

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 89888
)	
ROBERT OLIVER,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI
38th JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE MARK ORR, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant Robert Oliver appeals his convictions, after a jury trial in Taney County, Missouri for two counts of the class A felony of sexual exploitation of a minor, § 573.023, RSMo 2000,¹ and two counts of the class B felony of promoting child pornography in the first degree, § 573.025. The Honorable Mark Orr sentenced Mr. Oliver to concurrent terms of 15 years for both counts of sexual exploitation and ten years for both counts of promoting child pornography.

On February 24, 2008, this Court sustained Mr. Oliver's application for transfer from the Missouri Court of Appeals, Southern District, SD28820. Therefore jurisdiction lies in the Missouri Supreme Court. Rule 83.04.

¹ All statutory references are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Pretrial:

Prior to trial, Mr. Oliver filed a motion to suppress the evidence seized from his digital camera and computer (L.F. 15). Mr. Oliver's motion to suppress² was overruled (Tr. 88).

Trial:

On November 11, 2005, eight year old Joey Oliver invited brothers, K.K., and C.M. over to his house to play (Tr. 273, 274, 349). K.K. was eight years old and C.M. was five years old (Tr. 276). Karen Ray Misemer dropped the boys off at the Olivers between 1:00 and 2:00 p.m. and picked them up at 6:00 p.m. (Tr. 275).

That evening, while Misemer was bathing C.M., he told her that they had taken naked pictures at Joey's house (Tr. 276). Misemer went to K.K. and asked what had gone on and K.K. told her that Joey's dad took pictures of them with their clothes off (Tr. 276).

Misemer called the police (Tr. 277). Two Taney County Sheriff's deputies arrived and spoke with the boys (Tr. 277). The boys told Misemer that Mr. Oliver had not touched them (Tr. 279).

² An evidentiary hearing was held on Mr. Oliver's motion to suppress (Tr. 21-51). In order to avoid redundancy, the facts presented at that hearing are set out in Point and Argument I, and will not be set out here.

C.M. testified that “[Joey’s dad] took pictures of us then said take off your clothes, and C.M. did (Tr. 282). Mr. Oliver then showed them the pictures on the computer (Tr. 284). Mr. Oliver asked them to kiss and C.M. did (Tr. 285).

On cross examination, C.M. said he did not really know if they kissed (Tr. 287).

K.K. testified that Mr. Oliver had a digital camera and took pictures of C.M. and him first clothed, then without their shirts, then without the rest of their clothes (Tr. 290). Mr. Oliver put the photographs on the computer (Tr. 290). K.K. told his mother, the “cops,” and Nathan, Joey’s older brother (Tr. 292). The pictures were taken in Mr. Oliver’s office (Tr. 293). K.K. did not know if Mr. Oliver asked them to kiss or touch each other (Tr. 294).

Robert (Mike) and Alisa Oliver had been married for almost 13 years in November, 2005 (Tr. 344). At the time of trial they were divorced (Tr. 343). They had two sons, Nathan and Joey (Tr. 344). Mr. Oliver had two computers in his home office which he used to run his business (Tr. 345). Alisa would get on one of the computers every now and then (Tr. 345). Alisa recounted the night of November 6, 2005, when members of the Taney County sheriff’s department and a DFS worker came to the home (Tr. 346). After they told Mr. Oliver to leave, he did (Tr. 347). After he was gone, Detective Hill sought and obtained Alisa’s consent to take the computer tower, some disks and the digital camera (Tr. 347).

According to Alisa, Mr. Oliver changed after his 41st birthday (Tr. 347). He would get up in the middle of the night and go to his office “more times than not” (Tr.

349). She thought he was going through a midlife crisis (Tr. 350). Alisa never saw her husband looking at pornography (Tr. 351).

Joey testified that his father took one or two photographs of C.M. and K.K. but he did not remember if they had their clothes on or off (Tr. 357). They were taken in his father's office (Tr. 357).

Before the State called its final witness, Mr. Oliver objected that the State had presented no evidence of exhibiting and therefore the photographs the last witness would attempt to admit were irrelevant (Tr. 361). While C.M. testified that Mr. Oliver showed him his photograph on the computer screen, no internet images were displayed (Tr. 363). The State's position was that Mr. Oliver exhibited the images when he looked at them more than once, and putting something on a computer screen is publishing (Tr. 365). Mr. Oliver's objections were overruled (Tr. 369).

Detective David Rozell was a Taney County Sheriff's investigator who specialized in computer forensics (Tr. 372). He explained that the "hard drive" is where most of a computer's data is stored (Tr. 375). The hard drive for photographs include either MEDA or EXIF data which is hidden from the user (Tr. 378). By inspecting the hard drive, one can get to the data which will tell when a photograph was put in, when it was modified, when it was accessed, with dates and times, where it was located, and how big it was (Tr. 378).

The access date indicates the last time a piece of data was accessed, not every time, so the most Rozell could say is that if the creation date was different from the access date, the user had viewed the image at least twice (Tr. 379).

The first place Rozell looked when investigating allegations of pornography were the recycle or deleted files in the hard drive (Tr. 381). These images are no longer accessible to the user even though they are still stored in the hard drive and can be recovered by an expert using specialized software (Tr. 381, 383, 384). Rozell sorted the data, as many as 90,000 files in an average hard drive, and pulled the relevant data into a “report” (Tr. 388).

Prior to Rozell’s testimony concerning what he found in Mr. Oliver’s camera chip and hard drive, Mr. Oliver renewed his objection based on the illegal search and seizure, which was again overruled (Tr. 393).

On the camera chip, Rozell found 27 photographs of K.K., C.M. and J.O. (Tr. 396). Not all of these photographs were complete, some had been written over (Tr. 396). All of the photographs had been taken on November 6, 2005, and they had been deleted the same day (Tr. 396, 402). Some showed the boys with their pants off, and one showed a boy’s anus (Tr. 403).

Rozell testified about various websites Mr. Oliver had visited (Tr. 404). Mr. Oliver objected that these images were irrelevant and no foundation could be made because the dates differed from the dates charged in the information (Tr. 406). These objections were overruled (Tr. 406).

There were numerous graphic websites that appeared to be child pornography and adult pornography (Tr. 407). All the information was filed under Mr. Oliver's account (Tr. 410).

Rozell testified over objection that Mr. Oliver used various search terms, such as male porn sites, teenagers, some younger than teenagers, some incest, "Fathers Doing Sons," a "lot of sites like that" (Tr. 413). Mr. Oliver had bookmarked "boy love" and "boys" (Tr. 413). These were accessed from November 3 to November 6, 2005 (Tr. 414). Many of the images had originally been thumbnail size, some normal size (Tr. 415).

Before each group of images was admitted into evidence, Mr. Oliver voir dired Det. Rozell and determined that he did not know the ages of the people shown, and did not know when or where the photograph was taken (Tr. 438, 446, 450). His objections were overruled (Tr. 440, 447, 453). Mr. Oliver's objection that Exhibits 27 through 35 were cumulative was overruled (Tr. 442).

Exhibits 23 through 44 were admitted and published to the jury (Tr. 455). Rozell testified to what he found as to each image (Tr. 458). For example, State's Exh. 23 was in a folder Mr. Oliver had created, looked at once, but did not download (Tr. 457). Some of the images were described as "flash," which meant they "just flash at you, like a stop sign or a 4-way stop" (Tr. 461). Mr. Oliver had looked at most of the images at least twice (Tr. 458, 463, 464, 465, 467, 470).

On cross examination, Rozell conceded that the way he was defining how many times Mr. Oliver "looked" at an image was if there was any difference in the time of

creation and the time of access, even if that time was 9 seconds or 1 second (Tr. 473-474).

Rozell did not look to see if there were passwords on Mr. Oliver's computer and therefore he could not tell if Alisa, Nathan, or Joey could have used Mr. Oliver's file (Tr.476). All files are created automatically by the computer's software (Tr. 486).

Mr. Oliver's computer was not networked to any other computer (Tr. 489). There was nothing of significance on the 13-14 floppy disks that had been seized (Tr. 492). Mr. Oliver's computer did not have the software necessary to retrieve deleted files or photographs (Tr. 495). None of the photographs of K.K. and C.M. were on the hard drive of the computer (Tr. 502).

The State rested (Tr. 505). Mr. Oliver's Motions for Judgment of Acquittal at the Close of the State's Case and at the Close of All of the Evidence (L.F. 40, 42) were denied (Tr. 505, 513). The State dismissed Counts IV, VI, VII and VIII (Tr. 526-527).

During deliberations the jury sent out a question. It was confused by instruction 10 for Count III. The body of the instruction read "possessed with intent to exhibit material" but the finding they were making was whether Mr. Oliver was "guilty of promoting." The jury wanted to know if "the meaning of promoting carr[ied] the same definition as intent to exhibit?" (Tr. 568). The court responded that he could not provide any further instructions (Tr. 569).

The jury returned verdicts finding Mr. Oliver guilty on all four counts (L.F. 60-63). Mr. Oliver's Motion for New Trial was denied (L.F. 64-69; Tr. 573). The

Honorable Mark Orr sentenced him to concurrent terms of fifteen years on Counts I and II and ten years on Counts III and V (L.F. 74, Tr. 583). The trial court granted Mr. Oliver's Motion to Appeal *in forma pauperis*, and Notice of Appeal was timely filed (L.F. 77, 78).

POINTS RELIED ON

I

The trial court clearly erred in denying Mr. Oliver's motion to suppress, and in allowing the State to introduce into evidence a Kodak camera and its media chip, images retrieved from that media chip (Exhibits 6 – 16), a Dell computer's hard drive, the images retrieved from that hard drive (Exhibits 23 – 44), and the testimony of Detective Rozell concerning those exhibits, because those rulings denied Mr. Oliver's right to be free from unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and by Article I, § 15 of the Missouri Constitution, in that those items were seized without a warrant and without proper consent since Mr. Oliver refused Detective Hill's request for consent to seize the camera and computer hard drive and so Detective Hill waited until Mr. Oliver was ordered to leave the home and then requested and obtained consent from Mrs. Oliver. The warrant obtained two weeks later was invalid because information obtained as a result of the illegal search and seizure was presented to the judge and affected his decision to issue the warrant.

Georgia v. Randolph, 547 U.S. 103 (2006);

United States v. Murphy, 516 F.3d 1117 (9th Cir. 2008);

State v. Sund, 254 S.W.3d 267 (Mo. banc 2008);

State v. Berry, 92 S.W.3d 823 (Mo. App., S.D. 2003);

U.S. Constitution, Amendments IV and XIV;

Mo. Constitution, Art. I, § 15;

§ 542.296.6.

II

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal at the end of the State's case and at the end of all of the evidence and in accepting the jury's guilty verdicts on Counts I and II, sexual exploitation of a minor, § 573.023, because the State did not prove that offense beyond a reasonable doubt, in violation of Mr. Oliver's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 10 of the Missouri Constitution, in that the State failed to produce any evidence that Mr. Oliver created obscene material since the photographs of K.K. and C.M. do not show any sexual conduct, nor do they involve sexual performances.

State v. Helgoth, 691 S.W.2d 281 (Mo. banc 1985);

State v. Salata, 859 S.W.2d 728 (Mo. App., W.D. 1993);

Jackson v. Virginia, 443 U.S. 307 (1979);

In re Winship, 397 U.S. 358, (1970);

U.S. Constitution, Amendment XIV;

Mo. Constitution, Article I, § 10; and

§§ 566.010, 568.060, 573.023.

III

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal at the end of the State's case and at the end of all of the evidence and in accepting the jury's guilty verdicts on Counts III and V, promoting child pornography, § 573.025, because the State did not prove that offense beyond a reasonable doubt, in violation of Mr. Oliver's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 10 of the Missouri Constitution, in that the State failed to produce any evidence that Mr. Oliver created any photographs depicting sexual conduct or that he had any intention to exhibit obscene material since there was no evidence that he sold, shared, or gave any internet image to any other person. Rather, he looked at these images alone, in the study of his own home.

State v. Bouse, 150 S.W.3d 326 (Mo. App., W.D. 2004);

Jackson v. Virginia, 443 U.S. 307, 315, (1979);

In re Winship, 397 U.S. 358, 363-364 (1970);

State v. Carson, 941 S.W.2d 518, 521 (Mo. banc 1997);

U.S. Constitution , Amendment XIV;

Mo. Constitution, Art. I, § 10;

§§ 306.100; 542.281; 571.030 RSMo Cum.Supp. 1983; 573.025; and

MAI-CR3d 327.12.

ARGUMENT

I

The trial court clearly erred in denying Mr. Oliver's motion to suppress, and in allowing the State to introduce into evidence a Kodak camera and its media chip, images retrieved from that media chip (Exhibits 6 – 16), a Dell computer's hard drive, the images retrieved from that hard drive (Exhibits 23 – 44), and the testimony of Detective Rozell concerning those exhibits, because those rulings denied Mr. Oliver's right to be free from unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and by Article I, § 15 of the Missouri Constitution, in that those items were seized without a warrant and without proper consent since Mr. Oliver refused Detective Hill's request for consent to seize the camera and computer hard drive and so Detective Hill waited until Mr. Oliver was ordered to leave the home and then requested and obtained consent from Mrs. Oliver. The warrant obtained two weeks later was invalid because information obtained as a result of the illegal search and seizure was presented to the judge and affected his decision to issue the warrant.

The Taney County Sheriff's Department obtained the evidence used at trial against Mr. Oliver in an illegal search and seizure. The Department's attempt to legalize its illegal conduct by obtaining a warrant should be rejected because by the time the

application for the warrant was submitted to the judge, Mr. Oliver's camera chip and hard drive had already been seized and searched.

Preservation:

Prior to trial Mr. Oliver filed a Motion to Suppress (L.F. 15). One of the allegations in that motion was that the warrant was the product of a previous illegal search (L.F. 16). During trial, Mr. Oliver objected to the testimony about and admission of the chip from the Kodak camera, the camera and the computer hard drive (Tr. 393, 398, 419, 432). Mr. Oliver then asked for a continuing objection to the fruit of the unlawful search and seizure (Tr. 432). Mr. Oliver included this claim of error in his Motion for New Trial (L.F. 66), and therefore it is properly preserved for review by this Court.

Standard of Review:

On appeal, this Court determines whether there is substantial evidentiary support for the trial court's decision to deny the motion to suppress. *State v. Kempa*, 235 S.W.3d 54, 57 (Mo. App., S.D. 2007). In making that determination, this Court considers both the evidence presented at the suppression hearing and the evidence introduced at trial. *Id.*, citing *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999). All of the evidence is viewed in the light most favorable to the trial court's ruling and all contrary evidence and inferences are disregarded. *Id.* (citations omitted).

A trial court's ruling will not be reversed unless its decision is clearly erroneous, leaving this Court with a definite and firm impression that a mistake has been made. *Id.*,

(citations omitted). While this Court reviews questions of law *de novo*, deference is given to the trial court's findings of fact and determinations of credibility. *Id.* Thus, "[t]he trial court may not be reversed if its decision is plausible, even if this Court is convinced that it would have weighed the evidence differently. *Id.*

Facts presented at the hearing on the motion to suppress and trial:

On November 6, 2005, Taney County Detective Rick Hill received a telephone call from two road deputies asking for help (Tr. 37, 39). They had received a call indicating that two young boys had been photographed in the nude by Mr. Oliver (Tr. 39). Hill called for a DFS worker, ran a background check on Mr. Oliver, and went to the Oliver's home with the two deputies and the DFS worker (Tr. 39).

Alisa Oliver, Mr. Oliver's wife, lived in Taney County with her husband and two children (Tr. 21). At 10:30 p.m. on November 6, 2005, her door bell rang (Tr. 21, 22). At the door were two unnamed Taney County sheriff's deputies, Detective Hill, and a DFS worker (Tr. 22). Hill told her they were there on a report of child abuse and asked to come in to talk (Tr. 22).

Mr. Oliver had come to the door with his wife. After Hill told him about the investigation, Mr. Oliver invited them in (Tr. 40). Hill asked Mr. Oliver if he had taken photographs of his son and two other boys (Tr. 40). Mr. Oliver admitted that the boys had been there and he had photographed their "bellies" (Tr. 41). Mr. Oliver went to get his camera and Hill and one of the deputies followed him (Tr. 41, 47). After being shown the camera, Hill requested permission to take the camera and the computer (Tr. 42). Mr.

Oliver refused, telling Hill he would need a warrant (Tr. 42). Hill called Detective Bailey and asked him to begin the process of obtaining a warrant (Tr. 48).

Mr. Oliver, Hill and the deputy rejoined Alisa and the DFS worker in the living room (Tr. 50). The DFS worker gave the Olivers three options, either Mr. Oliver could leave; Alisa and the children could leave; or law enforcement would take the children (Tr. 30). Mr. Oliver agreed to leave (Tr. 30).

Hill waited until Mr. Oliver was gone before asking Alisa if he could take the computer monitor, the tower, the camera, and the memory chip out of Mr. Oliver's office (Tr. 23). He did not tell Alisa that her husband had refused consent (Tr. 29). Alisa signed a consent to search form (Tr. 24; H.Exh. 3). She took Hill back to her husband's office where the computer and camera were located, and showed him where some disks were stored (Tr. 25).

Alisa testified that the computer was not hers, but she was free to use it anytime she wished (Tr. 28, 34). She believed the police had the power to take the children and that if she did not cooperate and do whatever they asked, they would (Tr. 31-32). She summarized her feelings in this way, "when they came into the house, I wasn't in control anymore. They were calling the shots. And whatever they wanted, they got" (Tr. 35). The seizure form was completed at 12:55 a.m. (Tr. 50). Hill took the camera and computer tower to the Taney County Sheriff's Department (Tr. 50).

The parties stipulated to the admission of the warrant and affidavit prepared by Detective Bailey (Tr. 9). The Affidavit/Application for Search Warrant was prepared on

November 21, 2005 (H.Exh. 2). The Application requested a warrant to search : a Dell CPU serial number 730R071; a Kodak DC3400 Digital camera with Compact Flash memory card; a Sony Rewritable CD 650 MB; and 3.5” diskettes (twelve) (H.Exh. 2, p. 241). It went into technical language concerning how the search would be conducted and that the purpose would be to record any internet activity depicting sexual acts with, or images of, nude children (H.Exh. 2, p. 241). The application submitted that the sorting process could take weeks or months, depending on the volume of data stored, and it would be impractical and invasive to attempt this kind of data search on-site. (H.Exh. 2, p. 242). The application noted that the property was located at the Taney County Sheriff’s Department (H.Exh. 2, p. 242). But it also requested the Court’s permission to seize all computer hardware (and associated peripherals) described above that were believed to contain some or all of the evidence described in the warrant, and to conduct an off-site search of the hardware for all the evidence described, if, upon arriving at the scene, the agents executing the search concluded that it would be impractical to search the computer hardware on-site for this evidence (H.Exh. 2, p. 242). The “affidavit” portion of the application set out Det. Bailey’s expertise in the use of computers in facilitating crimes against children (H.Exh. 2 p. 243). It discussed the habits of people who possess, buy, produce, trade or sell child pornography and who molest children (H.Exh. 2, p. 243).

The last paragraph of the application informed the court that on November 6, 2005, Taney County deputies learned that photographs had been taken of at least three

juvenile males, depicting them in various stages of undress (H.Exh. 2 p. 244). The man who took the photographs was Robert Oliver. “Investigation determined the photographs were taken using a digital camera, and the suspect took something from the camera and put it in a computer located in the office area, at which time images of them with exposed genitals were then visible on the computer screen.” (H.Exh. 2, p. 244). The application closed by informing the court that, “[o]n 11-06-05, members of the Taney Co. Sheriff’s Dept. collected the above listed property from the Oliver home. The items were obtained during a consent search of the residence, and the items were collected and brought to the Taney Co. Sheriff’s Dept. (H.Exh. 2

The Motion to Suppress was overruled (Tr. 88).

Questions presented:

The question presented by this case is whether one co-tenant’s consent to search takes precedence over another co-tenant’s refusal to grant consent to search when the objecting co-tenant is no longer present to enforce the assertion of his constitutional rights to be free from unreasonable searches?

Underlying that question is another, more important question. Which is more deserving of protection, a citizen’s assertion of his constitutional right to be free from unreasonable searches and seizures, or law enforcement’s convenience in not having to obtain a search warrant when a co-tenant refuses consent to search but a more agreeable co-tenant is present?

Analysis:

The Fourth Amendment to the United States Constitution guarantees citizens the right to be free from unreasonable searches and seizures, *State v. Barks*, 128 S.W.3d 513, 516 (Mo. banc 2004). The protection guaranteed by Missouri Constitution, Article I, §15 is coextensive with that provided by the Fourth Amendment. *State v. Rushing*, 935 S.W.2d 30, 34, (Mo. banc 1996). The guarantee provided by the United States Constitution is enforced by the exclusionary rule. *Weeks v. United States*, 232 U.S. 383, 398 (1914). *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) extended, via the Fourteenth Amendment, that same protection to defendants in state prosecutions.

At a suppression hearing, “[t]he burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.” § 542.296.6; *State v. Franklin*, 841 S.W.2d 639, 644 (Mo. banc 1991).

The State failed to meet its burden. The State argued that the search and seizure of Mr. Oliver’s camera and hard drive were proper because Hill had Alisa Oliver’s consent (Tr. 52-54). But the State overlooked the United States Supreme Court case *Georgia v. Randolph*, 547 U.S. 103 (2006) which is directly on point. The *Randolph* Court held that “[a] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident. *Id.* at 120.

To be valid, a search or seizure must normally be based on probable cause and executed pursuant to a warrant. *Kempa*, 235 S.W.3d at 60. Warrantless searches or seizures are *per se* unreasonable unless they fall within one of the exceptions recognized by the courts. *Id.* The exception relied on by the State in Mr. Oliver’s case was consent (Tr. 52-54).

The Court had already recognized the validity of searches and seizures conducted with the voluntary consent of a co-tenant possessing, or reasonably appearing to possess, authority to give the police consent to search in the absence of other co-tenants. *United States v. Matlock*, 415 U.S. 164, 170 (1974); *Illinois v. Rodriguez*, 497 U.S. 177, 181-182 (1990).

In *Randolph*, the Court noted that no prior co-tenant consent-to-search case “presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained.” 547 U.S. at 109.

Matlock provides support for the holding in *Randolph* since in *Matlock*, the Court placed a limitation on a co-tenant’s ability to consent to a search of a shared dwelling when it stated that “the consent of one who possesses common authority over premises or effects is valid as against the *absent, non-consenting* person with whom that authority is shared.” 415 U.S. at 170 (emphasis added).

In *Randolph*, there was a physically present, non-consenting co-tenant who shared authority over the dwelling. 547 U.S. at 107. That factual distinction led to the

conclusion that one co-tenant's consent cannot override another co-tenant's refusal to consent. *Id.* at 115.

The distinction between *Randolph, Matlock* and *Rodriguez* is clear. In *Randolph*, the objecting co-tenant was physically present and unambiguously refused to consent to a warrantless search. 547 U.S. at 107. In *Matlock* and *Rodriguez*, the potentially objecting co-tenants, though nearby, were never asked for consent. *Matlock*, 415 U.S. at 110; *Rodriguez*, 497 U.S. at 180.

Mr. Oliver was physically present and unambiguously refused Hill's request to seize his camera and computer hard drive without a warrant (Tr. 42, 303). Hill told Mr. Oliver he would begin working on obtaining a warrant, and called Det. Bailey, told him what was going on, and asked that he prepare an application for a warrant (Tr. 42). Mr. Oliver, Hill, and a deputy then joined Alisa Oliver, the DFS worker, and the other deputy in the living room (Tr. 42). Hill explained his subsequent conduct as follows:

Q. Did you ask her about the digital camera and the computer?

A. No, not at that point.

Q. Did you at any point ask her about them?

A. Later.

Q. And why did you ask her later?

A. Because Mr. Oliver left.

Q. All right. What did you ask her?

A. If she mind (sic) if I took the computer tower and the camera

and items associated with that, if she had any problem with that.

Q. And she gave you permission to do so?

A. Yeah. Signed a consent

(Tr. 42-43). Hill then called Det. Bailey and told him the search warrant would not be needed (Tr. 52).

Mr. Oliver was physically present when he unambiguously refused to allow Hill to search or seize his camera and hard drive without a warrant (Tr. 42). At that point, Hill and the DFS worker stepped out to make telephone calls (Tr.49). When they returned, the DFS worker gave the Olivers three options: first, Mr. Oliver could leave the home; second, Mrs. Oliver and the children could leave the home; or third, law enforcement would take the children into protective custody (Tr. 50). Given those options, Mr. Oliver agreed to leave (Tr. 50). It was nearly midnight, his conduct had caused this situation, and therefore the “options” he was given could lead to only one result, he would leave. He did not do so voluntarily, and his refusal to consent to a search had not been rescinded. There was no evidence that Hill told Mr. Oliver he would be forfeiting his Fourth Amendment rights if he left the home. But Hill used the opportunity of Mr. Oliver’s absence to ask Alisa Oliver for consent to seize the property Mr. Oliver had refused to release. Hill did not tell Alisa that Mr. Oliver had denied him permission to search or seize the property without a warrant (Tr. 29).

Police cannot procure the absence of a co-tenant in order to avoid a possible objection. *Randolph*, 547 U.S. at 122. Thus Detective Hill’s conduct in waiting until Mr.

Oliver was forced from the home before asking his wife for permission to seize the camera and computer indicates that he knew that if he asked Alisa Oliver for consent to search while Mr. Oliver was still in the home, her consent, if given, could not override her husband's objection. 547 U.S. at 120. This conduct indicates the unreasonableness of law enforcement's conduct in procuring the consent to search.

In *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008), the police sought permission from Murphy to search two storage units. *Id.* at 1122. He refused to consent and was arrested and taken to jail. *Id.* at 1119-1120. Two hours later, the man who paid the rent on the storage units arrived and gave police permission to search. *Id.* at 1120.

The Court reversed Murphy's conviction for manufacturing methamphetamine on the basis of *Randolph*. *Id.* at 1120. The Court held:

We see no reason, however, why Murphy's arrest should vitiate the objection he had already registered to the search. we hold that when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant, the search is invalid as to the objecting co-tenant.

Id. at 1124.

Under *Randolph*, police cannot remove a co-tenant for the purpose of preventing him from objecting to a search. *Id.* "If the police cannot prevent a co-tenant from

objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made.” *Id.* at 1124-1125.

The 8th Circuit considered the application of *Randolph* in *United States v. Hudspeth*, 518 F.3d 954 (2008). In *Hudspeth* the police found child pornography on Hudspeth’s office computer while executing a warrant search at his business. *Id.* at 955. Believing there might be more pornography on his home computer, the police asked Hudspeth for permission to search his home computer. *Id.* He refused, was arrested for child pornography, and taken to jail. *Id.* Four policemen then went to his home and asked his wife for permission to search. *Id.* After initially refusing, she consented to the search. *Id.* at 956.

In upholding the search, the 8th Circuit found that *Randolph* did not apply because Mr. Hudspeth was not physically present in the home when he refused to consent. *Id.* at 960. The Court found that *Matlock* was more on point because “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.” *Id.* at 961, quoting *Matlock*, 415 U.S. at 171 n.7.

Hudspeth can be distinguished from Mr. Oliver’s case for the same reason. While Mr. Hudspeth was away from his home when he lodged his objection to a search of his home computer, Mr. Oliver was physically present in his home when he refused to give consent to search.

