

80169-0

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 JUL 20 P 2:51

BY RONALD R. CASSENTI

X FILED
JUL 20 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 80169-0
COA NOS. 34331-2-II & 35662-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON,

Respondent,

v.

RANDY J. SUTHERBY,

Appellant.

In re Personal Restraint of

RANDY J. SUTHERBY,

Petitioner.

ANSWER TO PROSECUTION'S PETITION FOR REVIEW

James E. Lobsenz
Attorney for Respondent

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u>	iii
A. <u>INTRODUCTION</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. MOTHER’S OPINION HER CHILD WAS NOT LYING	1
2. IMPROPER UNIT OF PROSECUTION FOR OFFENSE OF POSSESSION OF SEXUALLY EXPLICIT DEPICTIONS OF MINORS	3
C. <u>REASONS WHY REVIEW SHOULD BE DENIED</u>	4
1. THE COURT OF APPEALS CORRECTLY RULED THAT THE MOTHER’S TESTIMONY CONSTITUTED AN IMPERMISSIBLE OPINION THAT E.K. WAS TELLING THE TRUTH, AND THAT SUTHERBY WAS GUILTY.....	4
2. THIS COURT DOES NOT ORDINARILY GRANT REVIEW TO DECIDE WHETHER APPLICATION OF THE HARMLESS ERROR RULE WAS CORRECT, AND, IN ANY EVENT, THE COURT OF APPEALS’ DETERMINATION THAT THE ERROR IN THIS CASE WAS NOT HARMLESS IS ENTIRELY SOUND.....	6
3. THE DECISION IS NOT IN CONFLICT WITH THIS COURT’S RECENT DECISION IN <u>KIRKMAN</u>	8
4. THE COURT OF APPEALS’ UNIT OF PROSECUTION ANALYSIS IS A STRAIGHTFORWARD APPLICATION OF THE AMBIGUITY RULE OF <u>BELL AND ADEL</u>	11

5. THE DECISION BELOW IS CONSISTENT WITH THIS COURT’S DECISION IN STATE v. WESTLING WHICH HOLDS THAT USE OF THE WORD “ANY” MAKES THE NUMBER OF THE ITEMS MODIFIED BY THAT WORD IRRELEVANT..... 15

6. THE DECISION BELOW IS CONSISTENT WITH THIS COURT’S DECISION IN ROOT, WHERE THIS COURT REJECTED A “ONE COUNT PER PHOTOGRAPH” APPROACH. IT IS ALSO CONSISTENT WITH A HOST OF OTHER DECISIONS HOLDING THAT POSSESSION IS BUT ON CONTINUING OFFENSE REGARDLESS OF HOW MANY CONTRABAND ITEMS ARE POSSESSED..... 16

7. THE COURT OF APPEALS CORRECTLY NOTED THAT THE DECISION IN STATE v. GAILUS DID NOT ADDRESS THE ARGUMENT BASED ON USE OF THE WORD “ANY” BECAUSE THAT ARGUMENT WAS NOT MADE TO IT..... 18

D. CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES	<u>Page</u>
<i>Bell v. United States</i> , 349 U.S. 81 (1982)	11-15, 18
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	4
<i>Brown v. Ohio</i> , 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)	14
<i>In re Snow</i> , 120 U.S. 274, 7 S.Ct. 556 (1887)	14
<i>United States v. Universal Credit Corp.</i> , 344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260 (1952)	14
<i>United States v. Reedy</i> , 304 F.3d 358 (5th Cir. 2002)	13

STATE CASES

<i>State v. Gailus</i> , 136 Wn. App. 191, 47 P.3d 1300 (2006)	18-20
<i>State v. Adel</i> , 136 Wn. 2d 629, 965 P.2d 1072 (1998)	11, 13-15, 18
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992)	5
<i>State v. Black</i> , 109 Wn. 2d 336, 745 P.2d 12 (1987)	5-6
<i>State v. Carlson</i> , 80 Wn. App. 116, 906 P.2d 999 (1995)	6-7
<i>State v. Demery</i> , 144 Wn. 2d 753, 30 P.3d 1278 (2001)	2

