IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 39478-6-III

STATE OF WASHINGTON, Respondent,

v.

JUSTIN JOE ORTEGA, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
1360 N. Louisiana St. #A-789
Kennewick, WA 99336
Tel: (509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Federal:

Washington State:

Other States:

Constitutional Provisions

Court Rules

Other Sources

I. IDENTITY OF PETITIONER

Justin Ortega requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on July 11, 2024, concluding that the complete extraction of Mr. Ortega's cell phone was not overbroad when it made available for police inspection far more data than was authorized by the search warrant, and that images of Mr. Ortega engaged in sexual activity with a different person than the individual named in the warrant were properly seized under the plain view doctrine. A copy of the Court of Appeals' partially published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a warrant authorizing the search of a cell phone for specific items implicitly authorizes a dragnet

extraction of all of the cell phone's data to be reviewed by investigators to find the identified items.

2. Whether the differences between digital data and physical data require reconsideration or modification of the plain view doctrine to safeguard individual privacy interests protected by article I, section 7 of the Washington Constitution.

IV. STATEMENT OF THE CASE

Law enforcement relies upon technological limitations in the forensic extraction and analysis of digital data from devices such as cell phones and computers to seek authorization for comprehensive, general seizures of all of the data in the device, including data for which there is no probable cause to believe it is associated with a crime. This practice allows the State to "sweep up large quantities of data in the hope of dredging up information it could not otherwise lawfully seize." *U.S. v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1172 (9th Cir. 2010), *overruled on other grounds as recognized in*

Demaree v. Pederson, 887 F.3d 870, 876 (9th Cir. 2018). Then, in the course of searching through this data dump for the items named in the warrant, investigators rely on the "plain view" doctrine to seize private materials not covered by the warrant, thus "turning a limited search for particular information into a general search of . . . file systems and computer databases." *Comprehensive Drug Testing, Inc.*, at 1170.

In this case, police believed Mr. Ortega's cell phone would contain (1) images and/or videos depicting Justin Ortega engaged in sexual contact with eight-year-old M.R.; and (2) dominion and information identifying the owner of the device. CP 64. Consequently, it obtained a search warrant authorizing them to

> Make search of the above described Samsung Galaxy S10 plus smartphone . . . and to seize any and all evidence, specifically images and/or videos depicting Justin Ortega engaged in sexual contact with eight-year-old M.R., [and] dominion and information identifying the owner of the device....

CP 66. However, despite the limited evidence authorized to be seized in the warrant, police conducted "a Cellebrite dump of the whole phone" and then independently chose what file directories and types to examine, a process that necessarily resulted in exposing swathes of personal information not covered by the warrant to law enforcement examination – the kind of general rifling through personal effects that motivated the founders to limit the government's power to seize and search property. RP (Moore) 103.

Affirming the search of Mr. Ortega's cell phone, the Court of Appeals held that (1) the warrant was sufficiently particular because it authorized police to seize specified photos or videos along with owner-identifying information from the phone, *Opinion* at 7; (2) seizure of a photograph of an individual other than the individual named in the search warrant was authorized under the plain view doctrine, *Opinion* at 7, n. 4; and (3) the wholesale extraction of all of the data from Mr. Ortega's phone using forensic software did not exceed the

scope of the warrant's authorization in the absence of evidence that police looked at unauthorized data, *Opinion* at 10.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review under RAP 13.4(b)(3) because the routine extraction of the entire contents of a cell phone for analysis and the application of the plain view doctrine to justify seizures of digital data uncovered from that extraction implicate important privacy interests protected by the Fourth Amendment and article I, section 7 of Washington's Constitution.

