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RENDERED: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000378-MR

MICHAEL C. DUMAS — APPELLANT

V.

ON APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
NO. 09-CR-00118

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Michael Dumas appeals as a matter of right[1] from a circuit court judgment following a jury trial in which he was convicted of four counts of distributing matter portraying a minor in a sexual performance and three counts of possession of matter portraying a minor in a sexual performance. Dumas argues that the trial court erred by failing to (1) suppress several key pieces of evidence seized in the search of his residence, (2) dismiss the indictment against him, (3) order a new trial, and (4) declare parts of Kentucky Revised Statutes (KRS) 531.335 unconstitutionally overbroad.[2] We find no error on these claims and affirm the trial court's judgment.

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1 Ky. Const. § 110(2)(b).

2 The Court recognizes the vague description presented of Dumas's alleged errors. However, Dumas's appeal is loaded like a shotgun. He makes many allegations of error that are spread throughout the appeal; and each carries less velocity due to shortsighted arguments, mischaracterizations, and lack of coherency. We will do our best to appropriately characterize and address the issues presented by Dumas in an organized manner.

I. FACTUAL AND PROCEDURAL HISTORY.

A few days after River Marine Electronics fired Dumas, he returned to its place of business in McCracken County to pick up his last paycheck and to return the cell phone River Marine had issued to him for work.

While deleting contact information and other items saved on the cell phone, one of the River Marine owners discovered a disturbing picture electronically stored on it of a young girl posing suggestively and wearing adult-styled lingerie. River Marine gave the cell phone to the McCracken County Sheriff's Department, which turned the cell phone over to the Marshall County Sheriff's Department because Dumas resided in Marshall County. The Marshall County Sheriff's Department conducted a brief investigation and obtained a search warrant for Dumas's residence.

During the search of Dumas's residence, the sheriff's deputies seized computer and audio-visual equipment, compact discs, images of nude females, and e-mails. Other law enforcement agencies assisted the Marshall County Sheriff with forensic analysis of the computer drives and other media components.

The Marshall County Grand Jury indicted Dumas on sixty-two counts of distributing matter portraying a sexual performance by a minor and sixty-two counts of possession of matter portraying a sexual performance by a minor. Before trial, a superseding indictment charged Dumas with four counts of distributing matter portraying a minor in a sexual performance and three counts of possession of matter portraying a minor in a sexual performance.

Ultimately, the trial court consolidated the indictments and dismissed the original indictment without prejudice.[3] The case was tried before a jury.

Dumas's trial lasted several days. After hearing all the evidence, the jury found Dumas guilty on the seven charges contained in the superseding indictment. Dumas received five years' imprisonment on each count, and the jury recommended some of the sentences run concurrently and some consecutively, for a total of twenty years' imprisonment. The trial court entered judgment accordingly.

II. ANALYSIS.

A. The Trial Court Properly Denied Dumas's Motion to Suppress Evidence Seized Via the Search Warrant.

1. Matters in the Trial Court — The Affidavit and Suppression Hearing.

Dumas argues the trial court erred by denying his pretrial motion to suppress evidence seized in the search of his residence. We conclude that the trial court properly denied the suppression motion because we find that the record supports the trial court's ruling that the search warrant affidavit contained sufficient information to establish probable cause for the issuance of the search warrant.

The standard of appellate review of a decision of the trial court on a suppression motion following a hearing is twofold. First, the factual findings of

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[3] Dumas takes issue with the fact a hearing was not provided to argue that the 124-count original indictment be dismissed *with prejudice* rather than without prejudice. We can see no reason why a defendant should be entitled to a hearing concerning dismissing his case *with prejudice* when it is clear he was not entitled to an outright dismissal at trial. In this instance, the prosecution exercised its prosecutorial discretion; and Dumas cites no legal authority to support his claim.

the trial court are considered conclusive if they are supported by substantial evidence.[4] Second, when the findings of facts are supported by substantial evidence, the relevant inquiry is whether any rule of law is violated as applied to the established facts.[5] So we conduct a de novo review to determine whether the court's decision was correct as a matter of law.[6]

Dumas alleged the probable cause affidavit submitted in this case contained intentionally or recklessly false statements and omitted facts. The trial court held an evidentiary hearing to determine whether Dumas presented valid assertions. Detective Hilbrecht, who signed the affidavit in support of the requested search warrant, testified at the suppression hearing.

