

No. SC89888

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT M. OLIVER,

Appellant.

Appeal from Taney County Circuit Court
Thirty-eighth Judicial Circuit
The Honorable Mark Estile Orr, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 4

JURISDICTIONAL STATEMENT 7

STATEMENT OF FACTS 8

ARGUMENT..... 10

 Point I 10

 A. Pertinent Facts 11

 B. Standard of Review 12

 C. The camera, media chip, and hard drive were lawfully seized pursuant to the consent of Appellant’s wife because she had joint access to the items. 12

 D. Conclusion 22

 Point II 23

 A. Standard of Review 23

 B. There was sufficient evidence for a reasonable jury to find that the photographs showed the victims engaged in sexual conduct. 23

 C. Conclusion 28

 Point III..... 29

 A. Standard of Review 29

 B. There was sufficient evidence to demonstrate that Appellant possessed child pornography with the intent to exhibit it. 30

 C. Conclusion 35

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 37

APPENDIX 38

TABLE OF AUTHORITIES

Cases

<i>Georgia v. Randolph</i> , 547 U.S. 103 (2006).....	passim
<i>Illinois v. Rodriguez</i> , 497 U.S. 177 (1990).....	16
<i>State v. Bouse</i> , 150 S.W.3d 326 (Mo. App. W.D. 2004).....	31, 37
<i>State v. Butler</i> , 676 S.W.2d 809 (Mo. banc 1984).	22
<i>State v. Chaney</i> , 967 S.W.2d 47 (Mo. banc 1998).	26, 27, 34, 39
<i>State v. Edwards</i> , 116 S.W.3d 511 (Mo. banc 2003).	13
<i>State v. Eisenhouer</i> , 40 S.W.3d 916 (Mo. banc 2001).	35
<i>State v. Engel</i> , 859 S.W.2d 822 (Mo. App. W.D. 1993).	22
<i>State v. George</i> , 717 S.W.2d 857 (Mo. App. S.D. 1986).....	36, 37
<i>State v. Glass</i> , 136 S.W.3d 496 (Mo. banc 2004).	14
<i>State v. Goff</i> , 129 S.W.3d 857 (Mo. banc 2004).	8, 13
<i>State v. Keon</i> , 468 S.W.2d 625 (Mo. 1971).....	31
<i>State v. Mahsman</i> , 157 S.W.3d 245 (Mo. App. E.D. 2004).	23
<i>State v. McIntyre</i> , 63 S.W.3d 312 (Mo. App. W.D. 2001).....	28, 29, 35, 37
<i>State v. Moore</i> , 972 S.W.2d 658 (Mo. App. S.D. 1998).....	14
<i>State v. Perry</i> , 275 S.W.3d 237 (Mo. banc 2009).	28, 35
<i>State v. Rodden</i> , 728 S.W.2d 212 (Mo. banc 1987).	35
<i>State v. Salata</i> , 859 S.W.2d 728 (Mo. App. W.D. 1993).....	30
<i>State v. Simmer</i> , 772 S.W.2d 372 (Mo. banc 1989).....	29, 30
<i>State v. Smith</i> , 966 S.W.2d 1 (Mo. App. W.D. 1997).	14

<i>State v. Tisius</i> , 92 S.W.3d 751 (Mo. banc 2002).....	35
<i>State v. Willis</i> , 239 S.W.3d 198 (Mo. App. S.D. 2007).....	34
<i>United States v. Henderson</i> , 536 F.3d 776 (7th Cir. 2008).....	17, 18, 20
<i>United States v. Hudspeth</i> , 518 F.3d 954 (8th Cir. 2008).....	16, 17, 18
<i>United States v. James</i> , 353 F.3d 606 (8th Cir. 2008).....	14, 15
<i>United States v. Matlock</i> , 415 U.S. 164 (1974).....	16
<i>United States v. Murphy</i> , 516 F.3d 1117 (9th Cir. 2008).....	19, 20, 21
<i>United States v. Place</i> , 462 U.S. 696 (1983).....	21
<i>United States v. Smith</i> , 27 F. Supp. 2d 1111 (C.D. Ill. 1998).....	14
<i>Winfrey v. State</i> , 242 S.W.3d 723 (Mo. banc 2008).....	27, 35

Statutes

Sec. 556.061, RSMo 2000.....	27, 28
Sec. 566.083, RSMo 2000.....	37
Sec. 566.226, RSMo Supp. 2007.....	8
Sec. 568.060, RSMo 2000.....	28, 29, 30
Sec. 568.080, RSMo Supp. 1984.....	36
Sec. 573.010, RSMo 2000.....	27, 28, 35
Sec. 573.023, RSMo 2000.....	passim
Sec. 573.025, RSMo 2000.....	7, 8, 34

Other Authorities

The American Heritage Dictionary of the English Language (3d ed. 1996).....	36
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Rules

Supreme Court Rule 83.04 7

Constitutional Provisions

Mo. Const. art. V, § 10 7

JURISDICTIONAL STATEMENT

This is an appeal from a conviction for two counts of sexual exploitation of a minor, § 573.023, RSMo 2000, and two counts of first-degree promoting child pornography, § 573.025, RSMo 2000, in the Circuit Court of Taney County, and for which Appellant was sentenced to two terms of fifteen years incarceration and two terms of ten years incarceration, to be served concurrently. After the Court of Appeals, Southern District, affirmed the trial court's judgment as to all but one count of promoting child pornography, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

