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STATE OF WASHINGTON

NO. 81449-0

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SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NEIL GRENNING, APPELLANT

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STATE OF WASHINGTON

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

No. 02-1-01106-5

No. 03-1-05025-5

SUPPLEMENTAL BRIEF OF ~~PETITIONER~~

*Respondent*

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A. ISSUES PERTAINING TO REVIEW:

Did the Court of Appeals err in reversing the defendant's twenty convictions for possession of depictions of minors engaged in sexually explicit conduct when it found, without any showing of prejudice to the defendant, that he was entitled to possession of mirror image hard drives outside of the police facility?

B. STATEMENT OF THE CASE.

On June 7, 2004, the Pierce County Prosecutor's Office filed a Fifth Amended Information charging the defendant, NEIL GRENNING, with seventeen counts of rape of a child in the first degree<sup>1</sup>, two counts of attempted rape of the child in the first degree<sup>2</sup>, six counts of child molestation in the first degree<sup>3</sup>, twenty-six counts of sexual exploitation of a minor<sup>4</sup>, one count of assault of a child in the second degree<sup>5</sup>, and twenty counts of possession of depictions of a minor engaged in sexually explicit conduct.<sup>6</sup> 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

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<sup>1</sup> RCW 9A.44.073.

<sup>2</sup> RCW 9A.44.073, RCW 9A.28.020.

<sup>3</sup> RCW 9A.44.083.

<sup>4</sup> RCW 9.68A.040(1)(b).

<sup>5</sup> RCW 9A.36.021(1)(e), RCW 9A.36.130(1)(a).

<sup>6</sup> RCW 9.68A.070.

motivation. CP 350-59. The time period involved in the underlying allegations spanned from April 1, 2001, through March 3, 2002.<sup>7</sup> CP 325-53.

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 597-600; Appendix "A." The detective was ordered to copy all of the data contained on the defendant's hard

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<sup>7</sup> 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.

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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,<sup>8</sup> 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

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<sup>8</sup> 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.

time during which the lab equipment could be left unattended to process the defendant's hard drive because he could attend to other matters. CP 603. Presumably, if he was required to do his analysis at the State's facility, he would have to be present to monitor the analysis. *Id.*

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:

[T]he 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 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.

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. *Id.* 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. CP 528.

Both parties filed briefing with the Court of Appeals. On June 15, 2007, the Court of Appeals requested supplemental briefing from both parties regarding *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007), which had been issued after the original briefing was filed. On January 8, 2008, the Court of Appeals issued a published opinion reversing the defendant's 20 convictions for possession of depictions of minors engaged in sexually explicit conduct and affirming all of defendant's other convictions. Appendix "B." With respect to the 20 convictions the Court of Appeals reversed, the Court of Appeals found that reversal was required under this court's analysis in *Boyd*. The court held, in part:

Here, the trial court granted Grenning's motion for mirror-image hard drive copies. However, the trial court did not allow Grenning's attorney or computer expert to view or test the hard drive copies outside of the Tacoma police facility. Because expert analysis of the hard drives "requires greater access than can be afforded in the State's facility," the trial court's protection order was unduly restrictive for the commercial child pornography charges. *Boyd*, 160 Wn.2d at 436.

Appendix "B," at pages 13-14.

This court accepted review as to the 20 reversed convictions only, and denied the defendant's petition for review.

C. ARGUMENT.

1. THE COURT OF APPEALS ERRED IN REVERSING TWENTY OF THE DEFENDANT'S CONVICTIONS WHEN HE WAS DENIED HIS OWN MIRROR IMAGE HARD DRIVE BECAUSE THE DEFENDANT CANNOT MAKE ANY SHOWING OF PREJUDICE.

The defendant in this case alleged that he was denied his 5<sup>th</sup> Amendment rights to due process and his 6<sup>th</sup> Amendment rights to effective assistance of counsel when he was denied mirror-image copies of the hard drives containing evidence of child pornography. Supplemental Brief of Appellant at page 11. The Court of Appeals, without requiring the defendant to make any showing of prejudice, granted the defendant post-conviction relief and reversed 20 of the defendant's convictions.

Appendix “B,” page 14. The Court of Appeals did not specify on what basis they were reversing the defendant’s convictions.

- a. The defendant is not entitled to relief under an ineffective assistance of counsel claim because he cannot show any prejudice.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2045, 656, 80 L. Ed. 2d 657 (1984). When such true adversarial proceedings have been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

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); *State v. Jefferies*, 105 Wn.2d 398, 418, 717, P.2d 722, *cert. denied*, 497 U.S. 922 (1986). It is not enough for the defendant to show that an alleged error

had “some conceivable effect on the outcome on the proceeding.”

*Strickland*, 466 U.S. at 693. The court has held that not every error, even actual error, necessarily undermines the result of the trial. *Id.* Rather, the defendant must show that the result of the proceedings would have been different. *Id.* at 694.

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).

In order to determine if counsel was competent, the *entire* record is examined. *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988), citing *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985); *State v. Johnson*, 74 Wn.2d 567, 570, 445 P.2d 726 (1968). In order to establish ineffective assistance of counsel, the defendant must show that the errors made were so serious that counsel was not functioning as “counsel.” *State v. Garcia*, 45 Wn. App. 132, 724 P.2d 412 (1986). A defendant must show that his trial counsel’s performance fell below an objective standard of reasonableness and that this deficiency resulted in prejudice. *In re Personal Restraint of Connick*, 144 Wn.2d 442, 463, 28 P.3d 729 (2001). The proper standard for a showing of prejudice requires the defendant to

show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When applying the test for ineffective assistance of counsel, the prejudice prong is examined first. *Id.* at 697. The court has held that lack of prejudice alone can defeat an ineffective assistance of counsel claim. *Id.* at 700.

In *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007), the court addressed the defense's pretrial request for copies of the State's child pornography evidence, including mirror images of the computer hard drive at issue. In *Boyd*, the court ruled that the defense expert would have access to a mirror image at a State facility, during two sessions, and only through the State's operating system and software. *Id.* at 430. The procedural posture of *Boyd*, however, differs from the case at bar. In *Boyd*, the parties sought relief from the court *before* trial. *Id.* at 428-431.

In the present case, the defendant is seeking relief after conviction, and, in part, in the context of an ineffective assistance of counsel claim. The defendant should be required to make a showing of prejudice in order to prevail on such a claim. He has not proffered any argument that he was prejudiced by not having his own mirror-image hard drives, and the record does not support any such argument. At best, the defendant may be able

to support such a claim in a personal restraint petition where he could include additional evidence, but he cannot make such a showing while confining himself to the record below<sup>9</sup>.

The defendant asserted that he was “unable to find any expert who was willing to come from Seattle or Spokane or elsewhere, away from specialized equipment in his or her laboratory, and devote full time to examining the computer at the police station.” Brief of Appellant at p. 40. First, the defendant provided no citation in his briefing to substantiate such a claim. Second, the defendant did have an expert of his choosing—Mr. Apgood. While the defendant asserts in his supplemental briefing that “the defense had no computer expert to help prepare for trial or to testify on behalf of Mr. Grenning,” such assertion is unsupported by the record. Supp. Brief of Appellant at p. 6. The record does support, however, that Mr. Apgood was involved in the case to some degree. While he did not testify at trial, it could easily have been because his findings were not helpful to the defense.<sup>10</sup> The record does not support that he did not assist the defense in preparing for trial. In his affidavit to the court, Mr. Apgood never indicated that the protective order precluded him from doing his job.

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<sup>9</sup> Generally, allegations of ineffective assistance of counsel are more suitable for collateral review rather than direct appeal. *See United States v. Tatum*, 943 F.2d 370, 379 (4<sup>th</sup> Cir. 1991).

<sup>10</sup> Conduct that can be characterized as legitimate strategy or tactics cannot serve as a basis for a claim of inadequate representation. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

CP 601-609. The trial court invited the defendant to advise the court if the protective order was not workable. RP 3/26/04 at 84-85. It does not appear that the defendant ever indicated to the court he could not work within the parameters of the court's protective order.

The circumstances and procedural posture of the present case differ from that of *Boyd*. The court in *Boyd* addressed the discovery request pretrial—the court did not reach the issue of remedies for failure to provide such discovery. In the present case, the defendant has raised the issue in the context of ineffective assistance of counsel and fundamental fairness, and therefore must establish that there was a resulting prejudice. See, *In re Personal Restraint of Connick*, 144 Wn.2d 442, 463, 28 P.3d 729 (2001). The defendant cannot meet such a burden here. The defendant cannot, and does not, allege that there was any specific action he would have taken if he had been provided his own personal copies of the evidence. It is clear that the defendant had an expert who was granted access to the mirror image hard drive, and his expert failed to indicate that the protective order stopped him from performing his analysis of the evidence. The defendant also never advised the court that the order was “unworkable,” as the court advised him to do.

