did not sweep within its prohibition protected speech.

Although not entirely clear, it appears that what the Court meant was that not only do defendants have to know they are possessing or duplicating pornography, they must also know that the persons depicted

are minors. This must be that Court's interpretation because RCW 9.68A.070 and .050 are similar to the federal statute in that they bar the knowing possession of visual or printed matter depicting a minor engaged in sexually explicit conduct. They do not expressly prohibit depictions that merely "appear to be" of a minor. Thus, to the extent that there was any ambiguity as to the scope of the state law, the Court must have been narrowly construing the statutes to prohibit only the possession of images involving actual minors in order to comply with the decision in *Ashcroft*. "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech*, 535 U.S. at 255.

Following these decisions, the WPIC committee has suggested that the only way to save such a prosecution is to include in the instructions an element that tells the jury that it must find beyond a reasonable doubt that the persons depicted were minors. *See also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 49A.04. And, in fact, the pattern jury instruction includes that element.

However, the jury instructions in this case did not include that element. CP 91, 98. Defense counsel attempted to remedy this by proposing an "unwitting defense" instruction. RP 1127. But during the colloquy the prosecutor stated that the holding in *Rosul* was controlling

and did not require her to prove that Besola knew the age of the person depicted. *Id.*

As a result, the jury was never instructed that it had to find that persons depicted in the videos seized were minors. Moreover, the State presented no evidence that Besola knew that videos depicted minors because the prosecutor did not believe that she had to present such proof. For these reasons, this Court must reverse both convictions because they are unconstitutional.

B. THE WARRANT ADDENDUM WAS OVERBROAD

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). This requirement serves two functions by "limiting the executing officer's discretion"; and "informing the person subject to the search what items may be seized." *Riley*, 121 Wn.2d at 29.

Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater than in the case where the materials sought are not protected by the First Amendment. *State v. Perrone*, 119 Wn.2d 538, 547,

834 P.2d 611, 616 (1992). And, while the Supreme Court has held that child pornography is not protected by the First Amendment, any search warrant having as its object the seizure of child pornography must still meet the mandate that the particularity requirement be followed with "scrupulous exactitude." Books, films, and the like are presumptively protected by the First Amendment where their content is the basis for seizure. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (allegedly obscene videotapes presumptively protected by First Amendment).

In *Perrone*, per the United States Constitution's demand for increased particularity, the Washington Supreme Court pronounced the term "'child ... pornography'" invalid for insufficient particularity as it left the officer with too much discretion in deciding what to seize under the warrant. *Id.* at 553, 834 P.2d 611 (alteration in original). The Court observed the term "is an 'omnibus legal description' and is not defined in the statutes." *Id.* Furthermore, reasoned the court, "'child ... pornography'" is analogous to "'obscenity,'" a term insufficiently particular to satisfy Fourth Amendment standards. *Id. See also State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156, 1160 (2007).

Moreover, neither the officer's personal knowledge of the crime nor a proper execution of the search may cure an overbroad warrant. *Riley*,

121 Wn.2d at 29. For example, in *Riley* our Supreme Court held that a warrant authorizing the seizure of "fruits, instrumentalities, and/or evidence of a crime," followed by a list of various items that might fit the description, was overbroad because it did not limit the seizure by stating the crime under investigation. *Riley*, 121 Wn.2d at 26. Although the investigator knew that he was seeking items involved in the crime of computer trespass and limited his search accordingly, the Court reversed the conviction. *Id.* at 28-29. "Because the person whose home is searched has the right to know what items may be seized, an overbroad warrant is invalid whether or not the executing officer abused his discretion." *Id.* at 29 (citing *In re Lafayette Academy, Inc.*, 610 F.2d 1, 5 (1st Cir. 1979)).

Turning to the search warrant in the present case, the warrant was overbroad because it permitted the police to seize "any and all printed pornographic materials." General pornography, however, is protected by the First Amendment. Only child pornography is not. Thus, the warrant actually authorized the police to search for and seize property that is legal and not indicative of any criminal behavior.

The warrant also allowed the Pierce County Police Officers unbridled discretion to decide what things to seize and most critically, permitted the seizure of items which may be constitutionally protected. The warrant permitted the police to seize all visual or audio media in the

entire house. It permitted them to seize any and all computer hard drives and any and photographs in the house.