United States v. Henderson, 536 F.3d 776 (7th Cir. 2008) is closer to Mr. Oliver’s case but still distinguishable. In *Henderson*, police were called to investigate a report of

domestic abuse. *Id.* at 777. When they arrived, Patricia Henderson was standing in the yard and she told them that her husband had choked her and thrown her out. She warned the police that her husband had weapons in the house and had a history of drug and gun arrests. *Id.*

Using a key provided by the Henderson's teenage son, police opened the door and encountered Kevin Henderson who, in unequivocal terms, told the police to get out. *Id.* The police arrested Henderson and took him to jail. *Id.* After he was removed from the scene, police sought and obtained Patricia's consent to search. *Id.* The police found enough contraband to charge Henderson with drug and weapons charges. *Id.*

Henderson presents a situation where the police were called to a potentially dangerous situation. They did not go to the home for the purpose of searching for evidence. It was only after Patricia Henderson warned them that her husband was inside and had drugs and weapons, did the police enter, with a key provided by a family member. *Id.* at 777.

Once inside, the police encountered Henderson, who told them to get out. *Id.* at 778. They had not asked him for permission to search, they had entered to arrest him, which they did. *Id.* Once they removed him from the scene, the police obtained consent from Patricia to search. *Id.* The police found crack cocaine, drug paraphernalia, and weapons. *Id.* Henderson was charged with drug and weapons charges. *Id.*

The 7th Circuit upheld the search, finding that by validly arresting Henderson and taking him to jail, the contemporaneous presence of the objecting and consenting co-tenants, indispensable to the decision in *Randolph*, was not met. *Id.* at 784.

Henderson is distinguishable from Mr. Oliver's case. The police were not called to Mr. Oliver's home. There were no exigent circumstances as there were in *Henderson* where the police were responding to a domestic assault call.

A more fundamental question is whether Henderson had the right to tell the police to leave his home when they were there to arrest him for domestic assault and they had been given permission to enter by his wife and son? Given the facts, the police in *Henderson* acted reasonably. Not so in Mr. Oliver's case. The police forced Mr. Oliver to leave for the sole purpose of getting consent to search after he refused.

In *Silva v. State*, 344 So.2d 559 (Fla. 1977), Daniel Silva and Mrs. Brandon lived together but were not married. *Id.* at 560. On New Year's Day, Silva hit Brandon in the mouth. *Id.* She and her son left and called the police and told them that Silva had hit her and that he had guns in the closet. *Id.*

She then waited outside for the police to arrive. *Id.* When the police arrived, they found the front door locked but Mrs. Brandon opened it by putting her hand through the jalousies. *Id.* Once inside, Mrs. Brandon told the police that the guns were in the hall closet. *Id.* That closet contained only Silva's property, but Mrs. Brandon could go in it to clean, and her son occasionally went in. *Id.* Silva forbade a search of the closet, but the police searched anyway, depending on Mrs. Brandon's consent. *Id.* While the

primary issue in *Silva* was whether Mrs. Brandon had authority to give consent to search the closet, the Court also spoke to the issue of a co-tenant's authority to consent in general.

In a decision reached nearly twenty years before *Randolph*, the Supreme Court of Florida held that while a joint occupant should have authority to consent to a search of jointly held premises if the other party was unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another. *Id.* at 562.

Law enforcement's desire to conduct warrantless searches does not take precedence over a citizen's assertion of his federal and state constitutional rights to be free from unreasonable searches. As the Court in *Randolph* noted:

A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). (“[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law”)’ *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (“The warrant requirement . . . is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency”).

Randolph, 547 U.S. at 115 FN.5.

Someone who chooses to live with another does not relinquish his constitutional rights. A person who lives alone does not have greater Fourth Amendment protection than someone who shares a home with another. Had Mr. Oliver lived alone, and Hill's request to search his computer was denied, Hill would have had to seek a search warrant. This is exactly what Hill began to do when Mr. Oliver denied him consent to search. He called Detective Bailey and asked him to begin the process for obtaining a warrant. The fact that Mr. Oliver was forced to leave the home does not mean that his assertion of his rights no longer had force. No one told him that if he left the house, his constitutional rights went with him. "[N]o system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo v. Illinois*, 378 U.S. 478 (1964).

The State also argued that the motion to suppress should be overruled because there was no search of Mr. Oliver's camera and computer hard drive, only a seizure (Tr. 54). But in making that argument, the State overlooks the law that "[a]lthough the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, see *Texas v. Brown*, 460 U.S. 730, 747-748 (1983) (Stevens, J., concurring in judgment), neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona v. Hicks*, 107 U.S. 1149, 1154 (1987). The Court had never "drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action." *Id.*

Hill's action in seizing Mr. Oliver's camera and computer hard drive without a warrant and without valid consent was unreasonable even if no search was done until a warrant was issued. But, a search was made prior to the issuance of the warrant. That is established by the application for the warrant.

That application included the make, model and serial number of the computer, the make, model and serial number of the camera, and the make and model of a CD (Exh. 2). None of that information could have been obtained without a search of Mr. Oliver's property.

"It matters not that the search uncovered nothing of any great personal value to respondent – serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Hicks*, 107 U.S. at 1152.

Evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as the fruit of the poisonous tree. *State v. Sund*, 254 S.W.3d 267, 274 (Mo. banc 2008); citing, *Wong Sun v. United States*, 371 U.S. 471 (1963). The question is "whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Renfrow*, 224 S.W.3d 27, 34 (Mo. App., W.D. 2007), quoting *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995). The evidence against Mr. Oliver came directly from Hill's exploitation of Mr. Oliver's forced absence from his home. After waiting for Mr. Oliver to leave, Hill requested and received Alisa Oliver's consent to seize Mr. Oliver's camera

and hard drive. He neglected to tell her that her husband had refused consent to the search and seizure without a warrant.

There are three doctrines used to determine whether there are “means sufficiently distinguishable to purge the primary taint.” the attenuation doctrine, the independent source rule, and the inevitable discovery rule. *Renfrow*, 224 S.W.3d at 34. The independent source doctrine states that the facts obtained by illegal police misconduct may be admissible if knowledge of the facts can be proved through a source independent of the illegality.” *Id.* This doctrine does not apply since it was only through Hill’s misconduct that the camera and hard drive were located and seized.

The attenuation doctrine requires consideration of three factors: 1) the temporal proximity of the illegality and the [unlawful activity]; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. *Id.* This doctrine does not apply because Hill’s misconduct occurred immediately before the seizure of the property, there were no intervening circumstances, and Hill’s actions were in flagrant disregard of the Fourth Amendment since he ignored Mr. Oliver’s refusal to consent to the search and seizure, waited until Mr. Oliver was forced from his home, and then sought consent from Mrs. Oliver.

Finally, the inevitable discovery doctrine does not provide an exception to the exclusion of the evidence in Mr. Oliver’s case. “[W]here law enforcement personnel would ultimately or inevitably have discovered evidence, the evidence is admissible notwithstanding a constitutionally invalid search [or seizure].” *Renfrow*, 224 S.W.3d. at

36, quoting *State v. Coyne*, 112 S.W.3d 439, 443 (Mo. App., E.D. 2003). But the inevitable discovery exception only applies “where the state proves by a preponderance of the evidence that certain standard procedures of the local police would have been utilized and that those procedures would have resulted in the inevitable discovery of the challenged evidence.” *Id.*, *Coyne*, 112 S.W.3d at 443.