	<u>Page</u>
<i>State v. Dunn</i> , 125 Wn. App. 582, 105 P.3d 1022 (2005)	6-7
<i>State v. Fitzgerald</i> , 39 Wn. App. 652, 694 P.2d 1117 (1985)	7
<i>State v. Kirkman</i> , 159 Wn. 2d 918 (2007).....	8-10
<i>State v. Leyda</i> , 157 Wn. 2d 335, 138 P.3d 610 (2006)	18
<i>State v. Mason</i> , 31 Wn. App. 680, 644 P.2d 710 (1982)	15, 18
<i>State v. McReynolds</i> , 117 Wn. App. 309, 71 P.3d 663 (2003)	18
<i>State v. Root</i> , 141 Wn. 2d 701, 9 P.3d 214 (2000)	11, 16, 17, 18
<i>State v. Sutherby</i> , ___ Wn. App. ___, 158 P.3d 91 (2007)	<i>Passim</i>
<i>State v. Tvedt</i> , 153 Wn. 2d 705, 107 P.3d 728 (2005)	15
<i>State v. Westling</i> , 145 Wn. 2d 607, 40 P.3d 669 (2002)	15, 16, 18

STATE STATUTES

RCW 9.68A.011(1).....	14
RCW 9.68A.040	17
RCW 9.68A.070	1, 3, 11, 13, 18

Page

MISCELLANEOUS

Declaration of Todd Maybrown, ¶ ¶ 23-27 10

Webster's Ninth New College Dictionary 734 (1983)..... 11

A. INTRODUCTION

Randy J. Sutherby, the appellant/petitioner below, asks this Court to deny the prosecution's Petition for Review.

B. STATEMENT OF THE CASE

Randy J. Sutherby was charged, tried and convicted in Grays Harbor Superior Court with Rape of a Child 1, Child Molestation 1, and ten counts of Possession of Depictions of Minors. CP 27-32. Under former RCW 9.68A.070 the State charged Sutherby with "one count for each of 10 different digital files" found on his personal computer. State v. Sutherby, ___ Wn. App. ___, 158 P.3d 91, 93 (2007). He was given concurrent sentences of 279 and 160 months on child rape and child molestation, and additional concurrent sentences of 12 months on each of the Possession counts. CP 120-129. Sutherby appealed to Division Two. He also filed a personal restraint petition raising two claims of ineffective assistance of counsel. The PRP was consolidated with the direct appeal.

I. MOTHER'S OPINION HER CHILD WAS NOT LYING

The Court of Appeals reversed Sutherby's Child Rape and Child Molestation convictions, finding that the trial court erred in allowing the mother of E.K. (the alleged child victim), to give impermissible opinion testimony to the effect that her daughter failed to show the usual signs of lying that she generally displayed when she told a fib. Without any

objection from defense counsel the mother testified as follows in response to the prosecutor's questions:

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 see that face or reaction when she was talking about what happened with [Sutherby]?

A. No.

State v. Sutherby, 158 P.3d at 95. Relying upon State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), the Court of Appeals held that this was “wholly improper and deprived [Sutherby] of his right to have the jury determine [the child’s] credibility.” Sutherby, 158 P.3d at 95.

E.K.’s mother offered her opinion on he daughter’s credibility, by telling the jury that E.K. makes a half smile when she lies, but did not make a half smile when she accused Sutherby of rape. ***Central issues at trial included the assailant’s identity and E.K.’s credibility. E.K.’s mother expressed her opinion about the truth of E.K.’s claim of rape*** by stating that E.K. had certain mannerisms indicating when she was lying. In essence, E.K.’s mother (1) told the jury that E.K. told the truth when she related the incriminating events to her and (2) gave it information that she claimed would enable the jurors to evaluate E.K.’s testimony, that if .K. made a half-smile while testifying she was not simply nervous, but was fibbing. E.K.’s mother’s testimony regarding her daughter’s credibility was wholly improper.

Sutherby, 158 P.2d at 95 (bold italics added).

The Court of Appeals concluded that the admission of the mother's testimony was reversible error because it

was neither cumulative nor innocuous and the error in admitting it deprived Sutherby of his right to have the jury determine E.K.'s credibility base on its knowledge without regard to the mother's practice of judging E.K.'s veracity by the child's smile. The error affected the jury's deliberations and was not harmless.

