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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0233
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAY BERNARD GILLILLAND,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR-05-276

Honorable James A. Soto, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, Jay Bernard Gilliland was convicted of approximately three hundred offenses including sexual conduct with a minor, child molestation, sexual

exploitation of a child, and child abuse. He was sentenced to numerous consecutive life sentences, with possibility of parole after serving thirty-five years on each sentence, as well as to a combination of concurrent and consecutive shorter sentences. On appeal, Gilliland challenges the validity of two search warrants and argues the trial court erred in failing to suppress video evidence obtained as a result of the warrants. Gilliland also contends the trial court erred in denying his motion to dismiss what he claims were multiplicitous charges in the indictment. Because the trial court did not err or abuse its discretion, we affirm Gilliland's convictions.

Relevant Facts

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Gilliland was employed as a customs inspector at a U.S./Mexico border crossing. Federal authorities began investigating him on suspicion that he was smuggling narcotics across the border. On July 20, 2004, a United States magistrate issued a warrant to search Gilliland's home for evidence of possession and distribution of controlled substances. During the search, the agents seized a computer and some data storage discs and took them to their office. Upon opening one of the discs, an investigating agent immediately saw what appeared to be child pornography. The agent halted his examination and subsequently obtained a warrant on July 23, 2004, to search the items they had already seized for further evidence of child pornography. During the search of those items, the agent discovered pornographic pictures involving Gilliland's minor daughter. The agent showed this evidence to the Santa Cruz County Sheriff's Department.

¶3 Meanwhile, federal agents had also obtained a warrant on July 21 to search a storage unit leased by Gilliland for further evidence of drug trafficking. During that search, the agents observed a box of sexual instruments, video cassettes, and compact discs, including one with a label indicating it contained photographs. The agents also shared this information with the Santa Cruz County Sheriff’s Department. The sheriff’s department began its own investigation and obtained a warrant on July 30 from the state superior court authorizing another search of the storage unit. This search yielded videos depicting Gilliland performing multiple sexual acts with his daughter within a two-year period of time. Gilliland’s daughter was between five and seven years old during the incidents depicted. These videos comprised the primary evidence of guilt the state presented at trial.

Validity of the Search Warrants

¶4 Gilliland argues that two search warrants were not valid and that the trial court therefore erred in denying his motion to suppress the videos.¹ ““We review the trial court’s ruling on a motion to suppress evidence for clear and manifest error.”” *State v. Walker*, 215 Ariz. 91, ¶ 16, 158 P.3d 220, 223 (App. 2007), quoting *State v. Weinstein*, 190 Ariz. 306, 308, 947 P.2d 880, 882 (App. 1997). “A reviewing court must presume a search warrant is valid; it is the defendant’s burden to prove otherwise.” *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002). We defer to the court’s factual findings and consider only

¹Gilliland challenges the federal warrant issued on July 20 and the state warrant issued on July 30. He does not develop adequate argument in his opening brief about the federal warrants issued on July 21 and July 23 and has therefore waived on appeal any issues regarding those warrants. See Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). With respect to his discussion of the July 23 warrant in his reply brief, we will not address issues raised for the first time in a reply brief. See *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005).

what was presented during the suppression hearing. *State v. Barnes*, 215 Ariz. 279, ¶ 2, 159 P.3d 589, 590 (App. 2007).

¶5 The exclusionary rule is a “judicially created remedy designed to safeguard Fourth Amendment rights.” *United States v. Calandra*, 414 U.S. 338, 348 (1974). However, “[s]uppression of evidence . . . has always been our last resort, not our first impulse,” and is appropriate “only where its remedial objectives are thought most efficaciously served.” *United States v. Hill*, 459 F.3d 966, 977 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1863 (2007), *quoting Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

A. July 20 Warrant

¶6 Gilliland challenges the validity of the July 20 federal warrant, which authorized the initial search of his home, on several grounds.

Probable Cause

¶7 Gilliland first contends that no probable cause existed to support the warrant’s authorization to search for and seize computer records during the July 20 search. The trial court must determine whether, under the totality of the circumstances, a substantial basis existed to issue the warrant. *State v. Edwards*, 154 Ariz. 8, 12, 739 P.2d 1325, 1329 (App. 1986). “Affidavits are to be interpreted in a commonsensical and realistic manner.” *Id.*; *see also United States v. Ventresca*, 380 U.S. 102, 109 (1965). Direct evidence that items sought will be found in a particular location is not required. *See United States v. Poland*, 659 F.2d 884, 897 (9th Cir. 1981). Rather, “[a] magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense.” *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986); *see also*

Illinois v. Gates, 462 U.S. 213, 240 (1983) (magistrate free to draw “reasonable inferences” from information in warrant application). “[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.” *State v. Brazil*, 18 Ariz. App. 545, 549, 504 P.2d 76, 80 (1973), quoting *Hill v. California*, 401 U.S. 797, 804 (1971).

