No. SC91821

In the Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

DAVID D. LIBERTY,

Appellant.

Appeal from Platte County Circuit Court
Sixth Judicial Circuit
The Honorable Owens Lee Hull, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant David Liberty appeals from his conviction and sentence on one count of the class B felony of promoting child pornography in the first degree, section 573.025, RSMo 2000; and eight counts of the class C felony of possession of child pornography, section 573.037, RSMo Cum. Supp. 2004.[1] (L.F. 91-94, 97-98). Appellant waived his right to trial by a jury and was tried on July 27-28, 2009 by Judge Owens Lee Hull. (L.F. 11, 12, 61-62). Appellant contests the sufficiency of the evidence to support his conviction for promoting child pornography and his conviction on six of the eight counts of possession of child pornography. Viewed in the light most favorable to the verdict, the evidence at trial showed:

In 2007, a volunteer for the Wikisposure Project, which is dedicated to posting the real life identities of online pedophile activists, began monitoring a website called "boymoment.com." (Tr. 22-23). The volunteer, Michelle Weller, discovered that "boymoment.com" was "a very graphic website" where men talked about sex with young boys. (Tr. 23). While monitoring the website, Weller saw posts from someone with the user name of "DDLIBNKC."

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[1] The enhanced class C felony charge was based on Appellant's prior offender status due to a 2002 guilty plea to a charge of possession of child pornography. (L.F. 76-79, 86). § 573.037.2, RSMo Cum. Supp. 2004.

(Tr. 25). Weller began saving screenshots of some of the posts that contained identifying information about "DDLIBNKC" or information about his sexual contact with children. (Tr. 27, 28).

The posts stated that "DDLIBNKC" lived in the Show-Me State and that he was born on July 27, 1959. (Tr. 30). The posts also stated that he was primarily attracted to boys between the ages of four and ten, but sometimes would be attracted to boys as old as eleven or twelve. (Tr. 30). "DDLIBNKC" also stated that his screen name represented his initials.[2] (Tr. 32). In other posts, "DDLIBNKC" said that he worked in construction, that he lived in his mother's home in a small town near a big city, that his mother worked in law enforcement, and that he liked to go to area festivals to take pictures of young boys.[3] (Tr. 39, 43, 49, 52). "DDLIBNKC" also talked in the posts about treasures that he would remember for the rest of his life. (Tr. 34). They included a sock puppet that he kept on the dashboard of his

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[2] Appellant's full name is David Delaine Liberty, his date of birth is July 27, 1959, and he lived north of Kansas City, in Parkville. (Tr. 92-93, 111; L.F. 91).

[3] At the time Appellant was arrested, police confirmed that he worked in construction site-cleanup and that he lived with his mother, who was employed by the Parkville Police Department. (Tr. 92, 94-95, 102, 122-23).

vehicle, a framed handprint with a kindergarten picture of a boy who was referred to as "My J[]," a cassette tape of "J[]" singing, and a handmade book that was drawn by another young boy. (Tr. 34). "J[]" was mentioned in numerous posts. (Tr. 43, 46). Also mentioned was a five-year-old that "DDLIBNKC" videotaped who lived across the street and who "DDLIBNKC" called "Li'l Hercules." (Tr. 51).

Some of the posts also described a photo-sharing website called "IMGSRC.RU" that pedophiles use to share photos. (Tr. 54). Weller followed a link to that website and found that "DDLIBNKC" had an account there. (Tr. 54-55). Weller found pictures posted under that account that corresponded to some of the information contained in the postings made on "boymoment.com." (Tr. 56-58).

The Western Missouri Cyber Crimes Task Force was eventually asked to investigate "DDLIBNKC's" postings on "boymoment.com." (Tr. 71-72). Detective Jeremiah Filion took screen shots of several of those postings and saved them to a compact disc. (Tr. 73). One of the posts that Detective Filion saved referred to "DDLIBNKC" looking out a window with binoculars at a boy playing in the neighborhood. (Tr. 77). Another post stated that "DDLIBNKC" was employed as a home builder. (Tr. 84). Yet another post referred to a diaper fetish – stating that someone wearing a diaper is attractive and expressing a preference for bigger and thicker diapers on boys.

(Tr. 86). Detective Filion also found another post where "DDLIBNKC" talked about owning an HP Pavilion DV9000 laptop computer. (Tr. 88).

Detective Filion obtained a search warrant for the house in Parkville where Appellant lived with his mother. (Tr. 92, 94, 125). Appellant was present when the warrant was served. (Tr. 92-93, 111-12). A note with the name "boymoment.com" written on it was found inside the house. (Tr. 95). Several drawings that appeared to have been done by a child were found on a wall, along with papers and school awards given to a child. (Tr. 96-97). One certificate contained the name "J[]."[4] (Tr. 98). Various photographs of a young boy were also found in the room. (Tr. 99-101). A display case contained what appeared to be arrowheads or rocks that were arranged to spell out "J[] Rocks." (Tr. 97). The name "J[]" was printed on a piece of paper on top of a table. (Tr. 97). A videotape of a movie entitled "Li'l Hercules" was also found in the house. (Tr. 118).

A digital video camcorder was found in Appellant's bedroom. (Tr. 130-31). A handwritten letter that made reference to "J[]"" was also found in the bedroom. (Tr. 134). Literature for an HP Pavilion DV9000 laptop computer

[4] The name on the certificate and the other items found in the room was the same first name described in the posts on "boymoment.com."

was found in the living room, along with a box bearing the name "Olympus." (Tr. 118-19). A pair of binoculars was found in the bathroom. (Tr. 126-27).

A second warrant was obtained to search Appellant's pick-up truck. (Tr. 93, 112). Officers found an HP Pavilion DV9000 laptop inside the truck. (Tr. 88-89). They also found a sock puppet on the dashboard. (Tr. 116).

After Appellant was arrested, a pawn shop employee called the police to report that someone had recently pawned an Olympus digital camera. (Tr. 102). A photo array was shown to the pawn shop owner, and police recovered the camera. (Tr. 103, 105). The camera and the laptop computer were taken to a computer forensics laboratory. (Tr. 91, 105, 115). An examination of the computer showed that it had been used hundreds of times to access the website "boymoment.com" with the user name "DDLIBNKC." (Tr. 145-46). The examination also showed that the computer had been used several times to access the Russian website "IMGSRC.RU." (Tr. 148).

