STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, Circuit Court Judge
Appellate Case Tracking No. 2016-001215

The State, Respondent,

vs.

Aaron Baynard Griswold, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly admitted the videos and analysis from the three computers because the State established a chain of custody as far as practicable when all persons coming into contact with the computer data were identified and the manner of handling was reasonably demonstrated.

II. The trial court properly allowed the State to play the small portions of the videos which formed the basis of the charges against Appellant because their probative value in establishing the elements of the charge greatly outweighed any prejudice.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Brian Honig and Appellant were friends in 2007. Honig used Appellant's computer, which was located in Appellant's bedroom. (T.80; R.___). Honig used the computer in an attempt to find jobs and respond to emails. On June 1, 2007, he went to Appellant's home to use the computer and when he opened Windows Media Player to being playing some music, it opened to a video of child pornography. (T.81; R.___). Honig believed the child to be between six and eight years of age, and the child was performing fellatio. (T.82; R.___). Honig did not immediately report the child pornography to the police, instead he reported it a day or two later. (T.83; R.___).

Charlene Blackwelder, formerly a detective with the Rock Hill Police Department, obtained a sworn statement from Honig regarding his discovery of child pornography on Appellant's computer. (T.120; R.___). Subsequently, she obtained a search warrant for his home, executed the search warrant, and seized five computers from the residence. (T.120; R.___). The search warrant was executed on June 4, 2007. Blackwelder indicated the computers were not turned on during the seizure and she did no searching of the computers. She indicated she pulled the power plug of any computers on at the time of the seizure. (T.123; R.___). Appellant had computers in his living room, bedroom, and an inoperable one in the attic. An additional computer was found in Appellant's mother's bedroom. (T.125-128; R.___). Blackwelder identified each of the computers removed from the residence and where they were originally located. (T.130-137; R.___). She recorded serial numbers for the computers on a Rock Hill Police Department Evidence Sheet, which matched the computers at trial. (T.137; R.___). Blakwelder turned the computers into the Police Department's evidence and had nothing more to do with the case. (T.120; R.___).

Detective Kathy Harveston, with the Rock Hill Police Department, had the computers transported to SLED for forensic analysis to be done. She indicated she never turned on the computers. (T.100-101; R.___). She received a forensic report from SLED, specifically from Special Agent Farand Wasiak. (T.101; R.___).

Special Agent Wasiak conducted the forensic analysis of the computers submitted to SLED by the Rock Hill Police Department in 2007. (T.200; R.___). Special Agent Wasiak produced a CD detailing his findings. (State's Exhibit 4). Three of the computers contained images or videos of child pornography—State's Exhibit 7, the computer from Appellant's bedroom; State's Exhibit 8, the computer from Appellant's living room; and State's Exhibit 10, the second computer from Appellant's bedroom. (T.206; State's Exhibits 12, 13, and 14; R.___).[1] Some of the files contained on Appellant's computers include: 1) "(KINGPASS) NEW! 022 Asian - pthc (tied 8yo Cambodian boom-boom girl fucked + raped by sex-tourist) hussyfan.mpeg" which was found on the living room computer and both of the bedroom computers; 2) "((hussyfan)) pthc !!! NEW & GOOD Linda0001-1.avi"; 3) "pthc hussyfan!!!NEW Tammy&friends06.avi"; 4) "Kinderficker Pthc Ptsc Hussyfan I Slo-Mo Cum My Step Doughter Jenniefer Sofie Verme 4Yo In Mouth.avi" which was found on the living room computer and one of the bedroom computers; 5) "(Pthc) SHOCKING 6YO FUK with sound.mpg; and 6) "1 (7).mpg".[2] (State's Exhibits 12, 13, and 14; R.___). In total, twenty-seven files containing child pornography were located on the Dell computer in Appellant's bedroom. (State's Exhibits 11 and 13; R.___).

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[1] State's Exhibit 12 details the forensic findings related to the computer found in the living room, State's Exhibit 8. State's Exhibit 13 details the forensic findings related to the Dell computer found in Appellant's bedroom, State's Exhibit 10. State's Exhibit 14 details the forensic findings related to the other computer located in Appellant's bedroom, State's Exhibit 7.

