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NO. 34331-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

RANDY JAMES SUTHERBY,

Respondent.

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON

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DIVISION II

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A. ARGUMENT IN REPLY

**I. FAILURE TO MOVE FOR A SEVERANCE
CONSTITUTED INEFFECTIVE ASSISTANCE.**

a. Proper Joinder Is Irrelevant

The State argues that since the counts were properly joined under CrR 4.3, this means that severance would be improper. *Brief of Respondent*, at 13-14. This is a complete nonsequitur. Appellant has never argued that the joinder of the ten counts was improper under CrR 4.3. But just because counts are properly joined initially, that does not mean that severance of some of those counts would be improper. “A motion to sever brought under CrR 4.4(b) focuses on potential prejudice to the defendant notwithstanding proper joinder.” *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989); *State v. Gataliski*, 40 Wn. App. 601, 606, 699 P.2d 804 (1985).¹

b. Since He Suggested One, There is a Very Good Chance That The Trial Judge Would Have Granted a Severance Had One been Requested.

The State says in its brief that “[c]ontrary to the assertion of the defendant in his brief, the trial court did not suggest that there was a

¹ The tests for joinder and for severance are entirely different. Joinder is proper where the charged crimes are of “same or similar character.” Severance is proper where the danger of unfair prejudice is not sufficiently alleviated by prejudice mitigating factors such as strong evidence of guilt, clarity of the defenses, limiting instructions on the use of one offense when deciding another, and the cross-admissibility of the offenses at severed trials.

necessity for severance of the counts.” *Brief of Respondent*, at 18 (italics added). This is a blatant misrepresentation of the appellant’s brief, and an attempt to misrepresent the Strickland standard. Sutherby never claimed that the trial judge said that a severance of the counts was *necessary*. This is what Sutherby actually said:

Moreover, in the present case, the Superior Court judge *himself* suggested the possibility of a severance at one point in the pretrial proceedings, so we know that the trial judge was receptive to the idea of a severance.

Brief of Appellant, at 26, citing to RP 6/6/05, at 153.

The State’s misrepresentation of Sutherby’s position is a subtle attempt to mislead this Court into thinking that (1) unless the trial judge thought that a severance was absolutely required (“necessary,” as the State put it), the trial judge would have denied it, and (2) therefore Sutherby cannot show that he was prejudiced by the failure to move for a severance.

But this reasoning fails in two respects. First, a trial judge has *discretion* to grant or deny a severance, and thus has the power to grant a severance even though he is not *required* to do so.

Second, in order to prevail on a claim of ineffective assistance of counsel a defendant does *not* have to show that the trial judge necessarily would have granted his severance motion. In fact, a defendant need *not* even demonstrate that it is more likely than not that the motion would

have been granted. Strickland v. Washington, 466 U.S. 668, 693 (1984); Woodford v. Visciotti, 537 U.S. 19, 22 (2002); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). He need only show that there is a reasonable probability that the judge would have granted the motion. Since the judge himself suggested the possibility of a severance, it is clear that there was such a reasonable probability in this case.

c. The Degree of Prejudice Was At Its Highest, and There Were No Prejudice Mitigating Factors.

Even if the trial judge had never made his suggestion, it is still quite likely that he would have granted a severance motion. Any trial judge would have recognized that the prejudice from joinder of child rape charges and child pornography charges was very high, since prior case law has explicitly recognized that the danger of prejudice “is at its highest” in cases involving sex offenses. State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1987). Accord State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (quoting with approval scholars who criticized courts that paid “scant attention to inherent possibilities of prejudice” in “sex cases, where prejudice has reached its loftiest peak”).

In evaluating a severance motion, a trial judge is directed to consider potential prejudice mitigating factors. But in this case, there were none.