It is clear from the testimony at trial, that the police indiscriminately seized piles of materials from the house. They could not have been very discriminating at all because they did not receive the warrant to search until 10:30 p.m. but were out of the house about one hour later. Moreover, like the officer in *Perrone,* the police here clearly took adult pornography. As in *Perrone*, this seizure demonstrated the enormous discretion that was given to the police in this case. *Perrone* at 622-23.

Thus, this Court should hold that the warrant was overbroad and invalid in its entirety. The warrant authorized the seizure of items protected by the First Amendment. Thus, the highest degree of particularity was necessary. Second, the warrants did not indicate the specific crime under investigation. Thus, the discretion of the officers executing the affidavit was not limited by the crime at issue. And third, the items described were neither contraband nor inherently illegal. The Constitution forecloses searches and seizures "based on this type of seize-it-all-and-sort-it-out-later warrant that was obtained in this case." *United States v. Schesso*, 842 F.Supp.2d 1292, 1297 (W.D. Wash. 2011).

C. THE TRIAL COURT ERRED IN PERMITTING THE POLICE TO SEARCH BESOLA'S HOME BASED UPON THE UNCORROBORATED TIP FROM A KNOWN CRIMINAL

A search warrant may be issued only upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *State v. Smith,* 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). It is well settled that when the existence of probable cause depends on an informant's tip, the affidavit in support of the warrant must establish the basis of the informant's information as well as the credibility of the informant. *State v. Ibarra*, 61 Wn. App. 695, 698, 812 P.2d 114 (1991).

In determining whether an informant's tip is sufficient to establish probable cause, Washington applies the two-pronged *Aguilar-Spinelli* test. *State v. Bauer*, 98 Wn. App. 870, 875, 991 P.2d 668, *review denied*, 140 Wn.2d 1025, 10 P.3d 406 (2000). The *Aguilar-Spinelli* test requires law enforcement to establish (1) that the informant has a factual basis for his or her allegations, and (2) that the information is reliable and credible. *Aquilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964);

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969).

When the informant is an ordinary citizen, as opposed to a criminal or professional informant, the reliability prong is satisfied when an informant's identity is revealed to the magistrate and intrinsic indicia of the informant's reliability may be found in his detailed description of the underlying circumstances of the crime observed. *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978). Where a citizen informant comes forward and reveals his identity to the issuing judge, the informant's veracity may be established by the internal consistency and detailed nature of the information provided. *Id.* at 557. In contrast, an issuing magistrate may consider a criminal informant less trustworthy than a citizen-informant, due to the greater likelihood of criminal involvement and motivation due to self-interest. *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). Therefore, greater corroboration is required of an informant who may be involved in the criminal activity or motivated by self-interest. *Ibarra*, 61 Wn. App. at 700.

If the person giving information to the police is identified by name but it appears this person was a participant in the crime under investigation or has been implicated in another crime and is acting in the hope of gaining leniency, then the more strict rules regarding the showing of

veracity applicable to an informer from the criminal milieu must be followed, and not the rules applying to a citizen-informer. *State v. Rodriguez*, 53 Wn. App. at 576. Where either the informant's tip or the circumstances under which the informant provides the tip are suspicious, the presumption of reliability is greatly diminished and a more stringent standard of reliability applies. *Id.* at 574-77. Crimes of dishonesty are fatal to the credibility of an informant. *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir.), *cert. denied*, 531 U.S. 1000, 121 S.Ct. 499, 148 L.Ed.2d 470 (2000). If an informant's history of criminal acts involving dishonesty renders her statements unworthy of belief, probable cause must be analyzed without those statements. *Id.*

In *Bauer*, 98 Wn. App. at 873, and *State v. Berlin*, 46 Wn. App. 587, 589, 731 P.2d 548 (1987), the affidavits included sufficient facts to establish that the informants were truly disinterested citizens rather than criminal informants, and the police verified that the informants had no criminal records, supporting an inference that they were truly disinterested citizens without motive to fabricate or falsify.

Unlike the informants in *Bauer* and *Berlin,* Westfall was no disinterested citizen without a motive to fabricate and her statements were given under highly suspicious circumstances. Westfall had a criminal history. She was incarcerated under a no-bail hold at the time she gave

her statement to police. The warrant for her arrest was issued after she failed to appear for drug court for several felonies, including two crimes of dishonesty. Westfall acknowledged that there was "bad blood" between herself and Besola. She was, furthermore, a drug user who described herself as a "master manipulator." Significantly, she was released from jail just four days after giving her statement. There is a very strong inference that Westfall provided her statement in order to get out of jail, and that she was herself involved in criminal activity at Besola's residence.

