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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARK BESOLA and JEFFREY SWENSON, APPELLANTS

Appeal from the Superior Court of Pierce County Nos. 10-1-02315-3, 09-1-03223-0
The Honorable Ronald Culpepper, Vicki Hogan and Edmund Murphy, Judges

Court of Appeals No. 71432-5

CONSOLIDATED SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

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A. ISSUES PERTAINING TO SUPREME COURT REVIEW

1. Did the search warrant for defendants' sexually explicit depictions of minors satisfy the Fourth Amendment's particularity requirement when it succinctly limited the search to evidence of a narrowly defined crime within a finite array of media directly linked to the offense under investigation?
2. Do defendants erroneously contend knowledge of a depicted person's minority is an element of RCW 9.68A.050 and RCW 9.68A.070, when RCW 9.68A.110(2) constitutionally makes age a strict liability element subject to an affirmative defense of reasonable mistake?
3. Was defendants' jury properly instructed on the elements of RCW 9.68A.050 and RCW 9.68A.070 when those instructions accurately stated the law, did not mislead the jury, and enabled defendants to argue their theories of the case?

B. STATEMENT OF THE CASE.

A citizen informant alerted police to the presence of controlled substances and child pornography throughout the single family house defendants, Besola and Swenson, shared. CPMB¹ 8; Appx.A² at 2. Police executed a warrant for the controlled substances. Appx. A at 2; Appx. B.³ *Id.* While executing the warrant, officers observed writeable CDs or DVDs and a VHS tape with handwritten titles denoting depictions of minors

¹ Citations to the clerk papers are linked to each defendant by the inclusion of their initials: Mark Besola ("MB"); Jeffrey Swenson ("JS").

² Appendix ("Appx") A contains the unpublished Court of Appeals opinion: *State v. Besola and Swenson*, 2014 WL 2155229 (Wn.App. Div. 1).

³ Appendix B is a copy of the original Complaint for Search Warrant and Search Warrant. Ex. 2(10-19-10 Exhibit Record); CPMB 402-06.

engaged in sexual activity. Appx. A at 2; 3RP 360; CPMB 7-15. Swenson told the officers the house was a place where he and Besola watched videos of eight to ten year old males engaged in sexual acts. *Id.*; Appx. C at 2. He said Besola used a computer to download child pornography from the internet. *Id.* Police obtained a second search warrant for the associated media. Appx.A at 2-3; Appx.C at 4.⁴ A number of homemade CDs, DVDs, and VHS tapes were seized from defendants' house with several computers. 3RP 391; Appx.A at 3. Illicit depictions of minors engaged in sexual conduct were found on 40 computer files. *Id.* A DVD-duplicating device was attached to one computer. Appx.A at 38-39; *e.g.*, 4RP 508-09; 5RP 772-73, 777. Duplicated depictions of minors engaged in sexual acts were also recovered. Appx. A at 38; *e.g.*, 4RP 497-505.

Defendants were charged with possession of depictions of minors engaged in sexually explicit conduct (RCW 9.68A.070), and duplicating such depictions (RCW 9.68A.050). Appx. A at 3. Their motion to suppress based on several alleged deficiencies in the second warrant was denied. CPMB 3-6; 7-32, 336-54, 370-448, 451-502; CPJS 130, 142-47, 205-19. That ruling was affirmed. *E.g.*, Appx. A at 4, 13-14, 20, 26. This Court only accepted review as to the second warrant's particularity.⁵

⁴ Appendix C is a copy of the Addendum Complaint for Search Warrant and Search Warrant. Ex. 3, 5 (10-19-10 Exhibit Record); CPMB 478-82.

⁵ Independent state grounds were not raised.

Defendants were tried together.⁶ The State proposed standard WPICs on the elements of each offense that did not include each WPIC's bracketed element No. 2, which would have explicitly required the State to prove: "defendant[s] knew the person depicted was a minor". CPMB 47-48, 54-55; WPIC 49A.04; WPIC 49A.06; Appx. D.⁷ Neither defendant objected. 8RP 1135; CPMB 35-65. Swenson did not propose instructions. Besola proposed instructions on unwitting possession, which were not given because knowledge of possession is an element. CPMB 72-76; 8RP 1127-33, 36. This Court granted review of the appellate decision affirming the trial court's instructions on the elements.

In closing argument, the prosecutor argued credible evidence proved defendants knowingly possessed, and duplicated, matter they knew to depict minors engaged in sexually explicit conduct. *E.g.* 8RP 55-61, 65, 70. Besola argued he did not knowingly possess illicit depictions Swenson secretly brought into the house. *E.g.*, 8RP 1174-75, 1178-93. Swenson argued poverty drove him to live in a house where Besola kept child pornography. *E.g.*, 8RP 1194-99. Defendants were convicted as charged. Appx.A at 3.

⁶ Handwriting on CDs containing illicit sexual depictions of minors was attributed to both defendants. Appx. C at 37; 3RP 417, 425, 427, 443, 444-45, 447. Testimony placed such depictions in places peculiar to each defendant. 3RP 366-73; 4RP 535-36; 5RP 762, 770-758; 6RP 851, 1091, 1093. Defendants stipulated Ex. 6, 23-63 depicted minors engaged in sexually explicit conduct. CPMB 70-71; CPJS 221-22; 3RP 425-27.

⁷ Appendix D consists of copies of the challenged instructions and associated WPICs.

C. ARGUMENT.

1. THE CHALLENGED WARRANT SATISFIED THE PARTICULARITY REQUIREMENT BECAUSE IT SUCCINCTLY LIMITED THE SEARCH TO EVIDENCE OF A NARROWLY DEFINED CRIME WITHIN A FINITE ARRAY OF MEDIA DIRECTLY LINKED TO THE OFFENSE UNDER INVESTIGATION.

The Fourth Amendment's particularity requirement "is not ... a demand for precise *ex ante* knowledge of the location and content of evidence" *United States v. Banks*, 556 F.3d 967, 972-73 (9th Cir. 2009). Particularity is a flexible standard, varying with the crime or items involved. *State v. Perrone*, 119 Wn.2d 538, 546-47, 834 P.2d 611 (1992); *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2012). It is achieved when the search is reasonably limited to the court's authorization. *Id.* (citing *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999); *State v. Oliver*, 161 Wn. App. 307, 319, 254 P.3d 883 (2011)). Overbreadth claims are reviewed *de novo* through a commonsense reading of the warrant. *Id.*

The challenged warrant identified the crime under investigation as "Possession of Child Pornography, RCW 9.68A.070". Appx.C; WA.Legis. c 262 § 3 (1984)("Formerly: Child pornography")⁸. That statute narrowly criminalized one act in a single sentence:

"A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct" WA Legis. c 139 § 3 (2006).

⁸ Appendix E contains the relevant provisions of Chapter 9.68A (1984).

The warrant accordingly authorized police to seize evidence of "Possession of Child Pornography RCW 9.68A.070", to wit:

"1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings; 2. Any and all printed pornographic materials; 3. Any photographs, but particularly of minors; 4. Any and all computer hard drives or laptop computers and any memory storage devices; 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material...." Appx.C

All of which was linked to evidence detailed in the Complaint:

"writeable CDs or DVDs ...title[d] 'Czech Boy Swap', 'Beginner' and 'Young Gay Euro'; a VHS tape labeled 'Berlin Men Holland (Boys)'; videos "of young males ... between eight and ten ... performing sex acts"; and Besola's use of a home computer to "download[d] child pornography from the internet...." Appx. C.

The warrant was affirmed on appeal as sufficiently particular. 2014 WL 2155229 at 2, 5(relying on *Perrone, supra*; *United States v. Burke*, 633 F.3d. 894, *cert. denied*, 131 S. Ct. 2130, 179 L. Ed. 2d 919(2011); *State v. Riley* 121 Wn.2d 22, 28, 846 P.2d 1365 (1993)).

- a. Citation to a narrowly drafted criminal statute is a practical method to constitutionally limit searches.

Search warrants need not be elaborately detailed. *United States v. Brobst*, 558 F.3d 982, 993 (9th Cir. 2009). Sufficient particularity can be achieved by reference to a narrowly drafted statute that limits the search to evidence of conduct criminalized by the legislature. See *Riley*, 121 Wn.2d

at 28; *Perrone*, 119 Wn.2d at 547, 553-54. Such references differ from undefined omnibus legal terms like "child pornography", which, when used without other limiting language, enable executing officers to expand the scope of the authorized search according to subjective notions of the crime under investigation. See *Perrone* at 553-55; *United States v. Meek*, 366 F.3d 705, 715-16 (9th Cir. 2004); *United States v. Rabe*, 848 F.2d 994, 998 (9th Cir. 1998). *Perrone* accordingly observed overbreadth resulting from a challenged warrant's use of the generic term "child pornography" (untethered to other language limiting the search to the crime under investigation) could have been cured through a specific reference to the statute defining the content capable of turning a depiction into contraband. *Id.* at 554, FN 3⁹); see also *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

The warrant challenged in defendants' case contained the statutory reference *Perrone* deemed sufficient, but not necessary, to achieve the requisite degree of particularity to seize evidence of a RCW 9.68A.070 violation presumptively protected by the First Amendment. *Id.* at 554, n4.

A similarly drafted warrant was upheld in *United States v. Hurt*:

"officers were specifically commanded to search for material 'depicting minors (that is, persons under the age of 16) engaged in sexually explicit activity'...This language

⁹ "Defendant maintains ... the language of RCW 9.68A.011, if used in a search warrant to describe the materials sought, would be sufficiently particular. This is so"

sufficiently circumscribed the officers' discretion ... Any rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16...."

808 F.2d 707, 708 (9th Cir. 1987) amending, 795 F.2d 765 (1986). Citation to RCW 9.68A.070 likewise provided police clear notice of the materials eligible for seizure under the challenged warrant, just as publication of the statute provides citizens without legal training notice of the depictions they must avoid. See *State v. Bradford*, 175 Wn. App. 912, 925-26, 308 P.3d 736 (2013). Unlike vague references to general statutes criminalizing a broad range of activities, RCW 9.68A.070's plain language precisely focused the search to evidence of a readily identifiable offense. E.g., *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988); *United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986). The citation provided police a practical means to succinctly draft a warrant capable of serving its vital public purpose of constitutionally obtaining evidence needed to enforce a law intended to prevent the clandestine sexual exploitation of children. See RCW 9.68A.001(1984); *Thorton v. United States*, 541 U.S. 615, 636, 124 S. Ct. 2127, 158 L. Ed. 905 (2004).

- b. The warrant also particularly described the items to be searched through a succinct list of media reasonably believed to contain evidence of the crime under investigation.

Items authorized to be searched are adequately identified in a warrant when there is a fair probability they contain evidence of the offense under investigation. *United States v. Taketa*, 923 F.2d 665, 674

(9th Cir. 1991)(quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 525 (1978)); *United States v. Ocampo*, 937 F.2d 485, 490 (9th Cir. 1991); *Banks*, 566 F.3d at 973; *Richards*, 659 F.3d at 539-40 (6th Cir. 2012); *Oliver*, 161 Wn. App. at 318-19.

The challenged warrant's limiting condition that evidence subject to seizure be connected to violations of RCW 9.68A.070 modified the subsequently listed media—all of which was explicitly tied to the criminal activity detailed in the Complaint. Appx.C.; *see generally Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 853 (2009); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001); *Banks*, 556 F.3d at 973. In this way, the warrant restricted the search to items likely to contain evidence of the offense under investigation. The Fourth Amendment did not require the warrant to redundantly restate the qualifying condition line by line to particularly describe each item. *Id.*

Defendants wrongly contend the hindsight knowledge some of the seized media was free of contraband proves the warrant too broadly described the items subject to seizure. Warrants need not be tailored to obtain only evidence known to exist. *Banks*, 556 F.3d at 973. When the challenged warrant was sought, police could not know how much of the particularly described media contained illicit depictions reasonably believed to be stored within that kind of media throughout defendants' house. *See United States v. Schesso*, 730 F.3d 1040, 1046 (9th Cir. 2013).

The rapid transferability of illicit depictions downloaded from the internet on a home computer among other digital devices, combined with the contraband's ability to be mislabeled, manipulated, or mixed with innocuous data to conceal it, justified seizing all items matching the media described in the warrant for a forensic examination aimed at segregating evidence authorized to be seized from other materials. *See Schesso*, 730 F.3d at 1046; *Richards*, 659 F.3d at 527, 538; *Banks*, 556 F.3d 967; *United States v. Summage*, 481 F.3d 1075, 1079-80 (8th Cir.2007); *United States v. Grimmett*, 439 F.3d 1263, 1269-70 (10th Cir.2006); *Upham*, 168 F.3d at 535; ER 201. The warrant was appropriately affirmed as sufficiently particular. *See Banks*, 556 F.3d at 974.

2. THE LEGISLATURE HAS CONSTITUTIONALLY ENACTED A STATUTORY SCHEME THAT MAKES THE AGE OF A MINOR DEPICTED IN MEDIA CRIMINALIZED UNDER RCW 9.68A .050 AND .070 A STRICT LIABILITY ELEMENT SUBJECT TO AN AFFIRMATIVE DEFENSE OF REASONABLE MISTAKE.

