

**FILED: March 18, 2020**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Appellant,

v.

SCOTT MICHAEL MCNUTT II,  
Defendant-Respondent.

Washington County Circuit Court  
17CR52858

A167963

Andrew Erwin, Judge.

Argued and submitted on October 30, 2019.

Christopher A. Perdue, Assistant Attorney General, argued the cause for appellant. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Adam L. Dean argued the cause and filed the brief for respondent.

Before DeHoog, Presiding Judge, and Mooney, Judge, and Kistler, Senior Judge.

KISTLER, S. J.

Pretrial order reversed and remanded.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellant

- ☐ No costs allowed.
  - ☐ Costs allowed, payable by
  - ☐ Costs allowed, to abide the outcome on remand, payable by
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1 KISTLER, S. J.

2 The state appeals from a pretrial order granting defendant's motion to  
3 suppress evidence obtained pursuant to a search warrant. The trial court ruled that the  
4 affidavit filed in support of the warrant did not establish probable cause that the files on  
5 defendant's computer contained child pornography. We reverse the trial court's order.

6 We take the facts from the affidavit filed in support of the warrant.  
7 BitTorrent is a peer-to-peer (P2P) file-sharing network that allows persons to share  
8 pictures and videos over the internet. "P2P file sharing networks, including the  
9 BitTorrent network, are frequently used to trade digital files of child pornography." A  
10 BitTorrent user will begin the process of sharing files by creating a "torrent." The torrent  
11 does not contain the file being shared; rather, it typically contains a name or description  
12 of the file and identifies computers in the BitTorrent network where the file may be  
13 found.<sup>1</sup>

14 A person looking for a particular subject on the BitTorrent network can  
15 conduct a keyword search to find torrents that describe files of potential interest. The  
16 affiant explained:

17 "For example, a person interested in obtaining child pornographic  
18 images on the BitTorrent network would open the BitTorrent client  
19 application on his/her computer and conduct a keyword search for files

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<sup>1</sup> A torrent ordinarily uses "trackers" to identify peers on the network who are sharing the file described in the torrent. The BitTorrent program permits users to download the entire file from a single computer or constituent parts of a file from multiple computers, and it uses a unique "info-hash" or "SHA-1" value for each file to ensure that the constituent parts form a single file.

1 using a term such as 'preteen sex.' \* \* \* The results of the torrent search are  
2 typically returned to the user's computer by displaying them on the torrent  
3 hosting website. The hosting website will typically display information  
4 about the torrent, which can include the name of the torrent file, the name  
5 of the file(s) referenced in the torrent file, the file(s) size, and the 'info-hash'  
6 SHA-1 value of the torrent file. The user then selects a torrent of interest to  
7 download to their computer."

8 In this case, two Oregon detectives were investigating the BitTorrent  
9 network to identify persons sharing child pornography in Oregon. One detective focused  
10 on a particular computer located in Oregon "because it was associated with a torrent" that  
11 referred to "a file of investigative interest to child pornography investigations." Based on  
12 the information contained in the torrent, the detective "directly connected" to the  
13 computer and downloaded the following file from that computer: "Cp 9Yo Dad Cum  
14 Face Dee And Desi Zadoom Pedo Cumshot 9.mpg."

15 Two days later, the detective investigated another torrent that "was  
16 identified as being a file of investigative interest to child pornography investigations."  
17 That torrent was associated with the same computer, and the detective downloaded the  
18 following file from that computer: "11yo - girl - Preteen girl just wants to Fuck & Suck  
19 (Sound).avi." At approximately the same time, the other detective learned that the  
20 computer from which those two files were downloaded was located in defendant's home  
21 in Washington County.<sup>2</sup> During a 30-day period, the detectives downloaded

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<sup>2</sup> Neither detective knew initially that the computer was in defendant's home. They knew only its unique internet protocol address. Later, the detectives learned that the computer's internet protocol address had been assigned to a computer in defendant's home.

