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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY BRICE OGLE,

Defendant and Appellant.

A120774

(Napa County  
Super. Ct. No. CR134840)

**I. INTRODUCTION**

When appellant Jeffrey Brice Ogle was apprehended for prowling outside a young girl's window, he was found in possession of a video camera containing numerous images of secretly filmed teenaged girls in various stages of undress. Appellant ultimately entered a plea of no contest to numerous charges, including multiple counts of possession of child pornography (Pen. Code,<sup>1</sup> § 311.11, subd. (a)), and one count of attempted possession of child pornography (§§ 664; 311.11, subd. (a)). Appellant claims he should not have suffered more than one conviction for possession of child pornography (§ 311.11, subd. (a)) because the charged offenses comprise a single criminal act. Appellant also contends he should not have suffered a separate conviction for attempted possession of child pornography (§§ 664; 311.11, subd. (a)), because he committed only a single possessory offense. We agree with these arguments and remand this matter to the trial court for resentencing.

<sup>1</sup> All statutory references are to the Penal Code.

## II. FACTS AND PROCEDURAL HISTORY

We rely on the probation report and supporting documents to supply the facts of the offenses. On June 28, 2007, at approximately 10:45 p.m., appellant was arrested in relation to a prowling charge which occurred outside a 13-year-old girl's residence in the City of Napa. During a search of appellant's vehicle incident to his arrest, the police recovered a video camera, which was camouflaged with black electrical tape. The cassette inside the video camera contained separate footage of 12 different teenage girls in various stages of undress, some completely nude, filmed through the windows at their respective residences. The scenes contained a digital time stamp beginning in September 2006. The girls ranged from 13 to 19 years old. Appellant had a notebook in his possession with addresses written down from Benicia, California and Vallejo, California. The residents at these addresses were contacted and stated that appellant had no legitimate reason to have their addresses in his possession.

Appellant admitted prowling, peeking through windows, and videotaping various young women for sexual gratification. He stated that if he saw an attractive young woman during the day he would sometimes follow her to find out where she lived. He would then return at night in hopes of being able to spy on her while she was undressing or grooming. He climbed rooftops and used various items to stand on so that he could obtain a good vantage point.

On November 2, 2007, appellant pleaded no contest to three counts of possession of child pornography (§ 311.11, subd. (a)); one count of attempted possession of child pornography (§§ 664/311.11); one count of prowling (§ 647, subd. (h)); three counts of developing, printing or exchanging obscene matter depicting sexual conduct (§ 311.3, subd. (a)); thirteen counts of disorderly conduct (§ 647, subd. (k)(1)); two counts of eavesdropping (§ 632, subd. (a)); and three counts of peeking (§ 647, subd. (i)).

On January 17, 2008, following a contested sentencing hearing, the court denied appellant's request for probation and sentenced him to four years in state prison, calculated as follows: The court chose Count 7, possession of child pornography (§ 311.11, subd. (a)), as the principal term and imposed the upper term of three years. As

for Count 18, another conviction for possessing child pornography (§ 311.11, subd. (a)), the court stayed an upper-term sentence of three years pursuant to section 654. Running consecutive to Count 7, the court imposed a four-month term for Count 3, attempted possession of child pornography (§§ 664; 311.11, subd. (a)), which represented one-third the middle term. The court also imposed an eight-month consecutive term for Count 25, eavesdropping (§ 632, subd. (a)), which represented one-third the middle term.

Appellant sought and obtained a certificate of probable cause (§ 1237.5) preserving his right to argue on appeal that “despite pos[s]ession of multiple images”, he was guilty of a single possessory offense of possessing child pornography (§ 311.11, subd. (a)). This appeal followed.

### **III. DISCUSSION**

#### **A. Waiver**

Respondent first asserts that appellant is precluded from challenging his sentence by virtue of his nolo contendere plea. Respondent argues that by pleading no contest to all counts, appellant admitted separate acts of possession, thus precluding him from challenging the propriety of these convictions on appeal. We disagree.

