STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2016-001975

The State, Respondent,

vs.

Michael Scott Simmons, Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Section 16-15-405 of the South Carolina Code is not unconstitutionally overbroad because the South Carolina section criminalizing the sexual exploitation of a minor is vastly different from the Child Pornography Prevention Act of 1996 found unconstitutional by the United States Supreme Court and does not criminalize all visual depictions which "appear to be" of a minor.

II. Appellant opened the door to the introduction of the forensic investigator's report detailing the full examination of the external hard drive by separating items into focused and non-focused categories and implying nothing was found on those items focused on by the investigator. Further, the trial court properly admitted the testimony regarding the external hard drive because its probative value greatly increased from his pre-trial ruling based on the defense clear theory that others had access and could have downloaded the child pornography.

III. The trial court did not err in refusing to suppress evidence seized pursuant to a properly issued warrant. The information in the affidavit was not stale, especially in light of the fact it involved digital evidence which can still exist even after a person has attempted to delete it.

IV. The trial court did not err in refusing to charge Appellant's requested charge on third-party guilt as it was a comment on the facts and an incorrect statement of the law. Further, Appellant failed to provide sufficient evidence of third-party guilt to warrant the charge. Finally, the charge provided by the trial court properly covered all necessary law.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Using specially designed file sharing software, Detective Kevin Murphy began looking for computers offering to share known images and videos of child pornography. (T.142-147; R.95-100). On November 22, 2013, Detective Murphy conducted a proactive investigation which unveiled an IP address sharing child pornography.[1] In the process, Detective Murphy created a disk containing the videos he was able to download as well as a full report of the procedure used and what was located. (State's Exhibit 1).

Detective Murphy downloaded six files, including R@yGold99.mpg, R@yGold_lgassmania2.mpg, R@yGold_mexicangirl1.mpg, R@yGold_mexicangirl2.mpg, R@yGold_sucktime1.mpg, and R@yGold_TheFamily1.mpg. (T.173; R.126). He explained Ray Gold was an individual who ran a commercial child pornography ring where he produced videos which are now part of a known series of child pornography videos. (T.172; R.125). He explained "R@yGold" is a popular search term designed to locate these videos. (T.172; R.125).

The videos, based on Detective Murphy's review, were of children engaging in sexual activities. Some of the incredibly graphic videos include young girls, ages 8-12, performing oral sex on adult males. Other videos include girls as young as 6 or 8 being raped or anally penetrated by an adult male. Finally, one video includes an adult female "teaching" a young girl how to perform oral sex and have vaginal sex while straddling the adult male and then the young girl also performs the acts. (State's Exhibit 1; T.176-181; R.129-134).

Detective Murphy determined the IP address from which he downloaded the videos was assigned to Time Warner Cable. (T.181; R.134). After contacting the South Carolina Attorney

[1] An IP address is a numerical sequence that serves as an identifier for a device on the internet (usually a modem or router). It is a unique number consisting of 4 parts separated by dots–165.113.245.2 is an example of an IP address. The IP address is assigned to only one location. See http://techterms.com/definition/ipaddress (last visited February 16, 2018). (T.148; R.101).

General's Office to have the Internet Crimes Against Children division obtain a court order for subscriber information connected with the IP address from Time Warner, he connected the account to the home of Ron and Wendy Doiron. (T.181-182; R.134-135. He then turned the case over to investigators with the Columbia Police Department. (T.183; R.136).

Investigators with the Columbia Police Department, relying in part on an affidavit from Detective Murphy, obtained a search warrant for the Doiron residence. (Court Exhibit 2; R.486). As a result of the search, roughly 20 electronic items were seized from the house. Appellant lived at the residence along with Ron and Wendy Doiron and their children. Items collected included a desktop computer, external hard drive, broken laptop, and a phone from Appellant. Additionally, other computers, flash drives, external hard drives, and phones were collected from the other residents. (State's Exhibit 4; R.474).

