REL: December 16, 2020

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-0790

William Howard Wesson

v.

State of Alabama

Appeal from Lauderdale Circuit Court
(CC-17-312)

MINOR, Judge.

A jury convicted William Howard Wesson of 55 counts of possession of obscene material, see § 13A-12-192(b), Ala. Code 1975, and one count of possession of obscene material with intent to disseminate, see § 13A-12-192(a), Ala. Code 1975. For each possession-of-obscene-material

conviction the circuit court sentenced Wesson to 4 years in prison, and for the possession-with-intent-to-disseminate conviction the circuit court sentenced Wesson to 10 years in prison.[1] The circuit court ordered that Wesson's sentences be served consecutively.

Wesson raises six issues on appeal: (1) Whether the circuit court should have suppressed records from AT&T that law-enforcement officers obtained using a Customs summons[2] issued to AT&T under 18 U.S.C. § 2703 and 19 U.S.C. § 1509; (2) whether the circuit court should have granted a mistrial when the lead investigator became emotional while testifying about the contents of the child-pornography videos he found on Wesson's electronic devices; (3) whether the circuit court should have excluded from evidence the lead investigator's written summaries of the contents of the child-pornography videos found on Wesson's devices; (4) whether the State proved by sufficient evidence that Wesson knowingly

[1]The jury acquitted Wesson of 22 counts of possession of obscene material and 77 counts of production of obscene material.

[2]A "Custom Summons" is a summons issued by the United States Custom Service to insure compliance with the laws of the United States. 19 U.S.C. § 1509(a).

possessed child pornography under § 13A-12-192(b), Ala. Code 1975; (5) whether the State proved by sufficient evidence that Wesson possessed child pornography with the intent to disseminate it under § 13A-12-192(a), Ala. Code 1975; and (6) whether Wesson's sentences violate the prohibition against cruel and unusual punishment in the Eighth Amendment the United States Constitution.[3] We hold there is no merit to the first five issues Wesson raises, but, because the circuit court did not suspend or split Wesson's sentences for possession of obscene material under § 15-18-8(b), Ala. Code 1975, we must remand this case for the circuit court to resentence Wesson, rendering moot issue (6) above.[4]

Facts and Procedural History

In early January 2016 Homeland Security Special Agent Robert Fisher, a member of the United States Department of Justice's Internet Crimes Against Children ("ICAC") unit, was using ICAC's "Grid Cop"

[3]The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[4]We address the issues on appeal in a different order than Wesson discusses them in his brief.

software to see if any Internet Protocol ("IP") addresses in Alabama were sharing or making available for sharing child pornography over the Internet. Grid Cop is a Web-based law-enforcement software program that looks for and identifies IP addresses that are making available to share "child-notable" files. Agent Fisher explained that child-notable files are images or videos that law-enforcement officers have identified and tagged as containing child pornography.

Using Grid Cop, Agent Fisher identified an IP address that possessed, in a "peer-to-peer" file-sharing folder, large amounts of child-notable videos. Agent Fisher did not know whom the IP address belonged to, so he sent a Custom Summons to AT&T, the provider of the IP address, asking it to identify the subscriber and the physical location of the IP address. AT&T provided records showing the IP address belonged to Wesson at his home address in Florence, Alabama. Agent Fisher contacted the Florence Police Department, and Detective Drew Harless obtained a search warrant for Wesson's house based on the information from Agent Fisher.

Agent Fisher and Det. Harless, among others, executed the search warrant at Wesson's house. During the search Agent Fisher looked at one of the computers in Wesson's house and found child pornography on the computer. He testified that it took him only "[a] couple of minutes" to get onto Wesson's computer and to find child-pornography videos. "It was pretty easy." (R. 396.) Law-enforcement officers seized several devices from Wesson's house.

While law-enforcement officers were searching Wesson's house, Det. Harless heard Wesson tell his wife that he had accidentally downloaded one video containing child pornography. (R. 721.) Det. Harless spoke with Wesson, and Wesson agreed to go with Det. Harless to be interviewed at the police station. The video recording of Wesson's interview was played for the jury.

Wesson told Det. Harless during the interview that when he first got Internet on his computer years ago he began searching for adult pornography. He said he accidently saw some child pornography and it "started to turn my stomach." (R. 649.) At some point he began using a peer-to-peer file-sharing program to search for and download adult

pornography over the Internet. The file-sharing program does not allow users to view videos before downloading them, so Wesson said he downloaded videos in bulk using the file-sharing program and looked through the videos later when he had time. (R 644.)

Wesson told Det. Harless that he discovered some child-pornography videos mixed in with the adult pornography he downloaded, so he contacted Tony Logan, who was then the Deputy Chief of the City of Florence Police Department,[5] and showed Dep. Logan how easily child-pornography videos could "show up" on a computer without anyone searching for it. Wesson asked how he could help, and Dep. Logan told him he did not have the manpower or resources to investigate but he suggested Wesson keep track of the child pornography he found:

> "Here's what I would suggest you do. Don't send me anything. Don't send anybody anything. If you see something like that, you delete it, but before you do you write down the address, the web address of it ... and just keep a list of it."

[5]By the time of trial Logan was the police chief for the City of Tuscumbia.

(R. 649-50.) Some time later Wesson told a friend, who worked with the Federal Bureau of Investigation ("the FBI"), about accidently discovering child pornography in his downloaded videos. Wesson said his friend told him not to send the child pornography to anyone and to delete it when he saw it but to first note the Internet addresses.

Wesson told Det. Harless that for nearly 10 years he kept a log of any child pornography he found in the videos he downloaded using the file-sharing program. He said that from time to time he called Dep. Logan to tell him what he found, but eventually Dep. Logan told him he did not know what Wesson should do with the log because the police department referred those things to the FBI. (R. 650-51.) Wesson said he never provided Dep. Logan with the log of the child pornography he found in his downloads because every time he asked Dep. Logan if he wanted the list, Wesson said, Dep. Logan told him, "just hang on to it." (R. 664.) Wesson said eventually he threw the logs away.

