NO. 43585-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN POWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 11-1-03893-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were findings of fact and conclusions of law required to be entered after the CrR 3.6 motion to suppress when CrR 3.6(b) does not require them as no evidentiary hearing was held?

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2. The trial court erred when it made its oral ruling dismissing Count XV.

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[1] The State is not pursuing a cross-appeal on any evidentiary rulings or any sentencing issues. *See* CP 422.

4. The trial court erred when it found that cases interpreting the previous version of the statute still applied to the current statute.

5. The trial court erred when it ignored the plain language of the current statute.

6. The trial court erred when it substituted its own opinion for that of the legislature.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL.

1. Did the trial court err in dismissing Count XV, possession of depictions of minor engaged in sexually explicit conduct where the trial court relied on case law that interpreted a previous version of the statute and ignored the plain language of the current statute?

D. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2011, the State charged defendant, Steven Powell, with 14 counts of voyeurism and one count of possession of depictions of minor engaged in sexually explicit conduct in the second

degree. CP 1-8. On September 23, 2011, a corrected information was filed only to correct defendant's date of birth. CP 12-18.

On March 5, 2012, defendant filed a motion to suppress evidence obtained by search warrant. CP 23-34. Subsequently, a motion to unseal all search warrants and supporting affidavits was filed. CP 35-36. The trial court signed the order unsealing the search warrant and accompanying document on March 30, 2012. CP 37, 3/30/13RP 4-5.[2] The search warrant was for, among other things, the journals belonging to Susan Powell who was the victim in a murder and kidnapping investigation in West Valley, Utah. CP 38-71, Appendix A. The prime suspect in the investigation, Susan's husband Josh Powell, was living with his father, defendant. *Id.*

On April 23, 0212, a hearing was held on defendant's CrR 3.6 motion to suppress. 4/23/12RP 4. No witnesses were called and no evidence was presented- the hearing was simply argument on the briefs filed by the parties. *See* 4/23/12RP. On April 24, 2012, the trial court held a hearing for the sole purpose of stating its ruling on the motion to suppress. *See* 4/24/12RP. The trial court walked thru its reasons in

[2] The State will refer to the four sequentially paginated volumes of the verbatim report of proceedings, designated as volumes 1-4, as RP. All other volumes will be referred to as RP with the date of the hearing preceding the RP.

making its decision, found that there was probable cause for the search warrant and denied defendant's motion to suppress. 4/24/12RP 4-11.

On May 7, 2012, defendant moved to dismiss count XV: possession of depictions of minor engaged in sexually explicit conduct in the second degree. CP 76-81, RP 12. Defendant presented cases interpreting a previous version of the statute and urged the court to follow the rulings concerning a version of the statute that defendant was not charged under. RP 12, CP 76-81, *see* CP 103-107. The trial court found that the statute had changed but still relied on the cases interpreting a previous version of the statute and granted the defendant's motion to dismiss. RP 67-69, CP 169. Voir dire had not been commenced and a jury was not impanelled until after the trial court dismissed count XV. RP 96.

The trial court also heard defense motions as to the admissibility of statements made in defendant's own journals and the admissibility of certain photos that had been in defendant's possession. RP 23-55, 97-114, 122, 150-164. The trial court allowed one of defendant's statements from his journals and ruled the rest inadmissible. RP 98-114. The trial court also made specific rulings concerning each photo or photo sequence the State sought to introduce. RP 150-164.

At the close of the State's case, and after defendant had rested, defendant moved to dismiss twelve counts of voyeurism. RP 323, CP 161-164. The court denied the motion. RP 329.

The jury found defendant guilty as charged of all fourteen counts of voyeurism. RP 405-408, CP 285- 298.

Sentencing was held on June 15, 2012. 6/15/12 RP 3. Defendant made a double jeopardy argument. 6/15/12 RP 7, CP 310-322. Discussion followed and the State conceded that counts VIII and X were the same conduct. 6/15/12 RP 22. The trial court vacated count X upon agreement and then also vacated count VII. 6/15/12RP 25, 38, CP 369-371. The crime of voyeurism is unranked. CP 372-388. The trial court sentenced defendant to an exceptional sentence of 30 months. 6/15/12RP 68, CP 372-388. Findings of fact and conclusions of law were entered for the exceptional sentence. CP 400-402.

