
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,)
)
 Plaintiff-Respondent,) Trial Court No. 02022413C
 Respondent on Review,)
)
 vs.) Appellate Court No. A120293
) Supreme Court No. S52251
 ROBERT WAYNE BRAY,)
)
 Defendant-Appellant,)
 Petitioner on Review)

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Malheur County
Honorable PATRICIA A. SULLIVAN, Judge

Opinion Filed: January 12, 2005
Author of Opinion: Haselton, Presiding Judge
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BRIEF ON THE MERITS

Statement of the Case

This is a criminal case in which defendant appeals from a judgment convicting him of four counts of encouraging child sexual abuse in the first degree, ORS 163.684, and 11 counts of encouraging child sexual abuse in the second degree. ORS 163.686.

On appeal, defendant challenges his convictions on the four counts of encouraging child sexual abuse in the first degree. The resolution of this case presents a preservation issue, an issue of statutory construction, and a question concerning the sufficiency of the evidence to support a guilty verdict on the first degree offenses.

Questions Presented, Proposed Rules of Law, and Summary of the Arguments

First Question Presented: How does a defendant preserve a challenge alleging that the state failed to present sufficient evidence on a material element of an offense?

First Proposed Rule and Summary: A defendant preserves a challenge to the sufficiency of the state's evidence to prove a material element of an offense alleged in its charging document when he moves for a judgment of acquittal, addresses the specific count, focuses the court and parties on the specific element, and argues that the state failed to offer sufficient proof to sustain a guilty verdict.

Here, defendant properly preserved a sufficiency challenge to both of the state's theories supporting the first degree charges alleged in the indictment. First, defendant specified that he was challenging all 11 first degree counts. Second, defendant narrowed the focus of his motion to the "intent to print" and "intent to display" elements as alleged in the indictment. Third, the state had an opportunity to respond. Finally, the court addressed defendant's argument under both theories.

After defendant argued his sufficiency motion, it was the state's burden to identify the evidence to support the charges. Even if defendant on appeal identified an alternative reason why the element was unproven, neither the state's obligation nor the reviewing court's inquiry had changed. When a defendant raises the broader issue challenging the sufficiency of the evidence on a specific element, the state and court are on notice that defendant is contending that the element has not been proven.

Second Question Presented: When the state pleads two alternative theories of liability to prove a single crime, has the state abandoned one theory if it fails to mention or argue the theory during its opening, during its argument on defendant's motion for judgment of acquittal, during closing, and during the court's special verdict?

Second Proposed Rule and Summary: The state has abandoned an alternative theory of liability when it: (1) chooses to plead alternative theories in a single count instead of multiple counts; (2) fails to articulate the basis of the alternative theory (a) during opening, (b) during motion for judgment of acquittal,

and (c) during closing arguments; and (3) does not request a finding on that theory when the court renders a special verdict.

In the present case, the district attorney's conduct and the court's verdict indicate that the "intent to print" alternative theory of liability had not been advanced to the court: the district attorney did not address the "intent to print" theory in his opening statement, during the motion for judgment of acquittal, or during closing argument. Additionally, the court rendered a special verdict based entirely on the "intent to display" theory, and the state remained silent during the special verdict. Accordingly, the court and the parties appeared to fairly understand that the "intent to print" theory had been abandoned.

Third Question Presented: Did the legislature intend encouraging child sexual abuse in the first degree to apply to the consumers of child pornography?

Third Proposed Rule and Summary: The legislature designed the encouraging child sexual abuse statutory scheme to allocate liability based on the offender's status within the child pornography market: the second and third degree statutes are aimed at consumers, while the first degree statute is aimed at producers and distributors.

The plain language and context of the encouraging child sexual abuse in the first degree statute supports defendant's interpretation for five reasons. First, the operative words in the first degree statute reflect a legislative intent to punish those individuals who make child pornography accessible to a third party. Second, the legislature's usage of the word "display" in other statutes indicates that the first degree statute is aimed at production and distribution. Third, the

word "print" when read *in pari material* suggests that it is a commercial term aimed at capturing a method of distribution or production. Fourth, the overall structure of the encouraging child sexual abuse scheme indicates that it is aimed at those individuals participating in the production and distribution-end of the child pornography market. Fifth, the first degree statute is part of a subchapter of crimes that already contain statutes aimed at punishing child pornography consumers.

The legislative history confirms defendant's interpretation and indicates that the legislature intended the first degree statute to cover the production and distribution of child pornography. Like the legislature's previous statutes aimed at punishing dissemination of child pornography, the legislature chose the terms "print" and "display" to capture commercial practices associated with distribution and production.

Fourth Question Presented: By showing that defendant downloaded and saved child pornography on his computer, did the state also establish beyond a reasonable doubt that defendant intended to participate as a producer or distributor within the child pornography market?

Fourth Proposed Rule and Summary: The state failed to prove that defendant possessed child pornography with an intent to print or display the images. None of the evidence that the state presented reasonably showed that defendant intended to participate as a producer or distributor within the commerce of child pornography.

Additionally, none of the evidence that the state presented reasonably demonstrated that defendant intended to print the images for any reason.

Nature of the Proceedings Below

The state charged defendant with 11 counts of encouraging child sex abuse in the first degree and 11 counts of encouraging child sexual abuse in the second degree. (See Indictment at ER 1-7).

Defendant waived his right to a jury trial, and was tried by the court. Following the state's case-in-chief, defendant moved the court for judgments of acquittal on the 11 first degree charges. (Tr. 131–135). The trial court denied the motion. (Tr. 142).

After closing arguments, the trial court found defendant guilty on the first degree counts corresponding to the images saved to the computer's "allocated space"¹ (counts two, three, four, and five), and guilty on all of the second degree charges (counts 12 through 22). The court acquitted defendant on the remaining first degree counts that corresponded to images removed from the computer's

¹ A computer's hard drive includes allocated and unallocated space. Allocated space includes the part of the hard drive where saved files are stored. Unallocated space includes the area of the hard drive with unassigned binary code. (Tr. 37, 120, 127, 151–152).

