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No. 34331-2-II

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

BY: *[Signature]*
SUTHERBY

STATE OF WASHINGTON

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FILED
COURT OF APPEALS

STATE OF WASHINGTON,
Respondent,

v.

RANDY J. SUTHERBY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

RESPONDENT’S COUNTERSTATEMENT OF THE CASE

 Procedural history 1

 Factual background 4

RESPONSE TO ASSIGNMENTS OF ERROR

 The defendant received effective assistance of counsel 12

 Severance 12

 Testimony of Lisa Butcher 19

 The correct unit of prosecution for the crime of
 Possession of Depictions of Minors Engaged
 in Sexually Explicit Conduct, RCW 9.68A.070
 is each individual depiction 24

CONCLUSION 31

TABLE OF AUTHORITIES

Table of Cases

Bell v. U.S., 349 U.S. 81, 83, 75 S.Ct. 620, 99
L.Ed.2d 905 (1955) 25

Blakely v. Washington, 542 U.S. 296, 124
S.Ct. 2531 (2004) 30, 31

Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985) 13

In re Detention of Taylor, 132 Wn.App. 827, 838, 134
P.3d 254 (2006) 23

State v. Adel, 136 Wn.2d 629, 634, 965
P.2d 1072 (1998) 26

<u>State v. Alexander</u> , 64 Wn.App. 147, 822 P.2d 1250 (1992)	21, 22
<u>State v. Bobic</u> , 140 Wn.2d 250, 266, 996 P.2d 610 (2000)	29
<u>State v. Bouchard</u> , 31 Wn.App. 381, 639 P.2d 761 (1982)	17
<u>State v. Bryant</u> , 89 Wn.App. 857, 864, 950 P.2d 1004 (1998)	14
<u>State v. Bythrow</u> , 114 Wn.2d 713, 790 P.2d 154 (1990)	13
<u>State v. Carlson</u> , 80 Wn.App. 116, 906 P.2d 999 (1995)	21, 22
<u>State v. Crotts</u> , 104 Ohio St.3d 432, 820 N.E.2d 302, 305 (2004)	17
<u>State v. Ehli</u> , 115 Wn.App. 556, 560, 62 P.3d 929 (2003)	26, 28
<u>State v. Harris</u> , 46 Wn.App. 746, 677 P.2d 202 (1984)	14
<u>State v. Herzog</u> , 73 Wn.App. 34, 51, 867 P.2d 648 (1994)	14
<u>State v. King</u> , 131 Wn.App. 789, 800, 130 P.3d 376 (2006)	22
<u>State v. Kirkman</u> , 126 Wn.App. 97, 103, 107 P.3d 133 (2005)	22
<u>State v. Markel</u> , 118 Wn.2d 424, 439, 823 P.2d 1101 (1992)	13, 14
<u>State v. McNeal</u> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)	19
<u>State v. McReynolds</u> , 117 Wn.App. 309, 71 P.3d 663 (2003)	29

<u>State v. Medcalf</u> , 56 Wn.App. 817, 795 P.2d 158 (1990)	18
<u>State v. Mendoza-Solorio</u> , 108 Wn.App. 823, 834, 33 P.3d 411 (2001)	22
<u>State v. Ramirez</u> , 46 Wn.App. 223, 730 P.2d 98 (1987)	14
<u>State v. Ray</u> , 116 Wn.2d 531, 536-37, 806 P.2d 1220 (1991)	18
<u>State v. Root</u> , 141 Wn.2d 701, 9 P.3d 214 (2000)	27, 28, 30
<u>State v. Standifer</u> , 48 Wn.App. 121, 737 P.2d 1308 (1987)	16
<u>State v. Thomas</u> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	13
<u>State v. Tresenriter</u> , 101 Wn.App. 486, 4 P.3d 145 (2000)	27
<u>State v. Warren</u> , 138 P.3d 1081 (Wash.App. Division 1, July 10, 2006)	22
<u>State v. Westling</u> , 145 Wn.2d 607, 612, 40 P.3d 669 (2002)	29
<u>State v. Womac</u> , 130 Wn.App. 450, 457, 123 P.3d 528 (2005)	17
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 80 L.Ed.2 674, 104 S.Ct. 2052 (1984)	12

STATUTES

RCW 9.68A.001	26
RCW 9.68A.010	27
RCW 9.68A.011(2)	27
RCW 9.68A.040	27
RCW 9.68A.070	1-4, 25, 26, 31
RCW 9.94A.835	2
RCW 9.94A.855	25
RCW 9A.44.010(2)	17
RCW 9A.44.073	2
RCW 9A.44.083	1, 2

Table of Court Rules

CrR 4.3	14
CrR 4.3(a)	13
CrR 4.3(a)(1)	13
ER 404(b)	13

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural history.

The defendant was charged by Information on March 18, 2005, with one count of Child Molestation in the First Degree, RCW 9A.44.083, and one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070. (CP 1-3). Counsel, David Hatch, was retained. Arraignment was held on March 23, 2005. The defendant entered a plea of not guilty. The court administrator set the matter for trial commencing June 25, 2005.