Before addressing the legal accuracy of the challenged instructions, it is necessary to single out the essential elements of RCW 9.68A.050 and .070. Statutory interpretation is reviewed *de novo*. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The statute's plain meaning is given effect as the expression of legislative intent. *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4

(2002)). Plain meaning is assessed according to the language's ordinary usage, the statute's context, and the statutory scheme's related provisions. *Jacobs*, 154 Wn.2d at 600. Interpretations leading to constitutional deficiencies or absurd results should be avoided. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

- a. Knowledge of a depicted person's minority is not an element of either RCW 9.68A.050 or .070.

Chapter 9.68A is purposed to protect children from those who seek personal gratification from their sexual exploitation. RCW 9.68A.001 (1984). The operative version of RCW 9.68A.050 (1989) provided:

"A person who: (1) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct ... is guilty of a class C felony punishable under chapter 9A.20 RCW."

And the relevant version of RCW 9.68A.070 (2006) stated:

"A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony."

Both offenses were subject to an affirmative defense of reasonable mistake regarding the depicted person's minority:

"In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.080, it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter: PROVIDED, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that the person depicted was a minor."

RCW 9.68A.110 (2) (2007).

The plain language the legislature used—and continues to use—since the 1984 enactment of the statutory scheme comprised in part of RCW 9.68A.050, .070, and .110 (2), distributes the scienter element of knowledge to "possessed" or "duplicated" and the sexually explicit nature of the material's content, but withholds it from the minority status of the person depicted. Wash.Legis.1984 c 262§ 10. The depicted person's minority is a strict liability element subject to a reasonable mistake defense. Conviction under RCW 9.68A.070 therefore requires:

- (1) That the defendant knowingly possessed visual or printed matter;
- (2) That the defendant knew the visual or printed matter depicted a person engaged in sexually explicit conduct; and
- (3) The person depicted was a minor.

As RCW 9.68A.050 requires:

- (1) That the defendant knowingly duplicated visual or printed matter;
- (2) That the defendant knew the visual or printed matter depicted a person engaged in sexually explicit

- conduct; and
(3) That the person depicted was a minor.

This reading is grammatically sound since the adverb "knowingly" may modify the elements in the verb phrase it precedes. See *Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 853 (2009); *J.M.*, 144 Wn.2d at 480. Legislative intent for "knowingly" to operate that way in 9.68A.050, .070 is textually signaled by its placement immediately before the other elements in a single clause. *Id.* (distinguishing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)). Contrary interpretations, like those defendants advanced, have been consistently rejected by Washington courts. *E.g.*, *State v. Killingsworth*, 166 Wn. App. 283, 289, 269 P.3d 1064 (adverb "knowingly" modifies both 'trafficked' and 'stolen' in verb phrase 'trafficked in stolen property') *rev.denied*, 174 Wn.2d 1007, 278 P.3d 1112 (2012); *State v. Swanson*, 181 Wn. App. 953, 961-62, 327 P.3d 67 (2014); *State v. Zeferino-Lopez*, 179 Wn. App. 592, 599-600, 319 P.3d 94 (2014).

"Knowingly" does not similarly modify the minority of the person depicted, as 9.68A.110 (2)'s first clause explicitly excludes it from the offense. The statute combines with 9.68A. 050, .070 to create a special statutory context in which "knowingly" modifies only part of the verb phrase (i.e., "possessed" or "duplicated" and the sexually explicit nature of the content) without modifying the full object, which includes the depicted

person's age. See *Flores-Figueroa*, 556 U.S. at 652. *Jacobs*, 154 Wn.2d at 600; *Killingsworth*, 166 Wn.App. at 289. It then safeguards the right to possess or duplicate adult pornography through an affirmative defense set forth in the second clause. See *X-Citement*, 513 U.S. at 72 (scienter extended to the performers' age in statute that did not include a reasonable mistake of age defense). The affirmative defense confounds defendants' attempt to link the scienter element of knowledge to the minor's age by imposing upon a defendant the obligation to disprove negligent¹⁰ ignorance of the depicted person's minority. See also *State v. W.R., J.R.*, ___ Wn.2d ___, ___ P.3d __ (2014WL 5490399, 4); *Eaton*, 168 Wn.2d at 480.

Under a complete reading of 9.68A.110(2) with .050 or .070: once the State proves a defendant knowingly possessed or duplicated visual or printed matter, and proves the defendant knew the matter depicted a person engaged in sexually explicit conduct—or scienter as to the character of the material possessed—a strict liability standard is imposed; provided the State can prove the minority of the person depicted. Thereafter, the *prima facie* violation may be excused if a defendant can prove by a preponderance of the evidence the absence of any facts that were capable of alerting him to the depicted person's minority.

¹⁰ *Segura v. Cabrera*, 179 Wn. App. 630, 643, 319 P.3d 98 ("[I]nclusion of the phrase "should have known" ... imposes liability for negligence.") *rev. granted*, 181 Wn.2d 1006, 332 P.3d 985 (2014).

- b. RCW 9.68A.110(2) constitutionally makes the depicted person's minority a strict liability element capable of being excused through a reasonable mistake of fact defense.

"[C]hild pornography ... is outside the protection of the First Amendment...." *State v. Luther*, 157 Wn.2d 63, 70-71, 134 P.3d 205 (2006)(quoting *New York v. Ferber*, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). The Legislature's enactment of RCW 9.68A.110(2), .050 and .070 amply provide for the constitutionally required scienter element recognized in *Luther*, by both requiring the State to prove a defendant's knowledge of the general nature of the matter possessed or duplicated (*i.e.*, that the defendant knew the matter depicted a person engaged in sexually explicit conduct), and by creating an affirmative defense to excuse violators engaged in conduct reasonably believed to be lawful. *See Id.*, *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 590 (1974); *State v. Rosul*, 95 Wn. App. 175, 184-85, 974 P.2d 916 (1999); *State v. Garbaccio*, 151 Wn. App. 716, 726, 734, 214 P.3d 168 (2009).

The First Amendment does not require statutes criminalizing child pornography to make knowledge of the depicted minor's age an element of the offense. *Luther*, 157 Wn.2d at 70-71; *Rosul*, 95 Wn. App. at 184-85; *United States v. United States Dist. Court*, 858 F.2d 534, 540 (9th Cir. 1988). A statutory scheme's inclusion of a reasonable mistake defense is all that is required to protect those who act under a reasonable belief they

possessed pornography¹¹ protected by the First Amendment. *Id.*; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255-56, 122 S. Ct.1389, 152 L. Ed. 2d 403 (2002)(citing 18 U.S.C. § 2252(A)(c)). Requiring a defendant to prove reasonable mistake is fair, for the defendant is best situated to know the information available when illicit depictions were possessed or duplicated. *See Smith v. United States*, ___ U.S. ___, 133 S. Ct. 714, 720-21, 184 L. Ed. 2d 570 (2013); *Central District of California*, 858 F.2d at 540; *State v. Riker*, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994). Washington's legislature exceeded the minimum constitutional requirement of an affirmative defense by combining it with the scienter element of knowledge as to the sexually explicit nature of the content possessed.

3. DEFENDANT'S JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF RCW 9.68A.050 and .070.

"[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Challenged instructions are reviewed *de novo*. *State v. Lew*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Error resulting from a missing or misstated element is harmless if the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d

¹¹ The United States Supreme Court occasionally suggests certain speech, far removed from the political arena, deserves less First Amendment protection. *E.g., Ferber*, 458 U.S. at 757, 762.

889 (2002)(citing *Neder v. United States*, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The instruction on RCW 9.68A.050's elements required the State to prove beyond a reasonable doubt:

"(1) That ... defendant [Besola/Swenson], or a person to whom [Besola/Swenson] was an accomplice, knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct...." Appx. D at 3-4; CPMB 91-92.

The instruction on RCW 9.68A.070's elements likewise required the State to prove beyond a reasonable doubt:

"(1) That ... defendant [Besola/Swenson], or a person to whom [Besola/Swenson] was an accomplice, knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct" Appx. D at 1-2; CPMB 98-99.

Both instructions were given without objection. 8RP 1135; CPMB 35-65. Defendants claimed for the first time on appeal each instruction was constitutionally deficient because it did not contain language conforming to bracketed element No. 2 in WPIC 49A.04 and WPIC 49A.06, which states: "That the defendant knew the person depicted was a minor".

- a. The challenged instructions included each essential element of each charged offense.

Instructions on the elements are constitutionally adequate if they contain a complete statement of the essential elements of each charged

offense. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). An essential element establishes the illegality of the behavior charged. *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). The essential elements of RCW 9.68A.050 and .070 require the State to prove defendants knowingly possessed or duplicated visual matter, knowing it depicted a person engaged in sexually explicit conduct, and the person depicted was a minor. *Id.*; *Luther*, 157 Wn.2d at 70-71, *Rosul*, 95 Wn. App. at 184-85. Neither offense requires the State to prove defendants knew the depicted person's minority, as RCW 9.68A.110(2) makes reasonable mistake of age an affirmative defense.

Both challenged instructions were constitutionally adequate since they substantively tracked the content and form of RCW 9.68A.050 and .070 by similarly setting forth the essential elements in a single clause which distributed the scienter element of knowledge to the elements of possession and duplication, as well as the nature of the matter depicted. *See supra*; RCW 9.68A.050, .070, .110(2); *Killingsworth*, 166 Wn. App. at 289; *Swanson*, 181 Wn. App. at 961-62; *Zeferino-Lopez*, 179 Wn. App. at 599-600. No essential elements were missing, so the instructions could not mislead the jury into convicting on inadequate proof. *See Id.*

The instructions also enabled defendants' to argue their theories of the case. Besola argued unwitting possession. 8RP 1174-75, 1178-93. Swenson argued proximity without possession. 8RP 1194-99. Both

defenses were argued from the instructions, which unambiguously required the State to prove the illicit depictions were knowingly possessed. CPMB 91-92; 98-99; JSPet. 11.

Defendants nevertheless claim the instructions were constitutionally inadequate for failing to explicitly require the State to prove defendants knew a person depicted in the illicit media was a minor. They are wrong as the inclusion of language requiring the State to prove such knowledge would have resulted in an inaccurate statement of law. RCW 9.68A's statutory scheme unambiguously makes the depicted person's minority a strict liability element subject to an affirmative defense of reasonable mistake, which neither defendant raised. *See* RCW 9.68A.110(2); Appx. A; CPMB 72-76; 8RP 1127-33, 36.

- b. Defendant's convictions should be affirmed even if knowledge of minority is read into the statutes since the jurors surely placed the burden of proving such knowledge on the State in the absence of an instruction conforming to RCW9.68A.110(2).

The challenged instructions tracked the language used in RCW 9.68A.050 and .070 to describe each offense. That language would naturally be interpreted as applying the scienter element of knowledge to the depicted person's minority absent limiting language from RCW 9.68A.110(2). CPMB 91-92; 98-99. Since the jurors were not instructed on that statute, they should have interpreted the instructions as requiring

the State to prove defendants knew people depicted in their illicit media were minors. *See e.g., Flores-Figueroa*, 556 U.S. at 652; *Killingsworth*, 166 Wn. App. at 289; *Swanson*, 181 Wn. App. at 961-62; *Zeferino-Lopez*, 179 Wn. App. at 599-600. That interpretation would have been reinforced by the State's presentation of the case. For example, in closing, the prosecutor argued defendants knew the content of the contraband they possessed. 8RP 1127, 1156, 1165. After marshalling evidence of each defendant's involvement, which included media depicting minors engaged in sexual acts with handwritten titles such as: "Gang Bang Teen Loves DVD", "Europe Boys", "Football Orgy Beach Boys Hotel ...", and "Boys Club 3...", the prosecutor concluded:

"How could the defendants not know all this was in the house? 8RP 1165.

She then addressed Swenson's admitted knowledge of the content:

We know ... Swenson told Deputy Tjossem there were numerous DVDs with child porn throughout the house. And he was right ... Swenson said ... he viewed ... videos of eight to ten year old boys engaged in sexually explicit activities." *Id.*

The jury was never called upon to reconcile any ambiguity capable of being read into the challenged instructions with argument contending defendants could be convicted if they knowingly possessed media containing illicit depictions of children despite being ignorant of that

content. There is no instructional error, let alone prejudicial error warranting reversal.

D. CONCLUSION.

The challenged warrant limited the search to particular evidence of the crime under investigation through a specific reference to the narrowly drafted statute describing that offense. Each element of RCW 9.68A.050 and .070 was adequately provided for in the challenged instructions, as neither statute requires the State to prove defendants knew the age of a person depicted in the illicit media they knowingly possessed. Their convictions should be affirmed.

DATED: December 5, 2014.

MARK LINDQUIST
Pierce County Prosecuting Attorney



JASON RUYF, WSB #38725
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by EMS 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.

12.5.14 Theresa Ka
Date Signature

APPENDIX "A"

Westlaw.

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NOTE: UNPUBLISHED OPINION, SEE WA R
 GEN GR 14.1

Court of Appeals of Washington,
 Division I.
 STATE of Washington, Respondent,
 v.
 Mark Lester BESOLA and Jeffrey Edwin Swenson,
 Appellants.