1 approximately 300 files from a computer in defendant's home.<sup>3</sup>

2           The detectives transferred all the downloaded files to Detective Kiurski in  
3 the Washington County Sheriff's Office. Kiurski has substantial training and experience  
4 in investigating child sex crimes.<sup>4</sup> He "briefly looked at some of th[e] files [downloaded  
5 from the computer in defendant's home] and verified that there were over 300 files  
6 downloaded between 1/2/17 and 2/3/17 from the [computer in defendant's home] to [the  
7 detectives' computer] and that those files did contain child pornography."

8           Based on that and other information, Kiurski concluded that he had  
9 "probable cause to believe that one or more of the occupants residing at  
10 [defendant's home between August 2016 and January 25, 2017] used a  
11 computer(s), cell phone(s), tablet(s) or mobile electronic device, that more  
12 likely than not is located [at defendant's home] to engage in Encouraging  
13 Child Sexual Abuse in the First Degree in violation of ORS 163.684 and  
14 Encouraging Child Sexual Abuse in the Second Degree in violation of ORS  
15 163.686."

16 Kiurski requested a warrant authorizing the seizure and search of computers and related  
17 electronic devices for evidence of the crimes of first- and second-degree encouraging  
18 child sexual abuse. *See* ORS 163.684 (defining first-degree encouraging child sexual  
19 abuse); ORS 163.686 (defining second-degree encouraging child sexual abuse). Having

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<sup>3</sup> The detectives downloaded the two named files on January 6 and January 8, 2017. They downloaded more than 300 files from defendant's computer between January 2, 2017 and February 3, 2017.

<sup>4</sup> Kiurski had received over 400 hours of training relating to the investigation of sex crimes and child abuse when he investigated this case. Additionally, for approximately the last five years, he had devoted all his time as a detective to investigating crimes against children.

1 concluded that there was probable cause to seize and search those devices, the magistrate  
2 issued the warrant.

3 Defendant moved to suppress the evidence discovered as a result of  
4 executing the warrant. His argument in support of the motion was narrow. He did not  
5 challenge any of the facts recited in the affidavit, nor did he dispute that the affidavit  
6 established probable cause that all the downloaded files (the two named files and the  
7 approximately 300 unnamed files) would be found on a computer in his home and related  
8 electronic devices. He did not contend that the warrant was overbroad, nor did he argue  
9 that the officers exceeded the scope of the warrant in executing it.<sup>5</sup> Rather, his argument  
10 focused on one issue: He argued that the warrant failed to establish probable cause that  
11 any file on his computer contained child pornography.

12 On that issue, defendant began from the premise that Kiurski's affidavit  
13 reduced to a conclusory assertion that some of the files downloaded from a computer in  
14 defendant's home contained "child pornography." Defendant contended that, to establish  
15 probable cause, the affidavit needed either to attach copies of the downloaded files to the  
16 affidavit, describe specifically the contents of the downloaded files, or include more  
17 inculpatory circumstances than Kiurski's affidavit had. Defendant reasoned that a  
18 conclusory assertion that the files contained child pornography did not provide a

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<sup>5</sup> Defendant also does not argue that the officers engaged in an impermissible search when they downloaded files that were publicly available on the BitTorrent network; that is, he does not argue that the state unconstitutionally obtained the evidence on which it based its probable cause argument.

1 sufficient basis for the magistrate to make an independent determination that the files, in  
2 fact, depicted children engaged in sexual conduct. The state responded that not only did  
3 the affidavit establish that a detective who was experienced in investigating child sex  
4 crimes had viewed the files and determined that they contained child pornography, but  
5 the attendant circumstances set out in the affidavit corroborated Kiurski's determination.  
6 It followed, the state argued, that the magistrate reasonably concluded that the affidavit  
7 established probable cause.

