

SC 92236

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

ROBIN ROGGENBUCK,

Appellant

Appeal from the Circuit Court of Platte County County, Missouri
6th Judicial Circuit, Division 1
The Honorable Abe Shafer, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

FREDERICK J. ERNST # 41692
Assistant Appellate Defender
Office of the Public Defender
Western Appellate/PCR Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: 816.889.7699
Fax: 816.889.2088
E-Mail: fred.ernst@mspd.mo.gov

Counsel for Appellant

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STATEMENT OF FACTS

Mr. Roggenbuck relies on the statement of facts as set forth on pages 9 -17 of Appellant's Brief. To the extent that Respondent's Brief contains errors in its statement of facts, those errors are addressed in the argument portion of this Reply Brief.

ARGUMENT

Mr. Roggenbuck relies on the argument as set forth on pages 21-60 of Appellant's Brief but makes the following additional reply to arguments raised in Respondent's Brief.

I. The Search Warrant Lacked Probable Cause.

A. No Probable Cause in the Affidavit

1. The Alleged Sexual Abuse Committed Against Mr. M.¹ Over the Course of Five Months

(A) *What Mr. M. told Detective Neland*

In its brief, the State asserts that “[a]ccording to the affidavit, E.M. contacted Detective Sgt. Neland and informed her that Defendant had been sexually abusing him (Supp. L.F. 2).” (Respondent’s Brief, p. 19). This statement is a subtle but important mischaracterization of what Detective Neland wrote. Detective did not say that Mr. M. told her he had been sexual abused. Rather she said she “*received information from* [Mr. M.] . . . that Robin S. ROGGENBUCK, . . . had been sexually abusing [Mr. M.]. . . .” (S.L.F. 2) (emphasis added). The question then is what information was provided to Detective Neland that led her believe that the Mr. M. had been sexually abused.

The answer to that question appears to be, from looking at the affidavit, not very much. (S.L.F. 1-2). Based on the affidavit, the only information provided to Detective

¹ It is not clear that §566.226 applies as there are no pending or adjudicated charges arising out of any alleged conduct directed against Mr. M. However, he will be referred to as Mr. M. in this brief.

Neland was that Mr. Roggenbuck engaged in an act of sodomy with Mr. M. Not only was there no allegation that this was not consensual, but there was also no factual information provided about the circumstances surrounding the encounter(s)—none. If the sex acts were not consensual, how were these crimes carried out (allegedly repeatedly over the course of months)?—We don't know. Was Mr. M. asleep when this occurred?—we don't know. Were there actual or implied threats made?—we don't know. Was Mr. M. incapacitated or unable to give consent in some way?—we don't know.

(B) The fact that “a report” was made

In the absence of facts, the State argues that the issuing judge could infer that the sex was not consensual from “[t]he fact that [Mr. M.] went to the police and reported that Defendant had sodomized him.” (Respondent’s Brief, 19). As with the State’s discussion about what Mr. M. told Detective Neland, this assertion also mischaracterizes the information contained in the affidavit. The State’s argument assumes that Mr. M. voluntarily went to the police to report what Mr. M. believed to be a crime committed against him. However, there are no facts set forth in the affidavit that supports this assumption. The only thing we know from the affidavit was that Mr. M. talked (or—more accurately—provided information) to Detective Neland on February 13, 2008. (S.L.F. 1-2). We don't know how the conversation occurred or what prompted it. We don't know where the conversation occurred. We don't know the tenor of the conversation or how the information was provided. And we don't even know if Mr. M. believed that he was the victim of a crime. As noted by Judge Holliger, “[t]he issuing

judge cannot accurately determine probable cause from the totality of the circumstances if he or she has no idea what the circumstances are.” *State v. Trenter*, 85 S.W.3d 662, 675 (Mo. App. W.D. 2002); *see also State v. Wilbers*, 347 S.W.3d 552, 558 (Mo. App. W.D. 2011). The affidavit in this case provides no facts and circumstances about the alleged abuse and no facts and circumstances about how the alleged abuse was reported.