No. 71432-5-I.
 May 19, 2014.

Appeal from Pierce County Superior Court; Honorable Ronald E. Culpepper, Judge.
 Kathryn A. Russell Selk, Russell Selk Law Office,
 Suzanne Lee Elliott, Attorney at Law, Seattle, WA,
 for Appellants.

Stephen D. Trinen, Pierce County Prosecutors Office,
 Tacoma, WA, for Respondent.

UNPUBLISHED

COX, J.

*1 Mark Besola and Jeffrey Swenson appeal their judgments and sentences for possession of and dealing in depictions of a minor engaged in sexually explicit conduct. The trial court properly denied their motions to suppress evidence seized during the investigation of the crimes of conviction. The challenged jury instructions were properly given by the trial court. There is no showing that the trial court made any comment on the evidence. There was sufficient evidence to support the convictions. There was no abuse of discretion by the trial court in the evidentiary decisions challenged on appeal. The crimes of conviction do not involve the same criminal conduct. But the community custody conditions do not fully conform to the law. We affirm the convictions, but remand for resentencing only on the community custody conditions.

In 2009, law enforcement officers were investigating an informant named Kellie Westfall for criminal activity. She agreed to talk to them about Mark Besola and Jeffrey Swenson. Westfall told officers that Besola and Swenson had been in a relationship and lived together in Besola's house for a number of years.

She said that Besola was a veterinarian who would give Swenson controlled substances, and she observed a variety of these substances throughout the house. Westfall also told the officers that she saw child pornography throughout the house.

Based on Westfall's statements, law enforcement officers sought a warrant to seize both controlled substances and child pornography. The judge who issued the original warrant determined that probable cause existed only for the controlled substances.

During the execution of the warrant for controlled substances, officers observed CDs and DVDs with handwritten titles such as "Czech Boy Swap," "Beginner," and "Young Gay Euro." They did not seize these items but instead sought an addendum to the warrant. A different judge authorized the amendment of the warrant to authorize seizure of this additional evidence.

The warrant amendment identified the crime of investigation for the additional evidence as "*Possession of Child Pornography R.C.W. 9.68A.070.*" Moreover, it authorized the seizure of five broad categories of evidence, including "[a]ny and all videotapes, CDs, DVDs," and "any and all computer hard drives or laptop computers and any memory storage devices," as well as other evidence.

Officers executed the warrant amendment and seized a large number of homemade CDs, DVDs, VHS tapes, computers, and other evidence.

The State charged both Besola and Swenson

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with possession of depictions of minors engaged in sexually explicit conduct and with dealing in these types of depictions.^{FN1} They were tried together as co-defendants.

FN1. See RCW 9.68A.050; RCW 9.68A.070.

The jury convicted them as charged. The court sentenced them both to terms of confinement and also imposed a number of community custody conditions.

These appeals followed.

MOTIONS TO SUPPRESS

*2 Besola and Swenson challenge the validity of the search warrant, as amended. They claim that the trial court erred when it denied their motions to suppress.

They first argue that the search warrant amendment was not sufficiently particular. They next argue that Westfall, the informant who provided the information on which the original search warrant was based, was not credible and could not provide the basis for probable cause required to issue the warrant. Finally, they argue that the officers who obtained the warrant intentionally or recklessly omitted material facts from the supporting affidavit.

We address, in turn, each of these challenges.

Particularity Requirement

Besola and Swenson argue that the warrant amendment is not sufficiently particular. They contend that the warrant amendment did not describe the items to be seized with particularity given First Amendment protections. They also argue that the warrant amendment did not indicate the specific crime being investigated.

The Fourth Amendment mandates that a search warrant describe with particularity the things to be seized.^{FN2} The purpose of this particularity requirement is “to limit the executing officer’s discretion” and “to inform the person subject to the

search what items the officer may seize.”^{FN3} The degree of specificity required necessarily varies “according to the circumstances and the type of items involved.”^{FN4}

FN2. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (citing U.S. CONST. amend. 4).

FN3. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

FN4. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997).

We review de novo whether a search warrant contains a sufficiently particularized description to satisfy the Fourth Amendment, but we construe the language “in a commonsense, practical manner, rather than in a hypertechnical sense.”^{FN5}

FN5. *Perrone*, 119 Wn.2d at 549.

In *State v. Perrone*, the supreme court considered the First Amendment’s effect on the particularity requirement.^{FN6} It explained, “Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater than in the case where the materials sought are not protected by the First Amendment.”^{FN7} In other words, “such warrants must follow the Fourth Amendment’s particularity requirement with ‘scrupulous exactitude.’”^{FN8}

FN6. 119 Wn.2d 538, 547–48, 834 P.2d 611 (1992).

FN7. *Id.* at 547.

FN8. *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007) (internal quotation marks omitted) (quoting *Perrone*, 119 Wn.2d at 550).

Here, there does not appear to be any disagreement among the parties before us that a heightened

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standard of particularity applies to those items listed in the warrant that are protected by the First Amendment. The search warrant amendment stated in relevant part:

Possession of Child Pornography R.C.W. 9.68A.070

That these felonies were committed by the act, procurement or omission of another and that the following evidence is material to the investigation or prosecution of the above described felony, to-wit:

1. Any and all *video tapes, CDs, DVDs*, or any other *visual* and or audio *recordings*;
2. Any and all printed pornographic materials;....^[FN9]

FN9. Ex. 3 (some emphasis added).

The items that the court authorized to be seized in this case—“*video tapes, CDs, DVDs*”—are sufficiently similar to “[b]ooks, films, and the like,” that are “*presumptively* protected by the First Amendment where their content is the basis for seizure.”^{FN10} And these prosecutions were based, in large part, on seizure of these items.

FN10. *Perrone*, 119 Wn.2d at 550.

*3 Thus, the issue is whether the description—“*Possession of Child Pornography R.C.W. 9.68A.070*”—satisfies the heightened standard of particularity required for seized evidence that is presumptively protected by the First Amendment.

In *Perrone*, the supreme court concluded that the search warrant before it was not sufficiently particular partly because it did not specifically reference the crime under investigation.^{FN11} There, the warrant at issue authorized the seizure of a number of items.^{FN12} After striking portions of the warrant that were not supported by probable cause, it authorized seizure of “[c]hild ... pornography; photographs, movies, slides, video tapes, magazines

... of children ... engaged in sexual activities....”^{FN13} The court concluded that the term “child pornography” was an insufficient reference to the crime being investigated.^{FN14} It gave three reasons for this conclusion.

FN11. *Id.* at 555.

FN12. *Id.* at 543.

FN13. *Id.* at 552.

FN14. *Id.* at 552–55.

First, the court stated that “child pornography” is an “‘omnibus legal description’ and is not defined in the statutes.”^{FN15} It stated that this term gives law enforcement too much discretion in deciding what to seize and is not “scrupulous ex-actitude.”^{FN16}

FN15. *Id.* at 553–55.

FN16. *Id.*

Second, the court explained that a more particular description than “child pornography” was available at the time the warrant was issued.^{FN17} For example, the language in former RCW 9.68A.011 (1989), which defines “sexually explicit conduct” for the statutory chapter involving sexual exploitation of children, could have been used.^{FN18}

FN17. *Id.* at 553–54.

FN18. *Id.* (citing former RCW 9.68A.011 (1989)); *see also* RCW 9.68A.011(4) (“‘Sexually explicit conduct’ means actual or simulated: (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; (b) Penetration of the vagina or rectum by any object; (c) Masturbation; (d) Sadomasochistic abuse; (e) Defecation or urination for the pur-

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

Third, the court stated that reference to illegal activity in the form of “child pornography” could not “save” the warrant.^{FN19} The court explained that “so much of the rest of the warrant suffer[ed] from lack of probable cause and from insufficient particularity.”^{FN20} “It is simply too much to believe that a term overly general in itself can provide substantive guidance for the exercise of discretion in executing a warrant otherwise riddled with invalidities.”^{FN21}

FN19. *Id.* at 555.

FN20. *Id.*

FN21. *Id.*

Here, under *Perrone*, the “*Child Pornography*” description in the amended warrant is patently insufficient to satisfy the particularity requirement of the constitution. Moreover, the terms of the statute—possession of depictions of a minor engaged in sexually explicit conduct—were available for use at the time of the issuance of the warrant, as the *Perrone* court suggested.^{FN22} But the more specific terms of the statute were not used in this warrant. For both reasons, this portion of the description fails the particularity requirement that *Perrone* requires.

FN22. *Id.* at 553–54.

Attempting to distinguish this case from *Per-*

rone, the State asserts that this warrant contains the statutory citation to “*R.C.W. 9.68A.070*,” whereas the warrant in *Perrone* did not cite the relevant statute. The State further argues that this citation fulfills the particularity requirement that the constitution imposes for evidence presumptively subject to First Amendment protection.

*4 The year after *Perrone*, the supreme court, in *State v. Riley*, clarified that when the items to be seized cannot be precisely described at the time the warrant is issued, “generic classifications such as lists are acceptable.”^{FN23} But “[i]n such cases, *the search must be circumscribed by reference to the crime under investigation*; otherwise, the warrant will fail for lack of particularity.”^{FN24}

FN23. 121 Wn.2d 22, 28, 846 P.2d 1365 (1993).

FN24. *Id.*; see also *State v. Askham*, 120 Wn.App. 872, 878, 86 P.3d 1224 (2004) (“The required degree of particularity may be achieved by specifying the suspected crime.”).

Importantly, *Riley* did not involve evidence entitled to First Amendment protection.^{FN25} And that case contains little guidance for this case beyond the general statement in the previous paragraph.

FN25. *Riley*, 121 Wn.2d at 26.

The State also relies heavily on *State v. Ollivier* to support its position.^{FN26} In that case, this court cited *Riley* when it concluded that a warrant was sufficiently particular in a search for evidence of violation of RCW 9.68A.070.^{FN27} This court reasoned in just a few sentences that the warrant there included a “citation to the statute which Ollivier was accused of violating.”^{FN28} There was no further explanation of what the warrant actually stated.

FN26. Brief of Respondent at 37–46 (citing *State v. Ollivier*, 161 Wn.App. 307,

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318–19, 254 P.3d 883 (2011)); *see also* Report of Proceedings (Feb. 2, 2012) at 27, 38.

FN27. *Ollivier*, 161 Wn.App. at 318–19 (citing *Riley*, 121 Wn.2d at 28).

FN28. *Id.*

Here, the State asserts that the citation to “*R.C.W. 9.68A.070*” in this search warrant made it sufficiently particular, notwithstanding the patently deficient description, “*Child Pornography*,” that precedes this citation.

In our view, neither *Riley* nor *Ollivier* provides a clear answer to the question in this case. That is because neither case involved a warrant that authorized seizure of items presumptively protected by the First Amendment. *Riley* involved the seizure of “notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.”^{FN29} *Ollivier* involved the seizure of “a red lock box, computers, and the peripheral hardware associated with computers.”^{FN30} Thus, none of this evidence in either case implicates the particularity requirement that is to be followed with “‘scrupulous exactitude’” under *Perrone*.^{FN31}

FN29. *Riley*, 121 Wn.2d at 26.

FN30. *Ollivier*, 161 Wn.App. at 318.

FN31. *Reep*, 161 Wn.2d at 815 (quoting *Perrone*, 119 Wn.2d at 548).

Unlike *Riley* and *Ollivier*, as previously discussed, some of the items listed in the amended warrant are presumptively subject to First Amendment protection because they were seized on the basis of their content.

Moreover, neither *Riley* nor *Ollivier* clearly answers the question whether the statutory citation, by

itself, is a sufficient “reference to the crime under investigation” that circumscribes the generic classifications of items to be seized in this warrant amendment.^{FN32} In *Riley*, the warrant did not state any crime.^{FN33} In *Ollivier*, the court stated that there was a citation to the statute in the warrant.^{FN34} But the court did not address if the citation met the particularity requirement for seizure of evidence presumptively subject to the protections of the First Amendment.

FN32. *Riley*, 121 Wn.2d at 28; *Ollivier*, 161 Wn.App. at 318–19.

FN33. *Riley*, 121 Wn.2d at 26.

FN34. *See Ollivier*, 161 Wn.App. at 318–19.

*5 The parties before us have not provided any relevant briefing on this particularity requirement beyond the cases we already discussed in this opinion. But we note that a number of federal circuit courts have held that reference to a “broad” statute does not fulfill the particularity requirement but reference to a “narrow” statute may be sufficient.

For example, in *United States v. Leary*, the Tenth Circuit explained that “reference to a broad federal statute is not a sufficient limitation on a search warrant.”^{FN35} A “broad federal statute” is one that is “general” in nature,^{FN36} has “exceptional scope,”^{FN37} or covers “a broad range of activity.”^{FN38} The Tenth Circuit further noted that “some federal statutes may be narrow enough to meet the fourth amendment’s requirement.”^{FN39}

FN35. 846 F.2d 592, 601 (10th Cir.1988).

FN36. *See United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir.1982).

FN37. *See United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir.1986).

FN38. *Leary*, 846 F.2d at 601.