Nevertheless, the State relied exclusively on Westfall's statement without corroborating her statement. It is axiomatic under the *Aguilar-Spinelli* test that the police must ascertain some information which would reasonably support an inference that Westfall was telling the truth. *State v. Chatmon*, 9 Wn. App. 741, 746, 515 P.2d 530, (1973). Independent police investigation is required to show probative indications of criminal activity along the lines suggested by the informant. *State v. Duncan*, 81 Wn. App. 70, 912 P.2d 1090, *review denied*, 130 Wn.2d 1001, 925 P.2d 988 (1996). To make such a showing, law enforcement was required to obtain facts to support a reasonable inference that she was a credible informant without motive to falsify. *Bauer*, 98 Wn. App. at 876. Law enforcement undertook no such corroboration.

Where it appeared that Westfall was possibly a participant in the crime under investigation, was implicated in other crimes, and was possibly acting in the hope of gaining leniency, the stricter rules regarding the showing of veracity applicable to an informer from the criminal milieu should have been followed. *Rodriguez*, 53 Wn. App. at 576. That standard was not applied, and the State failed to establish that Westfall was a reliable and credible informant.

The trial court erred in holding that Westfall was a reliable informant. Most gravely, it erred in holding that Westfall was a citizen informant, even though she was in custody at the time she made her statement.

D. THE WARRANT IS INVALID AS IT IS BASED ON MATERIAL MISREPRESENTATIONS AND RECKLESS OMISSIONS BY THE POLICE

Not only did the State fail to establish Westfall's credibility as an informant, it recklessly omitted from the affidavit critical information which would have cast doubt on her credibility.

Article 1, § 7 of the Washington Constitution confers upon the citizenry of this state a right to be free from unreasonable governmental intrusions. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984). This constitutional right can be protected only if the affidavit informs the magistrate of the underlying circumstances which led the officer to

conclude that the informant was credible and obtained the information in a reliable way. *Id.* Only in this way can the magistrate make the properly independent judgment about the persuasiveness of the facts relied upon by the officer to show probable cause. *Id.* The issuance of a search warrant is not accomplished in an adversarial proceeding. *United States v. Hall*, 113 F.3d 157, 160 (9th Cir. 1997). An issuing magistrate or judge must depend on the prosecutor and law enforcement to present him with the truth, and to bring to his attention any problems with their informant's credibility. *Id.* Information tending to undercut an informant's reliability and veracity should not be omitted from the affidavit, as such information would doubtless lead to more skepticism and further questions had the magistrate been aware of it. *Id.*

A warrant may be invalidated and the fruits of a search may be suppressed if there were intentional or reckless omissions of material information from the warrant affidavit. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, known as a "Franks" hearing, if he or she makes a substantial preliminary showing of the omissions and their materiality. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978). An omission or misstatement is material if it was

necessary to the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996). Under *Franks*, where a defendant makes a substantial preliminary showing that a false statement in a search warrant affidavit was made knowingly and intentionally or with reckless disregard for the truth and the false statement is necessary to find probable cause, the Fourth Amendment entitles the defendant to a hearing. *Franks*, 438 U.S. at 155-56. If at the hearing, the defendant establishes by a preponderance of the evidence his allegation of perjury or reckless disregard, the trial court must excise the false material and then void the search warrant and exclude the fruits of the search if the remaining contents are insufficient to establish probable cause. *Id.* at 156. Innocent or negligent mistakes are insufficient to satisfy *Franks*. *State v. Olson*, 74 Wn. App. 126, 131-32, 872 P.2d 64 (1994), *affirmed*, 126 Wn.2d 315, 893 P.2d 629 (1995). In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant, but rather, whether the challenged information was necessary to the finding of probable cause. *Garrison*, 118 Wn.2d at 874. If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit. *Id.* at 873.