(i) Strength of the Evidence of Guilt

Although the State stops short of claiming that the evidence of guilt on the child rape and molestation charges was “strong,” it claims that its evidence was “substantial.” Without citing to anything in the record the State claims that the medical examination evidence “showed physical injury to the child that was completely consistent with the description of the offense given by the child.” *Brief of Respondent*, at 15. Similarly, without citing to anything, the State asserts that “No one seriously contested the fact of the injury.” *Id.*

To begin with, the prosecution never says what “physical injury” it is talking about. Dr. Ahart testified that she did *not* see any signs of trauma anywhere, but she did see some “mild erythema” inside the labia:

I look on the outside *to see if there is any trauma* to the outside of the vaginal area. *There was no lacerations or redness, which we call erythema*, so if I refer to it, I'll try to refer to redness in that area.

I then proceeded to look inside the vaginal – inside the labia. On little girls, the large labia are more prominent than the small labia so – because they still have the estrogen effect, so therefore we don't see very much of the labia minora. So when I say the labia majora, what I mean is, the outer part and lips of the labia.

After identifying *there was no trauma there*, I therefore looked inside to see if there was any cuts or laceration, any discharge coming from that area, *which there was not*, but inside the labia which again are the large lips, *there was mild erythema inside there, which is redness*.

RP 11/1/05, at 98 (bold italics added).

If the prosecution means to refer to "mild erythema," or mild redness, as a "physical injury," that is stretching the term injury quite a bit.

Dr. Ahart testified as follows:

Q. And erythema, that is just redness; is that correct?

A. Right.

Q. What can cause erythema?

A. Any kind of irritation. Irritation from discharge. Irritation from rubbing. Irritation from urine that would be on the children that are not potty trained that are sitting there.

RP 11/1/05, at 103-104.

Dr. Ahart did also testify that she saw what she believed to be a larger than normal hymenal opening, and that caused her to have an impression of trauma to the hymen:

Q. Now, you wrote in your report that the hymen was gaping; what do you mean by that?

A. The opening that I could see through, that's what I meant by gaping.

Q. Was that larger than what you normally see?

A. For me it was, yes.

Q. So your impression was trauma to the hymen, correct?

A. Right.

RP 11/1/05, at 104. Moreover, Dr. Ahart testified that her “impression” did not constitute an “opinion”. RP 11/1/05, at 119.

Assuming that the prosecution meant to refer to this “impression” of trauma to the hymen when it stated that “no one seriously contested” the fact of “physical injury,” this is simply untrue. The State’s own witness, Laurie Davis, testified that she conducted a medical examination of the child with a colposcope, RP 11/2/05, at 138, and that she did *not* see anything about the child’s hymen which was abnormal. “Dr. Ahart’s exam, she said it was abnormal, and I didn’t agree.” RP 11/2/05, at 152. Davis testified: “I can’t call it an abnormal amount of hymenal tissue,” and that what she saw in her colposcopic exam “was essentially within normal limits.” RP 11/2/05, at 141.²

Far from confirming that she saw any signs of trauma, Davis went to some lengths to explain that even though she did *not* see any trauma, that did not mean that the child’s accusation was untrue:

Because people expect to see trauma when there is sexual abuse, or alleged sexual abuse, and its very rare that we actually have physical findings, and we need to stress that it’s normal to be normal after any type of sexual assault.

RP 11/2/05, at 144-45.

² Because she didn’t agree with Dr. Ahart, Davis showed the film of her colposcopic exam to other practitioners for their peer review, and they agreed with Davis, not with Ahart: “The peer review looked at the video I showed them and said, yes, this is a normal finding with a narrow hymen.” RP 11/2/05, at 155.

Davis concluded that her physical findings alone did *not* indicate sexual abuse. RP 11/2/05, at 157. She could only say that the physical examination, combined with the history given by the child herself, was “certainly concerning for possible sexual abuse.” RP 11/2/05, at 159. When the State’s own witness can only say that she is concerned about “possible sexual abuse,” that is a far cry from a strong evidence of guilt.