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FN39. *Id.*

Here, it appears that RCW 9.68A.070 is sufficiently narrow to fall within the limits discussed in the previous paragraph to meet the constitutional requirement of particularity. This statute is specific in describing the way that a person may commit this offense: “knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct.”^{FN40}

FN40. RCW 9.68A.070.

United States v. Burke is the best guidance that we have discovered in our research to assist us in resolving the particularity issue in this case.^{FN41} That was a prosecution for possession of child pornography under a federal statute.^{FN42} There, the search warrant authorized the seizure of computers, firearms, photos, magazines, and videos or compact discs.^{FN43}

FN41. 633 F.3d 984, *cert. denied*, 131 S.Ct. 2130, 179 L.Ed.2d 919 (2011).

FN42. *Id.* at 987.

FN43. *Id.* at 992.

Burke argued that the warrant issued to allow the search of his home did not properly limit the search, violating the Fourth Amendment.^{FN44} The Tenth Circuit concluded that the statutory reference was narrow enough to satisfy the particularity requirement.^{FN45} The court explained, “[T]he charge listed on the warrant is the sexual exploitation of a child followed by a statutory reference, a charge ‘narrow enough to meet the fourth amendment’s requirement’ by bringing to [the] officers’ attention the purpose of the search.”^{FN46}

FN44. *Id.* at 991.

FN45. *Id.* at 992.

FN46. *Id.*

The court also indicated that whether the war-

rant was constitutional was a close question. It stated:

We emphasize that while we find the warrant in this case meets constitutional muster, the government can do better. We are confident an increase in particularity and detail will help avoid appeals like this one. Despite our conclusion on the facts of this case, we encourage law enforcement officers in the future to help the issuing court produce a warrant that obviates the flaws identified in this case.^(FN47)

FN47. *Id.* at 993 n. 4.

We conclude that the statutory reference to the crime, “*R.C.W. 9.68A.070*,” in this warrant was sufficiently narrow and particular to meet constitutional muster. *Riley* makes clear that the search authorized by the warrant must be circumscribed by reference to the crime under investigation. But it does not specify how specific that reference must be when the First Amendment presumptively applies. *Burke* establishes that a statutory citation may be sufficient if the crime under investigation is sufficiently narrow. Based on these cases, we cannot say that this warrant fails to meet these tests.

*6 We note, as the *Burke* court did, that the government can do better when seeking warrants that implicate First and Fourth Amendment protections. As *Perrone* makes clear, “*Child Pornography*” is patently insufficient to meet the “scrupulous exactitude” that the constitution requires where evidence is presumptively subject to First Amendment protection.^{FN48} Moreover, a warrant may not meet the particularity requirement if it does not contain a citation to a sufficiently narrow statute to reference the crime under investigation. Thus, like *Burke*, “we encourage law enforcement officers in the future to help the issuing court produce a warrant that obviates the flaws identified in this case.”^{FN49}

FN48. *Perrone*, 119 Wn.2d at 552–53.

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FN49. *Burke*, 633 F.3d at 993 n. 4.

The State makes two additional arguments. It argues that "items of apparent evidentiary value may also be seized even though they are not contraband." ^{FN50} The State also asserts that even if portions of the warrant are insufficiently particular, the severability doctrine should be applied to save valid parts of the warrant.^{FN51} Given the previous analysis, we need not reach these arguments.

FN50. Brief of Respondent at 46–49 (citing *United States v. Banks*, 556 F.3d 967, 973 (9th Cir.2009); *United States v. Richards*, 659 F.3d 527, 539 (6th Cir.2011)).

FN51. *Id.* at 49–50.

Informant's Credibility

Besola and Swenson next argue that the trial court erred when it concluded that Westfall was a credible citizen informant and that there was probable cause to issue a search warrant based on her statements. We disagree.

A search warrant may only be issued upon a determination of probable cause. ^{FN52} Probable cause is established where there are "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." ^{FN53}

FN52. *State v. Fry*, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010) (citing U.S. CONST. amend. 4; WASH. CONST., art. 1, § 7).

FN53. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

On appellate review, this court considers the same evidence presented to the judicial officer who issued the warrant.^{FN54} This court reviews de novo the issuing judicial officer's conclusion of law that probable cause is established.^{FN55}

FN54. *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007).

FN55. *Id.*; *Ollivier*, 178 Wn.2d at 848.

We reject the State's argument that we review for abuse of discretion the issuing judicial officer's legal conclusion that probable cause has been established. Although "[p]rior case law on the standard of appellate review of such probable cause determination is admittedly muddled," the more recent cases have held that de novo review is the applicable standard.^{FN56}

FN56. *In re Pet. of Petersen*, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002).

"When a search warrant is based on an informant's tip, the constitutional criteria for determining probable cause is measured by the two-pronged *Aguilar–Spinelli* test." ^{FN57} The two prongs consist of the "'veracity' or the credibility of the informant, and the informant's 'basis of knowledge.'" ^{FN58} Here, Besola and Swenson only challenge Westfall's credibility.

FN57. *Chamberlin*, 161 Wn.2d at 41 (citing *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)).

FN58. *State v. Atchley*, 142 Wn.App. 147, 161, 173 P.3d 323 (2007) (quoting *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984)).

"The credibility of a confidential informant depends on whether the informant is a private citizen or a professional informant and, if a citizen informant, whether his or her identity is known to the police." ^{FN59}

FN59. *Id.* at 162.

In *State v. Chamberlin*, the supreme court considered whether an informant was credible.^{FN60}

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There, the informant, Randall Paxton, was arrested for driving while under the influence, attempting to elude a pursuing police vehicle, and reckless driving.^{FN61} Paxton admitted to being under the influence of methamphetamine and marijuana, and he offered to provide a statement that he got these drugs from Scott Chamberlin.^{FN62} The police told Paxton that they would not make “any deal regarding his criminal charges” if he provided a statement.^{FN63} But Paxton still gave a tape-recorded statement regarding Chamberlin.^{FN64}

FN60. 161 Wn.2d 30, 41–42, 162 P.3d 389 (2007).

FN61. *Id.* at 34.

FN62. *Id.*

FN63. *Id.*

FN64. *Id.*

*7 The supreme court concluded that Paxton was a reliable citizen informant because Paxton made a statement against his penal interest when he admitted to driving under the influence.^{FN65} Moreover, Paxton revealed his identity. He was willing to “publicly stand by his information.”^{FN66} The court explained, “This particular set of considerations need not be met in every case, but in this case, these factors are sufficient” to establish the “veracity” or “credibility” prong of the *Aguilar–Spinelli* test.^{FN67}

FN65. *Id.* at 42.

FN66. *Id.*

FN67. *Id.*

Here, the original search warrant affidavit was primarily based on Westfall's statements to law enforcement. Similar to *Chamberlin*, Westfall was a credible informant who revealed her identity. The affidavit stated that Westfall was willing to testify and have her statements recorded. Additionally,

Westfall made statements against her penal interest. The affidavit stated that Westfall was a “methamphetamine user, who both sold to and bought from Mr. Swenson and Mr. Besola.” Thus, like *Chamberlin*, the trial court properly concluded that the “veracity” or “credibility” prong was satisfied and Westfall was a credible informant. Because the basis of her knowledge is unchallenged, the controlling test is satisfied.

Besola and Swenson argue that Westfall was not a credible informant because she “was possibly a participant in the crime under investigation, was implicated in other crimes, and was possibly acting in the hope of gaining leniency.” They cite *State v. Rodriguez* to support this argument.^{FN68}

FN68. Appellant's Opening Brief at 30 (citing *State v. Rodriguez*, 53 Wn.App. 571, 769 P.2d 309 (1989)).

There, Division Three explained that “suspicious circumstances” surrounding an informant's statement can “greatly diminish[] the presumption of reliability of the informant[].”^{FN69} These “suspicious circumstances” include when an informant is criminally involved or otherwise motivated by self-interest.^{FN70}

FN69. *Rodriguez*, 53 Wn.App. at 576–77.

FN70. *Id.*

Here, the search warrant affidavit stated that she came in contact with law enforcement because she was being investigated for another crime:

Deputy Tjossen was contacted by Officer Boyle with the Washington State Auto Task Force on March 25, 2009. Officer Boyle was investigating Kellie Westfall in regards to a stolen vehicle. During the contact with Deputy Tjossen and Officer Boyle, Ms. Westfall reported that her friend, Jeffrey Swenson, was obtaining drugs from his roommate, Mark Besola.^{FN71}

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FN71. Clerk's Papers at 308.

The affidavit does not state why Westfall wanted to talk to law enforcement, but the fact that she was being investigated for another crime does raise some suspicions about her veracity or credibility as an informant. But such suspicions do not outweigh her credibility, given several considerations. First, Westfall is not identified as a professional informant who was paid for her statements.^{FN72} Nor does the affidavit state that law enforcement made any promises to Westfall if she cooperated.^{FN73} Second, Westfall provided substantial detail in her statement, which can outweigh the suspicions.^{FN74} Third, as previously discussed, Westfall made statements against her penal interest.^{FN75} Finally, in *Chamberlin*, the informant was being investigated for other crimes, but the court still concluded that the informant was reliable.^{FN76} For these reasons, this argument is not persuasive.

FN72. See *Atchley*, 142 Wn.App. at 162 (“The credibility of a confidential informant depends on whether the informant is a private citizen or a professional informant and, if a citizen informant, whether his or her identity is known to the police.”).

FN73. See *Chamberlin*, 161 Wn.2d at 34, 42.

FN74. See *State v. Northness*, 20 Wn.App. 551, 558, 582 P.2d 546 (1978) (“[T]he fact that an identified eyewitness informant may also be under suspicion—in this case because of her initial contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant's identity.”).

FN75. See *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981) (“Since one who admits criminal activity to a police officer faces possible prosecution, it is generally held to be a reasonable inference that a

statement raising such a possibility is a credible one.”).

FN76. *Chamberlin*, 161 Wn.2d at 34, 42.

*8 Swenson argues that “[t]he idea that a person who makes a statement against penal interest must be telling the truth because they have potentially incriminated themselves, however, ignores important facts.”^{FN77} He cites a law review article to point out problems with this idea.^{FN78} But, as previously discussed, the supreme court has considered statements against penal interest in determining whether the “veracity” or “credibility” prong is met.^{FN79} Thus, we follow the supreme court, not the law review article.

FN77. Opening Brief of Appellant Swenson at 19.

FN78. *Id.* at 19–20 (citing Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L.Rev. 225, 239–40 (2010)).

FN79. See *Chamberlin*, 161 Wn.2d at 42.

Franks Hearing

Besola and Swenson argue that the trial court erred when it denied their motion for a *Franks* hearing. They allege that the search warrant affidavit omitted material facts. We disagree.

Under *Franks v. Delaware*, a criminal defendant may challenge material misrepresentations in an affidavit supporting a search warrant.^{FN80}

FN80. *State v. Cord*, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985) (citing *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *United States v. Martin*, 615 F.2d 318 (5th Cir.1980); *United States v. Park*, 531 F.2d 754, 758–59 (5th Cir.1976)).

A court begins with the presumption that the

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affidavit supporting a search warrant is valid.^{FN81} Then, “[a]s a threshold matter, the defendant must first make a ‘substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.’”^{FN82} “Importantly, the *Franks* test for material representations has been extended to material omissions of fact.”^{FN83}

FN81. *Atchley*, 142 Wn.App. at 157.

FN82. *Id.* (quoting *Franks*, 438 U.S. at 155–56).

FN83. *Id.* at 158.

Reckless disregard for the truth occurs when the affiant “ ‘in fact entertained serious doubts as to the truth’ of facts or statements in the affidavit.”^{FN84} Such “serious doubts” are shown by “ ‘(1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’”^{FN85} “Assertions of mere negligence or innocent mistake are insufficient.”^{FN86}

FN84. *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting *State v. O'Connor*, 39 Wn.App. 113, 117, 692 P.2d 208 (1984)).

FN85. *Id.* (quoting *O'Connor*, 39 Wn.App. at 117).

FN86. *Atchley*, 142 Wn.App. at 157.

“In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant,” but rather, the court must find “the challenged information was necessary to the finding of probable cause.”^{FN87}

FN87. *Id.*, at 158.

“If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit.”^{FN88} “If the affidavit with the matter ... inserted ... remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required.”^{FN89}

FN88. *Id.*,

FN89. *Id.* (quoting *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992)).

Here, Besola and Swenson argue that Detective Sergeant Teresa Berg and Deputy R. Vance Tjossem omitted certain material facts from the affidavit for the original search warrant. In its findings of fact and conclusion of law, the trial court listed 13 statements that Besola and Swenson claim were recklessly omitted:

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

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

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

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

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

f. Ms. Westfall was subsequently ordered to be

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released from jail on her personal recognizance on April 13, 2009 and directed to report back to drug court;

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

h. Ms. Westfall [had] bought drugs [from] Mr. Swenson;

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

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

...

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

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

n. The vials of Valium that Ms. Westfall saw in the house were for Mr. Besola's dog, who had cancer.^[FN90]

FN90. Clerk's Papers at 13–14.

The trial court then concluded that none of these statements "were omitted from the search warrant affidavit intentionally or with a reckless disregard for the truth."^{FN91} Further, the court determined that "none of the statements listed above were material or necessary to the finding of probable cause."^{FN92}

FN91. *Id.* at 13.

