SC 91821

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

DAVID D. LIBERTY,

Appellant.

Appeal from the Circuit Court of Platte County County, Missouri
6th Judicial Circuit, Division 2
The Honorable Owens Lee Hull, Judge

APPELLANT'S SUBSTITUTE 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

Counsel for Appellant

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JURISDICTIONAL STATEMENT

Appellant, David D. Liberty, was convicted after a bench trial of one count of promoting child pornography in the first degree (§ 537.025 RSMo (2000)) and eight counts of possession of child pornography – 2nd offense (§ 573.037 RSMo (2007 Supp.)) in the Circuit Court of Platte County, Missouri. This is Appellant's direct appeal.

This appeal does not involve any matters reserved for the exclusive jurisdiction of the Missouri Supreme Court. The appeal was initially decided in the Missouri Court of Appeals, Western District, pursuant to Mo. Const., Art. V, Section 3, Section 477.070 RSMo (2000). The case was ordered transferred to the Missouri Supreme Court pursuant to Mo. Const., Art. V, Section 9 and Mo. S. Ct. Rule 83.04.

STATEMENT OF FACTS

Appellant was charged with one count of the class B felony of promoting child pornography in the first degree and nine counts of the class C felony of possession of child pornography in the first degree as a second offense. (L.F. 76-79).

The charge of promoting child pornography arose out of text posted on a website describing a man riding on an inner-tube and an inflatable with some children (which are mentioned by their first names) pulled behind a boat at a lake. (L.F. 28; State's Ex. 1). At trial, there was no evidence as to who these children were, or whether the children or the incident were real or fictional.

In describing riding on the inner-tube with children riding in his lap or on his back, the writer made references to "lap dances" and "humping my back." (State's Ex. 1). The post also stated that the writer could feel a child's "boner" and feel the child "grow" while riding on the inner-tube. (State's Ex. 1). The post stated that at one point, the author could see one of the children's "boy pack." (State's Ex. 1).

The post came up under the user name of "Guest_DDLIBNKC" on May 29, 2007. (State's Ex. 1; Tr. 72). A woman who monitored the website testified that the "guest" appears in front of posts when the user deletes the user's account. (Tr. 37-38) Information contained in other posts and in the profile under the username "DDLIBNKC" corresponded to information known or discovered about Appellant, items found at his home or in his truck, and information found on a computer found in his truck. (Exs. 3, 8, 13, 19, 23, 25, 34, 40, 43, 46, 47, 48, 49, 50, 52, 54, 55, 56, 57, 58, 59, 67; Tr. 29-65, 74-92, 95-100, 116, 118-123, 126-127, 133-135, 148-149, 163-167). The

name of the website on which the post was made was also written on a mailer in Appellant's home. (Tr. 128-130).

On May 2, 2008, the police executed a search warrant and found a laptop computer in a truck registered to Appellant. (Tr. 88-91, 93-94, 113-115, 116-117). The same model of computer was referenced in one of the posts made under the user name DDLIBNKC. (Tr. 86-88). Although it appeared that a file cleaning software program was run on the computer, the police were able to obtain information off of the computer. (Tr. 142-144, 156-159). Some photographs on the computer (which were not obscene) were taken with the same model of camera that had been pawned by Appellant. (Tr. 102-105, 168-170).

The internet history showed that the computer had been used to access the internet dating back to October 18, 2006, and that the computer had been used frequently to access the website on which the inner-tube post was found. (Tr. 144-147). A computer examiner was able to determine that the website was accessed by someone using the username of DDLIBNKC in a number of instances. (Tr. 145-147). The computer was also used to access a watchdog website and a YouTube video that made claims about DDLIBNKC. (Tr. 150-153). In telephone conversations with his mother from jail, Appellant made statements indicating that he had downloaded images from the internet. (State's Ex. 99).

The police found nine images that they considered to be pornographic on the laptop computer. (Tr. 170-188). Included in these are boys who appear to be adolescents or in their teens and are naked or partially clothed. (State's Exs. 81-89). With the

exception of one image, none of the images depict deviate sexual intercourse or sexual intercourse. (Id.) As set forth in the amended information: Exhibit 81 (Count 2) showed an unclothed male bound by his hands and feet; Exhibit 82 (Count 3) showed two males engaged in deviate sexual intercourse; Exhibit 83 (Count 4) showed two unclothed males in physical contact with another's genitals; Exhibit 84 (Count 5) showed an unclothed male in physical contact with the pubic area of an unclothed male; Exhibit 86 (Count 7) showed two unclothed males in physical contact with the pubic area and buttocks of the other; Exhibit 87 (Count 8), shows an unclothed male in physical contact with the buttocks of an unclothed male; Exhibit 88 (Count 9) showed an unclothed male with his genitals exposed in an actual or stimulated act of masturbation; and Exhibit 89 (Count 10) showed an unclothed male in an actual or simulated act of masturbation. (L.F. 76-79). As set alleged in the Amended Information, Appellant possessed these images at some point between August 13, 2006, and May 2, 2008. (L.F. 76-79). Based on metadata, the computer examiner testified at seven of the images were present on the computer at various dates ranging from December 2, 2007, to February 14, 2008. (Tr. 170-187). This metadata, however, did not indicate the "age" of the images. (Tr. 188). The examiner did not find any metadata for two of the images (Exhibits 82 and 87) indicating when each image might have first been present on the computer. (Tr. 174-175, 184). The State presented no evidence as to when each image was first downloaded or put onto the computer. (Tr. 135-196).

Appellant waived jury trial. (L.F. 11, 61-62) He was found guilty of the class B felony of promoting child pornography and was sentenced to a term of twelve years on

that charge. (L.F. 91; Tr. 240, 276). He was also found guilty on counts 2-5 and 7-10 of the possession charges, and was sentenced to eight consecutive three-year sentences. (L.F. 91-93; Tr. 240-242, 276-277).

This appeal follows.

POINTS ON APPEAL

I. The post describing riding in an inner-tube does not depict sexual conduct.

The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence, in entering a judgment of conviction, and in sentencing Appellant for the class B felony of promoting child pornography, in violation of Appellant's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt, in that the text posted by Appellant did not depict sexual conduct and thus was not pornographic or obscene.

Section 556.061 RSMo (2007 Supp.);

Section 573.010 RSMo (2007 Supp.);

Section 573.025 RSMo (2000);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a).

II. The entry of eight separate convictions of possession of child pornography for each allegedly obscene item consisted a violation of constitutional protections against double jeopardy.

The trial court plainly erred in entering eight separate convictions, and eight consecutive sentences for possession of child pornography because the entry of multiple convictions for possession of a series of photographs violates the prohibition against multiple punishments for a single under the double jeopardy clause of the Fifth Amendment of the United States Constitution in that § 537.037 does not unambiguously provide for separate prosecutions of each individual image.

State v. Baker, 850 S.W.2d 944 (Mo. App. E.D. 1993);

State v. Cunningham, 193 S.W.3d 774 (Mo. App. S.D. 2006);

State v. Polson, 145 S.W.3d 881 (Mo. App. W.D. 2004);

Section 573.010 RSMo (2007 Supp.);

Section 573.037 RSMo (2007 Supp.);

U.S. Const., Amends. V and XIV.

III. The images giving rise to the charges in counts 2, 4, 5, 7, 8 and 9 do not fall within the definition of child pornography.

The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence, in entering a judgment of conviction, and in sentencing on Counts 2, 4, 5, 7, 8 and 9, in violation of Appellant's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt, in that the images supporting Counts 2, 4, 5 and 9 did not depict "acts of apparent sexual stimulation," and the images in Counts 7 and 9 did not depict physical contact.

Section 573.010 RSMo (2007 Supp.);

Section 573.037 RSMo (2007 Supp.);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a).

ARGUMENT ON APPEAL

I. The post describing riding in an inner-tube did not describe sexual conduct.

The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence, in entering a judgment of conviction, and in sentencing Appellant for the class B felony of promoting child pornography, in violation of Appellant's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt, in that the text posted by Appellant did not depict sexual conduct and thus was not pornographic or obscene.

Standard of Review

Appellant preserved the issue by filing motions for acquittal at the close of the State's evidence and at the close of all evidence. (L.F. 87-90).

Appellate review of the sufficiency of the evidence to support a guilty verdict is the same in a bench trial as it is in jury trial. *State v. Callen*, 97 S.W.3d 105, 109 (Mo.App. W.D. 2002). The review of factual issues is limited to a determination of whether the State presented sufficient evidence from which the trier of fact could have reasonably found the defendant guilty, viewing the evidence in the light most favorable to the verdict. *Id*.

Questions of law, including statutory interpretation, are reviewed *de novo*. *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 195 (Mo. banc 2009).

Discussion

The material giving rise to the charge of the class B felony of promoting child pornography in the first degree is written text posted in a chat room on a web site in which the author describes riding with some children in an inner-tube and another inflatable towable device pulled by a boat on a lake. (L.F. 32; Ex. 1). Appellant used the terms "lapdances" and "humping my back" in describing riding with the children on the inner-tube. (Ex. 1). And Appellant wrote that he could occasionally feel a child's "boner" and feel a child "grow" while a child was riding with him. (Ex. 1).

This written material does not depict "sexual conduct" as it does not depict "physical contact . . . in an act of apparent sexual stimulation." § 573.010(17) RSMo (2007 Supp.) Because the material does not depict sexual conduct, it was not "obscene." § 573.010(12) RSMo (Supp. 2007). And it does not support a charge of promoting child pornography. § 573.025 RSMo (2000).

Pursuant to § 573.025 RSMo (2000):

> A person commits the crime of promoting child pornography in the first degree if … such person . . . 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.

The statutory definition of "obscene" includes a requirement that the material "depicts or describes ***sexual conduct***.…" § 573.010(12)(b) RSMo (2007 Supp.) (emphasis added). Thus, the statutory framework requires that the material being promoted depict actual sexual conduct.

The term "sexual conduct" is defined as:

> [A]ctual 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 stimulaton, or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification.

§ 573.010(17), RSMo (Supp. 2006).

The issue in this case is whether the conduct described in the post—that of a child riding in the lap of a man or on his back riding on an inflatable device pulled behind a boat—depicted sexual conduct, i.e., people engaged in an act of *apparent* sexual stimulation or gratification. As evidenced by the statutory language, the child pornography statutes are designed to prohibit the creation and distribution of material depicting children involved in sexual conduct, not merely the creation of material talking about children using vulgar language or in a profane manner.