Moreover, the protective order in *Boyd* was more restrictive than the protective order that was issued in the case at bar. In *Boyd*, the defense expert was permitted access to a mirror image hard drive at a State facility for only two sessions with the State's software and operating

system. *Boyd*, 160 Wn.2d 430. In the present case, however, the defense expert was provided the mirror images at a secured facility from 8:30 a.m. until 4:30 p.m. Monday through Friday. CP 597-600; Appendix "A". The order also required that the State provide the defense with an operating system of the defendant's choosing. *Id.* The order did not place any time restrictions on viewing the mirror image hard drives, and the defendant does not allege that the State did not follow the provisions of the protective order.

While *Boyd* holds that the defendant is entitled to copies of such discovery, under the facts of the present case the defendant is not entitled to relief. He must be able to show resulting prejudice and he cannot. The Court of Appeals, citing *Boyd*, reversed the defendant's convictions for possession of depictions of minors engaged in sexually explicit conduct without requiring that the defendant show any prejudice. Such a ruling is not consistent with *Boyd* and ignores the requirements of *Strickland*. It is clear in this case that Mr. Apgood was available to work with the defendant and had an opportunity to advise the court if he was unable to work within the perimeters of the protective order.

As argued above, the defendant is unable to establish any prejudice on direct appeal. First, the nature of the defendant's defense in this case is further evidence that the result of the trial would not have been any different if a mirror image hard drive had been given to the defense. In the present case, the defendant's defense was that of general denial. In

closing argument, defense counsel argued that the case was “. . . not about whether or not something inappropriate happened here; it’s about how many times.” RP 6/18/04 952. The defendant conceded that inappropriate contact occurred. There were multiple photos admitted into evidence depicting the defendant raping, molesting, and sexually exploiting the two victims. *See*, Brief of the Respondent p. 14-23. The defense in this case was not that the photos were manipulated or tampered with, but rather that the dozens of photos the State used for multiple charges were from one incident. RP 6/18/04 949-950. The defendant argued:

Because I am supposing that, based on the evidence presented to you, you have already come to the conclusion that at least one movie exists. But that doesn’t mean you naturally come to the conclusion that there has to be a second, a third, a fiftieth, a seventy-fourth.

Each of them have to be individually proved . . .

RP 6/18/04 952-953.

The defendant contested the number of counts the State had charged, not that the photos have been altered in any way. Therefore, even if the defendant had been granted his own personal mirror image hard drives to examine away from police headquarters, he cannot establish that he would have done anything different, that he was prejudiced, or that the outcome of the case would have been different. The defendant, post trial, has no evidence to support an ineffective assistance of counsel or due process claim, as he was granted unlimited access to the electronic

materials at a secured location, he had an expert to examine the materials, many of the photos depicted the defendant himself engaging in sexual acts with children, and his defense did not challenge the forensic evidence.

Second, there were approximately 80,000 images involved in this case. 9/16/02 RP 4. Only 117 images were introduced at trial. 6/15/04 RP iii-iv; 6/16/04 RP iii-iv. This is not a case where the defendant was denied his own personal copies of thousands of images that were later admitted at trial. Rather, only a small portion of the images were admitted. Again, the defendant did not allege at trial that the images that were admitted were somehow altered, or that there was additional testing he wanted to conduct but was unable to do so. The defendant simply cannot show any kind of prejudice and the Court of Appeals erred in not requiring such a showing.

- b. The defendant is not entitled to relief under a due process claim because he cannot show any prejudice.

Neither the defendant nor the Court of Appeals conducted a due process analysis below. However, even under a due process claim, the defendant must still show prejudice. As argued above, the defendant cannot make such a showing on direct appeal. Even assuming, arguendo, that the defendant can establish a due process violation, he is not entitled to relief because any error was harmless.

CrR 4.7 requires a prosecutor to disclose any information which tends to negate defendant's guilt as to the charged offense. CrR 4.7 (h)(2) imposes a continuing duty to disclose such information promptly. Due process requires the State to disclose "evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). There is no *Brady* violation, however, "if the defendant, using reasonable diligence, could have obtained the information" at issue. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). Moreover, evidence is "material" and therefore must be disclosed under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. at 682; *Benn*, 134 Wn. 2d at 916.

In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Benn*, 134 Wn. 2d at 916. "A 'reasonable probability' of a different result is accordingly shown when the government's

evidentiary suppression 'undermines confidence in the outcome of trial.'”

*Id.* (quoting *Bagley*, 473 U.S. at 678).

In other words, a due process violation is not per se reversible error. *State v. Luvene*, 127 Wn.2d 690, 704, 903 P.2d 960 (1995). In *Luvene*, the defendant alleged that the State failed to disclose exculpatory information. *Id.* The court held that, “Even if the prosecutor did improperly fail to disclose this information, it was harmless error and resulted in no prejudice.” *Id.* A showing of prejudice is necessary in order to obtain relief for discovery violations. *Benn*, 134 Wn.2d at 916, *see also*, *State v. Linden*, 89 Wn. App. 184, 947 P.2d 1284 (1997).

In the present case, any alleged discovery violation was harmless. The defendant in this case cannot even allege that there was a violation involving exculpatory evidence. Because he cannot establish any prejudice, he is not entitled to relief under a due process analysis

- c. The defendant is not entitled to relief when the trial court’s ruling below was merely tentative.

In the present case, the trial court entered a tentative order allowing the defendant’s attorney access to the mirror-image hard drive copies inside a Tacoma police facility. Any objection to the court’s protective order was waived by the defendant’s failure to seek a final ruling. *See*

*State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993).

The trial court specifically told the defendant to inform the court if the protective order was unworkable. RP 3/26/04 at 84-85. The trial court stated, “I want to know if that order is unworkable. I don’t think that it is.” *Id.* The defendant did not ever indicate to the court that he was unable to work within the confines of the protective order. Because the defendant failed to seek a final ruling, he should be precluded from relief.

2. ASSUMING, ARGUENDO, THAT A  
VIOLATION OF CrR 4.7 OCCURRED, ANY  
ERROR WAS HARMLESS.

When an asserted error is a violation of a court rule, rather than a constitutional violation, a harmless error analysis applies. *State v. Robinson*, 153 Wn.2d 689, 697, 107 P.3d 90 (2005), citing *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002). The court in *Robinson* held:

Thus, only if the error was prejudicial in that “within reasonable probabilities, [if] the error [had] not occurred, then outcome of [the] motion would have been materially affected” will reversal be appropriate.

*Robinson*, 153 Wn.2d 689 at 697, quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

CrR 4.7(a)(1)(v) provides:

- (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
  - (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant;

The court in *Boyd* held that CrR 4.7 required copies of the discovery, including digital images, because the “culpability of the acts depicted may vary based on when the photos were taken, by whom, and what they actually display.” *Boyd*, 160 Wn.2d 424 at 435. The allegation in the present case was not that the defendant was denied access to the discovery, but rather that he was denied his own personal mirror images of the hard drives away from the secured location. Any error that occurred by the court's failure to order that mirror image hard drives be produced constitutes, at best, a violation of Cr.R 4.7, not a constitutional violation. Under *Robinson, supra*, such court rule violation is subject to a harmless error analysis.

In this case, any violation of CrR 4.7 was clearly harmless. The defendant cannot establish prejudice. The trial court instructed the defendant that if the protective order was not workable, to advise the court. The record is void of any subsequent requests from the defendant to modify the protection order. The defendant also has not established that

he was unable to present his defense based on the protection order that was issued. This is not a case in which the State somehow refused to disclose material or provide discovery or engaged in mismanagement. At issue in this case is the method in which the electronic discovery was provided. The defendant was not prejudiced, and therefore any error was harmless.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court reverse the Court of Appeals' decision reversing the defendant's 20 convictions for possession of depictions of minors engaged in sexually explicit conduct.

DATED: November 24, 2008.

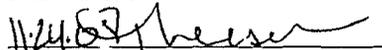
GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

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.

  
Date Signature

## **APPENDIX "A"**

*Protective Order Regarding Child Pornography*

Case Number: 02-1-01106-5 Date: November 24  
SerialID: D0E622AD-F20D-AA3E-549 CEE718C06C  
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-01106-5

vs.

NEIL GRENNING,

PROTECTIVE ORDER REGARDING  
CHILD PORNOGRAPHY

Defendant.

This matter having come before the court on July 26, 2003 for the defendant's motion to compel discovery and the defendant having been present represented by Attorney Mike Kawamura and the State of Washington having been represented by Hugh K. Birgenheier, Deputy Prosecuting Attorney and the court having reviewed the materials submitted by the parties and having heard the argument of counsel and being in all matters fully advised, it is hereby:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 1) The defense shall provide the Det. Richard Voce of the Tacoma Police Department three blank computer hard drives and necessary computer media to allow copying of the contents of the defendant's computer. The three hard drives and other computer media shall be of sufficient size to allow Det. Voce to copy all of the information contained on the defendant's computer onto the blank hard drives and other computer media. The defendant's computer has three drives. The drives are 30 gb, 40 gb and 18 gb.