¶8 Moreover, ““after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review.” *Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621, quoting *Gates*, 462 U.S. at 236. “Doubtful or marginal affidavits should be considered in light of the presumption of validity accorded search warrants.” *Edwards*, 154 Ariz. at 12, 739 P.2d at 1329; see also *Ventresca*, 380 U.S. at 109; *State v. Hyde*, 186 Ariz. 252, 272, 921 P.2d 655, 675 (1996) (“Close cases should be resolved by giving preference to the validity of warrants.”).

¶9 Here, the agent who prepared the affidavit provided detailed information about Gilliland’s suspected drug trafficking activities, including evidence that, for at least a year, Gilliland had conspired to smuggle narcotics across the Mexican border and to store, repackage, and distribute narcotics from his home in Arizona to a location in Virginia. The agent requested authorization to search for, inter alia, “[a]ny and all computer records related to the possession and distribution of controlled substances.” The affidavit also contained a statement of the agent’s experience and the assertion that his opinions were based on that experience. The warrant issued allowed search for and seizure of any computer records related to the possession and distribution of controlled substances.

¶10 Gilliland argues the affidavit failed to provide information to sustain the conclusion that related computer records existed. He does not dispute that the affidavit

established probable cause to believe he was engaged in drug trafficking. And he appears to concede the affidavit would have been sufficient if the agent who had prepared it had simply stated that, based on his experience, it was his opinion that drug traffickers frequently keep computer records of their transactions. But direct evidence that computer records were located in Gilliland's home was not required. *See Poland*, 659 F.2d at 897. Rather, it was only necessary for the magistrate to find a reasonable probability that such records would be found. *See Brazil*, 18 Ariz. App. at 549, 504 P.2d at 80. Even without an express statement of the agent's opinion in the affidavit, the magistrate could have reasonably inferred that a fair probability existed that a person who was smuggling, packaging, and distributing narcotics in a commercial manner across the country would have documentation related to those activities and that, in this day and age, a fair probability existed that he would keep that documentation on a computer. *See Angulo-Lopez*, 791 F.2d at 1399; *see also Poland*, 659 F.2d at 897 ("normal inferences about where criminals would be likely to hide property . . . [are] sufficient, taking into account the type of crime [and] the nature of the items").

¶11 Even if the affidavit had not sought specific authorization to search for computer records, it demonstrated probable cause and requested permission to search for documentation of Gilliland's narcotics trafficking. And the agents would have had probable cause under the warrant to seize the computer and data storage discs as likely containers of this documentation, along with other specified objects of the search. "If it is reasonable to believe that a computer contains items enumerated in the warrant, officers may search it." *United States v. Giberson*, 527 F.3d 882, 888 (9th Cir. 2008); *see also State v. Lavers*, 168 Ariz. 376, 385-86, 814 P.2d 333, 342-43 (1991) (reasonable for officers to conclude tape

recording was ““container that may conceal the object of a search authorized by a warrant””), quoting *United States v. Ross*, 456 U.S. 798, 823 (1982).

¶12 The affidavit contained information that Gilliland had engaged in interstate transportation of narcotics, thus suggesting a probability that travel receipts existed. The affidavit referred to the exchange of specific sums of money, thus suggesting a probability that relevant bank records existed. And the affidavit described communications between Gilliland and an informant regarding smuggling, thus suggesting a probability that written correspondence or telephone records existed. The warrant specifically authorized a search for and seizure of travel receipts, bank records, telephone records, and correspondence. Again recognizing the age of electronic record-keeping in which we live, the agents could reasonably conclude a fair probability existed that the computer or the data storage discs discovered during the search of Gilliland’s residence would contain all of these items. *Cf. Dalia v. United States*, 441 U.S. 238, 257 (1979) (“[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant”); *see also People v. Gall*, 30 P.3d 145, 153 (Colo. 2001) (“warrant cannot be expected to anticipate every form an item or repository of information may take”; computers reasonably likely to contain writings or serve as “functional equivalent” of written materials enumerated in warrant). Thus, even had the affidavit not contained the request to search for computer records, it still provided probable cause to seize the computer and discs.

