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NO. 32426-1-II

COURT OF APPEALS

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NEIL GRENNING, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 02-1-01106-5
No. 03-1-05025-5

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On June 7, 2004, the Pierce County Prosecutor's Office filed a Fifth Amended Information charging the defendant, NEIL GRENNING, with 17 counts of rape of a child in the first degree¹, two counts of attempted rape of the child in the first degree², six counts of child molestation in the first degree³, 26 counts of sexual exploitation of a minor⁴, one count of assault of a child in the second degree⁵, and 20 counts of possession of depictions of a minor engaged in sexually explicit conduct.⁶ CP 325-63. In addition, the State alleged that the defendant committed the assault of a child count and each of the 20 counts of possession of depictions of minors with the aggravating factor of sexual motivation. CP 350-59. The time period involved in the underlying allegations spanned from April 1, 2001 through March 3, 2002.⁷ CP 325-53.

¹ RCW 9A.44.073.

² RCW 9A.44.073, RCW 9A.28.020.

³ RCW 9A.44.083.

⁴ RCW 9.68A.040(1)(b).

⁵ RCW 9A.36.021(1)(e), RCW 9A.36.130(1)(a).

⁶ RCW 9.68A.070.

⁷ The original Information was filed on March 6, 2002. CP 2-5. The State amended the Information several times to add various counts as the investigation progressed. CP 6-38, 325-53. The investigation revealed an additional victim and more charges were filed, which were then consolidated into one case for the purposes of trial. CP 221. The final amendment was the Fifth Amended Information, which was filed on June 7, 2004. CP 325.

On September 18, 2002, the defendant raised a motion to suppress evidence obtained from his computer, arguing that the police retrieved data from his computer after the expiration of the search warrant. The Honorable Frederick Fleming denied the motion. RP 50.

On July 25, 2003, the defense raised a motion to compel the State to provide mirror image copies of the hard drives seized from the defendant's computer. The Honorable Lisa Worswick granted the motion, but issued a protective order requiring that the defense expert view the image copy of the hard drive at a secured facility. RP 7-25-03, at 23-24.

The court stated:

I'm swayed by the argument that the allegations in this case is that our four- or five-year-old victim is depicted in these photographs, and I feel some obligation to protect his image from making it into the mainstream of the market of child pornography. And that's because his picture is forever, the Internet is forever, and continues to revictimize people.

RP 7-25-03, at 23-24.

In the protective order, the court ordered the defense to provide three blank computer hard drives for copying the contents of the defendant's three hard drives. CP 597; Appendix A. The detective was ordered to copy all of the data contained on the defendant's hard drives onto the blank hard drives, which would then be mirror images of the originals. CP 598. The detective was then to provide the defense attorney and his expert with a secured location at which they could forensically

examine the mirror drives, and this location was required to be at the defense's disposal from 8:30 a.m. until 4:30 p.m., Monday through Friday. CP 598.

On March 26, 2004, the defense raised a motion before the Honorable Vicki Hogan to reconsider the protective order granted by Judge Worswick. The defense requested permission to retain a copy of the defendant's hard drives so that its expert, Robert Apgood, could analyze the drive in his own laboratory. RP 3-26-04,⁸ at 52; CP 603.

Mr. Apgood stated in an affidavit that he did not anticipate needing "to store or retain additional copies of any of the image files" contained in the defendant's hard drive. CP 602. Instead, the request for a copy of the hard drive was made for reasons of economics and convenience. CP 602. He stated that the forensic search of a computer disk drive could take from several hours to several days to complete. CP 602. If he could use his own lab to analyze the hard drive, he would not have to bill for any down time during which the lab equipment could be left unattended to process the defendant's hard drive. CP 603.

⁸ The title page of the Report of Proceedings for March 26, 2004, erroneously indicates that the volume pertains to a matter heard on "September 24, 2003." Inside the volume, the Report of Proceeding erroneously indicates it pertains to March 26, 2003, instead of 2004. RP 3-26-04, at 47.

The court denied the motion, stating that the real issue was *not* balancing the inconvenience or additional cost for Mr. Apgood's time against the need for the protective order. RP 3-26-04, at 84. Instead, the court noted:

the real issue . . . is what has happened since November when Mr. Apgood has been on board, and nothing has happened. Even under the existing order there has been no effort to try to comply with the order.

So I am going to deny the motion for reconsideration at this time, Mr. Kawamura. I want to know if that is unworkable. I don't think that it is. And I think that it is clear in Judge Worswick's order, and that's why I asked about the victim [R.W.] and the victim [B.H.]. I can't help [B.H.]. If that material is on the internet, in and out of the internet community for Australia, that makes a difference in safeguarding the materials. It makes a difference in [R.W.'s case] that that information is not out on the Internet.

RP 3-26-04, at 84-85 (emphasis added).

On June 7, 2004, the Honorable James R. Orlando presided over a hearing pursuant to CrR 3.5 and CrR 3.6. The court concluded that the original warrant authorizing the search of the defendant's home and seizure of his computer was not overly broad, and it declined to suppress the evidence found in the computer. CP 515-16. The court found the defendant's statements to the officers admissible under CrR 3.5. CP 522.

On June 10, 2004, during voir dire, the court excused one juror pursuant to the defense challenge for cause related to a Tacoma News Tribune article. RP 287. The court declined to excuse other jurors. The

court explained: "I will not excuse the balance of the jurors; I think their information is not sufficient to demonstrate that they incurred any kind of prejudice as a result of this information." RP 287.

The court held a competency hearing regarding B.H., one of the victims in this case, who was nine years old at the time of trial. RP 753, 760. The court found B.H. competent to testify. RP 770. R.W. was seven years old at the time of trial. RP 728. The court found that R.W. was unavailable due to his age. RP 743. The court found that R.W.'s statements to Dr. Duralde were admissible under the hearsay exception for statements made for medical diagnosis or treatment. RP 822.

On June 18, 2004, the jury found the defendant guilty of 71 of the 72 counts. RP 970-83. The jury acquitted the defendant on one count, Count 19, a charge of first degree rape of a child. CP 486. The jury answered each of the 21 special verdict forms in the affirmative, indicating it found the defendant had acted with sexual motivation in assaulting R.W. (Count 40) and in possessing the child pornography (Counts 43 through 62). RP 980-81.

On October 1, 2004, the defendant came before the court for sentencing. RP 999. His offender score was determined to be "99." RP 1001, 1009. The defendant's community corrections officer recommended an exceptional sentence:

Your Honor, I have done in excess of 300 sex offender [Presentence Investigation Reports]; I have read an awful lot of reports; I have met with an awful lot of victims and

offenders. This one is the first report that I had to put down and walk away from and then come back to. It has troubled me ever since I read it.

RP 1014. He also stated:

I know of no other offender that has committed anywhere near what Mr. Grenning has committed. But I also know that in the past, offenders that have committed as serious, albeit fewer causes or fewer counts, have received exceptional sentences and will spend the rest of their lives incarcerated.

RP 1015-16.

The defendant exercised his right to allocution and stated, in part, as follows:

Contrary to characterization, I am not a predator and did not seek out these two boys. The situation occurred naturally, I was not soliciting them. They came from homes which did not provide them the nurturing environment I was lucky to grow up in. One was desperately looking for a role model and chose me. My regret is that, despite caring deeply for him and empathizing with him over the scorn he faced at home, I did not foster, in all of my actions, attributes of a role model. When mutual curiosity presented itself, I did not exercise the wisdom to perceive what harm might come of it.

RP 1023. After listening to this allocution, Judge Orlando stated as follows in imposing sentence:

In this job, I come across all kinds of people, some good, some bad, and I think none as evil as Mr. Grenning. It's clear he is an unrepentant pedophile who has preyed upon young children entrusted to him. His acts are, I think, the most despicable that I have ever encountered. And it is

clear that he should spend well beyond his natural years incarcerated.

RP 1030.

The court imposed an exceptional sentence of 1,404 months. CP 578. This sentence consisted of the high-end of the standard range on each of the crimes. The court ruled that the time served on each class of crimes would be served concurrently. As the exceptional portion of the sentence, the court ran each class of crimes consecutive to each other. CP 546-48. For example, all of the rape counts involving R.W. would be served concurrently to each other, but consecutively to each of the other classes of crimes such as the molestation counts and the sexual exploitation counts. CP 546-48. The defendant filed a notice of appeal.

2. Facts

Between July 2001 and March 2002, R.W. and his mother were neighbors of the defendant's. RP 729. R.W. was born on October 30, 1996, and he turned 5 years old during the time period in question. RP 728. The defendant asked R.W.'s mother if he could baby sit R.W. RP 730. She let the defendant baby sit R.W. about six times at his house while she either took her daughter to school or went grocery shopping. RP 731. Once when she went to pick R.W. up, she found R.W. was taking a bath. RP 732. The defendant said that R.W. had spilled chocolate milk on himself. RP 732.

On March 3, 2002, while at home, R.W.'s mother went to check on R.W. because she was concerned that he had been in the bathroom for a long period of time. RP 324, 746. When she opened the door, she saw that R.W. had inserted a tooth brush in his anus. RP 747. She asked him what he was doing. RP 748. R. W. reached into the medicine cabinet and grabbed a jar of Vaseline. RP 748. R.W.'s mother called the police. RP 324.

Later that same day, the police contacted the defendant at his place of employment. RP 298, 302. As soon as the defendant saw them, his hands began to shake. RP 302. He was advised of his rights. RP 304. The defendant admitted that he babysat the victim "a couple times." RP 307. The defendant denied putting Vaseline in the victim's anus, or touching him. RP 307. He stated he gave R.W. baths because R.W.'s clothes smelled like smoke. RP 309. He said he did not have any tub toys for R.W., so he gave him a cup and a CD. RP 309. He said R.W. placed the CD over R.W.'s penis. RP 309. The defendant stated that at one point after a bath, R.W. ran naked through the house holding a tube of K-Y jelly. RP 310. The officers arrested the defendant. RP 312-13.