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

- 1  
2  
3 4) 2) Once the Detective Voce receives the three blank hard drives from the defense he shall  
4 copy the all of the data contained on the defendant's hard drives onto the blank hard drives and  
5 other computer media  
6  
7  
8 3) 3) Once Detective Voce is finished copying the data from the defendant's computer onto the  
9 hard drives and other computer media provided by the defense, Detective Voce shall notify both  
10 Mike Kawamura of the Department of Assigned Counsel and Ramona Lawson of Global  
11 CompuSearch that the mirrored drives of the defendant's computer (herein after referred to as  
12 Mirrored Drives) is available to be viewed.  
13  
14  
15 4) 4) Detective Voce shall provide Mr. Kawamura and Ms. Lawson a secured location in the  
16 County-City Building where they may forensically examine the contents of the Mirrored Drives.  
17 Det. Voce shall provide a CPU, monitor, keyboard, mouse and an operating system of Ms.  
18 Lawson's choosing. Det. Voce shall allow both Mr. Kawamura and Ms. Lawson access to the  
19 secured location from 8:30 a.m. until 4:30 p.m. Monday through Friday.  
20  
21 5) 5) The Mirrored Drives shall at all times remain in the secured location. Neither Mr.  
22 Kawamura nor Ms. Lawson shall remove any data obtained from the Mirrored Drives from the  
23 secured location without prior permission from the court.  
24  
25 6) 6) The data contained on the Mirrored Drives shall only be viewed by Mr. Kawamura, Ms.  
26 Lawson, and the defendant. The defendant may only view the data in the presence of Mr.  
27 Kawamura.  
28

1  
2  
3  
4 7) Under no circumstances shall the defendant be allowed to retain any graphic images  
5 contained on the Mirrored Drives. The defendant is allowed, in the presence of Mr. Kawamura  
6 and Ms. Lawson, to access and view non-image data on the Mirrored Drives for the purpose of  
7 assisting in the preparation of his defense.

8  
9 8) The computer into which the Mirrored Drives are inserted for access and operation shall  
10 not be connected to a network while the Mirrored Drives are installed.

11  
12 9) The computer into which the Mirrored Drives are installed shall not be connected to a  
13 printer, except as necessary to print non-graphic files (text files, log files and directory trees).  
14 Ms. Lawson must be present at all times that the printer is connected.

15  
16  
17 10) In no event shall any graphic files containing child pornography or which could  
18 reasonably be construed as constituting child pornography, be copied, duplicated or replicated, in  
19 whole or part, onto any external media including, but not limited to, paper, floppy disc, CD-  
20 Roms, DAT tape, zip discs or other media.

21  
22  
23 11) A copy of this order shall, at all times, be kept with the Mirrored Drives in the secured  
24 location.

25  
26  
27 12) Once Mr. Kawamura and Ms. Lawson have completed the forensic evaluation of the  
28 defendant's computer they shall notify Detective Voce. Detective Voce shall then remove the

1  
2 Mirrored Drives from the secured location and place the Mirrored Drives into the Pierce County  
3 Property Room. The Pierce County Property Room shall store the Mirrored Drives until the  
4 completion of the case(s) against the defendant. While the Mirrored Drives are stored Detective  
5 Voce shall not view any of the data contained on the Mirrored Drives nor shall Detective Voce  
6 attempt to determine what type of forensic evaluation Mr. Kawamura and/or Ms. Lawson  
7 conducted on the computer.  
8

9  
10 13) Ms. Lawson shall be permitted reasonable access to the defendant's original computer  
11 system. This access shall be in the presence of Det. Voce.  
12

13 DONE IN OPEN COURT this 1st day of August, 2003.

14  
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*Lisa Wosurich*  
JUDGE

FILED  
DEPT. 16  
OPEN COURT  
AUG 1 2003  
Pierce County Clerk  
By *[Signature]* Deputy

Presented by:

*[Signature]*  
Hugh K. Birgenheier  
Deputy Prosecuting Attorney  
WSB# 14720

Approved as to Form:

*[Signature]*  
Mike Kawamura  
Attorney for Defendant  
WSB# 17202

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned court do hereby certify that the document  
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electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/JANINE CAVALIER, Deputy.

Dated: Nov 24, 2008 3:47 PM



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## **APPENDIX “B”**

*Court of Appeals' Opinion*

2 of 2 DOCUMENTS

The State of Washington, *Respondent*, v. Neil Grenning, *Appellant*.

No. 32426-1-II Consolidated with No. 32456-3-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

142 Wn. App. 518; 174 P.3d 706; 2008 Wash. App. LEXIS 24

January 8, 2008, Filed

**SUBSEQUENT HISTORY:** Review denied by *State v. Grenning*, 2008 Wash. LEXIS 958 (Wash., Oct. 2, 2008)

**SUMMARY:**

WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** Prosecution for 17 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, 26 counts of sexual exploitation of a minor, 1 count of second degree assault of a child, and 20 counts of possession of depictions of a minor engaged in sexually explicit conduct. The second degree assault and possession offenses were alleged to have been committed with sexual motivation.

**Superior Court:** The Superior Court for Pierce County, No. 02-1-01106-5, James R. Orlando, J., on October 22, 2004, entered a judgment on a jury verdict finding the defendant guilty of 16 counts of first degree rape of a child, 26 counts of sexual exploitation of a minor, 6 counts of first degree child molestation, 1 count of second degree assault of a child with sexual motivation, 20 counts of possession of depictions of a minor engaged in sexually explicit conduct with sexual motivation, and 2 counts of attempted first degree rape of a child. At sentencing, the trial court imposed high end standard range sentences for each offense, ran the sentences for the convictions within each class of offense concurrently, and then ran each group of such sentences consecutively.

**Court of Appeals:** Holding that the trial court erroneously restricted the defendant's access to computer hard drive evidence in relation to the child pornography

possession charges but that the defendant's other claims of error were unsupported by the record or were not prejudicial, the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case for further proceedings.

**HEADNOTES**

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Searches and Seizures -- Constitutional Provisions -- Federal Constitution -- Application to States.** The Fourth Amendment applies to the states through the due process clause of the Fourteenth Amendment.

[2] **Searches and Seizures -- Validity -- Federal Constitution -- In General.** The Fourth Amendment grants citizens the right to protection against unreasonable searches and seizures. In general, a search is reasonable within the meaning of the Fourth Amendment if it is executed with a lawfully issued warrant and is based on probable cause.

[3] **Constitutional Law -- Right to Privacy -- State Guaranty -- Contrast to Federal Constitution.** The Washington Constitution provides greater protection to individual privacy interests than does the Fourth Amendment.

[4] **Criminal Law -- Evidence -- Suppression -- Findings of Fact -- Review -- Standard of Review.** Findings of fact entered by a trial court in support of a ruling on a motion to suppress evidence in a criminal trial are reviewed to determine whether they are supported by substantial evidence and, if so, whether they support the trial court's conclusions of law.

[5] **Criminal Law -- Evidence -- Suppression -- Conclusions of Law -- Review -- Standard of Review.** Conclusions of law entered by a trial court in support of a ruling on a motion to suppress evidence in a criminal trial are reviewed de novo.

[6] **Searches and Seizures -- Warrant -- Scope -- Test or Examination of Materials Seized.** The lawful seizure of apparent evidence of a crime under a valid search warrant includes a right to test or examine the materials seized to ascertain their evidentiary value.

[7] **Searches and Seizures -- Computer Files -- Hard Drives -- Search for Evidence -- Lawfully Seized Computer.** Where police timely seize computer hardware and software pursuant to a valid warrant, the continued testing of the computer's hard drives in search of evidence does not implicate the Fourth Amendment.

[8] **Searches and Seizures -- Warrant -- Execution -- Timeliness -- Test.** A search conducted pursuant to a warrant is timely if it begins before the warrant expires and probable cause continues through completion of the search.

[9] **Searches and Seizures -- Computer Files -- Hard Drives -- Probable Cause -- Passage of Time.** Inasmuch as the data stored on a computer hard drive is permanent, static, and unchanging, the passage of time does not affect probable cause that a computer hard drive stores evidence of a crime.

[10] **Searches and Seizures -- Computer Files -- Search -- Delay -- Validity -- Factors.** The Fourth Amendment does not provide for a specific time limit in which a computer may undergo forensic examination after it has been seized with a valid search warrant. If the delay is reasonable, it does not violate the Fourth Amendment. Because computer searches usually occur at a different location from where the computer was seized, involve more preparation than an ordinary search, involve a greater degree of care in the execution of the warrant, and generate more information than ordinary searches, delays in conducting and/or completing the search are expected and reasonable. In determining the reasonableness of a delay by law enforcement officers in conducting a search of computer files or hard drives, a court may consider (1) whether the delay caused a lapse in probable cause, (2) whether the delay created unfair prejudice to the defendant, and (3) whether the investigating officers acted in bad faith.

[11] **Searches and Seizures -- Warrant -- Probable Cause -- Review -- Standard of Review.** A magistrate's determination of probable cause in issuing a search warrant is reviewed for an abuse of discretion.