Further, the State lacks any legal authority for its argument that the mere fact that a person makes a claim that he was the victim of a crime without specifying any of the facts or circumstances of the crime is sufficient to justify the issuance of a warrant. And this argument is contrary to the constitutional requirement that warrants be issued only after sufficient *factual* information is provided to a reviewing judge to allow the judge to make an independent determination that “the charges are not capricious.” *Illinois v. Gates*, 462 U.S. 213, 230 n. 6 (1983) (quoting *Jaben v. United States*, 381 U.S. 214, 224-225 (1965)).

Assuming that Mr. M. did go to Detective Neland and tell her that he had been “sexually abused,” this information would certainly warrant Detective Neland making an additional inquiry, including obtaining information about the facts and circumstances of the alleged abuse. But the mere assertion by an individual that he had been sexually abused, without more specific information, cannot be sufficient to justify the intrusion into and a search of a one’s home and private belongings. It is certainly possible that a person may be aggrieved by another’s actions and make a report to law enforcement—perhaps in the mistaken belief that a crime occurred—even though no crime was committed. Before a warrant authorizing a search of person’s home, personal belongings

and private information can issue, it is incumbent on an officer to ascertain the facts and circumstances giving rise to the complaint and to submit those facts to an independent judge to enable the judge to make a determination that probable cause exists that a crime has been committed. This was not done in this case.

2. Alleged Unspecified Crimes Committed Against Unidentified Other “Victims” of Unspecified Ages

The initial problem with the allegations concerning the “other victims” is that there was no information provided to allow the issuing judge to access the veracity of the allegations. The State does not address this critical deficiency in the affidavit.

Facts and circumstances that the courts may look at in determining probable cause include: (a) the reliability of the informant, (b) the type of informant, (c) the detail of the information concerning the suspect’s criminal activities, (d) the basis for the informant’s knowledge, and (e) and the degree to which law enforcement is able to corroborate the details of the informant’s statement. *Gates*, 462 U.S. at 233-234, 242. Given the paucity of information provided in the affidavit, the allegations concerning the “other victims” are not sufficient to establish that the information provided by Mr. M. was reliable, that a crime was committed, or that evidence of a crime could be found on the computer.

Although Mr. M. was identified, the affidavit provided no indication that Mr. M. was reliable. (S.L.F. 1-2). More critically, the affidavit failed to show the basis for Mr. M.’s allegations concerning the “other victims.” There was no indication that Mr. M. participated in, witnessed, or otherwise had first-hand knowledge of any alleged activities with “other victims.” Additionally, there was no detail at all set forth concerning these

alleged “other victims.” Thus, this is not a situation in which an informant provided explicit and detailed description of alleged wrongdoing along with a statement that the event was observed first-hand, which would be entitled to greater weight. *See Gates*, 462 U.S. at 234. And although there was corroboration of the innocuous aspects of Mr. M.’s statements, such as Mr. Roggenbuck’s address and the presence of alcohol and a computer, there was no corroboration of any alleged illegal, or even suspicious, activity. *United States v. Gibson*, 928 F.2d 250, 252–53 (8th Cir.1991) (insufficient showing of probable cause when officer only corroborated “innocent details” of utility records for account name, revenue agency for physical description, and car titles). Because the affidavit provided no facts to permit the issuing judge to assess the credibility and reliability of the allegations, they do not support a showing of probable cause. *State v. Hammett*, 784 S.W.2d 293, 296 (Mo. App. E.D. 1989).

