NO. 43568-3-II (Consolidated)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARK BESOLA

and

JEFFREY SWENSON

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

No. 09-1-03223-0 (Besola)
10-1-02315-3 (Swenson)

BRIEF OF RESPONDENT

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

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2. Whether the claim that the court impermissibly commented on the evidence is without merit where, in response to an objection, the court made a statement acknowledging its lack of success in getting Amelia Besola to properly answer questions and the court stated that it understood the prosecutor's frustration?

3. Whether the court properly admitted evidence that Swenson offered child pornography to Waller where it was relevant to Besola's defense that it was Swenson, not Besola, who possessed the child pornography?

4. Whether the court properly instructed the jury as to the State's burden to prove knowledge where it used the standard WPIC instruction?

5. Whether sufficient evidence supported the convictions?

6. Whether the trial court properly decided that counts I and II are not the same criminal conduct where they involve a different intent?

7. Whether two of Swenson's community custody conditions are lawful, and in the event they are not, whether a remand for correction is a more appropriate remedy than striking them?

B. STATEMENT OF THE CASE.

1. Procedure

On July 7, 2009, the State charged Besola with: Count I, dealing in depictions of a minor engaged in sexually explicit conduct; Count II possession of depictions of a minor engaged in sexually explicit conduct. CPMB 1-2. The incidents were alleged to have occurred on September 27, 2008 and April 21st, 2009, respectively. CPMB 1-2. Besola was summonsed and arraigned on July 21, 2009. See CPMB 521, 522-23.

On May 28, 2010, the State filed an information charging Jeffrey Swenson with the same two counts. CPJS 125-26.

On April 6, 2010 Besola filed a motion to suppress evidence. CPMB 205-335. The State filed a response on August 12, 2010. CPMB 336-354. Swenson never filed a separate motion to suppress, but did join in Besola's motion. CPJS 130. The motion was heard on October 19, 2010, and the court issued a written decision denying the motion on October 25, 2010. CPMB 3-6; 7-15; 16-26. CPJS 205-08, 209-19.

On April 28, 2011 Besola filed a second motion to suppress evidence. CPMB 370-448. Swenson did not file a separate motion, and

the State could find no record that Swenson expressly joined in Besola's motion, however, presumably Swenson's prior joining in Besola's motion remained in effect. The State filed a response on June 7, 2011. CPMB 451-502. The court heard the motion on February 2, 2012, and on March 1, 2012 entered findings and conclusions denying the motion. CPMB 27-32. CPJS 142-147

On April 6, 2012 the case was assigned to the honorable Ronald Culpepper for trial. CPMB 524. CPJS 220. On April 9, 2012 the State filed an Amended Information as to each defendant that expanded the charging period in count I from on or about September 27, 2008 to the period September 27th, 2008 through April 21, 2009. CPMB 33-34. CPJS 33-34. A jury was empaneled on April 10. CPMB 541-68. CPJS 239-66.

On April 20, 2013, the jury returned verdicts, finding Besola guilty as to both counts, and finding Swenson guilty as to both counts. CPMB 77, 78; CPJS 157, 158.

On June 8, 2012, the court sentenced Besola to 35 months on Count I, and 30 months on Count II.[1] The court sentenced Swenson to 60 months on Count I, and 72 months on Count II, for a total of 72 months. CPJS 175-194. Besola timely filed a notice of appeal the same day. CP

105. Swenson timely filed a notice of appeal on June 11, 2012. CPJS 200.

2. Facts

a. Pertinent Facts at First Suppression Hearing

The following are taken from the findings of fact and conclusions of law entered after the first suppression hearing. *See* CPMB 7-15.

THE UNDISPUTED FACTS

1. The court heard live testimony from Detective Mike Hefty. Based on the testimony of this witness and exhibits admitted during the hearing, the following facts are not materially disputed.

2. On or about January 20, 2009, Kellie Westfall was charged in Pierce County Superior Court with Possession of a Stolen Vehicle, Possession of Methamphetamine, Possession of Another's Identification, DWLS 3, and Obstructing Law Enforcement.

3. On or about February 5, 2009, Westfall entered into a Drug Court Petition, Waiver and Agreement, which provided, among other things, that "upon successful completion of the treatment program, the Court will dismiss the charge with prejudice and the Prosecuting Attorney may not prosecute it in the future."

4. On or about March 25, 2009, Bonney Lake PD Detective Boyle contacted PCSD Deputy Tjossem regarding Ms. Westfall. Officer Boyle was investigating Westfall for her involvement with a stolen vehicle. Westfall told Officer Boyle and Deputy Tjossem that her friend, defendant Jeffrey Swenson, was obtaining drugs from his roommate, defendant Mark Besola. She reported that Besola worked as a veterinarian and was known to use,

[1] The total period of confinement does not appear to have been entered on the judgment and sentence.

sell, and distribute controlled substances, pharmaceuticals and methamphetamine. Besola was known to give pharmaceuticals to Swenson to trade or sell for methamphetamine. Westfall, a methamphetamine user, bought methamphetamine from and sold it to both Swenson and Besola.

5. On or about April 9, 2009, Westfall agreed to provide a tape-recorded statement to police. Westfall told Officer Boyle, Deputy Tjossem, and PCSD Detective Sergeant Berg that her decision to speak with them had nothing to do with her current charges. Westfall asked to speak with police regarding her information. Police did not make any promises to Westfall or threaten her in any way. Westfall was not paid for her information. Westfall spoke with police freely and voluntarily.

6. During the interview, Westfall discussed her relationship with defendants Swenson and Besola. Westfall and Swenson were good friends. Westfall reported that Swenson and Besola had a sexual relationship, which began when Swenson was approximately fourteen years old. Swenson stayed home and kept the house in exchange for Besola giving him drugs or money. Besola had a lot of money and invested well. Besola did not really like Westfall, but he allowed her into the residence because of her friendship with Swenson and because of the controlled substances. Westfall had stayed overnight in the residence several times.

7. Westfall also reported that she observed child pornography and controlled substances in Besola's home. Regarding the controlled substances, she observed Vicodan, liquid morphine, and other prescription type medications in prescription bottles, samples, and IV bags throughout the home. Westfall believed that Besola kept the drugs out in the open because there were no young children around and he was careful about who came into the home. At one time, Westfall observed Besola slumped over with a syringe and believed that he may be shooting drugs. During the interview, Westfall reported that she was last in Besola's home on March 25, 2009.

8. On April 21, 2009, Westfall contacted Deputy Tjossem and reported that Swenson had obtained

morphine from Besola. Swenson asked Westfall if she wanted to buy the morphine, which was at his residence.

9. Based on Westfall's statements, police sought to obtain a warrant to search defendants' residence. The affidavit in support of the search warrant identified Westfall by name, stated that she was willing to testify, and relayed the information Westfall provided to police on March 25, 2009, April 9, 2009, and April 21, 2009.

10. On April 21, 2009, at approximately 1700 hours, Det. Sgt. Berg and Deputy Tjossem requested and received a warrant to search the residence for controlled substances and other evidence regarding its use, possession, manufacture, distribution, or sale. The original request for the warrant included searching for evidence related to possession of child pornography. The issuing judge determined that probable cause to search for child pornography did not exist at that time. Police were not authorized to search for videotapes, CDs or DVDs.

11. On April 21, 2009, at approximately 1840 hours, police served the search warrant on defendants' residence located at 5314 218th Avenue East in Bonney Lake, WA.

12. According to Detective Hefty, during the search of the master bedroom, Detective Hefty located a CD/DVD case. Detective Hefty opened the CD/DVD case and observed numerous writeable CDs or DVDs with handwritten titles but could not remember during the hearing what those titles were.

13. On April 21, 2009, at approximately 2212 hours, police sought and obtained an addendum to the search warrant, which authorized police to search for and seize evidence of child pornography, including "any and all video tapes, CDs, DVDs, or any other visual and or audio recordings."

14. According to the April 21, 2009, affidavit for the addendum to the search warrant, the handwritten titles of the CD's and DVD's found by Det. Hefty included "Czech Boy Swap," "Beginner," and Young Gay Euro." He also located a VHS tape labeled "Berlin Men Holland Men (Boys) Location," as well as other writeable CDs or DVDs with seemingly pornographic titles.

15. Det. Hefty testified that no items, including CD's and DVD's were seized or removed from the premises until after the addendum to the search warrant authorizing the search and seizure of pornographic materials, was obtained by Det. Reigle.

16. Law enforcement made no attempt to corroborate the tips provided by either Westfall or Swenson

THE DISPUTED FACTS

1. During the initial search of defendants' residence, did Detective Hefty search the CD/DVD case for controlled substances or for CDs/DVDs?

FINDINGS AS TO DISPUTED FACTS

1. The court finds that Detective Hefty is an experienced and well trained law enforcement officer. The court finds that Officer Hefty's testimony during this hearing was honest, credible, and reasonable.

2. The court finds that when he was searching the bedroom in the defendant's home, Detective Hefty was searching the CD/DVD case for controlled substances, not for CDs/DVDs.

3. The court also finds that once Det. Hefty had opened the case the handwritten titles of the CD's and DVD's found by Det. Hefty were in plain view.

CONCLUSIONS OF LAW

1. The court finds that the informant meets both the basis of knowledge and the reliability prongs of the *Aguilar-Spinelli* test.

2. The court finds that there was sufficient information set forth in the affidavit in support of the search warrant that would allow Judge McCarthy to conclude that the informant had a basis for her knowledge, and that the information she provided would lead a reasonable person to believe that the defendant was engaged in criminal activity and that evidence of that activity could be found at the residence.

3. Regarding the basis of knowledge prong, the court finds the following:

a. The affidavit in support of the search warrant outlined that Ms. Westfall told police in a March 25, 2009 interview that her friend, defendant Jeffrey Swenson, was obtaining drugs from his roommate, defendant Mark Besola. Westfall said Besola was known to use, sell, and distribute controlled substances, pharmaceuticals and methamphetamine. Westfall said that Besola was known to give pharmaceuticals to Swenson to trade or sell for methamphetamine, and that Westfall is a methamphetamine user who both sold to and bought from Swenson and Besola.

b. The search warrant affidavit also detailed an April 9, 2009 interview in which Westfall told police that she was good friends with Swenson, and that it was Swenson's job to stay home and keep the house he shared with Besola. She said that, in exchange, Besola gave Swenson money or drugs. Westfall said that Besola did not really like her but that she was allowed into the home because of Swenson and the controlled substances. She said she had stayed at the house overnight several times. She said the last time she had been in the home prior to the interview was March 25, 2009.

c. Westfall told police that Besola had Vicodan, liquid morphine, and other prescription type medications in prescription bottles, samples and IV bags throughout the home. She also said she believed Besola may be shooting drugs because at one time she found him slumped over with a syringe. She said she believed the drugs were not put away or hidden because there were no young children and Besola was careful as to who came into the home.

d. The search warrant affidavit also stated that on April 21, 2009, the day on which the search warrant was issued, Westfall told Deputy Tjossem that Swenson had obtained morphine from

Besola and had asked Westfall if she wanted to buy the morphine. She said that Swenson told her the morphine was at his residence in a horse syringe.

4. Regarding the informant's reliability, the court finds that Ms. Westfall was a citizen informant. Her identity was revealed in the affidavit in support of the search warrant, as was the fact that she was willing to testify in court. The affidavit also described that the informant was being investigated by the Washington State Auto Task Force regarding a stolen vehicle. Westfall was not paid for her information. During her contacts with police, Westfall made statements against her penal interest by implicating herself in the use, possession, purchase, and sale of controlled substances. The information contained within the affidavit in support of the search warrant showed that Westfall was a reliable informant.

5. The court finds that the information provided by defendant Swenson to informant Westfall is also reliable and based upon his personal knowledge. Swenson was friends with the informant, lived with defendant Besola, and engaged in criminal activity himself with both Besola and the informant. Westfall therefore gathered her information in a reliable way and from a reliable source.

6. The court finds that none of the following statements were omitted from the search warrant affidavit intentionally or with a reckless disregard for the truth:

a. Ms. Westfall had been charged in a five-count information with Possession of a Stolen Vehicle, Possession of Methamphetamine, Possession of Another's Identification, DWLS 3, and Obstructing Law Enforcement was filed in Pierce County Superior Court on January 20, 2009;

b. Ms. Westfall's Drug Court Petition was entered on February 5, 2009, and as a condition of her entry into the drug court program, she stipulated that there were facts sufficient to find her guilty of the charged offenses;

c. Ms. Westfall failed to appear for drug court crew on February 25, 2009, and a warrant was issued for her arrest;

d. Ms. Westfall had been booked into the Pierce County Jail on or about March 25, 2009, and a no-bail hold had been ordered March 26, 2009;

e. Ms. Westfall was still incarcerated when she gave her statement to law enforcement on April 9, 2009;

f. Ms. Westfall was subsequently ordered to be released from jail on her personal recognizance on April 13, 2009 and directed to report back to drug court;

g. Ms. Westfall perceived Mr. Besola to be "jealous" of her because she had a close friendship with Jeffrey Swenson, an individual who lived at Mr. Besola's home and had a romantic relationship with Mr. Besola;

h. Ms. Westfall has bought drugs for Mr. Swenson;

i. Ms. Westfall became friends with Brent Waller, a registered sex offender who lived in an apartment located on the residence when she was in jail the last time, who told Ms. Westfall that she could live with him while she was going through drug court;

j. Ms. Westfall told law enforcement that she was no longer allowed at the house because "Mark doesn't like me";

~~k. Ms. Westfall perceived Mr. Besola to have "lots" of money;~~ E.M. [Judge's handwritten initials.]

l. The drugs that Ms. Westfall saw in the house were actual pharmaceuticals from Mr. Besola's vet clinic;

m. Ms. Westfall never actually read the drug labels on the drugs she claimed to witness Mr. Besola shooting; and

n. The vials of Valium that Ms. Westfall saw in the house were for Mr. Besola's dog, who had cancer.

7. The court further finds that none of the statements listed above were material or necessary to the finding of probable cause.

8. The court finds that Detective Hefty did not exceed the scope of the search warrant when he opened the CD/DVD cases in the master bedroom. The affidavit in support of the search warrant stated that "Controlled substances are commonly hidden in various types and sizes of containers, which are often disguised to avoid detection." The search warrant authorized the search of the residence for controlled substances, related equipment or material, and documents or records. Detective Hefty testified that he was searching for controlled substances when he opened the cases, and that, in his experience, controlled substances can be hidden anywhere. A warrant authorizing the search of premises for drugs allows officers to search virtually everywhere in those premises.

9. Detective Hefty was acting within the scope of the drug search warrant when he opened the CD/DVD cases in the master bedroom. He then discovered the suspect DVDs in plain view, but did not seize them until an addendum to the search warrant was obtained which authorized their seizure.

10. The items to be seized were described with sufficient particularity in the search warrant. Detective Hefty was well aware that CDs/DVDs/memory storage devices could not be seized under the drug search warrant. The CD/DVD cases were searched for controlled substances.

11. For these reasons, all of the defendant's motions to suppress the evidence obtained in this case are DENIED.

b. Facts at Trial

On April 21st of 2009, the Pierce County Sheriff's department served a search warrant at 5314 218th Avenue E. on Lake Tapps. 3RP 360, ln. 13-25. The location was a single family home. 3RP 360, ln. 17-

21. While searching upstairs in an open loft area that looked down into the living room below it, Detective Kevin Johnson found some CDs or DVDs that were writeable, meaning that something could be copied onto them. 3RP 362, ln. 21 to p. 365, ln. 12; Ex. 21. He also found some CDs or DVDs behind a water heater that was in a closet off the bathroom, which in turn was off of a bedroom. 3RP 366, ln. 11 to p. 367, ln. 23; Ex. 19. He also found some CDs or DVDs in a suitcase in the closet of the master bedroom. 3RP 368, ln. 6 to p. 369, ln. 12. More CDs and DVDs were found in one of the nightstands in the master bedroom. 3RP 370, ln. 4 to p. 371, ln. 3; Ex. 18. In the other nightstand were CDs, DVDs and VHS tapes. 3RP 371, ln. 4 to p. 372, ln. 3; Ex. 15. There was also a DVD in the DVD player hooked up to the TV in the master bedroom. 3RP 372, ln. 4 to p. 373, ln. 6; Ex. 16.

There were clothes in the master bedroom that were large to the point that they would not have fit Swenson. 4RP 535, ln. 10 to p. 536, ln. 7.[2] It was well established throughout the trial that Besola was quite large, as for example when his sister acknowledged as much.

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[2] The State was unable to locate in the VRPs an indication of the relative sizes of Besola and Swenson. However, in the police reports that were marked as exhibits, but not admitted, Besola was listed as 6'0" tall and weighing 300, while Swenson was listed as height 5"11" and weight 130. Where the defendants were both present at trial, such a difference would have been readily apparent to the jury. *See* Ex. 182 (Supplemental report .10).

On April 23, 2009 Sheriff's Deputies served a second warrant at the Lake Tapps House, to obtain handwriting samples. 3RP 391, ln. 2-19. Detective Johnson searched in the downstairs master bedroom to the left near the foot of the bed and found a letter or card in a box along with some miscellaneous documents. 3RP 392, ln. 20 to p. 393, ln. 9. Items found in the box included a notepad with handwriting on it. 3RP 394, ln. 2-24; Ex. 3A. In the box Detective Johnson also found a "thank-you" card addressed to Mark from Jeff Swenson. 3RP 395, ln. 3 to p. 396, ln. 14; Ex. 3B. A number of various documents with handwriting on them. 3RP 396, ln. 23 to p. 402, ln. 9; Ex. 3C. From the downstairs master bedroom the officers also collected a handwritten letter and envelope addressed to Mark Besola with a return address from Jeff Swenson. 3RP 402, ln. 11 to p. 405, ln. 23; Ex. 4.

Brett Bishop is a forensic handwriting analyst for the Washington State Patrol Crime Lab who evaluated the handwriting on the top surface of some of the compact disks against exemplars attributed to Swenson and Besola. Exhibit 174 if a handwriting exemplar attributed to Swenson. 3RP 417, ln. 5-6. Exhibit 175 is a combination of handwriting exemplars attributed to Besola. 3RP 417, ln. 7-8.

Exhibit 40 was a disk that contained the writing "Football Orgy, Beach Boys, Hotel CA, three large only, 12-2-05," 3RP 425, ln. 18 to p. 426, ln. 4. Mr. Bishop concluded that writing matched the writing from the Besola exemplar. 3RP 427, ln. 3-5.

Other disks contained writing that was consistent with and appeared to be Besola's, however as to those samples, Mr. Bishop was only able to give a qualified opinion that the writing was Besola's. 3RP 427, ln. A qualified opinion is one short of virtual certainty or a definitive conclusion that has significant characteristics, but the evidence is not strong enough to support a definitive conclusions. 3RP 427, ln. 21 to p. 428, ln. 1. Items that had indications of Besola's handwriting, but were not definitive were exhibits 23, 24, 25, 26, 27, 28, 29, 30, 31, 37, 38, 39, 41, 42, 44, 45, 49, 50, 54, 55, 57, 60, 61, 62. 3RP 428, ln. 2 to p. 445, ln. 1.

Exhibit 55 contained indications of both Besola's and Swenson's handwriting. 3RP 443, ln. 21 to p. 445, ln. 1.

Items that had indications of Swenson's handwriting included exhibits 33, 34, 36. 3RP 444, ln. 1 to p. 447, ln. 2. Some exhibits contained multiple video clips of child pornography. 4RP 496, ln. 21 to p. 497, ln. 4.

Detective Johnson gave brief general descriptions of the sex acts that occurred in the various video clips containing child pornography, including the apparent ages of the children. 4RP 491 to p. 523. The disks that contained child pornography described by Detective Johnson were Exhibit numbers 6, 10, 12, 20, 52, 51, 53, 54, 56, 57, 58, 59, 60, 61, 62.

4RP 491 to p. 523. Some of the disks contained duplicate copies of the same video clips. *See, e.g.*, 4RP 508, ln. 16 to p. 509, ln. 18.

In addition to the Detective describing the contents of the exhibits that contained child pornography, Besola and Swenson each entered a stipulation that Exhibits 6, 23-62, and 63 contained visual matter depicting minors engaged in sexually explicit conduct. CPMB 70-71; CPJS 221-22; 3RP 425, ln. 18 to p. 426, ln. 4; 3RP 427, ln. 3-5. This stipulation includes Exhibit 40, which had the handwriting on the top that the handwriting examiner testified he concluded matched Besola's handwriting. CPMB 70-71; CPJS 221-22.

Swenson and Besola, had lived together off and on for 10 to 12 years. 7RP 1046. Besola acknowledged that a romantic relationship developed between him and Swenson and claimed that it started in about 2001. 8RP 1097, ln. 13 to p. 1099, ln. 6. It was an on-again off-again relationship, and also that Swenson did not pay rent when he stayed with Besola. 8RP 1101, ln. 5-24.

Brent Waller, who lived in Besola's garage at the residence said that there was a substantial amount of pornography in Besola's place. 6RP 866, ln. 13-15. Brent Waller said Swenson copied pornography, traded it with him, and had offered him child pornography. 6RP 851, ln. 9-11.

Swenson used the computer in the house with Besola's permission. 8RP 1091, ln. 2-7. Video files with child pornography had been downloaded onto Besola's computer in a directory under his name. Swenson made statements to Amelia Besola that the child pornography was his. 7RP 994, ln. 7 to p. 995, ln. 2.

Besola acknowledged that he knew Swenson had pornography, but claimed he didn't know how much. 8RP 1093, ln. 8-9. Besola admitted old VHS tapes were his, that he didn't throw things away, and admitted to knowing there was some older pornographic movies on them. 8RP 1093, ln. 13-19.

Besola claimed that he didn't know that there was child pornography in the home or that Jeff liked child pornography, and he claimed that he found it reprehensible. 8RP 1094, ln. 1-11.

The forensic computer analyst testified that Item no. 1 was a Dell computer tower that appeared to be the main computer in the house. 5RP 762, ln. 9-19. It contained child pornography. 5RP 768, ln. 12-16. The registered owner of the computer was entered into the software as Mark, and the computer was named Mark PC. 5RP 769, ln. 16-19. The computer had other user accounts, including one named Hustlers, but no account named Jeff or Swenson, and no other names. 5RP 768, ln. 24 to p. 769, ln. 9. The computer contained a number of documents related to

Mark Besola, including photos of Besola, banking documents in the name of his business, images of checks related to his business with his name on it. 5RP 770, ln. 14-19. Nothing similar to Jeff Swenson was found on the computer. 5RP 770, ln. 23-25.

Under the user name of Mark, there was a desktop folder named BearShare, within which was another folder named "new folder" that contained video clips. 5RP 771, ln. 19-20; 772, ln. 8-22. BearShare is the name of a web site based peer to peer file sharing service that enables people connected to it to share files with each other. 5RP 774, ln. 8 to p. 775, ln. 8. It includes a search engine in which a user would enter the particulars on files they were looking for and then permits the user to see files available from other user's computer. 5RP 775, ln. 1-16.

Two of the video clips in the BearShare folder on Besola's computer appeared to contain images of minors engaged in sexually explicit activity, the first was titled "pedo - 11-year-old kids having sex," and the second was titled "zadoom pedo compilation, little nudist girl an boy tryin." 5RP 772, ln. 23 to p. 773, ln. 2. Another folder on the desktop named "new folder (2)" contained two files, one titled "V5" and the other titled "V8." 5RP 776, ln. 19-25. The file titled "V5" contained images of two juveniles performing oral sex, who are then joined by an adult male who has anal sex with the two juvenile males. 5RP 777, ln. 1-8. The file

titled "V8" was a video file that showed two juvenile males who engage in oral and anal sex. 5RP 777, ln. 9-18.

The file "pedo - 11-year-old kids having sex," was saved to the hard drive on September 27, 2008 at 5:15 a.m. 5RP 781, ln. 23 to p. 782, ln. 2. The file "zadoom pedo compilation, little nudist girl an boy tryin." was saved to the hard drive on September 27, 2008 at 5:10:31. 5RP 782, ln. 3-7. The file "V5" was saved to the hard drive on September 27, 2008 at 5:10:08. 5RP 782, ln. 13-16. The file titled "V8" was saved to the hard drive on September 27, at 5:10:15. 5RP 782, ln. 19-22. So all four files were saved to the hard drive within five minutes of each other in the early morning. 5RP 782, ln. 21-25.

The computer was located on a desk in an office type space on the first floor of the residence. 5RP 763, ln. 7-18.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED THE SUPPRESSION MOTIONS.

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, 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). *See also* ***State v.***

Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."); ***State v. J-R Distribs., Inc.,*** 111 Wn.2d 764, 774, 765 P.2d 281 (1988) ("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant."]. Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. ***State v. Feeman***, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. ***State v. Yokley***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); ***State v. Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. ***State v. Casto***, 39 Wn. App. 229, 232, 692 P.2d 890 (1984) (citing ***State v. Partin***, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting, with approval from ***United States v. Ventresca***, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

a. At the suppression hearing the court properly held that there was no intentional or reckless material misrepresentation in the probable cause declaration.

In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. ***State v. Maxwell***, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Generally, the "four corners rule" does not permit challenges to facially valid affidavits establishing probable cause for warrants. *See* ***State v. Moore***, 54 Wn. App. 211, 214, 773 P.2d 96 (1989) (citing ***United States v. Bowling***, 351 F.2d 236, 241-42 (6th Cir. 1965)). However, ***Franks v. Delaware*** established a procedure for challenging parts of a warrant that are predicated on an affiant's deliberate falsehoods or statements made with deliberate disregard for the truth. *See* ***State v. Garrison***, 118 Wn.2d 870, 827 P.2d 1388 (1992); and ***Moore***, 54 Wn. App. at 214 (both citing ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct.

2674, 57 L. Ed. 2d 667 (1978)). The ***Franks*** hearing was instituted to detect and deter the issuance of warrants based on information gathered as a result of governmental misconduct. ***Moore***, 54 Wn. App. at 214-15 (citing ***Thetford***, 109 Wn.2d at 399). Under the ***Franks*** procedure, a defendant is only entitled to an evidentiary hearing if the defendant first makes a "substantial preliminary showing" that an officer or agent of the State knowingly or recklessly made a statement that was the basis of a court's probable cause finding. ***Moore***, 54 Wn. App. at 214 (***State v. Thetford***, 109 Wn.2d 392, 398, 745 P.2d 496 (1987)) and ***Franks***, 438 U.S. at 155.

Washington has followed the federal standard, and a defendant must show either a material falsehood or a material omission of fact by the officer. ***State v. Chenoweth***, 160 Wn.2d 454, 465, 158 P.3d 595 (2007) (rejecting the argument that Article I, Section 7 of the Washington Constitution demands a standard of mere negligence). Intentional omissions or misstatements occur when the affiant shows "reckless" disregard for the truth. Recklessness is shown where the affiant, "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." ***State v. O'Connor***, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), quoting ***United States v. Davis***, 617 F.2d 677, 694 (D.C.Cir. 1979).

> "[S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

O'Connor, 39 Wn. App. at 117.

A defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. ***State v. Hashman***, 46 Wn. App. 211, 729 P.2d 651 (1986); ***State v. Stephens,*** 37 Wn. App. 76, 678 P.2d 832 (1984). Even if a defendant were able to prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included. ***State v. Gentry***, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

i. The Trial Court's Unchallenged Findings Of Fact Are Verities On Appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at

644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See* ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *see also* ***Neil F.***

Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc., 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law ***de novo***. ***State v. Smith***, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing ***State v. O'Neill***, 148 Wn.2d 564, 571, 62 p.3d 489 (2003); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

Here, pertinent to this issue, Besola assigns error only to the courts findings in support of its conclusions of law 6 [CP 13], and 7 [CP 14].[3] Swenson incorporates Besola's assignments of error as to this issue. Br. App. Swenson, p. 2 (assignment of error 6).

The challenged findings will be upheld so long as they are supported by substantial evidence. ***Hill***, 123 Wn.2d at 644.

Moreover, Besola's brief includes no argument whatsoever that there was not sufficient evidence to support the trial court's findings at the suppression hearing. Nor does Besola provide any citation to the VRP of the October 19, 2010 hearing regarding this issue. For these reasons

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[3] Besola also assigns error to the trial court's finding of fact in support of its conclusions 4 [CPMB 12] and 5 [CPMB 13], however, those findings relate to Kellie Westfall's status as an informant under an ***Agular-Spinelli*** analysis, which is addressed in section [??] below, and is not pertinent to the analysis of this issue.

alone, the claim should be dismissed as not properly supported. *See* ***Henderson***, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998);

Indeed, as best the State can determine, Besola has not included the VRP from the October 19, 2010 suppression hearing as part of the record in his appeal. Where a defendant fails to support an argument with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. *See* ***Spradlin Rock Products, Inc. v. Public Utility District No. 1***, 164 Wn. App. 641, 667, 226 P.3d 229 (2011); ***Ensley v. Pitcher***, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Smith v. State***, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006).

While the claim on this issue fails for the procedural defects mentioned above, it also fails on the merits. There was substantial evidence to support the court's findings in support of conclusions 6 and 7 in regard to the October 9, 2010 suppression hearing. Indeed, the court detailed those facts in its oral ruling.

In their motion the defense identified 14 facts were claimed to constitute material facts that were omitted from the search warrant affidavit. CPMB 208-09. At the motion hearing, the defense agreed that

one of the facts was improperly included. RP 10-19-10 & 11-30-11, p. 24, ln. 24 to p. 25, ln. 3; p. 28, ln. 20-21. The facts that were claimed to have been improperly omitted were based on information obtained from an interview officers had with Kellie Westfall on April 9, 2009. CPMB 207. A transcript of the interview was attached as Appendix D to Besola's motion. CPMB 244-298.

In its findings in support of conclusion 6, the court found that "none of the following statements were omitted from the search warrant affidavit intentionally or with reckless disregard for the truth, and then listed each of the remaining 13 statements raised by Besola in the motion. CPMB 13-14.

In its oral ruling, the court noted that the argument focused on a few areas less than the 13 total listed in the brief. RP 10-19-10 & 11-30-11, p. 29, ln. 1-2.

The court found that at the time the warrant was obtained on April 27, 2009,[4] Westfall had not been kicked out of drug court, but had been put into drug court on a case involving five counts that had been filed against her on January 20, 2009. RP 10-19-10 & 11-30-11, p. 30, ln. 2-4. The court found that it was unreasonable to expect law enforcement officers to know the nuances of Drug Court, the meaning of the

defendant's stipulation upon entry into drug court, and whether that constitutes a conviction. RP 10-19-10 & 11-30-11, p. 30, ln. 4-8. The court found that the omission of such facts certainly didn't rise to the level of a reckless or intentional act. RP 10-19-10 & 11-30-11, p. 30, ln. 9-11. This was sufficient to support the court's findings 6.a to 6.d.

As for the fact that Westfall was not incarcerated at the time of the interview, the court noted that the probable cause declaration for the search warrant contained discussion that Westfall was being investigated in regard to a stolen vehicle. RP 10-19-10 & 11-30-11, p. 30, ln. 18-20. The court also noted that nothing in evidence presented to the court indicated that she had been given any kind of promise or deal. RP 10-19-10 & 11-30-11, p. 30, ln. 23-25. Accordingly, the court found that in that context, the omission of her custody status from the declaration was not a reckless or intentional omission or misrepresentation. RP 10-19-10 & 11-30-11, p. 31, ln. 2-4. These facts provided sufficient evidence to support the court's findings 6.d, 6.e, and 6.f.

The court noted that the probable cause declaration contained statements that Ms. Westfall's close relationship with Swenson, that Besola is a veterinarian, that Besola gave Swenson pharmaceuticals to Swenson to trade or sell for methamphetamine, and that Kellie Westfall

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[4] The original warrant contains a scrivener's error and lists the year as 2008.

herself was a methamphetamine user who both sold and bought from Swenson and Besola, and that she thought Besola may be shooting drugs as one time she found him slumped over with a syringe. RP 10-19-10 & 11-30-11, p. 31, ln. 13-20. The court didn't find this inconsistent with the statements in the law enforcement interview. RP 10-19-10 & 11-30-11, p. 32, ln. 1-2. The court therefore found that the omission of the additional details was not a reckless or intentional omission. RP 10-19-10 & 11-30-11, p. 32, ln. 4-7. These facts support findings 6.h, 6.l.