[12] **Searches and Seizures -- Warrant -- Probable Cause -- Determination -- In General.** The Fourth Amendment requires that a search warrant be supported by a determination of probable cause as established by an affidavit stating facts and circumstances sufficient to support a reasonable inference that criminal activity has occurred or is occurring and that evidence of the crime can be found at the place to be searched. Probable cause also requires a nexus between the criminal activity and the place to be searched.

[13] **Searches and Seizures -- Warrant -- Affidavit -- Rules of Evidence -- Applicability.** An affidavit of probable cause for the issuance of a search warrant need not meet the standards governing the admissibility of evidence at trial.

[14] **Searches and Seizures -- Warrant -- Probable Cause -- Review -- Deference to Magistrate -- In General.** A magistrate's determination of probable cause in issuing a search warrant is entitled to great deference by a reviewing court.

[15] **Computers -- Searches and Seizures -- Computer Files -- Warrant -- Validity -- Investigation of Sex Offense -- Connection of Crime to Computer -- Sufficiency.** An affidavit provides sufficient probable cause for the issuance of a warrant to search a suspected child molester's computer and its hard drive for evidence of the molestation crime where the affidavit specifies facts from which it may reasonably be inferred that the suspect committed an act of child molestation, that the suspect used the computer for child molestation-related activities, and that there are sexually explicit images stored on the computer that would support a child molestation charge.

[16] **Criminal Law ? Discovery -- Protective Order -- Computer Files -- Factors.** When data or images stored on computer files or hard drives in the possession of law enforcement provide evidence of a criminal offense, a copy of that evidence must be made available to defendant for forensic examination or analysis subject to a protective order for the protection of victims. In fashioning a protective order, the trial court should (1) ensure that the evidence is secured and inaccessible to

anyone besides defense counsel, (2) limit access by noncounsel without court order, (3) permit access only for purposes of the action, (4) ensure no additional copies are made, (5) require that a copy of the protective order be kept with the evidence, (6) prohibit digitizing of the evidence, (7) order installation of a firewall between the Internet and any computer used to access the protected materials during inspection, (8) require counsel to return the evidence if representation is terminated, (9) require any computer used in the examination of the evidence to be cleared before it is accessed for other purposes, (10) order prompt return the evidence at the end of the criminal proceeding, and (11) require that law enforcement verify the data's destruction and confirm that destruction to the court.

**[17] Criminal Law -- Discovery -- Protective Order -- Computer Files -- Place and Time Restrictions -- Police Facility -- Inadequate Access.** A protective order that limits a criminal defendant's access to computer files or hard drives for forensic analysis to certain times of the day and only at a police facility is unduly restrictive if, due to the nature of the charge, the analysis needed to be made of the files or hard drives requires greater access than can be afforded in the police facility.

**[18] Criminal Law -- Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Review -- Role of Appellate Court -- Deference to Trier of Fact.** An appellate court reviewing a criminal conviction must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

**[19] Criminal Law -- Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Review -- In General.** The evidence presented in a criminal trial is sufficient to support a conviction of a charged offense if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the offense beyond a reasonable doubt.

**[20] Criminal Law -- Former Jeopardy -- Reversal of Conviction -- Retrial -- In General.** When a conviction is reversed on grounds other than the sufficiency of the evidence and the evidence in the record is sufficient to support the conviction, double jeopardy is not implicated and the defendant may be retried for the charge.

**[21] Criminal Law -- Discovery -- Scope -- Review -- Discretion of Court.** The scope of discovery in a

criminal prosecution is within the trial court's discretion. The trial court's discovery decisions will not be disturbed by a reviewing court absent a manifest abuse of discretion.

**[22] Criminal Law -- Discovery -- Protective Order -- Computer Files -- Place and Time Restrictions -- Police Facility -- Adequate Access.** A protective order that limits a criminal defendant's access to computer files or hard drives for forensic analysis to certain times of the day and only at a police facility is not unduly restrictive if, due to the nature of the charge, the analysis needed to be made of the files or hard drives can be accomplished within the confines of the place and time restrictions.

**[23] Criminal Law -- Discovery -- Order -- Review -- Harmless Error.** A trial court's erroneous discovery ruling in a criminal trial is harmless if the defendant is not prejudiced by the ruling. The defendant is not prejudiced by the ruling if it does materially affect the outcome of the trial.

**[24] Jury -- Selection -- Challenge for Cause -- Review -- Standard of Review.** A trial court's denial of a challenge to a prospective juror for cause is reviewed for a manifest abuse of discretion.

**[25] Jury -- Right to Jury -- Criminal Case -- Constitutional Right -- Impartial Jury -- In General.** A criminal defendant has a constitutional right to trial by an impartial jury.

**[26] Jury -- Selection -- Challenge for Cause -- Bias -- Actual Bias -- In General.** A juror must be excused for cause if the juror has an actual bias.

**[27] Jury -- Selection -- Challenge for Cause -- Bias -- Actual Bias -- Burden of Proof -- In General.** A party claiming that a juror should be excused for cause on the grounds of actual bias has the burden of proving actual bias.

**[28] Jury -- Selection -- Challenge for Cause -- Bias -- Actual Bias -- Review -- Challenger's Burden.** A party claiming on appeal that the trial court should have excused a juror for cause on the grounds of actual bias must show more than a mere possibility that the juror was prejudiced.

**[29] Jury -- Selection -- Challenge for Cause -- Equivocal Answers.** A prospective juror's equivocal

answers do not, alone, justify removal for cause. The appropriate question is whether a juror with preconceived ideas can set them aside and decide the case on an impartial basis.

[30] **Jury -- Selection -- Challenge for Cause -- Determination -- Deference to Trial Court.** The trial court is in the best position to address whether a juror has a bias that would warrant excusing the juror for cause. The trial court has the ability to evaluate factors outside of the written record, such as the juror's demeanor and conduct.

[31] **Criminal Law -- Right To Confront Witnesses -- Sixth Amendment -- Scope.** Under the Sixth Amendment, a criminal defendant has the right to confront witnesses and to meaningful cross-examination.

[32] **Criminal Law -- Right To Confront Witnesses -- Sixth Amendment -- Application to States.** The Sixth Amendment is incorporated in and applies to the states through the due process clause of the Fourteenth Amendment.

[33] **Criminal Law -- Evidence -- Hearsay -- Right of Confrontation -- Unavailability of Declarant -- Testimonial Statement -- Effect.** Under the Sixth Amendment, a testimonial hearsay statement made by a nontestifying witness may not be admitted against a criminal defendant unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.

[34] **Criminal Law -- Evidence -- Hearsay ? Right of Confrontation -- Review -- Harmless Error -- Test.** The erroneous admission of hearsay testimony in violation of the Sixth Amendment right to confront adverse witnesses is subject to harmless error analysis. The error is harmless if a reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. Under this test, the error is harmless if the untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding that the defendant is guilty.

[35] **Criminal Law -- Review -- Harmless Error -- Admission of Evidence -- Overwhelming Evidence.** The erroneous admission of evidence in a criminal trial is harmless beyond a reasonable doubt if the untainted evidence admitted at trial is so overwhelming that it

necessarily leads to a finding that the defendant is guilty.

[36] **Criminal Law -- Review -- Harmless Error -- Cumulative Error -- Absence of Prejudicial Error -- Effect.** A conviction will not be overturned on the basis of cumulative error if the reviewing court finds no prejudicial error.

[37] **Criminal Law -- Punishment -- Sentence -- Review -- Constitutional Error -- Standard of Review.** A constitutional challenge to a trial court's sentencing decision is reviewed de novo.

[38] **Sexual Offenses -- Punishment -- Sentence -- Nonpersistent Offender -- Statutory Provisions -- Multiple Current Offenses -- Exceptional Consecutive Minimum Sentences -- Determination by Court -- Validity.** A trial court sentencing a nonpersistent offender convicted of multiple delineated sex offenses or offenses with sexual motivation under the indeterminate sentencing scheme of *RCW 9.94A.712* may impose an exceptional minimum sentence consisting of standard range minimum sentences ordered to run consecutively based on one or more of the aggravating factors set forth in *RCW 9.94A.535(2)* as found by the court, not a jury, so long as the exceptional minimum sentence does not exceed the statutory maximum sentence for any of the offenses.

[39] **Criminal Law -- Punishment -- Cruel and Unusual Punishment -- What Constitutes.** A punishment is cruel and unusual within the meaning of the Eighth Amendment if it is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness.

[40] **Criminal Law -- Punishment -- Cruel Punishment -- Proportionate to Crime -- Factors -- In General.** Whether a sentence is grossly disproportionate to the offense for which it is imposed and violates *Const. art. I, § 14* and the Eighth Amendment prohibition against cruel and unusual punishment depends on (1) the nature of the offense, (2) the legislative purpose behind the sentencing statute, (3) the punishment the offender would have received in other jurisdictions, and (4) the punishment imposed for other offenses in this jurisdiction. No one factor is dispositive.

