

NO. 63759-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BARNEY FURSETH,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

The defendant possessed multiple images of child pornography on his computer. The Supreme Court has held that the "unit of prosecution" for possession of child pornography is the single act of possession, regardless of the number of images possessed or persons depicted. Thus, is it correct that no unanimity or "Petrich" instruction needed to be provided to the jury here, because there was only one criminal act that supported the charge of possession of child pornography?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On May 14, 2008, the defendant was charged with two counts of possession of child pornography for possessing images of child pornography on his computer. CP 1-6. On May 1, 2009, because of the Supreme Court's "unit of prosecution" decision in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), the State amended the Information to charge just a single count of possession of child pornography. CP 7; CP 83-84. The charging document reads as follows:

That the defendant BARNEY OLAF FURSETH in King County, Washington, during a period of time intervening between October 1, 2007 through October 19, 2007, did knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct.

CP 7.

On May 7, 2009, a jury found the defendant guilty as charged. CP 32. He received a standard range sentence of 12 months plus one day. CP 70-79.

2. SUBSTANTIVE FACTS

On October 10, 2007, the defendant brought his computer into RePC, a computer store, for repair. 2RP¹ 4, 8-9.

Subsequently, a RePC repair technician inadvertently discovered child pornography on the defendant's computer. 3RP 20-21. The police were called and the defendant's computer was seized.

3RP 23.

Detective Timothy Luckie of the Internet Crimes Against Children Task Force conducted a forensic search of the defendant's computer. 2RP 22, 30. On the defendant's computer were some 1,200 images and 12 videos of suspected child pornography.

¹ The verbatim report of proceedings is cited as 1RP--5/5/09, 2RP--5/6/09, 3RP--5/7/09, and 4RP--7/2/09.

3RP 43. For trial, Detective Luckie created a CD that contained four images and one video clip of child pornography. 2RP 35, 41-43; Ex 4 and 5.²

On March 5, 2008, Detective Malinda Wilson of the Task Force interviewed the defendant. 3RP 44-45. Post Miranda, the defendant admitted that he started looking at child pornography around 1998, as "a right [sic] of passage." 3RP 46, 48-49. He professed, however, that he was just a collector, that he did not distribute child pornography, and that he had never touched a child in an inappropriate manner. 3RP 59, 65.

In conducting the interview, Detective Wilson showed the defendant a series of montages, each containing photos obtained from the defendant's computer. 3RP 49-51; Ex 10-15.

Exhibit 10 contained a number of photos of the defendant himself. 3RP 52. The defendant said he recognized the images. 3RP 52.

Exhibit 11 contained a number of photos of men in their late teens to early 20's with no shirts on. 3RP 53. The defendant was

² Exhibit 4 is the CD. 2RP 35. Exhibit 5 is a written summary indicating the location or "path" on the defendant's computer where the images were found. 2RP 44-45.

told it was not illegal to possess these images. 3RP 54. The defendant said he did not recognize the images. 3RP 54.

Exhibit 12 contained three photos similar to Exhibit 11. 3RP 54. The defendant was told it was not illegal to possess the images. 3RP 54. The defendant said he did not recognize the images. 3RP 54.

Exhibit 13 contained photos of prepubescent boys in various poses, some clothed, some unclothed, but the boys were not engaged in any sexually explicit acts. 3RP 55. The defendant was told that it was not illegal to possess these images. 3RP 55. The defendant said he recognized the images as having come from a Russian internet site. 3RP 56.

Exhibit 14 contained similar photos as Exhibit 13, again not sexually explicit photos. 3RP 56. The defendant said these photos were also from a Russian source. 3RP 56.

Exhibit 15 contained six photos of prepubescent children being anally penetrated, manually masturbated and performing oral copulation. 3RP 57. Some of the photos were also contained in Exhibit 4. 3RP 71. The defendant said he had found these images on multiple internet sites. 3RP 58. He said he had searched

various sites including such sites as Teen Boys World, Boy Review, Boy Loves and Teenburg. 3RP 62.

After the interview was completed, the defendant told the detective that he felt a weight had been lifted off him. 3RP 66. The defendant did not testify at trial or put on any evidence. Additional facts are included in the sections they apply.

C. ARGUMENT

THE TRIAL COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION BECAUSE THE DEFENDANT COMMITTED ONLY ONE ACT OF POSSESSION OF CHILD PORNOGRAPHY.

The defendant argues that multiple images of child pornography--and other images not containing child pornography--were admitted at trial, and therefore a jury unanimity instruction was required. This is incorrect. The "unit of prosecution" for possession of child pornography is the act of possession, regardless of the number of images possessed or persons depicted. Therefore because there was only one act of possession, a jury unanimity instruction was not required. The other images that did not contain child pornography do not raise a unanimity issue because they do not support the charge.

a. The Multiple Images Of Child Pornography.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996). Where the State charges a single count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where such a situation exists--where there are multiple acts that could support the charge--to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that all jurors must agree as to what act or acts were proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by, Kitchen, supra. Such an instruction is commonly referred to as a unanimity or Petrich

instruction.³ See State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), rev. denied, 120 Wn.2d 1020 (1993).

The defendant contends that a unanimity instruction was required here. While the defendant may have been correct prior to the Supreme Court's decision in Sutherby, he is incorrect now. The Supreme Court held in Sutherby, that the "unit of prosecution" for possession of child pornography is the actual possession of child pornography, regardless of the number of images possessed or persons depicted.⁴ Sutherby, 165 Wn.2d at 882. This, the Court stated, avoids "turning a single transaction into multiple offenses."

³ The current WPIC "Petrich" instruction, WPIC 4.25, reads as follows:

The [State][County][City] alleges that the defendant committed acts of _____ on multiple occasions. To convict the defendant [on any count] of _____, one particular act of _____ must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of _____.

⁴ The statute, RCW 9.68A.070, reads as follows:

Possession of depictions of minor engaged in sexually explicit conduct: A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony.

Id. at 879. The possession is the "act or course of conduct" the legislature proscribed.⁵ Id.

Here, where the distinct act is the possession of images of minors engaged in sexually explicit conduct, regardless of the number of images possessed, no unanimity instruction was required because there was only one act that supported the charge. See Huckins, 66 Wn. App. at 221 (rejecting claim that unanimity instruction was required for act of possessing a single magazine containing multiple images of child pornography because each image could not be properly characterized as a distinct act).⁶ The "Petrich rule applies only to multiple act cases (those cases where several acts are alleged, any one of which could constitute the crime charged)." State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (finding a unanimity instruction was not required where

⁵ This result is in contrast to case law prior to Sutherby, wherein courts had ruled that the unit of prosecution was based on the number of images possessed. See State v. Gailus, 136 Wn. App. 191, 197-98, 147 P.3d 1300 (2006) (rejecting claim that multiple images contained "on a single digital storage medium, such as...a computer hard drive," could be but one act or unit of prosecution).

⁶ Huckins is a pre-Sutherby case. However, the rationale regarding the unanimity instruction is still good law. Huckins was convicted of four counts of possession of child pornography for possessing four separate magazines. Under Sutherby, not only would the multiple images in a single magazine be considered a single act--as the Huckins court held--so would the possession of multiple magazines.

multiple assaults occurred over a short period of time; the "continuous conduct" constituted the single act and the jury would only need to be unanimous as to whether this conduct occurred).⁷

The result that the defendant's possession of multiple images of child pornography is considered but one act in which a unanimity instruction is not required is entirely consistent with similar types of cases, for example, possession of controlled substances.

In Love, supra, the defendant challenged his conviction for one count of possession of a controlled substance with intent to deliver. He asserted that the trial court erred in failing to give a unanimity instruction because multiple acts supported the charge. This Court disagreed. "Where the State presents evidence of multiple acts," this Court said, "which indicate a 'continuing course of conduct' ... neither an election nor a unanimity instruction is required." Love, 80 Wn. App. at 361 (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)). This Court held that

⁷ The Court in Crane contrasted other cases wherein several distinct acts occurred, any one of which could constitute the crime charged. See Crane, 116 Wn.2d at 325 (citing Kitchen, supra (several separate sexual acts could support the charge of rape) and State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091 (1985) (two separate sexual acts could support statutory rape charge), rev denied, 105 Wn.2d 1003 (1985)).

Love's possession of cocaine on his person and the possession of cocaine in his home constituted a continuous course of conduct, a single act for which a unanimity instruction was not required. Love, at 362-63; see also Handran, supra, (multiple acts of assault upon a single victim in an attempt to secure sexual relations constitutes a single act); State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (unanimity that the defendant promoted prostitution was all that was required as the individual acts constituted but one continuing act) rev. denied, 111 Wn.2d 1012 (1988).

Similarly, in State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995), the defendant was charged and convicted of a single count of delivery of cocaine despite the fact that he provided cocaine to an informant in a restaurant and later in a store parking lot. Like here, the defendant argued the trial court was required to give the jury a unanimity instruction. This Court rejected this argument, finding that the two acts were a continuing course of conduct amounting to but "one transaction." Fiallo-Lopez, 78 Wn. App. at 725.

While the defendant could attempt to argue that his possession of child pornography was not a single offense or continuing offense, but that his possession of child pornography constituted several distinct acts, he has not done so, and any such argument would fail. To distinguish a continuing offense situation from a situation involving several distinct acts the court will look at whether the evidence involves conduct at different times, different places, or involves different defendants. Love, 80 Wn. App. at 361 (citing Handran, 113 Wn.2d at 17, and Petrich, 101 Wn.2d at 571). Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. Handran, at 17. Where these factors do not exist, or where there is a single objective, multiple acts will constitute a continuing course of conduct wherein a unanimity instruction need not be given. Love, at 361.

There is no differentiating evidence here. All the child pornography was possessed at the same time and from the same place--the defendant's computer and hard drive. As the Supreme Court held in Sutherby, the fact that there may be multiple images involving multiple children being depicted, does not divide a single

act of possession into multiple acts.⁸ In sum, while the defendant possessed multiple images of child pornography, this constituted but one act and a unanimity instruction was not required.

b. The Images Used In The Interview That Did Not Contain Child Pornography.

The defendant also asserts that because some of the images used by Detective Wilson in interviewing the defendant did not contain child pornography and were introduced into evidence, the trial court was required to give a unanimity instruction. This is incorrect. A jury unanimity or Petrich instruction only applies where multiple acts could support the charge. Exhibits 10-14 did not, and were not alleged to have contained child pornography and were not acts that could support the charge.

Child pornography is specifically defined. To constitute child pornography, an image must depict a minor engaged in sexually

⁸ Were the defendant able to divine and articulate how there exists separate and distinct acts here, he would merely be setting himself up for further potential punishment. The remedy for failure to provide a unanimity instruction where one is required is reversal and remand for a new trial. See State v. King, 75 Wn. App. 899, 900, 878 P.2d 466 (1994), rev. denied, 125 Wn.2d 1021 (1995). To prevail on appeal requires the defendant to admit that there are multiple acts upon which a conviction could rest, i.e., multiple counts of possession of child pornography.

explicit conduct. RCW 9.68A.070. "Sexually explicit conduct" is specifically defined by statute and requires the following:

"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 for the purpose of sexual stimulation of the viewer;
- (e) Exhibition 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;
- (f) Defecation or urination for the purpose of sexual stimulation of the viewer; 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.

RCW 9.68A.011(3). Only Exhibits 15 and 4 contained child pornography. As argued above, these images constituted but one act of possession. Whatever issues may have been raised in terms

of the introduction of any other images, their introduction into evidence does not raise a unanimity or Petrich issue.⁹ After all, if a person were charged with possession of cocaine, and marijuana was introduced into evidence for some purpose, a unanimity instruction would not be required.

The simple fact that other evidence may be introduced at a trial does not raise a unanimity problem. The other evidence must be a separate and distinct act that supports the charge. See Petrich, at 573 (the problem in Petrich existed because the evidence indicated that "multiple instances of conduct ... could have been the basis for each charge"). The other images used here in interviewing the defendant did not create a unanimity issue.

⁹ For example, if the defendant was concerned about what evidence the State intended to rely to support the charge, he could have asked for a bill of particulars. See State v. Eaton, 164 Wn.2d 461, 470 n.5, 191 P.3d 1270 (2008) (Johnson concurring) (a defendant can always ask for a bill of particulars); State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991) (the purpose of a bill of particulars is to amplify or clarify particular matters considered essential to the defense). The defendant also could have raised a motion to dismiss if he believed the charge was not supported by the facts. See State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). He also could have objected to the admission of the evidence under a variety of evidence rules, such as ER 401, 402 or 403.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 4 day of January, 2010.

Respectfully submitted,

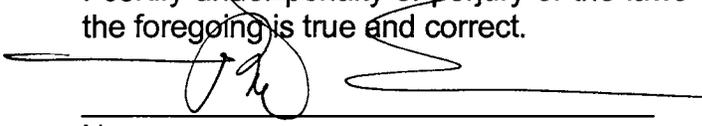
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FURSETH, Cause No. 63759-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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