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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in permitting the testimony of two investigating officers. Further, the issue is not preserved for review on appeal. Finally, any error is entirely harmless in light of the evidence in the record.

STATEMENT OF THE CASE

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

ARGUMENT

I. The trial court did not err in permitting the testimony of two investigating officers. Further, the issue is not preserved for review on appeal. Finally, any error is entirely harmless in light of the evidence in the record.

Appellant contends the trial court erred in allowing two investigators to provide opinion and expert testimony without being qualified as experts. The officers did not testify to opinions requiring them to be qualified as experts. In any event, the issue is not properly preserved. Even if preserved and error, it is entirely harmless in light of the overwhelming evidence Appellant possessed material that contains a visual representation of a minor engaging in sexual activity.

<u>Sergeant Taylor's Testimony</u>

The issue, especially as it relates to the testimony of Sergeant Taylor is not preserved for review on appeal. She testified: "And it was through the SHA values that don't change that I could recognize which ones were, by the state of South Carolina, were deemed illegal." (T.76; R. 42). The objection was then "Expertise. Foundation." (T.77; R. 43). The objection was clearly not based on her testifying without being qualified as an expert, but sought a foundation for her testimony. The solicitor then indicated he would clear it up and proceeded. In proceeding, the following colloquy occurred entirely without objection:

> Q. You said that often you look at the SHA values and determine from prior experience that these meet the definition of child pornography?
> A. Yes.
> Q. In your opinion?
> A. Yes.

(T.77-78; R. 43-44).

Sgt. Taylor continued to testify without Appellant ever objecting on the ground she was testifying to an expert opinion without being qualified as an expert. Appellant raised objections, including to some of the testimony complained about in Appellant's brief, based on hearsay and lack of foundation to some of Sgt. Taylor's testimony, but never objected on the basis of her offering expert opinion testimony. (T.80, 81, 82; 88; 90-92; R. 46, 47, 48, 54; 56-58). As a result, the issue as it relates to Sgt. Taylor's testimony is not preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Jerry Robert's Testimony

It is questionable whether the issue is preserved as to Mr. Roberts testimony. Leading up to Appellant's objection, Mr. Roberts testified specifically about the titles of files found on Appellant's computer. Then the following colloquy occurred:

> Q. Did you view each of those 54 items?
> A. Yes, sir.
> Q. And you are not [a] doctor, correct?
> A. No, sir, I'm not.
> Q. But using your common sense - -

(T.156; R. 119). At this point Appellant lodged his objection indicating "opinion. It's going to ask for an opinion." The court found the testimony leading sustained an objection to the question on that basis. (T.157; R. 120). The solicitor then asked a very different question, which explored why Mr. Roberts marked items as being items of interest in the forensic examination of the computer.

> Q. What again led you to conclude that these were items of interest?
> A. I tried to keep it very basic. And to me the item is of interest if it appears to be a prepubescent child in the videos or images that I come across. I tag those as items of interest.

(T.157; R. 120). There was no objection to this testimony which Appellant's now complains was improperly admitted. The prior objection was to a question requiring the witness to testify based on his use of common sense and may have required an objection, but the question was never actually asked. Appellant did not raise an objection to this testimony based on Appellant's belief it was offering an expert opinion. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court.")

Further, later Mr. Roberts is testifying to how limewire works and the various folders in which downloaded images may be found. He is asked:

> Q. If a user went and deleted all of his child pornography filed from the complete folder, would he still potentially have child pornography in his incomplete folder?
> A. Yes.
> Q. Is finding such a large number in the incomplete folder, and a relatively small number completed, does that indicate to you potentially that that is what a user did?

(T.159; R.122). At this point counsel objects on the basis of "Conclusion, speculation." (T.160; R.123). He never objected because he believed the testimony was offering an expert's opinion even though Mr. Roberts was never qualified as an expert. As a result, it is questionable whether this issue is preserved for review on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Additionally, the testimony by Mr. Roberts is not expert opinion testimony. The testimony regarding the images was based purely on his observations of the images and explained why he tagged them as items of interest in the investigation. He was not offering any conclusions about the images or any opinion about the images, but simply relaying his observations and stating a fact as to why he took the action he took. His testimony is no different than an officer's testimony regarding the steps he took in an investigation.

Even to the extent the testimony regarding the tagging of the images could be opinion testimony, it was properly admitted under Rule 701, SCRE. The Rule provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Mr. Roberts testified he viewed images, and tagged those that he believed contained prepubescent children. The testimony was rationally based on his perception, was helpful to the jury's understanding of the content of the images possessed by Appellant, and did not require any special knowledge, skill, experience, or training as any person can make a determination of whether a child appears to be prepubescent. As a result, there was no error in the admission of this testimony.