COUNSEL: Rita J. Griffith, for appellant.

Gerald A. Home, *Prosecuting Attorney*, and Donna Y.

Masumoto, *Deputy*, for respondent.

**JUDGES:** [\*\*1] Penoyar, J. We concur: Houghton, C.J.,  
Armstrong, J.

**OPINION BY:** PENOYAR.

## OPINION

[\*525] ¶1 Penoyar, J. -- Neil Grenning appeals his multiple convictions for various sexual offenses, claiming that (1) the search warrant was not timely executed, (2) the evidence was insufficient to support his possession of commercial child pornography convictions, (3) the discovery protective order was unduly restrictive, (4) his right to an impartial jury was violated, (5) hearsay statements were admitted in violation of his right to confrontation, (6) testimony was improperly admitted, and (7) he is entitled to a new trial due to cumulative error. Grenning further argues that (8) his consecutive sentences violate *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and (9) constitute cruel and unusual punishment.<sup>1</sup> Grenning also raises several additional issues in his statement of additional grounds (SAG).<sup>2</sup> We affirm in part, reverse in part, and remand for further proceedings.

<sup>1</sup> This case was originally heard on December 1, 2005; it was stayed on May 9, 2006; the stay was lifted on November 30, 2006; additional briefing regarding *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007), was requested on June 15, [\*\*2] 2007.  
<sup>2</sup> RAP 10.10.

## FACTS

### I. Initial Investigation and Search Warrant

¶2 On March 3, 2002, the Tacoma police department received a call from a mother concerned that Grenning had sexually molested her five year old son, RW. She explained that Grenning was her neighbor and that he occasionally took care of RW. The officer suggested that the mother take [\*526] RW to a hospital. RW's mother took him to Mary Bridge Children's Hospital, where a doctor examined him. During the examination, RW told the doctor that "Neil" had touched him on his "pee pee." 6 Report of Proceedings (RP) at 845.

¶3 On March 5, 2002, two days after RW's mother called the police, Detective Baker obtained a search

warrant for Grenning's residence. In the affidavit in support of the warrant, Detective Baker indicated that RW's mother found RW in the bathroom, placing an object in his anus. RW told his mother he was "trying to get out what Neil had put into my butt." Clerk's Papers (CP) at 49. Detective Baker stated that RW handed his mother a jar of petroleum jelly and said, "[t]his is what Neil put on his [sic] pee pee and put in my butt." CP at 49. RW's mother also told Detective Baker that Grenning had once showed her a digital picture [\*\*3] he took of RW and that RW told her Grenning had taken pictures of him unclothed.

¶4 Detective Baker explained in his affidavit that Grenning told the officers during an interview that he kept personal lubricant near his computer because "it was more enjoyable to do that while sitting at the computer." CP at 50. Grenning's computer was located in his bedroom. When the officers asked Grenning if he had pornographic materials on his personal computer, he stated that it was an older computer and that there may be some "old stuff" on it. RP at 401.

¶5 The search warrant granted the officers permission to search for and seize a variety of items concealed at Grenning's home that were material to the investigation or prosecution of first degree child molestation. It required detectives to enter and search the home within 10 days.

¶6 On March 6, officers entered Grenning's home. Detective Voce, who was assigned to handle all computer equipment during the search, lawfully seized Grenning's computer and hard drives. On March 15, Detective Voce copied Grenning's three hard drives and then began investigating and reviewing the copied hard drives. He recovered two [\*527] images of what appeared to be commercial child [\*\*4] pornography. At this point, he stopped his investigation to obtain another search warrant.

### II. Second Warrant and Subsequent Investigation

¶7 On March 27, police detectives obtained a second search warrant, expanding the search to include photographs, photograph albums, and drawings depicting minors engaged in sexually explicit activity. The warrant required that the search be done within 60 days.

¶8 More than a year later, on April 3, 2003, Detective Voce continued reviewing the information on

the copied hard drives, specifically looking for evidence of child molestation and child pornography. He ultimately uncovered approximately 35,000 to 40,000 photographs of minors engaged in sexually explicit conduct on Grenning's hard drives. He uncovered 300 images depicting RW being sexually assaulted and molested; 40 images of a second victim, BH, being sexually assaulted and molested; and 20 images of commercial child pornography. The commercial child pornography images depicted adult males sexually assaulting or molesting minors.

¶9 According to Detective Voce, the images were located in the "unallocated space" of two of the three hard drives seized from Grenning's house. RP at 640. Grenning's computer [\*\*5] was a Macintosh brand computer with an Apple operating system. Macintosh hard drives contain seven different partitions (or sections) of the drive. Two of Grenning's hard drives only contained four of the seven usual partitions and it appeared to Detective Voce that they had been intentionally removed. Detective Voce explained that removing partitions would cause data to be listed as unallocated even if the user had not deleted it. Additionally, the removed partitions made it more difficult to access the images and data on the hard drives. Detective Voce found all of the child pornography pictures on the two hard drives with unallocated space.

#### [\*528] III. Continuing Investigation

¶10 In April 2003, the Criminal Misconduct Office in Brisbane, Australia contacted Detective Baker. Australian police suspected that pornographic photographs they discovered in a computer in Australia were Grenning's photos. The photos depicted victim BH being sexually assaulted and molested. Detective Voce obtained another search warrant using the information obtained from the Australian police to specifically look for evidence relating to BH on Grenning's copied hard drives.

¶11 Detectives found photos of BH on Grenning's [\*\*6] hard drives and instant message chats. Chat participant "Photokind" referred to himself as a recent graduate of Pacific Lutheran University who was looking for work and applying for a teaching license. RP at 669-70. This description matched Grenning. In one chat, Photokind described a camping trip that matched up with the images found on Grenning's computer of BH being sexually assaulted. The chat gave a play-by-play narrative

of the camping trip and detailed each of the pictures very specifically.

¶12 On June 7, 2004, prosecutors charged Grenning with 17 counts of first degree child rape, 2 counts of attempted first degree child rape, 6 counts of first degree child molestation, 26 counts of sexual exploitation of a minor, 1 count of second degree child assault, and 20 counts of possession of depictions of a minor engaged in sexually explicit conduct. As an aggravating factor, the State alleged that Grenning committed the second degree child assault and possession of child pornography crimes with sexual motivation.

#### IV. Pretrial Motion

¶13 Grenning made a pretrial motion to suppress the evidence the police obtained from the copies of his hard drives, arguing that the search was untimely. The trial [\*\*7] court denied the motion. Grenning also made a pretrial motion for mirror-image copies of his computer hard drives. [\*529] The trial court granted Grenning's motion, but it crafted a protective order requiring that the mirror-image hard drive copies only be viewed and tested at the Tacoma police facility, because it was a secured location. It directed police detectives to provide a computer, monitor, keyboard, mouse, and operating system for Grenning.

¶14 Grenning was allowed to access the hard drives between 8:30 am and 4:30 pm Monday through Friday. The drives were to remain in the secured location. Only the defendant, his counsel, and his computer expert could view the data on the imaged drives. Once Grenning completed his examination, he had to notify Detective Voce, who would then remove the imaged drives and store them until completion of the case. While the drives were being stored, Detective Voce was not to view any of the data contained on the imaged drives or investigate what type of forensic evaluation Grenning conducted on the drives or the computer.

¶15 Grenning asked the trial court to reconsider the protective order and to allow him to remove the copied hard drives from the secure [\*\*8] location so his expert could use his own lab to analyze the hard drives. The trial court denied the motion, determining that the protective order was necessary to protect the victims and to ensure that material contained on the hard drives was not released on the Internet.

## V. Trial Testimony, Conviction, and Sentencing

¶16 At trial, BH was nine years old. At the time of the events, BH was approximately six years old. BH testified that he went on a camping trip with his older brother and Grenning. BH slept in the same tent as Grenning, and BH testified that Grenning touched his penis with his mouth. BH was nervous testifying and had difficulty talking about the camping trip.

¶17 RW was seven years old at the time of trial. The trial court found RW unavailable to testify due to his age.

[\*530] ¶18 On June 18, 2004, a jury convicted Grenning of 16 counts of first degree child rape,<sup>3</sup> 26 counts of sexual exploitation of a minor,<sup>4</sup> 6 counts of first degree child molestation,<sup>5</sup> 1 count of second degree assault of a child with sexual motivation,<sup>6</sup> 20 counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation,<sup>7</sup> and 2 counts of first degree attempted child rape.<sup>8</sup>

3 In [\*9] violation of *RCW 9A.44.073*.

4 In violation of *RCW 9.68A.040(1)(b)*.

5 In violation of *RCW 9A.44.083*.

6 In violation of *RCW 9A.36.130*.

7 In violation of *RCW 9.68A.070*.

8 In violation of *RCW 9A.44.073*; *RCW 9A.28.020*.

¶19 At sentencing, the trial court imposed the high end standard range for each offense, ran the sentences for the convictions within each type of offense concurrently, and then ran each class of offenses consecutively. This resulted in a total sentence of 1,404 months (117 years). Grenning appeals.

