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Division I
State of Washington

NO. 73947-6-I

No. 96035-6

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MARC MCKEE,
Appellant.

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

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE.....	3
1. STATEMENT OF PROCEDURAL HISTORY ERROR! BOOKMARK NOT DEFINED.	
2. STATEMENT OF FACTS	ERROR! BOOKMARK NOT DEFINED.
IV. ARGUMENT.....	3
1. THE SEARCH WARRANT WAS SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT.	3
i. Because the search warrant particularly described the things to be seized sufficiently for law enforcement to identify the property being sought with reasonable certainty it passes constitutional muster.	4
ii. There is probable cause to support investigation of the crime of dealing in depictions of minor engaged in sexually explicit conduct as listed on the search warrant.....	10
iii. Any invalid portions of the warrant are severable from the valid portion.....	13
2. DEFENSE COUNSEL WAS NOT INEFFECTIVE MAKING THE ISSUE OF “SAME CRIMINAL CONDUCT” WAIVED ON APPEAL. 14	
i. Counsel was not deficient as the convictions for possessing depictions of minors engaged in sexually explicit conduct in the first and second degrees did not constitute “same criminal conduct.”.....	14
ii. The defendant cannot raise the issue of “same criminal conduct” for the first time on appeal.	16
V. CONCLUSION.....	18

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON SUPREME COURT</u>	
<u>In re Pers. Restraint of Yim</u> , 139 Wn.2d 581, 989 P.2d 512 (1999).....	11
<u>State v. Besola</u> , 184 Wn.2d 605, 359 P.3d 799 (2015)	5
<u>State v. Cole</u> , 128 Wn.2d 262, 906 P.2d (1995).....	11
<u>State v. Maxwell</u> , 114 Wn.2d 761, 791 P.2d 223 (1990).....	11
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	15
<u>State v. Patterson</u> , 83 Wn.2d 49, 515 P.2d 496 (1973)	11
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992)	5, 6, 13
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	5, 6
<u>State v. Smith</u> , 93 Wn.2d 329, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980)	11
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994)	11
<u>WASHINGTON COURT OF APPEALS</u>	
<u>State v. Anderson</u> , 92 Wn. App. 54, 960 P.2d 975 (1998)	15
<u>State v. Askham</u> , 120 Wn. App. 872, 86 P.3d 1224 (2004).....	5
<u>State v. Casto</u> , 39 Wn. App. 229, 692 P.2d 890 (1984).....	11
<u>State v. Chambers</u> , 88 Wn. App. 640, 945 P.2d 1172 (1997).....	6
<u>State v. Ehli</u> , 115 Wn. App. 556, 62 P.3d 929 (2003)	15
<u>State v. Higgins</u> , 136 Wn. App. 87, 147 P.3d 649 (2006)	5
<u>State v. Higgs</u> , 177 Wn. App. 414, 311 P.3d 1266 (2013) rev. denied, 179 Wn.2d 1024, 320 P.3d 719 (2014).....	5
<u>State v. Maddox</u> , 116 Wn. App. 796, 67 P.3d 1135 (2003).....	13
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1990)	14
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000 (2000).....	16
<u>State v. Powell</u> , 181 Wn. App. 716, , 326 P.3d 859, rev. denied, 181 Wn.2d 1011 (2014)	10
<u>UNITED STATES SUPREME COURT</u>	
<u>Andersen v. Maryland</u> , 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)4	
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S.Ct. 20222035, 29 L.E.2d 564 (1971)	4
<u>Riley v. California</u> , ___ U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). 7	
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).....	14

<u>United States v. Ventresca</u> , 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).....	11
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FEDERAL CASES

<u>United States v. Burgess</u> , 576 F.3d 1078 (10th Cir. 2009).....	7
<u>United States v. Kimbrough</u> , 69 F.3d 723 (5th Cir. 1995).....	6
<u>United States v. Richards</u> , 659 F.3d 527 (6th Cir. 2011).....	6
<u>United States v. Schesso</u> , 730 F.3d 1040 (9th Cir. 2013).....	7
<u>United States v. Spilotro</u> , 800 F.2d 959 (9th Cir.1986).....	4, 6
<u>United States v. Triplett</u> , 684 F.3d 500 (5th Cir. 2012).....	6