Although the file-sharing program allows users to see the titles of videos before downloading them, Wesson said he could not see the videos' full titles before he downloaded them. Wesson said that, if he clicked on

a video after he downloaded it and saw it contained "bad stuff," he deleted the video. (R. 677.) He said, though, that sometimes he kept the child-pornography videos for "a month or so" to see if anyone would contact him. (R. 656.)

Wesson tried to explain to Det. Harless in the interview why there was child pornography on his computers when law-enforcement officers executed the search warrant at his house.

> "[T]here's several hundred that I haven't even gone through yet ... I mean, yeah, I may have had some porn of children on my computer, but I haven't looked at them yet. I have not intentionally looked at anything that—having to do with children."

(R. 654.) He said he did not intentionally download child pornography but he looked for it in the files he downloaded to see if it was there. (R. 667.)

Later in the interview, though, Wesson said he <u>was</u> intentionally looking for child pornography but only because, he said, he wanted to document it and report it to law-enforcement authorities.

> "Q. My question about that though is if you're intentionally looking for child porn so you can document it and we can eradicate it, why not just go search for child—why search—why are you looking for it in hidden 'vintage' spots or hidden whatever when I would—I don't know because I've

> never intentionally gone and searched, but I would assume that it's possible to go in and search for child porn, like maybe type in 'child porn' or type in whatever specifically that you're looking for.
>
> "A. It is not always on the internet that way.
>
> "Q. But is it on the internet that way sometimes?
>
> "A. Oh, yeah. You can type in 'child porn,' but a million different flags would go off; right?
>
> "....
>
> "Q. Why do you care if a flag would go off?
>
> "A. Because it's not my intention to find it really. I'm looking for it, but it's like looking for a virus on the internet. All right. I hope I don't find it, but it's out there. I know it is so they hide it."

(R. 671-72.) Although Wesson claimed that he did not save or intentionally keep any of the child-pornography videos, he admitted that he sought out child pornography on the Internet. "[T]he purpose is, I was trying to find it to give to you guys." (R. 679.)

Investigator Ken Rager did a forensic evaluation of the electronic devices seized from Wesson's home. He testified that he found 55 child-

pornography videos in several folders across 5 of Wesson's devices.[6] Rager also found large amounts of adult pornography on Wesson's devices. Wesson did not find any programs or viruses on Wesson's devices capable of maliciously downloading child-pornography videos to Wesson's computer. (R. 585.)

Inv. Rager searched Wesson's file-sharing program for the program's search-terms history. Inv. Rager testified none of the terms in the program's search history are terms typically associated with child pornography. He said, though, that there are chunks of time for which Wesson's file-sharing program has no record of any search terms being used, even though some of the videos found on Wesson's computers are dated within the timeframe for which the file-sharing program shows no search history. Inv. Rager testified he believes Wesson turned off the

[6]A later search revealed 22 more videos in the "unallocated space" of Wesson's computers. Unallocated space is "space on a hard drive that contains deleted data, usually emptied from the operating system's trash or recycle bin folder, that cannot be seen or accessed by the user without the use of forensic software." United States v. Pruitt, 638 F.3d 763 n.2 (11th Cir. 2011). Law-enforcement officers charged Wesson with possession of child pornography for those 22 videos but the jury found him not guilty on those counts.

search-terms feature but continued to search for videos during that timeframe. (R. 593.)

Wesson testified in his own defense at trial. He testified that he is 100 percent disabled from a groin injury he sustained in a parachuting accident in the military in the mid-1970s. He was diagnosed with erectile dysfunction, and, after consulting with a doctor, he began looking at pornographic magazines to help "stimulate" him. (R. 809.) When Wesson had the Internet installed in his house in the early 2000s, he discovered adult pornography on the Internet. Later an employee installed the file-sharing program for him, and he began searching for and downloading adult pornography using the file-sharing program. (R. 809.) Wesson said he "very seldom" saw the titles of the videos before he downloaded them, because, he said, he minimized the titles' "column" width in the file-sharing program's viewing pane so he could view other information about the videos. (R. 812-13.)

Wesson said he first noticed child pornography mixed in with adult pornography in the early 2000s. He called Dep. Logan and showed him what he found. Based on Dep. Logan's advice, Wesson said, he reviewed

every video he downloaded and, if a video contained child pornography, he wrote down the data about the video and deleted the video. Wesson said he mentioned the data to Dep. Logan several times but, because Dep. Logan never indicated he wanted it, Wesson eventually destroyed the log.

Wesson denied intentionally looking for child pornography, and he said any child pornography he downloaded was by accident. (R. 822; R. 859.) He said his statement to Det. Harless that he intentionally downloaded child pornography was a "misstatement." (R. 850.)

Dep. Logan testified Wesson approached him in the early 2000s about finding child pornography on the Internet. Dep. Logan said he told Wesson that, if he ran across child pornography on the Internet, not to download it but to write down the sites where he found it and provide that list to law-enforcement authorities. Dep. Logan said he did not remember Wesson ever speaking with him about child pornography after that conversation.

Brandon Manzo testified for the defense as a digital-forensics expert. Manzo testified he examined Wesson's devices and found 14 viruses in the operating system of Wesson's computer, including 2 "Trojan" viruses. He

said it "isn't unheard of" for someone to use a Trojan virus to place child pornography on someone else's computer to store child pornography. (R. 913; R. 922.) Manzo testified Wesson had "thousands" of adult-pornography videos on his computer, and he said the child-pornography videos represented less than 0.1% of the pornographic videos on Wesson's computer. (R. 940.)

