IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 81449-0
	)	
v.	)	En Banc
	)	
NEIL GRENNING,	)	
	)	
Petitioner.	)	Filed June 17, 2010
_____	)	

CHAMBERS, J. — Neil Grenning was charged with 72 counts of child sex crimes, and his home computer was seized. Prior to trial, Grenning moved for mirror-image copies of the hard drives from that computer. The trial court granted only limited access. His defense team could access copies of the hard drives only in the County-City Building, only on government operating systems and software, and only during limited hours. Under these limitations, Grenning was unable to obtain an expert willing to examine the hard drives. A jury ultimately convicted him of 16 counts of first degree child rape, 26 counts of sexual exploitation of a minor, 6 counts of first degree child molestation, 20 counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation, commonly referred to as possession of child pornography, among other crimes. He was sentenced to 117 years in prison.

The Court of Appeals largely affirmed, but it reversed Grenning's 20 counts of possession of child pornography, finding he was denied access to critical evidence to which he was entitled. We granted review and affirm.

FACTS

Police detectives found sexually explicit pictures, including pictures of Grenning's two victims, on his home computer. Long before trial, defense counsel retained experts and made a CrR 4.7 motion to compel discovery in the form of a mirror image of the hard drives that defense experts could analyze in their lab. The Pierce County Prosecuting Attorney's Office moved for a rigorous protective order, arguing the hard drives should only be viewed by the defense team at the police station and under limited conditions. Judge Worswick, concerned that the images of the victims could be released onto the Internet, largely granted the State's motion. Among other things, the protective order directed the investigating detective to copy the hard drives onto blank hard drives provided by the defense, to "provide a CPU [central process unit], monitor, keyboard, mouse and an operating system of [the expert's] choosing" to look at the material, and forbade any copying of the information. Clerk's Papers (CP) at 598. The order further limited the defense's access to the evidence both in time and location.[1]

The original experts retained by defense counsel declined to work on the case under the conditions of the protective order and the defense had considerable

[1] The trial court's order does not specify the police station. Instead, it says that the investigating officer "shall provide . . . a secured location in the County-City Building where they may forensically examine the contents of the Mirrored Drives." CP at 598. The defense was allowed to look at the material only between 8:30 a.m. and 4:30 p.m., Mondays through Fridays.

difficulty finding experts who would. Seven months before trial, the defense found an attorney and computer expert, Robert Apgood, who was willing to review the computer files, but like the original experts, wanted a copy to take to his own lab. Apgood submitted a declaration explaining that he had the equipment to analyze the mirror image hard drives at his lab in Seattle and

> forensic analysis of the copies of seized media is a detailed process entailing the use of specialized hardware and forensic software designed to allow bit-by-bit search and review of the media being studied. This analysis must be performed in a manner that ensures that the media is not changed in any way during that analysis.

CP at 602. He also declared that "[a] search conducted in a controlled environment, such as [the expert's] forensics lab, can be initiated and 'left to process' unattended," leaving the expert free to do other work and "not financially burden the public for his time." *Id.* at 603. Among other things, Apgood informed the court that he was concerned about the sanctity of the attorney work-product doctrine if his work were "supervised" by the State, especially given that any work he did on government computers could be reviewed by the government by analyzing the computer after he was through. *Id.* at 603-04. Based on this declaration, the defense unsuccessfully moved to modify Judge Worswick's order before Judge Hogan. Judge Hogan noted that "I think that there is a balancing act . . . in the very fundamental right for the defense to be prepared for trial" and the victims' interest in keeping the pictures off of the Internet. Verbatim Report of Proceedings (VRP) (Mar. 26, 2004) at 83-85. She was, however, somewhat willing to revisit the issue. "I want to know if [Judge Worswick's order] is unworkable. I don't think that it

is." *Id.* at 85. Apgood declined to examine the hard drives at the County-City Building and the defense, having lost two motions for access, did not make another.[2]

Three months later, Grenning went to trial without an expert witness who had examined the hard drives. Among other evidence, the jury was given 117 pictures from Grenning's computer. There was also considerable testimony and argument that the commercially produced images underlying the child pornography charges contained sexually explicit images of children, as opposed to images that had been manipulated into appearing as such or stills from a single movie.[3]

