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NO. 52996-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LONNIE MARTIN,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette M. Dalton, Judge

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BRIEF OF APPELLANT

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LISE ELLNER  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090  
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. Mr. Martin's double jeopardy rights were violated where he was sentenced to 3 counts of depictions of minors engaged in sexual conduct, without delineating if the second degree count was subsumed by the first 2 counts in the first degree under a unit of prosecution analysis.
2. The court abused its discretion by denying the motion to dismiss.

Issues Presented on Appeal

1. Were Mr. Martin's double jeopardy rights violated where he was sentenced to 3 counts of depictions of minors engaged in sexual conduct, without delineating if the second degree count was subsumed by the first 2 counts in the first degree under a unit of prosecution analysis?
2. Did the court abuse its discretion by denying the motion to dismiss?

B. STATEMENT OF THE CASE

Mr. Martin was charged with two counts of first degree possession of depictions of minors engaged in sexually explicit conduct (PDM1) and one count of possession of minors engaged in

sexually explicit conduct in the second degree (PDM2).CP 1. He pleaded guilty as charged without a plea agreement. CP 24. The plea form provided in relevant part as follows:

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

BETWEEN NOV. 21 + NOV. 27, 2017 I POSSESSED  
THREE IMAGES OF MINORS ENGAGED IN  
SEXUAL CONDUCT WITH ADULTS IN  
KITSAP COUNTY WA

[ ] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

CP 24. Shortly after pleading guilty, the state moved to vacate the plea. The defense moved to dismiss count 3, the second degree charge on double jeopardy grounds. CP 33. The court considered the unit of prosecution for multiple counts of possession depictions of minors and whether a defendant agrees to the legal and factual basis of the charge regardless of whether the statement of defendant on plea of guilty is inadequate to prove the crimes charged. RP 9, 24, 42, 57 (October 4, 2018),

The court asked the following question:

The only question really is given the factual basis for the plea, does it support your argument that one possession plus two in the first degree means only two in the first degree. Or is it he plead to three counts and, therefore, you can infer the factual separateness of each of the three counts. I.e., not just unit of possession but that there was a photograph that met the lesser criteria in the unit.

RP 57 (December 17, 2018). During the December hearing, counsel for Mr. Martin requested permission to file a reply brief on the “*Francis* issue” because he had not read the case. RP 86 (December 17, 2018). After the court asked counsel to keep the briefing to “one case”, counsel asked permission to also rely on “**Broce**”, “*Knight*” and “*Schoor*”. RP 87. The court entered its ruling denying the double jeopardy motion, based almost entirely on *Broce*. RP 11.

THE COURT:

*U.S. versus Broce*, B-r-o-c-e. I'm pronouncing it an Italian way. It may be Broce, I don't know. But it is 488 U.S. 563. 109 Supreme Court 757. 102 L.Ed.2d 927 (1989 case).

So I've read that case a number of times, as well as attempting to gain guidance from the administrative law review articles -- article that I read which discusses the *Broce* case.

The first thing that we have to apply is the presumption upon the defendant's plea of guilty.

Here, there is no argument about that presumption. It is very clearly axiomatic.

A plea of guilty comprehends all of the factual and legal elements necessary to sustain a binding final judgment of guilt and a lawful sentence

Further in the *Broce* case -- and I'll quote directly from 488 U.S. at page 570 -- quote, A guilty plea, quote, is

more than a confession which admits that the accused did various acts, end quote.

There's a citation continuing, quote, It is an, quote, admission that he committed the crime charged against him, end quote.

Another citation, continuing, quote, By entering a plea of guilty, the accused is not simply saying that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime, end quote.

Moving further down the page, quote, just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes, end quote.

The court in the *Broce* case focuses not on what the defendant says in a plea agreement but rather focuses on what is said in the indictments. Because as the t's plea of guilty. Here, there is no argument about that presumption court indicates, it is the indictment to which the defendant is agreeing that he committed, when he pleads guilty.

So I look then back to what the allegations were in the information and do those allegations allege the same crime or different crimes.

It is clear that Count 3 is not only facially different in terms of the factual assertion, but it is also legally different in terms of the statutory citation there can be no way that is clear reading of the charging document alleges the same crime in Count 3 as the crimes in Counts 1 or 2.