Previous images appearing on the computer monitor can be uncovered from unallocated space. (Tr. 119, 163–164). An image will appear in unallocated space either because the image was viewed and deleted or because the image was unintentionally stored via "mouse trapping." (Tr. 120–121, 156).

Mouse trapping occurs when an individual visits an internet site and other images unintentionally "pop-up." A "pop-up" is a window or image that automatically appears when someone searches a particular web address. (Tr. 153–156).

"unallocated space" (counts one, six, seven, eight, nine, ten, and eleven) (See Judgment at ER 8-18).

Defendant appealed, and the Court of Appeals affirmed the trial court's ruling on defendant's motions for judgment of acquittal. *State v. Bray*, 197 Or App 12, 19, 104 P3d 631 (2005).

Defendant petitioned for review. On May 31, 2006, this court granted defendant's petition. *State v. Bray*, 340 Or 672, ___ P3d ___ (May 31, 2006)²

Statement of the Facts

The Court of Appeals stated the facts, as follows:

"[D]efendant, an inmate at Snake River Correctional Institution, obtained access to the Internet while working as a clerk in a call center staffed by inmates as part of an inmate work program. Defendant logged onto his workstation computer using the password of a supervisor and visited Internet websites that contained photographs showing sexually explicit child pornography.

"Defendant saved some of those photographs onto the hard drive of his workstation computer. Defendant viewed other child pornography photographs as well, but did not save them to the hard drive. When confronted, defendant admitted that he had visited child pornography websites but indicated that he had done so while conducting legal research."

Bray, 197 Or App at 14.

Argument

The state charged defendant with one count of encouraging child sexual abuse in the first degree for each image of child pornography discovered on his

² This court also granted the state's petition for review in this case. *State v. Bray*, SC S52367. The state's petition involves sentencing issues resolved in defendant's favor by the Court of Appeals.

computer. ORS 163.684 (encouraging child sexual abuse in the first degree)

reads, in part:

"(1) A person commits the crime of encouraging child sexual abuse in the first degree if the person:

"(a)(A) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance or sells any photograph, motion picture, videotape or other visual recording of sexually explicit conduct involving a child or possesses such matter with the intent to develop, duplicate, publish, print, disseminate, exchange, display or sell it."

Additionally, for each first degree count in the indictment, the state pleaded two separate theories of liability alleging that defendant possessed the image with either an intent to "print" or "display" the image.

For example, as to count one, the indictment read:

"COUNT 1 --- The said defendant, ROBERT WAYNE BRAY, on or about the period between January 2, 2001, and May 22, 2001, in Malheur County, State of Oregon, did unlawfully and knowingly possess Exhibit 1, a computer generated visual recording of sexually explicit conduct involving a child *with intent to print or display* on the computer screen the computer generated visual recording while being aware of and consciously disregarding the fact that creation of the visual recording of sexually explicit conduct involved child abuse."

(See Indictment at ER 1-7) (emphasis added).

The primary issue on review is "whether the trial court erred in denying defendant's motion for judgment of acquittal on four charges of encouraging child sexual abuse in the first degree." *Bray*, 197 Or App at 14.

The trial court's ruling on defendant's motion and the Court of Appeals' opinion are incorrect and require reversal for three reasons: (1) defendant properly challenged the sufficiency of the evidence as to both of the state's

theories in the indictment; (2) the legislature intended encouraging child sexual abuse in the first degree to criminalize the production and distribution of child pornography; and (3) the state offered evidence that defendant possessed child pornography for personal consumption; it failed to prove that defendant possessed child pornography with an intent to print or display the images for purposes of participating in the production or distribution-end of the child pornography market.

- 1. Defendant properly preserved a sufficiency challenge to both of the state's theories in the indictment, because he specified the counts and elements that the state failed to prove, the state had an opportunity to respond, and the court addressed defendant's argument under both theories.**

As a general rule, an appellant is limited to raising issues that were preserved. *State v. Wyatt*, 331 Or 335, 341, 15 P3d 22 (2000); *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988). The purpose of the preservation rule is to ensure fairness and promote efficiency. *State v. Stevens*, 328 Or 116, 122, 970 P2d 215 (1998).

Those purposes are met if the party opponent is not "taken by surprise, misled, or denied opportunities to meet an argument" and the trial court had an opportunity to grasp the error and correct it. *Davis v. O'Brien*, 320 Or 729, 737, 891 P2d 1307 (1995).

- a. Defendant moved for a judgment of acquittal, specified the counts and elements at issue, and argued that the state failed to prove either theory.**

At the close of the state's case-in-chief, defendant moved for judgments of acquittal on all counts, challenging the sufficiency of the state's evidence to

support a guilty verdict. ORS 136.445³; *State v. Harris*, 288 Or 703, 721, 609 P2d 798 (1980).

For preservation purposes, this court favors sufficiency challenges that specify the count and the element at issue. See *State v. Stroup*, 290 Or 185, 204–05, 620 P2d 1359 (1980) (rejecting a defendant's sufficiency challenge on appeal, because the motion for judgment of acquittal in the trial court was directed to a different element). *But see State v. Reed*, 339 Or 239, 118 P3d 791 (2005) ("Although defendant has emphasized different aspects of the trial court's alleged error at different times, e.g., whether it erred in its treatment of the expert testimony or specific evidence of lack of consent, defendant consistently has asserted the state's failure to introduce evidence sufficient to support a jury verdict. We conclude that defendant properly preserved the issue.").

Consistent with that principle, defendant articulated his challenge "as far as Counts [one] through 11 go." (Tr. 133). Counts one through 11 described the first degree offenses and alleged two separate theories of liability. Specifically, defendant attacked the evidence in regard to both of the state's theories:

"[DEFENSE COUNSEL]: Furthermore, Your Honor, 163.684, again, if – if you'll read section (a)(A), knowingly develops, duplicates, publishes, prints, disseminates, exchanges cells or photograph, motion picture, videotape, or other visual recording to sexual explicit conduct involving a child, or possess such a matter

³ ORS 136.445 reads:

"In any criminal action the defendant may, after close of the state's evidence or of all the evidence, move the court for a judgment of acquittal. The court shall grant the motion if the evidence introduced theretofore is such as would not support a verdict against the defendant. The acquittal shall be a bar to another prosecution for the same offense."

with intent to develop, duplicate, publish, print, disseminate, exchange, display, or sell. That's one of the sections, and that's in fact the section that Mr. — [defendant] was indicted on. Your Honor, they indicted it as him having the intent to print or display on the computer screen."

