

FILED
Court of Appeals
Division II
State of Washington

NO. 52996-3-II
10/31/2019 10:29 AM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LONNIE DAVID MARTIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00790-18

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Lise Ellner
Po Box 2711
Vashon, Wa 98070-2711
Email: liseellnerlaw@comcast.net

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 31, 2019, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us



TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

III. FACTS2

IV. ARGUMENT3

 A. MARTIN PLED GUILTY TO THREE DISTINCT
 CRIMES ONE WITH A LEGISLATIVELY
 DEFINED UNIT OF PROSECUTION THAT
 CANNOT BE APPLIED TO THE OTHER TWO.....3

V. CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

<i>Blockburger v. United States</i> , 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932).....	6
<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....	7
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	8
<i>State v. Gocken</i> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	6
<i>State v. Novick</i> , 196 Wn. App. 513, 384 P.3d 252 (2016).....	3
<i>State v. Rosul</i> , 95 Wn. App. 175, 974 P.2d 916 (1999).....	7
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	3, 4
<i>Untied States v. Broce</i> , 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).....	7, 8

STATUTORY AUTHORITIES

RCW 9.68A.....	5
RCW 9.68A.011(4) (a)	4
RCW 9.68A.011(4) (f).....	4
RCW 9.68A.011(4)(a)	6
RCW 9.68A.070.....	4

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the clearly defined unit of prosecution for second degree possession of depictions of minor engaged in sexually explicit conduct may be applied to contemporaneously charged counts of first degree possession of depictions of minor engaged in sexually explicit conduct?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Lonnie David Martin was charged by information filed in Kitsap County Superior Court with two counts of first degree possession of depictions of minor engaged in sexually explicit conduct and one count of second degree possession of depictions of minor engaged in sexually explicit conduct (hereinafter “PDM”). CP 1-3.

The case was resolved by Martin’s pleas of guilty to each of the three counts. CP 9-18.

After the guilty pleas but before sentencing, Martin moved to dismiss count three, PDM2. CP 24. Martin claimed that convictions for two counts of PDM1 and one count of PDM2 for the “same unit of possession” violates double jeopardy. CP 26.

After argument, the trial court denied Martin’s motion. The trial

court entered findings of fact and conclusions of law regarding Martin's double jeopardy motion. CP 75. The trial court found and ruled that each of the three counts is a separate violation and that counts one and two have different elements than three. CP 75-76. The trial court ruled that the statutorily defined units of prosecution applied to each count and that Martin's pleas of guilty entailed that unit for each offense. CP 76-77. The trial court ruled that the separate units of prosecution for the separate crimes were included in and were consequences of Martin's pleas. CP 78.

III. FACTS

The statement of probable cause is attached to the original information and provides background about the case. CP 5-8. Martin did not stipulate to or otherwise admit those particular facts. The facts of record here are the facts alleged in the charging documents and Martin's affirmative response thereto by guilty pleas. In his pleas, Martin admitted that "Between Nov. 21 + Nov. 27, 2017 I possessed three images of nude minors engaged in sexual conduct with adults in Kitsap County WA." CP 18. This factual admission is sufficient for the present analysis.

IV. ARGUMENT

A. MARTIN PLED GUILTY TO THREE DISTINCT CRIMES ONE WITH A LEGISLATIVELY DEFINED UNIT OF PROSECUTION THAT CANNOT BE APPLIED TO THE OTHER TWO.

Martin argues that convictions for both first and second degree PDM violates his rights against double jeopardy. This claim is without merit because the separate crimes in each of the three counts have each been given a unit of prosecution by the legislature and the present procedure did not violate the legislature's enactment. Further, Martin's guilty pleas entail an understanding of the unit of prosecution for each offense and that the unit for one offense may not be applied to another.

Review of a question of the unit of prosecution implicates double jeopardy and is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). "Both double jeopardy clauses [United States and Washington] prohibit multiple convictions under the same statute if the defendant commits only one unit of the crime." *Id.* (alteration added). "In applying the unit of prosecution analysis, courts look to discern the evil the legislature has criminalized." *State v. Novick*, 196 Wn. App. 513, 522, 384 P.3d 252 (2016) (citation omitted) *review denied* 187 Wn.2d 1021 (2017). "The focus of this court's inquiry is on the actual act necessary to commit the crime." *Id.*

A unit of prosecution issue is one of statutory construction and legislative intent. *Sutherby*, 165 Wn.2d at 878. Lenity is applied “[i]f a statute does not clearly and unambiguously identify the unit of prosecution.” 165 Wn.2d at 878-79. In *Sutherby*, it was held that the legislature had failed to be clear and unambiguous on the unit of prosecution in the PDM statute and, therefore, lenity commanded the result of finding one unit for each instance of possession regardless of the number of images in that instance of possession. 165 Wn.2d at 882.

