No. _____

In The
Supreme Court of the United States

MATTHEW JOHN STICKLE,
Petitioner,

V.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

APPENDIX

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VIRGINIA:
In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of June, 2018.

Record No. 180151
Court of Appeals No. 0660-16-1

Matthew John Stickle, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon Review of the Record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the appeal.

The Circuit Court of the City of Williamsburg and James City County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth by appellant in Supreme Court of Virginia: Attorney's fee $750.00 plus costs and expenses.

A Copy,
Teste:
Patricia L. Harrington, Clerk

PUBLISHED

COURT OF APPEALS OF VIRGINIA
Present: Judges Humphreys, Russell and Senior Judge Bumgardner
Argued at Norfolk, Virginia

OPINION BY JUDGE ROBERT J. HUMPHREYS
DECEMBER 27, 2017

Record No. 0660-16-1

MATTHEW JOHN STICKLE
v.
COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY
Michael E. McGinty, Judge

Patricia Palmer Nagel for appellant.
John I. Jones, IV, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Matthew John Stickle ("Stickle") appeals his December 16, 2015 conviction in the Circuit Court of the City of Williamsburg and County of James City (the "circuit court") on three counts of possession of child pornography, first and second or subsequent offenses, and twenty-two counts of possession of child pornography with intent to distribute.

I. Background

"In accordance with established principles of appellate review, we state the facts in the light most favorable to the Commonwealth, the prevailing party in the [circuit] court. We also accord the Commonwealth the benefit of all inferences fairly deducible from the evidence." Muhammad v. Commonwealth, 269 Va. 451, 479, 619 S.E.2d 16, 31 (2005).

So viewed, the evidence shows that on September 3, 2013, Lieutenant Scott Little ("Little"), a district coordinator of the Southern Virginia Internet Crimes Against Children Task Force, took part in an undercover investigation into what is known as peer-to-peer ("P2P") distribution of child pornography over the internet. Little testified regarding his substantive role in the investigation of Stickle and also testified without objection as an expert in the field of digital forensics, in particular "as to the investigation of child exploitation offenses."

Although the record reflects that much of Little's testimony is somewhat technical, the specifics are important to the legal analysis in this case and are essentially as follows:

What is generically referred to as "the internet" is a cooperatively managed global network of smaller interconnected networks. Each internet site, whether such site is hosted on a computer server or a single specific computer, is associated with a unique internet protocol ("IP") address. Likewise, each device accessing the internet, such as computers, tablets, modems, routers, and smart phones, necessarily also is assigned a unique IP

address to facilitate two-way communication with other devices and locations on the internet.[1] The most common method of accessing internet sites is through a software application known as a "browser," such as Microsoft's Internet Explorer or Apple's Safari. Browsers can access that portion of the internet known as the Worldwide Web or simply "the web," which is the roughly fifteen percent of the internet sites that have been assigned domain names and indexed by Google and other search engines.[2] Using a browser to access a site on the

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[1] An IP address is a unique 128 bit number assigned by the Domain Name Server ("DNS") of an internet service provider to each specific customer. IP addresses of individual devices within that customer's premises are assigned and maintained by a DNS in a device called a router that creates a subnetwork within the premises based upon the IP address assigned by the internet service provider. Overall worldwide management of IP addresses and associated domain names is the responsibility of the Internet Corporation for Assigned Names and Numbers (ICANN).

[2] The web is defined as a collection of links to the registered domain names of internet locations or "web pages" created using HTML (Hypertext Markup Language) thereby enabling them to be indexed by search engines and displayed in a browser. The remainder and vast majority of internet sites, known as the "deep web," consists of unindexed, non-HTML locations, resources, and data that are encrypted, protected by a password, behind a paywall or otherwise beyond the reach of search engines and includes such things as email addresses, private networks and on-line banking sites. A small, encrypted subset of the deep web known as the "dark web" consists of peer-to-peer networks such as Tor, Freenet or, as in this case, ARES, and requires specific software, hardware configurations or authorization to access. See generally, Andy Greenberg, Hacker Lexicon: What Is the Dark Web?, Wired Magazine, November 19, 2014.

Worldwide Web requires that the link be routed through one or more DNS servers located throughout the world that maintain a current database of IP addresses and their associated domain names and direct internet traffic to the appropriate IP address.[3]

A less common, but nevertheless widely available and frequently used method of reaching a specific IP address is through a direct link that is not relayed through a routing DNS. Using specialized but readily obtainable software designed for the purpose, a direct, encrypted "peer-to-peer" or "P2P" link can be established between a user's computer and a specific folder or file on any linked computer—provided that the owner of the destination computer is using similar P2P software and has allowed specific access to such folder or file location.

In short, P2P networks use locally installed software called a "client" which allows users to share computer files of their choice directly with other similarly equipped users (a "peer") and without any intermediary routing. Files which a user intends to share are kept in a specific folder designated as sharable by the software client. While there is nothing inherently illegal about the use of peer-to-peer file sharing, P2P software is often used to share files in violation of copyright and other intellectual property laws and to facilitate communications

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[3] By way of example, www.vacourts.gov is the domain name registered with ICANN for the internet site hosting the on-line presence of the judicial department of the Commonwealth of Virginia. Entering www.vacourts.gov into a web browser will cause it to contact a DNS, lookup the IP address assigned to the domain name www.vacourts.gov which will return the associated IP address 208.210.219.101 and then link to that IP address and display the web page located there.

regarding various types of criminal activity.[4] Because P2P locations in the dark web are invisible to indexing and search engines such as Google, specialized software is required to access each separate P2P network.

Little was focusing his investigative attention on the ARES P2P network, which is often used to exchange child pornography. Testifying as an expert, Little explained how peer-to-peer networks are used in the context of the exchange of child pornography.

In a P2P network generally, users place any files they wish to share with others in a specific "shared" folder. P2P clients like ARES globally search all shared folders in the P2P network for any specified files. If found, the client then connects directly to all "peers," i.e. computers with shared folders that host the particular file being sought, and different pieces of the file are then downloaded from multiple peers and reassembled into a new whole copy which is then saved to the user's shared folder.[5]

Specifically, with respect to the use of ARES, Little testified that file source IP addresses are always collected by a P2P client, but in the stock version of ARES, they are not normally displayed to the user. An ARES user enters the name of any file sought into the ARES client. As with other P2P software, ARES then locates multiple IP addresses

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[4] Under the "Sony standard" articulated by the Supreme Court in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), a device does not constitute contributory copyright infringement so long as the device is capable of "substantial non-infringing uses."

[5] Apparently, this is done to preserve the anonymity of any single peer.

of computers hosting copies of the requested file, verifies that all copies available are identical to each other, then downloads separate pieces of the file from the many different copies found across the internet, reassembles the pieces into a new copy and, after verifying that the newly assembled copy is identical to the those from which it was assembled, saves the new file copy to the user's computer.

Little used a specialized version of the ARES client designed specifically for law enforcement ("ARES Round Up"). ARES Round Up, has been modified from its stock configuration in two ways. First, ARES Round Up forces the client to download a shared file from a single location instead of doing so piecemeal from multiple locations and then assembling the pieces into a whole copy of the sought-after file. The second law enforcement modification to the ARES client allows law enforcement users to view the actual IP address of the target computer containing the file location of a P2P shared file.

Little input the names of specific child pornographic images encrypted and verified through the Secure Hash Algorithm ("SHA")[6] and commonly exchanged by those interested in child pornography into ARES Round Up and instructed the ARES Round UP client to search the ARES network for matches. This process allows the verified SHA values to be used to search for identical copies of

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[6] The Secure Hash Algorithm compares two files at the basic binary level and calculates a unique checksum for the authenticity of digital data to ensure the integrity of a file. In effect, it is a digital signature that indicates if a file has been modified from its original form.

known files. Little had enabled ARES Round Up to constantly search the P2P network for matches with the SHA values of known child pornography image and video files. One of these SHA values matched to a shared folder location on a computer indicating an IP address within the task force's geographic area.

Little obtained a subpoena and served the internet service provider to obtain the physical address associated with that IP address - the shared home of Stickle and his fiancée Margaret Mallory ("Mallory"). Stickle had been living at this address since moving from New York to live with Mallory in August of 2013. Little obtained a search warrant for this address and executed it on December 27, 2013. Pursuant to the warrant, police seized two laptop computers. Mallory identified one of the laptops as belonging to her, the other she identified as Stickle's. Mallory initially told Little that she had no access to Stickle's device, but later amended her statement to admit she had used Stickle's computer on a few occasions.