Courts have long recognized that searches of digital data differ quantitatively and qualitatively from searches of physical data. *See Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014); *see also State v. Mansor*, 363 Or. 185, 201, 421 P.3d 323, 334 (Or. 2018) (discussing how the differences between digital searches and searches of physical evidence require different application of search and seizure

principles). This is not only because the information itself is significantly different – modern cell phones contain both vast quantities of personal information as well as types of data that are not generally available from physical searches, *see Riley*, 573 U.S. at 395-96 – but because while spatial limitations provide restrictions on the areas to be searched for physical evidence, with digital evidence, there is no real way to know ahead of time where a particular piece of data may be located. *See Mansor*, 421 P.3d at 214 (*quoting* Kerr, Orin S., *Digital Evidence and the New Criminal Procedure*, 105 Colum. L. Rev. 279, 303 (2005)).

These differences establish critical distinctions in the scope of privacy invasion contemplated by a search for items authorized by a warrant. With a physical item, any area not sufficiently large to contain the item will, by necessity, be excluded from the search authorization, and privacy within those excluded areas will be preserved. But digital evidence can be located in any number of files, as any file type, including

in ways and places that are unknown to the phone's owner, and investigators may not be able to tell whether an item is relevant or responsive without opening the file and examining it. *See State v. Bock*, 310 Or. App. 329, 337, 485 P.3d 931 (2021). The practical necessity that examiners must be able to examine more data than specifically authorized by the warrant in order to locate and seize all of the data authorized by the warrant, combined with the vast quantities and types of information contained in a cell phone, means that far more private information is at risk of exposure in the search of a cell phone than in the search of a room or a car. Because cell phone contents are considered private affairs within the meaning of article I, section 7, whether a cell phone search implicitly authorizes a dragnet seizure by extracting all of the phone's contents for inspection by examiners is a significant question of constitutional magnitude. *See State v. Samalia*, 186 Wn.2d 262, 272, 375 P.3d 1082 (2016).

Furthermore, the uniqueness of digital searches has led multiple courts to recognize that the justifications for applying the plain view doctrine to unauthorized items discovered during the course of the search do not apply in this context. In *Comprehensive Drug Testing*, the Ninth Circuit Court of Appeals noted that "everything the government chooses to seize will, under this theory, automatically come into plain view." 621 F.3d at 1171. This would then, in turn, create incentives for police to seize more rather than less, since they would be able to look through it all for named items and seize unnamed items under the plain view doctrine. *Id.*

Similarly, in *State v. Bock*, the Court of Appeals of Oregon observed that the assumption of minimal intrusion underlying the plain view doctrine cannot apply in cell phone searches, where both the amount of personal information subject to exposure and the necessity of viewing some information beyond the scope of the warrant in the course of a routine search threatens to bring an unprecedented amount of

personal information into the "plain view" of a forensic examiner. 485 P.3d at 339. For this reason, the *Bock* court rejected the plain view doctrine entirely in the context of cell phone searches, noting that under these circumstances, permitting the State to use any incriminating evidence discovered during the search "effectively converts the plain view doctrine into a vehicle for the execution of a general warrant" by nullifying the particularity requirement of the warrant. *Id.*

This Court has not previously confronted what limitations exist as to the scope and mechanics of a cell phone search under article I, section 7. Here, the Court of Appeals' precedential opinion not only authorizes but potentially incentivizes wholesale investigatory seizures of large swathes of personal information from cell phones to be searched and culled, with any inculpatory data that was not anticipated or targeted nevertheless available to support a criminal prosecution because it was found in plain view. Because of

article I, section 7's heightened privacy protections and because the Court of Appeals' decision does not acknowledge the unique challenges of cell phone searches recognized in other courts, review should be granted under RAP 13.4(b)(3) to evaluate whether article I, section 7 authorizes either the wholesale extraction of all cell phone data to conduct a search or the subsequent ability to expand the limits of the warrant under the plain view doctrine.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and this Court should enter a ruling that the extraction of all of the contents of Mr. Ortega's cell phone constitutes a prohibited investigatory dragnet seizure or, alternatively, that the nature of digital devices as vast repositories of private information requires additional limitations on the use of data falling outside the confines of the

warrant such that the plain view doctrine may not justify the seizure of items not named in the search warrant.