On March 4, 2004, R.W.'s mother took R.W. to Mary Bridge Hospital at the suggestion of the police, where R.W. was seen by Dr. Yolanda Duralde. RP 750-51, 839. Dr. Duralde is a physician employed at Mary Bridge Hospital in the child abuse intervention department. RP 825-26. She has specialized training in the area of child abuse and its

prevention. RP 827-28. She regularly sees patients when there is an allegation of sexual and physical abuse. RP 829. Patients are referred to her department through a variety of means including referrals by private physicians, parents, police, the prosecutor's office, and CPS. RP 831. She personally sees about 200 patients a year. RP 832. Prior to a physical examination, Dr. Duralde will talk with the child:

[Y]ou want to know what's going on with the child. And particularly in abuse situations, most of the time the child has been alone with the alleged perpetrator, so that even if other people have a sense of what happened to that child, obviously the child has firsthand knowledge of what happened.

And you want to get a sense of how traumatized is the child; . . . is this a frightening experience? What can they tell you about what happened in their own words.

RP 836. Dr. Duralde uses information she obtains from the child, along with the information from the physical examination, in the treatment and diagnosis of the patient. RP 836.

R.W. was brought into an exam room. RP 840. The room was "child-friendly" with big cartoon pictures of fish on the walls. RP 840-41. There was a small child-sized desk and chairs in the room. RP 841. Dr. Duralde told R.W. that she was a doctor, and that she was "going to be seeing him to make sure he was healthy." RP 841. A nurse was also present in the room to assist the doctor and to make sure that the child feels comfortable. RP 842. Dr. Duralde asked R.W. if he had any

“owies.” RP 843. R.W. said he had an “owie” on his stomach because he had pimples on that area. RP 843.

She asked R.W. for the words he used to describe his private area, and R.W. indicated “pee-pee” and “butt.” RP 844. She then asked R.W. whether anyone had ever touched him on his “pee-pee” or his “butt.” RP 845. R.W. said that Neil had touched him. RP 845. Dr. Duralde asked what happened with Neil, and R.W. said that Neil was going to jail. RP 845. She again asked R.W. what happened. RP 845. R.W. first said that the defendant just looked at R.W.’s “pee-pee.” RP 845. She asked R.W. if anyone else had ever touched him or made him feel uncomfortable, and R.W. said, “Just Neil.” RP 845. She then conducted a physical examination of R.W. RP 846.

On March 4, 2002, the defendant was interviewed again by the police, after the advisement of his Miranda rights. RP 390, 393-94. The defendant admitted that he babysat R.W. about six times, and that he bathed R.W. during five of those visits. RP 398-99. The defendant admitted to touching R.W.’s penis, anus and buttocks during the bathing process. RP 349-50. He said the babysitting sessions lasted for about an hour. RP 350. When asked about lubricants, the defendant said he kept a tube of K-Y jelly near his computer for his own personal use while he was at the computer. RP 351.

On March 5, 2002, the police obtained and executed a search warrant on the defendant's house. RP 352. The defendant's computer was seized from his bedroom pursuant to this warrant. RP 510. A detective forensically examined the computer for images or files related to R.W. RP 514. The computer was a Macintosh and had three hard drives. RP 511. The detective imaged or copied each of the hard drives for purposes of the forensic examination. RP 512-13.

A search of the defendant's imaged hard drives ultimately revealed that the defendant had approximately 35,000 to 40,000 images of minors engaged in sexually explicit conduct. RP 517. Some of these images were commercial child pornography. RP 517. When the detective first came upon two of these images, he obtained a second warrant that authorized a search for child pornography. RP 514-15. The detective ultimately found that the defendant had about 300 photographs of R.W. on the hard drive. RP 444.

The defendant's hard drive included images that formed the basis of each of the 72 charges involved in this case. At trial, the court's "to convict" instructions for the jury referenced each exhibit or series of exhibits that pertained to the specific count. See CP 354-462. There are three groups of charges involved in this case: (1) Counts 1 through 42 pertain to charges in which R.W. was the victim; (2) Counts 43 through 62

pertain to possession of commercial pornography found on the defendant's computer; and (3) Counts 63 through 72 pertain to charges involving victim B.H.

a. The Counts Involving R.H.

The following is a summary of the evidence presented at trial with respect to the first set of charges, the counts involving R.W.; the specific crime involved in each count is named in the summary for clarity's sake due to the large number of counts involved:

Count 1: In Exhibit 25, the defendant's face is visible between a juvenile male's legs; the defendant looks directly into the camera as he is sucking the juvenile's penis. A blue plaid bedding is visible underneath the juvenile. RP 526; CP 368 (first degree child rape).

Count 2: Exhibit 26 depicts R.W. lying naked on the defendant's bed with his legs spread apart. R.W.'s face is visible. The blue plaid bedding visible in Exhibit 25 is also visible here. An adult's index finger can be seen inserted in R.W.'s rectum. RP 528; CP 369 (first degree child rape).

Count 3: In addition to a rape charges, Exhibits 25 and 26⁹ were also the basis of a charge of sexual exploitation of a minor. CP 397.

Count 4: In a series of four images, R.W. is lying naked on the defendant's bed with his knees up. R.W.'s face is visible. An adult's left hand is seen inserting a long white porcelain-like object into R.W.'s rectum. RP 532-35; CP 370; Exhibits 27, 28, 29, 30 (first degree child rape).

Count 5: In addition to a rape charge, Exhibits 28 and 30 were also the basis of a charge of sexual exploitation of a minor. CP 398.

Count 6: In Exhibits 31 and 32, R.W. is naked in a bathtub filled with water. R.W.'s penis has been inserted through the center hole of a compact disc. R.W.'s face is visible. RP 536-37; CP 399 (sexual exploitation of a minor).

Count 7: In Exhibit 33, R.W. is lying naked between an adult's legs. R.W.'s face is visible. R.W. has a cassette tape recorder in

⁹ It appears that the trial court erred with regard to exhibit 26. The jury was instructed that it could find Exhibit 25 and/or 26 the basis for finding the defendant guilty of count 3, and it was also instructed that it could find Exhibits 24, 26, 28 and/or 30 as the basis for count 5. CP 397-98. Both counts involved charges of sexual exploitation of a minor. CP 397-98.

his hand; R.W.'s legs are open, exposing his genitalia. RP 541; CP 400 (sexual exploitation of a minor).

Count 8: In Exhibits 34 and 35, R.W. is lying naked on the defendant's bed with his legs spread apart and his genitalia visible. R.W.'s face is visible. An adult male's erect penis is resting against R.W.'s genitalia. The adult male's face is not visible, but his red shirt is visible in the second of two images. RP 542; CP 384 (first degree child molestation).

Count 9 In Exhibit 36, R.W. is lying naked on the defendant's bed with legs spread apart. R.W.'s face is visible. R.W. is holding an adult male's erect penis in his hands. RP 546; CP 385 (first degree child molestation).

Count 10: In addition the child molestation charge, Exhibit 36 was also the basis for a charge of sexual exploitation of a minor. CP 401.

Count 11: This count involves a series of four images in which the defendant's face is visible. He is sucking on a juvenile male's penis. The defendant is wearing a blue plaid shirt. RP 555; Exhibit 37, 38, 39 (39 contains two images); CP 371 (first degree child rape).

Count 12: In addition to the child rape charge, Exhibits 37, 38 and 39 were also the basis for one count of sexual exploitation of a minor. CP 402.

Count 13: In Exhibit 40, R.W. is standing naked and is urinating into a toilet. His face is visible. RP 554; CP 403 (sexual exploitation of a minor)

Count 14: In Exhibits 41 and 42, a juvenile male is lying naked on his back. The defendant's face is visible close to the juvenile's pubic area, and the defendant has inserted the juvenile's penis into the defendant's left nostril. RP 558-59; CP 386 (first degree child molestation).

Count 15: Exhibits 41 and 42 also formed the basis of a charge of sexual exploitation of a minor. CP 404.

Count 16: In this series of six images, a juvenile male is lying naked on the defendant's bed. R.W.'s face is visible in several of the images. An enema bottle is being inserted into his rectum, and an adult's hand is seen discharging the bottle's contents into R.W.'s rectum. RP 562-567; Exhibits 43, 44, 45, 46, 47, 48; CP 372 (first degree rape of a child). An audio recording was also found in the defendant's hard drive in which a

- speaker is talking to child, whose first name is identical to R.W.'s, about putting water in the child's bottom. RP 568.
- Count 17: Exhibits 43, 44, 45, 46, 47, and 48 also served as the basis for a charge of sexual exploitation of a minor. CP 405.
- Count 18: In Exhibit 49, R.W. is lying naked on the defendant's bed and is holding a plastic syringe in his hands. His face is visible. He has a white porcelain-like device protruding from his anus. RP 569-70; CP 373 (first degree child rape).
- Count 19: The jury acquitted the defendant of this count, which involved Exhibits 50 and/or 51, apparently as a duplicate count of Count 18.
- Count 20: In Exhibits 50 and 51, R.W. is lying naked on the defendant's bed with a cassette recorder in his hand. His face is visible. A white porcelain-like device is protruding from R.W.'s anus. RP 572-73; CP 406 (sexual exploitation of a minor).
- Count 21: In Exhibit 52, the juvenile male is lying on his stomach. The defendant's bedding is visible underneath him. An adult has inserted the index finger of his left hand in R.W.'s rectum. RP 575-76; CP 375 (first degree child rape).
- Count 22: Exhibit 52 also formed the basis for a charge of sexual exploitation of a minor. CP 407.

Count 23: In Exhibit 53, R.W. is naked and sitting on the defendant's living room couch. R.W.'s face is visible, as are his genitals. RP 577; CP 408 (sexual exploitation of a minor).