Examiners further found that the computer was used on March 31, 2008, to access the Wikisposure website at "Wikisposure.com/DDLIBNKC." (Tr. 150). That web page contained claims that "DDLIBNKC" was a pedophile. (Tr. 151-52). The computer was used that same day to view a YouTube movie that referred to "DDLIBNKC." (Tr. 152). Also on that day, a program called "nCleaner" was downloaded and run on the computer. (Tr. 157-58). That program is advertised as cleaning deleted files off of a

computer so that they cannot be recovered. (Tr. 156). But the program either did not work as advertised or it was not run correctly because some files were found on the computer. (Tr. 159).

Those files included more than a dozen pictures featuring young boys wearing diapers. (Tr. 165). The computer also contained more than forty pictures of Appellant wearing a diaper. (Tr. 166). Metadata recovered from the computer showed that those pictures were taken by an Olympus camera. (Tr. 166-67). The same model of camera was also used to take about 200 pictures that were found on Appellant's computer. (Tr. 168). Investigators believed that some of the images found on the computer contained child pornography. (Tr. 170). Metadata associated with those pictures showed that one image was placed on Appellant's computer on or after December 2, 2007, while the rest were placed on the computer in January and February of 2008. (Tr. 172-88).

Appellant made a series of phone calls while he was incarcerated at the Platte County Jail. (Tr. 201). In one of the calls, Appellant said that he should have thrown out his computer. (State's Ex. 99, Track 3). Appellant also said that he did not see anything wrong in what he had done and that there were thousands of other people like him. (State's Ex. 99, Track 3). He also expressed surprise that the police had found some of the pictures, saying that he thought he had deleted or overwritten them, and he expressed

dismay that he had not managed to remove the files from the computer. (State's Ex. 99, Tracks 5, 15). He said that he did not understand why the police did not get "everything else." (State's Ex. 99, Track 9). Appellant also said that he could not explain why he was the way he was, and that he could not help it. (State's Ex. 99, Track 9). Appellant instructed (presumably his mother) not to throw away two pairs of shorts in the bedroom that belonged to J[] and that reminded him of how little J[] once was. (State's Ex. 99, Track 10).

The court found Appellant guilty of promoting child pornography in the first degree and of eight counts of possession of child pornography as alleged in counts two through five and seven through ten.[5] (Tr. 239-42). The court acquitted Appellant on a ninth charge of possession of child pornography that was alleged in count six. (Tr. 242). The court sentenced Appellant to consecutive terms of twelve years imprisonment for promoting child pornography in the first degree and three years imprisonment on each count of possession of child pornography, for a total of thirty-six years. (Tr. 276-77).

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[5] The convictions were based on State's Exhibits 1, 81 through 84, and 86 through 89, the contents of which will be discussed in response to Appellant's Points I and III, which challenge whether certain of those exhibits are sufficient to support the convictions on which they are based.

ARGUMENT

I.

Sufficient evidence supported Appellant's conviction for promoting child pornography.

Appellant claims that there was insufficient evidence to support his conviction for promoting child pornography because the internet posting on which the conviction was based did not depict sexual conduct. But the State's evidence was sufficient to support the verdict because it described Appellant's physical contact with the genitals of young boys that caused him sexual stimulation and gratification.

A. Underlying Facts.

Count one of the amended information charged Appellant with promoting child pornography in the first degree for distributing obscene material that described a five-year-old male's physical contact with Appellant's genitals and Appellant's physical contact with the buttocks and genitals of a seven-year-old male. (L.F. 76). The charge was based on a post that Appellant made to the "boymoment.com" website on May 29, 2007. (L.F. 76; Tr. 225-26). That post read:

> Oh what a wonderful way for my summer to begin AT THE LAKE.

Lucky me 5 yr old D[] from across the street begged to tag along. Couldn't never talk him into HUMPING MY BACK by climbing on top of me as I was being pulled behind the boat on a Tiki Warrior.

BUT I did get a solid hour of LAP DANCES out of him when we switched over to a innertube.

BUT THE TWINS 7 year olds S[] and T[] [I see maybe once every 3 weeks]. Long legged boys tall and skinny for their age ARE QUITE TIMID lil things. [W]ouldn't say sissys, rather they are MOMMAS BABYS [at least she babys them Way to (sic) much never letting them explore] although S[] does have a lot of girly in him.

ANYWAYS, after much begging from there (sic) Dad driveing (sic) the boat they finally took turns HUMPING MY BACK, me hanging on for dear life on the Tiki Warrior and them there (sic) long arms and legs wrapped tight around mine as we were flying across the lake.

Now S[]'s never even took swim lessons TO (sic) AFRAID. [S]o he was wearing [oh so damn cute he looked] one of those little half wet-suit swimsuits. They came down to his knees/elbows and from the waist to the chest front/back they

> have sewn in lifevest so I only felt his lil boner only now and then.
>
> BUT, T[] christ, apparently nobody noticed he had no undies on underneath [at least till after we had left], go boating/swimming in navy blue NYLON SOCCER SHORTS. Not only could I feel him grow EACH and EVERY time he was hanging on for dear life, I also got to sneak LOTS OF PEEKS when he sat just right.
>
> Damn, at one point when we was climbing back on the boat, Me, my hands on T[]'s little firm butt pushing him up HIS dad pulling by his arms. HIS DAD busted out laughing. When I asked, wouldn't say why. Quickly, I realized why as I climbed up the ladder same time T[] turned to face me. FOR AS LITTLE AS HIS BOY PACK may be, it was very clear for all to see. IT WAS HARD AS HARD COULD BE after humping my back for a good solid 20 minutes.

(State's Ex. 1) (Broken into paragraphs and punctuation added for ease of reading. Phrases in "all caps" are in the original). The court found Appellant guilty of count one on the basis of the post admitted into evidence as State's Exhibit 1. (Tr. 239-40).

B. Standard of Review.

This Court's role in reviewing the sufficiency of the evidence in a court-tried criminal case is limited to determining whether the State presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty. *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo. banc 2005). This Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences. *Id*.

C. Analysis.

A person commits the crime of promoting child pornography in the first degree if, knowing of its content and character, he promotes obscene material that has a child as one of its participants or portrays what appears to be a child as a participant or observer of sexual conduct. § 573.025.1, RSMo 2000. Material is obscene if, taken as a whole:

> (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.

§ 573.010(12), RSMo Cum. Supp. 2006.

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 Cum. Supp. 2006.