Moreover, the defendant’s expert, Dr. Adams, expressly agreed with the prosecution’s witness Laurie Davis, that a medical examination of the child revealed nothing abnormal: “Her conclusion was that the examination was normal, and I agree with that.” RP 11/3/05, at 259. She found nothing abnormal at all. RP 11/3/05, at 262, 268. As to the presence of any trauma, she was equally emphatic. “Q. Was there any trauma at all to Libby’s hymen? A. No.” RP 11/3/05, at 263. Dr. Adams concluded that there was no way to tell from the medical evidence whether child abuse took place in this case. RP 11/3/05, at 273.

Notwithstanding all this testimony, the prosecution informs this court that the medical evidence “showed physical injury” and that “no one seriously contested the fact of the injury.” *Brief of Respondent*, at 15. If this were true, one would have expected the trial prosecutor to have mentioned this medical evidence of physical injury in his closing argument. But he never

did.³

(ii) Independent Cross-Admissibility of the Child Pornography Evidence Under the Exception for Proof of Absence of Accident.

The prosecution argues that a severance would not have been granted because the Superior Court would have found that even if a severance had been granted, at the trial of the child rape and molestation charges evidence of the possession of child pornography would have been independently admissible under ER 404(b) to show the absence of mistake and intent to obtain sexual gratification. This argument also fails for several reasons.

First of all, there is no intent element to Child Rape 1. It is a strict liability offense. State v. Chhom, 128 Wn.2d 739, 742-43, 911 P.2d 1014 (1996). Therefore, as to that offense the whole question of intent and absence of mistake is completely irrelevant.

³ But in fact, the prosecutor never mentioned the medical evidence at all in his opening argument. See RP 11/3/05, 397-410. Instead, it was defense counsel who first mentioned the medical evidence. RP 11/3/05, at 415. Indeed, defense counsel noted in closing the *absence* of any compelling medical evidence:

When you boil it all down with regard to counts I and II, the child rape and the child molestation charges, what do you really have? We 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, at 417.

In rebuttal, the prosecutor still did not contend that he did have medical evidence that proved there was sexual abuse, but confined himself instead to attacking the integrity of the defense expert by labeling her "an expert from California up here for over three grand, put on someone that has a whole bunch or all sorts of fancy credentials, a person that supplements her income." RP 11/3/05, at 431. The prosecutor simply ignored the fact that the defense expert and his own witness (Davis) were in agreement.

Second, while there is an intent element to Child Molestation 1 (intent to achieve "sexual gratification"), it is extremely unlikely that the trial judge would have concluded that the possession of photos of children engaged in sexual activity would be relevant and admissible under ER 404(b) to show the defendant's intent when he picked up his granddaughter and moved her while she was sleeping. The prosecution would have had to convince the judge that the defendant's lustful disposition towards one person in a photograph is probative on the issue of whether the defendant was acting intentionally or accidentally when he touched a different person. To begin with, that proposition is simply not logical. By way of illustration, consider the man who is in possession of several Playboy and Penthouse magazines. The same man is charged with indecent liberties for touching an adult woman's breast. The man's defense to the indecent liberties charge is, "It was an accident. I didn't mean to touch her breast, I meant to put my hand on her shoulder but I slipped and my hand accidentally touched her breast." Suppose the prosecutor then argued to the trial judge that the State should be allowed to introduce evidence that the man was in possession of Playboy and Penthouse magazines, because *his intentional possession of magazines* containing lots of photos of naked woman tended to show that *his touching* of the adult woman's breast was not an accident, but was an

intentional act. No judge would accept this reasoning because the act of intentionally possessing photos of nude strangers is *not* probative of whether the touching the intimate parts of a known person was intentional or accidental.

Similarly, the fact that there was evidence indicating that Mr. Sutherby had intentionally sought out a website to *look* at photographs of naked children, whose identities are not known, does not shed any light on whether Mr. Sutherby accidentally put his hand on his granddaughter's private part when he moved her while she was sleeping. Simply put, intentionally looking at naked person A says nothing about whether one intentionally or accidentally touched person B.