Appellant, Robert Oliver, was charged with two counts of sexual exploitation of a minor, § 573.023, RSMo 2000, and six counts of first degree promoting child pornography, § 573.025, RSMo 2000 (L.F. 1-2).¹ Appellant was tried by jury on July 30 through August 1, 2007, before Judge Mark Orr (L.F. 4-5). Viewed in the light most favorable to the verdict, the evidence at trial showed:

On November 6, 2006, two brothers, K.K. and C.M.,² went over to play at a friend's house (Tr. 274). K.K. was eight-years-old and C.M. was five-years-old (Tr. 278). Appellant, the friend's father, took some pictures of the boys with a digital camera (Tr. 293). Several of the pictures showed the boys with their pants pulled down and their genitals exposed (State's Exhibits 11-14). One picture showed a boy bending over and using his hands to manually separate his buttocks to expose his anus to the camera (State's Exhibit

¹ The record on appeal includes the transcript of the hearing on the motion to suppress (Tr. 9-90), the State's exhibits from that hearing (State's Hearing Exhibits 1, 2, & 3), the trial transcript (Tr. 91-589), and a number of the State's exhibits from trial (State's Exhibits 11-16, & 23-44). Facts from the hearing on that motion have been included in the statement of facts because one of the points involves the motion to suppress and courts consider facts from both the hearing on the motion to suppress and trial in evaluating such claims. *State v. Goff*, 129 S.W.3d 857, 861-862 (Mo. banc 2004).

² Consistent with the goals of § 566.226, RSMo Supp. 2007, Respondent will refer to the victims as K.K. and C.M.

15). A second picture showed another boy bending over and attempting to manually separate his buttocks to expose his anus to the camera (State's Exhibit 16). After taking the pictures, Appellant showed the pictures to the boys on his computer screen (Tr. 284).

That evening, when the boys returned home, C.M. told his mother that Appellant "had taken naked pictures" of the boys (Tr. 276). After speaking with her sister, the victims' mother called the police (Tr. 277). A detective and two deputies from the Taney County Sheriff's department along with a DFS worker went to Appellant's home to investigate (Tr. 300, 346). When Appellant answered the door, the detective explained the allegations to him (Tr. 300-301). Appellant admitted taking pictures of the boys, but said that it was just their bellies, and lifted up his shirt to demonstrate for the detective (Tr. 301). The detective asked if Appellant had a digital camera, and Appellant replied that he did (Tr. 301). Appellant went back to his office and picked up the camera to show it to the detective (Tr. 301). The detective asked if he could search the computer and the camera (Tr. 303). Appellant became upset and stated that they would need a warrant to do that (Tr. 303). The deputy called back to his office and asked another deputy to begin work on a warrant application (Tr. 48).

During this time, the DFS worker was talking to Appellant's wife in the bedroom (Tr. 29). She told Appellant's wife that they "had three options: He could leave the house, we could stay. We could leave the house; he could stay. Or they could take the kids." (Tr. 30). Appellant decided to leave (Tr. 30).

After Appellant left, the officer asked Appellant's wife if he could take the computer and the camera as well as some digital storage devices (Tr. 304; State's Hearing Exhibit 3). She agreed and signed a consent to search form (Tr. 304). The officers later obtained a

warrant to conduct an examination of the contents of the computer, camera, and other storage devices (State's Hearing Exhibit 1). The memory card from the camera contained twenty-seven images of the victims and Appellant's son in various stages of undress (Tr. 396). The hard drive of Appellant's computer contained numerous images of nude people engaged in various sexual activities or in sexual poses (Tr. 405; State's Exhibits 23-44). These pictures came from internet sites with names like "boy love" and "fathers doing sons" (Tr. 413-414).

At the close of the evidence, the prosecutor dismissed Counts IV, VI, VII, and VIII "in light of the testimony given" at trial (Tr. 526-527). The jury convicted Appellant of the remaining counts, and this appeal followed (L.F. 74-76).

ARGUMENT

Point I

The trial court did not err in denying Appellant's motion to suppress the digital camera, the media chip, the computer hard drive, the images retrieved from those devices, and the detective's testimony regarding those exhibits because the camera, media chip, and hard drive were seized pursuant to the valid consent of Appellant's wife, and the images were seized pursuant to a valid warrant.

Appellant, relying on *Georgia v. Randolph*, 547 U.S. 103 (2006), argues that the seizure of his digital camera, his media chip, and his hard drive violated the Fourth Amendment because his wife's consent was not effective in light of his prior refusal (App. Sub. Br. 24). This argument rests on an overbroad reading of *Randolph*. The Court in *Randolph* limited the case to its facts, *i.e.*, situations where the objecting co-tenant is *both*

present *and* refusing to consent to the search or seizure. Since Appellant had left the home when his wife consented to the seizure, *Randolph* is inapplicable to this case.

A. Pertinent Facts

After the victims reported Appellant's actions, a detective from the Taney County Sheriff's Department went to Appellant's home accompanied by two deputies and a DFS worker (Tr. 22). Appellant and his wife came to the door (Tr. 22). The officers explained their purpose in being there and then separated Appellant and his wife for questioning (Tr. 22).

Appellant told the detective that he had photographed the boy's bellies, and the detective asked to see Appellant's camera (Tr. 41). Appellant took the officers to his office, where he sat down in the chair and showed them a digital camera (Tr. 41). The computer, digital storage devices, and camera belonged to Appellant (Tr. 28-29). The items were kept in an office that Appellant shared with his wife (Tr. 31-32). Appellant's wife occasionally used the computer (Tr. 345). There was a user account in her name on the computer, but she would mostly use Appellant's account when she used the computer (Tr. 345, 409-410). When the detective asked if he could look at the camera and the computer, Appellant "became upset and told [him] that [he] would have to have a search warrant." (Tr. 42). The group went back to the living room, and the detective called the sheriff's department to have another detective begin work on a warrant application (Tr. 48).

The DFS worker told Appellant and his wife that they had three options (Tr. 29-30). The options were either 1) Appellant could leave the home, 2) Appellant's wife and the

children could leave the home, or 3) DFS would take protective custody of the children (Tr. 30). Appellant chose to leave (Tr. 30).

The detective then asked Appellant's wife if he could take the computer (Tr. 23). She consented, signed a consent to search form, and was given a receipt for the items taken (Tr. 23-25).

Later in the investigation, a second detective participating in the investigation applied for a search warrant to conduct a search of the contents of the items seized from Appellant's office (State's Hearing Exhibit 2). The warrant application contained information about computer searching generally, and a narrative relating the boys' reports (State's Hearing Exhibit 2). The judge issued a search warrant, and several images were retrieved from the computer hard drive and the media chip from the camera (State's Hearing Exhibit 1).

B. Standard of Review

Review of the denial of a motion to suppress is limited to a determination of "whether the decision is supported by substantial evidence." *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). The evidence is viewed in the light most favorable to the trial court's ruling, and the trial court's ruling will be overturned only where it is clearly erroneous. *Id.* Moreover, the appellate court will defer to the trial court's credibility determinations. *Id.* The appellate court will consider both evidence adduced at the hearing on the motion to suppress as well as evidence adduced at trial. *State v. Goff*, 129 S.W.3d 857, 861-862 (Mo. banc 2004).

C. The camera, media chip, and hard drive were lawfully seized pursuant to the consent of Appellant's wife because she had joint access to the items.

A warrantless search or seizure does not violate the Fourth Amendment if it is “made with proper voluntary consent.” *State v. Moore*, 972 S.W.2d 658, 660 (Mo. App. S.D. 1998); *State v. Glass*, 136 S.W.3d 496, 516 (Mo. banc 2004). Consent must be given voluntarily by a person with authority to do so. *Moore*, 972 S.W.2d at 660. “A third party with joint access or control of the premises sought to be searched has authority to consent to a search, and that consent is valid against any absent persons with whom that authority is shared.” *State v. Smith*, 966 S.W.2d 1, 7 (Mo. App. W.D. 1997). Authority to consent to search is based on “mutual use and joint access or control of property by an individual, not property law.” *Moore*, 972 S.W.2d at 661. This same framework has been used to analyze the search of files stored on computers. *United States v. Smith*, 27 F. Supp. 2d 1111 (C.D. Ill. 1998); *United States v. James*, 353 F.3d 606 (8th Cir. 2008).

In the context of computer searches, the distinction between seizure of the items and searching the contents of the files has been implicitly recognized in *United States v. James*, 353 F.3d 606 (8th Cir. 2008). In that case, the defendant had entrusted his computer discs to a friend but had marked them “DANGER PERSONAL PRIVATE.” *Id.* at 611. The police asked the friend for permission to look at the discs and discovered child pornography. *Id.* at 611. The court ultimately held that the search was unreasonable, in part because of the distinction between the authority to have possession of the physical discs, which the friend did have, and authority to view the contents of those discs, which the friend did not have, based on the markings on the discs. *Id.* at 614-615. Given that the court found that the friend had the authority to store the discs, the result would have been different if the police had merely taken physical custody of the discs.

Here, Appellant's wife clearly had the authority to consent to the physical seizure of the items pending the issuance of a warrant to search the files and media stored on those devices. Appellant and his wife shared the office (Tr. 31-32). She was allowed to use the computer, and when she did she used Appellant's account (Tr. 345). She stated that while she was concerned about keeping her children, the concern she felt did not influence her decision about whether to consent to the police seizure of the computer, camera, and electronic media storage equipment (Tr. 35). Appellant had already voluntarily left the home when his wife told the police they could take the items (Tr. 30). Appellant's wife had authority to consent to the police seizure of the computer, camera, and storage devices, and she voluntarily did so. Thus, the seizure of those items did not violate the Fourth Amendment.

Contrary to Appellant's assertions, this conclusion is not changed by the fact that Appellant had previously refused to consent to a search. Appellant voluntarily left the premises before the police asked his wife for consent to seize the digital equipment. While it is true that the consent of a co-occupant is not valid in the face of a present non-consenting co-occupant, *Georgia v. Randolph*, 547 U.S. 103, 120 (2006), this rule does not apply where the non-consenting co-occupant is absent. The court in *Randolph* noted the limitations of the rule, and even affirmed previous cases where the objecting co-tenant was close by. *Id.* at 121 (citing *United States v. Matlock*, 415 U.S. 164 (1974); *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). The court stated:

so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible

objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission where there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Randolph, 547 U.S. at 121-122.