Police conducted a forensic analysis on the laptops. Inside a password-protected user account titled "Matt" on Stickle's laptop, police found both images and videos of child pornography and the ARES client, as well as personal and family photos relating to Stickle. The ARES client's shared folder contained an "extensive" library of child and adult pornography. Some files dated back to 2010, three years before the device was seized. Little was also able to forensically retrieve the search history of the ARES client, indicating which types of files the user had been looking to obtain. It included explicit sexual terms referencing children. The in-client ARES chat function on Stickle's computer had been

set to indicate to others that the user was a 14-year-old male. In addition, there were three child pornography videos featuring Stickle himself in another folder labelled "X." The X folder was located near other folders which were personally relevant to Stickle, specifically one regarding a relative's baptism. The three video files located in the X folder portrayed Stickle performing sexual acts on a prepubescent eight-to-ten-year-old male.

When interviewed by police, Stickle denied knowledge of any child pornography on his computer and stated that he had had several roommates prior to moving to Virginia to live with Mallory. One of these roommates testified at trial that he had used Stickle's computer when they lived together. He also testified that he had seen another roommate use Stickle's computer. He did not testify that he had used ARES or placed any files on Stickle's computer or seen any other roommate do so.

A grand jury indicted Stickle on twenty-two counts of possession with intent to distribute child pornography, first and second or subsequent offenses, and three counts of manufacture of child pornography, first and second or subsequent offenses. The Commonwealth dropped the manufacture of child pornography charges when it was discovered that the videos had been created in New York, Stickle's residence before he moved to Virginia to live with Mallory. Stickle was tried on the remaining twenty-two charges in June of 2014. This trial ended in a mistrial. A grand jury subsequently indicted Stickle for three additional counts of possession of child pornography, first and second or subsequent offenses based upon the videos found in the X folder. The Commonwealth amended

the twenty-two possession with intent to distribute child pornography indictments to first offense. Stickle was tried again by a jury on all twenty-five charges and found guilty on all counts.

II. Analysis

A. Application of the Fourth Amendment

Stickle sought suppression of the evidence on the grounds that Little's use of ARES Round Up to download child pornography from a computer in Stickle's home violated his Fourth Amendment rights. "Since the constitutionality of a search and seizure under the Fourth Amendment involves questions of law and fact, we give deference to the factual findings of the trial court but independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements." Jackson v. Commonwealth, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004).

For the past fifty years, "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740 (1979) (internal citations omitted). Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347 (1967), proposed a two-part test for evaluating the expectation of privacy. Formally adopted in Smith v. Maryland, the Katz test first asks "whether the individual, by his

conduct, has 'exhibited an actual (subjective) expectation of privacy." Smith, 442 U.S. at 740 (quoting Katz, 389 U.S. at 361). Second, it asks "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable."'" Id.

This Court recently applied the Katz test to a case nearly identical to Stickle's. In Rideout v. Commonwealth, 62 Va. App. 779, 753 S.E.2d 595 (2014), the same law enforcement task force that tracked Stickle used a modified version of a different P2P client (Shareaza) to download child pornography from Rideout. He sought suppression of this pornographic evidence on the theory that his failed attempt to prevent the P2P client from sharing his files established a reasonable expectation of privacy. We held in Rideout that "by simply installing file-sharing software onto his computer, appellant has 'failed to demonstrate an expectation of privacy that society is prepared to accept as reasonable.'" Id. at 789, 753 S.E.2d at 600 (internal citation omitted).

Stickle argues the inverse of Rideout. Instead of claiming that he attempted to limit sharing, Stickle stresses both the fact that file sharing is enabled by default in ARES and that he was unaware the ARES client was on his computer or that the client was being used to download child pornography. By denying knowledge of the software, Stickle attempts to circumvent the "reasonable expectation of privacy" Katz test and tie Little's "search" to the earlier, more fundamental, property-based foundation of Fourth Amendment application resurrected by the Supreme Court in the wake of United States v. Jones, 565 U.S. 400 (2012). Though Katz originally broke with the previous property-based application of Fourth

Amendment protection by declaring that the Fourth Amendment protects "protects people, not places," Katz, 389 U.S. at 351, the Supreme Court in Jones revived and reinforced the pre-Katz concept of a property interest component to Fourth Amendment protection as a backstop to a privacy interest. However, Stickle's legal argument necessarily depends upon both a misunderstanding of the technology involved in this case and complete disregard for our standard of review. Stickle interweaves three specific Fourth Amendment arguments which we separate below for clarity.

Stickle first claims that Little, using ARES Round Up software, "entered the curtilage and threshold of [his] home without a warrant to search for evidence of probable cause of a crime." Stickle cites Florida v. Jardines, 569 U.S. 1 (2013), where the Supreme Court reversed a drug conviction because police had used a drug-sniffing dog on the defendant's curtilage. The Supreme Court held this was an unreasonable search, stating "[t]he Katz reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." Jardines, 569 U.S. at 11 (citing Jones, 565 U.S. at 409). Stickle claims Little "actually crossed the threshold of the house to reach the modem [sic] in order to find probable cause to obtain a search warrant." Analogizing to Jardines, Stickle argues

> [j]ust as the officer's use of a drug-sniffing dog constituted a warrantless search of the

> curtilage of the home, Little's use of the cable lines to the house to search the inside of the home constitutes a warrantless search of the curtilage of the home in this case. In fact, Little would not have been able to search the modem and router without use of the cable lines to the house to access these items inside of the house. Therefore, Little's actions constitute a warrantless search of the curtilage of Stickle's home.

The curtilage is a well-established common law concept describing the area immediately surrounding one's house, as defined by "its relationship to the residence and its use by its occupants." Foley v. Commonwealth, 63 Va. App. 186, 195, 755 S.E.2d 473, 478 (2014). The term "curtilage," as it is used in the legal context, "is historically understood to refer to an extension of the home that is so intertwined with the home that the law must provide it the same protection as the home itself." Id. It does not include the interior of the home which is specifically protected from warrantless intrusion by the text of the Fourth Amendment itself. While the lines carrying internet service to Stickle's home may indeed run through his curtilage, we need not engage in an esoteric determination and analysis of the precise physical location where the bits and bytes constituting digital images of child pornography were obtained because Little's actions with respect to his use of P2P software in no way constituted a search of the cables, curtilage, computer or any other location protected by Stickle's Fourth Amendment rights. To be clear, any "search" essentially involves prying into a

private place. See, e.g., United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."). However, it is well-settled that viewing items deliberately exposed to public view does not constitute a search and in any event, consensual searches and seizures of items within the scope of the consent given do not implicate the Fourth Amendment. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971) (generally discussing the application of the "plain view" doctrine); United States v. Williams, 41 F.3d 192, 196 (4th Cir. 1994) (holding that "[u]nder certain circumstances, the police may seize the contents of a container found in a lawfully accessed place, without a warrant, if the contents are in plain view"); United States v. Karo, 468 U.S. 705 (1984) (concluding that there was no violation of the Fourth Amendment through a beeper placed in chemical container as it was placed with consent of the then owner); United States v. Dunn, 480 U.S. 294, 307 (1987) (establishing a four-factor test for determining the extent of the curtilage, including "the steps taken by the resident to protect the area from observation by people passing by").

Here, no warrantless search of any area or seizure of any item protected by the Fourth Amendment occurred at all. When a user "searches" a P2P network, the software client is matching the search parameters to the contents of each P2P linked computer's shared folder that others, such as Stickle, chose to make publicly available. In other words, Stickle was essentially broadcasting the contents of his shared folder to the entire ARES network community in response to outside user queries and

inviting them to copy anything and everything in the folder he chose to share. Stickle's shared folder thus represents an "implicit invitation" of the type discussed in Jardines—a cultural custom, like placing a door knocker on the front door, "treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Jardines, 569 U.S. at 8 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)).

Such customs are easily understood and "generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." Id. Jardines ultimately held that such invitations are limited both in area and purpose, not present here, which ultimately rendered the search in Jardines unconstitutional. See id. at 9. Here, however, the invitation provided to others directly involved child pornography. To expand upon Justice Scalia's analogy from Jardines, placing a jack-o'-lantern on the porch and leaving the light on during the evening of October 31 signifies a homeowner's participation in the annual All Hallows Eve exception to parents' usual admonition to their children that they should not accept candy from strangers.

Similarly, viewing the record in the light most favorable to the Commonwealth, Stickle demonstrated his consensual participation in the file sharing community by downloading and installing the ARES client and then setting the contents of a folder as "shared" thereby exposing to public access those files in that folder he wished to share with others. Little, in effect a digital passerby, merely accepted the invitation offered by Stickle to help

himself to copies of the contents of Stickle's shared folder. Therefore, we reject Stickle's argument that Little's actions constituted a trespass to his curtilage in violation of the Fourth Amendment.

Stickle next argues that ARES Round Up violated his Fourth Amendment rights because it is "sophisticated equipment" prohibited by Kyllo v. United States, 533 U.S. 27 (2001). In Kyllo the Supreme Court overturned a drug conviction where police used a thermal imaging device to detect heat from a marijuana growing operation within a house. Kyllo held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id. at 40.[7] Unlike the device used in Kyllo, however, ARES Round Up is only slightly modified from the base ARES client, allowing it to connect to only one computer to download a file rather than to do so piecemeal from as many as are advertising the availability of the file, and also by allowing it to display the connected IP address to the investigating officer. These modifications, while clearly features of the software not readily available to the general public, are not of such sophistication that they represent a level of

[7] As an aside, we observe that Kyllo also creates an endemic problem for the courts as we try to apply 18th and 19th century legal and constitutional concepts to 21st century technology. The very infrared imaging device described in Kyllo is now widely available and can be readily purchased by the general public and thus, under its own analysis, would no longer render the search in Kyllo unconstitutional.

technology not available to the general public as was the case in Kyllo.

As Little testified, the modification to allow direct connection to a single user is not an unknown advancement but rather a regression in technology to earlier file sharing protocols. File sharing software between individuals has been in general public use since the advent of the original file sharing service, Napster, in 1999—much to the vexation of the music and movie industries.[8]

The second law enforcement modification simply displays the IP address of the source shared folder—data that is already captured, though not displayed, by the standard ARES client. The nature of the minor modifications present in ARES Round Up do not, in our judgment, suffice to render it a presumptively unconstitutional law enforcement tool.

Moreover, unlike in Kyllo, ARES Roundup was not used "to explore details of the home that would previously have been unknowable without physical intrusion." Rather, its modifications simply displayed the IP address of a single computer containing a copy of a file sought—information which was broadcast to everyone on the network by the ARES software on Stickle's computer.

Finally, Stickle argues that the warrant Little obtained subsequent to downloading the child pornography from Stickle's IP address "was issued based upon an unlawful and generalized search." Stickle claims that, because Little ran ARES Round Up continuously searching widely for any file being offered on the network which matched certain SHA

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[8] See Menn, Joseph, All the Rave: The Rise and Fall of Shawn Fanning's Napster. Crown Business, (2003).

values, his "search" violated the particularity requirement the Fourth Amendment places on warrants. Stickle specifically asserts that "Little . . . conduct[ed] a search into the curtilage of the homes and across the threshold of the homes of all of the citizens within a region, including Stickle's home, that Little decided to subject to law enforcement surveillance for criminal activity without probable cause to do so without the knowledge or consent of the citizens." (sic) This again is a misrepresentation of the technology. Little did not "[search] the modem for the IP address." Little searched the ARES network, a voluntary file-sharing community, for very specific files containing images of child pornography from users willingly sharing those specific files. As discussed above, these users, including Stickle, essentially invited anyone, including Little, to connect directly to a *specific* set of files on their computers for the purpose of making copies. We therefore conclude that no general search in violation of the Fourth Amendment occurred.

B. Joinder of Offenses

Stickle next argues that the circuit court erred by permitting him to be charged jointly for possession of the three child pornography videos located in the unshared X folder and the twenty-two child pornography still images found in the ARES shared folder. He asserts that the charges have "no connection to show a common scheme or plan, same act or transaction, or that the two sets of alleged charges are linked or connected in any way."

"The circuit court's decision to join offenses for trial is reviewed for abuse of discretion." Walker v. Commonwealth, 289 Va. 410, 415, 770 S.E.2d 197, 199 (2015) (citing Scott v. Commonwealth, 274 Va. 636, 644, 651 S.E.2d 630, 634 (2007)). An accused may be tried at one time for more than one offense "if justice does not require separate trials and (i) the offenses meet the requirements of Rule 3A:6 (b) or (ii) the accused and the Commonwealth's attorney consent thereto." Rule 3A:10(c). Rule 3A:6(b) permits joinder of multiple offenses in an indictment "if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan." Rule 3A:6(b).

Our Supreme Court has held that "the terms 'common scheme' and 'common plan' are not synonymous." Scott, 274 Va. at 645, 651 S.E.2d at 635. However, neither are they mutually exclusive. Id. at 646, 651 S.E.2d at 635. Scott defined both terms for the first time. A common scheme is composed of "crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes." Id. at 645, 651 S.E.2d at 635 (citations omitted). A common plan consists of "crimes that are related to one another for the purpose of accomplishing a particular goal." Id. at 646, 651 S.E.2d at 635 (citations omitted). Further, the Virginia Supreme Court has stated that "offenses may be considered parts of a common scheme or plan when they are 'closely connected in time, place, and means of commission.'" Walker, 289 Va. at 416, 770 S.E.2d at

199 (quoting Satcher v. Commonwealth, 244 Va. 220, 229, 421 S.E.2d 821, 827 (1992)).

Stickle argues that, though the pornographic files were all seized on the same date, they were placed on the computer at different dates over a range of years and are thus separate crimes that are not part of a common scheme or plan. However, Stickle is being charged with *possession* of these pornographic videos and *possession* with intent to distribute the various pornographic images, both of which are, "by nature," continuing offenses. Morris v. Commonwealth, 51 Va. App. 459, 467, 658 S.E.2d 708, 712 (2008). At the moment Stickle's computer was seized he was in possession of each of the files reflected in the charges irrespective of the date they were originally placed there.

To protect defendants from being prosecuted multiple times for arbitrary divisions of offenses, the law long ago adopted the rule that "'a continuing offence . . . can be committed but once, for the purposes of indictment or prosecution.'" In re Nielsen, 131 U.S. 176, 186 (1889) (discussing multiple prosecutions for "unlawful cohabitation," another continuous offense). Stickle argues that the twenty-two possession with intent to distribute charges should be separated from the three possession charges related to the X folder, but he provides no logical resting place for his argument. Among the questions Stickle's argument implicitly raises but does not answer are: Is child pornography more easily divisible than cocaine? Should a drug dealer charged with possession of twenty-five grams of cocaine have twenty-five (or more if a smaller unit of measurement is chosen) separate trials? Should a thief be tried separately for every unit of currency or

item stolen? The executive branch of government, in the form of the Commonwealth's Attorney, exclusively controls the charging decision and has wide discretion in doing so, subject only to constitutional or statutory limitations. Stickle's argument slides easily down a slippery slope which, if adopted, would serve no purpose beyond devastating judicial efficiency. Consistent with both Rules 3A:10(c) and 3A:6(b), the offenses here are so interrelated as to constitute part of a common scheme or plan to collect and/or distribute child pornography. Therefore, we conclude that the circuit court did not abuse its discretion in allowing joinder of all the offenses for trial.

Stickle alternatively argues that, even if joinder requirements were satisfied, the three videos are so prejudicial that justice requires separate trials. He claims the videos constitute impermissible character evidence and that the circumstances surrounding their creation are factually distinct from those regarding the pornographic images in the shared folder. In weighing the prejudice of evidence against its probative value "We generally defer to trial judges . . . because they, unlike us, participate first person in the evidentiary process and acquire competencies on the subject that we can rarely duplicate merely by reading briefs and transcripts." Thomas v. Commonwealth, 44 Va. App. 741, 758, 607 S.E.2d 738, 746, adopted upon reh'g en banc, 45 Va. App. 811, 613 S.E.2d 870 (2005) (citing Dandridge v. Marshall, 267 Va. 591, 596, 594 S.E.2d 578, 581 (2004)).

