MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	**WD71724**
Respondent,	)	
v.	)	**OPINION FILED:**
	)	
DAVID DELAINE LIBERTY,	)	**April 12, 2011**
	)	
Appellant.	)	
	)	

Appeal from the Circuit Court of Platte County, Missouri
Honorable Owens L. Hull, Jr., Judge

Before: Victor C. Howard, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

Mr. David Delaine Liberty appeals the trial court's judgment convicting him of one count of promoting child pornography in the first degree, section 573.025,[1] and eight counts of possession of child pornography, section 573.037. We affirm in part, reverse in part, and remand for further proceedings.

Factual and Procedural Background

Based on information from a group that monitors the online activities of suspected sexual predators, the Kansas City Missouri Police Department sought and received a

[1] Statutory references are to RSMo 2000 and the Cumulative Supplement 2007 unless otherwise indicated.

search warrant for Mr. Liberty's home. Laptop components were found in his home but no computer could be located. After receiving a search warrant for Mr. Liberty's truck, police recovered a laptop. A forensic exam of the laptop located numerous images of young nude boys engaged in various activities, most appearing pre-pubescent, and some wearing diapers, as well as several photos of Mr. Liberty either nude or wearing diapers. The exam also determined that the computer had been used to access a website alleged to contain child pornography using a distinct user name containing Mr. Liberty's initials, which substantiated information used to obtain the search warrants.

The State charged Mr. Liberty with one felony count of promoting child pornography in the first degree, section 573.025, on or about May 29, 2007; and nine felony counts of possessing child pornography as a second offense,[2] section 573.037, on or about May 2, 2008. Mr. Liberty waived jury trial and a bench trial was held. At trial, the State presented a textual posting allegedly made under Mr. Liberty's user name to the website at issue. It argued the post was obscene material depicting children under the age of fourteen, created and published by Mr. Liberty. It also presented photographs it alleged were child pornography possessed by Mr. Liberty.

Mr. Liberty was found not guilty of one count of possession of child pornography and was convicted of one count of promoting child pornography in the first degree and eight counts of possessing child pornography. The trial court sentenced Mr. Liberty to consecutive terms of twelve years on the promoting child pornography count and eight

[2] Mr. Liberty had been convicted of two counts of possession of child pornography after a guilty plea in August of 2002.

three-year consecutive terms on the latter counts of possession of child pornography, resulting in a sentence of thirty-six years imprisonment. Mr. Liberty appeals, raising three points.

Legal Analysis

In the first point, Mr. Liberty contends the trial court erred in convicting him of promoting child pornography in the first degree because the text of the post supporting the conviction did not depict "sexual conduct." Because he challenges the sufficiency of the evidence supporting his conviction, our review is limited to determining whether there was sufficient evidence for a reasonable fact-finder to find him guilty beyond a reasonable doubt. *State v. Oliver*, 293 S.W.3d 437, 444 (Mo. banc 2009). In this review, we give great deference to the fact-finder. *Id*. We accept as true all evidence and inferences drawn therefrom that are favorable to the State; we reject contrary evidence and inferences. *Id*.

Section 573.025.1 at the time of Mr. Liberty's alleged offense[3] provided that a person commits the first-degree offense of promoting child pornography if "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." § 573.025.1. The crime required the State to prove that the defendant: "(1) ha[d] knowledge of the content and character of and (2) possess[ed] with intent to promote or promote[d] (3) obscene material (4) that ha[d] a child as a participant or portrayed what appears to be a child as a participant or

[3] The section was amended in 2008, after the date of Mr. Liberty's charged crimes.

observer of sexual conduct." *State v. Kamaka*, 277 S.W.3d 807, 813 (Mo. App. W.D. 2009).