¶13 Moreover, to the extent the absence of an express statement of the agent’s opinion regarding the existence of records—computerized or otherwise—renders this

affidavit marginal or doubtful, the omission does not overcome the presumption of validity. *See Hyde*, 186 Ariz. at 272, 921 P.2d at 675 (close cases resolved in favor of upholding warrant); *see also Ventresca*, 380 U.S. at 109. The information in the affidavit provided sufficient probable cause to authorize a search for computer records related to the possession and distribution of controlled substances.

¶14 Finally, even if the omission of a statement of the agent’s opinion did render the warrant invalid, the good faith exception applies to preclude suppression of the evidence. In *United States v. Leon*, 468 U.S. 897, 924 (1984), the United States Supreme Court held that evidence obtained in good faith reliance on a faulty search warrant should not be suppressed. The Court reasoned that “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” *Id.* at 922. Arizona has likewise adopted a good faith exception to the exclusionary rule. *See A.R.S.* § 13-3925(B), (C); *State v. Coats*, 165 Ariz. 154, 157, 797 P.2d 693, 696 (App. 1990).

¶15 However, the good faith exception shall not apply in four situations:

- (1) when a magistrate is misled by information that the affiant knew was false or would have known was false but for his or her reckless disregard for the truth;
- (2) when the issuing magistrate “wholly abandon[s]” his or her judicial role;
- (3) when a warrant is based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; and
- (4) when a warrant is “so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.”

Hyde, 186 Ariz. at 273, 921 P.2d at 676, *quoting Leon*, 468 U.S. at 923 (alteration in *Hyde*).

Unless the situation was one in which “police would realize [that] under no conceivable

circumstances would probable cause exist,” *id.* at 274, 921 P.2d at 677, *quoting* trial court, “then the warrant was not ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *Id.* at 274, 921 P.2d at 677, *quoting Leon*, 468 U.S. at 923. The executing agents are not expected “‘to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient.’” *Id.*, *quoting Leon*, 468 U.S. at 921.

¶16 Here, Gilliland does not contend that the affidavit contained any false information, that the magistrate was not neutral, or that the warrant itself was facially deficient. He argues only that the affidavit lacked sufficient indicia of probable cause with respect to the computer records. Although we acknowledge the affidavit would have been stronger if it had contained a statement that in the agent’s opinion drug traffickers often keep relevant computer records, the omission did not create a situation in which the agent should have realized that “under no conceivable circumstances” did probable cause exist. *Id.*

¶17 The agent who prepared the affidavit testified at the suppression hearing that he knew from his “training and experience that narcotics traffickers often use computers as forms of communication, data storage and information storage regarding their illegal transactions.” The agent affirmed that this was the reason he had requested authorization to search for related computer records. Accepting that the agent’s informed opinion gave rise to probable cause to search for computer records, the omission of a such a statement from the affidavit did not render objectively unreasonable the agent’s belief that probable cause existed. *Cf. Hyde*, 186 Ariz. at 274, 921 P.2d at 677 (crediting testimony from detectives at suppression hearing articulating basis for believing probable cause to arrest existed). Rather,

the record supports the conclusion that the agent “harbored an objectively reasonable belief in the existence of probable cause.” *Leon*, 468 U.S. at 926. Therefore, even if the magistrate erred in determining that the warrant application was sufficient, the good faith exception to the exclusionary rule applies.

Overbreadth and Sufficient Particularity

¶18 Gilliland next argues the July 20 warrant was insufficiently particularized and therefore authorized an overbroad search.

The description in a search warrant must be of sufficient particularity to enable a searching officer to ascertain the place to be searched and property to be seized. The items to be seized must be defined with sufficient particularity so that the executing officer is not confused as to the scope of the permissible search.

State v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986) (citations omitted); *see also United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989) (factors to consider include whether warrant provided objective standards to differentiate seizable items from non-seizable items and whether more particular description was possible).

¶19 Gilliland claims the provision in the July 20 warrant authorizing seizure of “[a]ny and all computer records related to the possession and distribution of controlled substances” was insufficiently particular. The warrant also authorized the agents to search for and seize other items including controlled substances, drug paraphernalia, materials commonly used to package controlled substances, travel receipts, bank statements, telephone records, and correspondence concerning possession and distribution of narcotics.

¶20 Our supreme court, relying on decisions of the United States Supreme Court, has rejected similar challenges to authorizations to search for even more broadly stated

descriptions of evidence. *See Lavers*, 168 Ariz. at 384, 814 P.2d at 341 (upholding authorization to search for specific items as well as “any and all evidence relating to” victim’s murder); *State v. Prince*, 160 Ariz. 268, 272-73, 772 P.2d 1121, 1125-26 (1989) (upholding authorization to search for specific items as well as any “other evidence that would tend to indicate [defendant] did commit the crime of murder”); *see also Andresen v. Maryland*, 427 U.S. 463, 479-81 (1976). Here, the warrant did not authorize a search for “any and all evidence.” Rather, it was more narrowly confined to “computer records” related to Gilliland’s particular illegal activity.