The record confirms that in entering his pleas on November 2, 2007, appellant expressly admitted only one possession count. As to the remaining possession counts and the attempt to possess count, appellant entered what is commonly known as a *West* plea. (See *People v. West* (1970) 3 Cal.3d 595.) Under a *West* plea, a criminal defendant pleads no contest to a charge based on what is perceived to be in his or her best interests, but in doing so, does not acknowledge the factual basis of the plea. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 932.)

This is precisely what was done in appellant’s case. During the change of plea hearing, defense counsel repeatedly confirmed that appellant’s plea was entered with the understanding that he was preserving the argument that he could not be convicted for multiple counts of possessing child pornography. As defense counsel explained: “[T]he reason he would not be entering a straight no-contest plea to the other count of possession of child pornography on the other dates, is because it’s our opinion . . . that the People

cannot charge multiple counts of possession of child pornography for the . . . one tape.” Counsel went on to argue, “[W]e feel that we do have a good argument on appeal to get any convictions on those counts knocked out.” In a later portion of the hearing, counsel reaffirmed his belief that appellant’s “*People v. West* plea gives the defense the opportunity to have a second bite at arguing all of these issues again . . . .”

Because appellant entered his no contest pleas subject to *People v. West*, he preserved his ability to challenge the prosecutor’s right to charge and convict him of multiple counts of possession of child pornography and the separate attempt to do so, as well. The situation before us can be easily contrasted with the situation in *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*). In *Hester*, the defendant sought to raise a section 654 multiple-punishment issue on appeal after a guilty plea. The defendant in *Hester* had bargained for a four-year term, received that term at the time of sentencing, and “did not raise a section 654 objection to any possible concurrent terms ‘at the time the agreement [was] recited on the record,’ namely, at the change of plea hearing.” (*Id.* at p. 296.) The court in *Hester* declared that the defendant had abandoned any claim that a component of his sentence violated section 654’s prohibition against double punishment. (*Ibid.*)

In this case, by contrast, there was no explicit plea bargain for the four-year sentence imposed by the court and neither the court nor the prosecution made any promises regarding sentencing. Moreover, in contrast to the defendant in *Hester*, appellant raised his objection to the imposition of multiple convictions and punishment for possessing child pornography (§ 311, subd. (a)) in every manner possible, including obtaining a certificate of probable cause to preserve this issue for appeal. Thus, we find no waiver of the right to raise these issues on appeal, and we proceed to their merits.

### **B. Multiple Convictions for Possession of Child Pornography**

Appellant argues that the trial court erred in imposing a sentence using two counts of possessing child pornography, Counts 7 and 18. Specifically, appellant contends he improperly suffered multiple convictions for a single act of possession of child pornography because the same videotape provided the factual basis for each of

appellant’s convictions. (§ 311.11, subd. (a)).<sup>2</sup> In answering this argument, respondent claims that “Counts 7 and 18 involved separate and discrete offenses” because each segment of the videotape involved separate young women videotaped at different times.

Two recent cases have addressed the question presented here—whether possession of multiple images of child pornography constitutes multiple offenses for each image or type of media possessed, or whether it constitutes a single offense. In *People v. Hertzig* (2007) 156 Cal.App.4th 398 (*Hertzig*), the court provided a compelling rationale for charging one count of possession of child pornography (§ 311.11, subd. (a)) for a defendant who possessed 30 different pornographic videos involving children that had been downloaded onto his laptop computer. As in this case, the Attorney General in *Hertzig* justified the multiple convictions based on the separate existence of each pornographic video and the fact that different child victims appeared in each of the videos. (*Id.* at p. 401.)

Acknowledging that the matter was one of first impression, the *Hertzig* court held that the defendant’s possession “of multiple images on one computer” was a single violation of section 311.11, subdivision (a). (*Hertzig, supra*, 156 Cal.App.4th at pp. 401-402.) The court pointed out that the act proscribed by section 311.11, subdivision (a), is the act of possessing child pornography, not the act of abusing or exploiting children. (*Id.* at p. 43.)