[2] The State played a small portion of files 2-6 listed above without sound for the jury to demonstrate the type of material included in the files on Appellant's computers. (T.280-283; R.___).

For each of the computers, an "acquired" or "acquisition" hash value was determined when the hard drive was initially accessed at SLED. The hash value is similar to DNA in that it does not change and that it is unique to the individual hard drive. As Special Agent Wasiak explained: "If one thing is changed on that computer . . . the hash value will completely change." (T.208; R.___). Later, when the analysis is complete, a "verify" or "verification" hash is created to ensure nothing changed on the hard drives during the analysis. The hash values remained the same for all images of the hard drive created and through until the end, indicating no changes occurred to the hard drives or their contents. (T.209-215; State's Exhibits 12, 13, and 14; R.___). In 2014, Special Agent Wasiak performed a second analysis of the computers. (State's Exhibit 5). The same hash values were found for the hard drives at the time of the second analysis indicating nothing had changed between the 2007 and 2014 analysis. (T.219; 223; R.___).

On one of the computers from the bedroom that contained child pornography, State's Exhibit 10 (which was also designated Item 3 at SLED), Special Agent Wasiak determined a MySpace page had been viewed belonging to "Bay the Candyman" in Rock Hill, South Carolina. (T.233; R.___). Additionally, an email regarding a purchase made by Appellant was located on the computer. (T.244-245; State's Exhibit 17; R.___). Significantly, banking and credit card information was located on the computer which tied its use to Appellant. (T.247-254; State's Exhibits 18, 19, and 20; R.___). Further, Special Agent Wasiak was able to demonstrate Appellant's banking account information was accessed roughly nine seconds before someone accessed a video containing child pornography on one of the computers found in Appellant's bedroom.[3] (T.268-270; 281-282; R.___).

[3] The file accessed was the one titled "pthc hussyfan!!!NEW Tammy&friends06.avi" (T.281; R.___).

ARGUMENT

I. The trial court correctly admitted the videos and analysis from the three computers because the State established a chain of custody as far as practicable when all persons coming into contact with the computer data were identified and the manner of handling was reasonably demonstrated.

The trial court correctly admitted the videos and analysis found on three of Appellant's computers. To the extent necessary, the State established a chain of custody as far as practicable identifying all persons and the reasonable demonstrating the manner of handling. Further, the State provided significant authentication based on the hash values of the hard drives and the information tying the hard drives directly to Appellant. Finally, a full chain of custody should not be necessary because the data is non-fungible.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982).

> [A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and

> the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (emphasis added) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)); see also State v. Kahan, 268 S.C. 240, 244–45, 233 S.E.2d 293, 294 (1977) (holding the standard stated in Benton v. Pellum had been met where the evidence was transported in accordance with normal protocol, even though every person who may have handled it was not personally identified and there was no testimony regarding the care and handling of the item for an interval when it was being stored).

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility, not admissibility." Carter, 344 S.C. at 424, 544 S.E.2d at 837. Importantly: "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005).

In Cochran, the South Carolina Supreme Court stated "we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case." Cochran, 364 S.C. at 629, 614 S.E.2d at 646. The Court in Cochran found: "Generally, we will uphold the chain of custody if the

safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified." Id.

In State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989), the Supreme Court affirmed the decision of the trial court to admit blood test results even though the nurse who had drawn the blood of the defendant and placed it in the hospital refrigerator did not testify. Nurse Yorke, who was not the nurse that drew the blood, testified at trial. She indicated she removed the blood sample from the locked hospital refrigerator the morning after the accident and took it to the lab for testing. According to Nurse Yorke, the vial was labeled with appellant's name, patient number, date of birth, and the date the blood was drawn. The hospital's internal chain of custody form was initialed by Nurse Burns, the nurse who drew the blood, indicating she had obtained the sample from appellant and then locked it in the refrigerator. Under those circumstances, the Supreme Court ruled that the initialed form complying with hospital protocol and Nurse Yorke's testimony sufficiently established a chain of custody to allow admission. Id. at 293, 376 S.E.2d at 774.