Count 24: In Exhibits 54 and 55, R.W. is lying naked on the defendant's bed with his legs apart, showing his genitalia; R.W.'s face is visible in the first image. R.W. has a liquid substance on his genital and stomach areas. The second image is a close-up of R.W.'s genitalia. RP 577-78; CP 409 (sexual exploitation of a minor).

Count 25: In Exhibits 56 and 57, the defendant's face is visible. He is wearing a blue plaid shirt. A juvenile male is lying on the defendant's bed. The defendant is licking the juvenile male's penis in both images. RP 582; CP 376 (first degree child rape).

Count 26: In Exhibit 58, the defendant's face is visible. He is wearing a blue plaid shirt. He is sucking the juvenile male's penis. RP 582; CP 377 (first degree child rape).

Count 27: In Exhibit 59, R.W. is lying naked on his back on the defendant's bed. His face is visible. A long dark object attached to a wire protrudes from R.W.'s rectum. RP 583-84; CP 378 (first degree child rape).

- Count 28: Exhibit 59, as well as 60 and 61, provide the basis for one count of sexual exploitation of a minor. Exhibits 60 and 61 are close-up images of the long dark object inserted in R.W.'s rectum. CP 410.
- Count 29: In Exhibits 62 and 63, R.W. is lying naked on his back on the defendant's bed. His face is visible in one image. R.W. has a liquid substance, consistent in appearance with semen, on his genitalia, stomach, and right thigh. The second image is a close-up of his torso. RP 586; CP 411 (sexual exploitation of a minor).
- Count 30: In this series of three images, R.W. is wearing a blue shirt and is naked from the waist down. His face is visible. R.W. is holding a tube of K-Y lubricant and applying the lubricant to his genital area. An enema bottle can be seen protruding from his anus, and an adult hand is seen squeezing the bottle. RP 589; Exhibits 64, 65, 66; CP 379 (first degree rape of a child).
- Count 31: Exhibits 64, 65, 66 also form the basis for one count of sexual exploitation of a minor. CP 412.
- Count 32: In this series of two images, R.W. is seen wearing the blue shirt referenced above. His face is visible in one of the

images. An adult's left index finger is inserted in R.W.'s rectum. The second image is a close up of the finger in R.W.'s rectum. RP 591; Exhibit 67, 68; CP 380 (first degree rape of a child).

Count 33: Exhibits 67 and 68 also form the basis for one count of sexual exploitation of a minor. CP 413.

Count 34: In this series of two images, R.W. is naked and holding a tube of K-Y lubricant. R.W.'s face is visible on the first image. R.W.'s fingers are around an adult male's erect penis. The adult male is wearing blue jeans and a green shirt. RP 592; Exhibit 69, 70; CP 387 (first degree child molestation).

Count 35: Exhibits 69 and 70 also form the basis for one count of sexual exploitation of a minor. CP 414.

Count 36: In Exhibit 71, an adult male is wearing blue jeans and a green shirt. He is inserting his penis into a juvenile male's rectum. RP 593; Exhibit 71; CP 381 (first degree child rape).

Count 37: Exhibit 71 forms the basis for one count of sexual exploitation of a minor. CP 415.

Count 38: In this series of eight images, the defendant's face is visible in several images, and he displays for the camera a long purple and white object. He is wearing blue jeans and a gray shirt

with the letters "TASCA." R.W. is lying naked on his back on the defendant's bed. His face is visible in most of the images. The images document the defendant inserting the purple and white device into R.W.'s rectum. In one image, the end of the device is seen protruding from R.W.'s rectum; and R.W. is crying and red-faced. RP 595; Exhibit 72, 73, 74, 75, 76, 78, 79, 80; CP 382 (first degree child rape).

Count 39: The series of eight images referenced above also forms the basis for one count of sexual exploitation of a minor. Exhibit 72, 73, 74, 75, 76, 78, 79, 80; CP 416.

Count 40: In this series of eight images, R.W. lies naked on the defendant's bed. His face is visible in most of the images. R.W. has an electrical device with red wires attached to his genitalia and also strapped to his chest area. Exhibit 81, 82, 83, 84, 85, 86, 87, 88; CP 392 (assault of a child in the second degree). The police recovered this device from the defendant's closet during service of the search warrant. RP 601.

Count 41: The series of eight images above form the basis for one count of sexual exploitation of a minor. Exhibit 81, 82, 83, 84, 85, 86, 87, 88; CP 417.

Count 42: In this series of four images, R.W. is lying naked on his back on the defendant's bed. His face is visible. A metal nail is protruding from the tip of R.W.'s penis. RP 605; Exhibit 89, 90, 91, 92; CP 418 (sexual exploitation of a minor).

b. Counts involving Commercial Child Pornography.

The second group of charges, Counts 43 through 62, involves charges of possession of depictions of minors engaged in sexually explicit conduct. Each count was based on a single image admitted at trial. These images are commercial child pornography. RP 658. Commercial child pornography is bought or traded, often via computer, by people who collect child pornography. RP 646. The 20 images at issue here primarily depict young children, two of which are infants, being raped and molested by adult males. Exhibits 94-144. In one of these images, a child is being sexually abused by a dog. These images were all recovered from the defendant's computer. RP 648-58.

At trial, Dr. Duralde, a pediatric physician, testified that she has personally examined close to 3,000 patients while employed as a physician at Mary Bridge's child abuse intervention department. RP 832. When determining a child's age by visual appearance, she first looks at the child's habitus, or body build, for the presence or absence of fatty

deposits, which younger children tend not to have in great amounts. RP 848. She also determines sexual maturation from the appearance of the genitalia, and checks for the presence of facial or armpit hair. RP 849. Dr. Duralde testified at trial to her opinion that within a reasonable medical certainty, the individuals depicted in Exhibits 94 through 114 were children under the age of 18. RP 851-860.

An agent from Immigration and Customs Enforcement, Daryl Cosme, who has over 30 years of training and experience in identifying and detecting child pornography, testified to his opinion that the children depicted in Exhibits 94 through 114 appeared to be actual children, not computer generated images. RP 877-78; 892-902. He recognized a number of the images and specific children depicted therein from prior unrelated child pornography investigations. RP 894-902. He identified some of the images as having been produced in the 1970's or early 80's. RP 893-97.

c. Counts involving B.H.

The remainder of the counts, Counts 63 through 72, relate to six-year-old victim B.H. In 2001, the defendant went on a camping trip with a college friend and two of his friend's younger brothers. RP 802. B.H. was one of the brothers, and he was about 6 years old at the time. RP 800. B.H.'s brothers slept in one tent, and B.H. and the defendant slept in

another. RP 780. B. H. testified at trial that while in he was in the tent with the defendant, the defendant put B.H.'s penis in the defendant's mouth. RP 785.

B.H.'s identity as one of the defendant's victims was initially not known to the Tacoma police. His identity was discovered when the police in Brisbane, Australia contacted one of the detectives on this case. RP 415. The Australian police had discovered some of the images the defendant took of B.H. while searching another individual's computer in Australia; these images were forwarded to the Tacoma police, and the police discovered additional images of B.H. in the defendant's computer. RP 416. B.H.'s identity was traced through the license plate of a car that appeared in one of the defendant's photographs. RP 416-17, 426.

The defendant's computer contained several instant message chats that had been saved. RP 669. An instant messaging chat is real time communication between two computers. RP 664. Those who use instant messaging chat generally do not use their real names. RP 664. In these chats, a chat participant who went by the name "Photokind" referred to himself as a recent graduate of Pacific Lutheran University (PLU) who was looking for work and applying for a teaching license. RP 669-70. The detective determined this information was consistent with the

defendant, who was verified as a recent PLU graduate who had applied for a teaching license in Washington State. RP 669-70.

The detective searched the defendant's hard drive for other references to "Photokind," and received several thousand hits, consistent with the computer's owner using that name. RP 670. In one specific chat, "Photokind" engaged in a chat with a participant named "tjerkenson" in Australia. RP 670. In this chat, "Photokind" described a camping trip that matched up "play-by-play" with the images of B.H. recovered from the defendant's computer. RP 670. A copy of this chat was admitted at trial. RP 671; Exhibit 140.

In this chat, "Photokind" talked about going camping with a 7-year-old and incapacitating him with alcohol. RP 672-73; Exhibit 140. He stated, "The alcohol did work quickly." Exhibit 140. "Unfortunately, lights out still left him capable of pulling his pants up every time I tried to pull them down." Exhibit 140. "Photokind" then described in detail, step by step, how he used the 4 inch porcelain "probe" to anally rape the victim. RP 674; Exhibit 140. "Photokind" discussed his frustration about not being able to anally rape the victim with his penis and keep his right hand clean to take pictures with a camera. RP 673-74; Exhibit 140. He described ejaculating on the victim's genitalia and chest. Exhibit 140. During the chat, "Photokind" sent "tjerkenson" 25 images of the "event."

Exhibit 140. "Photokind" remarked that he had a chance to purchase a life-time supply of chloroform on EBay a couple of months earlier.

Exhibit 140. The detective found an audio log pertaining to the camping trip, which was admitted and played to the jury. RP 675; Exhibit 142.

B.H.'s brother testified at trial and identified various images found in the defendant's computer as images taken during the camping trip, and he identified B.H. in the photos. RP 799; Exhibit 14, 15, 16. Exhibit 18 is a photo of B.H. while asleep or otherwise incapacitated. In this exhibit, B.H.'s shirt has been pulled up to expose his chest and stomach, and his pants and underwear have been removed; a blue plaid fabric is visible on his thighs, which appears to be a pajama garment; a dark blue sleeping bag is also visible by his side and on his lower leg area. Exhibit 18. This exhibit was shown at trial to B.H.'s mother. RP 428. She positively identified the person in the photograph as being B.H. RP 428.

