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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001497-MR

SHANNON REEVES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 17-CR-00580

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Shannon Reeves appeals the Hardin Circuit Court's judgment upon jury verdict convicting him of possession of materials portraying a minor in a sexual performance and sentencing him to eleven years in prison. Finding no error, we affirm.

BACKGROUND

On March 11, 2017, a ChatStep¹ user named “twisted” distributed an image of a naked child to other users on the chatroom platform. That image was flagged and reported to the Kentucky State Police electronic crimes branch through the National Center for Missing and Exploited Children’s CyberTip program. From the image, police were able to trace the internet protocol (IP) address of the computer that disseminated the image. The IP address led them to Shannon Reeves. The police obtained a search warrant.

Reeves shared his home with his brother from 2012 to 2016, until his brother was arrested. However, in 2017, Reeves was the home’s only occupant. He had a computer in his spare bedroom that anyone who visited his home could use; it was rarely turned off. While executing the search warrant, police discovered a user drive named “Shannon” and a folder labeled “Virus” in which they found several images depicting child pornography.

According to Reeves, he created the “Virus” folder in 2012, when his brother still resided with him, to segregate the pornography and reduce the possibility his visiting grandchildren would discover what his brother left behind. However, Reeves admitted his ChatStep user name was “twisted,” the user source to whom the authorities traced the upload of a depiction of child pornography.

¹ ChatStep is an internet chatroom company. Users can chat using a nickname or anonymously.

The Commonwealth charged Reeves with eighty-two counts related to child pornography. At trial, after testimony and before a directed verdict motion, the Commonwealth moved to dismiss all but twenty-five counts. Those twenty-five counts were based on images and videos found in the “Virus” folder. It was undisputed that the images and videos contained child pornography of young females between the approximate ages of six and twelve years. The jury found Reeves guilty, and the circuit court sentenced him to a total of eleven years. This appeal followed.

STANDARD OF REVIEW

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Perdue v. Commonwealth, 411 S.W.3d 786, 790 (Ky. App. 2013) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)). “To defeat a

directed verdict motion, the Commonwealth must only produce ‘more than a mere scintilla of evidence.’” *Lackey v. Commonwealth*, 468 S.W.3d 348, 352 (Ky. 2015) (quoting *Benham*, 816 S.W.2d at 187).

ANALYSIS

Reeves contends the Commonwealth failed to establish he knowingly or actually possessed the photos on his computer. We disagree. KRS² 531.335 sets out the elements for possession or viewing of matter portraying a sexual performance by a minor. The statute provides, in relevant part, that:

A person is guilty of possession . . . of matter portraying a sexual performance by a minor when, having knowledge of its content, character, and that the sexual performance is by a minor, he or she:

(a) Knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person[.]

KRS 531.335(1)(a). In *Crabtree v. Commonwealth*, the Kentucky Supreme Court laid out the elements of this crime as follows:

[T]he essential elements are (1) knowingly having possession or control (2) of a visual depiction (3) of an actual sexual performance by a minor, and (4) having knowledge of its contents. The statute contains two separate mental states: the defendant must know the content of the images and videos (i.e., that they depict a sexual performance by a minor) and the defendant must knowingly possess the images or videos.

² Kentucky Revised Statutes.

455 S.W.3d 390, 396 (Ky. 2014).

During the trial, Reeves argued he was entitled to a directed verdict because there was no testimony he knowingly possessed the images and videos on his spare bedroom computer. In response, the Commonwealth argued that reasonable inferences could be drawn between his creation of the “Virus” folder on *his* spare bedroom computer and the child pornography. After appropriately considering the evidence in a light most favorable to the Commonwealth, the circuit court ruled there was sufficient evidence to defeat the motion for a directed verdict. The jury was entitled to weigh the circumstantial evidence supporting the fact Reeves was aware the computer he owned contained child pornography.

On appeal, Reeves repeats this argument. He contends he was unaware that among the more than 300,000 files on his computer, some included child pornography and that the Commonwealth could not prove otherwise. He argues that proof that he created the “Virus” folder does not prove he knew the images in that folder were child pornography. We are unpersuaded.

Reeves is correct that “merely negligently possessing child pornography is not a crime under the statute. Rather, ‘the culpability involved in this mental state is described in a single word – *awareness*.’” *Crabtree*, 455 S.W.3d at 398 (quoting ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY

CRIMINAL LAW § 2-2(c)(1), at 45 (1998)). Therefore, the appropriate question is whether Reeves was aware of the material on his computer.

“[D]irect proof of knowledge [*i.e.*, awareness] is not necessary.” *Id.* at 399. “[P]roof of actual knowledge can be by circumstantial evidence.” *Love v. Commonwealth*, 55 S.W.3d 816, 825 (Ky. 2001). “[P]roof of circumstances that would cause a reasonable person to believe or know of the existence of a fact is evidence upon which a jury might base a finding of full knowledge of the existence of that fact.” *Id.* (quoting LAWSON & FORTUNE, KENTUCKY CRIMINAL LAW, § 2-2(c)(1), at 45 (1998)). Reeves was the only individual residing in his home at the time of the ChatStep distribution and the images were found under the user drive named “Shannon” in a folder titled, “Virus,” he intentionally created to conceal pornographic materials. Taking all the evidence in a light most favorable to the Commonwealth, there was sufficient evidence to submit the case to the jury.

The Kentucky Supreme Court recognized in *Crabtree* that, “[t]he crime requires only the knowing possessing of child pornography, regardless of the purpose. The *mens rea* requirements of [KRS 531.335] are satisfied by showing that the defendant knew the [photographs and] videos were child pornography and that he knowingly possessed them.” *Crabtree*, 455 S.W.3d at 402.

The circumstantial evidence of Reeves’ knowledge of the content of the files included his own admission that he was the ChatStep user named

“twisted” and that he created the “Virus” folder. This evidence taken together is evidence from which a jury could infer that Reeves knowingly uploaded the image of child pornography that led authorities to his computer and him. It is also evidence he was aware his computer contained child pornography. Having considered the record and these arguments, we agree with the Commonwealth – the evidence that Reeves was aware he possessed the images and videos of child pornography was sufficient to present that question to the jury.

Reeves also asserts the circuit court erred in permitting testimony from the forensic examiner regarding a specific child pornographic image.³ He now objects that the examiner’s comment was irrelevant and, if relevant, was more prejudicial than probative and should have been excluded. This objection was not preserved at trial. He requests palpable error review as permitted by RCr⁴ 10.26, which we shall undertake. “A palpable error is one . . . that ‘affects the substantial rights of a party’ and will result in ‘manifest injustice’ if not considered by the court” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (quoting RCr 10.26).

³ The forensic examiner testified that the appearance of a substance on the face of the subject of this specific exhibit was consistent with semen.

⁴ Kentucky Rules of Criminal Procedure.

The applicable rules begin with KRE⁵ 401, which defines relevant evidence as “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.” Generally, “[a]ll relevant evidence is admissible,” unless otherwise provided, and “[e]vidence which is not relevant is not admissible.” KRE 402. KRE 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

The forensic examiner’s testimony described what she saw in the photographic exhibit. The minor was fully clothed; therefore, her testimony about other aspects of the exhibit were of consequence to determining whether what it depicted was more probably child pornography.⁶ Such testimony is relevant.

Because we are reviewing for palpable error, we will not reverse unless we first conclude the testimony “*probably*, not just possibly, affected the outcome of the proceeding” *Cox v. Commonwealth*, 399 S.W.3d 431, 435 (Ky. 2013). Reeves’ own argument helps show this not to be so. As he says, “Given that an erect adult penis is close to [the minor subject of the photographic

⁵ Kentucky Rules of Evidence.

⁶ For example, the photograph also depicted an adult male penis in the foreground.

exhibit] . . . the jury could easily infer that she had just had sexual contact with the man whose genitalia appear in the image.” (Appellant’s brief, p. 13.) We cannot find that, without the examiner’s testimony about ejaculate, the outcome would have been more favorable for Reeves because the jury recommended the minimum one-year sentence on the conviction based on that particular image. We find no palpable error here.

CONCLUSION

For the foregoing reasons, we affirm the Hardin Circuit Court’s judgment.

ALL CONCUR.

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