Our Supreme Court has found an affiant reckless in circumstances quite similar to those found here. In *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985), police failed to include important information in the affidavit. *Id.* at 308. While the affidavit related that the informant stated he personally viewed weapons and drugs at the residence to be searched, it failed to relate important facts surrounding the circumstances under which the informant provided his tip. *Id.* The affidavit gave the impression that the informant voluntarily came forward to assist the police with information concerning criminal activity. *Id.* In actuality, the informant's statements, given in response to police questioning about his own criminal activity, could be construed as an effort to exculpate himself and turn police interest away from his own crimes. That information did not appear in the affidavit for the search warrant, nor was it told to the magistrate who signed the warrant. *Id.*

The Court found the failure of the detectives to reveal to the magistrate the basis for the informant's cooperation highly significant. *Id.* From that failure, it could be inferred the detectives were reluctant to relate vital information which might have resulted in a denial of the warrant pending further investigation. *Id.* The importance of full disclosure of the facts relating to the informant's reliability was underscored by the seriousness of his accusations and the fact that the

detectives obtained minimal independent corroboration of the informant's story. *Id.*

As detailed above, the affidavit in the present case left out significant facts which should have been brought to the attention of the issuing judge, and law enforcement conducted no independent corroboration. No less than 14 of Westfall's statements were deliberately omitted or omitted with a reckless disregard for the truth. Those statements were available to law enforcement through Westfall's tape-recorded interview. Furthermore, her criminal record – including her stipulation to two crimes of dishonesty – and the fact that she was incarcerated on a no-bail hold at the time she made her statement – was readily available to law enforcement through public records.

The omissions are material because they bear directly on Westfall's credibility. The affidavit does not mention that Westfall never saw the labels of the drugs she claimed Besola took, or that the Valium she saw at the house was for Besola's sick dog. Of Westfall's criminal history, the affidavit states only that she was being investigated "in regards to a stolen vehicle." No mention is made of the charges of possession of a stolen vehicle, possession of methamphetamines, possession of another's identification, driving with a suspended license, and obstructing law enforcement.

Perhaps most critically, the affidavit makes no mention that Westfall was incarcerated under a no-bail hold at the time of her statement. The fact that an informant's statements upon which the affidavit for a search warrant was based were made while the informant was under arrest is relevant to the determination of the informant's veracity. *State v. Bean*, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978). As in *Turngren*, it can be inferred that law enforcement was reluctant to relate this vital information about Westfall's criminal record because it might have resulted in a denial of the warrant pending further investigation.

The affidavit in support of the search warrant recklessly omitted critical information which would have cast doubt on Westfall's credibility. The trial court erred in holding that critical information was not omitted from the affidavit intentionally or with reckless disregard for the truth.

E. THE TRIAL JUDGE IMPERMISSIBLY COMMENTED ON THE EVIDENCE

Article 4, § 16 of the Washington Constitution prohibits judges from commenting on the evidence. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). "A statement by the court constitutes a comment on

the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986), *affirmed*, 737 P.2d 670 (1987)). Circumstances to consider in determining whether the trial judge commented on the evidence include: (1) whether the comment resolves a contested fact, (2) whether the statement addressed a witness's credibility, or (3) whether the remarks were isolated or cumulative. *State v. Sivins*, 138 Wn. App. 52, 59, 155 P.3d 982 (2007).

Courts apply a rigorous standard of review to alleged violations of article 4, section 16. *Sivins*, 138 Wn. App. at 59. Thus, once it is established that the trial judge commented on the evidence, the reviewing court "presumes [the comments] were prejudicial." *Id.* at 58-59. "[T]he burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). To assess prejudice, the test is "whether there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61 (quoting *Lane*, 125 Wn.2d at 839). The rationale behind this prohibition "is to prevent the trial judge's opinion from influencing the jury." *Lane*, 125 Wn.2d at 838.

Here, the judge's comments told the jury that he found Besola's witness to be evasive and frustrating. This is a comment on the evidence. *Lane*, 125 Wn.2d at 835-39 (judge's remarks about a prosecution witness's early release was a comment on the evidence because it conveyed the judge's opinion on a fact relating to the witness's credibility); *State v. Eisner*, 95 Wn.2d 458, 460-63, 626 P.2d 10 (1981) (court's questions to a witness elicited a description of acts proving the State's case was a judicial comment on the evidence); *State v. Lampshire*, 74 Wn.2d 888, 891-93, 447 P.2d 727 (1968) (judge's remarks in sustaining the prosecutor's objection was an impermissible comment because it conveyed his opinion about the defendant's testimony); *Risley v. Moberg*, 69 Wn.2d 560, 561-65, 419 P.2d 151 (1966) (judge's questioning of the respondent's physician constituted a comment on the evidence since it reflected the judge's opinion regarding the credibility of the respondent).