Defendant filed this timely notice of appeal. RP 420. The State filed a timely notice of cross-appeal. RP 422.

2. Facts

On August 25, 2011, West Valley Police Detective Ellis Maxwell was involved in serving a search warrant on defendant's residence. RP 278-279. The search warrant was served on defendant's residence in

relation to a separate investigation. RP 176. During the search, a disk was recovered from inside defendant's bedroom. RP 178, 221-222, 230. The evidence retrieved from the search warrant was transported back to West Valley, Utah as part of their investigation into the separate investigation. RP 176, 281. It was discovered that the disk had images of underage females bathing and using the bathroom. RP 284, 299, 300. Some of the folders on the disk were labeled "open window," "taking bath-1," and "taking bath-2." RP 180, 300. The majority of the images on the disk were of a sexually suggestive nature. RP 295. The camera that took the photos on the disk was also seized from defendant's bedroom. RP 282-286. No other video camera was seized from defendant's house. RP 309. Detective Maxwell brought the evidence back to Pierce County. RP 284-285.

Pierce County Sheriff Detective Gary Sanders was one of 15-20 officers involved in serving a search warrant on defendant's residence. RP 174, 176. Two weeks after the search, Detective Sanders was informed that images on the disk needed additional criminal investigation. RP 179. The photos on the disk included photos through a window of a young female in her underwear, sitting on the toilet and wiping. RP 184, 185, 186. The photos were looped in a series so they could be watched over and over. RP 185. There was also a second set of photos with a different

girl in the same house using the bathroom. RP 186. Another series showed both girls in the bathroom with one only wearing a t-shirt. RP 186. One of the girls is getting dressed and putting on her underwear and defendant zoomed the camera in on her genital area. RP 187. Another series of pictures showed one victim in the bathtub with the second victim sitting on the toilet talking to her. RP 187-188. Defendant again zoomed in on the girl's breast and vaginal areas. RP 188. The victim also then uses the bathroom and that is recorded as well. RP 188. Another series shows the second victim unclothed getting ready to take a bath. RP 188. Another series showed the first victim taking another bath. RP 189. There is another bath scene as well with the two girls. RP 189-190. There are several more bath scenes of the same nature on the disk. RP 189-193. A separate film sequence made up each of the 14 counts. RP 204-212.

In addition to the photos of the victims, there were other photos on the disk. RP 213-217. The emphasis of the photos was young girls and many of the photos appeared to have been taken around defendant's neighborhood. RP 216. There were also images of defendant nude, undressing, urinating, exposing himself, and masturbating. RP 217.

Detective Maxwell assisted in locating the house that was photographed. RP 288. It was kitty corner from defendant's residence. RP 216. Detective Maxwell determined that the victim's former residence

was the residence in the pictures on the disk. RP 289. Detective Sanders was also at the victim's former residence and determined the pictures had to be taken from defendant's bedroom. RP 200-201, 231-232. Defendant's daughter, Jennifer Graves, confirmed the location of defendant's bedroom on the backside of his residence. RP 311-313. Detective Sanders was able to locate the victims. RP 198-199, 251. The victim's mom was able to identify her daughters from the pictures. RP 199, 252. The victim's were identified as A.H. and J.H.[3] RP 199, 252.

D.C. is the mother of the victims. RP 242. She and her family had lived in the house that was photographed from June 2006 until August 2007. RP 243, 250. Defendant lived in a neighboring house. RP 296-297. The house D.C. and her family lived in had a loft area. RP 244. There were no windows in the bathroom but there was a window at the top of the stairs. RP 248. It was not possible to see the bathroom from the street and so the window was opened to get a breeze going. RP 248-249. It was typical for them to leave the bathroom door open. RP 256-257. D.C. never gave anyone permission to film her kids inside her house. RP 250.