In this case, the post describes two occurrences that State has argued constitute the depiction of sexual conduct. The first is when the author says he got "a solid hour of LAP DANCES out of [a child] when we switched over to a innertube." (State's Ex. 1). The term "lap dancing" is commonly understood as "an activity in which a usually seminude performer sits and gyrates on the lap of a customer." Merriam Webster's

Online Dictionary.[1] However, from the context of the post, it is apparent that the author was not using the term literally. Rather, the post was indicating that a child sat in the author's lap while riding in an inner-tube. Although the author's genitals presumably came into contact with the child, it would not appear that this conduct would have appeared to have been an act of sexual stimulation.

The other conduct concerns the author riding on another type of inflatable towed by a boat with a child on his back. Again, the author used vulgar sexual terms to describe this conduct, saying that two children took turns "HUMPING MY BACK." (State's Ex. 1). The word "hump" is a vulgar expression meaning "to copulate with." Merriam Webster's Online Dictionary[2]. As with his use of the term "lap dance," the term was not used literally. To an objective observer, two individuals riding on an inflatable towed behind a boat would not appear to be involved in an act of sexual stimulation.

The fact that Appellant or one of the children may have, in fact, been sexually stimulated, is also not dispositive. If the material does not depict individuals involved in acts of *apparent* sexual stimulation, the fact that one or more of the participants was in fact sexually stimulated by the conduct does not thereby make the material obscene or pornographic. Thus, the fact that the post also mentions that one or more of the boys may have had an erection while or after riding around does not mean that the conduct depicted

[1] http://www.merriam-webster.com/dictionary/lap%20dance (accessed on September 13, 2011).

[2] http://www.merriam-webster.com/dictionary/hump (accessed on September 13, 2011).

of two people riding on an inflatable while towed by a boat appeared to be people involved in an act of sexual stimulation.

In its briefing in the Court of Appeals, the State also argued that the post depicted two people involved in an act of apparent sexual stimulation because it was apparent that Appellant derived some sort of sexual satisfaction by riding with the children. Again, whether a participant might have been sexually stimulated by the conduct is a separate issue from whether the conduct depicts what appears to be people engaged in sexual stimulation. Further, the text did not actually discuss or "depict" any sexual stimulation by the author.

The State has also argued that the post was obscene because it was intended to sexually stimulate the reader. Although perhaps relevant in determining whether the material appealed to the prurient interest in sex, it is not relevant to the issue of whether the material depicted people actually or apparently engaged in sexual conduct.

Going even further afield, the State also argued that the post depicted sexual conduct because Appellant "posted his story in a chat room frequented by men who are sexually attracted to young boys." Under the statutory scheme, however, material is either obscene or not regardless of where or how it was published. The determination must be based on examining the four corners of the material. To the extent that this Court's decision in *State v. Oliver*, 293 S.W.3d 437, 445 (Mo. banc 2009) may be read to support a contrary conclusion, that decision should be reexamined and clarified.

The Court in *Oliver* addressed the issue of whether photographs of "a boy bending over with his unclothed buttocks toward the camera and separating his buttocks with his

hands" was "an act of apparent sexual simulation." *Id.* The Court noted that there was physical contact with the child's unclothed buttocks (albeit with the child's own hands) and that "given the nature of this position, the fact that this position is the primary object of the photograph, ***and the circumstances under which these photographs were taken***," the photograph was one of apparent sexual stimulation. *Id*. (emphasis added). Thus, the Court appears to have endorsed the view that the circumstances surrounding the creation of the material is relevant to the question of whether material depicted an act of apparent sexual stimulation and was obscene. This conclusion is clearly contrary to the statute, which refers only to what is depicted, not how the material is created. § 573.025 RSMo (2000); § 573.010(17), RSMo (Supp. 2006). Such a holding would also be problematic when addressing a person's criminal responsibility for allegedly obscene material if the person was not involved in its creation. Would a person be guilty for possession of child pornography that is found to be obscene after consideration of the circumstances under which it was created when that individual was not aware of those circumstances? If not, does material that might be deemed obscene when possessed by one person who was aware of the circumstances of its production then become non-obscene when possessed by someone else?

In this case, the post was profane and talked about children while using vulgar sexual terms. The post did not, however, depict a person engaged in an act that was apparently for sexual stimulation, and did not otherwise depict sexual conduct. Thus, the post was not "obscene" as defined in the statute, and could not support a conviction for

promoting child pornography. Appellant's conviction and sentence for promoting child pornography must be reversed and a judgment of acquittal entered on that count.

II. Possession of Child Pornography Constitutes a Single Offense.

The trial court plainly erred in entering eight separate convictions, and eight consecutive sentences for possession of child pornography because the entry of multiple convictions for possession of a series of photographs violates the prohibition against multiple punishments for a single under the double jeopardy clause of the Fifth Amendment of the United States Constitution in that § 537.037 does not provide for separate prosecutions of each individual image.

Standard of Review

Questions of law, including statutory interpretation and whether multiple convictions violate constitutional double jeopardy protections are reviewed *de novo*. *State v. Cunningham*, 193 S.W.3d 774, 779 (Mo. App. S.D. 2006). Because Appellant did not raise this issue below, however, review is limited to plain error review under Rule 30.20. Plain error review is appropriate where appellant's claim establishes grounds for believing a manifest injustice or miscarriage of justice has occurred. *Id*. at 783. The entry of multiple convictions in violation of constitutional double jeopardy protections constitutes a miscarriage of justice warranting reversal under plain error review. *Id*. at 783; *State v. Polson*, 145 S.W.3d 881, 898 (Mo. App. W.D. 2004); *see also State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007).