The following is a summary of the evidence presented at trial regarding the specific counts involving B.H. Each exhibit referenced is an image recovered from the defendant's computer; the specific crime at issue is included in each summary for clarity purposes. B.H.'s face is not visible in most of the images, but the pajamas and bedding remain similar in all the images.

- Count 63: Exhibit 118 is an image of a juvenile male's penis. An adult's fingers are visible on the blue plaid pajama garment draped over the juvenile's thigh. This blue plaid garment is identical in appearance to the pajama garment visible around B.H.'s thighs in Exhibit 18. CP 446 (Sexual exploitation of a minor).
- Count 64: Exhibit 119 is an image of a juvenile's buttock. The blue plaid pajama garment is visible around the victim's thighs. CP 447 (sexual exploitation of a minor).
- Count 65: Exhibit 120 is an image almost identical to Exhibit 119, except the left hand of an adult is seen pinching the victim's left buttock. CP 450 (first degree child molestation).
- Count 66: This series of eight photographs show, step-by-step, the left hand of an adult inserting of a long, white porcelain object into the juvenile's rectum until the object is fully inserted, consistent with the description given by "Photokind" in the e-mail chat. Exhibit 140. The blue plaid pajama garment is visible in the images. Exhibits 121, 122, 123, 124, 125, 126, 127, 128; CP 452 (first degree child rape).

Count 67: Exhibit 129 is the same image contained in Exhibit 18, except B.H.'s genitalia are exposed. CP 448 (sexual exploitation of a minor).

Count 68: Exhibit 130 is an image of a juvenile male's torso, with an adult male lying on top of the juvenile. The adult's erect penis rests against the juvenile's penis. Some of the blue plaid pajama garment is visible next to the juvenile's torso. CP 451 (first degree child molestation).

Count 69: Exhibit 131 depicts the juvenile rolled over onto his stomach. An adult male is attempting to penetrate the juvenile's anus with the adult's erect penis. Some of the blue plaid pajama garment is visible next to the juvenile's torso. CP 455 (attempted first degree child rape).

Count 70: Exhibits 132 and 133 depict the juvenile rolled over on his stomach. The left index finger of an adult is inserted to varying degrees in the victim's rectum. The juvenile's torso rests on a dark blue sleeping bag consistent in appearance to the sleeping bag in Exhibit 18. CP 453 (first degree child rape).

Count 71: Exhibit 134 depicts the juvenile rolled over on his stomach. A part of the dark blue sleeping bag is visible on the right.

An adult male's torso is visible straddling the juvenile's thighs. The adult male is trying to insert his erect penis into the juvenile's rectum. CP 456; RP 683 (attempted first degree child rape).

Count 72: Exhibit 135 depicts the juvenile's torso with genitalia visible. A white liquid substance, consistent with semen, is visible on the victim's genitalia and stomach. The juvenile's torso rests on a dark blue sleeping bag consistent with the one in Exhibit 18. CP 449 (sexual exploitation of a minor).

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE CONTAINED WITHIN HIS COMPUTER.
 - a. Probable Cause Supported the Issuance of the Warrant, and the Warrant Was Not Overbroad.

The defendant argues that the search warrant that authorized the search of his house and the seizure of his computer lacked probable cause and was overly broad. The court should reject these arguments. The warrant complied with Fourth Amendment requirements.

Under the Fourth Amendment, a warrant may be issued only upon a showing of probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity, and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Accordingly, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Detective Baker's affidavit, which was dated March 5, 2002, established probable cause for the issuance of the initial search warrant. This affidavit established a nexus between the defendant's criminal activity and the items to be seized, which included Grenning's computer, digital camera and computer data storage devices.

In this affidavit, Detective Baker stated that on March 3, 2002, R.W. told his mother that the defendant had put something in R.W.'s anus, and R.W. was trying to get it out with a toothbrush. CP 49. R.W. showed his mother a jar of Vaseline and told her: "This is what Neil had put on his pee pee and put in my butt." CP 49. R.W.'s mother told the police that she knew that the defendant had given R.W. a bath on one occasion. CP 49. She also told them that Grenning had showed her a digital picture that he had taken of R.W. in which R.W. was fully clothed. CP 50. She

asked R.W. if Grenning had taken pictures of him, and R.W. answered in the affirmative and also indicated Grenning took pictures of R.W. naked. CP 50. Baker's affidavit also indicated that R.W. disclosed to Dr. Duralde that Grenning had touched R.W.'s penis and buttocks area. CP 51.

The officers interviewed the defendant and he confirmed that he had given R.W. baths on five occasions, that he would touch R.W.'s buttocks and genitals while washing R.W., and that he gave R.W. a CD, which R.W. placed around R.W.'s penis. CP 49-50. Grenning told the officers that he keeps K-Y lubricant next to his computer for personal use, stating "it was more enjoyable to do that while sitting at the computer." CP 50. Detective Baker indicated in his affidavit that based on his training and experience, he had knowledge that pedophiles use computers and digital cameras to photograph and store sexually explicit images of children. CP 51.

In evaluating an affidavit, the court is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re PRP of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). Warrants must be read in a common sense and practical fashion and not in an overly-technical manner. See United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965). Detective Baker's affidavit established probable cause to believe that the defendant had raped R.W. by placing his penis in R.W.'s anus, and that the defendant had taken digital images of R.W. naked. The facts and circumstances allow for reasonable inferences

that any such images could be related to the defendant's sexual assault on the victim, and that such images could have been stored or downloaded into the defendant's computer or other data storage devices. The defendant kept sexual lubricant next to his computer for the apparent purpose of masturbating while viewing pornographic items stored on his computer. The affidavit established probable cause and particularity, *i.e.*, a nexus between the defendant's criminal conduct and the items to be seized.

The defendant argues that the warrant was overly broad because the detective should have been required to follow a search methodology that involved looking at computer folders specifically marked as containing pictures that the defendant took, such as a folder marked "Neil's folder," "pictures I took" or "images." Without this methodology, according to the defendant, the warrant was overly broad in that it allowed the detective to search all the computer files, even those that did not contain pornographic images.

This argument should be rejected. The detective had no way of knowing the exact location in the hard drive where the defendant stored images. In determining whether the particularity requirement is satisfied, the court is entitled to place a great deal of weight on whether the warrant is as particular as reasonably could be expected under the circumstances. See Andersen v. Maryland, 427 U.S. 463, 480 n.10, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Here, the warrant was as particular as reasonably

could be expected given the complexity of the search, the crimes under investigation, and the nature of the evidence sought. "Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent." United States v. Hunter, 13 F. Supp.2d 574, 583 (D. Vt. 1998). Images can be hidden in all manner of files. Contraband can be concealed simply by changing the names and extensions of files to disguise their content from the casual observer. As one court has observed:

Forcing police to limit their searches to [computer] files that the suspect has labeled in a particular way would be much like saying police may not seize a plastic bag containing a powdery white substance if it is labeled "flour" or "talcum powder." There is no way to know what is in a file without examining its contents, just as there is no sure way of separating talcum from cocaine except by testing it. The ease with which child pornography images can be disguised. . . forecloses defendant's proposed search methodology.

United States v. Hill, 322 F. Supp. 2d 1081, 1090-91 (C.D. Cal. 2004).

The affidavit established probable cause and was not overly broad. The defendant's arguments to the contrary should be rejected.

b. The Search of the Computer Was Timely Within the Requirements of the Fourth Amendment.

The defendant argues that the detectives were required to search all the defendant's computer's files within the 10-day limit contained in CrR

2.3. Because this argument involves some analysis of Fourth Amendment requirements, the Fourth Amendment will first be addressed.

The conduct of law enforcement officers in executing a search warrant is governed by the Fourth Amendment's mandate of reasonableness. United States v. Hargus, 128 F.3d 1358, 1363 (10th Cir. 1997), cert. denied, 523 U.S. 1079 (1998). The Fourth Amendment does not provide a specific time in which an item, such as a computer, may be subjected to a government forensic examination after it has been seized pursuant to a search warrant. See United States v. Hernandez, 183 F. Supp. 2d 468, 480 (D.P.R. 2002).

However, a delay in executing the warrant may render the magistrate's probable cause determination stale. State v. Thomas, 121 Wn.2d 504, 513, 851 P.2d 673 (1993). Common sense is the test for staleness of information in a search warrant affidavit. State v. Petty, 48 Wn. App. 615, 621, 740 P.2d 879 (1987). The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized. State v. Bohannon, 62 Wn. App. 462, 470, 814 P.2d 694 (1991).

In evaluating whether the facts underlying a search warrant are stale, the court looks at the totality of circumstances. Maddox, 152 Wn.2d at 506. The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances,

including the nature and scope of the suspected criminal activity. Maddox, 152 Wn.2d at 506 (citing Andresen v. Maryland, 427 U.S. 463, 478 n.9, 96 S. Ct. 2737, 49 L.Ed.2d 627 (1976))(probable cause not stale despite three month delay in warrant's execution because of the nature of documentary evidence and defendant's ongoing criminal activity).

In determining whether probable cause continues to exist or whether it has dissipated over time, a court must “evaluate the nature of the criminal activity and the kind of property for which authorization to search is sought.” United States v. Foster, 711 F.2d 871, 878 (9th Cir. 1990), cert. denied, 465 U.S. 1103 (1984). At trial, the defendant conceded probable cause existed throughout the search of the mirror images of the hard drives. CP 43. The trial court also concluded that probable cause continued throughout the search. CP 94. The defendant has not challenged or otherwise contested this finding, but simply dismisses this finding as irrelevant.