The court noted that the probable cause declaration contained a statement that Besola did not like Ms. Westfall and she is allowed in the house because of Mr. Swenson and the controlled substances. RP 10-19-10 & 11-30-11, p. 31, ln. 8-10. The court found that where this information was included, there omission of the statement that she was no longer allowed in the house because Besola doesn't like her was not a reckless or intentional misrepresentation. RP 10-19-10 & 11-30-11, p. 31, ln. 6-12. These facts support the court's finding 6.j.

Moreover, a number of the statements Besola claimed were omitted are so substantially similar to facts that are contained in the probable cause declaration, that they don't support a finding that details that were not included were omitted recklessly or intentionally. Compare CPMB 308-09 with findings 6.a, 6.h, 6.i, 6.l, and 6.m.

Substantially the same analysis applies to the court's findings in support of conclusion 7, that none of the statements in finding 6.a to 6.n were material or necessary to the finding of probable cause. The probable cause declaration contained so much of the substance of what Besola claims was omitted from the declaration, that the omitted details are irrelevant and not material.

Here, sufficient evidence supported the court's findings where the facts Besola claims were omitted from the probable cause declaration are not substantially different from the facts that were contained in the probable cause declaration. Under such a circumstance, there was no basis for the court to find a reckless or intentional omission of material facts. The court's findings were supported by substantial evidence.

ii. The Trial Court Properly Held That There Were No Intentional Or Reckless Material Misrepresentations.

The defense claims that the court erred at the suppression hearing when it held that there was no intentional or reckless material misrepresentation of the facts in the probable cause declaration. Br. App. Besola, p. 32ff; Br. App. Swenson, p. 18 (incorporating by reference the arguments in Besola's brief).

For essentially the same reasons that the trial court's findings were supported by substantial evidence, the court properly found that there were no reckless or intentional misrepresentations. The defense claim that the officers recklessly or intentionally omitted the facts identified by Besola in the pre-trial motion is without merit in light of the substantially similar information the officers did include in the probable cause declaration. *See* CPMB 318-19.

Accordingly, the analysis of the preceding section, 1.a.i is incorporated here by reference.

The declaration stated the following facts, that: Westfall was being investigated in regard to a stolen vehicle; Westfall was a methamphetamine user who both sold to and bought from Swenson and Besola; Besola was a veterinarian and that Swenson obtained drugs from Besola; Westfall and Swenson were good friends; Besola does not like Westfall, but that she is allowed into the house because of the controlled substances and her relationship with Swenson; Besola had Vicodan, liquid morphine and other prescription type medications in prescriptions bottles, samples and IV bags throughout the home; Besola would give pharmaceuticals to Swenson to trade or sell for methamphetamine; Besola may be "shooting drugs" as she once found him slumped over with a syringe; but also that there were syringes in the home because Besola is

reportedly diabetic; Besola rents his garage to Brent Waller, a registered sex offender not known to be involved with the pornography, but known to Westfall to abuse drugs.

Where these facts were included in the probable cause declaration, the trial court properly found that the facts Besola relied upon were not omitted in reckless or intentional disregard for the truth. The court also properly found that the facts Besola relied upon were not material, because they would not have altered probable cause for the warrant.

In his brief, Besola claims that "[o]ur Supreme Court has found an affiant reckless in circumstances quite similar to those found here." Br. App. Besola at 35 (citing ***Turngren v. King County***, 104 Wn.2d 293, 705 P.2d 25 (1985)). However, the court in ***Turngren*** did no such thing. The court made no finding that the officer was reckless. *See* ***Turngren***, 104 Wn.2d at 308-309. Indeed, the court could not make such a finding, since appellate courts do not make factual determinations. ***State v. Walters***, 162 Wn. App. 74, 255 P.3d 835 (2011); ***Doyle v. Lee***, 166 Wn. App. 397, 406, 272 P.3d 256 (2012). *See also* ***Thorndike v. Hesperian Orchards, Inc***, 54 Wn.2d 570, 572-575, 343 P.2d 183 (1959).

Moreover, the court in ***Turngren*** did not undertake a ***Franks*** analysis because it wasn't even a criminal case. In ***Tungren*** the court

reversed the trial court's dismissal on summary judgment of a civil lawsuit against police agencies as a result of a search warrant they served.

What the court in ***Turngren*** actually did was to hold that plaintiffs' affidavits in opposition to the motion for summary judgment were sufficient to raise a genuine issue of material fact as to the existence of probable cause such that dismissal of the plaintiff's claim on summary judgment was improper. ***Turngren***, 104 Wn.2d at 308. This was because "[a]dditional evidence independent of the informant's statement, in the form of the detectives' depositions, raise[d] an issue of material fact in regard to the detectives' full disclosure of the facts relating to the informants reliability and the amount of independent corroboration of the informant's story." ***Turngren***, 104 Wn.2d at 307-08. Thus, the court in ***Turngren*** merely recognized the existence of a material dispute of fact between the parties. The court goes on to conclude that summary judgment was improper because, "[i]f the petitioners were able to prove this allegation, the jury would be permitted to infer malice..." ***Turngren***, 104 Wn.2d at 309.

The opinion ***Tungren*** is not applicable and is of no authoritative value to Besola's claim on this issue.

b. The Issuing Magistrate And Reviewing Judge Reasonably Determined That Westfall Was A Reliable Informant.

Besola assigns error to the trial court's conclusions that Westfall was a citizen informant; and that Westfall gathered her information in a reliable way from a reliable source. Br. App. Besola, p. 1 (assignments of error 3, and 4).

Swenson assigns error to the trial court's findings in support of, conclusion 1 that the informant meets both the basis of knowledge and reliability prongs; conclusion 4 that Westfall was a citizen informant and that the information within the affidavit showed that Westfall was a reliable informant. Br. App. Swenson, p. 1-2 (assignment of error 3).

When an affidavit in support of a search warrant contains information provided by an informant, the constitutional criteria for determining probable cause is measured by the two-prong ***Aguilar-Spinelli*** test. ***State v. Atchley***, 142 Wn. App. 147, 161, 173 P.3d 333 (2007); ***Cole***, 128 Wn.2d at 287. To satisfy that test, the officer requesting the warrant must show that (1) the informant obtained the information in a reliable way ("basis of knowledge" prong), and (2) the informant is credible or the information is reliable ("reliability" prong). ***Aguilar v. Texas***, 378 U.S. 108, 114, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723 (1964);

Spinelli v. United States, 393 U.S. 410, 413, 89 S. Ct. 584, 587, 21 L. Ed. 2d 637 (1969).

In order to satisfy the "basis of knowledge" prong, "the affiant must explain how the informant claims to have come by the information and the informant must declare that he personally has seen the facts asserted and is passing on firsthand information." ***State v. Atchley***, 142 Wn. App. 147, 163, 173 P.3d 323(2007); citing ***State v. Jackson***, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (internal quotations omitted).

In order to satisfy the "reliability" prong, the affiant must show that the informant or the informant's information is credible. The "reliability" prong of the ***Aguilar-Spinelli*** test is relaxed when the informant is a citizen named in the affidavit to the warrant. ***State v. Tarter***, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). If the citizen is not named in the warrant, but known to the police, the affidavit must "contain background facts to support a reasonable inference that the information is credible and without motive to falsify." ***Cole***, 128 Wn.2d at 287-288 (citing ***State v. Wilke***, 55 Wn. App. 470, 477, 778 P.2d 1054, *review denied*, 113 Wn.2d 1032, 784 P.2d 531 (1989)). If sufficient background information is provided, "the informant may be credible even though the affidavit does not state specifically why the informant wishes to remain anonymous." ***Cole***, 128 Wn.2d at 288 (citing ***State v. Dobyns***, 55 Wn.

App. 609, 619, 779 P.2d 746, *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989)).

If sufficient background information is provided, "the informant may be credible even though the affidavit does not state specifically why the informant wishes to remain anonymous." ***Cole***, 128 Wn.2d at 288. Additionally, the background facts within the affidavit can support the conclusion that the information is credible. ***Cole***, 128 Wn.2d at 287-288.

For purposes of the ***Aguilar-Spinelli*** test, the review is limited to the information contained in the four corners of the warrant. *See* ***State v. Lyons***, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). All facts and inferences are interpreted in favor of the validity of the warrant. ***Lyons***, 174 Wn.2d at 360. An issuing magistrate's factual determination that an informant is credible and reliable is reviewed for abuse of discretion, which is whether tenable grounds or reasons support the decision. ***Peterson v. State***, 145 Wn.2d 789, 800, 42 P.3d 952 (2002); ***State v. Perrett***, 86 Wn. App. 312 319, l936 P.2d 426 (1996). This court reviews *de novo* the issuing magistrate's legal determination that informant meets ***Aguilar-Spinelli*** test. ***Peterson***, 145 Wn.2d at 800. Thus, because this court stands in the same position as the trial court at the suppression hearing, that court's determinations are irrelevant, including its findings of fact.

The facts in the affidavit in this case are consistent with those in ***State v. Chamberlin***, where the court held that the informant was reliable. ***Chamberlin*** involved a situation where a suspect in a criminal investigation gave a tape recorded statement providing information to officers that provided probable cause for a warrant in an unrelated crime. *See* ***State v. Chamberlin***, 161 Wn.2d 30, 34, 162 P.3d 389 (2007). Like the informant in ***Chamberlin***, Westfall gave a taped interview to officers, made statements against penal interest, was identified in the warrant affidavit, and expressed a willingness to publicly repeat her statement in court. *See* ***Chamberlin***, 161 Wn.3d at 34-35, 42-43. There is not a significant difference between the facts in this case and ***Chamberlin***. Accordingly, the opinion in ***Chamberlin*** controls.

Further, to the extent Westfall relied on statements from Swenson in addition to her own observations, that reliance was proper. Swenson made statements and engaged in acts against his penal interest by buying and selling drugs with Westfall. Swenson had first-hand knowledge of his living circumstances. Where the probable cause declaration indicated that Swenson and Westfall were good friends, Westfall's statements regarding his living arrangements were reliable. Moreover, based on Westfall's first hand observations, she independently corroborated the statements Westfall made to her that supported probable cause.

The affidavit for the warrant contained facts from which the issuing magistrate could infer that Westfall was a reliable informant with a first hand basis of knowledge, and that Swenson was as well.

c. The Court Properly Denied The Second Motion To Suppress Based Upon The Claim That The Addendum To The Warrant Was Overbroad.

Both Besola and Swenson claim that the addendum to the warrant was overbroad and that the trial court erred in the second suppression motion when it failed to suppress the evidence obtained pursuant to the addendum. Br. App. Besola, p. 1 (assignment of error 2), p. 24ff. Br. App. Swenson, p. 1 (assignment of error 2), p. 15-18.