Discussion

The double jeopardy clause of the Fifth Amendment to the United States Constitution states that no person "shall be subject for the same offense to be twice put in double jeopardy of life or limb." U.S. Const., Amend. V. The double jeopardy clause

has been made applicable to the states through incorporation into the due process clause of the Fourteenth Amendment. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969)). Included in the protections afforded by the double jeopardy clause is the protection against multiple punishments for the same offense. *Id.*; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 802 (1989). Although there is no corresponding provision in the Missouri Constitution, the protection against multiple punishments is enforced through the common law. *Polson*, 145 S.W.3d at 892 n. 4 (citing *McTush*, 827 S.W.2d at 188-189).

Protection from multiple punishments "is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *McTush*, 827 S.W.2d at 186). "Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature." *Id.*

With respect to multiple counts alleging multiple violations of the same criminal offense arising out of a single incident, "the appropriate test is what, under the statute, the legislature intended to be the allowable unit of prosecution." *Horsey v. State*, 747 S.W.2d 748, 751 (Mo. App. S.D. en banc 1988); *see also United States v. Chipps*, 410 F.3d 438, 447-448 (8th Cir. 2005). "The legislature may expressly declare the limits of a unit prosecution. . . . When it has not done so, the cases afford little guidance in determining the intent of the legislature." *Horsey*, 747 S.W.2d at 751. When the legislature has not clearly defined the appropriate unit of prosecution, the rule lenity

should resolve any doubt "against turning a single transaction into multiple offenses." *State v. Good*, 851 S.W.2d. 1, 5 (Mo. App. S.D. 1992)(quoting *Bell v. United States*, 349 U.S. 81, 84 (1955)); *see also Chipps*, 410 F.3d at 449 (applying the rule of lenity after concluding that Congress had not specified the unit of prosecution for simple assault with clarity); *Turner v. State*, 245 S.W.3d 826, 827-829 (Mo. banc 2008) (applying the Rule of Lenity with respect to conflicting statutory provisions). "[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." *Good*, 851 S.W.2d at 5 (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).

In this case, the State charged Appellant with nine counts of possession of child pornography for his possession of nine allegedly pornographic images found on his computer. (L.F. 76-79). Because he had a prior conviction for possession of child pornography, each offense constituted a C felony. (L.F. 86). He was convicted of eight of the counts and sentenced to eight consecutive three-year terms of imprisonment. (L.F. 91-95).

The statute applicable at the time of the alleged offenses read:

> 1. A person commits the crime of possession of child pornography if, knowing of its content and character, such person possesses 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.

> 2. Possession of child pornography is a class D felony unless the person has pleaded guilty to or has been found guilty of an offense under this section, in which case it is a class C felony.

Section 573.037 RSMo (2007 Supp.)

At issue here is whether the phrase "any obscene material," when read in context with rest of the statutory provision, unambiguously expresses the intent of the legislature to permit the prosecution for each individual obscene item found in the possession of a defendant. A similar issue was raised in *State v. Foster* with respect to multiple convictions for promoting child pornography under § 573.025 RSMo (1986). 838 S.W.2d 60, 66-67 (Mo.App. E.D. 1992). But appellant's briefing on the issue was so defective that the court there could not adequately consider the issue and deemed it to be abandoned. *Id.* Thus, this is an issue of first impression in Missouri. However, although there are no decisions that address whether a defendant can be separately prosecuted under § 573.037 RSMo (2007 Supp.) for each separate image, there are a number of decisions instructive on this issue.

The Eastern District in *State v. Baker* considered whether the double jeopardy clause constituted a valid defense to four counts of possession of weapons in a correctional facility. 850 S.W.2d 944, 947-948 (Mo. App. E.D. 1993). Four homemade weapons were found in the search of the defendant's cell. *Id*. at 946. He was convicted of four different counts, one for each weapon. *Id*. at 947. In his post-conviction action, the defendant alleged that his trial counsel was ineffective for failing to raise a double jeopardy claim to the four separate convictions. *Id.* at 947.

The statute at issue in *Baker* read:

> 1. It shall be an offense for any person to knowingly deliver, attempt to deliver, have in his possession, deposit or conceal in or about the premises of any correctional facility: ...
>
> (4) *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. (Emphasis added).

Id. at 947. The court found the statute's use of the word "any" to be ambiguous as to the allowable unit of prosecution. *Id*. at 948. Therefore the double jeopardy clause was a defense to the entry of four separate convictions. *Id*. at 948.

Although not specifically discussed in *Baker*, a number of courts considering the use of the term in the context of multiple prosecutions have discussed why the term is problematic. As discussed by a Colorado court in *People v. Renander*:

> The modifier "any" means either "one or more" or "one, no matter what one." *Webster's Third New International Dictionary* 97 (1976). In the context of this statute, "any," includes a single item of sexually exploitative material. However, because "any" also connotes a lack of restriction or limitation, it could be interpreted as encompassing multiple items of child pornography. . . .