FN92. *Id.* at 14.

Besola and Swenson argue that Sergeant Berg and Deputy Tjossem recklessly disregarded the truth because they failed to include information that was readily available. They contend that Westfall's statements previously described were available through the tape-recorded interview. They also assert that her criminal history was available through public records.

In its oral ruling, the trial court stated that some of the alleged omissions involved "nuances of Drug Court." The court stated:

[Westfall] had not been kicked out of Drug Court, it appears, at the time that this interview took place, but she had been put into Drug Court. To find that law enforcement officers are required to know the nuances of Drug Court and what the stipulation means, as far as whether that falls into the category of a conviction or omission, I think is asking too much of law enforcement. Certainly doesn't rise to the level of any reckless or intentional act to not include the fact she was in Drug Court, what the status was of that.^[FN93]

FN93. Report of Proceedings (Oct. 19, 2012) at 30.

*10 But even assuming that some of the omissions were intentional or reckless, the affidavit would have established probable cause even if the omitted information had been included. Much of the information contained in the 13 statements was in the search warrant affidavit in some form.

For example, the affidavit did not state that Westfall was charged with five different crimes and was incarcerated at the time she gave her statement to the law enforcement officers. But the affidavit did state that Deputy Tjossem was investigating her for a crime and told another officer that Westfall

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was willing to make a statement.^{FN94} Additionally, Besola and Swenson assert that the affidavit did not state that Westfall bought drugs from Swenson. But the affidavit states, "Westfall is a methamphetamine user, who both sold to and bought from Mr. Swenson and Mr. Besola." Further, Besola and Swenson contend that the affidavit did not state that Westfall was no longer able to stay at Besola's house because Besola did not like her. But the affidavit states, "Mr. Besola does not really like Ms. Westfall, but she is allowed into the home, because of Mr. Swenson and the controlled substances. She has stayed overnight at the home several times."

FN94. Clerk's Papers at 308.

In sum, a *Franks* hearing was not required. The omitted information was not necessary to the determination of probable cause.

Besola and Swenson argue that the omissions are material because "they bear directly on Westfall's credibility." While this may be true, as previously discussed, the search warrant affidavit provided sufficient information to allow the trial court to determine whether Westfall was a credible witness. The 13 omitted statements do not change this determination.

Besola and Swenson also assert that the supreme court has "found an affiant reckless in circumstances quite similar to those found here." They cite *Turngren v. King County* to support this assertion.^{FN95} That case is distinguishable.

FN95. Appellant's Opening Brief at 35 (citing *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985)).

Turngren involved a civil action for malicious prosecution, false arrest and false imprisonment, libel, and slander.^{FN96} For the malicious prosecution claim, the court looked at misstatements and omissions in the affidavit in support of the search warrant.^{FN97} The court noted that the affidavit

made it seem like an informant voluntarily gave law enforcement information.^{FN98} When "[i]n actuality, the informant's statements, given in response to police questioning about his own criminal activity, could be construed as an effort to exculpate himself and turn police interest away from his own crimes." ^{FN99} The court explained that none of this information was presented to the magistrate.^{FN100} The court concluded, "A prima facie want of probable cause, together with the discrepancies between the informant's track record as set out in the affidavit and in the deposition, permits an inference of malice sufficient to survive summary judgment." ^{FN101}

FN96. *Turngren*, 104 Wn.2d at 295.

FN97. *Id.* at 305-08.

FN98. *Id.* at 308.

FN99. *Id.*

FN100. *Id.*

FN101. *Id.* at 309.

Turngren is distinguishable from this case for two reasons. First, *Turngren* was analyzing a malicious prosecution claim. Moreover, the search warrant affidavit in this case contained some of Westfall's criminal history, and it explained when Westfall provided a tape-recorded statement to law enforcement. The affidavit stated that Westfall was being investigated for a crime when she decided to talk to law enforcement. Thus, Besola and Swenson's reliance on *Turngren* is not persuasive.

JURY INSTRUCTIONS

*11 Besola and Swenson argue that the trial court improperly instructed the jury. Specifically, they contend that RCW 9.68A.070 and RCW 9.68A.050, possession of and dealing in depictions of minors engaged in sexually explicit conduct, require that they knew the persons depicted were minors. They contend that this element was missing from the jury instructions. We disagree.

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This court reviews de novo alleged errors of law in jury instructions. ^{FN102} “Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt.” ^{FN103} “Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt.” ^{FN104} “It is reversible error to instruct the jury in a manner that would relieve the State of this burden.” ^{FN105}

FN102. *State v. Lew*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

FN103. *State v. Garbaccio*, 151 Wn.App. 716, 732, 214 P.3d 168 (2009) (citing U.S. CONST. amend. XIV; WASH. CONST. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)), *review denied*, 168 Wn.2d 1027 (2010).

FN104. *State v. Peters*, 163 Wn.App. 836, 847, 261 P.3d 199 (2011).

FN105. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

As a general rule, “jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case.” ^{FN106}

FN106. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

Former RCW 9.68A.070 (2006), the law in effect at the time of the crimes, stated:

A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony.

Former RCW 9.68A.050 (1989) stated:

A person who:

(1) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct ... is guilty of a class C felony punishable under chapter 9A.20 RCW.

In *State v. Garbaccio*, this court analyzed RCW 9.68A.070. ^{FN107} It explained that the supreme court had concluded that this statute contained a “scienter element,” which is “knowingly.” ^{FN108} This element is necessary to avoid First Amendment problems. ^{FN109} This court further stated that in order to avoid constitutional difficulty, this court had previously construed this statute to require “ ‘a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed.’ ” ^{FN110}

FN107. 151 Wn.App. 716, 732–34, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027 (2010).

FN108. *Id.* at 733 (citing *State v. Luther*, 157 Wn.2d 63, 71, 134 P.3d 205 (2006)).

FN109. *Id.*

FN110. *Id.* (quoting *State v. Rosul*, 95 Wn.App. 175, 185, 974 P.2d 916 (1999)).

In *State v. Rosul*, this court noted that “ ‘[a] natural grammatical reading of [the statute] would apply the scienter requirement to possession, but not to the age of the children depicted.’ ” ^{FN111} But if the statute was read in this manner, “the statute might be viewed as being facially overbroad because it would allow for the imposition of criminal liability against individuals engaged in otherwise innocent conduct who happen merely to possess contraband.” ^{FN112}

FN111. *Id.* (alterations in original) (quoting *Rosul*, 95 Wn.App. at 182).

FN112. *Id.*

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Thus, in both cases, this court construed “RCW 9.68A.070 ‘as requiring a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed.’”^{FN113} Essentially, “the State must prove more than mere possession of contraband; *it must prove possession with knowledge of the nature of the illegal material.*”^{FN114}

FN113. *Id.* (quoting *Rosul*, 95 Wn.App. at 185).

FN114. *Id.* at 734 (emphasis added).

*12 In *Garbaccio*, this court concluded that the trial court adequately instructed the jury when it relied on pattern jury instructions for possession of depictions of a minor engaged in sexually explicit conduct.^{FN115} The pattern jury instructions and the instructions in that case read:

FN115. *Id.*

Instruction No. 6—Elements of Charged Offense (11 WPIC 49A.04):

To convict the defendant of the crime of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 3, 2006, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;

(2) *That the defendant knew the person depicted was a minor;* and

(3) That this act occurred in the State of Washington.^{FN116}

FN116. *Id.* at 725 n. 4 (emphasis added).

The *Garbaccio* court concluded that “the trial court adequately instructed the jury as to the ele-

ments of the charged offense.”^{FN117}

FN117. *Id.* at 734.

In this case, the issue is whether the jury instructions, which do not duplicate the pattern instructions are, nevertheless, adequate. The instructions for RCW 9.68A.070 read:

To convict defendant BESOLA [AND SWENSON] of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 21st day of April, 2009, defendant BESOLA [AND SWENSON], or a person to whom he was an accomplice, *knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct*, and

(2) That this act occurred in the State of Washington.^{FN118}

FN118. Clerk's Papers at 98–99 (emphasis added).

The instructions for RCW 9.68A.050 read:

To convict defendant BESOLA [AND SWENSON] of the crime of dealing in depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of September 27, 2008 through April 21, 2009, defendant BESOLA [AND SWENSON], or a person to whom he was an accomplice, *knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct*, and

(2) That this act occurred in the State of Washington.^{FN119}

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FN119. *Id.* at 91–92 (emphasis added).

These instructions, fairly read, inform the jury that the State had to “prove possession with knowledge of the nature of the illegal material.”^{FN120} The instructions are stated in a way that “knowingly” modifies “possessed visual or printed matter depicting a minor engaged in sexually explicit conduct” for the first crime. Likewise, “knowingly” modifies “duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct” for the second crime.^{FN121} Thus, under *Rosul* and *Garbaccio*, these instructions satisfied the scienter element—knowingly. It was not fatal for this court to give instructions that did not duplicate the pattern instructions.

FN120. *Garbaccio*, 151 Wn.App. at 734.

FN121. Clerk's Papers at 91–92; *see, e.g., State v. Killingsworth*, 166 Wn.App. 283, 289, 269 P.3d 1064 (“The ‘to convict’ instruction required the jury to find that Killingsworth ‘knowingly trafficked in stolen property.’ The most natural reading of the adverb ‘knowingly,’ as used in this instruction, is that it modifies the verb phrase ‘trafficked in stolen property.’”), *review denied*, 174 Wn.2d 1007 (2012).

*13 Moreover, the jury instructions permitted the parties to argue their theories of the case.^{FN122} Besola and Swenson were both able to present their defenses, which was to point to their co-defendant and argue that he was the sole offender. A properly instructed jury rejected these defenses. There was no error.

FN122. *See Teal*, 152 Wn.2d at 339.

Besola and Swenson argue that, in *State v. Luther*, the supreme court held that “not only do defendants have to know they are possessing or duplicating pornography, they must also know that the persons depicted are minors.”^{FN123} Further, they contend that this element does not appear in the

jury instructions.

FN123. Appellant's Opening Brief at 22–23 (citing *Luther*, 157 Wn.2d at 63).

First, it is not clear that this is what the supreme court held in *Luther*. The *Luther* court stated that the “possession of materials depicting actual minors engaged in sexually explicit conduct may be criminalized, provided that the offense includes a scienter element.”^{FN124} “RCW 9.68A.070 prohibits only possession of child pornography involving actual minors, and the statute contains a ‘knowingly’ scienter element.”^{FN125}

FN124. *Luther*, 157 Wn.2d at 71.

FN125. *Id.*

Second, as previously discussed in this opinion, the jury instructions, fairly read, inform the jury that the State had to “prove possession with knowledge of the nature of the illegal material.”^{FN126} Thus, this argument is not persuasive.

FN126. *Garbaccio*, 151 Wn.App. at 734.

COMMENT ON EVIDENCE

Besola argues that the trial court impermissibly commented on the evidence. We disagree.

Article 4, section 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” “A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.”^{FN127} “The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.”^{FN128} “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.”^{FN129}

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FN127. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

FN128. *Id.*

FN129. *Id.*

If the reviewing court determines the trial judge's remark constitutes a comment on the evidence, the burden is on the State to show that a defendant was not prejudiced based on the record below.^{FN130}

FN130. *Id.*

Here, Besola argues that "the judge's comments told the jury that he found Besola's witness to be evasive and frustrating." As the State points out, Besola fails to cite the report of proceedings for any particular statements. Normally, this failure would preclude review.

But we note that in the fact section of Besola's brief he cites a particular exchange during the State's examination of Besola's sister, Amelia Besola. There being no other reference in the briefing than this, we examine this exchange to resolve this issue.

During this examination, Amelia Besola failed to answer the State's questions that only required "yes" or "no" answers:

*14 MS. SIEVERS [Prosecutor]: Your Honor, I would ask you to direct the witness to answer the question.

THE COURT: I don't know how to do that, Ms. Sievers. They're very simple questions. Ms. Besola seems to be having trouble answering these simple [sic] questions.

Listen to the questions.

What's the next question, Ms. Sievers?

MS. SIEVERS: That's fine; I'll move on.

THE COURT: I do understand your frustration, Ms. Sievers.^{FN131}

FN131. Report of Proceedings (April 18, 2012) at 1059.

This comment did not reveal the trial court's feeling as to "the truth value of the testimony of a witness."^{FN132} Rather, the trial court's comments were directed to Amelia Besola not answering the State's questions and the court's statement of its understanding that counsel was frustrated. These comments say nothing about the court's view of the truth of the testimony. There was no prohibited comment on this evidence.

FN132. *Lane*, 125 Wn.2d at 838.

Besola cites a number of cases to support his position that the trial court made an impermissible comment. These cases do not change our conclusion.

First, he cites *State v. Eisner*^{FN133} and *Risley v. Moberg*.^{FN134} These cases involved judges who questioned witnesses.^{FN135} Here, the trial court did not question Amelia Besola. Thus, these cases are not helpful.

FN133. 95 Wn.2d 458, 626 P.2d 10 (1981).

FN134. 69 Wn.2d 560, 419 P.2d 151 (1966).