Investigator VanHouten performed the forensic examination of the items seized during the execution of the search warrant. (T.325; R.271). During his examination, Investigator VanHouten was unable to locate the specific R@yGold files shared to Detective Murphy. However, on the desktop originating in Appellant's bedroom he located a search history indicating searches for "R@yGold" among other terms associated with child pornography, including PTHC which means preteen hardcore. (State's Exhibit 17; State's Exhibit 18; State's Exhibit 22; T.331; 335; 352-353; R.476; 478; 277; 281; 288-289). Additionally, Investigator VanHouten found evidence of prior files downloaded on the desktop computer which included files with filenames indicative of child pornography. (State's Exhibit 20; T. 340-341; R.484; 286-287).

Further, on the external hard drive located in Appellant's bedroom, Investigator VanHouten located eight suspected files of child pornography. (State's Exhibit 23; T.397;

R.343). Also on the external hard drive were photos and bills connected to Appellant. (T.401-403; R.347-349). Investigator VanHouten explained the videos and other files found on the external hard drive originated on a computer and were transferred to the external hard drive. (T.405; R.351). Investigator VanHouten did not find any evidence or trace of child pornography on any of the other items seized from the Doiron residence. (T.358; R.304).

Appellant was charged with six counts of sexual exploitation of a minor in the second degree. (True-billed Indictments; R.532-533; 535-536; 538-539; 541-542; 544-545; 547-548). A jury found him guilty as charged and the court sentenced him to ten years imprisonment on each count, to be served concurrently. (Sentence Sheets; R.534; 537; 540; 543; 546; 549).

ARGUMENT

I. Section 16-15-405 of the South Carolina Code is not unconstitutionally overbroad because the South Carolina section criminalizing the sexual exploitation of a minor is vastly different from the Child Pornography Prevention Act of 1996 found unconstitutional by the United States Supreme Court and does not criminalize all visual depictions which "appear to be" of a minor.

Appellant contends the trial court erred in failing to find section 16-15-405 of the South Carolina Code unconstitutional in violation of the First Amendment. The trial court correctly found the statute constitutional and properly differentiated the section from the Child Pornography Prevention Act (CPPA) found unconstitutional by the United States Supreme Court (USSC) in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2001).

Standard of Review

In reviewing a challenge to the constitutionality of a statute, an appellate court has a "very limited" scope of review. State v. Harrison, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Id. at 292–93, 741 S.E.2d at 729 (citing Davis v. Cnty. of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." Id. at 293, 741 S.E.2d at 729 (citing Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995)). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." State v. Green, 397 S.C. 268, 275, 724 S.E.2d 664, 667 (2012) (quoting State v. White, 348 S.C. 532, 536–37, 560 S.E.2d 420, 422 (2002)).

Analysis

The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." The corollary in the South Carolina Constitution reads: "The General Assembly shall make no law . . . abridging the freedom of speech. . . ." S.C. Const. Art. I, § 2. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a statute] is unconstitutional on its face if it prohibits a substantial amount of protected expression." Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)). "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." Ashcroft, 535 U.S. at 255. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" New York v. Ferber, 458 U.S. 747, 769 (1982) (citing Broadrick, 413 U.S. at 613); see also, United States v. Williams, 553 U.S. 285, 292–93, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed."); Green, 397 S.C. at 277, 724 S.E.2d at 668 (same).

"As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. **The freedom of speech has its limits; it does not embrace** certain categories of speech, including defamation, incitement, obscenity, and **pornography**

produced with real children." Ashcroft, 535 U.S. at 245–46 (emphasis added). South Carolina's policy has always been to protect and safeguard the welfare of our children. See e.g., State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990); State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); Mr. T v. Ms. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008) ("Public policy suggests that 'South Carolina, as parens patriae, protects and safeguards the welfare of its children.'") (quoting Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992)). "Our society now recognizes that crimes against children, such as sexual abuse, occur with alarming frequency." Cooper, 291 S.C. at 356, 353 S.E.2d at 454. The Supreme Court has explained:

> Moreover, "[c]ourts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection, and while a statute may incidentally burden some protected expression in carrying out its objective, it will not be held to violate the First Amendment if it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose."

Green, 397 S.C. at 277, 724 S.E.2d at 668 (quoting Cashatt v. State, 873 So.2d 430, 434–35 (Fla. Dist. Ct. App. 2004)).