8           After carefully considering the parties' arguments, the trial court ruled in  
9 defendant's favor. It accordingly granted his motion to suppress and entered a pretrial  
10 order suppressing the evidence discovered as a result of the warrant. The state appeals  
11 from that order.

12           On appeal, the parties reiterate the positions they asserted below.  
13 Additionally, defendant argues that the trial court's ruling may be affirmed on an  
14 alternative ground. He argues for the first time on appeal that, even if the affidavit was  
15 sufficient to establish probable cause, the warrant did not comply with *State v. Mansor*,  
16 363 Or 185, 421 P3d 323 (2018). We begin with the predicate question whether the  
17 warrant established probable cause that the files on a computer in defendant's home  
18 contained child pornography. In doing so, we analyze that question initially under  
19 Article I, section 9, of the Oregon Constitution and then turn to the Fourth Amendment to  
20 the United States Constitution.

1 I. PROBABLE CAUSE

2 A. *Article I, Section 9*

3 As noted above, defendant does not controvert or otherwise challenge any  
4 of the facts set out in the affidavit. We accordingly accept those facts as true, as well as  
5 any inferences that the magistrate reasonably could have drawn from them. *See State v.*  
6 *Webber*, 281 Or App 342, 347 & n 7, 383 P3d 951 (2016) (stating the standard of  
7 review). The question accordingly becomes a legal one: Did the facts in the affidavit  
8 and all reasonable inferences that can be drawn from those facts establish probable cause  
9 that a computer in defendant's home contained "visual recording[s] of sexually explicit  
10 conduct involving a child."<sup>6</sup> *See* ORS 163.684 (prohibiting producing or distributing  
11 visual recordings of sexually explicit conduct involving a child or possessing that  
12 material with the intent to distribute it); ORS 163.686 (prohibiting possessing or  
13 acquiring visual recordings of sexually explicit conduct involving a child); *State v. Bray*,  
14 342 Or 711, 717-18, 160 P3d 983 (2007) (discussing the crime of first-degree  
15 encouraging child sexual abuse).

16 In answering that question, we use the phrase "child pornography" in this  
17 opinion as a shorthand way of describing the material that ORS 163.684 and  
18 ORS 163.686 prohibit--namely, visual recordings of sexually explicit conduct involving a

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<sup>6</sup> The phrase "sexually explicit conduct" means, among other things, actual or simulated sexual intercourse, oral-genital contact, anal-genital contact, and "[l]ewd exhibition of sexual or other intimate parts." ORS 163.665(3).

1 child. Additionally, in determining whether Kiurski's affidavit established probable  
2 cause that the files on defendant's computer contained child pornography, we are mindful  
3 that "[t]he standard is one of probability, not certainty," and that "the facts articulated in  
4 support of probable cause must be assessed in a commonsense and realistic fashion."  
5 *State v. Foster*, 350 Or 161, 169, 252 P3d 292 (2011).

6           With those considerations in mind, we turn to three sets of facts set out in  
7 the affidavit that, we conclude, collectively establish probable cause that the files on a  
8 computer in defendant's home contained child pornography: (1) the two named files that  
9 were downloaded from a computer in defendant's home; (2) an experienced detective's  
10 assessment after viewing some of the 300 files downloaded from the same computer that  
11 those files contained child pornography; and (3) defendant's use of a network that is  
12 commonly employed to share child pornography over the internet.

13           We focus initially on the two named files downloaded from the computer in  
14 defendant's home.<sup>7</sup> One file was titled, "Cp 9Yo Dad Cum Face Dee And Desi Zadoom  
15 Pedo Cumshot 9.mpg." The magistrate reasonably could have inferred that "Cp" was an  
16 abbreviation for child pornography. *See Bray*, 342 Or at 715 (explaining that the  
17 defendant in that case saved images of "child pornography" to a computer folder labeled

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<sup>7</sup> Although the affidavit is not completely clear on this point, the magistrate reasonably could have inferred that the file names set out in the affidavit were taken from the two files downloaded from defendant's computer rather than from the description of those files in the torrents. Not only is that a permissible reading of the affidavit, but it is the more reasonable reading based on the sentence structure.