The appellate court reviews *de novo* whether a search warrant contains a sufficiently particularized description. ***State v. Perrone***, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

i. The Warrant Was Not Overbroad

The Fourth Amendment mandates that warrants describe with particularity the place to be searched and the person or things to be seized." ***State v. Reep***, 161 Wn.2d 808, 813-14, 167 P.3d 1156 (2007). The particularity requirement serves to prevent general searches, the seizure of items on the mistaken assumption they fall within the issuing

magistrate's authorization, and the issuance of warrants on loose, vague, or doubtful bases of fact. ***State v. Perrone***, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

Courts determine the validity of a search warrant on a case-by-case basis. The required degree of particularity depends upon the nature of the materials sought and the circumstances of each case. For example, materials protected by the First Amendment require greater particularity than materials not protected by the First Amendment. ***Perrone***, 119 Wn.2d at 547.

The constitutional requirements are met if the warrant describes the property with reasonable particularity under the circumstances. ***Perrone***, 119 Wn.2d at 546-47. A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search, or because it describes, particularly or otherwise, items for which probable cause does not exist. ***State v. Maddox,*** 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). Again, courts are to evaluate search warrants in commonsense, practical manner, rather than in a hypertechnical sense. ***Maddox,*** 116 Wn. App. at 805.

In ***Perrone***, the Washington Supreme Court stated that using statutory language in describing the materials sought will tend to satisfy the particularity requirement. ***Perrone***, 119 Wn.2d at 553-54. The court

also stated that "*[r]eference* to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer's exercise of discretion in executing the warrant." ***Perrone***, 119 Wn.2d at 555 (quoting ***United States v. Spilotro***, 800 F.2d 959, 964 (9th Cir. 1986)) (emphasis added).

A year later, in ***State v. Riley***, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993), the Supreme Court held that a warrant was invalid because it *neither* specified the crime being investigated *nor* otherwise limited the scope of the search by reference to particular items to be seized. ***Riley*** and its progeny appear to stand for the proposition that a warrant can satisfy the particularity requirement if it references the particular crime being investigated. *See, e.g.*, ***State v. Ollivier***, 161 Wn. App. 307, 254 P.3d 883 (2011), *review granted*, 173 Wn.2d 1014, 272 P.3d 247 (2012). Here, the warrant addendum references the crime being investigated, RCW 9.68A.070. The warrant is therefore sufficiently particular and should be upheld.

In ***State v. Riley***, the crime under investigation was computer trespass. The warrant, however, authorized the seizure of: "any fruits, instrumentalities and/or evidence of *a crime*, to-wit: notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic

calculator, electronic notebooks or any electronic recording device." ***Riley***, 121 Wn.2d at 26 (emphasis added).

Although the warrant listed a broad range of items, it failed to identify the crime under investigation. ***Riley***, 121 Wn.2d at 27-28. In fact, it failed to identify *any* crime. There was no reasonable way to determine which of the "inherently innocuous" items on the list were subject to seizure. The warrant permitted the seizure of broad categories of material without reference to any specific criminal activity.

The ***Riley*** court held that the warrant was overbroad and invalid because it authorized the seizure of "fruits, instrumentalities and/or evidence of a crime," followed by a list of various items that might fit the description, and failed to identify the crime under investigation. ***Riley***, 121 Wn.2d at 26-28. The court held, "A search warrant that fails to specify the crime under investigation without otherwise limiting the items that may be seized violates the particularity requirement of the Fourth Amendment." ***Riley***, 121 Wn.2d at 27-28.

The ***Riley*** court's holding was recently applied in ***State v. Ollivier***. In ***Ollivier***, the defendant was a registered sex offender who lived with two roommates. One of the defendant's roommates told police that the defendant had shown him a video of a young girl and young boy engaged in sexually explicit activity. ***Ollivier***, 161 Wn. App. at 311. The

defendant also showed him photographs of young girls who were clothed but provocatively posed. ***Ollivier***, 161 Wn. App. at 311. The photographs were on the defendant's computer and in print form. ***Ollivier***, 161 Wn. App. at 316. Police subsequently obtained a warrant to search and seize a red lock box, computers, and peripheral hardware associated with computers.[5] ***Ollivier***, 161 Wn. App. at 311, 318. The defendant was arrested, charged, and convicted of possession of depictions of minors engaged in sexually explicit conduct under RCW 9.68A.070. ***Ollivier***, 161 Wn. App. at 312.

The defendant appealed his conviction arguing, among other things, that the search warrant was overbroad and not supported by probable cause. The court rejected both of these arguments and upheld the validity of the warrant. ***Ollivier***, 161 Wn. App. at 316-19. First, the court held that the search warrant affidavit was sufficient to establish probable cause. The affidavit was based on a tip from the defendant's roommate, who observed child pornography on the defendant's computer. ***Ollivier***, 161 Wn. App. at 316-18.

[5] For reasons not specified in the court's opinion, the information obtained from the red lock box was suppressed.

Next, the court held that the warrant described with sufficient particularity the items to be seized and searched, because it specifically referenced the crime under investigation, RCW 9.68A.070.

> The warrant set forth with particularity the items that were to be seized...The officers could identify with reasonable certainty the items to be seized, computers, storage media, and related items. The actual search of the computer system was also included with specificity in the warrant, *in particular with its citation to the statute which Ollivier was accused of violating*. As noted in ***State v. Riley***, particularity can be achieved by the specification of the suspected crime. Viewing the warrant in a commonsense manner, *it is sufficiently particular because it references the particular crimes being investigated in the case*.

Ollivier at ¶ 18 (emphasis added).

Under ***Riley*** and ***Ollivier***, the warrant addendum here is sufficiently particular because it references the particular crime under investigation. The addendum cites the statute which defendant was suspected of violating, RCW 9.68A.070. This is the statute that criminalizes possession of depictions of minors engaged in sexually explicit conduct. Notably, this is the *same* statute that the defendant was accused of violating in ***Ollivier***. The warrant was upheld in ***Ollivier*** because it referenced RCW 9.68A.070, and the warrant addendum in this case should be upheld for the same reason.

Neither ***State v. Perrone*** nor ***State v. Reep***, on which defense relies heavily, hold otherwise. Neither case supports defense's position that the

warrant addendum in this case is insufficiently particular. The warrants in both ***Perrone*** and ***Reep*** are distinguishable in a very critical way: they did not reference the specific crime under investigation.

In ***Perrone***, the warrant authorized police to search for adult pornography, child pornography, and various other items. The court held that there was probable cause to seize child pornography, but there was no probable cause to seize adult pornography, drawings of children, and some other items described in the warrant. ***Perrone***, 119 Wn.2d at 550-53. The court struck those portions of the warrant that were not supported by probable cause. ***Perrone***, 119 Wn.2d at 552-53. The language of the warrant, after striking the portions not supported by probable cause, authorized the seizure of "[c]hild...pornography; photographs, movies, slides, video tapes, magazines...of children...engaged in sexual activities...." ***Perrone***, 119 Wn.2d at 552-53. The court held that, under the circumstances, "the term 'child pornography,' i.e., the remainder of the first clause, [was] invalid in the context of the warrant's language as a whole." ***Perrone***, 119 Wn.2d at 552-53. The warrant was therefore overbroad and invalid in its entirety.

The court explained that (1) the term "child pornography" is an "omnibus legal description" not defined in the statutes; (2) the term "child pornography" is "a broad description of the type of materials sought"; and

(3) under the facts of the case, the description of materials sought could not be held sufficiently particular given the rest of the warrant's language, as "so much of the rest of the warrant suffers from lack of probable cause and from insufficient particularity." ***Perrone***, 119 Wn.2d at 552-55. The warrant used the term "child pornography" but did *not* reference the specific statute(s) that the defendant was accused of violating.

In ***Reep***, police searched the defendant's bedroom, pursuant to a search warrant, for evidence relating to the manufacturing of methamphetamine. During the search, officers found a "naked picture of a young female." ***Reep***, 161 Wn.2d at 811. They also found several images on the defendant's computer depicting "what appeared to be illicit photo[s]...of young children with out their knowledge" and "pornographic pictures of young girls conducting sex acts that also appeared to be graphically simulated." ***Reep***, 161 Wn.2d at 812 n. 3.

Law enforcement applied for a second telephonic search warrant to search for evidence related to the crime of "Narcotics/Child Sex." ***Reep***, 161 Wn.2d at 814. The warrant authorized police to seize, among other things, "Any Documentation of Criminal Activity By the Suspect And Other Evidence Not Listed that Support the Suspected Criminal Activity." ***Reep***, 161 Wn.2d at 814.

The ***Reep*** court held that the warrant, which authorized police to search the defendant's home for evidence of "child sex", was insufficiently particular to comply with the Fourth Amendment.

> Turning to the search warrant in the present case, the *fictitious crime of "child sex"* is even broader and more ambiguous than the term "child pornography." Consequently, the warrant allows the officer unbridled discretion to decide what things to seize and most critically, permits the seizure of items which may be constitutionally protected...As such, the warrant at issue fails for insufficient particularity.

Reep, 161 Wn.2d at 815 (emphasis added).

Again, both ***Perrone*** and ***Reep*** are distinguishable from the present matter. In those cases, neither warrant specifically referenced the particular crimes being investigated. Neither cited the particular statute(s) the defendant was accused of violating. By contrast, the warrant addendum here contains the caption, "Possession of Child Pornography, **RCW 9.68A.070**" (emphasis added). The officers could identify with reasonable certainty the items to be seized, including video tapes, CDs, DVDs, computers, storage media, printed materials, and related items, based on the warrant's reference to RCW 9.68A.070. The warrant addendum is therefore sufficiently particular.

The required degree of particularity may be achieved by specifying the suspected crime. ***Riley***, 121 Wn.2d at 28. Reading the warrant as a

whole and in a commonsense, non-hypertechnical manner, it is clear that RCW 9.68A.070 was the crime under investigation and that the search was circumscribed by reference to the crime. Further, the warrant addendum here limits the items subject to seizure. This Court should follow ***Riley*** and ***Ollivier***, uphold the presumptively valid warrant addendum as sufficiently particular, and deny defense's motion to suppress.

ii. Items Of Apparent Evidentiary Value May Also Be Seized Even Though They Are Not Contraband.

The defense argument fails to grasp the distinction that even though something may not be contraband in and of itself, it may still be evidence of the listed crime properly subject to seizure.

See ***State v. Maddox***, 116 Wn. App. 796, 805 n. 21, 67 P.3d 1135 (2003) (quoting ***Perrone***, 119 Wn.2d at 558 for the proposition that if probable cause is lacking to support seizure of some items, no degree of particularity will save them, so that a warrant may not describe items that are not shown to be contraband or **evidence** [emphasis added]).

Further, a generalized seizure of business documents may be justified it if is demonstrated that the government could not reasonably segregate ... documents on the basis of whether or not they were likely to

evidence criminal activity. ***United States v. Banks***, 556 F.3d 967, 973 (9th Cir. 2009). In the course of a reasonable search, investigating officers may examine innocuous documents, at least cursorily, in order to determine whether they are in fact among those papers authorized to be seized. ***United States v. Richards***, 659 F.3d 527, 539 (6th Cir. 2011) (quoting ***Andresen v. Maryland***, 427 U.S. 463, 482 n. 11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). Applying a case by case reasonableness analysis, most federal courts have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers. ***Richards***, 659 F.3d at 539. So long as searches of digital media are limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the officers to open the various types of digital files in order to determine whether they can contain such evidence. ***Richards***, 659 F.3d at 540.