The remark was not harmless. Amelia Besola was a defense witness who was corroborating Besola's alibi defense.

F. AS TO COUNT 1, THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT BESOLA WAS IN ACTUAL OR CONSTRUCTIVE POSSESSION OF CHILD PORNOGRAPHY

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490,

120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Here, as the prosecutor readily admitted at trial, there was no evidence of Besola's actual possession of child pornography. As Instruction 19 states: "Actual possession occurs when the item is in the actual physical control of the person charged with possession." No child pornography was found on Besola's person.

Thus, as the State argued, the only other theory was that Besola "constructively possessed" the child pornography. To establish constructive possession, the State had to show that Besola had "dominion and control over either the child pornography." *State v. George*, 146 Wn.

App. 906, 920, 193 P.3d 693 (2008) (quoting *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). "Dominion and control" means that Besola may reduce the item to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control need not be exclusive, but the State must show more than mere proximity. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029, 249 P.3d 624 (2011).

This Court determines whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). The Court must consider facts including the defendant's motive to possess the item; the quality, nature, and duration of the possession and why it terminated; whether another person claimed ownership of the item; and the defendant's dominion and control over the premises. *See, e.g., State v. Staley,* 123 Wn.2d 794, 801, 872 P.2d 502 (1994); *State v. Callahan*, 77 Wn.2d 27, 30-31, 459 P.2d 400 (1969); *State v. Summers*, 107 Wn. App. 373, 386, 28 P.3d 780 (2001), *modified*, 43 P.3d 526 (2002); *State v. Bowman*, 8 Wn. App. 148, 153, 504 P.2d 1148 (1972); *State v. Werry*, 6 Wn. App. 540, 548, 494 P.2d 1002 (1972).

Here, Swenson admitted to possessing and viewing the child pornography but Besola denied it. Besola had no motive to possess the

items but Swenson did have a motive because he was trading pornography with Brent Waller. Although Besola owned the home, Swenson had been a co-tenant for more than a decade.

The facts here are similar to those in *State v. Roberts*, 80 Wn. App. 342, 355, 908 P.2d 892, 899 (1996). In that case the prosecutor argued that the jury could find Roberts guilty as an accomplice to the manufacture of marijuana because Roberts accepted rent from his co-defendant, Sylvester, paid two-thirds of the utilities, did not call his landlord or the police, and did not destroy the marijuana plants. Thus, according to the prosecutor, Roberts "gave ... shelter" to the operation and had "dominion and control over the plants." The Court found that Roberts could not be found guilty as an accomplice by accepting rent, paying utilities, and not utilizing self-help to terminate Sylvester's grow operation. And, the Court found that his failure to contact his landlord or the police amounts only to presence and assent to criminal activity, which as a matter of law cannot support a finding of accomplice liability.

G. AS TO COUNT 2, THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT BESOLA DUPLICATED ANY CHILD PORNOGRAPHY

The State was also required to prove that Besola duplicated, published, printed, disseminated or exchanged child pornography. While duplicates of some of the items were found in the residence, there was

absolutely no evidence that Besola was the person who made these duplicates.

Again, the State's evidence was insufficient. Besola presented conclusive evidence that he was not present in the home on the two days that child pornography was duplicated onto his computer.

H. AS TO BOTH COUNTS, THERE WAS NO EVIDENCE THAT BESOLA WAS SWENSON'S ACCOMPLICE

Similarly, there was no evidence that Besola was Swenson's accomplice. "A person is legally accountable for the conduct of another person if he is an accomplice to that person in the commission of the crime." *State v. McDonald*, 138 Wn.2d 680, 690, 981 P.2d 443 (1999) (quoting *State v. Davis*, 101 Wn.2d 654, 657, 682 P.2d 883 (1984)); *see also* RCW 9A.08.020. A person is an accomplice to another in the commission of a crime if he or she solicits, commands, encourages or requests the other person to commit the crime; or if he or she aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3). Additionally, the State must prove that the individual acted with the specific knowledge that his or her actions would promote or facilitate the commission of the crime. *Id.*

"[P]hysical presence and assent alone are insufficient to establish accomplice liability." *State v. Amezola*, 49 Wn. App. 78, 89, 741 P.2d

1024 (1987). The State must also establish that the defendant was "ready to assist in the commission of the crime." *Id.* This generally requires a showing that the accomplice had "the purpose to promote or facilitate the particular conduct that forms the basis for the charge."