Third, even if the prosecution could persuade a trial judge that the child pornography evidence was minimally probative on the issue of whether the defendant's touching of his granddaughter was intentional or accidental, the trial court would nevertheless be bound by the case law to refuse to admit the child pornography evidence under this theory, because it is forbidden by the appellate court decisions in State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983); State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991); and State v. Medcalf, 56 Wn. App. 817, 795 P.2d 158 (1990). These cases explicitly hold that unless the proffered ER 404(b) evidence in question shows a lustful disposition towards the *particular*

allegedly “offended female” who is the subject of the charged offense, then it is *not* admissible.

The prosecution makes no direct response to appellant Sutherby’s citation to Ferguson and its progeny. Instead, the prosecution cites to the case of State v. Bouchard, 31 Wn. App. 381, 639 P.2d 761 (1982), and argues that there the appellate court affirmed a trial court decision to allow the prosecution to use evidence of the defendant’s uncharged prior sexual activity with his son to show that the charged acts allegedly committed against his granddaughter were not accidental. If Bouchard were still good law, it would lend some support to the prosecution’s argument. But the prosecution glosses over the fact that Bouchard was decided *before* Ferguson, long before Ray, and long before Medcalf. Bouchard is no longer good law, precisely because Ferguson adopted the rule that the uncharged act must show a lustful disposition towards the specific person alleged to be the victim of the charged offense.⁴

Fourth, the extreme weakness of the prosecution’s argument about admissibility to show absence of mistake is demonstrated by what the

⁴ Even if it were still good law, which it isn’t, Bouchard is easily distinguishable. There the defendant’s prior uncharged acts were masturbating and engaging in anal intercourse with his son, *not* acts of simply viewing sexual photographs of anonymous children.

The State also offers a “see also” cite to State v. Womac, 130 Wn. App. 450, 123 P.2d 528 (2005), where prior bad acts committed against one child were admitted to negate a claim of accident with respect to an alleged assault on a different child. But Womac did not involve a sex crime, and thus the admission of such uncharged bad act evidence in

prosecution actually did argue in this case. The child rape and child pornography charges were never severed. Since they were tried together, nothing prevented the prosecutor from making the argument that the defendant's possession of child pornography tended to prove the falsity of his speculation that there might have been an accidental touching of his granddaughter. Yet the prosecution never made any such argument! Review of the prosecutor's closing argument shows that he explicitly argued that possession of the child pornography proved that Sutherby had a criminal *propensity* to sexually molest children: "We know he is predisposed to touching children in a sexual manner . . . The pornography proves it." RP 11/3/05, at 398. But he *never* argued that possession of child pornography proved the absence of an accidental touching. The prosecutor's own failure to even make this argument, when he could have, demonstrates the weakness of the contention that evidence of the possession of child pornography would be independently admissible at the severed trial on the rape and molestation charges to prove the absence of an accidental touching.

(iii) Absence of Any Limiting Instructions Regarding Permitted Use of the Evidence

There was no limiting instruction given in this case as to what *use*

that case did not trigger the "lustful disposition towards the offended" person requirement of the Ferguson rule, which applies in all sex cases.

the jury could make of the child pornography evidence when deciding the child molestation charges.⁵ They were *never* instructed that they could *only* consider this evidence for the purpose of deciding what verdict to return on the child molestation count. Nor were they ever instructed that when deciding the child molestation count, they could only consider the child pornography evidence insofar as it shed light on the speculation that there might have been an accidental touching. They were never instructed that they were *not* permitted to consider the child pornography evidence as proof of a criminal propensity to sexually molest children. Moreover, in closing argument the prosecutor explicitly urged the jury to use the evidence of possession of child pornography as evidence of the fact that the defendant was “predisposed to touching children in a sexual manner.” RP 11/3/05, at 398.

d. Ineffective Assistance

The prosecution speculates that trial counsel must have had a strategic reason for failing to move for a continuance. This speculation is based on absolutely nothing, and is internally illogical and inconsistent.