Stickle relies on Hackney v. Commonwealth, 28 Va. App. 288, 504 S.E.2d 385 (1998) (*en banc*), and Long v. Commonwealth, 20 Va. App. 223, 456 S.E.2d

138 (1995), both cases where severance was ultimately required where other crimes evidence was introduced to show possession of a firearm by a convicted felon. The precedent set by these cases is stark but narrow, they are limited to this unfortunately common scenario: "a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." Hackney, 28 Va. App. at 295, 504 S.E.2d at 389. This is a sensible rule, as evidence of *prior* convictions is both highly prejudicial and entirely unrelated to the joined offenses. Evidence in criminal cases is usually prejudicial, otherwise it would not normally be relevant. To render otherwise relevant evidence inadmissible, the probative value of the evidence must be *substantially* outweighed by its prejudicial effect. Va. R. Evid. 2:403. Here, in the context of the charges and the evidence presented, the effect of the pornographic videos is no more prejudicial than an analogous situation where a defendant is on trial for possession of both cocaine and heroin and the evidence is that the cocaine was in his right pocket and the heroin in his left. Moreover, despite Stickle's protestations to the contrary, the evidence of the videos in which he is featured is directly related to the other charges and highly probative of both his knowledge that child pornography was on his computer and that he intended for child pornography to be distributed. "Evidence of other crimes or convictions may be admitted for the purpose of, among other things, . . . proving a relevant issue or element of the offense charged, such as motive, intent, common scheme or plan, knowledge or identity." Hackney, 28 Va. App. at 293,

504 S.E.2d at 388 (internal citations omitted). Thus, we find no error in the circuit court's conclusion that justice did not require severance of the charges involving the videos from the remaining charges.

C. Sufficiency of the Evidence

Stickle finally argues that the Commonwealth had no actual evidence that he knew the child pornography in the ARES folder was on the laptop and that the Commonwealth is "bootstrapping" knowledge of the three videos which Stickle created into knowledge of the twenty-two other pieces of pornography, despite the fact that they are located on different parts of the computer.

"When considering the sufficiency of the evidence to sustain a conviction, we examine the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, granting it all reasonable inferences fairly deducible therefrom." Jordan v. Commonwealth, 286 Va. 153, 156, 747 S.E.2d 799, 800 (2013) (citing Dowden v. Commonwealth, 260 Va. 459, 461, 536 S.E.2d 437, 438 (2000)). "We will not set aside the trial court's judgment unless it is 'plainly wrong or without evidence to support it.'" Kelley v. Commonwealth, 289 Va. 463, 468, 771 S.E.2d 672, 674 (2015) (citing Code § 8.01-680).

The evidence taken in the light most favorable to the Commonwealth did show that Stickle had roommates at various times who occasionally used his computer. It also showed that his fiancée Mallory had used his computer at least once. However, none of these roommates remained as such during the entire span of time videos were placed on Stickle's computer. Additionally, Little only began

detecting child pornography present at Mallory's IP address after Stickle moved in with her. All images were within a password-protected user account which also contained the three videos of Stickle himself performing sexual acts with a child. An oft-quoted maxim of our jurisprudence is that "[t]he Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." Hamilton v. Commonwealth, 16 Va. App. 751, 755, 433 S.E.2d 27, 29 (1993). Stickle's contention is entirely unsupported speculation clearly rejected by the jury rather than reasonable inferences flowing from the evidence, and it was unnecessary for the Commonwealth to exclude them. The jury was entitled to reject Stickle's assertion that for many years an interstate cabal of roommates and fiancées used his computer without his knowledge to store child pornography, and we hold that the evidence was legally sufficient for the jury to instead conclude beyond a reasonable doubt that the child pornography was knowingly possessed and possessed with the intent to distribute by a man with such an interest in child pornography that he created his own videos.

III. Conclusion

Upon review of the record, we find no error in the trial court's decisions to admit the evidence and to join the charges. We also find that the evidence was sufficient to convict Stickle on all charges. The judgment of the trial court is therefore affirmed.

Affirmed.

VIRGINIA:
In the Court of Appeals of Virginia on **Monday** *the* **8th** *day of* **May, 2017**.

Record No. 0660-16-1
Circuit Court Nos. CRM-23621-00 through CRM-23629-00, CRM-23661-00 through CRM-23673-00 and CR24643-00 through CR24645-00

Matthew John Stickle, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Williamsburg and County of James City

Before Judges Alston, Chafin and Decker

For the reasons previously stated in the order entered by this Court on February 13, 2017, the remainder of the petition for appeal in this case remains denied.

The briefing schedule in this case shall be deemed to commence from the date of entry of this order. This Court's records reflect that Patricia Palmer Nagel, Esquire, is counsel of record for appellant in this matter.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Monday** *the* **13th** *day of* **February, 2017**.

Record No. 0660-16-1
Circuit Court Nos CRM-23621-00 through CRM-23629-00, CRM-23661-00 through CRM-23673-00 and CR24643-00 through CR24645-00

Matthew John Stickle, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Williamsburg and County of James City

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is granted in part and denied in part. An appeal is awarded to the appellant from a judgment of the Circuit Court of the City of Williamsburg and County of James City, dated March 22, 2016, with respect to the following assignments of error:

III. The trial court erred in joining three new indictments of possession of child pornography in the re-trial, where the indictments constitute other crimes evidence; and the content thereof was ruled inadmissible in the initial trial.

VIII. The trial court erred in failing to find the evidence insufficient as a matter of law, where the

evidence showed people other than Stickle had access to the computer where contraband was found during the relevant time periods.

X. The trial court erred in failing to suppress the evidence obtained as a result of an unlawful search and seizure, where police crossed the curtilage and threshold of the home without a warrant in order to obtain evidence of a criminal activity, in violation of the Fourth Amendment to the U.S. constitution.

No bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

I. and XIII. Following a mistrial, appellant stood trial a second time and was convicted of twenty-two counts of possession of child pornography with the intent to distribute and three counts of possession of child pornography. In the first assignment of error, appellant asserts that

> [t]he trial court erred in failing to protect the record and provide an adequate record for appellate review, where the court overruled the objections to the transcripts based upon admitting an irrelevant, unauthenticated CD recording of the transcription of the initial trial, and accepting the certifications of the transcripts in both trials, where the certifications were undermined by the evidence.

While the first assignment of error asserts that the trial court "admitted" a CD recording of the first trial, appellant cites nothing from the record in the second trial indicating that such a recording was admitted into evidence. Instead, appellant argues that the trial court erred by including a CD recording of the first trial from the court reporter without first ascertaining its accuracy.

As to appellant's argument that the trial court erred by certifying the record of the first trial, appellant cites no authority supporting his assertion that the trial court had an obligation to certify the accuracy of the transcripts or records of a trial that resulted in a mistrial. Furthermore, while this Court and the Supreme Court have recognized that an appellant has an obligation to ensure that the record on appeal is properly compiled to permit full consideration of the questions presented on appeal, Justis v. Young, 202 Va. 631, 632, 119 S.E.2d 255, 256-57 (1961); Jenkins v. Winchester Dep't of Soc. Servs., 12 Va. App. 1178, 1185, 409 S.E.2d 16, 20 (1991), there are no issues properly before this Court that relate to the mistrial.

In the thirteenth assignment of error, appellant maintains that the trial court erred in denying him "a right to a fair trial in the initial trial that resulted in a hung jury, by admitting other crimes evidence, in violation of his right to due process" under the Fifth and Fourteenth Amendments. However, this Court has no jurisdiction to address appellant's argument that the trial court erred during the initial trial because that trial did not result in conviction. Pursuant to Code § 17.1-406(A)(i), we are without jurisdiction to consider an appeal except from an "aggrieved party . . . petitioning . . . from . . . [a] final

conviction in a circuit court of . . . a crime." Randolph v. Commonwealth, 45 Va. App. 166, 170, 609 S.E.2d 84, 86-87 (2005) (emphasis and footnote omitted) (quoting Code § 17.1-406(A)(i)).

Accordingly, this Court lacks subject matter jurisdiction to address the thirteenth assignment of error. Because the record from the mistrial is not necessary to address issues properly before this Court, any error committed by the trial court in certifying the record or transcripts of the first trial is moot.[1] Even assuming the transcripts of the first trial are necessary to address issues properly before the Court, appellant cites no inaccuracies or omissions in the transcripts. The obligation to provide an accurate record on appeal lay with

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[1] In support of the first assignment of error, appellant argues that "[b]ecause the Commonwealth used [the CD recording] to impeach a witness at the subsequent retrial, without sufficient proof of its authenticity, the convictions should be set aside." Appellant does not cite any objection lodged to the use of the CD recording during the cross-examination of a defense witness, and the first assignment of error does not assign error to any ruling by the trial court concerning the use of the CD recording for this purpose. Accordingly, that ruling is not before us on appeal. See Adjei v. Commonwealth, 63 Va. App. 727, 737 n.3, 763 S.E.2d 225, 230 n.2 (2014) (declining to address issues "beyond the scope of the assignments of error"); Rule 5A:12(c)(1)(i) ("Only assignments of error assigned in the petition for appeal will be noticed by this Court."). Furthermore, in citing to the part of the record where he preserved his objection to the use of the CD recording during the second trial, appellant cites only to motions that were filed after the retrial in December 2015. An objection to the use of the CD recording during cross-examination was untimely if raised for the first time after trial. See Wells v. Commonwealth, 65 Va. App. 722, 732, 781 S.E.2d 362, 367 (2016). Accordingly, appellant has waived that aspect of his argument for appeal. Id.

appellant. See Lawrence v. Nelson, 200 Va. 597, 598-99, 106 S.E.2d 618, 620 (1959) ("An appellant who seeks the reversal of a decree on the ground that it is contrary to the law and the evidence has the primary responsibility of presenting to this court, as a part of the printed record, the evidence introduced in the lower court, or so much thereof as is necessary and sufficient for us to give full consideration to the assignment of error."). See also Twardy v. Twardy, 14 Va. App. 651, 658, 419 S.E.2d 848, 852 (1992) (*en banc*).

