[Cite as *State v. Enyart,* 2010-Ohio-5623.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-184 (C.P.C. No. 07CR-9135)
v.	:	No. 08AP-318 (C.P.C. No. 07CR-6170)
Richard E. Enyart,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

James R. Willis, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Following our decision granting his App.R. 26(B) application for reopening, defendant-appellant, Richard E. Enyart, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty, pursuant to pleas of no contest, of multiple counts of rape, gross sexual imposition, pandering sexually orientated material involving a minor, and illegal use of a minor in nudity orientated material, as well as single counts of attempted rape and tampering with evidence. Because exigent circumstances supported

the officers' initial entry into defendant's home, and probable cause supported the warrant to search his home, we affirm.

I. Facts and Procedural History

{¶2} On August 24, 2007 the state indicted defendant on 13 counts of gross sexual imposition, six counts of illegal use of a minor in nudity oriented material or performance, eight counts of pandering sexually orientated material involving a minor, ten counts of rape, one count of attempted rape, and one count of tampering with evidence. The state subsequently indicted defendant on December 21, 2007 for 12 counts of gross sexual imposition, four counts of illegal use of a minor in nudity orientated material or performance, 12 counts of rape, and six counts of pandering sexually orientated material involving a minor. The victims of the offenses were girls between the ages of five and 12 years old.

{¶3} The facts supporting these charges came to light on August 11, 2007 when the four neighborhood sisters, ages seven to 13, went swimming at defendant's home. After swimming, the two older girls, ages ten and 13, went into defendant's bathroom to change out of their swim suits and back into their street clothes. Defendant told the girls to be sure to use the after-sun lotion in the bathroom, especially around the edges of the swimsuit. The girls stated they had to change in front of the toilet because of the way a chair was placed in the bathroom.

{¶4} After getting dressed, the oldest girl noticed a video camera, covered with towels, on the toilet seat. She knew the camera was operating because she could see herself move in the opened LED screen attached to the recorder, and she brought her younger sister in to see the camera. According to the girls, as soon as they left the

bathroom, "defendant immediately went into the bathroom and closed the door." (Tr. 12.) The older girl then collected the rest of her sisters to return home, but the youngest refused. The others immediately went home and advised their mother of what they saw in defendant's bathroom; their mother retrieved the youngest and brought her home.

{¶5} The girls' family lived anywhere from eight to 12 houses down the street from defendant, so that defendant's house was within eyesight from their front yard. The girls' mother called police and remained in her front yard the entire time as she awaited law enforcement's arrival, "observing the defendant's residence" and reporting "that she never saw him leave the house." (Tr. 14.) She informed the arriving officers which house was defendant's residence and gave them defendant's address.

{¶6} Before any member of the sexual assault squad arrived on the scene, Officers Edly and Waldenga arrived. (Tr. 93.) They knocked loudly several times on front and side doors in an attempt to speak with defendant, announced they were Columbus police, but received no response. One of the officers stated he heard some movement inside the residence but was unsure from what room the noise came.

{¶7} Detective David Phillips of the sexual assault squad arrived at the girls' house and, after speaking to the girls, "determined that it was critical that we recover this camera before there was any opportunities to destroying [sic] the evidence." (Tr. 10-11.) Sergeant Kaeppner, also from the sexual assault squad, was present as well. Phillips spoke to him of his concern that defendant was "in the home with the evidence and the potential for the destruction of that evidence," and Phillips requested the officers be allowed to "enter the house under exigent circumstances to remove Mr. Enyart from the house." (Tr. 14.)

{¶8} After being advised of the information known at that point, Kaeppner concluded that "[i]f the camera was on, as the two girls – one girl described, we're talking about electronic data which is easily erased. It's readily destructible." (Tr. 125.) Kaeppner decided to "secure anyone inside, bring them out, [and] secure the scene until we could get a search warrant." (Tr. 124-26.) Although Kaeppner admitted law enforcement never heard or saw any burning or crunching consistent with destroying evidence, he stated, in response to a question, that hitting a delete button on a camera "I think we all know * * * makes no – no sound." (Tr. 136.)

