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67678-4

NO. 67678-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**PAUL G. JONES,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

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**RESPONDENT'S BRIEF**

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I. SUMMARY OF ARGUMENT

The appellant, Paul George Jones, was convicted of three counts of Child Molestation in the First Degree. He was sentenced to a term of incarceration and community custody with a variety of conditions.

Jones claims that the search warrant issued in this case was unconstitutionally overbroad, that the items seized should have been suppressed and that the convictions should therefore be vacated.

He also claims that the above referenced conditions of community custody are either not authorized by the SRA, are unconstitutionally overbroad, or both.

The State responds that the warrant was not overbroad, that Jones failed to raise error as to some of the specific bases for the overbreadth claim, that any invalid parts of the warrant are severable, and that any error is harmless beyond a reasonable doubt.

The State, without conceding error, would agree to a vacation of condition 2<sup>1</sup> of the community custody order. The State concedes error as to the first sentence of condition 6<sup>2</sup> complained of by the appellant, as to condition 7<sup>3</sup>, and as

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<sup>1</sup> “Pay the costs of crime-related counseling and medical treatment required by for D.R.P.”

<sup>2</sup> “Do not possess or access pornographic materials, as directed by the supervising CCO.”

<sup>3</sup> “Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising CCO and therapist except as provided for therapeutic purposes.”

to condition 13<sup>4</sup>. The remaining conditions complained of are not overbroad and are statutorily authorized.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The appellant failed to object below to the warrant's authorization to search for and seize "signs or images", "photographs", "VHS/DVDs/ and movies", "computer", "camera", and "[v]ideo and media storage devices". Did he fail to preserve the alleged error for appellate review? (Assignment of Error 1).
- B. The warrants specified the crimes of conviction and provided a detailed list of items to be seized and detailed the location where those items could be found. Did the warrant state with particularity the items to be seized? (Assignment of Error 1.)
- C. The community custody condition requiring no contact with minors does not affect the appellant's freedom to travel apart from the court's order and is a prohibition regulated by statute. Is this condition unconstitutionally overbroad? (Assignment of Error 2.)
- D. The State agrees to vacate the community custody condition requiring restitution because no restitution has been requested or

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<sup>4</sup> "Do not access the Internet on any computer in any location, unless such access is approved in advance by the supervising CCO."

ordered and the statutory deadline to impose restitution has passed.

(Assignment of Error 3.)

- E. The State concedes that the prohibition on pornographic materials (line one of condition six) is unconstitutional pursuant to State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). (Assignment of Error 4.)
- F. The appellant made use of pornography in his grooming and molestation of multiple boys. Is the community custody provision prohibiting the frequenting of “establishments whose primary business pertains to sexually explicit or erotic material” a crime-related prohibition? (Assignment of Error 4.)
- G. The State concedes that the prohibition on “sexual stimulus material” is unconstitutional pursuant to State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). (Assignment of Error 5.)
- H. The appellant made prodigious use of toys, candy, gifts, special games, and activities to lure, groom, and molest little boys. The community custody provision that restricts the appellant’s possession or control of items designated or used to attract or lure children is a prohibition that regulates behavior as opposed to

speech. Is this community custody provision overbroad? Is it crime related? (Assignment of Error 6.)

- I. The appellant used different devices to take many, many movies and still pictures of multiple children engaged in sexually explicit conduct. Is the community custody provision that prohibits the appellant from possessing or controlling any item designed to take photographs or video overbroad? (Assignments of Error 7 and 8.)
- J. The State concedes that the prohibition on internet use not crime related). (Assignment of Error 9.)
- K. The appellant was ordered to participate in sexual deviancy treatment. To facilitate treatment, he was required to participate, “as directed by your community corrections officer”, plethysmograph examinations. Was this a valid condition of community custody for a convicted sex offender? (Assignment of Error 10.)

### III. STATEMENT OF CASE

#### 1. Procedural History

On December 16, 2010, the appellant, Paul George Jones, was charged by Information with four counts of first degree child molestation and one count of sexual exploitation of a minor. CP 1-3. On April 12, 2011, an amended Information was filed alleging five counts of first degree child molestation and two counts of sexual exploitation of a minor. CP 8-11. On April 13, 2011, Jones filed his motion to suppress based an unconstitutional search warrant. CP 12-28. On May 18, 2011, oral argument was heard on the motion. 1RP<sup>5</sup> 1-20. The Court denied the motion to suppress, 1RP 18, and entered written findings and conclusions to that effect on August 19, 2011. CP 46-50. On August 24, 2011, Jones agreed to be tried by the bench and stipulated to the admission of the police reports for the court's determination as to guilt on counts 1-3. 2RP 3-6. The State dismissed counts 4-7. 2RP 6. The court found Jones guilty as to counts 1 – 3, 2RP 6 - 8, and entered written findings and conclusions on September 6, 2011. CP 68 – 70. Jones was sentenced to a term of confinement of 130 months as to each count, to be served concurrently. CP 53-67. He filed a timely notice of appeal on September 7, 2011. CP 71-86.