With digital media, it is not always immediately clear what type of content files contain. A search limited to text could completely miss image files depicting child pornography. File names are not always descriptive of their content, and are sometimes intentionally altered. Some image files contain hidden or encrypted content that might not be immediately obvious upon preliminary inspection. Standard image editing software contains digital "filters" or rendering tools like those that reduce

red eye, which can make a photograph appear as a painting or drawing (and thus appear lawful to possess) even though the original image is embedded or recoverable.

Moreover, while pornography other than child pornography might not be contraband, it often has other evidentiary value, particularly digital files. For example review of lawful non-child pornography may yield valuable evidence of whether associated child pornography was possessed knowingly or inadvertently based on the file descriptions ("young" "kid" "child"), sites from which it originated, meta data, etc. in the lawful pornography. In the end, here, the handwriting analysis precluded the need for that kind of digital forensic analysis in this case. However, if results of the handwriting analysis had been different, such evidence could have been necessary.

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 also appear in the child pornography images. Such connections are not always readily apparent to investigators. If such material is not collected and separated in the first place, the evidentiary value of the context may be lost.

Not surprisingly, persons who unlawfully possess child pornography frequently seek to hide or obscure their contraband in case of

discovery. Even lawful non-child pornography may have significant evidentiary value with regard to the possession of child pornography. Where a warrant authorizes the seizure of such items, but that is limited to the search for evidence of the crime of possession of child pornography pursuant to RCW 9.68A.070, the warrant is not unconstitutionally overbroad.

iii. Even If The Court Were To Hold A Portion Of The Warrant Overbroad, Only The Items Obtained Pursuant To The Overbroad Language Should Be Excluded.

Overbreadth of a warrant is not a basis to reverse convictions where the material obtained pursuant to the overbroad language was not used, and the conviction was based upon the evidence that was validly seized. ***State v. Griffith***, 129 Wn. App. 482, 489, 120 P.3d 610 (2005). Even where an warrant contains some overbroad language, if the warrant does not require extensive "editing" to obtain potentially valid parts, the warrant will still be valid. ***State v. Thein***, 91 Wn. App. 476, 483, 957 P.2d 1261 (1998).

Where improper material has been obtained pursuant to an overbroad warrant, the remedy is to generally sever the improperly collected material where possible. *See* ***United States v. Galpin***, No. 11-

4808-cr, Slip. op. at 10, --- F.3d ---, 2013 WL 3185299 (2nd Cir. 2013). Severability is not possible if no part of the warrant is sufficiently particularized, the particularized portions only make up an insignificant or tangential part of the warrant, or no portion of the warrant may be meaningfully severed. ***Galpin***, No. 11-4808-cr, Slip. Op. at 10.

To the extent the warrant was impermissibly overbroad and any items were seized improperly, reversal is improper if those items were not admitted at trial, or if they were admitted, but their admission had no significant impact on the outcome of the trial.

2. THE COURT DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE.

Besola claims that the trial judge improperly commented on the evidence. Br. App. Besola, p. 37-39. However Besola's argument provides no citation to the record to identify what purported comments the court made, nor does Besola's argument quote or describe the particular comments. Assignment of error 7 states:

> 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.

Br. App. Besola, p. 2. The assignment of error also provides no citation to the record. Swenson does not separately raise this issue in his argument or

assignments of error, other than by incorporating by reference Besola's arguments. So Swenson's brief is of no assistance either.

Where a defendant fails to support an argument with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. *See* ***Spradlin Rock Products, Inc. v. Public Utility District No. 1***, 164 Wn. App. 641, 667, 226 P.3d 229 (2011); ***Ensley v. Pitcher***, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Smith v. State***, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006).

Further, "'Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" ***Spradlin Rock Products, Inc.***, 164 Wn. App. at 667 (quoting ***Holland v. City of Tacoma***, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

The court should decline to consider Besola's claim as to this issue where he fails to adequately cite to the record, and he does not make any argument related to the specific content of the statements.

By deduction, and the application of diligence, it may be possible to determine the portion of the record to which Besola may be referring. First, Besola called four witnesses, two of whom were women. In reviewing the testimony of each of those witnesses, it appears that the court's statement to which Besola refers occurs at 7 RP 1059, ln. 14-22.

This occurs in the course of the prosecutor's re-cross examination of Besola's sister, Amelia Besola. 7RP 1055, ln. 12-15.

The prosecutor asked Ms. Besola a number of questions about business papers in front of her. Ms. Besola repeatedly did not answer, either because she volunteered different information, equivocated, or sometimes claimed she didn't understand the question, even though the prosecutor's questions were very simple and straight forward. 7RP 1055, ln. 16 to p. 1059, ln. 11. Eventually the prosecutor asked the court to direct the witness to answer the question. The court responded and the following exchange took place:

> THE COURT: I don't know how to do that, Ms. Sievers [prosecutor]. 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. Sievers?
>
> MS. SIEVERS: That's fine; I'll move on.
>
> THE COURT: I do understand your frustration, Ms. Sievers.

Ms. Besola's non-responsiveness had been ongoing well before re-cross and the court's response and was pervasive throughout most of her testimony. Among other things she kept adding facts and statements beyond what was asked of her.

Indeed, on three occasions prior to this there was an objection that Ms. Besola was non-responsive, with the court twice directing her to listen carefully to the question and answer it, but not to expound beyond the question. 7RP 1042, ln. 16-20; p. 1048, ln. 15-21; p. 1049, ln. 5-11.

The court's statement was not a comment on the evidence. The prosecutor's request was yet another objection that the witness was non-responsive and seeking the court to direct the witness to respond to the question.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. This provision prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case." ***State v, Becker***, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." ***State v. Francisco***, 148 Wn. App. 168, 179, 199 P.3d 478 (2009) (quoting ***State v. Lane***, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)).

> 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 Wash.2d 825, 838, 889 P.2d 929 (1995) (quoting Wash. Const. art. IV, § 16). However, the comment violates the constitution only if those attitudes are "reasonably inferable

> from the nature or manner of the court's statements." ***State v. Elmore***, 139 Wash.2d 250, 276, 985 P.2d 289 (1999) (quoting ***State v. Carothers***, 84 Wash.2d 256, 267, 525 P.2d 731 (1974)).

State v. Johnson, 152 Wn. App. 924, 935, 219 P.3d 958 (2009).

Moreover, trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially. ***State v. Johnson***, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). This court, therefore, reviews a trial judge's courtroom management decisions for abuse of discretion. ***Peluso v. Barton Auto Dealerships, Inc.***, 138 Wn. App. 65, 69, 155 P.3d 978 (2007).

Here, there was no comment on the evidence. The court communicated no feeling on the truth value of Besola's testimony. Rather he noted her repeated failure to answer the question asked and his repeated failure to get her to do otherwise. Having no other solution to the problem, he let the prosecutor know that he understood her frustration. This was in no way a comment on Besola's credibility or the evidence. Instead it fell within the court's wide discretion on how to manage the courtroom and conduct trial fairly.

Moreover, the jury instructions included the standard instruction that the court has not intentionally commented on the evidence and if at appears that the court did, the jury must disregard the comment.

For all these reasons, the claim should be denied as without merit.

3. THE COURT PROPERLY ADMITTED EVIDENCE THAT SWENSON OFFERED CHILD PORNOGRAPHY TO WALLER WHERE IT WAS RELEVANT TO BESOLA'S DEFENSE THAT IT WAS SWENSON, AND NOT BESOLA WHO POSSESSED THE CHILD PORNOGRAPHY.

Swenson claims that the court improperly admitted evidence that he traded adult pornography with Brent Waller, a sex offender who lived above Besola's garage. Br. App. Swenson, p. 8-14. The claim fails for two reasons. First, trial counsel for Swenson never objected to the evidence on the grounds that it was improper under ER 404(b). Second, any lawful "adult" pornography was proper to refer to as it provided necessary context.

a. The Issue Was Waived Where Trial Counsel For Swenson Did Not Object To The Admission Of The Evidence.

In his appellate brief, Swenson relies on ER 404(b) to argue that Waller's testimony relating to Swenson's possession, and trading of adult pornography was improperly admitted propensity evidence. Br. App. Swenson, p. 12.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610

(1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. ***Thomas***, 150 Wn.2d at 856; ***Guloy***, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. ***State v. Powell***, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence is relevant if, it has "...any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ***State v. Saenz***, 156 Wn. App. 866, 873, 234 P.3d 336 (2010) (quoting ER 401). Relevant evidence is generally admissible, while irrelevant evidence is not. ***Saenz***, 156 Wn. App. at 873 (citing ER 402). However, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ***Saenz***, 156 Wn. App. at 873 (citing ER 403). Still, the threshold for the admissibility of relevant

evidence is very low and even minimally relevant evidence is admissible. ***State v. Aguilar***, 153 Wn. App. 265, 273, 223 P.3d 1158 (2009).

Evidence of other wrongs or acts is generally inadmissible to prove character of a person to show action in conformity therewith. ***Saenz***, 156 Wn. App. at 873 (citing ER 404(b)). However, evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Saenz***, 156 Wn. App. at 873 (quoting ER 404(b)). Such other purposes are often mistakenly referred to as exceptions, but are in fact merely types of evidence that is not barred by the rule because it falls outside the rule insofar as it is not offered to prove conformity therewith. *See* Tegland, WASHINGTON PRACTICE, VOL. 5: EVIDENCE, 5TH ED. § 404.9

Even when motive is not itself an element of the crime charged, it is nonetheless relevant as circumstantial evidence of other essential elements of the crime. *See* ***State v. Yarbrough***, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009).

> Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. However, when demonstrated, such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". If admitted for other purposes, a trial

> court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged.

Powell, 126 Wn.2d at 258 (citations omitted). However, more relevant here is the sentence which follows the language above.

> Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.

Powell, 126 Wn.2d at 259 (citing ***State v. Dennison***, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); ***State v. Saltarelli***, 98 Wn.2d 358 at 362-63, 655 P.2d 697 (1982).

A trial court's decision to admit evidence under ER 404(b) is reviewed for a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. ***Saenz***, 156 Wn. App. at 873 (citing ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)); ***Yarbrough***, 151 Wn. App. at 81. The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. ***Saenz***, 156 Wn. App. at 873.

Where there has been an objection to the admission of the evidence, normally, before a trial court may admit evidence of other bad acts, it must 1) find by a preponderance of the evidence that the misconduct [other bad acts] occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence

is relevant to an element of the crime charged; and 4) weigh the probative value against the prejudicial effect. ***Saenz***, 156 Wn. App. at 873.

Here, Swenson's trial counsel never objected to the evidence on the basis that it was improper under ER 404(b). Accordingly, the claim may not now be raised for the first time on appeal.