FN135. *Eisner*, 95 Wn.2d at 460-63; *Risley*, 69 Wn.2d at 561-65.

Second, he cites *State v. Lane*^{FN136} and *State v. Lampshire*.^{FN137} These cases involved judges who commented on witnesses' credibility.^{FN138} Here, the trial judge did not make any such comment. He commented on the witness not answering the State's questions. Thus, these cases are not helpful.

FN136. 125 Wn.2d 825, 889 P.2d 929

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(1995).

FN137. 74 wn.2d 888, 447 P.2d 727 (1969).

FN138. *Lane*, 125 Wn.2d at 835-39;
Lampshire, 74 Wn.2d at 891-93.

SUFFICIENCY OF THE EVIDENCE

Besola argues that there was insufficient evidence to support his convictions. We disagree.

As we previously stated in this opinion, the due process clause of the Fourteenth Amendment of the United States Constitution requires that the State prove every element of a crime beyond a reasonable doubt.^{FN139} To determine whether the evidence is sufficient to sustain a conviction, this court must determine “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.”^{FN140} A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence.^{FN141} On issues concerning conflicting testimony, credibility of witnesses, and persuasiveness of the evidence, this court defers to the jury.^{FN142} Circumstantial evidence and direct evidence are considered equally reliable when weighing the sufficiency of the evidence.^{FN143}

FN139. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

FN140. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

FN141. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

FN142. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

FN143. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

RCW 9.68A.070

Besola argues that there was insufficient evidence for the jury to find that he was in actual or constructive possession of depictions of minors engaged in sexually explicit conduct. He is wrong.

As previously noted, former RCW 9.68A.070 (2006) provides, “A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony.”

*15 Chapter 9.68A RCW does not provide a definition for “possession.”^{FN144} Possession generally is “actual” or “constructive.”^{FN145} Actual possession indicates “physical custody,” while constructive possession indicates “dominion and control over an item.”^{FN146} “In establishing dominion and control, the reviewing court examines the ‘totality of the situation.’”^{FN147} “This control need not be exclusive, but the State must show more than mere proximity.”^{FN148}

FN144. *See* RCW 9.68A.011.

FN145. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

FN146. *State v. Mobley*, 129 Wn.App. 378, 384, 118 P.3d 413 (2005).

FN147. *Id.* (quoting *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731 (1995)).

FN148. *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010).

Here, Brent Waller, who lived in the garage of Besola's house, testified that he saw a substantial amount of pornography in Besola's house. Law enforcement officers seized multiple DVDs with depictions of minors engaged in sexually explicit conduct from his house. Further, a handwriting expert testified that some of these DVDs contained handwriting that could be attributed to Besola.

Officers also seized a computer that was registered to “Mark,” which is Besola's first name,

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and it contained personal photographs of Besola and financial documents for his business. The computer also contained files with video clips of minors engaged in sexually explicit conduct.

This evidence was sufficient to establish that Besola had actual or constructive possession of depictions of minors engaged in sexually explicit conduct.

Besola argues that Swenson admitted to possessing and viewing the depictions and Besola denied it. Further, he contends that he had "no motive to possess the items but Swenson did have a motive because he was trading pornography with Brent Waller." While Besola denied possessing or knowing about the videos, this court does not review credibility determinations by the finder of fact.^{FN149}

FN149. See *Walton*, 64 Wn.App. at 415-16.

Besola also contends that this case is similar to *State v. Roberts*.^{FN150} We disagree.

FN150. Appellant's Opening Brief at 42 (citing *State v. Roberts*, 80 Wn.App. 342, 355, 908 P.2d 892 (1996)).

There, Dirk Roberts was convicted of possession of marijuana with intent to deliver or manufacture.^{FN151} Roberts claimed that the marijuana grow operation belonged to his subtenant, John Sylvester.^{FN152} The trial court implicitly held that Robert's ability to evict Sylvester showed that Roberts had dominion and control over the grow operation in the basement.^{FN153} This court concluded that the trial court erred when it came to this conclusion.^{FN154} Here, the evidence that Besola possessed the depictions was not based on his ability to evict Swenson. Thus, *Roberts* is not helpful.

FN151. *Roberts*, 80 Wn.App. at 344.

FN152. *Id.*

FN153. *Id.* at 353.

FN154. *Id.* at 354.

RCW 9.68A.050

Besola argues that there was insufficient evidence to prove that he duplicated any depictions of minors engaged in sexually explicit conduct. He is mistaken.

As previously noted, former RCW 9.68A.050 (1989) provides: "A person who ... [k]nowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct ... is guilty of a class C felony punishable under chapter 9A.20 RCW."

*16 Here, law enforcement officers seized three computers from Besola's home. The State presented evidence that 40 files were downloaded onto one of the computers that was registered to "Mark" and contained documents connected to Besola, and these files contained depictions of minors engaged in sexually explicit conduct. Moreover, this computer had a device attached to the computer that a detective described as a "Systor DVD duplicating device." The computer contained a peer-to-peer file sharing folder that contained two videos of minors engaged in sexually explicit conduct. The State also presented evidence that many of the seized DVDs were duplicates of the same videos.

This evidence was sufficient to prove that Besola duplicated depictions of minors engaged in sexually explicit conduct.

Besola argues that there was no evidence that he was Swenson's accomplice for both charges. He argues that there was no evidence proving that Besola "solicit [ed], command[ed], encourag[ed] or request[ed]" Swenson to commit the crime or "aid[ed] or agree[d] to aid" Swenson in planning or committing the crime.^{FN155} First, the jury did not need to find that Besola was Swenson's accomplice.

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^{FN156} There was sufficient evidence to find that Besola himself possessed and duplicated the depictions of minors. Second, reasonable inferences can be drawn from the evidence that Besola knew that Swenson was committing these crimes and Besola was aiding him. Thus, this argument is not persuasive.

FN155. Appellant's Opening Brief at 43 (citing RCW 9A.08.020).

FN156. *See* Clerk's Papers at 91–92, 98–99 (explaining in the jury instructions that “defendant BESOLA *or* a person to whom he was an accomplice” knowingly possessed and knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct) (emphasis added).

CHARACTER EVIDENCE

Swenson argues that the trial court abused its discretion when it admitted evidence that Swenson and his roommate, Waller, traded adult pornography. He argues that this character evidence was “irrelevant and highly prejudicial,” violating ER 404(b). Because Swenson failed to preserve this challenge by a timely objection, we decline to review it.

Swenson asserts that this testimony was admitted “over defense objection.” But he does not cite the record to show where he objected based on ER 404(b) during Waller's testimony. Nor did he submit a reply brief to respond to the State's argument that he did not preserve this issue based on his failure to object at trial. Accordingly, we do not address this issue any further.

SAME CRIMINAL CONDUCT

Besola and Swenson argue that the trial court erred in calculating their offender score for sentencing purposes. Specifically, they contend that possessing depictions of a minor engaged in sexually explicit conduct and dealing in these depictions involve the same criminal conduct. We disagree.

Under the Sentencing Reform Act of 1981, an offender's sentence range for each conviction is ordinarily calculated by counting “all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” ^{FN157} The act provides an exception to this general rule if the court finds that some or all of the current offenses encompass the same criminal conduct. ^{FN158} Crimes constitute the same criminal conduct when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” ^{FN159} Unless all three of these elements are present, the offenses do not constitute the same criminal conduct and must be counted separately in calculating the offender score. ^{FN160} “[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” ^{FN161}

FN157. RCW 9.94A.589(1)(a).

FN158. *Id.*

FN159. *Id.*

FN160. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

FN161. *Id.*

*17 For the first element, “[i]ntent is to be viewed objectively rather than subjectively.” ^{FN162} The first step is to “‘objectively view’ each underlying statute and determine whether the required intents, if any, are the same or different for each count.” ^{FN163} If the intents are different, the offenses are counted as separate crimes. ^{FN164} If the intents are the same, the next step is to “‘objectively view’ the facts usable at sentencing, and determine whether the particular defendant's intent was the same or different with respect to each count.” ^{FN165} If the intents are the same, then the counts constitute same criminal conduct. ^{FN166}

FN162. *State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868 (1991).

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FN163. *Id.* (quoting *State v. Collicott*, 112 Wn.2d 399, 405, 771 P.2d 1137 (1989)).

FN164. *Id.*

FN165. *Id.*

FN166. *Id.*

In *State v. Hernandez*, Division Two considered whether intent to deliver a controlled substance had the same intent as possession of a controlled substance.^{FN167} The court explained, “‘Objectively viewed, the intent of delivery is to transfer the narcotics from one person to another usually, if not universally, with an expectation of benefit to the person effecting the delivery.’”^{FN168} In contrast, “‘Objectively viewed, the criminal purpose of simple possession is to have the narcotics available and under the control of the possessor to use as he or she sees fit.’”^{FN169} The court concluded that the two crimes did not involve the same criminal conduct.^{FN170}

FN167. 95 Wn.App. 480, 483–86, 976 P.2d 165 (1999).

FN168. *Id.* at 484 (quoting *State v. Baldwin*, 63 Wn.App. 303, 307, 818 P.2d 1116 (1991)).

FN169. *Id.*

FN170. *Id.* at 485–86.

Here, like *Hernandez*, the intent to knowingly possess depictions of a minor engaged in sexually explicit is different than the intent to knowingly deal in these depictions. In this case, the State alleged that the relevant form of dealing was duplicating the depictions. Objectively viewing the statutes, duplicating these depictions has the intent to transfer them from one person to another. While simple possession allows the possessor to have control over the depictions for himself or herself. Because the intents are different, the trial court did not err when it counted the offenses as separate crimes.

FN171

FN171. *See id.*

Besola and Swenson argue that the two crimes have the same intent because in order to duplicate the depictions, they argue that a person must possess the depictions. They cite *United States v. Davenport* to support this assertion.^{FN172} But that case involved a double jeopardy and lesser included offense claim.^{FN173} Thus, that case is not helpful.

FN172. Appellant's Opening Brief at 46; Appellant's Reply Brief at 12–13 (citing *United States v. Davenport*, 519 F.3d 940 (9th Cir.2008)).

FN173. *Davenport*, 519 F.3d at 943.

COMMUNITY CUSTODY CONDITIONS

Swenson argues that condition 13 and condition 27 were not statutorily authorized, violated due process, and must be stricken. We conclude that certain conditions are not statutorily authorized and remand for resentencing only for these conditions.

When a court sentences someone to a term of community custody, the Sentencing Reform Act, RCW 9.94A.703(1), requires it to impose certain conditions. This court reviews community custody conditions for abuse of discretion.^{FN174} A court abuses its discretion if the sentence is not authorized by statute.^{FN175} The proper remedy for a condition not authorized by statute is to reverse that portion of the sentence and remand for resentencing of the improper condition.^{FN176}

FN174. *Riley*, 121 Wn.2d at 37.

FN175. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

FN176. *State v. Sansone*, 127 Wn.App. 630, 643, 111 P.3d 1251 (2005).

*18 Under RCW 9.94A.703(3)(f), a court may order an offender to “[c]omply with any crime-re-

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lated prohibitions.” A “crime-related prohibition” is an order that prohibits “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”^{FN177}

FN177. RCW 9.94A.030(10).

Swenson first challenges condition 13: “You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances *without a valid prescription from a licensed physician.*”^{FN178} Unless waived by the court, RCW 9.94A.703(2)(c) requires the court to order an offender to “[r]efrain from possessing or consuming controlled substances *except pursuant to lawfully issued prescriptions.*”^{FN179} As Swenson argues, a “lawfully issued prescription” is broader than a “valid prescription from a licensed physician.” He points to RCW 69.41.030 to show that physician assistants and other health care providers can issue lawful prescriptions and these providers may not necessarily fall within the definition of “licensed physician.”^{FN180} Thus, condition 13 is not authorized and should be stricken.

FN178. Clerk's Papers at 198 (emphasis added).

FN179. (Emphasis added.)

FN180. RCW 69.41.030 (listing health care providers such as optometrists, dentists, veterinarians, and nurse practitioners with prescription authority).

Swenson also challenges condition 27: “Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.”^{FN181} He makes three arguments about this condition.

FN181. Clerk's Papers at 199.

First, Swenson argues that it was improper to allow his sexually deviancy provider to define

“sexually explicit material.” He cites *State v. Sansone* to support this argument.^{FN182} There, this court held that the definition of “pornography” was “not an administrative detail that could be properly delegated” to a community corrections officer.^{FN183} But this court limited the decision to the facts of that case, and it observed that “[a] delegation would not necessarily be improper if Sansone were in treatment and the sentencing court had delegated to the therapist to decide what types of materials Sansone could have.”^{FN184} Since that is precisely what the trial court in this case has done, we conclude that there was no error.

FN182. Opening Brief of Appellant Swenson at 24 (citing *State v. Sansone*, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005)).

FN183. *Sansone*, 127 Wn.App. at 642.

FN184. *Id.* at 643.

Second, Swenson argues that this condition is not a crime-related prohibition. He contends that “*any* sexually explicit material” is too broad and can encompass “legal, adult pornography unrelated to the crime” of possessing and dealing in depictions of minors engaged in sexually explicit conduct.^{FN185} Contrary to Swenson's argument, “any sexually explicit materials” is not too broad. As just discussed, this term only includes those defined by the sexual deviancy treatment provider. Thus, this argument is not persuasive.