After his conviction, Wesson filed a motion for a new trial raising all the issues he now raises on appeal. The circuit court denied that motion.

I.

Wesson argues the circuit court should have suppressed the subscriber and IP-address records Agent Fisher received from AT&T because, he says, Agent Fisher violated 18 U.S.C. § 2703. Wesson says that, because Agent Fisher did not obtain a court order for the records under 18 U.S.C. § 2703(d)—which requires, among other things, that court orders issued under subsections (b) or (c) of that statute be issued only if the requesting party offers "specific and articulable facts showing that there are reasonable grounds" to believe the records are "relevant and

material to an ongoing criminal investigation—the circuit court should have suppressed the records.

"In reviewing a decision of a trial court on a motion to suppress evidence, in a case in which the facts are not in dispute, we apply a de novo standard of review." State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999). Because Wesson does not dispute the facts of how Agent Fisher obtained the AT&T records but takes issue only with whether that method is legal, we review de novo the circuit court's denial of Wesson's motion to suppress the records.

Agent Fisher testified he is with the Immigration and Customs Enforcement division of the Department of Homeland Security and that, when he identified an IP address in January 2016 that was making available for sharing files containing child pornography, he sent a Customs summons to AT&T under 19 U.S.C. § 1509 to obtain the records for that IP address. The summons requested AT&T to produce records for that IP address "pursuant to 18 U.S.C. 2703(c)(2)." (C. 511-12.)

As is relevant here, 18 U.S.C. § 2703(c) provides:

"(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

"....

"(B) obtains a court order for such disclosure under subsection (d) of this section;

"...; or

"(E) seeks information under paragraph (2).

"(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

"(A) name;

"(B) address;

"(C) local and long distance telephone connection records, or records of session times and durations;

"(D) length of service (including start date) and types of service utilized;

"(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

"(F) means and source of payment for such service (including any credit card or bank account number),

> "of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1)."

(Emphasis added.) So if a governmental entity seeks information under § 2703(c) through a court order, then, as Wesson points out, that court order must comply with the requirements of 18 U.S.C. § 2703(d).

But not all requests for information under § 2703(c) require court orders. If, as here, a governmental entity seeks only the type of information described in § 2703(c)(2), then the governmental entity may obtain that information by "an administrative subpoena authorized by a Federal or State statute." § 2703(c)(2).

Agent Fisher issued the summons under the authority of 19 U.S.C. § 1509. Subsection (a) of that section gives the United States Customs Service[7] the authority to issue, in "any investigation or inquiry conducted ... for insuring compliance with the laws of the United States administered

[7]The Homeland Security Act of 2002 transferred the functions and duties of the U.S. Customs Service from the Department of the Treasury to the Department of Homeland Security.

by the United States Customs Service," a summons to "any ... person he may deem proper" to produce records. Section 1509(a), then, is a federal statute authorizing the use of an administrative subpoena to obtain records under § 2703(c)(2).

Agent Fisher issued a Customs summons under 19 U.S.C. § 1509 to obtain from AT&T the type of information described in § 2703(c)(2). Because he did not use—nor was he required to use—a court order to obtain that information, the requirements for court orders in § 2703(d) did not apply, and the circuit court did not err in denying Wesson's motion to suppress the AT&T records.

II.

Wesson argues the circuit court should have granted a mistrial when Det. Harless became "overly emotional" while testifying about the contents of the child-pornography videos found on Wesson's electronic devices. Wesson says he was "inherently prejudiced" by Det. Harless's emotional response, and that, in not granting a mistrial, the circuit court denied Wesson a "constitutionally mandated fair trial." (Wesson's brief, pp. 76-77.)

Wesson did not move for a mistrial as soon as Det. Harless became emotional while testifying. " 'To be timely, a motion for a mistrial must be made "immediately after the question or questions are asked that are the grounds made the basis of the motion for the mistrial." ' " Jones v. State, 895 So. 2d 376, 378–79 (Ala. Crim. App. 2004) (quoting Powell v. State, 631 So. 2d 289, 293 n. 2 (Ala. Crim. App. 1993), quoting in turn Ex parte Marek, 556 So. 2d 375, 379 (Ala. 1989)). Because Wesson should have, but did not, move for a mistrial as soon as "the grounds made the basis of the motion for the mistrial" happened—that is, as soon as Det. Harless became emotional—his motion for a mistrial came too late to preserve the issue for our review.

Even if Wesson had preserved this issue, though, it would have no merit.

Whether to grant a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of abuse this Court will not disturb the trial court's ruling on a motion for a mistrial. Pressley v. State, 770 So. 2d 115, 141 (Ala. Crim. App. 1999).

Det. Harless testified that, although he had been with the police

department for over 15 years, this was the first case he investigated involving child pornography. As part of his investigation Det. Harless watched the videos found on Wesson's devices to verify the videos contained child pornography. Det. Harless said he prepared a written summary of each video, with the video's title, length, and a description of what the video showed. The prosecutor asked Det. Harless to describe the first video, and, as Det. Harless read a description of the video from his summary, he stopped and said, "I'm sorry. I don't think I can read it. I'm sorry." (R. 686.) The prosecutor did not ask Det. Harless to keep describing the video but offered into evidence some still-shot photographs taken from the video. The following exchange occurred:

> "The Court: Will counsel approach while—
>
> "(Discussion at bench.)
>
> "The Court: Turn that off, please. I don't want our witnesses crying.
>
> "[The State]: I know. That wasn't what I planned.
>
> "[Defense counsel]: I will have to take him [on] voir dire now before the next one's offered.
>
> "The Court: Sure. So.

> "[The State]: Your Honor, that wasn't part of the plan.
>
> "The Court: Well, let's make sure—
>
> "[The State]: Obviously. I don't think he intentionally did that either.
>
> "The Court: I'm not meaning to suggest that at all. I just want to minimize any emotional impact.
>
> "[The State]: Absolutely.
>
> "(Discussion at bench concluded.)"