Even if the allegations concerning the other victims were credible, there were no facts set forth to support a conclusion that Mr. Roggenbuck engaged in child sexual abuse as suggested by the State. (Respondent’s Brief, 20). Although, Mr. M. provided Detective Neland with the first names of these “other victims,” no other information was provided about them. There was nothing in the affidavit indicating that Mr. M. told Detective Neland either the approximate or actual ages of “the other victims.”² Although

² And even if Mr. M. had given some indication of the “other victims” ages, there is nothing in the affidavit indicating how Mr. M. knew how old these other victims were. As people mature, it becomes much more difficult to determine a person’s age from mere

the State asserts that “E.M. told police that Defendant provided alcohol to *young* boys” (Respondent’s Brief, 22 (emphasis added)), the word “young” does not appear in the affidavit. Rather, the affidavit reports that Mr. M. said that Roggenbuck would give alcohol to “the boys.” (S.L.F. 2). There is no indication from this statement whether the boys were young children, teenagers, college-aged, in their twenties or older. Nor was there any factual information (such as a statement that the “other victims” were in high school) that would have permitted the court to infer their approximate ages.

Detective Neland’s use of the word “minors” in describing the scope of the search does not help. First, it is not clear whether the word “minors” was used by Mr. M. or was Detective Neland’s conclusion. Further, the word “minor” is ambiguous. Generally, the law recognizes the age of eighteen as the age of majority. See e.g., §§ 431.060 RSMo (contracts); 451.090 RSMo (marriage); 507.115 RSMo (civil suits). However, with respect to the purchase and consumption of alcohol, the age is twenty-one. §§ 311.310, 311.325 RSMo. And the criminal statutes pertaining to sexual conduct place the age of consent at seventeen. §§ 566.034, 566.064, 566.068 RSMo. One could be twenty-years-old, be considered a minor with respect to the consumption of alcohol, and yet be well

observation. See e.g., *State v. Bookwalter*, 326 S.W.3d 530, 534 (Mo. App. S.D. 2010) (“By simple observation, a jury could easily determine that a four-year-old was less than fourteen years old but have a much more difficult time doing so if the child at issue was a seventh-grader”).

outside of the age limit for statutory sex crimes. The affidavit provides no facts showing that Mr. M. was able to or did tell Detective the approximate ages of the “other victims.”

So even if the references to the “other victims” as “boys” or “minors” when talking about the alcohol was sufficient to conclude that the “boys” were or might have been under the age of twenty-one, this was not sufficient to conclude that Mr. Roggenbuck was engaged in any type of child sexual abuse, as the State suggests. (Respondent’s brief, 20). At best, the affidavit indicates only that Mr. Roggenbuck provided alcohol to individuals who were under the age of twenty-one in violation of § 311.310.2 RSMo. This alleged criminal conduct should not permit the search and seizure of Mr. Roggenbuck’s computer.

3. Possession of Child Pornography.

In the absence of any connection between the alleged sexual abuse of Mr. M. and the computer, or any allegation that the images on the computer were pornographic, the State attempts to justify the seizure and search of the computer by linking it to the allegations concerning the “other victims.” (Respondent’s Brief, 22-23). As noted, because there is nothing in the affidavit that would enable the issuing court to evaluate the veracity of Mr. M.’s allegations with respect to the “other victims,” the allegations must be disregarded. *Hammett*, 784 S.W.2d at 296.

Additionally, the State’s attempt to tie the alleged abuse to the possession of child pornography or images “relating to the sexual abuse of children” is problematic as there is nothing in the affidavit alleging that Roggenbuck was sexually abusing *children* (as defined by the Missouri criminal statutes as a person under the age of seventeen, §§

566.034, 566.064, 566.068). At best, the affidavit indicated that Roggenbuck gave alcohol to and engaged in some type of unspecified sexual conduct with Mr. M. and others under the age of twenty-one. There is no allegation (much less a credible, specific, factual one) that Mr. M. or these “other victims” were children under the age of seventeen. Thus, while some courts may recognize an inherent connection between child molestation the possession of child pornography, there is no allegation that Mr. Roggenbuck was engaged in conduct with children rather than young adults.

Further, there were no facts asserted in the affidavit establishing any type of a nexus between the unspecified crimes committed against these “other victims” and the computer. This case stands in marked contrast to the recent Southern District decision in *State v. Johnson*, SD 31437, --- S.W.3d --- (Mo. App. S.D., July 17, 2012).

In *Johnson*, the circumstances surrounding the alleged abuse were specifically set out, and the victim was clearly identified as a fifteen-year old child. *Id.* at *1. The affidavit in *Johnson* also established a close connection between the abuse and the defendant’s use of his camera and computer, noting that the defendant photographed the victim and his friends in the very same hotel room the day before the incident, that the defendant was working on his computer when the victim came out of the bathroom after having taken a shower, and that the defendant had access to his camera and computer while the victim was sleeping, showering and changing clothes in the hotel room. *Id.* at *1-*2, *4-*5. In addition, the defendant was photographing other children without their knowledge as a part of his upstart “cameo” photography business. *Id.* at *2, *5. The officer who completed the affidavit also set forth his extensive history in investigating

child sexual abuse and specifically stated why the officer believed—based on his experience—that evidence or contraband would be found on the suspect’s computer. *Id.* at *2. The court in *Johnson* concluded that “[t]aken together, the information in Sergeant Cooper’s Affidavit shows a fair probability that evidence of a crime (including possible images Johnson took depicting sexual conduct or images of persons under the age of eighteen in various states of undress) would be found on Johnson’s computer and electronic storage devices.” *Id.* at *5.

Unlike in *Johnson*, in this case there was not either a specific allegation or any factual showing that Roggenbuck had sexually abused a child. (S.L.F. 1-3). Nor was there any indication that Roggenbuck photographed Mr. M. or the “other victims,” or even that he had the means to do so. (S.L.F. 1-3). There was no indication that the photographs of children depicted any type of sexual conduct or that these photographs were of “the other victims.” (S.L.F. 1-3). And Detective Neland did not appear to have the same experience as the investigating officer in the *Johnson* case in investigating child sex cases and did not explain why, given the nature of Mr. Roggenbuck’s alleged conduct, she anticipated finding evidence of a crime or child pornography on computer equipment owned by Mr. Roggenbuck. (S.L.F. 1-3).

The State also cites to *State v. Miller*, 14 S.W.3d 135, 138 (Mo. App. E.D. 2000) as supporting its argument that the vague assertions concerning conduct involving Mr. M. and the “other victims” supported the seizure and search of the computer. (Respondent’s Brief, 21-22). In *Miller*, the affidavits supporting the warrant application set forth specific facts indicating that the defendant was engaged in the production of

methamphetamine. *Id.* at 136-137. These facts included the defendant's purchase on a single day of 27 bottles containing 50 pills each of pseudoephedrine, the defendant's use of a false name to purchase the pseudoephedrine, the defendant's previous purchase one month prior of a large quantities lithium batteries, and an officer's statement that lithium batteries and pseudoephedrine were necessary components in the manufacture of methamphetamine. *Id.* Given these facts, there was no dispute that facts set forth in the affidavit were sufficient to establish probable cause that the defendant was engaged in the manufacture of methamphetamine. *Id.* at 138. Rather the issue in the case was whether the issuing judge could infer that the police could find evidence relating to the defendant's drug activities at the residence he shared with a woman absent information directly connecting the drug activities to the residence. *Id.* at 138. The Court of Appeals found that "because Defendant was driving Carol Wenke's car when he purchased some of the suspicious materials and was known to reside with her, it was reasonable for the trial court to infer that the materials had been transported there." *Id.* at 138. In coming to this conclusion, the court in *Miller* cited to a number of federal decisions that reached the unremarkable conclusion that "evidence of drug dealing is likely to be found where the dealers live." *Id.* at 138 (citations omitted).

In this case, assuming that the affidavit was sufficient to show that a crime or crimes had been committed, there is no dispute that a warrant could include a search of Roggenbuck's residence for evidence of those crimes. Thus, for example, the search of the residence for and seizure of "sex toys" for DNA testing might have been warranted.

But the warrant went well beyond a search for evidence of the alleged sexual abuse of Mr. M. or “other victims.”