(Tr. 135). That passage focused the parties and the court on the material elements in the statute and indicated that defendant was raising a challenge to the state's evidence regarding "the intent to print or display on the computer screen." (Tr. 135).

Defendant articulated his argument with respect to the challenged elements contained in the indictment. Defendant posited:

If you'll read that section as a whole, Your Honor, that section as a whole clearly shows that the idea is to stop 'dealer,' the person who has the material and wants to disseminate it or develop it, or print it, or publish it, or exchange it * * *

"There's absolutely no evidence that that is the case — that is the case here. *In fact, the — the testimony that has — that has come out is that the — the computer — where the computer was located in the Call Center had a 'privacy screen' on there, which shows an intent **not to show anybody, not to display anything, or to do anything like that.***

"* * * * *

"But bottom line is, Your Honor, the only way that — to have that material [the images on defendant's computer] viewed is if you display it on the computer."

(Tr. 135–136) (emphasis added). In sum, defendant argued that he did not intend to print or display the images to another person or print the images for *any* purpose.

b. The state was given an opportunity to meet defendant's arguments.

After defendant argued his motion, the court gave the state an opportunity to respond. (Tr. 136). The state articulated the evidence supporting its "display" theory. (Tr. 136-140). However, the state said nothing about its "print" theory.

At that point, the state should have known that defendant was challenging the first degree charges and alleging that there was no evidence of an intent to print or display. (Tr. 135). Therefore, defendant's arguments did not deny the state an opportunity to meet the argument at trial; rather, defendant's argument invited a response by the prosecutor on both theories of liability.

c. The trial court understood and rejected defendant's motions for judgment of acquittal on the "print" and "display" theories.

The trial court disagreed with defendant's construction of the statute. The court stated, "As far as the display issue, I – I think the statute means what it says, and a display means that when somebody can see it, and it doesn't say that you – you have to display to another person." (Tr. 141).

After rejecting defendant's statutory construction argument, the court ruled that the state had presented sufficient evidence to withstand a motion for judgment of acquittal:

"THE COURT: The problem is that we don't know. I mean there's lots of ways he could display this [to] other inmates. It – there's no evidence that he was doing that, but I did hear some disturbing evidence that he was sending e-mails to people, and so I don't know if – the *possibility's certainly there for printing and displaying.*

** * * * *

"So why did he clean the hard drive, and why were – since he, assuming his admission that he'd been doing this for months was true, what happened to that other stuff? Did it go out on the e-mails? *Was it printed and sold to other inmates? Who knows, but that would at least be some evidence that would survive a judgment of acquittal that he intended to print or display them.* So I'll go ahead and deny your motion on that basis, and – and you can go forward with your case."

(Tr. 141–142) (emphasis added). The emphasized portions indicate that the court understood defendant's motion to challenge the sufficiency of the evidence under both the intent to "print" and "display" theories in the indictment.

The Court of Appeals disagreed. Apparently, the court crafted a distinction between a sufficiency challenge made as a matter of law and a sufficiency challenge argued as a matter of fact. *Bray*, 197 Or App at 14. Based on that apparent distinction, the court held that defendant only furthered a legal challenge to the sufficiency of the state's proof of an intent to print or display. According to the Court of Appeals, defendant's factual challenge to the state's alternative "print" theory was not preserved. *Id.*

However, even if the Court of Appeals characterization of the record is correct, this court has routinely allowed an appellant to raise alternative arguments or theories that support the broader legal issue raised at trial. *State v. Roble-Baker*, 340 Or 631, 639, ___ P3d ___ (May 25, 2006) ("Although defendant now identifies three alternative points at which she contends the circumstances became compelling, neither the state's obligation nor the reviewing court's inquiry has changed."); *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 501, 982 P2d 1117 (1999) ("The record shows that NWNG's counsel argued at trial that NWNG's conduct did not cause Chase's

damage. On this record, we conclude that permitting NWNG to make specific alternative arguments on appeal on the issue of causation results in no fundamental unfairness to Chase[.]").

The legal/factual distinction drawn by the Court of Appeals does not advance the purposes behind preservation. After defendant argued his motions for judgment of acquittal, it was the state's burden to identify the evidence in the record to support the challenged elements in the indictment. Even if on appeal defendant identifies an alternative reason why a challenged element was unproven, neither the state's obligation nor the reviewing court's inquiry has changed. When a defendant raises the broader issue challenging the sufficiency of the evidence on a specific element, the parties and court are on notice that defendant is contending that the element has not been proven. *Hitz*, 307 Or at 188.

d. The district attorney's conduct and the court's verdict indicate that the "intent to print" theory had been abandoned.

The record indicates that the state abandoned its "intent to print" theory and elected to prove only that defendant intended to "display" the images. The trial court's findings and verdict affirm that it treated the "intent to print" theory as abandoned.

First, the purpose of opening statement is to notify the fact-finder of the contested issues and the anticipated evidence to prove those issues. *State v. Reynolds*, 164 Or 446, 454, 100 P2d 593 (1940). The state did not flag its "intent to print" theory in its opening, nor did it discuss any of its evidence that might

produce an inference that defendant intended to print any of the offending images.

Second, during the motion for judgment of acquittal, defendant challenged the "intent to print" theory. (Tr. 131–135). However, the state did not meet the argument or identify the evidence purportedly supporting the "print" theory. Instead, the state argued that "[d]isplay means display." (Tr. 136).

Third, the purpose of closing argument is "to persuade the jury to adopt a particular view of the facts." *Ireland v. Mitchell*, 226 Or 286, 295, 359 P2d 894 (1961). In its closing argument to the fact-finder, the state relied entirely on the theory that defendant intended to "display" the images to himself on his computer screen when he saved them to the allocated space. (Tr. 173). The state did not attempt to persuade the fact-finder that defendant was guilty based on its "intent to print" theory.