The trial court also found: “The information on the hard drives of the computer was not transitory, it was not changeable, and it was not stale during the time Detective Voce was reviewing the information.” CP 93. The defendant has not challenged this finding, and it is therefore a verity on appeal. See Hill, 123 Wn.2d at 644. This case does not involve evidence that was in transit or flux, such as the location of a reported quantity of a controlled substance. Probable cause supported the search of the computer at all times during the course of the search, and the

information supporting the search did not become stale. The search warrant and subsequent search complied with the Fourth Amendment.

c. CrR 2.3(c)

The defendant argues that the search violated CrR 2.3(c) because the search of the computer was not completed within 10 days of the warrant's issuance. This argument should be rejected because CrR 2.3 did not require that the search of the computer's contents be completed within 10 days.

CrR 2.3(b)(1) provides that “[a] warrant may be issued under this rule to search for and seize any . . . evidence of a crime.” Under CrR 2.3(c), a warrant “shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified.” The “person, place or thing” that the warrant “specified” for the search within 10 days was the defendant’s *home*, not his computer:

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance you enter into and/or search the said house, person, place or thing, **to-wit: 7241 So. G St., a light blue two story single family dwelling with dark blue trim and brown roofing** and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed or according to law.

CP 53 (emphasis in original). The warrant did not require the officers to complete the search of the *computer* within ten days. There is no case law supporting the defendant's contention that an item lawfully seized pursuant to a valid search warrant must itself be "searched" within 10 days under CrR 2.3.

The defendant argues: "It is undisputed that no evidence of any crime was discovered during the 10-day period authorized by the warrant. . . ." Brief of Appellant, at 28. The State disputes this contention because the computer and other items of evidentiary value were in fact *recovered* from the defendant's home during the 10-day period.

Even if the court were to somehow find that CrR 2.3 required the search of the computer to be completed within 10 days, the defendant is not entitled to relief. A search can be deemed timely within CrR 2.3(c)'s time requirement if the search begins before the warrant expires and probable cause continues to exist through the completion of the search. State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114, review denied, 130 Wn.2d 1003 (1996). Absent constitutional considerations, the rules for execution and return of a warrant are essentially ministerial in nature, and suppression will be ordered as a remedy for violation only where prejudice can be shown. Kern, 81 Wn. App. at 311-12.

As stated above, this case does not involve Fourth Amendment concerns. The trial court concluded that probable cause continued during the entire course of the search. CP 94. The defendant does not contest

this finding. Nor does the defendant contest the trial court's finding that the police did not act in bad faith in executing the warrants or in reviewing the evidence seized. CP 93.

The defendant argues that the search of the computer's files did not technically begin until after the detective completed making the imaged copies of the hard drive, which may have been completed outside the 10 day period. Therefore, according to the defendant, the search was untimely. But the police initiated the search of the computer by physically seizing it from the defendant's home, which was done the same day the warrant was issued. There is no authority for the proposition that their "search" of this item did not officially begin until the imaging or copying process was completed. Since probable cause existed throughout the search process, the officer's actions in searching the computer were permissible.

The trial court's found that it was not realistic or reasonable for the detective to review all of the evidence contained within the computer within the time specified in the original warrant, or within the 60 days specified in the second warrant. CP 92-3. The defendant challenges this finding. Findings of fact that are supported by substantial evidence will be affirmed on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence in the record supports the trial court's finding that more than 10 days or 60 days was necessary to review the contents of the defendant's computer. This computer had three hard

drives that contained approximately 35,000 to 40,000 images of minors engaged in sexually explicit conduct. RP 517. The detective had to search through these images in order to find the images related to R.W. and B.H.

The defendant nevertheless maintains that the search should be found invalid even though the magnitude of data contained within the three hard drives precluded completion of the search within the 10-day period. Even if the court were to find non-compliance in this case, non-compliance with CrR 2.3 does not invalidate a warrant or otherwise require suppression of evidence absent a showing of prejudice to the defendant. Kern, 81 Wn. App. at 311. The defendant conceded before the trial court that he was not prejudiced by the length of time required by the search of the imaged drives. CP 43. Nor does he argue on appeal that he suffered any prejudice. There is no basis for assuming that any evidence contained in the computer was lost or otherwise altered during the time period encompassing the search. The defendant cannot establish he was prejudiced by the length of time taken to examine the computer's contents. The court should reject his arguments that CrR 2.3 requires suppression of the evidence found in his computer.

Finally, it should be noted that under the defendant's interpretation of CrR 2.3, an additional warrant would be necessary each time the police engage in any specific testing of an item that is already lawfully within their custody. This would require superior courts to review tens of

thousands of additional warrant requests every year. For example, police often recover dozens of evidentiary items at murder scenes pursuant to a warrant, and these items may require time consuming testing such as DNA analysis, ballistics testing, or blood spatter analysis. According to the defendant's interpretation of CrR 2.3, a warrant is required each time some new testing occurs on any individual item. Neither CrR 2.3 nor the Fourth Amendment requires this improbable result. There is no authority for the proposition that a new warrant is required to engage in lawful testing or analysis of evidence that has already been lawfully seized pursuant to a specific criminal investigation that provided the probable cause for the original warrant. The defendant's arguments to the contrary should be rejected.

2. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTIONS.

The defendant argues that the evidence does not support the jury's conclusion that he knowingly possessed the 20 images that form the basis of his convictions for possession of depictions of minors engaged in sexually explicit conduct. This argument should be rejected.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). 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).

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). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. 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)).

A defendant is guilty of possession of depictions of a minor engaged in sexually explicit conduct if he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct. RCW 9.68A.070. A “minor” is defined as “any person under eighteen years of age.” RCW 9.68A.011(4). “Visual or printed matter”

means any photograph or other material that contains a reproduction of a photograph. RCW 9.68A.011(2). The term "photograph" includes making a "digital image." RCW 9.68A.011(1). The term "sexually explicit conduct" means actual or simulated:

- (a) Sexual intercourse, which including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
- (b) Penetration of the vagina or rectum by any object;
- (c) Masturbation;
- (d) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer;
- (e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;
- (f) Defecation or urination for the purpose of sexual stimulation of the viewer; and
- (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011(3).

The images found in Exhibit 94 through 114 depict "sexually explicit conduct" squarely within the specific meaning of RCW 9.68A.011(3). The defendant does not contest this fact.

Nor does he dispute that each image depicts children under the age of 18 engaging in sexually explicit conduct, including some who are clearly infants. His sole contention is that the evidence is not sufficient to show that he knew that the images were stored in his computer.

The computer at issue was located in the defendant's bedroom. RP 510. While he had roommates, these other roommates each had their own computers. RP 510. The police searched the roommates' computers, and no pornographic images were found. RP 510-11. In fact, the defendant's chat with "tjerkenson" contained in Exhibit 140 indicates that the roommates likely had no knowledge of the defendant's activities involving pornography. Early in the chat, the defendant had to break off the chat because one of his roommates had inadvertently entered the room, needing to check his e-mail on Grenning's computer. Exhibit 140.

It is undisputed that the defendant stored a large number of pornographic images that he had personally taken of R.W. and G.H. in his computer. In addition, the detective recovered somewhere between 35,000 and 40,000 images involving minors engaged in sexually explicit conduct from the defendant's hard drive. RP 517. Some of these images, such as those depicted in Exhibits 94 through 114, are commercial child pornography. RP 517.

Police detectives interviewed the defendant and specifically asked him whether he had any pornographic images on his computer. RP 401. In response, the defendant stated that his computer was an older computer, but he admitted knowledge that there may be some "old stuff", *i.e.* pornography, in the computer:

[W]e asked him if he visited pornographic web sites on his computer; he stated he did not. We followed that up with a question, "Do you have any pornographic images on your computer?" And that's when he indicated it was an older computer and *there may be some old stuff on there.*

RP 401 (emphasis added). The defendant also admitted to the detectives that he kept a tube of personal lubricant, K-Y jelly, near his computer for his own personal use while he was at the computer. RP 351. In the light most favorable to the State, these admissions to the detectives indicate the defendant knew that the pornography at issue was stored in his computer. The interview with the detectives occurred on March 4, 2002. CP 390, 393. The State charged the defendant with knowingly possessing the images on or about March 3, 2002. CP 351-59.

The evidence is sufficient to establish that the defendant had knowledge that on or about March 3, 2002, his computer contained the images of commercial child pornography at issue in this case. His convictions on these counts should be affirmed.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ENTERING THE DISCOVERY ORDER.

The scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent a manifest abuse of that discretion. State v. Brown, 132 Wn.2d 529, 626, 940 P.2d 546 (1997). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. State v. Demery, 144 Wn.2d 753,

758, 30 P.3d 1278 (2001). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. Demery, 144 Wn.2d at 758.

CrR 4.7 governs discovery and requires that the prosecutor shall disclose certain materials to the defendant “[e]xcept as otherwise provided by protective orders.” CrR 4.7(a)(1). The trial court’s ability to issue protective orders during the course of regulating discovery is governed by CrR 4.7(h)(4). This rule provides:

Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party’s counsel to make beneficial use thereof.

CrR 4.7(h)(4).

The trial court acted within its discretion in allowing the defense to have mirror images of the hard drive created for its use, and in issuing a protective order preventing the copying of any image depicting child pornography. CP 599. The court issued the protective order to protect the victim from the possibility of having his image make its way into the market for child pornography. RP 7-25-03, at 23-24. Images of B.H. had already shown up on the Internet. RP 3-26-04, at 74. But R.W.’s images were not yet on the Internet. RP 3-26-04, at 79-80. In denying the defense motion to reconsider this order, the court again made reference to the need to protect the victim. RP 3-26-04, at 85.

In entering the protective order, the trial court struck an appropriate balance between the defendant's need to prepare for trial and the need to protect the victim. To ensure that the defendant had adequate access to the hard drive, the court ordered that the defense have access to the imaged hard drive *every business day* from 8:30 a.m. until 4:30 p.m. presumably until the completion of the trial. CP 598. This order was entered on August 1, 2003. CP 597. Both parties rested at trial on June 17, 2004. RP 912. The defendant therefore had access to the images for 10 months.

