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**DISTRICT IV**

July 20, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP1865-CR

State of Wisconsin v. Timothy D. Moseley (L.C. # 2011CF412)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Timothy Moseley appeals a judgment convicting him, following a jury trial, of one count of second-degree sexual assault (intoxicated victim) and twelve counts of capturing an image of nudity in violation of WIS. STAT. §§ 940.225(2)(cm) and 942.09(2)(am)1. (2013-14).<sup>1</sup> On appeal, Moseley argues that three of the capturing nude photograph counts of conviction violate

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

his right to protection against double jeopardy.<sup>2</sup> Based upon our review of the record and briefs, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The facts relevant to this appeal are briefly stated. Moseley was charged in 2012 in Columbia County with second-degree sexual assault of M.K. and capturing nude photographs of M.K. without her consent while she and Moseley were in a motel room in 2009. Prior to being charged in Columbia County, Moseley had been charged and convicted<sup>3</sup> in Milwaukee County of *possession*<sup>4</sup> of three of the photographs that became the subject of the Columbia County capturing counts, after Milwaukee County law enforcement found the three photographs stored on Moseley's personal computer. Moseley moved to dismiss the three capturing counts before us on appeal. He argues that the earlier Milwaukee County dispositions for possession of these three photographs rendered the subsequent Columbia County capturing charges violations of Moseley's constitutional and statutory protections against double jeopardy. The circuit court

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<sup>2</sup> Moseley also raises a constitutional challenge, alleging that WIS. STAT. §§ 942.09(1)(a) and 942.09(2)(am) are unconstitutional as applied to him. However, Moseley points us to no evidence in the record—and we find none on our own—indicating that he raised this challenge before the circuit court. *See* WIS. STAT. RULE 809.19(1)(b) (the appellant's brief must contain "[a] statement of the issues presented for review and how the trial court decided them"). We decline to take up the issue in light of the undeveloped nature of Moseley's as-applied constitutional challenge, *see State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, Moseley declined to file a reply brief and fails to refute the State's response to his constitutional argument; thus, we deem the issue conceded. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

<sup>3</sup> Moseley's trial counsel indicated that Moseley was convicted of all three counts. However, appellate counsel indicates that Moseley was convicted of only two of the counts and acquitted of the third. Any discrepancy has no bearing on our analysis or resolution of the issues raised.

<sup>4</sup> WIS. STAT. § 942.09(2)(am)3.

denied Moseley's motion to dismiss and the matter proceeded to trial, with the resulting convictions now before us.

As a general matter, double jeopardy protections prohibit multiple punishments for the same offense. *State v. Ziegler*, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. Whether Moseley's right to be free of double jeopardy has been violated is a question of law that we review de novo. *State v. Robinson*, 2014 WI 35, ¶18, 354 Wis. 2d 351, 847 N.W.2d 352. Moseley's double jeopardy argument is grounded in his assertion that the three Milwaukee County possession counts are the same offenses for double jeopardy purposes as the subsequent Columbia County capturing nude images convictions at issue—that by “capturing” the images, he simultaneously and necessarily “possessed” the images. Moseley's position, however, ignores the critical factual distinction between the two sets of charges: Moseley used his camera to capture the nude photographs of M.K. without her consent, and then separately possessed the photographs on his personal computer after having transferred the photographs from his camera to his computer. Moseley was not charged with possessing the photographs on his camera.

The facts underlying the two sets of convictions are not the same; therefore we need not engage in a full double jeopardy analysis. In *Ziegler*, 342 Wis. 2d 256, ¶60, our supreme court explained that offenses “are not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed.” Moseley engaged in two different acts and inflicted two different types of harms, and thereby committed separate crimes, first by taking the photographs with his camera and second by transferring the photographs to his computer and maintaining them there for his continued use. Under the facts of this case, Moseley separately “captured” and later “possessed” the three photographs. Thus,

the Columbia County prosecution, conviction, and punishment of Moseley did not violate Moseley's right to double jeopardy protection.

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*