An agreed omnibus order was entered on May 23, 2005. (CP 8-10). At that time, the court also signed an agreed order regarding the out-of-court statements of the defendant. (CP 11). Plaintiff's Omnibus Response was filed on May 31, 2005.

A child hearsay hearing was held on June 6, 2005. The child victim, Libby Kain, was found to be competent to testify. The out-of-court statements of Libby to her mother, Lisa Butcher, her grandmother, LaDonna Butcher, pediatrician Dr. Sharon Ahart, child interviewer Martha Murstig, and nurse practitioner Lauri Davis were found to be admissible. (CP 12-19).

On June 3, 2005, the defendant moved to continue the trial date. An order of continuance was entered on June 6, 2005, setting the matter for August 30, 2005. The continuance was at the request of the defendant who asked for additional time to prepare because the child interview tape

had yet to be transcribed and he had recently received the report concerning the examination of his computers. (RP 06/06/05 p. 149-150).

On July 18, 2005, the State amended the Information to allege one count of Rape of a Child in the First Degree, RCW 9A.44.073, one count of Child Molestation in the First Degree, RCW 9A.44.083, and ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, with an allegation of sexual motivation as to each of the last ten counts. RCW 9.68A.070, RCW 9.94A.835 (CP 27-32).

The trial date was continued on two other occasions, one on the State's motion due to the unavailability of a witness for the State, and another based upon the unavailability of the defendant's expert witness. The matter went to trial commencing November 1, 2005. The jury returned a verdict on November 3, 2005, finding the defendant guilty as charged on each count with a special finding of sexual motivation as to Counts 3 through 12.

Prior to sentencing, the defendant moved to dismiss nine of the ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct alleging that all of the depictions should be combined in a single unit of prosecution. (CP 93-110). The evidence at trial

established that the defendant downloaded numerous images at different times:

Count	Exhibit No.	Date Downloaded	
3	6	02-04-04	RP 11/2/05, p. 7-8, 18, 19
4	7	02-02-04	RP 11/02/05, p. 16-19
5	8	02-02-04	RP 11/02/05, p. 19
6 & 7	9, 10	02-02-04	RP 11/02/05, p. 19-20
8	11	01-27-05	RP 11/02/05, p. 20-21
9	12	02-18-05	RP 11/02/05, p. 21-22
10	12	02-18-05	RP 11/02/05, p. 22
11	14	found to be possessed on date of arrest and seizure of computer, 03-02-05, download date not available	RP 11/02/05 p. 23-24
12	15	11-29-02	RP 11/02/05 p. 25-26

Following hearing, the court found that the unit of prosecution for violation of RCW 9.68A.070 to be each individual child photographed or filmed. The court consolidated Counts 5, 6 and 7 into a single count and Counts 9 and 10 into a single count because it could not determine that these were depictions of different children. The court ordered that the

defendant be sentenced for 7 separate violations of RCW 9.68A.070. (CP 130). Sentence was imposed as follows: Count 1, Rape of a Child in the First Degree - Life in prison with a minimum term of 279 months; Count 2 - Life in prison with a minimum term of 160 months; Counts 3, 4, 5, 8, 9, 11, and 12: 365 days in jail and a term of community custody of 36 to 48 months on each count. All counts were ordered to run concurrent. (RP 120-129).

Factual background.

The facts at trial were as follows. In December 2004, Lisa Butcher was residing in Kennewick with her husband, Ryan Sutherby, the defendant's son, and her two daughters, Elizabeth (Libby), age 5, and Hannah, age 1 1/2. (RP 18).

Lisa drove the children to Hoquiam to visit in mid-December 2004. They initially stayed with Ms. Butcher's parents, Ron and Ladonna Butcher in rural Hoquiam. (RP 23). The plan was for the children to stay with her parents until December 24, 2004, and then return to Kennewick on Christmas Day. (RP 23). Arrangements were also made for the children to spend three days and two nights with the defendant and his wife starting on December 20, 2004. (RP 23). Lisa Butcher had previously allowed the children to stay at the defendant's residence by themselves on two or three occasions. (RP 20-21). When they stayed there, the children slept in the rec room, a room that Libby called the "deer

room.” (RP 21). The defendant drove the children to his home. He brought them back to the maternal grandparents’ residence on December 22, 2004, where they remained until Christmas Day. (RP 48). The defendant and his wife picked the children up on Christmas Day and drove them to Kennewick. (RP 48-52).

On the morning of December 25, 2004, the maternal grandmother, LaDonna Butcher, bathed the children and dressed them in preparation for leaving with the defendant and his wife. While she was dressing Libby, the child complained to her that her “pee pee” stung and that it hurt. (RP 49). The grandmother told her that she thought it might be a urinary infection. (RP 50).

