

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2014-002423

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SC Court of Appeals

The State,

Respondent,

vs.

David A. Land,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in denying Appellant's motion for a directed verdict. The State presented ample evidence Appellant violated section 16-15-405(A)(2) of the South Carolina Code to support sending the case to the jury.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.¹

¹ The State only agrees with the portion labeled Procedural History and does not make any statement regarding the accuracy of Appellant's Factual History.

STATEMENT OF FACTS

Two Agents with the State Law Enforcement Division (SLED) conducted undercover online operations targeting people distributing child pornography using peer-to-peer file sharing programs. Using a program utilized by the Internet Crimes Against Children Task Force, Agents Dove and McKellar each began searches looking for individuals with child pornography available to be shared on the file sharing networks such as LimeWire, Phex, FrostWire and others. (T.141; 218-220; R. 104-106). In searching for distributors of child pornography, the programs search out specific SHA values or Hash values known to be associated with images of child pornography.² No matter the title of a file, the SHA value will remain constant unless something within the file changes. (T.231-232; R.117-118).

Both Agent Dove and Agent McKellar searched a computer and found images with SHA values known to represent child pornography. Agent Dove explained he downloaded the file and then viewed them to verify they were what he believed to be child pornography. (T.145; R. 31). In doing so, he would also obtain the internet protocol address or IP address. The IP address is similar to a phone number. Only one person can have one assigned at a time and it will give you the location where the computer was being used. Further, he obtained the GUID, a global unique identifying number which is generated when the software—LimeWire in the instant case—is installed on the computer. The GUID is tied to that software and will not change even if the location of the computer or its IP address changes.

² A SHA value or Hash value is a unique identifier for a file derived by a mathematical formula. Every file would have a unique SHA or Hash value, similar to the uniqueness of DNA. (T.141; 231; R.27; 117).

On December 7, 2009, Agent Dove conducted an online investigation and found a computer in Lexington, South Carolina with likely child pornography available for distribution. (T.149; R.35). Agent Dove downloaded four files from the computer. (T.178; R.64). One of the downloaded images was titled "MafiaSex.Ru_Children_Kids_Hard_000300_ChildPorn_Collection_10_Pussy_Illegal_Preteen_Underage_Lolita_Kiddy_Child_Incest_XXX_Porno_Gay_Fuck_Young_Naked_Nude_Little_Girl(1).jpg." (Indictment; T.186; R. 72). The title contained numerous words typically associated with child pornography. (T.186; R. 72). Agent Dove obtained the IP address and GUID for the computer running the LimeWire program from which he downloaded the above file. (T.189; R. 75).

Agent McKellar conducted online investigations on December 4, 2009. During her investigation, she located a computer which shared known child pornography and was able to download several files from the computer. (T.221-222; R. 107-108). The computer had an IP address in Lexington County, South Carolina. One file she downloaded was titled: "zooskool-Pthc((LELIA))11y.o with dad teach to fuck with sound.mpg." (Indictment; T.229; R. 2; 115). Agent McKellar obtained both the IP address and GUID from the computer.

On January 27, 2010, Agent McKellar again conducted an online investigation and located a computer distributing child pornography. It had the same GUID as the computer distributing child pornography on December 4, 2009, though the IP address had since changed. (T.235; R. 121). One of the files she downloaded during this investigation was titled: "8yr girl and 12 yr boy are fucking lolitas lolita preteen sex child underage Pedo Kiddy Lolita Child Porno.avi.mpg." (Indictment; T.240; R. 126).

Agents Dove and McKellar realized they had access computers using IP addresses in neighboring apartments at the same location. (T.244; R.130). During their investigation of the IP address and its location, they found an open wireless network called ADMIN. (T.246-247; R.132-133). They also determined the same GUID from the computer distributing child pornography was located previously in Ft. Campbell. (T.192; R. 78). After conducting search warrants in Lexington County at the locations of the IP address, the agents determined the defendant may be located in Greenwood, South Carolina. (T.247; R. 133).

Agent McKellar made contact with Appellant and his grandparents in Greenwood. (T.248-249; R. 134-135). Agent McKellar interviewed Appellant. He admitted being familiar with file sharing and discussed using LimeWire, including during the time when he was located at Ft. Campbell in the military. (T.255-256; R. 141-142). He also admitted travelling to Lexington to visit his mother as well as accessing an unsecured wireless network named ADMIN. (T.265; R. 151). Appellant admitted intentionally receiving child pornography after using specific search terms of pre-teen and Lolita. (T.266; 269; R. 152; 155). Appellant acknowledged and admitted downloading the three files Agent McKellar was able to download from his computer on January 27, 2010. (T.268; R. 154). Finally, he admitted after looking at the hundreds of files of child pornography he would download while in Lexington, he would perform a system restore to delete everything from his computer. (T.269; R. 155).

The Attorney General's Office indicted Appellant on three counts of second degree sexual exploitation of a minor based on the files distributed from his computer. The Lexington County Grand Jury returned a true-bill on all three and he proceeded to

trial where he was convicted as indicted. The trial judge sentenced him to seven years, suspended on service of thirty months and two years probation on each count. The sentences to run concurrent. He was also ordered to register as a sex offender as required by law.

ARGUMENT

- I. **The trial court did not err in denying Appellant's motion for a directed verdict. The State presented ample evidence Appellant violated section 16-15-405(A)(2) of the South Carolina Code to support sending the case to the jury.**

Appellant contends the trial court erred in failing to enter a verdict of acquittal because the State failed to prove Appellant intended to share the child pornography he downloaded and knew the items could be shared. First, there is substantial circumstantial evidence indicated Appellant knew how LimeWire, a peer to peer **file sharing** program, worked and that the child pornography files he downloaded would be available for others to download consistent with the function of the program. The State provided sufficient evidence, through Appellant's conduct and through other evidence, indicating he knowingly distributed child pornography. Further, pursuant to section 16-15-405(A)(2) of the South Carolina Code the State can prove he distributed, received, or solicited the files. Appellant specifically admitted searching for, requesting or soliciting the files from other LimeWire users, and then receiving the files by downloading them. Accordingly, the State presented ample evidence to warrant sending the case to the jury and to support the jury's determination Appellant violated section 16-15-405(A) in regards to the three separate files containing child pornography.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable

inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Section 16-15-405 provides:

(A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

(1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or

(2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

S.C. Code Ann. § 16-15-405 (Supp. 2013).

In State v. Tuckness, the South Carolina Supreme Court examined criminal intent:

The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (emphasis added) (citations omitted). Thus, the issue of whether a defendant possessed the requisite intent

at the time a crime was committed is typically a question for jury determination because, without a statement of intent by an actor, proof of intent must be determined by inferences from conduct. State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971).

Even if the proper *mens rea* of the crime of sexual exploitation of a minor in the second degree is knowledge, there was ample evidence presented by the State demonstrating Appellant's knowledge and intent. First and foremost, Appellant used a **file sharing** program to look for and solicit, download and receive, and distribute child pornography. File sharing programs, also known as peer-to-peer file sharing programs, enable computer users to share and receive electronic files, including images, videos, and audio files, with a network of other users. (T.140; R. 26). As the court stated in United States v. Bastian, 650 F.Supp.2d 849, 861 (N.D.Iowa 2009): "It is axiomatic that a person who installs a file-sharing program on a personal computer intends to use that program to share files. Otherwise, there would be no reason to install it." LimeWire is a "peer to peer" program allowing people to access files stored on other people's computers and Appellant specifically used this program to find, download, and distribute child pornography. (T.139-140; 267-269; R. 25-26; 153-155). The mere fact he used a program whose specific function is to download and distribute files, including the child pornography downloaded and distributed by Appellant, is sufficient evidence to send it to the jury on the issue of whether he had the requisite knowledge and intent to be convicted of the crime.

Further, Appellant's statement was sufficient evidence warranting sending the case to the jury. He admitted using LimeWire. He admitted searching for—soliciting—child pornography using terms "pre-teen" and "Lolita." (T. 269; R. 155). He admitted

downloading child pornography; downloading not only the specific files later distributed to undercover agents, but hundreds of files of child pornography. (T.266-267; 268; R. 152-153; 154). He admitted the files were the ones he sought and that he **intentionally received** them. (T.266; R. 152).

Section 16-15-405(A) only requires the State prove Appellant solicited or received or distributed the child pornography, not that he did all three. Appellant's statement specifically indicated he solicited the child pornography by using LimeWire to search and find images and videos using the search terms pre-teen and Lolita. In addition, he admitted intentionally receiving the images of child pornography, including the three downloaded by law enforcement agents. Finally, he admitted he intentionally received hundreds of images of child pornography. Appellant's own statement warrants sending the charges to the jury for consideration.

Appellant maintains because he simply clicked on the program's default settings the State did not prove he knew he was distributing the files ultimately downloaded by Agents McKellar and Dove. Notwithstanding the fact the State does not have to prove distribution, but only had to prove he received or solicited the files—both of which he admitted in his statement—the State presented ample evidence to warrant sending the case to the jury based upon Appellant's distribution of the child pornography. First, as discussed above, he was using a **file sharing** program. He specifically admitted being familiar with file sharing and LimeWire.

The testimony by Agent Dove indicated LimeWire provided a series of questions and instructions during its installation. One of the questions presented is where to download the files received from another computer using the LimeWire program. The

program has a default setting which is to keep the files in the Shared folder. Otherwise, it provides the user the ability to change the default setting and enter another location, which as Agent Dove explained, would not be accessible and allow for further distribution. (T.144-145; R. 30-31). Appellant maintained the default location, thereby allowing the files to be distributed. As the South Carolina Supreme Court explained in *State v. Sterling* when discussing the *mens rea* of knowledge in a security fraud case, “one cannot escape liability by ‘shutting one’s eyes to what would otherwise be obvious.’” *State v. Sterling*, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012) (quoting *State v. Thompkins*, 263 S.C. 472, 211 S.E.2d 549 (1975)). By claiming he merely accepted the defaults, he is attempting to cover his eyes to the fact the program specifically allowed him the opportunity to provide a location for the files which would ensure they would not be later downloaded by Agent Dove, Agent McKellar, or anyone else.

Appellant also claims the State failed to present evidence of his computer knowledge and he had sufficient knowledge to understand how to change the setting on the LimeWire program. The State demonstrated Appellant was very well versed in the use of the computer, the internet, and LimeWire. He admitted in his statement being familiar with the program. He also acknowledged he would download a large quantity of child pornography, view it and delete it. He would delete the images and his tracks by performing a system restore on the computer, to bring it back to the condition it was in prior to his download of the illegal material. (T.269-270; R. 155-156). The jury could certainly and reasonably infer from Appellant’s actions and ability to thwart law enforcement from finding any downloaded material on his computer, even after he

admitted downloading and receiving it, that he had the requisite knowledge to use LimeWire and to distribute the child pornography over the **file sharing** program. The trial court properly submitted the case to the jury for consideration because the State amply demonstrated Appellant knew or should have known the obvious fact, he would be distributing the child pornography he already solicited and received.

Finally, Appellant relies on several cases to argue the State failed to prove he distributed the child pornography files. In Biller v. State, 109 So.3d 1240 (Fla. 5th Dist. Ct. App. 2013), the Florida Court construed their statute which requires transmission and not distribution. The statute also defines transmission as “the act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment.” Biller, 109 So. 3d at 1241 (emphasis added). The Court concluded the defendant did not cause to be delivered a file simply because he placed it into a shared folder.

South Carolina’s statute uses the term “distribute.” The term is not specifically defined by our statute. As a result, the term is given its ordinary and common meaning. See State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) (“In interpreting a statute, ‘[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.’”)(citations omitted). Merriam-Webster dictionary defines distribute as: “to divide” or “to give out or deliver especially to members of a group.”³ Accordingly, Appellant can “give out” the file without “causing [the file] to be delivered” as required by the Florida statute. By placing the file in a folder specifically designated for sharing and allowing the file to be

³ See <http://www.merriam-webster.com/dictionary/distribute>

downloaded and shared, he gave out the file to a group—those using the peer-to-peer file sharing networks, including Agents Dove and McKellar.

Appellant also relied upon United States v. Husmann, 765 F.3d 169 (3rd Cir 2014) for the proposition that merely placing the files into a shared folder is not sufficient to constitute distribution. The Court in Husmann, however, continued by finding that distribution does occur when the file is actually transferred to or downloaded by another person. Id. at 174. The files in the instant case were not merely placed into the shared folder by Appellant. The files were downloaded and transferred to both Agents Dove and McKellar. Under the requirements of Husmann, Appellant distributed the files at issue in this case.

Several other federal courts have concluded the use of a file sharing program such as LimeWire is sufficient evidence to support a conviction for distributing child pornography. See e.g., United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (holding “that use of a peer-to-peer file-sharing program constitutes ‘distribution’”); United States v. Richardson, 713 F.3d 232, 236 (5th Cir.2013) (upholding a distribution conviction where a law enforcement officer “actually downloaded” a child pornography video stored in the defendant's shared folder); United States v. Collins, 642 F.3d 654, 656–57 (8th Cir.2011) (finding sufficient evidence of attempted distribution of child pornography where defendant downloaded, installed, and used file-sharing program and possessed knowledge of computers); United States v. Shaffer, 472 F.3d 1219 (10th Cir. 2007) (finding the use of a peer-to-peer program sufficient for distribution and comparing the use of the program to a self-service gasoline station in which the gasoline is made available to the public and is distributed by the owner); United States v. Dunn, 777 F.3d

1171, 1175 (10th Cir. 2015) (defendant's placement of child pornography files into shared folder accessible to other users was sufficient to establish distribution even without active transfer of possession to another user).

Accordingly, the State presented evidence showing Appellant violated section 16-15-405(A) of the South Carolina Code by soliciting, receiving, and then distributing a visual representation of a minor engaged in sexual activity.

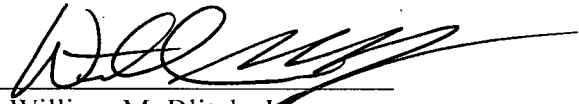
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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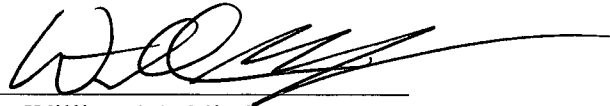
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

William M. Blitch, Jr.

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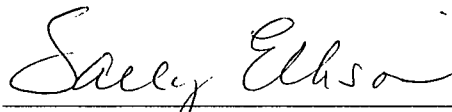
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 18th day of February, 2016.



SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727