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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AMOS KEYRONE LEWIS, Defendant and Appellant.	B277092 (Los Angeles County Super. Ct. No. YA091681)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Reversed with directions.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

While examining data taken from an electronic device pursuant to a search warrant for evidence of commercial sex activity, law enforcement personnel viewed and seized videos of defendant Amos Keyrone Lewis (defendant) discharging a handgun at a firing range. Because we find the videos do not depict criminal activity per se, they should not have been seized. We therefore reverse the judgment with directions to vacate the order denying the suppression of this particular evidence and for further proceedings consistent with this opinion.

II. BACKGROUND

On May 21, 2015, the defendant was charged in an information with pandering (count 1) in violation of Penal Code section 266i, subdivision (a)(1)[1] and possession of a firearm by a felon (count 2) in violation of section 29800, subdivision (a)(1). On January 7, 2016, he filed a section 1538.5 motion to suppress evidence and to quash and traverse a search warrant. He sought to suppress all evidence found on his person, in his vehicle and in a cell phone and other electronic devices that were in his possession at the time of his detention. After an evidentiary hearing on February 8, 2016, those motions were denied.

Pursuant to a plea agreement, the defendant pleaded no contest on June 16, 2016, to count 2 and an added charge of

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[1] Further statutory references are to the Penal Code except where otherwise noted.

supervising a prostitute (count 3), a misdemeanor (§ 653.23).[2] He admitted prior strike and prior separate prison term allegations pursuant to sections 667, subdivisions (b)-(i), 667.5, subdivision (b), 1170.12 and was sentenced 44 months in state prison. On appeal, he challenges the trial court's order denying his motion to suppress.

We will first explain why we agree with the trial court that defendant's detention and the search of defendant's vehicle was lawful. This discussion will provide background information relevant to our analysis of the constitutionality of the search warrant and the seizure of the videos.[3]

A. Defendant's Detention

Officer Steven Sieker was a 14-year veteran of the Los Angeles Police Department (LAPD) who has acted in various field assignments including patrol, gang enforcement and vice investigations. He has attended the LAPD's five-day, 40-hour "vice school." In that school, he was trained in investigative methods and topics related to vice including pimping and prostitution. He had attended several seminars on human trafficking and worked closely with senior vice officers and

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[2] Count 1 was dismissed pursuant to the plea agreement.

[3] While law enforcement "seized," i.e., took possession of, various electronic devices well before the issuance of the search warrant, the subject videos were not examined until copies of them were generated by a technician. They were then used as evidence against the defendant. We thus use the term "seize" and "seizure" in a very general sense.

detectives. Officer Sieker described his knowledge of prostitution and related crimes as "very extensive." He was able to recognize patterns of behavior typical of individuals involved in prostitution and related crimes.

In June 2014, Officer Sieker was a vice investigator assigned to the Figueroa and Western corridors near 77th Street, an area well known for prostitution. He conducted nearly daily vice surveillance operations there for more than a year. He understood that prostitutes working the neighborhood were known to be completely controlled by their pimps.

On June 25, he was working with other LAPD officers, including a supervisor, and three federal agents. The law enforcement officers were in constant communication with each other in person, by radio and by cell phone.

At 4 a.m., a fellow officer saw defendant in the driver's seat of a white 2013 Hyundai Elantra (the Elantra) parked at a McDonald's restaurant. During early morning hours, the McDonald's lot was frequented by pimps who had prostitutes working nearby. It was common for pimps to remain close when their prostitutes were working. The pimps collected money while providing security, transportation and protection in the form of condoms.

A federal agent advised Officer Sieker and the other officers that on June 19, 2014, defendant and a prostitute, Raya Woodward, were detained in the Elantra during a "supervising of a prostitute" investigation; Woodward was observed loitering for prostitution in the nearby city of Lynwood; defendant had arrived to pick her up; but they were not arrested.

