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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2017-001037

The State of South Carolina ..... **Respondent,**

v.

David A. Land ..... **Petitioner.**

REPLY TO **RETURN ~~TO REPLY BRIEF~~**

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Argument

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 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?

In arguing against the directed verdict motion, the State contends that if David Austin Land received child pornography, he is guilty. The State does not discuss or address the question that at the trial level, the trial judge equated receive with possess and therefore gave a lesser included charge of a violation of S.C. Code 16-15-405(A)(3). At the trial below, while the State may not have agreed with the ruling of the trial court, it finally acquiesced in the ruling. Rec. on App. at 244, l 20 to 246, l 17. As the Court of Appeals and now the State are urging affirming the conviction on a ground that was precluded by the trial judge this Court should grant the writ of certiorari and reversed the conviction.

The State further argues "[T]he establishment of intent and *mens rea* is quintessentially a question for the jury." Br. of Resp. at 9. This is not correct. The government has the burden of establishing intent and *mens rea.* The jury has the responsibility of determining if the government has established that element.

The State argues that knowledge is not required as to distribution of child pornography. Br. of Resp. at 10. They appear to argue that possession of child pornography is like a wild animal - if it escapes from one's computer that person has distributed child

pornography. Under this view, there is no *mens rea* to distribution. This Court should grant review to hold that South Carolina does not permit a felony without a men rea for the act involved. *State v. Jefferies*, 316 S.C. 13, 446 S.E.2d 427 (1994).

The State cites *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982) for the proposition that the legislature can enact a felony without a *mens rea.* The opinion cites states "[I]f such legislative intention appears, the Court must give effect, although the intent of the doer may have been innocent." *Id.* at 221, 294 S.E.2d at 45. Nothing in the statute shows a clear intent of the legislature to eliminate the intent requirement of in a distribution of child pornography case. Surely no court would say a person has distributed child pornography if a person's computer containing child pornography were stolen. But this is precisely what the State is urging.

In passing the law "to curb the scourge of child pornography" (Br. of Resp. at 12) the legislature made possession of child pornography a serious crime. Nothing in the statute indicates an intent on the part of the legislature to eliminate the *mens rea* in distribution and thus blur the distinction between S. C. Code § 16-15-405(A)(2) and the lesser included in (3). The State further argues that "[W]ithout a statement of intent by an actor, proof of intent must be determined by inferences from conduct." Br. of Resp. at 13. Mr. Land agrees. What conduct, not inaction, but action, on the part of Mr. Land indicates an intent to distribute child pornography? The State produced none. Without such positive action on the part of Mr. Land a jury is left to speculate as to whether he had any intent to distribute child pornography. A conviction based on speculation is not based upon sufficient evidence. The State is required to produce evidence of intent other than to let the jury speculate as to what

Mr. Land intended.

Question II

Did the South Carolina Court of Appeals err in applying an "any evidence" standard of review in evaluating the evidence in this case?

An any evidence standard of review in a criminal case is not sufficient under the United States Constitution. As the United States Supreme Court has said "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 320 (1979). A "modicum" of evidence would satisfy an "any evidence" standard, but that was specifically rejected by the United States Supreme Court. The State is simply incorrect to say "any evidence" is the standard of review in a criminal case in South Carolina or any other state. The State's reliance upon *Holland v. United States*, 348 U.S. 121 (1954) is also misplaced. Even *Holland* urged appellate court to use a more careful standard of review when reviewing a conviction based on circumstantial evidence. The Court said " Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Id* at 129.

This Court, unfortunately, has appeared to apply an inconsistent standard when reviewing the sufficiency of evidence in a circumstantial evidence case. For example, in *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009) there was some evidence that Mr. Hernandez knew drugs were in the truck. This Court said "The State claims that it is 'nonsensical' to find that the Thunderbird occupants did not know [Defendants] prior to this

transaction. However the State failed to present any evidence such as acts, declarations or specific conduct to support this inference, and thus, we find that conclusion that [Defendants] knew the Thunderbird and therefore had knowledge of the drugs in the trailer is mere speculation." *Id.* at 624, 677 S.E.2d at 606. Here the State has failed to present any evidence of an intent by Mr. Land to distribute the child pornography. Following a tractor trailer in a Ryder rental truck down a country raod is certainly some evidence that would meet the "any evidence" standard.

Also in *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) this Court held " The key pieces of circumstantial evidence relied upon by the State are: (1) the marital relationship between Burgess and Lollis; (2) Lollis' alleged financial trouble; (3) his placement of valuables in the storage room; and (4) his possession of the storage key on the day of the fire. According to the trial judge, Lollis' possession of the storage key is the most significant piece of circumstantial evidence." Again, the record was not devoid of "any evidence" as the facts cited above certainly qualify as "any evidence" for the jury to determine.

In *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) this Court reversed the conviction even though there was testimony that the defendant had been involved in a sexual relationship with the victim, possessed a firearm, his fingerprint was found on a coffee cup lid in the car of the victim and the car was found about 10 miles from the parents' house of the defendant in Tennessee. Again, the record in *Arnold* was not devoid of any evidence to sustain the conviction. *see also, Goldsmith v. Witkowski,* 981 F.2d 697 (1992).

As the State notes in its Reply, and as stated in the Petition in this case, this Court has

said on numerous occasions that a reviewing court is not concerned with the weight of the evidence but with its existence. The State in its Reply, however, has failed to explain whether the "any evidence" standard of review is greater than a "modicum" of evidence found to be insufficient in *Jackson*. If one then assumes this Court's "any evidence" standard is greater than a "modicum" how does a reviewing court make such a determination without weighing the evidence. In a civil context this Court has said "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 309, 454 S.E.2d 320, 321 (1995). Thus substantial must mean more than "any evidence."

Granted questions of credibility are for a jury. In this case, for example, the alleged statement by Mr. Land to law enforcement officers has to be accepted as true. But the inferences from the then undisputed facts can be reviewed by this Court to determine if the State has produced sufficient circumstantial evidence to sustain the conviction. Arguably, once credibility issues are resolved by the jury, an appellate court is then in an equal position with the jury to determine if the state has proven the case. Put another way, if two equally plausible theories of the case are presented to the jury, has the state proven its case beyond a reasonable doubt. Proof beyond a reasonable doubt has to be more than a 50/50 chance of being right.

The State also contends that the word "substantial" simply means that the evidence must remove the determination of guilt from the realm of conjecture and speculation. Br. of Resp. at 8. The State then, urges this Court to reject the petition without explaining how

the intent of Mr. Land in this case is not based upon conjecture and speculation.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to clarify the proper standard of review in a circumstantial evidence case and reverse the conviction of David Austin Land on the ground that the State did not produce substantial circumstantial evidence of the intent of Mr. Land to distribute child pornography.

June 26, 2017

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