¶21 Moreover, we agree with the trial court that “there is really no better way to describe the request since before execution of the search warrant the agents had no way of knowing what computer records would be located in the residence.” *See United States v. Spilotro*, 800 F.2d 959, 963, 964-65 (9th Cir. 1986) (general descriptions may be valid if more precise description not possible and if specific criminal activity is identified). And, as the state notes, the contents of computer files in general are not readily apparent until they are opened and examined. Thus, it would not really be possible to specify which computer files should be searched. *See United States v. Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006) (“government should not be required to trust the suspect’s self-labeling when executing a warrant” to search computer records).

¶22 Finally, to the extent the authorization to search for computer records could be construed as somewhat open-ended, we note that the agent executing the search warrant actually interpreted this provision restrictively. *See State v. Moorman*, 154 Ariz. 578, 583, 744 P.2d 679, 684 (1987) (open-ended phrases in search warrant constitutionally permissible

if restrictively interpreted with regard to specific crime being investigated). As soon as the agent inadvertently discovered evidence of child pornography, which was not within the scope of the July 20 warrant, he halted the search until he could obtain a new warrant.

¶23 Gilliland contends that *United States v. Riley*, 906 F.2d 841 (2d Cir. 1990), bears “striking similarities” to his case. In *Riley*, the Second Circuit Court of Appeals upheld a warrant authorizing seizure of “evidence of the offense of conspiracy to distribute controlled substances, namely cocaine, and marihuana, firearms, instrumentalities of cocaine and marihuana distribution such as scales, dilution or ‘cut’ materials, packaging materials, telephone and/or address books and lists, [and] telephone toll records.” *Id.* at 843-44. The court noted that the broadly worded categories were to be interpreted in light of the specific seizable items. *Id.* at 844. It further stated that the fact the officers would have to search through documents to determine which were subject to seizure did not invalidate the warrant. *Id.* at 845. *Riley* supports rather than undermines the trial court’s conclusion in this case. The warrant here similiarly contained specific descriptions of other items in addition to the broad category of computer records. And the fact that the officers had to review some computer files not related to the suspected criminal activity does not invalidate the warrant. *See id.* (recognizing “the reality that few people keep documents of their criminal transactions in a folder marked ‘drug records’”).

¶24 The warrant here did not authorize a general search. The agent’s discretion was properly circumscribed, and he was not confused about the scope of the search. *See Ault*, 150 Ariz. at 466, 724 P.2d at 552. We therefore reject Gilliland’s assertion that the

warrant's authorization to search for computer records related to the possession and distribution of controlled substances was overbroad or insufficiently particular.

Exceeding the Scope of the Search

¶25 Gilliland further contends that, even if the warrant was sufficiently supported by probable cause and sufficiently particularized, the agent exceeded the scope of the search authorized when he seized the computer and storage discs instead of examining them on-site. Gilliland argues actual seizure and removal of the records would only have been permissible if an on-site search had shown the records were in fact “related to the possession and distribution of controlled substances.”

¶26 First, the agent was reasonable in concluding that the computer and discs would likely contain the object of his search—that is, computer records related to the possession and distribution of controlled substances. *See Lavers*, 168 Ariz. at 385-86, 814 P.2d at 342-43 (reasonable to conclude tape recording was container concealing object of search). Second, practical issues in sorting through computerized documents are increasingly well known, and they justified conducting this search off-site. *See United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001) (“computer evidence is vulnerable to tampering or destruction”); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (recognizing practical difficulties in conducting on-site searches of computers and discs); *see also Gall*, 30 P.3d at 154-55 (collecting cases upholding seizure of computer data for later examination).

¶27 In *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1863 (2007), the Ninth Circuit Court of Appeals addressed the propriety of removing computer equipment and computer records for later examination. In reviewing

the federal district court's decision upholding the seizures, the court of appeals adopted much of the district court's analysis. *Id.* at 968, 973-75; *United States v. Hill*, 322 F. Supp. 2d 1081 (C.D. Cal. 2004). The district court had discussed the many technical challenges posed by conducting a search of computers and computer storage media on-site, including the probability that computers will be protected by security measures difficult to bypass; the fact that, to examine the contents of storage media, executing agents would have to bring computer equipment capable of reading files encoded for all major operating systems; the "serious risk" that investigators might damage the storage devices or otherwise compromise evidence; and the extensive amount of time required to sift through computer files. *Hill*, 322 F. Supp. 2d at 1088-89.