On Christmas morning, when Libby was walking out the door she saw the defendant approaching the house. She turned around, and walked back to her grandmother. The child, almost in tears, asked her grandmother, “Do I have to go back to his house?” (RP 50). The grandmother assured her that the defendant and his wife were taking her to her mother’s residence in Kennewick. (RP 50). Libby had never previously acted like this in the presence of the defendant. (RP 51).

The defendant and his wife stayed at the Butcher residence in Kennewick until December 27, 2004. Within minutes after the defendant left Libby told her mother that the defendant had “hurt my pee pee.” (RP 24-25). Lisa Butcher asked her daughter exactly what had happened. The child stated that the defendant got under the blankets and poked at her pee

pee. She told her mother that it hurt and felt like pinching. The child explained that it stung on the morning after when she went to the bathroom. (RP 26). The child explained to her mother that this happened in the “deer room” when she was sleeping with Hannah. Mrs. Butcher took her daughter to Sharon Ahart, a pediatrician, that same day. (RP 27).

As part of the examination, Dr. Ahart spoke with the child. The doctor determined that, in her opinion, the child had the capacity to tell the truth. (RP 90). The child told Dr. Ahart that she was there because someone had hurt her by poking her in her “potty.” (RP 92). The child identified her assailant as “Randy,” her dad’s dad. She stated that he poked her with his finger while she was at his home on the bed sleeping with her sister. She woke up because her “pee pee” hurt. When she woke up, the defendant was on the bed. She told the doctor that she was not wearing anything at the time. (RP 90-94).

Libby told Dr. Ahart that the defendant poked her “lots of times” during the incident. (RP 95). She explained that the defendant had never done this before and that no one else had ever touched her “pee pee.” (RP 95). When asked by Dr. Ahart if it hurt, the child’s expression changed to sadness and she said, “When I went to the bathroom it stung.” (RP 96).

The doctor’s examination revealed there that was an area of erythema inside the child’s labia. (RP 98). Dr. Ahart explained that an erythema is caused by any kind of irritation to the skin and specifically can be caused by rubbing. (RP 103). Dr. Ahart also found trauma to the

hymen including tenderness and redness. Dr. Ahart reported that she only normally sees this if there is an infection or an irritation to the area. (RP 103). The doctor testified that the erythema and trauma that she saw was consistent with the description given by the child of how the touching occurred. (RP 104). Dr. Ahart explained that the vaginal area heals over time and that this accounts for the difference between her observations on December 27, 2004 and the examination that took place eight days later. (RP 108-109).

Libby testified at trial. She told the court that she was six years old and that her birthday was on September 8. She told the court that she knew that the rules for court were “never lie.” (RP 58-59). The child explained that she was at court to tell what had happened. (RP 67).

She told the jury that “Randy” had touched her front pee pee where she goes potty. (RP 68). It happened after she had gone to bed in the room with the “mooses”. (RP 69). The child was able to describe the bedding and recalled that the room was hot. She had taken off her pajamas. (RP 70). The child explained that the defendant poked her inside of her pee pee more than one time. She demonstrated this to the jury. (RP 71). This had never happened to her before. (RP 71). The child recalled telling her mother and going to see a lady (Dr. Ahart) who was nice. The lady looked at her private and made sure that it was okay. (RP 73).

The matter was reported to the police. Detective Ed McGowan of the Grays Harbor County Sheriff's Office spoke to Lisa and Ryan Sutherby on December 28, 2004. (RP 73). Arrangements were made for a forensic interview with the child. (RP 73-74). McGowan also tried to schedule a forensic examination in Kennewick, because Dr. Ahart did not have access to a colposcope for her examination. Detective McGowan was unable to make arrangements to have the child re-examined in Kennewick. A second examination was performed on January 4, 2005. (RP 74-75).

Libby was interviewed by Mari Murstig, a child interviewer with the Benton County Prosecuting Attorney's Office. An audio and video recording was made of the interview and played for the jury. Once Ms. Murstig was able to build up a rapport with the child and assess her developmental level, she asked Libby why she had come in for the interview. The child answered, "I was sleeping in Randy's house and he touched my private area and I waked up when he did this to me and I telled my mom. That is all that happened, but he did it a long time." (RP 171).

The child identified "Randy" as her grandpa, her dad's dad. (RP 171). The child told the interviewer that the room had deers in it. She told Ms. Murstig that she was not wearing clothes and had taken off her pajamas because it was hot. She was able to describe the bedding. (RP 174-175).

The child related to Ms. Murstig that "he poked me real hard" and it "felt like a pole." While describing the poking, Libby pressed her finger

hard on the table. (RP 175). When asked how the defendant touched her the child stated that it was more than one time and that he “pushed and pushed and pushed and pushed.” (RP 182).

The child was also seen by Laurie Davis, a nurse practitioner at the Sexual Assault Clinic in Lacey, Washington, on January 4, 2005. During the interview, the child told Ms. Davis that the defendant had poked her in her private area and he hurt her “worsen than a bite.” (RP 133). The child related that it hurt when it happened and that it hurt afterwards when she urinated. (RP 134).

