No. 80169-0

J.M. JOHNSON, J. (dissent)—Poor little L.K. This innocent young girl was victimized at age five by her own grandfather, and now by a justice system that is supposed to protect her. The majority holds that Randy Sutherby, although convicted after a jury trial, is entitled to a new trial because he and his counsel did not ask to sever other criminal charges. I dissent because the majority finds this violates Sutherby's constitutional rights and remands to force L.K. to an unnecessary second trial.

L.K. is not the only child victimized. The second half of the majority opinion holds that Sutherby's possession of eight different films of sexual violation of different child victims on two separate computers equals just *one* charge. Because the majority ignores the legislature's express interest in protecting each child victim of filmed sexual abuse, I dissent.

Sutherby's trial for child rape, molestation, and child pornography involved simple questions of fact and credibility, each of which the jury

resolved. With respect to the child rape, L.K. testified her grandfather poked her repeatedly in her "pee pee" when she was at his house during the Christmas holiday. Verbatim Report of Proceedings (VRP) (Nov. 1, 2005) at 25. A doctor testified she observed physical evidence consistent with the child's account of digital penetration. Sutherby did not dispute much of what L.K. reported but testified that he had an injured finger that might have "accidentally" been in the area of his granddaughter's privates, but he didn't insert his finger into her vagina. The jury heard all the evidence, including testimony and cross-examination of L.K. and Sutherby, as well as testimony of other family members. The jury unanimously found Sutherby guilty. The case should have ended there as Sutherby received his full constitutional rights—including using his own attorney throughout.

However, Sutherby now contends, and the majority holds, that his trial had multiple errors, including his own failure to ask for severance of charges while represented by an attorney of his own choosing. Sutherby's claims for a new trial are meritless, especially considering the strong evidence supporting the jury convictions. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619-20, 73 S. Ct.

481, 97 L. Ed. 593 (1953).

Severance

The majority errs in holding Sutherby proves his counsel was deficient and that Sutherby was prejudiced by the alleged deficiency in violation of his constitutional rights. Although correctly citing the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the majority misapplies both prongs.

Sutherby's counsel was not deficient because enduring one trial for all the charges was likely a strategic choice.[1] Most obviously, Sutherby decided to save money by one trial, rather than two. Sutherby now has the burden of affirmatively showing that the decision was not tactical. But Sutherby's sole argument on deficiency is the bald assertion that there was "no downside" to severance. Br. of Appellant at 18. That is not a persuasive argument. First, he saved both time (under community suspicion) and money by avoiding two trials. Also, several scenarios indicate it would be no advantage to seek severance, even if granted.[2] Sutherby and his counsel knew that the State

[1] *See State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) ("If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel.").

[2] The majority limits its consideration of this prong to reasons expressed in the record.

could likely admit evidence of Sutherby's child pornography at any later separate trial for rape and molestation, especially if Sutherby testified, as he did here.[3] *Lex parsimoniae*, the logician's "Law of Parsimony," holds that the simplest, most obvious explanation is usually correct.[4] Sutherby and his counsel simply concluded a costly separate trial would be redundant and pointless, as well as expensive. Sutherby paid his selected counsel. Second, Sutherby obviously (if mistakenly) believed he could convince the jury of his innocence and that these charges were all a mistake. Sutherby had one

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Majority at 13 ("The record . . . reflects no legitimate strategic or tactical reason for . . . failure to move for a severance."). Neither *Strickland* nor our cases mandate such a limitation.