At 5 a.m., officers saw Woodward at Figueroa and 66th Street. She was standing on the sidewalk "wearing attire

consistent with street-walking prostitutes in the area." She was with a group of similarly dressed women and did not appear to have any legitimate business in the area. She was waving at passing lone male motorists. This was consistent with the manner in which prostitutes attempt to attract business. Woodward remained at the location for 30 minutes to an hour. Based on those observations, Officer Sieker believed Woodward was soliciting prostitution.

Two officers told Woodward and the other women to leave the area because a school was about to open. Woodward borrowed another prostitute's cell phone and placed a call. Defendant was parked at a laundromat just north of Woodward's location. He was conversing with other suspected pimps. At the same time Woodward placed her call, defendant received a call. He immediately drove out of the lot. Woodward walked to the laundromat and sat down inside. A second suspected pimp retrieved some of the other women from the intersection where Woodward had been standing.

Officer Sieker contacted Woodward at the laundromat. Woodward told him she had been working as a prostitute when officers told her to leave the area. She had not "caught" any "dates." She called defendant, her boyfriend, and asked him to pick her up. As Officer Sieker and Woodward were speaking, defendant arrived in the Elantra. Officer Sieker approached defendant and asked him to step out of the car so they could talk.

B. The Automobile Search

When defendant opened the driver's door to step out, Officer Sieker saw a green plastic prescription bottle containing a

green plant-like substance resembling marijuana in the driver's door storage compartment. The plastic container looked like the type a person would get from a marijuana dispensary. It was subsequently determined the prescription bottle contained 16.77 gross grams (less than an ounce) of marijuana. Eyeballing it at the time, Officer Sieker thought it was approximately that amount.[4]

Officer Sieker searched defendant's vehicle for evidence of narcotics or pimping and pandering. Defendant was not under arrest at that time. On the front passenger seat, Officer Sieker discovered a Samsung tablet, a black Samsung cell phone, power cords for those devices and two SD card readers. In the center console compartment Officer Sieker found a large number of business cards identifying "Keyrone Lewis" as an agent or consultant for Nine Life Connections. The glove box contained a business card for a lingerie store and a single latex condom. In

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[4] The present search occurred prior to the adoption of Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, effective November 9, 2016. Pursuant to Proposition 64, a person 21 years or older may possess 28.5 grams (one ounce) or less of marijuana. When Officer Sieker searched defendant's car, however, "Unlawful possession of marijuana remain[ed] a criminal offense under [Health and Safety Code] section 11350, subject to seriously ill persons using marijuana for medical purposes recommended by a physician [under the Compassionate Use Act of 1996] . . . not being subject to criminal liability . . . ." (*People v. Strasberg* (2007)148 Cal.App.4th 1052, 1060.) Further, under Health and Safety Code section 11357, subdivision (b), possession of not more than an ounce (28.5 grams) of marijuana was an infraction punishable by a fine. (Stats. 2011, ch. 15, § 159; see *In re Drake M.* (2012) 211 Cal.App.4th 754, 769, fn. 10.)

the trunk were several articles of women's clothing and high-heeled shoes.

Discovering the foregoing items contributed to Officer Sieker's belief that defendant was supervising a prostitute. Officer Sieker testified: "[T]he condom seems obvious." Further, "[P]imps who supervise and coordinate the efforts of their prostitutes will often have additional clothing . . . including high-he[e]led shoes in their possession readily available for their prostitutes . . . [T]hat type of clothing is consistent with street-walking prostitution." The tablet and cell phone were relevant because prostitutes and pimps commonly communicate by text or cell phone calls. The lingerie store business card suggested defendant knew where to buy seductive clothing. And, with respect to defendant's business cards, "prostitutes are [often] lured into human trafficking by people who introduce themselves as agents or consultants for talent or photography . . . ."

Officer Sieker placed defendant under arrest and searched his person. Defendant's wallet contained a business card featuring a semi-nude photograph of Woodward and the words, "Erotic Masseuse." There were also several prepaid debit cards. Pimps commonly possess and use prepaid debit cards because they are not traceable. Defendant was booked for supervising a prostitute. Officer Sieker testified he never asked whether defendant had a medical marijuana prescription. He did not recall finding one in defendant's wallet.

The trial court denied defendant's evidence suppression motion. Regarding the search of defendant and his car, the court ruled: "[T]he facts of this case that were related to the court . . . rise beyond the level of reasonable suspicion [to detain]. [¶] There's sufficient evidence when you take into consideration

[Officer Sieker's] experience, his training, and the investigation, details of this investigation, to support the finding that [Officer Sieker] had probable cause to arrest the defendant. [¶] . . . Search incident to arrest, I suppose . . . the People could rely on that if there is some question about probable cause."

C. The Search Warrant

One month after defendant's arrest, on August 27, 2014, Officer Sieker obtained a warrant to search the electronic devices found in defendant's car including the cell phone. The search warrant authorized a search for and seizure of: "Any and/or all electronically stored data, including *but not limited to* any and all information which would tend to show [defendant] is engaged in pimping, pandering, prostitution, and/or commercial sex activity." (Italics added.) This language was followed by an itemized list authorizing a search for, among other things, child pornography and photographs, records, documents, correspondence, or materials specifically relating to prostitution or commercial sex activity, hotel or motel room rentals, the purchase of condoms, clothing, cell phones, "or other items used by prostitutes." The warrant further authorized a cell phone search for, inter alia, "SMS and text messages, instant messages, photographs, pictures, images, videos, e-mails, and digital diaries."

In support of the warrant, Officer Sieker described the common uses of digital devices in the present context: "Cellular telephones, [. . .] are used by the different parties involved to conduct the illicit activities of pimping, pandering, and prostitution"; "[p]imps commonly use cellular telephones and other digital devices that provide high speed access to the

internet, as well as photo/video capabilities, to recruit prostitutes on social networking [W]eb[]sites . . .; to take photographs of their prostitute(s) for online prostitution advertisements, facilitate communication between themselves, prostitutes, and their clients, as well as to record sexual activity with their prostitute(s), among other purposes"

Officer Sieker further explained what he expected the electronically stored data to reveal about the present crime: "Based on my training and experience, I know that a review of the stored electronic data within the cellular telephone, a review of voice mail messages accessible via a cellular telephone, and a review of the telephone business records maintained by the cellular telephone service provided for telecommunication devices can effectively be used to identify co-conspirators, locations used by co-conspirators, and other evidence of the crimes being investigated"; "I know that many cellular telephones and digital devices can take and also have the ability to store photographs and / or videos that have been sent to them"; "I know that persons participating in crimes of this nature use their digital devices [to] take and store photographs and / or videos that depict themselves and / or co-conspirators, as well as photographs and / or videos that depict evidence of their criminal activities"; "I believe a review of the photographs and / or videos stored in the listed digital devices . . . will provide investigative leads and evidence relevant to the criminal investigation"; "[b]ased on my training and experience and the information contained in this Affidavit, I believe the listed property constitutes evidence that . . . [p]imping, and . . . [p]andering, have been committed and that a particular person, [defendant], committed those felonies, and that evidence of that criminal activity can be found in the examination

of the evidence items recovered by Officers at the time of [defendant's] arrest."

Pursuant to the warrant, an examination of the contents of electronic storage devices found in defendant's possession was eventually conducted.[5] Photographs and videos were found therein.[6] The videos depicted the defendant operating a semi-automatic pistol at a firing range. At the suppression hearing, defense counsel argued that the search warrant was constitutionally overbroad, did not set forth with sufficient particularity what could be searched or seized and, if the warrant was not defective, the seizure of the videos was improper because they were not evidence of a crime. All of these arguments were rejected by the trial court.

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[5] The warrant including a section entitled "Authority to Duplicate Electronic Media." This permitted a forensic technician to make copies of the data retrieved from the above-mentioned devices. Officer Sieker viewed these copies and testified about their contents at the preliminary hearing.

[6] There was a discussion in the pleadings and at the suppression motion hearing regarding whether the videos were retrieved from a storage device (SD) not named in the warrant or a "SIM card" that was found in the defendant's cell phone. Based on the trial court's ruling, we will assume it adopted the prosecution's position that the source of the videos was a either a SIM card or SD found in the cell phone.

III. DISCUSSION

A. Standard of Review

We apply the following standard of review. We defer to the trial court's factual findings, express or implied, if supported by substantial evidence and exercise independent review as to whether a search or seizure was reasonable under the Fourth Amendment. (*Ornelas v. United States* (1996) 517 U.S. 690, 695-700; *People v. Simon* (2016) 1 Cal.5th 98, 120; *People v. Brown* (2015) 61 Cal.4th 968, 975.) Federal constitutional standards govern the reasonableness of the search or seizure. (Cal. Const., art. I, § 28, subd. (f)(2); *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1223; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

B. Reasonable Suspicion to Detain Defendant

The law governing detentions is well established. "'The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." (*United States v. Cortez* [(1981)] 449 U.S. 411, 417-418 . . . .)'" (*People v. Brown, supra*, 61 Cal.4th at p. 981; accord, *People v. Souza* (1994) 9 Cal.4th 224, 230-231.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, *considered in light of the totality of the circumstances*, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza, supra*, 9 Cal.4th at p. 231, italics added; accord, *People v. Casares* (2016) 62 Cal.4th 808,

837-838.) An officer may draw on his or her experience and training "to make inferences from and deductions about the cumulative information available to [him or her] that 'might well elude an untrained person.'" (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274; accord, *Ornelas v. United States, supra*, 517 U.S. at p. 700; *People v. Hernandez* (2008) 45 Cal.4th 295, 299.)

Defendant argues Officer Sieker could not point to any specific and articulable facts that, considered in the totality of the circumstances, raised a reasonable suspicion defendant might be engaged in criminal activity. We disagree. First, that defendant was in an area known for prostitution activity was a relevant consideration. As the United States Supreme Court has held, "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. [Citation.] But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations . . . . [Citation.]" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 242.)

Second, defendant's recent detention with Woodward was relevant. Defendant had been detained with Woodward in connection with a supervising prostitution investigation less than a week earlier. The circumstances were very similar to the present case. Woodward had been loitering for prostitution in Lynwood. Defendant, driving the Elantra, arrived to pick her up.

Third, the time of day was a pertinent factor. (*People v. Souza, supra*, 9 Cal.4th at p. 241.) Defendant's and Woodward's observed activities occurred during early morning hours, between roughly 4 a.m. and 5 a.m. Officer Sieker opined Woodward did not appear to have any legitimate business in the area at that time and appeared to be soliciting prostitution.

Fourth, defendant's observed behavior was relevant. He was present in a high prostitution area, in the company of other suspected pimps, and in proximity to Woodward, who was working as a prostitute that night. She so confessed to Officer Sieker. Defendant was in communication with Woodward. After officers told Woodward to leave the area, she called defendant to pick her up. These observations were consistent with supervising a prostitute. Considering the totality of the circumstances, including Officer Sieker's training and experience, Officer Sieker reasonably suspected defendant was engaged in criminal activity and properly detained him on that ground.

C. Probable Cause to Search Defendant's Vehicle

As described above, Officer Sieker searched defendant's car without a warrant. Under the automobile exception to the warrant requirement, a law enforcement officer may search a car when he or she has probable cause to believe it contains contraband or evidence of a crime. (*Carroll v. United States* (1925) 267 U.S. 132, 149, 155-156; *People v. Minjares* (1979) 24 Cal.3d 410, 416.) Probable cause means based on known facts and credible information, there is a fair probability contraband or evidence of a crime will be found in the vehicle. (*Carroll v. United States, supra*, 267 U.S. at p. 162.) Where probable cause

exists, an officer may search "every part of the vehicle and its contents that may conceal the object of the search." (*United States v. Ross* (1982) 456 U.S. 798, 825; accord, *People v. Chavers* (1983) 33 Cal.3d 462, 467; *People v. Waxler* (2014) 224 Cal.App.4th 712, 719 (*Waxler*).)