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<sup>2</sup> Section 311.11, subdivision (a), reads as follows: “Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment.”

Consequently, the *Hertzig* court looked to analogous possession cases for guidance. These cases involved multiple convictions for the possession of property with altered serial numbers (*People v. Harris* (1977) 71 Cal.App.3d 959); multiple convictions for the possession of controlled substances (*People v. Rouser* (1997) 59 Cal.App.4th 1065); multiple convictions for the possession of firearms (*People v. Rowland* (1999) 75 Cal.App.4th 61) and multiple convictions for the possession of false checks (*People v. Bowie* (1977) 72 Cal.App.3d 143). In these possession cases, the courts concluded that where a person is in possession of numerous items of property, there could only be one count of possession for the entire group of items, regardless of the number.

The *Hertzig* court reasoned, “[l]ike the 11 blank checks, the nine different pieces of property with defaced or obliterated serial numbers, the two different kinds of controlled substances, or the three weapons of the same type, defendant violated a provision of the Penal Code by the solitary act of possessing the proscribed property. And like the courts in these varied types of possession cases, we are not at liberty to fragment a single crime into more than one offense.” (*Hertzig, supra*, 156 Cal.App.4th at p. 403.)

*Hertzig* was followed by *People v. Manfredi* (2008) 169 Cal.App.4th 622 (*Manfredi*), which was decided after briefing was completed in this case. *Manfredi* was factually distinct from *Hertzig* in that the defendant in *Manfredi* possessed pornographic images of children in different media, i.e., “multiple computers, multiple hard drives, multiple discs, and multiple tapes,” as opposed to the one computer in *Hertzig*. (*Id.* at p. 625.)

Relying on *Hertzig*, the court found the defendant’s “simultaneous possession of multiple child pornography materials at the same location is chargeable as but one criminal offense under [section 311.11].” (*Manfredi, supra*, 169 Cal.App.4th at p. 624.) The court believed section 311.11’s criminalization of the possession of “any matter” was clearly suggestive of an intent to establish a single prosecution based upon a broad course of conduct involving multiple pornographic images. (*Id.* at pp. 633-634.) The court found that if the legislative aim had been to make the possession of each individual item

of child pornography a separate offense, it could have clearly expressed that intent, and “[y]et, the Legislature has not taken any steps to provide that each single piece of evidence in a child pornography case can be the basis of a separate count.” (*Id.* at p. 634.) Absent a legislative amendment to change the express wording of section 311.11, the *Manfredi* court held that possession of multiple images of child pornography cannot be “fragmented” into separate counts so long as the images are possessed “simultaneously” and are “found at the same time and in the same place.” (*Ibid.*)

Nevertheless, respondent argues that where there is evidence of another date of possession, such as the date the videotaping occurred, separate acts of possession can be charged. However, respondent has not cited a single possession case that would support this proposition. Instead, respondent cites *People v. Johnson* (2007) 150 Cal.App.4th 1467 [a corporal injury case involving multiple applications of force to the victim]; *People v. Washington* (1996) 50 Cal.App.4th 568 [multiple entries into apartment supports multiple burglary charges]; *People v. Harrison* (1989) 48 Cal.3d 321 [multiple digital penetrations during a single sexual assault can be charged separately]; and *People v. Delvalle* (1994) 26 Cal.App.4th 869 [multiple attempts to buy a person occurring on separate occasions].

We adopt the reasoning in *Hertzig* and *Manfredi* and hold that appellant’s possession of multiple images of child pornography on his video camera as a result of his surreptitious recording of young women was a single criminal violation of section 311.11, subdivision (a), prohibiting the possession of child pornography. Any other construction allows for fragmentation of the offense and violates the legislative intent embodied in section 311.11, that the possession of multiple images of child pornography “found at the same time and in the same place.” constitutes a single act of possession. (*Manfredi, supra*, 169 Cal.App.4th at p. 634.) That is precisely what *Manfredi* and

*Hertzig* are addressing by prohibiting splitting a unitary possession crime.<sup>3</sup>

Consequently, we agree with appellant that he can only be convicted of one count of violating section 311.11, subdivision (a).