Although the child’s genital examination showed narrowed and slightly angulated hymenal margins, it was within normal limits. (RP 144). Ms. Davis testified that injuries in the area of the hymen heal very quickly and the fact that it had been eight days since Dr. Ahart’s exam would account for the difference in her assessment. Ms. Davis testified that she was “not surprised at all” that fourteen days after the assault Libby’s exam was essentially within normal limits. (RP 142-143).

Detective McGowan arrested the defendant on March 2, 2005. The defendant acknowledged that the children had come to stay with him during the Christmas holidays and had spent two nights at his home. (RP 79-80). He told McGowan that he took the children back to their grandparents’ house prior to Christmas and that he had driven them to Kennewick on Christmas Day. (RP 80).

The defendant told McGowan that the girls shared the same bed. The defendant admitted checking on the children before he went to bed. Libby had taken her clothes off and piled the blankets on top of her. (RP 80-81). McGowan took a written statement from the defendant. (Exhibit No. 17). The defendant denied touching Libby at all. Defendant told McGowan he simply "straightened up the blankets and went to bed". (RP 81). Subsequently, with the consent of the defendant, two of his personal computers were seized.

Arrangements were made for a polygraph examination. Kevin Darst, an Aberdeen police officer, administered the polygraph. The fact of the polygraph was not presented to the jury at trial. The defendant told Darst that he felt that it was normal behavior to view child pornography. (RP 198). The defendant acknowledged that he had looked at young children on the internet and had sexual fantasies. (RP 196). The defendant told Darst, however, that he "would never cross the line by acting out a fantasy with a child." (RP 196-97).

At trial, the defendant denied telling Darst that he had sexual fantasies while viewing images of young children. (RP 310). He explained that his wife put the children to bed earlier in the evening and then went to bed herself, around 10 p.m. (RP 325). The defendant stated that he prepared to go to bed after the 11:30 news. He checked on the girls. (RP 326). Hannah was off the mattress and Libby was laying on the mattress, naked. (RP 328-331).

The defendant explained that Libby's "little bottom" was hanging off the edge of the mattress and she was ready to fall off. He scooped her up to try to move her back over. (RP 330). According to the defendant, the child was laying naked in a fetal position. As he went to pick up the child, she arched her back, her legs got stiff and she rolled out of his hands back onto the mattress. (RP 331). According to the defendant, the child went back into the fetal position so he reached down and again tried to "scoop" up the child, but once again the child straightened her back and became stiff. She fell onto the mattress. The defendant then placed the blanket over her. (RP 331).

The defendant explained that he had an injury to the little finger on his right hand. The finger was broken in the tailgate of a pickup truck and did not heal straight. (RP 320-21). With the aid of a large doll, he demonstrated how he had picked up Libby. He explained to the jury that his injured finger must have been in the immediate area of the child's vagina and caused the injury to the child. The defendant denied intentionally molesting the child. He speculated that the child must have been touched, inadvertently, by his damaged pinky finger. (RP 332-33).

The defendant admitted that his version of events offered at trial was different than what he told Detective McGowan orally and in his written statement following his arrest. In his statements to McGowan he said that Libby was not naked. He said that the child was covered by a pile of blankets and stuffed animals that looked like an anthill. (RP 348).

He never did tell Detective McGowan that he had moved Libby. All he ever told McGowan was that he had picked up Libby's sister, Hannah, placed her on the bed and covered her with blankets. (RP 348, Exhibit 17).

When asked about the depictions of minors engaged in sexually explicit conduct, the defendant stated that he never intentionally searched for or downloaded child pornography. (RP 308). He admitted downloading adult pornography "fairly often." (RP 308). His explanation was that the child pornography was inadvertently downloaded. (RP 303, 308-09, 354-55).

RESPONSE TO ASSIGNMENTS OF ERROR

The defendant received effective assistance of counsel.

Severance.

The courts have recognized a two-pronged test when examining an allegation of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2 674, 104 S.Ct. 2052 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted

from a breakdown in the adversary process that renders the result unreliable.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in all significant decisions. Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985). There must be a showing that the representation fell below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The defendant cannot make that showing.

First of all, any competent attorney would immediately recognize that these counts may be properly joined. CrR 4.3(a) provides that two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses are of the “same or similar character, even if not part of a single scheme or plan.” CrR 4.3(a)(1). Sex offenses may be properly joined for trial even though the counts may involve different victims and different offense dates and there is no showing of cross-admissibility under ER 404(b). State v. Markel, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). The denial of a motion for severance is reviewed for a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990).

Counsel had to recognize that the offenses were certainly of the same character. They both involved sexual exploitation of minor children. The sexual contact occurred in December of 2004. The evidence at trial was that the defendant, both before and after the sexual contact, was downloading images of children engaged in sexually explicit conduct.

