In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI,

Respondent,

v.

ROBIN S. ROGGENBUCK,

Appellant.

WD72045

OPINION FILED:

November 15, 2011

Appeal from the Circuit Court of Platte County, Missouri
The Honorable Abe Shafer, IV, Judge

Before Alok Ahuja, P.J., Thomas H. Newton, and James Edward Welsh, JJ.

Robin S. Roggenbuck appeals the circuit court's judgment convicting him of five counts of possession of child pornography. First, he asserts that the court erred in overruling his motion to suppress evidence and admitting the evidence at trial. He contends that the affidavit, offered in support of the search warrant used to seize the evidence, was insufficient to establish probable cause. Second, he contends that the court erred in entering multiple convictions and multiple consecutive sentences for his possession of multiple photographs of child pornography. He maintains that he committed the single offense of possessing a "series" of photographs. Finally, Roggenbuck claims that the court improperly admitted hearsay evidence regarding the content of resumes found on his computer. We affirm the circuit court's judgment.

On February 13, 2008, a detective, from the Platte City Police Department, obtained a search warrant for Roggenbuck's residence. Application for the warrant was primarily based on information reported by a man claiming that Roggenbuck had sexually abused him. The informant reported that there were other "victims" and that Roggenbuck kept a supply of alcohol under his sink to give to "boys" so that he could "have his way with them." The informant stated that Roggenbuck had images of young children on his computer, which Roggenbuck had asked the informant to look at. The warrant was granted and served on Roggenbuck's residence. Roggenbuck's computer was seized and forensically examined. Analysis of the computer uncovered, among other things, five different photographs of child pornography, each of which was separately acquired by Roggenbuck at different points in time.

Prior to trial and with no argument from Roggenbuck, the circuit court found Roggenbuck to be a prior and persistent offender pursuant to section 558.016, RSMo Cum. Supp. 2007. Thereafter, a jury convicted Roggenbuck of five counts of possession of child pornography. The court sentenced Roggenbuck to seven years in the Missouri Division of Adult Institutions for each count, with the sentences to run consecutive. Roggenbuck appeals.

In his first point on appeal, Roggenbuck contends that the circuit court erred in overruling his motion to suppress and admitting evidence seized from his residence. He claims that the affidavit offered to support the search warrant lacked probable cause because the affidavit was "conclusory," lacked a factual and sufficient basis to determine credibility of the allegations, and did not set forth a crime or set forth that the computer would contain evidence of a crime. We disagree.

The application and affidavit in support of the search warrant contained the following:

> On February 13, 2008, Detective Sergeant Elizabeth Neland received information from E.D.M.[1] b/m 03-17-1970, [social security #], that Robin S. Roggenbuck, w/m 07-26-1952, at 400 Studio Drive, Building A, Apartment #2, Platte City, Platte County, Missouri, had been sexually abusing E.D.M. for the past five months at Roggenbuck's residence. E.D.M. indicated that Roggenbuck has a computer system in the living area of the apartment. E.D.M. reported the computer system is located to the left of the door upon entry and it is placed on a glass type desk. E.D.M. stated that Roggenbuck has images of children approximately ten years of age and older on his computer system. E.D.M. stated that Roggenbuck would ask him to look at the images.
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> On February 13, 2008, E.D.M. informed Detective Sergeant Elizabeth Neland that Robin S. Roggenbuck had stuck his finger and other "sex toys" in his buttocks penetrating the anal cavity. E.D.M. stated the sex toys were kept under Roggenbuck's bed and that there was only one bed in the apartment. E.D.M. reported there are other victims and provided first names of these victims. E.D.M. stated Roggenbuck keeps a supply of alcohol under the kitchen sink and gives the alcohol to the boys to 'have his way with them.'
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> On February 11, 2008, Nina Epperson, M.S., a psychologist, accompanied E.D.M. to the residence located at 400 Studio Drive, Building A, Apartment #2, Platte City, Platte County, Missouri to gather his belongings and while inside the residence observed large quantities of alcohol and a large massager plugged into the bedroom wall.

Based on the above affidavit, the circuit court found probable cause to warrant search and seizure of any "[p]roperty, article, material or substance that constitutes evidence of the commission of a crime" and "[p]roperty for which possession is an offense under the laws of this state." The court further articulated the scope of the search and seizure to include, among other items, Roggenbuck's computer.