Grenning was convicted on 71 counts and sentenced to 117 years in prison. He was sentenced to one year on each of the possession of child pornography charges, to be served concurrently. While his case was on direct appeal, this court announced *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007). *Boyd* held that the defense was entitled to a mirror image copy of the defendant's computer hard drives. *Id.* at 441. The Court of Appeals affirmed all conviction except the 20 counts of possession of sexually explicit pictures of children under former RCW 9.68A.070 (2006).[4] *State v. Grenning,* 142 Wn. App. 518, 536, 174 P.3d 706 (2008). Those charges were reversed and remanded. *Id.* Grenning petitioned for

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[2] The dissent is correct that nothing in our record supports the statement that the experts "refused" to examine the hard drives. Based on the facts recounted above, we may fairly infer that the defense was not able to find an expert willing to work within the limitations of the protective order. Also based on those facts, we respectfully disagree with the dissent's assertion that "the defendant made no effort to engage in the discovery process about which he now complains." Dissent at 1. The defense made valiant, though unsuccessful, efforts.

[3] For example, Detective Richard Voce was asked by the prosecutor about "some blocking at the top of the screen" and responded that "[t]his particular was done by a user[, the] reason is it's squared, completely symmetrical, goes across straight lines." VRP (June 15, 2004) at 553.

[4] "A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony." Former RCW 9.68A.070.

review and the State cross-petitioned on the reversed charges. We denied Grenning's petition and granted the State's cross-petition.[5] *State v. Grenning,* 164 Wn.2d 1026 (2008).

ANALYSIS

Boyd

The State argues the Court of Appeals erred and our decision in *Boyd* does not apply because of the different procedural postures of the two cases. Whether *Boyd* applies is a question of law that we review de novo. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) (citing *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299 (1994)). In both *Boyd* and its consolidated companion case, *Giles,* the defendants were charged with child pornography offenses. *Boyd,* 160 Wn.2d at 429. Boyd's computer was seized; pictures and videotapes were seized from Giles. Both defendants, like Grenning, moved for copies of the evidence against them. *Id.* at 435-36. In *Boyd,* the motion was denied; in *Giles,* it was granted. Before trial was held in either case, this court granted interlocutory review of the discovery orders themselves. Therefore, in *Boyd,* this court was not reviewing a conviction, but rather the defendants' right to compel discovery.

First, we held that the mandatory disclosure provisions of CrR 4.7(a), rather than the discretionary provisions of CrR 4.7(e), applied. *Id.* at 432. CrR 4.7 states in relevant part:

> **(a) Prosecutor's Obligations.**

[5]Because we denied review of Grenning's petition, several of the issues touched on in the State's answer to that petition have been rendered moot and will not be addressed.

> (1) *Except as otherwise provided by protective orders* or as to matters not subject to disclosure, *the prosecuting attorney shall disclose* to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
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> . . . .
>
> (v) *any* books, papers, documents, *photographs, or tangible objects*, which the prosecuting attorney intends to use in the hearing or trial *or which were obtained from or belonged to the defendant*.

CrR 4.7 (emphasis added). Since CrR 4.7(a)(1)(v) applied, the State had a duty to disclose the evidence. *See Boyd,* 160 Wn.2d at 432. Next, the court rejected the State's argument that it need not provide the defense with actual copies of the material, as opposed to simply "acknowledging the existence of seized evidence." *Id.* at 433. We explained:

> The principles underlying CrR 4.7 require meaningful access to copies based on fairness and the right to adequate representation. The discovery rules "are designed to enhance the search for truth" and their application by the trial court should "insure a fair trial to all concerned, neither according to one part an unfair advantage not placing the other at a disadvantage." Under CrR 4.7(a) the burden is on the State to establish, not merely claim or allege, the need for appropriate restrictions. The defendant does not have to establish that effective representation merits a copy of the very evidence supporting the crime charged. To adopt the State's position is to restrict the defendant's right to potentially exculpatory evidence on the State's mere allegation that the evidence involves contraband.