Counts 3 through 7 relate to the downloading of sexually explicit depictions of minors that occurred in February 2004. Count 8 relates to the downloading of such depictions in January of 2005, shortly after the rape of the child was alleged to have occurred. Counts 8 through 10 relate to the downloading of sexually explicit pictures of minors that occurred in February 2005. Count 11 relates to images found on the computer when it was seized. These were in unallocated disc space and no download date could be established. (RP 11/02/05, p. 23-24). Count 12 relates to images found on a second computer that were downloaded in September 2002 and 2003. (Ex. 5, CP 93-94).

Counsel had to know that CrR 4.3 has been construed expansively to promote the public policy of conserving judicial and prosecution resources. State v. Bryant, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998). Cases cited by the defendant such as State v. Harris, 46 Wn.App. 746, 677 P.2d 202 (1984) and State v. Ramirez, 46 Wn.App. 223, 730 P.2d 98 (1987) which purport to require severance of offenses in all sex cases where the evidence is not cross-admissible have essentially been overruled. Markel, *supra*, 118 Wn.2d at 439.

Counsel certainly knew the factors that the court must consider when ruling on a motion for severance. State v. Herzog, 73 Wn.App. 34, 51, 867 P.2d 648 (1994):

The factors to be considered include
(1) the strength of the state's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to

the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

The strength of the State's evidence on each of the counts was substantial. The jury heard the testimony of the child. She gave a convincing, straight forward explanation of how the injury occurred. The circumstances regarding the disclosure strongly corroborated the testimony of the child. The first disclosure was to the maternal grandmother when the defendant was about to pick up the child and take her back to Kennewick. The child was afraid that she was going to have to go back to the defendant's house where she had been molested. The second disclosure occurred immediately after the defendant left her home in Kennewick.

A physical examination of the child done on the day of the last disclosure, showed physical injury to the child that was completely consistent with the description of the offense given by the child. No one seriously contested the fact of the injury. When interviewed a day or two later the child gave a consistent story as to how and where the injury occurred. That never changed.

The defendant tried to establish that the injury may have been caused by the child's uncle who is a year older than her. The child explained that he had bit her and poked her when she was four years old. He never touched her private area.(RP 78-79). Libby turned five on

September 8, 2004. (RP 19). The events charged herein occurred in December 2004.

The strength of the State's case on each of the counts contained in Counts 3 through 12 were likewise substantial. Two computers belonging to the defendant were seized. Depictions were found on the computers that had been downloaded on numerous occasions over at least a two year period. The defendant admitted that he liked to view pornography on the internet. He told Lieutenant Darst that he had sexual fantasies about young children. He called his wife from the jail to ask her to delete items from the computer. (RP 100-01, Ex. 21).

There is no confusion about the clarity of the defenses to each count. They occurred at different times. His defense was that he did not intentionally touch the child and did not intentionally download child pornography. Everything occurred by accident.

The fact that counts joined for trial are not cross-admissible is not necessarily dispositive of a motion to sever. State v. Standifer, 48 Wn.App. 121, 737 P.2d 1308 (1987). Nevertheless, it must have been apparent to counsel, given the defense that his client was going to put forward, that evidence of the defendant's possession of depictions of children engaged in sexually explicit conduct was going to come into evidence in a separate trial for rape of a child and child molestation.

The charge of child molestation requires proof of sexual contact. Sexual contact is a touching done for the purpose of gratifying sexual

desire. RCW 9A.44.010(2). The fact that the defendant viewed depictions of minors engaged in sexually explicit conduct on numerous occasions around the time of the molestation is relevant evidence to show that the touching was for the sexual gratification of the defendant. State v. Crotts, 104 Ohio St.3d 432, 820 N.E.2d 302, 305 (2004). Likewise, the touching of the child is relevant to prove that the possession of the depictions was sexually motivated.

More importantly, however, is the fact that the defendant presented a defense of accident as to each of the counts charged. The defendant claimed that the touching of the child's private area must have occurred by accident because of his injured finger. The downloading of the depictions occurred by accident when he was actually intending to download other material.

In State v. Bouchard, 31 Wn.App. 381, 639 P.2d 761 (1982), the defendant was charged with Indecent Liberties. The physical evidence was that the child had a perforated hymen. Bouchard's defense was that the injury occurred when the child fell on a metal bar connecting the footrest to a chair in which he was sitting. The court in Bouchard held that evidence of prior sexual activity of the defendant with a different child was relevant to show that the acts committed against the victim granddaughter were not accidental. Bouchard, 31 Wn.App. at 385. See also, State v. Womac, 130 Wn.App. 450, 457, 123 P.3d 528 (2005).

Cases cited by the defendant involve completely different sets of facts where there was no claim of accident. State v. Ray, 116 Wn.2d 531, 536-37, 806 P.2d 1220 (1991). (Denial of any sexual contact. Third party testimony that the acts could not have occurred at the time and place alleged.); State v. Medcalf, 56 Wn.App. 817, 795 P.2d 158 (1990) (no claim of accident. Introduction of evidence regarding x-rated movies found to be harmless error.)