Id. at 95-96. The Court of Appeals reversed the convictions for child rape and molestation and remanded for retrial on those counts. Id. at 96. Because it resolved the direct appeal in this manner, the Court of Appeals found it unnecessary to address the PRP claim of ineffective assistance of counsel which was predicated upon trial counsel's failure to object to the mother's opinion testimony.¹

2. IMPROPER UNIT OF PROSECUTION FOR OFFENSE OF POSSESSION OF SEXUALLY EXPLICIT DEPICTIONS OF MINORS.

After the jury returned its verdicts, and prior to sentencing, Sutherby made a motion to dismiss all but one of the ten RCW 9.68A.070 counts. He argued that when the proper "unit of prosecution" analysis was employed, it was evident that the prosecution's charging of ten

¹ The Court of Appeals found it unnecessary to address Sutherby's other PRP claim of ineffective assistance, which was based upon trial counsel's failure to move for severance of the child pornography charges from the trial of the child rape and molestation charges. See Sutherby, 158 P.3d at 96, FN 6. This claim independently supports the decision to reverse the rape and molestation convictions.

counts violated the multiple punishment prohibition of the Double Jeopardy Clause. CP 93-110. The Superior Court denied this motion, concluding that the proper unit of prosecution was “each individual child photographed or filmed.” CP 130.²

The Court of Appeals rejected the Superior Court’s “unit of prosecution” analysis, and agreed with Sutherby that only one count should have been charged because the legislative definition of the crime set forth in RCW 9.68A.070 was ambiguous, and under prior decisions of both this Court and the United States Supreme Court, such ambiguity had to be resolved in favor of the defendant. Sutherby, 158 P.3d at 94-95.

C. REASONS WHY REVIEW SHOULD BE DENIED

1. THE COURT OF APPEALS CORRECTLY RULED THAT THE MOTHER’S TESTIMONY CONSTITUTED AN IMPERMISSIBLE OPINION THAT E.K. WAS TELLING THE TRUTH, AND THAT SUTHERBY WAS GUILTY.

Inexplicably, the prosecution contends that the mother “did not express an opinion concerning the ultimate issue of whether her child had been molested,” and that her testimony was “not an opinion concerning whether the child is telling the truth.” *Petition for Review*, at 7, 8. These

² Over Sutherby’s Sixth Amendment objection (based upon Blakely v. Washington, 542 U.S. 296 (2004)) that only a jury could make such a factual determination, the Superior Court judge examined the ten photographs, concluded that some of them appeared to represent the same child, and reduced the number of possession counts to seven. CP 130. Each of these seven counts caused Sutherby’s sentence on the child rape and child molestation charges to be greatly increased, because they added 7 points to his Offender Score on those charges.

contentions are squarely belied by this Court's opinion in *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). While less egregious than the opinion testimony given in this case, in *Black* the witness (a rape counselor) testified that "in her opinion R.J. [the alleged victim] suffered from rape trauma syndrome." *Id.* at 348. This Court held that this testimony carried with it "an implied opinion that the alleged victim is telling the truth and was, in fact, raped." *Id.* at 349. In the present case, the mother's opinion was not simply "implied," it was explicit: she testified that she did not see the half smile that she sees whenever her daughter lies. The decision below in this case is also completely consistent with other reported decisions such as *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) ("By stating that he believed that M. was not lying, Bennett effectively stated that Alexander was guilty as charged," thereby violating right to jury trial).

The prosecution suggests that this well established rule was not violated because the mother's testimony "is not *expert* witness testimony." *Petition for Review*, at 8 (italics added). Whether or not the mother is fairly classified as an "expert witness" (and a court might fairly conclude that a mother *is* an expert when it comes to the behavior of her own child) is a red herring issue since it is clearly established that "No witness, *lay or expert*, may testify as to his opinion as to the guilt of a

defendant, whether by direct statement or inference.” Black, 109 Wn.2d at 348; State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

2. THIS COURT DOES NOT ORDINARILY GRANT REVIEW TO DECIDE WHETHER APPLICATION OF THE HARMLESS ERROR RULE WAS CORRECT, AND, IN ANY EVENT, THE COURT OF APPEALS’ DETERMINATION THAT THE ERROR IN THIS CASE WAS NOT HARMLESS IS ENTIRELY SOUND.

In the alternative, the prosecution contends that “In any event, error, if any, was harmless beyond a reasonable doubt.” *Petition for Review*, at 8. Even if there were some plausible contention that the Court of Appeals’ harmless error analysis was flawed in some respect (and there isn’t), such an error does not meet the criteria for granting review set forth in RAP 13.4(b). Whether a given application of the harmless error rule was correct is not “an issue of substantial public interest that should be determined by the Supreme Court.”