1 "CP"). The magistrate also reasonably could have inferred that "9Yo" referred to the age  
2 of the children depicted in the file. The name of the file then describes the result of a  
3 sexual activity presumably between "Dad" and two nine-year-old children Dee and Desi.  
4 Finally, the title of the first file ends with the phrase, "Pedo Cumshot." The magistrate  
5 reasonably could have inferred that, in context, the phrase referred to sexually explicit  
6 activity involving pedophilia.

7           The title of the second file is equally telling: "11yo - girl - Preteen girl just  
8 wants to Fuck & Suck (Sound).avi." That title leaves little doubt as to the age of the  
9 child (preteen), her gender, or the sexual activities depicted. The titles of those two files  
10 permitted the magistrate reasonably to infer that both files contained, as the title for one  
11 of those files explicitly stated, "Cp" or child pornography.

12           Defendant, however, discounts the significance of those two file names. He  
13 argues that the affidavit stated only that those two files were "of 'investigative interest to  
14 child pornography investigations.' It did not allege that [the] files were 'child  
15 pornography.'" In our view, defendant misperceives what the affidavit said. The part of  
16 the affidavit that defendant quotes describes why the detectives focused on the torrents  
17 that led them to download the two named files. It does not purport to preclude the  
18 magistrate from considering the names of those two downloaded files in determining  
19 whether they contained child pornography. *See Foster*, 350 Or at 169 (reminding courts  
20 to consider the "totality of the circumstances" in assessing probable cause).<sup>8</sup>

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<sup>8</sup> In the trial court, defendant argued that the two files names did not necessarily

1           We need not decide whether the magistrate could have relied solely on the  
2 names of the two files downloaded from a computer in defendant's home in finding  
3 probable cause that those files contained child pornography. *See United States v.*  
4 *Miknevich*, 638 F3d 178, 184-85 (3d Cir), *cert den*, 565 US 847 (2011) (relying, in part,  
5 on the graphic title of a single computer file to find probable cause that the file and the  
6 computer from which it was downloaded contained child pornography). In this case, the  
7 affidavit also states that Kiurski, a detective who had extensive training and experience  
8 investigating child sexual abuse crimes, personally viewed some of the 300 files  
9 downloaded from defendant's computer and concluded that those files contained child  
10 pornography in violation of ORS 163.684 and ORS 163.686.<sup>9</sup> Kiurski's assessment of  
11 the contents of the downloaded files corroborates what the names of the two files implied  
12 and further supports the magistrate's determination that there was probable cause that the  
13 files on a computer in defendant's home contained visual recordings of sexually explicit

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establish that the files depicted "sexually explicit conduct" with a child. For example, he argued that the second file could have merely portrayed an 11-year-old girl who was excited about engaging in the named activities and that it did not necessarily follow from the file name that the file actually depicted her engaging in those activities. Suffice it to say that the affidavit should be read in "a commonsense and realistic fashion" and that "probability, not certainty," is the standard for probable cause. *See Foster*, 350 Or at 169 (stating that principle).

<sup>9</sup> Kiurski stated at one point in his affidavit that the files he viewed contained "child pornography." At another point, he concluded that the evidence established probable cause that those files violated ORS 163.684 and ORS 163.686. The magistrate reasonably could infer from those two statements that Kiurski concluded that the files he viewed contained "child pornography" in violation of ORS 163.684 and ORS 163.686--that is, they depicted sexually explicit conduct involving children.

1 conduct involving children.