Finally, the court's verdict fairly indicates that it too, considered the state's "intent to print" theory abandoned. In rendering its verdict, the court specifically found defendant guilty of the four first degree charges based on the state's "intent to display" theory. The court found that "the only reason that someone would [save the images] would be to organize them in that way *and bring them back up for further display*." (Tr. 183) (emphasis and bracketed information added). The court said nothing about an "intent to print."

In acquitting defendant on the seven remaining first degree charges, the court noted, "I don't think there's evidence that proves the element that [defendant] — he possessed these knowingly with the intent to display." (Tr. 181,

183). The court explained, "I think in that case I have a problem with the language in the charge on Counts 1 and 6 through 11 *that he possessed those with the intent to display them*, because if he simply deleted them or they came in and he didn't know they were there, I think there's a problem with those." (Tr. 181–182, 183) (emphasis added; bracketed information added).

Therefore, defendant's guilt and innocence turned on only one of the two alternative theories charged in its indictment—the "display" theory. There were no factual findings regarding the "intent to print" theory, because the parties fairly understood that the "print" theory had been abandoned.

The state could have avoided abandoning its alternative theory of liability in three ways: (1) the district attorney could have pleaded the alternative theories in different counts; (2) the district attorney could have requested specific findings on both of its alternative theories; or (3) the district attorney could have objected to the trial court's special verdict on the "display" theory. However, the state did nothing in response to the court's special verdict, which further evinces the prosecutor's intent to abandon the "print" theory and underscores that the court implicitly accepted the state's election to proceed on the single "display" theory. *See Shoup v. Wal-Mart Stores*, 335 Or 164, 178, 179, 61 P3d 928 (2003) (explaining how a special verdict avoids the "we can't tell" problem associated with multiple theories alleged under a single claim).⁴

⁴ *Shoup* partially overruled *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990). *Whinston* articulated the application of the common law "we can't tell" rule as it applied to appeals from civil judgments. Neither *Whinston* or *Shoup* addressed the common law "we can't tell" rule as it would

Finally, even if the state did not abandon its “print” theory, reversal is still required because (1) there is no evidence of an intent to print for purposes of participating in the child pornography market, and (2) there is no evidence that defendant intended to print even for personal consumption.

2. The legislature designed the encouraging child sexual abuse statutory scheme to allocate liability based on the offender's status within the child pornography market: the second and third degree statutes are aimed at consumers, while the first degree statute is aimed at producers and distributors.

The proper interpretation of ORS 163.684 (encouraging child sexual abuse in the first degree) presents a question of statutory interpretation under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). Specifically, the issue is whether a person who saves an image to a file on a computer's hard drive is guilty of possessing the saved image with an “intent to print” or an “intent to display” the saved image.

a. The plain language, context, and case law indicate that the legislature intended the first degree statute to punish those individuals who produce or distribute child pornography.

The plain language and context of the encouraging child sexual abuse in the first degree statute supports defendant's interpretation for five reasons. First, the operative words in the first degree statute reflect a legislative intent to punish those individuals who make child pornography accessible to a third party.

The legislature did not define the term “print” or “display.” Accordingly, the terms must be understood under their common usage. See *Id.* at 611 (stating

apply to criminal judgments. However, the “we can't tell” rule is not an issue in this case because the court rendered what amounts to a special verdict.

words of common usage are to be given their plain, natural, and ordinary meaning when not otherwise defined by the legislature).⁵

The word "display" means "to put on exhibition (these reproductions have been ~ed throughout Canada)." *Webster's Third New Int'l Dictionary* 654 (unabridged ed 1993). Therefore, a "display," like an exhibition, involves more than one person. Coupled with the attached mental state, the legislature intended the state to prove that a defendant possessed the material with the conscious objective to exhibit the material to a third party.

Second, the legislature's usage of the word "display" in other statutes suggests that the first degree statute is directed at commercial functions. *Denton and Denton*, 326 Or 236, 241, 951 P2d 693 (1998) (explaining that context includes related statutes as well as "the preexisting common law and the statutory framework within which the law was enacted."). The word "display" appears in a list with the word "sell" 20 times in the Oregon Revised Statutes.⁶ When the legislature uses the word "display" with words such as finances, sells, or exchanges, it suggests an act associated with multi-party transactions. For

⁵ The disputed terms are preceded by the legal phrase "with the intent to." See ORS 161.085(7). That section reads:

"'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described."

⁶ ORS 83.510, 163.684, 323.085, 459A.650, 471.400, 480.130, 571.005, 571.190, 571.210, 619.370, 632.480, 632.786, 634.006, 634.050, 646.949, 647.135, 815.095, 822.025, 822.082, and 830.780.

example, ORS 822.005 defines a motor vehicle dealer for the purposes of dealing without a license, as anyone who

“(a) Buys, sells, brokers, trades or exchanges vehicles either outright or by means of any conditional sale, bailment, lease, security interest, consignment or otherwise;

“(b) Displays a new or used vehicle, trailer, semitrailer or manufactured structure for sale * * *”

Those words evoke commercial, business, production, and marketing themes. Encouraging child sexual abuse in the first degree uses “display” and “print” in that same manner.

Third, the word “print” when read *pari in material* suggests that it is a commercial term aimed at capturing distributors or producers who print child pornography for consumption. The word “print” means “to make a copy of by impressing paper against an inked printing surface or by an analogous method.” *Webster's Third New Int'l Dictionary* 1803 (unabridged ed 1993). Nothing in that definition, by itself, requires an intent to exhibit or display to an audience. However, the phrase “intent to print” can not be deduced in a vacuum. *State v. Werdell*, 340 Or 590, 596, ___ P3d ___ (2006) (explaining that when interpreting a disputed statute, words should not be read in isolation, but instead must be interpreted *in pari material*). Therefore, to correctly interpret the meaning of the word “print” it must be understood in context with the statutory terms “develop, duplicate, publish, print, disseminate, exchange, display or sell.” ORS 163.684(1)(a)(A).