{¶9} Officers entered the house through an unlocked side door; they were in the house three to five minutes and exited the house with only defendant. Although the officers performed a sweep of defendant's residence to assure no one else remained inside the house, the officers neither searched defendant's home nor looked around for anything other than another person. Phillips re-entered the house at defendant's request to retrieve defendant's shoes but stated he performed no type of search while inside the house. Officers then took the defendant to police headquarters to interview him while other officers secured the scene until police obtained a search warrant.

{¶10} Detective Grube, a detective from the sexual assault squad who with Phillips interviewed the girls, went back to her office and drafted the search warrant for defendant's residence. A Franklin County Municipal Court judge signed the warrant that authorized officers to search defendant's residence for implements and tools used as a means of the commission of a crime, including "all digital media storage devices, any type of equipment used to produce and view photographs or video images, including all computers, external and internal storage equipment or media and any type of storing

mediums including, but not limited to hard disks, floppy disks, video disks or video tapes," or any other evidence of the crimes of voyeurism and pandering sexually oriented matter involving a minor. (State's Exhibit A.) The affidavit in support of the warrant included the information the girls gave the detectives.

{¶11} When the officers executed the search warrant that evening, they seized numerous digital video disks ("DVDs") and VHS cassette tapes, DVD players, and a book about calculation of drug dosages. The videos revealed defendant "performing sexual acts on children who seemed to be not conscious." (Tr. 146.) One of the first DVDs the officers watched depicted defendant engaging in sexual conduct with a five to six-year-old child. Based on the incriminating DVDs and tapes, police obtained another search warrant and re-arrested defendant.

{¶12} Defendant filed three motions to suppress in the trial court. The first sought to suppress any evidence derived from the initial warrantless entry into defendant's residence. Defendant argued that because no exigent circumstances justified the officers' entry into the home, they violated defendant's Fourth Amendment rights. The second motion sought to suppress defendant's statements made to police following his second arrest. Defendant asserted police elicited those statements in violation of defendant's Fifth Amendment rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, and *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880. (R. 25.) The third motion sought to suppress the evidence taken from defendant's home; it alleged police had no probable cause to support the unconstitutionally overbroad search warrant. (R. 28.) The trial court denied all three motions.

{¶13} Pursuant to defendant's no contest pleas, the trial court found defendant guilty on all charges and imposed maximum, consecutive sentences. Defendant appealed, assigning a single error that asserted his no contest plea was involuntary because the trial court failed to comply with Crim.R. 11 and the due process clauses of the Ohio and United States Constitutions. *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶1. We concluded the trial court did not err in conducting the plea proceedings, as the record demonstrated the trial court engaged in "an extensive inquiry with the defendant regarding the crimes to which he was entering the plea and the maximum penalties." As a result, we affirmed the trial court's judgment.

{¶14} On March 5, 2009 defendant filed an application to reopen his appeal pursuant to App.R. 26(B), arguing he was deprived of effective assistance of appellate counsel. Although defendant alleged numerous potential errors in the trial court proceedings that his appellate counsel did not raise, we granted the application for reopening only as to one: appellate counsel's failure to assign as error the trial court's decision denying defendant's motion to suppress evidence from the warrantless entry to his home.

II. Assignments of Error

{¶15} In his reopened appeal, defendant assigns the following errors:

I

> The Court Erred When It Denied The Defendant's Motion To Suppress All Property Seized In The Wake Of The Illegal Entry Made Into, The Search Made Of, And The Seizures Made From, The Home.

II

The Court Erred When It Failed To Credit The Fact That The Affidavit For Search Warrant Was Based In Part On Evidence That Had Been Impermissibly Acquired In The Wake Of The Illegal Entry And The Ensuing Observations Made While Inside The Home By The Officers.

