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

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SC Court of Appeals

Appellate Case No. 2014-002423

The State , ... Respondent,

vs.

David A. Land .... Appellant.

BRIEF OF APPELLANT

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Procedural History

Agents of the State Law Enforcement Division arrested David Austin Land on February 11, 2010 at the home of his grandparents in Greenwood, SC. The agents charged him with three counts of Sexual Exploitation of a Minor. The basis for the charge was the fact that agents from SLED accessed a computer using Limewire, a file sharing program.

On February 10, 2014, the grand jury for Lexington County indicted him on three charges of Sexual Exploitation of a Minor. They alleged he did wilfully and knowingly "distribute, transport, exhibit, received, sell, purchase, exchange, and/or solicit material" in a named file "that contains a visual representation of a minor engaged in sexual activity, as defined by Section 16-15-375(5)" and "is in direct violation of Section 16-15-405(A) of the South Carolina Code of Laws (1975), as amended. Rec. on App. at 1. The indictments are identical except for the specific name of the file and the dates. The three separate indictments alleged this occurred on December 4, 2009, December 7, 2009 and January 27, 2010.

He was tried before the Honorable Donald Hocker and a jury on November 5-8, 2014 and convicted of the charges. He was sentenced to seven years in prison, suspended upon the service of 30 month and two years probation. He was also required to register as a sex offender.

Mr. Land filed his notice of Appeal on November 14, 2014.

Factual History

SLED agents David B. Dove and Lucinda McKellar conducted separate undercover operations investigating child pornography. Their operation consisted of using a file

share program to go on the internet and look for other computers that had a file share program that contained child pornography. Rec. on App. at 127, ll 1-22. When the computer was accessed they obtained, in addition to pictureS and movies they believed contained child pornography, the IP address the computer was using to access the internet and the global unique identification (GUID) number that the file sharing software was using. Rec. on App. at 31, ll 23-25 to 32, ll 1-20.[1] The IP address could change as the person accessing the internet changes locations or providers. The GUID number does not change unless the person takes some action, such as a system restore, to delete the file sharing program and re-installs it. Rec. on App. at 90 ll 4-11; 97, ll 10-17. The software used by the SLED agents did not obtain any unique identification numbers for the computer they were accessing. Or at least there was no testimony any such identification number could be obtained. The agents admitted they could not tell who was using the computer.

The testimony from both agents established that the file sharing software used by the person whose computer they were accessing was named LimeWire. When LimeWire is downloaded and installed the default position is to give open access to the files the person downloads from LimeWire. The files downloaded are by default stored in a file called "share." Thus, by simply downloading LimeWire and accepting the default position, a user would share the files they download with the world without any further action on their part. Rec. on App. at

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[1] The GUID is a 32 alphanumeric identifier. The number is so large that every time the program is downloaded, a new number can be assigned without concern for duplication of numbers. While the testimony that the GUID number is like a Vin number for an automobile, this is not correct. Under no circumstances does a VIN number change while a GUID number will change every time the software is re-installed. The number is unique to the software download and not the computer on which it is downloaded. Rec. on App. at 54, ll 2-9.

30, ll 13-23; 67, 2-6; 95, ll 1-6. Agent Dove testified he believed the majority of people who download LimeWire simply accept the default position. Rec. on App. at82, ll 11-22. No testimony was presented as to whether a person downloading the program would know the default position permitted them to share files with everyone. If one had their computer on, no further action was required by the person using the computer to permit access to the files they had downloaded. Rec. on App. at84, ll 5-11. Once the agent connected to the computer that had the LimeWire program, the downloads started automatically. Rec. on App. at 37, ll 6-7.

On December 7. 2009 agent Dove located the IP address used. He then obtained the location of that IP address from the internet provider that was associated with the IP address. Rec. on App. at76, ll 4-9. The physical address was that of Christy Land, the mother of David Austin Land. She lived in the residence with her daughter and other son. Rec. on App. at 79, ll 9-12. They seized from the residence a laptop and two computer towers. Rec. on App. at79, ll 13-16.