Notably, all of those acts involve either an act associated with a third party transaction (disseminate, exchange, or sell) or involve the act of creating more

child pornography (develop, duplicate, publish or print).⁷ However, read together the terms are aimed at capturing the production and distribution-end of commerce. Under the principle *noscitur a sociis*, all the operative terms must reflect a similar meaning. See *State v. Ott*, 297 Or 375, 392, 686 P2d 1001 (1984) (stating “the meaning of a term is ascertained in relation to the terms associated with it.”). Therefore, whether the act is “printing” or “displaying,” it reflects an act associated with the production and distribution of the offending material.

Fourth, the structure of the first degree statute indicates that it is aimed at those individuals participating in the production and distribution-end of the child pornography market. There are three ways to violate the first degree encouraging statute. First, a person who “knowingly develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance or sells any photograph, motion picture, videotape or other visual recording of sexually explicit conduct involving a child,” violates the first clause of the statute. ORS 163.684(1)(a)(A).

⁷ “Disseminate” means “to spread or send out freely or widely as though sewing or strewing seeds: make widespread.” *Webster’s Third New Int’l Dictionary* 656 (unabridged ed 1993). “Exchange” means the act of giving or taking one thing in return for another as if equivalent.” *Webster’s Third New Int’l Dictionary* 792 (unabridged ed 1993). “Sell” means “to give up (property) to another for money or other valuable consideration.” *Webster’s Third New Int’l Dictionary* 2061 (unabridged ed 1993). “Develop” means “to render a (photographic image) visible by [chemical treatment].” *Webster’s Third New Int’l Dictionary* 618 (unabridged ed 1993). “Duplicate” means “to be or make a duplicate, copy, or transcript of.” *Webster’s Third New Int’l Dictionary* 702 (unabridged ed 1993). “Publish” means “to place before the public: DISSEMINATE.” *Webster’s Third New Int’l Dictionary* 1837 (unabridged ed 1993).

Second, a person who “possesses” any photograph, motion picture, videotape or other visual recording of sexually explicit conduct involving a child “with the intent to develop, duplicate, publish, print, disseminate, exchange, display or sell it,” violates the second clause of the statute. ORS 163.684(1)(a)(A).

Third, a person who “knowingly brings any photograph, motion picture, videotape or other visual recording of sexually explicit conduct involving a child” into Oregon “for sale or distribution,” also violates the first degree statute. ORS 163.684(1)(a)(B).

The three general categories composing the first degree statute require an act beyond personal consumption. The common thread in all three categories is the act of producing or distributing child pornography. For example, the first method is aimed at actual producers or distributors currently engaged in the commerce of child pornography; the second method is aimed at individuals who intend to produce or distribute in the commerce of child pornography; and the third method is aimed at individuals distributing and selling the producer’s creation. The statute *does not apply* to the consumer.

Fifth, the overall structure of the encouraging child sexual abuse scheme supports defendant’s argument. Encouraging child sexual abuse in the first degree is positioned in a subchapter of crimes directed toward prohibiting “visual recording of sexual conduct by children.” ORS 163.665–163.696. The statutes in that subchapter prohibit various subsidiary activities associated with the child

pornography industry, including distribution, purchase, transport, production, duties to report, and possession.

For example, ORS 163.686 (encouraging child sex abuse in the second degree)⁸ and ORS 163.687 (encouraging child sexual abuse in the third degree)⁹ prohibit possession. Accordingly, the second and third degree statutes are intended to punish the consumers of pornography.

The second and third degree statutes focus on the encouragement that occurs through simple possession. That is, the possessor encourages child abuse by sustaining the market. However, the first degree charge is more serious and it captures the encouragement that occurs when someone produces or distributes child pornography for the market. That production creates more consumers, and thereby encourages even more child abuse in the future.

⁸ ORS 163.686 reads in relevant part:

“(1) A person commits the crime of encouraging child sexual abuse in the second degree if the person:

“(a)(A)(i) Knowingly possesses or controls any photograph, motion picture, videotape or other visual recording of sexually explicit conduct involving a child for the purpose of arousing or satisfying the sexual desires of the person or another person; or

“* * * * *

“(2) Encouraging child sexual abuse in the second degree is a Class C felony.”

⁹ ORS 163.687 is the misdemeanor violation within the scheme and is identical to the second degree charge except that it involves a lesser mental state.

For example: "X" purchases a depiction of child pornography from "Y," who obtained the depiction from his distributor "Z." Under that example, "X," as consumer, is guilty of either second or third degree encouraging. However, "Y" would be guilty of first degree encouraging because he sold the material to "X," and "Z" would be guilty of first degree encouraging because he distributed the material to "Y." In other words, "X" is guilty of a lesser degree because his act of possession encourages child abuse by sustaining the market. However, his actions do not encourage more consumers. On the other hand, "Y" and "Z" are guilty of the more serious offense because their actions produce for the marketplace. By selling and distributing the child pornography, "Y" and "Z" encourage even more child abuse because they create a wider market of consumers (possessors).

However, if "X" intended to provide the material to an audience or a third party by printing a copy, displaying the material to associates, or by downloading the images to an accessible web page, then he too would be guilty of the first degree charge. That is so because his act of intending to print, display, duplicate, or disseminate the material to an audience encourages more child pornography, because it creates a wider market of consumers (possessors).

Therefore, the distinction between the more serious offense and the second or third degree offense is the impact that the offender has on the child pornography marketplace. Another example is illustrative: "X" finds an image of child pornography on the street and takes it home with him for purpose of arousal. At that point, he has violated the second or third degree statute because

he possesses the image. If "X" decides that the material is deteriorating and makes a copy of the image with a home copier, he still has not violated the first degree statute, because he has not participated at the production or distribution-end of the market. Instead, he has only possessed another image, and his status as a consumer within the marketplace has not changed; his actions did not create a wider marketplace for other consumers.

