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DIVISION II

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STATE OF WASHINGTON

BY _____

NO. 34331-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

RANDY JAMES SUTHERBY,

Respondent.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Appellant assigns error to the following:

1. His trial counsel's failure to make a motion for severance of the ten counts of Possession of Depictions of Minors from the two other counts for Child Rape 1 and Child Molestation 1.
2. The admission of Lisa Butcher's testimony that her daughter makes a certain type of smile when she lies, and that she never saw that type of smile on her daughter's face when she was talking about what the defendant did to her.
3. His trial counsel's failure to object to the testimony of Lisa Butcher that her daughter makes a certain type of smile when she lies, and that she never saw that type of smile on her daughter's face when she was talking about having been sexually assaulted by the defendant.
4. The Superior Court's ruling that the proper unit of prosecution for RCW 9.68A.070 was each individual child that was photographed.
5. The Superior Court's ruling that the Court, rather than the jury, was permitted to make factual findings as to whether each photo that was charged as a separate count actually depicted a different child from all the other photos that were charged in all the other Possession of Depictions counts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did trial counsel's failure to move for severance of the child pornography counts from trial of the other counts, constitute a denial of the Sixth Amendment right to effective representation of counsel?
2. Was the defendant's Sixth Amendment right to a jury trial violated by the admission of the mother's testimony that she could tell when her daughter was lying, and that she

saw no such signs when her daughter spoke about the defendant molesting her?

3. Did trial counsel's failure to object to the mother's testimony that she could tell when her daughter was lying, and that she did not see the facial signs of lying when her daughter spoke about the defendant molesting her, constitute a denial of the Sixth Amendment right to effective representation of counsel?
4. What is the proper "unit of prosecution" for the offense of "Possession of Depictions of Minors Engaged in Sexually Explicit Conduct"? Is it, as the defendant argued, the number of continuous acts of possession, such that there should only be one count if there was only one continuous act of possession of a collection of photographs? Or is it, as the sentencing judge concluded, the number of separate children depicted in the set of photographs?
5. Assuming, *arguendo*, that the proper unit of prosecution is the number of separate children depicted in the set of photographs, does it violate either the Sixth Amendment rule of Blakely v. Washington, or the Article 1, § 21 state constitutional right to jury trial and the Article 4, § 16 prohibition against judicial interference with the jury's role as fact finder, for the sentencing judge, rather than the jury, to make the factual determination of how many separate children are depicted in the photographs?

C. STATEMENT OF THE CASE

I. PROCEDURE

On March 18, 2005, appellant Randy J. Sutherby, was initially charged with Rape of a Child 1 and one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. CP 1-3. Later, on July 18, 2005, an amended information was filed which charged Rape of a

Child 1 (Count 1), Child Molestation 1 (Count 2), and *ten* counts of Possession of Depictions of Minors (Counts 3 through 12). CP 27-32.

The matter was tried to a jury before the Honorable David E. Foscue on October 31, 2005 and November 1-3, 2005.¹ On November 3, 2005 the jury returned verdicts finding Sutherby guilty as charged. CP 79-90. After trial and before sentencing Sutherby filed a Motion to Dismiss Multiplicitous Counts of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, in which he argued that under the proper definition of the “unit of prosecution” he should only have been charged and tried on one count of Possession of Depictions. CP 93-110. The Superior Court denied this motion, concluding that the unit of prosecution for violation of RCW 9.68A.070 was “each individual child photographed or filmed.” CP 130; RP 12/21/05, at 26-27.

Sutherby also raised a Blakely issue, arguing that even if the proper unit of prosecution was a separate charge for each photo of each individual child, only a jury could make a finding of fact as to whether the photo charged in each count actually depicted a separate and distinct child

¹ Six different booklets of the report of proceedings were prepared by court reporters Johnston and Stanley and labeled as follows: (No Volume No.) – Pretrial proceedings of May 23, June 6, July 18, and Oct. 31, 2005 (pages 1-186) (Johnston); Vol. I – Trial proceedings of Nov. 1, 2005 (pages 1-136) (Johnston); Vol. II – Trial proceedings of the *morning* of Nov. 2, 2005 (pages 137-230) (Johnston); Vol. II – Trial proceedings of the *afternoon* of Nov. 2, 2005 (pages 1-108) (Stanley); Vol. III – Trial Proceedings of Nov. 3, 2005 (pages 231-435) (Johnston); and Sentencing – Sentencing Hearing of Dec. 21, 2005 (pages 1-83) (Stanley).

from the children in all the other photos. The Superior Court rejected this argument, and ruled that notwithstanding Blakely, the Court could make findings as to whether a separate child was depicted in each of the ten Depictions counts. Sent. RP 12/21/05, at 37-38.

The sentencing judge found that the children depicted in the photos that were the subject of Counts 3, 4, 8, 11, and 12 were different individual children. But the Court could not determine whether the children depicted in Counts 5-7 were different individual children, or whether the minors shown in Counts 9 and 10 were different children. CP 130. Accordingly, the Court combined Counts 5-7 into one Count, and Counts 9-10 into one Count. CP 130. Thus, the Court reduced the number of convictions for Possession of Depictions from ten counts to seven counts, and sentenced Sutherby accordingly. CP 130.

On December 23, 2005 Sutherby was sentenced to concurrent terms of 279 months and 160 months on Counts 1 and 2, and to seven additional concurrent terms of 12 months in jail on each of the 7 counts of Possession of Depictions. CP 120-129. Sutherby filed timely notice of appeal to this Court on January 20, 2006. CP 144-155.

2. FACTS

a. Testimony of the Child, and Child Hearsay Statements

The alleged victim in this case was “LK,” a five year old girl. She

was found to be competent, RP 6/6/05, at 141. She testified that for two nights, she and her sister Hannah visited her grandpa Randy at his home in Grays Harbor County. RP 11/1/05 at 72. On the second night, she took off her nightgown because she was hot and was sleeping in the nude. *Id.* at 70. (LK's mother testified that this was not unusual; the child frequently took off all her clothes while sleeping. *Id.* at 22, 39-40.) Randy touched her pee pee in the front where she goes potty. *Id.* at 68, 72. The touch felt like a pinch and it hurt. *Id.* at 71.

Although other witnesses testified that LK said no one else had ever touched her private area, *Id.* at 95; RP 11/2/05, at 179-180, on cross-examination LK testified that when she played with her 6 year old uncle Andy, he tried to make her do something bad to him. RP 11/1/05, 79. Andy asked her to kiss him on the lips, but she said she didn't want to do it and she refused to do it. *Id.* at 80. She said that Andy "poked" her and pinched her. *Id.* She denied that Andy ever touched her privates, but said that Andy did want her to touch him in the privates. *Id.* at 81. The child testified that she had told both her mother and her (maternal) grandmother that Andy had tried to get her to touch his privates. *Id.* at 81. (See Appendix A). But the child's grandmother denied any knowledge that any such thing had ever happened. *Id.* at 56.

Several witnesses testified to statements made by LK. The mother,

Lisa Butcher, testified that in December of 2004 she was living in Kennewick, and that she allowed her two daughters to visit both sets of grandparents who lived in Grays Harbor County. *Id.* at 18. She dropped off her daughters at the home of her parents, Ladonna and Ronald Butcher, on December 15th. *Id.* at 21, 23. She also made arrangements for the girls to spend two nights (December 20 & 21) with their paternal grandparents, Randy and Debbie Sutherby, who also lived in Grays Harbor. *Id.* at 23. The Sutherbys drove the two girls back to Kennewick on December 25th, and then stayed and spent two nights at Lisa Butcher's house, before leaving on the morning of December 27th. *Id.* at 24.

As soon as the Sutherbys' truck left on the morning of December 27th, Lisa Butcher's older daughter told her that Randy Sutherby hurt her pee pee. *Id.* She told her mother that she was in bed with her sister and that Randy came in and got underneath the blankets and poked at her pee with his finger. *Id.* at 25-26. This prompted Lisa Butcher to take LK to her Kennewick pediatrician, Dr. Ahart. *Id.* at 27.