This Court has also noted: "[W]here the handling of the evidence is reasonably demonstrated, a weakness in the chain implicates credibility, but does not render the evidence inadmissible." State v. Taylor, 360 S.C. 18, 24-25, 598 S.E.2d 735, 738 (Ct. App. 2004) (citing State v. Kahan, 268 S.C. 240, 244, 233 S.E.2d 293, 294 (1977) (ruling the ballistics test results of a nightgown worn by the deceased and placed in the evidence locker in a plastic bag were admissible even though there was no testimony as to the care and handling of the plastic bag containing the gown during the time it was in the evidence locker); State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997) (affirming admissibility of blood tests even though the arresting officer stored the blood sample in his home refrigerator prior to testing, noting that there was no

evidence of tampering); State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995) (upholding the admission of drug evidence where a discrepancy existed as to the dates of possession of persons in the chain of custody).

The Supreme Court has stated:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

State v. Hatcher, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-755 (2011). The Court in Hatcher explained: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." Id.

Appellant contends the State did not present a complete chain of custody because two individuals did not testify. In the instant case, even assuming the videos and data on the hard drives are fungible evidence, the State presented a chain of custody, and the State did not need to present the testimony of two individuals in the chain of custody because they were identified, their method of handling the evidence was sufficiently established, and other factors demonstrated the evidence was what it was purported to be.

The two individuals who were clearly identified but did not testify were Tony Pantsari and Kevin Suggs. The two individuals received the computers and were responsible for making images of the computers' hard drives from which the analyst, Special Agent Wasiak, would conduct his forensic examination instead of utilizing the original hard drive. Special Agent

Wasiak explained the procedure used by Pantsari and Suggs when they received the computer. He testified once the evidence is brought to SLED:

> The hard drive is removed from the computer, at which point, without the hard drive being in the computer, a date time check is done on the machine, using the computer's bios function, which is just the date and time. The hard drive is not connected at all at this point in time. **So, no data to the hard driveis -- is manipulated.**

(T.150; R.___)(emphasis added). He continued:

> The hard drive is then hooked up to what we call is a write blocker . . . . This write blocker enables only one-way traffic, data to -- to transfer out, but no data can come back in. Okay? And what we do is, we make a bit by bit copy of that hard drive. Okay? And that hard drive, **that original evidence, nothing is put -- no information is put on that**. Once that bit by bit copy is made, that hard drive is placed back into the computer and locked up into evidence. We call that imaging.
>
> Once that hard drive is imaged, it is put to a server, which I work off that image on a server from my desk.

(T.151; R.___)(emphasis added). Pursuant to his testimony, no information is placed on the original hard drive once it arrives at SLED and they have steps in place to ensure the image (copy) of the hard drive is an exact match. The documentation of this process was included in State's Exhibits 4 and 5, the forensic evaluations performed by Special Agent Wasiak. (T.162; R.___).[4]

Further, the State need not eliminate any possibility of tampering. Rogers, 361 S.C. at 187, 603 S.E.2d at 915. Instead, the State need only demonstrate a "reasonable probability the article has not been changed in important respects." Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-755. Special Agent Wasiak explained the program used by SLED creates an "acquisition" hash value prior to starting the imaging process. This is the DNA summary of the hard drive as

[4] On State's Exhibit 4, the SLED documentation the procedure was followed is found in "Forensic Worksheets.pdf" found in a folder labeled "Additional." On State's Exhibit 5, the SLED documentation the procedure was followed is found in "Imaging Worksheets.pdf" found in a folder labeled "Additional." Special Agent Wasiak also discussed the intake sheets and the information submitted. (T.455-456; R.___).

it exists at that time and as discussed above, any change to the hard drive would result in a change to the hash value. Each image created, in this case one by Pantsari and one by Suggs, has a "verification" hash value performed after the copying is complete to verify they are the same as the original. As explained by Special Agent Wasiak, this "verification" hash "shows that that hash value is still the same as when we started, **therefore showing that we do not manipulate any data**." (T.151; R.___)(emphasis added). The jury was presented with the "acquisition" and "verification" hash values for each of the computers containing child pornography and could verify they were the same value. (State's Exhibits 12, 13, and 14; R.___). It is also significant that both Pantsari and Suggs generated the same hash values for each of the drives, meaning nothing about the drives changed between 2007 and 2014.