In addition to attempting to tie the seizure and search of the computer to the unspecified crimes committed against “other victims,” the State also resorts to the argument that “the images on the computer must have related to sexual abuse” merely because they were discussed. (Respondent’s Brief, 23). As with the argument concerning whether the sexual conduct was consensual, this argument assumes—without any factual support—that Mr. M. volunteered the information about the images. However, because the affidavit provides no information about the circumstances concerning Mr. M.’s communication with Detective Neland (S.L.F. 1-2), it is impossible to know how the topic of the photos of children on the computer arose or even what Mr. M. specifically told Detective Neland about these photographs. Again, “[t]he issuing judge cannot accurately determine probable cause from the totality of the circumstances if he or she has no idea what the circumstances are.” *Trenter*, 85 S.W.3d at 675. And although the issuing judge “is entitled to a common sense reading of the entire affidavit[,] . . . [t]his does not mean, however, that a judge may read things into the affidavit that simply are not there.” *Id.* at 677; *Wilbers*, 347 S.W.3d at 558. The affidavit provides no information about why or how the issue of the images of children came up and no facts or circumstances that would permit an inference that they related to the alleged abuse of Mr. M. and the “other victims.”

Considering the totality of the factual assertions in the affidavit, there was nothing to support a reasonable probability that Mr. Roggenbuck committed any crime, that

evidence of whatever unspecified crime(s) Mr. Roggenbuck might have committed would be found on Mr. Roggenbuck's computer, or that Mr. Roggenbuck's computer would contain child pornography.

B. No Good Faith Reliance of the Warrant

The State relies on the decision in *State v. Wilbers*, 347 S.W.3d 552 (Mo. App. W.D. 2011), to support its argument that the affidavit in this case was not "entirely lacking" such that the officers acted in good faith reliance on the warrant. (Respondent's Brief, 27-28). However, an examination of the facts in *Wilbers* illustrates how deficient the affidavit was in this case.

In *Wilbers*, the affidavit specifically stated that a confidential informant personally observed the defendant in possession of four bags of methamphetamine inside of the defendant's residence. *Id.* at 556-557. The affidavit went on to state that the confidential informant had known the defendant for five years and had seen the defendant in possession of methamphetamine hundreds of times. *Id.* The affidavit stated that the informant had provided information to the officer, which the officer had found to be reliable and true. *Id.* The affidavit went on to state the officer's experience as a Narcotics Investigator and explain why the officer expected to find contraband or evidence of drug activities on the defendant's person, in his home and out buildings, and in his vehicles to justify a search of these areas. *Id.* The affidavit also noted that the defendant was under investigation by another narcotics law enforcement office. *Id.*

In *Wilbers* the defendant argued that although the affidavit stated that the officer was contacted by the confidential informant within 48 hours of the application, it did not

state when the confidential informant actual was in the defendant's house and observed him to be in possession of methamphetamine. *Id.* at 558. The Western District concluded that the time that the informant actually saw the methamphetamine could not be inferred from the rest of the affidavit, and that this omission was fatal. *Id.* at 558-561. The court concluded, however, that although it was "a close case," the omission of the date did not preclude the officers from relying on the warrant given that the affidavit otherwise set forth probable cause the defendant was involved in criminal behavior. *Id.* at 562.

In this case, the affidavit also failed to set forth when the alleged conduct committed by Mr. Roggenbuck occurred. (S.L.F., 1-2). However, that was not the only problem with the affidavit. The affidavit provided no facts or circumstances concerning the alleged sexual abuse of Mr. M or even a conclusory allegation that the sexual contact was not consensual. (S.L.F., 1-2). The affidavit contained no information specifying even what crime that Mr. Roggenbuck was alleged to have committed against the other victims, and failed to set forth the basis of Mr. M.'s allegation concerning those "other victims." (S.L.F., 1-2). The affidavit did not contain any explanation why Detective Neland believed that evidence of the unspecified crimes committed against the "other victims" would be present on the computer or that the computer would contain child pornography. (S.L.F., 1-2). And the affidavit did not contain any allegation that Mr. M. was in possession of child pornography. (S.L.F., 1-2). Whereas the affidavit in *Wilbers* presented the court with "a close case," the affidavit in this case does not.