LK also told Dr. Ahart that her dad's dad poked her in the potty and that it stung when she went to the bathroom. *Id.* at 92, 96. She also told Mari Murstig, a child interviewer employed by the Benton County Prosecutor's office, the same thing. *Id.* at 171, 175. Finally, LK was examined at the sexual assault clinic at St. Peter's Hospital in Olympia, by

Laurie Davis, an advanced registered nurse. *Id.* at 125, 128. LK told Davis that her grandfather poked her in the private area while she was lying in bed. *Id.* at 132-33.

b. **Mother's Testimony Regarding How She Can Tell When Her Daughter Lies**

During her direct examination, without any objection from defense counsel, Lisa Butcher gave the following testimony in response to the prosecutor's questions about her daughter LK:

Q. Can you tell when she has told a fib?

A. Yeah.

Q. How do you tell that?

A. She makes kind of a – tries not to smile, but makes a half-smile when she is telling a fib.

Q. Ever seen that face or reaction when she is talking about what happened with Randy?

A. No.

RP 11/1/05, at 34.

c. **Medical Testimony from Prosecution Witnesses**

Dr. Ahart testified that when she examined the child she found mild erythema (redness) inside the labia and a larger hymenal opening into the vagina than she expected. *Id.* at 98, 104. She acknowledged that she could not make a determination that sexual abuse occurred based upon

these findings. *Id.* at 120.

Laurie Davis, who conducted a more sophisticated examination with a colposcope, found that the child's physical condition was within normal limits. RP 11/2/05, at 141. She did not notice any erythema. *Id.* at 141. She also believed that the physical findings alone did not indicate sexual abuse. RP 11/2/05, at 159.

The prosecutor never argued that the medical evidence proved that the child had been sexually molested. RP 11/3/05, at 397-409, 426-433.

d. Medical Testimony from Defense Expert

Dr. Joyce Adams, a pediatrician, testified for the defense. She agreed with Davis that the physical exam showed the child to be normal. There was nothing abnormal about the child's hymen. RP 11/2/05, at 259, 262. She disagreed with Dr. Ahart and found that there was nothing abnormal about the vaginal opening. *Id.* at 269. She did not see any erythema. *Id.* at 265. She agreed with Davis and Dr. Ahart that there was no way to tell from the medical evidence whether the child in this case was abused. *Id.* at 273.

e. Testimony of Forensic Computer Analysis Expert

Detective Edward McGowan arrested Sutherby at his home on March 2, 2005. *Id.* at 75. While Sutherby was in custody, he telephoned his wife from the county jail, and his conversation was recorded. *Id.* at 99.

Mrs. Sutherby asked him how much child pornography was on his computers and he responded by saying that there was lots. RP 11/3/05, at 355-56. That portion of the phone conversation was played for the jury. RP 11/2/05, at 101.

On March 3rd, after Sutherby was released from custody, McGowan went back to the Sutherby home and Sutherby allowed him to seize his two computers. *Id.* at 84. McGowan took the computers to the Washington State Crime Lab. *Id.* at 85.

The computers were examined by Detective Sergeant Scott Jarmon. RP 11/1/05, at 207-08. Jarmon searched the computers for photo image and video files. *Id.* at 221. He found several files containing images of children engaged in sexual acts on Sutherby's two computers. RP 11/2/05, at 16-21.

f. Interview by Lieutenant Darst

Police lieutenant Kevin Darst interviewed Sutherby on March 4, 2005. RP 11/1/05, at 191-92. Darst said that Sutherby admitted that he looked at child pornography on his computer at home, and when asked if he had ever acted out his sexual fantasies, Sutherby said that he "never crossed that line, that he wouldn't act out on fantasies." *Id.* at 196-97.

g. Testimony of the Defendant

Randy Sutherby testified in his own defense. He testified that

when he was arrested and questioned by Detective McGowan, he told the detective that there would be pornography on his computers, and he voluntarily allowed McGowan to seize his computers without a warrant. RP 11/3/05, at 295, 298. Sutherby said he often searched for adult pornography, using a program called Free Agent, and that he did this by clicking on file labels and waiting for the file to download. *Id.* at 299. Sutherby never intentionally set out to locate child pornography. *Id.* at 308. He denied telling Lieutenant Darst that he ever had any sexual fantasies about children. *Id.* at 310-311. According to Sutherby, none of the labels indicated that any of the files he selected for downloading contained child pornography. *Id.* at 299. (However, Detective Sergeant Jarmon testified that some of the files he located on the computers had names like “113YO.realschoolgirl” and “I spy on J high locker rooms.” *Id.* at 383, 385.) He would view a series of files after they had been downloaded, and sometimes he would discover that child pornography had been downloaded as well as adult pornography. *Id.* at 303. Sutherby said that when this occurred he would delete the child pornography files. *Id.* at 303. However, in at least one instance, Detective Sergeant Jarmon located some child pornography files that had never been deleted. RP 11/2/05, at 58.

With respect to the child rape charge, Sutherby said that he went to

check on his two granddaughters before going to bed, and he found that LK had taken her clothes off and was sleeping in a position such that she was partially hanging over the edge of the mattress. RP 11/3/05, at 326, 330. He reached out to pick her up with his right hand to push her back onto the mattress. *Id.* at 330. Sutherby has an old injury on the little finger of his right hand that he received when his finger was caught and broken in the tailgate of a dump truck 30 years ago. *Id.* at 320-21, and Exhibit No. 25. As Sutherby started to pick the child up, the child arched her back and rolled out of his hands and back onto the mattress. *Id.* at 331. He then pulled the blankets over her and went to bed. *Id.* at 331.

Sutherby demonstrated how his injured finger will not straighten out, and how it sticks out from the rest of his hand. *Id.* at 332. He hypothesized that it is possible that when he went to pick her up, his broken finger might have touched her in her private area, but he denied that he ever poked her, or inserted his finger inside her. *Id.* at 333-34.

h. Closing Argument

Right from the very beginning of his closing argument, the prosecutor argued that the child pornography on the defendant's computers proved that he had molested his granddaughter:

Christmas came early for Randy Sutherby last year. Little [LK] and her sister were presented at his house and they were asleep in a bed, and [LK] was naked and he took

advantage of it. And how do we know he took advantage of it? You heard [LK]. *And how do you know that this man has a problem with sex with children and he fantasized about it and this was a present for him? You saw all, not all of it, but you saw a representative sample from the child pornography on that screen.* We know that he is predisposed to touching children in a sexual manner. He had been fantasizing about it. He denied it up here, but was Lieutenant Darst mistaken about his conversation with the defendant? *The pornography proves it. Is it normal for a person to look at that stuff? No. They have a predisposition to have sex with kids. It shows his motive; why he touched [LK]. It shows his intent.* He is a predator that went over the line and we are here to hold him responsible today.

RP 11/3/05, at 297-98 (bold italics added).

Recognizing that the evidence on the child rape and child molestation counts was entirely a credibility contest between the defendant and the child, the prosecutor also used the child pornography evidence to support his contention that the defendant was lying to the jury just as he had lied to his wife about the child pornography:

We know this defendant is capable of deception. And how do we know that? He had been doing this child pornography. He has not an [sic] problem with it, and his wife didn't know about it at all. This has been a problem with the marriage. You heard the phone call. And you can hear it again if you want, but she was clearly upset by the child pornography. I don't understand why you got to look at this stuff. He was able to deceive his wife, but he was able to deceive his wife about it for a very long time. *He had been battling this stuff for a very long time. The dates on the child pornography are on the exhibits for the 10 counts that you are taking back there, but this has been an ongoing problem with him for a long time. And*

you know that from the phone call.

But what's more important here? If a defendant is willing to deceive you about something on one point, then you ought to throw out all his testimony. And he deceived you and you know it. And when he was up here, he told you that that child pornography stuff is disgusting. I have never looked at it. I never download it. It's not [sic] on my computer, but I didn't want it there. The accident, mistake, and when he talked to detective Darst, Detective Darst was mistaken, he didn't tell Detective Darst that he has a problem with child sex. He didn't tell Detective Darst that he has fantasies about homosexual sex, and that's awful too, and he wouldn't do that.

RP 11/3/05, at 404-05 (bold italics added).

The prosecutor ridiculed the defendant's contention that the child pornography got onto his computer accidentally, by reminding the jury of detective sergeant Jarmon's testimony which disproved the defendant's claim that he accidentally ended up with child porn on his computer. Then the prosecutor once again linked the computer porn to the child rape count by arguing that if the defendant lied about the former, then he also lied about the latter.

RP 11/3/05, at 405-409 (bold italics added). (See Appendix B).

Finally, the prosecutor asked the jury "Who are you going to believe? Little [LK – the child] who has no reason to deceive you." *Id.* at 409. Or the man who had hundreds of pictures of child porn on his computer and tried to tell Lieutenant Darst that

they got there accidentally:

Are you going to believe [LK] or are you going to believe the guy that you know was not being truthful with him [Lieutenant Darst].

RP 11/3/05, at 409.