2 Defendant argues that an assertion that an image or video is "child  
3 pornography" is a subjective determination that is entitled to little or no weight in  
4 determining probable cause. As noted above, however, the magistrate reasonably could  
5 have inferred that Kiurski determined that the files he viewed contained child  
6 pornography in violation of ORS 163.684 and ORS 163.686. Those statutes prohibit  
7 possessing, producing, or distributing "visual recording[s] of sexually explicit conduct  
8 involving a child"--conduct that includes actual or simulated sexual intercourse, oral-  
9 genital contact, anal-genital contact, masturbation, and "[l]ewd exhibition of sexual or  
10 other intimate parts." *See* ORS 163.665(3) (defining sexually explicit conduct). It  
11 follows that the question whether an image or a video depicts sexually explicit conduct  
12 involving a child often will entail an objective assessment, and Kiurski's conclusion that  
13 the files he viewed constituted child pornography in violation of ORS 163.684 or  
14 ORS 163.686 is entitled to greater weight than defendant perceives.<sup>10</sup>

15 To be sure, other cases may turn on more subjective prohibitions and thus  
16 require more explicit descriptions of the images to establish probable cause that those

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<sup>10</sup> Although the definition of sexually explicit conduct in ORS 163.665(3) primarily lists conduct that can be assessed objectively (sexual intercourse, oral-genital conduct, masturbation, and the like), one listed act--"[l]ewd exhibition of sexual or other intimate parts"--may entail a more subjective assessment. In this case, Kiurski did not rely explicitly on "[l]ewd exhibition" in concluding that the files he viewed constituted child pornography in violation of ORS 163.684 and ORS 163.686. And the titles of the two files set out in the affidavit permitted the magistrate to infer that the files Kiurski viewed were not limited to "[l]ewd exhibition" but included other sexually explicit conduct listed in ORS 163.665(3), that can be assessed objectively.

1 images are pornographic. For example, in *United States v. Brunette*, 256 F3d 14 (1st Cir  
2 2001), the court considered whether there was probable cause that an image constituted a  
3 "lascivious exhibition of [a child's] genitals" in violation of a federal statute. *Id.* at 17-18.  
4 The court explained that it had adopted a six-factor test to determine when a picture  
5 would be considered a "lascivious exhibition" and that an affidavit that merely parroted  
6 the statutory prohibition was not sufficient to establish probable cause that the picture  
7 was pornographic.<sup>11</sup> *See id.* at 17-19.

8 By contrast, an experienced officer's assessment that an image or video  
9 depicts sexually explicit conduct in violation of ORS 163.684 and ORS 163.686  
10 involving a child can encompass a more objective conclusion and thus be entitled to  
11 greater weight in a magistrate's determination of probable cause. We need not decide  
12 whether Kiurski's assessment that the files he viewed constituted child pornography in  
13 violation of ORS 163.684 and ORS 163.686 would be sufficient, standing alone, to  
14 establish probable cause. We note only that the greater specificity that Oregon's statutes  
15 require can lend greater weight to an experienced officer's assessment that a visual  
16 recording violates those statutes.

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<sup>11</sup> Not all pictures of naked children are lascivious, as a quick survey of Renaissance art reveals. *See, e.g., Putti with a Wine Press*, National Gallery of Art, Washington, D.C. (attributed to a follower of Raphael c. 1500). Presumably, to distinguish putti from pornography, the First Circuit considers whether a child's genitals or pubic area is the focal point of the image, whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or inappropriate attire, whether the child is clothed, partially clothed, or nude, whether the image suggests sexual coyness, and whether the image is designed to elicit a sexual response in the viewer. *Brunette*, 256 F3d at 18 n 4.