(R. 688-89.) On voir dire Det. Harless admitted that he had watched the video during his investigation and that he was not seeing the video for the first time at trial; that he prepared a summary of the video based on what he saw in the video; and that he was reading from the summary he had prepared of the video. (R. 689-90.) After the circuit court dismissed the jury for the day the circuit court addressed Det. Harless:

> "The Court: Now, Mr. Harless, Investigator, as with everybody, we know the subject matter in this case is very difficult and you sat through everything and we had a tough time getting a jury, but tomorrow, do what you need to do to steel yourself so that you may maintain minimum of emotions as you testify.
>
> "A. Yes, sir. Of course."

(R. 693-94.) The next morning, outside the presence of the jury, Wesson moved for a mistrial because of Det. Harless's reaction during his testimony about the child-pornography videos. "[H]e just broke down and started crying." The circuit court denied Wesson's motion: "Humans aren't robots. What I witnessed yesterday was not contrived, appeared to be a natural emotional response." (R. 695-96.) When the jury returned to the courtroom the circuit court instructed them that, in reaching a verdict, "you are not to consider any emotion, whether that be sympathy, anger or otherwise." (R. 706.)

> "[E]motional outburst by a spectator or family member during a criminal trial, even where the outburst may influence or disturb the jury, does not require reversal 'unless it appears that the rights of accused were prejudiced thereby, and, generally in the absence of showing to the contrary, it will be assumed that the jury was not prejudiced thereby ....' "

Gaddy v. State, 698 So. 2d 1100, 1140 (Ala. Crim. App. 1995) (quoting DeBruce v. State, 651 So. 2d 599 (Ala. Crim. App. 1993)). "This same general rule also applies to emotional manifestations made while testifying." McNair v. State, 653 So. 2d 320, 330 (Ala. Crim. App. 1992).

The circuit court did not err in denying Wesson's motion for a

mistrial. The record shows that Det. Harless's emotional response was brief, and both the circuit court and the prosecutor moved quickly to shut down any further emotional displays. The circuit court recognized the "very difficult" subject matter about which Det. Harless was testifying, and it found that Det. Harless's emotional response was "not contrived" and "appeared to be a natural emotional response." See Smith v. State, 37 Ala. App. 116, 118, 64 So. 2d 620, 621 (1953) ("We think that it can be accurately stated that the emotions were not staged, planned, or feigned. Davis received a very severe injury .... It is very reasonable to suppose that the pain and suffering incident to his injuries upset his nerves and affected his emotional control."). Although Det. Harless's display of emotion while testifying about the videos may have made some impression on the jury, Wesson offers no evidence showing his rights were prejudiced by Det. Harless's display of emotion.

Wesson argues that he did not have to prove actual prejudice because, he says, he was inherently prejudiced by Det. Harless's emotional response while testifying. The cases he cites in support, though, do not apply, because they do not involve a spectator or witness becoming

emotional in front of the jury, but improper contact between a witness or a victim's family member and the jury. Ex parte Smith, 213 So. 3d 313 (Ala. 2010) (holding that the defendant did not have to prove actual prejudice when the mother of the victim told several jurors during the penalty phase that "[h]e took the life of my son, he deserves to die"); Ex parte Pierce, 851 So. 2d 606 (Ala. 2000) (holding that close and continual contact between the sheriff, who was a key prosecution witness, and the jury was inherently prejudicial to the defendant and did not require a showing of actual prejudice); Turner v. Louisiana, 379 U.S. 466 (1965) (holding that close and continual contact between two sheriff deputies who testified at trial and the sequestered jury was inherently prejudicial to the defendant). Absent a showing that Wesson's rights were prejudiced by Det. Harless's emotional display, "it will be assumed that the jury was not prejudiced thereby." Gaddy, 698 So. 2d at 1140.

The circuit court, who could observe Det. Harless's demeanor and emotions on the stand, was in a much better position than this Court to determine whether Det. Harless's display of emotion on the stand affected Wesson's right to a fair and impartial trial. Smith, 64 So. 2d at 621 ("The

trial judge witnessed the incident. To him must of necessity be committed a wide discretion in determining whether or not the occurrence affected the rights of the accused to a fair, impartial trial."). Based on these facts, we cannot say the circuit court abused its discretion by not granting a mistrial.

III.

Wesson says the circuit court should not have admitted into evidence Det. Harless's written summaries of the videos found on Wesson's devices because, he says, he stipulated that the videos contained child pornography. The gist of his argument is that, because he stipulated that the videos contained child pornography, Det. Harless's summaries describing the contents of the videos were irrelevant and "served no purpose except to unfairly prejudice and mislead the jury," and the circuit court should have excluded the summaries, he says, under Rule 403, Ala. R. Evid.[8]

[8]Although Wesson cites Rule 1006(7), Ala. R. Evid., to say that courts should not admit misleading or inaccurate summaries, he does not claim Det. Harless's summaries were misleading or inaccurate. But even if Wesson had invoked Rule 1006(7) to argue that the circuit court erred

> "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion."

Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000).

Det. Harless testified that he watched the videos found on Wesson's devices and prepared a written summary of each video. After Det. Harless became emotional while reading the first summary to the jury, Wesson stipulated that each video contained child pornography. Based on that stipulation the State offered (but did not publish to the jury) the videos and still shots from the videos, but it did not elicit any more testimony from Det. Harless about the contents of the videos. Instead, the State attached Det. Harless's summaries of the videos to the discs containing the videos. (R. 712.) Wesson did not object to the admission of the videos or the still shots, but he objected to Det. Harless's summaries being included with the exhibits.

Relevant evidence is "evidence having any tendency to make the

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in admitting Det. Harless's summaries into evidence, that argument would have no merit. Cf. United States v. Deason, 965 F.3d 1252, 1266–67 (11th Cir. 2020).

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Ala. R. Evid. Relevant evidence is admissible; irrelevant evidence is not. Rule 402, Ala. R. Evid. Trial courts have discretion in determining whether evidence is relevant. Hayes v. State, 717 So. 2d 30, 36 (Ala. Crim. App. 1997). Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." Rule 403, Ala. R. Evid.

That a defendant stipulates to a fact the State must prove does not divest the circuit court of discretion to allow the State to introduce evidence to prove that fact. To allow a defendant to stipulate to a fact to prevent the State from offering evidence of that fact would, at times, undermine the State's ability to present its most convincing evidence to the jury.

> " 'It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove.... Parties, as a general rule, are entitled to prove the essential facts,--to present to the jury a picture of the events relied upon. To

> substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' 9 J. Wigmore, Evidence § 2591 at 826 n. 2 (Chadbourn rev. 1981) (quoting Dunning v. Maine Central R.R., 91 Me. 87, 39 A. 352, 356 (1897)). '[A] colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence.' 9 J. Wigmore at 824 (emphasis in original).
>
> "In Alabama, a party is not required to accept his adversary's stipulation, but may insist on proving the fact.
>
> > " 'A party's statement on the trial, that he admits the existence of a specified fact which is beneficial to the adverse party, creates a discretion in the trial court, to be exercised within the bounds of reason, to refuse to allow the adverse party to introduce evidence to prove the fact. As a matter of wisdom in the exercise of the discretion, however, the trial court should generally allow the adverse party to introduce evidence to prove the fact unless it is palpable that the admission is as fully persuasive of the existence of the fact as would be the adverse party's offered evidence of the fact.'
>
> "C. Gamble, McElroy's Alabama Evidence, § 472.01(5) (4th ed. 1991) (footnotes omitted)."

Duncan v. State, 624 So. 2d 1084, 1086 (Ala. Crim. App. 1993). We see no reason to treat differently a case in which the State accepts the defendant's stipulation but chooses still to offer some evidence of the fact

stipulated to. As the United States Court of Appeals for the Eleventh Circuit held in United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010), a defendant's stipulation that images found in his possession are child pornography does not make inadmissible other evidence proving the contents of those images.

> "Admission of the five still images from the DVDs served valid purposes. See Old Chief v. United States, 519 U.S. 172, 190, 117 S.Ct. 644, 655, 136 L. Ed. 2d 574 (1997). Those images proved that the DVDs actually contained child pornography, although it is true that Alfaro–Moncada stipulated to that fact. See id. at 186–87, 117 S.Ct. at 653 ('[The] standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.'). They also tended to show that Alfaro–Moncada knew he was in possession of child pornography, a fact that he did not stipulate. Even if showing the images to the jury created some risk of injecting emotions into the jury's decision-making, see id. at 180, 117 S.Ct. at 650, it was not an abuse of discretion for the district court to decide that the risk did not substantially outweigh the still images' probative value."

Alfaro–Moncada, 607 F.3d at 734.

The contents of the videos found on Wesson's devices were relevant to the charges the State brought against Wesson. Rather than show the videos to the jury or have Det. Harless describe the videos to the jury, the

State sought to prove the contents of the videos by Wesson's stipulation, still shots from the videos, and Det. Harless's summaries. The circuit court had discretion to admit or not to admit Det. Harless's summaries, and it did not abuse its discretion in admitting the summaries into evidence.

IV.

Wesson argues the State failed to prove by sufficient evidence that he knowingly possessed child pornography under § 13A-12-192(b), Ala. Code 1975. He says the fact that no search terms commonly used to locate child pornography were found on his computer, the fact that he testified he accidently downloaded child pornography when he was searching for adult pornography, and the fact that he contacted a law-enforcement officer when he first found child pornography on the Internet, show that he did not reach out and search for child pornography. With no evidence he was searching for child pornography, Wesson says, the State failed to show he "knowingly" possessed child pornography.

" 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced

by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution.' " Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998) (quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984)). " 'The test used in determining the sufficiency of the evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.' " Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997) (quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)).

> " ' "When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision." ' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).' "

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004) (quoting Ward v. State, 610 So. 2d 1190, 1191

(Ala. Crim. App. 1992)). Section 13A-12-192(b), Ala. Code 1975, provides:

> "Any person who knowingly possesses any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony."[9]

"A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists." § 13A-2-2(2), Ala. Code 1975.

The State presented sufficient evidence from which the jury could have found that Wesson knowingly possessed child pornography. The State presented evidence that, when law-enforcement officers searched Wesson's house, it took them only "a couple of minutes" to find child

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[9]A 2019 amendment, see Act No. 2019-465, Ala. Acts 2019, added "breast nudity" to the description of obscene matter in § 13A-12-192(b). That change is immaterial to the issues in this case; further, because "the law in effect at the time of the commission of the offense controls the prosecution," see Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005), we review this claim under the version of § 13A-12-192 in effect in 2016.

pornography on his computer. Wesson told Det. Harless that he sought out child pornography on the Internet to document it, he said, and to report it to law-enforcement authorities. "I was trying to find it to give to you guys." (R. 679.) Wesson said sometimes he would keep child-pornography videos for "a month or so," and he told Det. Harless that the computers seized from his house "may have had" child pornography on them he had not yet had a chance to go through. (R. 654-56.) The State also presented evidence indicating that Wesson moved child-pornography videos out of his file-sharing program's default-download folder into different folders on five of his electronic devices. This evidence was sufficient for the jury to find that Wesson knowingly possessed the child pornography found on his devices.

