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Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TANNER RYAN LANE,<br><br>Appellant. | No. 59755-1-II<br><br><br><br><br><br>PUBLISHED OPINION |

GLASGOW, J.—Police found depictions of minors engaged in sexually explicit conduct on two phones and a computer they seized from Tanner Lane's bedroom. The State charged Lane with four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct.

At a bench trial, a forensic investigator testified that police found one of the images, exhibit 39, in a "cache database" on Lane's computer, which is a database that stores images automatically downloaded from a website so the images can load faster if the user opens the website again. Unlike other images at issue at trial that Lane had manually downloaded or deleted, there was no testimony establishing that Lane manually downloaded or deleted exhibit 39.

The trial court found Lane guilty on all four counts, including count 3, for which the State elected possession of exhibit 39. The trial court included Lane's prior Colorado conviction for sexual exploitation of a child in his offender score. The trial court found Lane indigent and imposed

community custody conditions that Lane was required to pay for polygraph examinations and to stay within a certain geographic boundary determined by the Department of Corrections.

Lane appeals, arguing that there was insufficient evidence demonstrating that he *knowingly* possessed the image found in the cache database, which is a required element of first degree possession of depictions of a minor engaged in sexually explicit conduct. Lane also contends that the Colorado conviction should not have been included in his offender score because it was not comparable to a Washington crime, which the State concedes. Lane additionally challenges the condition requiring him to pay for polygraph examinations, which the State concedes should be stricken on remand. And Lane argues that the condition requiring him to stay within a certain geographic boundary is unconstitutionally vague.

The Washington Legislature has created separate crimes for knowingly viewing and knowingly possessing depictions of a minor engaged in sexually explicit conduct. We hold that Lane's conviction for count 3 is not supported by sufficient evidence of *knowingly possessing*, rather than knowingly viewing, exhibit 39. Though there is circumstantial evidence that Lane knowingly sought out and viewed a website displaying this image, the State presented no evidence that Lane knew that accessing the website would result in automatic download of the image into his computer's cache database, nor that Lane knew the image was downloaded and located on his computer. Accordingly, we conclude that insufficient evidence supports Lane's conviction on count 3. Lane does not appeal his remaining convictions

As a result, we reverse Lane's conviction on count 3. We remand for the trial court to vacate Lane's conviction on count 3, dismiss count 3 with prejudice, and resentence Lane. We accept the State's concession that Lane's prior Colorado conviction should not be included in his

offender score at resentencing. We also accept the State's concession that the trial court must omit the requirement that Lane pay for polygraph examinations at resentencing. Finally, based on this court's recent holdings, we conclude that the condition imposing a geographic boundary is not unconstitutionally vague and may be reimposed at resentencing.

## FACTS

### I. BACKGROUND

Lane was arrested in April 2022 after police found depictions of minors engaged in sexually explicit conduct on two phones and a computer hard drive they seized from his bedroom. Police also found sexual aid devices in Lane's bedroom, including at least one doll that mimicked the body of a child.

The State charged Lane with one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct (count 1)[1] and four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct (counts 2-5). Lane waived his right to a jury trial and opted for a bench trial. The State ultimately elected for the presence of exhibit 39 on Lane's computer to serve as the basis for count 3.

#### A. Trial Testimony

At trial, a forensic investigator testified that depictions of minors engaged in sexually explicit conduct are not easily accessible on the open internet because search engines are careful about removing that kind of material. Instead, the images are available either in chat rooms or on the dark web, which is only accessible through specific means. For example, an application

[1] The trial court later dismissed count 1 per the State's motion.

enabling a "Tor browser" specifically designed for anonymity and browsing the dark web can be used to locate and view such images. 2 Verbatim Rep. of Proc. (VRP) at 122.

Police testified that they found several images of minors engaged in sexually explicit conduct on two phones and a computer hard drive they found in Lane's bedroom.

On one phone, police found images that were admitted as exhibits 33, 34, and 35. The forensic investigator testified that these images were all saved to the download folder on the phone, which required the user to perform a manual action. The State elected for exhibit 35 to serve as the basis for count 5.

On the other phone, police found images that were admitted as exhibits 36, 37, and 38. Exhibits 36 and 37 were images located in manually-created, titled folders. Exhibit 38 showed images that were manually saved to the download folder on the phone. The State elected for exhibits 36 and 37 to serve as the basis for counts 2 and 4 respectively.

On the computer hard drive, police found images that were admitted as exhibits 39, 40, and 41. The State elected for exhibit 39 to serve as the basis for count 3 and exhibit 39 is the only image at issue in this appeal.

The forensic investigator testified that the image admitted as exhibit 39 was found in a "cache database," which is a database that "saves artifacts of the user's [web] activity" on the computer's hard drive. 2 VRP at 212, 178. She explained that "when a user is browsing [a] website, images from that website are stored in the cache in order to be brought up later, in order for the page to load quicker, so they're artifacts of that web browsing." 2 VRP at 179-80.