When defense counsel argued to the jury, he spent most of his time discussing the child rape and child molestation charges, (*Id.* at 412-422), and much less time discussing the child pornography counts (*Id.* at 422-424). As to the child rape allegation, defense counsel argued that the child was mistaken as to what her grandfather had done to her, and that the child was confused because of her prior sexual play with her uncle Andy. Defense counsel focused on the conflict between the child's testimony about her interaction with her six year old uncle Andy, and the testimony of the child's mother and maternal grandmother on that point.²

² "Mr. Conroy, the prosecutor, directed your attention to the provision that we talked about here. You are the sole judges of the credibility here. One of the interesting things in this case, I think the very first witness was [the child's] mom, Lisa Butcher. She was asked if there was – if she had ever talked about – regarding sexual issues with her daughter [LK], and her testimony was, yes, about when she was three and a half years old. She testified that there has been no problems with anybody else before.

"The next witness was [LK's] grandmother, Ladonna Butcher. She got up here and she testified and her letter statement drafted in May, you know, five months later. She said she sent it in to Detective McGowan. Um, not close in time to the events we are talking about. After a lot of discussions has gone on with [LK], but the important thing is, is I asked her if she was aware, had any information if Andy, her six year old adopted son, had ever bitten [LK]. And she goes, yeah, I think back when she was about one. I asked if Andy and [LK] were allowed to play together or without supervision. No, and we keep that door open over there so we can see in there. The problem with all of that is, of course, we heard from [LK], and she is clear on a lot of subjects. She is clear on a lot of topics here. I believe what she says. She said my uncle Andy, he is mean, he bites

Defense counsel argued that much of what the defendant and the child had to say was consistent, and that the child was simply mistaken as to the key point of whether the defendant intentionally “poked” her with his finger, or whether he accidentally touched her with his injured finger when he moved her back onto the mattress. RP 11/3/05, at 420-421.³

As to the ten child pornography counts, defense counsel argued simply that when Sutherby was looking for adult pornography, he would highlight a large amount of file headings for downloading, without

me. How old are you when he bit you [LK]? I don't know. As I sit here and talk to this little girl in this case, and she said, when I was about four. We talked a little bit more about did Andy ever try to get you to do anything? She sat right here and she told us and she told us that, yeah, Andy tried to get me to touch his privates. You heard her say that. And again, I asked her what the rule in talking in court was, and she said never lie. I don't think [LK] is lying. She may be mistaken on some things, but the point of that is, then I asked her when she said that about her uncle Andy, I asked her, did you tell her mom? She said, yes, I told my mom. I asked her if she told her grandma Ladonna, and she said, yes. Why do you think her mom and her grandma Ladonna didn't want to admit that in court? I don't know what is going on over in that house, but there is something going on over there. Otherwise they would have just told you. The point is Mr. Conroy, the prosecutor, is talking about credibility; right off the bat we have some concerns with two people in this case who you know are probably the closest to [the child], have the most influence over her and talking about all of these situations with them.” RP 11/3/05, at 412-14.

³ “The point here is, I think Libby is simply misinterpreting or mistaking as to what actually occurred in that bedroom. She can certainly interpret what Mr. Sutherby described to you and demonstrated and that can be interpreted exactly how she said it. It doesn't mean it happened that way. And a five year old saying that doesn't make it necessarily so. Does she believe she is telling the truth? I think so, and I believe her parents think so too, and the grandma. The thing is, though, when you look at that, was she misinterpreting what was happening? I think she was.

“I think that Mr. Sutherby is sure exactly what happened. He explained to you how she stiffened up. Certainly consistent with an accidental touching by his injured finger. You saw how that was positioned there. I don't think that's just a coincidence that that's how his finger is. . . .”

knowing for sure what he was going to get, and then he would accidentally end up with some child pornography files. *Id.* at 423-24.

In his rebuttal argument, the prosecutor returned to his theme that the defendant *deliberately* downloaded files with titles that suggested they contained child pornography, thereby demonstrating that that was what the defendant was *intentionally* seeking:

If you go and press the Lolita 13-15 year old button, what were you after? I don't care what you got when you pressed that button. What you were after is a 13 to 15 year old lolita [sic]. And is there any other logical way to think about that. The defendant is trying to sell you a bag of goods. This is unintentional. You know it's not unintentional, because all of the various things the defendant was downloading, that he had focused on, you know what his intent was.

RP 11/3/05, at 427. The prosecutor then ended his argument by again asserting that the child had told the truth, and that the defendant had lied in court just as he had lied to his wife about the child pornography:

You heard [LK]. You know she was telling the truth. And you know this man wasn't being truthful to you. You know he wasn't being truthful with his wife.

RP 11/3/05, at 432-33.

D. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO MOVE FOR A SEVERANCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance of counsel a

defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that this deficiency in his counsel's performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). Accord State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

"A defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The Supreme Court recently reaffirmed this point in Woodford v. Visciotti, 537 U.S. 19, 22 (2002).⁴

Deficiency Prong. There can be little doubt that trial counsel's failure to move for severance of the child pornography counts was deficient conduct. It is virtually impossible to think of any strategic reason why trial counsel would not want a severance of these charges. In prior cases involving claims of ineffective assistance of counsel based upon a failure to move for a severance, appellate courts have assumed that the failure to make such a motion constituted deficient conduct.⁵

⁴ "Strickland held that to prove prejudice the defendant must establish a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.*, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (emphasis added); *it specifically rejected* the proposition that the defendant had to prove it more likely than not that the outcome would have been altered, *id.*, at 693, 80 L.Ed.2d 674, 104 S.Ct. 2052." (Bold italics added).

⁵ See, e.g., State v. Warren, 55 Wn. App. 645, 654, 779 P.2d 1159 (1989) ("the State suggests that defense counsel may have decided not to seek severance for tactical reasons. . . . Absent any evidence in the record to support this theory, however, we

In the present case, the presence of the ten child pornography counts suggested that the defendant had a perverted sexual appetite and that he was sexually attracted to underage children. This evidence could only have harmed his chances of persuading a jury that he did not rape LK in this case. Indeed, the prosecutor argued at length that the hundreds of pictures of child porn on the defendant's computers helped demonstrate that he was guilty of raping and molesting LK. Had Sutherby's trial counsel made a motion for severance, and had such motion been granted, that could only have been to Sutherby's great advantage. There was no downside to making such a motion, and the failure to make it can only be viewed as objectively unreasonable deficient conduct.

Prejudice. The Standifer Court enumerated the areas of possible prejudice to a defendant that can result from the failure to sever offenses.

- (1) [The defendant] may become embarrassed or confounded in presenting separate defenses;
- (2) ***the jury may use the evidence of one of the crimes to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged;***
- or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

decline to speculate about defense counsel's tactical intentions."); State v. Standifer, 48 Wn. App. 121, 737 P.2d 1308 (1987) ("it is unnecessary to address both parts of the Strickland test, and if it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice, then the court should do so."); People v. Kirk, 290 A.D.2d 805, 807, 736 N.Y.S.2d 778 (2002) ("we can conceive of no legitimate, strategic or tactical explanation for trial counsel's failure to move for a severance of the sex charges from the remaining counts of the indictment . . .").

Standifer, 48 Wn. App. at 126 (bold italics added).

In this case the prosecution expressly encouraged the jury “to infer a criminal disposition on the part of the defendant from” the fact of his possession of child pornography on his computer. In fact, the prosecutor argued that the child pornography “proved” that he had a problem that led directly to his molestation and rape of LK. RP 11/3/05, at 297-98.

Appellate courts have identified a number of prejudice mitigating factors which sometimes lead to the conclusion that the defendant was not prejudiced by either a failure to move for a severance, or by the denial of a severance motion. For example, the Warren opinion states that in determining whether a defendant has been prejudiced by the absence of a severance, courts should consider the following relevant factors:

(1) the strength of the State’s evidence on each count, (2) the clarity of defenses as to each count, (3) whether the trial court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of evidence of the other crimes.

Warren, 55 Wn. App. at 654-55.

Strength of the State’s evidence. In a number of cases the appellate courts have concluded that the defendant failed to show that there was a reasonable probability of prejudice because the prosecution’s evidence on all counts was “relatively strong.” See, e.g., Warren, 55 Wn.

App. at 655. That cannot be said in the present case, however, since the prosecution's evidence on Counts I and II was relatively weak. Aside from the highly prejudicial evidence of possession of hundreds of pictures of child porn, the prosecution was relying solely on the testimony, and the prior consistent statements, of a six year old child. There was no clear medical evidence of abuse. At best there was some redness (erythema) which one of the three doctors saw, but all agreed that there were many possible explanations for erythema which did not involve sexual abuse at all. The medical professionals all agreed that a conclusion of sexual abuse could *not* be drawn from the physical medical evidence.