Additionally, as discussed above the chain of custody rule is used to authenticate evidence before it is admitted in court, to ensure that the item of evidence is what it purports to be. See Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be."); United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982) ("The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence."). The authentication of the hard drives in this case was enhanced by the presentation of evidence on the hard drives which clearly linked Appellant to the hard drives. This included the credit card application; web pages accessed which clearly belonged to Appellant; and bank account information.

Also, Special Agent Wasiak noted the file created dates for all the videos of child pornography. He stated the file created date is the date the file is put onto the hard drive. If the file is then copied to another hard drive, it would have a different file created date on that drive.

(T.260; R.___). He explained the operating system established the file created dates and that they were not dependent on any input by a person. (T.319; R.___). Special Agent Wasiak also explained that a person cannot manipulate these dates by going in and manually changing them. (T.319; R.___). Examining the file created dates for the various videos of child pornography found on the computers indicate all of the files were created prior to the computer being seized by officers with Rock Hill Police Department. (State's Exhibits 12, 13, and 14; R.___). The fact all the files were on the hard drives prior to the computers being seized and taken to SLED, coupled with the fact the hard drives contained evidence linking their use directly to Appellant, is significant evidence indicating there was no tampering with the computers and that the hard drives are what the State purported them to be.

While the State did not present the testimony of the two agents who created the images, the State identified the individuals in the chain, presented sufficient evidence a process existed to ensure the images remained accurate and without manipulation, and documented the process was followed. Further, the State fully authenticated the hard drives through the use of the hash values, file created dates, and information contained on the hard drives linking them to Appellant. The trial court properly concluded the State sufficiently established a chain of custody to authenticate the hard drives and the data on the hard drives.

II. The trial court properly allowed the State to play the small portions of the videos which formed the basis of the charges against Appellant because their probative value in establishing the elements of the charge greatly outweighed any prejudice.

The trial court properly allowed the State to prove its case by playing small portions of several of the videos forming the basis of five of the twenty-seven indictments for third degree sexual exploitation of a minor. The videos were highly probative based on the elements of the offense the State was required to prove. Further, any prejudice did not substantially outweigh the probative value and the State minimized any possible prejudice to Appellant.

"The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (emphasis added). Further, "[t]his Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision." State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004); see also State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.") (emphasis added).

"Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE (emphasis added). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); see also, State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d

153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

"The relevancy, materiality, and admissibility of photographs [or videos] as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (emphasis added). Admitting videos which serve to corroborate testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

Videos calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. See State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs [or videos] must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The portions of the videos presented in the instant case had significant probative value because they demonstrated the videos met the elements necessary for a conviction for third degree sexual exploitation of a minor. Section 16-15-410 of the South Carolina Code establishes the offense of third degree sexual exploitation of a minor:

> An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.

S.C. Code Ann. § 16-15-410(A) (Supp. 2007).[5] As a result, the State would be required to prove that Appellant knew the character or content of the material he possessed and that the material contained a visual representation of a minor engaging in sexual activity. Certainly the State would be entitled to prove its case by showing the jury a minimal number of the videos—only portions of five out of twenty-seven videos.

Further, the State is entitled to present and prove its case. As the United States Supreme Court has explained:

> [T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard.

Old Chief v. United States, 519 U.S. 172, 189 (1997). Thus, the Supreme Court has recognized that the "persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." Id. at 187.

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[5] The offense occurred in June 2007, so the statute applicable at the time is referenced.

In this case, the concrete videos were necessary even when the summary was presented. First, and most significantly, the videos supported and corroborated the summary. The State should not be required to ask the jury to just accept its description of all the videos without providing some proof of its sincerity. By showing a small portion of the videos, the jury was able to conclude whether the State's summary was accurate and to be relied upon. Second, as mentioned, only a small sampling of the videos on Appellant's computers were played so that the jury could readily discern that Appellant knew the character and content of the files and that the files met the requirements of sexual exploitation of a child. Finally, the State did not present more than was warranted to establish the corroboration of the summary and the elements of the crime.