The post introduced by the State at trial was in a forum entitled "Little BoyLover Chat." The posting was titled "Getting humped by 7 yr old twins/ Lap dances from a 5 yr old, Mercy sakes I AM SPENT it's how I spent my lazy afternoon" and describes the author's day at a lake with a five-year-old boy and seven-year-old twin boys. Mr. Liberty argues that text describing "a child riding on an inner tube with an adult is not obscene child pornography." However, the text went far beyond describing a child and an adult riding on an inner tube. The post offered detailed descriptions of the children's erections while engaged in physical contact with the author, the author seeking such contact, as well as to view or feel the child's erection, and the author's delight in such a "wonderful way" for his summer to begin.

Mr. Liberty argues that the State did not show that the text depicted sexual conduct. Section 573.010(17) defines "sexual conduct" as:

> actual or simulated, normal or perverted acts 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;

Viewed in the light most favorable to the verdict, the text was sufficient to support the conviction for promoting obscene material with a child as a participant or observer of sexual conduct. The text depicted the author's description of a five year-old engaged in "lap dances" on the author, thus describing "physical contact with a person's clothed or

unclothed genitals . . . in an act of apparent sexual stimulation or gratification." *See* § 573.010(17); *see also Oliver*, 293 S.W.3d at 445 (finding photographs of a "boy bending over with his unclothed buttocks toward the camera and separating his buttocks with his hands" depicted sexual conduct). The post further described the seven-year-olds "humping" his back while the author felt the children's erections, thus depicting "simulated . . . acts of human masturbation" or "sexual intercourse; or physical contact with a person's clothed or unclothed genitals . . . in an act of apparent sexual stimulation or gratification." *See* § 573.010(17); *see also Oliver*, 293 S.W.3d at 445. Thus, the evidence was sufficient to support the trial court's finding that the material fell within the statutory definition of "sexual conduct." Mr. Liberty's first point is denied.

In the second point, Mr. Liberty argues that convicting him of eight separate possession offenses—one for each photograph—violates the prohibition against multiple punishments for a single offense under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Whether a person's right to be free from double jeopardy has been violated is a question of law we review *de novo*. *Kamaka*, 277 S.W.3d at 810. Because Mr. Liberty did not raise this claim below, our review is for plain error. Rule 30.20; *State v. Tremaine*, 315 S.W.3d 769, 776, n.6 (Mo. App. W.D. 2010); *State v. Polson*, 145 S.W.3d 881, 891 (Mo. App. W.D. 2004) (although constitutional issues must be raised at the first opportunity, an appellant may request plain error review of his double jeopardy claim). Under plain error review, a defendant is entitled to reversal for a manifest injustice or miscarriage of justice only when the error is outcome determinative. *State v. Barraza*, 238 S.W.3d 187, 193 (Mo. App. W.D. 2007).

The Double Jeopardy Clause protects a criminal defendant from "successive prosecutions for the same offense after either an acquittal or a conviction," and "multiple punishments for the same offense." *Kamaka*, 277 S.W.3d at 810-11 (internal quotation marks and citation omitted). This latter protection "is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *Polson*, 145 S.W.3d at 892. Multiple convictions are permissible if the defendant has committed separate crimes in both law and fact. *Kamaka*, 277 S.W.3d at 811.

To ascertain if the defendant has committed separate crimes, we must determine whether multiple punishments were intended by the legislature. *Barraza*, 238 S.W.3d at 193. We look to the allowable "unit of prosecution" within the charging statute. *Id.* If the statute's unit of prosecution is subject to more than one reasonable construction, we are to resolve it in favor of lenity. *State v. Good*, 851 S.W.2d 1, 5 (Mo. App. S.D. 1992) (quoting *Bell v. U.S.*, 349 U.S. 81, 82-84 (1955) and finding that its principles governed in the case before it)). "[T]his is not out of any sentimental consideration, or for want of sympathy with the purpose of [the legislature] in proscribing evil or antisocial conduct." *Id*. (quoting *Bell*, 349 U.S. at 83). Rather, it is because it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Id*. (quoting *Bell*, 349 U.S. at 83).