151 P.3d 657, 661 (Colo. Ct. App. 2006). Although the term "any" is ambiguous, it does not necessarily follow that a statute is ambiguous as to whether a separate prosecution is

permitted for each item simply because the word is used in the statute when the legislative intent is otherwise clear. However, as noted by the Florida Supreme Court, "absent clear legislative intent to the contrary, the a/any test serves as a valuable but nonexclusive means to assist courts in determining the intended unit of prosecution." *State v. Rubio*, 967 So. 2d 768, 777 (Fla. 2007).

Thus, for example, the Southern District in *State v. Williams*, found that the possession of different types of controlled substances at a single point in time could be charged as separate offenses. 542 S.W.2d 3, 5 (Mo. App. St. L. 1976). The statute at issue criminalized the possession of "any controlled or counterfeit substance." *Id.* at 5. The defendant in *Williams* was charged with possession of both marijuana and heroin. *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.

As noted by the court in *Baker*, the situation in *Williams* where a defendant is in possession of different types of contraband is different from the situation where the defendant has possession of multiple items of the same type of contraband. *Baker*, 850 S.W.2d at 948. Consistent with this analysis, the courts in *State v. Polson*, 145 S.W.3d 881 (Mo. App. W.D. 2004), and *State v. Cunningham*, 193 S.W.3d 774, 780-782 (Mo. App. S.D. 2006), have rejected the notion that the State can engage in multiple prosecutions against a defendant in possession of discrete quantities of the same type of contraband.

In *State v. Polson*, 145 S.W.3d 881 (Mo. App. W.D. 2004), the defendant was convicted of possession of a methamphetamine precursor (pseudoephedrine) with intent to manufacture methamphetamine and of possession of a chemical (pseudoephedrine) with intent to create a control substance (methamphetamine). *Id*. at 884. The defendant challenged the convictions as a violation of double jeopardy, arguing that one charge was the lesser included offense of the other. *Id*. at 890. In response, the State argued that even if one charge was the lesser included of the other, there was no double jeopardy violation because the evidence established that the evidence at trial established there were "two separate and distinct instances of possession" because pseudoephedrine was found in two different places—some in the defendant's home, and other pills in the defendant's truck. *Id*. at 894. The court rejected this argument. *Id*. at 896. The court first noted that adoption of this position "would permit the State to achieve one of the very things the Fifth Amendment was designed to prevent," by allowing the State to "split a single crime and prosecute it in separate parts…." *Id.* at 896 (quoting *State ex rel. Westfall v. Campbell*, 637 S.W.2d 94, 97 (Mo.App. E.D.1982)). The court also noted that the State's position "would necessarily permit separate felony convictions under either or both statutes for each and every individual blister pack of Actifed possessed by a defendant as long as they were found in different physical locations;" something the court would not do absent clear statutory language indicating such a result was intended. *Id*. at 896-897.

A similar issue was addressed by the Southern District in *State v. Cunningham*, 193 S.W.3d 774, 780-782 (Mo. App. S.D. 2006). In that case, the defendant was convicted of both possession (of cocaine) and possession (of cocaine) with intent to

distribute. *Id*. at 780. The defendant asserted that possession was a lesser included offense of possession with intent to distribute, and that the multiple convictions therefore violated double jeopardy protections. *Id*. at 780. On appeal, the State argued that both convictions were proper because the defendant was in possession of two different packages of cocaine. *Id*. at 780-781. The Southern District also rejected this argument. *Id*. at 782.

In its motion for transfer, the State argued that multiple convictions were permitted because each count required proof of a distinctive element. (Motion for Transfer, 11-12). This is not accurate. The "elements of the crime of possession of child pornography require a defendant to: (1) have knowledge of the content and character of and (2) possess (3) obscene material (4) that has a child as a participant or portrays what appears to be a child as an observer or participant of sexual conduct." *State v. Kamaka*, 277 807, 814 (Mo. App. W.D. 2009); *see also* M.A.I. Cr.3d 327.16. Although sexual conduct includes a number of different types of conduct, the elements of what the state must prove in each count are the same.

Further, such an argument would apparently authorize a separate count for each type of sexual conduct depicted, regardless of the number of images. Thus, under the State's theory, a single image that depicted two different types of sexual conduct would support two separate convictions. Regardless of the relative merits of such a rule, there is nothing within the text of the statute that would support that conclusion.

The statutory provision in this case is similar to that examined in *Baker*. The statute prohibits the possession of "*any* obscene material." § 573.037 RSMo (2007 Supp.) Not only does the statute contain the word "any," but it also references "material." "Material[3]" can be used as collective noun, which is a noun that "names an aggregate of individuals or things with a singular form." BRYAN A. GARNER, A DICTIONARY OF MODERN USAGE 133 (1998).

Adding additional ambiguity to the statute, the definition of "material" uses both the singular and plural forms of various items included in the definition. Section 573.010(9) defines "material" as:

> anything printed or written, or any picture, drawing, photograph, motion picture film, videotape or videotape production, or pictorial representation, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or stored computer data, or anything which is or may be used as a means of communication. "Material" includes undeveloped

[3] Material is defined as: "*b (1)***:** something (as data) that may be worked into a more finished form <*material* for a biography> *(2)***:** something used for or made the object of study <*material* for the next semester> *(3)***:** a performer's repertoire <a comedian's *material*>." Merriam-Webster online dictionary. (http://www.merriam-webster.com/dictionary/material?show=1&t=1316188563). Accessed on September 16, 2011.

photographs, ***molds,*** printing ***plates,*** stored computer ***data*** and other latent representational ***objects***.