## ANALYSIS

### I. Motion To Suppress the Photos

¶20 Grenning first argues that the trial court erred in admitting evidence the police found during their search of his computer hard drives because (1) the police search was not completed within 10 days of the warrant's issuance and (2) the search warrant was overbroad and lacked probable cause. He argues that the trial court should have granted his motion to suppress evidence.

[1-3] ¶21 The *Fourth Amendment* grants citizens the right to protection against unreasonable searches and seizures and is applied to the states through the *due*

*process clause of the Fourteenth Amendment. U.S. Const. amend. IV; Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. [\*531] 2d 1081 (1961). [\*\*10]* Generally, a search is reasonable if it is executed with a lawfully issued warrant and based on probable cause. *Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)*. The Washington Constitution provides greater protection to individual privacy interests than the *Fourth Amendment. City of Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988)*.

[4, 5] ¶22 When reviewing the denial of a motion to suppress, we determine whether substantial evidence supports the findings of fact and then whether the findings of fact support the conclusions of law. *State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)*; *State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)*. We review conclusions of law de novo. *Mendez, 137 Wn.2d at 214*.

### A. Untimely Execution of the Search Warrant

¶23 Grenning argues that the search of his computer hard drives was untimely under *CrR 2.3(c)*<sup>9</sup> because Detective Voce found two child pornography photographs more than 10 days after the March 5, 2002, warrant was issued. Grenning argues that because the warrant required that the search be executed within 10 days, any investigation of his computer after the 10 days was warrantless and in violation of his *Fourth Amendment* [\*\*11] rights.

9 "A search warrant ... shall command the officer to search, within a specified period of time *not to exceed 10 days*, the person, place, or thing named ... ." *CrR 2.3(c)* (emphasis added).

¶24 Grenning further argues that there was no probable cause to issue the warrant on March 27, 2002 because discovery of the first two photographs that were the basis for probable cause was untimely. Thus, he contends that all evidence seized under both the March 5 and March 27, 2002 search warrants should be suppressed.

[6] ¶25 This is an issue of first impression in Washington. There are no Washington cases dealing directly with the constitutionality of an ongoing forensic examination of information stored on copies of a hard drive that extends [\*532] beyond the 10-day deadline

specified in *CrR* 2.3(c). However, it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value. 2 Wayne R. LaFave, *Search and Seizure* § 4.10(e), at 771 (4th ed. 2004).

[7] ¶26 On March 5, the police obtained a search warrant to search Grenning's residence. The express terms of the warrant authorized [\*\*12] police to search Grenning's residence for evidence relating to the investigation of first degree child molestation, specifically including photography equipment, computer hardware, computer software, and electronic communications. On March 6, the police entered Grenning's residence, searched the premises, and seized his computer and hard drives. Because the police entered and searched Grenning's residence within the 10-day warrant requirement, the search was timely and the seizure of his hard drives lawful. That investigators continued testing the hard drives in search of evidence after they were lawfully seized does not implicate the *Fourth Amendment*. However, even if the *Fourth Amendment* was implicated, it was not violated.

[8, 9] ¶27 A search is constitutionally timely so long as it begins before the expiration of a warrant and as long as probable cause continues through completion of the search. *State v. Kern*, 81 Wn. App. 308, 312, 914 P.2d 114 (1996). [\*\*13] Here, Detective Voce searched information stored on imaged copies of Grenning's hard drives. Hard drives store permanent, static, and unchanging data. Due to the nature of the material seized, the passage of time did not affect probable cause.

[10] ¶28 The *Fourth Amendment* does not provide for a specific time limit in which a computer may undergo forensic examination after it has been seized with a valid search warrant. *United States v. Hernandez*, 183 F. Supp. 2d 468, 480 (P.R. 2002). If the delay is reasonable, it does not violate the *Fourth Amendment*. See *Hernandez*, 183 F. Supp. 2d at 480-81. Because computer searches usually [\*533] occur at a different location than where the computer was seized, involve more preparation than an ordinary search, involve a greater degree of care in the execution of the warrant, and contain more information than ordinary searches, delays are expected and reasonable. *Hernandez*, 183 F. Supp. 2d at 480-81; see also *United States v. Syphers*, 426 F.3d 461 (1st Cir. 2005). In *Syphers*, a five-month delay in

execution of a warrant did not invalidate the search of the defendant's computer since there was no showing that: (1) the delay caused a lapse in probable cause, [\*\*14] (2) it created unfair prejudice to the defendant, or (3) officers acted in bad faith. *Syphers*, 426 F.3d at 469. This test instructs our analysis here.

¶29 Detective Voce had to search Grenning's three hard drives. He had to consult with another expert to obtain specialized software in order to complete his search. The information on the hard drives was not transitory, changeable, nor stale when Detective Voce reviewed the copies of the hard drives. There was a significant amount of information on the hard drives and the trial court found that it was not realistic or reasonable for Detective Voce to review it all in 10 days. Probable cause continued to exist throughout Detective Voce's search. The police did not act in bad faith in executing the warrant. The delay was reasonable and Grenning cannot demonstrate prejudice. We hold that the trial court did not err in admitting evidence obtained under the search warrants.

#### B. Probable Cause and the Particularity Requirement of the Search Warrant

¶30 Grenning next argues that the warrants lacked probable cause and were overbroad because Detective Baker's affidavit only cites to noncriminal behavior together with general statements about pedophile's [\*\*15] habits. The State responds that the warrant was properly issued and complied with *Fourth Amendment* requirements.

[11, 12] ¶31 We review a challenge to a search warrant for an abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, [\*534] 906 P.2d 925 (1995). The *Fourth Amendment* requires that an affidavit supporting a warrant must establish probable cause. *State v. Nordlund*, 113 Wn. App. 171, 179, 53 P.3d 520 (2002). The affidavit must contain facts and circumstances that are sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *Cole*, 128 Wn.2d at 286. There must also be a nexus between the criminal activity and the place to be searched. *Thein*, 138 Wn.2d at 140.

[13, 14] ¶32 Affidavits of probable cause need not meet the standards governing the admissibility of

evidence at trial. *State v. Withers*, 8 Wn. App. 123, 125, 504 P.2d 1151 (1972). We give great deference to the trial court's probable cause determination. *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985).

[15] ¶33 Relying on *State v. Smith*, 60 Wn. App. 592, 602-03, 805 P.2d 256 (1991), [\*\*16] Grenning argues that general information about pedophilia in a search warrant does not establish probable cause when it is not demonstrated that the defendant is a pedophile. However in *Smith*, all the facts in the affidavit were 10 years old and the pedophile profile was the only basis for probable cause. *Smith*, 60 Wn. App. at 594-600.

¶34 Here, unlike in *Smith*, Baker's affidavit specifies facts about Grenning's molestation of RW. Thus, the issuing court did not rely solely on the profile of a typical pedophile to establish probable cause for searching Grenning's computer.

¶35 Relying on *Nordlund*, Grenning argues that greater particularity was required for probable cause to search his computer. In *Nordlund*, the court held that there must be a greater degree of particularity in the search warrant for a defendant's personal computer. *Nordlund*, 113 Wn. App. at 182.

¶36 However, in *Nordlund*, the affidavits did not recite particularized information linking the computer to possible [\*535] evidence of crimes and only established the defendant's noncriminal use of the computer. *Nordlund*, 113 Wn. App. at 182. The State seized the defendant's computer to search for evidence of his whereabouts on the day he allegedly [\*\*17] attacked two young women, not to look for pornography or evidence of child molestation supported by other evidence in the affidavit. *Nordlund*, 113 Wn. App. at 183.

¶37 Here, Baker's affidavit established a reasonable inference that Grenning sexually molested RW, that he masturbated in front of his computer, and that there were sexually explicit photographs on Grenning's computer supporting a child molestation charge. We affirm the trial court's finding that probable cause existed to authorize the search of Grenning's computer and that the search was sufficiently particularized.

## II. Protective Order

[16, 17] ¶38 Grenning next contends that the trial court's protective order regarding the hard drives was an

undue restriction on his access to discovery and denied him his state and federal rights to due process, effective assistance of counsel, compulsory process, and to maintain confidentiality. He contends that the trial court's concern about the sensitive nature of the images and the unauthorized release of the images was unreasonable and that the order effectively precluded him from having an expert properly examine the hard drives and computer.

### A. Possession of Commercial Child Pornography Convictions

¶39 The [\*\*18] trial court did not have the benefit of the recent case of *State v. Boyd*, where the Washington Supreme Court held that a defendant is entitled to mirror-image copies of hard drives where the evidence on the computer supports charges of commercial child pornography possession. *State v. Boyd*, 160 Wn.2d 424, 436, 158 P.3d 54 (2007). The analysis of the hard drives "requires greater access than can be afforded in the State's facility." *Boyd*, 160 Wn.2d at 436. In [\*536] child pornography possession cases, defense counsel is entitled to the hard drive copies, subject to a protective order, "where the forensic expert intends to use particular diagnostic equipment from his lab and must review tens of thousands of images from potentially disparate sources." *Boyd*, 160 Wn.2d at 437.