RESPECTFULLY SUBMITTED this 12 day of August, 2024.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Jill Reuter
Deputy Prosecuting Attorney for Yakima County
Jill.Reuter@co.yakima.wa.us
appeals@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12 day of August, 2024 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 39478-6-III (filed 7/11/2024)

APPENDIX A

FILED
JULY 11, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JUSTIN JOE ORTEGA, Appellant.	)))))))))	No. 39478-6-III OPINION PUBLISHED IN PART

PENNELL, J. — Justin Ortega appeals his convictions for eight instances of sexual and physical abuse against his girlfriend's young daughters.[1] He argues the State's case was tainted by evidence seized during an unconstitutional cell phone search. We reject this claim. The search occurred pursuant to a warrant that particularly authorized seizure of photographs documenting sexual abuse. And by using forensic technology to extract

---

[1] To protect the privacy interests of the minor children, we refer to them by their initials throughout this opinion. *See* Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. Jun. 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

and organize the cell phone's data, law enforcement officers were able to execute the warrant in a way that limited the scope of information that came under their review. We therefore affirm Mr. Ortega's convictions.

FACTS

In October 2019, nine-year-old J.R. and her sister, eight-year-old M.R., each disclosed—first to a teacher, then to police—that they had suffered physical and sexual abuse at the hands of their mother's boyfriend, Justin Ortega. The State charged Mr. Ortega with five counts of first degree rape of a child, two counts of first degree child molestation, and one count of third degree assault of a child.

During the police investigation, M.R. related that Mr. Ortega had recorded images of his assaultive conduct on his cell phone. Based on this disclosure, law enforcement believed Mr. Ortega's cell phone probably contained evidence of the crimes with which he was charged. The police subsequently obtained possession of the cell phone from a family member, who voluntarily turned it over to police.

Detective Curtis Oja of the Yakima Police Department applied for a search warrant to examine the contents of the phone. The superior court granted a warrant, authorizing police to search Mr. Ortega's cell phone and seize any images or videos depicting

Mr. Ortega engaged in "sexual contact" with M.R., as well as any information identifying the owner of the device. Clerk's Papers (CP) at 63, 66.

Pursuant to the warrant, police searched the phone and seized 35 images, some showing Mr. Ortega as the device's owner (for example, selfies taken by Mr. Ortega), some showing him engaged in sexual contact with M.R., and one showing him engaged in sexual contact with J.R.

Mr. Ortega moved to suppress the fruits of the cell phone search. He argued that the warrant was insufficiently particular, in violation of the state and federal constitutions. The trial court held an evidentiary hearing on the motion and the State presented testimony from detectives Curtis Oja and Kevin Lee.

According to the testimony, officers began the search by connecting Mr. Ortega's phone to an extraction device known as the "Cellebrite Touch." 1 Rep. of Proc. (RP) (Nov. 9, 2022) at 90. Detective Lee then ran an extraction that allowed the files on Mr. Ortega's phone to be organized into categories (for example, messages, images, etc.). Once extracted, data is not visible unless someone opens the individual category folders through Cellebrite's physical analyzer program. *See id.* at 91-92. Neither Detective Lee nor Detective Oja recalled reviewing anything besides photos and videos.

Detective Lee was asked, "are you able to" simply type in "8-year-old girl, sexual contact and only remove" those images "from [the phone?]" *Id.* at 98. Detective Lee responded, "No. . . . It's just not possible." *Id.* He clarified that it would be possible to run a search directing the program to extract solely images, instead of all of the phone's data, but such an extraction would be incomplete because it would not gather deleted images. Detective Lee also agreed that it was technically possible to search the phone manually for the authorized images, given that the phone had no passcode. But he explained that "best practice dictates that hand searches occur after a forensic search is conducted, that way there's no chance that you would delete or change any data." *Id.* at 110. Detective Oja explained that the forensic extraction process "preserves [the cell phone] in the same format that it was at the time it was searched." *Id.* at 139.