[3] Given the nature of the charges and the fact that the victims in this case are juveniles, the State will refer to the victims by their initials. Given the nature of this case, the trial court also referred to the victims' mom by her initials to avoid the victims being identified. RP 196. The State will continue that practice in this brief.

J.H. was eight years old at the time they lived in the house. RP 259. She always had the bathroom door open because she was scared. RP 262. She never gave anyone permission to photograph her while she was in the bathroom. RP 263.

A.H. was 10 years old at the time they lived in the house. RP 264. She also used the bathroom with the door open. RP 266. She never gave anyone permission to photograph her while she was in the bathroom. RP 267.

West Valley Police Detective Todd Gray also assisted in serving the search warrant. RP 296-297. Defendant's personal journals were seized from his bedroom. RP 197-198. Detective Gray was responsible for reviewing defendant's journals. RP 301. Defendant wrote in his journal, "I also enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use those images for self-stimulation." RP 302.

E. ARGUMENT.

1. WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT REQUIRED BECAUSE NO EVIDENTIARY HEARING WAS HELD.

CrR 3.6 concerns motion to suppress. Part (b) states: "If an evidentiary hearing is conducted, at its conclusion the court shall enter

written findings of fact and conclusions of law." This has been reiterated in case law. In ***State v. Whitney***, 156 Wn. App. 405, 407-8, 232 P.3d 582 (2010), a hearing with argument was held on defendant's motion to suppress but no evidentiary hearing was conducted. No written findings of fact were entered. *Id.* at 408. The Court of Appeals found that "the trial court was not required to enter written findings of fact and conclusions of law on the suppression motion because no evidentiary hearing was held." Even before the current version of the rule was adopted, the courts recognized that when an issue before the court is purely legal in nature, written findings are not needed and in fact are superfulous. *See* ***State v. Pulido***, 68 Wn. App. 59, 62-63, 841 P.2d 1251 (1992); *see also* ***State v. Stock***, 44 Wn. App. 467, 722 P.2d 1330 (1986). Conclusions of law that relate to the suppression of evidence are reviewed de novo. ***State v. Winterstein***, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

In the instant case, defendant filed a motion to suppress, the State responded and a hearing was held where both sides presented argument. *See* 4/23/12RP. As the question presented by defense was purely legal, no witnesses were called and no evidentiary hearing was held. As such, written findings of fact and conclusions of law were not required. No facts were in dispute which is why no evidentiary hearing was needed and

why findings of fact would be superfluous. As this court reviews conclusions of law related to the suppression of evidence de novo, written conclusions of law also would have been superfluous. The trial court complied with the court rule. There is no reason to remand for written findings when they are not required. The trial court followed the rule and did not error.

2. THE TRIAL COURT DID NOT ERROR IN FINDING THAT THE SEARCH WARRANT PROPERLY IDENTIFIES THE NEXUS BETWEEN THE JOURNALS AND THE CRIMES BEING INVESTIGATED AND ALSO OUTLINES DEFENDANT'S OBSTRUCTIVE BEHAVIOR SUCH THAT OBTAINING A SEARCH WARRANT WAS NECESSARY.

It is well established in Washington that a search warrant is entitled to a presumption of validity. ***State v. Chenoweth***, 160 Wn.2d 454, 477, 158 P.3d 595 (2007), *citing* ***State v. Wolken***, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. ***State v. Fisher***, 96 Wn.2d 962, 967, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

"Affidavits in support of search warrants are to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the warrant." ***State v. Casto***, 39 Wn. App. 229, 232, 692 P.2d 890 (1984). Hyper-technical interpretations should be avoided when reviewing search warrant affidavits. ***State v. Freeman***, 47 Wn. App. 870, 873, 737 P.2d 704 (1987). The court is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. ***State v. Yorkley***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); ***State v. Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).