The State theorizes that defense counsel must have realized that if he moved for a severance and the motion was *granted*, then he would have

⁵ They *were* instructed that the verdict on one count did not *control* their verdict on any other count. But they were never instructed that they could not use *evidence* of guilt on one count as support for a conclusion of guilt on another count.

found himself facing the same evidence of possession of child pornography at the *rebuttal stage* of the trial of the child rape and molestation charges. *Brief of Respondent*, at p. 18. This theory is based upon the assumption that the trial judge would have done two totally inconsistent things: (1) grant a severance, and yet (b) allow the child pornography evidence in as rebuttal evidence to rebut the speculation of a possible accidental touching. But if the trial court had *granted* a severance, it would only be *after* concluding that the prejudice mitigating factor of cross-admissibility of the pornography evidence was *not* present. Thus a ruling granting a severance would have been predicated upon the determination that the possession of child pornography did *not* rebut a claim of accidental touching. Therefore, the evidence of possession of child pornography would never have been allowed as rebuttal evidence.

In sum, there was no risk at all in moving for a severance. If the motion was granted, then the child pornography evidence would be excluded from the trial of the rape and molestation charges, and the defendant's chances of winning an acquittal on those charges would have been hugely increased. If the motion had been denied, the defendant would not be in any worse position than he was already in. There was no conceivable strategic reason not to move for a severance. The failure to do so was both deficient conduct and highly prejudicial.

2. **ADMISSION OF THE MOTHER'S OPINION THAT HER DAUGHTER WAS NOT LYING CONSTITUTES AN OPINION THAT SHE WAS TELLING THE TRUTH, AND THAT THE DEFENDANT IS THEREFORE GUILTY.**

The State *admits* that the mother testified that there are "Certain things that she sees when she knows the child is not telling the truth," and that the mother testified "that she did not see these gestures when the child disclosed to her what had happened with the defendant." *Brief of Respondent*, at 21. Despite these admissions the State claims that the mother's testimony was "not an expression concerning the truthfulness of her daughter." *Id.* Thus the State takes the position that a mother who testifies that she knows that her daughter "was not lying" is *not* giving an opinion that her daughter was telling the truth. This makes no sense.

The State makes no meaningful attempt to distinguish the cases cited by appellant Sutherby, 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.") Despite the fact that the issue was "not properly preserved for appeal" with the making of an objection, the Court reversed the conviction.⁶

⁶ The State points out that the witness in Alexander who gave the impermissible opinion was an "expert" whereas the mother in this case was not an "expert." Even assuming that it is accurate to say that the mother should *not* be viewed as an "expert" when it comes to the veracity of her own daughter, this is a meaningless distinction. The rule that forbids one witness from giving an opinion as to the veracity of another is not restricted to expert

Accordingly, there was manifest constitutional error in this case, and the conviction must be reversed unless the prosecution can demonstrate that there was so much overwhelming untainted evidence of guilt that this court can confidently say that the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The State has not even attempted to argue that it can meet that burden in this case. Nor could it. Here, as in State v. Kirkman, 126 Wn. App. 97, 107, 107 P.3d 133 (2005), “there is no evidence other than the statements of [the child]. At best, the evidence is that [the child] repeated the same factual recitation to” several other people. This is not a case where there is medical evidence that demonstrates that there was sexual abuse; at most it is a case where there was some mild erythema (redness). “Because there was not overwhelming untainted evidence of” the defendant’s guilt, here as in Kirkman “the error is not harmless,” and the convictions must be reversed. Id.