Admittedly, the State's evidence on counts III through XII was strong, and thus there is less reason to fear that the evidence pertaining to the molestation of LK caused the jury to return convictions on the child pornography counts that would not otherwise have been returned. But the weakness of the evidence on the child rape and child molestation charges does raise a serious concern that the guilty verdicts on counts 1 and 2 would not have been returned had it not been for the child pornography evidence which the prosecutor argued showed that Sutherby had "a predisposition to have sex with kids." RP 11/3/05, at 298.

Clarity of defense to each count. The defendant's defenses were clear. With respect to the child molestation/rape charges, he denied ever

inserting his finger into the child's private area, and his counsel argued that the child was mistaken and might be confusing the incident with her grandfather with an earlier incident with her uncle. With respect to the possession of child pornography charges, the defense was that the defendant never "knowingly" possessed or acquired these pictures, and that he accidentally acquired them by searching for adult pornography.

Trial Court's Jury Instructions. The trial court did instruct the jury that it was to consider each charge separately and that it should not allow its verdict on any one count to control its verdict on any other count. CP 63-74, Instruction No. 3. On the other hand, in contradiction to this instruction, the prosecutor explicitly argued that the defendant's guilt on the possession of child pornography counts also "proved" his guilt on the two charges involving the child LK.

Admissibility of Evidence of Other Crimes if Severance Granted. Courts are instructed to consider whether evidence of other severed crimes would be cross-admissible in any event, at the trial of the other offenses. In this case, it is quite clear that evidence of the possession of photos of other children engaged in sexually explicit acts would *not* have been independently cross-admissible at the trial of the child rape/molestation charges if a severance had been granted.

On the contrary, it is well established that it is reversible error to

admit such evidence because it violates ER 404(b) which prohibits the introduction of evidence of “other crimes, wrongs, or acts” to show the bad character of the accused and to show that he acted in conformity with that bad character. Under the lustful disposition doctrine, evidence of collateral sexual misconduct may be admitted only when it shows the defendant had a lustful disposition towards the particular offended female whom the defendant is accused of molesting.

In State v. Ferguson, 100 Wn.2d [131,] at 134, 667 P.2d 68 [(1983)] (quoting State v. Thorne, 43 Wash.2d 47, 60-61, 260 P.2d 331 (1953) the Court emphasized that:

“Such evidence is admitted for the purpose of showing the lustful disposition inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.

“... The important thing is whether it can be said that it evidences a sexual desire for the particular female.”

State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991) (bold italics added).

Where the evidence showed a lustful disposition towards the offended female, the Washington Supreme Court has held there was no error.⁶ But where the acts in question do not involve the “offended person” then it is improper to admit evidence of them.

⁶ Thus in Ferguson, where the trial court admitted seven year old nude photographs of the defendant’s stepdaughter during the defendant’s trial for having engaged in sexual contact with that same stepdaughter, the Supreme Court found no error because the photos showed a lustful disposition towards the offended female. Ferguson, 100 Wn.2d at 132-134. Similarly, where evidence of uncharged sexual misconduct was directly

Thus, in State v. Medcalf, 58 Wn. App. 817, 795 P.2d 158 (1990), these principles were applied to a case where the defendant was on trial for raping an 11 year old child. At trial the prosecution presented evidence that the defendant owned videotapes that contained child pornography, but the cassettes did not portray the alleged victim and were in no way connected to that child. This Court held the admission of these videotapes was improper:

Officer Steve Emm testified that he observed in Medcalf's apartment a number of video cassettes on which children's film titles were followed by x-rated movie titles. The State argued that the evidence was relevant because the movies were, "a rather unique device to, one, entice children, and then two, apparently to show them exactly how to do it." However, Gigi [the child] testified that she had never been invited to Medcalf's apartment to watch movies, and there was no evidence that she had watched any while she was there.

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith. While this kind of evidence may be admissible to establish motive, intent, preparation, or plan, evidence showing lustful disposition should be admitted in a sex case only when it tends to show such lustful inclination toward the offended female. State v. Ferguson, 100 Wash.2d 131, 134, 667 P.2d 68 (1983); State v. Bernson, 40 Wash. App. 729, 737-38, 700 P.2d 758 (1985). The evidence in this case does not. These video tapes have no connection with Gigi. The admission of officer Emm's testimony about them was, therefore, improper.

connected to the "offended person," as in State v. Ray, 116 Wn.2d at 547-48, the Court has found admission of the evidence to have been proper.

Medcalf, 58 Wn. App. at 823.

In the present case, as in Medcalf, the pictures of child pornography on Sutherby's two computers had nothing to do with LK, the offended person. Accordingly, it was not proper to argue that the defendant's possession of these photos tended to show that he was guilty of raping or molesting LK. (Nevertheless, that is exactly what the prosecution argued.) Had Sutherby's trial counsel made a motion for severance, the trial court would have been compelled to recognize that evidence of the possession of the child pornography images on the computers would *not* be admissible at the trial of the severed charges of child rape and child molestation, and thus realization would have led the Court to grant the severance motion. The prosecution was able to exploit trial counsel's failure to make a severance motion and thus gained the improper benefit of a completely improper argument about the inferences that could properly be drawn from the defendant's possession of such photos.

The appellate courts of this state have generally recognized that the prejudice from a failure to seek or to grant a severance is at its highest when the charges against the defendant are sexual offenses. Thus, in State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1987), this Court held it was an abuse of discretion to deny severance of two counts of indecent

liberties. There the Court recognized that multiple counts of sex offenses “creates strongly the impression of a general propensity for pedophilia.” Id. at 101. These circumstances fell “squarely within the lesson of State v. Saltarelli, [98 Wn.2d 358, 655 P.2d 697 (1982)], supra, that an intelligent application of ER 404(b) is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” Ramirez, 46 Wn.App. at 101. Similarly, in State v. Harris, 36 Wn. App. 747, 677 P.2d 202 (1984), this Court held it was abuse of discretion to deny a motion for severance of two counts of first degree rape. The Harris Court found reversible error “despite [the giving of] an instruction to consider the counts separately,” because “there was extreme danger that [the] defendants would be prejudiced” by the joinder of the two rape charges. Id. at 750.⁷

This case involved the prosecution’s joinder of ten counts of Possession of Depictions of Minors Engaging in Sexually Explicit Conduct, and two other counts of child rape and child molestation involving a child who was not depicted in any of the photos that were the subject of the ten child porn counts. In sum, the prejudice in this case was

⁷ In other cases, where the offenses involved were *not* sexual offenses, the courts have distinguished Harris and Ramirez. For example, in State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990) the trial court denied a motion to sever two robbery charges. The Supreme Court affirmed, finding no abuse of discretion, and noted that “[b]oth Harris and Ramirez” cited by the defendant “involved sexual offenses where the court recognized the ‘great potential for prejudice inherent in evidence of prior sexual offenses.’” 114 Wn.2d at 718.

extreme. Had a motion for severance been made, it is very likely it would have been granted, for any reasonable trial judge would have seen that denial of severance would quite likely be held to be an abuse of discretion.

Moreover, in the present case, the Superior Court judge *himself* suggested the possibility of a severance at one point in the pretrial proceedings, so we know that the trial judge was receptive to the idea of a severance. RP 6/6/05, at 153.⁸ The prosecutor replied that he did not want to sever the rape charge from the pornography charge. He wanted to use the possession of pornography charge to bolster his case on the child molestation 1 charge by demonstrating to the jury that the defendant had a sexual interest in children in general, thus inducing the jury to find it more likely that he molested LK, the particular child in this case.⁹ As noted above, that is precisely what Ferguson and Medcalf forbid. Had Sutherby's attorney done proper research into the law governing severance

⁸ On June 6, 2005, the trial judge suggested a severance of the two charges then pending: one count of Child Molestation 1 and one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. The trial judge asked the prosecutor: "What about the possibility of separating those two counts?" RP 6/6/05, at 153. Later, on July 18, 2005, the prosecution amended the charges to add a count of Child Rape 1, and alleging *ten* counts of Possession of Depictions. RP 7/18/05, at p. 157.

⁹ MR. CONROY: I really don't want to do that. There is an element in the child molestation count of sexual motivation and the text in his statement to law enforcement admitted going into the child's – sort of straightening up her bed or something, I don't have the exact statement with me. So it might say, yeah, I was in there but I wasn't touching. And I have proof that this man was looking at little kids having sex on the internet for a long period of time and I think that's probative, not only of the separate criminal charge, but also of the sexual motivation. I think they are intertwined, they have to be tried together." RP 6/6/05, at 153.

and sex charges, he would have been familiar with these rules, and would have realized that he had a very strong argument in favor of a severance. And since the judge was already leaning towards a severance, had defense counsel made such a motion it surely would have been granted.