- b. **The legislative history indicates that the legislature intended encouraging child sexual abuse in the first degree to be part of a three-tiered statutory scheme aimed at punishing the possession and dissemination of child pornography.**

The 1985 legislature enacted a series of crimes directed at disrupting the commerce of child pornography. Or Laws 1985, ch 557, §§ 1–10. Part of that scheme included a statute intended to punish dealing in child pornography.

Former ORS 163.675. That statute read:

"(1) It is unlawful for any person to sell or exhibit for money or anything of value a photograph, motion picture, videotape or visual reproduction of sexual conduct by a child under 18 years of age which has been produced in violation of the laws of this state or which has been brought into this state in violation of the laws of the United States."

Or Laws 1985, ch 557, § 4.

However, fueled by concerns that the "dealing in" statute was too difficult to prosecute, the 1987 legislature enacted a new series of laws intended to punish the production and distribution of child pornography. Testimony, Senate Committee on Judiciary, SB 364, May 13, 1987, Ex's A–Y (Exhibits S–Y were presented but not mentioned during the hearing).

For example, *former* ORS 163.670 (1987) targeted the participation of children in sexually explicit conduct for the purpose of visual recording; *former* ORS 163.680 (1987), prohibited payment to obtain or view such depictions; while *former* ORS 163.673 (1987) prohibited "dealing in" visual recordings of children. 1987 Or Laws ch 864 § § 1–15; *State v. Stoneman*, 323 Or 536, 542, 920 P2d 535 (1995) (describing the former statutes).

Former ORS 163.673, the "dealing in" statute, read, in part:

"(1) A person commits the crime of dealing in depictions of a child's sexual conduct if the person knowingly:

"(a) *Develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance, or sells* any photograph or other visual recording that depicts a child under 18 years of age in an act of sexually explicit conduct; or

"(b) *Possesses such matter with the intent to develop, duplicate, publish, print, disseminate, exchange, display, or sell it.*"

Or Laws 1987, ch 864, § 4 (emphasis added).

The 1987 "dealing in" law removed the "for value" element from the 1985 version and expanded the list of commercial terms aimed at capturing distribution or production techniques to include "[d]evelops, duplicates, publishes, *prints*, disseminates, exchanges, *displays*, finances, attempts to finance, or sells." *Id.* (emphasis added); See Exhibit, Senate Committee on Judiciary, SB 364, May 13, 1987, Ex X (Analysis by legislative staff attorney Mark Cramer).

However, in *Stoneman*, the defendant challenged the constitutionality of ORS 163.680 (1987), a provision within the 1987 child abuse statutory scheme. 132 Or App 137, 143–44, 888 P2d 39 (1994). The Court of Appeals concluded

that ORS 163.680(1) (1987) was a content-based restriction on expressive material. *Id.* Based on that opinion, the legislature began drafting the current encouraging child sexual abuse statutory scheme.¹⁰

The current legislation was introduced as House Bill (HB) 2692 (1995). The legislature repealed its prior "dealing in" statute and replaced it with the encouraging child sexual abuse statutory scheme. 1995 Or Laws ch 768 § 16. The bill initially included two offenses for encouraging child sex abuse: "section 2" currently codified as ORS 163.684 and "section 3" codified as ORS 163.686. Tape Recording, House Judiciary Subcommittee on Civil law and judicial Administration, HB 2692, Feb 23, 1995, Tape 28, Side A (statement of Virginia Vanderbilt).¹¹

The bill had three purposes: (1) to address the concerns from the Court of Appeals' *Stoneman* opinion by creating a legislative record explicitly identifying the harm behind the bill; (2) to continue to prohibit the production and distribution of child pornography; and (3) to create new crimes aimed at targeting possessors

¹⁰ In the meantime, this court overruled the Court of Appeals, rhetorically holding:

"May the legislature regulate commerce in communicative products derived from actual sexual exploitation of children? We have little difficulty in concluding that the legislature may do so, where the manufacture of those products for distribution and eventual purchase provides the very *raison d'etre* for engaging in the underlying acts of child sexual abuse."

Stoneman, 323 Or 543.

¹¹ The legislature later added a third misdemeanor offense for encouraging child sexual abuse (ORS 163.687) during the bill's work session. Testimony, House Judiciary Subcommittee on Civil Law and Judicial Administration, HB 2692, Mar 8, 1995, Exhibits E & F (testimony of Rep. Brown).

of child pornography. Tape Recording, House Judiciary Subcommittee on Civil law and judicial Administration, HB 2692, Feb 23, 1995, Tape 28, Side A (statement of Virginia Vanderbilt and Deputy District Attorney Keith Meisenheimer).

In drafting the first degree statute, the legislature employed the same terminology, "with the intent to develop, duplicate, publish, print, disseminate, exchange, display, or sell," as it did form its earlier "dealing in" statute. Or Laws 1995 ch 768 § 2. The subcommittee explained that "section 2" (encouraging child sexual abuse in the first degree) is aimed at the production and distribution-end of child pornography and affects people producing, not possessing, prohibited material. Tape Recording, House Judiciary Subcommittee on Civil law and judicial Administration, HB 2692, Mar 8, 1995, Tape 34, Side B (discussion between Rep. Tiernan, Committee Counsel Milt Brown, and Rep. Brown, one of the bills primary sponsors); Tape Recording, House Judiciary Subcommittee on Civil law and judicial Administration, HB 2692, Feb 23, 1995, Tape 28, Side A (statement of Virginia Vanderbilt and Keith Meisenheimer).¹²

¹² The following exchange is encapsulated in the Subcommittee minutes:

"REP. TIERNAN: Is this going to effect people that are producing, not possessing videos?

"MILT JONES: Assuming that the material involves the abuse of children, it would be covered *under section 2 of the bill*.

"REP. BROWN: It would be a Class B felony.

"REP. TIERNAN: Can you explain that?

On the other hand, the legislature aimed the second and third degree offenses at people who encourage child sexual abuse by possessing the material. Tape Recording, House Judiciary Subcommittee on Civil law and Judicial Administration, HB 2692, Mar 8, 1995, Tape 34, Side A (statements of Rep. Brown and Rep. Johnston).