Appellant argues that the post contained in State's Exhibit 1 does not describe sexual conduct because it merely described a child riding on the lap of a man or on his back in an inner-tube pulled behind a boat and did not describe an act of apparent sexual stimulation or gratification. That characterization grossly understates the nature of the post.

It is clear from the context of the post that Appellant wanted the boys to ride on his back to satisfy his sexual desires, and that he received sexual stimulation and gratification from his physical contact with the genitals of T[] and S[] as they rode with him on the inner tube and from touching "T[]'s firm little butt." (State's Ex. 1). And Appellant's reference to receiving lap dances from D[] can be reasonably inferred as Appellant being sexually

stimulated and gratified by physical contact with that child's genitals and/or buttocks.

Appellant admits that the terms "lap dance" and "humping" carry sexual connotations. He nonetheless suggests that those sexual connotations are of no import because the author was not using the terms literally. That argument, and Appellant's attempt to portray the contact as incidental asks this Court to indulge in an inference that is contrary to the verdict. The post can reasonably be read as suggesting that the boys rode in Appellant's lap and on his back for the purpose of achieving sexual stimulation. And even if the fact-finder did not reach that inference, the post makes it clear that Appellant was seeking out physical contact with the boys to fulfill his own sexual desires. The suggestion now being made of incidental contact between Appellant and the boys is refuted by the full context of the post. No reasonable person could read that post and objectively conclude that it depicts anything other than sexual conduct.

Appellant also ignores the reference to his touching "T[]'s little firm butt[.]" (State's Ex. 1). Again, the reasonable inference from the post is that Appellant sought out that contact for the purpose of sexual stimulation and that he in fact experienced sexual stimulation from that contact.

The post also meets the statutory requirements because its depiction of physical touching of the children's genitals and buttocks was designed to

cause the sexual stimulation and gratification of the reader. The statutory definition of "sexual conduct" contains no requirement that the acts being depicted result in the sexual stimulation or gratification of the subjects of the depiction. If the legislature had wanted to so limit the statute, it would have drafted it in that way. That the legislature did not do so is unsurprising, since the construction that Appellant seems to urge would impair the underlying purpose of protecting children from the abuse inherent in the production of obscene materials, abuse that includes the viewing of those materials by others. By not so limiting the language of the statutory definition, the legislature expressed its intent that "sexual conduct" includes depictions that are intended to cause the sexual stimulation or gratification of the viewer.

That conclusion is supported by this Court's recent opinion in *State v. Oliver*, 293 S.W.3d 437 (Mo. banc 2009). The Court found in *Oliver* that a picture of a boy bending over with his unclothed buttocks toward the camera and separating his buttocks with his hands depicted sexual conduct. *Id*. at 445. The Court based that finding on the nature of the position, the fact that the position was the primary object of the photograph, and the circumstances under which the photograph was taken. *Id*. There is nothing in the opinion to suggest that the boy shown in the picture was experiencing sexual stimulation or gratification from the pose being depicted. And the factors

cited by the Court in finding that the picture depicted sexual conduct demonstrates that the Court was focusing on the effect on the viewer, and not the effect on the subject.

Appellant posted his story in a chat room frequented by men who are sexually attracted to young boys. *See* (State's Ex. 1). He knew that his audience would be sexually stimulated and gratified when they read his post. And the responses show that he was right, including the one that says "sexy and memorable day. I hope u enjoy more[.]" (State's Ex. 1).

By attempting to portray the post as describing innocent behavior, Appellant is asking this Court to disregard the standard of review and indulge in inferences that are contrary to the verdict. This Court should reject that request and deny Appellant's point.

II.

The trial court did not violate the Fifth Amendment's Double Jeopardy Clause by entering convictions on eight counts of possession of child pornography.

Appellant claims that the trial court plainly erred in entering convictions on eight separate counts of possession of child pornography because doing so resulted in multiple punishments for the same offense, in violation of his Fifth Amendment right to be free from double jeopardy. But the convictions did not violate double jeopardy because the possession statute permits a conviction for each item of child pornography that is possessed.

A. Standard of Review.

The constitutional right to be free from double jeopardy is a personal right or privilege which is waived if not timely or properly raised at trial. *State v. Paglino*, 319 S.W.2d 613, 627 (Mo. 1959); *State v. Harris*, 243 S.W.3d 508, 511 (Mo. App. W.D. 2008). Appellant concedes that his claim, which is being raised for the first time on appeal, is not preserved, and he requests plain error review. Under plain error review, Appellant must prove the error so substantially affected his rights that a manifest injustice or miscarriage of justice has resulted therefrom. *State v. Couts*, 133 S.W.3d 52, 54 (Mo. banc 2004).

B. Analysis.

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *State v. Sanchez*, 186 S.W.3d 260, 266 (Mo. banc 2006). But multiple punishments are permissible if the defendant has in law and in fact committed separate crimes. *Id*. at 267. Where multiple punishments are imposed following a single trial, double jeopardy analysis is limited to determining whether multiple punishments were intended by the legislature. *Id*. at 266-67. To determine whether the legislature intended multiple punishments, a court looks first to the unit of prosecution allowed by the statute under which the defendant was charged. *Id*. at 267.

The statute under which Appellant was convicted states:

> 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.

§ 573.037.1, RSMo Cum. Supp. 2004. Appellant argues that the use of the word "any" to modify the term "obscene material" renders the statute ambiguous as to the unit of prosecution allowed under the statute, and that

the Double Jeopardy Clause thus prohibits entry of separate convictions for the separate photographs found in his possession.

That argument is based on the Eastern District's decision in *State v. Baker*, 850 S.W.2d 944 (Mo. App. E.D. 1993). There, the court found that a statute prohibiting the possession of "any gun, knife, [or] weapon" in a correctional facility was ambiguous as to the allowable unit of prosecution. *Id.* at 947 (construing § 217.360.1(4), RSMo 1986).[6] *Baker* conflicts, though, with the approach that the Southern District has taken in construing similar statutory language. In *Horsey v. State*, the court found that the use of the word "any" in a statute making it illegal to possess any controlled or counterfeit substance indicated that each separate substance possessed is an unlawful act. *Horsey v. State*, 747 S.W.2d 748, 751-52 (Mo. App. S.D. 1988). In *State v. Foster*, the defendant raised a double jeopardy claim regarding five separate counts charging him with promotion of child pornography. *State v. Foster*, 838 S.W.2d 60, 66 (Mo. App. S.D. 1992). The Southern District found that the double jeopardy argument had not been adequately developed and