Appellant acknowledges that the court reporter provided the trial court with a CD recording of the first trial, but appellant cites nothing from the CD recording suggesting that the transcripts prepared by the court reporter was inaccurate. Likewise, while appellant maintains that the trial court erred by certifying the transcripts of the second trial, he cites no evidence that the transcripts were inaccurate or incomplete.2 Instead, he notes only that the court reporter in the second trial was the subject of a motion for inquiry regarding whether she used her cell phone during the trial.

In essence, appellant disputes the credibility of the two court reporters, both of whom certified the accuracy of the transcripts they prepared; however, appellant cites no evidence from the record that the transcripts were, in fact, inaccurate or incomplete.[2] "The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact

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[2] Appellant alleges that he presented testimony from a trial witness who contradicted the accuracy of the trial transcripts, but he neither identifies the witness nor the nature of the inaccuracy.

finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995).

Accordingly, the trial court did not err by including the transcripts and the CD recording in the record.

II. Appellant was originally charged with three counts of making or producing child pornography. On February 12, 2015, the trial court granted the Commonwealth's motion to *nolle prosequi* those charges, and the trial court granted the motion. Appellant contends that the trial court lacked subject matter jurisdiction over the three charges and, therefore, lacked the authority to take any action regarding them, including granting the Commonwealth's motion.

Because these charges did not result in criminal convictions, however, this Court does not possess the authority to entertain this assignment of error. See Duggins v. Commonwealth, 59 Va. App. 785, 789, 722 S.E.2d 663, 665 (2012); accord Harris v. Commonwealth, 258 Va. 576, 583 n.4, 529 S.E.2d 825, 829 n.4 (1999).

IV. Appellant maintains that his three convictions for possession of child pornography are barred because they are based upon the same conduct that gave rise to earlier indictments for manufacturing or producing child pornography. He asserts that his convictions should be overturned based on principles of res judicata, collateral estoppel, and double jeopardy. Appellant reasons as follows: (1) The trial court lacked jurisdiction over the original indictments because the actions giving rise to them occurred out of state;

(2) "[t]he trial court's lack of jurisdiction to try [appellant] on the three charges of make or produce operates as an acquittal of those charges as a matter of law"; and (3) "[h]aving been acquitted as a matter of law, the Commonwealth is barred from a re-trial of those offenses, because jeopardy attached to those charges as well as the twenty-two charges that were actually tried to the jury." Appellant contends that "[p]ossession of the images is subsumed within its manufacture or production."

The flaw in appellant's reasoning is that he was never acquitted of the manufacturing charges. Because those charges were *nolle prosequied*, jeopardy did not attach. See Duggins, 59 Va. App. at 792, 722 S.E.2d at 666 (*nolle prosequi* not "an acquittal or discharge from further prosecution" (quoting Lindsay v. Commonwealth, 4 Va. (2 Va. Case.) 347, 347 (1823))). Likewise, because the manufacturing charges were not litigated and appellant was not acquitted, collateral estoppel and res judicata principles do not apply. See Painter v. Commonwealth, 47 Va. App. 225, 236-37, 623 S.E.2d 408, 413-14 (2005).3

V. With regard to the videos containing child pornography recovered from appellant's computer, he contends that the trial court erred by "admitting into evidence the titles, and written and oral descriptions of the evidence, which was hearsay."

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." Bynum v. Commonwealth, 57 Va. App. 487, 490, 704 S.E.2d 131, 133 (2011) (quoting Gonzales v. Commonwealth, 45 Va. App. 375, 380, 611 S.E.2d 616, 618 (2005) (*en banc*))

(other citation omitted). "However, 'when the trial court makes an error of law' in the admission of evidence, 'an abuse of discretion occurs.'" Brown v. Commonwealth, 54 Va. App. 107, 112, 676 S.E.2d 326, 328 (2009) (citation omitted). Accordingly, "such evidentiary issues presenting a question of law are reviewed *de novo* by this Court." Id. at 112-13, 676 S.E.2d at 328 (citation omitted).[3]

"Hearsay is a statement, other than one made by the declarant while testifying at trial, which is offered to prove the truth of the matter asserted." Clark v. Commonwealth, 14 Va. App. 1068, 1070, 421 S.E.2d 28, 30 (1992) (citation omitted). "This Court has previously recognized that where 'there is no out-of-court asserter,' there can be no hearsay." Bynum, 57 Va. App. at 491, 704 S.E.2d at 133 (quoting Tatum v. Commonwealth, 17 Va. App. 585, 588, 440 S.E.2d 133, 135 (1994)). In Tatum we held that testimony regarding information from a caller ID display did not violate the hearsay rule because the display was "based on computer generated information and not simply the repetition of prior recorded human input or observation." Tatum, 17 Va. App. at 588, 440 S.E.2d at 135.

Accordingly, because the tapes were not an out-of-court statement, Little's testimony summarizing the content of the tapes did not constitute hearsay.

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[3] Appellant also maintains that the new possession charges should be dismissed because they are based on the same subject matter as the original manufacture charges and have therefore "expired" under the speedy trial statute. Because the assignment of error does not allege a speedy trial violation, it is not properly before us and we decline to address that argument. See Adjei, 63 Va. App. at 737 n.3, 763 S.E.2d at 230 n.2; Rule 5A:12(c)(1)(i)

With regard to the titles, however, we reach a different conclusion. The titles were written by law enforcement personnel outside of court. For that reason, the titles constituted hearsay to the extent they were offered to prove the truth of the statements. Appellant does not specifically recite each of the twenty-four tape titles to which he objected, but many of them contained simply a combination of letters and numbers, while others contained a description of the tape content. With regard to the titles bearing a combination of numbers and letters, the titles did not constitute hearsay because they were not offered for the truth of the matter.

With regard to the descriptive titles, however, some of the titles constituted out-of-court statements describing the content, and were therefore offered for the truth of the matter. With respect to these titles, the trial court erred by ruling that the titles did not constitute hearsay. However, because the titles' description did no more than to identify the tapes as child pornography, a fact to which appellant had already stipulated, any error in the admission of the titles was harmless because the evidence was cumulative and did not pertain to a contested issue. See Greenway v. Commonwealth, 254 Va. 147, 154, 487 S.E.2d 224, 228 (1997) ("Improper admission of evidence does not create reversible error when it is merely cumulative of other competent evidence properly admitted."). Significantly, appellant does not explain how he was prejudiced by the admission of the titles or summaries.

Accordingly, any error committed by the trial court in admitting the written descriptions and titles was harmless.

VI. In the sixth assignment of error, appellant contends that the trial court erred by admitting into evidence "the identification of him as the subject of the three new indictments, previously excluded, in violation of the Fifth and Sixth Amendments . . . ." In support of this assignment of error, appellant asserts that the trial court should have excluded the testimony of a parent of one of the children in a video with appellant. Specifically, appellant contends that the parent,[4] "J.G.," should not have been allowed to identify appellant and J.G.'s son in Commonwealth's Exhibit 30, (an image lifted from one of the three videos depicting appellant with a minor). J.G. stated that he recognized appellant because appellant was his ex-wife's fiancé. J.G. estimated that his son was approximately ten years old at the time the image was created.

Lieutenant Little testified that Commonwealth's Exhibit 30 was a screenshot taken from one of the three videos depicting appellant engaged in sexual acts with an eight- to ten-year-old prepubescent boy. Little identified appellant in each of three videos as well as the screenshot. Little also testified that the same boy appeared in all three videos.

Thus, assuming, without deciding, that J.G. was located based upon information provided by appellant during his custodial interrogation, any error in admitting the testimony was harmless beyond a reasonable doubt because it was cumulative. See Dearing v. Commonwealth, 260 Va. 671, 673, 536 S.E.2d 903, 904 (2000).