### **C. Double Conviction and Punishment**

We now reach the related question of whether the multiple convictions and punishment appellant received for attempted possession (§§ 664; 311.11, subd. (a)) and possession of child pornography (§ 311.11, subd. (a)) are permissible. In this case, appellant's conviction and consecutive four-month sentence for Count 3, attempted possession of child pornography, was based on his act of approaching a young girl's window on June 28, 2007, the night he was apprehended and arrested.

Appellant contends that he committed a single possessory offense which was improperly fragmented into two separate offenses. (See *Hertzig, supra*, 156 Cal.App.4th at p. 403 ["we are not at liberty to fragment a single crime into more than one offense"]; *Manfredi, supra*, 169 Cal.App.4th at p. 632 ["a single crime cannot be fragmented into more than one offense"].) He points out that if he had succeeded in his attempt to capture this girl's image on his videotape, "he would have possessed her images on the same videotape he had used to film" the other girls. Moreover, if his attempt had been successful, under *Hertzig* and *Manfredi*, "[s]uch possession would have amounted to a single 'possession' of child pornography;" and "the law would have required the trial court to dismiss [C]ount [T]hree." Appellant claims that his resulting sentence is nonsensical because he "finds himself with a conviction on [C]ount [T]hree and an additional four-month term in state prison because he *failed* to possess [the girl's] images, whereas he would have suffered no conviction on [C]ount [T]hree had he possessed [her] images."

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<sup>3</sup> Under respondent's theory, nothing would prevent the prosecutor from using a computer expert to determine when each of 100 images recovered on a computer were first downloaded. If the 100 images were each on the computer for a year, presumably respondent would assert the absurd notion that this evidence would support charging 365 counts of possession as to each image.

We conclude that a single crime was committed here, and that the conviction as well as the punishment for the duplicate crimes must fall. An accusatory pleading may charge multiple offenses “connected together in their commission” and a “defendant may be convicted of any number of the offenses charged. . . .” (§ 954.) Stated differently, “[s]ection 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct.” (*People v. Pearson* (1986) 42 Cal.3d 351, 354 (*Pearson*)). The one exception to this rule is “that multiple convictions may not be based on necessarily included offenses. [Citations.]” (*Id.* at p. 355, italics omitted.)

The *Pearson* rule, which has been the subject of criticism, was recently reaffirmed by our Supreme Court in *People v. Medina* (2007) 41 Cal.4th 685 (*Medina*). “There is logic behind the rule prohibiting convictions for both a greater offense and a necessarily included offense: ‘If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser. . . .’ [Citation.]” (*Id.* at p. 702, original italics.)

“ ‘Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]’ [Citation.]” (*Medina, supra*, 41 Cal.4th at p. 701.) “An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (§ 21a.) “California appellate courts have repeatedly accepted the principle that attempt is a lesser included offense of any completed crime.” (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609, fn. omitted.) Therefore, the completed offense of possession of child pornography necessarily includes an attempt to commit that offense. (See *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [attempted kidnapping conviction vacated as lesser-included offense of kidnapping for ransom]; *Medina, supra*, 41 Cal.4th at pp. 701-702 [conviction for attempted carjacking reversed because it is a lesser included offense of attempted kidnapping during the

commission of a carjacking].) Consequently, appellant's conviction on the attempt offense alleged in Count 3 must also be vacated.

#### **IV. DISPOSITION**

The matter is remanded to the trial court for resentencing with directions to vacate appellant's conviction for Counts 11 and 18, possession of child pornography (§ 311.11, subd. (a)). The trial court is also directed to vacate appellant's conviction for Count 3, attempted possession of child pornography (§§ 664; 311.11, subd. (a)), the lesser included offense of possession of child pornography (§ 311.11, subd. (a).) In all other respects, the judgment is affirmed.

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Ruvolo, P. J.

We concur:

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Reardon, J.

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Rivera, J.