(Emphasis added). Thus, while using some terms in the singular, the definition also refers to "undeveloped photographs," "molds," and "printing plates." § 573.010(9) RSMo. The definition of material also refers to "computer data and other latent representational objects," which is what Appellant was convicted of possessing. The word data also can be used as collective noun. Merriam-Webster Online Dictionary, "data.[4]" Thus, again, the language used in the definition is itself ambiguous and does not clarify this issue.

Because the statute refers to "any," uses the collective noun "material," and then uses singular, plural and collective nouns in the definition of "material," it does not unambiguously indicate an intent to subject individuals to separate prosecutions for each individual obscene or pornographic image or item. 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."

In addition to looking at the statutory language, the Court may also look to the gravamen of the offense. *Good*, 851 S.W.2d at 5-6. The *actus reus* the statute required the State to prove—the defendant's possession—was a single event in the instant case, at

[4] Noting that "data" is a "noun plural but plural or singular in construction." http://www.merriam-webster.com/dictionary/data (accessed on 02/07/2011).

a single time and place, indistinguishable in law or in fact. The State was not required to show a distinct *mens rea* on each of the possession counts.

Thus, this case is more similar to *Baker* than it is to a case such as *State v. Wadsworth,* 203 S.W.3d 825, 834 (Mo. App. S.D.2006). At issue in *Wadsworth* were multiple convictions for attempted enticement of a child based on numerous messages sent over a number of days. The court was not looking at the statutory language to determine how it defined the appropriate unit of prosecution. *Id*. Rather, the issue was whether the defendant's actions in sending messages on different days asking the purported child to meet him at different locations and different times constituted discreet acts of attempted enticement that would support separate counts. *Id* The court concluded that they would, finding that the defendant made numerous attempts to entice a purported child. *Id*.

The decision in *Wadsworth* is not instructive on the issue here. Here, Appellant was charged with the simultaneous possession of nine images at the same location. (L.F. 76-79). The State did not allege that the images were possessed on different days or at different locations. (L.F. 76-79). And although there was some testimony indicating that some of the images were present on the computer on specific dates, there was no evidence indicating the age of the images or the dates that each image was first downloaded or placed on the computer. (Tr. 170-188).

And even if the State had presented such evidence, the date on which the obscene material might have been placed on the computer would be irrelevant. The statute does not criminalize obtaining, downloading or receiving obscene material. § 573.037.1

RSMo (2007 Supp.). Rather, the criminal act occurs when a person is in possession of obscene material and knows of the content of the material. Possession can be constructive and joint. See § 556.061(22) RSMo. Thus, it is not an element of the offense to show that the defendant was the person who downloaded or obtained the obscene material. As it is not an element to show that the defendant downloaded or obtained the obscene material, the date on which such material might have been placed on the computer should not be relevant in determining the appropriate unit of prosecution.

This is also not a case where the Legislature's intent to permit multiple convictions under the same statute was evidenced by its reference to specific victims. The statute at question here makes no distinction between material in which minors were used and those in which no children were used. 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).

Unlike the child pornography statutes at issue in all of the decisions cited by the State in the Court of Appeals, the Missouri statute at issue here is not limited to pornography in which actual children were used in its creation, but rather applies any obscene material the depicts "what appears to be a child" and includes virtual pornography.§ 573.037 RSMo (2007 Supp.). The statute is also contained within the general provisions concerning obscenity in Chapter 573 and actually prohibits the possession of "obscene material" and not "child pornography." *Id*. And the statute treats

the possession of obscene material different from the use of children in creating pornography. *Compare* § 573.037 (2009 Supp.) with § 573.023 (pertaining to the sexual exploitation of a minor). Thus, the statute at issue appears to be targeted to prohibiting obscene materials generally, rather than limited solely to preventing the sexual abuse of children.

Unlike pornography created by the use of actual children, prohibitions on virtual pornography cannot be justified on the basis of protecting children from sexual abuse and exploitation. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244-251 (2002). Such virtual pornography can be prohibited if it is obscene. However, obscenity laws are typically justified on the basis of protecting against offending the sensibilities of unwilling recipients or juveniles who might inadvertently see such material. *See Miller v. California*, 413 U.S. 15, 18-19 (1973). Because the Missouri statute applies more broadly to obscene material in which no actual children are depicted and thus there is no actual victim, multiple convictions cannot be justified on the basis that each item constitutes a separate and distinct act of sexual abuse against a specific victim.

Further, cases that permit separate convictions for each pornographic item on the basis that each item constitutes a separate and distinct act of sexual abuse against a victim are not logically consistent. Based on that rationale, each child depicted should constitute a separate unit of prosecution. Thus, if two children are depicted in a single image, such a rule should permit two convictions. Again, however, there is no language in the statute that would support such a conclusion.

Subsequent amendments to the statute further demonstrate that the Legislature did not intend for an individual to be separately prosecuted for each individual pornographic item. *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 statute was amended as follows:

> 1. A person commits the crime of possession of child pornography if, knowing of its content and character, such person possesses 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~~ **child pornography of a minor under the age of eighteen or obscene material portraying what appears to be a minor under the age of eighteen**.
>
> 2. Possession of child pornography is a class ~~D~~ **C** felony unless the person **possesses more than twenty still images of child pornography, possesses one motion picture, film, videotape, videotape production, or other moving image of child pornography, or** has pleaded guilty to or has been found guilty of an offense under this section, in which case it is a class ~~C~~ **B** felony.