The court also ordered that the defense could "print out all the data that they need[ed] so long as no images were reproduced." RP 7-25-03, at 24. The defense expert himself stated that the defense did not need copies of any images. He stated: "[T]he need to store or retain additional copies of any of the image files that the State so ardently seeks to protect is not anticipated." RP 602. The court acted within its discretion in issuing the protective order, and it struck an appropriate balance between the interests at issue.

The defendant now asserts that the trial court's protective order denied him the right to independent testing of the computer and its contents, and that it denied him an expert of his own choosing. It is clear, however, that the defense did in fact have an expert of its own choosing, which was Mr. Apgood. In his affidavit to the court, Mr. Apgood asserted that it would be more convenient and economical for the defense if it

could have its own copy of the hard drive, as this would allow him to perform the work in his own lab. He indicated that the analysis did not need constant monitoring, and he could attend to other matters while the processing occurred. CP 603. He never stated that the protective order precluded him from being able to do the job. The record does not support the defendant's contention that the protective order precluded him for independently analyzing the contents of his hard drives.

The defendant also argues the trial court "failed to protect his attorney's right to have his work product remain confidential." The defense, however, cannot point to any instance in the record indicating any defense work product was compromised at the secured facility that was open to the defense's use for analyzing the hard drives. The court's protective order required the detective to not view any of the data contained in the defense copy of the hard drives while these drives were stored. CP 600. There is no allegation that the detective violated this order, or otherwise attempted to gain knowledge of any defense work product.

The defense also frames this issue as involving a denial of his right to effective assistance of counsel. A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d

563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The defendant has not shown deficient performance on the part of his attorney, or on the part of any expert hired by the attorney. There is no allegation that they failed to uncover any aspect of the defendant's hard drive that would have proved helpful to the defendant at trial. Also, there is no indication that the outcome of the trial would have been different had any such hypothetical information been uncovered. The defendant's claim should be rejected. The trial court acted within its discretion in issuing the protective order in this case.

4. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN VOIR DIRE.

The defendant argues that that the trial court erred in voir dire in not excusing for cause a juror who was exposed to the headline of a newspaper article, even though the headline did not reference the defendant by name. The defendant has failed to provide a transcript of voir dire for this Court's review of the issue, and he otherwise cannot show that the juror was actually biased against the defendant as a result of

exposure to the article. The trial court's decision in voir dire should be affirmed.

A prospective juror must be excused for cause if the trial court determines the juror is actually biased. State v. Gosser, 33 Wn. App. 428, 433, 656 P.2d 514 (1982). Actual bias is defined as:

the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the [challenging] party

RCW 4.44.170; CrR 6.4(c)(2). A juror with preconceived ideas need not be disqualified for actual bias if he or she can "put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." Gosser, 33 Wn. App. at 433.

The denial of a juror challenge for cause lies within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). Actual bias must be established by proof in the record. Noltie, 116 Wn.2d at 838.

The defendant argues that the trial court abused its discretion in not excusing Juror 31 during voir dire because that juror had been exposed to the headline of a newspaper article that was published during voir dire in this case. The defendant, however, has failed to provide a transcript of the voir dire proceedings. It is clear from the court's Memorandum of Journal

Entry that on June 10, 2004, that the defense brought the newspaper article to the court's attention. CP 659. The Journal Entry indicates:

Court makes remarks and inquires of the jury if anyone of them saw, read or had comments made to them re[garding] the article. Juror 2, 14, 31, and 33 saw the article but did not read [it].

CP 659. The Journal Entry indicates that later that morning, the court conducted private or individualized voir dire of the jurors who indicated some exposure to the article, including juror 31. CP 659.

It is unknown what questions were posed to Juror 31 regarding his ability to serve as an impartial juror with respect to the newspaper article. It is unknown what his specific responses were. It is likely that counsel in voir dire specifically inquired of Juror 31 whether he could be fair and impartial despite any exposure the news article. It is also likely that the juror answered that he could be fair and impartial. This remains speculative, however, due to the defendant's failure to produce a transcript of voir dire.

The defendant relies solely on the statement defense counsel made below in raising his challenge for cause. The only thing defense counsel said with respect to Juror 31 was:

Juror 31 I think also indicated []he saw the headline, enough of a degree that []he recognized it might be applicable to this case and then didn't read the body of the report.

RP 286. As the prosecutor then observed, the article's headline did not specifically mention Mr. Grenning and could have referred to another suspect. RP 286; Exhibit 1. In denying the defendant's challenge for cause of Juror 31 and other jurors, the trial court stated:

I am confident that of the jurors that I am keeping on that did have some exposure, none of them got into the specific of the article.

RP 289.

The trial court is in the best position to determine a juror's ability to be fair and impartial. Noltie, 116 Wn.2d at 839. In a challenge for cause, the trial court can observe the demeanor of the juror and evaluate and interpret the responses, and the appellate court will defer to the trial court's judgment. Noltie, 116 Wn.2d at 839. As the court observed in Noltie:

[T]he trial court has, and must have a large measure of discretion. *On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that a juror was prejudiced.*

Noltie, 116 Wn.2d at 840 (emphasis in original); see also Gosser, 33 Wn. App. at 434 ("The trial court's personal observation of [the juror's] demeanor in answering the questions places it in a better position to evaluate and interpret the response than we can from reading the cold record").

In this case, the defendant has not met his burden of showing the juror was actually biased. Nor has he shown that the juror had any

preconceived notions based on exposure to the article, or that he would have been unable to set aside any such notions in order to be fair and impartial. In failing to provide a transcript of the juror's statements during voir dire, he has not shown even a mere *possibility* that the juror may have been biased. It is undisputed that the juror did not read the text of the article, but were merely exposed to the headline, which did not reference the defendant. The trial court acted well within its discretion in denying the challenge for cause. The defendant's arguments to the contrary should be rejected.

5. THE DEFENDANT'S CONFRONTATION
CLAUSE RIGHT WAS NOT VIOLATED.

The defendant argues that his Confrontation Clause right was violated by admission of hearsay from R.W. to a physician who examined him. He also argues R.W.'s statements were impermissibly admitted through the police officers, even though such statements were not admitted for the truth of the matter asserted. His arguments should be rejected.

The Confrontation Clause generally precludes admission of a testimonial hearsay statement unless the defendant has had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). The Crawford Court declined to provide a comprehensive definition of "testimonial," but

gave the following examples of testimonial statements: ex parte in court testimony, and its functional equivalents, such as affidavits, custodial examinations, prior testimony that the defendant has not had the opportunity to cross-examine, and pretrial statements that declarants would reasonably expect to be used prosecutorially. Crawford, 124 S. Ct. at 1364. The Court declined to settle on a single formulation but noted that whatever else the term “testimonial” covers, it applies to:

prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 124 S. Ct. at 1374.

The Crawford Court also gave examples of nontestimonial statements: “off-hand, overheard” remarks and “business records or statements in furtherance of a conspiracy.” Crawford, 124 S. Ct. at 1364, 1367. The Court also suggested that “statements made unwittingly” to a government officer may not be testimonial. Crawford, 124 S. Ct. at 1368.

In State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (2005), this Court held that a 29-month-old child’s statement to a physician that the defendant hit him was not testimonial and therefore admissible under the hearsay exception for statements made for purposes of medical diagnosis. Fischer, 108 P.3d at 1269. The doctor was not a government employee,

and the doctor questioned the child as part of her efforts to provide him

with proper treatment. The court reasoned:

there was no indication of a purpose to prepare testimony for trial and no government involvement. Nor was the statement given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer.

Fischer, 108 P.3d at 1269.

In this case, Dr. Duralde's purpose in questioning R.W. was for the medical treatment and diagnosis of her patient. RP 836. Duralde is employed by Mary Bridge Hospital. RP 825-26. She is not a governmental employee. While the police and prosecutor sometimes refer patients to her, she also receives referrals from private physicians and parents. RP 831. While the police referred R.W. to her, there is no indication the police had any involvement in her examination of R.W. R.W.'s statements were nontestimonial under Fisher and Crawford. See State v. Vaught, 268 Neb. 316, 682 N.W.2d 284, 291-92 (2004) (four-year-old child's identification of defendant as the perpetrator was a non-testimonial statement and admissible under the medical diagnosis or treatment hearsay exception).

The court admitted R.W.'s statements to Dr. Duralde under ER 803(a)(4), which allows admission of hearsay statements:

made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. . . .

ER 803(a)(4). The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment. In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985). To be admissible under this rule, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis. State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999). The trial court's admission of testimony under the medical treatment exception is reviewed under the abuse of discretion standard. State v. Wood, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

The trial court acted within its discretion in admitting R.W.'s statements under this exception to the hearsay rule. R.W.'s statements were made consistent with the motive to receive treatment. When the doctor asked R.W. if he had any "owies," R.W. indicated that his stomach hurt. The trial court stated that this "lends some support to a belief that [R.W.] knew to tell the doctor what it is that was wrong with him," and that this would support a finding that he had a motive to be truthful. RP 822. R.W.'s statement regarding the abuse is information on which a

medical provider would reasonably rely to make a diagnosis. The trial court acted within its discretion in admitting these nontestimonial statements under the medical diagnosis or treatment exception.

The defendant appears to argue that a finding of unavailability was required before the hearsay was admissible as a statement for medical diagnosis. A finding that the declarant is unavailable is not a requirement for admissibility under the medical diagnosis exception to the hearsay rule. See ER 803(a).

The defendant also argues that the court erred in admitting R.W.'s statements through the testimony of the officers. While questioning the defendant regarding the offenses, the officers confronted him with R.W.'s allegations. The court did not admit the officer's testimony recounting R.W.'s allegations for the truth of the matter asserted. Instead, the jury was specifically instructed that this evidence of R.W.'s statements was presented:

for the limited purpose of explaining what questions were asked to the defendant by [the officers.] You must not consider this evidence for any other purpose.