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[6] The relief ordered in *Baker*, a post-conviction case, was to remand the case to the circuit court for an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to raise double jeopardy at trial. *Baker*, 850 S.W.2d at 948.

deemed it abandoned. *Id*. at 67. But in doing so, it noted that "the fact that defendant took five photographs of child pornography at the same location and within a relatively short period of time does not necessarily prevent prosecution, conviction and sentencing for five separate offenses." *Id*. The Southern District subsequently cited *Foster* in finding that double jeopardy did not bar a defendant's conviction on seven counts of attempted enticement of a child because each communication by the defendant to the same child was a separate act that constituted a separate offense. *State v. Wadsworth*, 203 S.W.3d 825, 834 (Mo. App. S.D. 2006). Although the court's decision did not hinge on the statutory language, it is noteworthy that the statute involved created the offense of enticement of a child when a person twenty-one years of age or older "persuades, solicits, coaxes, entices, or lures . . . **any** person who is less than fifteen years of age . . . ." § 566.151.1, RSMo Cum. Supp. 2004 (emphasis added).

This Court should follow the Southern District cases. First, this case is is distinguishable from *Baker* because different proof was required to establish that each image possessed by Appellant met the statutory definition of "obscene material." Second, *Baker* is flawed because it is based on cases from other jurisdictions that do not support the conclusion reached in *Baker*. And finally, the Southern District cases are more persuasive because they

more closely follow the approach taken by the federal government and other states in interpreting their child pornography statutes.

1. *Baker* is distinguishable because each image that Appellant was convicted of possessing was unique and distinct from the others.

In *Baker*, the Eastern District distiguished an earlier case finding that a statute using the term "any" permitted multiple units of prosecution. The court had found in *State v. Williams* that the use of the word "any" in section 195.020, RSMo Cum. Supp. 1971,[7] which made it unlawful for "any person . . . to . . . possess . . . any controlled substance or counterfeit substance," indicated that each separate substance possessed was an unlawful act. *State v. Williams*, 542 S.W.2d 3, 5 (Mo. App. St.L.D. 1976). The court found that the legislature would have used a term such as "one or more" had it intended that the possession of several substances would only constitute one offense. *Id*.

The court went on to note that because the defendant was convicted under one count of possessing marijuana and under another count of

[7] The opinion erroneously cited to the 1969 version of the statute, which used the term "any narcotic drug" instead of "any controlled or counterfeit substance." *Compare* § 195.020, RSMo 1969 *with* § 195.020, RSMo Cum. Supp. 1971.

possessing heroin, the proof necessary to support one charge was different from the proof necessary to support the other. *Id*. at 6. The Eastern District later used that rationale to distinguish its holding in *Baker*. As previously noted, that case construed section 217.360, RSMo 1986, which prohibited the possession of "any weapon" in a correctional facility. *Baker*, 850 S.W.2d at 947. Because the defendant had been charged with possessing two knives found in his cell, the elements of proof as to each count were nearly identical. *Id*. at 948.

If *Baker* and *Williams* were properly distinguished on that basis, this case should be found to be more like *Williams* than like *Baker*. Different proof was required for each item that Appellant was charged with possessing to establish that it fell within the statutory definition of "obscene material" and that it depicted "sexual conduct." The latter term encompasses several types of behavior, including: (1) sadomasochistic abuse; (2) deviate sexual intercourse; (3) actual or simulated acts of human masturbation; (4) physical contact with the genitals in an act of apparent sexual stimulation or gratification; and (5) physical contact with the buttocks in an act of apparent sexual stimulation or gratification. § 573.010(17), RSMo Cum. Supp. 2007.

Each of the five types of sexual conduct listed above were present in at least one of the images for which Appellant was convicted of possessing, but none of the images depicted all of the various types of sexual conduct.

(State's Exs. 81-84, 86-89). Just as proof that possession of heroin would not support a conviction for possession of marijuana, proof that possession of an image depicting deviate sexual intercourse would not support a conviction for possession of an image of sadomasochistic abuse. And the fact that the trial court acquitted Appellant on one of the posession charges further demonstrates that the proof as to each image was not identical. (Tr. 242).

Appellant argues that the State still has to prove the same elements on each charge, regardless of the specific type of sexual conduct involved. But Missouri courts follow the separate or several offense rule in determining double jeopardy. *State v. Bowles*, 360 S.W.2d 706, 707 (Mo. 1962); *State v. Barber*, 37 S.W.3d 400, 403 (Mo. App. E.D. 2001). That rule permits multiple convictions for violations of the same statute if the defendant has in law and fact committed separate crimes. *Barber*, 37 S.W.3d at 403; *State v. Whitley*, 382 S.W.2d 665, 667 (Mo. 1964). The Eastern District applied that rule in *Williams* to conclude that separate convictions were permitted for simultaneous possession of both marijuana and heroin. *Williams*, 542 S.W.2d at 6. The bare element that the State had to prove was possession of any controlled substance. *Id*. at 5. But establishing that element required proving the nature of the substance and that it was a controlled substance as defined by statute. Similarly, while the bare elements of section 573.037, RSMo, were possession of obscene material that depicted a child engaged in

sexual conduct, the State had to present unique evidence for each image to demonstrate that the image was obscene and that it depicted sexual conduct.

Appellant incorrectly claims that the State's theory would authorize a separate count for each type of sexual conduct depicted in a single image. That would not happen since the unit of prosecution authorized under the statute is the individual photograph, motion picture, videotape, etc. But each photograph, motion picture, videotape or other item is distinctive and non-fungible, unlike two rocks of cocaine contained in the same bag or a half-dozen sudafed pills packaged in a single blister pack.

Applying the several or separate offense rule to the charges in this case shows that the various counts of possession of child pornography are different in law and fact because of the unique proof required to demonstrate that each image is obscene and depicts sexual conduct as defined by statute. The possession of each image thus constituted a separate offense for which Appellant could be tried and convicted.

2. *Baker* is based on a faulty reading of other cases.

The Eastern District's conclusion in *Baker* that the word "any" is ambiguous was based on decisions by the Florida Supreme Court and the United States Court of Appeals for the Second, Fifth, Seventh, and Eighth Circuits. *Baker*, 850 S.W.2d at 947-48 (citing cases). But a closer look at those cases shows that they do not support the conclusion reached by the

Eastern District in *Baker*. The Florida Supreme Court case cited by the Eastern District was *State v. Watts*, 462 So. 2d 813 (Fla. 1985). *Baker*, 850 S.W.2d at 947. But the Florida Supreme Court has subsequently questioned that case as appearing to mechanistically apply the use of the word "any" in a statute when trying to determine the unit of prosecution for double jeopardy purposes. *State v. Rubio*, 967 So. 2d 768, 778 (Fla. 2007).