When I thought about the issue of double jeopardy and I asked preliminarily about what the presumptions were when an individual has pled guilty to the crime

and whether the court can presume not only that the defendant is guilty of the crime, but whether the defendant has, by the guilty plea, admitted all elements of the crime.

The case law is consistent that if the defendant pleads guilty to more than one criminal act alleged, that as long as the information sustains three separate criminal charges under separate statutory provisions that there cannot be a claim of a violation of the rule against double jeopardy.

So then the complicating feature is what or how does the defendant's own statement in terms of his factual assertion relate to the argument on double jeopardy?

And, frankly, I could find no case where the defendant's own factual assertion was evaluated as relevant by the court in making a determination as to the unit of prosecution or double jeopardy.

Rather the defendant's statement was analyzed and relevant to whether the plea itself was sufficient; that is, did the defendant allege or agree to sufficient facts underlying the charges that it would support a court's finding that the plea -- that the allegations made by the defendant, the statement made by the defendant does or did in fact constitute a sufficient factual basis to support the charge?

That's a completely different kind of attack on a plea of guilty than is one brought here, which is double jeopardy.

So for those reasons, I respectfully deny the request to dismiss Count 3. And I'll be happy to have findings and conclusions as needed by the parties.

RP 11-15 (January 7, 2019). During this hearing, after the court

issued its oral ruling, counsel admitted that he had not read *Broce*. RP 15 (January 7, 2018). The court denied the double jeopardy motion based on *Broce*. RP 11-15.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

To prove knowing possession of a minor engaged in sexually explicit conduct in the first degree, the state had to prove depictions of minors engaged in certain acts for the purpose of sexual stimulation of the viewer. RCW 9.68A.070(1).

To prove knowing possession of a minor engaged in sexually explicit conduct in the second degree, the state had to prove images that depicted the unclothed private areas of a minor for the purpose of sexual stimulation of the viewer. RCW 9.68A.070(2).

Under *State v. Francis*, 170 Wn.2d 517, 522, 242 P.3d 866 (2010), a defendant does not waive his right to challenge a plea on double jeopardy grounds. Art. I, § 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution protect a criminal defendant from double jeopardy.

*State v. Fuller*, 185 Wn.2d 30, 33, 367 P.3d 1057 (2016). This includes protection from multiple punishments for the same offense. *Fuller*, 185 Wn.2d at 33-34. But the legislature may constitutionally authorize multiple punishments for a single course of conduct. *State v. Thompson*, 192 Wn. App. 733, 737, 370 P.3d 586, *review denied*, 185 Wn.2d 1041, 377 P.3d 766 (2016).

“Washington courts use a three-step analysis to determine whether the legislature authorized multiple punishments for one course of conduct.” *Thompson*, 192 Wn. App. at 737. “In undertaking this analysis, the court looks first to the plain language of the statute and, if necessary, to the legislative history.” *State v. Durrett*, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009).

This requires the court to examine what act or course of conduct is proscribed by the legislature. *State v. Sutherby*, 165 Wn.2d 870, 879, 204 P.3d 916 (2009). Where the statutory language fails to provide guidance, the court employs the “same evidence” test, “which asks if the crimes are the same in law and fact: in other words, whether, as charged, each offense includes elements not included in the other and whether proof of one offense would also prove the other.” *Thompson*, 192 Wn. App. at 737.

Finally, the court may look to the merger doctrine to help determine legislative intent, where “the degree of one offense is elevated by conduct constituting a separate offense.” *Thompson*, 192 Wn. App. at 737-38.

If the statute does not clearly identify the unit of prosecution, then the appellate court resolves any ambiguity in favor of the defendant under the rule of lenity. *Sutherby*, 165 Wn.2d at 878-79. Double jeopardy protections are the same under the state and federal constitutions. *Francis*, 170 Wn.2d at 522. This Court reviews double jeopardy claims de novo. *Fuller*, 185 Wn.2d at 34. A guilty plea does not waive a challenge on double jeopardy grounds. *Francis*, 170 Wn.2d at 522.