The forensic investigator testified that exhibit 39 was in

> a database for Opera, which is a web browser specifically for the cache data. So when you are browsing the web in Opera, and you open up a website with images

> in it, those images are saved as cache data in order to reopen the website quicker the next time you go to it. So this database is those cached images.

2 VRP at 151. She further stated, "[I]n this web browser if you open up the same exact website this image was from, it's already saved on there, so it doesn't have to re-download the image in order to view it -- so you can view it." 2 VRP at 152.

Outside of its location in the cache database, the forensic investigator testified that there was no metadata associated with the exhibit 39 image, so she did not know when the stored image was created, when it was last modified, or "how it got there or when." 2 VRP at 176. Thus, unlike her testimony about many of the other images discussed above, the forensic investigator did not testify that exhibit 39 had been manually saved or downloaded.

The forensic investigator found exhibits 40 and 41 in "unallocated space" on Lane's computer, which is a location for images that have been deleted, often manually, from a computer. 2 VRP at 153-54. The State did not elect for either of these exhibits to serve as the basis for counts 2-5.

B. Closing Arguments and Verdict

During closing arguments, the State summarized the evidence relevant to each elected count as described above. The State contended that the seized devices clearly belonged to Lane, and there was proof that the images in question were intentionally viewed and stored on Lane's devices. The State also argued that the location of the sexual aid devices "in the immediate proximity to the electronic devices containing child sex abuse material indicate[s] that the owner, the possessor of that material knew he had them because it shows intent. It shows he was intentionally seeking this material out . . . , and he was intentionally interacting with it." 2 VRP at 207.

Lane's defense counsel primarily argued that the State did not prove knowing possession of the images because the State did not demonstrate that Lane did more than momentarily handle the images or that he possessed them within the dates listed in the information. Regarding exhibit 39, defense counsel argued Lane should not be found guilty for any cached images and explained, "[W]e don't know when it was entered and when [it was] taken out. We know nothing. . . . There's no time frame with it." 2 VRP at 212.

The trial court found Lane guilty of all four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court found, "Defense's argument that this may have been accidentally downloaded at some point or gotten on to Mr. Lane's phone or his hard drive would certainly have a lot more weight if there was not all the other evidence in this case." Clerk's Papers (CP) at 342 (Finding of Fact (FF) 2). Regarding the sexual aid devices, the trial court stated, "It is reasonable to conclude that those items were being used in conjunction with the possession of this [depiction of a child engaged in sexually explicit conduct]." CP at 343 (FF 10). As a result, the trial court ultimately found that "[t]here is definite possession here." *Id.* (FF 11).

C. Sentencing

Before sentencing, Lane moved to exclude a prior Colorado conviction for sexual exploitation of a child because the offense was not comparable to any Washington offense. The trial court denied Lane's motion and determined that, including current offenses and the Colorado conviction, Lane had an offender score of 12, which provided a standard sentencing range of 77 to 102 months.

The trial court followed the State's recommendation and sentenced Lane to 84 months followed by 36 months of community custody. The trial court also found Lane indigent and waived all nonmandatory fees, fines, and costs. The trial court included a community custody condition requiring Lane to submit to polygraph examinations at his own expense. The trial court also included a community custody condition requiring Lane to "[r]emain within geographic boundary, as set forth in writing by the Community Corrections Officer." CP at 305.

Lane appeals his conviction for count 3 based on exhibit 39, as well as his sentence.

## ANALYSIS

### I. SUFFICIENCY OF THE EVIDENCE

Lane argues that the State presented insufficient evidence to support his conviction for count 3, first degree possession of depictions of a minor engaged in sexually explicit conduct related to exhibit 39, because the State failed to demonstrate that Lane knowingly possessed the image and did not simply view the image, which results in a lesser crime.

Specifically, Lane contends that the trial court "failed to distinguish between evidence that [Lane] may have viewed a website containing [exhibit 39] and evidence that he *knowingly possessed* that photograph." Appellant's Opening Br. at 13. Lane notes that for exhibit 39, the forensic investigator testified that the image was found as "'cache data,'" which includes images automatically saved onto a computer by a browser when a user opens a website in order to reopen the website faster in the future. Appellant's Opening Br. at 14 (quoting record). Additionally, there was no evidence that a person manually downloaded or deleted the image and no metadata for the image indicating how or when the file was put on Lane's computer. Lane argues that this evidence fails to demonstrate that he knew the image was saved on his computer, and knowing possession

is a required element of possession of depictions of a minor engaged in sexually explicit conduct. We agree.

A. Legal Principles

1. Standard of review

The Washington Supreme Court recently clarified that when reviewing a sufficiency of the evidence claim after a bench trial, we consider whether, when viewing the evidence in the light most favorable to the State, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Roberts*, 5 Wn.3d 222, 231, 572 P.3d 1191 (2025).[2] We do not reweigh the evidence and we defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.* at 234. "We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Locke*, 175 Wn. App. 779, 788, 307 P.3d 771 (2013).

