

67678-4

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No. 67678-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL JONES

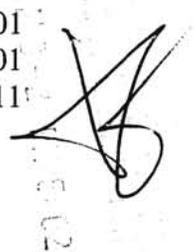
Appellant.

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The objections made below were sufficient to preserve the claims of error, and even if they were not, the claims may be raised for the first time on appeal.

The State claims that several of Mr. Jones's grounds for appeal were not preserved because he failed to adequately object to them below. Br. of Resp't at 15-19, 22-23. This claim fails for two reasons: first, Mr. Jones did in fact object through a CrR 3.6 motion; and second, the issues presented are manifest errors affecting a constitutional right, and therefore may be raised for the first time on appeal.

a. Mr. Jones objected to the breadth of the warrant through his CrR 3.6 motion.

In Mr. Jones's CrR 3.6 motion before the trial court, he specifically noted his objection to the search warrant's inclusion of "bedding, to include blankets," "signs or images," "photographs," "sex related material to include[] [b]ooks, literature, object[s], toys, pumps and vibrators," and "VHS/DVDS/CD and movies." CP 14-15. Each of these objections was accompanied by a brief argument clearly showing that the reason for the objection was the unjustified breadth of each provision. *Id.* Thus, all four of those items, not just three, as claimed by the State, *see* Br. of Resp't at 18-19, were raised in the CrR 3.6 motion, along with the objection to the general "any and all evidence" term.

The State argues that Mr. Jones "abandoned his argument" with respect to all but the "any and all evidence" term by failing to explicitly discuss the other warrant provisions during the CrR 3.6 hearing. Br. of Resp't at 17-19. The State's theory is apparently that if, during a CrR 3.6 hearing, a defendant does not parrot every line-item objection contained in the written motion, he loses those claims then and forever after. The State presents no authority to support this position. *See id.* The radical implications of the State's claim—for both appellate procedure and for the length of future CrR 3.6 hearings—cannot be overstated. And the degree of required precision and repetition to which the State would hold Mr. Jones runs counter to RAP 1.2(a)'s admonition that the Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits."

Mr. Jones properly raised these issues before the trial court and did not abandon them. Similarly, the court ruled on all of them as a group, by holding that it was "very comfortable with the particular list of items given and the general language in addition to that, any and all other evidence of the crime." Verbatim Report of Proceedings, 5/18/11 (1RP) 17. The State's argument that these claims were not preserved for appeal is therefore meritless.

b. The warrant-overbreadth issue is a manifest error affecting a constitutional right that may be raised for the first time on appeal.

Even if Mr. Jones had not objected to the warrant's breadth at all, he still could raise the issue on appeal, because the overbreadth issue is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). This Court has formulated a useful four-step framework for applying this standard:

[T]he reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The first step—"a cursory determination as to whether the alleged error in fact suggests a constitutional issue"—is easily met here. Whether a warrant satisfies constitutional particularity standards is, by definition, a constitutional issue. The State concedes this point. Br. of Resp't at 19 n.8. The third step—the merits of the constitutional issue—is addressed in the opening brief and will not be repeated here.

The error in this case also satisfies the second step of the *Lynn* test: it was "manifest" under the meaning of RAP 2.5(a)(3). The *Lynn* court interpreted the word "manifest" in RAP 2.5(a)(3) according to its ordinary usage, meaning "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." 67 Wn. App. at 345 (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The court further interpreted the term "affecting" as "having an impact or impinging on, in short, [making] a difference." *Id.*

The court held that these terms laid out a limiting principle to distinguish errors for which an appellant can make "some reasonable showing of a likelihood of actual prejudice," *id.* at 346, from "purely formal and obscure claims of constitutional error," *id.* at 344 n.3, or errors that were "purely abstract and theoretical . . . [and without] practical consequences," *id.* at 346. Thus, under *Lynn*, showing a "manifest" error does not require an appellant to establish that the error actually affected the verdict. Indeed, if that were the case, the further inclusion of a harmless error analysis would be entirely redundant. Rather, an appellant needs only to make "some reasonable showing of a likelihood of actual prejudice." *Id.* at 346. The asserted error, in other words, must have been plausibly capable of causing prejudice, rather than a hypertechnical

objection or pie-in-the-sky theory that, in the context of the case, could not actually have affected the defendant's rights. *Id.*