FN185. (Emphasis added.)

Third, Swenson argues that the condition that he not “patronize ... establishments that promote the commercialization of sex” is too broad and not crime-related. We agree. It is not clear what “establishments that promote the commercialization of sex” means. Further, given this vague term, it is not clear from this record whether there was evidence that such establishments were related to Swenson's crimes. Thus, this part of condition 27 is without authority of law.

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*19 We affirm the judgments and sentences except that we reverse the community custody conditions that we discussed in this opinion and remand for resentencing only on these conditions.

WE CONCUR: VERELLEN, A.C.J., and APPELWICK, J.

Wash.App. Div. 1, 2014.

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END OF DOCUMENT

APPENDIX “B”

WA, which is further described as a blue with white trim A-Frame type house. The residence includes a four bay garage with apartment and the property is secured by a fence and black wrought iron type security gate. in said county and state; that the affiant's belief is based upon the following facts and circumstances: Deputy Tjossen was contacted by Officer Boyle with the Washington State Auto Task Force on March 25, 2009. Officer Boyle was investigating Kellie Westfall in regards to a stolen vehicle. During the contact with Deputy Tjossen and Officer Boyle, Ms. Westfall reported that her friend, Jeffrey Swenson, was obtaining drugs from his roommate, Mark Besola. Mr. Besola is a veterinarian and works at "A Small Animal Hospital," 1115 S. #47th Place Federal Way. Mr. Besola's sister is the owner and also a veterinarian. Mr. Besola is known to use, sell, and distribute controlled substances, pharmaceuticals and methamphetamine. Mr. Besola is known to give pharmaceuticals to Mr. Swenson to trade or sell for methamphetamine. Ms. Westfall is a methamphetamine user, who both sold to and bought from Mr. Swenson and Mr. Besola.

Det./Sgt. Berg was contacted and an interview with Ms. Westfall was set for April 9, 2009. During this tape recorded interview, Ms. Westfall discussed her relationship with Mr. Besola and Mr. Swenson, the controlled substances, and the child pornography. Ms. Westfall is good friends with Mr. Swenson and he has told her that he has had a relationship with Mr. Besola since he was approximately fourteen years old and he began living with Mr. Besola when he was fifteen years old. Their relationship is/was sexual. She said that it is Mr. Swenson's job to stay home and keep the house. In exchange, Mr. Besola gives him money or drugs. Mr. Besola does not really like Ms. Westfall, but she is allowed into the home, because of Mr. Swenson and the controlled substances. She has stayed overnight at the home several times. She told us that the home is cluttered with lots of boxes of stuff. Some of the boxes have photographs and there are some boxes with pornographic magazines. She told us that Mr. Swenson has told her that there were sex toys, straps and bondage, when he was younger, as well as spankings. Mr. Swenson reports no sexual relations for about the last three years. Mr. Swenson did tell her that he used to bring his young male friends to the home to meet Mr. Besola. Some of these friends still come around and they are also drug abusers. Ms. Westfall described Mr. Besola as being very controlling and domineering with Mr. Swenson.

Regarding the child pornography, in October 2008 she saw some DVDs, stacks of them, some labeled, some not. It appeared that most of the DVDs contained mostly homosexual type pornography. She discovered some child pornography, described as young boys performing sexually explicit acts, while putting in what she thought was a movie. Ms. Westfall told me that she has four boys of her own and knows the boys in the DVD to be young juveniles, approximately ten to twelve years old. She saw some other DVDs and homosexual pornography while looking for Christmas stuff in December 2008. The last time she was in the home was on March 25, 2009. All of the DVDs and materials were still in the home. She reported that there are digital cameras, DVD and VCR players, and TVs in nearly every room. She told us that some of the DVDs look like they have stuff downloaded from the computer in the home. Mr. Besola currently has two desk tops, an older computer in the bedroom and another newer computer downstairs that has recently been moved upstairs. She advised that Mr. Besola said that there were surveillance equipment / cameras, but she has not seen them. She told us that there are two safes in the home, one in an upstairs closet and one downstairs.

Regarding the controlled substances, Ms. Westfall told us that Mr. Besola has Vicodan, liquid morphine, and other prescription type medications in prescription bottle, samples, and IV bags throughout the home. She said that she believes Mr. Besola may be "shooting drugs," as one time she found him slumped over with a syringe. The drugs are not put away or hidden, she believes because there are no young children and Mr. Besola is careful about who comes into the home. There are syringes in the home also because Mr. Besola is reportedly diabetic.

Ms. Westfall told us that Mr. Besola has a lot of money and has invested well. He is also a pilot and has a plane that he possibly keeps at the Renton Airport. He flies a lot on his time off, including into British Columbia. There is an apartment in the four bay garage that is currently rented by Brent Waller, who is a registered sex offender. Mr. Waller is not known at this time to be involved with the pornography, but he is known to Ms. Westfall to be a drug abuser. This complaint for this search warrant does not include Mr. Waller's apartment in the garage.

Ms. Westfall's identification is known to your affiants. Her statement was recorded and she told us that she is willing to testify.

Your affiant, Detective Sergeant Teresa Berg, has been with the Pierce County Sheriff's Department for twenty-three years. I have been a patrol officer (four years), a narcotics / vice officer (three years), and a Detective Sergeant (sixteen years). As a narcotics / vice officer I worked numerous and extensive narcotic cases and child pornography cases. I have worked specifically child abuse cases for fifteen years and I am currently the supervisor of the Special Assault Unit. I have had numerous trainings in the area of child sexual assault, child exploitation, and child pornography, as well as narcotics. I have written and served numerous search warrants for both narcotic and child pornography cases.

Your affiant, Deputy R. Vance Tjossem, being first sworn on oath deposes and says; that I am a duly commissioned Deputy Sheriff for the Pierce County Sheriff's Department. My training with the Sheriff's department includes; attending the Basic Law Enforcement Academy, and fourteen weeks with the Pierce County Sheriff's Dept. Field training officer program; I have a Bachelor of Arts Degree in Criminal Justice.

I have been a certified member of the Pierce County Sheriff's Department clandestine lab team for over two years. I am also a narcotics investigator with the Pierce County Sheriff's Department Special Investigations Unit and attended the following schools and training:

- Basic Law Enforcement Academy
- CADRE Clandestine Laboratory Operations
- DEA Basic Narcotics Investigation School
- Undercover Operations School
- Drug Warrant Entry Class
- Hazardous Materials Technician
- WMD Hazardous Materials Technician
- Radiological/Nuclear course for Hazardous Materials Technicians
- Monthly training with the Pierce County Sheriff Department Clandestine Lab Team

Your Affiant is a certified member of the Pierce County Clandestine Laboratory Team has been the case officer, Affiant, and/or assisted in numerous Superior Court narcotics and evidence search warrants for illicit substances, documents, and various forms of evidence. These search warrants have resulted in numerous convictions. In addition to the listed training, I have experience with literally hundreds of drug related investigations. I have initiated, planned, and executed many controlled substance search warrants that resulted in the arrest of suspects and the seizure of evidence. I have contacted, interviewed, and arrested numerous subjects for the possession, use, sale, distribution, delivery, and manufacture of controlled substances. I have become very educated, trained and experienced with the terms, trends, habits, commonalties, methods, and idiosyncrasies surrounding illicit drug possession, use, distribution, manufacture, business and culture. Based on my training and experience, and upon the training and experience of knowledgeable Law Enforcement Officers, with whom I associate with, I recognize that the listed items are evidence of the above listed violations for the following reasons:

1. In addition to the controlled substances being sought in this search warrant, drug manufacturers, dealers and users often possess more than one

controlled substance, for variety in personal use, to diversify and monopolize the illicit drug market, to supply a broader base of clients, and to maximize their potential profits;

2. Drug dealers, manufactures, and users will have materials, products, and equipment in their possession to further their business or habit. This could include, but is not limited to, precursor chemicals, glassware, tubes, growing apparatus and assorted cookware for manufacture of narcotics; bags, scales, and packaging materials for distribution of narcotics; and pipes, bong, torches, and assorted drug paraphernalia for usage;

3. Controlled substances are commonly hidden in various types and sizes of containers, which are often disguised to avoid detection;

4. Drug manufacturers, dealers, and users utilize theirs or other person's vehicles to conceal controlled substances, deliver drugs, transport their person to purchase drugs, transport coconspirators to purchase drugs, transport materials used in production, and to further their drug trade/habit;

5. Information regarding the manufacture, distribution, sale and use of controlled substances are found in books, records, receipts, notes ledgers, research products, papers, microfilms, video/audio tapes, films developed and undeveloped and other assorted media;

6. Drug manufacturers, dealers and users will trade, exchange, and sell anything for controlled substances including money, food stamps, food, electrical equipment, jewelry, clothing, stolen property, guns/firearms, other drugs, cigarettes and any tangible or intangible property;

7. Guns, firearms, rifles, pistols, shotguns, and all types of dangerous weapons are utilized by drug manufacturers, dealers, and users to protect themselves from robbery, police intervention, and for self defense; to protect their profits, assets, and narcotics; and to assist in the furtherance of their drug habits;

8. Computers are used to log delivery records, gain media access to information, communicate with coconspirators, transfer funds, store information, and enhance the efficiency of controlled substance transactions;

9. Digital pagers, telephones, cellular phones and other communications equipment assist manufactures to negotiate deals, contact coconspirators, conduct business transactions, and communicate with potential customers;

10. Papers showing ownership, residency, occupancy and other indicia corroborate the length of time narcotics activity has occurred, location of occurrence, coconspirator's involvement, and constructive possession of evidence;

11. Drug manufacturers, dealers and users commonly keep the names, addresses, and phone numbers of other conspirators, drug associates, and sources for equipment, chemicals or other controlled substances. This information is valuable in the furtherance of other related drug and/or controlled substance investigations.

Your affiants respectfully request permission to search the above described residence for the listed evidence of the above described crimes.

Jessica Berg
Not from [unclear]

SUBSCRIBED AND SWORN to before me this 27th day of April, 2008.

John A. McCarthy 5:05 PM.
 JUDGE

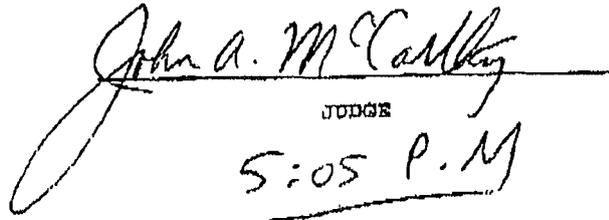
On 4-21-09 I was contacted by Kellie Westfall, Westfall stated that Jeff Swenson had obtained morphine from Mark Besola. Swenson asked Westfall if she wanted to buy the morphine. Swenson stated the morphine was at his residence contained in a horse syringe.

Robert Vance Tjessem #472
 Robert Vance Tjessem

00000170

person or persons found in or on said house or place and if no person is found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, or thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

GIVEN UNDER MY HAND this 27th day of March, 2009.



JUDGE
5:05 P.M.

APPENDIX "C"

In the Superior Court of the State of Washington
In and for the County of Pierce

ADENDEM N

Complaint for Search Warrant
(Evidence)

COPY

State of Washington)
) SS: No. _____
County of Pierce)

Comes now Detective Elizabeth Reigle being first duly sworn, under oath, deposes and says:

That, on or about the 21st day of April, 2009 in the State of Washington, County of Pierce, felonies, to-wit, Possession of Child Pornography, RCW 9.68A.070

That these felonies were committed by the act, procurement or omission of another, that the following evidence is material to the investigation or prosecution of the above described felonies, to-wit;

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material;

Your affiant recognizes that the listed items of evidence are material to the investigation or prosecution of the above described felonies for the following reasons, To further the investigation of the above described felony and for the purpose of recovering the above listed evidence.

Furthermore, your affiant verily believes that the above listed items of evidence are concealed in or about the following particular person, place, residence, vehicle and/or thing, to-wit,

A two story light blue house with white trim A frame house which includes a four bay garage with apartment and the property is secured by a wrought iron type fence addressed as 5314 218th Avenue East, Bonney Lake, Washington

Your affiant's belief is based upon the following probable cause:

See attachment A for probable cause regarding the search warrant obtained for the crime of Unlawful Possession of Controlled Substance.

On 04/21/09 Deputy Vance Tjossem obtained a search warrant for the above listed residence for evidence of the crime of Unlawful Possession of Controlled Substance, R.C.W. 69.50.401. At 1840 hours, I assisted Deputy Tjossem, Detective Mike Hefty, Detective Mark Merod, Detective Mark Collier and other Deputies with the search of the residence. During the search of the master bedroom Detective Mike Hefty located a black CD/DVD case in a cardboard box next to the entertainment center. Inside the CD/DVD case there were numerous writeable CDs or DVDs with handwritten titles including "Czech Boy Swap", "Beginner" and "Young Gay Euro". Also located was a VHS tape labeled "Berlin Men Holland Men (Boys) Location" In several other locations throughout the master bedroom there were writeable CDs/DVDs with handwritten titles which appeared to be pornographic.