¶28 The court of appeals agreed with the district court on these points but also cautioned that, "[a]lthough computer technology may in theory justify blanket seizures for the reasons discussed above, the government must still demonstrate to the magistrate *factually* why such a broad search and seizure authority is reasonable in the case at hand." *Hill*, 459 F.3d at 975. Because the affidavit in *Hill* authorized wholesale seizure but failed to explain why it was necessary, the court found the authorization overbroad. *Id.* at 976-77. However, the court then held that despite this conclusion, suppression was not appropriate. *Id.* at 977. The court observed that "the officers' wholesale seizure was flawed here because they failed to justify it to the magistrate, not because they acted unreasonably or improperly in executing the warrant." *Id.* The court further explained that, "[b]ecause the officers were 'motivated by considerations of practicality rather than by a desire to engage in indiscriminate "fishing," we cannot say . . . that the officers so abused the warrant's authority

that the otherwise valid warrant was transformed into a general one, thereby requiring all fruits to be suppressed.” *Id.*, quoting *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982).

¶29 The district court’s observations in *Hill* with respect to the technological challenges are equally applicable here. The executing agent testified at the suppression hearing that he had limited resources and did not have a forensic computer examiner in his office. The agent also testified that he had not brought a laptop computer to the scene because he did not know what he would find during the search. We agree that an explanation of the technological barriers that necessitated wholesale removal of the computer and related records would have strengthened the affidavit. But we also question whether, in this electronic age, any magistrate would reasonably believe an authorization to search for computer records was anything other than an authorization to seize and remove the computers and related data storage devices for off-site examination. The challenges summarized in the district court’s decision in *Hill* are practically a matter of common knowledge.

¶30 In any event, even if the warrant was deficient in failing to explicitly authorize the removal of the computer and related storage discs, we conclude suppression was not required or appropriate. In light of the technological challenges and limited resources available, the executing agent here was clearly motivated by practical considerations when he seized the computer and discs for later examination. *See Hill*, 459 F.3d at 977. And the record demonstrates he did not engage in a “fishing” expedition. *Id.* The first electronic file the agent opened depicted what he suspected was child pornography. The agent promptly

recognized that this evidence was not within the scope of his warrant. He immediately halted his search, which he had only just begun, and sought a new warrant. *Cf. Walser*, 275 F.3d at 986-87 (finding warrant not exceeded when agent's search of computer records for evidence of drug trafficking revealed evidence of child pornography; agent halted search and sought new warrant).

¶31 We acknowledge that, in *Hill*, the evidence the defendant sought to suppress was evidence actually described in the warrant. 459 F.3d at 977; *see also Tamura*, 694 F.2d at 597. The court of appeals considered this a factor that contributed to the reasonableness of upholding the decision not to suppress. *Hill*, 459 F.3d at 977. Here, Gilliland seeks to suppress the fruits of evidence that was not described in the warrant. But, as discussed above, the executing agent properly curtailed his search as soon as he saw evidence outside the scope of the warrant. *See Walser*, 275 F.3d at 987. Given the agent's reasonable and prudent conduct in this case and the extremely limited examination of the computer records that actually did occur before obtaining the second warrant, we conclude that suppression would not serve the remedial objectives of the exclusionary rule. *See Hill*, 459 F.3d at 977; *see also Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (exclusion only appropriate when deterrence benefits outweigh substantial social costs). The agent did not abuse the authority granted by the warrant, and suppressing the fruits of that search was not necessary.

B. July 30 State Warrant

¶32 Gilliland next raises various challenges to the validity of the July 30 state warrant, which authorized a second search of his storage unit.

Fruit of the Poisonous Tree

¶33 Gillilland’s first argument is that the probable cause supporting the July 30 state warrant is derived solely from evidence obtained illegally under the July 20 federal warrant and, therefore, anything obtained during the July 30 search is “fruit of the poisonous tree.” But because we have rejected Gillilland’s challenges to the July 20 warrant, we necessarily reject his “fruit of the poisonous tree” argument.

Probable Cause

¶34 Gillilland next argues the July 30 state warrant was not supported by probable cause because the supporting affidavit did not specify what criminal activity was suspected and because no substantial basis existed to believe the storage unit would contain evidence of that criminal activity.

