THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-002423

The State, ... Respondent,

vs.

David A. Land ..... Appellant.

REPLY BRIEF OF APPELLANT

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Question I

Did the State provide sufficient proof to establish for a reasonable jury to conclude that David Austin Land knowingly distributed or exchanged pictures or videos of a minor engaged in a sexual act when the State never established any evidence that Mr. Land knew the pictures and videos he downloaded were available to the public from his computer?

The jury charge in this case is not an example of clarity so as to inform the jury as to what factors they are to consider or what the various terms mean. As our Supreme Court has said "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). In this case the jury charge is both ambiguous and confusing. While the defense attorney did not move for clarification, neither did the State, and the obligation is on the State to establish the elements of their case. "A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime." *State v. Attardo,* 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975).

The State has argued that because the jury under the charge could have convicted Mr. Land of receiving the child pornography or of soliciting the child pornography then the State need not prove a distribution. First the State in its closing never argued that soliciting or receiving alone would be sufficient to convict. They argued first "Then these files were callously disseminated to everyone else." Rec. on App. at 262, ll 4-5. The State further argued "And these files were disseminated both to Special Agent Britt Dove and Special Agent McKellar on three different occasions." Rec. on App. at 266, ll 19-21. At the end of their closing they argued "David Austin Land solicited, received and then disseminated these files on

December 4, 2009, December 7th, 2009 and January 27th, 2009." Rec. on App. at 266, ll 19-21. The obvious implication being Mr. Land had to do all three to be guilty of Criminal Exploitation of a Minor Second Degree.

The trial judge agreed to charge Criminal Sexual Conduct Third Degree because as he stated "So if you receive it you are possessing it, since you only have to find one of those methods of a second degree." Rec. on App. at246, ll 7-9.[1] As the trial judge found "receiving" included "possessing" prohibited by Criminal Exploitation of a Minor Third Degree, he in essence directed a verdict in favor of Mr. Land on the issue of "receiving."

The trial judge never defined soliciting and the jury was left to speculate as to the meaning of that term. But common usage of the word shows it does not apply to this case. The word "solicit" according to Black's Law Dictionary 4th Ed. (1957) means "to appeal for something" or "to ask earnestly" or "to ask for the purpose of receiving." The definition further continues "The term implies personal petition and importunity addressed to a particular individual to do some particular thing." To solicit requires that one make an actual request. The State presented no facts that support this position. Thus, the only element that could apply is to distribute. On that element there is no evidence that Mr. Land knowingly distributed any such material. The best the State can say about this case is that Mr. Land was "familiar" with the Limewire program. The State produced no evidence that he knew the exact workings of the program including the fact that if one uses the default positions then by default other people can

[1] Obviously one cannot "receive" anything without "possessing" the same item. To do so would defy the law of physics. Under the rule of lenity, any ambiguity in the two terms must be resolved in favor of the defendant. *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009).

access his program. Nor did he ever admit he knew the defualt file would be available to the public. With no proof that he in fact knew of exactly how the program operated, a jury could not assume, based upon the absence of evidence, that such evidence exists in this case. The State elected to try Mr. Land for Sexual Exploitation of a Minor 2nd Degree instead of 3rd Degree. As a result, they elected to assume the burden of proving that Mr. Land in fact knew how the program operated or to prove that he otherwise did in fact distribute the material. Neither the jury nor this Court is entitled to simply assume such knowledge based upon a statement that he is familiar with the program.

The cases cited by the State are also not helpful to the State's position. They all contain clear proof that the defendant knew exactly how the program worked or otherwise knew the materials in the folder were available to anyone with a similar program. "Because Layton created and used a shared folder that he knew others could access to download his child pornography files, the district court properly applied a two-level sentencing enhancement for distribution under U.S.S.G. § 2G2.2(b)(3)(F). *United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009). Mr. Lawton took an affirmative act to permit downloading. As the Court found "Using the same program, Layton also had created a shared folder called 'My Music' that allowed others to download his files" *Id.* at 333. No file was intentionally created by Mr. Land. "Richardson admitted that he was the only person in the home using the computer in his room and that none of the residents knew of his activities involving child pornography; that he was a computer technician and was very knowledgeable about computers; that he was familiar with common search terms associated with child pornography; that he installed LimeWire on his computer; and that he knew that what was in his "shared"folder was made available to others

through file sharing." *United States v. Richardson*, 713 F.3d 232, 234 (5th Cir. 2013). No evidence in this case establishes that Mr. Land was any type of computer expert. "Collins does admit that there is 'some'evidence here of his knowing distribution." *United States v. Collins,* 642 F.3d 654, 656 (8th Cir. 2011) Further the Court found "Collins admits that there was evidence he is knowledgeable about computers because some child-pornographic pictures were taken with his cell phone, then stored on the HP and hard drive." *Id.* at 657 (8th Cir. 2011). There was no such admission by Mr. Land. "Mr. Shaffer further admitted that he stored images of child pornography in his Kazaa shared folder. . . . He explained that he did so because, among other things, Kazaa gave him 'user points' and various incentive rewards corresponding to how many images other users downloaded from his computer." *United States v. Shaffer*, 472 F.3d 1219, 1222 (10th Cir. 2007). Again no such facts were proven in this case. "The district judge rejected this instruction, and instead instructed the jury that "If a person knowingly makes images available on a peer-to-peer file sharing network, such as LimeWire, this is considered 'distribution' of the images.'1 R. at 850." *United States v. Dunn*, 777 F.3d 1171, 1174 (10th Cir. 2015) The Court further noted " Mr. Dunn was previously employed as both a computer technician and computer teacher." *Id.* at1174. Again, the State produced no evidence that Mr. Land possessed such knowledge.

The State could have prosecuted David Austin Land under S. C. Code § 16-15-410 and had a relatively easy case. All they would have been required to prove is that Mr. Land knowingly possessed the child pornography. While they never found any such material on his computer they had an admission from him that the material had been on his computer. Instead, the State made the decision to prove more than mere possession and charged him with a

violation of S. C. Code § 16-15-405 which requires the State to prove more than mere possession. The State must prove he took some affirmative act to distribute the material or he actually solicited by asking for the material from another individual. They simply failed on both counts.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, this Court should reverse the conviction of David Austin Land for Sexual Exploitation of a Minor 2nd Degree.

February 10, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

February 10, 2016

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on February 11, 2016, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Final Brief of Appellant, Final Reply Brief of Appellant, and the certificate of Counsel in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 11 day

of February, 2016.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22