The federal courts have relied on this reaffirmation of *Matlock* and *Rodriguez* to deny claims similar to the one Appellant raises here. *United States v. Hudspeth*, 518 F.3d 954, 956-957 (8th Cir. 2008); *United States v. Henderson*, 536 F.3d 776, 780 (7th Cir. 2008). In *Hudspeth*, child pornography was found on the defendant's business computer and the defendant was arrested. 518 F.3d at 955. The police asked the defendant if they could search his home computer and he refused. *Id.* After arresting the defendant, the police went to the defendant's home and requested permission from his wife which she gave. *Id.*

The facts in *Henderson* were similar. In that case, the police arrived at the scene of a domestic disturbance and entered the home with the permission of the defendant's wife and son. 536 F.3d at 777. The defendant ordered them out, but they arrested him. *Id.* After the defendant had been transported from the scene, the police requested permission to search the home from the defendant's wife. *Id.* She granted consent, and the police found contraband. *Id.*

In both *Henderson* and *Hudspeth*, the court of appeals found that the search pursuant to the wife's consent did not result in a Fourth Amendment violation. 536 F.3d at 783; 518 F.3d at 961. They based their decision on the narrowness of the holding in *Randolph*, and the Court's explicit reaffirmation of *Matlock* and *Rodriguez*. 536 F.3d at 780; 518 F.3d at

956-957. Both courts found there to be a dual requirement of presence *and* objection. The *Hudspeth* court stated that “it was Randolph’s *physical presence* and *immediate objection* to Mrs. Randolph’s consent that distinguished *Randolph* from prior case law. 518 F.3d at 959 (emphasis in original). The *Henderson* court reached the same conclusion by relying on Justice Breyer’s concurrence in *Randolph*: “The Court’s opinion does not apply where the objector is not present and objecting.” 536 F.3d at 781 (quoting *Georgia v. Randolph*, 547 U.S. 103, 126 (2006) (Breyer, J., concurring)).

Henderson also addressed the specific situation where the objecting co-tenant was removed from the scene before the wife gave her consent. The court reasoned that so long as the arrest or removal of the objecting co-tenant was not pretextual, *i.e.*, for the sake of avoiding his refusal, the operative fact was that the objector was no longer at the scene. 536 F.3d at 781. They noted that a legitimate arrest is not pretextual in this analysis. *Id.* at n.5.³ *Hudspeth* and *Henderson* thus clarify the limits of the holding in *Randolph*: to warrant

³ Appellant attempts to distinguish this case by pointing out that the police in *Henderson* were responding to an emergency (App. Sub. Br. 30-31). In the present case, while it is true that it was not someone at Appellant’s home who called the police, the police were still responding to an emergency. The officers had received reports of child sexual abuse and arrived at the scene with a DFS worker to protect Appellant’s own son who had been in some of the pictures (Tr. 300, 346). Given the seriousness of the crimes and the potential for harm to Appellant’s son if officials had delayed, Appellant’s attempt to distinguish *Henderson* is unavailing.

suppression of items searched or seized in this type of situation, the record must show both refusal of consent to search and the objector's presence at the scene, and the reason for the defendant's absence is immaterial, so long as the police did not orchestrate that absence for the purpose of avoiding that refusal.

In the present case, the police did not remove Appellant for the sake of avoiding his refusal. It was the DFS worker, and not the police, who suggested that Appellant could leave the home (Tr. 30). She did so, not for the purpose of bypassing Appellant's refusal to consent to the search, but for the safety of the children. This goal is demonstrated by the fact that Appellant was given options as to how to proceed (Tr. 30). Two of these options would have allowed him to stay in the home, but what they all shared was separating Appellant from the children (Tr. 30). After being given those options, Appellant "volunteered to leave" (Tr. 50). Thus, the police did not remove Appellant for the sake of avoiding his objection, and so the rule in *Randolph* does not apply.

Appellant's reliance on *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008), is misplaced for two reasons. First, that case was improperly decided. In *Murphy*, the defendant was living in a storage unit which belonged to another and operating a methamphetamine lab. 516 F.3d at 1119. When the defendant answered the door, the police saw the lab components and requested permission to search. *Id.* The defendant refused. *Id.* The police arrested the defendant and began working on a warrant application while maintaining surveillance of the storage unit. *Id.* at 1120. A short while later, the owner of the storage unit arrived and the police requested his permission to search the storage unit. *Id.*

He consented. *Id.* The Ninth Circuit held that the defendant's refusal made this subsequent consent invalid. *Id.*

That holding does not comport with the express holding in *Randolph*. *Randolph* explicitly reaffirmed cases where the non consenting co-tenant was close by. 547 U.S. at 121. The Court even recognized that they were drawing a "fine line." *Id.* The decision in *Murphy* does not take into account these limitations.

This conclusion is supported by the reasoning in *Henderson*. The *Henderson* court also criticized the decision in *Murphy* because it read the case too broadly. The *Henderson* court put it this way:

the Ninth Circuit[] interprets *Randolph* as not confined to its circumstances, that is, as *not* limited to a disputed consent by two contemporaneously present residents with authority. On this broader reading of *Randolph*, a one-time objection by one is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises. We think this extends *Randolph* too far. *Randolph* itself . . . "expressly disinvites" any reading broader than its specific facts.