III

Given The Absence Of Any Basis For the Required Determination It Would Be Reasonable To Search These Premises For Anything Other Than A Described Camera, The Court Erred When It Failed To Credit the Affidavit With Having Failed To Set Forth A Probable Cause Basis For The Seizure Of The DVD's And The Cassette Tapes.

IV

The Court Erred When It Failed To Suppress And Exclude As Evidence All Statements (Confessions, Admissions And The Like) Which Were Acquired In Violation Of Principles That Distill From Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1973); And Miranda v. Arizona, 384 U.S. 436 (1966) And Its Progeny.

V

Under The Facts Here The Defendant, Who Was Arrested After The Rape Charges Had Been Filed, Could Not Be Lawfully Detained For Questioning Of The Type He Was Required To Submit To. With This Being So, The Court Erred When It Denied The Motion To Suppress The Appellant's Admissions And Confessions.

VI

The Court Erred In Ruling The State Actually Proved The Appellant Waived Rights Guaranteed Him By Miranda (and its progeny), And When He Voiced The View It Was For That Reason The Motion To Suppress Was Denied.

VII

> Given The Confessions Provided By The Appellant Were The Product Of Coercion And Duress And For That Reason Were Involuntary, It Follows The Court Erred When He Ruled They Were Proven To Be Admissible.

{¶16} Defendant's assignments of error involve three main arguments. Initially, defendant argues the first warrantless entry into his home violated his Fourth Amendment rights because no exigent circumstances justified the entry. Defendant next asserts no probable cause supported the search warrant, the search warrant was impermissibly overbroad, and it was based on observations the officers made during their initial warrantless entry. Finally, defendant contends his statements to police during his first interrogation were involuntary and his statements to police during his second interrogation were inadmissible as a violation of defendant's *Miranda* rights.

III. Exigent Circumstances

{¶17} Defendant contends his appellate counsel was ineffective in failing to assert as error the trial court's decision denying defendant's motion to suppress evidence arising from law enforcement's initial warrantless entry into his home.

{¶18} The Fourth Amendment to the United States Constitution assures the "right of the people to be secure in their * * * houses * * * against unreasonable searches and seizures." Indeed, the Fourth Amendment "has drawn a firm line at the entrance to the house," and generally "that threshold may not be crossed without a warrant." *Payton v. New York* (1980), 445 U.S. 573, 590, 100 S.Ct. 1371, 1382. An exception to the warrant requirement "permits warrantless felony arrests in the home if both probable cause to arrest and exigent circumstances are present." *State v. Jenkins* (1995), 104 Ohio App.3d

265, 268, citing *Payton*, 445 U.S. at 583-90, 100 S.Ct. at 1378-82. In reviewing a trial court's decision on a motion to suppress, we examine the trial court's findings of fact for clear error, but "must independently determine as a matter of law * * * whether, from the standpoint of an objectively reasonable police officer, the facts gave rise to probable cause and exigent circumstances." *State v. Sheppard* (2001), 144 Ohio App.3d 135, 140, citing *Ornelas v. United States* (1996), 517 U.S. 690, 696, 699, 116 S.Ct. 1657, 1661-62, 1663.

{¶19} Probable cause is a "fluid concept" and must be determined under the totality of the circumstances. *Maryland v. Pringle* (2003), 540 U.S. 366, 370-71, 124 S.Ct. 795, 800, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 232, 103 S.Ct. 2317, 2329. "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States* (1949), 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, quoting *Carroll v. United States* (1925), 267 U.S. 132, 162, 45 S.Ct. 280, 288. Here, probable cause for the initial entry is not at issue because defendant's appellate counsel properly noted at oral argument on the reopened appeal that the officers had probable cause to enter defendant's residence. Accordingly, defendant's argument turns on whether exigent circumstances existed.