L.2008, S.B. Nos. 714, 933, 899 & 758, § A, eff. June 30, 2008 (deletions struck through; additions in bold). The amendment retains the word "any," but changes from the possession of "any obscene material," to "any child pornography … or obscene material. . . ." This provision is still somewhat ambiguous as to whether an individual can be charged and convicted separately for each pornographic or obscene item. However, in

the next paragraph, the Legislature has set out different punishments based on both the nature and the number of items. Thus, the level of the offense is elevated from a C felony to a B felony if the person possessed twenty or more images. Under the amended statute, it does not appear that the Legislature understood or intended for the term "any . . . material" to permit a separate charge for each individual item. If that had been the understanding of the Legislature, the amendment to the provision to specifically authorize an enhanced punishment if a person was in possession of twenty or more images makes no sense. "When examining statutes, this Court presumes that the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results." *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 842 (Mo. banc 2005).

Because of the unique language and the amendment to the Missouri statute, decisions cited by the State construing other jurisdictions' statutory schemes are not useful in deciding this issue. Nor is it useful to consider decisions that look at this issue with respect to convictions for charges other than possession of child pronography.

On this issue, the State has cited to a number of foreign decisions that it argues support the conclusion that this Missouri statute unambiguously indicates that each image possessed is the correct unit of prosecution. These decisions are not useful in deciding the issue in this case for a number of reasons: (1) they concern offenses other than the possession of pornography, (2) they rely on an expression of legislative intent not present in Missouri, (3) they address statutes that do not contain similar language, and (4) they do not involve a legislative history in which the legislature has actually articulated the appropriate unit of prosecution.

In the Court of Appeals, the State cited the decisions in *United States v. Esch*, 832 F.2d 531, 542 (10th Cir. 1987); *State v. Mather*, 646 N.W.2d 605, 609, 611 (Neb. 2002); and *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005). All of these cases concerned offenses relating to the use of minors in the creation of child pornography. With respect to the creation of the multiple photographs, the taking of each photograph involved a distinct act, which may be separately prosecuted. *See Esch*, 832 F.2d at 542 (finding that "[e]ach photograph depended upon a separate and distinct use of the children," and thus supported separate prosecutions). This is different from the possession of multiple pornographic images at issue in this case, which occurred simultaneously.

Additionally, other decisions cited by the State—*Esch*, 832 F.2d at 542; *State v. Fussell*, 947 So. 2d 1223, 1233, 1235 (La. 2008); and *People v. Renander*, 151 P.3d 657, 662 (Colo. Ct. App. 2006)—relied on an expressed or apparent legislative intent in the statutes at issue of preventing the abuse of children in creating child pornography. Because these decisions relied on expressed statements concerning the intent of legislature and involve very different statutory schemes than the one at issue here, they provide no guidance to the Court in this case. The court in *Esch*, looked to expressions of legislative intent contained in a Senate report. 832 F.2d at 542. The Colorado statute at issue in *Renander* contained a provision explicitly stating the purpose of the legislation. 151 P.3d at 661-662. And the court in *Fussell* looked specifically at committee notes and other aspects of the legislative history to determine the intent of the legislature. 974

So.2d at 1233-1234. No such legislative history or statement of purpose is available with respect Missouri's enactment of the statute at issue here.

In addition to the absence of any legislative history or explicit statements of purpose, Missouri's statutory scheme is different from the statutory schemes considered in *Esch*, *Fussell* and *Renander*. The statute at issue in *Esch* prohibited the use of actual children in the production of pornography and did not address the possession of child pornography. 832 F.2d at 541. Although *Fussell* and *Renander* prohibited the possession of child pornography, the statutory schemes in both cases were specifically targeted to pornography in which actual children were used in its creation. *Fussell*, 974 So.2d at 1234; *Renander*, 151 P.2d at 661-662. Both statutory schemes applied to pornography depicting actual children involved in sexual activity. *Fussell*, 974 So.2d at 1234; *Renander*, 151 P.2d at 661. Both statutory schemes applied equally to both the producers and consumers of actual child pornography within a single statute. *Fussell*, 974 So.2d at 1234; *Renander*, 151 P.2d at 661. And, at least with respect to Louisiana statute at issue in *Fussell*, the legislature clearly segregated laws pertaining to child pornography (i.e., pornography using children) from the laws pertaining to obscenity. *Fussell*, at 1236.

Similarly, the statute at issue in *Multater* applied only to the possession of recordings of an actual child engaged in sexually explicit conduct. Wisconsin Stat. § 948.12. And, as noted, that statutes construed in *United States v. Esch*, 832 F.2d 531, 542 (10th Cir. 1987); *State v. Mather*, 646 N.W.2d 605, 609, 611 (Neb. 2002); and *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005) all concerned the use of use of actual minors in the creation of child pornography.

The statutes in those cases did not apply more broadly to all obscene material, including "virtual child pornography." Thus, the statutes differ significantly from the Missouri statute at issue here, which is not limited to pornography in which actual children were used in its creation. § 573.037 RSMo (2007 Supp.). Because Missouri's statutory scheme is broader than the schemes in other jurisdictions it is not appropriate to attribute the same purpose in enacting the legislation in Missouri as was stated in those other jurisdictions.