WASHINGTON STATUTES

RCW 9.68A.011	7, 8, 9, 12
RCW 9.68A.040	7
RCW 9.68A.050	7, 8, 10, 12
RCW 9.68A.070	15, 16
RCW 9.94A.030	15
RCW 9.94A.525	15
RCW 9.94A.589(.....	15

WASHINGTON COURT RULES

RAP 2.5.....	15
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I. SUMMARY OF ARGUMENT

On October 29, 2014 Brenda Brickey contacted Mount Vernon Police Department about an incident that occurred the night prior. Ms. Brickey advised law enforcement that her 16 year old daughter, AMZ, had been hanging out with the defendant, a 41 year old, and that following an altercation between herself and the defendant she had procured his cell phone which contained sexually explicit photos and videos of her daughter with the defendant as well as pictures of other young women in various states of undress. Law enforcement secured a search warrant and conducted a lawful search of the defendant's cell phone. The search warrant described with particularity the place to be searched and items to be seized, stated the crimes being investigated, and was supported by probable cause.

Following conviction for eight of the nine counts charged, the defendant was sentenced to 113 months in jail. This sentence was calculated using a score of 16 for the charged sex offenses in addition to the scores for the other offenses. At sentencing, defense counsel agreed that 16 was the appropriate score and that the statute supported that the counts could not be treated as "same criminal

conduct.” Defense counsel was not deficient and the issue is now waived on appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The warrant specified the crimes being investigated, particularly listed the location to be searched, and provided a detailed list of the items to be seized as well as the method for conducting the search. Did the warrant state with particularity the items to be seized? (Assignment of Error 1)

2. The defendant was reported to have videos of him having sex with a minor on his cell phone, photos of a minor in his bedroom while naked, and images of other young girls that were also undressed on his phone. Was there probable cause to support the defendant committed the crime of dealing in depictions of minors engaged in sexually explicit conduct, one of the crimes listed on the warrant? (Assignment of Error 1)

3. The appellant affirmatively agreed to the offender score of 16 for counts 1-4 for purposes of sentencing and agreed that these offenses did not constitute “same criminal conduct” for purposes

of sentencing. Can appellant raise the issue of “same criminal conduct” for the first time on appeal?

4. Was defense counsel ineffective for failing to make the argument that convictions 1-4 constituted the “same criminal conduct” at sentencing? (Assignment of Error 2)

III. STATEMENT OF THE CASE

The State stipulates to the Statement of the Case as outlined in Appellant’s Statement of the Case. Appellant Brief 2-6.

IV. ARGUMENT

1. THE SEARCH WARRANT WAS SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT.

McKee contends that the search warrant in this case was not sufficiently particular to satisfy the Fourth Amendment, that the cell phone content seized pursuant to the warrant should have been suppressed, and that the convictions, therefore, should be vacated. McKee claims a lack of particularity for three reasons: (1) there is no indication the affidavit of Detective Ely was attached to the warrant or properly incorporated by reference and the warrant alone is insufficient, (2) there was no probable cause to support the crime of Dealing in Depictions of a Minor engaged in

sexually explicit conduct, which inclusion of improperly broadened the boundaries of the search, and (3) because items protected by the First Amendment were potentially subjected to seizure the authorization to search the entire contents of the phone rendered the warrant overly broad.

General warrants of course, are prohibited by the Fourth amendment. “[T]he problem (posed by the general warrant) is not that of intrusion per se, but of general, exploratory rummaging in a person’s belongings....[The Fourth Amendment addresses the problem] by requiring a ‘particular description’ of the things to be seized.” Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971).

Andersen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Thus, to pass constitutional muster, a warrant “must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.” United States v. Spilotro, 800 F.2d 959, 963 (9th Cir.1986). The seizure of objects which have not yet been adjudged unlawful to possess, such as books or films, require a careful, precise description. State v. Besola, 184 Wn.2d 605, 359 P.3d 799 (2015).