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[4] To protect the privacy of the victim's family, we have cited the initials of the victim's parent. For purposes of this argument, we shall assume appellant refers to the testimony of "J.G."

VII. Appellant maintains the trial court erred by excluding a videotaped interview of him by police. In citing the part of the record where appellant preserved his objection, he cites the entire second day of trial. The issue actually arose during the first day of trial when the Commonwealth made a motion *in limine* to preclude appellant from introducing his taped interview with Little. The Commonwealth advised the trial court that it had decided not to introduce appellant's interview through Little and, therefore, appellant would be precluded from introducing the interview because it would constitute hearsay. The trial court ruled prior to trial that it would address the issue further after the Commonwealth completed its direct examination of Little. The trial court also advised defense counsel that it would expect a proffer from defense counsel prior to cross-examination regarding "what you want to ask [Little], specifically, about his conversation [with appellant] and the purpose of doing so."

However, defense counsel responded, "I'm sorry. I don't think that I should have to give away my defense and what all my questions are of him ahead of time." The trial court emphasized that it needed to know the nature of the questioning in advance so that it could rule on whether it would elicit admissible evidence.

After the Commonwealth concluded its direct examination of Little, defense counsel attempted to question Little regarding statements appellant made to Little. The Commonwealth objected on hearsay grounds, and the trial court sustained the objection. However, appellant cites nothing from the record

indicating that he offered the taped interview into evidence and that the trial court refused to admit it.[5] "Because he was denied nothing by the trial court, there is no ruling for us to review." Fisher v. Commonwealth, 16 Va. App. 447, 454-55, 431 S.E.2d 886, 890 (1993).

IX. Appellant contends the trial court erred by refusing to allow him access to a second computer found at the home he shared with his fiancée, Mallory.[6] He asserts the second computer "may have contained evidence which could have led to other exculpatory evidence."

In citing the part of the record where appellant preserved this issue for appeal, he refers to a motion filed on March 19, 2015, and certain excerpts from transcripts. The motion, filed on March 19, 2015, was a motion to dismiss the indictments. It alleged that the Commonwealth had committed a violation of Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose to defense counsel that Mallory had accessed appellant's computer on at least one occasion. Appellant did not request access to Mallory's computer in this motion.

At the hearing on the motion on March 20, 2015, the trial court announced that it would defer its ruling on the motion to dismiss. In response, appellant asked for a continuance and requested

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[5] Appellant asserted in his motion to set aside the verdict that the trial court refused to allow him to play the videotape in the second trial, but cites nothing from the trial transcript specifying when he offered the tape into evidence.

[6] Appellant does not specifically complain in the assignment of error that the trial court refused to issue a subpoena *duces tecum*.

that the trial court order the Commonwealth to produce the computer. The trial court denied the motion for a continuance, but did not rule on appellant's motion to compel the production of the computer.[7]

Because appellant failed to obtain a ruling on his motion to have the Commonwealth produce the computer prior to trial, there is nothing for this Court to review on appeal. See id.

Following his conviction, appellant filed a motion to set aside the verdict. In support of the motion he asserted in a conclusory manner that the Commonwealth had violated Brady, and argued that "[t]o the extent the ability to examine Mallory's computer for exculpatory evidence after she made false statements regarding her usage was discretionary, it . . . was an abuse of discretion." Appellant does not assert that Mallory's computer was in the Commonwealth's possession at the time appellant sought access to it. Even assuming that it was, appellant never obtained a ruling from the trial court on its motion to compel the Commonwealth to produce it. Appellant never renewed the motion after the trial date was continued to a later date.

Accordingly, the trial court did not err by denying appellant's motion to set aside the verdict on the basis that Mallory's computer was not made available to appellant.

XI. Appellant maintains the trial court's denial of his motion for a change of venue due to pretrial publicity violated his right to a fair trial under the Fifth and Fourteenth Amendments. He asserts that

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[7] While the trial court denied the motion for a continuance, trial was delayed until June because appellant announced he had decided to be tried by a jury.

sixteen reports were published by the media during the time the charges were pending against appellant and that on the morning of closing argument during the first trial, an article erroneously reported that appellant was in a video with three children "engaged in contraband," a phrase appellant characterizes as a "euphemism for child pornography."

"The trial court's decision whether to grant a motion for change of venue is reviewed for an abuse of discretion." Cressell v. Commonwealth, 32 Va. App. 744, 753, 531 S.E.2d 1, 5 (2000) (citation omitted).

A criminal defendant is presumed to receive a fair trial in the jurisdiction where the offense occurred. Thomas v. Commonwealth, 263 Va. 216, 230, 559 S.E.2d 652, 659-60 (2002). The defendant bears the burden "to overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that would 'be reasonably certain to prevent a fair trial.'" Mueller v. Commonwealth, 244 Va. 386, 389, 422 S.E.2d 380, 388 (1992) (quoting Stockton v. Commonwealth, 227 Va. 124, 137, 314 S.E.2d 371, 380 (1984)). "[T]he mere showing of extensive publicity or general knowledge of a crime or of the accused, including his criminal record, is not enough to justify a change of venue." Buchanan v. Commonwealth, 238 Va. 389, 407, 384 S.E.2d 757, 769 (1989). Factors to consider include the volume, accuracy, and timing of the publicity, and also whether the publicity is temperate or inflammatory. See Thomas, 263 Va. at 233, 559 S.E.2d at 660. The ease of impaneling a jury is another important consideration. Id.

Here, appellant filed his motion for a change of venue prior to questioning the venire panel. The trial court denied appellant's motion because it was premature until the jurors could be questioned regarding their exposure to pre-trial publicity. During *voir dire* the trial court questioned the veniremen regarding whether they had acquired any information about the case through any "news, media, or any other sources." The jury responded negatively. Defense counsel followed up and asked the panel specifically about whether they had read anything about the case in either the Virginia Gazette or the Williamsburg Yorktown Daily.[8] Only one venireman subscribed to the Virginia Gazette, and he denied having read anything about the case in that periodical. Another venireman stated that he was a frequent reader of the Williamsburg Yorktown Daily, but he was "almost positive" he had read nothing about the case in that periodical.

Appellant cites no evidence in his petition that suggests any of the jurors who were seated had read any media accounts or that exposure to pretrial publicity affected their ability to provide appellant with a fair trial.

Accordingly, the trial court did not abuse its discretion by denying appellant's motion for a change of venue.

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[8] While appellant alleges that sixteen articles were published during the pendency of his charges, the articles are not part of the record on appeal, precluding this Court from assessing their potential impact upon the veniremen. See e.g., Graham v. Cook, 278 Va. 233, 249, 682 S.E.2d 535, 543-44 (2009) (citing the Court's inability to assess the prejudicial impact of excluded evidence without an adequate proffer).

XII. Appellant asserts the trial court erred in rehabilitating jurors when they expressed doubt regarding their ability to render a fair verdict in violation of appellant's right to a fair trial pursuant to the Fifth and Fourteenth Amendments. Appellant does not cite any specific facts in support of this assignment of error: he cites neither the expression of doubt voiced by the jurors nor the manner in which the trial court allegedly rehabilitated them. Instead, he simply alleges that the trial court abused its discretion because

> [d]uring *voir dire*, the jurors stated they were unsure if they could give [appellant] a fair trial regarding the other crimes evidence; yet the court merely rehabilitated them and allowed them to serve. Permitting jurors to be rehabilitated to serve where the sole question for change of venue and admissibility of other crimes evidence was an abuse of discretion. Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (1988).

The assignment of error fails to comply with Rule 5A:12(c)(4) and (5). Pursuant to Rule 5A:12(c)(4), a petition must contain a "clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the record, transcript, or statement of facts." Rule 5A:12(c)(5) requires that each assignment of error contain argument and supporting legal authorities.

Appellant has failed to develop either the facts or legal argument supporting this assignment of error.

