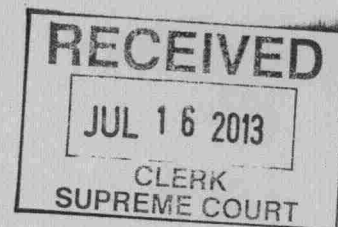


Commonwealth of Kentucky
Kentucky Supreme Court
File No. 2012-SC-591-D



SAMUEL CRABTREE

APPELLANT

v.

Appeal from Madison Circuit Court
Hon. William Clouse, Judge
Indictment No. 09-CR-258

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Respectfully Submitted,

JACK CONWAY

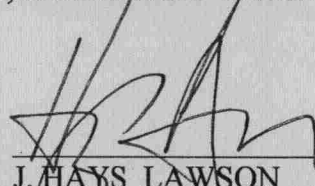
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 16th day of July, 2012 to Hon. William Clouse, Judge, Madison Circuit Court, 101 West Main Street, Richmond KY 40475; Hon. Fred Peters, Fred Peters Law Office, 236 E High Street, P.O. Box 2043, Lexington KY 40588; and electronically mailed to Hon. David Smith, Commonwealth's Attorney, 101 North 1st Street, P.O. Box 717, Richmond KY 40476.



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INTRODUCTION

This is a matter-of-right appeal from multiple convictions of Use of a Minor in a Sexual Performance based on child pornography found on Appellant's laptop computer.

STATEMENT CONCERNING ORAL ARGUMENT

This case is before the Court on discretionary review. The Commonwealth anticipates that the Court will set the case for oral argument.

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COUNTERSTATEMENT OF THE CASE

Appellant admittedly viewed child pornography on his laptop computer.

Detective-Lieutenant Brandon Collins of the Eastern Kentucky Police Department testified that he interviewed Appellant. In the interview, Appellant stated that he downloaded child pornography onto his laptop using Limewire, a peer-to-peer file-sharing program. VR 1/24/11 at 1:20:00. Appellant explained that he had viewed five or six images that he described as child pornography. *Id.* at 1:21:45. He further admitted to viewing one video consisting of child pornography. *Id.* Appellant gave a written statement that Detective Collins read to the jury in full and which the Commonwealth introduced as an exhibit. *Id.* at 13:25:45; TR Vol. I at 82 (Appellant's voluntary statement).

The Appellant's written confession provides in pertinent part:

A while ago, out of boredom and curiosity I looked at some mature content using limewire [sic]. Limewire is a file sharing program. I looked to find disturbing images or videos that would shock me. Some of these could be classified as child pornography. I tried to delete these things from my laptop. . . . I realize that looking at this type of stuff was wrong and I feel sick because I did look at things that I should not have looked at. However I did not realize that anyone would find out.

Five pornographic videos were found on Appellant's laptop computer. *Id.* at 14:22:00-26:40. (Testimony of Cynthia Fitch, who was Forensic Examiner II for the Kentucky State Police. VR 11/24/11 at 14:18:30-19:30). Four of these videos were in the Limewire/ incomplete file folder and another was found the Limewire/saved file folder on Appellant's laptop computer. *Id.* The file names for these videos contained known

“buzz words” for child pornography, such as “hussy,” “pedo,” “mafia sex,” and “brazil kid.” *Id.*

The forensic examination of Appellant’s laptop also uncovered a large number of still photographs of child pornography, all of which were located in the thumbnail cache of the Windows Vista operating system installed on Appellant’s laptop. *Id.* at 15:13:20-15:43:00. These photographs were in two different sizes and formats: bitmap and jpeg. *Id.* “The thumbnail cache allows Vista to display thumbnails quicker for you by having all the images stored in a cache ready to use rather than loading them from the hard drive each and every time.”¹ After an image or photograph is viewed and/or deleted, it is automatically written to the thumbnail cache. VR 11/24/11 at 15:05:00-10:30.