- i. Because the search warrant particularly described the things to be seized sufficiently for law enforcement to identify the property being sought with reasonable certainty it passes constitutional muster.**

The search warrant for the defendant’s cell phone sufficiently described the property being sought so that it conformed to the particularity

requirement of the Fourth Amendment and did not need the affidavit to attach to cure any deficiency in the warrant. The Fourth Amendment requires that warrants must particularly describe the things to be seized. State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993), State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992). A search warrant is not overbroad when it sets certain limits on what is to be seized thereby preventing a general exploratory search by the officers executing the search. State v. Higgs, 177 Wn. App. 414, 311 P.3d 1266 (2013), as amended, (Nov. 5, 2013) and rev. denied, 179 Wn.2d 1024, 320 P.3d 719 (2014), State v. Higgins, 136 Wn. App. 87, 147 P.3d 649 (2006). There is no requirement that a warrant state with particularity (or, indeed, state at all) the crime being investigated. State v. Askham, 120 Wn. App. 872, 86 P.3d 1224 (2004). However, where the warrant does state the crime, this assists in providing constitutionally sufficient particularity for the search warrant. State v. Askham, 120 Wn. App. at 878-879. See State v. Chambers, 88 Wn. App. 640, 645-646, 945 P.2d 1172 (1997). “Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer’s exercise of discretion in executing the warrant.” State v. Perrone, 119 Wn.2d 538, 555, 834 P.2d 611 (1992) quoting United States v. Spilotro, 800 F.2d at 964. See also State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) (warrant was overbroad where it

permitted the seizure of broad categories of material not limited by reference to any specific criminal activity).

Where detailed particularity is not possible, generic language is permissible if it particularizes the types of items to be seized. United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995). The degree of specificity required is flexible; it varies depending on the crime at issue and the types of items sought. United States v. Richards, 659 F.3d 527, 537 (6th Cir. 2011). A warrant will be valid if it is as specific as the circumstances and the nature of the criminal activity under investigation permit. Id. “[I]n the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files.” Id. at 539. See United States v. Triplett, 684 F.3d 500, 502 (5th Cir. 2012) (“We agree with our sister circuits to have addressed the issue that ‘a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause.’” (quoting Richards, 659 F.3d at 538)); United States v. Burgess, 576 F.3d 1078, 1092 (10th Cir. 2009) (same); United States v. Schesso, 730 F.3d 1040, 1043, 1046 (9th Cir. 2013) (finding warrant authorizing search of “[a]ny computer or electronic equipment or digital data storage devices” capable of being used for possession and distribution of child pornography not overly broad where

government had no way of knowing where illicit files might be stored). The Riley court described cell phones as “minicomputers that also happen to have the capacity to be used as a telephone.” Riley v. California, ___ U.S. ___, 134 S.Ct. 2473, 2489, 189 L.Ed.2d 430 (2014).

Because electronic data can be hidden anywhere on a computer or cell phone, it is almost impossible for officers to narrow down in advance the area on the device to be searched. Here, the search warrant states the crimes being investigated as “Sexual Exploitation of a Minor RCW 9.68A.040, Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050.” CP 228. These crimes are defined by statute as:

RCW 9.68A.040(1)(b) states that a person is guilty of Sexual Exploitation of a Minor if the individual:

Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.

RCW 9.68A.011 sets forth definitions:

(3) To “photograph” means to make a print, negative, slide, digital image, motion picture, or videotape. A “photograph” means anything tangible or intangible produced by photographing.

(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 purpose 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.

(5) "Minor" means any person under eighteen years of age.

RCW 9.68A.050, Dealing in depictions of a minor engaged in sexually explicit conduct states:

(1)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:

...

(ii) Possesses with the 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 as defined in RCW 9.68A.011(4) (a) through (e).

(2)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she:

...

(ii) Possesses with the 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 as defined in RCW 9.68A.011(4) (f) or (g).

The same definitions of RCW 9.68A.011 apply here.

The warrant specifically listed the place to search as “a LG cell phone with model VX9100 currently being held at the Mount Vernon Police Department.” CP 228. The items wanted are specifically listed as:

Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence **of the above listed crimes.**

CP 229 (emphasis added). Then, the warrant described the method by which the search of the cell phone would be conducted as:

If compatible, the phone content will be copied from the phone using forensic hardware and software that retrieves basic identifier information about the phone and can forensically download images, video, text messages, contacts, audio recordings, and other additional data for the investigator to examine depending on support for that particular phone. It is also possible to conduct a physical dump on some supported phones obtaining all of the memory of the phone for examination. If the cell phone is not supported by any forensic tools, the phone will be examined manually.