After the data extraction, Detective Lee gave Detective Oja a thumb drive containing more than 5,000 extracted images. Detective Oja agreed that it was similar to being given a physical photo album and having to flip through the pages to find what you are looking for. As he explained, "Somebody has to manually go through and identify which images . . . depict sexual contact." *Id.* at 136. Detective Oja explained that after he seized 35 images, M.R. and J.R. identified themselves in the photographs they were shown.

The trial court denied Mr. Ortega's motion to suppress the images seized from his cell phone.[2] Mr. Ortega subsequently waived his right to a jury trial and his case was tried to the bench. The court found Mr. Ortega guilty as charged. At sentencing, the court imposed an indeterminate life sentence with a minimum of 299 months' confinement. As to legal financial obligations, the court found Mr. Ortega was indigent and imposed the then-mandatory $500 crime victim penalty assessment (VPA) and $100 DNA collection fee.

Mr. Ortega timely appeals.

ANALYSIS

Cell phone search

Mr. Ortega contends we should reverse his convictions and remand with instructions to grant his suppression motion. He argues (1) the search warrant was insufficiently particular, and (2) police exceeded the scope of the warrant. We discuss each contention in turn.

---

[2] The court granted the suppression motion in one narrow respect, ruling that it would not consider any of the "EXIF" (exchangeable image file format) data associated with the extracted images. 1 RP (Nov. 14, 2022) at 178. While Detective Oja had asked for permission to seize EXIF data, the warrant itself—perhaps inadvertently—did not include EXIF data in its authorization. EXIF data is metadata that can help precisely identify when an image was captured.

1. Whether the warrant failed the particularity requirement

"Both the Fourth Amendment [to the United States Constitution] and article I, section 7 [of the Washington Constitution] require that a search warrant describe with particularity the place to be searched and the persons or things to be seized."[3] *See State v. Vance*, 9 Wn. App. 2d 357, 363, 444 P.3d 1214 (2019). The particularity requirement, which aims to prevent generalized rummaging through a suspect's private affairs, "is of heightened importance in the cell phone context," given the vast amount of sensitive data contained on the average user's smartphone device. *State v. Fairley*, 12 Wn. App. 2d 315, 320, 457 P.3d 1150 (2020). Whether a warrant satisfies the particularity requirement is a constitutional issue that is reviewed de novo. *Id.* at 321.

The purposes of the particularity requirement are to prevent a general search, limit the discretion of executing officers, and ensure that items to be searched or seized are supported by probable cause. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). When reviewing whether a warrant satisfies the requirement, we do not take a

---

[3] Mr. Ortega emphasizes that our state constitution "provides for broader privacy protections than" its federal counterpart. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). This is certainly true and explains why the state constitution is less forgiving of *warrantless* searches. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.3d 563 (1996). However, Mr. Ortega cites no authority indicating that our state constitution imposes a stricter particularity requirement.

hypertechnical approach. *Id.* at 549. Rather, we interpret a warrant "in a commonsense, practical manner." *Id.*

The warrant here easily satisfies the particularity requirement. It directed officers to "search" the phone and "seize . . . images and/or videos depicting Justin Ortega engaged in sexual contact with" an eight-year-old, along with "information identifying the owner of the device."[4] CP at 66. This did not permit a general rummaging; it was akin to a warrant allowing a search of a residence for controlled substances and indicia of ownership. The terms of the warrant were sufficiently descriptive to direct the actions of law enforcement; the warrant only allowed for a search of areas of the phone where the officer might find photos or indicia of ownership. And, as set forth in the warrant, there was probable cause[5] to believe that images of Mr. Ortega assaulting M.R. would be found on the phone and that the phone belonged to Mr. Ortega.

