

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 9, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRYSTANO PEDER CARMELO
COOPER,

Defendant - Appellant.

No. 25-7047
(D.C. No. 6:24-CR-00070-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ, BACHARACH, and EID**, Circuit Judges.

The Double Jeopardy Clause protects criminal defendants “against cumulative punishments for convictions on the same offense.” *Ohio v. Johnson*, 467 U.S. 493, 500 (1984). This appeal requires us to decide whether the Clause prohibits Chrystano Cooper’s separate convictions for both receiving and possessing child pornography.¹

* We have honored the parties’ request for a decision without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This decision is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

¹ The jury convicted Mr. Cooper of two other crimes as well, but those convictions are not challenged on this appeal.

Two offenses are considered the same for double-jeopardy purposes if one is a lesser-included offense of the other. *See United States v. Isabella*, 918 F.3d 816, 847 (10th Cir. 2019). Possessing child pornography is a lesser-included offense of receiving child pornography. *See United States v. Benoit*, 713 F.3d 1, 14 (10th Cir. 2013). Yet the Double Jeopardy Clause permits separate convictions for those offenses if they are based on distinct conduct. *See id.* at 16. We have upheld separate convictions, for instance, for possessing one set of child pornography and receiving a different set. *See United States v. Sturm*, 673 F.3d 1274, 1288 (10th Cir. 2012).

Because Mr. Cooper never raised his double-jeopardy argument in district court, we review it for plain error. *See United States v. Dunn*, 777 F.3d 1171, 1176 (10th Cir. 2015). That standard requires him to show that (1) an error occurred; (2) it was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See id.*

To decide whether the district court “clearly or obviously erred, we consider the entire record.” *United States v. Reed*, --- F.4th ----, No. 24-6241, 2026 WL 2329635, at *6 (10th Cir. Aug. 12, 2026). Mr. Cooper can succeed under plain-error review “only if the record unambiguously shows that he was convicted of receiving and possessing the same images.” *Id.* He will not “prevail if the record could reasonably reflect punishment for receiving at least one image of child pornography and for possessing at least one different image of child pornography.” *Id.* (internal quotation marks omitted).

In *Benoit* we determined that the defendant's convictions for both possessing and receiving child pornography were multiplicitous because they were based on the same conduct. *See* 713 F.3d at 18. The indictment in *Benoit* used "identical language in both counts." *Id.* at 17. "[T]he jury was not instructed that the two counts referred to distinct visual depictions." *Id.* And "both the prosecutor and defense counsel expressly stated to the jury that the two counts were based on identical conduct." *Id.*

The circumstances in *Benoit* are similar to those in this case. Here, too, the indictment charged both possession and receipt of child pornography during the exact same date range. The jury instructions tracked the indictment, never informing the jury that the possession and receipt counts were based on distinct materials. And although defense counsel said nothing in closing argument about the exhibits supporting the possession and receipt counts, the prosecutor did. The prosecutor told the jury that the possession count was based on a set of nine images and videos. And the receipt count, the prosecutor said, was based on that same set, plus one additional video.

The parties agree that the evidence supporting the possession and receipt counts overlapped with the exception of the single video supporting the receipt count but not the possession count. The government focuses on that single video. Without perfect overlap in the evidence supporting the counts, the government contends, the Double Jeopardy Clause permits both convictions to stand.

The government’s argument overlooks a decisive fact—even under its own view of the evidence, every item of child pornography that supports the possession count also supports the receipt count. In other words, by the government’s telling, the greater offense (receipt) includes the entire lesser offense (possession). The convictions are therefore multiplicitous. *See Benoit*, 713 F.3d at 14.

The multiplicity error is obvious. The record does not “reasonably reflect” the possibility that the possession conviction was predicated on an image not also used to support the receipt conviction. *Reed*, 2026 WL 2329635, at *6. We therefore “have no problem concluding that there has been plain error.” *Dunn*, 777 F.3d at 1176.

* * *

We remand the case with directions to vacate one of Mr. Cooper’s multiplicitous convictions.

Entered for the Court

Harris L Hartz
Circuit Judge