At 2000 hours, the resident of the house, Mark Besola, who is also the suspect in the crime of Unlawful Possession of Controlled Substance for which the search warrant was obtained, arrived at the residence in a vehicle. Marks room mate, Jeffrey Swensen also arrived at the residence by vehicle. Deputy Vance Tjossem and Detective Mark Merod interviewed Besola who did not want to speak with out his attorney. Detective Mark Merod and Deputy Vance Tjossem also interviewed Jeffrey Swensen. Swensen confirmed that he has been living with Mark Besola since the age of twelve or thirteen. Jeffrey said his first sexual encounter with Mark was when he was about twelve years old. Jeffery said he has watched videos of young males aged between eight and ten years old performing sex acts including intercourse, with Mark at this residence for the past seven to eight years. The last time Jeffrey watched this type of video with Mark was about a year ago at this residence. Jeffrey said he knows Mark downloads the child pornography from the internet using his home computer. Jeffrey showed Detective Merod where most of Marks child pornography is usually kept which was in the nightstands next to the bed in the master bedroom and various locations in the master bedroom as well as other locations throughout the house.

BACKGROUND AND EXPERIENCE

Your affiant is a commissioned law enforcement officer in the State of Washington and has completed the basic law enforcement academy at the Criminal Justice Training Center. Your affiant has 10 years as a commissioned law enforcement officer. Your affiant is employed by the Pierce County Sheriff's Department. Your affiant has been assigned to various duties during his law enforcement career. Those assignments include: patrol, domestic violence investigator, sexual assault, child abuse and child sexual assault detective, and general investigations. Your affiant has experience investigating assaults, burglaries, thefts, robberies, fraud, sexual assaults and child abuse. Your affiant has training in criminal investigations, crime scene investigations,

interviewing and interrogation techniques, homicide investigation, and hundreds of hours in continuous education related to law enforcement and investigations.

Elizabeth Reigle Det. #228
Detective Elizabeth Reigle
Pierce County Sheriff's Department.
Criminal Investigations Division

SUBSCRIBED AND SWORN to before me this 21 day of April, 2009

Thomas Lahn
Superior Court Judge.
Pierce County, Washington

Time 10:12 p.m.

In the Superior Court of the State of Washington
In and for the County of Pierce

COPY

ADENDEM

Search Warrant
(Evidence)

State of Washington)
)SS: No. _____
County of Pierce)

The State of Washington to the Sheriff or any peace officer of said County:

WHEREAS, Detective Elizabeth Reigle has this day made complaint on oath to the undersigned one of the judges of the above entitled court in and for said county that on or about the 21st Day of April, 2009 in the State of Washington, County of Pierce, felonies, to-wit;

Possession of Child Pornography R.C.W. 9.68A.070

That these felonies were committed by the act, procurement or omission of another and that the following evidence is material to the investigation or prosecution of the above described felony, to-wit:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors; .
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material;

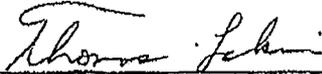
Furthermore, your affiant verily believes that the above listed items of evidence are concealed in or about a particular person, place, residence, vehicle, and/or thing, to wit;

A two story light blue house with white trim A frame house which includes a four bay garage with apartment and the property is secured by a wrought iron type fence addressed as 5314 218th Avenue East, Bonney Lake, Washington

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or thing, and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. A copy of this warrant shall be served upon the person or persons found in or on said house or place and if no person is found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, or thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution

Given under my hand this 21 day of April, 2009.

Time: 10:17 p.m.



Superior Court Judge.
Pierce County, Washington

APPENDIX "D"

INSTRUCTION NO. 10

To convict defendant BESOLA of the crime of dealing in depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of September 27, 2008 through April 21, 2009, defendant BESOLA, or a person to whom he was an accomplice, knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict defendant SWENSON of the crime of dealing in depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of September 27, 2008 through April 21, 2009, defendant SWENSON, or a person to whom he was an accomplice, knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict defendant BESOLA of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of April, 2009, defendant BESOLA, or a person to whom he was an accomplice, knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

To convict defendant SWENSON of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of April, 2009, defendant SWENSON, or a person to whom he was an accomplice, knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 49A.04

**POSSESSION OF DEPICTIONS OF A MINOR
ENGAGED IN SEXUALLY EXPLICIT
CONDUCT—ELEMENTS**

To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;
- [(2) That the defendant knew the person depicted was a minor;] and
- [(3)] That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

Use this instruction with WPIC 10.02 (Knowledge—Knowingly—Definition), WPIC 47.09 (Minor—Definition), WPIC 49A.10 (Visual or Printed Matter—Definition), and WPIC 49A.09 (Sexually Explicit Conduct—Definition).

With regard to using the bracketed element (2), see the Comment below.

For a discussion of the phrase “this act” in the jurisdictional element, see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

COMMENT

RCW 9.68A.070.

WPIC 49A.06

DEALING IN DEPICTIONS OF A MINOR ENGAGED
IN SEXUALLY EXPLICIT CONDUCT—RCW
9.68A.050(1)—ELEMENTS

To convict the defendant of the crime of dealing in depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly [developed] [duplicated] [published] [printed] [disseminated] [exchanged] [attempted to finance] [financed] [or] [sold] visual or printed matter depicting a minor engaged in sexually explicit conduct;
- [(2) That the defendant knew the person depicted was a minor;] and
- [(3)] That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

This instruction is to be used only for cases in which dealing in depictions is charged under RCW 9.68A.050(1). For cases in which dealing in depictions is charged under RCW 9.68A.050(2), use WPIC 49A.08 instead of this instruction.

Use bracketed language as applicable. For directions on the various ways to use the bracketed phrases relating to how the crime is committed, see the Introduction to WPIC 4.20 and the Note on Use and Comment to WPIC 4.23, Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form.

APPENDIX "E"

of intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, paralysis, stupefaction, or dulling of the senses of the nervous system, or for the purpose of, in any manner, changing, distorting, or disturbing the audio, visual, or mental processes. This section does not apply to the inhalation of any anesthesia for medical or dental purposes. [1984 c 68 § 2; 1969 ex.s. c 149 § 2.]

9.47A.030 Possession of certain substances prohibited, when. No person may, for the purpose of violating RCW 9.47A.020, use, or possess for the purpose of so using, any substance containing a solvent having the property of releasing toxic vapors or fumes. [1984 c 68 § 3; 1969 ex.s. c 149 § 3.]

9.47A.040 Sale of certain substances prohibited, when. No person may sell, offer to sell, deliver, or give to any other person any container of a substance containing a solvent having the property of releasing toxic vapors or fumes, if he has knowledge that the product sold, offered for sale, delivered, or given will be used for the purpose set forth in RCW 9.47A.020. [1984 c 68 § 4; 1969 ex.s. c 149 § 4.]

Chapter 9.68A

SEXUAL EXPLOITATION OF CHILDREN

(Formerly: Child pornography)

Sections	
9.68A.001	Legislative finding.
9.68A.010	Repealed.
9.68A.011	Definitions.
9.68A.020	Repealed.
9.68A.030	Repealed.
9.68A.040	Sexual exploitation of a minor—Elements of crime—Penalties.
9.68A.050	Dealing in depictions of minor engaged in sexually explicit conduct.
9.68A.060	Sending, bringing into state depictions of minor engaged in sexually explicit conduct.
9.68A.070	Possession of depictions of minor engaged in sexually explicit conduct.
9.68A.080	Processors of depictions of minor engaged in sexually explicit conduct—Report required.
9.68A.090	Communication with minor for immoral purposes.
9.68A.100	Patronizing juvenile prostitute.
9.68A.110	Certain defenses barred, permitted.
9.68A.120	Seizure and forfeiture of property.
9.68A.130	Recovery of costs of suit by minor.
9.68A.900	Repealed.
9.68A.910	Severability—1984 c 262.

9.68A.001 Legislative finding. The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.

The legislature further finds that the protection of children from sexual exploitation can be accomplished without infringing on a constitutionally protected activity. The definition of "sexually explicit conduct" and other operative definitions demarcate a line between

protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities. [1984 c 262 § 1.]

9.68A.010 Repealed. See Supplementary Table of Disposition of Former RCW Sections, this volume.

9.68A.011 Definitions. Unless the context clearly indicates otherwise, the definitions in this section apply throughout the [this] chapter.

(1) To "photograph" means to make a print, negative, slide, motion picture, or videotape. A "photograph" means any tangible item produced by photographing.

(2) "Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph.

(3) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation, for the purpose of sexual stimulation of the viewer;

(d) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer;

(e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor for the purpose of sexual stimulation of the viewer;

(f) Defecation or urination for the purpose of sexual stimulation of the viewer; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer. [1984 c 262 § 2.]

9.68A.020 Repealed. See Supplementary Table of Disposition of Former RCW Sections, this volume.

9.68A.030 Repealed. See Supplementary Table of Disposition of Former RCW Sections, this volume.

9.68A.040 Sexual exploitation of a minor—Elements of crime—Penalties. (1) A person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Sexual exploitation of a minor is:

(a) A class B felony punishable under chapter 9A.20 RCW if the minor exploited is less than sixteen years old at the time of the offense; and

(b) A class C felony punishable under chapter 9A.21 RCW if the minor exploited is at least sixteen years old

but less than eighteen years old at the time of the offense. [1984 c 262 § 3.]

9.68A.050 Dealing in depictions of minor engaged in sexually explicit conduct. A person who:

(1) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct; or

(2) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct

is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "minor" means a person under sixteen years of age. [1984 c 262 § 4.]

9.68A.060 Sending, bringing into state depictions of minor engaged in sexually explicit conduct. (1) A person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, any visual or printed matter that depicts a minor engaged in sexually explicit conduct is guilty of a class C felony punishable under chapter 9A.20 RCW.

(2) As used in this section, "minor" means a person under sixteen years of age. [1984 c 262 § 5.]

9.68A.070 Possession of depictions of minor engaged in sexually explicit conduct. (1) A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a gross misdemeanor.

(2) As used in this section, "minor" means a person under sixteen years of age. [1984 c 262 § 6.]

9.68A.080 Processors of depictions of minor engaged in sexually explicit conduct—Report required. (1) A person who, in the course of processing or producing visual or printed matter either privately or commercially, has reasonable cause to believe that the visual or printed matter submitted for processing or producing depicts a minor engaged in sexually explicit conduct shall immediately report such incident, or cause a report to be made, to the proper law enforcement agency. Persons failing to do so are guilty of a gross misdemeanor.

(2) As used in this section, "minor" means a person under sixteen years of age. [1984 c 262 § 7.]

9.68A.090 Communication with minor for immoral purposes. (1) A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state, in which case the person is guilty of a class C felony punishable under chapter 9A.20 RCW.

(2) As used in this section, "minor" means a person under sixteen years of age. [1984 c 262 § 8.]

person engages or agrees or offers to engage in sexual conduct with a minor in return for a fee, and is guilty of a class C felony punishable under chapter 9A.20 RCW.

(2) As used in this section, "minor" means a person under eighteen years of age. [1984 c 262 § 9.]

9.68A.110 Certain defenses barred, permitted. (1) In a prosecution under RCW 9.68A.040, it is not a defense that the defendant was involved in activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses. Law enforcement and prosecution agencies shall not employ minors to aid in the investigation of a violation of RCW 9.68A.090 or 9.68A.100. This chapter does not apply to individual case treatment in a recognized medical facility or individual case treatment by a psychiatrist or psychologist licensed under Title 18 RCW, or to lawful conduct between spouses.

(2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.080, it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter: *Provided*, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that the person depicted was a minor.

(3) In a prosecution under RCW 9.68A.040 or 9.68A.100, it is not a defense that the defendant did not know the alleged victim's age: *Provided*, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant reasonably believed the alleged victim to be at least eighteen years of age based on declarations by the alleged victim.

(4) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.090, it is not a defense that the defendant did not know the alleged victim's age: *Provided*, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant reasonably believed the alleged victim to be at least sixteen years of age based on declarations by the alleged victim.

(5) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070, the state is not required to establish the identity of the alleged victim. [1984 c 262 § 10.]

9.68A.120 Seizure and forfeiture of property. The following are subject to seizure and forfeiture:

(1) All visual or printed matter that depicts a minor engaged in sexually explicit conduct.

(2) All raw materials, equipment, and other tangible personal property of any kind used or intended to be used to manufacture or process any visual or printed matter that depicts a minor engaged in sexually explicit conduct, and all conveyances, including aircraft, vehicles, or vessels that are used or intended for use to transport or deliver such matter.

OFFICE RECEPTIONIST, CLERK

To: Therese Nicholson-Kahn
Subject: RE: St. v. Besola and Swenson, No. 90554-1

Rec'd 12/5/14

From: Therese Nicholson-Kahn [mailto:tnichol@co.pierce.wa.us]
Sent: Friday, December 05, 2014 2:31 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'suzanne-elliott@msn.com'; 'KARSdroit@aol.com'
Subject: St. v. Besola and Swenson, No. 90554-1

Please see attached the State's Consolidated Supplemental Brief in the below matter Call me at 253/798-7426 if you have any questions.

St. v. Besola and Swenson
No. 90554-1
Submitted by: J. Ruyf
WSB # 38725