In sum, the failure of Sutherby's trial attorney to make a motion for severance constituted deficient conduct, was highly prejudicial to the defendant, and constituted a denial of Sutherby's Sixth Amendment right to effective representation of counsel.

2. THE MOTHER'S TESTIMONY AS TO HOW SHE COULD TELL IF HER DAUGHTER WAS LYING CONSTITUTED AN IMPERMISSIBLE OPINION ON THE DEFENDANT'S GUILT AND VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL.

It is well established that no witness may testify to his or her opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). In Black the Court held that testimony by an expert that the victim suffers from "rape trauma syndrome" necessarily "carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. [Citation]. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape." Id. at 349. The defendant argued that admission of this type of opinion invaded the exclusive province of the jury to decide the facts, and the Supreme Court agreed, and reversed the

defendant's conviction. Id. at 348.

Similarly, in State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992), Division One reversed a conviction for first degree child rape because, like the mother in this case, a prosecution witness testified that the child did not exhibit any signs of lying:

Alexander assigns error to the prosecutor's questioning Bennett about whether M [the child] gave any indication that she was lying about the abuse. As in most sexual abuse cases, credibility was a crucial issue here because the testimony of M and Alexander directly conflicted. [Citation]. *An expert may not offer an opinion on the ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness.* [Citation]. *That is precisely what Bennett did in this case. By stating that he believed that M was not lying, Bennett effectively stated that Alexander was guilty as charged.* An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility. [Citations].

Alexander, 64 Wn. App. at 154 (bold italics added).¹⁰

The testimony of Lisa Butcher in the present case was virtually identical to the improper testimony of witness Bennett in the Alexander

¹⁰ Accord State v. Kirkman, 126 Wn. App. 97, 105, 107 P.23d 133, *review granted*, 155 Wn.2d 1014, 124 P.3d 304 (2005) (“[A] witness may not give an opinion on another witness’ credibility.”); State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (“[N]o witness may give an opinion on another witness’ credibility.”); State v. Castenada-Perez, 61 Wn. App. 354, 360, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991) (Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth.”) State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994) (“Asking a witness to judge whether or not another witness is lying invades the province of the jury.”).

case. Like Butcher, Bennett testified that she did not think the child was lying, and therefore she effectively testified that Sutherby was guilty as charged. Here, as in Alexander, this testimony invaded the province of the jury and constituted reversible error.

There are numerous other cases which recognize that the admission of a witness' opinion as to the credibility or veracity of an alleged child victim of sexual abuse violates the defendant's constitutional right to a jury trial. See, e.g., State v. Dunn, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005) (testimony of physician's assistant that based on his interview of the child he believed sexual abuse was probable was constitutional error that was presumed to be prejudicial, and in this case was not harmless error); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994) (manifest constitutional error to allow witness to express opinion that child suffered from post-traumatic stress disorder which was "secondary to sexual abuse," but error harmless due to overwhelming untainted evidence);¹¹ State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (statutory rape convictions reversed due to error in

¹¹ "By stating that her diagnosis of post-traumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact – i.e., whether KT had been sexually abused – which was for the jury alone to decide. Because only Terrell and Florczak were implicated as the possible abusers, this segment of Wilson's testimony also amounted to an opinion that they were guilty, either individually or jointly, of sexually abusing KT. Admitting that evidence invaded the province of the jury. [Citation]. It therefore was manifest constitutional error, that is, error that had 'practical and identifiable consequences in the trial of the case.'")

admission of pediatrician's testimony that based on her interviews with two children she believed they had been molested; improper for witness to give opinion on the ultimate issue of guilt based upon the witness' determination of a witness' veracity).

Most recently, in State v. Kirkman, supra, this Court held that it was error to permit a doctor to testify that the report of sexual touching by an 8 year old child was clear, consistent, and made with appropriate affect and vocabulary, because this testimony amounted to a comment on the child's credibility. Id., at 102-03. This Court also found error in the admission of the detective's testimony that he gave the child a test to determine her ability to tell the truth, because "[i]n essence" this testimony amounted to an opinion as to the child's credibility. Id., at 99, and 104-05.

This Court found both errors to be of constitutional magnitude:

Admission of these opinions was error of constitutional magnitude because the evidence violated the defendant's right to a jury trial and invaded the fact-finding province of the jury. Thus, these errors can be raised for the first time on appeal under RAP 2.5(a)(3), and because there was no physical evidence or eyewitness testimony, the constitutional errors were not harmless.

Kirkman, 126 Wn.2d at 134.¹²

¹² Judge Quinn-Brintnall dissented in Kirkman because she did not believe that either the testimony of either Dr. Stirling or Detective Kerr constituted a comment directly on Kirkman's guilt. 126 Wn. App. at ¶ 48 (Quinn-Brintnall, J., dissenting). Even if the Supreme Court decides to adopt Judge Quinn-Brintnall's position and reverse this Court's Kirkman decision on that basis, that would have no effect on the analysis in this

Similarly, in State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003) this Court reversed a conviction for assaulting a young child because two witnesses testified that in their opinion the mother of the child was not responsible for the child's injuries, thus indirectly expressing their opinion that the defendant was the responsible party. Although Dolan's trial counsel made no objection to this testimony during trial, this Court expressly held that "[b]ecause improper opinion testimony violates the constitutional right to jury trial, it may be raised for the first time on appeal." Id. at 330. Because the State could not show that the error was harmless beyond a reasonable doubt, Dolan's conviction was reversed.

Here, as in Kirkman, Dunn, Dolan, Fitzgerald and Alexander, the testimony of a prosecution witnesses included the witness' improper opinion that the alleged child victim was telling the truth, and that the defendant was therefore guilty as charged. Although there was no objection by Sutherby's trial counsel, the error was nevertheless manifest constitutional error. As the Kirkman opinion notes:

Within the meaning of RAP 2.5, "manifest" means "unmistakable, evident, or indisputable." [Citation].

case. For by no stretch of the imagination could anyone claim that the mother's testimony in this case did not constitute a direct opinion on Sutherby's guilt. The mother testified that LK "makes a half-smile when she is telling a fib," and that she never saw "that face or reaction when [LK was] talking about what happened with Randy [the defendant]." RP 11/1/05, at 34. Thus the mother's testimony constituted a direct comment that what LK had to say about the defendant was the truth, not a fib, and that the defendant was therefore guilty as charged.

Manifest errors are those that had “practical and identifiable consequences in the trial of the case.” [Citation]. This case rested on the credibility of A.D. and there was no other evidence apart from her statements. By bolstering A.D.’s testimony through Dr. Stirling and Detective Kerr, the jury was told that they could believe her. Her credibility was essential to convict Kirkman.

Kirkman, 126 Wn. App. at 137.

Similarly, in Sutherby’s trial the prosecution’s case rested entirely on the credibility of LK.¹³ By bolstering LK’s testimony through admission of her mother’s opinion that LK showed no signs that she was fibbing, the jurors were told that they could believe LK. Since there was no physical or medical evidence which shows that any sexual abuse was perpetrated, the State cannot show that the error was harmless beyond a reasonable doubt, and therefore reversal is required.

3. THE FAILURE OF TRIAL COUNSEL TO OBJECT TO THE TESTIMONY OF THE MOTHER REGARDING HER DAUGHTER’S HABIT OF MAKING A PARTICULAR KIND OF SMILE WHEN SHE LIED, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

In addition to violating his right to trial by jury, the failure of

¹³ The fact that LK repeated her accusations and told several people that Sutherby molested her does not change the fact that the child rape and child molestation convictions rest entirely upon her credibility. As the Kirkman court noted: “here, there is no evidence other than the statements of A.D. At best, the evidence is that A.D. repeated the same factual recitation to her aunt, the physician, and the policeman. Her credibility is for the jury to decide. Because there was not overwhelming untainted evidence of Kirkman’s guilt, the improper opinion evidence invaded the province of the jury, and review under RAP 2.5(a)(3) is warranted. When the error is not harmless, we reverse and remand for a new trial.” 126 Wn. App. at 138.

Sutherby's trial attorney to object to the mother's testimony that her daughter was not lying violated Sutherby's Sixth Amendment right to effective assistance of counsel. The failure to object was obviously deficient conduct, since there cannot possibly have been any strategic reason for failing to object to this testimony. The case rested entirely on the credibility of the child, and therefore the mother's testimony that LK was telling the truth was obviously prejudicial. Given the absence of physical medical evidence that could clearly establish that any sexual molestation occurred, there is a reasonable probability that had the improper opinion testimony of the mother been excluded, the outcome of the trial would have been different. Thus, both prongs of the Strickland test are met, and a Sixth Amendment violation is demonstrably present.

4. THE PROPER UNIT OF PROSECUTION WAS THE CONTINUOUS ACT OF POSSESSION OF "VISUAL MATTER" CONTAINING "ANY" DEPICTIONS OF CHILDREN ENGAGED IN SEXCUALY EXPLCIT CONDUCT. THE SENTENCING COURT'S ERROR OF REFUSING TO DISMISS 9 OF THE 10 COUNTS OF POSSESSION OF DEPICTIONS VIOLATED THE DOUBLE JEOPARDY CLAUSE.

a. The Statute

RCW 9.68A.070, entitled "Possession of depictions of minor engaged in sexually explicit conduct," reads as follows:

A person who knowingly possesses *visual or printed matter* depicting a minor engaged in sexually explicit

conduct is guilty of a class C felony.

(Bold italics added). In addition, RCW 9.68A.011(1) provides:

“Visual or printed matter” means *any* photograph or other material that contains a reproduction of a photograph.

(Bold italics added).

b. Double Jeopardy Principles

The Fifth Amendment double jeopardy clause prohibits a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When deciding whether multiple punishments violate double jeopardy, courts first must ascertain what the Legislature intended to be the proper “unit of prosecution.” Adel, at 634.

In Adel the defendant was charged and convicted of two counts of possession of marijuana based on the fact that small amounts of marijuana were found both inside his convenience store in an ashtray, and in his car parked outside his store. The Court considered whether each place where the marijuana was kept was properly a separate unit of prosecution. “The proper question for this case is what act or course of conduct has the legislature defined as the punishable act for simple possession of a controlled substance?” Adel, at 634.

For at least a half a century it has been well-established that ambiguity in the wording of a criminal statute weighs in favor of the

defendant. If the legislature does not define the “unit of prosecution” with clarity, courts will adopt the construction that is the most lenient:

If the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the *ambiguity should be construed in favor of lenity*. Bell, 349 U.S. at 84, 75 S.Ct. 620 (“[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, *doubt will be resolved against turning a single transaction into multiple offenses*”); *see also* United States v. Universal Credit Corp., 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952). The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (“*The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.*”); Snow, 120 U.S. at 282, 7 S.Ct. 556 (*if prosecutors were allowed to arbitrarily divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges*).

Adel, 136 Wn.2d at 634-35 (bold italics added).

The Adel Court was guided by the Supreme Court’s decision in Bell v. United States, 349 U.S. 81, 83, 99 L.Ed. 905, 75 S.Ct. 620 (1982). There the Court held that double jeopardy was violated when the defendant was convicted of two counts of transporting women across state lines when two women were transported at the same time. The text of the Mann Act, the statute at issue in Bell, read as follows:

Whoever knowingly transports in interstate or foreign commerce . . . *any woman or girl* for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 241, *quoted in Bell*, 349 U.S. at 82 (bold italics added).

In the present case, the statutory language “A person who knowingly possesses,” parallels the Mann Act language “Whoever knowingly transports...” Similarly, the object of the verb in the Mann Act, “any woman or girl” parallels the object of the verb in RCW 9.68A.070, “visual or printed matter...” Thus the Bell case strongly indicates that the unit of prosecution in Sutherby’s case is the ongoing act of possession, just as the unit of prosecution in the Bell case was the ongoing act of transportation. The number of photos possessed is as irrelevant here, just as the number of women was irrelevant in Bell.

Adel also cites to In re Snow, 120 U.S. 274, 30 L.Ed. 658, 7 S.Ct. 556 (1887). The Snow Court found a double jeopardy violation when the defendant was convicted on three counts of plural cohabitation and was given three consecutive maximum sentences of six months imprisonment on each count. The Court held that the division of three continuous years of cohabitation with seven wives was but a single offense, and that it was unconstitutional to divide up this one continuing crime into three separate

offenses, thereby increasing the punishment which could be imposed.¹⁴ The Supreme Court set aside Snow's three convictions and remanded for re-sentencing upon a single offense.

The Adel court also approved of the Court of Appeals' decision in State v. Mason, 31 Wn. App. 680, 644 P.2d 710 (1982), where the owner of a steam bath was convicted on three counts of promoting prostitution because she employed three different women who committed acts of prostitution at the business. The Court of Appeals analyzed the promoting prostitution statute and concluded that the legislature sought to target people who were profiting from prostitution. The "unit of prosecution" was the ongoing participation in the business of prostitution. Therefore, it was irrelevant whether a madam had one prostitute working for her or three. The Mason Court held that two of the three convictions had to be invalidated.

The Adel Court reached a similar conclusion. The statute in Adel stated that "any person found guilty of possession of forty grams or less of

¹⁴ *"There was but a single offense committed prior to the time the indictments were found.* This appears on the face of the judgment. It refers to the indictments as found "for the crime of unlawful cohabitation committed" "during the time" stated, divided into three periods, according to each indictment. For so much of the offense as covered each of these periods, the defendant is, according to the judgment, to be imprisoned for six months and to pay a fine of \$300. *The division of the two years and eleven months is wholly arbitrary.* On the same principle there might have been an indictment covering each of the 35 months, with imprisonment for 17-1/2 years and fines amounting to \$10,500, or even an indictment covering every week, with imprisonment for 74 years, and fines amounting to \$44,400; and so on, *ad infinitum*, for smaller periods of time. *It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once,*

marijuana shall be guilty of a misdemeanor.” RCW 69.50.401(e). The only elements of the offense the State needed to establish were the nature of the controlled substance and the defendant’s possession of it. Id. at 635. Noting that the statute “fails to indicate whether the Legislature intended to punish a person multiple times for single possession based upon the drug being stashed in multiple places,” the Adel Court held that the defendant could only be convicted of one offense. Id. at 635. Citing the same danger of the arbitrary exercise of prosecutorial charging discretion, the Court rejected the contention that Adel could be charged with two crimes because he kept marijuana in two places:

The State’s argument that Adel violated the possession statute multiple times simply because he constructively possessed the drug in two different places rests on a slippery slope of prosecutorial discretion to multiply charges. How far apart do they have to be kept to constitute “separate” stashes? Under the State’s theory it seems a defendant could be convicted of three counts of possession if the drug was found in the defendant’s sock, pant pocket, and purse – each “location” being a “separate” place.

Adel, 136 Wn.2d at 636. The Abel Court reversed two of the defendant’s three convictions, and remanded the third for resentencing. Id. at 637.

In later cases, such as State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003), the appellate courts have noted the key distinction between

for the purposes of indictment or prosecution, prior to the time the prosecution is instituted.” Snow, 120 U.S. at 282 (bold italics added).

a “continuing offense” such as possession, and other offenses that involve discrete acts which are not continuing in nature. The two defendants in McReynolds were each charged with eleven separate counts of possession of stolen property. There were several different owners of the items of stolen property. The State argued that multiple charges could be brought based on the fact that the items of stolen property possessed had several different owners. But the Court of Appeals rejected this argument, noting that unlike the crime of receipt of stolen property, *possession was one continuing offense* no matter how many different property owners there might be.¹⁵

c. **Possession is a Continuing Offense, and Thus Supports Only One Charge**

Analysis of the statute at issue here shows that possession is the only

¹⁵ “The State’s confusion here may be because of the *different types of acts* identified in RCW 9A.56.140. *The definition includes some identifiably discrete acts (receive, conceal, and dispose) and other acts that identify a course of conduct (possess and retain).* [Citation]. In Tili, 139 Wn.2d at 117, 985 P.2d 365, the Supreme Court held that individual acts of penetration constituted separate rapes or units of prosecution *because they were not a continuous course of conduct. Conversely, when a statute defines a crime as a course of conduct over a period of time, “then it is a continuous offense* and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.” Harrell v. Israel, 478 F. Supp. 752, 754-55 (E.D. Wis. 1979); *see* Sanchez v. State, 97 N.M. 445, 446, 640 P.2d 1325 (1982) (“*the simultaneous possession of stolen items owned by different individuals is a single act constituting one offense*”); State v. Goins, 705 S.W.2d 648, 651 (Tenn. 1986) (“A defendant may be indicted and convicted only for as many counts of receiving or concealing stolen goods as evidence shows there are separate transactions of receiving or concealing particular goods. Otherwise, *the simultaneous possession of goods stolen from more than one person is only one offense.*”); State v. Blair, 671 P.2d 203, 208 (Utah 1983) (“*[R]etaining’ the stolen property of different individuals is but a single act and must be prosecuted as only one offense if the evidence shows . . . that the retention or possession of such stolen property was simultaneous.*”); State v. Hall, 171 W.Va. 212, 223, 298 S.E.2d 246 (1982) (“*many articles stolen at different times from several persons may be received and concealed by the same act, and then there is but one offense.*”.)” McReynolds, 117 Wn. App. at 338-39 (bold italics added).

type of conduct which can trigger criminal liability. The *sole* means by which the crime of “*Possession* of Depictions of a Minor” can be committed is for a person to “knowingly possess” visual or printed matter depicting minors engaged in explicit sexual conduct. RCW 9.68A.070.¹⁶

Similarly, as noted in McReynolds, the phrase “possessing stolen property” is statutorily defined. It means to “retain,” “possess,” or “conceal” property of another with knowledge that it has been stolen, RCW 9A.56.140(1). When the offense of possession of stolen property is committed in one of these three ways, the offense is a continuing offense and only one count can be charged, no matter how many different people may be the true owners of the stolen property. But possessing stolen property is also defined as being committed when a person “receives,” or “disposes” of stolen property knowing that it is stolen. Therefore, since acts of receipt or disposal are *not* continuing acts, separate acts of receipt or disposal *can* support separate criminal charges.