¶35 As we set forth above, the trial court determines whether, under the totality of the circumstances, a substantial basis existed to issue the warrant. *State v. Edwards*, 154 Ariz. 8, 12, 739 P.2d 1325, 1329 (App. 1986). We interpret affidavits according to common sense, *see id.*, and do not require direct evidence that items sought will be found, *see United States v. Poland*, 659 F.2d 884, 897 (9th Cir. 1981). Rather, the issuing court is free to draw all reasonable inferences based on the crime and type of evidence at issue. *See United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986). Marginal or doubtful affidavits will be considered “in light of the presumption of validity.” *Edwards*, 154 Ariz. at 12, 739 P.2d at 1329.

¶36 Here, the affidavit of the investigating detective from the Santa Cruz County Sheriff’s Department contained a detailed description of photographs found in Gillilland’s

home, depicting Gillilland's minor daughter in sexually explicit positions with an adult male hand touching her sexually. The background of the photographs was Gillilland's home. The affidavit describes additional evidence, discovered by federal investigators in a storage unit leased by Gillilland, that included various compact discs, one entitled "Shawn's Pics"; video cassettes, and a box containing sexual instruments.

¶37 The detective's description of the photographs already in her possession was manifestly a description of the criminal offense of sexual exploitation of a minor. *See* A.R.S. § 13-3553(A) (one "commits sexual exploitation of a minor by knowingly . . . photographing . . . any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct . . . [or by] possessing" such depictions). And when describing the evidence federal investigators had observed in the storage unit, the affidavit characterized that evidence as "additional items of interest pertaining to the investigation of sexual exploitation of a minor." A common-sense reading of the affidavit leads to the obvious conclusion that Gillilland was suspected of sexual exploitation of a minor and that the detective was seeking authorization to search for additional evidence of that criminal activity. *See Edwards*, 154 Ariz. at 12, 739 P.2d at 1329 (affidavits must be interpreted in a "commonsensical and realistic manner").

¶38 Further, the photographs described in the affidavit had been found in Gillilland's home. This evidence, combined with the evidence that other photographs and videos of an unknown nature were being stored along with sexual instruments in a secured storage unit leased to Gillilland, provided a substantial basis to believe a search of that unit would yield additional evidence of sexual exploitation of a minor. *See id.* (substantial basis determined from totality of circumstances).

¶39 Gilliland contends that the portion of the affidavit relating to the evidence in the storage unit was wholly conclusory and akin to the affidavits found defective in *Giordenello v. United States*, 357 U.S. 480 (1958), and *Aguilar v. Texas*, 378 U.S. 108 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983). But the affidavit at issue does not resemble those in *Aguilar* and *Giordenello*. *See Gates*, 462 U.S. at 239 (affidavit in *Aguilar* merely containing “officer’s statement that ‘affiants have received reliable information from a credible person and believe’ that heroin is stored in a home, is . . . inadequate”), *quoting Aguilar*, 378 U.S. at 109 (alteration in *Gates*); *see also Giordenello*, 357 U.S. at 486 (affidavit defective because lacked allegation of affiant’s personal knowledge, did not provide sources of information, and did “not set forth any other sufficient basis” for probable cause). Here, the detective’s affidavit provided specific facts, delineated background circumstances, and identified sources of information. The affidavit did not merely conclude that the information was reliable or that probable cause existed. This was not a “bare bones” affidavit. *See Gates*, 462 U.S. at 239 (distinguishing “bare bones” affidavit in *Aguilar* from those providing additional information). And as we state above, the totality of the information set forth in the affidavit provided a substantial basis to issue the warrant.

¶40 Gilliland also suggests the affidavit was deficient because the detective did not specifically state that it was her opinion, based on her experience and training, that these facts gave rise to probable cause. But the court issuing the warrant could have reasonably inferred from the evidence described in the affidavit, without a statement of the detective’s opinion, that a search of the storage unit would likely yield additional evidence of sexual exploitation

of a minor. *See Angulo-Lopez*, 791 F.2d at 1399. Moreover, to the extent the absence of a statement of the detective’s personal opinion rendered the affidavit at all marginal or doubtful, we resolve the matter in favor of the validity of the affidavit. *See Edwards*, 154 Ariz. at 12, 739 P.2d at 1329; *see also Hyde*, 186 Ariz. at 272, 921 P.2d at 675.