[3] The majority opines it is "highly likely" that evidence of Sutherby's child pornography would not be admissible in a separate trial. Majority at 16. But none of the cases the majority cites deal with the ER 404(b) exception relevant here, the defense of accident. These cases merely stand for the proposition that showing lustful disposition is one proper purpose for admitting ER 404(b) evidence. *See, e.g., State v. Medcalf*, 58 Wn. App. 817, 823, 795 P.2d 158 (1990) (noting evidence of other bad acts is admissible to show lustful disposition, and for other purposes). The majority assumes that, because our prior cases involving evidence of possession of child pornography have only dealt with the lustful disposition exception to ER 404(b), ipso facto other ER 404(b) exceptions do not apply to such evidence. This ignores the plain language of ER 404(b) and has no support in our case law. It is also inconsistent with child sexual assault cases where we have explicitly approved admission of ER 404(b) evidence for other purposes. *See, e.g., State v. DeVincentis*, 150 Wn.2d 11, 17-23, 74 P.3d 119 (2003) (common scheme or plan); *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (motive and opportunity); *State v. Elmore*, 139 Wn.2d 250, 286, 985 P.2d 289 (1999) (res gestae).

[4] In its more complete form it is often called "Ockham's Razor" and attributed to a 14th century logician, William of Ockham. *J.S. v. Shoreline School Dist.*, 220 F. Supp. 2d 1175, 1186 (W.D. Wash. 2002).

common defense—any penetration of his granddaughter was an "accident," and he accidentally downloaded child pornography. Sutherby has not proved that these were not tactical reasons for his decision not to seek severance, even after the issue was raised by the judge. Therefore, he cannot establish that his counsel's performance was constitutionally deficient.

The United States Supreme Court in *Strickland* warned that it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission . . . was unreasonable." *Strickland*, 466 U.S. at 689. That is why "every effort be made to . . . reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

Sutherby was not represented by an overworked public defender provided at public expense. He hired, at his own expense, a private attorney who made tactical decisions with his client, including not moving for severance. The majority glosses over the fact that there are plausible and even more likely reasons for Sutherby and his counsel's decisions, and the majority is badly skewed by the "distorting effects of hindsight." *Id.*

Sutherby was also not prejudiced by his counsel's allegedly deficient

performance. Under the second prong of *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. The majority presumes, without any rationale, that the outcome of a severed trial would be different. To the contrary, the jury heard strong evidence of Sutherby's guilt—much stronger than similar cases in which we have upheld the sufficiency of the evidence[5]—and Sutherby's defense was unbelievable. L.K. was clear, consistent, and timely in her accounts, which were supported by other witnesses. Her reluctance to be around Sutherby after the rape was observed and recounted by several other family members who testified. Medical evidence from an examining doctor supported the claim of digital penetration, and Sutherby *admitted* that his finger might have been in the area of L.K.'s vagina while she was naked.

Sutherby's sole defense—that he might have "accidentally" poked the child's vagina—is similarly unpersuasive. The jury's verdict reflects its disbelief of Sutherby—and belief that little L.K. told the truth. There is no

[5] *See*, *e.g., State v. Tilton*, 149 Wn.2d 775, 787, 72 P.3d 735 (2003) (victim's timely report and testimony about the event sufficient); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987) (victim's timely report and identification of the perpetrator sufficient).

reason to believe a separate trial would have resulted in a different outcome.[6]

Furthermore, remanding now for an unnecessary new trial disregards an important principle of our constitution's crime victims' rights amendment. *See* Const. art. I, § 35 (amend. 84). That amendment stands for the principle that victims ought to be accorded dignity and respect throughout the criminal process. Under the majority's holding, L.K. and her family must now suffer through a second trial on the rape and molestation charges because the majority has an unfounded hunch that Sutherby might have been prejudiced. The majority disregards the spirit, if not the letter, of this important Washington constitutional provision.

Unit of Prosecution

The majority also errs in concluding Sutherby can be convicted of only one count of possession of child pornography.[7] These images were found on *two* separate computers containing "lots" (Sutherby's own word) of sexually

[6] *Cf. State v. Warren*, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989) (holding that failure to move to sever charges of attempted rape against different victims was not prejudicial when both victims testified, gave concise accounts of the defendant's conduct, and were subject to cross examination, the defendant testified, and the jury had a full opportunity to assess the demeanor and credibility of all the parties).

[7] At sentencing, the trial judge reduced Sutherby's convictions from 10 to 7. The judge combined the counts for images depicting the same minor.

explicit series of different children, individually titled and downloaded on different days over a period of several *years*. VRP (Nov. 3, 2005) at 355-56. Sutherby's possession was not an isolated, singular criminal act.

The unit of prosecution is "'a question of statutory interpretation and legislative intent.'" *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 956 P.2d 1072 (1998)). "In determining legislative intent, this court first looks to the statute's plain meaning." *Id.* The statute here forbids the "knowing[] possess[ion of] visual or printed matter depicting *a* minor." Former RCW 9.68A.070 (1990) (emphasis added). Printed matter is defined as "any photograph or other material that contains a reproduction of a photograph." RCW 9.68A.011(2). In *State v. Root,* 141 Wn.2d 701, 710, 9 P.3d 214 (2000), where this court addressed the unit of prosecution for the sexual exploitation of a minor (RCW 9.68A.040), we held, "[t]he statute specifically states 'a minor,' so [the defendant] may be charged per child involved." This court approved multiple charges in *Root*, 141 Wn.2d at 711. We should hold the same here.

In enacting chapter 9.68A RCW, the legislature declared, "the prevention of sexual exploitation and abuse of children constitutes a

government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children." RCW 9.68A.001. The majority's ruling "result[s] in a defendant's receiving the same punishment for possessing photographs of one hundred children as for possessing only one . . . ." *State v. Reeves,* 144 Wn. App. 422, 428, 182 P.3d 491 (2008) (disapproving of the Court of Appeals' reasoning in this case and holding the rule of lenity did not apply).[8]

The majority's holding undermines the legislature's purpose in suppressing the production and trade of child pornography. The multibillion dollar child pornography industry,[9] like any market, is driven by demand. Sutherby, as a consumer of numerous sexually explicit downloads, contributed significantly to this demand, more than a consumer who

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[8] A significant majority of other jurisdictions have also rejected the one-count-fits-all approach and have found a separate count is warranted for each minor depicted in the images possessed, or even for each image possessed. *See Commonwealth v. Davidson*, 595 Pa. 1, 938 A.2d 198, 219-20 (2007) (surveying unit of prosecution for possession of child pornography in various jurisdictions).

[9] "[C]hild pornography has become a multi-billion dollar commercial enterprise, and is among the fastest growing businesses on the Internet." Press Release, Nat'l Ctr. for Missing & Exploited Children, Child Porn Among Fastest Growing Internet Businesses (Aug. 18, 2005), *available at* http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2064

downloads a single image. But under the majority's holding, once a person has downloaded one pornographic image, every additional image brings no risk of additional punishment. Child pornography offenders should not be entitled to a "volume discount." *Commonwealth v. Davidson*, 595 Pa. 1, 938 A.2d 198, 221 (2007).

Sutherby's possession harmed at least seven different child victims whose images were recorded and stored on his computers, and he should be punished accordingly. The majority's analysis undermines the legislature's purpose and fails to adequately protect innocent child victims. Hopefully the legislature will act to correct this misreading of the statute.

Conclusion

Sutherby received a fair trial and was properly convicted by a unanimous jury of sexually abusing his granddaughter and of seven counts of possession of child pornography. The majority's ruling fails to adequately protect innocent child victims and misapplies the test set by the United States Supreme Court to determine truly constitutionally ineffective assistance of counsel. Therefore, I dissent.

And what about L.K.? She did everything a little girl in her situation

should have done. She told her mother what her grandfather had done. She gave the same account to two doctors and to a child interviewer. She recounted the incident at a competency hearing, and she honestly described the events again to the jury. She knows the number one rule of the court is "[n]ever lie." VRP (Nov. 1, 2005) at 59. And she did not lie; indeed, the jury—our system's lie detector—properly made that determination. But now, several years later, the majority's decision means she will have to relive these traumatic events at another trial (or see her victimizer plead down to a reduced sentence). It would be possible to explain to L.K. why she has to go through such a horrible experience if the constitution required that result, but it does not. I dissent. Poor little L.K.

AUTHOR:
Justice James M. Johnson

WE CONCUR: