



Missouri Court of Appeals
Southern District

Division One

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SD28820
)	
ROBERT M. OLIVER,)	Opinion filed:
)	December 16, 2008
Appellant.)	
)	

APPEAL FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI

Honorable Mark E. Orr, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

Robert M. Oliver (“Appellant”) appeals his convictions following a jury trial for two counts of the Class A felony of sexual exploitation of a minor, violations of section 573.023, and two counts of the Class B felony of promoting child pornography in the first degree, violations of section 573.025.¹

¹ Unless otherwise stated, all statutory references are to RSMo 2000.

Appellant was sentenced to fifteen years in the Department of Corrections on each count of sexual exploitation of a minor and ten years on each count of promoting child pornography with the sentences to run concurrently.

Appellant asserts five points of trial court error.

“Viewed in the light most favorable to the verdict,” ***State v. Hagan***, 79 S.W.3d 447, 449 (Mo.App. 2002), the record reveals that on November 6, 2005, J.O., Appellant’s eight-year-old son, invited his friends K.K., who was eight years old, and C.M., who was five years old, over to play at his house.² K.M., the mother of K.K. and C.M., dropped the children off at Appellant’s home between 1:00 p.m. and 2:00 p.m. in the afternoon and picked them up at 6:00 p.m.

Later that evening, K.M. was giving C.M. a bath when C.M. informed her that “they had taken naked pictures” while at Appellant’s house that afternoon. K.M. then spoke with her older son, K.K., who confirmed that Appellant “had taken pictures of them with their clothes taken off.” K.M. contacted the

In addition to the charges mentioned above Appellant was charged in the “First Amended Information” with two additional counts of promoting child pornography in the first degree and two charges of the Class C felony of attempted promotion of child pornography in the first degree, violations of sections 573.025 and 564.011. These charges were dismissed by the State at trial.

² Pursuant to section 566.226, RSMo Cum. Supp. 2007, we shall refer to the victims and their family by their initials in order to protect their identity.

We note that, in addition to J.O., at the time of the incident in question Husband resided with his spouse, A.O. (“Wife”), and another child, N.O; however, Wife and Appellant were divorced prior to trial after thirteen years of marriage.

authorities and police officers were dispatched to her home to speak with the family.

After this preliminary discussion with K.M. and her children, Detective Rick Hill (“Detective Hill”) of the Taney County Sheriff’s Department, two deputies, and an investigator with the Children’s Division of the Department of Family Services, Ms. Ledbetter, went to Appellant’s home late in the evening on November 6, 2005. Appellant answered the door and Detective Hill explained the allegations against him. Appellant stated he did take pictures of the children that afternoon but he “said it was just of their bellies” and he “then demonstrated by lifting his shirt while talking about this.” Detective Hill asked Appellant if he owned a digital camera, Appellant indicated he did own a digital camera, and they went into Appellant’s home office to retrieve the camera. When Detective Hill asked Appellant for consent to search the digital camera as well as his computer equipment, Appellant “became a little upset, and told [Detective Hill he] needed to get a search warrant.”

While Appellant was speaking with the officers, Ms. Ledbetter spoke with Wife in a bedroom. When the officers finished with Appellant, Ms. Ledbetter met with Appellant and Wife and told them that they had three options based on the allegations against Appellant. She informed Appellant and Wife that Wife and the children could leave the home; that Appellant could leave the home; or the authorities could take the children into custody. Following this discussion, Appellant “volunteered” to leave the home without being charged by the officers.

After Appellant departed the residence, Wife signed a consent to search form presented to her by the officers and gave the officers permission to take away the computers located in the office, the digital camera, and other devices. Thereafter, the sheriff's department seasonably obtained a warrant to examine the contents of the computer and the digital storage devices. Employing sophisticated computer recovery software, the officers discovered on the memory card of the digital camera twenty-seven images of J.O., K.K., and C.M. in various stages of undress and some of the images depicted the boys totally nude.³ Likewise, Appellant's computer hard drive yielded numerous pictures of nude men and boys in assorted graphic and suggestive sexual positions. Further, there was digital evidence that Appellant had searched the internet for "basically male porn sites . . . teenagers, younger than teenagers, some incest sites" and that he had visited websites containing search terms such as "fathers doing sons" and "boy love."

³ Ten photographs of the boys were admitted into evidence at trial: Exhibit 6 was a photograph of all three boys fully clothed with their arms around one another; Exhibit 7 was a photograph of all three boys with their shirts off; Exhibit 8 was a photograph of one boy with his shirt off and his hand down his pants; Exhibit 9 was a photograph of a blond boy, who was wearing pants, with his hands grabbing his genitals; Exhibit 10 was a photograph of the same blond child shirtless with his hands on his hips; Exhibit 11 was a photograph of all three boys in which the boy with glasses had his pants pulled down to expose his genitals; Exhibit 12 was a photograph of a boy sitting in a chair with his pants pulled down exposing his genitals; Exhibit 13 was a photograph of a boy with glasses exposing his genitals with his hands on his hips; Exhibit 14 was a photograph of a boy exposing his genitals; Exhibit 15 was a photograph of a boy bending over with his buttocks toward the camera, his hands on his buttocks pulling apart his buttock cheeks, and exposing his open anus; and Exhibit 16 was a photograph of a boy bending over with his buttocks toward the camera and his anus partially visible.