Appellant was convicted of sixty-five counts of Possession of Matter Portraying Sex Performance by a Minor and sentenced to five years on each count with the sentences ordered to be served concurrently. *Record Supplemental*. He was also convicted of one count of attempted Possession of Matter Portraying Sex Performance by a Minor and sentenced to 12 months imprisonment. *Id.* He appealed to the Court of Appeals. In a very thoughtful and well-reasoned to-be-published opinion, the Court of Appeals affirmed the trial court. This Court granted discretionary review and this appeal followed.

¹<http://www.vistax64.com/tutorials/73720-thumbnail-cache.html>.

ARGUMENT

I.

I.

SUFFICIENCY OF THE EVIDENCE AND DIRECTED VERDICT

Appellant's first argument does not appear to be tied to any particular allegation of error at trial. Rather, the argument seems to be made to set the stage for Appellant's following argument, in which Appellant claims that he was entitled to a direct verdict of acquittal. In his first argument, Appellant notes that, in 2013, the General Assembly amended the statute under which Appellant was convicted, KRS 531.355, to criminalize the intentional viewing of child pornography. Appellant then implies that the Commonwealth put the cart before horse in this case by convicting him in 2011 under the terms of KRS 531.355 as amended in 2013. But as will be seen, Appellant was properly convicted of knowing possession of child pornography.

Appellant's second argument is that he was entitled to a directed verdict of acquittal on grounds that there was no evidence that he knowingly possessed child pornography. Appellant's argument is wrong. The trial court and Court of Appeals had the right of it.

A. Standard of Review

The oft-cited case of *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991) sets forth the appropriate standard of review of the denial of a motion for a directed verdict:

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 reserv[e] 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 is the defendant entitled to a directed verdict of acquittal.

Id. at 187.

B. Appellant Downloaded, Viewed, and Possessed Child Pornography

Appellant admitted that he viewed child pornography on his laptop. Videos and pictures of child pornography were found on his laptop. Appellant had to click twice on file names containing key buzzwords for child pornography in order to download the child-pornography videos from Limewire. There was an eight minute, viewable and playable video of child pornography in the Limewire/incomplete file on his computer. This evidence was more than sufficient to convict Appellant of possession of child pornography under KRS 531.335, which provides in pertinent part:

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 knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person.

Appellant's main argument is that there was insufficient evidence that he possessed or had control over the child pornographic images on his computer. There were

two types of child pornography found on Appellant's laptop: videos and still images in the thumbnail cache.

There were five videos found on the computer. Appellant was acquitted of the charge relating to the video found in the Limewire/saved folder on his computer. But he was convicted of possession of the videos in the Limewire/incomplete file. Expert testimony confirmed that, while incomplete, these videos were indeed playable. VR 11/24/11 at 14:38:20-45. There were a substantial number of still photographs of child pornography in the thumbnail cache of the Vista operating system of his laptop. Cynthia Fitch, the Commonwealth's computer expert testified that an **"image in a thumb cache is an image viewed on the computer."** *Id.* at 15:09:45. When coupled with Appellant's admission that he sought and viewed child pornography on his laptop and that there were Limewire searches on his computer that included child pornography buzz words, this evidence was sufficient to survive a motion for directed verdict.

"[A] person does knowingly receive and possess child pornography images when he seeks them out over the internet and then downloads them to his computer." *United States v. Kuchinski*, 469 F.3d 853, 861 (9th Cir. 2006). "In the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it." *United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006). Here, Appellant downloaded and viewed child pornography on his laptop computer. Further, expert testimony confirmed that the Limewire program used by Appellant required him to double-click a file in order to download it. VR 11/24/11 at 14:31:30-45. Appellant intentionally double

clicked on filenames that contained express buzz words that referred to child pornography:

- Count 2: Video-T-111768279-sex crime
Brazilkids (Pthc Kisex Underage)
Nobull 2 Wonderfull 11 yo Girls &
sy same age boy get vagina fucked
by one, littler girl get him off again
some kiddy pedo outercou.mpg.
- Count 3: Video-T-229521418-Pedo-Hussyfan
pthc r@raygold babyshivid fucking
8yr old daughter.mpg
- Count 4: Video-T-51277651-8 Best little girl in pink dress,
r%252540y gold hello video (illegal underage Lolita
preteen pedo). Mpg
- Count 5: Video-T-9477110-0 yo KAJ R@GOLD BABY RAPE-
PLEASE SHARE!!! Clip fr dadndotr 10 yo play in woods
2.o3 (pth pedo kiddy incest).mpg

TR Vol. III at 151-56.