**3. THE FAILURE TO OBJECT TO THE MOTHER’S
OPINION TESTIMONY CONSTITUTED
INEFFECTIVE ASSISTANCE, AND WAS NOT THE
PRODUCT OF TRIAL STRATEGY.**

witnesses, it applies to *all* witnesses: “*No witness, lay or expert*, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (bold italics added); State v. Carlson, 80 Wn.App. 116, 123, 906 P.2d 999 (1995) (“*[N]o witness* may give an opinion on another’s witness’ credibility”) (bold italics added).

The State claims that the failure of Sutherby's attorney to object to the mother's opinion testimony "was a matter of trial strategy." *Brief of Respondent*, at 23. According to the State, this supposed defense attorney strategy was based on the fact that "[t]he defendant did not deny the injury or the touching." *Id.*

The problem with this conjecture is that the defendant unequivocally *did* deny the touching:

Q. Did you poke Libby with your index finger or any other finger?

A. No, of course not.

Q. Did you insert your finger or anything else into her vagina?

A. Absolutely not. I didn't do that.

RP 11/3/05, at 334. Thus, the prosecution's hypothesized "strategic" reason for not objecting to the mother's testimony rests upon a completely false premise. There was no reason not to object. The failure to do so was grossly deficient conduct, and resulted in extreme prejudice.

4. ONLY ONE COUNT OF POSSESSION OF CHILD PORNOGRAPHY SHOULD HAVE BEEN CHARGED.

a. **The Prosecution's Public Policy Argument As To Why the Crime of Sexual Exploitation Ought to be More Broadly Defined Is Irrelevant Since That Crime Was Never Charged In This Case.**

Despite the fact that the crime of Sexual Exploitation of a Minor was never even charged in this case, the prosecution conflates this crime with a different offense (possession of depictions) and makes an irrelevant public policy argument for a broader definition of the crime of sexual exploitation. The State argues that it would be a good idea the unit of prosecution for the crime of possession, RCW 9.68A.070, was “each” photograph possessed, because this would advance the public policy of preventing the sexual exploitation of children, RCW 9.68A.040. But they are two *different* crimes, a fact the prosecution simply ignores.

At one point the prosecution states, “The crime is defined as ‘sexual exploitation of a child.’” *Brief of Respondent*, at 26. It is true that sexual exploitation of a child is a crime. But it is *not* the crime that Sutherby was charged or convicted of.

RCW 9.68A.040, which is entitled “Sexual Exploitation of a Minor,” is defined as the act of “compel[ling]”, forc[ing]”, employ[ing]”, or caus[ing]” a minor to engage in sexually explicit conduct. The crime of “Possession of Depictions of a Minor,” is defined as knowingly possessing depictions of minors engaged in sexually explicit conduct. Inexplicably, in its brief the State equates the two crimes, stating that “[p]ossession of depictions of a minor engaged in sexually explicit

conduct is sexual exploitation.” *Brief of Respondent*, at 26. If that were really true, then the statute criminalizing possession of depictions would serve no purpose because possession of photos would already be covered as a form of the crime of sexual exploitation. But the two crimes are not the same, because the mere act of “possessing” such photos does not “compel,” “force,” or “cause” a child to engage in sexually explicit conduct.

It seems that what the State is really arguing is that a person who knowingly possesses photos of children engaged in sexually explicit conduct thereby creates a market demand for the product which other people produce and supply. Since those other people, the producers, do commit the crime of sexual exploitation, the prosecution is making the public policy argument that the crime of sexual exploitation of a minor ought to be *amended* to include the act of encouraging others to produce child pornography through the act of acquiring possession of their product.