1           We note one final consideration. The magistrate reasonably could have  
2   inferred that, during a one-month period, defendant shared over 300 files on a P2P  
3   network that is "frequently used to trade digital files of child pornography." In *State v.*  
4   *Martin*, 327 Or 17, 22, 956 P2d 956 (1998), the Supreme Court explained that a  
5   defendant's repeated presence at a location known for continuous drug sales gave an  
6   officer probable cause that the defendant's late night, hand-to-hand transaction constituted  
7   distribution of a controlled substance. As we later made clear, however, the context in  
8   which that act occurs will shed light on its meaning. *See State v. Jacobs*, 187 Or App  
9   330, 334-35, 67 P3d 408 (2003) (explaining that a hand-to-hand transaction that occurred  
10   in more benign circumstances did not give rise to probable cause). In this case,  
11   defendant's repeated use over a one-month period of a P2P network that is frequently  
12   employed to trade digital files of child pornography sheds light on the nature of the files  
13   he offered to share. Specifically, his frequent use of that network cuts against his  
14   argument that the named files he shared depicted innocuous activity, and it corroborates  
15   Kiurski's assessment that the files he viewed were child pornography that violated  
16   ORS 163.684 and ORS 163.686.

17           We do not place undue weight on defendant's use of the BitTorrent  
18   network. Rather, it is simply another piece of the puzzle that, considered in conjunction  
19   with the two named files downloaded from a computer in defendant's home and Kiurski's  
20   assessment that the downloaded files he viewed contained child pornography, established  
21   probable cause that officers would find child pornography in violation of ORS 163.684

1 and ORS 163.686 on a computer in defendant's home. Indeed, this affidavit contains  
2 more evidence that the files in defendant's home contained child pornography than the  
3 affidavit that we found sufficient in *State v. Tropeano*, 238 Or App 16, 241 P3d 1184  
4 (2010), *rev den*, 349 Or 654 (2011).<sup>12</sup>

5 B. *Fourth Amendment*

6 Defendant argues that, even if Kiurski's affidavit was sufficient to establish  
7 probable cause under Article I, section 9, the Fourth Amendment requires more than a  
8 "bare conclusions" that the files he viewed were child pornography. *See United States v.*  
9 *Leon*, 468 US 897, 915, 104 S Ct 3405, 82 L Ed 2d 677, *reh'g den*, 468 US 1250 (1984)  
10 (stating that "bare conclusio[n]" of wrongdoing is insufficient to establish probable  
11 cause). As explained above, one problem with defendant's argument is the premise that  
12 underlies it. Kiurski's affidavit was not limited to his conclusion that the files he viewed  
13 contained child pornography. The affidavit also sets out the graphic titles of two files  
14 downloaded from a computer in defendant's home and defendant's persistent use for over  
15 a month of a network that is frequently used to share child pornography. Beyond that,  
16 defendant's argument fails to recognize that, in light of Oregon's more specific  
17 prohibitions against visual recordings of sexually explicit conduct involving a child,

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<sup>12</sup> In *Tropeano*, we concluded that there was probable cause that the defendant possessed child pornography based on his prior conviction for that crime, his subscription to a pornographic magazine from a country where child pornography was legal, his possession of a laptop, and his request to motel staff for 15 minutes of privacy. 238 Or App at 19-20.

1 Kiurski's assessment that the files he viewed violated those prohibitions is entitled to  
2 more weight than defendant perceives.

3           In similar circumstances, the federal circuits have held that comparable  
4 affidavits established probable cause that suspect material was child pornography. *See*  
5 *United States v. Haymond*, 672 F3d 948, 950, 959 (10th Cir), *cert den*, 567 US 923  
6 (2012) (upholding a magistrate's probable cause determination based on "filenames  
7 suggesting child pornography" and the agent's assessment that, having viewed the files,  
8 he "believed [they] contained child pornography"); *Miknevich*, 638 F3d at 185 (graphic  
9 file name plus the officer's statement that the file's SHA-1 value was associated with  
10 "child pornography" established probable cause).<sup>13</sup> Indeed, in *United States v. Grant*,  
11 490 F3d 627, 632 (8th Cir 2007), *cert den*, 552 US 1281 (2008), the Eighth Circuit found  
12 probable cause based solely on a computer repairman's report that the defendant's  
13 computer contained child pornography.