The error in this case easily satisfies this standard of prejudice. The search revealed a large amount of incriminating material in Mr. Jones's home. *See* Sealed CP Sub no. 45 (SCP) 19-20, 122-23, 185-86. Contrary to the State's claim, the trial court had all of this material before it and stated that it had reviewed the material before it pronounced Mr. Jones guilty. Verbatim Report of Proceedings, 8/24/11 (2RP) 3 (noting that the trial court had reviewed all of the discovery provided to it), 6 (same); SCP cover page (stamped "JUDGE'S COPY"). The availability of this material to the trial court clearly created a "likelihood of actual prejudice." *Lynn*, 67 Wn. App. at 346; *see also State v. Jones*, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011) (reviewing a challenge to a warrantless search raised for the first time on appeal under RAP 2.5(a)(3) because the record was sufficiently developed for the appellate court to fully consider the issue) & n.9 (noting that the Washington Supreme Court has done the same), *rev. denied*, 173 Wn.2d 1009 (2012). The error was therefore "manifest" under RAP 2.5(a)(3), and may be raised for the first time on appeal.

II. The generic search authorization and failure to include available detail to limit the scope of the search rendered the warrant unconstitutionally overbroad.

The State relies on several cases to support its contention that the inclusion of a generic search authorization at the end of a list of other items does not necessarily render a warrant overbroad. Br. of Resp't at 12-14. As a basic proposition, this is correct—it is possible, in some circumstances, for a warrant to include somewhat generic descriptions of items without violating constitutional particularity requirements. But that does not support the State's argument that the warrant in this case was sufficiently particular, for two reasons.

First, the warrant was substantially broader than it needed to be on the facts of this case. Detective Luvera knew a significant amount of information about the specific items for which probable cause had been established, and described these items in detail in her affidavit. CP 23-25. Yet the warrant itself described the items to be searched and seized in very general terms, including the final catch-all provision, and did not reference the affidavit at all. CP 27-28. Thus, this is not a case where the generic description was the best that was available at the time, or where the nature of the crime rendered a more specific description impossible. Rather, the warrant was far less particular than it could have been given what police knew when they requested it. This alone rendered the warrant

unconstitutionally overbroad, even if precisely the same warrant might have been sufficiently particular under different circumstances. *See, e.g., State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992) (noting that "courts have reasoned that the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues") (collecting cases).

Second, the State's argument misses the main point of the *ejusdem generis* issue. Mr. Jones's claim is not that a generic term at the end of a list of more-specific items in a warrant is always invalid. Rather, it is that in this case, the list of supposedly specific items did not provide any guidance to limit the more general term.

To illustrate the point, one can consider the familiar example of a sign posted in a park that prohibits "cars, motorcycles, and other vehicles." In that case, the intended meaning of "other vehicles" is fairly discernible from the context—it probably includes mopeds, but not wheelchairs or tricycles, even though they are all technically "vehicles." But if the sign instead prohibited "doing backflips, riding bicycles, and other activities," the principle of *ejusdem generis* would be useless. Because doing backflips and riding bicycles have little to nothing in common, the

meaning of "other activities" is not meaningfully limited by its association with the other two terms.

As with this second hypothetical park sign, the authorization to search for "any and all evidence of the crime" contained in the warrant was not meaningfully limited by the terms preceding it, because those terms had nothing in common with each other. Thus, regardless of whether there are some cases in which a general term included at the end of a list of specific items might be valid in a warrant, this is not such a case.

III. The invalid portions of the warrant are not severable and were not harmless error.

The State next claims that any invalid portions of the warrant may be severed, and that any error was harmless. Br. of Resp't at 24-27. Regarding severability, the State asserts that the only claim of non-severability made by Mr. Jones is for the "any and all evidence" provision. *Id.* at 24-25. This is incorrect. As noted in the opening brief, there are two independent reasons why the invalid portions of the warrant are not severable from the arguably valid portions. First, the inclusion of the "any and all evidence" term authorized a general search of Mr. Jones's home. Because general warrants may not be saved by severing the provision that authorized the general search, the warrant is invalid. *Perrone*, 119 Wn.2d

at 556-57; *see also State v. Maddox*, 116 Wn. App. 796, 807-09, 67 P.3d 1135 (2003).