*U.S. v. Broce*, 488 U.S. 563, 570-71, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) also does not prohibit challenging a plea on double jeopardy grounds, unless the defendants expressly agreed to the units of prosecution. In *Broce*, the petitioners unsuccessfully attempted to challenge on double jeopardy grounds a plea agreement where the petitioner expressly agreed to plead guilty to two charges of conspiracy on the explicit premise of two agreements which started at different times and embraced different

objectives. *Broce*, 488 U.S. at 570-71.

In *Broce*, the court held that the admission in the plea to committing the crimes precluded a double jeopardy challenge unless the defendants were not properly advised prior to pleading guilty and had not expressly agreed to multiple counts for the same crime. *Broce*, 488 U.S. at 765. Here, unlike in *Broce*, Martin did not enter into a plea agreement with the prosecution and he did not stipulate to any facts in the indictment or statement of probable cause. RP 21 (February 8, 2019); 51-52 (December 17, 2018).

Here, counsel argued that under *Sutherby*, 165 Wn.2d 870, double jeopardy and the unit of prosecution required dismissal of count three based on the plea form not specifying which images the court relied on to support each charge. RP 8-13 (December 17, 2018). The sentencing court ruled that *Broce* precluded this argument. RP 11-15 (January 7, 2019). This was incorrect.

In response to *Sutherby*, the legislature expressly provided that the unit of prosecution for PDM1 is based on the number of images the defendant possessed. RCW 9.68A.070(2)(c). The unit of prosecution for PDM2 is per incident - regardless of the number of images. *Id.*; *Sutherby*, 165 Wn.2d at 882; *State v. Polk*, 187 Wn.

App. 380, 392, 348 P.3d 1255 (2015). In *Polk*, following the amendments to RCW 9.68A.070, the defendant was convicted of four counts of PDM2. Finding that there was only one unit of prosecution, the Court of Appeals reversed and dismissed three of the counts.

We know from the legislature, that the state was barred from charging Martin with multiple counts of PDM2, but there are no cases and the legislature did not address whether double jeopardy bars a court from convicting a defendant of first and second degree PDM where the evidence is the same and does not delineate the nature of the image relied on. *Sutherby*, 165 Wn.2d at 882.

Because the legislature is silent on this issue, this Court must apply the same evidence test under *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). This provides when “the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is, whether each provision requires proof of a fact which the other does not.” *Id.* Unless each crime contains an element not found in the other crime, double jeopardy precludes a conviction on both crimes.

Washington modifies the *Blockberger* test to read: “double jeopardy principles are violated if the defendant is convicted of offenses that are identical in fact and in law.” *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007).

Under the same evidence test, a double jeopardy violation occurs when the evidence required to support a conviction on one charge would suffice to warrant a conviction on the other. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). But, when each offense requires proof of an element not required in the other and when proof of one offense does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted. *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005).

Here, the state relied on the same evidence without delineation to support both the first and second degree charges. CP 24. Reviewing the statutes provides that it is not possible to commit first degree PDM without also committing second degree. RCW 9.88A.0270(1)(2). Even though the legislature intended to treat the unit of prosecution differently for PDM1 and PDM2 separately, it is silent on whether PDM2 merges with PDM1.

The evidence presented in Martin's case which does not delineate the evidence used to support each charge, but simply denotes facts sufficient to support a single count of PDM2. CP 24. Under *Freeman*, it is not possible to commit PDM1 without also committing PDM2. *Freeman*, 153 Wn.2d at 772.

There is no evidence to support the separate convictions (failing to delineate the images relied on). In sum, Martin's double jeopardy rights were violated.

Under an abuse of discretion standard, this Court should reverse the order denying the motion to dismiss count three with prejudice.

D. CONCLUSION

Mr. Martin respectfully requests this court reverse his conviction for PDM2 on double jeopardy grounds.

DATED this 3<sup>rd</sup> day of September 2019.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us) and Lonnie Martin/DOC#411272, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520a true copy of the document to which this certificate is affixed on September 3, 2019. Service was made by electronically to the prosecutor and Lonnie Martin by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is positioned above a horizontal line.

\_\_\_\_\_  
Signature

**LAW OFFICES OF LISE ELLNER**

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