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<sup>5</sup> 1RP refers to the Verbatim Report of Proceedings of May 18, 2011; 2RP refers to the Verbatim Report of Proceedings of August 24, 2011; 3RP refers to the Verbatim Report of Proceedings of September 2, 2011, and September 6, 2011.

2. Substantive Facts

During the time period January 1, 2006, through December 31, 2009, Jones lived in a trailer park in Sedro Woolley, Washington. He became acquainted with the young people who lived there including the victim, DRP. DRP's date of birth is February 8, 2000, and Jones' is May 18, 1947. DRP spent a significant amount of time at Jones' trailer or recreational vehicle, including multiple overnight stays. CP 42. Jones would have DRP sleep naked in his bed with him. While in bed, Jones touched DRP's penis with his hand on at least one occasion. CP 69. Jones gave DRP toys, candy, and special attention in terms of gifts. CP 68. DRP said that Jones would buy him bigger toys than his sister and the other kids in the park and he and this other neighborhood boy used to get candy from Jones in the mornings before school. CP 43. During the time he was there, Jones would allow DRP to play airplane games on his computer and watch cartoons. CP 42. Jones also had a game he called "face painting" which involved Jones using a paint brush to paint DRP's penis and have DRP do the same to him. CP 42. Then Jones would shower with DRP and wash his penis with his hands. Jones' penis would become erect while in the shower. CR 42. On at least one occasion, this activity was captured in a video seized from Jones' residence. CP 69. According to DRP, Jones said that he had done this painting with other boys too. CP 42. There was a sign on the shower door with the image of a naked father,

mother, and two children. CP 43. Jones would have DRP sleep naked when DRP would spend the night. CP 43.

Jones videotaped numerous acts of sexual contact with DRP. These videotapes were seized from Jones' residence. These videos show Jones rubbing, painting, and touching DRP's penis. One video shows Jones using a vibrator on DRP. CP 69. In addition, DRP reported that Jones had taken pictures of him naked and masturbating. CP 42.

The court found that Jones engaged in more than three acts of sexual contact with DRP based upon the statements of DRP, the videotape evidence recovered and the information gathered by the parents as well consisting of potentially admissible child hearsay. CP 69. The sexual contact was for the purpose of sexual gratification of Jones. Jones had indicated that the activity made him feel happy as reported by DRP. In addition there is information on the videotapes that reflects Jones' attitude of gratification. CP 69.

According to DRP, Jones would play movies of males having sex. CP 43. Jones would have DRP lay on his bed naked and "jerk" to the movies until his penis hurt. Jones would also have DRP jerk Jones' penis and Jones would jerk DRP's penis. CP 43. At other times, Jones used his computer camera to record DRP lying naked on the bed "jerking" and using a vibrator. CP 43. DRP said that Jones had many pictures and videos of him and other males naked. CP 43.

According to DRP, Jones would also taken him fishing and then take pictures of him naked. He said the pictures of him were kept in different files on Jones' computer and they were labeled with icons, such as a smiley face, an airplane picture, and a frown face. CP 43.

Jones told DRP that he did this same stuff with a boy before him. CP 43.

At some point after the sexual contacts, Jones moved away from the trailer park. CP 42. In about May of 2010, DRP received a letter from Jones indicating that Jones had a new friend to face paint with but his new friend wasn't as good at it as DRP was. CP 43. In November, 2010, DRP's mother asked DRP if he wanted to call Jones. CP 43. This prompted DRP to tell his mother what Jones had done to him. CP 43. He was scared to tell because Jones had showed DRP two guns that he kept in a closet in his motor home. CP 43.

DRP's father reported this matter to the police on November 13, 2010. CP 42.

#### IV. ARGUMENT

##### A. THE SEARCH WARRANT IS NOT OVERBROAD.

Jones contends that the search warrant in this case was unconstitutionally overbroad, that the items seized pursuant to the warrant should have been suppressed, and that the convictions, therefore, should be vacated. Jones now claims overbreadth on three bases: (1) that the "any and all evidence of" the

crimes of child molestation and sexual exploitation of a minor rendered the warrant overly broad, (2) that the authorization to search for “signs or images”, “photographs”, “sex related material to include[] [b]ooks [and] literature”, and “VHS/DVDs/CD and movies” rendered the warrant overly broad in light of the First Amendment protections for these items, and (3) that the authorization to search for and seize all computers, cameras, and video and media storage devices” was overly broad because it permitted a broad search of all digital files, without any limitation on the scope of the search, especially in light of First Amendment protections for these items.

General warrants of course, are prohibited by the Fourth amendment. “[T]he problem (posed by the general warrant) is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings . . . . [The Fourth Amendment addresses the problem] by requiring a ‘particular description’ of the things to be seized.” Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.E.2d 564 (1971).

Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

The warrant must be read “in a commonsense, practical manner, rather than in a hypertechnical sense, keeping in mind the circumstances of the case.” Id., citing State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992); State v. Stenson, 132 Wn.2d 668 (1997), cert. denied 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed. 323 (1998). The warrant must be read as a whole and in context. See

Andresen v. Maryland. The validity of a search warrant is determined on a case-by-case basis. State v. Chambers, 88 Wn.App. 640, 945 P.2d 1172 (1997).

A warrant is overbroad where it fails to describe with particularity items to be seized.<sup>6</sup> State v. Maddox, 116 Wn.App. 796, 805, 67 P.3d 1135 (2003), aff'd 152 Wn.2d 499, 98 P.3d 1199 (2004). The particularity requirement is intended to prevent “general searches”; i.e., prevention of “a general, exploratory rummaging in a person’s belongings.” Perrone, 119 Wn.2d at 545. It is also intended to eliminate the danger of unlimited discretion in the executing officer’s determination of what to seize. Id. “The warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.” Perrone, 119 Wn.2d at 546. In determining whether items are described with particularity, the court is to consider whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. State v. Higgins, 136 Wn.App. 87, 92, 147 P.3d 649 (2006).

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<sup>6</sup> A warrant may also be overbroad where, although it particularly describes the items to be seized, there is no probable cause to seize those items. Maddox, 116 Wn. App. at 805. The appellant does not argue that probable cause is absent in the current case. This memorandum, therefore, is confined to the issues raised as to the particularity of the description of the items sought to be seized.

There is no requirement that a warrant state with particularity (or, indeed, state at all) the crime being investigated. State v. Askham, 120 Wn.App. 872, 86 P.3d 1224, rev. denied 52 Wn.2d 1032, 103 P.3d 201 (2004). However, where the warrant does state the crime, this assists in providing constitutionally sufficient particularity for the search warrant. State v. Askham, 120 Wn.App. at 878-879. See Chambers, 88 Wn.App. at 645-646. “Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer’s exercise of discretion in executing the warrant.” State v. Perrone, 119 Wn.2d at 555, quoting United States v. Spilotro, 800 F.2d 959, 964 (9<sup>th</sup> Cir. 1986). See also State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) (warrant was overbroad where it permitted the seizure of broad categories of material not limited by reference to any specific criminal activity).

1. The “any and all evidence of this crime” provision does not render the search warrant overly broad.

The appellant argues that the final item to be seized on the search warrant, “any and all evidence of this crime”, “authorized an unconstitutional general search” of the appellant’s home and that the warrant was thus overbroad. Br. App. at 15.

The United States Supreme Court and the courts of the State of Washington have repeatedly upheld language to the effect that officers may search for “all evidence” of the crime or crimes specified in the warrant.

In State v. Reid, 38 Wn.App. 203, 687 P.2d 861, rev. denied, 102 Wn.2d 1025 (1984), the warrant authorized the police to search for “a shotgun, ammunition for the shotgun, a dark leather or vinyl jacket, a pillowcase or other bed linen with a pattern of daisies, leaves, and strawberries on it, nitrates, and any other evidence of the homicide. . .” The court of appeals rejected the argument that the “any other evidence of homicide” language permitted a general search:

The warrant here sufficiently limited the searching officers' discretion. The phrase “any other evidence of the homicide” specifically limited the warrant to the crime under investigation. The specific items listed, such as a shotgun and shotgun shells, also provided guidelines for the officers conducting the search. Therefore, these limitations were adequate to prevent a general exploratory search.

Reid, 38 Wn.App. at 212.

In State v. Lingo, 32 Wn.App. 638, 649 P.2d 130, rev. denied, 98 Wn.2d 1005 (1982), the court upheld a warrant which authorized the seizure of “any and all evidence” of the crimes of assault and rape. The court held that that in addition to the particularity supplied by linking the items to be seized with specific crimes, “additional restrictions were incorporated in the warrant by the listing of possible items such as female clothing, bedding and blood and semen

stains, and thereby provided guidelines for the officers conducting the search. These limitations adequately prevented any danger of a general search.” Lingo, 32 Wn.App. at 642.

In State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001), the court upheld the language in a warrant authorizing a search for “trace evidence”. The court cited with approval Reid and Lingo. See also State v. Barnes, 85 Wn.App 638, 661, 032 P.2d 669 (1997) (citing with approval Reid, Lingo, and State v. Smith, 16 Wn.App. 425, 558 P.2d 265 (1976) (approving warrant to search for “documents, canceled checks, bank statements, and correspondence pertaining to guardianship accounts”), rev. denied, 88 Wn.2d 1011 (1977)).