At trial, J.O. testified that Appellant took pictures of his friends and himself while they were in Appellant's office, but J.O. could not remember if they were wearing clothes at the time or not. Additionally, C.M. testified that Appellant "took pictures of [the boys] first, then he said take off [their] clothes." He stated he took off his shirt for the pictures and pulled his pants down. C.M. testified Appellant then showed the pictures to the boys on his computer screen. On direct examination, C.M. stated Appellant asked the boys to kiss each other and they did so, but on cross-examination he related he was unsure if they had kissed.

K.K. testified at trial that Appellant took pictures of them with their clothes on and then he asked them to take off their shirts. After a few pictures with their shirts off, Appellant asked them to remove their pants and he took more pictures of them. K.K. related Appellant put the pictures on his computer and they viewed the pictures. He further stated he did not recall if they were asked to kiss or touch each other.

Wife testified that she used the computer in their home office "every now and then, but not that much." She related that she had recently noticed some differences in Appellant's behavior and "more often than not" he would get up in the middle of the night and go to his home office. She stated she often woke up at "2 or 3:00 in the morning, and [Appellant] wouldn't be there." She related she had never seen Appellant looking at pornography.

Detective David Rozell ("Detective Rozell"), an investigator with the Taney County Sheriff's Department who specializes in computer forensics, testified

about the electronic digital files recovered from Appellant's computer and camera memory card. He stated that each file or image contains data relating to when the item was created, when it was modified, and when it was last accessed. He stated that the access date on each file indicated the last time a piece of information was accessed, but not every time it was viewed, so that if the creation date of a file was different from the date it was last accessed then the file had been viewed at least twice. He related that he found 27 photographs on Appellant's digital camera memory card which were created on November 6, 2005, but that the files were also deleted on that same date. He also testified that Appellant's internet account indicated internet search terms such as "boys," "boy love," and "a lot of sites like that." He stated that some of the internet search terms and pornographic websites had been accessed from November 3, 2005, to November 6, 2005. Detective Rozell also testified that he found a folder on Appellant's computer containing pornographic images, and that it appeared from the data attached to the images that Appellant had looked at most of the images at least twice. Over Appellant's various objections, the photographs Detective Rozell recovered from the camera card were admitted into evidence as well as a number of pornographic images recovered from Appellant's hard drive.

Appellant did not testify at trial. At the close of all the evidence, the jury convicted Appellant as set out above and he was thereafter sentenced by the trial court as previously related. This appeal followed.

In his first point relied on, Appellant maintains the trial court erred in denying his motion to suppress and in allowing the State to introduce into evidence “a Kodak camera and its media chip, images retrieved from that media chip . . . , a Dell computer’s hard drive, the images retrieved from that hard drive . . . , and the testimony of Detective Rozell concerning those [images]” Appellant asserts the aforementioned items were “seized without a warrant and without proper consent” in that Appellant “refused Detective Hill’s request for consent to seize the camera and computer hard drive and so Detective Hill waited until [Appellant] was ordered to leave the home” at which time consent was obtained from Wife. Further, he urges that “the warrant obtained two weeks later was invalid because information obtained as a result of the illegal search and seizure was presented to the judge and affected his decision to issue the warrant.”

Appellate review of a trial court’s ruling on a motion to suppress is limited to a determination of whether the evidence was sufficient to support the finding. ***State v. Edwards***, 116 S.W.3d 511, 530 (Mo. banc 2003). This Court will view the evidence in a light most favorable to the judgment and will reverse the judgment only if clearly erroneous. ***Id.*** The Court will consider all evidence presented at trial, including evidence presented at a pre-trial hearing. ***Id.***

First, we will address Appellant’s contention that Wife’s consent to seize the computer and camera was invalid. In the present matter, Detective Hill and the other officers went to Appellant’s home on the evening of November 6, 2005. As previously related, when they asked Appellant if they could examine

his computer and digital camera, he “became a little upset, and told [Detective Hill he] needed to get a search warrant.” Detective Hill then telephoned his office to commence the search warrant application process, and the officers and Ms. Ledbetter then met with Appellant and Wife in the living room of their home. After talking to Ms. Ledbetter, Appellant then “left” the home. Thereafter, “[b]ecause [Appellant] left,” Detective Hill asked Wife if he could take the computer, digital camera, and other peripheral electronic items. Wife consented and signed a “Permission to Search” form. Detective Hill then departed with the items.⁴

The Fourth Amendment to the United States Constitution guarantees all citizens the right to be free from unreasonable searches and seizures. **State v. Barks**, 128 S.W.3d 513, 516 (Mo. banc 2004). That protection is co-extensive with the protection provided to citizens of the State of Missouri by Article I, Section 15 of the Missouri Constitution. **State v. Sullivan**, 49 S.W.3d 800, 806 (Mo.App. 2001). “In the absence of consent or exigent circumstances, law enforcement officers must obtain a warrant to conduct a search and seizure that would invade a constitutionally-protected privacy interest.” **State v.**

⁴ Prior to trial, Appellant filed a “Motion to Suppress” any information from the computer and digital camera on the basis that the search and seizure of these items was unlawful. A hearing was held on the matter and the trial court denied Appellant’s request. At trial, when the State introduced the various images discovered on the aforementioned devices, Appellant lodged a continuing objection to such evidence. Likewise, Appellant included this claim in his motion for new trial such that this matter was preserved for our review. See **State v. Campbell**, 147 S.W.3d 195, 205 (Mo.App. 2004) (holding that in order to preserve an error in the admission of evidence at trial, it is necessary to object to the evidence at trial at the earliest opportunity and to assert the error in a motion for new trial).