The USSC has upheld statutes criminalizing the production, distribution, and sale of child pornography. See New York v. Ferber, 458 U.S. 747, 758 (1982). In Ferber, the Court found:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759. "Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping it out without regard to any judgment about its content." Ashcroft, 535 U.S. at 249. The USSC in Ferber concluded that with child

pornography there was no need to set forth the obscenity standard set forth in Miller v. California, 413 U.S. 15 (1973), because "It is irrelevant to the child [who has been abused] whether or not the material ... has a literary, artistic, political or social value." Ferber, 458 U.S. at 761 (citations omitted).

Later, the USSC considered whether possession of child pornography could be proscribed. See Osborne v. Ohio, 495 U.S. 103 (1990). The Court explained:

> First, as Ferber recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at 111. Ultimately, the Court found "[g]iven the gravity of the State's interests in this context," a state "may constitutionally proscribe the possession and viewing of child pornography." Id.

The USSC then considered the constitutionality of the CPPA, and whether it violated the First Amendment by being overbroad and substantially impacting protected speech, in its decision in Ashcroft. See Ashcroft, 535 U.S. at 241. The CPPA at issue in Ashcroft defined child pornography:

> "[C]hild pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, **or appears to be**, of a minor engaging in sexually explicit conduct;

> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that **conveys the impression that the material is or contains a visual depiction of a minor** engaging in sexually explicit conduct . . . .

18 U.S.C.A. § 2256 (1996) (emphasis added). The Ashcroft Court made it clear that there was no challenge to the portions of the CPPA which criminalized child pornography made using actual minors. See Ashcroft, 535 U.S. at 241-242. The challenge was only as to subsections B and D above because those subsections did not harm or victimize actual minors as required by subsections A and C.

The Court found: "In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the CPPA (analyzing subsection B) prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in Ferber." Id. at 250. In considering the provisions of Subsection B, and the language "appears to be" the Court found the prohibition could not be justified under Miller or Ferber. The Court concluded too many artistic or legally created images or videos would be entrapped by the statute. Ashcroft, 535 U.S. at 251.

In analyzing subsection D, the Court found the prohibition did not prohibit any content, but prohibited how it was presented. The Court found: "The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction." Id. at 258. Ultimately, the USSC held: "For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional." Id. at 258.

Section 16-15-405, unlike the CPPA, is narrowly written to avoid any unnecessary and improper intrusion into protected speech. The statute 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 appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation; or
>
> (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that **contains a visual representation of a minor** engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

S.C. Code Ann. §16-15-405(A) (Supp. 2014) (emphasis added). Section 16-15-405 specifically requires the material to contain "a minor." It does not have the overbroad language "appears to be a minor" or "conveys the impression that the material . . . is or contains . . .a minor" included in the CPPA. Further, section 16-15-375 specifically defines "minor" for use in the sexual exploitation statutes: "'Minor' means **an individual** who is less than eighteen years old." S.C. Code Ann. § 16-15-375(3) (Supp. 2014) (emphasis added). Accordingly, South Carolina's statute only criminalizes those visual representations which include an actual minor, an individual, and would not run afoul of Ashcroft's concerns that other media such as entirely computer generated children, adults who look youthful acting in movies, or Renaissance paintings would result in conviction under section 16-15-405. See e.g., State v. Howell, 609 S.E.2d 417 (N.C. Ct. App. 2005) (upholding North Carolina's sexual exploitation statute, upon which South Carolina's statute is based and is remarkably similar, and finding the North Carolina statute is not overbroad).

The statute contains the provision: "In a prosecution pursuant to this section, the trier of fact may infer that a participant in sexual activity or a state of sexually explicit nudity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor." S.C. Code Ann. § 16-15-405(B) (Supp. 2014). This subsection merely creates a permissive inference the jury may choose to accept. It does not criminalize any visual representations which merely "appear to be" minors or material simply labeled as containing minors engaged in sexual activity. The jury is still required to find all elements of subsection A before a person can be found guilty. Such permissive inferences have generally been upheld as constitutional as long as they do not shift the burden or "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 157 (1979). The permissive inference in this case could be accepted or rejected by the jury, did not shift the burden, and was entirely reasonable in light of the content of the videos seen by the jurors.