In reviewing a search warrant for probable cause, the court looks to the four corners of the search warrant itself. ***United States v. Damitz***, 495 F.2d 50 (9th Cir. 1974); ***State v. Murray***, 110 Wn.2d 706, 709-710, 757 P.2d 487 (1988). Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that evidence of a crime can be found at the place to be searched. ***State v. Maxwell***, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. ***Cole***, 128 Wn.2d at 286.

Probable cause for a search warrant requires two nexuses: first, a nexus between criminal activity and the item to be seized; and second, a nexus between the item to be seized and the place to be searched. ***State v.***

Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999), citing ***State v. Goble***, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). Nexus is defined as, "A connection or link." BLACK'S LAW DICTIONARY (9th ed. 2009).

In the instant case, defendant's motion at the trial court and his argument on appeal specifically focus on the journals belonging to Susan Powell. CP 23-34. Defendant has never disputed that a nexus exists between the items to be seized and the place to be searched. Defendant conceded at the trial court that there is a nexus between the home and the journals. CP 23-34 (page 7). Defendant only challenges the first prong and alleges there is no nexus between the journals and any crime. Defendant questions the evidentiary value of the journal and also claims that the search warrant is based on Detective Sanders personal beliefs and unsupported conclusions. Defendant's claims are not supported by the affidavit.

The journals have evidentiary value and are a necessary part of the investigation. First, Susan Powell, the author of the journals, is the subject of a kidnapping and homicide investigation. CP 38-71 (Appendix A[4]). Her own words are useful to the investigators to possibly provide further leads and areas of investigation. Ms. Powell had kept a journal since she was eight years old. CP 38-71 (Appendix A, page 5). The journal that

the West Valley Police had was found at her work. CP 38-71 (Appendix A, page 5). It indicated that other journals were packed up. CP 38-71 (Appendix A, page 5). The journal that the West Valley Police had obtained started on January 3, 2002. CP 38-71 (Appendix A, page 5). Ms. Powell would have been 20 years old in 2002. CP 38-71 (Appendix A, page 1). Ms. Powell had been engaged to Josh Powell since she was 19. CP 38-71 (Appendix A, page 5). Other journals that covered the rest of the relationship between the Powell's are relevant since she is missing and he is the prime suspect. The trial court came to this conclusion after reviewing the affidavit and listening to argument. 4/24/12RP 8. The journals are the words of a missing mother who is the victim in a homicide investigation. She cannot speak for herself. Her journals are necessary to help police get a better understanding of her life and find out information that would help them develop further leads.

Second, the journals have a nexus to the investigation of the kidnapping and homicide. The test requires that there is a nexus or link between the journals and the criminal conduct. ***Thein***, 138 Wn.2d at 140. (*See also* ***State v. Stenson***, 132 Wn.2d 668, 693-4, 940 P.2d 1239 (1997) - probable cause that murder had been committed and evidence of a

[4] The search warrant and affidavit are attached as Appendix A to the State's Response to Defendant's Motion to Suppress Evidence Obtained by Search Warrant.

relationship between those who appeared to be involved in the crime was relevant.) As the affidavit explains, the journals are written by Ms. Powell, who is missing and is the victim in the kidnapping and homicide investigation. Her words and recordings of her daily life would be beneficial to the investigators to help understand her life and the people in it. By examining these journals, leads may develop as to people to talk to or places to investigate. They also may lead to further suspects or clear current suspects. These are reasonable inferences based on the fact that the author of the journals is missing and not just a personal belief of Detective Sanders. In fact, the trial court also came to the conclusion that the journals would have evidence of the relationship between the victim and the prime suspect as well as possible evidence of the motive of Josh Powell. 4/24/12RP 9. The relationships between the victim and the people around her, including those who appear to be involved in the crime, is relevant as noted in the ***Stenson*** case above. The journals written by the victim of the investigation are extremely relevant. There is a relationship to the crime. The nexus is clear. The trial court properly found that there was probable cause for the search warrant.