Howes, 150 S.W.3d 139, 143 (Mo.App. 2004). However, “[a] warrantless search in which proper consent, voluntarily given, is obtained is constitutionally valid.” **Id.** “Evidence need not be excluded when ‘voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises.’” **State v. Glass**, 136 S.W.3d 496, 516 (Mo. banc 2004) (quoting **Illinois v. Rodriguez**, 497 U.S. 177, 181 (1990)). “‘Common authority’ exists when there is a ‘mutual use of the property by persons generally having joint access or control for most purposes.’” **Glass**, 136 S.W.3d at 516 (quoting **U.S. v. Matlock**, 415 U.S. 164, 171 n.7 (1974)).

Appellant maintains this matter is guided by **Georgia v. Randolph**, 547 U.S. 103 (2006). In **Randolph**, the defendant’s wife, from whom he had been separated, telephoned the police regarding a domestic dispute. **Id.** at 106-07. When officers arrived at the home, the defendant’s wife informed them that the defendant “was a cocaine user.” **Id.** at 107. Thereafter, the defendant arrived home while the officers were present. **Id.** In that the defendant’s wife had informed the police that “‘items of drug evidence’” could be located in the home, the officers asked the defendant “for permission to search the house, which he unequivocally refused.” **Id.** The officers then “turned to [the defendant’s wife] for consent to search, which she readily gave.” **Randolph**, 547 U.S. at 107. During the search of the home, the officers discovered various drug related paraphernalia and the defendant was ultimately “indicted for possession of cocaine.” **Id.** At trial, the defendant filed a motion “to suppress the evidence,

as products of a warrantless search of his house unauthorized by his wife’s consent over his express refusal.” **Id.** The trial court “denied the motion, ruling that [the defendant’s wife] had common authority to consent to the search.” **Id.** at 107-08. The Court of Appeals of Georgia reversed the trial court’s ruling and the Supreme Court of Georgia sustained that court’s ruling. **Id.** Thereafter, the United States Supreme Court granted *certiorari* in order “to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.” **Randolph**, 547 U.S. at 108.

The Supreme Court ultimately ruled in favor of the **Randolph** defendant by holding that when law enforcement officers conduct a search, authorized by one co-occupant, over the express objection of another present co-occupant, any further search would be unreasonable as to the objecting co-occupant. **Id.** at 122-23. However, in so holding the Supreme Court very carefully distinguished and preserved its earlier holdings in **U.S. v. Matlock**, 415 U.S. 164 (1974), and **Illinois v. Rodriguez**, 497 U.S. 177 (1990).⁵ **Id.** In fact, to reconcile **Randolph** with **Matlock** and **Rodriguez**, the court specifically stated:

⁵ In **Matlock**, 415 U.S. at 166, the defendant, who was arrested in his front yard, was placed in a nearby squad car while police officers obtained consent to search his residence from a woman with whom he lived without first asking the defendant for consent to search the home. Likewise, in **Rodriguez**, 497 U.S. at 180, the defendant was asleep inside his residence when officers obtained consent to search the home from his girlfriend. In both **Matlock** and **Rodriguez**, the law enforcement authorities did not give the defendants an opportunity to object to the searches and, instead, first asked for consent from

If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Randolph, 547 U.S. at 121-22. Accordingly, the United States Supreme Court concluded that “this case invites a straightforward application of the rule that a *physically present* inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant,” thus, the evidence in **Randolph** should have been suppressed by the trial court. **Id.** at 122-23 (emphasis added).

A more recent Missouri case in the United States Court of Appeals of the Eighth Circuit, **U.S. v. Hudspeth**, 518 F.3d 954 (8th Cir. 2008), further demarcated the holding in **Randolph**. In **Hudspeth**, the defendant's business was raided by drug enforcement officers and, pursuant to a search warrant, the defendant's business computers were seized. **Id.** at 955. “During the course of the search, officers discovered child pornography on [the defendant's] business computer” **Id.** The officers, believing that the defendant's home computer probably also contained child pornography, “asked [the defendant] a co-tenant. In both cases the searches were upheld.”

for permission to search his home computer. [The defendant] refused.” **Id.** The defendant was arrested and taken to jail. **Id.** The officers then went to the defendant’s home and asked his wife if they could search the computers located in the home. **Hudspeth**, 518 F.3d at 955-56. While she initially refused permission, the defendant’s wife ultimately gave the officers permission to seize and search the home computers. **Id.** at 956. The officers “did not tell [the defendant’s wife] her husband previously denied consent to search the home computer.” **Id.** The officers discovered child pornography on the home computers. **Id.** At trial, the defendant filed a motion to suppress the child pornography discovered on his home computer. **Id.** This motion was denied by the district court and the defendant appealed. **Hudspeth**, 518 F.3d at 956.