{¶20} "An exigent circumstance is one that prompts police officers to believe either that a person in the home is in need of immediate aid to prevent a threat to life or limb, or that immediate entry is necessary to stop the imminent loss, removal, or destruction of evidence or contraband." *State v. Karle* (2001), 144 Ohio App.3d 125, 131.

The burden is on the "government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin* (1984), 466 U.S. 740, 750, 104 S.Ct. 2091, 2098. An important factor "to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." Id., 466 U.S. at 753, 104 S.Ct. at 2099.

{¶21} Whether exigent circumstances are present is determined through an objective test that looks at the totality of the circumstances confronting the police officers at the time of entry. *United States v. MacDonald* (C.A.2, 1990), 916 F.2d 766, 769. "[A] warrantless entry to prevent the destruction of evidence is justified if the government demonstrates: '(1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that these third parties may soon become aware the police are on their trail, so that the destruction of evidence would be in order.' " *United States v. Lewis* (C.A.6, 2000), 231 F.3d 238, 241, quoting *United States v. Sangineto-Miranda* (C.A.6, 1988), 859 F.2d 1501, 1512. See also *State v. Russell* (June 30, 1998), 4th Dist. No. 97 CA 37, quoting *United States v. Bates* (C.A.6, 1996), 84 F.3d 790, 796 (noting officers must have a "reasonable belief that the loss or destruction of evidence [was] imminent," as the "mere possibility or suspicion that a party is likely to dispose of evidence * * * is not sufficient to create an exigency").

{¶22} Applying that standard, *Lewis,* supra, addressed officers who did not see anyone or hear anything inside the house. The court concluded that without a reasonable belief third parties were in the house, "the belief that any evidence presumed to be inside the house was in danger of imminent destruction [was] unfounded." Id. Similarly, in *State*

v. Wangul, 8th Dist. No. 79393, 2002-Ohio-589, the state presented no evidence "the detectives were afraid that the appellant was going to start destroying" evidence. Although a neighbor alerted police to the defendant's growing marijuana in his backyard, not only was the defendant unaware of the officers' presence, but officers were present in sufficient numbers to secure the scene until a warrant could be obtained.

{¶23} Defendant's circumstances differ markedly. The officers here knew defendant was in his residence because the mother of the neighborhood girls who saw the camera recording them in the bathroom stated she observed defendant's residence after she called police and never saw defendant leave. What is more, the car he typically drove remained in the driveway. Her remarks were confirmed in the sound of rustling or movement inside the house that one of the officers heard.

{¶24} Moreover, the officers reasonably could believe defendant soon would become aware of their presence and would destroy the evidence. The girls told Phillips that, after they found the video camera, defendant immediately went into the bathroom and closed the door. Defendant at that point would have seen that the girls moved the towels and discovered the camera. Likewise, when he viewed the footage he would see the girls discovering the camera and realizing it was filming them. On hearing the officers' knocking on the doors, defendant would have reason, as well as occasion, to destroy the evidence.

{¶25} Police, however, cannot rely on exigent circumstances of their own making to justify a warrantless entry. *Jenkins* at 271. In *Jenkins* the police knocked on defendant's door because they suspected he was selling marijuana. Id. at 267. The defendant peered through the shade and told the officers they could not enter. Id.

Believing the defendant had something to hide and was inside destroying drugs, the officer kicked in the door. Id. at 267-68. *Jenkins* found no exigent circumstances because "[i]t was not until after [the officer] knocked and was refused entry that [the officer] suspected that appellant was running to destroy evidence of drugs," so the "exigent circumstances, if any * * * were the direct result of [the officer's] actions." Id. at 269. See also *United States v. Chamber* (C.A.6, 2005), 395 F.3d 563, 568-69 (finding no exigent circumstances where police had extensive and reliable information the defendant was running a methamphetamine lab in his trailer, knocked on the door of the trailer and, after a woman appeared, retreated, and called out "police," the officers used their knock and her refusal to talk to justify their warrantless entry); *State v. Sheppard* (2001), 144 Ohio App.3d 135, 142; *State v. Sims* (1998), 127 Ohio App.3d 603, 612; *State v. Heaven* (1990), 65 Ohio App.3d 832, 833.