Prior to Waller's testimony, when the parties discussed what evidence Besola would be entitled to put before the jury regarding Swenson, Swenson's trial counsel never objected to Waller testifying that Swenson's trading of pornography with Waller included an attempt to trade child pornography. 6RP 814, ln. 16 to p. 815, ln. 6; p. 815, ln. 10; p. 818, ln. 11-25.

Swenson's trial counsel did object to Waller being permitted to testify about a forgery Swenson was alleged to have committed, and allegations Swenson stole from Besola (both allegations for which he was never charged or convicted). 6RP 814, ln. 21 to p. 815, ln. 6. Defense counsel's objection to this testimony was that [even assuming a proper foundation could be laid] such evidence would only be admissible as impeachment evidence as to Swenson's credibility if Swenson were to testify, and that otherwise, it was improper, and irrelevant.

It was the court that *sua sponte* raised 404(b) concerns, but didn't view those as pertaining to the swapping of child pornography. 6RP 816, ln. 12-15. Swenson's trial counsel did not object or disagree with the court

as to that. 6RP 816, ln. 16 to p. 820, ln. 15. When the court finally turned to the prosecutor for argument on the issue, she stated that she agreed with Swenson's trial counsel and thought the swapping and viewing of pornography with Waller was appropriate for Waller to testify to, but that anything about Swenson stealing or forging "...or any other basically 404(b) evidence..." would not be proper, but that could change if Swenson testified. 6RP 819, ln. 16-25. Swenson's trial attorney did not disagree with this characterization of his position, or express any objection to Waller's testimony regarding the swapping of pornography. 6RP 820, ln. 1-16.

Further, when the court then announced its ruling that the swapping and viewing of pornography was advisable, but the other material was excluded, Swenson's attorney again did not make an objection to the admission of Waller's testimony regarding the swapping of pornography. 6RP 820, ln. 1-16.

Similarly, when Waller was on the stand testifying, Swenson's attorney made no objection that Waller should be permitted to testify to his swapping pornography with Swenson.

When Waller first testified that the mutual interest he shared with Swenson was that they traded pornography, Swenson's trial attorney did not object. 6RP 850, ln. 10-12. When Besola's attorney asked Waller

what type of pornography he traded with Swenson, Swenson's attorney still did not object, nor did he object when Waller answered, "I just like straight stuff." 6RP 850, ln. 13-15. Besola's attorney then asked if Swenson liked something different [than straight porn], and it was only at this point that Swenson's attorney first objected, not on the basis of ER 404(b), but because insufficient foundation had been laid. 6RP 850, ln. 15-17.

When counsel for Besola then attempted to lay additional foundation, he asked Waller how often he would swap pornography with Swenson, and to neither that question, nor Waller's answer of once a week, did Swenson's counsel object on the basis of ER 404(b). Indeed, not once did Swenson's trial counsel object to Waller's testimony on ER 404(b) grounds.

Indeed, trial counsel for Swenson not only had no objection to this line of testimony, on cross-examination he specifically asked Waller about where in the house he saw the porn. 6RP 879, ln. 22 to p. 880, ln. 11. Nor did he object when the prosecutor reviewed Waller's observation of pornography in the house during her cross-examination. 6RP 875, ln. 9-25.

The "strenuous objections" Swenson on appeal claims his attorney made to Waller's testimony regarding his "penchant" for pornography

were based on a lack of foundation, narrative without a question and hearsay, and improper leading, but not ER 404(b) or the inadmissibility of Waller testifying to the swapping of pornography with Swenson . *See* Br. App. Swenson, p. 10; 6RP 864, ln. 24 p. 866, ln. 14.

Because Swenson's trial counsel did not argue that Waller's testimony was improper under ER 404(b), that claim was waived and cannot now be raised on appeal.

Procedurally, this case can be distinguished from the three cases Swenson relies upon in his brief.

In ***State v. Coghill***, the Arizona court of appeals held that the trial court improperly admitted evidence in order to show the defendant's intent, knowledge of what was on the computer and opportunity, that the defendant had downloaded and copied to disks lawful adult pornography where such evidence could have been demonstrated by other means or by sanitizing the testimony. ***State v. Coghill***, 216 Ariz. 578, 582, 169 P.3d 942 (2007). Significantly, in ***Coghill***, the defense expressed a strenuous objection to the admission of such evidence. ***Coghill***, 216 Ariz. at 582.

Similarly, in ***United States v. Marcus***, the defendant made a pre-trial motion that the government be precluded from eliciting evidence regarding adult pornography recovered during the search of the

defendant's home. ***United States v. Marcus***, 193 F.Supp.2d 552 (E.D.N.Y. 2001).

In ***United States v. Harvey***, the court held that in a prosecution for child pornography, the trial court improperly admitted over defense objections testimony that described some of the video tapes as depicting people performing gross acts involving human waste, and people engaging in bestiality and sadomasochism, as well as the reading of the titles of more than ten adult X-rated films and videotapes found in the defendant's possession. ***United States v. Harvey***, 991 F.2d 981, 995-96 (2nd Cir. 1993).

Unlike this case, in all three cases cited by Swenson the defense objected to the admission of the evidence relating to lawful "adult" pornography. Thus, unlike this case, the defendants in those cases preserved the issue.

b. The Core Of Waller's Testimony Pertained To Swenson's Interest In Trading Child Pornography, To Which The General Trading Of Pornography Was Foundational And Necessary.

In his brief on appeal, Swenson claims that,

> Here, evidence that Swenson possessed, viewed and traded **adult** pornography was completely irrelevant to anything other than what Besola used it for - to argue Swenson was guilty of the charged crimes because of his "proclivity."

Br. App. Swenson, p. 12. [Emphasis in original.]

This statement is not accurate. Waller's testimony was admitted as relevant because it purported to show that Swenson expressed an interest in exchanging child pornography. The pertinent testimony is as follows:

> Q [ΔC BESOLA]: So you developed a friendship of sorts with Mr. Swenson?
> A [WALLER]: Yeah.
> Q: What type of mutual interest did you share with Mr. Swenson?
> A: Well, we traded porn.
> Q: What type of pornography did you trade with Jeff?
> A: I just like the straight stuff.
> Q: He seemed to like something different?
> ΔC [SWENSON]: Objection; foundation.
> THE COURT: Let's get a little foundation.
> Q [ΔC BESOLA]: How often would you swap pornography with Mr. Swenson?
> A [WALLER]: Once a week.
> Q: Did this go on over a significant period of time?
> A: A couple months.
> Q: And would you talk to each other about what your personal likes and dislikes were?
> A: Sometimes. My wife -- I'm still married, but she hadn't been around for a few years, but she would come around once in a while and, yeah. I mean, if Jeff was around, we'd talk about -- because I always wondered what Mark's and Jeff's relationship was. I never -- I still don't know what their relationship is, but I told him I don't like gay stuff.
> Q: And did you see what Jeff liked to get for himself or he would like to swap with your?
> A: Younger girls or young men with older women. My wife was older. She's 19 years older than me. I never really had that fascination for boys.
> [...].

6RP 850, ln. 7 to p. 851, ln. 11.

Waller did also testify regarding the trading of pornography other than child pornography. That testimony was not only relevant, but indeed necessary context for explaining how Waller was acquainted with Swenson. More particularly, it was relevant to how Waller was familiar with Swenson's pornographic preferences, and how he would know about Swenson's interest in child pornography. Without the background of their trading pornography in general, Waller's statement would have been somewhat confusing where it was decontextualized.

Moreover, it would have been potentially far more prejudicial toward Swenson that the testimony that did occur if taken out of context, such a statement could have given the jury impression that Swenson was a dealer in child pornography.

In his opening argument, counsel for Besola argued that the child pornography that was the basis of the charges belonged to Swenson [and not Besola] "...because Mr. Swenson is the one who had the proclivity for *child pornography*." 6RP 844, ln. 18-19. [Emphasis added.] To the extent that the use of the word "proclivity" was a reference to character evidence, it was a reference specifically to child pornography, and not a reference to Swenson's constitutionally protected right to possess adult pornography.

In his brief, Swenson cites two points where he claims Counsel for Besola argued his propensity based upon his possession of adult pornography. *See* Br. App. Swenson, p. 11 (citing 6RP 1811; 4RP 1190). It is the State's position that these claims also do not correctly characterize the evidence.

The first passage cited in Swenson's brief fits into a larger context:

> When you pick a disk up and you've got oil on your fingers, you would leave a print. You may not want to go underneath because it may damage the quality of the front part. Come on. You could easily get a print off that. Fingerprints go with one individual; they're distinctive. They can't put somebody else's fingerprints on something. They're yours and your stuck with them. But the officers decided they weren't going to look for evidence because -- I don't know.
>
> CDs, DVDs. Brent Waller, who was in here testifying, who was swapping porn with who here? Brent was swapping porn with Jeff, period. That's what these guys were doing. It's their deal. But the bottom line is, who's passing material back and forth? Brent and Jeff. It's not Mark and Jeff; it's with Brent and Jeff.
>
> It's one of those situations where you look at it and there is reason to doubt here. Exhibit 51, that's the big one. That's got the kiddy porn. Once again, 9-27, 4:00 p.m., you know that Dr. Besola couldn't have made that disk and opened this disk. He wasn't even in the area.

8RP 1180, ln. 21 to p. 1181, ln. 17.

When viewed in context, it is clear that what defense counsel is arguing is that it was Swenson who made the CDs and DVDs with the video clips of child pornography. His argument was that Besola's finger prints weren't on the disks, Waller established that Swenson had copied

pornography files onto CDs and DVDs that he traded with Waller, and on a crucial exhibit, no. 51, it was made at a time when Besola wasn't even present.

Contrary to the claim in Swenson's brief, this was not an argument that Swenson possessed the child pornography based on his propensity to possess adult pornography. Rather, it is a claim that he was the one who was making the CDs and DVDs based on his previously having made other CDs and DVDs.

The other passage cited in Swenson's brief occurs about 9 pages later in the transcript. In context it is as follows:

> The point I'm making is, you've been provided testimony to show that Mark was aware that this was going on. He wasn't. He got on the stand. He didn't know what was in there. He didn't go to Jeff's room. Why? Because he respects individual rights. The same reason why Mark doesn't burn disks; he doesn't burn CDs. Why? He thinks it's an infringement of people's copyrights. He's not going to do that. But who was burning DVDs? Jeff. Who was burning music? Jeff. Who has the propensity to do this? Jeff. Who as all the tie-ins with CDs and DVDs? Jeff. Its not Mark.

8RP 1190, ln. 11-21.

Again, Besola's attorney is not arguing that Swenson had a propensity for child pornography based upon his interest in adult pornography. Rather, what he is arguing is that CDs and DVDs were Swenson's because had the propensity to copy files (including child

pornography) to CD and DVD because the evidence showed that he had copied music and video files other than child pornography to CD and DVD.