On review, in its **Hudspeth** opinion, the Eighth Circuit analyzed **Randolph** as well as **Matlock**, 415 U.S. at 166-78, and **Rodriguez**, 497 U.S. at 180-86. In discussing **Randolph**, the **Hudspeth** court noted that “[t]hroughout the **Randolph** opinion, the majority consistently repeated it was [the defendant’s] *physical presence* and *immediate objection* to [the wife’s] consent that distinguished **Randolph** from prior case law. The Court reinforced this point in its conclusion . . .” and “emphasize[d] the significance and preservation of both *Matlock* and *Rodriguez*, and thus [its] consequently narrow holding.” **Hudspeth**, 518 F.3d at 959. In applying the aforementioned cases to its own facts, the court stated that “[t]he legal issue of whether an officer’s knowledge of the prior express refusal by one co-tenant negates the later obtained consent of another authorized co-tenant is a matter of first

impression in this court.” **Id.** at 960. “First, we know [the defendant’s wife] was a co-tenant authorized to give the officers consent to search.” **Id.**

Second, unlike **Randolph**, the officers in the present case were not confronted with a . . . dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search, while the other objects. Instead, when [the officers] asked for [the consent of the defendant’s wife], [the defendant] was not present Thus, this rationale for the narrow holding of **Randolph**, which repeatedly referenced the defendant’s physical presence and immediate objection, is inapplicable here.

Third, the Fourth Amendment’s reasonableness requirement did not demand that the officers inform [the defendant’s wife] of her husband’s refusal. This conclusion is supported by *Matlock* and *Rodriguez*

Id. Saliently, the court explained that because the **Hudspeth** defendant was “not at the door and objecting [he] does not fall within **Randolph**’s ‘fine line.’” **Hudspeth**, 518 F.3d at 960-61.

Accordingly, the **Hudspeth** court concluded:

The Fourth Amendment does not prohibit warrantless searches and seizures, *nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure.* What [the defendant] is assured by the Fourth Amendment itself, however, is no such search will occur that is unreasonable. As the Supreme Court explains, it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his or her own right. And the absent, expressly objecting co-inhabitant has assumed the risk that another co-inhabitant might permit the common area to be searched.

* * *

Under the totality of circumstances of the present case, maintaining the Fourth Amendment’s touchstone requirement against unreasonable searches and seizures, we conclude the seizure of [the defendant’s] home computer was reasonable and *the*

Fourth Amendment was not violated when the officers sought [his wife's] consent despite having received [the defendant's] previous refusal.

Id. at 961 (internal quotations and citations omitted) (emphasis added).

Likewise, in **U.S. v. Henderson**, 536 F.3d 776 (7th Cir. 2008), the United States Court of Appeals agreed with the **Hudspeth** interpretation of **Randolph**. In **Henderson**, 536 F.3d at 777, the police were dispatched to the defendant's home "to investigate a report of domestic abuse." Upon arrival, the police were informed by the defendant's wife that he "had weapons in the house and had a history of drug and gun arrests." **Id.** The officers spoke with the defendant in the home and "[i]n unequivocal terms, he ordered them out." **Id.** After the defendant was arrested for domestic battery and removed from the home, his wife "signed a consent-to-search form and led the police on a search that uncovered several firearms, crack cocaine, and items indicative of drug dealing." **Id.** The defendant "was indicted on federal weapon and drug charges." **Id.** At trial he filed a motion to suppress the evidence against him on the basis that it was illegally seized and should be suppressed under the holding in **Randolph. Henderson**, 536 F.3d at 777. This motion was granted by the district court and the government appealed. **Id.**

The reviewing court in **Henderson** analyzed both **Randolph** and **Hudspeth** in reaching its conclusion that "the contemporaneous presence of the objecting and consenting cotenants [i]s indispensable to the decision in **Randolph**" and its own case. **Id.** at 783. It stated that

Indeed, the fact of a conflict between present co-occupants plays a vital role in the **Randolph** majority's . . . premise; a third party . . .

would not, without some very good reason, enter when faced with a disputed invitation between cotenants. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it, or perhaps . . . because the affront to his authority to assert or waive his privacy interest is no longer an issue. As between two present but disagreeing residents with authority, the tie goes to the objector; police may not search based on the consent of one in the face of a physically present inhabitant's express refusal of consent to search. We do not read **Randolph** as vesting the objector with an absolute veto; nothing in the majority opinion suggests the Court was creating a rule of continuing objection.

* * *

[T]he [**Randolph**] Court went out of its way to limit its holding to the circumstances of the case: a disputed consent by two then-present residents with authority

Our conclusion, like the Eighth Circuit's, implements **Randolph's** limiting language and the Court's stated intent to maintain the vitality of *Matlock* and *Rodriguez*. Absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. *Both presence and objection by the tenant are required to render a consent search unreasonable as to him.*

Here, it is undisputed that [the defendant] objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and [his wife] was free to authorize a search of the home. This she readily did. [The consent of the defendant's wife] rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed.

Id. at 783-85 (internal quotations and citations omitted) (emphasis added).⁶

⁶ We note that the Ninth Circuit interpreted **Randolph** differently in **U.S. v. Murphy**, 516 F.3d 1117 (9th Cir. 2008); however, for the reasons set out in **Henderson**, 536 F.3d at 782-85, our case is more akin to that found in

Based on the record before this Court, we find that **Randolph** is inapplicable to the present matter because **Randolph** does not apply where the non-consenting occupant is absent.

First, it is clear, as it was in **Hudspeth**, 518 F.3d at 960, that Wife had the right as a co-tenant of the home to authorize a search. She clearly resided in the home as Appellant's spouse and had all the rights associated with being a co-tenant.

Second, there is no evidence the police requested Appellant leave his home so that they could specifically ask Wife for permission to search the computers and overrule Appellant's denial of consent. See **Randolph**, 547 U.S. at 121-22. Wife testified that after discussing the situation with the officers and the Children's Division caseworker, Appellant "left" the home. Likewise, Detective Hill testified that Appellant "volunteered to leave" after hearing the options set out by the Children's Division caseworker.