The Florida court cautioned in *Rubio* that *Watts* and the cases preceding it "should not be interpreted to suggest that the intended unit of prosecution is automatically rendered ambiguous whenever a statute uses the word 'any.'" *Id*. Instead, the court stated that the overall statutory scheme and language must be considered in determining the intended unit of prosecution. *Id*. That approach is consistent with the one taken by this Court, which is to give effect to every word or phrase in a statute. *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010), *see also State v. Angle*, 146 S.W.3d 4, 12 (Mo. App. W.D. 2004) (stating that in determining whether a statute permits multiple punishments, "We do not limit our review to one or two sentences, but must consider the words of the entire statute.").

The federal cases that the Eastern District relied on in *Baker* also do not support the conclusion that using the word "any" renders a statute ambiguous as to the unit of prosecution. Two of those cases did not even discuss the statutory language, but instead merely found that the conduct in

question (felon obtaining firearms and transportation of firearms across state lines) constituted only a single offense because it stemmed from a single act. *United States v. Calhoun*, 510 F.2d 861, 869 (7th Cir. 1974); *United States v. Carty*, 447 F.2d 964, 965 (5th Cir. 1971).

A third case, *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975), was subsequently distinguished on grounds that are applicable here. *Castaldi v. United States* involved a violation of a federal statute making it a crime to forge or counterfeit any postage stamp. *Castaldi v. United States*, 783 F.2d 119, 121 (8th Cir. 1986). The Eighth Circuit acknowledged that it had previously noted in *Kinsley* that the use of the word "any" in a statute had typically been found ambiguous in connection with the allowable unit of prosecution. *Id.* (citing *Kinsley*, 518 F.2d at 668). But the court went on to state that any ambiguity in the statute could be clarified by considering its legislative history and the statutory scheme of which it is a part. *Castaldi*, 783 F.2d at 121-22. The court found that the statute's primary purpose was to protect postal revenues, and that it was consistent with that purpose to allow a separate unit of prosecution for each denomination of postage stamp that was counterfeited. *Id.*

3. Underlying Statutory Purpose Supports Finding that Statute Creates Multiple Units of Prosecution.

Just as the *Castaldi* and *Rubio* cases cited above found that the word "any" must be construed in a manner consistent with the statute's underlying purpose, state and federal courts have also relied on underlying statutory purpose to find that multiple prosecutions are permitted under child pornography statutes using the word "any." *See Horsey*, 747 S.W.2d at 752 (noting that it is appropriate to look to similar statutes of other states as an aid in determining the allowable unit of prosecution under a Missouri statute).

Laws prohibiting the production, dissemination, and possession of child pornography are justified by the State's compelling interest in safeguarding the physical and psychological well-being of minor children and protecting them from the inherent harm caused by the production of child pornography. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110-11 (1990); *United States v. Esch*, 832 F.2d 531, 542 (10th Cir. 1987). Consistent with that underlying statutory purpose, the Tenth Circuit found in *Esch* that a federal statute making it a crime to produce "any visual depiction" of sexually explicit conduct involving a minor was violated each time an image was produced. *Esch*, 832 F.2d at 541. The court concluded that a defendant could be charged with separate counts for each photograph

taken, even if the photographs were of the same children and were taken sequentially during a single photographing session. *Id*. at 542.

Several states have similarly construed their child pornography statutes. The Nebraska Supreme Court cited to *Esch* in construing its statute making it an offense to make, create, or generate any visual depiction of sexually explicit conduct which has a child as a participant or observer, and making it unlawful to cause a child to engage in any visual depiction of sexually explicit conduct. *State v. Mather*, 646 N.W.2d 605, 609, 611 (Neb. 2002). The majority of the court followed *Esch* and concluded that each of the eighteen photographs taken by the defendant of the same child on the same day were separate offenses. *Id*. at 610, 612-13.[8]

The Colorado Court of Appeals found that the term "any" in a statute prohibiting the possession of any sexually exploitative material involving a minor created a separate unit of prosecution for every image possessed.

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[8] Appellant attempts to distinguish *Esch* and *Mather* on the basis the they did not construe possession statutes, but rather statutes criminalizing the creation of child pornography. But as the Supreme Court has found that the same purpose justifies statutes criminalizing the possession as well as the creation and distribution of child pornography (*see Ferber* and *Osborn*, *supra*), that is a distinction without a difference.

People v. Renander, 151 P.3d 657, 662 (Colo. Ct. App. 2006). The court noted that the statute was designed to stop the sexual victimization of children, that each sexually exploitative image constituted a permanent record of sexual abuse that victimized the child, and that the child was subjected to continuing victimization each time the image was viewed. *Id.*

The Louisiana Supreme Court found that a statute prohibiting the possession of any visual reproductions of any sexual performance involving a child under the age of seventeen was designed to protect any single child from being sexually exploited through the visual reproduction of any single sexual performance involving that child. *State v. Fussell*, 947 So. 2d 1223, 1233, 1235 (La. 2008). The court concluded that the statute evidenced a legislative intent to allow a separate conviction on a separate count for each child, in each sexual performance in which that child is victimized, meaning any photograph, film, videotape, or other visual reproduction that the defendant possessed. *Id.* at 1235. In reaching that conclusion, the court noted that the statute's use of the the phrase "a child" indicated that each of the prohibitions contained in the statute revolved around the legislative goal to protect any single child from being sexually exploited through the visual reproduction of any single sexual performance involving that child. *Id.* at 1233. The inclusion of the term "a child" in section 537.037, RSMo similarly demonstrates the legislature's goal to protect children from being sexually

exploited through the visual reproduction and possession of any single item of obscene material depicting that child.