14           To be sure, the Third Circuit distinguished *Miknevich* when the affidavit  
15 stated that two coworkers had reported seeing the defendant "viewing child pornography"

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<sup>13</sup> In upholding the magistrate's probable cause determination, the *Miknevich* court relied not only on the graphic file name but also on the detective's statement that he knew the file contained "child pornography" based on its SHA-1 or info-hash value. 638 F3d at 185. However, as the court previously had observed, the detective never explained how he knew that information, *id.* at 182-83, nor did he explain what he meant by the phrase "child pornography." In this case, Kiurski's statement that the downloaded files he viewed contained child pornography was based on his personal knowledge and thus provided greater support for finding probable cause than the detective's unexplained statement in *Miknevich* regarding the file's SHA-1 value.

1 at work, unlike this case where the magistrate reasonably could have inferred that an  
2 experienced officer determined that the files he viewed depicted sexually explicit conduct  
3 involving a child. *United States v. Pavulak*, 700 F3d 651, 661-62 (3d Cir 2012), *cert den*,  
4 569 US 968 (2013). Similarly, the Fourth Circuit has held that an affidavit stating that  
5 photographs depicted "nude children" is insufficient to establish probable cause. *United*  
6 *States v. Doyle*, 650 F3d 460, 473 (4th Cir 2011). And as noted above, the First Circuit  
7 has held that merely describing an image as a "lascivious exhibition" of a child's genitals  
8 is insufficient to establish probable cause. *See Brunette*, 256 F3d at 19.

9           The decisions in *Miknevich* and *Haymond* persuade us that the magistrate in  
10 this case complied with the Fourth Amendment when she found that the affidavit  
11 established probable cause that a computer in defendant's home contained child  
12 pornography in violation of ORS 163.684 and ORS 163.686. We also find the decisions  
13 in *Brunette*, *Doyle*, and *Pavulak* distinguishable. Even if those federal decisions  
14 constituted binding precedent, they do not persuade us that the magistrate erred in light of  
15 the statements in *this* affidavit. *Cf. Eastern Oregon Mining Assoc. v. DEQ*, 365 Or 313,  
16 320 & n 4, 445 P3d 251 (2019) (explaining that federal court of appeals decisions  
17 interpreting federal law do not bind state courts interpreting the same issue; only the  
18 United States Supreme Court's decisions on federal law are binding). We accordingly  
19 conclude that the affidavit provided a substantial basis from which the magistrate could  
20 find probable cause that the files on a computer in defendant's home contained child  
21 pornography in violation of ORS 163.684 and ORS 163.686. *See Massachusetts v.*

1     *Upton*, 466 US 727, 732-33, 104 S Ct 2085, 80 L Ed 2d 721 (1984) (explaining that,  
2     under the Fourth Amendment, the question for a reviewing court is "whether the evidence  
3     viewed as a whole provided a 'substantial basis' for the Magistrate's finding of probable  
4     cause").

## 5 II. PARTICULARITY

6 Defendant argues, for the first time on appeal, that the warrant was not  
7 sufficiently particular. Relying on the Oregon Supreme Court's decision in *Mansor*, he  
8 argues that we can affirm the trial court's ruling on an alternative ground. *See Outdoor*  
9 *Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001)  
10 (explaining when a trial court's ruling may be upheld on alternative grounds). He  
11 contends:

12 "Here, the search warrant failed to comply with the requirements set  
13 forth in *Mansor* \* \* \* [because] it did not describe with particularity 'what'  
14 law enforcement sought to find and the temporal limitations on such search.  
15 The warrant also did not impose limits on the use of information disclosed  
16 in the examination; or limit the search to the information identified in the  
17 warrant."

18 Although defendant asserts that the warrant was deficient in those respects, his brief  
19 never explains why that is so, and we conclude that the grounds he identifies are either  
20 not well taken or do not provide a basis under *Outdoor Media Dimensions Inc.*, for  
21 upholding the trial court's order.