Id. at 433-34 (quoting *State v. Boehme,* 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967) (footnote omitted). Neither in *Boyd* nor in the case before us has the State offered any more than mere allegations that the evidence might be improperly disseminated by the defense team. *Boyd,* 160 Wn.2d at 434. In *Boyd,* we weighed

the State's concern that the defense team might disseminate the images against the critical nature of such hard drives in child pornography cases and the potentially exculpatory nature of the evidence. *Id.* at 436-37. We concluded that there is minimal risk of improper dissemination of such images because of defense attorneys' professional responsibilities as officers of the court. *Id*. at 438.

We also concluded that denying defense counsel such potentially critical exculpatory evidence went beyond merely violating the court rule and had constitutional implications: "Courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial." *Id.* at 434. Further, "[w]here the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial." *Id.* at 435. Finally, we held that

> adequate representation requires providing a "mirror image" of that hard drive, enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer. Forensic review might show that someone other than the defendant caused certain images to be downloaded. It may indicate when the images were downloaded. It may reveal how often and how recently images were viewed and other useful information based on where the images are stored on the device. Expert analysis of the application or program used to acquire the images may be useful. Providing a copy enables the expert to test that application or program using the same type and version of computer operating system as was used by the defendant, a difference that may alter how the program runs, stores data, and so forth. Analysis may also reveal that the images are not of children. *This analysis requires greater access than can be afforded*

in the State's facility.

Id. at 436 (emphasis added) (citations omitted).[6] Nothing in our reasoning in *Boyd* turned on its procedural posture. Grenning was entitled to have his defense team take a mirror image of his own computer's hard drives out of the County-City Building to be analyzed by his experts, subject to an appropriate protective order.

Remedy

Next, we must determine if Grenning is entitled to relief. The State contends that any error was waived by the defense. After the trial court entered its initial ruling that Grenning was only entitled to access to the computer hard drives subject to significant limitations, Grenning moved for reconsideration. Reconsideration was denied, but the trial judge did suggest a willingness to revisit the issue. Grenning did not ask again, and we must decide whether he was required to do so.

The State largely relies on *State v. Riker,* 123 Wn.2d 351, 369, 869 P.2d 43 (1994), where we found the defendant had waived an evidentiary challenge by failing to renew it. But *Riker* involved a *tentative* ruling to exclude the testimony of an acquaintance of Riker's. We held that a clearly "tentative" ruling on a motion in limine is not final or preserved for review. *Id.* (citing *State v. Carlson,* 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). Grenning is not challenging an initial motion in

[6] The dissent would have us revisit this test, on the unquestionable grounds that child pornography is a terrible thing. However, the record and argument before us does not support taking that step. Further, there is also evidence that innocent men and women have had their computers pressed into service as storage devices for other people's pornography collections. *See generally* Susan W. Brenner, Brian Carrier & Jef Henninger, *The Trojan Horse Defense in Cybercrime Cases*, 21 Santa Clara Computer & High Tech. L.J. 1 (2004); *see also* John Leyden, How Malware Frames the Innocent for Child Abuse, The Register, Nov. 9, 2009, *available at* http://www.theregister.co.uk/2009/11/09/malware_child_abuse_images_frame_up/. Any proposed change to our jurisprudence should consider those dangers too, based on appropriate briefing and argument.

limine. He is challenging a denial of his motions to compel discovery for access to copies of his own hard drives. Grenning had twice made motions for access to evidence supported by argument and expert declaration setting forth all of the reasons why the court's approach was unworkable. Further, it was the State's burden to produce the evidence and it was the State's burden to demonstrate the need for a protective order. It was not Grenning's burden to show the restrictions were unworkable. He was not obligated to do more than he did to preserve any error.