Third, as in **Hudspeth**, 518 F.3d at 960, the officers were not confronted with a **Randolph** situation where two co-tenants are physically present at the same time with one giving consent and one denying consent. Here, Appellant denied consent and voluntarily left the premises. It was not until Appellant was no longer in the home and the officers were wrapping up their investigation that they asked Wife for permission to search. The **Randolph**,

Hudspeth. See also **U.S. v. McCurdy**, 480 F.Supp.2d 380, 390 n.9 (D. Maine 2007) (holding that **Randolph** "is expressly limited to defendants who are physically present and expressly refuse consent"); **Commonwealth v. Ocasio**, 882 N.E. 2d 341, 344-45 (Mass. 2008); **People v. Olmo**, 846 N.Y.S.2d 568, 571 (NY 2007).

547 U.S. at 122-23, limitations are restricted to a situation where “the express refusal of consent” by a co-tenant who is physically present is given and that is not the present matter.

Fourth, there is no obligation that the officers had to tell Wife that Appellant had previously refused to give his consent to search. See **Hudspeth**, 518 F.3d at 959. Wife was in the bedroom speaking to the caseworker when Appellant informed the officers that they needed to get a search warrant for the computer and there is nothing in the record which suggests Wife knew Husband had previously denied consent. “Thus, we must conclude [the officers’] failure to advise [Wife] of her husband’s earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable one.” **Hudspeth**, 518 F.3d at 960-61. “[T]he Fourth Amendment’s reasonableness requirement did not demand that the officers inform [Wife] of her husband’s refusal.” **Id.** at 960.

Fifth, **Hudspeth**, 518 F.3d at 961, makes it clear that in situations such as the present matter where the objecting co-tenant is no longer present, an “authorized co-tenant may give consent for several reasons including an unawareness of contraband on the premises, or a desire to protect oneself or others” Here, Wife had the right to allow the search for the safety of her children, one of which was actually pictured in the child pornography at issue. As a result, Wife “rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed.” **Henderson**, 536 F.3d at 785. This portion of Appellant’s first point relied on is denied.

We turn now to Appellant's allegation that the search warrant obtained on November 21, 2005, was invalid because information obtained from the "unlawful seizure" of the computer and digital camera on November 6, 2005, "was presented to the judge and affected his decision to issue the warrant." Here, the computer and the digital camera were seized with Wife's consent from Appellant's home on November 6, 2005, but the warrant application to search the contents of those items was not filed until November 21, 2005.⁷ Appellant's complaint is that the warrant "application included the make, model and serial number of the computer, the make, model and serial number of the camera, and the make and model of a CD," which the law enforcement officials would not have had if they had not seized the items on November 6, 2005. Having already found that the items seized on November 6, 2005, were seized as part of a reasonable search properly conducted with Wife's consent, there is no need to address this allegation of error. Point I is denied.

Appellant's second point relied on asserts the trial court erred in denying his motions for judgment of acquittal at the close of the State's case and at the close of all the evidence as well as in finding Appellant guilty of Counts I and II, sexual exploitation of a minor, because "the State failed to produce any

⁷ The warrant to search the aforementioned items was also granted and issued on November 21, 2005. Among other things, the warrant authorized law enforcement officers to seize other items from Appellant's home including any discs or other media storage devices, certain paperwork, and all computer equipment and peripherals in addition to allowing them to search the media storage devices associated with the computer and camera. Additionally, the warrant acknowledged that the equipment would need to be taken to a third location by the sheriff's department in order to have access to the proper software and equipment to perform a full battery of electronic searches on the media located on the computer and camera.

evidence that [Appellant] created obscene material since the photographs of K.K. and C.M. do not show any sexual conduct, nor do they involve sexual performances.”

We review the denial of a motion for acquittal to determine if the State adduced sufficient evidence to make a submissible case. **State v. Christian**, 184 S.W.3d 597, 602 (Mo.App. 2006). Our standard of review is whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. **State v. Botts**, 151 S.W.3d 372, 375 (Mo.App. 2004). The Court must examine the elements of the crime and consider each in turn; review the evidence in the light most favorable to the judgment; disregard any contrary evidence; and grant the State all reasonable inferences from the evidence. **State v. Whalen**, 49 S.W.3d 181, 184 (Mo. banc 2001). We defer to the superior position of the jury to assess the credibility of witnesses and the weight and value of their testimony. **State v. Nichols**, 20 S.W.3d 594, 597 (Mo.App. 2000).

Section 573.023.1 sets out that “[a] person commits the crime of sexual exploitation of a minor if, knowing of its content and character, such person photographs, films, videotapes, produces or otherwise creates obscene material with a minor or child pornography.”

Section 573.010(2) defines “child pornography” as “any obscene⁸ material or performance depicting sexual conduct, sexual contact, or a sexual

⁸ In defining “obscene,” section 573.010(9) sets out that

any material or performance is obscene if, taken as a whole:

performance, as these terms are defined in section 556.061,^{9]} and which has as one of its participants or portrays as an observer of such conduct, contact, or performance a child under the age of eighteen” (Emphasis added).

While Appellant argues that section “573.023 does not criminalize photographing a nude child,” at least two of the photographs at issue clearly fall under the ban of creating child pornography set out in section 573.023.1. One of the photographs, Exhibit 15, is a photograph of a young boy bending over with his buttocks toward the camera with his hands on his buttocks pulling apart his buttock cheeks such that his anus is open and exposed.

(a) Applying contemporary community standards, its predominant appeal is to prurient interest in sex; and

(b) The average person, applying contemporary community standards, would find the material depicts or describes sexual conduct in a patently offensive way; and

(c) A reasonable person would find the material lacks serious literary, artistic, political or scientific value

⁹ Section 556.061, Cum. Supp. 2004, contains the following definitions:

(29) “Sexual conduct” means 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;

(30) “Sexual contact” means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person;

(31) “Sexual performance”, any performance, or part thereof, which includes sexual conduct by a child who is less than seventeen years of age

Similarly, the other photograph, Exhibit 16, is a photograph of a boy bending over with his buttocks toward the camera and he has his hands on his buttocks attempting to show his anus to the camera.

This Court has no doubt that Exhibits 15 and 16 constitute “obscene material[s]” as described in section 573.010(9) and clearly “depict[] sexual conduct” as this term is defined in section 556.061(29), Cum. Supp. 2004, for purposes of meeting the definition of “child pornography.”

There is nothing in section 556.061(29), Cum. Supp. 2004, suggesting that the “physical contact with the person’s clothed or unclothed . . . buttocks . . . in an act of apparent sexual stimulation or gratification” has to be of another person. The proscribed sexual conduct can constitute the physical contact with “a person’s” buttocks and, based on the rules of statutory construction, we need not examine the statute further.¹⁰ § 556.061(29), Cum. Supp. 2004 (emphasis added). Indeed, both exhibits depict “sexual conduct” in that the photographs show boys touching their own buttocks to reveal their anuses for the purpose of the “apparent sexual stimulation or gratification . . .” of the viewer of the photograph or, in this case, Appellant. § 556.061(29), Cum. Supp. 2004. Given the scenario under review, there is simply no justifiable

¹⁰ As stated in ***State v. Williams***, 24 S.W.3d 101, 115 (Mo.App. 2000),

When a word used in a statute is not defined therein, it is appropriate to derive its plain and ordinary meaning from a dictionary. The courts are without authority to read into a statute a legislative intent which is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning.

value in taking pictures of minor boys deliberately exposing their anuses and, in one photograph, having one of the boys pull his buttocks such that his anus is opened approximately one inch, other than a “prurient interest in sex.” § 573.010(9).

Furthermore, the fact that the pictures were taken for the express purpose of “apparent sexual stimulation or gratification,” section 556.061(29), Cum. Supp. 2004, is particularly compelling given the reality that Appellant’s computer revealed he frequented “basically male porn sites . . . teenagers, younger than teenagers, some incest sites” and that he had visited websites containing search terms such as “fathers doing sons” and “boy love.” See **State v. McIntyre**, 63 S.W.3d 312, 315 (Mo.App. 2001) (holding that in a sexual misconduct case the evidence was sufficient to prove the defendant touched the victim to satisfy his own desires because of “[t]he acts themselves and the surrounding circumstances (i.e., the sexual nature of the acts and the fact that the men were alone when the incidents occurred) . . .”).

Exhibits 15 and 16 constituted child pornography as defined under the statutes such that Appellant is guilty of creating “obscene material with a minor or child pornography.” § 573.023.1. The State adduced sufficient evidence to make a submissible case. **Christian**, 184 S.W.3d at 602.

Lastly, Appellant asserts under this point relied on that “it is clear that the legislature did not intend to prohibit photographing nude children in [section] 573.023 . . . because there was already a criminal statute prohibiting

that conduct, [section] 568.060, abuse of a child;”¹¹ accordingly, he essentially argues the State charged him with the wrong crime. However, when a criminal’s conduct is prohibited by more than one statute the State may, at its discretion, “decide under which statute to charge the defendant.” **State v. Ondo**, 232 S.W.3d 622, 629 (Mo.App. 2007); *see also* **State v. Bouse**, 150 S.W.3d 326, 336 (Mo.App. 2004). Accordingly, there is no error in the fact that Appellant was charged under the particular statutory scheme at issue. There was sufficient evidence adduced at trial to convict Appellant of two counts of sexual exploitation of a minor under section 573.023.1. *See* **Christian**, 184 S.W.3d at 602; *see also* §§ 573.023.1; 573.010(9); 556.061, Cum. Supp. 2004. The trial court did not err in denying Appellant’s motions for judgments of acquittal and in convicting Appellant of the crimes charged. Point II is denied.

¹¹ Section 568.060 sets out:

1. A person commits the crime of abuse of a child if such person:

* * *

(2) Photographs or films a child less than eighteen years old engaging in a prohibited sexual act or in the simulation of such an act or who causes or knowingly permits a child to engage in a prohibited sexual act or in the simulation of such an act for the purpose of photographing or filming the act.

2. As used in this section ‘prohibited sexual act’ means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fetishism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

Appellant’s third point relied on asserts the trial court erred in denying his motions for judgment of acquittal at the close of the State’s case and at the close of all the evidence as well as in finding Appellant guilty of Counts III and V, promoting child pornography in the first degree, because the State “failed to produce any evidence that [Appellant] had any intention to exhibit obscene material since there was no evidence that he sold, shared, or gave any internet image to any other person” in that Appellant “looked at these images alone, in the study of his own home.”¹²

As previously related, we review the denial of a motion for acquittal to determine if the State adduced sufficient evidence to make a submissible case. **Christian**, 184 S.W.3d at 602. Our standard of review is whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. **Botts**, 151 S.W.3d at 375.