Because we conclude the defects with regard to this assignment of error are significant, we decline to consider it. See Jay v. Commonwealth, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008) ("the Court of Appeals should . . . consider whether any failure to strictly adhere to the requirements of [the Rules of Court] is insignificant . . ."); Atkins v. Commonwealth, 57 Va. App. 2, 20, 698 S.E.2d 249, 258 (2010).[9]

Even assuming appellant's assignment of error pertains to the trial court's questioning potential jurors regarding their ability to set aside their personal views and listen to the evidence fairly and impartially, we defer to the trial court's factual finding on juror impartiality. Lovos-Rivas v. Commonwealth, 58 Va. App. 55, 61, 707 S.E.2d 27, 30 (2011) (citations omitted). "This deference stems from our recognition that 'a trial judge who personally observes a juror, including the juror's tenor, tone, and general demeanor, is in a better position than an appellate court to determine whether a particular juror should be stricken.'" Hopson v. Commonwealth, 52 Va. App. 144, 151, 662 S.E.2d 88, 92 (2008) (quoting Teleguz v. Commonwealth, 273 Va. 458, 475, 643 S.E.2d 708, 719 (2007)). "Accordingly, the decision to retain or exclude a prospective juror 'will not be disturbed on appeal unless there has been manifest error amounting to an abuse of discretion.'" Lovos-Rivas, 58 Va. App. at 61-62, 707 S.E.2d at 30 (quoting

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[9] Furthermore, Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (1988), cited by appellant, does not support his assertion that the trial court abused its discretion by "rehabilitating" the jurors.

Barrett v. Commonwealth, 262 Va. 823, 826, 553 S.E.2d 731, 732 (2001)).

Here, appellant cites nothing from the record suggesting that the trial court's determination was not supported by the record or was "manifestly" in error. Thus, to the extent appellant assigns error to the trial court's *voir dire*, the trial court did not abuse its discretion.

XIV. Appellant was convicted of twenty-two counts of possession of child pornography with the intent to distribute. He was sentenced to eight years for each of those convictions. He was also convicted of three counts of possession of child pornography. On each of those convictions, he was sentenced to three years. Appellant contends that "[t]he trial court erred in sentencing him to twenty-five consecutive sentences, where the verdicts are equally consistent with concurrent sentences, in violation of the Eighth Amendment . . . ." He maintains that, because the jury recommended the same sentence for each charge category, "it is unknown whether or not the recommendation was for concurrent or consecutive sentences" because the jury was not allowed to have information about whether the sentences would run concurrently or consecutively.

> We review the trial court's sentence for abuse of discretion. Given this deferential standard of review, we will not interfere with the sentence so long as it "was within the range set by the legislature" for the particular crime of which the defendant was convicted. Jett v. Commonwealth, 34 Va. App. 252, 256, 540 S.E.2d 511, 513 (2001)

> (quoting Hudson v. Commonwealth, 10 Va. App. 158, 160-61, 390 S.E.2d 509, 510 (1990)).

Scott v. Commonwealth, 58 Va. App. 35, 46, 707 S.E.2d 17, 23 (2011) (citation omitted). By statute, multiple sentences are presumed to be served consecutively. See Code § 19.2-308.[10] Thus, the trial court did not abuse its discretion by ordering that appellant serve his sentences consecutively.

"To the extent that appellant's argument . . . raises a question of constitutional interpretation, that issue is reviewed *de novo*." Johnson v. Commonwealth, 63 Va. App. 175, 182, 755 S.E.2d 468, 471 (2014) (citing Lawlor v. Commonwealth, 285 Va. 187, 240, 738 S.E.2d 847, 877 (2013)). Here, appellant points out that he faces a sentence of one hundred and eighty-five years because the trial court imposed the sentences consecutively and that the length of his incarceration constitutes cruel and unusual punishment under the Eighth Amendment. While appellant contends that his total sentence is disproportionate to his offenses, this Court will not engage in a proportionality review in cases that do not involve life sentences without the possibility of parole. Cole v. Commonwealth, 58 Va. App. 642, 653-54, 712 S.E.2d 759, 765 (2011).

Even if proportionality review were available in this case, the result would not change. As the

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[10] That section provides that, "When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court."

Supreme Court has observed, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991).

> "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem v. Helm, 463 U.S. 277, 290 (1983).

Jackson v. Commonwealth, 44 Va. App. 218, 225, 604 S.E.2d 122, 125 (2004).

Accordingly, appellant's consecutive sentences do not violate the Eighth Amendment prohibition against cruel and unusual punishment.

XV. In the fifteenth assignment of error, appellant asserts that the trial court erred in failing to strike the indictments of second or subsequent violations,[11] and instructing the jury thereon, where

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[11] Appellant does not identify the statute in question, but because he states that "[t]he Virginia Code enhances punishment for a second or subsequent violation of the statutes prohibiting the making or possessing with [the] intent to distribute child pornography," we shall assume that this assignment of error refers to Code § 18.2-374.1:1. Subsection (C) of that statute provides that "[a]ny person who commits a second or subsequent violation under this subsection shall be punished by a term of imprisonment of not less than five years nor more than 20 years in a state correctional facility, five years of which shall be a mandatory minimum term of imprisonment."

the statutory interpretation led to an absurd result, in violation of the Fifth, Eighth, and Fourteenth Amendments. He contends that the enhancement provisions in Code § 18.2-374.1:1(B) do not apply when a defendant has no convictions prior to the proceedings in which the enhancement is sought. Appellant argues that, to the extent that Mason v. Commonwealth, 49 Va. App. 39, 636 S.E.2d 480 (2006), Chapman v. Commonwealth, 56 Va. App. 725, 697 S.E.2d 20 (2010), and Papol v. Commonwealth, 63 Va. App. 150, 754 S.E.2d 918 (2014), allow for such a result, they should be overruled because they are unconstitutional.

Absent an *en banc* decision from this Court or the Supreme Court overruling Mason, Chapman, or Papol, we are bound by principles of *stare decisis*. See Johnson v. Commonwealth, 252 Va. 425, 430, 478 S.E.2d 539, 541 (1996) ("[A] decision of a panel of the Court of Appeals becomes a predicate for application of the doctrine of *stare decisis* until overruled by a decision of the Court of Appeals sitting *en banc* or by a decision of this Court."); Sandoval v. Commonwealth, 64 Va. App. 398, 419, 768 S.E.2d 709, 720 (2015) ("The interpanel accord doctrine precludes our reconsideration of Mason.").

In Papol we rejected the argument that "the eleven 'second or subsequent' charges under Code § 18.2-374.1:1(B) should have been dismissed because [the defendant] had never been previously convicted of possession of child pornography." Papol, 63 Va. App. at 153, 754 S.E.2d at 920. We held that, "[w]hen multiple images are downloaded on a single occasion, one of those images invariably constitutes the first image possessed, while all the others qualify as second or subsequent images possessed." Id. at

156, 754 S.E.2d at 922. Accordingly, based upon Papol, the trial court did not err in refusing to strike the second and subsequent indictments against appellant, and instructing the jury that appellant's argument that the child pornography statutes providing for enhanced punishment based upon second or subsequent violations should be read to include only convictions prior to trial are without merit.

Appellant contends that such a construction of the statute violates his constitutional rights to due process and against cruel and unusual punishment.[12] With regard to his assertion that the statutes provide for cruel and unusual punishment, he contends that "[t]he notion that a person could be convicted of hundreds or thousands of violations of the statute based upon the number of images found violates the Eighth Amendment['s protection] against cruel and unusual punishment." With regard to his due process argument, he argues that "[a] sentence of thousands of years [of] imprisonment is disproportionate to the offense" and "offends traditional notions of fundamental fairness and due process."[13]

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[12] For each of the possession with the intent to distribute convictions, the trial court sentenced appellant to eight years. For each of the simple possession convictions, the trial court sentenced appellant to three years. The trial court sentenced appellant to a total of one hundred and eighty-five years.

[13] 13 We note that appellant lacks standing to attack the constitutionality of the statute except as it was applied to him. See Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute

For the reason discussed previously, we decline to engage in a proportionality review of appellant's punishment. Cole, 58 Va. App. at 653-54, 712 S.E.2d at 765. As for his due process argument, appellant appears to assert that the statute under which he was sentenced was so flawed that he was deprived of due process. See e.g., Ray v. Commonwealth, 55 Va. App. 647, 651, 688 S.E.2d 879, 881 (2010) (defining "structural error" as one that "affects the very framework within which the trial proceeds" and "undermines the entire adjudicatory framework of a criminal trial").

Appellant cites no authority, and we are aware of none, supporting the proposition that a sentence imposed within the bounds of statutory limits constitutes "structural error" or a deprivation of due process. Accordingly, the trial court did not err in denying appellant's motion to strike or instructing the jury in accordance with Virginia law.