The above evidence was sufficient to support Appellant's conviction for possession of child pornography. *United States v. Kain*, 589 F.3d 945, 950 (8th Cir. 2009).

Similar to this case, in *Kain*, the appellant admitted that he had used his laptop computer "to download 40–50 images of child pornography to the 'Y file'" on his computer. *Id.* at 949. One of the issues on appeal concerned the appellant's conviction for possession of six "images found in 'temporary internet' and 'orphan' files because they were in user inaccessible space outside Kain's control." *Id.* The government's computer expert

described "temporary internet" files as locations where the computer temporarily stores web pages that were

previously viewed “so they can be viewed on the computer itself.” “Orphan” files are files “that were on the computer somewhere saved” but were subsequently deleted, “so the computer doesn’t know exactly where they came from.”

Id. at 948.

The *Kain* Court began its discussion of the appellant’s argument thusly:

[t]he presence of child pornography in temporary internet and orphan files on a computer’s hard drive is *evidence* of prior possession of that pornography, though of course it is not conclusive evidence of knowing possession and control of the images, just as mere presence in a car from which the police recover contraband does not, without more, establish actual or constructive possession of the contraband by a passenger.

Id. at 950 (emphasis in original).

In holding that there was sufficient evidence of possession of child pornography to support the appellant’s conviction based on the images found in the temporary internet and orphan files on the computer, the *Kain* Court explained:

Kain’s admissions and [the expert’s] testimony explaining his forensic examination of Kain’s computer provided ample support for the district court’s finding that Kain knowingly possessed the images of child pornography found on his computer. As we have said in another context, “[c]onstructive possession of contraband is established when a person has ownership, dominion or control over the contraband itself, or dominion over the premises in which the contraband is concealed.”

Id.

So under *Kain*, the images of the child pornography in the thumbnail cache of Appellant’s laptop was evidence of possession of those images. According to

the Commonwealth's expert, the images in thumbnail cache meant that the images in the thumbnail cache had been viewed on Appellant's computer. During the time "the images were displayed on [Appellant's computer] screen and simultaneously stored to his laptop's hard drive, he had the ability to copy, print, or email the images to others." *Romm*, 455 F.3d at 998. This constitutes evidence of control over the images of child pornography represented by the pornographic images in the thumbnail cache of Appellant's laptop. *Id.*

The Court should affirm the Court of Appeals on this issue.

II.

APPELLANT WAS NOT ENTITLED TO INSTRUCTION ON INNOCENT POSSESSION

Appellant argued at trial that he was entitled to an innocent-possession instruction under *Commonwealth v. Adkins*, 331 S.W.3d 260, 264 (Ky. 2011). This Court rendered *Adkins* close in time to Appellant's trial. While *Adkins* concerns innocent possession of illegal substances, the trial court did not reject Appellant's request for an innocent-possession instruction on grounds that *Adkins* did not apply to a possession-of-child-pornography case. Rather, the trial court found that there was no evidence of innocent possession to support the instruction. VR 1/25/11 at 13:44:30.

Adkins holds that the possession and trafficking

statutes implicitly recognize an innocent possession or innocent trafficking defense, and whenever the evidence reasonably supports such a defense—where there is evidence that the possession was incidental and lasted no longer than reasonably necessary to permit a return to the owner, a surrender to authorities, or other suitable disposal—the instructions should reflect it.

Adkins, 331 S.W.3d at 264.