Those standard procedures cannot be found by speculation, but must be proven by demonstrated facts which are capable of verification and impeachment. *Id.* In this case the State presented no evidence concerning the standard procedures of the Taney County Sheriff’s Department, or that those procedures would have been followed in this case. The evidence obtained by Hill’s illegal seizure was not admissible under the inevitable discovery doctrine.

The State seized and searched Mr. Oliver’s property prior to obtaining a search warrant. There was no reason Det. Hill could not have obtained a warrant before going to the Oliver’s home at 10:30 p.m., on November 6, 2005. When Mr. Oliver denied him permission to search his camera and hard drive, Hill called Det. Bailey, gave him the information he had, and asked that he prepare an application for a warrant. But rather than waiting for a judicial determination by a neutral magistrate that a warrant was justified, Hill took advantage of Mr. Oliver’s forced absence and obtained the invalid consent of Mrs. Oliver. “To justify a denial of Fourth Amendment protection simply because law enforcement believes its criminal investigation would be enhanced by particular investigative conduct, would, as a practical matter, completely abrogate the

protection afforded by the [Fourth] amendment.” *State v. Berry*, 92 S.W.3d 823, 831 (Mo. App., S.D. 2003), quoting *State v. Kriley*, 976 S.W.2d 16 (Mo. App., W.D. 1998). The trial court’s order overruling Mr. Oliver’s motion to suppress was clearly erroneous. This Court should reverse Mr. Oliver’s convictions and remand the case with an order that the evidence obtained by the illegal search and seizure be suppressed.

II

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal at the end of the State's case and at the end of all of the evidence and in accepting the jury's guilty verdicts on Counts I and II, sexual exploitation of a minor, § 573.023, because the State did not prove that offense beyond a reasonable doubt, in violation of Mr. Oliver's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 10 of the Missouri Constitution, in that the State failed to produce any evidence that Mr. Oliver created obscene material since the photographs of K.K. and C.M. do not show any sexual conduct, nor do they involve sexual performances.

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal on Counts I and II because there was no evidence presented from which a reasonable juror could have found, beyond a reasonable doubt, that Mr. Oliver photographed K.K. and C.M. in a sexual performance, or that either boy was shown engaging in sexual conduct.

Preservation:

Mr. Oliver filed motions for judgment of acquittal at the close of the state's case and at the close of all of the evidence (L.F. 40, 42). Both motions were denied (Tr. 508, 513). He included this issue in his motion for new trial (L.F. 65) which was also denied (Tr. 573). This issue was properly preserved for review.

Standard of Review:

Because this appeal challenges the sufficiency of the evidence to support a verdict beyond a reasonable doubt, this Court, while not weighing the evidence, must scrutinize the entire record to assure that the evidence was substantial. *State v. Pierce*, 906 S.W.2d 729, 730 (Mo. App., W.D. 1995), citing *State v. Harvey*, 641 S.W.2d 792, 799 (Mo. App., W.D. 1982); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936).

The court must examine the elements of the crime and consider each in turn; reviewing the evidence in the light most favorable to the judgment; disregarding any contrary evidence; and granting the State all reasonable inferences from the evidence. *State v. Davis*, 219 S.W.3d 863, 866 (Mo. App., S.D. 2007), citing, *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). Contrary evidence and inferences are disregarded. *State v. Pike* 162 S.W.3d 464, 476 (Mo. banc 2005). While great deference is given to the trier of fact, *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998), [t]he Court may ‘not supply missing evidence or give the [State] the benefit of unreasonable, speculative, or forced inferences.’” *State v. Whalen*, supra at 184; *Bauby v. Lake*, 995 S.W.2d 10, 13 n.1 (Mo. App., E.D. 1999).

Facts:

Mr. Oliver was charged with two counts of the class A felony of sexual exploitation of a minor, § 573.023 (L.F. 11-12). The bases of the charges were that on November 6, 2005, he, knowing of its content and character, created child pornography

by photographing K.K. (Count I) and C.M. (Count II), nude participants, who were under the age of fourteen (L.F. 7).³

On November 6, 2005, Karen Misemer dropped her eight year old son K.K., and five year old son C.M. at Joey Oliver's home to play (Tr. 274-275). That evening, while she was bathing C.M., he mentioned that naked pictures had been taken while they were at the Olivers (Tr. 276). K.K. confirmed this, telling his mother that Joey's dad took pictures of them with their clothes off (Tr. 276).

Both boys said that Mr. Oliver had not touched them (Tr. 279).

Det. David Rozell obtained the contents of Mr. Oliver's computer hard drive using special software (Tr. 381, 383). The first place he looked, because this was an alleged pornography case, was in the deleted files (Tr. 381). While this data was no longer available to the user, it could be accessed by someone with the technical knowledge and proper software (Tr. 383-384).

Rozell found 27 photographs of three boys in the chip from Mr. Oliver's camera (Tr. 396). A digital camera chip holds the same information as a computer hard drive (Tr. 390). Not all of the photographs were complete, some had been written over, and all had been deleted and were no longer available to Mr. Oliver or any other user (Tr. 381,

³ §573.023.1 also criminalizes the production of child pornography, but Mr. Oliver was not charged with that offense. (See Appendix 4-7, the verdict directors for Counts I and II.)

396). The State introduced ten of the recovered photographs (Tr. 397). All of the photographs had been taken on November 6, 2005 (Tr. 402). Those photographs showed:

Exh. 7⁴ – all three boys⁵ with their shirts off.

Exh. 8 –the taller boy without his shirt.

Exh. 9 –the blond boy without his shirt and his hands in front of his crotch.

Exh. 10 – the blond with his hands on his hips, without a shirt.

Exh. 11 – all three boys; the boy with glasses has his pants down, exposing his genitals.

Exh. 12 –the taller boy sitting in a chair, pants down, exposing his genitals and a hand seen making a “V” sign over his head.

Exh. 13 – the boy with glasses, hands on hips, pants down, genitals exposed.

Exh. 14 –the taller boy standing with genitals exposed.

Exh. 15 –an unidentifiable boy, bending over with buttocks toward camera, pulling his cheeks apart to expose his anus.

Exh. 16 – another boy trying unsuccessfully to expose his anus.

⁴ The prosecutor indicated that he had handed Det. Rozell Exhibits 6 through 16 but then stated there were 10 photographs. There does not appear to be an Exh. 6.

⁵ The identity of the boys is not disclosed on the record. The jurors saw K.K., C.M. and J.O. testify so they would have recognized each boy in the photographs.

Mr. Oliver's computer was not networked to any other computer (Tr. 489). After initially stating that Mr. Oliver's computer did not have the software needed to retrieve deleted data, Rozell admitted that he had not checked, but said that he did not think the necessary software was available in 2005 and Mr. Oliver's Kodak camera was "fairly old and fairly low-tech" (Tr. 497).

Analysis:

Due process requires that the State prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-364 (1970). This standard impresses upon the fact finder the need to reach "a subjective state of near certitude" of the guilt of the accused. *Jackson v. Virginia*, 443 U.S. 307, 315, (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318. No person can be deprived of liberty except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Id.*

A person commits the crime of sexual exploitation of a minor if, knowing of its content and character, such person photographs, films, videotapes, produces or otherwise creates obscene material with a minor or child pornography.