Section 573.037 prohibited the possession of "any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct." The crime as it existed at the time of this case required the State to prove that the defendant "(1) ha[d] knowledge of the content and character of

and (2) possess[ed] (3) obscene material (4) that ha[d] a child as a participant or portray[ed] what appear[ed] to be a child as an observer or participant of sexual conduct." *Kamaka*, 277 S.W.3d at 813. Mr. Liberty argues that section 573.037 does not unambiguously allow for a separate charge for each photograph he possessed as a unit of prosecution.

In determining whether several charges violate Double Jeopardy, we may look to "whether each offense necessitates proof of a fact which the other does not." *Good*, 851 S.W.2d at 4 (internal quotation marks and citation omitted). Arguably, in the present case, in order to support its charging instrument, the State had to establish a different factual element on each count—it had to prove that each photograph was in fact child pornography. This is not a case, for example, where the defendant was separately charged for possessing duplicates of the same image. However, section 573.037 did not criminalize the possession of "a photo" of child pornography—it criminalized the possession of "any obscene material" depicting child pornography. We thus must determine the legislature's intended unit of prosecution in this phrase "any obscene material." *See id*.

In *State v. Williams*, the Southern District found the legislature's use of the word "any" unambiguously expressed the legislature's intent that the possession of different controlled substances at a single point in time could be charged as separate offenses. 542 S.W.2d 3, 5 (Mo. App. S.D. 1976). The statute at issue criminalized the possession of "any controlled or counterfeit substance." *Id*. at 5. The *Williams* court reasoned that "[i]f the legislature had intended that the possession of several Schedule I substances would

only constitute a single offense, it could have used words such as 'one or more substances' to evidence that intent." *Id.* Because the State in *Williams* had to prove possession of heroin as a controlled substance on one count, and possession of marijuana as a controlled substance on another count, there was not identity in law and in fact and the punishments did not offend the prohibition against double jeopardy. *Id.* at 6. However, the legislature subsequently repealed and replaced this statute changing "any controlled substance" to "a controlled substance," which a later court found to indicate that the legislature was attempting to clarify its intent of only one unit of prosecution. *See Baker*, 850 S.W.2d at 948, n.2.

In *State v. Baker*, the Eastern District interpreted "any" to a different conclusion while considering a double jeopardy claim where the defendant had been convicted of separate possession charges for four knives found simultaneously in his prison cell. 850 S.W.2d 944, 947 (Mo. App. E.D. 1993). The statute at issue criminalized the possession of "Any gun, knife, weapon, or other article or item of personal property that may be used in such manner as to endanger the safety or security of the correctional facility or as to endanger the life or limb of any offender or employee of such a facility." *Id.* at 947. The *Baker* court found the legislature's use of the word "any" created an ambiguity as to the intended unit of prosecution. *Id.* at 948. Because the elements of proof were nearly identical for each count, all four convictions were entered in a single proceeding, and the legislature's intended unit of prosecution was ambiguous, the *Baker* court found that the defendant was entitled to a hearing on his claim of ineffective assistance of counsel for failing to raise a double jeopardy argument. *Id.* It distinguished *Williams* on several

grounds, one of them being that in *Williams* "[t]he State had to provide substantially different elements of proof to establish that one element constituted one drug, and one element constituted a second, different drug." *Id*. at 948.

Our cases have thus differed in their interpretations of the legislature's intention in using the word "any" when referring to contraband in a criminal possession statute. In cases such as *Williams*, we question whether the result would have been the same had the defendant possessed, as Mr. Liberty did, more than one of the same identifiable item. If, for example, Mr. Williams had been separately charged with possession of two discrete quantities of marijuana, rather than separately charged with possession of marijuana and heroin, we believe it unlikely that the court would have reached the same result. Key to the *Williams* analysis is that the evidence offered as proof for each count would not have been sufficient to support conviction under the other count. 542 S.W.2d at 6. In Mr. Liberty's case the State's proof for each count was nearly identical. We believe the instant case is more analogous to *Baker* than it is to *Williams*.