Based on the above language, the trial court found that there was no evidence that Appellant's possession of child pornography was incidental to deletion of the images. VR 1/25/11 at 9:10:15. Rather, the trial court found that, under the evidence, Appellant either intentionally clicked twice on a link to download the pornography or he did not. *Id.* The trial court found that there was no evidence that Appellant maintained possession of the child pornography just long enough to dispose of it by deletion.

Appellant argues that his written statement to the police is sufficient evidence to entitle him to an instruction on innocent possession. But the statement does not. In his statement, Appellant confessed:

I looked to find disturbing images or videos that would shock me. Some of these could be classified as child pornography. I tried to delete these things from my laptop. . . . I realize that looking at this type of stuff was wrong and I feel sick because I did look at things that I should not have looked at. However I did not realize that anyone would find out.

Appellant argues that the above confession should be interpreted as a statement "that he was looking for 'shock videos,' saw the material, was sickened by it, and deleted it immediately." This interpretation is not reasonable. Rather, Appellant confessed to actively seeking out child pornography. And he did not confess that he was sickened by what he saw. Indeed, he admitted that he felt "sick because [he] did look at things [he] should not have." Moreover, Appellant's confession does not state that he immediately deleted the pictures and videos as he argues on appeal. The confession simply states that he did delete them but not when the deletion occurred. The most

reasonable reading of Appellant's confession is that Appellant deleted the child pornographic images from his computer so that no one would find out what he had been looking at. Finally and most importantly, the trial court found that the evidence did not support an innocent-possession instruction. The trial court's finding is supported by substantial evidence, *i.e.* Appellant's oral and written statements to the police would not support a finding that Appellant's possession of the child pornography on his computer was incidental and lasted no longer than necessary to dispose of the pornography.

Because the trial court's findings are supported by substantial evidence, the findings are conclusive on appeal. RCr 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920, 925 (Ky. App. 2002).

Therefore, the Court should affirm the Court of Appeals on this issue.

III.

THE TRIAL COURT WAS NOT REQUIRED TO INTERPRET THE MEANING OF "KNOWINGLY" FOR THE JURY

Appellant's argument on this issue is not particularly clear. Appellant appears to argue that the trial court should have provided a legal interpretation of "knowingly" beyond the definition of "knowingly" in the jury instructions.

The trial court's instructions to the jury did include a definition of "knowingly" as follows: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists." TR Vol. II at 149. This is the statutory definition of "knowingly" under KRS 501.020(2). Appellant argues that this definition was not sufficient. Rather, Appellant claims that the trial court should have instructed the

jury that, in order to find Appellant guilty of “knowingly” possessing child pornography, the jury would have to find that Appellant intended to “keep” the child pornography on his computer when he viewed it. This is not the law. Rather the opposite is true.

“[T]he failure to instruct on the definitions of such easily understood words as ‘knowingly’ and ‘willfully’ does not constitute a failure to instruct on the ‘whole law of the case,’ since the meaning of those terms is apparent to the average juror.” Cooper and Cetrulo, *Kentucky Instructions to Juries, Criminal* § 1.05(A) at 1-16 (5th ed.2007) (citing *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83 (Ky. 1991); *Lawson v. Commonwealth*, 309 Ky. 458, 218 S.W.2d 41, 42 (1949)).

In *Caretenders*, the appellants were indicted for violating KRS 209.990(2) by “knowingly and willfully neglect[ing]” an adult patient in their care. *Caretenders*, 821 S.W.2d at 85. At the time of the indictment, KRS 209.990(2) provided

that “any caretaker who knowingly and willfully abuses, neglects, or exploits an adult within the meaning of this Chapter” is guilty of a class C felony if the prohibited conduct results in serious physical or mental injury or permanent disability or a class A misdemeanor if the adult suffers minor physical injury or temporary disability.

Id. at 86.

The appellants in *Caretenders* argued that the trial court erred by failing to provide the jury with “instructions defining ‘knowingly’ or ‘willfully.’” *Id.* at 87. This Court rejected the argument explaining, “We do not believe these are technical terms requiring instructions.” *Id.* Here of course, the trial court did provide the jury with statutory definition of “knowingly.” The trial was not required to provide its own

interpretation of the application of the statutory definition to the charges against Appellant.