The supervising a prostitute evidence discussed above gave Officer Sieker probable cause to search defendant's vehicle. Officer Sieker knew defendant was present in a high prostitution area, he had been recently detained with Woodward, a prostitute, under similar circumstances, he was in proximity to Woodward while she was working as a prostitute and was in communication with her. These facts all pointed to defendant engaging in supervising a prostitute. Officer Sieker also knew it was common for a person supervising a prostitute to carry a cell phone and other electronic devices, clothing, shoes, condoms and prepaid debit cards in their vehicles. Based on the facts and credible information known to the officer, there was a fair probability evidence of supervising a prostitute would be found in defendant's automobile.

Additionally, when defendant opened his car door, Officer Sieker saw a green plastic prescription bottle containing a green plant-like substance resembling marijuana in the driver's door storage compartment. Defendant argues Officer Sieker's observation of "a small amount of marijuana in a marijuana dispensary prescription bottle" did not give rise to probable cause to search the vehicle. Defendant concedes, however, that our Courts of Appeal have held otherwise. An officer who observes marijuana in plain sight in a vehicle is entitled to search to determine whether the defendant in fact possesses the marijuana for personal use and has adhered to legal limits or has additional

quantities stashed in other parts of the car. (*People v. Steele* (2016) 246 Cal.App.4th 1110, 1120 ["After . . . seeing marijuana in plain sight on the backseat, [the deputy] could then . . . lawfully search defendant's car"]; *Waxler, supra*, 224 Cal.App.4th at p. 721 ["a law enforcement officer may conduct a warrantless search of a vehicle pursuant to the automobile exception when the officer has probable cause to believe the vehicle contains marijuana, which is contraband"]; *People v. Strasburg, supra*, 148 Cal.App.4th at p. 1059 (*Strasburg*).) As the Court of Appeal held in *Waxler*, "[E]ven if a defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car. [Citations.]" (*Waxler, supra*, 224 Cal.App.4th at pp. 723-724.) Further, "[T]he observation of any amount of marijuana—which is currently illegal to possess except as authorized by the [Compassionate Use Act of 1996, Health and Safety Code, section 11362.5 et seq.]—establishes probable cause to search pursuant to the automobile exception." (*Waxler, supra*, 224 Cal.App.4th at p. 725.)

Defendant claims he possessed both a valid medical marijuana prescription and a medical marijuana identification card. However, possession of a marijuana prescription or a medical marijuana card does not preclude a reasonable warrantless automobile search. (*Waxler, supra*, 224 Cal.App.4th at pp. 720, 723, 725; *People v. Strasburg, supra*, 148 Cal.App.4th at pp. 1058-1059.)

Defendant argues the foregoing cases were incorrectly decided. We find no reason to question the sound conclusions reached by our colleagues. "That California ha[d] decriminalized

medicinal marijuana in some situations and ha[d] reduced the punishment associated with possession of up to an ounce of marijuana [did] not bar a law enforcement officer from conducting a search pursuant to the automobile exception." (*Waxler, supra*, 224 Cal.App.4th at p. 723.) As the court noted in *People v. Strasberg, supra*, 148 Cal.App.4th at page 1060, "Otherwise, every qualified patient would be free to violate the intent of the medical marijuana program expressed in [the Compassionate Use Act of 1996, Health and Safety Code,] section 11362.5 and deal marijuana from his [or her] car with complete freedom from any reasonable search." (Accord, *Waxler, supra*, 224 Cal.App.4th at p. 723.) In short, under existing decisional authority, the presence of marijuana in plain sight in defendant's vehicle gave Officer Sieker probable cause to search it.