The South Carolina statute prohibiting the second degree sexual exploitation of a minor meets the requirements of Ferber and Ashcroft. Finally, even if the statute can be read in such a way as to be overbroad, this Court should construe section 16-15-405 to be constitutional. See In re Stephen W., 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."); State v. Nation, 408 S.C. 474, 479, 759 S.E.2d 428, 431 (2014) ("All statutes are presumed constitutional, and when possible, courts must construe statutes so as to render them valid."). Accordingly, this Court should construe section 16-15-405(A) to involve only those material which involve an actual minor and not provide for criminalization of "virtual" minors in contravention of Ashcroft.

II. Appellant opened the door to the introduction of the forensic investigator's report detailing the full examination of the external hard drive by separating items into focused and non-focused categories and implying nothing was found on those items focused on by the investigator. Further, the trial court properly admitted the testimony regarding the external hard drive because its probative value greatly increased from his pre-trial ruling based on the defense clear theory that others had access and could have downloaded the child pornography.

Appellant maintains the trial court erred in allowing the State to present evidence of uncharged videos found on an external hard drive seized from Appellant's room. While these images were initially excluded by the trial court, Appellant opened the door to their admission by implying the investigator did not find anything on the "focused" items, when in reality eight videos of suspected child pornography were located in Appellant's possession. Further, the trial court properly admitted the evidence because its probative value at the time of admission significantly outweighed any possible prejudice in light of Appellant's defense theory that someone else downloaded the child pornography.

Standard of Review

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). "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, 176, 460 S.E.2d 368, 370 (1995). "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). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct.

App. 2008). "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. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Analysis

Prior to trial, Appellant moved to suppress evidence of child pornography videos found on an external hard drive for which he was not specifically charged. In total, the State found eight videos of child pornography on the hard drive which was found in Appellant's room. The trial court excluded the evidence. (T.74-75; 83-84; 106; R.34-35; 43-44; 66).

After Appellant's counsel questioned the computer forensic investigator regarding his findings, the trial court allowed in details regarding the investigator's findings on the external hard drive found in Appellant's room. The trial court properly admitted testimony regarding the external hard drive and the child pornography found on the hard drive. Appellant opened the door to the testimony, whether admissible or inadmissible, because he categorized the external hard drive as a "focused" item and implied through his questioning that nothing significant was found on the hard drive.

"When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). When a party opens the door to evidence, he cannot complain of prejudice resulting from its admission. See State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); see also, Page, 378 S.C. at 482, 663 S.E.2d at 360 ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing

counsel opens the door to that evidence."); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App. 1999) ("A party may not complain of error caused by his own conduct.").

In the instant case, Appellant's counsel began his questioning of the State's computer forensic investigator, Investigator VanHouten, by separating the items he received to examine into two categories: those he focused on and then "non-focus" items. (T.361; R.307). Counsel asked him if VanHouten was asked to "focus on" the items recovered from Appellant's room, which would include the computer and external hard drive. (T.362; R.308). Appellant's counsel indicated all the items seized and presented to VanHouten for analysis, including listing the external hard drive at issue. (T.362-363; R.308-309). Counsel then went through the items in the "non-focus" category. He made a chart of the "non-focus items," explaining and describing each item. (T.365-367; R.311-313). He made it clear to the jury only one of the external hard drives was on the "non-focused" list:

> Q. All right, bear with me. I've only got two more categories. Go to the external hard drive, and there's one of those on this sheet?
>
> A. Yes, sir.
>
> Q. Of the non-focused items?
>
> A. Non-focused, yes.

(T.367; R.313).