"The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue except upon probable cause supported by oath or affirmation." *State v. Neher*, 213

[1]In compliance with § 566.226, RSMo Cum. Supp. 2010, the alleged sexual assault victim's name has been replaced with initials and statutorily prohibited identifiers have been omitted.

S.W.3d 44, 48-49 (Mo. banc 2007); U.S. CONST. amend. IV. "In determining whether probable cause exists, the issuing magistrate or judge must 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her] . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* at 49 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "[I]n reviewing a trial court's ruling on a motion to suppress evidence seized pursuant to a search warrant, the court gives great deference to the initial judicial determination of probable cause that was made at the time the warrant issued." *Id.* "The duty of a reviewing court is simply to ensure that the issuing judge had a substantial basis for determining that probable cause for the search did exist." *Id.*

Roggenbuck complains that the affidavit does not allege criminal activity. We disagree. The base allegation set forth in the affidavit is that of "sexual abus[e]." Pursuant to section 566.100, RSMo Cum. Supp. 2007, "sexual abuse" is a crime. "A person commits the crime of sexual abuse if he subjects another person to sexual contact by the use of forcible compulsion." *Id.* While Roggenbuck contends that the affidavit suggests nothing more than consensual sodomy between two adult men, use of the term "sexual abuse" contradicts this. The informant's status as an adult does not preclude him from "sexual abuse" under the statute.

The affidavit does not rest on the term "sexual abuse," however, and goes on to specify sexual acts allegedly perpetrated and sexual implements allegedly used by Roggenbuck. The affidavit states that E.D.M. also named other "victims" of Roggenbuck in his report to the police and alleged that Roggenbuck kept alcohol under his sink to give to "boys" to "have his way with them." These assertions are corroborated, in part, by a separate informant's, a psychologist's, first-hand observation of a "massager" and large quantities of alcohol in Roggenbuck's home.

Supplying alcohol to minors, in the manner set forth in the affidavit, is also a crime. § 311.310, RSMo Cum. Supp. 2007.

Nevertheless, Roggenbuck contends that, even if the affidavit is sufficient to allow search of the apartment due to allegations of "other victims," there is no basis for seizure of the computer. He contends that nothing within the affidavit suggests that the pictures of children are illegal in nature. We do not agree. The affidavit contains information from E.D.M. asserting that Roggenbuck had images of young children on his computer, which Roggenbuck "would ask him to look at." Immediately prior to this statement, the affidavit sets forth E.D.M.'s allegation of "sexual abuse." Immediately following this statement, the affidavit sets forth E.D.M.'s account of specific sexual acts allegedly perpetrated and sexual implements allegedly used by Roggenbuck. The context of the affidavit never strays from the theme of sexual abuse. Thus, the reviewing judge could have reasonably concluded that the initial and base allegation of sexual abuse set the context for all succeeding allegations and that, the aforementioned images of young children were likely sexual in nature. Possession of such images is a crime. § 573. 037, RSMo Cum. Supp. 2007. Exhibiting such pictures, including via a computer, is "promoting child pornography," a separate crime. § 573.025, RSMo Cum. Supp. 2007, § 573.010 (15), RSMo Cum. Supp. 2007. Based on a common-sense review of the affidavit, the court issuing the search warrant had ample information to conclude that there was a fair probability that evidence of a crime would be found on the computer. Consequently, the circuit court did not err in overruling Roggenbuck's motion to suppress and admitting evidence obtained pursuant to the search warrant. Point one is denied.

In point two, Roggenbuck contends that the court erred in entering five separate convictions and five consecutive sentences for possession of child pornography, thereby

violating double jeopardy prohibitions. U.S. CONST. amend. V. Roggenbuck claims that he committed the single offense of possessing a "series" of illegal photographs. While a violation of the double jeopardy clause is generally reviewed *de novo*, Roggenbuck concedes failure to preserve this issue and requests plain error review under Rule 30.20. *State v. Royal*, 277 S.W.3d 837, 841 (Mo. App. 2009).