While working on his case. Agent Dove learned that agent McKellar had an investigation concerning the same GUID number. Agent McKellar was involved in downloads on December 4, 2009 and January 27, 2010. The IP address for December 4, 2009 was the same IP address used in agent Dove's investigation. On January 27, 2010 a different IP address was used but the same GUID number. Rec. on App. at 121, ll 15-16;125, ll 15-17.[2] The January 27, 2010 IP address was located in the same apartment complex as the IP address used in the other two downloads.

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[2] The IP address found by agent Dove and agent McKellar in her first contact was 98.121.204.235 Rec. on App. at 43, ll 9-12.

Once the location of the IP addresses was obtained, agents Dove and McKellar conducted further investigations and determined that two open wireless wi-fi connections were available at the apartment complex. By being "open" no pass code was needed to access the internet through the router. They both were open to the public. After making this determination, a seach was conducted of both apartments. Computers from both apartments were examined but the router in either location was not seized or examined to determine if it had any evidentiary value. Rec. on App. at 157, 13-16;87, ll 7-24. Three computers were seized from the Land residence. Two computers from the residence above Ms. Land were seized and examined. No computer was found to contain either the GUID number or child pornography. Rec. on App. at 91, ll 6-24; 132, ll 15-25 to143, ll 1-9.

Agent Dove further testified that if a program is used that erases pictures or programs the forensic experts should be able to detect the fact that this was done. 91, ll 6-25, to 94, ll 1- 11. Of the three computers seized from the residence of Ms. Land, none had the GUID number nor evidence of the file having been deleted. When Mr. Land was interviewed and arrested on February 10, 2009, at the request of Agent McKellar, he brought his computer. That computer was as well as the computer belonging to his grandfather. A forensic examination of the computers was conducted. The GUID number was not found on Mr. Land's computer or his grandfather's computer. Rec. on App. at157, ll 21-25 to158, ll 1-5. In addition, the computer had no indication that a system restore has been conducted or any other erasure type program. Rec. on App. at158, ll 16-25 to159, ll 1-19. Simply put, no computer seized by the agents had the GUID number on it, child pornography, or evidence that an attempt had been made to erase any pictures or programs.

While at his grandfather's residence, Mr. Lander was interviewed by the officer for approximately two hours. Rec. on App. at162, ll 20-25. In the interview, after about an hour and 50 minutes, he admitted using LimeWire and admitted downloading child pornography. He did not admit to distributing child pornography. He was not asked about his knowledge as to his understanding of how LimeWire works or if he knew the default position would permit people to access his computer. He did identify several titles from those provided by agent McKellar as the title of some of the videos he had downloaded. Mr. Land told the officers he had been up until about 2 am before the interview. Rec. on App. at162, ll 11-12. He also named several medications he was taking for post traumatic stress disorder. Rec. on App. at162, ll 14-16; 161, ll 22-25 to162, ll 1-2. He stated the files he downloaded at his mother's house were deleted. Rec. on App. at 152 ll 7-9. He further stated that he did a system restore on his computer. Rec. on App. at 155 at ll 15-21.[3] The state presented no evidence that Mr. Land had access to any other computers other than the ones they seized. The State presented no evidence of any missing computers.

[3] The testimony at trial established that if Mr. Land had downloaded LimeWire after deleting a prior version from his computer, a new GUID number would have been assigned. The computer on which the GUID number involved in this case was obviously restored or had the LimeWire program deleted from at least December 3, 2009 until January 27, 2010.

Argument

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

To establish the guilt of David Austin Land to the charge of Criminal Exploitation of a minor second degree, the State is required to do more than prove that Mr. Land had pictures and videos that could be accessed by someone with file sharing software. To prove that Mr. Land had the mens rea to violate the statute the State has to prove he in fact knew that a person with file sharing software could access his computer and that he intended to permit such access. The State in this case proved neither.

This Court has said "Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand.'" *State v. Jefferies*, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994). *See, also, Morissette v. United States*, 342 U.S. 246, 252 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.") . The evil doing hand has to be more than "clicking default" on a software program unless the State has proven a defendant knew by clicking default he has the evil intent.

Under South Carolina Code § 16-15-405 the State is required to prove a defendant knows of the nature of the pictures. The statute does not specify a mens rea for the act of

distribution of the child pornography. As the South Carolina Supreme Court did in *Jefferies* this Court should hold that a mens rea of knowledge is required. Under such a holding the State would be required to prove a defendant knew they were in fact actually distributing child pornography. At the trial below the trial judge, with the consent of the State, agreed the State had to prove the defendant acted with at least knowledge that he was acting in violation of the statute. Rec. on App. at 247, 8-24. In his charge, the trial judge equate intent with knowledge. Rec. on App. at 276, ll 24-25 to 277, ll 1-20.

The only case that research has found that is on all fours with the present facts is *Biller v. State*, 109 So.3d 1240 (Fla. .5th Dist. Ct. App. 2013). In that case the Florida court of appeals reversed the conviction of the defendant for "transmission of pornography by electronic device . . . ." *Id.* The facts giving rise to the charges are substantially similar to the ones in this case. In *Biller* the defendant used LimeWare to download child pornography to his computer. Deputies of the local sheriff's department then accessed the files using their own LimeWire program that was installed on their computer. The Florida court stated the issue: "Thus, the legal issue we are asked to confront is whether, by allowing access to files through a sharing network, Appellant 'sent' images to another person." *Id.* at 1241. While the South Carolina statute does not use the word "sent" the words used are the equivalent. The South Carolina statute uses "distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material . . . ." South Carolina Code of Laws § 16-15-405 (A)(2). Notably the statute does not use the phrase "offers for distribution, sell or exchange."

In the present case, the State never produced any evidence that Mr. Land knew that by clicking on the default position he would be giving another user of peer to peer software

access to the files he downloaded. The State never produced any evidence that Mr. Land had sufficient computer knowledge to understand how to change the setting on the LimeWire program to prevent his files from being accessed by others. The State has the burden of proving its case. The burden requires the State to prove more than the fact that child pornography files were in a file share folder on his computer. The State is required to prove he intended to distribute those files or he had knowledge that his files could or would be accessed by third parties. Without proof of this knowledge, the State has failed to prove Mr. Land guilty of Second degree sexual exploitation of a minor.

In *United States v. Husmann*, 765 F.3d 169 (3rd Cir. 2014) the court held that merely placing child pornography files in a file share folder of a peer to peer file sharing system is not distribution within the meaning of 18 U.S.C. § 2252(a)(2). The Court held " Based on the ordinary meaning of the word 'distribute,' the other statutory provisions criminalizing child pornography offenses, and the decisions of our sister circuits, we hold that the term 'distribute' in § 2252(a)(2) requires evidence that a defendant's child pornography materials were completely transferred to or downloaded by another person." *Id.* at 176. Thus, a conviction in this case cannot be sustained simply because the files were found in a folder that can be accessed by other individuals.

Mr. Land acknowledges that in this case, unlike *Husmann,* three files containing child pornography were in fact downloaded by the investigating officers. The import is this: If merely having the files in a folder of a file sharing program is not sufficient to sustain a conviction, what more is required? The answer to that question goes back to the original discussion of the intent or knowledge the government must prove to sustain the conviction. The

knowledge is that Mr. Land knew the files are in fact available for third parties to access them. The intent is that with this knowledge he intended for people to download files. Without proof of that Mr. Land has such knowledge or intent, the conviction cannot be sustained. Several cases that have addressed the question of knowledge support the position of Mr. Land.