2. Possession of depictions of a minor engaged in sexually explicit conduct

A person commits the crime of first degree possession of depictions of a minor engaged in sexually explicit conduct when the person "knowingly possesses a visual or printed matter

[2] In his opening brief, Lane assigns error to the trial court's findings of fact 2 and 11 (quoted above), contending that the standard for evaluating sufficiency of the evidence after a bench trial is whether findings of fact are supported by substantial evidence. However, in his reply brief, Lane acknowledges that *Roberts* clarified that the standard of review for sufficiency of the evidence after bench trials is whether any rational fact finder could find that all the elements of the crime were proven beyond a reasonable doubt. 5 Wn.3d at 231; Appellant's Reply Br. at 1. Accordingly, under *Roberts*, we need not specifically address Lane's challenges to specific findings of fact. 5 Wn.3d at 234-35. Instead, we view the specifics of his challenges to these findings in the context of evaluating whether any rational trier of fact could have found guilt beyond a reasonable doubt as *Roberts* requires.

depicting a minor engaged in sexually explicit conduct." RCW 9.68A.070(1)(a).[3] A person acts knowingly when they are "aware of a fact, facts, or circumstances or result described by a statute defining an offense" or they have "information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b)(i)-(ii). While ch. 9.68A RCW, does not define "possession," generally possession for purposes of this crime means physical custody or dominion and control over an item. *State v. Mobley*, 129 Wn. App. 378, 384, 118 P.3d 413 (2005).

In 2010, the Washington Legislature amended former ch. 9.68A RCW (2010), the chapter dealing with crimes regarding sexual exploitation of children, to add crimes for *viewing* depictions of a minor engaged in sexually explicit conduct, which do not require *possession* of an image. *See* LAWS OF 2010, ch. 227, § 7. The legislature stated:

> By amending current statutes governing depictions of a minor engaged in sexually explicit conduct, it is the intent of the legislature to ensure that intentional viewing of and dealing in [child sexual abuse material] over the internet is subject to a criminal penalty without limiting the scope of existing prohibitions on the possession of or dealing in [child sexual abuse material], including the possession of electronic depictions of a minor engaged in sexually explicit conduct.

LAWS OF 2010, ch. 227, § 1. The original version of the proposed bill added intentionally viewing depictions of a child engaged in sexually explicit conduct in the offense of possession, but the substitute bill that was ultimately adopted created a separate offense for intentionally viewing. *See* H.B. REP. ON SUBSTITUTE H.B. 2424, at 3, 61st Leg., Reg. Sess. (Wash. 2010). The legislature expressed its intent to respond to a 2009 Washington Supreme Court decision by making it clear that the unit of prosecution for possession of and dealing in depictions of minors engaged in

[3] Although Lane's offenses occurred in 2021 and 2022, we cite the current version of the statute as the relevant language is the same.

sexually explicit conduct was per image, while also creating a separate crime for viewing such images whose unit of prosecution was per internet session. LAWS OF 2010, ch. 227, § 1.

The units of prosecution for the crimes of possession and viewing depictions of a minor engaged in sexually explicit conduct are therefore different under current law. Depending on the degree of possession, each depiction or incident of possession constitutes a separate offense, whereas for viewing, each "separate internet session" of intentionally viewing the depictions constitutes a separate offense. RCW 9.68A.075(4); RCW 9.68A.070(1)(c), (2)(c). Additionally, the standard sentencing ranges associated with first degree convictions for possessing depictions of a minor engaged in sexually explicit conduct are greater than the standard sentencing ranges for viewing such depictions. *See* RCW 9.94A.515, tbl. 2 (first degree possession has a sentencing seriousness level of VI, whereas viewing has a seriousness level of IV); RCW 9.94A.510 (showing the difference in standard sentencing ranges for crimes with different seriousness levels).

3. Background on storage of downloaded images

Many courts in other jurisdictions have addressed various permutations of the sufficiency issue presented here. Though it is not precedential, *State v. Ballantyne*, 64 Kan. App. 2d 14, 543 P.3d 1152 (2024), contains a helpful basic background about how images are saved from the internet onto a computer.

