

**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

**David A.
Land.....Applicant,**

v.

**State of South
Carolina.....Respondent.**

BRIEF OF APPELLANT

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State of the Case

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

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. at 82, 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. at 84, 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. at 76, 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. at 79, 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.

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 search 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 to 143, 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. at 157, ll 21-25 to 158, 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. at 158, ll 16-25 to 159, 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. at 162, 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. at 162, ll 11-12. He also named several medications he was taking for post traumatic stress disorder. Rec. on App. at 162, ll 14-16; 161, ll 22-25 to 162, 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 *Tremaine* 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.* at 774-775

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.

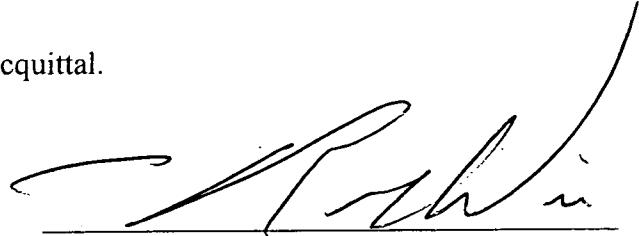
The requirement that the State is required to present facts of a defendant's knowledge that his computer makes downloaded files accessible to third parties does not prevent the State from prosecuting cases of child pornography. As the court noted in *Husmann* “In the end, our interpretation of ‘distribute’ 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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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.

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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,

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February 18, 2016

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

The State,

Respondent,

vs.

David A. Land,

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."

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February 18, 2016

**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

**David A.
Land.....Applicant,**

v.

**State of South
Carolina.....Respondent.**

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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. at 246, 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 default 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.* at 1174. Again, the State produced no evidence that Mr. Land possessed such knowledge.

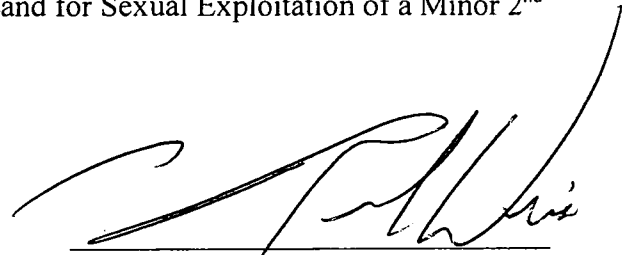
The State could have prosecuted David Austin Land under S. C. Code § 16-15-410 and had a relatively easy case. All they would have been required to prove is that Mr. Land knowingly possessed the child pornography. While they never found any such material on his computer they had an admission from him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