This public policy argument is doubly irrelevant to this case. First, it’s an argument that the crime defined by RCW 9.68A.040 ought to be expanded. But since this case doesn’t involve that statute, the argument is irrelevant. Second, the Legislature is free to so amend the sexual exploitation statute if it is persuaded by the prosecution’s argument. But “legislative bodies, not courts, hold the power to make public policy

determinations.” Anderson v. King County, ___ Wn.2d ___, 138 P.3d 963, 984 (2006). Accord Skagit Surveyors v. Friends of Skagit County, 135 Wn.2d 542, 567, 958 P.2d 962 (1998); Leavitt v. Jefferson County, 74 Wn. App. 668, 675, 875 P.2d 681 (1994). Therefore, the State’s public policy argument simply has no relevance to the issue of how the courts should construe the separate statute, RCW 9.68A.070, which makes it a crime to simply *possess* “visual matter” that depicts minors engaged in explicit sexual activity.

b. The State Ignores The Holding of *Westling* and the Use of the Word “Any”.

Sutherby was convicted of ten counts of “Possession of Depictions of Minors.” That statute makes it a crime to knowingly possess “visual or printed matter” that depicts a minor engaged in sexually explicit conduct. The word photograph does not appear in the statute defining the crime. RCW 9.68A.070. It does appear, however, in the separate definitional statute, RCW 9.68A.011(1), which defines the term “visual or printed matter” as meaning “any photograph”. While the prosecution focuses on the word “photograph,” it completely ignores the quantifier “any” which the Legislature put in front of it. If RCW 9.68A.011(1) had used the word “every” or the word “each” in front of the word “photograph,” then the prosecution would have a better argument that the Legislature intended

possession of “each” photograph to constitute a separate crime of possession of “visual matter.” Instead, the Legislature used the quantifier “any,” a fact the prosecution studiously ignores.

State and federal courts have consistently held that the use of the word “any” is very significant. As Sutherby noted in his opening brief, State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002) holds that the use of the word “any” as a quantifier preceding a noun signifies that the Legislature is indifferent to the quantity in question. There could only be one count of arson in Westling, even though multiple automobiles were damaged by the act of causing a fire or an explosion.

Federal courts have consistently taken a similar view of the word “any,” holding that since the word does not clearly signal an intent to make it a separate crime for each subject noun modified by the word, under the rule of lenity only one count can be charged. See, e.g., Bell v. United States, 349 U.S. 81 (1955) (prohibition against transporting “any woman” means it is one crime only, no matter how many women are transported). This statutory construction principle has been applied to the use of the word “any” in all kinds of criminal statutes, including pornography statutes.

For example, in United States v. Reedy, 304 F.3d 358 (5th Cir. 2002) the defendant was charged and convicted of 43 counts of

transportation of materials that sexually exploit minors in violation of 18 U.S.C. § 2252. The defendant operated ten different websites at which consumers could purchase access to child pornography. Since each website transported child porn to consumers, the defendants argued that there should only have been ten counts. The government argued that it was proper to file as many counts as there were photographic images appearing on all of the websites. The statutory language made it a crime to knowingly transport or ship in interstate commerce “*any* visual depiction.” The Court noted “the problem posed by the use of the word ‘any’” and held that because it was not clear what the Legislature meant by use of that word, the “rule is that the ‘unit of prosecution’ for [such] a crime is the actus reus, the physical conduct of the defendant.” *Id.* at 365.

Since the Reedy defendants chose to transport child pornography through separate websites, each website constituted a separate act of transport. The Court held that they could be charged with a separate count for each website, but that they could not be charged with a separate count for each photo on each website. In setting aside the defendants’ 43 convictions and remanding for resentencing, the Reedy court expressly relied on the Supreme Court’s decision in Bell:

The Supreme Court provided the answer almost fifty years ago when faced with this interpretive dilemma. In Bell v. United States, 349 U.S. 81, 82, 75 S.Ct. 620, 99 L.Ed. 905

(1955), the Court considered whether the Mann Act's prohibition against knowingly transporting "any woman or girl" in interstate commerce for an immoral purpose supported two counts for transporting two women at the same time in the same vehicle. The Court reached the same impasse that we have reached today. Because "argumentative skill" "could persuasively and not unreasonably reach" either interpretation, the Court ruled that the ambiguity should be resolved in favor lenity," and the government should charge only one count. [Citation & Footnote omitted]. We reach the same conclusion here and decide that the district court erred by permitting the prosecution to group the counts by individual image rather than by website.