CP 229. The warrant specified the crimes under investigation and those crimes are defined by statute. The location to search for evidence of the crimes was particularized—on the defendant’s cell phone. The cell phone is where the evidence of the crimes existed. The items that were permitted to be seized and the method by which law enforcement could search the cell phone was also described with sufficient particularity. The warrant did not authorize law enforcement to go through the defendant’s home, car,

computers—rather to search the very device that contained evidence of the crime. Accordingly, the search warrant granted by the magistrate is not overbroad.

ii. There is probable cause to support investigation of the crime of dealing in depictions of minor engaged in sexually explicit conduct as listed on the search warrant.

Stating the crime of dealing in depictions of a minor engaged in sexually explicit conduct RCW 9.68A.050 on the search warrant did not impermissibly broaden the scope of law enforcement's search as the crime is supported by probable cause. Although the trial court's legal conclusion as to whether evidence meets the probable cause standard is subject to de novo review, that review nevertheless gives great deference to the issuing judge's assessment of probable cause. State v. Powell, 181 Wn. App. 716, 723, 326 P.3d 859, rev. denied, 181 Wn.2d 1011 (2014). A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d (1995). This determination should be given great deference by a reviewing court. Id.

A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring. State v. Smith, 93 Wn.2d 329,

352, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980); State v. Patterson, 83 Wn.2d 49, 58, 515 P.2d 496 (1973). Probable cause exists when an affidavit supporting a search warrant sets forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Probable by its terms requires a showing on only that—probability; it does not require a prima facie showing of criminal activity. In re Pers. Restraint of Yim, 139 Wn.2d. 581, 594-95, 989 P.2d 512 (1999). “Affidavits in support of search warrants are to be read as a whole, in a common sense, nontechnical manner, with doubts resolved in favor of the warrant.” State v. Casto, 39 Wn. App. 229, 692 P.2d 890 (1984), citing United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

Here, AMZ’s mother reported to law enforcement the defendant’s phone held images of AMZ having sex with the defendant. CP 226. She reported it held multiple images of AMZ naked in the defendant’s room, including one where AMZ was tied to the bed while naked. CP 226. AMZ was 16 years old, a minor by definition of RCW 9.68A.011, supra. CP 226. The images described are sexually explicit under RCW 9.68A.011(4), supra. CP 226. As the images were located on the defendant’s phone, appeared to be taken in his bedroom, and he appears in the images with the minor, probable cause

existed that the images were taken with his knowledge and encouragement.
CP 226.

Although the crime here, RCW 9.68A.050, defined supra, dealing in depictions of a minor engaged in sexually explicit conduct, is entitled “Dealing” the actual definition of what constitutes the crime is far broader. Law enforcement had probable cause to investigate the defendant’s phone to discover the images reported to have been seen and to investigate what the defendant had done with those images. Law enforcement had probable cause to investigate if those images had been transferred to another device, copied, or printed. Law enforcement had probable cause to determine how the images were obtained and what had been done with them since they were obtained.

The defendant was reported to have videos of him having sex with a minor on the device in question, his phone. The phone had been reported to contain photos of a minor in his bedroom while naked. Images of other young girls that were undressed were also reported to be on the phone. Evidence of what he was doing with these images would be found on the phone. Thus, there were facts and circumstances sufficient to establish a reasonable inference that the criminal activity was occurring.

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

Under the severability doctrine “infirmity of part of a warrant requires suppression of evidence seized pursuant to that part of the warrant but does not require suppression of items seized pursuant to valid parts of the warrant.” State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611 (1992). As long as the part of the warrant that includes particularly described items is significant as compared to the part that does not, then the part that fails in particularity may be severed. See State v. Maddox, 116 Wn. App. 796, 807, 67 P.3d 1135 (2003). As summarized in Maddox, the Perrone Court refused to apply the severability doctrine because:

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

Maddox, 116 Wn. App. at 809.

Should the court find that the dealing in depictions expanded the search warrant impermissibly, the remaining charge would still outweigh any deficiency such it may be severed from the warrant. Thus, the remaining

valid portion and evidence gathered from the search, including the videos and images of minors engaged in sexual conduct, should not be suppressed.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE MAKING THE ISSUE OF “SAME CRIMINAL CONDUCT” WAIVED ON APPEAL.