The State also argues that the officers were acting in good faith reliance on the issuance of the warrant because Detective Neland had been told by Mr. M. that the images of the children on the computer were “pornographic.” (Respondent’s Brief, 28-31). Citing to language in *United States v. Leon*, 468 U.S. 897 (1984) stating that the courts may look to the totality of the circumstances—including whether another judge refused the warrant application—to determine whether the officers acted in good faith reliance on the issuance of the warrant, the State argues that the information known to Detective Neland but not included in the affidavit showed that Detective Neland acted in good faith reliance on the judge’s finding of probable cause in issuing the warrant. (Respondent’s Brief, pp. 29-30).

The problem with the State’s argument is that the determination of good faith under *Leon* hinges on whether the officer reasonably relied on the judge’s finding of probable cause in issuing the warrant. 468 U.S. at 913-915, 922-923. Thus, while the fact that another judge rejected the warrant application is relevant to the question of whether the officer could have reasonably believed that the affidavit was sufficient, information supporting probable cause known to the officer but not included in the affidavit is not. The question is not whether Officer Neland believed that probable cause existed based on information known only to her. Rather, the question is whether the warrant was based on “an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Leon*, 468 U.S. at 924. As noted by Judge Michael’s opinion in *United States v. Bynum*, 293 F.3d 192, 213 (4th Cir. 2002), “*Leon* and *Malley*’s emphasis on the officer’s affidavit suggests that an officer has a duty

to ask not only whether he knows enough to establish probable cause, but also whether he has given the magistrate at least a substantial basis for finding probable cause.”

Essentially, the State is arguing not that the officer relied on the warrant, but that the search was constitutional regardless of the validity of the warrant because the officer nonetheless had probable cause to seize and search the computer.³ The problem with this argument, however, is that probable cause alone is not sufficient to support a warrantless search. *State v. Rutter*, 93 S.W.3d 714, 723 (Mo. banc 2002). And the Court in *Leon* did not create an exception to the warrant requirement based on officers’ reliance on their own belief that probable cause existed based on information known to them but not included in the warrant application.

³ As set forth in Appellant’s Brief, Mr. M.’s statement to Detective Neland that the images were “pornographic” is itself not sufficient to show probable cause to search the computer without at-least some description indicating that the images fell within the statutory definition of prohibited material. (Appellant’s Brief, pp. 39-42). *United States v. Burnette*, 256 F.3d 14, 18 (1st Cir. 2001); *State v. Nuss*, 781 N.W.2d 60, 66-68 (Neb. 2010); *United States v. Smith*, 795 F.2d 841, 848-49 (9th Cir. 1986); *United States v. Grant*, 490 F.3d 627, 630-632 (8th Cir. 2007). So the State’s argument is even more attenuated as it is attempting to support the search based on Detective Neland’s own subjective belief that probable cause existed based on information known only to her, rather than the existence of actual probable cause.

Absent a valid warrant, the search was illegal (even if the officers had adequate probable cause). The warrant in this case was not valid because it was not supported by an adequate showing of probable cause. Further, the affidavit on which the warrant was based was so lacking in probable cause to search the computer that Detective Neland and the other officers could not have reasonably relied on the validity of the warrant in seizing and searching the computer. The trial court clearly erred in not excluding the evidence obtained as a result of the illegal search.

II. The Entry of Five Separate Convictions Constituted a Violation of the Constitutional Protections against Double Jeopardy, Due Process and the Right to a Trial by Jury

In its brief, the State states that “the examiner indicated that the creation date of an image file could correspond to the date that the file was downloaded from the Internet (Tr. 421-22).” (Respondent’s Brief, p. 9). This assertion is not supported by the record. With respect to one image—and one image only—the computer examiner found that a web browser program was used to “download” the image on the same date it was “created.” (Tr. 421-422). However, the examiner could not state that the image was downloaded from the Internet and noted that “web browsers” can be used to “access files from Web pages from the Internet *or locally.*” (Tr. 421-422) (emphasis added). The examiner did not testify to finding any similar information with respect to the other images. (Tr. 397-431). Nor did the examiner testify that the “creation date” for each image necessarily corresponded to the date that the image was downloaded from the Internet, or even that the images were obtained from the Internet. (Tr. 397-431).