Appellant argues that Missouri's possession statute in effect at the time of Appellant's crimes was not motivated by the same concerns underlying those statutes because it was not limited to pornography depicting actual children. *See* § 573.037.1, RSMo Cum. Supp. 2004 (criminalizing the possession of obscene material that "portrays what appears to be a child as an observer or participant of sexual conduct."). Appellant cites the United States Supreme Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), for the proposition that prohibitions on what he terms "virtual pornography" cannot be justified on the basis of protecting children from sexual abuse and exploitation. But his reliance on *Ashcroft* is misplaced. That opinion noted prior precedents establishing the general rule that pornographic material can be banned only if obscene, but that pornography depicting minors can be banned whether it is obscene or not. *Id*. at 240. A plurality of the Court went on to invalidate a federal statute that went beyond that general rule by banning the possession or distribution of sexually explicit images that were neither child pornography, because they did not

depict actual children, nor obscene.[9] *Id*. at 239-40, 256. The conclusion that Appellant draws from *Ashcroft* is at best limited to non-obscene materials that depict what appears to be a child. But the statute under which Appellant was convicted criminalizes only the possession of obscene materials that "portray[] what appears to be a child." § 537.037.1, RSMo Cum. Supp. 2004. The statute thus does not implicate the concerns addressed in *Ashcroft*.

Subsequent to *Ashcroft*, the Supreme Court has affirmed that obscene material depicting virtual children engaged in sexually explicit conduct is constitutionally proscribable. *United States v. Williams*, 553 U.S. 285, 293 (2008). The Court upheld in *Williams* a federal statute barring someone from pandering or soliciting any material or purported material in a manner that reflects the belief or that is intended to cause another to believe that the material contains, *inter alia*, an obscene visual depiction of a minor engaged in sexually explicit conduct. *Id*. at 289-90 (setting out the provisions of 18 U.S.C. § 2252A). The Court also took note of the underlying concerns that

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[9] Four Justices, while concurring in the judgment, expressed the view that the government interest in protecting children could justify a ban on "virtual child pornography" under a more narrowly tailored statute. *Id*. at 259-60 (Thomas, J. concurring); *id*. at 260, 263-64 (O'Connor, J., concurring).

motivated Congress to pass the statute: (1) that limiting the child pornography prohibition to material that could be proved to feature actual children would enable many child pornographers to evade conviction, and (2) that the emergence of new technology and the repeated retransmission of picture files over the internet could make it nearly impossible to prove that a particular image was produced using real children. *Id*. at 290. Read together, *Ferber*, *Osborne*, *Ashcroft*, and *Williams* demonstrate that the State's interests in protecting children from harm does justify a statute criminalizing the possession of obscene material containing virtual child pornography. That legislative purpose is thus appropriate to consider in determining the unit of prosecution allowed under section 537.037, RSMo, which banned the possession of obscene material that depicted either actual children or subjects that appeared to be children.

4. Other States Have Construed the Word "any" in their Child Pornography Statutes as Creating Multiple Units of Prosecution.

Other courts have taken the approach endorsed by Missouri courts[10] and looked at how the term "any" fits within the entire statutory language to determine the intended unit of prosecution. *See Horsey*, 747 S.W.2d at 752 (noting that it is appropriate to look to similar statutes of other states as an

[10] *Moore*, 303 S.W.3d at 520; *Angle*, 146 S.W.3d at 12.

aid in determining the allowable unit of prosecution under a Missouri statute). The Supreme Courts of Wisconsin and Kentucky have found that child pornography statutes linking the word "any" with the singular term "photograph" showed a legislative intent to create a separate unit of prosecution for each individual photograph. *State v. Multaler*, 643 N.W.2d 437, 451 (Wis. 2002); *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005).[11] Similarly, section 573.037, RSMo, pairs the singular term "obscene material" with the word "any." § 573.037.1, RSMo Cum. Supp. 2004. The statute also uses the singular term "a child" in conjunction with the term "any obscene material." *Id.*

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[11] Appellant attempts to distinguish these cases on the basis that the statutes being construed were limited to pornography involving actual minors. That distinction is unavailing for two reasons. First, as noted above, the same underlying concerns support criminalizing actual child pornography and obscene material depicting what appears to be a child. Secondly, *Multaler* and *Williams* are cited for how the courts analyzed the use of the word "any" in determining the allowable unit of prosecution, not for how the underlying purpose of the statute affected that interpretation. Neither court relied on or even mentioned underlying statutory purpose in reaching its conclusion. *Multaler*, 643 N.W.2d at 450-52; *Williams*, 178 S.W.3d at 494-95.

And the statutory definition of "material" that applies to Chapter 573 pairs the singular term "photograph" with the word "any":

> [A]nything 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 photographs, molds, printing plates, stored computer data and other latent representational objects[.]

§ 573.010(9), RSMo Cum. Supp. 2006.[12] That pairing of "any" with the singular "photograph" further evidences the legislature's intent to create a separate prosecution for each photograph possessed.

Appellant notes that section 573.010(9), RSMo, also lists some items in the plural. But the Utah Supreme Court has rejected a similar argument in construing its statutory definition of "material" as applied to its child

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[12] Appellant improperly relies on a dictionary definition of "material" to support his argument. Dictionary definitions are to be used to give meaning to statutory terms only in the absence of a statutory definition. *Oliver*, 293 S.W.3d at 446.

pornography statutes. *State v. Morrison*, 31 P.3d 547, 555-56 (Utah 2001). That statute defined "material" as:

> [A]ny visual representation including photographs, motion pictures, slides, videotapes, or other pictorial representations produced or recorded by any mechanical, chemical, photographic, or electrical means and includes undeveloped photographs, negatives, or other latent representational objects.

Id. at 555. The court concluded that "the clearest reading of the statute" was that each individual "visual representation" of child pornography that was knowingly possessed by a defendant constituted the basis for a separate offense. *Id*. at 556. The Utah statute, like section 573.010(9), RSMo, uses the word "any" immediately preceding a singular term. That singular term in the Utah statute was "visual representation." The relevant singular term in the Missouri statute is "photograph." Both statutes then go on to list examples of items that would be included in the statutory definition and do so using the plural form. But those illustrative listings are separate from the actual term or terms that comprise the statutory definition of material, i.e., "visual representation" and "photograph." And it is the terms comprising the statutory definition, not the illustrative examples, that indicate the unit of prosecution intended by the legislature. *See also State v. Howell*, 609 S.E.2d 417, 419 (N.C. Ct. App. 2005) (finding that the listing of plural items in the

statutory definition of "material" was a matter of style and not an indication that the legislature intended to create only a single unit of prosecution for the possession of multiple images).