22 Defendant notes initially that the warrant did not establish "what" law  
23 enforcement sought to find. However, the warrant and the affidavit, whether viewed  
24 individually or collectively, made clear "what" the warrant authorized officers to look

1 for--evidence of visual recordings of sexually explicit conduct involving children. *See*  
2 *Mansor*, 363 Or at 216 (explaining that "a warrant must describe, with as much  
3 specificity as is reasonably possible under the circumstances, *what* investigating officers  
4 believe will be found on the electronic devices" and that "the 'what' is a description of the  
5 *information* related to the alleged criminal conduct which there is probable cause to  
6 believe will be found on the computer") (emphases in original). In that respect, this case  
7 finds support in *State v. Savath*, 298 Or App 495, 502, 447 P3d 1, *rev den*, 365 Or 722  
8 (2019), where we explained that the crime of creating and possessing child pornography  
9 "served to greatly clarify and limit" the scope of the warrant.

10           Defendant also argues that the warrant lacked a temporal limit. The state  
11 responds that the affidavit identified that the investigation began in August 2016 and  
12 continued through January 2017. It contends that a reasonable period encompassing  
13 those dates provides a sufficient temporal limitation on the scope of the search. The  
14 parties, however, did not argue below and the trial court did not find whether the affidavit  
15 could be considered in determining the scope of the search that the warrant permitted.  
16 *See Mansor*, 363 Or at 203-04 (discussing when the affidavit may be considered in  
17 determining the scope of the warranted search). Because the record developed in the trial  
18 court is not sufficient to permit us to resolve whether the affidavit may be considered in  
19 determining the limits of the warranted search, we conclude that defendant's second  
20 alternative ground for affirmance is not properly before us. *See Outdoor Media*  
21 *Dimension Inc.*, 331 Or at 659-60 (explaining that the absence of a developed record

1 precludes reliance on an alternative ground for affirmance).

2           Finally, in asserting that the warrant failed to impose a limit on the use of  
3 information that officers discovered during the course of executing the warrant, defendant  
4 appears either to misperceive what *Mansor* said or to rely on information that is not part  
5 of the record before us. *Mansor* explained that police officers may come across  
6 information in searching a computer that falls outside the permissible scope of the  
7 warranted search. 363 Or at 220. *Mansor* observed that "the state should not be  
8 permitted to use information obtained in a computer search if the warrant did not  
9 authorize the search for that information, unless some other warrant exception applies."  
10 *Id.* at 221. As *Mansor* makes clear, the limit that defendant seeks to invoke is on the  
11 future use of evidence discovered during the search of a computer that either goes beyond  
12 what the warrant properly authorized or that fails to come within a warrant exception.

13           In this case, the record developed in the trial court does not disclose what  
14 information the state uncovered in executing the warrant. It follows that the record does  
15 not disclose whether the state discovered evidence that fell outside the scope of the  
16 warrant, nor does it disclose whether, if the state did discover such evidence, the evidence  
17 came within an exception to the warrant requirement. Finally, the record does not  
18 disclose whether the state has sought to use such evidence, if it exists. Not only is the use  
19 issue that defendant raises premature, but the record is not sufficiently developed for us  
20 to consider the final ground for alternative affirmance that defendant identifies. *See*  
21 *Outdoor Media Dimensions Inc.*, 331 Or at 659-60 (alternative grounds for affirmance

1 not available if the record is not sufficiently developed).

2                   We conclude that the first alternative ground for affirming the trial court's  
3 pretrial order that defendant has identified is not well taken and that the other two  
4 alternative grounds are not properly before us. We express no opinion on any challenges  
5 that defendant may properly raise to the warrant when this case is back before the trial  
6 court. It is sufficient to resolve this appeal to hold that the affidavit established probable  
7 cause that evidence of visual recordings of sexually explicit conduct involving children  
8 would be found on a computer in defendant's home and that defendant has not identified  
9 a viable alternative ground for upholding the trial court's pretrial order on appeal.

10                   Pretrial order reversed and remanded.