In many cases this important distinction has been discussed. The courts have found that the government has proven that the defendant knew or should have known based upon his expertise that the files would be shared. In *State v. Lyons,* 417 N.J. Super.251, 9 A.3d 596 (2010) the Superior Court of New Jersey reversed the dismissal of the charges by the lower court. In finding the State had presented sufficient evidence of distribution, the court said "In his answer to the next question, defendant acknowledged that he knew he had the ability to 'set it not to share,' but said he did not do so because he 'just forgot.'" *Id.* at 599. In *United States v. Richardson*, 713 F.3d 232 (5th Cir. 2013) the court affirmed the defendant's conviction for distribution of child pornography. In so doing the court found the defendant "knew that what was in his 'shared' folder was made available to others through file sharing." *Id.* at 234. No such facts exist in this case. In *State v. Fielding,* 15 N.E.2d 912 (Ohio Ct. App. 10th Dist. 2014) the Ohio court affirmed the conviction noting "Although he conceded that files in the shared location on his laptop could be accessed by others, he stated he did not intentionally share files with others." *Id.* at 926. Mr. Land made no such concession. *See, also, United States v. Chiaradio,* 684 F.3d 265, 282 (1st Cir. 2012)("When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.")

State v. Tremaine, 315 S.W.3d 769 (Mo. Ct. App. W.D. 2010) has special

application to this case from a factual discussion and the legal application. In *Trem*aine the defendant was accused of possessing child pornography and "promoting child pornography in the first degree by offering to disseminate it." *Id.* at 770. As in this case Mr. Termaine had downloaded child pornography with the use of LimeWire. His conviction was affirmed because the court found that Mr. Termaine knew the files he downloaded was accessible to others. In reaching this conclusion the court noted:

> While Detective Anderson testified that "there's also a setting on LimeWire *that I believe is by default, on the newer versions,* that will allow you to share partial files," this statement did not establish that the LimeWire program had set Tremaine's computer to share files in the "Incomplete" folder automatically and without his knowledge. Indeed, the testimony of defense expert Greg Chatten suggests Tremaine's active involvement in determining which (if any) of his files would be shared. Chatten testified that, "*[f]rom whatever setting you've put in LimeWire* is to where your—what folder or folders you wish to share, yes." Hence, the jury could reasonably conclude that Tremaine voluntarily enabled the sharing of files in his "Incomplete" folder, which constituted the offer to disseminate child pornography. *Id.* at774-775

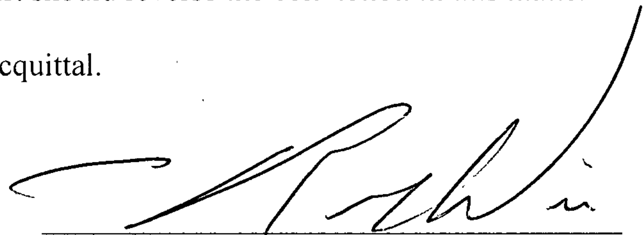
In the present case the apparently newer version LimeWire did in fact set Mr. Land's computer to share files in the "share" folder automatically and without the knowledge of Mr. Land. Mr. Land did not have to perform an affirmative act to have LimeWire set up a folder that would share files. The State has not proven he had the knowledge that he was in fact sharing files.

The requirement that the State is required to present facts of a defendant's knowledge that his computer makes downloaded files accessible to third parties does not prevent the State from prosecuting cases of child pornography. As the court noted in *Husmann* "In the end, our interpretation of 'distribute' in § 2252(a)(2) might affect the government's charging

decisions, but it does not handicap the government's ability to prosecute child pornography offenses." *Id* at 176.

CONCLUSION

For the foregoing reasons this Court should reverse the conviction in this matter and remand with directions to enter a verdict of acquittal.



February 10, 2016

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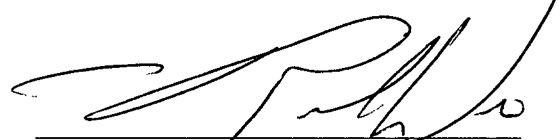
CERTIFICATE OF COUNSEL

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

February 10th, 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