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 REPLY BRIEF

**Suzanne Lee Elliott**
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

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### 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

Besola argues that, because the Court did not instruct the jury that RCW 9.68A.070 and RCW 9.68.050 required that Besola knew that the persons depicted were minors, his conviction is unconstitutional. The State argues that the Court properly instructed the jury because: "It is not an element of the crime that they knew that it was an actual minor depicted in the images." Brief of Respondent at 68.

The State, however, fails to address the decisions 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), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). In *Ashcroft*, the United States Supreme Court said that, in light of the First Amendment, sexual expression that is indecent but not obscene is protected. In *Luther* 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. Thus, statutes prohibiting the possession of child pornography prohibit only possession

of pornography where the person knows that the children in the pictures are minors.

Further, the State completely misrepresents the holding in *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027, 230 P.3d 1060 (2010), resulting in a misstatement of the law. In *Garbaccio*, the Court held that while RCW 9.68A.070 does criminalize the possession of child pornography, for criminal liability to attach, the State must prove more than mere possession of the contraband. It must prove possession with knowledge of the nature of the illegal material. *Id.* at 734. The Court found there was no error in *Garbaccio* because the jury was instructed that in order to find Garbaccio guilty, it had to find that he "knew the person depicted was a minor." *Id.* at 734 (quoting the clerk's papers). Moreover, the Court held that Garbaccio's defense was that he did not commit the offense because he handled material that he knew contained child pornography but only had it momentarily before he deleted it from his computer. *Id.* at 735.

Contrary to the State's assertion then, *Garbaccio* affirms that the State must prove that he knew the persons in the videos were under age 18. Unlike *Garbaccio*, however, Besola did raise this defense in the trial court. Moreover, unlike the jury instructions in *Garbaccio*, nothing in the

jury instructions in this case told the jury that it had to find that the persons in the video were minors.

The State also argues that requiring the State to prove the defendant knew the minor depicted was, in fact, under the age of 18 would

> have absurd results contrary to the intent of the legislature when it adopted the statute in so far as it would render the statute largely unenforceable as a practical matter where the state would only in the rarest of circumstances be able to show that the defendant knew the age of the minors depicted.

Brief of Respondent at 69-70. While it may be true that in some cases such proof would be difficult[1], the United States Supreme Court has clearly stated that such proof is required in order to avoid prosecuting and convicting persons who possess material protected by the First Amendment.

Third, the State argues that there was nothing wrong with the instructions given in this case because the Court gave the Washington pattern jury instruction. But, as argued by Besola in his Opening Brief at 27, the WPIC committee has suggested that the only way to save a pornography prosecution is to include in the instructions an element that tells the jury it must find, beyond a reasonable doubt, that the persons

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[1] And, in many cases such proof would be exceptionally easy. The pictures themselves could conclusively demonstrate that the persons depicted were small children.

depicted were minors. *See also* 11 Wash. Prac. Pattern Jury Instruction Committee. WPIC 498.040. 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.

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

Besola also argues that warrant addendum in this case was overbroad. The warrant authorized the seizure of every piece of media in Besola's home. To the extent that it provided any guidance to the officers executing the warrant, the warrant apparently sought to describe everything on the premises and direct that everything be seized. "'[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible.'" *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (quoting *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir.1982)). The State could have made the warrant more particular by describing what kind of videos the police could collect and limiting the

search to only *illegal* child pornography. But the entire tone of the State's response is that it is simply too hard or too time-consuming to comply with its constitutional duties.

The State argues that the warrant addendum here is sufficiently particular because it "references the particular crime under investigation." Brief of Respondent at 42. But that alone does not save the search when as here, the warrant in this case permitted the police to seize every piece of media in Besola's house. In fact, despite referencing the statute, the warrant allowed the officers to seize all pornography, not just child pornography, and any photographs, no matter what their subject matter. And that was exactly what the police did. The testimony demonstrated that the police made no effort to discern which media was arguably illegal and which was not. They simply grabbed everything. As argued in Appellant's Opening Brief, the Constitution forbids searches and seizures based upon this type of "seize it all and sort it out later" sort of warrant.

The State suggests that it needed to seize all of the media in the home because: "Even print images of non-child pornography associated with child pornography may have evidentiary value, if for example, it contains images of background spaces or adults who appear in child pornographic images." But there was absolutely no allegation that Besola was manufacturing child pornography and that crime was never referenced

in any of the warrant paperwork. The fact that there was no probable cause to search for evidence of that crime renders the seizure of photographs for that purpose unconstitutional *See, e.g., United States v. Galpin*, 720 F.3d 436, 448 (2d Cir. 2013).