A file that is created, either manually by a user or by the computer itself, can be saved in allocated space on the computer's hard drive. *Ballantyne*, 64 Kan. App. 2d at 17. When that file is deleted, the space where the file was previously assigned is called unallocated space, and that unallocated space may still contain the data of the file. *Id.* For example, when a user creates a file, the file is in allocated space. *Id.* If the user deletes the file through normal means, like placing it in

the recycle bin, the recycle bin is also allocated space. *Id.* If the user empties the recycle bin, the computer considers the file deleted and in unallocated space. *Id.* Special software is required to access data in a computer's unallocated space. *Id.* When the computer needs space, it may overwrite data in unallocated space. *Id.*

In contrast with manually downloaded or saved files, "[c]omputers may also create files automatically[,] which are also stored in allocated space." *Id.* When a user is browsing the internet, the computer may automatically save images that appear on a website in order to speed up the browsing experience on that website in the future. *Id.* These temporary cached files are stored in allocated space, and the computer eventually deletes them automatically. *Id.* These cached files are not necessarily seen by the user. *Id.* at 18. For example, "[i]f a webpage has 200 pictures of fishing lures, but only a few are visible on the screen, the computer will store files of all 200 pictures on the webpage to a temporary file cache." *Id.* So an image may be downloaded on the user's computer without the user ever seeing the picture. *Id.* "Though the user controls which websites [they] visit[], the user does not control which images from those websites are saved in the browser cache." *Id.*

4. Washington case law

The parties have not identified any Washington case that deals directly with cached images in the context of possession of depictions of a minor engaged in sexually explicit conduct.

The most analogous Washington case is *Mobley*, a Division Three case that addresses images found in unallocated space. In *Mobley*, police found three images depicting minors engaged in sexually explicit conduct in unallocated space on Mobley's computer hard drive. 129 Wn. App. at 381, 385. These images had previously been deleted, and a detective testified that the images

"were 'downloaded or purposefully put on the computer.'" *Id.* at 382 (quoting record). Mobley was convicted for possession of depictions of a minor engaged in sexually explicit conduct. *Id.* at 381, 383.

On appeal, Mobley argued that there was insufficient evidence that he knowingly possessed the images. *Id.* at 384. Division Three discussed *United States v. Tucker*, 305 F.3d 1193 (10th Cir. 2002), explaining that the defendant in *Tucker* argued he did not possess depictions of minors engaged in sexually explicit conduct, but merely viewed these images. The *Tucker* court concluded the defendant had sufficient control over the images in his browser's cache files, noting that he had reached out for the images by visiting websites containing depictions of minors engaged in sexually explicit conduct. *Mobley*, 129 Wn. App. at 384.

In contrast, Division Three also discussed a footnote from *United States v. Perez*, 247 F. Supp. 2d 459 (S.D.N.Y. 2003), citing an Eighth Circuit case addressing cached images: "'[O]ne cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image.'" *Mobley*, 129 Wn. App. at 385 (internal quotation marks omitted) (quoting *Perez*, 247 F. Supp. 2d at 484 n.12).

Division Three concluded that "the core question seems to be whether the totality of the circumstances establishes that a defendant reached out for and exercised dominion and control over the images at issue." *Id.* Accordingly, "evidence of 'reaching out for' and 'controlling' [such] images is incriminating, while inadvertent viewing questions are left to the fact finder." *Id.*

Applying this standard, the court affirmed Mobley's convictions for possession of depictions of a minor engaged in sexually explicit conduct. *Id.* at 387. The court relied on the fact

that the images were found in unallocated space, indicating that they had been deleted from Mobley's hard drive twice. *Id.* at 385. Additionally, a detective testified that the images had been "'downloaded or purposefully put on the computer'" and a minor had testified that Mobley made her look at pictures of naked children on his computer. *Id.* (quoting the record). Division Three held that this evidence was sufficient for the jury to find that Mobley "sought out these images [and] controlled them by downloading and/or saving them on his computer." *Id.* at 386.

5. Case law from other jurisdictions

There are a number of federal and state court cases that analyze cached images in the context of possession of depictions of minors engaged in sexually explicit conduct.

a. Federal cases

In *Tucker*, the Tenth Circuit case cited in *Mobley*, the court concluded that there was sufficient evidence demonstrating the defendant knowingly possessed child sexual abuse material under the applicable federal statute at the time, former 18 U.S.C. § 2252A(a)(5)(B) (1998). *Tucker*, 305 F.3d at 1204.[4] This statute provided that any person who "knowingly possesses any book,

[4] We note that some prior and current federal and state court opinions refer to depictions of minors engaged in sexually explicit conduct as "child pornography." This is the term that is used in the current federal statute. *See* 18 U.S.C. 2252A.

Pornography refers to "images involving consenting adults that are transmitted to the public legally." Elizabeth L. Jeglic, *Language Matters:* "*Child Pornography*" *No Longer,* PSYCH. TODAY (Aug. 20, 2020) (last visited Sep. 24, 2026), https://www.psychologytoday.com/us/blog/protecting-children-sexual-abuse/202008/language-matters-child-pornography-no-longer?msockid=16de58786ba06d121e804c086a286cd0. "Referring to child sex abuse images as pornography can make the crime seem less harmful to victims" and minimizes the seriousness of the crime. *Id.*

International Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (the Luxembourg Guidelines) explain that depictions of minors engaged in sexually explicit conduct should now be referred to as "child sex abuse material." SUSANNA GREIJER & JAPP DOEK, INTERAGENCY WORKING GRP. ON SEXUAL EXPLOITATION OF

magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of [child sex abuse material] that has been . . . transported in interstate . . . commerce . . . shall be punished." Former 18 U.S.C. § 2252A(a)(5)(B).