However, the fact that the error was not waived is not enough to compel relief. Grenning argues the court's protective order limiting his access to the evidence prevented his counsel from providing him effective assistance and therefore, a fair trial. Generally, we review trial court evidentiary decisions, including decisions on discovery, for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (citing *State v. Noltie,* 116 Wn.2d 831, 852, 809 P.2d 190 (1991)); *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (citing *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 778, 819 P.2d 370 (1991)). Among other things, discretion is abused if exercised on untenable grounds or for untenable reasons. *T.S.,* 157 Wn.2d at 424 (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). In this case, the trial judges did not have the benefit of *Boyd.* While it is not entirely clear from the record, it appears that both trial judges analyzed the motions under the CrR 4.7(e) standard that we rejected in *Boyd,* 160 Wn.2d at 432. CrR 4.7(e) is a catch all provision that gives trial courts the discretion to grant or deny reasonable requests

for material and relevant evidence and the authority to condition disclosure to protect against certain risks. It does not, however, apply to the defendant's *own* "books, papers, documents, photographs, or tangible objects," in the prosecutor's control. CrR 4.7(a)(1)(v); *Boyd,* 160 Wn.2d at 432. Those *must* be disclosed, and in this context, disclosure means a mirror image copy of the hard drives. *Id.* at 441.[7]

By failing to apply CrR 4.7(a)(1)(v), the trial court exercised its discretion on untenable grounds and therefore abused its discretion. An error in a trial is not grounds for reversal unless the error was prejudicial to the defendant. *State v. Cunningham,* 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (citing *State v. Rogers,* 83 Wn.2d 553, 520 P.2d 159 (1974)). If the error is of constitutional magnitude, the harmless beyond a reasonable doubt standard is applied. *State v. Nist*, 77 Wn.2d 227, 234, 461 P.2d 322 (1969). A violation of a court rule is generally not considered constitutional error, and we consider whether "the outcome of the trial would have been materially affected" had the error not occurred. *Cunningham,* 93 Wn.2d at 831. The State argues that any error was merely a violation of a court rule and that Grenning is entitled to relief only if his trial would have been materially affected. Grenning, on the other hand, argues that the error was of constitutional magnitude and should be reversed unless we are convinced beyond a reasonable doubt that the error did not contribute to the verdict.

[7] Again, we respectfully disagree with the dissent's characterization of the underlying facts. While the trial judge did not have the benefit of our opinion in *Boyd,* if the trial judge had properly applied CrR 4.7(a)(1)(v), mirror images of the hard drives would have been provided to the defense. Since they were not, it appears to us that the trial judge relied on CrR. 4.7(e). But this is not material to our conclusion.

While it is true that *Boyd* rested on a violation of a court rule, we found that the Fifth and Sixth Amendments were implicated and that "[c]ourts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial." *Boyd,* 160 Wn.2d at 434. *Boyd* specifically held that "[t]he defendant does not have to establish that effective representation merits a copy of the very evidence supporting the crime charged." *Id.* at 433-34. Instead, we held as a matter of law that "adequate representation requires providing a 'mirror image' of that hard drive." *Id.* at 436. Under *Boyd,* Grenning did not receive adequate—effective—assistance of counsel. That is of constitutional magnitude. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); s*ee also Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Conde v. Henry*, 198 F.3d 734, 741 (9th. Cir. 1999) (reversing conviction because trial court orders prevented counsel from providing effective assistance).

Further, the State's proposed rule would, in effect, impose an impossible burden on the defendant since the defendant could only speculate what exculpatory evidence it might reveal. Again, it was the State's duty to produce the evidence under CrR 4.7(a). *Boyd,* 160 Wn.2d at 441. It was the State's burden to establish good cause for a protective order. CrR 4.7(h)(4); *Rhinehart v. Seattle Times Co*., 98 Wn.2d 226, 231, 654 P.2d 673 (1982). It did not do so, and we should not treat that lightly. However, Grenning's suggestion that we adopt constitutional harmless error in this context is also unsatisfactory, as it would often result in vacation of

convictions where no actual prejudice occurred. Roger J. Traynor, The Riddle of Harmless Error 81 (1970).[8] Fortunately, other standards exist, and we hold that when the State has failed to produce material and information it was obligated to produce pursuant to CrR 4.7(a), the appropriate test is the "overwhelming untainted evidence test." "Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." *State v. Flores,* 164 Wn.2d 1, 19, 186 P.3d 1038 (2008); *see also* Dennis J. Sweeney*, An Analysis of Harmless Error in Washington: A Principled Process,* 31 Gonz. L. Rev. 277 (1995).[9]