CP 364: Court's Instruction to the Jury 8(a). The jury was instructed not to consider the evidence for any purpose except to explain what questions the officers asked the defendant. The jury is presumed to have followed

the court's instructions. State v. Grisby, 97 Wn.2d 493, 497, 647 P.2d 6 (1982).

Even if the court were to find that admission of R.W.'s statements through Dr. Duralde or the officers violated the Confrontation Clause, any such error is harmless beyond a reasonable doubt. The State bears the burden of showing constitutional error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). An appellate court will find constitutional error harmless if it is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242; State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).

The evidence at issue pertained only to the counts involving R.W. The counts involving B.H. or the possession of child pornography are not at issue in this claim. The evidence of the defendant's guilt with respect to all the counts involving R.W. was overwhelming. Each of these counts was supported by graphic photographs the defendant took while committing the crimes against R.W. R.W.'s face and the defendant's face appear in many of the photographs; and objects in his room, such as the defendant's bed, are consistent throughout the photographs. R.W. stated to Dr. Duralde that the defendant had touched him, and he told his mother

that the defendant had inserted Vaseline into his rectum. These acts were documented by the images. Even absent R.W.'s statements, the remaining "untainted" evidence in the form of these images was overwhelming.

At trial, the defendant did not dispute that he had performed sexual acts on R.W. Instead, his defense at trial was that the State had charged duplicate counts based on the same act inflicted upon R.W. The defense attorney argued in closing: "It's not about whether or not something inappropriate happened here; it's about how many times." RP 951-52.

The evidence of the sexual abuse inflicted on R.W. is overwhelming based on the images presented at trial. Any error in admitting R.W.'s statement that the defendant had touched him or inserted an object into his rectum was harmless beyond a reasonable doubt in view of this graphic evidence.

6. THE WITNESSES DID NOT TESTIFY TO AN OPINION THAT THE DEFENDANT WAS GUILTY.

The defendant challenges the admission of expert testimony from Dr. Duralde and Customs Agent Darryl Cosme with respect to the 20 charges of possession of depictions of minors. Specifically, he argues that Dr. Duralde should not have been allowed to testify to the opinion that the individuals engaged in sexually explicit conduct in Exhibits 94 through

114 were, within a reasonable degree of medical certainty, children and not adults. He also argues that Cosme should not have been allowed to testify that to the opinion that the images in these exhibits were of actual children, not computer generated children.

The admission or exclusion of expert testimony lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Mak, 105 Wn.2d 692, 715, 718 P.2d 407 (1986). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Admissibility under ER 702 depends on whether "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." Mak, 105 Wn.2d at 715.

The defense at trial did not raise an ER 702 objection to the testimony of Dr. Duralde or Cosme. The defense did raise a general objection to "foundation" when each witness testified concerning Exhibit 94, the first in the series of 20 exhibits, but this was not sufficient to preserve an objection based on ER 702. An objection to evidence must

apprise the trial court of the specific ground upon which it is made. Mak, 105 Wn.2d at 719. If a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983)(citing 5 K. Tegland, Wash. Prac., *Evidence* § 10, at 25 (2d ed. 1982)); ER 103; RAP 2.5(a). The defendant did not preserve an objection based on ER 702.

The defendant also argues that the trial court erred in admitting “expert testimony” from Detectives Baker when he testified that R.W. and Grenning were in the photographs admitted into evidence. He also argues that Detective Voce gave impermissible expert testimony when he testified to his opinion that the images at issue were of minors engaged in sexually explicit conduct and that the defendant was “Photokind.” Once again, the defendant did not raise an ER 702 objection to this evidence. The defendant has not preserved this issue for appeal. Even if the court were to review the admission of this evidence, it is clear that the evidence was admissible as *lay witness* opinion under ER 701.

ER 701 allows admission of lay witness opinions that are both “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’ testimony or the determination of a fact in

issue.” ER 701. The State did not offer the police testimony as “expert testimony” with regard to the identity of the victim or the perpetrator, or with regard to what was depicted in the images at issue. Instead, this testimony was admissible as a lay opinion rationally based on the witness’s perceptions.

For example, Detective Voce’s opinion that Grenning was “Photokind” was rationally based on evidence he had acquired in investigating the defendant. He verified that the defendant, like “Photokind,” was a recent graduate of Pacific Lutheran University who was attempting to obtain a teaching certificate in Washington State. RP 669-70. He also found several thousand references to “Photokind” in the defendant’s hard drives, which was consistent with the computer’s owner using that name. RP 670.

The detective’s opinion was helpful to the jury’s understanding of Exhibit 140, the “chat” “Photokind” had with “tjerkenson” in which “Photokind” revealed details of a rape and molestation identical to the one depicted in the his photos of the camping trip with B.H. Detective Voce’s opinion evidence was properly admitted under ER 701.

Detective Baker’s opinion that R.W. was the victim depicted in the images is rationally based on his prior experience seeing R.W. on previous occasions. He testified that he saw R.W. through a two-way

glass during an interview. RP 412-13. He also obtained a photograph of R.W. from the victim's mother. RP 413. (Exhibit 13). He testified that he saw several pictures that were recovered from the defendant's computer that he believed were R.W. RP 413. He then obtained an even larger photograph of the R.W. for comparison purposes. RP 414. He also testified that he had seen the defendant during an interview. RP 414. And he had seen him during a court hearing. RP 415. He testified that he believed he saw the defendant in the images with R.W., and that the defendant was fondling R.W.'s genital area and performing oral sex on the boy. RP 415. This testimony was rationally based on Detective Baker's prior experience seeing R.W. and the defendant.

This evidence was also helpful to the jury in that it was essential in establishing the foundation for the admissibility of the images involving R.W. and the defendant. The proponent of the evidence must establish its relevance to establish its admissibility. ER 401, 402. The images of R.W. were relevant because they were taken from the defendant's computer and contained images of unlawful actions the defendant performed on R.W.'s person. The officers' lay opinion that the images did depict R.W. and the defendant assisted in laying the proper foundation for admissibility. The trial court acted within its discretion in finding this testimony admissible

as foundational. RP 412. The defendant's arguments to the contrary should be rejected.

The defendant also argues that all of the above mentioned witnesses gave an impermissible opinion about the defendant's guilt. In general, a witness may not give an opinion about a defendant's guilt. Demery, 114 Wn.2d at 759. Such an opinion invades the province of the jury as the fact-finding body and may violate the defendant's constitutional right to a jury trial. Demery, 144 Wn.2d at 759. Thus, testimony that is an opinion on guilt may be an error of constitutional magnitude raised for the first time on appeal under RAP 2.5(a)(3). State v. Kirkman, 126 Wn. App. 97, 107 P.3d 133 (2005).

To address a claim of constitutional error for the first time on appeal, the court employs a four-part analysis to decide if a manifest error exists. Kirkman, 107 P.3d at 137. First, the court must determine whether the error raises a constitutional issue; second, the court determines whether any such error is manifest; third, if the error is manifest, the court will address the merits of the issue; fourth, if the court determines that error was committed, the court will apply a harmless error analysis. Kirkman, 107 P.3d at 137 (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

An error is “manifest” when it is unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed; essentially, the error must have “practical and identifiable consequences in the trial of the case.” Lynn, 67 Wn. App. at 345. Some reasonable showing of a likelihood of actual prejudice is what makes a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); Lynn, 67 Wn. App. at 346.

In determining whether testimony is an impermissible opinion on guilt or a permissible opinion pertaining to an ultimate issue, the court must consider: (1) the particular circumstances of the case; (2) the type of witnesses called; (3) the nature of the testimony and the charges; (4) the defenses invoked; and (5) the other evidence presented to the trier of fact. Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

With respect to the charges involving possession of depictions of minors, the defense argued in closing that there was insufficient evidence that the defendant “knowingly” possess these images. RP 954. He did not argue that the images were of adults or that they were computer generated, as opposed to images of actual children. There was no factual dispute raised regarding Dr. Duralde’s or Cosme’s testimony that the images depicted real children. The defense attorney stated in closing: “I don’t dispute what the contents of those photographs are; just if he knowingly possessed them.” RP 955.

Nor did the defense dispute that R.W. and the defendant were indeed depicted in the images at issue in those counts. In fact, in closing argument, the defense conceded that the defendant had engaged in inappropriate conduct, but its defense was that the State had charged duplicate counts for the same underlying act or acts, and therefore an acquittal was appropriate on any duplicate count. RP 951-52. The defense attorney used the analogy of shooting a one-hour movie, and then splitting it up into 100 frames: "it doesn't transform that conduct into a hundred separate crimes; it's one crime." RP 952.

The witnesses did not give opinion testimony that precluded the defense from arguing its theory of the case. Their testimony merely supplemented the images admitted at trial that provided graphic proof of the defendant's guilt. In view of the nature of the testimony, the photographic evidence, and the nature of the defenses raised, the defendant cannot meet his burden of showing that the testimony at issue constituted an impermissible opinion of guilt. The defendant has therefore not met his burden of showing manifest constitutional error occurred below.

Even if the court were to somehow find that constitutional error occurred, any such error was harmless beyond a reasonable doubt. As stated above, overwhelming evidence supported each of the counts

involving R.W. In addition, even absent the expert opinion testimony at issue, the evidence involving possession of depictions of minors engaged in sexually explicit conduct was overwhelming. Of the 20 images at issue, all contain images of pre-pubescent children. Exhibits 94-114. The defendant has not pointed to any image that could arguably contain only adults 18 or older. Nor has he pointed to any image that shows evidence that the children depicted therein are computer generated. The evidence supporting the defendant's convictions is overwhelming. Even if the court were to somehow find constitutional error, any error was harmless beyond a reasonable doubt.