The legislature clearly and unambiguously responded to this holding and included units of prosecution for each degree. RCW 9.68A.070, in relevant part, provides:

(1)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.

(2)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

The elements that Martin does not address are found in RCW

9.68A.011:

(4) “Sexually explicit conduct” means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

Thus, to prove the first degree offense, it must be proven that the material includes sexual intercourse, object penetration of a vagina or rectum, masturbation, sadomasochism, or defecation or urination. *See* WPIC 49A.03.02.

In contrast, the second degree offense requires the trier of fact to find nudity of a minor's sexual parts or touching of sexual parts by a minor. *See* WPIC 49A.04.02. The two degrees describe and criminalize distinct behavior. A defendant is guilty of the second degree offense if she has a picture of a minor taking a bath to be viewed for her own sexual gratification. She cannot be guilty of the first degree offense because none of the behaviors listed in RCW 9.68A.011(4)(a) through (e) are proven. And, any of the behaviors in (a) through (e) can occur without the material showing a minor's nudity or a minor's touching. These offenses are not the same in either law or fact: each includes an element that the other does not and a person can be guilty of either without being guilty of the other. *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995); *see also Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932).

Moreover, the record reflects that Martin was aware of the distinction in elements. The charging documents made clear that the first degree charges included the necessary alternative elements from subsections (a) through (e). CP 1-2. The second degree count was also charged with the necessary alternatives for that offense. CP 3. When Martin pled guilty, he answered each of the charges in the information. Martin affirmed that he understood the charges. CP 9; RP, 10/4/18, 2-5.

And that understanding must include the various elements of the two degrees of PDM. *See State v. Rosul*, 95 Wn. App. 175, 184, 974 P.2d 916 (1999)(“Conviction for possession of child pornography requires a minimum showing that the defendant was aware of the nature and content of the material he or she possessed.”) *review denied* 139 Wn.2d 1006 (1999).

The flaw in Martin’s logic is his conflation of count three’s unit of prosecution with counts one and two. Martin’s plea of guilty to count three includes the unit of prosecution for that offense. His pleas to the first degree counts includes the unit of prosecution for those offenses. That is, the unit of prosecution for count three applies only to count three, not counts one and two. His pleas include that two of the three images he admits to in the plea form met the elements of first degree PDM. Similarly, Martin admits that the third count includes that he “possessed” a third image that met the distinct elements of the second degree charge. CP 18 (“I possessed. . .”).

“A guilty plea “is more than a confession which admits that the accused did various acts.”” *United States v. Broce*, 488 U.S. 563, 570, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) *quoting Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). It is an “admission that he committed the crime charged against him.” *Id.*, *quoting*

North Carolina v. Alford, 400 U.S. 25, 32, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). “By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.” *Broce*, 488 U.S. at 570. The *Broce* Court found a waiver of a double jeopardy defense by a valid guilty plea there because the appellants “cannot prove their claim by relying on those indictments and the existing record. Indeed, as noted earlier, they cannot prove their claim without contradicting those indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas.” *Broce*, 488 U.S. at 576

The statutory language is clear and unambiguous on the question of unit of prosecution. Martin pled guilty to three separate crimes. First degree PDM does not include a unit of prosecution curtailed to a single act of possession. Martin’s conflation of the two different units of prosecution fails. There is no double jeopardy violation in this case.

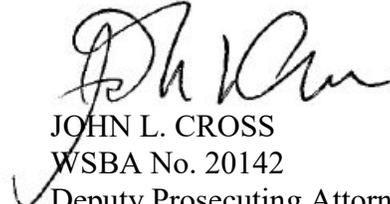
V. CONCLUSION

For the foregoing reasons, Martin's conviction and sentence should be affirmed.

DATED October 31, 2019.

Respectfully submitted,

CHAD M. ENROGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

October 31, 2019 - 10:29 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52996-3
Appellate Court Case Title: State of Washington, Respondent v. Lonnie D. Martin, Appellant
Superior Court Case Number: 18-1-00790-7

The following documents have been uploaded:

- 529963_Briefs_20191031102805D2466186_8022.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Martin coa resp brief.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- Liseellnerlaw@comcast.net
- jcross@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us
- valerie.liseellner@gmail.com

Comments:

Sender Name: Diane Sykes-Knoll - Email: dsykeskn@co.kitsap.wa.us

Filing on Behalf of: John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20191031102805D2466186