In the present case, there are multiple photos depicting different children. But that is as irrelevant as the fact that there were multiple women

¹⁶ In this respect, RCW 9.68A.070 is quite different from, for example, the offense of “*Dealing* in Depictions of a Minor Engaged in Sexually Explicit Conduct.” “Dealing in Depictions” is committed not only when a person “possesses” such depictions with the intent to do various other acts with them, but also when a person knowingly “develops,” “duplicates,” “publishes,” “prints,” “disseminates,” “exchanges,” “finances,” “attempts to finance,” or “sells” such depictions. Each of these alternate means of committing the offense is a discrete act, not a continuing offense.

employed by the defendant in Mason, multiple women transported by the defendant in Bell, and multiple women cohabiting with the defendant in Snow. There was but one continuous course of conduct -- *possession* of visual or printed matter that contained depictions of children engaged in explicit sexual acts -- and this continuous course of conduct cannot be divided into discrete packages for multiple charging.

d. Rejection of the Per Photograph Approach in Prosecutions for Sexual Exploitation of A Minor

State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000) supports this same conclusion. There the defendant was charged and convicted with six counts of first degree child rape, and 73 counts of sexual exploitation of a minor. This multiplicity of sexual exploitation counts allowed the prosecutor to inflate the offender score on the child rape counts by an additional 73 points, and thereby produced a huge increase in the standard range for the six child rape counts. Id. at 704. The Supreme Court considered this issue: “Whether, in a case charging multiple counts of sexual exploitation of a minor based on posing children for many photographs, the proper ‘unit of prosecution’ is each photograph, each pose, or each photo session.” Id.

As in Adel the Root opinion declares that the proper starting point is to look at the language of the statute. The Court looked to whether the statute defined the crime as the discrete act of taking a photograph, or as a

larger course of conduct, and concluded that it was the latter.

The “unit of prosecution” does not appear to be merely the act of taking the photograph. Case law suggests something more must be involved than simply taking a photograph. The defendant must take some sort of active role in causing the sexually explicit conduct. ***Therefore, the defendant should not be charged per photograph. The “unit of prosecution” for RCW 9.68A.040 is engaging in activity*** that compels, aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, while knowing such conduct will be photographed.

Root, 141 Wn.2d at 708 (bold italics added).

Since the language of RCW 9.68A.040 focused on the act of “compelling” or “causing” a minor to engage in sexual conduct so that it could be photographed, the Root Court concluded that “[t]he correct unit of prosecution was per photo session per minor involved.” Based upon this analysis, the Court held that instead of 74 counts, there should only be 24, because there were 21 photography sessions, and three of those sessions involved two children. Id. at 711. The case was remanded for resentencing on the reduced number of counts.

Like the U.S. Supreme Court in Snow, the Washington Supreme Court once again forbade prosecutors from multiplying charges unreasonably. In Root the Court condemned the “per photograph” approach, noting that it would lead to absurd and arbitrary results:

A standard 35-mm motion picture camera produces 24 still pictures per second. A 10-minute motion picture produces

the equivalent of 14,400 still frames. If the “unit of prosecution” is per photograph, the ten minute video would constitute one “unit of prosecution” (or 14,400) while someone using a still camera could be charged each time a picture is taken. Arguably the culpable conduct is equal here; however, each would be charged with a different number of counts. Root argues that “the exploitation occurred during the time that each child was engaged in sexually explicit conduct. It should not matter how many photographic images were produced. Pet. For Review at 14. We agree that the culpable conduct involves more than simply taking the photograph.

Root, 141 Wn.2d at 709.

In the present case, the prosecution’s charging contradicts the holding of Root. Even though nothing in the language of RCW 9.68A.070 suggests that a per photograph approach should be taken, that is how the prosecutor packaged the charges in the present case. In Root the targeted course of conduct was coercing or causing a child to engage in sexually explicit conduct that would be photographed. Since that course of conduct happened 24 times, 24 counts were appropriate, but not 74 counts based on a count for each photo taken. In the present case the targeted course of conduct is the “possession” of illegal visual or printed matter. There was but one continuous act of possession, and yet the prosecution charged and obtained convictions on ten separate counts because there were ten separate photos. This pattern of charging is contrary to Root, and contrary to the cases that lay the foundation for Root, such as Bell, Snow, Adel and Mason.

Additional evidence of legislative intent makes this conclusion even more obvious. The *title* given to this offense manifests the Legislature's complete indifference to the number of photographs. The crime is entitled "Possession of *Depictions* of Minor Engaged in Sexually Explicit Conduct." The use of the plural form of the noun is significant. It shows that the Legislature didn't care how many depictions of minors engaged in sexually explicit conduct a person possessed. One photo or 1,000 photos, it made no difference to the Legislature.¹⁷

e. **Use of the Word "Any" Manifests Legislative Indifference to the Number of Photos Possessed.**

The Legislature also used the word "matter" to describe what could not be possessed. "Matter" is defined as "a material substance of a particular kind or for a particular purpose (vegetable ≈)." Webster's Ninth New Collegiate Dictionary 734 (1983). Just as it is understood that a quantity of "vegetable matter" will ordinarily contain more than one leaf

¹⁷ This makes good sense, since a contrary approach would lead to absurd disparities. Imagine two child porn collectors. They each look at child porn, and they each engage in this conduct continuously for a period of five years. But on the last day of the five year period, one of them decides to reduce the size of his computer collection from 100 saved photos to 5, in order to make memory room for the installation of some new software for a video game. The other man simply keeps all 100 of his collected photos because his computer has greater memory capacity, so he doesn't need to free up hard drive space. The day after the five year period is completed, police execute search warrants at the homes of the two men. In one home they find a computer with 5 child porn photos on it. In the other they find a computer with 100 photos. It would make no sense to charge the first man with five counts and the second with 100 counts of possession of depictions of minors. They both engaged in the same continuous course of possessing and retaining such "depictions." In each case, only one charge should be filed against each.

or stem, it is also understood that “visual or printed matter” will ordinarily contain more than one photo. The Legislature’s use of the word “matter” thus signifies that the Legislature did not care how many photos the “matter” contained. The “matter” is all “of a particular kind” and possession of any amount of that “particular kind” of substance is one offense, no matter how much of it there is.¹⁸

Finally, the phrase “visual or printed matter” is itself defined by statute. RCW 9.68A.011(1) provides: “Visual or printed matter” means any photograph or other material that contains a reproduction of a photograph.” The Washington Supreme Court has specifically held that use of the word “any” indicates that the Legislature is indifferent to the quantity in question. In State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002) the defendant was charged and convicted with three counts of arson in the second degree. That crime was defined as being committed when a person “knowingly and maliciously causes a fire or explosion which damages ... any ... automobile.” The Westling Court held that unit of prosecution was the causing of a fire. Use of the word “any” signified that the number of vehicles damaged by the fire was irrelevant.

[T]he statute refers, in relevant part, to the causing of “a

¹⁸ Just as there is only one offense of possession of cocaine regardless of whether the cocaine is possessed in the form of one large brick, ten separate rocks, or a thousand flakes, there is only one offense of possession of illegal “visual or printed matter,” regardless of whether there is one photo or ten thousand.

fire” that damages “any automobile.” “Any” means “every” and “all.” State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991). Thus, under the plain language of the statute, one conviction is appropriate where one fire damages multiple automobiles, i.e., by use of the word “any” the statute speaks in terms of “every” and “all” automobiles damaged by the one fire.

Westling, 145 Wn.2d at 611-612.