The government relies on *United States v. Banks*, 556 F.3d 967 (9th Cir. 2009). But in that case the warrant was sufficiently limited because it stated that the range of seizure was limited to items containing "'child pornography' ('child erotica') or 'minors engaged in sexually explicit conduct' as defined by statute." *Id.* at 973. The Ninth Circuit held that this description was sufficiently particular to overcome an argument that the warrant was too general. It is true that the Court also approved a warrant that permitted the government to seize a computer system in order to examine the electronic data for contraband. But, in that case, the Court explained that the affidavit explained why it was necessary to seize the entire computer system. There was no such explanation in the warrant addendum in this case.

The State also relies on *United States v. Richards*, 659 F.3d 527 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 2726, 183 L.Ed.2d 84 (2012). The State argues that most courts have rejected the particularity challenges to warrants authorizing the search and seizure of entire business or personal computers. But the search in this case involved more than a computer. It

involved the seizure of "any and all video tapes, CDs, DVDs, or any other visual or audio recordings in the house, any and all printed pornographic materials in the house, and any photograph." None of these items involved the same kind of problems or concerns that arise with computer hard drives or computer systems. A description of the proper videotapes, CDs, DVDs, or printed materials could easily have been fashioned by the police in order to avoid the wholesale ransacking of Mr. Besola's house.

Finally, the State appears to argue that the warrant here was "severable." But the State does not identify which sections of the warrant were valid and what evidence seized pursuant to these sections should not be suppressed. And, severance is not always possible. In particular, "[i]f no portion of the warrant is sufficiently particularized to pass constitutional muster, then total suppression is required. Otherwise the abuses of a general search would not be prevented." *Kow*, 58 F.3d at 428. Here, no portion of the warrant is sufficiently specific to pass constitutional muster.

In sum, the chief evil that prompted the framing and adoption of the Fourth Amendment was the "indiscriminate searches and seizures" conducted by the British "under the authority of 'general warrants.'" *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Arizona v. Gant*, 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d

485 (2009) ("[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."). To prevent such "general, exploratory rummaging in a person's belongings" and the attendant privacy violations, *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564, *reh'g denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971), the Fourth Amendment provides that "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011). The warrant here and the actions of the police under the apparent authority of that warrant violated these constitutional principles.

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

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.

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

The State argues that "the facts in this case are consistent with the facts in *State v. Chamberlin*, 161 Wn.2d 30, 34, 162 P.3d 389 (2007). Brief of Respondent at 36. But in *Chamberlin*, the main issue the Court considered was whether a judge can issue a search warrant and then later rule on a motion to suppress evidence obtained as a result of the warrant. *Chamberlin,* 161 Wn.2d at 35-36. The court concluded that because no inherent prejudice or bias resulted from doing so, the judge was not required to disqualify himself. *Id.* at 39-40.

But according to the State, *State v. Chamberlin* rests upon the notion that the informant gave a taped interview to officers and made statements against penal interest. The circumstances of the informant in *Chamberlin,* however, were markedly different from the circumstances here. In *Chamberlin*, the Court considered information given by Randall Paxton after he was arrested for DUI. At the time of that arrest, he told the police he had received the drugs from Chamberlin, offered to make a statement, and to testify against Chamberlin. The police told him they were not making any deals with him and he gave the tape recorded statement as he offered.

In this case, however, Westfall was being held in jail. She also had a motive to lie about Besola because she was no longer permitted to enter his house. It was clear in her statements to the officers that she wanted to

continue to work for them and she described herself as a master manipulator. Shortly thereafter, she was released from custody. Here, Westfall was not a citizen informant because she was a participant in crimes under investigation and she was acting in the hope of gaining some leniency.

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

The State argues that the jury is sole judge of the credibility of the witness. That is true. But Besola is not asking the Court to disregard the testimony of any witnesses. Rather, his point is that even crediting the statement of every witness in the case, there was insufficient evidence to find him guilty.

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 State failed to address or to distinguish *State v. Roberts*, 80 Wn. App. 342, 355, 908 P.2d 892, 899 (1996).

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

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.

## G. 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. Again, the State fails to address, *State v. McDonald*, 138 Wn.2d 680, 690, 981 P.2d 443 (1999), and *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*, 49 Wn. App. at 89-90. Similarly, this Court should find the evidence in this case insufficient.

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

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 the Fifth Amendment's prohibition of double jeopardy). This Court should vacate Count 1, which will reduce Besola's standard range to 15-20 months in custody.

## II. CONCLUSION

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

DATED this 16th day of September, 2013.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Mark Besola

**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:

Pierce County Prosecutor
Appellate Unit
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402

Dr. Mark Besola
1115 South 347th Place
Federal Way, WA 98003

Ms. Kathryn Russell Selk
Russell Selk Law Office
1037 NE 65th Street, Box 135
Seattle, WA 98115-6655

9/20/13
Date

William Brenc