

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

DAVID DELAINE LIBERTY

Appellant

DOCKET NUMBER **WD71724**

DATE: April 12, 2011

Appeal From:

Circuit Court of Platte County, MO
The Honorable Owens L. Hull, Jr., Judge

Appellate Judges:

Division One
Victor C. Howard, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

Attorneys:

Frederick J. Ernst, Kansas City, MO

Counsel for Appellant

Attorneys:

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Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, Respondent, v.
DAVID DELAINE LIBERTY, Appellant

WD71724

Platte County

Before Division One Judges: Howard, P.J., Newton, and Ahuja, JJ.

After receiving a tip about a website where men allegedly talked about sex with young boys, police officers received warrants to search Liberty's home and vehicle. A forensic exam of his laptop revealed images of nude young men, mostly pre-pubescent, and that the computer had been used to access the website using a distinct user name. The user had posted a narrative to the website that the State alleged was obscene material depicting children under the age of fourteen. The State charged Liberty with one count of promoting child pornography and nine counts of possessing child pornography for nine separate photographs found on Liberty's computer. After a jury trial, Liberty was convicted of one count of promoting child pornography and eight counts of possessing child pornography. The trial court sentenced Liberty to consecutive terms of twelve years on the promoting child pornography count and eight three-year consecutive terms on the latter counts of possession of child pornography, resulting in a sentence of thirty-six years imprisonment. Liberty appeals, raising three points.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Division One Holds:

In the first point, Liberty contends the trial court erred in convicting him of promoting child pornography in the first degree because the text of the post supporting the conviction did not depict "sexual conduct" as required by section 573.025.1. Viewed in the light most favorable to the verdict, the evidence was sufficient to support the conviction for promoting obscene material with a child as a participant or observer of sexual conduct. Liberty's first point is denied.

In the second point, Liberty argues that convicting him of eight separate possession offenses—one for each photograph—violates the prohibition against multiple punishments for a single offense under the Double Jeopardy Clause. Under the Double Jeopardy Clause, multiple convictions are permissible if the defendant has committed separate crimes in both law and fact. To determine if the defendant has committed separate crimes, we look to the allowable "unit of prosecution" within the charging statute. Under the rule of lenity, if the intended unit of prosecution is ambiguous, courts are to resolve it in the defendant's favor.

Section 573.037, RSMo 2000, prohibited the possession of "any obscene material that has a child as one of its participants or portrays what appears to be a child as a participant or observer of sexual conduct." The Legislature used the collective noun "material," in addition to the word "any." 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."

The gravamen of the offense also supports the construction that Liberty's possession of multiple images on one computer, at the same time, is one act rather than separate acts. Moreover, in 2008, the Legislature added an enhanced penalty to the section for possession of, *inter alia*, more than twenty still images of child pornography. If the Legislature had intended separate convictions for each still image in the prior statute, its addition of an enhanced penalty for the possession of multiple images becomes illogical.

Therefore, Mr. Liberty's second point is granted. His possession sentences are reversed and we remand for resentencing on a single possession count. By our disposition of the second point, Liberty's third point is rendered moot. Therefore, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Opinion by Thomas H. Newton, Judge

April 12, 2011

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