Appellant's counsel then begins the discussion of how the examinations of the various items were conducted. He notes again for the jury that VanHouten was told to focus on certain items and not others, after the jury has been made well aware that one of the external hard drives is in Appellant's "focused" category. (T.370; R.316). Counsel discusses how VanHouten does "previews" of every item, and unless something is found on a "non-focused" item a quick

preview is where it stops. Counsel specifically differentiates the previews done on "non-focused" from the full examinations conducted on "focused" items, including the external hard drive. After discussing the process of a preview the following colloquy occurs:

> Q. And if the process ends there, that's what we characterize as not doing a full forensic examination?
>
> A. That is correct.
>
> Q. And I believe on direct examination, you said there were no full examinations done on these items, the non-focus items?
>
> A. No full examination. However, some images were obtained.
>
> Q. Okay. How, sometimes if you do a preview and you don't see anything, any low-hanging fruit, you said something that - - along the lines of you might still go further and do the full forensic exam if it's a focus item?
>
> A. If it's, if it's a focus item, if, if I've been told when the evidence is submitted to me, if I've been told this is what we need to look at, then I will go ahead and start a full focus examination on that.

(T.372-373; R.318-319).

Counsel then has VanHouten "briefly move to the desktop that was one of the focus items." (T.374; R.320). They then discuss some of the findings on the computer, including the fact the videos downloaded by Detective Murphy were not found and no other child pornography videos were found on the desktop. (T.375; R.319).

Counsel, by his questioning, implied to the jury that full examinations were done on all four items in the "focused" category, and that the only things found relevant to this case were on the desktop. The reality is that significantly relevant files, other examples of child pornography downloaded by Appellant and stored on an external hard drive in his room, were located on the

external hard drive listed as a "focused" item.[2] The State was properly allowed to explain that a full examination of the hard drive was conducted and something was actually found—child pornography videos.

The implication that nothing was found on the "focused" hard drive was heightened by Counsel's continued questioning when he immediately shifted gears back to the "non-focused" hard drive and discussed the fact a full examination was not conducted on that hard drive:

> Q. Okay, but on the external hard drive, you didn't review every file and folder that was on that hard drive?
>
> A. I viewed the, the logical stuff, the stuff that you could see. I did a quick preview of what, what was on there.
>
> Q. Sure. So - - -
>
> A. But nothing, nothing relevant, I would say. No, no CP reference or deleted folders - - or, I'm sorry, deleted photos or type deal.
>
> Q. Well, now, if it had been deemed by whatever law enforcement agency to be one of the focus items, could you have done more to review it?
>
> A. Oh, absolutely.

(T.377-378; R.323-324). Counsel's questioning regarding the "non-focused" hard drive immediately after talking about the "focused" items could have confused the jury regarding which hard drive was being discussed, or again raised the implication that a full exam was conducted on the "focused" hard drive and nothing was found. Either confusion or the improper implication needed to be clarified by the State in presenting its case and, therefore, opened the door to the admission of the evidence. Even if the testimony regarding the files found on the

[2] The probative value of the items found on the external hard drive was significantly greater by the time of this testimony in light of the defense's constant questioning regarding whether others had access to the computer and whether any of the law enforcement individuals could establish who was using the computer at the time of the child pornography searches and downloads. This probative value will be discussed further.

external hard drive were otherwise inadmissible, Appellant, through his questioning of VanHouten, opened the door to the State being able to explain to the jury that a full examination of the hard drive was made and that highly relevant and probative files were found so that the jury was not left with the inference that the only files found on any of the items searched were found on the desktop computer.

Further, cross-examination conducted by Appellant's counsels prior to the admission of the testimony regarding the files located on the external hard drive increased the probative value of the hard drive such that it no longer constituted inadmissible testimony. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

Rule 403, SCRE, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "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.").

Generally, evidence of prior bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Specifically, evidence of a subsequent or other bad act can be probative evidence to establish the identity of the perpetrator, especially when identity is at issue during trial. See e.g., State v. Stokes, 381 S.C. 390, 405, 673 S.E.2d 434, 441 (2009) (finding other bad act evidence, which connected the defendant to a gun used in a burglary, "highly probative on the issue of the identity" when an identification could not be made by victims).

One of the items seized in the search of Appellant's room was an external hard drive. Investigator VanHouten located eight videos of child pornography on the external hard drive during his forensic examination. (T.397; R.343). Also on the hard drive was a photo of Appellant and a bill from Certified Recovery Service to Michael and Melanie Simmons, connecting him to the use of the external hard drive. (T.401-402; State's Exhibit 24; R.347-348). The child pornography found on the external hard drive was in the recycle bin, indicating Appellant attempted to delete the files after they were transferred to the hard drive from a computer.