Second, severability does not apply if the valid provisions of the warrant are "relatively insignificant" compared to the invalid provisions. *Perrone*, 119 Wn.2d at 557; *Maddox*, 116 Wn. App. at 807-08. The invalid portions of this warrant were the overbroad authorizations related to signs and images, photographs, sex-related material including books and literature, movies, and computer files—in addition to the "any and all evidence" term. Contrary to the State's claim, *see* Br. of Resp't at 24-25, Mr. Jones does not concede that any of these invalid provisions in the warrant are severable. And the unchallenged provisions—addressing items such as bedding, guns, and paint—are insignificant compared to the scope of the search authorized by the invalid portions of the warrant. The overbroad terms therefore are not severable, and the entire warrant is invalid.

Nor was the use of the invalid warrant harmless error. As noted in the State's brief, the constitutional harmless error standard applies in this case, so it is the State's burden to prove harmlessness beyond a reasonable doubt. Br. of Resp't at 25-26. The State contends that the trial court relied only on the seized videotapes in rendering its judgment. *Id.* at 27. This is inaccurate. The trial court specifically noted, prior to rendering its

judgment, that it had reviewed all of the discovery provided to it. 2RP 3, 6. These files included summaries and descriptions of many of the items found in Mr. Jones's home. *See* SCP 19-20, 122-23, 185-86. Much of this information was incriminating and could not have helped but influence the court in its decision.

The State also claims that the error was harmless because the trial court found DRP's statements, as reported by his parents and police, to be credible. Br. of Resp't at 26-27. The State contends that because the statement of a credible witness is sufficient to uphold a conviction, it is also per se sufficient to establish harmless error. *Id.* at 27. As with the earlier claim that Mr. Jones abandoned the portions of his CrR 3.6 motion that he did not reiterate orally at the hearing, the State provides no authority to support this sweeping legal principle. Furthermore, even if the only issue was indeed DRP's credibility, the error still would not be harmless, because the existence of corroborating evidence unquestionably would have affected the trial court's assessment of DRP's accusations. The State therefore cannot meet its burden to show beyond a reasonable doubt that the error was harmless.

IV. The State's claims regarding the challenged community-custody conditions are without merit.

The State responds to Mr. Jones's claims regarding certain community-custody conditions with a variety of arguments. First, the State argues that the condition prohibiting Mr. Jones from frequenting any business that deals primarily in sexually oriented material is a valid crime-related prohibition. Br. of Resp't at 29-31. The State admits that its reason for wanting to impose this condition is related to Mr. Jones's prior possession of lawful pornography. *Id.* at 30. But the Washington Supreme Court has clearly held that a condition prohibiting the possession of pornography is unconstitutional. *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). This Court should not accept the State's attempt to skirt the holding of *Bahl* in this way.

The State also claims that the prohibitions on possessing items that could prove attractive to children and on photography or video equipment are as narrow as they could be under the circumstances. But Mr. Jones's opening brief provides examples of how these conditions could be reasonably limited to protect both the legitimate State interests at issue and Mr. Jones's fundamental constitutional rights to privacy and freedom of speech. *See* Br. of Appellant at 31-33. Moreover, the State's references to acts of molestation and recorded images and videos relating to children

other than DRP are not the proper basis of any crime-related prohibitions, since Mr. Jones was convicted only of acts of molestation against DRP.

The State next claims that "[i]t is absurd to imagine that a corrections officer would direct that a plethysmograph occur for any reason other than a treatment-related reason." Br. of Resp't at 34. If that is indeed the case, then the State should willingly accept a remand to the trial court on this condition with an instruction to enter a properly limited plethysmograph-testing provision, which Mr. Jones agrees would be the appropriate remedy. Under *State v. Riles*, 135 Wn.2d 326, 345-46, 957 P.2d 655 (1998), plethysmograph testing clearly must be limited to treatment-related purposes, and there is no reason for that limitation not to be reflected in the condition itself.

Finally, the prohibition on contact with minors is not controlled by *Riles*, as the State contends. In *Riles*, the defendant challenged a similar condition on First Amendment freedom of speech and association grounds. 135 Wn.2d at 346-47. Mr. Jones's challenge, on the other hand, is based on substantive due process under the Fourteenth Amendment. See Br. of Appellant at 40-42. The order as written effectively banishes Mr. Jones from all public places, in derogation of his right to travel and right to loiter for innocent purposes. *Id.* It is therefore unconstitutional

regardless of any First Amendment considerations, and is not controlled by the holding in *Riles*.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, Mr. Jones asks this Court to set aside his convictions, or alternatively, to strike or limit the challenged conditions of community custody as described in the opening brief.

DATED this 2nd day of August, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Lahiri", written over a horizontal line.

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67678-4-I
v.)	
)	
PAUL JONES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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