¶40 The Washington Supreme Court suggests safeguards to protect a victim's interests. As part of the protective order, the trial court should: (1) ensure that the evidence is secured and inaccessible to anyone besides defense counsel, (2) limit access by noncounsel without court order, (3) permit access only for purposes of the action, (4) ensure no additional copies are made, (5) require a copy of the protective order be kept [\*\*19] with the evidence, (6) prohibit digitizing of the evidence, (7) order installation of a firewall between the internet and any computer used to access the protected materials during inspection, (8) require counsel to return the evidence if representation is terminated, (9) require any computer used in the evidence's examination to be cleared before it is accessed for other purposes, (10) order prompt return of the evidence at the end of the criminal proceeding, and (11) require that law enforcement verify the data's destruction and confirm that destruction to the court. *Boyd*, 160 Wn.2d at 438-39.

¶41 Here, the trial court granted Grenning's motion for mirror-image hard drive copies. However, the trial court did not allow Grenning's attorney or computer

expert to view or test the hard drive copies outside of the Tacoma police facility. Because expert analysis of the hard drives "requires greater access than can be afforded in the State's facility," the trial court's protection order was unduly restrictive for the commercial child pornography charges. *Boyd*, 160 Wn.2d at 436. Thus, we reverse Grenning's convictions for 20 counts of possession of depictions of minors engaged in sexually explicit [\*\*20] conduct and remand for proceedings consistent with this opinion.

[\*537] B. Sufficiency of Evidence of Possession of Commercial Child Pornography

¶42 Grenning argues that the evidence was insufficient to convict him under *RCW 9.68A.070* because the State did not prove that he actually possessed the child pornography. He claims that though the pornography was found on his computer, there is no evidence to indicate he knew the images were there and that his possession conviction should be reversed. We reject this claim.

[18, 19] ¶43 Generally, we "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997); see also *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The applicable standard of review here 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). The State presented evidence to the jury that the computer at issue was located in Grenning's bedroom and that other [\*\*21] roommates did not likely know of the images. This computer stored a large number of pornographic images that Grenning personally took of RW and BH, as well as a large number of commercial child pornography photographs. Upon questioning by police as to the pornography on the computer, Grenning admitted that there may be some "old stuff" on it. RP at 401. Grenning also told police that he kept a bottle of lubricant next to the computer for personal use while he was at the computer.

[20] ¶44 These facts presented to the jury are not in dispute and taken in the light most favorable to the State, they provide sufficient evidence that a reasonable trier of fact could find beyond a reasonable doubt that Grenning knew of the child pornography on his personal computer.

Because double jeopardy is not implicated, these charges may be retried on remand. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

[\*538] C. Child Rape, Attempted Child Rape, Child Molestation, Sexual Exploitation of a Minor, and Assault of a Child Convictions

[21] ¶45 The scope of discovery is within the trial court's discretion and we do not disturb its decisions absent a manifest abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 626, 940 P.2d 546 (1997). [\*\*22] The trial court's protective order was not unduly restrictive for the first degree child rape, attempted first degree child rape, first degree child molestation, sexual exploitation of a minor, or second degree assault of a child. Grenning was given access to mirror-image copies of his hard drives. Grenning's expert stated that "the 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 at 602. Grenning does not argue he did not have copies or access to the hard drive copies; rather, he challenges the protective order restriction that the hard drives could not be removed from the Tacoma police station.

[22] ¶46 In *Boyd*, the court reasoned that defendants should have access outside of a State facility to mirror-image copies of the defendant's computer hard drive in child pornography cases because forensic analysis "might show that someone other than the defendant caused certain images to be downloaded. It may indicate when the images were downloaded. It may reveal how often and how recently images were viewed and other useful information based on where the images are stored on the device." *Boyd*, 160 Wn.2d at 436. [\*\*23] The *Boyd* court reasoned that defense experts could not conduct such detailed examinations of a hard drive in the State facility.

¶47 In Grenning's first degree child rape, attempted first degree child rape, first degree child molestation, sexual exploitation of a minor, and second degree assault of a child charges, the discovery provided was adequate. For these charges, the factors the *Boyd* court considered are not at issue: It is irrelevant (1) "how the evidence made its way [\*539] onto the computer," (2) who caused the "images to be downloaded," (3) "when the images were downloaded," (4) "how recently [the] images were viewed," and (5) "where the images are stored on the device." *Boyd*, 160 Wn.2d at 436.

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¶48 In the child rape, molestation, exploitation, and assault charges, it does not matter if Grenning purposefully possessed, downloaded, or viewed the pictures. The pictures were entered into evidence because they depict Grenning raping and molesting RW and BH. The issue was whether Grenning committed these acts. The three cases consolidated for *Boyd* involved commercial child pornography. *Boyd*, 160 Wn.2d at 429-31. They did not involve child pornography that depicted the *defendants* engaging [\*\*24] in sexual acts with minors. *Boyd*, 160 Wn.2d at 429-31. Additionally, *Boyd* did not address charges beyond child pornography possession. *Boyd*, 160 Wn.2d at 429-31. Because the factors the *Boyd* court considered are not at issue here, we decline to extend *Boyd's* holding to charges other than child pornography possession.

[23] ¶49 Additionally, even if the trial court committed error in ruling on discovery, Grenning must demonstrate that the error was prejudicial and that it materially affected the trial outcome. *State v. Linden*, 89 Wn. App. 184, 190, 947 P.2d 1284 (1997). Grenning's computer expert had access to mirror-image hard drive copies. He was able to perform tests on the hard drives. The pictures were entered as evidence of the acts that Grenning committed. In some of the pictures, Grenning's face is visible. They depict Grenning raping and molesting RW and BH. Both BH's mother and older brother testified at trial. They positively identified the child in some of the photographs as BH.

¶50 Considering that (1) Grenning had a computer expert that could perform tests on the hard drives; (2) he did not request further duplication of the pictures; (3) the testimony of BH, his mother, and brother; [\*\*25] and (4) the nature of what the pictures depict, access to the hard drives in a location other than the secured room in the police station would not have materially affected the trial outcome. [\*540] Thus, we affirm Grenning's convictions for child rape, attempted child rape, child molestation, sexual exploitation of a minor, and assault of a child.

### III. Impartial Jury

¶51 On the first day of trial, the *Tacoma News Tribune* ran a story about Grenning's case. Grenning argues that juror 31 should have been dismissed because the juror indicated she saw the headline, recognized it might apply to this case, and then did not read the body of the article. The State responds that the trial court did

not abuse its discretion in keeping juror 31 on the panel as there was no evidence that the juror was actually biased against Grenning.

[24-26] ¶52 We review a trial court's denial of a challenge for cause for manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). A criminal defendant has a constitutional right to a jury trial. *State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (1998). This implies the right to an impartial jury. *Stackhouse*, 90 Wn. App. at 350. The trial court must excuse [\*\*26] a juror for cause if actual bias is shown. *State v. Gosser*, 33 Wn. App. 428, 433, 656 P.2d 514 (1982); *RCW* 4.44.170.

[27-30] ¶53 A defendant must prove actual bias. *Noltie*, 116 Wn.2d at 838. A defendant must show "more than a mere possibility that the juror was prejudiced" to successfully challenge the trial court's decision on appeal. *Noltie*, 116 Wn.2d at 840 (emphasis omitted) (quoting 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice* § 202, at 331 (4th ed. 1986)); *Stackhouse*, 90 Wn. App. at 350. A juror's "equivocal answers alone" do not justify removal for cause. *Noltie*, 116 Wn.2d at 839. The appropriate question is "whether a juror with preconceived ideas can set them aside" and decide the case on an impartial basis. *Noltie*, 116 Wn.2d at 839. The trial court is in the best position to address this question because it has the ability to evaluate factors outside the written record such as a juror's demeanor and conduct. *Noltie*, 116 Wn.2d at 839.

[\*541] ¶54 In this case, juror 31 did not read the article in question, only the headline, which did not mention Grenning. The trial court questioned juror 31 and found that the first page of the article contained no prejudice to Grenning. Furthermore, voir [\*\*27] dire was not transcribed or recorded for our review. There was no manifest abuse of discretion in finding a lack of prejudice, given that the juror read only the headline and not the article. We find no error in allowing juror 31 to remain.

### IV. Confrontation Clause

¶55 Grenning next challenges the admission of RW's hearsay testimony from Dr. Duralde and the police detectives. He contends that admission of RW's out-of-court hearsay statements violated his right of confrontation under the United States Constitution.

