STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RICHARD REISS, II,

Defendant-Appellant.

UNPUBLISHED
May 29, 2008

No. 269630
Macomb Circuit Court
LC No. 2004-003378-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the prosecution failed to prove beyond a reasonable doubt that defendant *knowingly* possessed the child sexually abusive material found on his computer.

The statute under which defendant was prosecuted, MCL 750.145c(4), states in pertinent part, "A person who knowingly possesses any child sexually abusive material is guilty of a felony . . . ." In *People v Girard*, 269 Mich App 15, 20; 709 NW2d 229 (2005), this Court observed that the statute's knowing possession requirement is not satisfied solely by evidence that child sexually abusive materials existed within the recesses of a defendant's computer. "[T]he prosecution [has] to show more than just the presence of child sexually abusive material in a temporary Internet file or a computer recycle bin to prove that defendant knowingly possessed the material." *Id.* To establish the knowing possession of child sexually abusive material, a prosecutor must prove beyond a reasonable doubt that a defendant knew of the continuing presence of the contraband within his or her computer

The central issue in this case involves whether the prosecution carried its burden of proving beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material. The majority concedes that the contraband in the instant case resided only in defendant's temporary Internet files, and that "there was no evidence that defendant knew about the existence of the temporary Internet files . . . ." In my view, this fact requires the reversal of his conviction under MCL 750.145c(4).

Michigan law, embodied in the plain language of subsection 145c(4), does not prohibit the mere *viewing* of child sexually abusive material on a computer. Rather, the statutory offense at issue punishes a defendant's *knowing* possession of this contraband. *Girard*, *supra* at 20. Defendant confessed to having viewed the child sexually abusive materials, but the prosecution

failed to prove beyond a reasonable doubt that defendant possessed any knowledge that after he viewed the images, they continued to remain available within his computer.

Michigan's "knowing possession" statute is similar to many enacted in other jurisdictions, and this Court's discussion of the knowledge element in *Girard* is entirely consistent with other state and federal courts' interpretations of laws requiring knowing possession of child pornography. For example, in *United States v Romm*, 455 F3d 990 (CA 9, 2006), the Ninth Circuit explained that "to possess the images in the cache,[1] the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." *Id*. at 1000. The court in *Romm* affirmed the defendant's conviction because the defendant exercised control over the images stored within his computer's cache, specifically by enlarging or erasing some of the saved images. *Id*. at 1000-1001.

In a subsequent Ninth Circuit case, *United States v Kuchinski*, 469 F3d 853 (CA 9, 2006), the Court observed that

> [w]here a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control. [*Id*. at 863.]

In *United States v Stulock*, 308 F 3d 922, 925 (CA 8, 2002), the Eighth Circuit observed that the district court properly had acquitted the defendant of knowing possession of child pornography because "one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image." Another federal district court reached precisely the same result, holding that to satisfy the requirement of knowing possession, a defendant must have "purposely saved or downloaded the image." *United States v Perez*, 247 F Supp 2d 459, 484 n 12 (SDNY, 2003), quoting *Stulock*, *supra* at 925.

The Georgia Court of Appeals reversed a defendant's conviction of knowing possession of child pornography because although the defendant viewed the contraband images on his

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[1] Deputy Tom Gemel, the prosecution's forensic computer expert, explained that the temporary Internet file "is a location on your hard drive that stores images and graphics from when you visit … and surf the internet." In *United States v Luken*, 515 F Supp 2d 1020, 1027 (D SD, 2007), the district court explained that the terms "cache" and "temporary Internet files" are synonymous:

> Files stored in the "Temporary Internet Files" folder or cache are created automatically by the Microsoft web browser Internet Explorer so that if the site is revisited it comes up more quickly. These files are created by the Internet Explorer during the normal course of web browsing without any action of the computer user, or unless a sophisticated computer user is involved, without even any knowledge of the computer user.