¶41 Gilliland further challenges the observations of the federal investigators by pointing out that the agent named in the detective’s affidavit had not personally seen the items in the storage unit; rather, he was conveying information reported by another federal agent. Gilliland concedes that, when information in an affidavit is based on the observations of a fellow law enforcement officer, it is presumed reliable. *See United States v. Ventresca*, 380 U.S. 102, 111 (1965). And Gilliland does not argue that the information about the items observed in the storage unit was false. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Rather, his argument appears to be that the affidavit fails to explain whose opinion it is that the items observed in the storage unit were “of interest pertaining to the investigation of sexual exploitation of a minor” and on what experience that opinion was based. Gilliland contends that, because that statement is conclusory, it cannot give rise to probable cause and that nothing else remains in the affidavit that could support a finding of probable cause.

¶42 The affidavit’s characterization of the evidence as “of interest pertaining to the investigation of sexual exploitation of a minor” is not necessary to support a finding of probable cause in this affidavit. As stated above, that statement serves as an adequate description of the specific criminal activity being investigated. But it is the factual description of the items themselves, in light of the other factual circumstances set forth in the

affidavit, that gives rise to probable cause. Thus, it is irrelevant whose opinion it is that the described items are “of interest” or on what experience such opinion is based. The relevance of those items is self-evident when viewed as part of the totality of the factual circumstances set forth in the affidavit. *See State v. Torrez*, 112 Ariz. 525, 530, 544 P.2d 207, 212 (1975) (including conclusory opinion in affidavit does not defeat validity where underlying factual circumstances giving rise to probable cause are delineated). The trial court did not err in determining that probable cause existed to issue the July 30 search warrant.

Overbreadth and Sufficient Particularity

¶43 Gilliland also argues the July 30 warrant did not provide sufficiently particular descriptions of what items were authorized for seizure. As we previously observed:

The description in a search warrant must be of sufficient particularity to enable a searching officer to ascertain the place to be searched and property to be seized. The items to be seized must be defined with sufficient particularity so that the executing officer is not confused as to the scope of the permissible search.

State v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986) (citations omitted). Additionally, “[s]earch warrants are presumed to be correct and should not be invalidated by a hypertechnical interpretation when a magistrate had probable cause to issue the warrant.” *Id.* at 466-67, 724 P.2d at 552-53.

¶44 Here, Gilliland specifically challenges the authorization to search for and seize “[p]ornography to include but not limited to, magazines, videos, VHS cassette tapes, photographs and pictures that depict minor children engaged in sexual acts.” Gilliland argues that this provision could be interpreted to authorize the seizure of any kind of pornography, whether it depicted minor children or not.

¶45 The object of the search as set forth in this provision was clearly pornography depicting minor children engaged in sexual acts, and the words “to include but not limited to” were obviously intended to encompass all of the various types of media in which such depictions might be found. We observe that the alleged ambiguity would not exist but for the apparently inadvertent omission or misplacement of certain commas. We will not permit this “hypertechnical interpretation” to invalidate this warrant that was supported by probable cause. *See Ault*, 150 Ariz. at 466, 724 P.2d at 552.

¶46 Gilliland also appears to suggest that the precise criminal activity of which he was suspected was not specified in the warrant itself and that this invalidates the warrant as being insufficiently particular. But the warrant states probable cause existed to believe that the storage unit contained, inter alia, pornography depicting children engaged in sexual acts. As with our earlier discussion of a similar point, by definition, this is a description of the criminal offense of sexual exploitation of a minor. *See* A.R.S. § 13-3553(A)(2) (a “person commits sexual exploitation of a minor by knowingly . . . possessing . . . any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct”). Thus, specific criminal activity was described in the warrant.²

¶47 Based on the foregoing, we conclude the July 30 warrant was not overbroad or insufficiently particular.

²The cases upon which Gilliland relies are inapposite. *See United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (warrant deficient for failure “to give any indication of the alleged crime to which the seized documents pertained”); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989) (warrant “contained no reference to any criminal activity”); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982) (warrant insufficient when authorizing seizure of business papers showing unspecified violations of general tax evasion statute).

Exceeding the Scope of the Search

¶48 Gillilland also argues the officers conducting the search acted in “flagrant disregard” of the terms of the warrant because they seized all videos in the storage unit, not just the ones depicting minor children engaged in sexual acts.³ Gillilland contends the officers should have viewed the videos during the search and seized only those described in the warrant. He asserts that all video evidence should have been suppressed for this reason.