Accordingly, like the previous statutes aimed at punishing dissemination of child pornography, the legislature chose the terms "print" and "display" to capture commercial practices associated with distribution and production. Therefore, a person who made a duplicate of pornography for his own personal use would not be adding material to the marketplace and would only be guilty of possession under the second or third degree encouraging statutes.¹³

"REP. BROWN: If you knowing develop a video tape that involves sexually explicit conduct involving children with *the intent of displaying it*, and that you knew the recording of the sexually explicit conduct involved child abuse, you would be convicted *under section 2* [encouraging child sexual abuse in the first degree]."

Tape Recording, House Judiciary Subcommittee on Civil law and judicial Administration, HB 2692, Mar 8, 1995, Tape 34, Side B (emphasis and brackets added).

¹³ The state may argue that by printing or displaying an image, an individual risks exposing a third party to the material, and thereby risks creating a new consumer. However, the text and history of the encouraging child sexual abuse scheme indicates that the legislature was not creating a statute that imposed liability based on risk.

Instead, the text and history indicate that the legislature was imposing liability based on the offender's status within the marketplace of child pornography. Therefore, even if a consumer-possessor carelessly left a printed depiction of child pornography where it might be observed by another person, that action would not necessarily violate the first degree statute unless the consumer-possessor was consciously acting as a distributor or producer of the material.

The Court of Appeals disagreed and concluded that "an intent to print" does not require an intent to show or distribute material.¹⁴ *Bray*, 197 Or App at 18–19. The court based its interpretation on two factors. First, the court noted that "the statute is phrased in the disjunctive; that is, it criminalizes possession of certain material with the intent to print *or* the intent to disseminate it (or exchange it, or display it, or sell it)." *Id.* The court reasoned, "[D]efendant's construction would effectively render the statute conjunctive--*i.e.*, the state would be required to prove intent to print *and* disseminate." *Id.* In other words, the court held that defendant's interpretation would render the word "disseminates" superfluous.

Naturally, the definitions for a string of similar terms will overlap to a various degree. However, the Court of Appeal's interpretation assumes that "disseminates" is exactly the same as production and distribution. Yet, "disseminates" means "to spread or send out freely or widely as though sewing or strewing seeds: make widespread." *Webster's Third New Int'l Dictionary* 656 (unabridged ed 1993). The word "disseminates" could capture other actions not covered by traditional terminology associated with production and distribution practices, such as mass e-mailing or the creation of an accessible web page. Therefore, it would not be superfluous.

Additionally, as the history of the prior "dealing in" statutes indicate, the term "disseminates" was intended to capture the essence of the act of engaging in the production and distribution of child pornography. See Exhibit, Senate

¹⁴ The court did not address defendant's challenge to the "intent to display" theory. The court did note, "Whatever innate appeal defendant's argument might have as to the allegation concerning 'intent to display,' that argument is unavailing when applied to the 'intent to print' allegation." *Bray*, 197 Or App at 17.

Committee on Judiciary, SB 364, May 13, 1987, Ex X (Analysis by legislative staff attorney Mark Cramer) (stating that the new "dealing in" statute "removes the element requiring an exchange for value and criminalizes the possession of child pornography with the *intent to disseminate.*") (emphasis added).

The legislative history behind the current encouraging child abuse statutory scheme supports that argument. In summarizing the legislation, Senator Brown wrote:

"The first [encouraging child sexual abuse in the first degree] is a Class B felony if a person **knowingly disseminates**, or possesses **with intent to disseminate**, visual recordings of sexually explicit conduct involving a child * * *

"The second [encouraging child sexual abuse in the second degree] is a Class C felony if a person knowingly possess visual recordings of sexually explicit conduct involving a child, pays to view them, or pays to view actual sexually explicit conduct by a child * * *

Exhibit, House Judiciary Subcommittee on Civil Law and Judicial Administration, HB 2692, Mar 8, 1995, Ex F. (emphasis added).

The exhibit identifies "dissemination" as the crucial distinction between the degrees of the crime. That is so even though the bill included all the operative terms, including "print" and "display." Therefore, the legislature intended the phrase "develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance or sells" to capture ways that individuals disseminate or produce child pornography for the marketplace. On the other hand, as Exhibit F clarifies, the second degree charge is limited to possession and observation. Accordingly, if a defendant prints an image for dissemination,

he violates the first degree statute. However, if he prints it for personal consumption, he violates the second or third degree statute.

Second, the Court of Appeals disagreed with defendant's interpretation noting that "print" in the first half of section (1)(a)(A) stood alone, while "print" in the second half of the clause was attached to the mental state "with the intent to."

Bray, 197 Or App at 18–19. The court concluded:

"Nothing in the statutory text suggests that conduct proscribed in the first phrase is culpable only if undertaken with an intent to ultimately exhibit the material to a third party. Indeed, the statute's explicit reference to a "knowing" mental state for such conduct (*i.e.*, with knowledge of the character of the material) contradicts any such implication."

Id.

However, defendant's construction is aimed at interpreting the word "print" as it appears in the operative phrase. Defendant's interpretation is not dependent on either the mental state "knowingly" or "with the intent to." Instead, under defendant's interpretation "print" under the first clause means to knowingly make a copy intended for consumption within the child pornography market, while "print" in the second clause simply covers individuals who have not yet done so but intend to make the copy available for consumption within the child pornography market.¹⁵

¹⁵ Defendant acknowledges that in his petition for review he stated:

"Defendant agrees that that interpretation squares with the legislative intent behind the statute as a whole because by printing a picture of child pornography a defendant creates more child pornography, thereby expanding the availability and consumption of child sex abuse. However, this does not answer the ultimate question in this case—whether the state presented any evidence

3. The state failed to prove that defendant possessed child pornography with an intent to print or display the images for production or distribution to the child pornography marketplace.

Viewing the evidence in the light most favorable to the state, the record contains seven critical pieces of evidence, none of which reasonably establishes that defendant intended to either print or display the images on his computer for other consumers.

First, defendant occupied a computer where four images of child pornography were found saved to a file entitled "Junk CP." (Tr. 28, 51, 53). That evidence only tends to establish that defendant possessed the material. Nothing about that possession creates an inference that defendant intended to display or print the images on the computer for other consumers.

Second, corrections officers discovered magazine cut-outs, including children dressed in formal attire, in materials confiscated from defendant's prison cell. (Tr. 21; State's Exhibits 1–5). That evidence only tends to establish defendant's proclivity toward children and pornography. It does not show that

that defendant intended to "display or print" the child pornography extracted from his computer."

(Defendant's PFR at 12).

In his brief on the merits, defendant argues that the legislature intended the entire phrase including the operative terms "print" and "display," to require an intent to produce or distribute to a consumer.

Whether the paragraph in defendant's petition is inconsistent with his argument in his brief to the Court of Appeals and to this court is irrelevant, because the court has an independent obligation to construe the statute correctly. See *Stull v. Hoke*, 326 Or 72, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

defendant intended to exhibit any material from his computer to a third party. If anything, it shows that defendant kept the material for his personal consumption.

Additionally, the material in defendant's cell was not printed from a computer. Accordingly, the inference that defendant printed or intended to print the images saved on the computer's allocated space decreases .

Third, defendant made statements to supervisors following the discovery of the illicit material. Defendant claimed that he was accessing the internet to do legal research regarding child pornography sites. (Tr. 57). Defendant was nervous and shaking and asked if he could talk privately with Mr. Schmidkoffer, the call center supervisor. (Tr. 58). Defendant said "Josh I'm deathly afraid. You have to just drop this. Silently fire me, and let me delete some files." (Tr. 58). Mr. Schmidkoffer asked him how long he had been using Mr. Woolery's password, and defendant replied "months and months." (Tr. 59).

That evidence establishes that defendant understood that he possessed the material. However, those statements prove nothing about his intent to print or display the material. If anything, defendant's statement that he had been accessing the internet for "months and months" coupled with the fact that no printed images were recovered from defendant's cell, cut against an inference that he intended to print the material, or even had the means to.

Fourth, the state produced evidence regarding defendant's computer use. The staff assigned defendant a pod and a computer with the IP address 10.2.140. (Tr. 51). After defendant requested to be moved to a more isolated work station, the staff placed defendant in a "pod" away from the staff offices in

an area difficult to supervise. (Tr. 30). Staff members disciplined defendant for using a "privacy screen," which blocks observers from seeing a monitor from a side view. (Tr. 55). None of that evidence suggests defendant intended to print or display the images. In fact, the evidence evinces defendant's furtive attempts to shelter the images from others; defendant was consciously trying not to display the images.

Fifth, the state introduced evidence describing the configuration of the call center, which is staffed by approximately 100 to 120 inmates and employees from Oregon Correctional Enterprises. (Tr. 27, 47). The call center is rectangular in shape with 90 "pod" stations, each containing a computer assigned to an inmate. (Tr. 31, 42). There are two centralized staff offices. (Tr. 26, 42, 46, 79). Notably, none of that evidence describes a print station or the physical means for defendant to print from his computer.

Sixth, there was testimony that partially-composed, unsigned letters addressed to foreign nationals had been saved on defendant's "home directory on the network." (Tr. 61, 62). The letters were not entered into the record and their content was not addressed in testimony. Had those letters mentioned child pornography or had they been sent to individuals who operate child pornography sites, then the inference that defendant intended to display images might flow.

Perhaps from the existence of the letters, the court incorrectly inferred that defendant "was sending e-mails to someone." (Tr. 142). However, there is no evidence in the record to support the finding that defendant had sent "disturbing" e-mails or, for that matter, any e-mails. See *Ball v. Gladden*, 250 Or 485, 487,

443 P2d 621 (1968) (holding that this court is bound by the trial court's factual findings, but only if supported by evidence in the record). Absent evidence of the content of those letters or a showing that letters drafted to foreign nationals were used to circulate child pornography, the court erred by inferring defendant's intent to "print" or "display."

Seventh, there was evidence that another inmate, inmate Nimmo, had printed a "personal letter" from a computer. (Tr. 48). However, the fact that one inmate printed a personal letter does not support an inference that defendant intended to print his saved images. In fact, there was no evidence that defendant's computer was even linked to a printer. However, even if the evidence of inmate Nimmo's printed letter, coupled with the evidence that defendant's computer was part of a network, might lead to a reasonable inference that defendant's computer had the capacity to print, that inference alone does not support the necessary additional inference that defendant had used or intended to use the printing capabilities.

Finally, on appeal the state argued that "there was sufficient evidence in the record from which a rational trier of fact could have concluded that defendant intended to print copies of images." (Resp Br at 4). In support of its argument, the state reasoned:

"* * * if defendant possessed the images for the purpose of sexual gratification—and the court found that he had that purpose—he would have had difficulty pursuing that gratification unless he had access to the images. Viewing the images on his computer screen at work while worrying about getting caught doing so would not be an optimal manner to satisfy his desires."

(Resp Br at 4).

There is nothing in the record to suggest defendant's imagination is so limited. In essence, the state argued that the court could properly infer an "intent to print" based on the fact that anyone who seeks to satisfy their sexual desires through such images naturally would need a physical copy to be viewed in isolation. There is nothing in the record supporting such an inference, and the state does not cite any portion of the record for that novel proposition. If that were a proper inference, then anytime the state proved that an individual visited a child pornography web site for sexual arousal under ORS 163.686 (encouraging child sexual abuse in the second degree), then the fact-finder could properly infer that the individual also intended to print the images in violation of ORS 163.684 (encouraging child sexual abuse in the first degree). The law does not support such unsupported inference building. *State v. Rainey*, 298 Or 459, 466, 693 P2d 635 (1985) (discussing the range of permissible inferences for proving an element beyond a reasonable doubt).

Conclusion

For the foregoing reasons, petitioner respectfully prays that this court reverse the decision of the Court of Appeals, reverse defendant's convictions for

encouraging child sexual abuse in the first degree, and remand this case to the trial court for resentencing.

Respectfully submitted,

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