The State also argues that the evidence presented at trial showed “that Defendant acquired each item of child pornography at a separate, distinguishable time.” (Respondent’s Brief, p. 36). This statement is also not an accurate statement of the record. Although the evidence did permit an inference that each image was put onto the computer at different times (although only minutes apart in the case of two of the images), there was no evidence directly showing that Mr. Roggenbuck was the person who obtained the images and placed them on the computer. There was not even evidence

showing that Mr. Roggenbuck was home when the images were put on the computer. Although the jurors might have been able to infer that Mr. Roggenbuck was the person who obtained the images and placed them on the computer, they also may have concluded that he was not. However, the issue was not submitted to the jury. (L.F. 68-77; Tr. 485, 490-491, 505, 507).

The State also argues that that “the proper time to object to duplicative counts on double jeopardy grounds is before trial” and that Mr. Roggenbuck waived this issue by failing to object to the charging documents or verdict directors. (Respondent’s Brief, 37-38). However, Mr. Roggenbuck was not required to object to the charging documents or verdict directors because they were not erroneous. The charging documents were not incorrect because the specific date on which Mr. Roggenbuck came into possession of each image was not essential elements of the offense. § 573.037 RSMo; *see also State v. Shinkle*, 340 S.W.3d 327, 334 (Mo. App. W.D. 2011); *State v. Gardner*, 741 S.W.2d 1, 6 (Mo. banc 1987). Because the date of the offense was not an essential element of the offense, the State had no obligation to specify the specific dates in the charging documents, regardless of any double jeopardy issues. *Gardner*, 741 S.W.2d at 6.

Further, the protection against multiple punishments for the same offense does not prohibit the state from prosecuting or submitting multiple counts, even if arising from a single offense. *State v. Taylor*, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991). Thus, “[t]he double jeopardy protection against multiple punishments does not arise until the time of sentencing” and any objection to the verdict directors would have been meritless. *Taylor*, 807 S.W.2d at 675; *State v. Bacon*, 841 S.W.2d 735, 741 (Mo. App. S.D. 1992).

To the extent that the decisions in *State v. Shinkle*, 340 S.W.3d 327 (Mo. App. W.D. 2011) and *State v. Tipton*, 314 S.W.3d 378, 380 (Mo. App. S.D. 2010) hold otherwise and impose a duty on a defendant to somehow raise the issue prior to trial, they must be overruled.

Although Mr. Roggenbuck did not properly preserve the issue by failing to raise it at sentencing, the failure to raise the issue at sentencing did not deprive the State of the opportunity to submit the case in a manner that would have supported multiple punishments. The State was free to prosecute and to submit the case however it saw fit. The State chose to prosecute and to submit the case on the basis that Mr. Roggenbuck was in constructive possession of the images at some point between January 18, 2007, and February 13, 2008, rather than take on the more difficult burden of proving that Mr. Roggenbuck obtained possession of each image on a specific date. (L.F. 68-77). Although the State may have elected to proceed in this manner based on the State's incorrect reading of the statute as authorizing a separate conviction for each image regardless of when Mr. Roggenbuck came into possession of each image, this was not due to any "sandbagging" by the defendant.

The State also argues that multiple punishments can be imposed even in the absence of a jury finding that the defendant did in fact come into possession of each image on a different day. (Respondent's Brief, 38-39). This argument simply ignores the dictates of *Apprendi v. New Jersey*, 530 U.S. 466, 476-484 (2000). Regardless of whether a given fact is an element of the crime, if the fact increases the potential punishment of the defendant, it must be submitted to the jury. *Apprendi*, 530 U.S. at 490.