{¶26} Here, as in *Jenkins* and *Chamber*, two patrol officers knocked loudly on defendant's doors and announced "police" before the detectives from the sexual assault squad arrived and interviewed the neighborhood girls. (Tr. 15-16, 140.) The officers, however, did not create the exigent circumstances with their knocking. Having been informed of what the girls related to their mother, the officers knew that, after the girls discovered the video camera, defendant went into the bathroom, shut the door, and inevitably would have realized the girls discovered the camera: someone was aware of his criminal behavior. The information the girls supplied, coupled with the readily destructible nature of the evidence, justified the officers' entry.

{¶27} As a result, unlike *Chamber* or *Jenkins*, where police's knocking created the exigency by alerting the defendant to the officers' presence, here the girls' discovery of

the camera, with defendant's knowledge they had done so, created the likelihood that defendant would try to destroy the recording. As Kaeppner explained, "[i]f the camera was on * * * we're talking about electronic data which is easily erased. It's readily destructible." (Tr. 125.) Cf. *State v. Bowe* (1988), 52 Ohio App.3d 112, 114 (concluding VCRs, cameras and radios were "not of a type easily destroyed, and the record [did] not reflect any indication that the police thought otherwise"); *United States v. Bates* (C.A.6, 1996), 84 F.3d 790, 796 (determining officers were unreasonable in thinking "fifteen kilograms of powder cocaine could be quickly disposed of by flushing it down the toilet or dumping it down the sink drain").

{¶28} Because exigent circumstances justified the officers' warrantless entry into defendant's house, the trial court properly denied defendant's motion to suppress any evidence derived from the initial warrantless entry. Defendant suffered no prejudice in appellate counsel's failure to raise the issue in defendant's first appeal.

IV. Validity of Search Warrant

{¶29} Defendant alleges his appellate counsel was ineffective for failing to assign as error the trial court's denial of his motion to suppress the evidence obtained pursuant to the first search warrant, because (1) the warrant was impermissibly based on evidence seen during the first warrantless entry, (2) police had no probable cause to search for DVDs or cassette tapes, and (3) the warrant was unconstitutionally overbroad.

A. Warrant not based on any evidence acquired during initial warrantless entry

{¶30} Nothing in the record indicates Detective Grube's affidavit to support the request for a search warrant used any information obtained or evidence seen as a result of a search during law enforcement's initial warrantless entry into defendant's home. The

officers all testified they performed no search of any kind when they went into the house. Although they performed a sweep of the residence to assure no one else remained inside, they did not look around for anything besides another body and removed only defendant from the house. Indeed, Grube's affidavit simply reiterates what the two older girls told Phillips and Grube about what happened at defendant's house earlier that day. The affidavit does not reference the earlier entry, defendant's arrest or anything the officers may have seen during that entry. Accordingly, defendant's argument that the warrant was impermissibly based on the officers' observations during their initial entry is unpersuasive.

B. Probable cause to search for DVDs and cassette tapes established

{¶31} Defendant contends police had probable cause to search only for the video camera the girls reported seeing, not for DVDs or cassette tapes. The warrant authorized police to search defendant's residence for "digital media storage devices, any type of equipment used to produce and view photographs or video images, including * * * video disks or video tapes." (State's Exhibit A.)

{¶32} The Fourth Amendment to the United States Constitution requires that warrants issue only "upon probable cause." Probable cause "means less than evidence which would justify condemnation," so that only the "probability, and not a prima facie showing of criminal activity is the standard of probable cause." *State v. George* (1989), 45 Ohio St.3d 325, 329 (internal quotation marks omitted). To search for evidence of a crime there must "be a nexus * * * between the item to be seized and criminal behavior" as well as "cause to believe that the evidence sought will aid in a particular apprehension or

conviction." *Warden, MD Penitentiary v. Hayden* (1967), 387 U.S. 294, 307, 87 S.Ct. 1642, 1650.