¶49 Our discussion above regarding whether the July 20 search exceeded the scope of the warrant is applicable here. First, the agents were reasonable in concluding that videos in the storage unit likely contained the object of their search, that is, pornography depicting minor children engaged in sexual acts. *See State v. Lavers*, 168 Ariz. 376, 385-86, 814 P.2d 333, 342-43 (1991) (reasonable to conclude tape recording contained object of search). Second, practical considerations in obtaining and operating the equipment required to view the videos justified conducting a search of this type off-site. *See People v. Gall*, 30 P.3d 145, 154-55 (Colo. 2001) (collecting federal cases upholding seizure of containers for later examination of voluminous contents). And, although Gillilland may be correct in his assertion that “there was no reason to believe that all videos in the storage unit would contain evidence of a crime,” there was also no feasible way to determine which videos did contain evidence without viewing all of them. Seizure of the videos for later examination was practical and did not constitute a “fishing” expedition. *See United States v. Hill*, 459 F.3d 966, 977 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1863 (2007). The agents did

³The state contends Gillilland failed to raise this issue below and has therefore waived it on appeal. But Gillilland’s argument on this issue on appeal appears verbatim in his motion to suppress.

not abuse the authority granted by the warrant when they seized the videos. *Cf. United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982). Moreover, the video evidence admitted at trial was actually described in the warrant. *See id.* The trial court did not err in admitting that evidence.

¶50 Based on the foregoing, we conclude the trial court did not err in denying Gilliland’s motion to suppress the evidence, or the fruits of evidence, seized during either the July 20 search or the July 30 search.⁴

Objection to Charges as Multiplicitous

¶51 Gilliland next argues the trial court erred in denying his motion to dismiss what he claims were multiplicitous counts in the indictment. He acknowledges that “[m]ultiple sexual acts that occur during the same sexual attack may be treated as separate crimes,” *State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App. 1993), but nevertheless contends that he should have been charged with only six counts, rather than over three hundred, since each of the more than three hundred acts charged were part of six “single episodes of sexual conduct.” Because multiplicity implicates double jeopardy, we review a trial court’s ruling on a multiplicity claim *de novo*. *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App.), *approved*, 200 Ariz. 363, 26 P.3d 1134 (2001); *see also State v. Brown*, 217 Ariz. 617, ¶ 7, 177 P.3d 878, 881 (App. 2008) (trial court’s ruling on multiplicity claim reviewed *de novo* because involves issues of statutory interpretation).

⁴In light of our conclusion regarding the validity of the warrants, we do not address Gilliland’s remaining arguments concerning the good faith exception.

¶52 An indictment is defective as multiplicitous when it “charges a single offense in multiple counts.” *Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d at 670. In determining whether multiplicity exists, “the court must consider whether each count of the indictment requires proof of a fact that the other counts do not.” *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App.), *approved*, 133 Ariz. 549, 653 P.2d 6 (1982). When several illegal sexual acts “are committed on the same victim” during the same sexual episode, there is “no reason why as many counts for each offense cannot be brought, despite the fact the defendant never left his victim’s bed during the course of the commission of the acts.” *State v. Hill*, 104 Ariz. 238, 240, 450 P.2d 696, 698 (1969). A defendant may be charged with multiple counts arising from the same sexual episode as long as each count constitutes a separate crime. *Cf. State v. Williams*, 182 Ariz. 548, 562-63, 898 P.2d 497, 511-12 (App. 1995) (consecutive sentences proper for multiple convictions of sexual assault arising from “multiple assaults of the same type [which] occurred in very rapid succession during a single episode”).

¶53 Here, Gilliland was charged with over three hundred counts arising from six “episodes” of sexual activity depicted on video. At indictment and in the trial, the state alleged that each count charged involved a distinct and independent act that included all of the necessary statutory elements without regard to any other act charged separately.⁵ Gilliland does not dispute this but instead “confuses the repetition of the same crime with “multiplicity.”” *State v. Bruni*, 129 Ariz. 312, 319, 630 P.2d 1044, 1051 (App. 1981), *quoting State v. Dorsey*, 578 P.2d 261, 266 (Kan. 1978) (McFarland, J., dissenting). To find,

⁵The state argued, for example, that “[e]very time the defendant touches the vagina of the victim is one act. Every time he takes his hand back and touches it again, it is another act.”

as Gilliland argues, that each entire episode of sexual conduct was a single act meriting a single charge would be ““against public policy and . . . [an] . . . insult to the victims of such crimes.”” *Id.* at 320, 630 P.2d at 1052, *quoting Dorsey*, 578 P.2d at 266. Accordingly, the trial court did not err when it denied Gilliland’s motion to dismiss what he claimed were multiplicitous counts in the indictment.

Conclusion

¶54 In light of the foregoing, we conclude the court did not err in denying Gilliland’s motion to suppress or in denying his motion to dismiss multiple counts in the indictment as multiplicitous. We therefore affirm Gilliland’s convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge