IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26936-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MICHAEL NOAH BELFORD,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, A.C.J. — Michael Belford was convicted of six counts of possession of depictions of a minor engaged in sexually explicit conduct. The six counts were based on six different images of six different minor children found in Mr. Belford's possession. Mr. Belford appealed, arguing the proper unit of prosecution was one per possession, not one per minor child. The Supreme Court's decision in *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009) held that the proper unit of prosecution is one count per possession. Following *Sutherby*, we vacate five of Mr. Belford's six convictions and remand for resentencing.

FACTS

Michael Belford was charged with and convicted of six counts of possession of depictions of a minor engaged in sexually explicit conduct. Each depiction was of a different minor child and contained portions from movies referred to as the "baby-sitter," "backyard," "brothers," "family," "grandpa," and "montage." Report of Proceedings at 124-25. All six counts took place on the same violation date and at the same location.

The State requested an exceptional sentence for multiple current offenses. The trial court cited RCW 9.94A.535(2)(c) and found that Mr. Belford's offender score was 9+ points, based on his multiple current offenses and prior offenses. The trial court found that his high offender score resulted in some of the current offenses going unpunished. In section 2.4 of the judgment and sentence, under aggravating factors, the trial court wrote in: "See RCW 9.94A.535(2)(c)." Clerk's Papers at 44. The trial court sentenced Mr. Belford to serve consecutive sentences for counts 1 and 2, and concurrent sentences for the rest of the counts, totaling 204 months. The State did not give notice that they were seeking an exceptional sentence.

Mr. Belford appealed to this court, arguing that (1) the trial court violated double jeopardy by convicting him of six counts of possession of depictions of a minor engaged in sexually explicit conduct, and (2) the trial court erred by imposing an exceptional sentence.

Mr. Belford's appeal was stayed pending the Supreme Court's decision in *Sutherby*. *Sutherby* was decided in April 2009 and the stay on Mr. Belford's case was lifted.

ANALYSIS

Both the United States Constitution and the Washington Constitution prohibit a person from being tried twice for the same offense under their respective double jeopardy provisions. U.S. Const. amend. V; Const. art. I, § 9. When a person is convicted of violating a statute multiple times, the question is what unit of prosecution did the legislature intend as the punishable act under the statute. *State v. McReynolds*, 117 Wn. App. 309, 334, 71 P.3d 663 (2003) (quoting *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998)).

Mr. Belford appealed his conviction for six counts of possession of child pornography before the Supreme Court decided *Sutherby*. At that time, the State argued that the proper unit of prosecution was each photograph, film, or digital file containing a

photograph or film based on *Gailus*[1] and *Reeves*.[2] Following the decision in *Sutherby*, the State now concedes that the proper unit of prosecution is one count per possession, regardless of the number of images or number of children depicted in the images. The State asks that this court remand the matter for resentencing based on one count of possession of child pornography rather than six.

In *Sutherby*, Randy Sutherby was convicted of 10 counts of possession of depictions of minors engaged in sexually explicit conduct. *Sutherby*, 165 Wn.2d at 876. Mr. Sutherby's 10 counts corresponded to the 10 images found in his possession. At sentencing, the court consolidated five of the counts into two counts because the court stated that the proper unit of prosecution was per minor depicted and some images contained the same minor. *Id*. at 874. Mr. Sutherby appealed, arguing that the proper unit of prosecution was one count per possession, regardless of the number of images or the number of children in the images. *Id.* at 877. Division Two of this court held that the proper unit of prosecution was one count per possession of child pornography. *Id.* The Supreme Court agreed with Division Two and held that the proper unit of prosecution is one count per possession, not one count per image or per minor. *Id.* at 880.

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[1] *State v. Gailus*, 136 Wn. App. 191, 147 P.3d 1300 (2006).

[2] *State v. Reeves*, 144 Wn. App. 422, 182 P.3d 491 (2008), *review granted*, 166 Wn.2d 1024 (2009).

The scenario here is virtually identical to Mr. Sutherby's situation. *Sutherby* holds that the proper unit of prosecution is one unit per possession. Therefore, Mr. Belford should have been convicted of only one count of possession of child pornography. To convict him of any more than one count would violate the double jeopardy rule.

We vacate five of the six convictions and remand for sentencing per *Sutherby* on a single count of possession of depictions of minors engaged in sexually explicit conduct.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, A.C.J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, J.