In the instant case, the trial court made a pre-trial determination not to allow the evidence found on the external hard drive. However, as trial progressed, Appellant's defense theory that the State could not establish the identity of the person who uploaded the videos became clear. As a result of this theory being advanced, the external hard drive containing both child pornography

and other files connected to Appellant became highly probative by the time it was admitted by the trial court.

Appellant's counsel asserted in her opening statement:

> [T] he state's going to tell you they looked at all the items. You'll see what the proof will show is they didn't, and that's concerning. There's no password protected. There's no Internet chats. **There's nothing, nothing to connect Michael Simmons to these six videos**, nothing that can reach beyond a reasonable doubt. **Nothing, nothing that can put him in front of a computer disseminating porn.**

(T.135-136; R.88-89) (emphasis added). She began the trial asserting the State could not connect Appellant to the computer or the videos. As a result, the probative value of the external hard drive and its contents significantly increased to show identity.

The probative value of the hard drive increased more after the cross-examination of Detective Kevin Murphy. Appellant asked a series of questions to confirm Detective Murphy could not specifically identify who uploaded the child pornography. He admitted he did not know the specific device from which he downloaded the videos. Further, he indicated he did not have a screen name associated with the downloads which could be traced to any individual. He was specifically asked: "Can you tell these jurors who trans - - who uploaded these videos?" He responded: "No. No." (T.203; R.156). On re-cross, Appellant's counsel continued to assert the videos could have been uploaded from anywhere and not just Appellant's computer:

> Q. And the ISP address - - excuse me, the IP address, that was just for the house. So, any device in that house?
>
> A. That's correct.
>
> Q. Or anybody connected to that IP address outside of that house?
>
> A. That's correct.

(T.206-207; R.159-160).

Throughout the cross-examination of Kyle Doiron, Appellant's counsel sought to show Kyle had access to Appellant's computer, was left home alone, and even used Appellant's computer. (T.291-298; R.241-248). Appellant even examined Kyle regarding files he shared using his school's file sharing program for which he got in trouble in order to demonstrate his knowledge of file sharing and imply he could have been the one downloading and uploading child pornography. (T.294-295; R.244-245). Finally, Kyle admitted on re-cross that he used a device to look up pornography. (T.300; R.250). Kyle's activities were also the subject of the cross-examination of Kyle's step-mother. (T.308-309; R.258-259).

Finally, in her cross-examination of Investigator VanHouten, Appellant again continued to raise the issue of identity through her questioning:

> Q. Meaning that all the times that we see, we don't know if they're accurate or not accurate?
>
> A. Right. In this particular instance, I cannot definitively say if something was accessed on a particular date and time.
>
> Q. And one thing that you're unable to tell us is who actually had access -- not access but who was actually using the computer at the times we see activity, right?
>
> A. That is correct. I cannot determine who, who was using the computer what particular time.

(T.375; R321).

Because Appellant clearly placed the identity of the individual downloading and uploading the child pornography into issue, the external hard drive found in Appellant's room containing child pornography and other files directly tying it to Appellant became incredibly probative compared to how it was considered by the trial court prior to trial. The probative value to provide evidence to the jury tying Appellant to child pornography was extensive and was

definitely not significantly outweighed by any prejudice caused by its introduction. As a result, the trial court did not err in admitted the external hard drive based on its extensive probative value and the fact it satisfied both Rule 403 and Rule 404.

Finally, in light of the other evidence presented at trial connecting Appellant to the searches for, downloading of, and sharing of child pornography, any error in admitting the findings on the hard drive were entirely harmless. See State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence was harmless error given the overwhelming evidence of guilt).

III. The trial court did not err in refusing to suppress evidence seized pursuant to a properly issued warrant. The information in the affidavit was not stale, especially in light of the fact it involved digital evidence which can still exist even after a person has attempted to delete it.

Appellant contends the trial court erred in not suppressing the evidence seized as a result of the search warrant on the basis the information contained in the affidavit was stale. While several months passed between Detective Murphy downloading the videos and the receipt and execution of the search warrant, the information was not stale in light of the nature of the materials and the typical behavior of those involved in the possession and distribution of child pornography.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). "A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005). "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983).

Analysis

A probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The Court of Appeals, in analyzing staleness, quoted from United States v. Steeves, 525 F.2d 33 (8th Cir.1975):

> While the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

State v. Corns, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992). After agreeing with the analysis in Corns, the South Carolina Supreme Court quoted United States v. Hershenow, 680 F.2d 847, 853 (1st Cir.1982): "Whether 'averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case.'" State v. Beckham, 334 S.C. 302, 316, 513 S.E.2d 606, 613 (1999).

South Carolina has not had opportunity to address the staleness of information in a search warrant when the subject of the search is digital evidence such as child pornography. Numerous federal courts have addressed the issue. The Fourth Circuit addressed the issue by explaining:

> Although there is no question that time is a crucial element of probable cause, the existence of probable cause cannot be determined by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Instead, we look to all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized. **In the context of child pornography cases, courts have largely concluded that a delay—even a substantial delay—between distribution and the issuance of a search warrant does not render the underlying information stale.** This consensus rests on

> the widespread view among the courts . . . that collectors and distributors of child pornography value their sexually explicit materials highly, rarely if ever dispose of such material, and store it for long periods in a secure place, typically in their homes.

United States v. Richardson, 607 F.3d 357, 370 (4th Cir. 2010) (emphasis added) (internal quotation marks and citations omitted); see also, United States v. Burkhart, 602 F.3d 1202, 1206–07 (10th Cir. 2010) (holding that an email between child pornography distributor and the defendant that occurred two years and four months before issuance of a search warrant for the defendant's home was not stale); United States v. Lemon, 590 F.3d 612, 615 (8th Cir. 2010) ("Many courts, including our own, have given substantial weight to testimony from qualified law enforcement agents about the extent to which pedophiles retain child pornography."); United States v. Morales–Aldahondo, 524 F.3d 115, 119 (1st Cir. 2008) (holding that a more than three-year lapse between the defendant's purchase of child pornography and the warrant application did not render the information stale because a special agent attested that those who download child pornography tend to retain images for years and use computers to augment and store collected images); United States v. Eberle, 266 Fed.Appx. 200, 205–06 (3d Cir. 2008) (holding that three-and-a-half-year-old information was not stale "because individuals protect and retain child pornography for long periods of time as child pornography is illegal and difficult to obtain").

The trial court found the only basis set forth by Appellant to assert the warrant was invalid was the mere passage of time—from November 22, 2013 when the files were downloaded by Detective Murphy to June 13, 2014 when the search warrant was executed. The trial court, in considering the nature of the offense and materials being sought, specifically found under a totality of the circumstances that probable cause existed and the information upon which the warrant was based was not stale. (T.115-116; R.75-76). This finding comports with the vast

majority of cases analyzing the alleged staleness of information contained in warrants seeking child pornography. Accordingly, this Court should affirm the trial court's decision not to suppress the evidence.

IV. The trial court did not err in refusing to charge Appellant's requested charge on third-party guilt as it was a comment on the facts and an incorrect statement of the law. Further, Appellant failed to provide sufficient evidence of third-party guilt to warrant the charge. Finally, the charge provided by the trial court properly covered all necessary law.

Appellant contends the trial court erred in not giving a requested charge regarding third-party guilt. First, even if a third-party guilt charge could be appropriate, Appellant failed to establish third-party guilt warranting such a charge. Additionally, the charge requested was an improper charge on the facts and an incorrect statement of law. Finally, the trial court's jury instructions adequately covered all the necessary and required law for the jury, and this State has never required or even approved a third-party guilt charge.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "'In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)).

Analysis

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it

contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. Further, "[j]ury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous." Id.

Initially, the State notes there are no cases in South Carolina requiring the giving of a third-party guilt charge, especially not one similar to the one requested by Appellant.[3] Appellant's requested jury instruction essentially highlights the defendant's theory on his defense. It begins by stating: "The defendant contends that there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt." This statement at a minimum is a comment on the facts because it is discussing the evidence as the defendant would have the jury believe it. It is also isolating one type of evidence and providing special instructions for that type of evidence, which our Supreme Court has indicated is not allowed in jury instructions. See Stukes, 416 S.C. at 499, 787 S.E.2d at 483.

[3] The jury charge requested by Appellant is a prime example of what the South Carolina Supreme Court discussed in Belcher: "It is axiomatic that some matters appropriate for jury argument are not proper for charging." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

In Stukes, the instruction isolated one type of evidence and set it apart from all others by indicating a victim's testimony need not be corroborated. The Supreme Court stated: "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes, 416 S.C. at 499, 787 S.E.2d at 483. In this case, the instruction highlights a defendant's theory of the case and specifically invites the jury to give it special consideration which would be just as invalid as the jury instruction found in Stukes.

The jury instruction also improperly holds that a defendant "has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his/her own guilt." The "right to rely" language at a minimum has the likelihood to confuse the jury based on the trial court's explanation that they are the finders of fact and "it is your duty to determine the effect, the value, the weight, and the truth of the evidence that has been presented during this trial." (T.521; R.457).

The jury instruction requested by Appellant then continues to address the weight and type of evidence presented and how a defendant should be allowed to rely on that evidence. This type of instruction, commenting on the weight to be assigned specific evidence or types of evidence is not allowed. See State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). In Cheeks, the jury charge indicated that actual knowledge of the possession of drugs is "strong evidence" of intent to control its disposition or use. The Supreme Court found the charge "improperly weighs the evidence . . . ." Cheeks, 401 S.C. at 328, 737 S.E.2d at 484.

The remainder of the jury charge requested by Appellant is just a re-wording of the burden of proof and the need for the State to prove its case beyond a reasonable doubt. The

requested charge was fully covered by the trial court's instructions to the jury. Even prior to trial starting, the trial court explained: "The [S]tate, . . . has the burden of proving each of the elements of the indictment beyond a reasonable doubt. And it will be your duty, ladies and gentlemen, to decide whether or not the [S]tate has met that burden." (T.120; R.79). Later, prior to Appellant presenting his case, the court reminded the jury that the defendant is presumed innocent and "has no burden of proving himself or herself innocent; the burden is and always remains on the State of South Carolina to prove guilt beyond a reasonable doubt." (T.425-426; R.366-367). In his final jury instructions, the court explained the defendant maintained a presumption of innocence and that he did not have to prove himself innocent. (T.517-518; R.453-454). The court explained many times the requirement that the State prove Appellant's guilt beyond a reasonable doubt. (T.518-519; 521; 524; 525; 528; R.454-455; 457; 460; 461; 464). Specifically, in charging the jury of the law related to sexual exploitation of a minor the court stated:

> **The [S]tate must prove beyond a reasonable doubt** that the **defendant**, knowing the character or content of the material he distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contain a visual representation of a minor engaged in sexual activity, or appeared in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

(T.525; R.461) (emphasis added). This charge makes it clear the burden is on the State and that the State must establish Appellant was the one that committed the acts beyond a reasonable doubt. This one sentence covers everything Appellant's requested charge sought to cover in a way that is not a comment on the facts and does not otherwise confuse the jury.

Further, it is clear Appellant has failed to establish third-party guilt, so he was certainly not entitled to a charge on third-party guilt. In Holmes v. South Carolina, 547 U.S. 319 (2006),

the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328.

In Gregory, this Court explained:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are **inconsistent with his own guilt**, and to such facts as raise a **reasonable inference or presumption as to his own innocence**; evidence which can have (no) other effect than to **cast a bare suspicion** upon another, or to **raise a conjectural inference** as to the commission of the crime by another, **is not admissible**. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. **Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose**.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted) (emphasis added).

Here, the Record establishes no evidence indicating anyone other than Appellant used his computer and external hard drive for purposes of searching for, receiving, downloading, and distributing child pornography. The evidence related to Kyle, at most, established conjecture and speculation that Kyle may have used the computer on occasion, but provided absolutely no evidence inconsistent with Appellant's guilt regarding the charges in this case. As a result, the trial court properly denied any charge related to third-party guilt, especially the incorrect comment on the facts requested by Appellant.

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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April 11, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 11 2018
SC Court of Appeals

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2016-001975

The State, Respondent,

vs.

Michael Scott Simmons, 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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