And although Wesson insisted at trial that his possession of the child-pornography videos was accidental and unknowing, the jury was free to reject Wesson's version of events and to believe the State's version instead. See, e.g., Mullis v. State, 545 So. 2d 205, 211 (Ala. Crim. App. 1989) ("The jury had the option of believing the State's witnesses or believing the appellant's version and acquitting him."). We again point to

United States v. Alfaro-Moncada, supra, in which the United States Court of Appeals for the Eleventh Circuit rejected the defendant's argument that he did not "knowingly" possess child pornography found on two DVDs in his possession.

> "Alfaro–Moncada argues that the government failed to prove ... that he 'knowingly' possessed child pornography. He asserts that the evidence showed that he bought the DVDs by accident and kept them because of forces beyond his control, namely his forgetful memory and churning stomach.
>
> "....
>
> "Alfaro–Moncada's sufficiency challenge is free of anything resembling merit. The government introduced into evidence the covers of the DVD cases found in his desk drawer by Specialist Meyer and Officer Quiñones. On both of those covers there were photos of young girls engaging in sex acts. Although Alfaro–Moncada testified that he had bought the DVDs without knowing that they contained child pornography, the jury was free to reject that testimony and believe the opposite to be true .... Moreover, Alfaro–Moncada admitted in his testimony that he had looked at the covers of the DVD cases when he got back to the [the ship] and watched a 'little bit' of the DVDs inside. At that point, by his own admission, he knew that he was in possession of child pornography. His own testimony therefore established the knowledge element of [the offense of possession of child pornography].
>
> "Alfaro–Moncada did testify that he intended to throw the DVDs overboard after he discovered that they contained child pornography, but the jury was free not to believe him ....

> Even taking his testimony as true, once he discovered the DVDs contained child pornography and made the decision to put them in his desk drawer, he was in knowing possession of them. Although Alfaro–Moncada seems to think otherwise, the grace period for disposing of child pornography after discovering it is not an extended one."

Alfaro–Moncada, 607 F.3d at 732–34. The State presented sufficient evidence that Wesson knowingly possessed the child pornography found on his electronic devices; the jury's rejection of Wesson's explanation for why the child pornography was there does not make that evidence insufficient.

Wesson argues, though, that to prove that he "knowingly" possessed child pornography the State had to show he "reached out" and searched for child pornography. (Wesson's brief, p. 55.) Because no witness could say that Wesson searched the Internet for child pornography using terms commonly used to locate child pornography, Wesson says the State failed to meet the standard for "knowingly possessed" this Court set, he says, in Ward v. State, 994 So. 2d 293 (Ala. Crim. App. 2007). But the question in Ward was not whether the defendant knowingly possessed child pornography, but whether he constructively possessed child pornography

not in his actual possession.

The defendant in Ward viewed images of child pornography by accessing a computer owned by Troy State University and located on its campus. Law-enforcement officers charged Ward with possession of child pornography. Ward argued there was no evidence indicating that he possessed child pornography because, he said, he did not download, copy, or otherwise possess the images but only viewed the images on the university's computer. The State argued that, by visiting the Internet sites to view the images, Ward had actual knowledge of and was in constructive possession of the images. Ward, 994 So. 2d at 295.

We noted in Ward that, because Ward admitted to knowingly accessing Internet sites containing images of child pornography and to viewing those images on a computer owned by Troy University, the question before us was "whether Ward was in 'possession' of the obscene matter." Ward, 994 So. 2d at 296. We asked:

> "[W]hether an individual can be in possession of pornographic materials when he or she has viewed the pornographic materials on a computer screen but has not copied or saved those files to the computer."

Id. at 296-97 (emphasis added). In considering that question we were concerned not with whether Ward knowingly possessed the images, but whether there was sufficient evidence that he exercised dominion and control over the images so that he constructively possessed the images.

> "[T]he record shows that the child pornography was saved as temporary Internet files on Troy University's computer. Because Ward pleaded guilty, we do not know whether Ward was aware that the Web pages were automatically saved. However, a forensic examination of the computer showed that Ward 'reached out' for 288 images of child pornography. Though the factual basis is silent as to whether Ward copied, printed, e-mailed, or sent the images to his home computer, and there is no other indication in the record that he did so, Ward had the ability to do so when he was viewing the downloaded Web pages. Also, we note that Ward's home computer was seized and found to contain child pornography. Applying the broad definition of constructive possession recognized in Alabama, we find that the evidence was sufficient to show that Ward exercised dominion and control over the child pornography and thus was in possession of child pornography."

Ward, 994 So. 2d at 301–02.

Our citation in Ward to federal decisions that have considered similar questions confirms that whether a defendant intentionally seeks out and exercises dominion and control over child-pornography images is an important question in resolving constructive-possession cases when the

defendant says he did not purposely download the images, but not when, as here, the defendant admits to downloading the images but says he did not possess them knowingly. See United States v. Romm, 455 F.3d 990, 997-98 (9th Cir. 2006) (noting that, although the defendant admitted he knowingly viewed child pornography images but said he did not download them to his computer, "[i]n the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it"); United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002) (holding that, although the defendant "may have wished that his Web browser did not automatically cache viewed images," because the defendant knew the images he sought out and viewed were temporarily saved on his computer, his possession of the images was knowing and voluntary).

In Ward, Romm, and Tucker, the State did not use evidence indicating that the defendants intentionally searched for child pornography on the Internet to prove a knowing mental state—the defendants admitted to searching for and viewing child-pornography images but denied downloading and saving the images to their

computers—but to show the defendants' constructive possession of the child pornography.