D. The Search Warrant

As discussed above, Officer Sieker secured a warrant to search the electronic devices discovered in defendant's car. Defendant challenges the search warrant's breadth specifically with respect to the cell phone and electronic storage devices insofar as it authorized police to seize "[a]ny and / or all electronically stored data, including *but not limited to* any and all information which would tend to show [defendant] engaged in pimping, pandering, prostitution, and / or commercial sex activity." (Italics added.) Defendant argues, in other words, the property to be seized from the devices was *not* limited to evidence of the crimes under investigation; the warrant thus purported to allow the police to seize evidence as to which the warrant application failed to establish probable cause. Defendant argues

the warrant's broad language and lack of particularity is demonstrated by the fact that among the items seized, for example, were video recordings of defendant shooting a gun at a firing range. This evidence was unrelated to the crimes being investigated. Nevertheless, this evidence led, after further investigation, to defendant being charged with being a felon in possession of a firearm.

1. Overbroad Nature of Warrant and Lack of Particularity

The United States and California Constitutions require that a thing to be seized pursuant to a warrant be particularly described. The Fourth Amendment to the United States Constitution provides, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The California Constitution contains a similar provision: "[A] warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." (Cal. Const., art. 1, § 13.) The particularity requirement is also reflected in sections 1525 and 1529.[7]

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[7] "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. . . . ." (§ 1525.) A warrant must describe the property, thing, things, or person to be searched "with reasonable particularity." (§ 1529.)

The particularity requirement protects against general, exploratory searches. (*Maryland v. Garrison* (1987) 480 U.S. 79, 84; *People v. Scott* (2011) 52 Cal.4th 452, 486.) A warrant must be particular, that is, it must clearly state what is sought. (*In re Grand Jury Subpoenas Dated Dec. 10, 1987* (9th Cir. 1991) 926 F.2d 847, 856-857; *People v. Eubanks* (2011) 53 Cal.4th 110, 133.) The scope of the warrant must be limited by the probable cause on which it is based. (*In re Grand Jury Subpoenas Dated Dec. 10, 1987, supra*, 926 F.2d at pp. 856-857.) But a warrant need only be reasonably specific consistent with the circumstances of and facts known about the present case. (*U.S. v. Bridges* (9th Cir. 2003) 344 F.3d 1010, 1016; *People v. Robinson* (2010) 47 Cal.4th 1104, 1132.)

Whether the search warrant's description of the property to be seized is sufficiently specific is a question of law subject to our de novo review. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 370; *People v. Eubanks, supra*, 53 Cal.4th at p. 133.) "In considering whether a warrant is sufficiently particular, courts consider the purpose of the warrant, the nature of the items sought, and 'the total circumstances surrounding the case.' [Citation.] A warrant that permits a search broad in scope may be appropriate under some circumstances, and the warrant's language must be read in context and with common sense. (*Andresen v. Maryland* (1976) 427 U.S. 463, 480-481.)" (*People v. Eubanks, supra*, 53 Cal.4th at pp. 133-134.)

In the warrant before us, the use of the boiler plate phrase "including but not limited to" following the phrase "[a]ny and/or all . . . data" was poor draftsmanship. Read literally, it allows law enforcement personnel to examine and seize *any* data stored on the cell phone or electronic storage device named in the

warrant, whether or not it tended to show defendant had engaged in pimping or related crimes. But the purpose of the warrant was clear and the descriptions of the items sought were very specific. Officer Sieker stated in his affidavit "the listed property constitutes evidence that . . . [p]imping, and . . . [p]andering, have been committed and that a particular person, [defendant], committed those felonies, and that evidence of *that* criminal activity can be found in the examination of the evidence items recovered by Officers at the time of [defendant's] arrest." (Emphasis added).[8] The "listed property" included items such as child pornography and photographs, records, documents, correspondence, or materials specifically relating to prostitution or commercial sex activity, hotel or motel room rentals, the purchase of condoms, clothing, cell phones, "or other items used by prostitutes." Combined with a common sense reading of the warrant, this leads us to the conclusion that the items to be searched and seized were particularly described and that the scope of the warrant sufficiently limited. It therefor was not unconstitutionally overbroad. As result, the search for the above described evidence was conducted pursuant to a valid warrant.