Detective Hilbrecht's testimony detailed how he (1) became aware through the McCracken County Sheriff's Department of Dumas's cell phone containing a picture of a young girl posed in a sexually suggestive manner, wearing lingerie inappropriate for her age; (2) interviewed Dumas's former employer about the cell phone; and (3) decided to take a picture of the cell phone image to the Marshall County Attorney's Office to ask for assistance in drafting papers to take to a judge in order to obtain a search warrant for Dumas's residence. The affidavit contained the following information in pertinent part:

> Affiant has been an officer in [the Marshall County Sheriff's Department] for a period of 7 years and 10 months. The

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4 Kentucky Rules of Criminal Procedure (RCr) 9.78.

5 *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citations omitted).

6 *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006) (citations omitted).

> information and observations contained herein were received and made in [his] capacity as an officer hereof. On Wednesday, April 18, 2007, at approximately 3:16 PM, Affiant received information from/observed:
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> Affiant received information from Detective David Shepherd of the McCracken County Sheriff's Department . . . . Det. Shepherd sent an [e-mail] with an attached photo that was found on a camera phone that was once possessed by Dumas. The photo was of a young girl, who appeared to be between the ages of 6 & 8, wearing adult-type lingerie. Specifically, the girl had on a garter belt, panty hose, lace panties, and what appeared to be a [brassiere]. The [child's] upper thighs and midriff are exposed in the photo and she is posing in a provocative manner. Detective Shepherd showed Affiant the phone with the photo on April 23, 2007.
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> Acting on the information received, Affiant conducted the following independent investigation:
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> Affiant learned that this phone had been issued to Dumas as a part of his employment . . . [Affiant learned that Dumas was fired on April 13, 2007, and turned the phone in to his employer who contacted law enforcement] . . . Affiant learned that Dumas was permitted to have the phone in question with him at all times . . . .
>
> Affiant has reasonable and [probable] cause to believe, and believes, grounds exist for issuance of a Search Warrant based on the aforementioned facts, information, and circumstances, and prays a Search Warrant be issued, that the property (or any part thereof) be seized and brought before the Court and/or retained subject to order of said Court.

The affidavit also requested the following items of personal property as items of interest:

> any and all devices capable of taking and/or storing electronic photographs, including but not limited to, computers, web cams, hard drives, CD/storage disks, thumb drives, flash drives, VHS tapes, DVD's, magazines, photographs, PDA's, phones with digital cameras, film negatives, 35 mm films, photographs stored in [e-mail] and/or computer servers. Also any and all information which could identify minor child in photograph described in Affidavit on page 2.

Dumas argued to the trial court the affidavit was facially insufficient because (1) Detective Hilbrecht stated he did not consider the picture of the child to be pornographic and (2) the image became known to law enforcement in neighboring McCracken County rather than in Dumas's home county, Marshall County.

At the conclusion of the hearing, the trial court rejected Dumas's argument and ruled that the information contained in the affidavit sufficiently indicated "probable cause to believe Dumas possessed illegal materials or committed a crime"; and the affidavit did not contain untruthful or deceitful information.

2. Relevant Legal Standards for Search Warrant Affidavits.

The Fourth Amendment of the U. S. Constitution and Section 10 of the Kentucky Constitution mandate that no warrant shall be issued without probable cause. The Supreme Court of the United States recognized a "totality of the circumstances" approach to determining probable cause related to search warrants in *Illinois v. Gates*:[7]

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed.[8]

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[7] 462 U.S. 213 (1983) (The Court specifically addressed determining whether probable cause existed to issue a warrant based on an anonymous tip; but the guidelines should be applied in other situations to determine probable cause, as well.).

[8] *Id.* at 238-39 (citations omitted).

This Court adopted the "totality of the circumstances" test for Kentucky in *Beemer v. Commonwealth.*[9]

An affidavit supporting a search warrant must include a statement of facts sufficient to support a finding of probable cause.[10] Probable cause exists when the totality of the circumstances indicates a fair probability that contraband or evidence of a crime will be found in a particular place.[11] Upon review, the warrant-issuing judge is given great deference; and the decision must not be reversed unless the court arbitrarily exercised its discretion.[12]

a. Beckam v. Commonwealth.

In *Beckam v. Commonwealth,*[13] the Court of Appeals dealt with whether an affidavit created a sufficient factual nexus to issue a warrant and search a residence. *Beckam* was a case in which a car dealership owner contacted the Kentucky State Police regarding an individual, Beckam, who rented several vehicles from the dealer over a period of several weeks.[14] The car dealer reported suspicious findings in the returned vehicles.[15] The investigating

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9 665 S.W.2d 912 (Ky. 1984).

10 *Carrier v. Commonwealth*, 142 S.W.3d 670, 674 (Ky. 2004) (citing *Vick v. Commonwealth*, 264 S.W. 1079, 1080 (Ky.App. 1924)).

11 *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005)

12 *Id.*

13 284 S.W.3d 547 (Ky.App. 2009).

14 *Id.*

15 A car rented for one week was returned with over 2,000 new miles on it and a large amount of alleged drug residue in it. The back seat was removed and damaged. A spare tire was missing. A second van was rented and returned two days later with 290 miles and alleged drug residue.

trooper took field samples of the alleged marijuana residue in the second vehicle and received a positive result.[16] The trooper also found a set of electronic scales in one of the vehicles.[17] After investigating the rental cars, the trooper ran a background check and discovered that Beckam and his wife had criminal records for drug-related offenses.[18] After confirming Beckam's address with the rental car information, he requested a search warrant.[19] The warrant issued and, when executed, many items were seized resulting in an indictment.[20] Before trial, Beckam asserted the affidavit was insufficient and moved to suppress all evidence obtained as a result of the search.[21]

The Court of Appeals looked to whether the trooper's affidavit provided "a sufficient nexus for authorizing a search warrant to search [Beckam's] residence."[22] The court found persuasive a federal case, which held, based upon the relevant facts, that the magistrate was justified in inferring the suspect was engaged in marijuana trafficking.[23] Specifically, the federal court held, "'in issuing a search warrant, a magistrate is entitled to draw reasonable

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16 284 S.W.3d at 549 (Ky.App. 2009).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Beckam*, 284 S.W.3d at 549 (Ky. App. 2009).

23 *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999) (In *McClellan*, a DEA agent's request for a search warrant was supported by an affidavit stating a source indicated marijuana was getting ready to be moved across the country; the individual in question was previously arrested in possession of a large quantity of marijuana; and that in the past, the suspect was known to keep marijuana at his home.).

inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense, and that in the case of drug dealers evidence is likely to be found where the dealers live.'"[24] The court found that the principle articulated by the federal courts reflected the "common sense" approach required by *Beemer v. Commonwealth*[25] and adopted it.[26]

The *Beckam* court noted our decision in *Moore v. Commonwealth*,[27] which also permitted a warrant-issuing judge to infer a nexus between a crime and the location of evidence of that crime.[28] The facts in *Moore* related to a banking scam in which at least one fraudulent instrument was a "computer generated check."[29] The fact that the check was created on a computer led the court to reason that "[i]t was highly likely Moore used a computer or similar machine in the secrecy of his home. Thus, such a description of the instrument and the certainty that Moore was passing the instruments gave information that provided a nexus between the crime and the place."[30]

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[24] *Id.* (quoting *United States v. Reddrick*, 90 F.3d 1276, 1281 (7th Cir. 1996). Other federal circuits have dealt with similar issues and reached similar conclusions. *See United States v. Miggins*, 302 F.3d 384, 393-94 (6th Cir. 2002) for a discussion of cases from the First, Second, Fourth, Sixth, Eighth, Ninth, and D.C. Circuits).

[25] 665 S.W.2d at 914.

[26] *Beckam*, 284 S.W.3d at 550.

[27] 159 S.W.3d 325.

[28] *Id.* at 330.

[29] *Id.*

[30] *Id.*

b. Supported by the Facts Contained Within the Affidavit, the Search Warrant was Supported by Probable Cause.

In this case, the affidavit presented to the issuing judge contained an explicit description of the location to be searched. The officer seeking the warrant described a particular category of items[31] that might be used to produce, possess, or distribute matter portraying a minor in a sexual performance. In addition to the specific items listed, the affidavit requested permission to search for information to enable the identification of the minor child in the described photo. The "informants" are not specifically named in the affidavit. But they are described as Dumas's former employers who saw the picture described in the affidavit and contacted law enforcement. In the affidavit, Detective Hilbrecht specifically states he received the described photo of the young girl from a detective in the McCracken County Sheriff's Department. The affidavit indicates Detective Hilbrecht performed some investigation to determine the terms of Dumas's possession of the cell phone.

In *Crum v. Commonwealth*,[32] we found an affidavit grossly deficient of indicia of probable cause where it listed things to be seized as "illegal contraband," did not contain the name of the informant, did not address the reliability of the informant, and was vague about the requesting officer's

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[31] This included items of technology that might be used to record, transfer, and preserve media images. Although the list may be long, it clearly reflects a specific type of item to be searched. It does not authorize law enforcement to look for generic "illegal contraband," which we found so troubling in *Crum v. Commonwealth*, 223 S.W.3d 109, 112 (Ky. 2007).

[32] 223 S.W.3d 109.

independent investigation.[33] We found that "[o]n the whole, it [was] impossible to tell the basis of the officer's knowledge or exactly what he is looking for."[34] In contrast, Detective Hilbrecht made it known where he received his knowledge and what he expected to find during a search, although the affidavit lacked some clarity.

By looking at the four corners of the affidavit alone, the issuing judge could determine that an experienced law enforcement officer[35] received an e-mail from another law enforcement officer.[36] The affidavit also makes it known that the photo did not come from some unknown informant eventually becoming transferred from one agency to another until someone took initiative to investigate. The photo came into the hands of law enforcement because employees at Dumas's former place of employment, River Marine Electronics in Paducah, contacted law enforcement to express concern over a picture. The affidavit also contained a tame description of a crude photo of a young girl in adult lingerie. Detective Hilbrecht was able to describe the photo in the affidavit because he personally viewed it.[37] None of these facts require extrinsic evidence to accept.

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[33] *Id.* at 112.

[34] *Id.*

[35] The affidavit states that the "Affiant has been an officer . . . for a period of 7 years and 10 months."

[36] Presumably, the law enforcement officer that sent Detective Hilbrecht the photo possesses a relatively high level of experience because he also attained the rank of detective.

[37] At the suppression hearing, Detective Hilbrecht could not recall with certainty that he showed the judge issuing the warrant the picture. Detective Hilbrecht believed the judge saw the picture but was certain he read the description.

Based on substantial evidence, the trial court found the search warrant valid and did not suppress evidence discovered at Dumas's residence. As a matter of law, the trial court's decision was correct and we affirm.

B. Dumas's Motion for Dismissal Based on Double Jeopardy and Dumas's Motion for Judgment NOV Properly Denied.

1. The Trial Court Properly Denied Dumas's Motion to Dismiss Based on Double Jeopardy Claims.

Dumas argued to the trial court that two of three counts of possession of matter portraying a sexual performance by a minor should have been dismissed. Dumas asserted that three of the four counts of possession of matter portraying a sexual performance by a minor arose from a common act or occurrence and should be brought as a single count. Specifically, he contended that multiple counts of the same charge violated double jeopardy. He renews the same argument before us. The trial court denied dismissal. And this Court affirms the decision of the trial court.

Dumas relied heavily on *Clark v. Commonwealth*[38] before the trial court as he does now. He improperly applies the holding in *Clark* to this case. In *Clark*, this Court held convictions for promotion of a sexual performance with a minor and the use of a minor in a sexual performance violated double jeopardy because the convictions arose from the same conduct.[39] We applied the *Blockburger*[40] test and concluded that the exact same facts proved the

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[38] 267 S.W.3d 668 (Ky. 2008).

[39] *Id.*

commission of two separate offenses but could only result in conviction under one statute because of the protections of the double jeopardy clause.[41]

Dumas was not charged with either of the offenses discussed in *Clark*. Dumas faced charges of possession of matter portraying a sexual performance by a minor[42] and distributing matter portraying a sexual performance by a minor.[43] Upon comparing those statutes, it becomes clear the different types of proof to sustain conviction: one requires possession of matter and the other requires distribution of matter. As such, they do not violate *Blockburger*.

Because *Blockburger* addresses convictions of different offenses for one set of actions, that holding is not the applicable analytical test for determining whether multiple counts of the same offense can be brought by the Commonwealth. Instead, KRS 505.020 provides the relevant parameters for charging multiple counts of the same offense:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
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> . . . .
>
> (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was

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[40] 284 U.S. 299 (1932) (adopted by *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996) (stating violations of the Double Jeopardy Clause must be determined by whether a single course of conduct has resulted in a violation of two distinct statutes and, if so, whether each state requires proof of an additional fact which the other does not.).

[41] 267 S.W.3d at 677-78.

[42] KRS 531.335.

[43] KRS 531.340.

> uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

In *Williams v. Commonwealth*,[44] we held, "Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution."[45] Both KRS 531.335 (possession) and KRS 531.340 (distribution) use the word "matter" in reference to the unit of prosecution. KRS 531.300 states:

> "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, live image transmitted over the Internet or other electronic network, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials . . . .

The legislature's use of the singular words "matter" and "any" purposely allows for the prosecution of *each* piece of contraband an individual possesses.

In the present case, Dumas argues double jeopardy violations existed when the Commonwealth indicted him on three counts of possession of matter portraying a sexual performance by a minor. Counts Five, Six, and Seven of the indictment are for two different computer hard drives with digital images and videos of sexual performances by minors and a collection of compact discs containing digital images and videos of sexual performances by minors. Each count is for a distinctly different piece of property containing child

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[44] 178 S.W.3d 491 (Ky. 2005).

[45] *Id.* at 495.

pornography. The Commonwealth properly brought these as separate and distinct charges.

2. The Trial Court Properly Denied Dumas's Motion to Dismiss for JNOV.

Under one subheading, entitled "Appellant's Motion for JNOV," Dumas lumps assertions regarding a variety of motions, including those related to directed verdict, double jeopardy, and evidentiary claims. All of these topics are mentioned by Dumas and summed up by stating that his motion for directed verdict and JNOV should have been granted. Because we addressed the double jeopardy issue earlier, we will address the trial court's decision not to grant a JNOV because Dumas styles his appeal in that manner.

Dumas was charged with four counts of distributing matter portraying a sexual performance by a minor. He contends insufficient support existed to justify those convictions because the Commonwealth did not present evidence an individual received the e-mails. On this point, Dumas is clearly wrong. KRS 531.340[46] does not require proof of actual distribution. In fact,

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[46] (1) A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he or she:

(a) Sends or causes to be sent into this state for sale or distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he or she:

1. Exhibits for profit or gain; or

2. Distributes; or

3. Offers to distribute; or

4. Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

KRS 531.340 contains a rebuttable presumption that anyone who possesses matter portraying a sexual performance by a minor intends to distribute that matter. In the case of Dumas, the Commonwealth presented evidence confirming he sent e-mails containing explicit images of minors to another individual.

Additionally, Dumas takes issue with evidentiary rulings made by the trial court. Dumas asserts that various pieces of evidence should have been excluded because there was not a perfect chain of custody. At the same time, Dumas acknowledges a perfect chain of custody is not necessary to make evidence admissible, particularly when items are clearly identifiable (in the present matter, this refers to a cell phone and various computer components). The Commonwealth elicited substantial witness testimony placing the cell phone, computer components, and media images in Dumas's possession.

We find no error in admitting the evidence in question. However, the Court notes Dumas pays little attention to the varying standards of review applied to his assertions of errors. His arguments focus on the weight of the evidence rather than its admissibility as a matter of law. Furthermore, Dumas's arguments fail to discuss how the trial court's decision to admit evidence was an abuse of discretion.

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(2) Any person who has in his or her possession more than one (1) unit of material coming within the provision of KRS 531.300(2) shall be rebuttably presumed to have such material in his or her possession with the intent to distribute it.

(3) Distribution of matter portraying a sexual performance by a minor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

3. *Denying Dumas's Motion for a New Trial was Proper for the Trial Court.*

Dumas asserts the trial court erred when it denied his motion for a new trial. Again, Dumas's several allegations of error are superficial, conclusory statements with little factual and legal substance to support the claims. We will strictly focus our analysis on the relief Dumas specifically requests: reversal of the trial court's decision not to grant a new trial.

A reviewing court will not interfere with a trial court's decision not to grant a new trial unless there has been an abuse of discretion.[47] With some detail, Dumas complains he (1) was denied his right to confront a witness, (2) was deprived a fair trial when the Commonwealth amended his indictment before trial, and (3) should have been granted a mistrial because of juror irregularities. We briefly analyze his arguments.

Dumas was not denied the right to confront a witness, Tim Bennett. Bennett allegedly received e-mails containing matter portraying a sexual performance by a minor, and he asserted his right under the Fifth Amendment of the United States Constitution[48] not to incriminate himself. In Kentucky, the prosecution cannot call a witness who will invoke his Fifth Amendment

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[47] *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky.App. 2003) (citation omitted).

[48] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

right and refuse to answer substantive questions.[49] Under this rule, the trial court properly excused Bennett; and Dumas was not deprived any right.

No error occurred when the indictment against Dumas was amended before trial. The Kentucky Rules of Criminal Procedure provide that an indictment may be amended before the verdict when no additional offense is charged, and the defendant suffers no prejudice of his substantial rights.[50] At the beginning of the trial, the Commonwealth made a motion to amend dates in the indictment. The issues at trial were not date-specific, so this change was more clerical than substantive in its nature. Dumas's rights were not substantially prejudiced in any way.

Finally, Dumas contends several errors occurred in relation to the venire. For reasons that are unclear from the record, an insufficient number of potential jurors arrived the morning of trial. The trial court decided to adjourn and resume jury selection later in the day to give the circuit clerk an opportunity to contact absent veniremembers. The circuit clerk was instructed to advise any missing veniremembers that their presence was a necessity to begin the trial. In the afternoon, a sufficient number of veniremembers appeared and jury selection began. The trial court took appropriate measures

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[49] *Clayton v. Commonwealth*, 786 S.W.2d 866 (Ky. 1990). (The Court recognized federal rulings that neither party can call a witness who will refuse to testify based on his Fifth Amendment rights. The Court further acknowledged that Kentucky will not allow any party to call a witness who will refuse to testify on Fifth Amendment grounds.)