Counsel for the defendant had a choice to make. He could leave all the counts joined for trial and put forth a uniform, organized defense that he could outline to the jury from the outset or he could move to sever the offenses. Say, for example, that a motion to sever was granted and Counts 1 and 2 were tried first, separately. The matter goes to trial, the defendant puts on his defense and the State is allowed to present in rebuttal, for the first time, the fact that the defendant possessed depictions of minors engaged in sexually explicit behavior. Quite literally, the defense that he has spent the entire case trying to prepare may be destroyed because the jury could believe that the defendant had been withholding evidence. The choice was to take that gamble or to address, from the outset, all of the allegations. Who can say, as a matter of trial strategy, that counsel for the defendant in this matter did not make the right choice.

Contrary to the assertion of the defendant in his brief, the trial court did not suggest that there was a necessity for severance of counts. The defendant moved to continue the trial, claiming that he needed

additional time to prepare his defense in order to get certain evidence transcribed. (RP 149). The defendant also claimed that he needed additional time because he had just recently received the report regarding the examination of the computers and the presence of depictions of minors engaged in sexually explicit conduct. (RP 150). In that context, the judge inquired as to whether it might not be appropriate to sever counts and proceed to trial on the charges of Child Rape and Child Molestation. The defendant did not ask for a severance and the court was not suggesting that one was appropriate based upon the particular facts of this case.

The decision to ask for a severance is a matter of trial strategy. New counsel cannot now second guess the actions of trial counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Testimony of Lisa Butcher.

At no point was Lisa Butcher asked nor did she offer any opinion as to whether her daughter was telling the truth or whether she believed her daughter.

The sum and substance of the objected to testimony of the mother is as follows:

Q And have you taught Libby about telling the truth and the consequences?

A Yes.

Q And how have you done that?

A How?

Q Yeah, what kind of conversations?

A Just -- she just knows it's wrong to lie and that she will be punished and you get time outs. She knows it can hurt people and causes problems and it's for her safety too.

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.

Q And had you previously, before the incident, had you previously talked to Libby about touching in private areas and what she should do?

A Yes.

Q What did you tell her?

A I talked to her a couple of different times. Just told her that if anything ever happens, anybody ever touches you in your private area and or asks you to touch them in a private area, that you need to tell me, not be afraid, no matter what they say.

Q To tell you?

A Yes.

In context, the testimony of the mother was proper. It was not an expression concerning the truthfulness of her daughter.

The mother was asked if the child got along with the defendant on prior occasions. (RP 33). The mother spoke to her daughter on the first night that she was at the defendant's residence. She related that the child was having fun and wanted to get off the phone so she could play with her friends. (RP 33). Would anyone object saying that it was improper to describe the child's manner and demeanor during this conversation? The answer must be no.

The examination of the mother moved on to asking her if her child had been instructed in the need to tell the truth. The mother testified that the child knows that telling a lie "... can hurt people and causes problems and it's for her safety too." (RP 34). Thereafter, the mother testified, without objection, to certain things that she sees when she knows the child is not telling the truth. The mother described that she did not see these gestures when the child disclosed to her what had happened with the defendant. The mother was never directly asked "do you believe your daughter."

Unlike the facts in State v. Alexander, 64 Wn.App. 147, 822 P.2d 1250 (1992), the mother did not express an opinion that her daughter had been molested. She did not testify that she believed her daughter had been sexually abused by the defendant. See State v. Carlson, 80 Wn.App. 116, 906 P.2d 999 (1995). Nor did she testify to a "... clear and consistent

history of sexual touching... with appropriate affect." See State v. Kirkman, 126 Wn.App. 97, 103, 107 P.3d 133 (2005).

Alexander, Carlson and Kirkman, all involved expert witness testimony concerning the ultimate issue of whether a criminal act had occurred. This is not what occurred in this case. The mother was simply asked to express the manner and demeanor of the child during the time of the disclosure.

In any event, there was no objection at trial to this testimony. As shown below, this was a matter of trial strategy. Such failure to object, even if not a matter of trial strategy, precludes appellate review unless the alleged error involves "manifest error affecting a constitutional right." State v. Mendoza-Solorio, 108 Wn.App. 823, 834, 33 P.3d 411 (2001). The error, if any, is harmless beyond a reasonable doubt in light of the entire record. Lisa Butcher did not expressly state an opinion concerning her daughter's account of the events. The testimony cannot constitute manifest constitutional error. State v. King, 131 Wn.App. 789, 800, 130 P.3d 376 (2006). See also State v. Warren, 138 P.3d 1081 (Wash.App. Division 1, July 10, 2006).

Assuming, without deciding, that the testimony of Lisa Butcher regarding the capacity of her child to tell the truth was inadmissible, the failure of counsel for the defendant to object, in the context of this case, was not ineffective assistance of counsel. From the defendant's point of view, it would have been incredibly foolish to deny that a touching had

occurred. There was the direct testimony of the child. There was the injury found shortly after the touching. The defendant did not deny the injury or the touching. Rather, he offered an explanation concerning how the child received the injury.

An attack upon the credibility of the child was completely inconsistent with the defendant's claim that the touching was an accident. It would have been foolish for the defendant to claim, on one hand, that the touching was an accident and on the other that the child was lying. It was in his best interest to concede that the child was telling the truth as she knew it. This was a matter of trial strategy. An attorney's legitimate trial strategy or tactics cannot constitute ineffective assistance of counsel. In re Detention of Taylor, 132 Wn.App. 827, 838, 134 P.3d 254 (2006).

This trial strategy is reflected in final argument presented by counsel for the defendant. The issue was not whether the child was lying. From the defendant's point view, the child was genuinely mistaken about whether the poking was intentional. (RP 11, 305 at 420-421).

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 happened? 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. It took him a while to realize that's happened in the context of all of this. He was asked to give that written statement only an hour and a half after he has been arrested at his house. He didn't have his thoughts together. His mind was probably racing, wondering if he is going to be able to go home. I'm not sure what they were talking about. His words were floored, couldn't comprehend the nature of the charges.

In short, given the way the facts came out and the defense presented at trial, it was appropriate trial strategy to decline to attack the credibility of the child. It would have been simply foolish to accuse the child of lying. From the defendant's point of view, the child was telling the truth. She was poked in her private area by the defendant. The defendant's claim was simply that she could not know the touching was accidental. An objection to the testimony given by the mother or a claim that the child was lying would have severely detracted from his defense. The decision not to object was a matter trial strategy.

The correct unit of prosecution for the crime of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070 is each individual depiction.

The defendant was arrested on March 2, 2005. In connection with that arrest, investigators seized two computers from the defendant's

residence. A preliminary examination of the computers yielded pictures of juveniles engaged in sexually explicit conduct. These depictions formed the basis for Count 2 of the original Information alleging that the defendant possessed the depictions on or about March 2, 2005, the date the computer was seized.

Subsequently, a complete examination of both computers was done by a detective with the Washington State Patrol. A large number of other images were recovered. The State filed an Amended Information that included ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070. Each of the ten counts alleged that the offense was sexually motivated. RCW 9.94A.855. The offense dates for Counts 3 through 10 and Count 12 were established by showing the date and time that the image was downloaded from the internet to the defendant's computer. (RP 21-22, 12/21/05). The offense date for Count 11 was the date of the seizure of the computer because these depictions were in unallocated space and no download date could be established. (CP 93-4, RP 228-29).

The power to define criminal conduct and set out appropriate punishment is vested in the legislature, limited only by the Eighth Amendment. Bell v. U.S., 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed.2d 905 (1955). The question presented herein is "What act or course of conduct has the legislature defined as the punishable act constituting a violation of RCW 9.68A.070?" When the legislature defines the scope of a criminal

act, “the unit of prosecution,” double jeopardy principles protect the defendant from being convicted twice under the same statute for committing just “one unit of the crime.” State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

The defendant asserted that all the images should be lumped into a single count. The trial court determined that the unit of prosecution for a violation of RCW 9.68A.070 is possession of depictions of each individual child photographed or filmed, regardless of when the particular depiction was downloaded from the internet or “possessed” by the defendant. (CP 130). Both are incorrect.

The stated legislative purpose of RCW 9.68A is the “prevention of sexual exploitation and abuse of children.” The legislature has declared that “the care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on exploitation of the children.” RCW 9.68A.001. The crime is defined as “sexual exploitation of a child.” The child is the victim. See State v. Ehli, 115 Wn.App. 556, 560, 62 P.3d 929 (2003). Possession of depictions of a minor engaged in sexually explicit conduct is sexual exploitation of the child. Such pornography is sexual exploitation that victimizes the child. Ehli, 115 Wn.App. at 560-61.

The statute prohibits knowing possession of visual or printed matter depicting “a minor” engaged in sexually explicit conduct. On its face, the statute provides that each separate picture of a child engaged in

such conduct is a crime. The child is victimized by each separate image. This interpretation is supported by the definition of terms provided by RCW 9.68A.010. “Visual or printed matter” means any photograph or other material that contains a reproduction of a photograph. (emphasis supplied) RCW 9.68A.011(2). To “photograph” means to “...make a print, negative, slide, digital image, motion picture or videotape.” A photograph is any item produced by photographing. (emphasis supplied) RCW 9.68A.010.

By its literal meaning, the statute provides that each photograph possessed is a separate crime. It may be that multiple depictions possessed on the same date and time constitute “same criminal conduct,” but this is quite apart from whether the legislature has the authority to define the unit of prosecution. See, for example, State v. Tresenriter, 101 Wn.App. 486, 4 P.3d 145 (2000). The State acknowledged at sentencing that some of the counts constituted “same criminal conduct” because they occurred on the same date. (CP 156-67, Statement of Prosecuting Attorney)

State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000) provides an application of the “unit of prosecution” analysis for violation of RCW 9.68A.040, Sexual Exploitation of a Minor. For purposes of the “unit of prosecution” analysis the essential elements of the statute involve causing a child to engage in sexually explicit conduct knowing that the conduct will either be photographed or part of a live performance. Root, 145 Wn.2d at 707. The culpable conduct is not the taking of the photographs.