The court in *Tucker* relied on the fact that the defendant knew images he viewed on his web browser would be saved onto his cache database. 305 F.3d at 1205. Accordingly, it concluded, "Since [Tucker] knew his browser cached the image files, each time he intentionally sought out and viewed [child sexual abuse material] with his Web browser he knowingly acquired and possessed the images." *Id.* In a footnote, the court stated that it was leaving for another day the question of whether the mere viewing of child sex abuse material on the internet, "absent caching or otherwise saving the image, would meet the statutory definition of possession." *Id.* at 1205 n.16. The court also declined to address "whether an individual could be found guilty of knowingly possessing [child sex abuse material] if he viewed such images over the Internet but was ignorant of the fact that his Web browser cached such images." *Id.*

In another case regarding the same federal statute several years later, the Ninth Circuit also found sufficient evidence for possession of child sex abuse material where the images were found in a cache database. *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006). In *Romm*, law enforcement found child sex abuse material on Romm's computer, the majority of which had been

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CHILD., TERMINOLOGY GUIDELINES FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE 40 (JUNE 2016) [HTTPS://PERMA.CC/2PR2-G69N].

"The term 'child sexual abuse material' can be used as an alternative to 'child pornography' for material depicting acts of sexual abuse and/or focusing on the genitalia of the child. The term 'child sexual exploitation material' can be used in a broader sense to encompass all other sexuali[z]ed material depicting children." *Id.* As a result, we use either "depictions of minors engaged in sexually explicit conduct," which is consistent with Washington law, or "child sex abuse material" throughout this opinion.

deleted from his internet cache. *Id.* at 995. When talking to law enforcement, Romm stated that he had searched for websites containing child sex abuse material and when he found images he liked, he would keep them on his screen for five minutes and then delete them. *Id.* To describe this activity, Romm used the terms "'save'" and "'download.'" *Id.* (quoting record). At trial, a detective acknowledged that internet cache images can be deleted automatically by a computer, but based on "'experience and training,'" the detective thought that Romm had either instructed his browser to empty the cache or had deleted the files manually. *Id.*

On appeal, Romm argued that there was insufficient evidence of his control over the images in the internet cache. *Id.* at 999. Citing *Tucker*, the Ninth Circuit stated that "to possess the images in the cache, the defendant must, at minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." *Id.* at 1000. The Ninth Circuit concluded that "Romm exercised control over the cached images while they were contemporaneously saved to his cache and displayed on his screen," as during that time, "Romm could print the images, enlarge them, copy them, or email them to others." *Id.* Further, the court relied on Romm's admission that when he found certain images, he would view and "save" or "download[]" them to his computer, look at them for five minutes, and then delete them. *Id.* The court also relied on the testimony that Romm deleted these images from the internet cache, either manually or by instructing his computer to do so. *Id.* at 1001. Accordingly, there was evidence that Romm "exercised control over the images in his cache," such that a jury could have found Romm knowingly possessed the images. *Id.*

The *Romm* court summarized by explaining that "given Romm's ability to control the images while they were displayed on screen, and the forensic and other evidence that he actually

exercised this control over them, there was sufficient evidence to support the jury's finding that Romm possessed . . . [child sex abuse material]." The court then emphasized that "[c]oupled with Romm's conceded knowledge that the images were saved to his disk, the prosecution produced sufficient evidence to establish every element of knowingly possessing [child sex abuse material]."*Id.*

In contrast, later that year, the Ninth Circuit also decided *United States v. Kuchinski*, holding that the evidence in that case did not support a finding that the defendant knowingly possessed child sex abuse material. 469 F.3d 853, 862 (9th Cir. 2006). In *Kuchinski*, there was no evidence that the defendant knew of or tried to get access to the cache files on his computer. *Id.* The court contrasted these facts with *Romm*, where the defendant "knew about the cache files and had actually taken steps to access and delete them." *Id.* at 862. Ultimately, the *Kuchinski* court concluded, "[w]here a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the [child sex abuse] images located in those files, without some other indication of dominion and control over the images." *Id.* at 863.

After these Ninth Circuit cases were decided, in 2008, Congress amended the relevant federal statute, 18 U.S.C. § 2252A(a)(5)(B), to include any person who "knowingly possesses, *or knowingly accesses with intent to view*, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of [child sex abuse material]." (Emphasis added.); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 203, 122 Stat. 4001, 4003-04.

After this amendment, the Eighth Circuit decided *United States v. Kain*, 589 F.3d 945 (8th Cir. 2009), which the State cites as support for its argument that opening an image on a device is enough to establish dominion and control for purposes of proving knowing possession, without the need to download the image.