536 F.3d at 783. *Murphy* is an anomaly and should not be followed.

Appellant's reliance on *Murphy* is also misplaced because that case is distinguishable. In *Murphy*, the defendant was arrested and forcibly removed from the scene. 516 F.3d at 1119. Here, Appellant voluntarily left the scene (Tr. 30). While Appellant characterizes this as police action designed to circumvent his refusal, Appellant was given options that would have allowed him to stay in the home (Tr. 30). Even if *Murphy* was properly decided, the

force used to remove the defendant in *Murphy* clearly separates that case from the present case.

Finally, even if Appellant's refusal vitiated the consent later given by his wife under a broader reading of *Randolph*, the police did not need her consent to seize the camera, computer, and digital storage devices pending the issuance of the warrant. Where officials have reasonable suspicion that a container holds evidence of a crime, but have not secured a warrant, they may seize the item pending the issuance of a warrant. *United States v. Place*, 462 U.S. 696, 706 (1983). The justification for this rule is that the risk of possible destruction of evidence outweighs the property interest in possession of the item. *Id.* at 701-702.

Here, every time the computer was used, evidence could have been destroyed. Data regarding when the pictures were viewed or modified is very easily changed (Tr. 378). The detective who searched the computer took special care to avoid changing any of the files (Tr. 377-378). The potential for destruction of the digital evidence justified the seizure of the computer, camera, and storage devices even without the consent of Appellant's wife.

In any event, the evidence seized was admissible under the doctrine of inevitable discovery. The doctrine of inevitable discovery "allows illegally obtained evidence to be admitted if it would have inevitably been discovered by lawful means." *State v. Butler*, 676 S.W.2d 809, 812 (Mo. banc 1984). If the State proves that a valid search warrant could have been obtained, the inevitable discovery doctrine will support the admission of the evidence that was obtained through allegedly illegal means. *State v. Engel*, 859 S.W.2d 822, 827-828 (Mo. App. W.D. 1993).

In this case, there is affirmative evidence that a valid search warrant would have been obtained if Appellant's wife had not consented. The officers had the victim's reports of Appellant's wrongdoing, and Appellant admitted taking some of the pictures (Tr. 41). The police even began the warrant application process before Appellant left the home (Tr. 48). In fact, the detective testified that he would not have left the house without the camera and the computer (Tr. 50). If Appellant had remained in the home, the police would simply have continued the warrant application process and the camera, computer, and storage devices would have been collected pursuant to that warrant.

Finally, Appellant argues that the warrant permitting the search of the files on the computer, camera, and storage devices was irrevocably tainted by the officer's use of the serial numbers from the devices in the warrant application because that information was the result of an unlawful search (App. Br. 30-31). Even if the discovery of those serial numbers violated the law, the evidence would not have to be suppressed in this case. If a warrant application contains facts that were gained improperly, the remedy is not automatically the suppression of the evidence obtained during the search. *State v. Mahsman*, 157 S.W.3d 245, 251 (Mo. App. E.D. 2004). Rather, the illegally obtained evidence in the affidavit is discounted and the court considers whether "setting aside all tainted allegations, the independent and lawful information stated in the affidavits suffices to show probable cause." *Id.*

Here, the only information contained in the warrant application that could be considered tainted was the serial numbers on the electronics (State's Hearing Exhibit 2). The remainder of the affidavit was general information about computer searches and child

pornography (State's Hearing Exhibit 2). At the end, it contained a paragraph describing the victim's accounts (State's Hearing Exhibit 2). The paragraph contained information that came from talking with the victims' mother, not from the seizure and search of Appellant's property. That paragraph stated

On 11-06-05, members of the Taney County Sheriff's Dept responded to a location in Taney County, Missouri and took a criminal report relating to photographs being taken of at least three juvenile males under the age of 18.

The photographs depicted the juveniles in various stages of undress, and depicted exposed genitals of the juveniles. During an interview with the victims, they advised they went to a friend's house to play. They disclosed an adult male (friend's Father) later identified as; [sic] Robert Oliver took numerous pictures of them with their pants pulled down and genitals exposed. This occurred on or about 11-06-05 in an office area of the Oliver home. Both juveniles advised another juvenile male (suspect's son) also had photographs taken of him. 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.

(State's Hearing Exhibit 2). This was sufficient for the court to make a determination that there was a fair probability that Appellant's camera and computer contained evidence of a crime. Therefore, the warrant allowing the search that disclosed the pictures was valid, and so the search did not violate the Fourth Amendment.

D. Conclusion

The trial court did not clearly err in denying Appellant's motion to suppress the evidence seized in his home and during the search of his computer files. Appellant's wife had authority to consent to the initial seizure because she shared the office and computer with Appellant. She voluntarily consented to that seizure after Appellant chose to leave. Even if her consent was vitiated by Appellant's prior refusal, those items were admissible under the doctrine of inevitable discovery because the officers would have merely continued the process of applying for a warrant. Appellant's first point should be denied.