McKee contends he was denied effective representation when his attorney failed to argue that his possession offenses involved the “same criminal conduct” for sentencing. The standard for determining effective assistance of counsel is well established. The defendant must first show that defense counsel was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances. Then, the defendant must show actual prejudice, meaning that there is a reasonable probability that the result of the proceeding would have been different had the alleged error not occurred. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d. 322, 335, 337, 899 P.2d 1251 (1990).

- i. Counsel was not deficient as the convictions for possessing depictions of minors engaged in sexually explicit conduct in the first and second degrees did not constitute “same criminal conduct.”**

The defendant asserts defense counsel should have argued that counts 1 through 4 (three counts of Possession of Depictions in the First Degree and

one count Possession of Depictions in the Second Degree) constituted same criminal conduct and should have been scored as a single offense. Generally, “[w]hen imposing a sentence for two or more current offenses, the court determines the sentence range for each current offense by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” State v. Ehli, 115 Wn. App. 556, 560, 62 P.3d 929 (2003). However, some or all current offenses can count as one crime if the court finds that those offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). “Same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). RCW 9.68A.070(1)(c) and (2)(c), Possession of depictions of minor engaged in sexually explicit conduct, states:

[f]or the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.

The appellant relies on Chenoweth to support that analysis for double jeopardy and same criminal conduct not being the same. Appellant Brief at 20; State v. Chenoweth, 185 Wash. 2d 218, 222, 370 P.3d 6, 8 (2016). This argument, though true, is misplaced. In Chenoweth, the statutes being addressed, rape of a child in the third degree and incest, did not specifically state that each count would constitute a separate offense. The legislature

clearly articulates in RCW 9.68A.070 that “each depiction or image of visual or printed matter” constitute a separate offense. Here, counts 1-3 pertain to three separate videos found on the defendant’s cell phone. Count 4 refers to still pictures recovered from defendant’s cell phone. Thus, in light of the clear indication from the legislature, it is not deficient for counsel to view these as separate offenses for the purpose of scoring for sentencing. Because these counts did not constitute “same criminal conduct,” and, thus, the score was properly calculated there is no prejudice to the defendant.

Possession of depictions of minors engaged in sexually explicit conduct in the first degree, second degree, and commercial sex abuse of a minor are all sex offenses under RCW 9.94A.030(46) and each scores as three points against the other sex offenses under RCW 9.94A.525(17). Thus, the score for the sex offenses are rightly calculated at 16.

ii. The defendant cannot raise the issue of “same criminal conduct” for the first time on appeal.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a); State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). A decision on “same criminal conduct” is a discretionary one. State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). If the defendant does not identify a factual dispute for the court’s resolution or request that the trial court exercise its discretion, the defendant cannot then

claim on appeal that the trial court erred. State v. Nitsch, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000). Where a defendant affirmatively agreed to the standard range and the offender score at sentencing it is an implicit assertion that the defendant's crimes did not constitute same criminal conduct and cannot be raised for the first time on appeal. Id.

At sentencing, defense counsel admitted that, "when they amended the statute [RCW 9.68A.070, defined supra], the Legislature says but for Possession of Depictions First degree... that's (unit of prosecution) going to be per image...[a]nd I thought about this and researched it." 10 RP 39. Counsel went on to state "I did not think there was really a colorable argument that I could make to the Court to say that these three possession of depictions first degree should count as one or same criminal conduct, because the Legislature has been so clear on that." 10 RP 39. Counsel accepted and agreed that computation of the offender score for the sex offenses was 16. 10 RP 40. Thus, defense counsel affirmatively agreed to the calculation of the standard range based on the offender score of 16, waiving this argument on appeal.

V. CONCLUSION

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

The trial court properly sentenced the appellant and, thus, trial counsel was not ineffective for failing to argue “same criminal conduct” at sentencing.

The State does not argue for imposition of appellate costs.

DATED this 9th day of January, 2017.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: _____
REBECCA L. BARTLETT, WSBA#49846
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Skagit County Prosecutor’s Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X] Electronic Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, of Nielsen Broman & Koch PLLC, e-mail address SloaneJ@nwattorney.net **under agreement reached pursuant to GR 30(b)(4)**. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 9th day of January 2017.



KAREN R. WALLACE, DECLARANT