The State's theory of accomplice liability here was that Besola was Swenson's accomplice because he provided Swenson with a residence and access to a computer. But this theory is analogous to the theory rejected in *Amezola*:

> The State argues that her cooking and cleaning enabled the others to deliver the heroin, calling her role an "important if somewhat unglamorous part of the distribution scheme." We cannot agree. Although we view the evidence in a light most favorable to the State, there is not even an inference of Ramirez's liability as an accomplice. The mere performance of domestic tasks which, at most, might have made life easier for those committing the crime, is hardly conduct sufficient to expose one to criminal liability. Ramirez' cooking and cleaning are activities totally distinct from and incidental to the criminal acts charged here. Her connection to the latter is no more than physical presence and assent, both insufficient to establish accomplice liability for possession of a controlled substance with intent to deliver.

Amezola, 49 Wn. App. at 89-90. Similarly, this Court should find the evidence in this case insufficient.

I. BECAUSE COUNTS 1 AND 2 CONSTITUTE THE SAME CRIMINAL CONDUCT, BESOLA'S CONVICTION FOR POSSESSION OF CHILD PORNOGRAPHY MUST BE DISMISSED

The calculation of the offender score is reviewed de novo. *See, e.g., State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497, 504 (1994); *State v. Allyn*, 63 Wn. App. 592, 596, 821 P.2d 528 (1991), *review denied*, 118 Wn.2d 1029, 828 P.2d 563 (1992). This Court will generally not address an issue which was not raised at trial. However, it has become a well-established "common law" rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law. *See State v. Paine,* 69 Wn. App. 873, 884, 850 P.2d 1369, *review denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993); *Roche*, 75 Wn. App. at 512-13; *State v. Moen,* 129 Wn.2d 535, 547, 919 P.2d 69 (1996). This rule tends to bring sentences into conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand only because counsel did not object in the trial court. *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975, 978 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099 (1999); *Paine*, 69 Wn. App. at 884; *Moen*, 129 Wn.2d at 545-47.

Besola was charged with both possessing and duplicating child pornography on April 21, 2009. The two crimes encompass the same

criminal conduct. Washington courts look for the concurrence of intent, time and place, and victim by examining whether each offense was part of a recognizable scheme or plan and whether the defendant substantially changed the nature of his criminal objective from one offense to another. *State v. Boze*, 47 Wn. App. 477, 480, 735 P.2d 696 (1987). Moreover, a court's analysis focuses on whether one crime furthered the other. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). On April 21, the possession and duplication occurred at the same time and place. The alleged victims were the same in both the depictions possessed and the depictions duplicated.

Here, the statutory criminal intent was the same – knowingly. When one possesses child pornography, one has the objective intent of having it, and when one duplicates child pornography, one has the intent to produce it. In duplication, one has the intent not only to copy it, but also a present intent to possess it because possessing the pornography is necessary for its duplication. Therefore, a knowing possession is common in both offenses. *See also United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008) (Offense of possessing child pornography was lesser included offense of receipt of child pornography, and thus entering judgment against defendant on separate counts for receiving child pornography and

possessing child pornography was multiplicitous, in violation of Fifth Amendment's prohibition of double jeopardy).

This situation is analogous to the crimes of possession of marijuana and manufacture of marijuana which this Court has determined are the same criminal conduct. *See State v. Bickle*, 153 Wn. App. 222, 234-35, 222 P.3d 113 (2009).

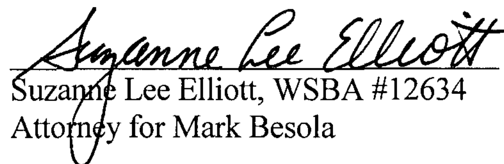
This Court should vacate Count 1, which will reduce Besola's standard range to 15-20 months in custody.

V. CONCLUSION

For the reasons stated above this Court should reverse and remand this case for dismissal.

DATED this 8th day of February, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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FEBRUARY 8, 2013
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