In *Kain*, law enforcement found child sex abuse material in a desktop folder on the defendant's computer. 589 F.3d at 948. Kain admitted he had used the computer to download multiple images into a specific desktop file. *Id.* at 949. But law enforcement also found images in the computer's temporary internet files. *Id.* The court first acknowledged that "[t]he presence of [child sex abuse material] in temporary internet and orphan files on a computer's hard drive is *evidence* of prior possession of that [material], though of course it is not conclusive evidence of knowing possession and control of the images." *Id.* at 950. However, finding sufficient evidence of knowing possession, the court wrote,

> A computer user who intentionally accesses [child sexual abuse material] on a web site gains actual control over the images, just as a person who intentionally browses [child sex abuse material] in a print magazine "knowingly possesses" those images, even if he later puts the magazine down without purchasing it. Congress in enacting and later clarifying § 2252A(a)(5)(B) made clear its intent to prohibit the *viewing* of [child sex abuse material] in order to protect its child victims.

*Id.*

In sum, the Ninth and Tenth Circuits have distinguished between instances where there was evidence that a person knew images were downloaded into cached or temporary internet files and cases where there was no such evidence. In contrast, the Eighth Circuit, relying in part on the language in the federal statute making viewing illegal, nevertheless found intentionally accessing images on a website was enough to amount to knowing possession.

b. Cases from other states

There are many cases from other states that have grappled with images found in temporary internet or cached files, and the parties cite several of these cases. We focus on examples from each school of thought, keeping in mind that Washington's intentional separation of crimes for viewing and possession of images depicting children engaged in sexually explicit conduct distinguishes it from many other jurisdictions.

In *Commonwealth v. Diodoro*, decided by the Pennsylvania Supreme Court, police found many images depicting minors engaged in sexually explicit conduct in cache files on the defendant's computer. 601 Pa. 6, 8, 970 A.2d 1100 (2009). Testimony demonstrated that the defendant had accessed those images by searching for and viewing them on the internet. *Id.* The relevant Pennsylvania statute stated that a person who "'knowingly possesses or controls'" a depiction of a minor engaged in sexually explicit conduct commits a criminal offense. *Id.* at 17 (boldface omitted) (quoting former 18 PA. CONS. STAT. § 6312(d)(1) (2002)).

Focusing on the definition of "control," the court stated, "[a]n individual manifests such knowing control of [child sex abuse material] when he purposefully searches it out on the internet and intentionally views it on his computer." *Id.* The court explained that "the viewer may, *inter alia,* manipulate, download, copy, print, save or e-mail the images," finding it did not matter "whether an individual actually partakes in such conduct or lacks the intent to partake in such activity because intentionally seeking out [child sex abuse material] and purposefully making it appear on the computer screen—for however long the defendant elects to view the image—itself constitutes knowing control." *Id.* at 17-18. The court emphasized that "[i]t is clear that [the statute] should not and cannot be read to allow intentional and purposeful viewing of [child sex abuse

material] on the internet without consequence." *Id.* at 18.[5] Thus, the *Diodoro* court concluded that knowing possession *or control* did not require any more than viewing an image on a person's computer screen, regardless of whether the image was stored anywhere. But the *Diodoro* court was concerned, in part, with leaving viewing images in the internet unpunishable.

In *State v. Barger*, decided by the Oregon Supreme Court, the defendant was convicted of the crime of encouraging child sex abuse, which included knowingly possessing or controlling images of sexually explicit conduct involving a child, based on images that were found in a computer's temporary internet file cache. 349 Or. 553, 556-57, 247 P.3d 309 (2011); *see also* former Or. Rev. Stat. § 163.686(1)(a)(A)(ii) (1995); former OR. REV. STAT. § 161.015(9) (1995) (defining to "possess" as "to have physical possession or otherwise exercise dominion or control over property"). In *Barger*, the Oregon Supreme Court noted that under a different subsection for the crime of encouraging child sex abuse, the legislature also defined a crime for knowingly paying, exchanging, or giving "anything of value to *obtain or view* a photograph . . . of sexually explicit conduct involving a child.'" 39 Or. at 560 (quoting 1995 Or. Laws 2368). From this inclusion of viewing images of sexually explicit conduct involving a child in a related offense, the Oregon Supreme Court concluded that the legislature "chose *not* to criminalize the act of *viewing* [such images]" on its own. *Id.* at 561. Relying on Oregon's case law related to possession broadly, the court also concluded that "even *constructive* possession of a thing, *i.e.*, dominion or control over it, cannot be established merely by showing that the thing was in close proximity or physically available to a potential possessor." *Id.* at 562.

[5] In 2009, the Pennsylvania legislature amended the statute to include intentionally viewing child sex abuse material. Former PA. CONS. STAT. § 6312(d)(1); 2009 Pa. Laws 63. But this was not the version at issue in *Diodoro*.