[31, 32] ¶56 Under the *Sixth Amendment*, a defendant has the right to confront witnesses and to meaningful cross-examination. The *Sixth Amendment* was incorporated and made applicable to the states through the *due process clause of the Fourteenth Amendment*. *Pointer v. Texas*, 380 U.S. 400, 401, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[33] ¶57 In *Crawford*, the Supreme Court held that the *confrontation clause* bars the admission of testimonial hearsay statements made by a nontestifying witness unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). [\*\*28] In *Crawford*, the Supreme Court held that the *confrontation clause* prohibits testimonial hearsay without regard to whether a firmly rooted hearsay exception applies. *State v. Moses*, 129 Wn. App. 718, 724, 119 P.3d 906 (2005). Under *Crawford*, statements made during police interrogation are testimonial. *Moses*, 129 Wn. App. at 725.

¶58 Here, the trial court admitted Dr. Duralde's testimony under *ER 803(a)(4)* as a statement made for the purposes of medical diagnosis or testing. Grenning argues [\*\*542] that it violates *Crawford* because statements to a doctor are testimonial when police are involved. The trial court also allowed hearsay testimony from three police officers about what RW's mother told them.

[34] ¶59 It is well established that constitutional errors, including violations of a defendant's rights under the *confrontation clause*, may be so insignificant as to be harmless. *Harrington v. California*, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 21-22, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh'g denied*, 386 U.S. 987 (1967). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached [\*\*29] the same result in the absence of the error. Any violation of *Crawford* in this case is harmless, given the overwhelming physical evidence showing Grenning's assaults on RW.

¶60 Even absent RW's statements to his mother and doctor, the untainted evidence of Grenning's guilt was overwhelming. Each count was supported by graphic photographs found on Grenning's personal computer. Grenning took the photographs while committing the crimes against RW and BH. The pictures depict Grenning raping and molesting the children. Grenning's, BH's, and

RW's faces are visible in many of the photographs that depict child rape and molestation. The record is replete with evidence supporting Grenning's convictions. In addition to the photographs, there was an audio recording and physical evidence seized from Grenning's residence that support the convictions. We have no reasonable doubt that even absent the hearsay, the jury viewing the photographs, viewing the items seized from Grenning's residence, hearing BH's testimony, and listening to the audio recording would have found Grenning guilty beyond a reasonable doubt. We hold that any violation of *Crawford* was harmless.

#### V. Opinion Testimony

¶61 Grenning argues that [\*\*30] the trial court admitted opinion testimony in violation of his constitutional right to a [\*\*543] jury trial. Grenning challenges Detective Baker's testimony that the child in the photographs was RW, that the perpetrator was Grenning, and that the photographs were taken in Grenning's bedroom. He also challenges Detective Voce's testimony that a majority of the images on Grenning's computer depicted minors engaged in sexually explicit conduct and that "Photokind" referred to Grenning. Additionally, Grenning challenges Dr. Duralde's testimony that the victims depicted in exhibits 94 through 114 were children under the age of 18. Finally, Grenning challenges Customs Agent Darryl Cosme's testimony that the commercial pornographic photographs were of actual children and not computer generated.

¶62 Grenning argues that the above testimony was inadmissible under *ER 702*, and it was merely the witnesses' personal resolution of factual issues. He further argues that it was for the jurors to decide whether the images satisfied the elements of the crimes and that the above testimony left nothing for the jurors to decide.

[35] ¶63 The State counters that even if we were to find that constitutional error occurred, any such [\*\*31] error was harmless beyond a reasonable doubt. We agree. Even absent the above testimony, the photographic evidence supporting Grenning's convictions is overwhelming and any error was harmless.

#### VI. Cumulative Error

[36] ¶64 Grenning argues that cumulative error denied him a fair trial. The cumulative error doctrine applies when several errors occurred at the trial court

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level, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

¶65 We hold that the cumulative error doctrine does not apply here. Even if any of the asserted errors occurred, the photographic evidence in this case is undisputed and overwhelming. No prejudice could have resulted and we decline to grant Grenning a new trial on this basis.

[\*544] VII. *Blakely* and Former RCW 9.94A.589(1)(A) (2002)

¶66 Grenning next maintains that his consecutive sentences, imposed under former RCW 9.94A.589(1)(a), violate *Blakely*, 542 U.S. 296, and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The trial court ruled that the sentences for each type of crime would be served concurrently. It then imposed sentence for each different class of crimes consecutive to each other. For example, all the [\*\*32] child rape counts involving RW were to be served concurrently to each other but consecutively to each of the other classes of crimes, such as the molestation convictions.

[37] ¶67 We review constitutional challenges to a trial court's sentencing decision de novo. *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). Under former RCW 9.94A.589(1)(a), felonies that are not serious, violent offenses are served concurrently. Consecutive sentences for violent offenses that are not serious may be imposed only "under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). The Washington Legislature has not categorized first degree child rape as a serious violent offense. See RCW 9.94A.030(41). In *VanDelft*, our Supreme Court held that *Blakely* applies to consecutive sentencing decisions under RCW 9.94A.589(1)(a). In *re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 743, 147 P.3d 573 (2006). Thus, judicial fact finding that imposes consecutive sentences under RCW 9.94A.589(1)(a) is impermissible. *VanDelft*, 158 Wn.2d at 743.

[38] ¶68 However, *VanDelft* does not discuss RCW 9.94A.712. The trial court sentenced Grenning under RCW 9.94A.712.<sup>10</sup> When a person who is not a persistent offender is sentenced [\*\*33] for specified sex-related crimes, including first degree child rape, RCW 9.94A.712 applies. RCW 9.94A.712(1); see *State v. Woodruff*, 137 Wn. App. 127, 131, 151 [\*545] P.3d 1086 (2007). Under

RCW 9.94A.712, judicial fact finding is permissible for the imposition of exceptional sentences. *State v. Clarke*, 156 Wn.2d 880, 892, 134 P.3d 188 (2006) (*Blakely* does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 that does not exceed the statutory maximum sentence imposed); *Woodruff*, 137 Wn. App. at 133. Because Grenning was sentenced under RCW 9.94A.712(3), allowing judicial fact finding, "the trial court may rely on the factors in RCW 9.94A.535(2) to impose an exceptional sentence." *Woodruff*, 137 Wn. App. at 135.

10 We apply former RCW 9.94A.712 (2004), which was the applicable version at the time of Grenning's sentencing.

¶69 The trial court made factual findings under RCW 9.94A.535(2) to support imposing the sentences consecutively. Additionally, the jury returned a special verdict finding that Grenning committed the second degree assault of a child with sexual motivation. A finding of sexual motivation for the offense is an aggravating factor that allows the court to impose [\*\*34] an exceptional sentence. RCW 9.94A.535(3)(f). Thus, the consecutive sentences the trial court imposed were proper.

#### VIII. Cruel and Unusual Punishment

¶70 Grenning argues that his sentence constitutes cruel and unusual punishment under the *Eighth Amendment to the United States Constitution* and *article 1, section 14 of the Washington Constitution*. However, given the nature of the crimes Grenning committed, we hold that his sentence does not constitute cruel and unusual punishment.

[39, 40] ¶71 Punishment is cruel and unusual if it "is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness." *State v. LaRoque*, 16 Wn. App. 808, 810, 560 P.2d 1149 (1977). Whether a sentence is grossly disproportionate to the crime for which it is imposed and violates the state and federal constitutional prohibitions against cruel punishment depends on the (1) nature of the offense, (2) legislative purpose behind the statute, (3) punishment the defendant would have received in other jurisdictions, and [\*546] (4) punishment imposed for other offenses in the same jurisdiction. *State v. Ames*, 89 Wn. App. 702, 709, 950 P.2d 514 (1998). These are only factors to [\*\*35]

consider and no one factor is dispositive. *State v. Gimarelli*, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001).

¶72 Grenning committed crimes against two young children, RW and BH, both under the age of six at the time of the crimes. Grenning took and saved graphic photographs of the acts. Grenning's sentence does not shock the general conscience, given the severity and gruesome nature of the crimes committed. Given the gravity of Grenning's offenses, we do not feel it necessary to discuss the three remaining factors. Grenning's sentence is entirely reasonable.

#### IX. Statement of Additional Grounds

¶73 Finally, Grenning filed a SAG, in which he raises numerous arguments.<sup>11</sup> We have carefully reviewed all of Grenning's additional grounds and find no merit in any of them.

<sup>11</sup> These arguments include (1) the trial court's failure to suppress statements made by Grenning; (2) the State's failure to bring Grenning to trial within speedy trial time; (3) the State's failure to

produce evidence in a timely manner; (4) that Detective Voce's investigation was "poorly executed, scarcely documented, and wrought with assumption and error"; (5) that the State committed misconduct in the presentation of the evidence [\*\*36] and the "unit of prosecution"; (6) that Grenning's right to a fair trial was violated by extrajudicial comments made by State to a "saturated media environment"; (7) the imposition of unreasonable and excessive bail; (8) that cumulative error denied Grenning a fair trial; and (9) that Grenning's *Fourth Amendment* rights were violated by the trial court for failing to rule on his motion to return property. SAG at i-ii.

¶74 We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Houghton, C.J., and Armstrong, J., concur.

Washington Rules of Court Annotated (LexisNexis ed.)

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Therese Kahn  
Legal Assistant to Michelle Hyer