

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000077-MR

MICHAEL MYERS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 10-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, LAMBERT AND TAYLOR, JUDGES.

DIXON, JUDGE: A jury convicted Michael Myers of twelve counts of possession of matter portraying a sexual performance by a minor. Myers appeals from the final judgment, arguing that he was entitled to a directed verdict of acquittal.

Myers, who was a member of the 160th Special Operations Unit stationed in Fort Campbell, was charged following an investigation by Kathryn Reed, a cyber crime investigator at the office of the Attorney General. Reed testified that she identified an IP address in Kentucky associated with sharing or advertising files containing terms related to child pornography. The files were downloaded using Limewire, a now-defunct aftermarket software program. Reed explained that downloads made by the Limewire program are user driven. Reed was able to link her computer to the suspicious computer, and saw 28 files with titles associated with child pornography. She successfully downloaded two of the files from the IP address, and the images they contained were later shown to the jury. Under subpoena, the internet service provider identified the IP address as assigned to Myers. Reed obtained a search warrant. When she arrived at Myers's residence on September 29, 2009, to serve the warrant, she told him they were looking for a computer containing images of child pornography. Myers told Reed he knew the computer they were looking for, and that it belonged to him. He told them they would find some images on it, and that he knew the computer had child pornography on it.

Bill Baker, a certified forensic investigator at the Attorney General's office, testified regarding images he recovered from a forensic copy of a hard drive copied from Myers's computer. He produced for the jury two still images of child pornography recovered from Myers's recycle bin, and stated that he found other

similar files, including 25 videos, from recovered folders created by his forensic software.

Myers testified that he returned from a tour of duty in Iraq and Afghanistan in April 2009. While he was overseas, other soldiers told him about Limewire as a means of getting free music and pornography. When he returned to Fort Campbell, he installed Limewire on his computer. He testified that when he searched Limewire, child pornography would pop up, but that most times it was adult pornography. He said he tried to erase the child pornography. At the end of August 2009, he told his sergeant that he had child pornography on his computer. His sergeant told Myers to remove it. Myers, who testified that he is not “computer savvy,” arranged for his stepfather to erase the pornography from the computer. Myers also testified that he, his roommate, and his roommate’s girlfriend shared a two-bedroom house, and that the computer was open and accessible for anyone to use.

On rebuttal, in response to Myers’s testimony that the child pornography popped up on his computer through Limewire without his request, Reed testified that Limewire was not set up to allow someone else to download material onto the computer. She explained that Limewire requires a three-way “handshake,” which means that a computer sends out a request, another computer responds that it is present and listening, and the first computer upon receiving that response specifies what it wants to receive.

A jury found Myers guilty of twelve counts of possession of matter portraying a sexual performance by a minor, and he was sentenced to a probated sentence of one year on each count to be run concurrently.

“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.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id.* at 188.

Myers argues that on September 29, 2009, the date on which the search warrant was executed and he was arrested, he had completely cleaned his computer to the point that no “normal person” (i.e. a person without specialized computer skills) could see anything incriminating on it, and the images could only be recovered by experts. He points to the fact that Reed and Baker testified that no “normal person” could see whether there was any child pornography on the computer on that date.

The statute in effect at the time provided as follows:

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.

Kentucky Revised Statutes (KRS) 531.335(1).

Myers argues that the use of the present tense in the phrase “knowingly **has** in his or her possession” means that, in order to be convicted, the defendant must possess the computer images in a form that is accessible to a “normal person” on the actual date of his arrest. We decline to read such a requirement of simultaneity into the statute. Myers’s interpretation would mean that a defendant could avoid prosecution simply by deleting files prior to his arrest by the police, and that investigators could not use forensic means to recover them. The indictment, to which Myers did not object, alleged that he committed the offenses “On or before the 29th day of September, 2009.” Myers testified that he told his sergeant in August 2009 that there was child pornography on his computer; this was confirmed by the sergeant’s testimony. Reed testified that she obtained pornographic still images from the computer on September 3, 2009, and that when she served the search warrant, Myers admitted that the computer then contained child pornography. Baker testified that he recovered two more images and twenty-five videos from the computer using forensic software. Taken as a whole, there was sufficient evidence of possession to defeat the motion for a directed verdict.

Next, Myers argues that he should have been able to avail himself of the “temporary innocent possession” defense recognized by the Kentucky Supreme Court in the context of controlled substances. *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011). He attempts to distinguish the facts of his case from those in *Crabtree v. Commonwealth*, 2012 WL 3538316 (Ky. App. Aug. 17, 2012) (2011-CA-000452-MR) (disc. rev. granted Apr. 17, 2013). In *Crabtree*, a panel of

this Court held that a trial court did not err in refusing to give a “temporary innocent possession” instruction in a possession of child pornography case. Myers, however, provides no reference to the record to show that he ever tried to raise this defense, tendered an instruction on this defense, or that the trial court ever prevented him from using this defense. We have reviewed the record and have been unable to find where the error is preserved. In any event, it is not the job of the appellate courts to scour the record in support of an appellant’s argument. *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011).

Failure to ask for such an instruction means the defense is waived, and may not be reviewed. “RCr 9.54(2) bars palpable error review for unpreserved claims that the trial court erred in the giving or the failure to give a specific instruction.” *Wise v. Commonwealth*, 422 S.W.3d 262, 276 (Ky. 2013) (quoting *Martin v. Commonwealth*, 409 S.W.3d 340, 345 (Ky. 2013)). “In other words, a defendant cannot rely on the palpable-error rule to complain about the absence of an instruction that was never requested (and thus was not given)[.]” *Id.* at 277.

For the foregoing reasons, the final judgment and sentence of the Christian Circuit Court is affirmed.

ALL CONCUR.

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