Third, defendant had been uncooperative with investigators which necessitated the search warrant. While defendant may have consented to a search on May 11, 2010, his cooperation with investigators did not

continue. CP 38-71 (Appendix A, page 5). Instead of bringing the journals to the police, defendant and his son went to the media and told them they had Ms. Powell's journals in their possession. CP 38-71 (Appendix A, page 6). On November 16, 2010, investigators requested the journals from defendant and his son. CP 38-71 (Appendix A, page 6). Defendant did not turn over the journals. Instead, defendant and his son tried to bargain with the investigators. CP 38-71 (Appendix A, page 6). Defendant and his son said they would only release a copy of the journals and would only release that if the investigators turned over to them the journal that investigators had in their possession. CP 38-71 (Appendix A, page 6). Essentially, defendant and his son were holding the journals hostage until their demands were met. However, after they made this demand, defendant himself then called investigators and said they were no longer interested in releasing the journals and would not be cooperating any longer. CP 38-71 (Appendix A, page 6). Defendant's actions hindered the investigation.

Defendant and his son then took to the internet and the media with the journals. Defendant and his son posted on his son's website, susanpowell.org, six scanned images that appeared to be entries from the journals. CP 38-71 (Appendix A, page 6). In addition, defendant and his son went on the NBC Today Show and admitted to being in possession of

2000 pages of journal entries. CP 38-71 (Appendix A, page 6). Defendant himself told the media that the journals were very important to the investigation. CP 38-71 (Appendix A, page 7). It seems disingenuous that defendant now argues that the journals are not related at all to the investigation. Defendant's actions of trying to bargain with investigators to release evidence in an ongoing homicide investigation and his declaration that he would no longer cooperate are obstructive. Defendant's actions do not show cooperation and do show obstruction such that obtaining a search warrant was necessary.

The affidavit established probable cause for the warrant. As the journals were written by the victim of the homicide investigation who has yet to be located, their content was very relevant and could develop further leads as to who to talk to or where to search. There is a nexus to the crimes. The warrant is valid and there is no basis to suppress the evidence seized. The trial court did not error in denying defendant's motion to suppress.

3. THE TRIAL COURT ERRED IN DISMISSING COUNT XV, POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT, WHERE THE TRIAL COURT RELIED ON CASES INTERPRETING A PREVIOUS VERSION OF THE STATUTE AND FAILED TO APPLY THE CURRENT VERSION OF THE STATUTE.

Defendant was charged with one count of possession of depictions of minor engaged in sexually explicit conduct in the second degree. CP 1-8. The charging language states, "did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g)." "Sexually explicit conduct" is defined in RCW 9.68A.011(4), which reads as follows:

> (4) "Sexually explicit conduct" means actual or simulated:
>
> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
>
> (b) Penetration of the vagina or rectum by any object;
>
> (c) Masturbation;
>
> (d) Sadomasochistic abuse;
>
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
>
> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female

> minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
>
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011(4). Sections (f) and (g) are the sections at issue in defendant's case.

In the trial court, defendant challenged the application of the above statute to his conduct. Specifically, defendant argued that the images he possessed did not meet the definition of "sexually explicit conduct." CP 76-81, RP 12-15. The cases defendant relied on all dealt with a previous version of the statute. CP 76-81, RP 12-15. Defendant focused on the argument that "sexually explicit conduct" does not encompass depictions of minors engaging in conduct that is not influenced by a third party and when the minor or third party is not intending to sexually stimulate the viewer. In the main case that defendant relied on, ***State v. Grannis***, 84 Wn. App. 546, 930 P.2d 327 (1997), the only subsection of RCW 9.68A.011 at issue has since been amended. The definition in effect at the time included "exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." Former RCW 9.68A.011(3)(e). The

court in ***Grannis*** essentially held that any "exhibition" must be done with the purpose of gratifying the sexual desire of the person who initiates, contributes to, or otherwise influences the occurrence of the exhibition itself. *See* ***Grannis***, 84 Wn. App. at 549-50. The court went on to note that "[n]othing said herein means that the legislature could or could not criminalize conduct of the sort at issue in this case." *Id.* at 551-552.