---

[4] While the warrant here only authorized seizure of images of Mr. Ortega engaged in sexual contact with M.R., the image of Mr. Ortega engaged in sexual contact with J.R. was properly seized under the plain view doctrine. *See State v. Temple*, 170 Wn. App. 156, 164, 285 P.3d 149 (2012) ("Under the plain view doctrine, an officer must (1) have a prior justification for the intrusion, (2) inadvertently discover the incriminating evidence, and (3) immediately recognize the item as contraband."). Law enforcement had a prior justification for the intrusion into the photo album on Mr. Ortega's phone: the warrant. And while executing that warrant, law enforcement inadvertently discovered an image of Mr. Ortega engaged in sexual contact with J.R., a nine-year-old, which any reasonable observer would immediately recognize as contraband.

[5] Mr. Ortega has never challenged the existence of probable cause.

Mr. Ortega complains that the warrant authorized a wholesale data dump of information on his phone. But this issue goes to how the warrant was executed. The warrant itself did not mention broad swaths of cell phone data. *Cf. State v. McKee*, 3 Wn. App. 2d 11, 19, 29, 413 P.3d 1049 (2018) (holding warrant specifying broad categories of cell phone data not connected to charged crimes was overbroad), *rev'd on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019). Nor did the warrant specify a forensic method for how officers were to search Mr. Ortega's phone. Thus, Mr. Ortega's complaints about the data dump go not to the issue of particularity, but to the officers' execution of the warrant.[6]

2. Whether officers exceeded the scope of the warrant

Execution of a search warrant must be strictly tied to "the scope of the warrant." *State v. Witkowski*, 3 Wn. App. 2d 318, 325, 415 P.3d 639 (2018). Our review of whether a particular search has met this constitutional mandate is de novo. *Id.* at 324.

"'[A] computer search may be as extensive as reasonably required to locate items described in the warrant' based on probable cause." *United States v. Burgess*, 576 F.3d

[6] Arguably, Mr. Ortega did not preserve an objection to the execution of the warrant. During the suppression hearing in superior court, his only complaint pertained to whether the warrant particularly described items to be seized. Nevertheless, the State does not claim this issue has been waived.

1078, 1092 (10th Cir. 2009) (quoting *United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006)). The scope of a search can be limited by identifying targeted content. *Id.* at 1093. When a warrant authorizes a search for a particular item, the scope of the search "'generally extends to the entire area in which the object of the search may be found.'" *Witkowski*, 3 Wn. App. 2d at 325-26 (quoting *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)).

The record here shows detectives Oja and Lee properly limited the scope of their search to the terms of the warrant. The images of M.R. could have been located almost anywhere on Mr. Ortega's cell phone—not only in a photos application, but also in e-mails and text messages. Had the detectives chosen to search Mr. Ortega's phone manually, they likely would have needed to sort through data other than images in order to find the targets of their search. And they would have risked jeopardizing the evidentiary integrity of the phone. *See United States v. Ganias*, 824 F.3d 199, 215 (2d Cir. 2016) (recognizing that, when dealing with digital evidence, "[p]reservation of the original medium or a complete mirror may . . . be necessary in order to safeguard the integrity of evidence" and "afford criminal defendants access to that medium or its forensic copy"); *State v. Grenning*, 169 Wn.2d 47, 60-61, 234 P.3d 169 (2010) (holding defendant was entitled to "mirror image copy" of the data on his hard drives seized by

law enforcement). By instead using forensic software, the detectives were able to organize the data from Mr. Ortega's phone without first viewing the phone's contents. This enabled them to limit their search to data labeled as photos and videos, thus restricting the scope of the search to areas where the target of the search could be found.