7. CUMULATIVE ERROR DID NOT OCCUR IN THIS CASE.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). The defendant is not entitled to a new trial when errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928.

As stated above, the defendant has not established that any error occurred at his trial. The doctrine of cumulative error does not apply, and he is not entitled to a new trial.

8. THE DEFENDANT'S EXCEPTIONAL SENTENCE IS VALID UNDER BLAKELY V. WASHINGTON.

The defendant argues his sentence should be reversed under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). This argument should be rejected.

In Blakely, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 124 S.Ct. at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). The statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S.Ct. at 2537.

The defendant first argues that Blakely invalidated the entire sentencing scheme for imposing exceptional sentences. The Washington Supreme Court rejected this contention in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). In Hughes, the court concluded that the exceptional sentence scheme remains facially valid in view of Blakely. Hughes, 154 Wn.2d at 134.

The defendant next argues that the aggravating factors relied on by the trial court render the sentence invalid. The trial court found a number of factors warranted an exceptional sentence. These factors can be

summarized as follows: (1) the multiple offense policy would result in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act; (2) the defendant's conduct was more egregious than the typical case, distinguishing his crimes from other cases in the same category; (3) the jury found the defendant committed the crimes of second degree assault of a child and possession of depictions of minors with sexual motivation.

The first two of these factors are problematic under Hughes. The "multiple offense policy" provides that when a person is to be sentenced for two or more current offenses:

the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.

RCW 9.94A.589(1)(a). This statute allows the court to consider current convictions as prior convictions for purposes of calculating the offender score. The court in Hughes held that under Blakely, this aggravating factor cannot justify the imposition of an exceptional sentence unless a jury makes the determination that the statute's application "results in a sentence that is clearly too lenient." Hughes, 154 Wn.2d at 136-37. The trial in this case occurred prior to Blakely's issuance. The jury was not asked to render a special verdict on this question. The trial court therefore erred under Hughes in relying on this factor. The jury was also not asked to render a special verdict on whether the defendant's conduct was more

egregious than the typical case. This court erred in relying on this factor as well.

The third factor relied on by the trial court, however, remains valid under Blakely and Hughes. The jury found the defendant guilty of assault of a child in the second degree, and it returned a special verdict that this crime was committed with sexual motivation. CP 510. The jury found the defendant guilty of 20 counts of possession of depictions of minors engaged in sexually explicit conduct, and it returned a special verdict finding that the defendant committed each of these crimes with sexual motivation. CP 490-509.

The State gave the defense notice at the time it filed this case that the State intended to seek an exceptional sentence. RP 990. Contrary to the defendant's assertions, the State also gave notice to the defendant in the Fifth Amended Information that it was alleging each of these crimes was committed with sexual motivation. CP 340-49. The State both pled and proved to the jury the allegations that these crimes were committed with sexual motivation.

The court in Hughes noted that the SRA's listing of sexual motivation as an aggravating factor in RCW 9.94A.535(2)(f) is valid in Blakely's wake "because RCW 9.94A.835 requires the jury to find beyond a reasonable doubt that sexual motivation was present." Hughes, 154 Wn.2d at 134. In this case, the jury was instructed that it had to find sexual motivation "beyond a reasonable doubt" before it could answer the

special verdict form in the affirmative. CP 461. The jury is presumed to have followed the court's instructions. State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). The jury's findings of sexual motivation are valid aggravating factors under Blakely and Hughes.

Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996). In its written findings and conclusion, the trial court emphatically stated that it would impose the same sentence even if only one factor was found valid:

The grounds listed in the proceeding paragraphs, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. *This court would impose the exact same sentences even if only one of the grounds listed in the proceeding paragraph is valid.*

CP 548-59 (emphasis added). Where the trial court makes factual findings supporting several aggravating factors and states that any one of those factors would warrant the exceptional sentence, the exceptional sentence can stand so long as one of those factors is valid. Hughes, 154 Wn.2d at 135 (citing State v. Jackson, 150 Wn.2d a251, 276, 76 P.3d 217 (2003)). In this case, the jury entered 21 special verdicts finding sexual motivation, and these special findings support the trial court's exceptional sentence. This sentence should be affirmed.

9. THE DEFENDANT'S SENTENCE DOES NOT VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment prohibits “cruel and unusual” punishment, and article I, section 14 of the Washington Constitution prohibits “cruel” punishment. The prohibition in the Washington Constitution affords greater protection than its federal counterpart. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); State v. Fain, 94 Wn.2d 387, 392, 617 P.2d 720 (1980). Therefore, if a statute does not violate the more protective state constitutional provision, it does not violate the federal constitution. State v. Rivers, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); State v. Thorne, 129 Wn.2d 736, 772-73, 921 P.2d 514 (1996).

A sentence violates article I, section 14 when it is grossly disproportionate to the crime committed. State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113, review denied, 142 Wn.2d 1010 (2000). In order to determine whether a sentence is grossly disproportionate, the court considers four factors: 1) the nature of the offense; 2) the legislative purpose behind the statute; 3) the punishment the defendant would have received in other jurisdictions; and 4) the punishments imposed for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397. These are merely factors to consider and no one factor is dispositive. State v.

Gimarelli, 105 Wn. App. 370, 380-82, 20 P.3d 430, review denied, 144 Wn.2d 1014 (2001).

Under the first Fain factor, the court considers whether the crime was violent and whether it was against a person or property. Morin, 100 Wn. App. at 30-31. “The nature of the offense is also a factual question; proportionality standards apply ‘to a specific set of facts.’” Morin, 100 Wn. App. at 31 (citing Fain, 94 Wn.2d at 396, 397-97). In this case, the defendant committed 51 sexual crimes against two young children. These crimes included 16 counts of first degree rape of a child, 2 counts of attempted first degree rape of a child, 6 counts of first degree child molestation, one count of second degree assault of a child, and 26 counts of sexual exploitation of a minor. He also possessed 20 images of other young children being raped, molested, or otherwise sexually abused and degraded. This factor weighs in favor of finding the sentence is not grossly disproportionate.

Under the second Fain factor, the Legislature has provided that 24 of the defendant’s crimes each carry a statutory maximum of life in prison. First degree rape of a child and attempted first degree child rape are Class A felonies that carry a life sentence. RCW 9A.44.073(2); RCW 9A.20.021(a); RCW 9A.28.020(a). First degree child molestation is also a Class A felony carrying a life sentence. RCW 9A.44.083(a).

The Legislature has classified these sexual offenses as “most serious offenses.” RCW 9.94A.030(28). The Legislature has also, in a different context, determined that the commission of only *two* of these sexual crimes against children will subject the offender to a sentence of life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). See RCW 9.94A.030(32); RCW 9.94A.570. If the defendant had been convicted of his offenses against B.H. before he committed his offenses against R.W., he would have been subject to a life sentence without the possibility of parole under the POAA. This factor weighs in favor of finding that the defendant’s exceptional sentence is not grossly disproportionate.

Under the third Fain factor, most states have “two strikes” laws for serious sex offenses, such as those the defendant committed in this case. See Gimarelli, 105 Wn. App. at 381-2. This factor weighs in favor of finding the sentence the defendant received for committing 24 serious sex offenses, rather than merely two such offenses, is not grossly disproportionate.

Finally, under the fourth Fain factor, the sentence the defendant received is comparable to a sentence he could have received had he committed just two counts of first degree child rape or molestation. As stated above, he would have been eligible for life without possibility of parole under the POAA if the conviction for the first crime preceded the commission of the second crime. See RCW 9.94A.030(32). For example,

in Gimarelli, the defendant had a prior rape conviction and he was convicted of attempted first-degree child molestation. The court analyzed the Fain factors and found that the defendant's sentence of life in prison without the possibility of parole under the POAA was not grossly disproportionate to this crime and did not violate Article I, section 14. Gimarelli, 105 Wn. App. at 382. The Fain factors indicate that in this case, the defendant's sentence of 1,404 months for 71 felony convictions involving sexual crimes against children, including 22 convictions for first degree rape and first degree child molestation, is not grossly disproportionate.

The defendant argues that his exceptional sentence is grossly disproportionate because it is four times the high end of the standard range for one of his rape convictions. This argument is not compelling in view of the fact that he was convicted of committing not one, but 16 separate rapes of the victims, as well as 55 other felony crimes.

The Washington Supreme Court has upheld an exceptional sentence that was 15 times the high end of a defendant's standard range. State v. Oxborrow, 106 Wn.2d 525, 526, 723 P.2d 1123 (1986). It has also upheld an exceptional sentence 16 times the standard range based on one aggravating factor alone. State v. Branch, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996)(upholding exceptional sentence based of factor of "major economic offense"). Under the Fain factors, the defendant's exceptional

sentence does not violate article I, section 14, and it therefore does not violate the Eighth Amendment. The defendant's exceptional sentence should be affirmed.

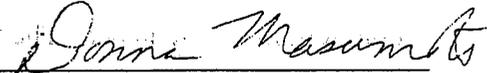
D. CONCLUSION.

The State respectfully requests that the court affirm the defendant's convictions and sentence. The trial court correctly denied the defendant's motion to suppress evidence obtained during the search of his computer. The evidence is sufficient to support the defendant's convictions for depictions of minors engaged in sexually explicit conduct. The trial court acted within its discretion in issuing the protective order. The defendant has not met his burden of showing that the juror had any actual bias. The defendant's Confrontation Clause rights were not violated, nor did any witness give impermissible opinion testimony. The defendant's sentence

complies with Blakely and does not constitute cruel or unusual punishment. The convictions and sentence should be affirmed.

DATED: August 4, 2005.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


DONNA MASUMOTO
Deputy Prosecuting Attorney
WSB # 19700

Certificate of Service:

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

8/4/05 Johnson
Date Signature