Similarly, for purposes of the crime of Possession of Depictions Of Minor Engaging in Sexually Explicit Conduct, “by use of the word ‘any’ the statute speaks in terms of ‘every’ and ‘all’” (145 Wn.2d at 611) photographs which the visual matter “contains.” The number of photos “contained” in the visual matter in a “possession of depictions” case is as irrelevant as the number of automobiles damaged in the fire set by the defendant in an arson case. The Westling Court reversed the defendant’s multiple convictions and remanded for re-sentencing on one count of second degree arson. 145 Wn.2d at 612. Similarly, in the present case it would be a violation of double jeopardy to enter judgment and impose sentence for multiple counts of possession of depictions. All but one count must be set aside.

5. THE SENTENCING COURT VIOLATED SUTHERBY'S ART. 1, § 21, ART. 4, § 16, AND 6TH AMENDMENT RIGHTS BY MAKING A FACTUAL DETERMINATION ESSENTIAL TO THE MAXIMUM SENTENCE, RATHER THAN BY RECOGNIZING THAT ALL SUCH DETERMINATIONS MUST BE MADE BY THE JURY.

Assuming for the sake of argument that the Superior Court's determination of the proper "unit of prosecution" is correct, there is still state and federal constitutional error infecting Sutherby's sentence. The sentencing court determined that the proper unit of prosecution was "each individual child photographed or filmed." CP 130. Thus, under the Superior Court's "per child" analysis, there could properly be a separate count of possession of depictions for each child that was depicted. But if there were multiple photos of the same child, there could not be a separate count for each photo of the same child.

Under this analysis, it is necessary to determine whether each photo that was the subject of one of the ten counts depicted a child that was not depicted in any of the other photos. Since the jury had not been instructed that it needed to make such a determination, no such determination was ever made by the jury. At sentencing the trial judge concluded, over the objection of the defendant, RP 12/21/05, at 2-3, that he could make that factual

determination himself. RP 12/21/05 at 37-38.¹⁹

Yet this is precisely what Blakely holds to be impermissible. Any fact which increases the maximum punishment must be found by a jury beyond a reasonable doubt. Blakely, 542 U.S. 296, 303-04 (2004); State v. Hughes, 154 Wn.2d 118, 126 (2005). Since the jury never made this requisite factual determination, it was improper for the Court to sentence Sutherby on the basis of his own factual determination that seven different children were depicted in the ten photos that were the basis of the ten charged counts. Since no jury determination of the number of separate children was ever made, the number of Possession of Depictions counts should have been reduced from ten to one. Sutherby should then have been sentenced on the Child Rape 1 count using an offender score of 3,²⁰ to a sentence somewhere within the proper standard range of 93 to 123 months.²¹ Instead, he was sentenced to 279 months which was the midpoint of the

¹⁹ Judge Foscue concluded that the children in counts 3, 4, 8, 11, and 12 were different individual children, but that he could not tell whether the children depicted in Counts 5-7, or in Counts 9-10, were different individual children. CP 130. Therefore, he combined Counts 5-7 into one Count, and Counts 9-10 into one Count, thereby reducing the total number of convictions for Possession of Depictions from ten to seven, and he then sentenced Sutherby accordingly. CP 130.

²⁰ Because it is a sex offense, one count of Possession of Depictions counts as 3 points in the offender score. Because the sentencing judge allowed seven counts of Possession of Depictions to stand, the offender score used when sentencing Sutherby on the Child Rape 1 count was 21.

²¹ Everyone agreed that the Child Rape 1 and Child Molestation 1 counts were the same criminal conduct, and thus Counts 1 and 2 did not count against each other when computing the offender score on those counts. RP 12/21/05, at 41.

standard range computed on the basis of an offender score of 9 or above.

E. CONCLUSION

Appellant Randy Sutherby asks this Court to reverse his convictions and remand for a new trial. In the alternative, Sutherby asks this Court to vacate his sentences and to remand for resentencing.

DATED this 2nd day of August, 2006.

CARNEY BADLEY SPELLMAN, P.S.

By James E. Lobsenz
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

DECLARATION

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the following persons

Gerald Fuller

containing a copy of the document to which this document is attached

SIGNED AT Seattle, Washington this 3rd
day of August, 2006

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STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX A

“Q. Did Andy want you to touch him in the privates?

A. Yes.

Q. Yes?

A. Mm-hmm.

Q. And what did he want you to do?

A. To touch him in the privates.

Q. I’m sorry.

A. To touch him in the privates.

Q. Kiss him?

A. Touch him in the privates.

Q. Touch him in the privates?

A. But I didn’t do it.

Q. You didn’t do it? Good. Who did you tell about that?

A. Grandma.

Q. Told your grandma, which grandma?

A. Ladonna again.

Q. Grandma Ladonna?

A. Mm-hmm.

Q. Did you tell your mom?

A. Yes, her too.

Q. Your mom too?

A. Mm-hmm.”

RP 11/1/05, at 81.

APPENDIX B

“First, the defendant is saying, well, you don’t know when you click on the description of the file or the header, it doesn’t necessarily mean what the picture is, and some of that stuff, I click on a title that didn’t indicate it was child porn and then, oh my god, I am so shocked it shows up on my machine and it’s child pornography, but I never intentionally do it. Nice try. Not true.

“The third screen, what was he interested in? What was it called? Teen sisters comparing pussy. If somebody wants to know what’s on that, that’s going to be teenage sisters comparing pussy. That’s what he clicked on. And is he trying to tell you, well, I was looking for pictures of adults, or whatever, cars. So I thought I would take a look at teen sisters comparing pussy and maybe it wouldn’t be child porn. That’s what he is trying to sell you today.

“And then you look at some of her [sic] folders that the defendant went to. The numbers by the folders, the person operating the system has to go in there and physically say, yeah, I want to know what’s in those bulletin boards. I want to know. So which ones did the defendant highlight out of thousands that he had on his machine? Sexual stories, incest, sex stories, gay. Remember; homosexual stuff. Would never – he is not perverted. He says, or it’s awful or whatever, he would never do that’s [sic] but that’s what he was interested in. So he was not being truthful with you today when he denied saying that to Sergeant – to Detective Darst.

“And look at some of the other ones he wanted to know about what was in these bulletin boards. Erotica LL series, Lolita, young kids. He clicked on that. He wanted to know what was in there. He wanted to know what was in male chubby, male hard-on, male oral. So then you go to some of these ones that he opened up and the ones that he physically had to go and mark and say I want to see that, I want to see what that is. And how do you know what you think the subject is, what it’s going to be? Well, it says right on it what it is, 13 year old real school girl. Do you think that’s going to be adult pornography? There is a

whole bunch of those 13 year old real school girls that he focused on, that he selected. 12 to 13 year old teenage strippers. Do you think you are likely to get legal child pornography when you want to find out what's there? And how about on this one screen where there is a whole bunch and he picked only four on that screen. He wasn't interested in candid beach picture, or fetish sluts or anything else, what was he interested in? 13 year old Lolita neighbors. And on the next screen Detective Jarmon showed you. He again, wasn't interested in, and I'm sorry for the language, but we have got to talk about it. He didn't want to look at two sluts for one big cock. He didn't want to look at great topless pixels. He didn't want to look at anymore candid beach pics. What did he want to look at it? 13 to 15 year cherry lolitas. I spied on J high locker rooms. That's what he selected. You know he wasn't being truthful about that. He was trying to save face. He thought he could after Detective Jarmon, that there was enough there that he could get up here and deny it, but then Detective Jarmon came back in here and showed you that he wasn't telling you the truth. ***And if he is not going to tell you the truth about that, how could you believe a word he said about anything else?***

"The broken finger defense.

"What are the facts about the computer that he was trying to deny. They are plain. They are simple. You heard me talk about some of it here. Two computers at his house, over thousands of pictures Detective McGowan looked at. He did a quick survey of some of them, and the ration of kiddie porn to regular porn, maybe 3, 4 to one for regular, but still a whole bunch when you do the math, hundreds and he didn't deny it. ***You didn't hear any evidence that says, no, there is not hundreds of pictures of child pornography on my computer*** and if you want to come in and look at them, we will set it up for you. . . ."

RP 11/3/05, at 405-409 (bold italics added).

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

RANDY J. SUTHERBY,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a lawful permanent resident of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On August 3, 2006, I caused to be served one copy of the following documents on:

Mr. Gerald R. Fuller
Office of the Grays Harbor County Prosecuting Attorney
102 W. Broadway, Room 102
Montesano, WA 98563-3621
(Via Messenger)

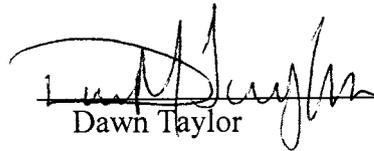
And To:

Randy Sutherby
c/o Debra Sutherby
2591 Wynooche Valley Road
Montesano WA 98563
(via US Mail)

Entitled exactly:

BRIEF OF APPELLANT

DATED: September 6, 2006.


Dawn Taylor