Mr. Ortega laments that, due to the extraction method used by police, "the entire contents of the phone" were "available" to police. Appellant's Br. at 7-8. But it is unclear how the mere *availability* of the data constituted an intrusion into Mr. Ortega's "private affairs" absent any indication that law enforcement in fact *looked* at data besides that which they were authorized to examine. WASH. CONST. art. I, § 7. The phone was not password protected; its contents were therefore "available" to law enforcement the moment it came into their possession. Appellant's Br. at 7. But a seizure is not the same as a search. *See Fairley*, 12 Wn. App. 2d at 321-22. Here, the extraction process did not, by itself, enable law enforcement to view the entire contents of Mr. Ortega's phone. It was still necessary to open up the individual data-type folders created through the extraction process. By using forensic software to extract and organize data from Mr. Ortega's phone, the detectives were able to minimize their review of the phone contents and tailor their search to the evidence authorized by the warrant. This did not

violate Mr. Ortega's constitutional rights. *See United States v. Mann*, 592 F.3d 779, 784 (7th Cir. 2010).

Mr. Ortega's convictions are affirmed.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

VPA and DNA collection fee

Mr. Ortega contends, and the State concedes, that the VPA should be struck on remand. The legislature amended the VPA statute by passing Engrossed Substitute House Bill 1169, with the amendments taking effect July 1, 2023. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (citing LAWS OF 2023, ch. 449, § 1). The statute now prohibits courts from imposing the VPA on defendants, like Mr. Ortega, who have been found to be indigent, and requires courts to waive any VPA imposed before the effective date, on the offender's motion, if the offender is unable to pay. *See* RCW 7.68.035(4), (5)(b). We therefore accept the State's concession and remand with instructions to strike the VPA from Mr. Ortega's judgment and sentence.

Mr. Ortega also contends, and the State concedes, that the DNA collection fee should be struck on remand, pursuant to legislative changes. We also accept this concession and remand with instructions to strike the DNA collection fee. *See Ellis*, 27 Wn. App. 2d at 17 (citing LAWS OF 2023, ch. 449, § 4).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Ortega filed a pro se statement of additional grounds for review (SAG). *See* RAP 10.10(a). Mr. Ortega's SAG raises 14 points. Each is addressed in turn.

First, Mr. Ortega writes that "[o]nly M.R. stated any phone activity happening. . . . J.R. never once said that there was any phone activity involved." SAG at 2. This "does not inform the court of the nature and occurrence of" an "alleged error[]." RAP 10.10(c). Thus, we "will not consider" it. *Id.* To the extent Mr. Ortega is complaining that the warrant did not authorize seizure of any images of J.R., the image of J.R. was discovered in plain view while searching for images of M.R., and it obviously depicted an unlawful act. Its seizure was therefore lawful. *See State v. Temple*, 170 Wn. App. 156, 164, 285 P.3d 149 (2012).

Second, Mr. Ortega asks us to upend the trial court's conclusion that the victims were credible, based on a comment M.R. made during her cross-examination. But we may not disturb a trial court's credibility determinations. *See, e.g., State v. Truong*, 168 Wn.

App. 529, 534, 277 P.3d 74 (2012); *see also* CP at 141 (trial court's finding that the children's "detailed descriptions" of their abuse were "highly credible").

Third, Mr. Ortega complains that police interviewed J.R. twice and that only the second interview was admitted into evidence. This does not "allege[]" an "error." RAP 10.10(c).

Fourth, Mr. Ortega complains that "[t]he warrant was not clear in particulars." SAG at 3. This issue was adequately briefed by counsel, so need not be considered further. *See* RAP 10.10(a); *State v. Thompson*, 169 Wn. App. 436, 492-93, 290 P.3d 996 (2012).

Fifth, Mr. Ortega contends the victims' aunt found information about the case posted on the Internet. This does not "allege[]" an "error." RAP 10.10(c).

Sixth, Mr. Ortega alleges his trial counsel and trial counsel's paralegal "told" him he "could not read/go over . . . discovery." SAG at 4. Assuming this contention is that trial counsel performed ineffectively, it involves a factual allegation outside the record on review. Therefore, Mr. Ortega's remedy, if any, is to seek relief by collateral attack. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

Seventh, Mr. Ortega complains that his trial counsel never hired a technician "to look into the phone." SAG at 4. Again, assuming Mr. Ortega is making a claim of

ineffective assistance, such claim involves matters outside this record, so it cannot be resolved on direct appeal. *See McFarland*, 127 Wn.2d at 338 n.5.