{¶33} When determining "the sufficiency of probable cause in an affidavit submitted to support a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him including "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *George* at paragraph one of the syllabus, quoting *Gates,* 462 U.S. 213 at 238-39, 103 S.Ct. 2317 at 2332. A reviewing court should not conduct a de novo review of a magistrate's determination of probable cause. Rather, "the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed," according "great deference to the magistrate's determination of probable cause" and resolving "doubtful or marginal cases in this area * * * in favor of upholding the warrant." Id. at paragraph two of the syllabus.

{¶34} The magistrate is charged with considering the veracity and basis of the individuals' knowledge who supply the officers with information. Information "from a citizen eyewitness" is "presumed credible and reliable, and supplies a basis for a finding of probable cause in compliance with *Gates*." *State v. Garner* (1995), 74 Ohio St.3d 49, 63. Indeed, " 'a tip from an identified citizen informant who is a victim or witnesses a crime is presumed reliable, particularly if the citizen relates his or her basis of knowledge.' " *State v. Jackson* (Mar. 5, 1999), 2d Dist. No. 17226, quoting *State v. Gress* (June 19, 1998), 2d Dist. No. 16899; *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 302, citing *Gates*, 462 U.S. at 233-34, 103 S.Ct. at 2329-30 (noting a "personal observation by an

informant is due greater reliability than a secondhand description"). Here, because the girls were citizen eyewitnesses who personally observed defendant's act of secretly videotaping them as they undressed, the magistrate could presume the information the girls provided to the officers was credible, reliable, and entitled to great weight.

{¶35} Within that context, we note Detective Grube filled out the affidavit in support of the search warrant to search for evidence of the crimes of voyeurism under R.C. 2907.08(D)(1) and pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1). Grube's affidavit stated defendant not only attempted to secretly record the girls as they undressed but told them to rub lotion on the erogenous parts of their body. With the girls' information, the magistrate had a substantial basis to conclude the crimes occurred in defendant's house, and the house likely held evidence of the crimes in the form of DVDs, cassette tapes, or some other digital media format. Accordingly, the items properly were listed as objects to be seized pursuant to the search warrant, and the magistrate had probable cause to issue the warrant.

{¶36} Defendant relies on *United States v. Hodson* (C.A.6, 2008), 543 F.3d 286 to argue Grube's affidavit failed to set forth probable cause. Id. at 289 (concluding the warrant could not pass constitutional muster because the affidavit "established probable cause to search for evidence of one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography"). Defendant thus contends "any link between evidence showing [his] interest in seeing children undressing and being involved in sex crimes would be an assumption – an unfounded assumption at best." (Appellant's brief, 20.) Unlike *Hodson*, the officers here were looking for evidence of the very crime for which they had information, not for evidence of a different crime.

Hodson is not persuasive on these facts, as the girls' information provided a basis for the municipal court judge to conclude probable cause existed.

C. Search warrant not overbroad

{¶37} In a related argument, defendant contends the search warrant was impermissibly overbroad because it authorized officers to search for items other than the digital camera subject of the girls' report to their mother and law enforcement. The Fourth Amendment to the United States Constitution provides that warrants only may issue if the warrant "particularly describ[es] the place to be searched and the * * * things to be seized." The purpose of the "particularity requirement was to prevent general searches" and the "wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison* (1987), 480 U.S. 79, 84, 107 S.Ct. 1013, 1016.