Here, though, Wesson admits to downloading child-pornography videos to his computer but denies searching for and knowingly possessing the videos. The dispute, then, is not "actual possession" versus "constructive possession," but whether Wesson's admitted actual possession was knowing. See Levett v. State, 593 So. 2d 130, 137 (Ala. Crim. App. 1991) ("[C]onstructive possession was not at issue here because the appellant was in actual possession of the cocaine in his pants pocket .... [T]he only disputed issue here was whether the appellant's actual possession was knowing.") Wesson admitted possessing the images, and we held above that the State presented sufficient evidence that possession was knowing.[10] Ward's actual possession of the child-

[10]Although Wesson said at trial that his statement to law-enforcement officers that he intentionally downloaded child pornography was a "misstatement," any inconsistencies between what Wesson told law-enforcement officers and what he testified to in court goes to his credibility. See Petersen v. State, [Ms. CR-16-0652, Jan. 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019), writ quashed (No. 1180504, Aug. 21, 2020) ___ So. 3d ___ (Ala. 2020) ("Generally, a witness's prior inconsistent statement is admissible to impeach the witness's credibility ...."). The

pornography videos obviated the need for the State to prove Wesson was in constructive possession of the videos.[11] The State presented sufficient evidence from which the jury could have found beyond a reasonable doubt that Wesson knowingly possessed the child-pornography videos.

V.

Wesson argues the State's evidence was insufficient to show he possessed child pornography with the intent to disseminate it under § 13A-12-192(a), Ala. Code 1975. He says the State did not offer any

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credibility of a witness goes to the weight, not the sufficiency, of the evidence. Gargis v. State, 998 So. 2d 1092, 1096 (Ala. Crim. App. 2007). " ' "[T]he credibility of witnesses and the weight or probative force of testimony is for the [fact-finder] to judge and determine," ' " and " 'it is not the province of the court to reweigh the evidence presented at trial.' " Williams v. State, 710 So. 2d 1276, 1338 (Ala. Crim. App. 1996) (quoting other cases).

[11]Wesson did not argue he did not possess the electronic devices found in his home or that someone else had access to the devices. Cf. C.B.D. v. State, 90 So. 3d 227, 246-47 (Ala. Crim. App. 2011) (holding that, although other members of the defendant's household had access to the computer on which the child-pornography images were found, because the defendant used the computer and admitted downloading pornography on that computer that "may have" included child pornography, "given Alabama's broad definition of constructive possession, a rational finder of fact could have reasonably concluded that C.B.D. 'reached out' for the child pornography found on the computer and exercised dominion and control over it").

evidence that he sold, lent, or showed the child pornography to anyone for "monetary consideration," which, he says, is an element of the offense. Because the State offered "a complete absence of proof of an essential element," Wesson says, this Court should reverse his conviction for possession with intent to disseminate child pornography.

The jury convicted Wesson of one count of possession with intent to disseminate child pornography under § 13A-12-192(a). At that time, § 13A-12-192(a) provided:

> "Any person who knowingly possesses with intent to disseminate any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony. Possession of three or more copies of the same visual depiction contained in obscene matter is prima facie evidence of possession with intent to disseminate the same."[12]

(Emphasis added.) "Disseminate" at that time meant "[t]o sell, lend or show for monetary consideration or to offer or agree to do the same." §

[12]In 2019 the Alabama Legislature amended § 13A-12-192. See Act No. 2019-465, Ala. Acts 2019. We review Wesson's claim under the version of § 13A-12-192 in effect in 2016. See Minnifield, 941 So. 2d at 1001.

13A-12-190, Ala. Code 1975.[13]

Wesson agrees there were four copies of the same child-pornography video on his electronic devices, but he says the State offered no evidence indicating that he intended to disseminate those videos because it offered no evidence Wesson intended to—or offered or agreed to—sell, lend, or show the videos.[14] Wesson points to Det. Harless's testimony that he found no evidence Wesson intended to sell, lend, or show the videos to anyone for monetary consideration, and to Det. Harless's testimony that, in his opinion, because the definition of "disseminate" includes the phrase "for monetary consideration," "by the law's definition, he did not disseminate child pornography." (R. 763-64.)

To convict a defendant under § 13A-12-192(a), the State ordinarily must show that the defendant knowingly possessed child pornography

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[13]A 2019 amendment, see Act No. 2019-465, changed the definition of "disseminate" to, among other things, eliminate the phrase "for monetary consideration." We review Wesson's claim under the definition of "disseminate" in effect at the time of this offense. See Minnifield, 941 So. 2d at 1001.

[14]Although Wesson argues he did not "knowingly" possess the child-pornography videos, we addressed that claim in Part IV above and held that claim has no merit.

with the intent to disseminate it—that is, with the intent to sell, lend, or show it to someone for monetary consideration, or to offer or agree to sell, lend, or show it to someone for monetary consideration. Had Wesson not possessed more than three copies of the same child-pornography video, to prove possession with intent to disseminate the State would have had to show that Wesson intended to—or offered or agreed to—sell, lend, or show the video or videos to someone for monetary consideration.

But § 13A-12-192(a) offers another way for the State to establish the elements of possession with intent to disseminate—by showing the defendant possessed three or more copies of the same visual depiction of child pornography. When the State makes that showing it "is prima facie evidence of possession with intent to disseminate the same." § 13A-12-192(a). That showing—that the defendant possessed three or more copies of the same visual depiction of child pornography—removes the need for the State to offer more evidence that the defendant intended to sell, lend, or show the child pornography for monetary consideration. That is, a showing that the defendant has three or more copies of the same visual depiction of child pornography <u>is</u> evidence that the defendant intended to

disseminate the child pornography. Although the circuit court instructed the jury that "the defense may by rebuttable presumption show by the evidence that he had no intent to disseminate" (R. 1067), it was for the jury to decide whether the defense rebutted—through Det. Harless's testimony or otherwise—the State's prima facie case of possession with intent to disseminate. Cf. Davis v. State, 553 So. 2d 671, 672-73 (Ala. Crim. App. 1989) (holding that evidence the defendant had a small wine bottle under his jacket, instead of a gun, went "toward rebuttal of the presumption that the appellant was armed and create[d] a question of fact for the jury").[15]