[50] RCr 6.16.

to ensure a proper pool of potential jurors for trial, thereby protecting Dumas's right to a fair trial by an impartial jury of the county in which he lives.[51]

Dumas also alleges the trial court erred when it failed to strike two prospective jurors for cause. Prospective Juror W stated a witness might be related to her. Prospective Juror W was only certain her cousin was married to a woman having the same name as one of the trial witnesses. The prospective juror resolutely maintained that this fact would have no bearing on her ability to sit as a juror for Dumas's trial. Prospective Juror H informed the court she knew two witnesses, Dumas's former employers; but that fact would not influence her ability to make a decision based solely on the evidence. Dumas failed to show either prospective juror exhibited bias or should be excused for cause.

This court finds no reason to disturb the decision of the trial court not to grant a new trial. Individually or in the aggregate, Dumas's allegations do not establish any error by the trial court and fall far short of demonstrating any abuse of discretion.

C. KRS 531.335 is Not Unconstitutional.

Dumas relies on *Ashcroft v. Free Speech Coalition*[52] to support his argument that KRS 531.335 is unconstitutionally overbroad because it encumbers his First Amendment right to free speech by criminalizing

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[51] Dumas cites KRS 29A.100 in support of his claim. But KRS 29A.100 addresses the rules and procedures related to a judge's decision to excuse a juror from service or postpone a juror's service. Because the missing veniremembers were absent and not excused, the statute has no relation to the matter before us.

[52] 535 U.S. 234 (2002).

possession of images of fictitious or virtual children. In *Ashcroft*, the United States Supreme Court found the portions of 18 U.S.C. § 2256 that criminalized possession of images that *appeared to be a minor* or *contained the impression of minors* were overbroad.[53] KRS 531.335 is not strictly controlled by the *Ashcroft* decision because the language of the statute addresses possession of matter portraying *sexual performances by minors*, not virtual representations of minors.

To establish a statute is constitutionally overbroad, an appellant must show the statute "needlessly prohibits constitutionally protected activities or may be enforced in an arbitrary manner."[54] Additionally, we recognize a strong presumption in favor of constitutionality, and this Court will uphold a statute when possible.[55]

Dumas challenges KRS 531.335, which states:

> (1) A person is guilty of possession of matter portraying a sexual performance by a minor when, having knowledge of its content, character, and that the sexual performance is by a minor, he or she knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person.

Dumas was convicted for violating KRS 531.335 (possession of matter portraying a sexual performance by a minor) and KRS 531.340 (distribution of matter portraying a sexual performance by a minor). In 2001, the Kentucky Court of Appeals considered a constitutional challenge to KRS 531.340 in

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[53] *Id.*

[54] *State Board for Elementary and Secondary Education v. Howard*, 834 S.W2d. 657, 661 (Ky. 1992).

[55] *Ratliff v. Fiscal Court of Caldwell County, Kentucky*, 617 S.W.2d 36, 38 (Ky. 1981).

Hause v. Commonwealth.[56] In *Hause*, the court rejected the argument that KRS 531.340 prohibited constitutionally permissible conduct (distribution of virtual portrayals of fictitious minors). The court found the plain meaning of the word "minor" referred to a person.[57] Consequently, the statute did not control distribution of computer-generated pornography.[58]

Dumas calls into question the constitutional validity of a companion statute that uses the same language considered by the Court of Appeals in *Hause*. We agree with the *Hause* analysis and find it applicable in this case.

The statute does not attempt to control fictitious or virtual images of minors. In *Free Speech Coalition v. Reno,*[59] the court stated, "Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children."[60] While that may be true, our General Assembly has a great interest in protecting actual children from involvement in the exhibition of sexual performances. Regarding KRS 531.335, the word *minor* means a *real person* under the age of eighteen. The statute criminalizes the activity of individuals who possess sexually explicit images of real people under the age of eighteen. This statute is neither overbroad nor confusing in its intent.

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56 83 S.W.3d 1 (Ky.App 2001).

57 *Id.* at 7-8.

58 *Id.*

59 198 F.3d. 1083 (9th Circuit 1999).

60 *Id.* at 1092.

III. CONCLUSION.

We affirm the judgment of the trial court.

All sitting. All concur.

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