computer screen, he had not taken any affirmative action to save the images on his computer's hard drive. *Barton v State*, 286 Ga App 49; 648 SE2d 660 (2007). The court in *Barton* explained, "In any criminal prosecution for possession … the State must prove that the defendant was *aware* he possessed the contraband at issue. Thus, in this case, the State was required to show that Barton had knowledge of the images stored in his computer's cache files." *Id*. at 52 (emphasis in original). The *Barton* court determined that the prosecution failed to prove that the defendant "was aware that the computer was storing these images, but instead established only that these files were stored automatically, without Barton having to do anything." *Id.*

Here, the evidence revealed solely the presence of child sexually abusive material in defendant's temporary Internet files. Deputy Tom Gemel admitted that defendant did not purposefully place the images in the temporary Internet files; rather, the computer's operating system automatically sent the material there "[b]y default." Gemel also conceded that no proof existed that defendant ever again viewed the offensive material after the computer automatically stored the web pages in its temporary Internet files. And the prosecution produced no other evidence tending to establish that defendant intentionally saved the material in his computer, sent it to another computer user, traded the child sexually abusive images, purchased them, sold them, accessed the computer's temporary Internet files, or could have accessed or even knew how to access the temporary Internet files.

According to the majority, defendant's statements to the investigating detectives "made it more probable than not that defendant had the requisite knowing possession." In my view, however, these statements prove only that defendant passively viewed the child sexually abusive material. Detective Patrick Conner testified that defendant admitted that he "*watched* kiddie porn on his computer at home" (emphasis added), and Detective Neil Childs testified that around the time of defendant's arrest, he "stated *he had been looking* at kiddie porn on the computer" (emphasis added).[2] These statements do not tend to prove that defendant knew that his computer continually saved and stored the child sexually abusive material after he viewed it.

Officer Todd Murdock, who arrested defendant, testified that after defendant received his *Miranda* rights, he stated that he "wanted to confess that he had child pornography on his home computer." I believe that this single and fundamentally ambiguous statement does not suffice to prove beyond a reasonable doubt that defendant *knowingly possessed* the contraband images, but only that defendant had previously viewed them on his computer.

In *People v Wolfe*, 440 Mich 508; 489 NW2d 748, amended 441 Mich 1201 (1992), our Supreme Court held that to sustain a conviction, an appellate court must determine whether sufficient record evidence existed "to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Id*. at 513-514 (internal quotation omitted). This standard, articulated in *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), reflects "an attempt to give 'concrete substance'" to a criminal defendant's due process rights. *Id*. at 514. The beyond

[2] Conner's affidavit for a search warrant states that after being taken into custody, defendant "blurted out[,] 'I need to confess. I've been watching kiddie porn.'"

a reasonable doubt standard requires that the fact finder "reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson*, *supra* at 315.

In *Jackson*, the United States Supreme Court specifically rejected the "no evidence" test of evidentiary sufficiency set forth in *Thompson v Louisville*, 362 US 199, 206; 80 S Ct 624; 4 L Ed 2d 654 (1960), which permitted a reviewing court to reverse a conviction only if "no evidence" supported it. The Supreme Court in *Jackson* characterized the "no evidence" doctrine as "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id*. at 320. According to the Supreme Court, the fact that "a mere modicum" of evidence could satisfy the "no evidence" standard illustrated its constitutional inadequacy: "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence … could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id*.

Although the majority is satisfied that the mere modicum of evidence supplied by defendant's vague statement "that he had child pornography on his home computer" suffices to prove knowing possession beyond a reasonable doubt, I disagree. Viewed in the light most favorable to the prosecution, the statement demonstrates only that defendant had viewed child pornography on his computer. The statement does not suggest that defendant knew that his computer saved and stored the images after he ceased viewing them. Fairly construed, defendant's three consistent postarrest statements prove that he watched child sexually abusive material, but not that he purposefully saved them within his computer, or even knew that they remained stored there after he had viewed them. Because defendant's statements do not amount to proof of knowing possession beyond a reasonable doubt, I would reverse his conviction under MCL 750.145c(4).

/s/ Elizabeth L. Gleicher