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[8] An affidavit may be considered part of the warrant if the warrant makes sufficient reference to it and it is available to the searching officials for reference during the search. (*U.S. v. SDI Future Health* (9th Cir. 2009) 568 F. 3d 684, 699, 701.) Both of these requirements are met here. The phrase "proof by affidavit having been made before me by Officer Sieker" appears in the warrant signed by the issuing judicial officer, and it is fair to assume that Officer Sieker either had his affidavit, or had easy access to it, when conducting the search.

2. Examination and Seizure of all Videos

a. Scope of Search and Plain View

Whether Officer Sieker had legal grounds to view all of the videos during the search is a different matter. He had no authority to look for or seize evidence of crimes unrelated to those mentioned in the warrant. On the other hand, to find evidence related to pimping and other commercial sex crimes, it was entirely appropriate for him to briefly look at all of the video files contained in the cell phone, whether in the body of the phone or on a storage device found inside it, notwithstanding the file name or particular image summarizing its contents. (*See U.S. v. Comprehensive Drug Testing* (9th Cir. 2010) 621 F.3d 1162, 1176 (en banc) ["There is no way to be sure exactly what an electronic file contains without somehow examining its contents—either by opening it and looking, using specialized forensic software, keyboard searching or some other such technique"].) Thus, Officer Sieker was permitted to look at each video found on the devices until he was satisfied that they did not contain any of the information sought under the warrant.[9]

This leads us to the next question: Was he entitled to "seize" and then use the subject videos? Under certain circumstances, the answer would be "yes." ""[W]hen officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are

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[9] Officer Sieker looked at the videos closely enough to determine the name of the firing range. He eventually went there and obtained a registration form signed by the defendant.

reasonably identifiable as contraband, they may seize them whenever they are initially in plain sight or come into plain sight subsequently, as a result of the officers' efforts." [Citation.]' [Citation.]" (*People v. Scott, supra*, 52 Cal.4th at p. 487.) This is often called the "plain view" exception, and that exception permits the seizure of items not specifically listed in a warrant if their incriminating character is immediately apparent. (*Horton v. California* (1990) 496 U.S. 128, 136.)[10] Moreover, an item seized need not be associated with a particular crime so long as investigators have probable cause to believe it is evidence of *some* crime. (*People v. Kraft* (2000) 23 Cal.4th 978, 1043.) Before discussing whether this decades old doctrine applies to the facts

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[10] In the concurring opinion in *U.S. v. Comprehensive Drug Testing, supra*, 621 F.3d 1162, Chief Judge Kozinski takes the position that when the government seeks to take possession of a computer it should "forswear reliance on the plain view doctrine" and if it does not, the judge issuing the warrant "should order that the seizable and non-seizable data be separated by an independent third party . . . or deny the warrant altogether." (*Id.* at p. 1178.) Our Legislature has not gone this far, but newly enacted section 1546.1, subdivision (d)(2) directs that a warrant for electronic information "shall require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant shall be sealed and shall not be subject to further review, use, or disclosure except pursuant to a court order or to comply with discovery as required by Sections 1054.1 and 1054.7. A court shall issue such an order upon a finding that there is probable cause to believe that the information is relevant to an active investigation, or review, use, or disclosure is required by state or federal law."

presented here, we pause to address respondent's forfeiture argument.

b. Respondent's Forfeiture Argument

Respondent argues the defendant has waived his right to challenge the seizure of the videos based on grounds that they were not evidence of a crime because the issue was not raised in the trial court. This is not accurate.[11] During the hearing on the motion this particular topic came up several times. Trial counsel argued: ". . . they saw photos at the firing range, that's not contraband;" ". . . watching the videotape for evidence of a crime and then seeing stuff that's not even evidence of a crime;" ". . . once he sees these images of firing range or music or whatever, that's not—there's nothing [. . .] inherent about those objects that would tend to show a crime was committed."