Appellant further tries to avoid the use of the singular form of "photograph" in section 573.010(9), RSMo by claiming that he was convicted of possessing not a photograph, but "computer data," which he describes as a collective noun. The Wisconsin Supreme Court rejected a similar argument in *Multaler*, finding that a computer disk containing multiple photographs served as an electronic photo album. *Multaler*, 643 N.W.2d at 451. The court concluded that the language of the possession statute would permit separate charges for each separate photo in a traditional album, and separate charges would be equally appropriate for individual images displayed in an electronic photo album. *Id*. The South Dakota Supreme Court reached a similar conclusion, agreeing with the Eighth Circuit that a computer hard drive is similar to a library, and finding that separate prosecutions were allowed for each image of child pornography contained on the defendant's computer. *State v. Martin*, 674 N.W.2d 291, 303 (S.D. 2003) (citing *United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999)). Appellant was charged in each count with possessing obscene material consisting of a still image, in other words, a photograph. (L.F. 76-79). He was not charged with possessing computer

data and the photographs found on his computer are just that, photographs. They are not computer data merely because they were saved onto a computer.

Applying the rules of construction used by the courts cited above to section 573.037, RSMo leads to the conclusion that the legislature intended to create a separate unit of prosecution for each item of obscene material featuring a child or what appears to be a child that is possessed. Again, the rules of construction used by those courts is consistent with the approach endorsed in *Moore* and *Angle*, while the approach urged by Appellant improperly focuses on a single word in the statute with no consideration of the context in which that word appears.

5. State was not required to prove that Appellant possessed the images at different times or at different locations.

Appellant faults the State for not establishing that the photographs were possessed at different times or at different locations. He specifically argues that the State's evidence did not indicate the date that each image was downloaded or placed on his computer. That argument miscontrues the burden of proof.

A mere two weeks after issuing its opinion in this case, the Western District rejected an argument that double jeopardy applied to the defendant's conviction on multiple counts of receiving stolen property because the State failed to prove that the defendant received each item of stolen property on

separate occasions. *State v. Shinkle*, 340 S.W.3d 327, 333, 334 (Mo. App. W.D. 2011). Like Appellant in this case, the defendant in *Shinkle* did not raise a double jeopardy claim at trial. *Id*. at 334. The Western District noted that whether there was a single or multiple reception of stolen property was not an element of the statute. *Id*. at 333. The State therefore had no statutory burden to prove that the items of stolen property were received at separate times. *Id*. Time is also not an element of section 573.037, RSMo. The statute thus placed no burden on the State to show that Appellant possessed the various items of child pornography at different times.

The burden instead rested on Appellant to plead double jeopardy as an affirmative defense. *Id*. at 334. The Western District found that because the defendant in *Shinkle* did not plead or raise the affirmative defense of double jeopardy in the circuit court, she "'cannot fairly complain that the state should have offered more evidence against an affirmative defense [she] never raised.'" *Id*. (quoting *State v. Tipton*, 314 S.W.3d 378, 380 (Mo. App. S.D. 2010)). The Western District went on to find that unless the issue is raised by the defense, the State has no burden of proof or other evidentiary obligation to disprove the possibility of double jeopardy. *Shinkle*, 340 S.W.3d at 334. The Court found that the defendant had waived her double jeopardy claim by failing to put the State on notice of the defense and the need to present evidence that the stolen items were received on separate occasions.

Id., *see also Horsey*, 747 S.W.2d at 754 (finding that defendant failed to allege or establish that he did not acquire possession of each item of stolen property at a different time).

Section 573.037, RSMo does not on its face contain any requirement that the items proscribed by the statute be possessed at different times in order to support a prosecution and conviction in separate counts for each individual item possessed. But even if this Court were to determine that the protection against double jeopardy requires that a defendant come into possession of each item of child pornography at a different time, the burden of pleading and proving that issue belongs to the defendant. Appellant failed to raise the issue and is estopped from complaining that the State did not prove facts to refute his abandoned affirmative defense.

6. Subsequent revision of statute does not support single unit of prosecution argument.

Appellant also argues that a 2009 amendment to the statute evidences the legislature's intent to create only a single unit of prosecution, regardless of the number of items possessed. That amendment enhanced the penalty for violations of the statute from a class C felony to a class B felony if the defendant possessed more than twenty still images of child pornography. § 573.037.2, RSMo Cum. Supp. 2009. That amendment does not mandate the conclusion urged by Appellant.

The sentence enhancement provision is only one of the changes made to the statute and all those changes need to be read together to discern what the legislature intended. *State v. Salter*, 250 S.W.3d 705, 711 (Mo. banc 2008). Subsection one of the amended statute adopts the standards set forth in *Ashcroft* and reaffirmed in *Williams* by criminalizing the possession of two types of materials: (1) child pornography, which does not necessarily have to meet the statutory definition of obscene,[13] but does have to feature actual minors under the age of eighteen; and (2) obscene material that portrays what appears to be a minor under the age of eighteen. § 573.037.2, RSMo Cum. Supp. 2009. The enhanced penalty provisions contained in subsection two only apply to child pornography. § 573.037.2, RSMo Cum. Supp. 2009. The enhanced penalties do not apply to obscene materials featuring what appear to be minors. *Id*.

The amendment when read as a whole reflects the legislature's concern with curtailing the proliferation of child pornography and the resulting victimization of actual children by enhancing the sentences for those who possess those materials. The more pictures that exist means the higher possibility for the proliferation of child pornography, which in turn leads to greater victimization of the children portrayed in those pictures. And even if

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[13] *See* § 573.010(2), RSMo Cum. Supp. 2006.

the pictures are not distributed, but just viewed by the possessor for self-gratification, that still results in a greater victimization than does possession of one or a few pictures. *Renander*, 151 P.3d at 662. The legislature could thus reasonably conclude that persons who possess large numbers of pictures featuring actual children should be subject to greater punishment that can include a stiffer sentence for each picture possessed. And that enhanced punishment can take into account that the greater sentence on each of the multiple counts of possession of child pornography can be ordered to be served consecutively, as was Appellant's sentence.

Furthermore, Appellant's argument when taken to its logical conclusion would result in an absurd construction of the statute. Appellant's theory is that the enhanced sentence for possessing multiple images of child pornography reflects the intent to create a single unit of prosecution. But a corollary that can be drawn from the argument is that the failure to enhance the sentence for possessing multiple items of obscene material reflects an intent to permit multiple units of prosecution for those items. That would lead to the absurd result where a person possessing multiple images of child pornography featuring actual children could be subject to a much lower sentence, due to being liable on only a single count, than a person who could be sentenced to consecutive prison terms for multiple counts of possessing images of obscene material not featuring actual children.

Statutes are not to be interpreted in ways that yield unreasonable or unjust results, and it is assumed that the legislature's enactment of a statute is meant to serve the best interests and welfare of the public. *State v. Nash*, 339 S.W.3d 500, 508 (Mo. banc 2011). Applying that principle to the amended version of section 573.037, RSMo shows that the 2009 amendment is properly read as concerning only sentence enhancement, and not as making any alteration in the allowable unit of prosecution.

The trial court did not plainly err in entering a conviction on eight counts of possession of child pornography. Appellant's point should be denied.

III.

Sufficient evidence supported Appellant's convictions for possession of child pornography on counts 2, 4, 5, 7, 8 and 9.

Appellant claims that there was insufficient evidence to support his convictions for possession of child pornography on counts two, four, five, seven, eight, and nine, because the images used to support the charges did not fall within the statutory definition of sexual conduct. But the images do depict various forms of sexual conduct as defined by statute.

A. Underlying Facts.

The trial court found Appellant guilty of count two, charging possession of child pornography, based on a photograph that was admitted into evidence as State's Exhibit 81, that showed a naked boy lying on his stomach with his hands and feet bound by what appears to be a piece of cloth. (Tr. 240-41; State's Ex. 81). The conviction on count four was based on State's Exhibit 83, which showed two boys lying together on a bed with the leg of one boy touching the pubic area and genitals of the other. (Tr. 241; State's Ex. 83). Count five was based on State's Exhibit 84, showing two boys lying naked in bed with the head of one boy touching the pubic area of the other. (Tr. 241; State's Ex. 84). Count seven was based on State's Exhibit 86, which depicted two naked boys, with the genitals of one boy touching the head of the other,

who is sitting on top of him. (Tr. 241; State's Ex. 8). Count eight was based on State's Exhibit 87, which showed two naked boys on a bed with one boy sitting on top of the other and the leg of the boy on top touching the other boy's pubic area. (Tr. 241; State's Ex. 87). And the conviction on count nine was based on State's Exhibit 88, which depicted a boy with a semi-erect penis, with his right hand near the penis in a position indicating that the hand had recently touched the penis. (Tr. 241-42; State's Ex. 88).[14]

B. Standard of Review.

This Court's role in reviewing the sufficiency of the evidence in a court-tried criminal case is limited to determining whether the State presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty. *Vandevere,* 175 S.W.3d at 108. This Court examines the

[14] Appellant does not challenge the sufficiency of the evidence supporting his convictions on counts three and ten. Count three was based on a photograph admitted as State's Exhibit 82, depicting two naked boys who each have their mouth on the penis of the other boy. (Tr. 241; State's Ex. 82). Count ten was based on State's Exhibit 89, a photograph depicting a naked boy who has his hand on his penis. (Tr. 242; State's Ex. 89).

evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences. *Id*.

C. Analysis.

The statute under which Appellant was charged and convicted states:

> 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.

§ 573.037.1, RSMo Cum. Supp. 2004. Therefore, 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 S.W.3d 807, 813 (Mo. App. W.D. 2009). Appellant challenges the sufficiency of the third and fourth elements which both require the existence of sexual conduct.

The third element is met when material, taken as a whole, meets the following statutory definition:

> (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.

§ 573.010(12), RSMo Cum. Supp. 2006.

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 Cum. Supp. 2006.

Appellant's argument as to counts four, five, and eight is that the exhibits supporting those charges do not depict acts of apparent sexual stimulation or gratification. Appellant does not develop his argument. This Court may not make Appellant's argument for him. *Foster*, 838 S.W.2d at 67. The Court must rather remain impartial and not become a witting or unwitting adversary of the State, fashioning an argument for Appellant and

then searching the record and the law in support of that argument. *Id*. Because Appellant has not developed his argument, it should be deemed abandoned. *Id*.

Appellant's argument fails even if the Court does consider it. In *State v. Oliver*, this Court found that a photograph depicted sexual conduct, based on the nature of the position of the subject, the fact that the position was the primary object of the photograph, and the circumstances under which the photograph was taken. *Oliver*, 293 S.W.3d at 445. Applying those factors to the pictures used to support counts four, five, and eight shows that the pictures depict acts of sexual stimulation and gratification. The naked boys are the primary object of the photographs, and they are placed in poses that are designed to cause the sexual stimulation and gratification of persons who are aroused by such images. The pictures constitute sexual conduct under the standard set forth in *Oliver* and are thus sufficient to support the convictions on which they are based.

On count two, Appellant cites *Oliver* in arguing that State's Exhibit 81, which depicted a naked boy bound by the hand and feet, does not constitute sexual conduct because it does not contain any touching of the boy in a sexually provocative way. But *Oliver* does not require that every depiction of sexual conduct contain sexually provocative touching. The only significance of the boy touching his buttocks in *Oliver* was that the charge against the

defendant was based on that portion of the "sexual conduct" definition that encompasses "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks . . . in an act of apparent sexual stimulation or gratification." *Id*. But count two in this case was based on a different portion of the "sexual conduct" definition, encompassing "actual or simulated . . . sadomasochistic abuse or acts . . . in an act of apparent sexual stimulation or gratification." (Tr. 226, 236). *See* § 573.010(17), RSMo Cum. Supp. 2006. The lack of physical touching is thus irrelevant to the offense as charged in count two.

Appellant next argues that State's Exhibit 86 does not depict physical contact and thus cannot support his conviction on count seven. The photograph depicts two naked boys with one boy straddling the head of the other. (State's Ex. 86). The genitals of the boy who is on top appear to be touching the head of the boy on the bottom. And the touching is displayed in a manner designed to result in the sexual stimulation or gratification of the viewer. *Oliver*, 293 S.W.3d at 445. The picture is sufficient to meet the statutory requirement of sexual conduct.

Appellant's final argument is that there was insufficient evidence to support his conviction on count nine because State's Exhibit 88 shows a semi-erect penis, but does not depict physical contact with the genitals, pubic area or buttocks, and does not depict any apparent act of masturbation. But

Appellant's interpretation of the picture and of the statute is too narrow. "Sexual conduct" includes "simulated . . . acts of human masturbation." § 573.010(17), RSMo Cum. Supp. 2006. The picture shows not only a semi-erect penis, but also the child's hand in close proximity with the fingers curled as though it had recently been wrapped around the penis. (State's Ex. 88). The position of the hand in conjunction with the semi-erect nature of the penis can reasonably be viewed as a simulated act of masturbation. State's Exhibit 88 depicts sexual conduct and is sufficient to support Appellant's conviction on count nine.

Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 10,525 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 11th day of October, 2011, to:

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