Moreover, the harmless error analysis conducted by the Court of Appeals is completely sound, and totally consistent with other reported cases involving the same type of error in the same type of criminal cases. For example, in all of the following cases the appellate court refused to find admission of an improper opinion on guilt or veracity to be harmless error, noting that there was neither medical evidence nor an independent witness to corroborate the child’s claim of sexual abuse. See, e.g., State v. Dunn, 125 Wn. App. 582, 594, 105 P.3d 1022 (2005) (“there is no

physical evidence or independent witness”); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (“The physical evidence does not show whether sexual abuse of the children occurred”); State v. Carlson, 80 Wn. App. at 129 (“There was no physical evidence and no independent witness to the charged events.”)

The same is true in the present case. The medical evidence was inconclusive and did *not* show whether sexual abuse occurred. Although the prosecution states at page 8 of its *Petition* that “[t]here was direct physical evidence from a physician concerning the injury to the child,” the State cites *nothing* in support of that contention. In fact, this assertion is at the very least blatantly misleading, if not completely false, since the State’s own physicians testified that they could *not* testify that physical findings showed that sexual abuse had occurred.³ Thus, the Court of

³ Dr. Ahart, a prosecution witness, testified that in her medical examination she determined that “there was no trauma” either on the outside or the inside of the vaginal area, and that all she was “mild erythema inside there, which is redness.” RP 11/1/05, at 98. She acknowledged that “any kind of irritation. Irritation from discharge. Irritation from rubbing. Irritation from urine. . .” could have caused the erythema she observed. RP 11/1/05, at 103-04.

Dr. Laurie Davis, who examined the child with a colposcope, testified that her exam showed that everything “was essentially within normal limits.” RP 11/2/05, at 141. She concluded that her physical findings did not indicate sexual abuse, and that she could only say that even though everything looked normal it was still “possible” that there had been sexual abuse. RP 11/2/05, at 159.

Dr. Adams, the defense medical expert agreed with the prosecution’s physicians and testified that there was no sign of trauma to the hymen, and that there was no way to tell from the medical evidence whether sexual abuse had taken place. RP 11/3/05, at 273. The prosecutor never made any mention of physical evidence in his closing argument. See RP 11/3/05, at 397-410. Defense counsel, however, pointed out in closing that “We

Appeals was correct to decide that “[t]he error affected the jury deliberations and was not harmless.” 158 P.3d at 96.

3. THE DECISION IS NOT IN CONFLICT WITH THIS COURT’S RECENT DECISION IN KIRKMAN.

In a statement of supplemental authorities the prosecution cites to this Court’s recent decision in State v. Kirkman, 159 Wn.2d 918 (2007), implying that the decision in this case is somehow in conflict with Kirkman. In fact, Kirkman *reaffirms* the principle that an opinion as to the defendant’s guilt or a witness’ veracity violates the constitutional right to a jury trial.⁴ To be cognizable for the first time on appeal despite the absence of an objection raised below, such constitutional error must also be “manifest” error. In order to be “manifest” constitutional error, it must be demonstrated that the error “actually affected the defendant’s rights at trial.” Kirkman, 159 Wn.2d at 927.

In Kirkman this Court held: “Manifest error’ requires a nearly explicit statement by the witness that the witness believed the accusing victim.” Kirkman, at 937. As the facts of this case show, that test was clearly *met* in this case, since the child’s mother explicitly stated that

don’t really have any credible, physical evidence. Nothing from the medical exams that really indicates to you that any abuse took place.” RP 11/3/05.

⁴ “Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” Kirkman, 159 Wn.2d at 927, *citing* State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) and State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

whenever her daughter spoke about being sexually abused by Sutherby, the mother did not see the “half-smile” sign of lying that her daughter exhibits when she lies.

The Court of Appeals was obviously well aware of this Court’s decision in Kirkman, since it cited directly to this Court’s Kirkman decision it in the course of distinguishing it from this case:

In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense. See, e.g., State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). Here, however, E.K.’s mother’s testimony was neither cumulative nor innocuous and the error in admitting it deprived Sutherby of his right to have the jury determine E.K.’s credibility based on its knowledge and experience without regard to the mother’s practice of judging E.K.’s veracity by the child’s smile.

State v. Sutherby, 158 P.3d at 95-96.

In Kirkman a detective testified that the child “was able to distinguish between the truth and a lie and that [the child] promised to tell him the truth.” Kirkman, at 930. This Court simply observed that although the detective testified to the fact that the child had the ability to tell the difference between truth and falsehood, he “did not testify that he believed [the child], or that she was telling the truth.” Id. at 931. But in this case the child’s mother *did* testify that the child was telling the truth because the telltale facial sign of lying was not present. Similarly, in the

companion case decided along with defendant Kirkman's case, this Court noted that although the detective testified that the child expressly promised to tell him the truth when he interviewed her, that could hardly be deemed prejudicial, and therefore "manifest" error, "given that the same child takes the witness stand in front of the jury and swears under oath that the testimony will be truthful." Id. at 935.

Kirkman holds that to show that an error is "manifest" there must be "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Id. In the present case the Court of Appeals expressly and correctly found that precisely such a showing had been made: "the error affected the jury deliberations" and was "neither cumulative nor innocuous . . ." Sutherby, 158 P.3d at 95-96, thereby adhering scrupulously to this Court's RAP 2.5(a)(3) methodology.⁵

⁵ Even if one were to assume for the sake of argument that the Court of Appeals' RAP 2.5 analysis of the "manifest error" question was flawed in some way, the *result* in this appeal would not be changed, since the appellate court would have been compelled to set aside Sutherby's conviction in the context of the personal restraint petition on ineffective assistance of counsel grounds. As noted in the record supplied to the Court in connection with the PRP, (*See Declaration of Todd Maybrown*, ¶¶ 23-27), "any reasonably competent defense attorney would have objected to this line of questioning *before* the damaging opinion testimony was elicited." ¶ 26. "[T]he questions that led up to her improper opinion testimony clearly signaled what was coming. (Can you tell when she has told a fib? How do you tell that?)" They were transparent enough to put any reasonably competent defense attorney on notice that the prosecutor was about to elicit testimony that the child did not show the "usual signs" of lying that the mother was intimately familiar with." ¶ 25.

4. THE COURT OF APPEALS' UNIT OF PROSECUTION ANALYSIS IS A STRAIGHTFORWARD APPLICATION OF THE AMBIGUITY RULE OF BELL AND ADEL.

The proper inquiry for double jeopardy analysis is to ask what "unit of prosecution" the legislature intended. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). "The first step in a 'unit of prosecution' inquiry is to analyze the applicable criminal statute." State v. Root, 141 Wn.2d 701, 706, 9 P.3d 214 (2000).

Citing to both Adel and Root, the Sutherby Court of Appeals looked at the language of former RCW 9.68A.070, which read:

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). Sutherby argued that there was no ambiguity in this statute, and that since it employed the word "matter" it was clear that the legislature did not carry how much "matter" or how many photographs the defendant possessed:

"Matter" is defined as "a material substance of a particular kind for a particular purpose (vegetable ≈)." Webster's Ninth New College Dictionary 734 (1983). Just as it is understood that a quantity of "vegetable matter" will

The prosecution asserts, again without any evidentiary support whatsoever, that trial counsel decided "as a matter of trial strategy" not to object to the mother's testimony because counsel had decided that it was in the best interest of the defendant to concede that the child was telling the truth about the touching . . ." Petition for Review, at 8. This unsupported speculation is contradicted by the stark fact that the defendant testified and unequivocally *denied* that he ever touched the child's private parts. See RP 11/3/05 at 34, quoted in Sutherby's direct appeal Reply Brief on page 17.

ordinarily contain more than one leaf 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. This “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. FN 18.

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.

Brief of Appellant, at 44-45.

In the alternative, Sutherby also argued that even assuming it was not clear that the Legislature intended for there to be only one count no matter how many photos were contained in the visual matter, that at the very least the statutory language was ambiguous, and that under the case law such ambiguity had to be construed in favor of the defendant. Sutherby pointed to the language of RCW 9.68A.011(1) which defines the term “visual or printed matter” as follows:

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

(Bold italics added). The Sutherby Court noted that several decisions, such as Bell v. United States, 349 U.S. 81, 83 (1982), recognize the ambiguity inherent in the word “any” and go on to hold that such

ambiguity must be resolved in favor of the accused by construing the actual number of illegal items involved to be completely irrelevant.

The Court of Appeals simply followed the multiple punishment ambiguity rule of Adel and Bell. It held that since the word “any” has long been recognized to be an ambiguous term which fails to clearly reveal what “unit of prosecution” the Legislative intended, that only one count of RCW 9.68A.070 could be charged, even though Sutherby’s computer contained several illegal sexually explicit photographs of minors.

“The word ‘any’ has troubled many courts.” *United States v. Reedy*, 304 F.3d 358, 365 n.7 (5th Cir. 2002). It denotes a full spectrum of quantities, including (1) one; (2) one, some, or all regardless of quantity; (3) one or more; (4) great, unmeasured, or unlimited in amount, and (5) all. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976). The placement of the word in RCW 9.68A.011(2) provides no guidance as to the legislature’s intended use in this context. . . . A reading of the statute’s plain meaning fails to reveal the legislature’s intended answer to the question of how many is ‘any’ and, thus, does not set a unit of prosecution.

If the legislature fails to denote the unit of prosecution in the statute, courts must resolve the ambiguity and must do so in favor of the defendant charged with having violated the statute. Adel, 136 Wn.2d at 634-35, 965 P.2d 1072 (citing Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)). In Bell, the United States Supreme Court held that when “argumentative skill . . . could persuasively and not unreasonably reach either of the conflicting constructions,” it is improper to resolve the question by turning a single transaction into multiple offenses. Bell, 349 U.S. at 83-84, 75 S.Ct. 620. Applying

this rule of lenity here to avoid turning a single transaction into multiple offenses, we hold that Sutherby's violation of the statute by simultaneously possessing multiple materials in the same location is one unit of prosecution for which he is subject to only one conviction.

Sutherby, 158 P.3d at 94.

The decision below is consistent with the U.S. Supreme Court's decision in Bell, where the defendant had been tried and convicted of two counts of transporting women across state lines for prostitution purposes. Since the statute made it a crime to knowingly transport "*any* woman or girl" (emphasis added) for such purposes, the statute was ambiguous as to the proper unit of prosecution, and thus Bell could only be convicted of one such offense. ("[D]oubt will be resolved against turning a single transaction into multiple offenses. . ." Bell, 349 U.S. at 84.) As this Court specifically recognized in Adel, this constitutional rule of lenity has been repeatedly recognized and applied by the U.S. Supreme Court:

[S]ee 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 charges 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 634-35.⁶ Accord State v. Tvedt, 153 Wn.2d 705, 710-711, 107 P.3d 728 (2005).

5. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN STATE v. WESTLING WHICH HOLDS THAT USE OF THE WORD "ANY" MAKES THE NUMBER OF THE ITEMS MODIFIED BY THAT WORD IRRELEVANT.

The decision below is also completely consistent with this Court's decision in State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002), which reaffirmed the Adel/Bell "unit of prosecution" rule regarding use of the word "any". In that case the defendant was charged and convicted of three counts of second degree arson because he set a fire which damaged three different vehicles. The statutory text made it a crime for a person to knowingly cause a fire or explosion "which damages . . . any . . . automobile." This Court ringingly reaffirmed the principle that use of the word "any" signals that the legislature does not care how many items (or people) are modified by that word:

[T]he statute refers, in relevant part, to the causing of "a fire" that damages "any automobile." "any" means "every"

⁶ In Adel this 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 originally convicted of three counts promoting prostitution because she employed three different women who committed acts of prostitution at the business. The Court of Appeals held that the "unit of prosecution" was the ongoing participation in the business of prostitution, and that it was irrelevant how many women the defendant employed. This the Mason Court invalidated two of the three convictions.

and “all.” [Citation]. 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 611-12. Accordingly, this Court reversed Westling’s multiple convictions, and remanded for resentencing on one count only of second degree arson. Id. at 612.

6. THE DECISION BELOW IS CONSISTENT WITH THIS COURT’S DECISION IN ROOT, WHERE THIS COURT REJECTED A “ONE COUNT PER PHOTOGRAPH” APPROACH. IT IS ALSO CONSISTENT WITH A HOST OF OTHER DECISIONS HOLDING THAT POSSESSION IS BUT ON CONTINUING OFFENSE REGARDLESS OF HOW MANY CONTRABAND ITEMS ARE POSSESSED.

In Root this Court examined the somewhat different statutory language of the sexual exploitation statute, and concluded that the wording of that statute manifested an intent to make the “unit of prosecution” the act of “causing” a child to pose for a sexually explicit photo. Root had been charged and convicted of 73 counts of sexual exploitation of a minor, based on his having taken 73 photographs of children engaged in sexually explicit conduct. This Court rejected the “one count per photograph” approach:

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 statutory 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, this Court concluded that the correct “unit of prosecution” was to charge one count for every time the defendant *caused* a child to submit to a session of taking photos. The number of photos actually taken was irrelevant. This Court sensibly noted that absurd results would be produced if a “one count per photograph” rule were to be approved:

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 would 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, 141 Wn.2d at 709.

In the present case the crime is defined as one of “possession.” Traditionally, possession of contraband has been considered one continuing offense, no matter how many separate items of contraband

were possessed. See, e.g., State v. McReynolds, 117 Wn. App. 309, 338-39, 71 P.3d 663 (2003) (charging eleven counts improper, only one count should have been charged even though there were multiple owners of multiple items of stolen property).⁷ Moreover, the very name of the crime defined by RCW 9.68A.070, “Possession of Depictions of a Minor,” demonstrates, through the use of the *plural* form of the noun which is the object of the verb of possession, that the Legislature didn’t care how many such depictions were possessed.

7. THE COURT OF APPEALS CORRECTLY NOTED THAT THE DECISION IN STATE v. GAILUS DID NOT ADDRESS THE ARGUMENT BASED ON USE OF THE WORD “ANY” BECAUSE THAT ARGUMENT WAS NOT MADE TO IT.

The prosecution silently acknowledges that the “unit of prosecution” decision rendered below by the Court of Appeals is totally consistent with all of this Court’s decisions (Adel, Root, Westling), U.S. Supreme Court decisions, (Bell, Snow), and a host of other the Court of Appeals’ decisions (Mason, McReynolds). The sole basis put forth by the State for granting review of the decision below is a perceived conflict between the decision here and Division One’s decision in State v. Gailus,

⁷ Similarly, in State v. Leyda, 157 Wn.2d 335, 338, 138 P.3d 610 (2006), this Court held that the defendant’s “single course of conduct should not have been divided into multiple offenses by the State and that doing so violated double jeopardy principles” even though he used someone else’s credit card on three different dates to make four different purchases.

136 Wn. App. 191, 47 P.3d 1300 (2006).

In Sutherby's case, however, the Court of Appeals explicitly stated that it was "mindful that [its] decision differs from Division One's recent opinion in State v. Gailus" and nevertheless sensibly concluded that Gailus was inapplicable to this case. 158 P.3d at 94-95. Since the parties in Gailus failed to make any argument concerning use of the inherently ambiguous word "any," and did not cite any of the case law involving the statutory use of that word, the Gailus Court had no occasion to even address the ambiguity issue, much less to resolve it:

But the Gailus Court was not asked to interpret the word "any." Its analysis focused instead on whether a compact disc containing multiple images constituted one unlawful act or many. In light of those arguments, we agree [with the Gailus Court] that the legislature intended to prohibit possession of the images regardless of the method or medium used to store them. Because Gailus's narrow unit of prosecution ruling does not address the arguments Sutherby raises, it does not apply here.

Sutherby, 158 P.3d at 94-95.

Sutherby never contended that it made any difference whether he stored all of his sexually explicit photos in one digital file in his computer, or in separate digital files. Gailus, however, argued that it did make a difference how he chose to package his photos for storage, maintaining that several photos on one compact disc should constitute only one unit of prosecution, while a separate disc for each photo would

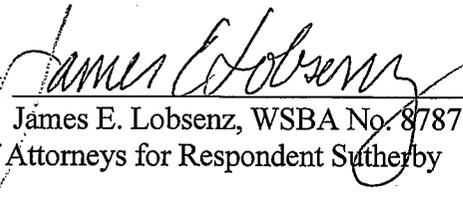
constitute multiple units of prosecution. Division Two's analysis in Sutherby's case focused upon the proper legal analysis of the word "any". Division One's analysis in Gailus focused solely on the separate question of whether the number of permissible counts depended upon how a defendant "packaged" his photos or digital files on a compact disc. Thus, the two cases addressed different issues. Moreover, in Sutherby Division Two explicitly states that it *agrees* with Division One's determination of the packaging issue that was put before it: "[W]e agree [with the Gailus Court] that the legislature intended to prohibit possession of the images regardless of the method or medium used to store them." Sutherby, 158 P.3d at 94-95. In sum, there is no conflict between the two decisions, and thus there is no justification for granting further review in this case.

D. CONCLUSION

For the reasons stated above, Randy J. Sutherby respectfully asks this Court to deny the Petition for Review.

DATED this 19th day of July, 2007.

CARNEY BADLEY SPELLMAN, P.S.

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