The Court should affirm the Court of Appeals on this issue.

IV.

APPELLANT WAS NOT ENTITLED TO INTRODUCE EVIDENCE OF HIS REPUTATION FOR TRUTHFULNESS IN THE COMMUNITY

Appellant's final argument is that the trial court erred by excluding character evidence in his favor. "It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion." *Com. v. King*, 950 S.W.2d 807, 809 (Ky. 1997). The trial court did not abuse its discretion by excluding Appellant's tendered character witness.

Appellant begins his argument with the false premise that he had the unfettered right to introduce evidence of his character under KRE 404(a)(1), which provides:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a **pertinent trait** of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

KRE 404(a)(1) is clear that in order to be admissible under the rule, the character trait has to be "pertinent." In interpreting the similarly worded Fed. R. Civ. P. 404(a)(1)(A), the First Circuit Court of Appeals explained, "The word 'pertinent' is read

as synonymous with 'relevant.'" *United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982).

And as explained in *Corpus Juris Secundum*

Under the Federal Rules of Evidence and similar state rules, the character trait must be pertinent to be admissible. A **character trait is pertinent to the crime charged, and thus may be used as substantive evidence of the defendant's innocence, if it is relevant**—that is, if it is particularly involved in the crime alleged, if it directly relates to a particular element or facet of the crime, if it tends to make the existence of any material fact more or less probable than it would be without evidence of that trait if it helps prove or disprove an affirmative defense, or if the existence or nonexistence of the trait would be involved in the commission or noncommission of the particular crime charged. The trait need not be an element of the crime charged.

The traits of character which may be proved depend on the nature of the crime charged. Evidence of the defendant's reputation for truth and veracity is generally not admissible, except where the trait of truthfulness is involved in the charge, or has otherwise been attacked.

C.J.S. *Criminal Law* s. 112 (updated January 2013) (citing cases) (emphasis added).

Here, Appellant makes no argument that his general reputation for truthfulness is pertinent to the crime charged. That is, Appellant makes no argument or showing that his reputation for truthfulness is relevant to the offense of possession of child pornography or its elements. Rather, Appellant insists that the evidence was admissible to rebut an alleged attack on his veracity by the Commonwealth. Consequently, KRE 404(a)(1) does not control the admissibility of Appellant's tendered character witness. Rather, the

admissibility of the testimony falls under KRE 404(a)(3), which allows the introduction of character evidence of witnesses as provided in KRE 608.

KRE 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

So under the plain language of KRE 608, evidence of truthfulness is only admissible if a witness's character for truthfulness is attacked. Appellant's argument that the Commonwealth attacked his character for truthfulness turns on the Commonwealth's interpretation of Appellant's written statement to the police. Appellant repeatedly mischaracterizes his confession. Appellant spins his confession and interprets it to read that "that he was looking for 'shock videos,' saw the material, was sickened by it, and deleted it immediately." But Appellant's characterization of his confession is not the only interpretation. Nor is it the most reasonable or likely.

Appellant did not confess that he sickened by what he saw but rather, he confessed that he felt "sick because [he] did look at things [he] should not have." Appellant did not state that he immediately deleted the pictures and videos, only that he deleted them at some point in time. More importantly, his statement that he felt "sick" because he looked at things he should not have can easily and readily be interpreted as a confession that he felt guilty at taking pleasure from viewing forbidden pictures and images. The fact that the Commonwealth interpreted Appellant's confession differently

at trial than Appellant's interpretation of the same confession does not mean that the Commonwealth attacked Appellant's character for truthfulness. Rather, it means that there was disagreement as to what Appellant's words meant. The trial court did abuse its discretion in excluding Appellant's tendered character witness.

The Court should affirm the Court of Appeals on this issue.

V.

NO CUMULATIVE ERROR

There was no error in this case, much less cumulative error.

CONCLUSION

For the reasons set forth above, the Court should AFFIRM the opinion of the Court of Appeals.

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