Rule 30.20 authorizes this Court to review, in its discretion, "plain errors affecting substantial rights when the court finds that manifest injustice or miscarriage of justice has resulted there from." Our Supreme Court has established a threshold review to determine if a court should exercise its discretion to entertain a Rule 30.20 review of a claimed plain error. First, we determine whether or not the claimed error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted[.]"' *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc), *cert. denied*, 516 U.S. 1031 (1995) (quoting Rule 30.20). If not, we should not exercise our discretion to conduct a Rule 30.20 plain error review. If, however, we conclude that we have passed this threshold, we may proceed to review the claim under a two-step process pursuant to Rule 30.20. In the first step, we decide whether plain error has, in fact, occurred. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc), *cert. denied*, 130 S.Ct. 144 (2009). "All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious and clear." *Id.* (citations and internal quotations marks omitted). In the absence of evident, obvious, and clear error, we should not proceed further with our plain error review. If, however, we find plain error, we must continue to the second step to consider whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected. *Id.* We conclude Roggenbuck's claim does not facially establish substantial grounds for believing

that he has been a victim of manifest injustice and we, therefore, exercise our discretion and decline a full plain error review.

The double jeopardy clause protects a criminal defendant from "multiple punishments for the same offense." *State v. Flenoy*, 968 S.W.2d 141, 143 (Mo. banc 1998). This protection "'is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature.'" *State v. Polson*, 145 S.W.3d 881, 892 (Mo. App. 2004) (citation omitted). "Multiple convictions are permissible if the defendant has in law and in fact committed separate crimes." *Flenoy*, 968 S.W.2d at 143. To determine whether the defendant has committed separate crimes, we must determine whether multiple punishments were intended by the legislature. *State v. Barraza*, 238 S.W.3d 187, 193 (Mo. App. 2007). This determination depends on the "unit of prosecution" intended by the legislature. *Id.*

At the time Roggenbuck was charged, possession of child pornography was defined as possessing "any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct." § 573.037, RSMo Cum. Supp. 2007. Roggenbuck claims that the child pornography statute is ambiguous with regard to whether possession of "any obscene material" allows for separate prosecutions for each individual obscene or pornographic image. This ambiguity, he asserts, must be decided in his favor per the rule of lenity to avoid double jeopardy. *State v. Good*, 851 S.W.2d 1, 5 (Mo. App. 1992). In making his double jeopardy argument, Roggenbuck relies heavily on this Court's decision in *State v. Liberty*, No. WD71724, 2011 WL 1363804 (Mo. App. April 12, 2011), which found that conviction of a defendant of multiple counts of possession of child pornography, based on multiple images possessed at the same time, violated the double jeopardy clause. The Missouri Supreme Court sustained a motion for transfer in *Liberty* on August 30, 2011, however.

See Order in No. SC91821 (Mo. banc Aug. 30, 2011). In light of the Supreme Court's grant of transfer, our opinion in *Liberty* has no precedential value. *State v. Abdelmalik*, 273 S.W.3d 61, 65 (Mo. App. 2008); *Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 173 n.4 (Mo. App. 2007).

But even if *Liberty* remained precedential, Roggenbuck's case is distinguishable, and warrants a different outcome. In *Liberty*, the court emphasized that, on the evidence in that case, "the *actus reus* the statute required the State to prove – the defendant's possession – was a single event . . ., at a single time and place, indistinguishable in law or in fact." 2011 WL 1363804, at *5. *Liberty* itself acknowledged that, "[h]ad the State in the present case, for example, used metadata from the computer files to allege Mr. Liberty 'possessed' each photo at the time it was placed on his computer, rather than the State's generic charge that he possessed each of the photos 'on or about May 2nd, 2008,' our analysis might proceed differently." *Id.*

In this case the State presented the sort of evidence which *Liberty* recognized could justify separate convictions for possession of multiple images constituting child pornography. Therefore, whether or not *Liberty* was correctly decided on its own facts, it is not controlling here.[2] Each of the photographs for which Roggenbuck was convicted were acquired by Roggenbuck at different points in time.[3] State's Exhibit 29, one of the photographs for which Roggenbuck was charged, was first possessed by Roggenbuck on January 23, 2007 at 4:39 a.m.

[2]For reasons explained in the text, we need not address the merits of *Liberty*'s analysis as applied to the facts before it. We note, however, that *Liberty* did not cite either the definition of "material" found in § 573.010(9), RSMo Cum. Supp. 2007, which includes, among other things, "any picture" or "photograph" or the definition of "child pornography" found in §573.010(2)(b), RSMo Cum. Supp. 2007, which includes "any visual depiction, including any photograph . . . or computer or computer-generated image or picture" of sexually explicit conduct where the image is of a minor engaging in that conduct. Both of these definitions may affect the *Liberty* court's analysis.

[3]This evidence was produced at trial in the form of exhibits and testimony regarding metadata from Roggenbuck's computer files.

State's Exhibit 30 was first possessed by Roggenbuck on January 31, 2007 at 12:38 a.m. State's Exhibit 31 was first possessed by Roggenbuck on January 13, 2007 at 6:49 p.m. State's Exhibit 32 was first possessed by Roggenbuck on January 13, 2007 at 6:47 p.m. State's Exhibit 33 was first possessed by Roggenbuck on February 1, 2007 at 8:10 p.m. The jury had the opportunity to view each photograph and found each photograph to be child pornography. This point is uncontested. While Roggenbuck asks us to find that each of the five photographs were part of a "series," the fact that they were initially downloaded to his computer at identifiably different points in time contradicts this assertion.

Further, each photograph is distinctly unrelated to each of the other photographs. Without detailing the obscene and graphic nature of each photograph, as it is uncontested that they constitute child pornography, each child, depicted in each photograph, is different from the children depicted in each of the other photographs. This is evident from examination of details such as hair color, hair length, body structure, facial features, etc. Also apparent is that the setting for each photograph is different. For example, Exhibit 29 depicts what appears to be gray or white bed linens, while Exhibit 33 depicts what appears to be green and white plaid bed linens. Additionally, each photograph depicts a separate obscene act. For example, Exhibit 29 depicts two young male children engaged in sexual conduct, while Exhibit 32 depicts what appears to be an adult male engaging in anal sex with a young child.

At trial, the jury was asked to look at each photograph and make very specific findings with regard to the separate factual details of each. For example, jury instruction number six as to Count I required the jury to find beyond a reasonable doubt, along with other elements of the crime, that Roggenbuck "possessed a still image on his computer depicting a young male having a penis inserted into his anus." Jury instruction number seven regarding Count II asked the jury

to find that Roggenbuck possessed an image depicting "a young male performing oral sex on another young male."

The jury heard additional testimony, from a forensic examiner, that the five photographs had been accessed on dates and times other than Roggenbuck's first time of possession. The jury also heard that some of the photographs had been duplicated numerous times and found in different locations within Roggenbuck's computer.

Roggenbuck asks us to conclude that each of the five unique photographs, first possessed at different points in time, are part of a single unitary offense of "possession," and therefore cannot be individually prosecuted. We do not. Our determination is analogous to the finding in *State v. Wadsworth*, 203 S.W.3d 825 (Mo. App. 2006). There, a jury found the defendant guilty of seven counts of attempting to entice a child. *Id.* at 832. Each count was derived from defendant's internet conversations, each occurring on a separate date, with a person defendant believed to be less than fifteen years old. *Id.* at 833. The defendant contended that the charges were but a multiplicity of a single offense and that convictions for each separate conversation subjected him to double jeopardy. *Id.* at 831. The court rejected this claim. *Id.* at 834. In so doing, the court detailed the contents of each conversation and found that, for each conversation, the evidence was sufficient for a jury to conclude that the defendant had engaged in separate acts of enticement for each count. *Id.* at 833-834. The court concluded that the "particular communications in which defendant participated were separate actions" and that the

"[d]efendant's actions constituted a series of offenses." *Id.* at 834-835.[4]

Likewise, we find sufficient evidence from which Roggenbuck's jury could have found, beyond a reasonable doubt, that Roggenbuck engaged in separate offenses with respect to each charged image. The evidence warrants the reasonable conclusion that Roggenbuck engaged in different conduct and/or formed a new *mens rea* for each pornographic photograph that he took possession of, therefore justifying separate convictions and sentences for each. The court did not err in failing to *sua sponte* disregard the jury's conclusions and Roggenbuck's claim does not facially establish substantial grounds for believing that he has been a victim of manifest injustice. Point two is denied.

In point three, Roggenbuck contends that the circuit court committed reversible error in admitting hearsay evidence regarding resumes found on his computer. Roggenbuck claims that testimony, regarding the resumes, constituted hearsay not falling within an exception because they were unauthenticated documents admitted for the truth of the matter asserted. He maintains that the resume evidence was critical to the establishment of his guilt and that, if the evidence had been excluded, it is likely that the jury would have reached a different result. We disagree.

"A trial court's evidentiary rulings are reviewed for abuse of discretion." *State v. Davis*, 318 S.W.3d 618, 630 (Mo. banc 2010). "A trial court's decision to admit evidence is an abuse of discretion when it is clearly against the logic of the circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id.* (quoting *State v. Smith*, 136 S.W. 3d 546, 550 (Mo. App. 2004)).

[4]In support of this finding, the court cited *State v. Foster*. 838 S.W.2d 60 (Mo. App. 1992). In *Foster*, while the court deemed the appellant's double jeopardy argument abandoned due to inadequate briefing, the court stated that "the fact that defendant took five photographs of child pornography at the same location and within a relatively short period of time does not necessarily prevent prosecution, conviction, and sentencing for five separate offenses. *Id.* at 67.

Here, the State had the burden of proving that Roggenbuck possessed child pornography while "knowing of its content and character." § 573.037.1. As the photographs were not found on Roggenbuck's person and he was absent from his residence when they were seized, they were not in his "actual" possession. The State had to thus prove "constructive" possession of the illegal items. *Glover v. State*, 225 S.W.3d 425, 428 (Mo. banc 2007). To prove constructive possession, the State had to show, at a minimum, that Roggenbuck had access to and control over the area where the pornography was found. *Id.* In possession cases, where there is joint control over premises, "evidence of additional incriminating circumstances" that imply knowledge may be required. *State v. Warren*, 304 S.W.3d 796, 800 (Mo.App 2010). In *Glover v. State*, a case involving drug possession, the court stated that the "presence of a defendant's personal belongings in close proximity to the drugs may support an inference that he possessed the drugs." 225 S.W.3d at 428.

Here, the State presented testimony regarding residential leases signed by Roggenbuck to show that Roggenbuck had access and control over the premises where the illegal photographs were found. Nevertheless, trial testimony suggested that there were other potential users of the computer on which the pornography was found. Thus, it was reasonable for the State to put forth additional evidence to prove Roggenbuck's personal knowledge and possession of the illegal items and to submit evidence that might dispel doubts with regard to the same. Evidence of what appeared to be Roggenbuck's resume, located on the computer desktop next to a PowerPoint file containing the five photographs for which Roggenbuck was charged, served this purpose, as did other evidence the State offered. Additional State evidence consisted of testimony that the registered owner of the computer's operating system was "Robin," that a picture of Roggenbuck was found in the computer's "My Pictures" folder along with numerous copies of some of the

five photographs for which Roggenbuck was charged, that the only user-created account on the system was named "Robin," and that an e-mail account on the system was named rscott52rscott@aol.com.[5] This evidence was not offered to prove the truth of each but to provide for the jury a more complete picture of the contents of the computer and whether, based on the contents, Roggenbuck was likely to have had knowledge of the pornography.

Nevertheless, Roggenbuck claims prejudicial error because the State used the resume information in closing argument to draw inferences with regard to Roggenbuck's possession and knowledge of the illegal photographs. The State is "allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments." *State v. Brown*, 337 S.W.3d 12, 14 (Mo. banc 2011). It is within the jury's province to weigh the evidence and consider its credibility. *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). The challenged testimony was relevant to the elements of the State's case and admission of the resume content was not unreasonable, arbitrary, or unfairly prejudicial. Consequently, inferences drawn by the State regarding such evidence was permissible. Point three is denied.[6]

We, therefore, conclude that the circuit court did not err in overruling Roggenbuck's motion to suppress evidence and admitting the evidence at trial. The affidavit offered in support of the search warrant was sufficient to establish probable cause. Further, the circuit court did not err in entering five separate convictions and five separate sentences for Roggenbuck's possession

[5]Aside from Roggenbuck's continuing objection to all computer evidence on the grounds of warrant insufficiency, Roggenbuck did not object to this additional evidence at trial and does not herein object on appeal.

[6]Assuming, *arguendo*, that the resume testimony was improperly admitted, Roggenbuck would still not be entitled to reversal of his conviction unless he could show outcome-determinative prejudice. *State v. Bell*, 62 S.W.3d 84, 92 (Mo. App. 2001). Here, the testimony consisted of information that the resumes contained the name "Scott Roggenbuck," an e-mail address, familiar computer applications, educational experience, and a residential address. The only additional evidence that the contents of the resume offered, that was not already in evidence, was information regarding educational experience and familiarity with specific computer programs. To suggest that the jury would not have convicted Roggenbuck, but for this evidence, is unreasonable.

of five separate photographs of child pornography. Possession of each constituted a separate crime. Finally, the circuit court did not err in admitting evidence regarding resumes found on Roggenbuck's computer. We affirm the circuit court's judgment.

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James Edward Welsh, Judge

All concur.