In fact, the legislature did go on to criminalize the conduct at issue in ***Grannis*** and in the case at bar. In 2010, the legislature adopted ESHB 2424 (amending RCW 9.68A.011), set forth in relevant part below.

> ((~~(3)~~)) (4) "Sexually explicit conduct" means actual or simulated:
>
> > (a) Sexual intercourse, including genital-genital, oral genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> >
> > (b) Penetration of the vagina or rectum by any object;
> >
> > (c) Masturbation;
> >
> > (d) Sadomasochistic abuse ((~~for the purpose of sexual stimulation of the viewer~~));
> >
> > (e) ((~~Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;~~)
> >
> > (f))) Defecation or urination for the purpose of sexual stimulation of the viewer;

> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
>
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

The plain language of the statute makes it clear that the victim need not be aware that he/she is participating in the conduct. The legislature also made a clear change from the word "exhibition" to the word "depiction." "Exhibition" is defined as "an act or instance of showing, evincing, or showing off." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged, 796 (2002). "Depiction" is defined as "representation." *Id.* at 605. While exhibition clearly requires some sort of action on the part of the person being photographed, depiction is passive and does not require any action by the person being photographed. There is a clear change in the wording and intent of the statute. The legislature was clear in what acts it wanted to criminalize and clear that the person being photographed need not know or participate in the conduct for it to qualify as sexually explicit conduct.

The depictions in defendant's possession clearly meet the definition in the current statute. The depictions at issue here stem from the defendant's act of video recording young girls who lived in a residence

adjacent to the defendant's residence. RP 199, 216, 246-247, 251-252. From the defendant's bedroom, he captured the girls on video in their bathroom as they were changing clothes, bathing, or on the toilet apparently urinating. *See* RP 180, 184-187, 188-191, 191-193, 205-212, 284, 299. Frequently, he would zoom in on the girls' buttocks, breasts, and vaginal area. RP 187, 188, 190, 216. At times, the girls are seen touching their genitals and/or pubic area for hygiene purposes. RP 185-186, 188, 191, 193. These images, when viewed in context with other images stored on the same CD of defendant nude, undressing, urinating, and masturbating, are clearly possessed for the sexual stimulation of the viewer: defendant. RP 217. The images clearly meet the definition as set forth in the plain language of the statute.

Despite the plain language of the statute and the clear intent of the legislature, the trial court chose to ignore the statutory change and rely on the previous case law. RP 68-69. Specifically, the trial court found that the word change from "exhibition" to "depiction" was not a real difference. RP 68. The trial court also ignored the plain language of the statute that says, "it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it" and found that because the minor victims in this case were not posed or directed in any way that the statute did not apply to defendant. RP 69. The trial court

substituted its own opinion for that of the legislature when it stated, "without a limiting instruction, theoretically, there would be almost no limits on what potential criminal liability would be for unclothed adults or children." RP 69. The trial court ignored the plain language of the statute, relied on cases that interpreted a pervious version of the statute that did not apply to defendant and substituted its own personal opinion for that of the legislature. The trial court substituted its own opinions for that of the legislature which is impermissible. The plain language of the current statute clearly criminalizes defendant's conduct. This Court should reverse the trial court's dismissal of Count XV and remand for trial.

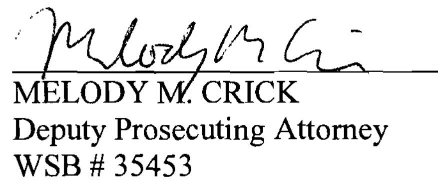
F. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions and sentence. The State also request that this court reverse the

trial court's pre-trial decision that dismissed Count XV, reinstate Count XV, and remand for trial on Count XV.

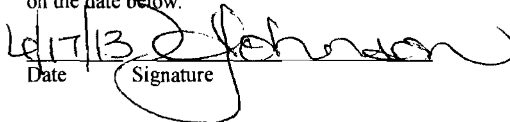
DATED: June 17, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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PIERCE COUNTY PROSECUTOR

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