In this case, the *only* evidence on the possession charges was the untested pictures themselves. We cannot say that the result would have been the same if Grenning's expert had been allowed to bring his full expert force to bear on the evidence. We simply do not know what would have been found. Detective Voce spent more than 200 hours working on Grenning's computer and testified extensively about the structure of the computer and the implications of the fact that the pictures were found on "unallocated" space, which generally means that they had been deleted. This testimony was essentially untested by the defense.[10]

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[8] In determining the proper standard on review, we are mindful of Chief Justice Traynor's caution:

> The practical objective of tests of harmless error is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error. The grand objective is to conserve the vitality of the rules and procedures designed to assure a fair trial. Only when the law is the soul of fairness can it be truly the soul of reason.

Traynor, *supra,* at 81.

[9] We respectfully disagree with the dissent that this is the same as the constitutional harmless error standard.

[10] While it is not before us, at least based on our cursory review of the trial record, it appears that ample evidence supports the remaining charges. One of the victims and his mother and brother

Grenning asks for reversal and retrial, or in the alternative, dismissal. But outside of reversal for insufficiency of the evidence (which he does not argue to this court), outright dismissal is rarely granted. *Cf. State v. Michielli,* 132 Wn.2d 229, 243, 937 P.2d 587 (1997) (affirming dismissal when the prosecutor added new charges days before trial, forcing defendant to waive speedy trial rights or proceed without opportunity to prepare a defense); *State v. Sherman,* 59 Wn. App. 763, 769, 801 P.2d 274 (1990) (dismissal based on State's discovery violations). We have been offered no reason to believe the particular evidence at issue has not aged well or that the State deliberately withheld evidence it knew or should have known that Grenning was entitled to have.[11] Dismissal is not appropriate.

CONCLUSION

In summary, we hew to our holding in *Boyd*. In cases where the defendant's own computer is seized, analyzed by the State, and used as evidence, the defendant

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testified as did the mother and doctor of the other, who was deemed too young to testify. The court also admitted a transcript of an Internet chat that Grenning had had with another man where he described in detail drugging, molesting, and raping one of the victims. In his own statement of additional grounds, Grenning admits the acts took place though he disputes the number of charges filed. The Court of Appeals, which reversed the possession charges for the *Boyd* error, also specifically rejected Grenning's claim that there was insufficient evidence to convict him of possession of child pornography. *Grenning,* 142 Wn. App. at 537. Of course, if forensic review of the computer does uncover exculpatory evidence, Grenning will have an opportunity to raise it in a personal restraint petition.

[11] In his supplemental brief, Grenning argues for the first time that the protective order was structural error. "A structural error resists harmless error review completely because it taints the entire proceeding." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Structural errors include things like relieving the State of its burden of proof, denying a public trial, and denying counsel. *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *Gideon*, 372 U.S. 335. Grenning cites no case where something like an overbroad protective order has been deemed a structural error, and we found none ourselves.

is entitled to a mirror image copy of the hard drives for analysis by the defendant's expert at an appropriately secured laboratory. Concerns about security of the evidence and the possibility of any copies being disseminated may be addressed by an appropriate protective order requiring defense counsel to maintain logs of those who have access to the evidence and to return all copies of images and other evidence at the conclusion of the case. Grenning made two motions to have access to his own computer hard drive so that his expert could test the State's evidence without compromising his attorney's work product. It was the State's duty to produce the mirrored copies of the hard drives, and it was the State's burden to show why a protective order was necessary. Grenning was not required to do more to preserve the error. Under these circumstances, the appropriate test is the "overwhelming untainted evidence test" to determine whether a trial court's erroneous ruling requires reversal. Under that test, he is entitled to a new trial on the 20 counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation. We affirm the Court of Appeals and remand for further proceeding consistent with this opinion.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson	Justice Mary E. Fairhurst
Justice Richard B. Sanders	Justice Debra L. Stephens