Also, the following exchange took place at the suppression hearing which shows that the trial court relied on the "plain view" doctrine as a basis for denying the suppression of the videos:

"[Defense Counsel]: Afterwards is when he checked the record [of defendant's criminal history], but—but he has to view the video. They may have these little thumbnails. At that point

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[11] The defendant's written motion included a request to suppress "any evidence obtained from the search of the SIM card, as this search was beyond the scope of the search warrant." Typically, it is the prosecution that asserts that seizure of an item not mentioned in a warrant should not be suppressed if it was found in "plain view." The defendant was not obliged to raise that exception and then rebut it.

he should get an additional warrant. There is nothing inherent about this.

"The Court: For what? He has the warrant, and it's come out as a result of having viewed—

"[Defense Counsel]: He has thumbnails. So maybe thumbnails—

"The Court: Digital information in the items they were authorized to search. That's my analysis."[12]

The issue of whether the plain view exception applies here is therefore properly before us.

c. Application of Plain View Exception

As we said at the outset, operating a firearm is not necessarily a crime. There is no evidence in the record to conclude that the type of firearm (semi-automatic pistol) in the hand of the defendant was illegal to possess in the State of California. Had the searching official known of the defendant's prior felony conviction before the examination of the video the incriminating nature of it may have been "immediately apparent." (See *People v. Hill* (1974) 12 Cal.3d 731, 763, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896 ["The police officers who seize an article must be presently aware of some specific and articulable fact from which a rational link between the item seized and criminal behavior can

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[12] We understand "thumbnail" to mean a small image representing an introductory scene in the video. It is unclear from the record which one of the many "thumbnails" generated by the forensic technician was expanded and viewed.

be inferred. . . . [Pure] speculation . . . will not suffice to establish the requisite nexus."]; *U.S. v. Blom* (8th Cir. 2001) 242 F.3d 799, 808 ["We reject the government's suggestion that a police officer with no knowledge of a citizen's criminal history may constitutionally seize firearms or ammunition without a warrant, so long as the citizen turns out to be, in hindsight, a convicted felon"].) But that is not what occurred here. As a result, the videos of the defendant using a pistol at a firing range should have been suppressed.

This is a different situation than that found in *People v. Scott, supra*, 52 Cal.4th at page 452, where an identification card of murder victim Joseph C. and a letter addressed to murder victim Regina M. were properly seized from the defendant's bedroom even though neither victim was named in the search warrant that sought items taken during a homicide. The court found that a commonsense interpretation of the affidavit submitted in support of the warrant meant that such items were among those taken during the murders. The court also noted that "Joseph C.'s paramedic identification and Regina M.'s letter clearly did not belong to defendant or his housemates. Just as clearly, Detective Keers, who was one of the officers executing the search warrant, knew they belonged to the defendant's victims and were 'souvenirs' of his crimes. Keers had been assigned to the investigation of this series of crimes because she took charge of [one of the crime scenes]." (*Id.* at p. 487.) Hence, the seizure of these items was based on more than a searching officer's speculation that they constituted evidence of a crime.

"[Because defendant's] motion to suppress [evidence] should have been granted . . . he must be allowed to withdraw his no contest plea. Aside from the fact that the error is by its nature

prejudicial, the concept of harmless error is irrelevant where, as here, a defendant pleads guilty or no contest after the erroneous denial of his suppression motion. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Hill*[, *supra*,] 12 Cal.3d [at pp.] 767-769; *People v. Holmsen* (1985) 173 Cal.App.3d 1045, 1049.)" (*People v. Ramirez* (2006) 140 Cal.App.4th 849, 854.)

IV. DISPOSITION

The judgment is reversed with directions to vacate the order denying suppression of the videos and for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.