In Andresen v. Maryland, the United States Supreme Court upheld the search warrant which listed specific documents and ended with “together with other fruits, instrumentalities, and evidence of crime.” The court noted that the phrase was not a separate sentence; rather it appeared at the end of a sentence containing a lengthy list of specified and particular items to be seized, all from a specified area. Id. 427 U.S. at 480. Furthermore, the warrant itself specified the crime under investigation. Thus, the warrants only authorized the search for evidence located in a specific area and relevant to the under investigation. Id. at 482. See also State v. Christiansen, 40 Wn.App. 249, 251, 698 P.2d 1059 (1985), (court upheld validity of a warrant that authorized the search and seizure of “all

evidence and fruits of the crime(s) of manufacturing, delivering or possessing controlled substances”) and State v. Chambers, 88 Wn.App. at 647.

Here, the appellant does not claim that probable cause is lacking, rather he claims that the phrase “any and all evidence of this crime” is lacking in particularity. However, the argument fails under the foregoing authorities. The search warrant specified that the crimes under investigation were child molestation and sexual exploitation of a minor. The search warrant specified with particularity where the officers were authorized to search. The phrase was not a separate sentence, but appeared at the end of a lengthy list of specified and particular items to be seized, and from specified areas. The search was adequately circumscribed by specifying the criminal activity being investigated.

2. The authorization to search for “signs or images,” “photographs,” “sex related material, to include[] [b]ooks [and] literature,” and “VHS/DVD/CD and moves” was not overly broad.

The appellant argues that the authorization to search for “signs or images,” “photographs,” “sex related material, to include[] [b]ooks [and] literature,” and “VHS/DVDs/CD and movies” was unconstitutional because those items are protected by the first amendment, the particularity requirement must “be accorded the most scrupulous exactitude,” and the description of them is constitutionally lacking in particularity. Br. App. at 18.

- a. The appellant failed to preserve error when he did not specify this ground for his overbreadth claim to the trial court.

Although Jones filed a motion to suppress based on lack of particularity as to “signs or images”, “photographs”, and “VHS/DVD/ and movies”, he abandoned this claim at the hearing by failing to ask the court for a ruling on this issue, thus he failed to preserve error. Additionally, he never claimed that the authorization to search for and seize “sex related material, to include[] [b]ooks [and] literature” was overbroad.

“Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection . . . is made, stating the specific ground of objection, if the specific ground was not apparent from the context. . .” ER 103(a)(1). See State v. Louthan, 158 Wn.App. 732, 242 P.3d 954 (2010) (In order to preserve a challenge to admissibility of seized evidence for appellate review, a defendant must state the specific grounds upon which his challenge lies.).

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). This is because a “[f]ailure to object deprives the trial court of this opportunity to prevent or cure the error.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

language in the warrant, and there was no way that Mr. Jones could have been informed as to what the police could or could not have properly taken.”<sup>7</sup> 1RP 4.

The court’s ruling, in terms of the overbreadth argument, was limited to this particular argument, whether the language that permitted the search of “any and all evidence of this crime” made the warrant overly broad. 1RP 18. The court found that it did not. 1RP 18; CP 48 (Conclusion of Law 3). The court made no findings as to whether the descriptions of photographs, signs and movies was overbroad, nor was it asked to do so. 1RP 1-5.

On appeal, Jones argues that the search warrant was overly broad as to the “signs or images,” “photographs,” “sex related material, to include[] [b]ooks [and] literature,” and “VHS/DVD/CD and movies.” As to none of these items did the defendant ask the trial court for a ruling on whether they passed constitutional muster. While three of those four items were raised in the written briefing, when the defendant failed to present those issues orally to the trial court, and where the defendant failed to ask the trial court for a ruling, the defendant effectively waived any objection. As to the “sex related material, to include[] [b]ooks [and]

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<sup>7</sup> The defendant also maintained his lack of probable cause, staleness, and severability arguments. 1RP 3-5. The trial court found in favor of the State of the probable cause and staleness challenges, and the appellant does not challenge these findings.

literature,” the defendant never even raised this issue in his written briefing to the trial court.

In order to raise this issue now, the defendant must show actual prejudice from the alleged error.<sup>8</sup> This, the defendant has failed to do. If there were error arising from a lack of particularity as to the above items, and if the severance doctrine is inapplicable as the appellant alleges, then the remedy would be suppression of all items seized from the residence. The only seized item relied upon by the court in its finding of guilt was the videotapes. However, the videotapes were not the sole basis for the finding of guilt. As argued later herein, the court found credible, and relied upon, the victim’s statements that he had been molested in finding that the defendant was guilty of child molestation. The testimony of the victim alone is sufficient to sustain a finding of guilty beyond a reasonable doubt. State v. Gregory, 80 Wn.App. 516, 519, 910 P.2d 505, rev. denied, 129 Wn.2d 1009, 917 P.2d 129 (1996).

Thus, the defendant has failed to show any actual prejudice resulting from the seizure of any of the items.

Because the defendant did not specifically object to these items in the court below, did not seek a trial court ruling on the issue, and because the

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<sup>8</sup> The State concedes that the error alleged is of constitutional dimension.

defendant has failed to show manifest error and actual prejudice, this court should decline to review his claim now.

- b. If the objection was preserved, then there was no error because the items were described with sufficient particularity.

Even upon a substantive review of Jones' claim, it fails because the items were described with sufficient particularity.

Where items such as books or movies are the subject of a search, courts demand the highest degree of particularity. State v. Chambers, 88 Wn.App. at 644, citing State v. Perrone. However,

the use of a generic term or a general description is not per se a violation of the particularity requirement. *Blakeney*, at 1027. Rather, where the precise identity of goods cannot be determined when the warrant is issued, a generic or general description may be sufficient, if probable cause is shown and a more specific description is impossible. *Krasaway*, at 553; *People v. Smith*, 180 Cal.App.3d 72, 89, 225 Cal.Rptr. 348, 358 (1986). Conversely, courts have reasoned that the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues. *State v. Noll*, 116 Wis.2d 443, 451, 343 N.W.2d 391, 395, *cert. denied*, 469 U.S. 837, 105 S.Ct. 133, 83 L.Ed.2d 73 (1984); *Smith*, 180 Cal.App.3d at 89, 225 Cal.Rptr. 348; *Cook*, at 733.

State v. Perrone, 119 Wn.2d at 547.

Furthermore,

“[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.” *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir.1986). For example, a search limited to items evidencing “involvement and control of prostitution activity” was held by the Ninth Circuit to satisfy the particularity requirement. *United States v. Washington*, 797 F.2d 1461, 1472 (9th Cir.1986); *see also, e.g., State v. Lingo*, 32 Wash.App. 638, 649 P.2d 130, *review denied*, 98 Wash.2d 1005 (1982).

State v. Perrone, 119 Wn.2d at 555.

Here, Jones argues that the search warrant was overly broad as to the “signs or images,” “photographs,” “sex related material, to include[] [b]ooks [and] literature,” and “VHS/DVD/CD and movies.” He argues that the terms of warrant permit the seizure of political signs or cartoons, family photographs, and adult pornography. However, he fails to recognize that the items sought by the warrant are limited by the specification on the warrant of the crimes being investigated.

Furthermore, the items were described with as much particularity as was possible under the circumstances. While it is true that the victim of the criminal activity related the details of the specific photographs and videos that were taken of him, it is also true that the affidavit provided probable cause to believe that there would be photographs and videos of other victims of the defendant’s sexual criminal activity. The defendant had told the victim that he had done the same type of activity with other boys before he met DPR. CP 42, 43. The defendant wrote the victim a letter indicating that he found a “new friend” to conduct with

activities with. CP 43. DPR said that the defendant had “many, many pictures and videos of him and other males naked.” CP 43. DPR said that “there are lots and lots of movies and penis toys up in his cupboard above his bed.” CP 43.

Under these circumstances, there was probable cause to believe that Jones had multiple images and movies in a variety of formats of one known and at least two other unknown boys engaged in some known and some as yet unknown sexually explicit conduct. The warrant was as particular as it could be under the circumstances.

3. The authorization to search for and seize all computers, cameras, and “[v]ideo and media storage devices” was not overly broad.
  - a. The appellant failed to preserve error when he did not specify this ground for his overbreadth claim to the trial court.

For the same reasons stated as to the immediately preceding subsection of this brief, Jones has also failed to preserve error as to whether the warrant was overbroad when it authorized the police to search for and seize all computers, cameras, and “[v]ideo and media storage devices.” Indeed, not only did Jones fail to request a ruling as to these items during the hearing on the overbreadth issue, but he also failed to raise the issue in his written briefing to the court. In failing to raise the issue, the parties were unable to argue, and the trial court was unable to

make a record and a decision, on the issue of how particular such a search warrant needed to be in searching the contents of these items. “[T]he facts necessary to adjudicate the claimed error are not in the record on appeal” therefore no actual prejudice has been shown and the error is not manifest. Jones, 163 Wn.App. at 360. That is, had Jones properly raised the issue, there could have been testimony and consideration of how much particularity is possible in limiting digital searches of computer contents and other electronic storage devices.

- b. If the objection was preserved, there was no error because the warrant authorized a search of Jones’ residence to search for and seize the items, but not a subsequent content search of the computer or other storage devices.

Jones contends not that the search warrant authorizing the search of the residence for and the seizure of these items is overbroad, but he argues, implicitly, that the search warrant authorizes a subsequent search of the contents of these items and that that authorization is overbroad. He appears to specifically argue that an authorization for a subsequent examination of the contents of the computer, camera, and storage devices implicates first amendment concerns as well as privacy concerns.

However, this search warrant did not authorize a subsequent search of the contents at all. This search warrant did authorize a search of Jones’ residence to

search for and seize the items, but not a subsequent content search of the computer or other storage devices. For this reason, Jones' argument fails.

4. Any invalid portions of the warrant are severable from the valid portion.

“Under the severability doctrine, ‘infirmary of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant but does not require suppression of anything seized pursuant to valid parts of the warrant.’” Maddox, 116 Wn. App. at 806, citing Perrone, 119 Wn.2d at 556. As long as the part of the warrant that includes particularly described items is significant as compared to the part that does not, then the part that fails in particularity may be severed. See Maddox, 116 Wn. App. at 807. As summarized in Maddox, the Perrone Court refused to apply the severability doctrine because:

[The warrant] purported to authorize a search for adult pornography that was not supported by probable cause, and for child pornography that was not described with particularity. Its lawful part was small when compared to its whole. Its lawful and unlawful parts were so inextricably intertwined that there was no way to tell which part the police were executing at the time they found and seized any given item. The police seem to have conducted a general search, for they seized many items not related to any crime.

Maddox, 116 Wn. App. at 809.

Jones argument hinges on this court's finding that the “any and all evidence” portion of the warrant is invalid. His does not argue that other items

complained of are not severable and thus must implicitly agree that those portions of the warrant are severable.

As to the “any and all evidence of this crime” portion of the warrant, even if this were overbroad, it is a small portion of the warrant in comparison with the specified items. If this language were excised from the warrant, the warrant’s authorizations would not be significantly altered given the otherwise detailed list of items to be seized.

5. Any error in the denial of the motion to suppress was harmless.

If those portions of the warrant complained of were invalid, could not be severed from the valid portions of warrant, and thus rendered the warrant unconstitutionally overbroad, and if the objections were properly preserved for review, then all items seized pursuant to the warrant should have been suppressed. The question next becomes whether it was harmless error for the court to not suppress those items.

The State bears the burden of demonstrating the error is harmless. *Id.* Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

State v. McReynolds, 117 Wn.App. 309, 326, 71 P.3d 663 (2003), see also State v. Myrick, 102 Wn.2d 506, 515, 688 P.2d 151 (1984).

Here, the defendant was found guilty by the court after a trial to the bench based upon the stipulated admission of the police reports. In such a trial, the judge “still determines the defendant’s guilt or innocence; the State must prove beyond a reasonable doubt the defendant’s guilt [and the defendant] agrees that what the State presents is what the witnesses would say.” State v. Johnson, 104 Wn.2d 338, 342-343, 705 P.2d 773 (1985).

Pursuant to CrR 6.1, the court entered written findings and conclusions after the trial.<sup>9</sup> The evidence relied upon by the trial court in its finding the defendant guilty of the three counts of first degree child molestation was the statements of DRP, contents of videotapes recovered pursuant to the search warrant, and child hearsay statements to DRP’s parents. CP 69 (Finding of Fact 8).

From the court’s findings, it appears that the court found DRP to be credible. “It is not the function of the appellate court to reevaluate the credibility of witnesses.” State v. Ross, 7 Wn.App. 62, 63, 497 P.2d 1343, rev. denied, 81 Wn.2d 1003 (1972). See also State v. Emery, 161 Wash. App. 172, 199-200, 253

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<sup>9</sup> The appellant has not assigned error to any of the trial courts findings or conclusions on the stipulated trial.

P.3d 413, 428 (2011), aff'd, 86033-5, 2012 WL 2146783 (Wash. June 14, 2012) (“We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.”).

It appears that the only seized item relied upon in some part by the court were the videotapes. However, the court also clearly found the victim to be credible. Where the victim’s statements alone establish a sufficient basis for multiple separate acts of first degree molestation, and the trial court finds that victim to be credible, then it is apparent, beyond a reasonable doubt, that the trial court would have found the defendant guilty even if the videos had been suppressed. Therefore, any error in their admission is harmless.

Thus, even if the items seized had all been suppressed, the trial court still, beyond a reasonable doubt, would have found the defendant guilty based on the credible victim’s statements.

6. If there was reversible error, the remedy is remand for a new trial.

Even if the warrant were unconstitutionally overbroad and the invalid parts cannot be severed from the valid parts and all the evidence obtained from there warrant therefore must be suppressed, and any error was not harmless, the remedy is reversal of the convictions and remand for a new trial.

B. THE TRIAL COURT DID NOT ERR IN ITS IMPOSITION OF COMMUNITY CUSTODY CONDITIONS 6 (SECOND SENTENCE), 8-10, 15, AND THE NO CONTACT WITH MINORS PROVISION.

Jones argues that conditions 2, 6-10, 13, the condition requiring plethysmograph testing, and the condition ordering no contact with minors should be vacated as being overbroad and/or not statutorily authorized. Jones did not object to these conditions at sentencing, and did not make a motion to the sentencing court to vacate the conditions, but raises them for the first time on appeal.

Although the appellant failed to object below, “[t]he right to challenge the condition is not waived . . .” State v. Julian, 102 Wn.App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001), citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024, 866 P.2d 39 (1993). “A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.” State v. Julian, 102 Wn. App. at 304. In accord, State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008); State v. Jones, 118 Wn.App. 199, 204, 76 P.3d 258 (2003). Furthermore, the issue is ripe for review. State v. Bahl; State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

As to the overbreadth arguments,

“[o]verbreadth analysis measures how enactments that prohibit conduct fit with the universe of constitutionally protected conduct.” A law is unconstitutionally overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment. Statutes which regulate behavior, as opposed to speech, will not be overturned unless the overbreadth is both real and substantial in relation to the conduct legitimately regulated by the statutes.

Our first task in overbreadth analysis is to determine whether a statute reaches constitutionally protected speech or expressive conduct. If the answer is yes, the next determination is whether the statute prohibits a real and substantial amount of protected conduct in contrast to the statute’s legitimate sweep. This Court has previously noted that the right to move about freely is constitutionally protected. We have previously stated that a “defendant’s constitutional rights during community placement are subject to the infringements authorized by the SRA.” A convicted defendant’s “freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.

State v. Riles, 135 Wn.2d 326, 346-347, 957 P.2d 655 (1998), abrogated in part<sup>10</sup> by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010) (citations omitted).

1. Conditions 6 (first sentence) and 7 can be vacated.

The State concedes error as to the first sentence of condition 6 and the entirety of condition 7 based on State v. Bahl.

2. Condition 6 (second sentence) is a valid crime related prohibition.

Jones contends that the prohibition against frequenting “establishments whose primary business pertains to sexually explicit or erotic material” is not crime-related.

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<sup>10</sup> Valencia abrogated Riles in holding that the petitioner does not have the burden of overcoming a presumption of constitutionality. Valencia, 169 Wn.2d at 792.

The trial court is authorized to impose crime-related prohibitions. RCW 9.94A.700. While “[a] ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime,” “it need not be causally related to the crime.” State v. Zimmer, 146 Wn.App. 405, 413, 190 P.3d 121 (2008) rev. denied, 165 Wn.2d 1035, 203 P.3d 381 (2009), quoting from State v. Autrey, 136 Wn.App. 460, 466, 150 P.3d 580 (2006) and State v. Letourneau, 100 Wn.App. 424, 432, 997 P.2d 436 (2000).

“Generally, ‘imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.’” State v. Valencia, 169 Wn.2d at 791-792. See also Zimmer, 146 Wn. App. at 413 (whether a prohibition is crime-related is reviewed for an abuse of discretion).

Where a defendant is convicted of drug possession, a prohibition on possession of drug paraphernalia is an appropriate prohibition. Zimmer, 146 Wn. App. at 413.

The victim in this case described that the defendant showed pornography to him as part of the grooming and molestation process. CP 43 (“DRP said that Jones would play movies of males having sex with no females in it” and described acts of molestation occurring in conjunction with the movies.) A prohibition on

the frequenting of establishment which provide such materials is clearly related to the crime of conviction and it was not abuse of discretion to impose it.

3. Condition 8 is not overly broad.

Jones argues that the prohibition on possessing or controlling any item designated or used to entertain, attract or lure children is overbroad and is not crime related. His overbreadth claim rests on the supposition that the prohibition may prevent Jones from possessing a first-amendment protected book or movie that would appeal to a minor.

This is a prohibition that regulates behavior, as opposed to speech and so should not be overturned unless the overbreadth is real and substantial in relation to the conduct regulated. Riles, 135 Wn.2d at 346. As a convicted child molester, Jones rights may be restricted in order to protect children. Id. at 346-347.

In this case, Jones made prodigious use of toys, candy, gifts, special games and activities to lure, groom and molest multiple little boys. Under these circumstances, the prohibition, which is intended to prevent future luring and grooming behavior, is as narrowly drawn as it can be.

4. Conditions 9 and 10 are not overly broad.

Jones argues that the prohibitions on possessing or controlling any item designated to take photographs, such as cameras and cell phones with picture capabilities, or any item designed to take video, are unconstitutionally overbroad.

Jones used his computer camera and a camera with a timer to take pictures of and record sexual activity of himself with children as well as children masturbating; he took “many many pictures and videos of the victim and other males naked”; he took nude pictures of the victim inside and outside. CP 43.

Given the multitude of pictures and movies Jones took, on different types of image-recording devices, of many naked boys performing sexual acts, this prohibition is as narrowly drawn as it possibly can be. To do as Jones suggests in his briefing, and prohibit only the recording of images of children, would be virtually impossible for the community corrections officer to actually monitor.

5. Condition 13 can be vacated.

The State concedes error as to condition 13 based on State v. O’Cain, 144 Wn.App. 772, 184 P.3d 1262 (2008).

6. Condition 15 (relating to plethysmograph examinations) is not overly broad.

Jones argues that the portion of condition 15 which requires plethysmograph examinations as directed by the supervising CCO is overbroad. Jones acknowledges that this condition would be valid if ordered as part of crime-related treatment or counseling, but argues that because the condition here may be at the direction of the community custody officer, that it was not ordered incident

to a treatment purpose. Jones also claims constitutional violations of his privacy and liberty interests.

It is well-accepted that probationers and parolees (and, thus, those on community custody) have a diminished right to privacy and liberty. State v. Parris, 163 Wn.App. 110, 117, 259 P.3d 331 (2011), rev. denied, 173 Wn.2d 1008, 268 P.3d 942 (2012), citing State v. Lucas, 56 Wn.App. 236, 783 P.2d 121 (1989), rev. denied, 114 Wn.2d 1009, 790 P.2d 167 (1990) and State v. Simms, 10 Wn. App. 75, 516 P.2d 1088 (1973), rev. denied, 83 Wn.2d 1007 (1974). Furthermore, “[c]onvicted sex offenders in Washington also have a reduced expectation of privacy because of the ‘public’s interest in public safety’ and in the effective operation of government.” Parris, 163 Wn. App. at 118, citing In re Det. of Campbell, 139 Wn.2d 341, 986 P.2d 771 (1999), cert. denied 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001). See also State v. Olson, 164 Wn. App. 187, 262 P.3d 828 (2011).

The defendants in both State v. Riles, and State v. Castro, 141 Wn. App. 485, 170 P.3d 78 (2007), challenged the trial court’s order, as part of their community custody conditions, to “[s]ubmit to polygraph and plethysmograph testing upon the request of [his] therapist and/or Community Corrections Officer”. Castro, 141 Wn. App. at 493, Riles, 135 Wn.2d at 337.

The Supreme Court in Riles noted that “[p]lethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders.” Riles, 135 Wn.2d at 343-344 (footnotes omitted). The Court held that requiring plethysmograph testing incident to treatment is a valid condition which a court can impose if the treatment would reasonably rely on such testing as an assessment measure. However, such testing cannot be ordered in the absence of a condition of crime-related treatment. Riles, 135 Wn.2d at 345.

Castro, supra, reiterated the Riles holding that plethysmograph testing can properly be ordered incident to crime related treatment. Castro, 141 Wn. App. at 494.

The language of the condition approved in both Riles and Castro was that the testing could be directed by either the treatment provider or the community corrections officer or both. The only difference between the language there and that here is that only the community corrections officer is referenced. However, it is clear when reading this condition in conjunction with the condition requiring treatment, that, together, they are intended to ensure that Jones gets treatment while on community custody. It is absurd to imagine that a corrections officer would direct that a plethysmograph occur for any reason other than a treatment-related reason. However, if that were to happen, Jones could seek relief at the trial

court if he believed that the community corrections officer were acting unreasonably.

If the court determines that the condition was erroneously imposed, the remedy should not be to strike the condition but to remand to the trial court to revise the condition to require plethysmograph testing only at the direction of his sexual deviancy treatment provider. Riles, 135 Wn.2d at 345 (“We conclude that requiring plethysmograph testing . . . incident to [the defendant’s] treatment is a valid condition which a court is authorized to impose.”).

7. The prohibition on any contact with minors is not overly broad.

Jones contends that the portion of the judgment and sentence which prohibits contact with any minors is overbroad. He argues that his right to travel is impinged upon because “[s]imply by venturing onto a public street, taking a bus, or shopping for groceries, Mr. Jones would almost certainly come into contact with minors”.

This argument was considered, and rejected, in the context of such a prohibition infringing on the right to free speech and free association by the court in State v. Riles. There, Riles had contended that the court’s order preventing contact with any minor children infringed on his right to free speech and free association. The court found:

[A]lthough Petitioner Riles' constitutionally protected freedom of movement may be limited, it is a valid restriction because the prohibition is not real or substantial in relation to the conduct legitimately regulated by the statute. That is, RCW 9.94A.120(9)(c)(ii)<sup>[11]</sup> plainly authorizes this type of prohibition and it does not affect Petitioner's freedom of association apart from the court's order."

State v. Riles, 135 Wn.2d at 347. The same analysis and conclusion applies here.

8. Condition 2 can be vacated.

Since no restitution has been requested, and the statutory time period for making such a request has passed, without conceding error, the State would be in agreement with vacating this condition of community custody.

III. CONCLUSION

Because the search warrant was not overly broad, the trial court did not err in its denial of the suppression motion and the convictions should be affirmed.

The trial court properly sentenced the appellant except that the State agrees to the vacation of conditions 2, 6 (first sentence only), 7, 9, and 13.

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<sup>11</sup> RCW 9.94A.120(9)(c)(ii) authorizes the trial court to require offenders "not [to] have direct or indirect contact with . . . a specified class of individuals."

DATED this 19<sup>th</sup> day of June, 2012.

  
ROSEMARY H. KAHOLOKULA  
#25026  
Chief Criminal Deputy Prosecutor

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Rabi Lahiri, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 19<sup>th</sup> day of June, 2012.

  
KAREN R. WALLACE, DECLARANT