XVI., XVII., and XVIII. Appellant asserts the trial court erred by failing to grant his motion for inquiry and to set aside the verdict because the trial judge, the Commonwealth's attorney, and the court reporter used their cell phones in a manner that suggested the three parties were communicating with each other during the time defense counsel was

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may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court."); Toghill v. Commonwealth, 289 Va. 220, 228, 768 S.E.2d 674, 678 (2015) ("[I]f a statute is constitutional as applied to a litigant, he or she lacks standing to assert a facial constitutional challenge to it, and the statute is not facially unconstitutional because it has at least one constitutional application.").

arguing a motion. Appellant filed a "motion for inquiry" seeking "to inquire into the matter." In the motion appellant made "further inquiry into whether or not the trial court and/or Commonwealth's Attorney engaged in any *ex parte* communication(s) – directly or indirectly through a third party – during the preparation and/or presentation of the case, in court or out of court." (Emphasis added). Following a hearing on the motion and the presentation of evidence, the trial court denied the motion. After the trial court denied these motions, appellant moved to have the verdicts set aside on the basis that the trial judge and the Commonwealth's attorney were guilty of judicial and prosecutorial misconduct, thereby depriving him of a fair trial in violation of the Fifth and Fourteenth Amendments.

A. Motion for Inquiry

While appellant does not expressly state as much in his petition, the motion for inquiry was for the purpose of gathering evidence that the trial judge, the prosecutor, and the court reporter had engaged in improper conduct, thereby depriving him of a fair trial.

Here, the trial court allowed appellant the opportunity to question both the Commonwealth's attorney and the court reporter under oath. The court reporter denied communicating with either the Commonwealth's attorney or the trial judge through her cell phone or any other method. Likewise, the Commonwealth's attorney testified that he had not communicated with either the court reporter or the trial judge during the trial. Finally, the trial judge stated on the record as follows: "I would say

emphatically, and as unequivocally as I can, there was absolutely no *ex parte* communication before, during, or since this trial by this court."

Appellant was provided with a transcript of the trial that was certified by the court reporter as "a true and accurate record of the testimony." He points to nothing in the transcripts prepared by the court reporter that inaccurately reflects the trial proceedings. Likewise, he offers no argument regarding any prejudice he suffered.

Based upon this record, the trial court did not abuse its discretion[14] by denying appellant's motion for inquiry.

B. Motion to Set Aside Based upon Prosecutorial and Judicial Misconduct[15]

1. Judicial Misconduct

Appellant contends that the trial court should have set aside the verdicts because he was deprived of due process by virtue of judicial misconduct. To justify the reversal of a conviction, a defendant must

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[14] Neither party cites any authority specifically addressing the controlling standard of review, and we are unable to locate any case law directly on point. Thus, in reviewing the trial court's decision on the motion for inquiry, we apply the same standard of review as that applied to a motion seeking the trial judge's recusal. See e.g., Wilson v. Commonwealth, 272 Va. 19, 28, 630 S.E.2d 326, 331 (2006).

[15] Appellant points out that he moved several times unsuccessfully to have the trial judge recuse himself; however, appellant does not assign error to the trial court's denial of those motions. Accordingly, the trial court's decisions on those motions are now the law of the case.

demonstrate that the due process violation asserted was "material" – i.e., that, absent the alleged judicial misconduct, there was a "reasonable probability" the result would have been different.

For example, in the context of an alleged due process violation based upon a potential Brady violation,

> [t]he suppression of exculpatory evidence upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution. . . . Nor is an automatic retrial required whenever combing of the prosecutor's files after trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . . [F]ailure to disclose exculpatory or impeachment evidence requires reversal only if the evidence was "material," and evidence is "material" only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

MacKenzie v. Commonwealth, 8 Va. App. 236, 243-44, 380 S.E.2d 173, 177 (1989).

Here, appellant stipulated that the images on his computer constituted child pornography. While he suggests that the trial judge, the prosecutor, and the court reporter deprived him of a fair trial by virtue of their alleged *ex parte* communications, he cites no

specific evidence supporting that assertion. "Speculation" and "conjecture" will not support a "reasonable probability" that the outcome of the trial would have been different. Id. at 245, 380 S.E.2d at 178.[16]

Appellant cites no evidence that the trial judge was biased against him other than to point out that the trial judge was previously employed by the Commonwealth's attorney's office and "appeared" to engage in *ex parte* communications with the prosecutor and the court reporter, an allegation that is not supported by the record. Accordingly, the trial court did not err in denying the motion to set aside the verdicts on this basis.

2. Prosecutorial Misconduct

For the same reasons discussed in connection with appellant's arguments regarding alleged judicial misconduct, the trial court did not err in denying appellant's motion to set aside the verdicts. Appellant cites no evidence that the Commonwealth's attorney engaged in *ex parte* communications with the trial court and court reporter, and, even assuming that he did, that the misconduct was "material" to the trial proceedings.

In addition to asserting that the Commonwealth engaged in improper *ex parte* communications, appellant contends that the Commonwealth's attorney was guilty of prosecutorial misconduct

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[16] In the context of seeking a trial judge's recusal, "[t]he burden of proving a judge's bias or prejudice lies with the party seeking recusal." Prieto v. Commonwealth, 283 Va. 149, 163, 721 S.E.2d 484, 493 (2012).

when he elicited testimony from Little that "contraband" was found on appellant's cell phone when evidence supported such testimony.

As the Commonwealth points out, however, defense counsel, not the Commonwealth's attorney, elicited this testimony from Little. During cross-examination, defense counsel questioned Little as follows:

> Q Okay. And so -- and by the way, you did a forensics analysis of Mr. Stickle's iPhone, correct?
> A That's correct.
> Q He had an iPhone 5, correct?
> A I believe so.
> Q And you found no child pornography on that phone, correct?
> A That's is not correct.
> Q You found child pornography on that iPhone 5?
> A I did.
> Q And is that part of your investigation?
> A Is it a part of . . . .
> Q A part of your forensics report.
> A The forensics report for his computer, no, it's not.
> Q For the iPhone.
> A I didn't generate a forensics report for the iPhone.
> Q Okay. That's what I'm asking.
> A Yes. I didn't generate one.

Accordingly, appellant's assertion that the Commonwealth was guilty of misconduct by eliciting

testimony regarding the presence of contraband on the cell phone is not supported by the record.[17]

Appellant also argues that the Commonwealth was guilty of prosecutorial misconduct because it disseminated false information about the case to the media through its law enforcement "agents." Because appellant cites no evidence in support of this argument, the trial court did not err in refusing to set aside the verdicts on this basis.

Finally, appellant contends that his rights under the Equal Protection Clause were violated because the Commonwealth prosecuted him for multiple child pornography offenses while only charging a

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[17] Appellant also argues that the Commonwealth's attorney should not have allowed its former employee, Maureen Kufro, "to inspect its file and search for a report of the evidence o[n] the cell phone." Appellant points out that Kufro was not attorney of record in the case and "had no basis to assist" the Commonwealth's attorney. As Kufro was the Commonwealth's attorney at the time the pre-trial discovery order was entered, she was authorized to turn over Brady material. Appellant also points out that, if "the image" on his cell phone was not "contraband," then the Commonwealth committed a Brady violation by failing to disclose that information to defense counsel because it was exculpatory. However, Little's legal conclusion that the image on appellant's cell phone was not sufficient to support a criminal charge did not constitute "exculpatory evidence." Due process requires the Commonwealth to disclose all "exculpatory evidence" to an accused. Allen v. Commonwealth, 20 Va. App. 630, 637, 460 S.E.2d 248, 251 (1995), (citing Brady, 373 U.S. 83 (1963)), rev'd on other grounds, 252 Va. 105, 472 S.E.2d 277 (1996). "Exculpatory evidence" is defined as evidence that is "material to guilt or punishment and favorable to the accused." Id. Because Little's conclusion was not "evidence," exculpatory or otherwise, the Commonwealth was not guilty of prosecutorial misconduct by failing to disclose that conclusion to defense counsel.

"similarly situated" individual with one count of possession of child pornography. Despite the evidence allegedly supporting several counts of distribution of child pornography and a count of manufacturing child pornography, appellant points out that the individual was ultimately charged only with a misdemeanor offense for which he was sentenced to two months in jail.[18]

Appellant's assignment of error argues only that he was deprived of due process by virtue of prosecutorial misconduct. The assignment of error does not include an assertion that the appellant was deprived of his rights under the Equal Protection Clause. Accordingly, appellant's argument with respect to the Equal Protection Clause is not properly before us. See Adjei v. Commonwealth, 63 Va. App. 727, 737 n.3, 763 S.E.2d 225, 230 n.2 (2014) (declining to address issues "beyond the scope of the assignments of error").

This order is final unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

This Court's records reflect that Patricia Palmer Nagel, Esquire, is counsel of record for appellant in this matter.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

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[18] In support of this argument at trial, appellant offered a newspaper article about the individual's case.