Point II

The trial court did not err in denying Appellant’s motions for judgment of acquittal on Count I and Count II, because there was sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that Appellant created obscene material in that State’s Exhibits 15 and 16 depict the child victims engaged in sexual conduct, *i.e.*, the child victims exhibiting or attempting to exhibit their anuses.

Appellant argues that the evidence is insufficient to support his convictions on Counts I and II because the pictures do not show sexual conduct or a sexual performance (App. Sub. Br. 16). This argument fails because the poses of the children, *i.e.*, bending over and manually separating their buttocks to expose their anuses, come squarely within the statutory definitions of sexual conduct.

A. Standard of Review

When reviewing a claim that the evidence was insufficient to support the conviction, appellate courts consider “whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.” *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). Additionally, the appellate court will “accept[] as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence and disregard[] all evidence and inferences to the contrary.” *Id.*

B. There was sufficient evidence for a reasonable jury to find that the photographs showed the victims engaged in sexual conduct.

The resolution of this point requires the court to address the meaning of “sexual conduct” under §§ 556.061(29), 573.010, and 573.023 RSMo 2000. When construing

statutes, courts will give effect to the legislature’s intent by employing the plain, ordinary meaning of the statutory language. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). When the language is not clear, “[r]elated statutes are also relevant to further clarify the meaning of a statute.” *Id.* The conduct at issue here—a young boy bending over and manually separating his buttocks to expose his anus—is clearly encompassed by the meaning of sexual conduct when that term is interpreted in light of the related statutes.

Counts I and II charged Appellant with sexual exploitation of a minor by “creating child pornography” under § 573.023, RSMo 2000 (L.F. 11). Child pornography is any obscene material or performance depicting sexual conduct, sexual contact, or a sexual performance, as these terms are defined in section 566.061, RSMo, and which has as one of its participants or portrays as an observer of such conduct, contact, or performance a child under the age of eighteen § 573.010, RSMo 2000. Material is obscene if it meets three requirements: it must appeal “to prurient interest in sex”; it must depict “sexual conduct in a patently offensive way”; and it must lack “serious literary, artistic, political or scientific value.” § 573.010(9), RSMo 2000. Sexual conduct includes “physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or the breast of any female person in an act of apparent sexual stimulation or gratification” § 556.061(29), RSMo 2000.

Another statute which criminalizes this type of conduct is § 568.060, RSMo 2000, which describes the crime of abuse of a child. That statute defines nudity as a sexual act “if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.”

§ 568.060.2, RSMo 2000. Whether an act is done for the purpose of sexual gratification may be inferred from “the circumstances of the particular case.” *State v. Perry*, 275 S.W.3d 237, 248 (Mo. banc 2009). That purpose may be inferred from the nature of the act and the fact that the defendant was alone with the victim or victims. *State v. McIntyre*, 63 S.W.3d 312, 315-316 (Mo. App. W.D. 2001).

Here, the pictures clearly depicted “physical contact with a person’s . . . unclothed . . . buttocks.” § 556.061(29), RSMo 2000. Each boy was bending over, touching his unclothed buttocks (Tr. 403; State’s Exhibits 15 and 16). One boy manually separated his buttocks to expose his anus (Tr. 403; State’s Exhibit 15). That this was an act of “apparent sexual stimulation” is demonstrated by the context in which the pictures were taken. The photographs were created in the office where Appellant kept other digital pornography (Tr. 357, 404-405). Also, Appellant was alone with the victims when the photographs were taken (Tr. 274, 293). Thus, there was sufficient evidence for the jury to find that the pictures depicted sexual conduct. *McIntyre*, 63 S.W.3d at 315-316.

Appellant’s argument that these photographs do not depict sexual conduct rests on the implicit assumption that such conduct requires physical contact by another person. This is made clear by his statement that the statute “does not criminalize photographing a nude child.” (App. Sub. Br. 44). But sexual conduct does not require another party to touch the individual engaged in the sexual conduct. Again, reference to the crime of abuse of a child is helpful. A person commits the crime of abuse of a child if they photograph or film a child involved in a prohibited sex act. § 568.060.1(2), RSMo 2000. A prohibited sex act can be “performed or engaged in either with any other person or alone.” § 568.060.2, RSMo 2000.

A pose for a camera is a sex act where that pose is calculated to arouse the sexual desires of any person.

This conclusion is supported by this Court's holding in *State v. Simmer*, 772 S.W.2d 372, 374 (Mo. banc 1989). In that case, the defendant was charged with promoting obscenity, and the issue was whether the material the defendant had offered for sale was obscene. *Id.* This Court found that the magazines containing "photographs of naked women in various positions," without any suggestion that they were being touched by another person, constituted obscenity under the relevant statute. *Id.* The related statutes and case law thus suggest that a picture of a nude child alone may be "sexual conduct" under the appropriate circumstances.

Appellant's argument to the contrary overlooks the blatantly sexual posturing of the children in these photos. The victims were bent over in front of a camera, touching their unclothed buttocks (Tr. 403). One boy manually separated his buttocks to expose his anus to the camera (Tr. 403). This is a form of sexual conduct as contemplated by the statute.