Swenson is not entitled to raise this issue for the first time on appeal where he did not properly object below. Further, contrary to the claim in Swenson's brief, his trading of "adult pornography" was not argued as evidence of his propensity to possess child pornography. For both these reasons, his claim on this issue fails.

4. THE COURT PROPERLY INSTRUCTED THE JURY.

The defense argues that RCW 9.98.070 and RCW 9.38.050 require the State to prove that the defendants' knew the persons depicted on the video clips were minors. Br. App. Besola, p. 19-24; Br. App. Swenson, p. 25 (incorporating by reference the arguments of Besola). The defendants' go on to argue that because the jury was not so instructed, the convictions are unconstitutional. Br. App. Besola, p. 19-24. However, the defense argument fails because the State is not required to prove that the defendant's knew the persons depicted in the videos were minors.

It is not an element of the crime that they knew that it was an actual minor depicted in the images. In ***State v. Garbaccio***, with regard to RCW 9.68A.070, the court considered and rejected the same argument the

defendants raise here. ***State v. Garbaccio***, 151 Wn. App. 716, 734, 214 P.3d 168, *review denied*, 168 Wn.2d 1027 (2009). Neither of the defendants cite to ***Garbaccio***. Where they fail to address it, and provide no argument why it is distinguishable or wrongly decided, the court's holding in ***Garbaccio*** should control.

Moreover, the court's reasoning in ***Garbaccio*** is sound. The crimes of dealing in or possession of depictions of a minor engaged in sexually explicit conduct require a scienter, or specific intent such that the crime is not committed unwittingly in a way that renders it facially overbroad such that it impinges upon First Amendment protected activities. *See* ***Garbaccio***, 151 Wn. App. at 733.

In ***State v. Luther***, the Washington Supreme Court determined that RCW 9.68A.070 avoids facial overbreadth because it contains a scienter element. ***Garbaccio***, 151 Wn. App. at 733 (citing ***State v. Luther***, 157 Wn.2d 63, 71, 134 P.3d 205 (2006)). While the court in Luther referred to the existence of a ***scienter*** element, it was not clear from the opinion what precisely that element consisted of. *See* ***Garbaccio***, 151 Wn. App. at 733.

However, requiring the State to prove that the defendant knew that the minor depicted was in fact under the lawful age would as a practical matter have absurd results contrary to the intent of the Legislature when it adopted the statute insofar 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. Such an outcome would defeat the Legislature's intended purpose of protecting children from such exploitation. Moreover, such an interpretation of the statute is contraindicated by the fact that the legislature did not include as specific elements of the crime that the state prove both the minor's age, and the defendant's specific knowledge thereof.

Accordingly, the court in ***Garbaccio*** held that the scienter element consisted of the defendant knowing the general nature of the material possessed, but not the very specific knowledge of the ages of the minors. ***Garbaccio***, 151 Wn. App. at 733-34.

Here, the court gave the jury the standard WPIC instruction. That instruction is adequate in light of the elements of the crime, the evidence presented and the arguments made to the jury. *See* ***Garbaccio***, 151 Wn. App. at 736. The defendants did not request an instruction with a different that the jury must find beyond a reasonable doubt that the persons depicted were minors. See. e.g., Br. App. Besola, p. 23.

For all these reasons, the defendants' claim is without merit and should be denied.

5. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, 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. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In

considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Here, there was sufficient evidence to support the jury's verdicts.

Swenson and Besola, and had lived together off and on for 10 to 12 years. 7RP 1046. Besola acknowledged that a romantic relationship developed between him and Swenson and claimed that it started in about 2001. 8RP 1097, ln. 13 to p. 1099, ln. 6. It was an on-again off-again relationship, and Swenson also did not pay rent when he stayed with Besola. 8RP 1101, ln. 5-24.

Brent Waller said that there was a substantial amount of pornography in the house. 6RP 866, ln. 13-15. Multiple disks were found with child pornography and some had writing that could be attributed to Besola, while others had writing that could be attributed to Swenson. 3RP 417, ln. 7-8; 3RP 425, ln. 18 to p. 427, ln. 16; 3RP 443, ln. 21 to p. 445, ln. 1; p. 444, ln. 1 to p. 447, ln. 2. Exhibits that Mr. Bishop had an opinion were Besola's were Nos. 23, 24, 25, 26, 27, 28, 29, 30, 31, 37, 38, 39, 40, 41, 42, 44, 45, 49, 50, 54, 55, 57, 60, 61, 62. 3RP 428, ln. 2 to p. 445, ln. 1. Exhibits that Mr. Bishop had an opinion were Swenson's were 33, 34, 36. 3RP 444, ln. 1 to p. 447, ln. 2.

Brent Waller who lived in the garage also testified that Swenson copied pornography, traded it with him, and had offered him child pornography. 6RP 851, ln. 9-11. Amelia Besola testified Swenson told her that that the child pornography was his. 7RP 994, ln. 7 to p. 995, ln. 2.

Swenson used the computer with Besola's permission. 8RP 1091, ln. 2-7. Besola acknowledged that he knew Swenson had pornography, but claimed he didn't know how much. 8RP 1093, ln. 8-9. Besola admitted the old VHS tapes were his, that he didn't throw things away, and admitted to knowing there was some older [presumably adult] pornographic movies on them. 8RP 1093, ln. 13-19. Video files with child pornography had been downloaded onto Besola's computer in a

directory under his name. 5RP 769, ln. 16-19.

Besola claimed that he didn't know that there was child pornography in the home or that Jeff liked child pornography, and he claimed that he found it reprehensible. 8RP 1094, ln. 1-11. However, the jury didn't have to find this convincing and could disbelieve his claims.

From all these facts the jury could infer that Besola and Swenson were both downloading pornography and copying it to disks, and they could also infer that Besola and Swenson were doing so together as accomplices. Besola's writing could be identified on more of the disks with child pornography than Swenson's could. The files were downloaded into Besola's directory on the computer.

When all the inferences are drawn in favor of the validity of the jury's verdict, it was supported by substantial evidence.

6. COUNTS I AND II ARE NOT THE SAME CRIMINAL CONDUCT.

For the purposes of sentencing "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); ***State v. Tili***, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria

prevents a finding of same criminal conduct. ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); ***State v. Lessley***, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992)).

An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. ***State v. Haddock***, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); ***State v. Maxfield***, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The presumption is that a defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a).

Where concurrent offenses contain the same criminal conduct, the crimes are treated as one crime for sentencing purposes. RCW 9.94A.589; ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Separate

offenses "encompass the same criminal conduct" when they involved the (1) same criminal intent, (2) same time and place, and (3) same victim. ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). All three elements must be present to support a finding of same criminal conduct. ***Vike***, 125 Wn.2d at 410.

Determining a defendant's intent involves a two-step process. ***State v. Rodriguez***, 61 Wn. App. 812, 816, 812 P.2d 868, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). First, the court must objectively view each underlying statute and determine if the required intents are the same for each count. ***Rodriguez***, 61 Wn. App. at 816. Where the intents are the same, the court objectively views the facts to determine whether a defendant's intent was the same with respect to each count. ***Rodriguez***, 61 Wn. App. at 816.

Therefore, the focus is on whether the criminal "objective" changed from one offense to the next. ***Maxfield***, 125 Wn.2d at 403.

The defendants were each charged in Count I with dealing in depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.050(1). CPMB 1-2; CPJS 1-2. They were each charged in count II with possession of depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.070. CPMB 1-2; CPJS 1-2. The intent

element of these two crimes is substantially different. For that reason, the crimes are not the same criminal conduct.

The Court of Appeals, Division Two, has reached analogous conclusions. In ***State v. Hernandez***, 95 Wn. App. 480, 976 P.2d 65 (1999) the court found that simple possession of a controlled substance and possession of a controlled substance with intent to deliver did not constitute the same criminal conduct because "[w]here one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct." ***Hernandez***, 95 Wn. App. at 485. In ***State v. Soper***, the court found that manufacturing of marijuana and possession of marijuana with intent to deliver does not constitute the same criminal conduct because the defendant had a different criminal objective for each offense; "[o]ne objective was to grow the marijuana; the other objective was to deliver it to third persons." ***State v. Soper***, 135 Wn. App. 89, 105, 143 P.3d 335 (2006).

Similarly, here, the intents to possess depictions of minors engaged in sexually explicit activity is different from the intent to deal in such depictions. For this reason, the two counts are not the same criminal conduct.

7. THE COMMUNITY CUSTODY CONDITIONS ARE PROPER.

RCW 9.94A.505(8) provides that "[a]s a part of any sentence the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." From a plain language reading, this subsection appears to distinguish between prohibition and affirmative requirements. The prohibitions must be "crime-related" RCW 9.94A.030 is the definition section. It defines crime-related prohibitions as:

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender ahs been convicted , and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of the court may be required by the department."

RCW 9.94A.030(10).

The party seeking review of a condition of sentence has the burden of perfecting the record so that the court has all relevant evidence. ***State v. Armstrong***, 91 Wn. App. 635, 639, 959 P.2d 1128 (1998). A "crime-related" prohibition is an order "prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." ***Armstrong***, 91 Wn. App. at 639 (quoting RCW 9.94A.030(11) (1994). We have previously held that no causal link need be established between

the condition imposed and the crime committed, so long as the condition is related to the circumstances of the crime. ***Armstrong***, 91 Wn. App. at 639 (citing ***State v. Llamas-Villa***, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Swenson claims that his condition of sentence 13 is improper where it limits him to using controlled substances prescribed by a physician. His claim is that he should not be limited to physicians, but entitled to use prescriptions issued by any medical provider licensed by the state to do so. Br. App. Swenson, p. 21-22.

Swenson makes no argument that "physicians" as used in the condition excludes any medical personnel with prescription authority. For that reason alone, he has failed to meet his burden and his claim as to this condition should be denied. However, where Besola was a veterinarian and there was evidence that his possession of child pornography occurred in a context of possible controlled substance abuse relating to his misuse of his prescription authority, the court has a reasonable basis for imposing limitations on the types of providers from which he can obtain prescriptions.

Swenson also challenges community custody condition 27 as unconstitutionally vague where it delegates the determination of "sexually explicit materials" to the sexual deviancy treatment provider. Br. App.

Swenson, p. 22-23. It appears that this condition could fall under the holding in ***State v. Sansone***, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). However, to the extent that it does, the matter should merely be remanded to the trail court for correction.

Where the trial court wanted some restrictions on the defendant's conduct, the proper remedy of any errors is not to strike the prohibitions, but rather to remand the matter to the trial court for the re-imposition of appropriate conditions. *See* ***State v. Sansone***, 127 Wn. App. at 643 (remanding to the sentencing court for imposition of a condition that contains necessary specificity. Given the nature of Swenson's crime, simply removing any condition is not in the best interests of the community.

D. CONCLUSION.

For the foregoing reasons, the defendants' claims should be denied as without merit and the convictions and sentences affirmed.

DATED: July 9, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ efile 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.

7/9/13 _____
Date Signature

PIERCE COUNTY PROSECUTOR

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