{¶38} Reviewing courts conduct a de novo review in considering whether a warrant is unconstitutionally overbroad. *State v. Gritten*, 11th Dist. No. 2004-P-0066, 2005-Ohio-2082, ¶11, citing *United States v. Ford* (C.A.6, 1999), 184 F.3d 566, 575. The degree of specificity required in a search warrant necessarily will vary with the nature of the items to be seized. Id. at ¶13, quoting *State v. Benner* (1988), 40 Ohio St.3d 301, 307. A broad or generic description of items to be searched will be "valid if it 'is as specific as circumstances and nature of the activity under investigation permit' and enables the searchers to identify what they are authorized to seize." *State v. Hale*, 2d Dist. No. 23582, 2010-Ohio-2389, ¶71, quoting *State v. Armstead*, 9th Dist. No. 06CA0050-M, 2007-Ohio-1898, ¶10.

{¶39} In *Hale*, the Montgomery County police received information from the Immigration, Customs and Enforcement Agency that Hale subscribed to a known child pornography site. Id. at ¶7. Police obtained a warrant to search Hale's residence for "items of property like computers, central processing units, storage devices, and financial records connected with the crime of Pandering Obscenity Involving a Minor." Id. at ¶7, ¶56-60. The Second District concluded the warrant was not unconstitutionally overbroad because officers were "to search only for items connected to the crime of Pandering Obscenity Involving a Minor." Id. at ¶76. The court added not only that "the warrant could not reasonably have described the items more precisely" but that the "search was limited to items related to the specified offense." Id. at ¶77. See also *United States v. Summage* (C.A.8, 2007), 481 F.3d 1075, 1079-80 (determining the warrant at issue was not overbroad in authorizing officers to search for video tapes, DVDs, pornographic pictures, all video and/or digital recording devices and equipment, all equipment used to develop and/or upload/download photographs and/or movies, and computers at defendant's residence where the warrant arose out of the defendant's offering a mentally handicapped male money to have sex with an unknown female while the defendant videotaped the incident and took photos of the victim); *State v. Mazzaferro* (July 23, 2007), Wash. Ct. App. Div. 1 No. 58836-2-I.

{¶40} Here, as in *Hale*, the search warrant named the items to be seized in reference to the crimes of voyeurism and pandering, thus limiting the search to items related to the offense. Moreover, as in *Summage*, the search warrant specified a range of items because, although officers knew defendant made a video recording of the girls' undressing, they did not know in which format defendant kept the recorded material.

Accordingly, the warrant described the items with sufficient particularity considering the evidence police were searching for and the range of media available to defendant for storing the evidence. Cf. *Armstead* at ¶11 (concluding warrant was overbroad when, in addition to authorizing search for the crack-cocaine suspected to be on the premises, it also authorized a search for "any other controlled substances or dangerous drugs" and "any other contraband"); *Gritten* at ¶14 (determining warrant to be overbroad when it authorized officers to seize "any evidence of the crime drug abuse and all other fruits and instrumentalities of the crime at the present time unknown").

{¶41} Because defendant's argument is unpersuasive in asserting the trial court erred in not granting his motion to suppress the evidence taken from his house, appellate counsel's failure to assign the issue as error did not prejudice defendant.

V. Statements

{¶42} Defendant's third main argument on reopening asserts the trial court wrongly admitted into evidence defendant's statements to law enforcement, as the interrogations that produced the statements either were involuntary or violated defendant's *Miranda* rights. Defendant did not seek, and we did not grant, reopening concerning appellate counsel's failure to assign as error the trial court's decision denying defendant's motion to suppress his statements to law enforcement. Rather, we granted reopening regarding defendant's motion to suppress the evidence taken from his home. In any event, since we determined the initial entry into defendant's home to arrest him and the search warrant were valid, all of the incriminating DVDs and VHS tapes which depicted defendant raping and sexually assaulting children properly could have been admitted into evidence. As such, the record would have contained more than enough

evidence to convict defendant of the crimes to which he pled no contest, even without defendant's statements to police.

VI. Conclusion

{¶43} Because the trial court properly denied defendant's motions to suppress the evidence taken from defendant's home, we overrule defendant's assigned errors and, pursuant to App.R. 26(B)(9), we confirm our prior judgments affirming the trial court.

Judgments confirmed.

TYACK, P.J., and McGRATH, J., concur.

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