The State presented sufficient evidence from which the jury could

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[15]Wesson did not argue below or on appeal that the version of § 13A-12-192(a) applicable here created an unconstitutional mandatory presumption or that the circuit court's jury charges created an unconstitutional mandatory presumption. Cf. Manuel v. State, 711 So. 2d 507 (Ala. Crim. App. 1997). Because "[e]ven constitutional issues must first be correctly raised in the trial court before they will be considered on appeal," Alonso v. State, 228 So. 3d 1093, 1099 (Ala. Crim. App. 2016) (quoting Hansen v. State, 598 So. 2d 1, 2 (Ala. Crim. App. 1991)), we consider only whether the State's evidence was sufficient to show Wesson possessed child pornography with the intent to disseminate it under the earlier version of § 13A-12-192(a), and we express no opinion about the constitutionality of that statute.

have found beyond a reasonable doubt that Wesson possessed child pornography with the intent to disseminate it.

VI.

Wesson says his consecutive sentences of 230 years in prison are "constitutionally infirm and violative of his constitutional rights against cruel and unusual punishment." (Wesson's brief, p. 55.) He says his 55 consecutive 4-year sentences for possession of child pornography, combined with his 10-year sentence for possession with intent to disseminate child pornography, add up to one of the most severe sentences ever imposed for similar offenses.[16]

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[16]After the circuit court sentenced him on May 15, 2018, Wesson filed a motion to reconsider and a motion for a judgment of acquittal or, alternatively, for a new trial. The circuit court held a hearing on the motions on August 3, and on August 7 the circuit court entered an amended sentencing order purporting to reduce each of Wesson's sentences for possession of child pornography from four years to two years, with the sentences to be served consecutively. Wesson appealed, and this Court held that, because the record did not show Wesson's posttrial motions were continued by the consent of the parties beyond 60 days from the pronouncement of sentence, the circuit court lacked jurisdiction to amend Wesson's sentences with its amended sentencing order. Because a void judgment will not support an appeal, Bush v. State, 171 So. 3d 679, 691 (Ala. Crim. App. 2014), and because Wesson did not timely appeal from the date his posttrial motions were overruled by operation of law, we

We do not consider whether Wesson's sentences constitute cruel and unusual punishment, because we hold Wesson's straight four-year sentences for his possession-of-child-pornography convictions do not comply with §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, and are unauthorized sentences. Although Wesson does not argue on appeal that his sentences are unauthorized under § 15-18-8(b), this Court may take notice of an unauthorized sentence on direct appeal, whether the issue is raised or not.[17] Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994); Pender v. State, 740 So. 2d 482 (Ala. Crim. App. 1999).

Possession of child pornography is a Class C felony offense. § 13A-12-192(b), Ala. Code 1975. When Wesson committed and was sentenced

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dismissed Wesson's appeal as untimely filed. (C. 443-44.) Wesson filed a Rule 32.1(f) petition in the circuit court requesting an out-of-time appeal, and the circuit court granted Wesson's petition. (C. 460.)

[17]Wesson mentions § 15-18-8(b) in his reply brief, but he does not argue his sentence is illegal under that section; he interprets the phrase "the judge presiding over the case shall order the convicted defendant be confined ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years," see § 15-18-8(b), to mean that consecutive sentences for multiple Class C felony convictions would "thwart the intention of the Legislature." He argues: "[C]onsecutive sentences totaling 220 years for a Class C felony is ... incongruent with the provisions set forth in [§ 15-18-8(b)]."

for that offense, the sentencing range for a Class C felony was "not more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8 unless sentencing is pursuant to Section 13A-5-9 [Ala. Code 1975]."[18] § 13A-5-6(a)(3), Ala. Code 1975.[19]

Section 15-18-8(b) provides:

> "Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C or D felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best."

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[18] The circuit court did not sentence Wesson as a habitual felony offender under § 13A-5-9.

[19]In 2019 the Alabama Legislature amended § 13A-5-6(a)(3) to add that a sentence for a Class C felony offense does not have to comply with § 15-18-8(b) if "the offense is a sex offense pursuant to Section 15-20A-5." Because the law in effect at the time of the offenses controls, see Minnifield, 941 So. 2d at 1001, we review Wesson's claim under the version of § 13A-5-6 in effect in 2016.

The circuit court sentenced Wesson to four years in prison for each of his Class C felony convictions. Those sentences were within the statutory range. The circuit court did not, however, split Wesson's sentences. Because the circuit court did not suspend (that is, sentence Wesson to probation) or split Wesson's sentences for possession of child pornography under § 15-18-8(b), we must remand this case to the circuit court for it to impose sentences for those convictions that comply with §§ 13A-5-6(a)(3) and 15-18-8(b). See Jackson v. State, [Ms. CR-18-0454, Feb. 7, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020).[20]

We also note that, because a circuit court can split a sentence "only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence," see Goldsmith v. State, 200 So. 3d 45, 45-46 (Ala. Crim. App. 2015), on remand, if the circuit court imposes a split sentence, it must impose a probationary period that

[20]In remanding this case for the circuit court to impose sentences that comply with §§ 13A-5-6(a)(3) and 15-18-8(b), we note that, because Wesson's four-year sentences for each of his Class C felony convictions were within the statutory range, the circuit court cannot change the underlying sentences. See Jackson, ___ So. 3d at ___; Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003).

complies with § 15-18-8(b).

Because we are remanding this case for the circuit court to resentence Wesson, Wesson's argument that his consecutive sentences constitute cruel and unusual punishment is moot.

This cause is remanded to the circuit court for the circuit court to impose sentences that comply with §§ 13A-5-6(a)(3) and 15-18-8(b). Due return should be made to this Court within 28 days of the release of this opinion.

AFFIRMED AS TO CONVICTIONS; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

Windom, P.J., and McCool, J., concur. Kellum and Cole, JJ., concur in the result.