The State's argument is also inconsistent with this Court's recent decision in *State v. Celis-Garcia*, 344 S.W.3d 150, 158-59 (Mo. banc 2011). In *Celis-Garcia*, this Court held that the verdict directors failed to differentiate between the various alleged acts of sodomy in a way that ensured the jury unanimously convicted Ms. Celis-Garcia of the same act or acts. *Celis-Garcia*, 344 S.W.3d at 156. Thus, although the time and place of an offense were not elements of the offenses, it was still necessary to set forth the time and place of each alleged act in the verdict directors to adequately protect the defendant's right to a unanimous verdict. *Id.* Further, this Court in *Celis-Garcia* found that the failure to adequately instruct the jury to insure a unanimous verdict was plain error—and was not waived—even though the issue was not raised at trial. *Id.* at 154 n. 3, 158-159. Thus, to the extent that this issue could be characterized as instructional error, plain error review is still appropriate.

In this case, the question of whether Mr. Roggenbuck was the person who actually obtained the images and placed them on the computer was contested. Mr. Roggenbuck argued that there were other people who had access to the computer and that one of these other individuals put the images on the computer without his knowledge. (Tr. 497-503). And the jury was clearly not required to and did not find that Mr. Roggenbuck was the person who placed the images on the computer or that he came into possession of them on different days. (L.F. 68-77; Tr. 485, 490-491, 505, 507). As was the case in *Celis-Garcia*, 344 S.W.3d at 157-159, the failure to submit this disputed factual issue to the jury constituted a violation of Mr. Roggenbuck's constitutional rights and resulted in a manifest injustice requiring remand despite his failure to raise the issue at trial.

III. The Court Erred in Admitting Hearsay Evidence from the Resumes

The State cites to *State v. Copeland*, 928 S.W.2d 828, 846 (Mo. banc 1996) to support its claim that “the fact that a document purports to be written by a particular person is not, in itself, dispositive of the document’s authenticity, the fact is still relevant and may be considered by the trial court in determining whether the evidence should be admitted.” (Respondent’s Brief, 44). The authenticity of the letter in *Copeland*, however was authenticated by circumstantial evidence apart from the fact that it was purportedly written by the defendant. Significantly, the letter requested that the sheriff do certain things on behalf of the defendant, which the sheriff did without any apparent indication from the defendant that she did not in fact make the requests. *Copeland*, 928 S.W.2d at 846.

Other than the fact that information within the resumes indicated that they were written by Mr. Roggenbuck, and the fact that were located on a computer in Mr. Roggenbuck’s apartment, there was no other evidence submitted to establish that Mr. Roggenbuck was in fact the author of those documents. The contents of the resumes where used as proof that Mr. Roggenbuck was a sophisticated and heavy computer user, and to thus support the State’s claim that Mr. Roggenbuck knew of the existence of the images on the computer. (Tr. 491, 505-506). There was a reasonable probability that but for the admission of this evidence, the outcome of the trial would have been different.

CONCLUSION

Based on the argument presented, Appellant respectfully asks this Court to reverse his convictions and to remand to the trial court for a new trial with instructions to enter an order suppressing evidence obtained as a result of the search and seizure of the apartment and computer.

Respectfully submitted,

/s/ Frederick J. Ernst
FREDERICK J. ERNST # 41692
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: 816.889.7699
Fax: 816.889.2088
E-Mail: fred.ernst@mspd.mo.gov

Counsel for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Frederick J. Ernst, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 6,314 words, which does not exceed the 7,750 words allowed for an appellant's brief under Rule 84.06.

A copy of the foregoing and separate appendix in PDF format without hyperlinks was filed electronically with the court on September 21, 2012. The electronic files have been scanned for viruses using a Symantec Endpoint Protection program. According to that program, the electronic files are virus free.

Pursuant to the Missouri Supreme Court electronic filing system, an electronic copy was sent to James Farnsworth, jim.farnsworth@ago.mo.gov; Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, on September 21, 2012.

/s/ Frederick J. Ernst
Frederick J. Ernst