The State in *Barger* argued that the defendant controlled, and therefore had possession of, the images at the time they appeared on his computer screen because he had the ability to direct or influence the images by, for example, saving, copying, printing, or emailing them. *Id.* at 563. The Oregon Supreme Court rejected this argument, stating that the "argument still is nothing more than the assertion . . . that the *ability* to possess or control a thing means that one actually *is* possessing or controlling it." *Id.* at 566. The Oregon Supreme Court thus held that under the applicable statute, a computer user does not possess a digital image that they have "called up on a computer screen" without "some additional action." *Id.* at 566.[6]

Accordingly, there are conflicting views in state courts about whether intentional viewing of an image on the internet, without knowingly downloading it, constitutes knowing possession of that image. But a significant consideration has been whether the court's analysis of what constitutes knowing possession will leave viewing images depicting children engaged in sexually explicit conduct completely unpunishable.

B. Sufficiency of the Evidence that Lane Knowingly Possessed Exhibit 39

As an initial matter, the State originally asserted that exhibit 39 was found in unallocated space on Lane's computer. However, as the State correctly acknowledged at oral argument, there was no testimony at trial that exhibit 39 was found in unallocated space. The forensic investigator stated that only exhibits 40 and 41 were located in unallocated space, but exhibit 39 was separately

[6] After *Barger*, the Oregon legislature amended the statute to include "[k]nowingly possess[ing] or control[ling], *or knowingly access*[*ing*] *with intent to view*" images of sexually explicit conduct involving a child. *See* OR. REV. STAT. 163.686(1)(a)(A)(i) (emphasis added); 2011 Or. Laws, ch. 515, § 4.

located in the cache database on the computer hard drive. *See* Appellant's Reply Br. at 4; 2 VRP 151-53, 179-80.

Under RCW 9.68A.070(1)(a), a person must *knowingly* possess depictions of a minor engaged in sexually explicit conduct to commit the crime of possession. Here, there was no evidence that Lane knew the image associated with exhibit 39 was in the cache database on his computer. The forensic investigator testified that cache databases store images from websites in order to display the images faster if the user reopens the websites. The forensic investigator did not indicate that Lane took any specific action to place exhibit 39 in the cache database except by browsing the internet, unlike other images that he intentionally downloaded or saved. And, unlike in *Mobley*, the forensic investigator presented no evidence that Lane knew the image was in the cache database. In fact, the forensic investigator stated there was no metadata associated with exhibit 39 that would show how or when it had been placed into the cache database.

The State cites the fact that Lane had manually downloaded other depictions of a minor engaged in sexually explicit conduct onto his computer and phones as circumstantial evidence of knowing possession of exhibit 39. However, this is evidence associated with other images in the case and does not demonstrate that Lane knew exhibit 39 was cached on his computer. The State could have elected to rely instead on other images, for example the images in unallocated space, suggesting manual deletion. But the State chose to rely on exhibit 39. Accordingly, even when viewing the evidence and taking any reasonable inferences in the light most favorable to the State, there was not sufficient evidence that Lane knew exhibit 39 was placed or located in a cache database on his computer hard drive.

We acknowledge the forensic investigator testified that the image associated with exhibit 39 was in "a database for Opera, which is a web browser specifically for cache data. So when you are browsing the web in Opera, and you open up a website with images in it, those images are saved as cache data in order to reopen the website quicker the next time you go to it." 2 VRP at 151. But there was no testimony establishing that Lane knew that Opera was for cached data, or that this is a well-known feature of Opera, or even that Opera is typically used to download images. Thus, when applying the test for a circumstantial finding of knowledge—whether the defendant has "information [that] would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense"—it is not clear from this record that a reasonable person using Opera would have known the use of that program would result in cached images. RCW 9A.08.010(1)(b)(ii).

Additionally, the State argues that there was sufficient evidence that Lane knowingly *viewed* the image associated with exhibit 39, which is sufficient evidence that he "reached out for and exercised dominion and control" over the image, thereby fulfilling the standard for possession. *Mobley*, 129 Wn. App. at 385. Specifically, the State relies on the fact that Lane would have likely had to intentionally use a "Tor Browser" to access the dark web in order to view depictions of a minor engaged in sexually explicit conduct. 2 VRP at 122. But, like the Oregon Supreme Court reasoned in *Barger*, we find it crucial that the Washington Legislature specifically created a separate statute criminalizing mere viewing of depictions of minors engaged in sexually explicit conduct on the internet. *See* RCW 9.68A.075. And the State ignores that illegally viewing such images has a different unit of prosecution and seriousness level for sentencing, showing the legislature intended internet viewing to constitute a distinct crime from possession. As a result, we

conclude that evidence that Lane took steps to knowingly view the image associated with exhibit 39 on a web browser is insufficient to demonstrate the dominion and control required for *knowing possession*.