Moreover, as Mr. Liberty points out, the legislature here used the collective noun "material," in addition to the word "any." The most relevant definition we have located of the noun "material," in the sense used in section 573.037, defines the word as "something (as a group of specimens) used for or made the object of study and investigation <museum~>." WEBSTER'S THIRD NEW INT'L DICTIONARY 1392 (unabridged ed. 1993). Had the legislature wished to expressly permit separate convictions, it could have criminalized the possession of "an item" of child pornography rather than "any material." As noted, when the legislature's intended unit of prosecution

is not clearly expressed and is fairly subject to either of two constructions, the "canon of statutory construction" guiding our analysis is the rule of lenity. *Good*, 851 S.W.2d at 5.

We are also directed to look to the "'gravamen' of the offense." *Id*. at 5-6. Here we find compelling that the *actus reus* the statute required the State to prove—the defendant's possession—was a single event in the instant case, at a single time and place, indistinguishable in law or in fact. Nor was the State required to show a distinct *mens rea* on each of the possession counts. These factors also render the instant case more similar to *Baker* than it does to a case such as *State v. Wadsworth*, in which double jeopardy was not offended by multiple convictions for attempted enticement of the same child when these acts each occurred on a separate, distinguishable date. 203 S.W.3d 825, 834 (Mo. App. S.D. 2006). Had the State in the present case, for example, used metadata from the computer files to allege Mr. Liberty "possessed" each photo at the time it was placed on his computer, rather than the State's generic charge that he possessed each of the photos "on or about May 2nd, 2008," our analysis might proceed differently.

The State has offered no limitation to its argument here. In *Polson*, we rejected the State's argument that it could separately charge the defendant with possession of separate and distinct packages of Actifed as a precursor ingredient for producing methamphetamine, "as long as they were found in different physical locations." 145 S.W.3d at 896-97. Here, the State does not suggest a requirement that the items must be possessed at different times or locations.

Nor is this a case such as *State v. Sanchez*, where the legislature's intent to permit multiple convictions under the same statute was evidenced by its reference to specific

victims. 186 S.W.3d 260, 267 (Mo. banc 2006). While one might argue that the legislature in section 573.037 intended separate convictions because it sought to deter the harm caused by the abuse of children in making pornography, the statute did not require the use of an actual child in the material for the offense.[4] Possession of obscene material that "portray[ed] *what appear[ed] to be* a child" was sufficient to convict. § 573.037 (emphasis added). Nor did the statute require any proof of a victim. The "gravamen" of the statute thus did not define a crime against a person, which "may result in as many offenses as there are victims." *Horsey v. State*, 747 S.W.2d 748, 752 (Mo. App. S.D. 1988).

Finally, while the present statute does not dictate our analysis, we find the legislature's subsequent amendment informative. *See Baker*, 850 S.W.2d at 948 n.2 (finding the legislature's subsequent amendment a "persuasive indicator" of its intent to clarify the permissible unit of prosecution). In 2008, the legislature added an enhanced penalty to the section for possession of, *inter alia*, "more than twenty still images of child pornography." *See* 2008 Mo. Laws 598, S.B. No. 714. If the legislature had intended separate convictions for each still image in the prior statute, amending to add an enhanced penalty for the possession of multiple images becomes illogical.

For the foregoing reasons, we cannot accept the State's argument that section 573.037 supported convictions for each individual photograph as charged in the facts of this case. Mr. Liberty's second point is granted. His possession sentences are reversed and we remand for resentencing on a single count.

[4] The legislature removed the requirement of the use of a minor in 2000. *See* 2000 Mo. Laws 731, S.B. No. 757.

In the third and final point, Mr. Liberty contends the trial court erred in convicting him of six of the counts of possession of child pornography in that the images supporting these counts did not depict "acts of apparent sexual stimulation" or did not depict physical contact. He does not contest that two of the images constituted child pornography. Thus, his conviction is supported by at least one image. Because we have determined that entering multiple convictions for the same *actus reus* under section 573.037 was barred by the prohibition against double jeopardy, his third point is rendered moot.

Conclusion

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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Thomas H. Newton, Judge

Howard, P.J., and Ahuja, J. concur.