Finally, Appellant argues that the legislature did not intend to criminalize his conduct in § 573.023 because § 568.060 also criminalizes photographing nude children (App. Sub. Br. 45). While it is true that the legislature will not be presumed to have done a useless act, *State v. Salata*, 859 S.W.2d 728, 734 (Mo. App. W.D. 1993), there is nothing that prohibits the legislature from enacting statutes that have overlapping application, *i.e.*, two statutes which under some circumstances may be violated by a single set of facts.

Here, each of the statutes contemplates different, but related, applications and goals. The differing goals of the two statutes can be seen by their relative placement in the code.

The crime of abuse of a child is in Chapter 568, which is titled “Offenses Against the Family.” Consequently, the main goal for this statute is the protection of children. The crime of sexual exploitation of a minor, however, is found in Chapter 573 which addresses crimes involving pornography. Thus, the focus of that statute is to prohibit the proliferation of pornography. Because the two statutes have potentially different applications and different, if overlapping goals, the legislature did not commit a useless act by enacting § 573.023. Hence, the fact that there is another statute which also criminalizes the conduct at issue does not mean that the statute under which Appellant was charged does not also encompass that conduct. *State v. Bouse*, 150 S.W.3d 326, 335-336 (Mo. App. W.D. 2004).

That Appellant’s crime happens to be covered by both of these statutes does not mean that the evidence was insufficient to convict him of sexual exploitation of a minor or that the prosecutor was required to charge him with abuse of a child instead. When a single act constitutes an offense under more than one statute, “the state may elect to prosecute for either offense.” *State v. Keon*, 468 S.W.2d 625, 629 (Mo. 1971). The prosecutor was acting within the realm of his discretion in charging Appellant with sexual exploitation of a minor, and the evidence supports Appellant’s conviction for that offense because the photographs he took were obscene.

C. Conclusion

There was sufficient evidence to convict Appellant of two counts of sexual exploitation of a minor. The pictures Appellant took were obscene because they depict sexual conduct in that the photographs contain images of young boys bending over in front of a camera and manually separating their buttocks to expose the anus. Therefore, the trial court did not err in denying Appellant's motions for acquittal on Count I and Count II. Appellant's second point should be denied.

Point III

The trial court did not err in overruling Appellant’s motion for judgment of acquittal on Count III because there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellant possessed child pornography with the intent to exhibit it in that the victims testified that Appellant showed them the pictures he had taken.

The trial court did not err in overruling Appellant’s motion for judgment of acquittal on Count V because there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellant possessed child pornography with the intent to exhibit it in that he downloaded the pictures from the internet and looked at them multiple times.

Appellant argues that there was insufficient evidence to support his convictions under Counts III and V because the State failed to adduce evidence that he intended to exhibit any of the photographs (App. Sub. Br. 46). Specifically, he points out that his computer was not networked and that he merely looked at the pictures “in the privacy of his home” (App. Sub. Br. 46). This argument fails because the victims testified that Appellant showed the pictures he had taken to them. Also, Appellant’s act of downloading the internet images allows the inference that he intended to do something with the photographs besides looking at them.

A. Standard of Review

When examining a claim that the evidence was insufficient to support the conviction, appellate courts examine the record “to determine whether sufficient evidence existed from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.”

State v. Willis, 239 S.W.3d 198, 199 (Mo. App. S.D. 2007). When reviewing the sufficiency of the evidence, the appellate court “accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence and disregards all evidence and inferences to the contrary.” *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). Moreover, “the court does not act as a super juror with veto powers, but gives great deference to the trier of fact.” *Id.* (internal quotation marks omitted).

B. There was sufficient evidence to demonstrate that Appellant possessed child pornography with the intent to exhibit it.

To sustain a conviction for first-degree promoting child pornography, the State must show that the defendant “possesse[d] with the intent to promote or promote[d] child pornography of a child less than fourteen years of age.” § 573.025.1, RSMo 2000. Promote carries several meanings including to “exhibit.” § 573.010(12), RSMo 2000. Here, Appellant was charged with promoting by “possessing with the intent to exhibit” child pornography (L.F. 11).

The defendant’s mental state may be inferred from circumstantial evidence. *State v. Perry*, 275 S.W.3d 237, 248 (Mo. banc 2009). Such circumstantial evidence may include the defendant’s conduct before and after the act itself. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002). Intent may also be inferred from the nature of the act itself. *Id.*; *State v. McIntyre*, 63 S.W.3d 312, 315 (Mo. App. W.D. 2001). A finding that the defendant acted with the purpose of gratifying his sexual desire is supported where the acts were undertaken while the defendant was alone with his victim or victims. *McIntyre*, 63 S.W.3d at 315.

Moreover, exculpatory statements, later proven to be false, can indicate a consciousness of guilt. *State v. Rodden*, 728 S.W.2d 212, 219 (Mo. banc 1987).

The intent that must be proven in the present case is the intent to exhibit (L.F. 11-12). Exhibit is not defined in the statute. § 573.010, RSMo 2000. “Absent a statutory definition, the words used in the statute will be given their plain and ordinary meaning as derived from the dictionary.” *State v. Eisenhower*, 40 S.W.3d 916, 919-920 (Mo. banc 2001). It is also appropriate to consider related laws, as well as the statute’s history and surrounding circumstances. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). Exhibit is defined as “To show outwardly; display” or “To present for others to see.” The American Heritage Dictionary of the English Language 641 (3d ed. 1996). It is also synonymous with “show,” *id.*, which means “[t]o cause or allow to be seen.” *Id.* at 1671.

There is nothing in the statute that demands the exhibiting occur in front of an audience of a specified size. In the context of other sex crimes, the courts have found that an audience of one is enough. In *State v. George*, 717 S.W.2d 857 (Mo. App. S.D. 1986), the Southern District of the Missouri Court of Appeals examined the meaning of performance in the context of § 568.080, RSMo Supp. 1984. The defendant in that case forced his wife to have sex with his son while he watched. *George*, 717 S.W.2d at 858. The defendant argued on appeal that there was insufficient evidence to convict him because there was no performance in that he was the only person who viewed the acts. *Id.* at 858-859. Because the statute did not specify that the performance had to be public and the purpose of the statute, *i.e.*, to protect children, would be served by its application in that case, the court held that the action was a performance because the defendant alone was sufficient to constitute an

“audience.” *Id.* at 859. Thus, if there is evidence that Appellant intended to show the pictures to even one other person, there is sufficient evidence to support his convictions.

The evidence the State introduced supporting Appellant’s conviction under Count I showed that Appellant did far more than merely intend to show the pictures he had taken to one other person. The State’s evidence proved that Appellant showed the pictures on the camera to his victims. After taking the pictures, Appellant put the pictures on the computer (Tr. 290). The victims were then allowed to see the pictures on the screen (Tr. 284). Thus, Appellant showed the pictures to the victims, and so his intent to exhibit the pictures can be inferred from that act. *McIntyre*, 63 S.W.3d at 315. The fact that the pictures were only shown to the people involved does not prohibit conviction. *George*, 717 S.W.2d at 589.

Including this conduct in the definition of exhibit also comports with the current interpretation of related statutes. The purpose of the statutes criminalizing sexual conduct involving children is to protect children from inappropriate exposure to sexual material or images. *See Bouse*, 150 S.W.3d at 331-332 (interpreting § 566.083, RSMo 2000). Thus, by interpreting the word “exhibit” to include showing the pictures to the children themselves, the legislative purpose is served.

Appellant argues that the “State’s evidence failed to explain how Mr. Oliver could intend to exhibit photographs that no longer existed.” (App. Br. 48). This argument rests on a misconception about what the State was required to prove. It is true that the pictures had been deleted when the detective searched the camera, but the State was not required to prove that Appellant possessed the material when the detective searched the camera. The State was required to prove that he possessed them “on or about the 3rd day of November.” (L.F. 11).

Appellant took the pictures, and they existed on his camera for some length of time, on November 6 (Tr. 274). That he later deleted them does not prevent him from having possessed them at an earlier point in time and then having decided to delete them. Appellant is not absolved from responsibility for his acts because he later tried to destroy the evidence.

Appellant's intent to show the internet pictures to at least one other person can be inferred from the fact that he downloaded the images and looked at them multiple times. At trial, the State presented evidence regarding several pornographic pictures taken from Appellant's computer. The detective who examined the images testified he could tell whether Appellant had looked at a picture once, or "at least twice" by comparing the date the file was created and the date the file was last accessed (Tr. 458). Some of the files were only viewed on the internet one time (Tr. 462; State's Exhibit 29). Others were viewed "at least twice," for example State's Exhibits 39 and 42. Both files were created, *i.e.*, brought down on to Appellant's computer, in October (Tr. 458, 469-470). They were then last accessed in November (Tr. 469-470). The files were kept in the temporary internet directory, but the detective testified that files can be intentionally placed there to hide them from ordinary users (Tr. 479). The act of downloading the pictures supports the inference that Appellant intended to do more with the pictures than merely view them—he could have done that by merely returning to the internet site. The fact that these images were taken off the internet and looked at multiple times over several weeks support the inference that Appellant intended to show these photographs to someone other than himself.

Appellant points out that the jury was confused about the definition of promote, and that the prosecutor allegedly admitted Appellant was only guilty of possessing child

pornography by stating in the opening portion of his closing argument that the pictures were for Appellant's own consumption (App. Sub. Br. 52, 54). These arguments miss the point. The issue in a sufficiency case is not what the prosecutor argued, or even what the jury found. Rather, the sufficiency of the evidence is a legal question about whether there is sufficient evidence from which a hypothetical rational jury could find guilt beyond a reasonable doubt. *Chaney*, 967 S.W.2d at 52. Appellant's arguments about the jury's subjective confusion or the prosecutor's theory of the case is irrelevant to determining whether the evidence presented meets the legal standard for sufficiency of the evidence. If Appellant believed that either the instruction misled the jury, or that the prosecutor's argument was improper, those are separate claims which he could have raised. Furthermore, his argument fails to take into account the fact that Appellant showed at least some of the pictures to his victims.

C. Conclusion

There was sufficient evidence from which a rational trier of fact could determine that Appellant intended to exhibit both the photographs of the victims and the internet images. He took pictures of the child victims and then showed those pictures to the children on his computer. He also did more than merely view the pictures from the internet; he placed them on his computer and looked at them more than once over a period of several weeks. Appellant's third point should be denied.

CONCLUSION

The trial court did not err. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,856 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed this 31st day of April, 2009, to:

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APPENDIX

Judgment..... A1