Further, a court's speculation concerning an unexpressed purpose in enacting legislation to determine what the legislature intended to be the appropriate unit of prosecution is problematic. Even if the Court could determine what was the intent of the legislature in enacting the statute, it does not follow that the Court can divine from such broad policy statements what the legislature intended to be the allowable unit of prosecution. As noted by the Eight Circuit in *Kinsley* in looking at federal firearms legislation: "It does not necessarily follow that, because possession of a single firearm is sufficient to constitute the evil legislated against, Congress thereby intended that felons in simultaneous possession of more than one firearm should be deemed to have committed multiple offenses." *United States v. Kinsley*, 518 F.2d 665, 669 (8th Cir. 1975). The Court in *Kinsley* also believed that "general arguments as to the gravity of the evil unavailing to prevent application of the Bell[5] rule of lenity." *Id* at 669 (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)).

[5] *Bell v. United States*, 349 U.S 81 (1955)

Because the statute does not unambiguously provide for a separate charge of possession for each obscene item, the court plainly erred in entering convictions on eight counts of possession of child pornography based on Appellant's possession of eight images. The division of a single offense into eight violates the double jeopardy provisions of the United States Constitution. U.S. Const., Amends. V and XIV.

III. The images giving rise to the charges in counts 2, 4, 5, 7, 8 and 9 do not fall within the definition of child pornography.

The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence, in entering a judgment of conviction, and in sentencing on Counts 2, 4, 5, 7, 8 and 9, in violation of Appellant's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt, in that the images supporting Counts 2, 4, 5 and 9 did not depict "acts of apparent sexual stimulation," and the images in Counts 7 and 9 did not depict physical contact.

Standard of Review

Appellate review of the sufficiency of the evidence to support a guilty verdict is the same in a bench trial as it is in jury trial. *State v. Callen*, 97 S.W.3d 105, 109 (Mo.App. W.D. 2002). The review of factual issues is limited to a determination of whether the State presented sufficient evidence from which the trier of fact could have reasonably found the defendant guilty, viewing the evidence in the light most favorable to the verdict. *Id.*

Discussion

To be convicted of possession of child pornography, the material possessed by the defendant must be obscene and must depict a child as a participant or observer of "sexual

conduct." The requirement that the child be a participant or observer of "sexual conduct" is set forth in the criminal statute, §573.037 RSMo (2007 Supp.), and is also contained within the definition of "obscene," § 573.010(12) RSMo (2007 Supp.). "Sexual conduct" is defined 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." § 573.010(17) RSMo (2007 Supp.).

The image in exhibit 81 (Count 2) depicts a naked adolescent boy with his hands and feet bound. (State's Ex. 81). In charging this count, the State did identify how this image constituted sexual conduct. (L.F. 76). At trial, the State argued that this constituted torture or sadomasochistic conduct. (Tr. 226, 236). However, this is not sufficient. The image must depict sadomasochistic abuse "in an act of apparent sexual stimulation or gratification." This image does not depict "an act of apparent sexual stimulation." This case is different from the image addressed by the Supreme Court in *State v. Oliver*, 293 S.W.3d 437, 445 (Mo. banc 2009). The photographs at issue in that case were of "a boy bending over with his unclothed buttocks toward the camera and separating his buttocks with his hands." *Id*. Here, there is no touching of the boy—by himself, an object or another—in such a sexually provocative way.

Exhibits 83 (Count 4), 84 (Count 5), and 87 (Count 8), showed unclothed males in "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks." But these images also do not depict acts of apparent sexual stimulation.

With respect to Count 7 (State's Ex. 86), the State alleged that the conduct depicted sexual conduct by virtue of the fact that the pubic area and buttocks of one male was in physical contact with that of the other. (L.F. 78). The trial court, however, found that although the individuals were in close proximity with the unclothed genitals, pubic areas and buttocks of another, there was no physical contact. (Tr. 241). Thus, this image cannot support a conviction for child pornography as charged.

Exhibit 88, which supported the charge in Count 9, does show a boy with a semi-erect penis, but there is no physical contact with the genitals, pubic area or buttocks. (State's Ex. 9). Nor is there any apparent act of masturbation. (Id.). Thus this image does not depict sexual conduct.

Because the conduct depicted in Exhibits 81, 83, 84, 86, 87 and 88, did not constitute sexual contact, those images cannot support convictions for possession of child pornography. The court erred in entering convictions for possession of child pornography as under Counts 2, 4, 5, 7, 8 and 9.

CONCLUSION

Based on the argument presented, Appellant respectfully asks this Court to reverse his conviction for promotion of child pornography, and to remand to the trial court to enter a judgment of acquittal on that count. Appellant also requests this Court to reverse Appellant's convictions for eight counts of possession of child pornography and remand with instructions to enter a conviction for a single count. In the alternative, Appellant requests this Court to reverse his convictions for possession of child pornography under Counts 2, 4, 5, 7, 8 and 9, and remand to the trial court with instructions to enter a judgment of acquittal on those counts.

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

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). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 9,678 words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A copy of the foregoing and separate appendix in PDF format without hyperlinks was filed electrically with the court on September 19, 2011. The electronic files have been scanned for viruses using a Symantec Endpoint Protection program, which was updated on September 19, 2011. According to that program, the electronic files are virus free. Pursuant to the Missouri Supreme Court electronic filing system, a electronic copy was provided to Dan McPherson, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

s/Frederick J. Ernst
Frederick J. Ernst