Eighth, Mr. Ortega complains that the trial court repeatedly continued trial over his objections. The record indicates trial was continued five times over Mr. Ortega's objections. *See* CP at 15-17, 21, 114. "In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Thus, we review a continuance for abuse of discretion. *See id.* A trial court abuses its discretion where its decision was based on untenable grounds or reasons or was otherwise manifestly unreasonable. *See Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986). Here, each time the trial court continued trial, it had a tenable reason for doing so: On three occasions, Mr. Ortega's counsel plausibly explained he needed more time to prepare in order to render effective assistance; on one occasion, the defense and the State plausibly agreed they needed additional time to prepare because plea negotiations had recently fallen through; and on the final occasion, the trial prosecutor tested positive for COVID-19 mere days before the scheduled start of trial. *See* 1 RP (Jul. 23, 2021) at 5-6; 1 RP (Jan. 14, 2022) at 9; 1 RP (May 11, 2022) at 12-15; 1 RP (Jul. 29, 2022) at 16, 21; 1 RP (Oct. 17, 2022) at 28. Given these tenable reasons for

continuances, Mr. Ortega has not identified any abuse of discretion. Nor does he articulate any argument that a constitutional violation flowed from the continuances.

Ninth, Mr. Ortega complains that M.R. and J.R. were not medically examined. But medical evidence was not required. *See* RCW 9A.44.020(1).

Tenth, Mr. Ortega baldly claims "[t]he photos admitted as evidence do not show" him "performing any sexual acts." SAG at 5. But the trial court looked at the images, was able to see Mr. Ortega in court, and was persuaded the man in the images was him. We may not disagree with a trial court's assessment of the persuasiveness of evidence. *See Truong*, 168 Wn. App. at 534.

Eleventh, Mr. Ortega claims the children had "past sexual encounters" that his attorney "failed to address." SAG at 5. This does not "allege[]" an "error." RAP 10.10(c).

Twelfth, Mr. Ortega complains that the final trial continuance was expressly granted so the trial prosecutor could recover from COVID-19, but that "the prosecutor added that he needed time to interview Det[ective] Lee," indicating that, in addition to their illness, the trial prosecutor actually was not ready. SAG at 5. Mr. Ortega misreads the record. The continuance *was* requested and granted solely on the basis of the prosecutor's illness. Detective Lee became relevant because his scheduling conflicts

made setting a new trial date challenging, *not* because the prosecutor still needed to conduct an interview with him.

Thirteenth, Mr. Ortega baldly asserts the trial prosecutor has been charged with various crimes. This contention both relies on facts outside the record on review *and* fails to allege an error. We must decline to consider it. *See* RAP 10.10(c); *McFarland*, 127 Wn.2d at 338.

Fourteenth, Mr. Ortega complains that, in summation, the prosecutor argued Mr. Ortega must have taken the photos of himself performing sexual acts on the children for the purposes of sexual gratification. This does not "allege[]" an "error." RAP 10.10(c).

CONCLUSION

Mr. Ortega's convictions are affirmed. We remand for the limited purpose of striking the VPA and DNA collection fee from the judgment and sentence. Resentencing is not required.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Staab, J.

BURKHART & BURKHART, PLLC

August 12, 2024 - 3:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39478-6
Appellate Court Case Title:	State of Washington v. Justin Joe Ortega
Superior Court Case Number:	19-1-01953-6

The following documents have been uploaded:

- 394786_Petition_for_Review_20240812152129D3758257_6187.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review_001.pdf

A copy of the uploaded files will be sent to:

- appeals@co.yakima.wa.us
- jill.reuter@co.yakima.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
1360 N. LOUISIANA ST. #A-789
KENNEWICK, WA, 99336-8113
Phone: 509-572-2409

Note: The Filing Id is 20240812152129D3758257