Further, the State minimized any possible prejudice from the playing of the videos. The State played the videos without sound so the jury was not forced to listen to the cries or screams of children. Additionally, the State only played a portion of five videos when Appellant was indicted on twenty-seven counts. The State did not force the jury to watch a portion of each video, and instead presented a small sampling and then asked the jury to trust in the summary and the file descriptions for the remaining videos. The State also did not choose some of the worst videos to show to the jury, including videos of bondage and the use of sex toys on children.

The State made a concerted effort to minimize any prejudice and to prevent any decision by the jury from being made on the basis of emotion or other improper basis. The minimal prejudice that was created by the playing of the videos was not unfair prejudice, but was the prejudice associated with providing evidence against a defendant. Any prejudice certainly did

not substantially outweigh the probative value, when the videos were direct evidence of the elements of the crimes for which Appellant was charged.

Appellant relies on a Third Circuit Court's decision to argue the videos in this case should not have been admitted because they were unduly prejudicial. The Third Circuit, however, recognized: "Indeed, courts are in near-uniform agreement that the admission of child pornography images or videos is appropriate, even where the defendant has stipulated, or offered to stipulate, that those images or videos contained child pornography. United States v. Cunningham, 694 F.3d 372, 391 (3d Cir. 2012) (citing United States v. Polouizzi, 564 F.3d 142, 153 (2d Cir. 2009); United States v. Schene, 543 F.3d 627, 643 (10th Cir. 2008); United States v. Ganoe, 538 F.3d 1117 (9th Cir.2008); United States v. Morales–Aldahondo, 524 F.3d 115, 120 (1st Cir. 2008); United States v. Sewell, 457 F.3d 841, 844 (8th Cir. 2006); United States v. Dodds, 347 F.3d 893 (11th Cir. 2003)). The Court in Cunningham noted there were only three charges and the government put in seven total video excerpts. The Court found the government needed only put in one or two video excerpts for each charge to prove the defendant knew the content of the files and to establish the elements of either a possession or distribution of child pornography charge. Importantly, the Court in Cunningham found that several of the videos, which it described as containing bondage and actual violence against the children, had minimal probative value due to having the other videos played for the jury, and a significant opportunity to prejudice the defendant because of the nature of their content. Id. at 389-391. The Court's holding in Cunningham is similar to the South Carolina Supreme Court's holding in State v. James, where the Court found the admission of seven prior convictions to satisfy the element for first degree burglary requiring two or more prior convictions was unduly prejudicial because "the probative value of the convictions entered beyond the two required by the statute decreases

because of the already sufficient evidence submitted to prove that element." State v. James, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003).

In the instant case, the State did not present multiple video excerpts for each charge. Instead, it provided only five excerpts as demonstrative of the twenty-seven charges Appellant faced. Additionally, the State did not play videos containing the type of bondage and other violent acts depicted in the videos the Third Circuit found unduly prejudicial. The acts displayed were horrible and graphic, but so is the nature of the crime for which Appellant is charged, and Appellant has presented no evidence the jury was swayed by emotion or other improper influence resulting from the videos. See e.g., Holder, 382 S.C. at 291, 676 S.E.2d at 697 ("Although the photographs were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis."). Accordingly, the trial court did not err in admitting the videos as they were highly probative of the elements of the crime of third degree sexual exploitation of a child and were not unduly prejudicial.

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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Attorney General

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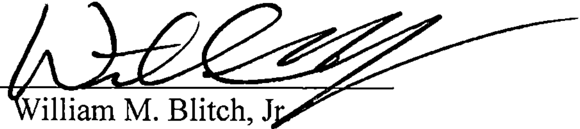
BY: 
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ATTORNEYS FOR RESPONDENT

July 21, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, Circuit Court Judge
Appellate Case Tracking No. 2016-001215

The State, Respondent,

vs.

Aaron Baynard Griswold, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 21st day of July, 2017.

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RE: State v. Aaron Baynard Griswold
Appellate Case Tracking No. 2016-001215

Dear Ms. DuRant:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services