A person is guilty of promoting child pornography in the first degree under section 573.025.1 “if, knowing of its content and character, such person possesses with the intent to promote or promotes obscene material that has a

¹² In his argument, Appellant asserts it is unclear whether the obscene material he is charged with exhibiting were the photographs taken by him of the children or the images discovered on his computer which had been downloaded from the internet. Count III charged Appellant with possessing “with the intent to exhibit obscene material consisting of an image *stored on a computer chip*” and Count V charged Appellant with possessing “with the intent to exhibit obscene material consisting of an image *stored on a computer*” (Emphasis added). Accordingly, it is clear that Count III charged Appellant in relation to the images of the children he took and stored on his digital camera card and Count V charged Appellant with possessing the images found on his computer which were downloaded from the internet.

child as one of its participants or portrays what appears to be a child as a participant or observer of sexual conduct.”

Section 573.010(12) sets out that “promote” is defined as “to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same, by any means including a computer” Here, Appellant was specifically charged with “possessing [child pornography] with the intent to exhibit” it.

We turn first to Appellant’s argument as it relates to Count III and the images taken of the children with his digital camera on November 6, 2005. Having already determined under Point II above that at least two of the photographs taken with his digital camera were obscene images of child pornography, we need only examine whether Appellant “intended to exhibit” those images as set out in section 573.025.1. We are mindful that a defendant’s intent is rarely proven by direct evidence and “will often rest on circumstantial evidence and permissible inferences.” ***State v. Willis***, 239 S.W.3d 198, 201 (Mo.App. 2007).

In the present matter, two of the three children at issue testified that Appellant took photographs of them with his digital camera and that he then showed these photographs on the camera card to them on his computer. Appellant argues, nevertheless, that this was insufficient to prove he “exhibited” the images. He maintains the images had been deleted from the digital camera’s media card and were only recovered by Detective Rozell with

the aid of sophisticated software such that he could not have the “intent to exhibit photographs that no longer existed.”

Appellant misunderstands the fact that the State was not required to prove that Appellant possessed the images at the time of trial. Instead, the State was required to prove Appellant possessed the images on November 6, 2005, a fact that was proven by the digital data uncovered by Detective Rozell.

The crux of this issue, then, revolves around the definition of “exhibit” as it is used in the section 573.010(15) definition of “promote.” Preliminarily, we observe that based on the previously set out definition, it is clear that to “promote” necessarily implicates more than just the promoter. At least one other person must be involved. Furthermore, the term “exhibit” is not defined in relation to this section nor does a definition appear elsewhere in the Code that would aid us. “In the absence of a statutory definition, a word’s plain and ordinary meaning is derived from the dictionary.” **State v. Bush**, 250 S.W.3d 776, 780 (Mo.App. 2008). The term “exhibit” has been defined as “to present to view” or “to show or display” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 437 (11th ed. 2003). Such a definition means that the State in this case was required to prove that Appellant possessed child pornography with the intent to show or display it to someone. However, there is nothing in the aforementioned definition or in the statutes at issue which requires the images be viewed publicly or exhibited to a certain number of audience members. One person is sufficient. Nor is there a requirement that any profit be gained from such an exhibition.

Here, there was direct testimony from K.K. and C.M. that Appellant showed the photographs derived from the camera computer chip to them on his computer on the afternoon of November 6, 2005, shortly after he took the photographs. Accordingly, the jury could have found that Appellant had “exhibited” the images by showing them to the children on his computer. See **State v. George**, 717 S.W.2d 857, 859 (Mo.App. 1986) (holding that “one person . . . can be the audience” for purposes of proving the crime of using a child in a sexual performance). Based on the plain meaning of the statutes, the fact that Appellant exhibited the photographs only to the children involved does not preclude his conviction under section 573.025.1. There was sufficient evidence elicited to prove that Appellant exhibited the images at issue by showing them to the children and, from this evidence, we can infer that he possessed child pornography with the intent to exhibit the obscene material.

Next, we turn to Count V and the images which had been downloaded from the internet by Appellant, and which were found by Detective Rozell in a hidden folder on Appellant’s computer hard drive. These images, were introduced into evidence at trial and provided to this Court. They contain, among other things, graphic sexual images of older men engaged in anal sex with young boys and also depict young boys engaged in fellatio with older men and vice versa. This Court finds these images are clearly child pornography under sections 573.010(2) and 573.010(9).

With that being said, we turn to the issue of whether the State made a submissible case that Appellant’s conduct with regard to these particular

images violated the provisions of section 573.025.1 as alleged in Count V.

Detective Rozell testified that the digital data attached to these images illustrated that all of the images had been viewed at least one time and many of the images had been viewed more than one time. He stated the images were mostly downloaded in October of 2005 and had been accessed most recently on November 3, 2005. The State maintains that based on the fact that Appellant took pornographic photographs of his son and his son's young friends, which he then showed the children; that Appellant repeatedly accessed numerous graphic child pornography images stored on his computer; and that Appellant repeatedly searched the internet for websites containing child pornography involving young boys and older men, it can be inferred from the aforementioned circumstantial evidence that Appellant intended to exhibit the child pornography he possessed to other people. We disagree.