§ 573.023 1.

The jury was instructed in relevant part that in order to find Mr. Oliver guilty beyond a reasonable doubt, it had to find:

1. that the defendant created obscene material by photographing K.K and C.M.. as nude persons; and
2. that the material depicted a *sexual performance*; and
3. that such material had a person under the age of fourteen years as a participant of a *sexual performance*; and
4. that the defendant knew the person was under the age of fourteen; and
5. that the defendant at the time knew or was aware of the content and character of the material.

(L.F. 44, 47).⁶

The jury was instructed that in order to find the material “obscene”, it had to find that:

[a] the average person, applying contemporary community standards, would find its predominant appeal is to prurient interest in sex; and

[b] the average person, applying contemporary community standards, would find the material depicts or describes *sexual conduct* in a patently offensive way; and

[c] a reasonable person would find that the material lacks serious literary, artistic, political, or scientific value.

⁶ Instructions 6 and 8, the verdict directors for Counts I and II, are set out in full in the Appendix.

§ 573.010(9).

A “sexual performance” is any performance, or parts thereof, which includes *sexual conduct* by a child who is less than seventeen years of age.

§ 566.010 (31).

“Sexual conduct” requires a finding of an “actual or simulated, normal or perverted act of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification.

§ 573.010(14).

The photographs of K.K. and C.M. taken by Mr. Oliver were not obscene, as that word is defined in § 573.023. Nor do the photographs depict a sexual performance.

None of the photographs depict or describe sexual conduct, and

§ 573.023 does not criminalize photographing a nude child.

The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). Each word must be given meaning if possible. Related statutes are also relevant to further clarify the meaning of a statute. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999). If the plain language of a criminal statute is ambiguous, the statute is construed in favor of the defendant. *Id.*

There is a presumption that in passing laws, the legislature means to accomplish some legislative purpose. That presumption rests on the premise that the legislature may not be charged with doing a useless act. *State v. Salata*, 859 S.W.2d 728, 734 (Mo. App., W.D. 1993). Employing these principles to Mr. Oliver's case, it is clear that the legislature did not intend to prohibit photographing nude children in § 573.023. Nudity is not mentioned in § 573.023. That is because there was already a criminal statute prohibiting that conduct, § 568.060, abuse of a child. § 568.060 prohibits photographing or filming a child less than seventeen years old engaging in a prohibited sexual act. A "prohibited sexual act" means . . . nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction. §568.060.1(b)(1)., *State v. Helgoth*, 691 S.W.2d 281 (Mo. banc 1985).

The State could not prove the elements of sexual exploitation of a minor because Mr. Oliver did not commit that offense. The trial court's denial of Mr. Oliver's motions for judgment of acquittal on Counts I and II was erroneous. This Court should reverse Mr. Oliver's convictions and order his discharge from the sentences he received on Counts I and II.

III

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal at the end of the State's case and at the end of all of the evidence and in accepting the jury's guilty verdicts on Counts III and V, promoting child pornography, § 573.025, because the State did not prove that offense beyond a reasonable doubt, in violation of Mr. Oliver's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 10 of the Missouri Constitution, in that the State failed to produce any evidence that Mr. Oliver created any photographs depicting sexual conduct or that he had any intention to exhibit obscene material since there was no evidence that he sold, shared, or gave any internet image to any other person. Rather, he looked at these images alone, in the study of his own home.

The trial court erred in denying Mr. Oliver's motions for judgment of acquittal on Counts III and V because there was no evidence presented from which a reasonable juror could have found, beyond a reasonable doubt, that Mr. Oliver possessed the photographs of K.K. and C.M. or internet pornography with any intent other than to look at them himself, in the privacy of his home.

Preservation:

Mr. Oliver filed motions for judgment of acquittal at the close of the state's case and at the close of all of the evidence (L.F. 40, 42). Both motions were denied (Tr. 508,

513). He included this issue in his motion for new trial (L.F. 65) which was also denied (Tr. 573). This issue was properly preserved for review.

Standard of Review:

Because this appeal challenges the sufficiency of the evidence to support a verdict beyond a reasonable doubt, this Court, while not weighing the evidence, must scrutinize the entire record to assure that the evidence was substantial. *State v. Pierce*, 906 S.W.2d 729, 730 (Mo. App., W.D. 1995), citing *State v. Harvey*, 641 S.W.2d 792, 799 (Mo. App., W.D. 1982); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936).

The court must examine the elements of the crime and consider each in turn; reviewing the evidence in the light most favorable to the judgment; disregarding any contrary evidence; and granting the State all reasonable inferences from the evidence. *State v. Davis*, 219 S.W.3d 863, 866 (Mo. App., S.D. 2007), citing, *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). Contrary evidence and inferences are disregarded. *State v. Pike* 162 S.W.3d 464, 476 (Mo. banc 2005). While great deference is given to the trier of fact, *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998), [t]he Court may ‘not supply missing evidence or give the [State] the benefit of unreasonable, speculative, or forced inferences.’” *State v. Whalen*, supra, 49 S.W.3d at 184; *Bauby v. Lake*, 995 S.W.2d 10, 13, n.1 (Mo. App., E.D. 1999).

Facts:

When Rozell searched the hard drive of Mr. Oliver’s computer, he found images that appeared to be adult and child pornography (Tr. 407). All of these

images were found in Mr. Oliver's account (Tr. 410). Mr. Oliver would get up in the middle of the night and go to his office, where the computer was located (Tr. 345, 348, 349).

Rozell found that Mr. Oliver sought out male pornography sites (Tr. 413). He had bookmarked as "favorites," sites entitled "boy love" and "boys" (Tr. 414). Rozell could tell from the information contained in the hard drive the date a particular website or image had been "created" (pulled up on the computer), "modified" (changes made), and "accessed" (Tr. 436).

The state introduced twenty images recovered by Rozell (Tr. 455).⁷ There was no evidence presented as to the age of the boys or men depicted in the images, but some of them appear to be younger than 14 (Exh. 24, 35, 40). However, these three images are not obscene since they do not show sexual conduct. They are photographs of nude boys (Exh. 24, 35), and a boy undressing (Exh. 40).

By looking at the dates and times printed on the exhibits, it can be established that exhibits 23, 26, 28, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44 were either created or accessed on November 3, 2005 (Tr. 389). Rozell testified that some of these images were "flash" which meant they would just flash at the user, "like a stop sign or a 4-way stop" (Tr. 461).

⁷ Exh. 27 and Exh. 34 are duplicates, and Exh. 36 is a color image of Exh. 35, the same image in black and white.

Mr. Oliver's computer was not networked to any other computer (Tr. 489). The state did not present any evidence of e-mails, letters, etc. showing that Mr. Oliver sent, offered, or received any of these images to or from another user.

Analysis:

Due process requires that the State prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-364 (1970). This standard impresses upon the fact finder the need to reach "a subjective state of near certitude" of the guilt of the accused. *Jackson v. Virginia*, 443 U.S. 307, 315, (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318. No person can be deprived of liberty except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Id.*

A person commits the crime of promoting child pornography when, knowing of its content and character, such person possesses with the intent to promote or promotes obscene material that has a child as one of its participants or portrays what appears to be a child as a participant or observer of *sexual conduct*.

§ 573.025 (emphasis added).

A child is any person under the age of fourteen. § 573.010(1).

"Sexual conduct" means an "actual or simulated, normal or perverted act of human masturbation; deviate sexual intercourse; sexual intercourse; or physical

contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification.

§ 573.010(14).

Promote means "to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same, by any means including a computer.

§ 573.010(12).

Obscene has the same meaning in § 573.025 as in § 573.023. § 573.010(9).

The jury was instructed in relevant part that in order to find Mr. Oliver guilty beyond a reasonable doubt on Counts III and V, it had to find:

- 1) the defendant possessed with the intent to exhibit material, consisting of an image stored on a computer chip, and
- 2) the material was obscene; and
- 3) the material portrayed a person under the age of fourteen years as a participant in sexual conduct, and
- 4) the defendant at the time knew or was aware of the content and character of the material.(L.F. 50).

The verdict director for Count V was identical except in the first finding, the jury had to find that the defendant possessed with the intent to exhibit material, consisting of an image stored on a computer.

The State failed to introduce any evidence from which a reasonable juror could find, beyond a reasonable doubt, that any of the photograph of the boys showed sexual conduct, or that Mr. Oliver had the intent to “exhibit” the photographs of K.K. and C.M., or the images pulled from the internet.

None of the photographs taken by Mr. Oliver showed either C.M. or K.K. in an act of sexual conduct. The single photograph of a boy bending over with his back to the camera and pulling his buttocks apart to expose his anus does not fall within the definition of sexual conduct. The word “anus” is nowhere in the definition of sexual conduct. Therefore Mr. Oliver cannot be guilty of promoting child pornography.

In addition, Mr. Oliver had deleted the photographs he took of K.K. and C.M. before the police seized his camera chip (Tr. 396). He did not have the sophisticated software necessary to retrieve those photographs even if he tried (Tr. 381, 384, 478, 495-497). The State’s evidence failed to explain how Mr. Oliver could intend to exhibit photographs that no longer existed.

As for the internet images, the State failed to produce any evidence that would prove, or allow a reasonable inference, that Mr. Oliver was doing anything more than looking at pornography on his own computer, in his own home, while he was alone.

In its opening argument, the prosecutor spent very little time discussing Counts III and V. But he ended with:

He promoted it. He promoted it by exhibiting it on his computer. Just like any business you patronize or go to the business of, keeps it going, promotes it” (Tr. 547).

The prosecutor’s argument confuses the title of the offense, promoting child pornography, with the first essential element of that offense: that Mr. Oliver *possessed with the intent to exhibit* material, consisting of an image stored on a computer chip or in a computer’s harddrive (L.F. 50, MAI-CR3d 327.12) (emphasis added).

The issue was not what “promote” means. Under the instruction given, the state had to prove that Mr. Oliver’s intent was to “exhibit” the internet images. So the question is, what does “exhibit” mean?

The word “exhibit” is not defined by § 573.010. Mr. Oliver has been unable to find any case law defining “exhibit” for purposes of § 573.025. Therefore, this Court must “ascertain and give effect to the legislative intent by considering the language used in its plain and ordinary meaning. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). The plain and ordinary meaning of statutory language is generally derived from the dictionary. *State v. Carson*, 941 S.W.2d 518, 521 (Mo. banc 1997). Related statutes are also relevant to further clarify the meaning of a statute. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999). If the plain language of a criminal statute is ambiguous, the statute is construed in favor of the defendant. *Id.*

The Missouri legislature has used the term “exhibited” in a number of statutes, both civil and criminal. For example, § 571.030.1(4) prohibits any person from *exhibiting*, in the presence of one or more persons, any weapon, see, *State v. Hampton*, 580 S.W.2d 552, 553 (Mo. App., E.D. 1979); § 542.281.1 permits law enforcement agents to apply for a search warrant for obscene matter being held for . . . *exhibition*; § 306.100.2 requires any vessel under way from sunset to sunrise to *exhibit* navigation lights.

In *State v. Bouse*, 150 S.W.3d 326 (Mo. App., W.D. 2004), the issue was the meaning of “expose”. *Id.* The court noted that one definition of “expose” was to “exhibit. *Id.* at 329. Under the dictionary definition, “exhibit” and “display” are synonyms for “expose.” *Id.* Another dictionary defines “exhibits” as “to present to view; to show or display outwardly especially by visible signs or actions; to show publicly especially for purposes of competition or demonstration. Merriam-Webster On-Line Dictionary and Thesaurus.

Based on the obvious requirements of the statutes mentioned above, and the dictionary definitions, the legislature did not intend §573.025 to prohibit one person from sitting in front of a computer screen in his own home, looking at pornography. If what he was looking at was adult pornography, there is no law against it. If it was child pornography, then he may be guilty of possession of child pornography, § 573.037, but he is not guilty of promoting child pornography in the first degree.

An examination of the prosecutor's opening argument reveals that the State understood that Mr. Oliver was not guilty of promoting child pornography. The state's opening argument began:

Ladies and gentlemen, Robert Mike Oliver is an amateur child pornographer. Maybe not for everyone's eyes. He's not the Larry Flint, he's not out there selling magazines. *At least for his own consumption*, this defendant is an amateur child pornographer.

(Tr. 529) (emphasis added).

The jury was obviously confused. During its deliberations, it asked the trial court, "[r]egarding Count 3, verbage, 'possessed with the intent to exhibit material . . . ' versus verdict form 'guilty of promoting . . . ' Does the meaning of promoting carry the same definition as intent to exhibit?" (Tr. 568). The question was not answered, and one half an hour later the jury returned, finding Mr. Oliver guilty on all four counts.

The State failed to produce any evidence that Mr. Oliver's intent was to exhibit either the photographs of K.K. and C.M. or the internet images he had stored in his camera chip or his hard drive. The trial court erred in denying Mr. Oliver's motions for judgment of acquittal, in accepting the jury's guilty verdicts, and in sentencing Mr. Oliver on Counts III and V.

This Court should reverse Mr. Oliver's convictions for promoting child pornography and discharge him from those sentences.

CONCLUSION

For the reasons set out in Point Relied On and Argument I, Mr. Oliver respectfully requests that this Court reverse his convictions and remand the case for a new trial with an order that the evidence illegally seized be suppressed.

For the reasons set out in Point Relied On and Argument II, Mr. Oliver respectfully requests that this Court reverse his convictions for sexual exploitation of a minor as charged in Counts I and II, and discharge him from those sentences.

For the reasons set out in Point Relied On and Argument III, Mr. Oliver respectfully requests that this Court reverse his convictions for promoting child pornography as charged in Counts III and V, and discharge him from those sentences.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 12,184 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, updated in March, 2009. According to that program, these disks are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of March, 2009, to Shaun Mackelprang, Chief, Criminal Division, Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Nancy A. McKerrow

APPENDIX

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