Harmless Error

Finally, any error in admission of the evidence is entirely harmless in light of the overwhelming evidence of Appellant's possession of material that contains a visual representation of a minor engaging in sexual activity. The State presented ample

evidence, even after removing the allegedly improper testimony by both Sgt. Taylor and Mr. Roberts. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citations omitted). "An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result could have been reached." State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005); see also, State v. Herring, 387 S.C. 201, 215–16, 692 S.E.2d 490, 497 (2009) (holding admission of evidence seized in search, even if erroneous, was harmless where there was overwhelming evidence of guilt); State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (finding any error in admission of the seized evidence harmless beyond a reasonable doubt given the abundant evidence of appellant's guilt).

In order to convict Appellant of the offense of third degree sexual exploitation of a minor, the State must demonstrate Appellant, knowing the character or content of the material, possessed material that contains a visual representation of a minor engaging in sexual activity. S.C. Code Ann. § 16-15-410 (2008). Additionally, the statute provides: "In a prosecution pursuant to this section, the trier of fact may infer that a participant in sexual activity depicted as a minor through its title, text, visual representation, or otherwise is a minor." S.C. Code Ann. § 16-15-410(B) (2008).

At trial, the State presented evidence Appellant knowingly possessed the illegal contraband. Mr. Roberts read without objection some of the titles of files located on Appellant's computer. Two files found in complete form on his computer included "Exploited!!! Asian Teens, Three Thai Girls, 14-year-old" and "XXX Paula Homemade

Amateur." (T.115; 174; R. 79; 137). Additionally, other files were found within the Limewire program on the computer, including: 1) 12-year-old boy fu**s 12-year-old-girl; 2) Kitty Pedo Boy Lolita; 3) Best Russian Trio Father and Two Young Daughters Incest; 4) Vicky, 7-year-old and 10-year-old 69 Pedo Child Pornography; 5) Blonde Ukraine Girl Amateur First Time Sex; 6) Lolita Hard Girl Boy Sex; 7) 7-year-old Crystal Pleasuring her Pretty Child; 8) Cu** Masturbation Preteen Pedo; 9) 8-year-old girl and 12-year-old boy fu**ing Lolitas; 10) Lolita Preteen Sex Child Underage; 11) 4-year-old girl Pedo; and 12) 3-year-old Girl Pedo Rigoal Hussy Fan Lolita Guy PTHC. (T.154; 156; R. 119).

In addition to the names of the files found on Appellant's computer, which the statute allows the jury to presume to be violations of the statute based on the names of the files, the State played a videotape of files Sgt. Taylor downloaded from Appellant's computer over the Gnutella file sharing network. The videotape clearly demonstrates multiple minors engaged in sexual activity including performing oral sex and having adult males ejaculate on them. (State's Exhibit 1 videos; T.83-84; 86; R. 49-50; 52). Sgt. Taylor also indicated Appellant had two additional videos for download on a second search through the file sharing program. The first video displayed a "prepubescent female displaying her genitals and then being tied up by her hands and her chest and being blindfolded by an adult male." (T.88-89; R. 54-55). She indicated the second video included a "prepubescent female child bound by rope with an artificial penis being pushed into her mouth. Then she did perform oral sex on an adult male, and then was penetrated by an adult male penis." (T.89; R. 55).

Finally, the State presented Appellant's confession. He admitted downloading the images and viewing them. (State's Exhibit 3 audio recording; T.126-127; R. 90-91). When asked if he was surprised he was being interviewed regarding child pornography, Appellant indicated he was not surprised. (State's Exhibit 3; T.140; R. 104). When asked how long he had been looking at child pornography, Appellant initially responded one month and later changed the time frame. (State's Exhibit 3; T.141; R. 105). Appellant's own statement is sufficient proof he was in possession of child pornography—material that contains a visual representation of a minor engaging in sexual activity. As a result, any admission of the testimony by the court is entirely harmless in light of the overwhelming evidence in the record and could not have possibly impacted the jury's decision.

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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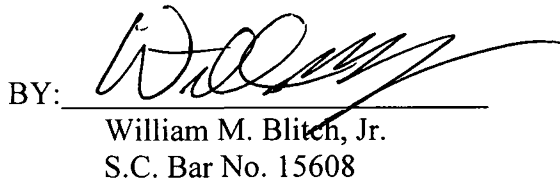
BY: 
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December 7, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2010-163348

The State, Respondent,

v.

Willie Don Horry, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served.
This 7th day of December, 2012.

Ellen R. DuBois

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