Reedy, 304 F.3d at 367-68.⁷

The one-count-per-photograph approach was *rejected* in State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000), a case which did not involve the possession statute, but was instead a prosecution for sexual exploitation under RCW 9.68A.040. The State argues that the one-count-per-photograph approach is nevertheless appropriate in this case, even though the actus reus of possession is a continuing offense, and even though courts have consistently rejected a one count per item possessed approach in cases involving other statutes criminalizing possession. See, e.g., State

⁷ There are dozens of cases which reach similar conclusions based upon the use of the word "any." "Significantly, in many of the cases in which the courts have found a Bell type ambiguity, the object of the offense has been prefaced by the word 'any'." United States v. Kinsley, 518 F.2d 665, 667 (8th Cir. 1975) (holding that only one count of unlawful possession of firearms no matter how many firearms were possessed). Accord United States v. Verrecchia, 196 F.3d 294 (1st Cir. 1999) (only one count of felon in possession of firearms no matter how many firearms); United States v. Coiro, 922 F.2d 1008, 1014-1015 (2nd Cir. 1991) (only one count of obstruction of justice no matter how many sources of witnesses were tampered with).

v. McReynolds, 117 Wn.App. 309, 71 P.3d 663 (2003) (only one continuing offense, and thus only one count could be charged, no matter how many separate items of stolen property defendant possessed). See also State v. Leyda, 157 Wn.2d 335 (2006) (in prosecution for identity theft, even though defendant used credit card four different times on three different dates, his “single course of conduct should not have been divided into multiple offenses by the State and . . . doing so violated double jeopardy principles.”)

5. THE JUDGE’S FACTUAL DETERMINATION OF WHETHER A DIFFERENT CHILD WAS PICTURED IN EACH PHOTO VIOLATED BLAKELY.

The prosecution simply refuses to acknowledge the clear application of the Sixth Amendment principle of Blakely v. Washington, 542 U.S. 296 (2004) to this case. Blakely holds that the maximum sentence that may be imposed without violating the Sixth Amendment “is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.” Id. at 303.

Under the “unit of prosecution” ruling made by the sentencing court, absent a determination that each count was based on a photo of a different child, the defendant could only be convicted and punished for one count. In this case the jury did not determine whether a different child was depicted in each of the possession of depictions counts, and the

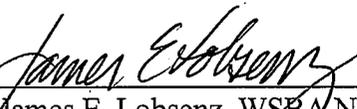
defendant never admitted that a different child was depicted in each count. Therefore, even assuming *arguendo* that the Superior Court's definition of the proper unit of prosecution was correct, the inflated sentence based on assigning offender score points to multiple counts of possession of child pornography violated the rule of Blakely.

B. CONCLUSION

For the reasons set forth above in sections A(1) through A(3), appellant asks this Court to reverse his convictions for child rape and child molestation, and to remand for a new trial on those counts. As to Counts III through X, appellant asks this Court to remand them for resentencing with directions that they be reduced to one count.

DATED this 7th day of December, 2006.

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NO. 34331-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY J. SUTHERBY,

Appellant.

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BY _____
DEPUTY

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On December 8, 2006, I caused to be served one copy of the following documents on:

Mr. Gerald R. Fuller
Office of the Grays Harbor County Prosecuting Attorney
102 W. Broadway, Room 102
Montesano, WA 98563-3621
(Via US Mail, postage prepaid)

And To:

-1-
ORIGINAL

Randy Sutherby
c/o Debra Sutherby
2591 Wynooche Valley Road
Montesano WA 98563
(Via US Mail, postage prepaid)

Entitled exactly:

REPLY BRIEF OF APPELLANT

DATED: December 8, 2006.



Lily T. Laemmle