The evidence does not show that Appellant was attempting to promote these images by exhibiting them to at least one other individual. While the children spoke of seeing photographs of themselves made by Appellant's digital camera they did not testify that they viewed other images that may have been displayed on Appellant's computer. We "may not supply missing evidence or give the State the benefit of unreasonable, speculative, or forced inferences." **Whalen**, 49 S.W.3d at 184 (internal quotation omitted). There was insufficient evidence adduced at trial to prove Appellant was guilty beyond a reasonable doubt as to Count V. Point III is denied as to Count III and **granted** as to Count V.

Appellant's fourth point relied on maintains the trial court plainly erred in accepting the jury's verdict in relation to the two counts of promoting child pornography and in sentencing Appellant based on those convictions. He asserts plain error was committed in that the trial court's actions violated his right to be free from double jeopardy in that "the verdict directing instruction for Count III was identical to the verdict directing instruction for Count V, there was no basis in the instructions to distinguish the two counts, and therefore [Appellant] was found guilty twice for the same offense."

Because of our holding setting aside Appellant's conviction as to Count V, we need not address this point. It is now moot. ***State v. Hicks***, 221 S.W.3d 497, 505 (Mo.App. 2007).

Appellant's fifth and final point relied on asserts the trial court abused its discretion in overruling Appellant's objection to statements made in the State's closing argument that "due to an oversight, the date on Count III was wrong" Specifically he maintains "the prosecutor misstated the evidence since the date on the Count III verdict director was the same date used in the information, and the prosecutor was asking the jury to ignore [this difference and] find [Appellant] guilty based on pity for the prosecutor because if [Appellant] was acquitted based on the incorrect date, the prosecutor would take 'the heat.'"

"The 'trial court has broad discretion in controlling the scope of closing argument, and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant.'" ***State***

v. Tinsley, 143 S.W.3d 722, 735 (Mo.App. 2004) (quoting *State v. Cunningham*, 32 S.W.3d 217, 219 (Mo.App. 2000)). “An abuse of discretion will not be found unless the statements were clearly unwarranted and had a decisive effect on the jury.” *Tinsley*, 143 S.W.3d at 734. “Comments have a decisive effect on the jury when there is a reasonable probability that, in the absence of these comments, the verdict would have been different” and “the burden is on Appellant to prove the decisive significance of the comments.” *Id.*

In the present matter, Count III of the First Amended Information set out “that on or about the 3rd day of November, 2005, . . . [Appellant] . . . possessed with the intent to exhibit obscene material consisting of an image stored on a computer chip” At trial there was evidence from several sources that the images on the computer chip were actually created or taken on November 6, 2005. The verdict director for this count, which was presented to the jury as Jury Instruction No. 10, stated similarly that “on or about the 3rd day of November, 2005, . . . [Appellant] possessed with the intent to exhibit material, consisting of an image stored on a computer chip” During the State’s closing argument, the following exchange took place:

The Prosecutor: Instruction 10, that’s Count III. Instruction 12 that’s Count V. Those involve promoting child pornography in the first degree. And that’s in the language of Instruction 10 stated ‘that on or about the 3rd of November 2005’ – and this involved the computer chip from the camera. Now, this is where I have to accept responsibility for a clerical error or just an oversight on my part.

This is why we use the language of these pleadings that we file the language ‘on or about.’

Defense Counsel: Judge, I'm going to object to this being a typographical error. It's clearly not, and it's misconstruing. That instruction's going to confuse the jury.

The Prosecutor: Judge –

Defense Counsel: It's the way it's been charged.

The Prosecutor: Judge, I don't think [defense counsel] can presume to know what's an error and what's not an error and how the error took place.

The Court: I will overrule the objection.

The Prosecutor: Thank you.

This is why we use the language 'on or about' the 3rd of November to the 6th of November, 2005. Sometimes it's hard to tell what the evidence is going to be on the dates.

Now, I will tell you, me, the culprit on this. I wish I had caught this before, because we put in here on the computer chip, the camera chip, the media chip on or about the 3rd of November 2005.

We clearly know now [from] the evidence those photographs were taken November 6, 2005. If you for that reason choose not to find [Appellant] guilty on Count III, I'm going to take the heat for that. And I'll do it, because I should have caught that before we went to trial on this.

Appellant's argument is that the Prosecutor "misstated the evidence" because the verdict director set out "that on or about the 3rd day of November, 2005, . . . [Appellant] . . . possessed . . . obscene material consisting of an image stored on a computer chip . . . ," while the evidence at trial revealed that the images were specifically created three days later on November 6, 2005. We fail to see how this is a misstatement of the evidence in that the verdict director gave the date as "on or about" November 3, 2005. If anything, this is a clerical mistake as suggested by the State and is certainly not the type of unwarranted

statement which could have “a decisive effect on the jury.” *Tinsley*, 143 S.W.3d at 734. Appellant has failed to prove these statements in closing argument were so significant that “there is a reasonable probability that, in the absence of these comments, the verdict would have been different.” *Id.* The trial court did not abuse its discretion in overruling Appellant’s objection to the comments made in the State’s closing argument. Point denied.

The trial court’s judgment is affirmed with respect to Appellant’s conviction on Counts I and II, sexual exploitation of a minor child, and Count III, promoting child pornography in the first degree. Appellant’s conviction on Count V, promoting child pornography in the first degree, is reversed and the cause is remanded to the trial court with instructions to set aside as to the conviction on Count V.

Robert S. Barney, Judge

BATES, J. – CONCURS

SCOTT, P.J.- CONCURS

Appellant’s attorney: Nancy A. McKerrow

Respondent’s attorneys: Jeremiah W. (Jay) Nixon & Jamie Pamela Rasmussen