Rather, it is the act of causing the child to engage in sexually explicit conduct which the defendant knows will be photographed. Root, 141 Wn.2d at 709. Accordingly, the court in Root held that the proper unit of prosecution is each separate photo session during which the minor is compelled to engage in sexually explicit conduct that the defendant knows is going to be photographed. Root, 141 Wn.2d at 710-11.

Unlike Root, the essence of the current statute is the possession of the depictions. The State, in its Amended Information, identified possession by specific dates and times when it is alleged the images were downloaded. This establishes the date and time when the defendant “possessed” the depictions. The State conceded, at sentencing, that Counts 6 and 7 were the same criminal conduct, as were Counts 9 and 10 because they were depictions of the same victim downloaded on the same date. (Statement of Prosecuting Attorney, CP 156-67).

Indeed, the courts have held that it is appropriate to charge different counts when there is evidence that the images were downloaded at different times. Such proof precludes the crimes from being the same criminal conduct. Ehli, 115 Wn.App. at 561. To do otherwise would lead to an absurd result. Suppose the defendant was found in possession of twelve different depictions, each downloaded on a different day. By the defendant’s theory, the defendant could be charged with only one count. The result would be that the defendant was essentially charged for the

downloading of one of the depictions and given a pass for other criminal conduct that happened on different days and times.

The case at hand is unlike State v. McReynolds, 117 Wn.App. 309, 71 P.3d 663 (2003), cited by the defendant. In McReynolds, the State alleged the continuing possession of stolen property belonging to multiple victims. Over a fifteen day period the counts in the Information were segregated by victim even though the possession of the stolen property was alleged to have occurred at the same place and time. The court in McReynolds held that the unit of prosecution was all the stolen property, regardless of victim, that was alleged in the Information to have been possessed at the same time.

The result in McReynolds would have been quite different if the State were able to allege and prove discreet, different, times that the defendant possessed each victim's stolen property. Once the unit of prosecution is determined, a factual analysis is necessary to decide whether, under the facts of the particular case, more than one unit of prosecution is present. State v. Westling, 145 Wn.2d 607, 612, 40 P.3d 669 (2002). Even though the legislature may have expressed its view on the appropriate unit of prosecution, the facts of the particular case may reveal that more than one unit of prosecution is present. State v. Bobic, 140 Wn.2d 250, 266, 996 P.2d 610 (2000).

The following example illustrates the principles involved. Assume the facts to be that a defendant caused a minor child to engage in sexually

explicit conduct that he knew was to be photographed on two separate occasions. On each occasion, ten photographs were taken of the child. A search warrant was served on a later date and all twenty depictions were seized pursuant to the search warrant. The State could properly charge the defendant with a count of causing a minor to engage in sexually explicit conduct for each photo session. Root, supra. The State could properly charge twenty counts for the possession of the depictions although each of the ten depictions corresponding to the particular photo session would be the same criminal conduct.

The legislature has defined the unit of prosecution as each individual photograph possessed. A child victim is exploited each time his or her image is downloaded to an individual computer. The interpretation of the trial court, segregating the counts by identifiable victims, does not completely encompass the extent of the exploitation. Each time an image of the child is downloaded, that child is exploited and is a “victim.” The unit of prosecution must be each depiction.

The defendant asserts that the trial court’s determination of the unit of prosecution somehow violates the principles of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). Such an argument demonstrates a complete misunderstanding of the principles of Blakely.

Blakely had to do with the sentencing authority of the court. May the court, once a defendant has been convicted, make factual findings of

its own to impose a sentence beyond the standard range for the sentence as set forth by the legislature?

The case at hand does not involve a situation in which the court imposed a sentence outside the standard range for any one of the ten counts of a violation of RCW 9.68A.070. The trial court determined which of the counts, in its view, constituted “same criminal conduct,” consolidated certain counts as constituting the same criminal conduct, and then imposed a sentence on each count that was within the standard range. All counts were ordered to be served concurrently. Blakely simply does not apply.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully submitted,



GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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STATE OF WASHINGTON

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IDENTITY

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY J. SUTHERBY,

Appellant.

No.: 34331-2-II

DECLARATION OF MAILING

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 10th day of October, 2006, I mailed a copy of Respondent's Brief to James E. Lobsenz and Carney B. Spellman; Attorneys at Law; 701 Fifth Avenue Suite 3600; Seattle, WA 98104-7010; and Randy J. Sutherby 888499; Airway Heights Corrections Center; P. O. Box 1899; Airway Heights, WA 99001-1899., by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Randi M. Toyra