The State contended at oral argument that when the legislature adopted the separate crime of knowing possession of depictions of minors engaged in sexually explicit conduct, it expressed an intent not to limit "the scope of existing prohibitions on the possession of or dealing in [child sexual abuse material], including the possession of electronic depictions of a minor engaged in sexually explicit conduct." LAWS OF 2010, ch. 227, § 1. The State asserts that the creation of the separate crime for viewing such images was intended to apply only when a person views the images as a bystander while someone else physically possesses them. But this ignores that the legislature also expressed its intent to respond to a 2009 Washington Supreme Court decision by making it clear that the unit of prosecution for possession of and dealing in depictions of minors engaged in sexually explicit conduct was per image, while also creating a separate crime with a per internet session unit of prosecution for viewing such images. *Id.* This shows that the legislature intended to specifically address a person viewing images of children engaged in sexually explicit conduct *on the internet* in 2010 when it created the separate crime.

Finally, the State points to the presence of sexual aid devices mimicking a child's body in Lane's bedroom as evidence of possession of depictions of a minor engaged in sexually explicit conduct. However, these sexual aid devices could equally be construed as evidence of viewing depictions of a minor engaged in sexually explicit conduct; the devices do not act on their own as sufficient circumstantial evidence that Lane knew the image associated with exhibit 39 was located in a cache database on his computer. To the extent the State is asking us to infer knowing

possession of exhibit 39 based on Lane's knowing possession of other images or his possession of other related items in his bedroom, although this may have been sufficient evidence to reasonably infer viewing, it is insufficient to support a reasonable inference of knowing possession.

For all of these reasons we reverse Lane's conviction of count 3 for first degree possession of depictions of a minor engaged in sexually explicit conduct associated with exhibit 39. Lane does not challenge any of the other three convictions associated with other images. We remand for the trial court to vacate Lane's conviction on count 3, dismiss count 3 with prejudice, and resentence him.

## II. OFFENDER SCORE

Lane argues that the trial court erred by including his Colorado conviction for sexual exploitation of a child in his offender score because the Colorado offense is not comparable to a Washington crime. The State concedes this is true and we agree.

Lane was sentenced under Colorado's statute for sexual exploitation of a child, which applies when a person "possesses[] or controls any sexually exploitative material." Former COLO. REV. STAT. § 18-6-403(3)(b.5) (2018). The statute defines "sexually exploitative material" as visual media "that depicts a child engaged in, participating in, *observing*, or being used for explicit sexual conduct." COLO. REV. STAT. § 18-6-403(2)(j)(I) (emphasis added).

Washington has criminalized "possession of depictions of a minor *engaged in* sexually explicit conduct." RCW 9.68A.070(1)(a) (emphasis added). Our definition of engaging in "sexually explicit conduct" does not include observation. *See* RCW 9.68A.011(8)(a)-(f). Accordingly, we accept the State's concession that the Colorado offense is broader than the Washington crime and therefore is not legally comparable. *See In re Pers. Restraint of Canha*, 189

Wn.2d 359, 366, 402 P.3d 266 (2017). The State does not argue that the Colorado offense was nevertheless factually comparable. Therefore, the trial court must not include the Colorado conviction in Lane's offender score at resentencing.

## III. COMMUNITY CUSTODY CONDITIONS

### A. Polygraph Test Expense

Lane argues that the trial court erred by imposing a community custody condition requiring Lane to pay for polygraph examinations despite its finding that Lane was indigent. The State concedes the payment requirement should be stricken on remand. We accept the State's concession. The trial court must amend this community custody condition at resentencing. *See* LAWS OF 2022, ch. 29, § 8(2)(d); RCW 9.94A.703.

### B. Geographic Boundary

Lane also argues that the community custody condition requiring him to remain within a certain geographic boundary determined by the Department of Corrections is unconstitutionally vague. This court and Division One have recently held that almost identical community custody conditions were not unconstitutionally vague. *See State v. Cobb*, 36 Wn. App. 2d 382, 385, 584 P.3d 420 (2026); *State v. Lundstrom*, 34 Wn. App. 2d 977, 983, 572 P.3d 1243 (2025). We agree with the reasoning in *Cobb* and *Lundstrom* and conclude that the community custody condition requiring Lane to remain within a geographic boundary determined by the Department of Corrections is not unconstitutionally vague.

## CONCLUSION

We reverse Lane's conviction on count 3. We remand for the trial court to vacate Lane's conviction on count 3, dismiss count 3 with prejudice, and resentence Lane. We accept the State's

concession that Lane's prior Colorado conviction should not be included in his offender score at resentencing. We also accept the State's concession and require the trial court to omit the requirement that Lane pay for polygraph examinations at resentencing. Finally, based on this court's recent holdings, we conclude the condition imposing a geographic boundary is not unconstitutionally vague.

GLASGOW, J.

We concur:

PRICE, A.C.J.

LEE, J.