RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001980-MR

MICHAEL FIELDS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 10-CR-00190

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE AND KRAMER, JUDGES.

KRAMER, JUDGE: Michael Fields appeals from a judgment of the Scott Circuit Court convicting him of four counts of possession of matter portraying a sexual performance by a minor. He was sentenced to a total of ten years' imprisonment.[1]

[1] Fields was sentenced to two and one-half years' imprisonment on each count to run consecutively for a total of ten years' imprisonment.

Having reviewed the arguments of the parties, the record and the applicable law, we conclude there is no reversible error and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January 2010, Investigator Tom Bell of the cyber crimes branch of the Kentucky Attorney General's office ("AG") was investigating online computers that were advertising, via peer-to-peer networks, that they had files available for sharing that matched known signatures of child pornography. Bell identified an IP address advertising approximately 156 files with these known child pornography signatures. The IP address was using the now-defunct file-sharing software program called Limewire. Bell could not connect to the IP address directly, so he used data mining software (described as specialty software that can detect sharing of child pornography files) to look at historical data from the IP address that matched known signatures for child pornography. Bell took the data and compared it to files previously seized by the AG in other investigations. He found that numerous images and videos that had been advertised from the IP address matched known images of child pornography. The AG issued a subpoena to Time Warner Cable, the internet service provider for the associated IP address. As a result of the subpoena, Bell determined that the IP address belonged to Michael Fields. Bell obtained a search warrant and executed a search of Fields's

home on March 19, 2010. Bell seized a laptop computer, a desktop computer, and numerous DVDs and CDs.

Fields was indicted by a grand jury in the Scott County Circuit Court on 105 counts of possession of matter portraying a sexual performance by a minor. The indictment was eventually amended to include only ten counts. Counts 1 and 10 were based on videos; the remaining counts were based on images. The videos and images contained in the amended indictment were found on the desktop computer seized from Fields's bedroom. The files were located either in the recycle bin of the computer or on the external hard drive associated with the desktop computer.

The case went to trial in June 2017.[2] Fields testified on his own behalf and maintained that he used Limewire for the purpose of downloading music and adult pornography. He acknowledged that adult pornography "came with the music," but that he did not look at file names and was unaware that any child pornography existed on his computer. Fields was found guilty on Counts 2, 4, 6, and 9 of the indictment. The jury recommended a sentence of two and one-half years on each count to run consecutively for a total of ten years' imprisonment. The trial court sentenced Fields to ten years' imprisonment on

[2] The record shows numerous continuations of the trial due to various factors including scheduling conflicts; medical issues of attorneys involved in the case; medical issues of the defendant; and that defendant's counsel withdrew from the case in 2016. A public defender was subsequently appointed to represent Fields.

November 17, 2017. This appeal followed. Further facts will be developed as necessary.

II. ANALYSIS

Fields raises four issues on appeal. He asserts: (1) the images and videos were admitted into evidence by the trial court without the required review of the materials; (2) the trial court erred in denying his motion for directed verdict; (3) the trial court erred in admitting Commonwealth's Exhibits 11-14 and 18 into evidence; and (4) the trial court improperly excluded the testimony of his expert witness.

A. Admission of Images and Videos

Fields argues that the trial court did not conduct a proper balancing test pursuant to KRE[3] 403 to determine if the probative value outweighed the prejudicial effect of showing the images and videos associated with the ten counts contained in the indictment to the jury. *See Hall v. Commonwealth*, 468 S.W.3d 814, 824 (Ky. 2015). The Commonwealth argues that Fields's argument pursuant to KRE 403 is not properly preserved for appeal. We agree with the Commonwealth.

We acknowledge that whether Fields's KRE 403 argument is properly preserved is a close call. We first note that at no time–either prior to or during the

[3] Kentucky Rule of Evidence.

trial–did Fields make a motion to exclude the images and videos pursuant to KRE 403. The matter was before the court on April 7, 2017. At that time, the Commonwealth indicated that it would submit the images that it intended to display at trial for an *in camera* review by the trial court. Fields did not raise an objection at that time. When the Commonwealth informed the trial court that it would be submitting the images, it was in reliance on a de-published case from this Court, *Purdom v. Commonwealth*, 2014-CA-002079-MR, 2016 WL 2586080 (Ky. App. April 22, 2016).[4] The Commonwealth described a "process" for the trial court to conduct an *in camera* review of the evidence "to determine if the probative value outweighs [unintelligible] and so forth." While the Commonwealth did submit the images and video to the trial court–and the court subsequently conducted a review and allowed the images and videos to be shown to the jury–the record does not show that a motion had been made to exclude the evidence prior to the Commonwealth's submission. We can only assume that the Commonwealth chose to submit the images to the court, absent a defense motion to exclude, out of an abundance of caution. The Commonwealth's reliance on *Purdom* was misplaced then, and Fields's reliance on the same de-published case in this appeal

[4] The Kentucky Supreme Court denied discretionary review on October 13, 2016, and ordered the opinion of the Court of Appeals not to be published.

is also misplaced. CR[5] 76.28(4)(c) states, in relevant part, "[o]pinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state . . . ."

A pretrial hearing was held on May 8, 2017. The trial court indicated that it had reviewed the images submitted by the Commonwealth. Fields did make an oral request that the trial court rule on the admissibility of the images.[6] However, defense counsel did not argue KRE 403. Rather, Fields argued that the child in the images associated with Counts 2 and 3 of the indictment was not engaged in sexual activity as provided in KRS[7] 531.335. He described the contents of the images as "erotica," as opposed to child pornography and asked for the images to be excluded on that basis. Defense counsel also argued that it was too difficult to determine if the individuals contained in the images and video in Counts 6-10 were under the age of eighteen and asked that the images be excluded for that reason. Fields did not make an argument regarding the images and video associated with Counts 1, 4 and 5. The Commonwealth argued that the issues raised by Fields were questions for the jury and more appropriate for a directed verdict motion at trial. Defense counsel responded by arguing, "Community

[5] Kentucky Rule of Civil Procedure.

[6] The record does not show that a written motion was filed by Fields.

[7] Kentucky Revised Statute.

standards would be outraged by any obscene matter. The question is whether the jury's passions will be inflamed by seeing a naked nine-year-old when it doesn't portray a sexual performance." The trial court agreed with the Commonwealth and indicated that it could not rule, as a matter of law, that the matter contained in the images and videos was or was not child pornography. The court denied Fields's oral motion. The Commonwealth showed the videos and images associated with the indictment to the jury.[8] Fields did not raise an objection to the images and videos at the trial.

We decline to interpret the Commonwealth's voluntary submission of evidence for an *in camera* review as preservation of defendant's argument under KRE 403 on appeal. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Defendant's objection to the images and videos at the hearing on May 8, 2017, was based solely on whether the images rose to the level of child pornography under KRS 531.335. No motion was made pursuant to KRE 403. The fact that Fields questioned "whether the jury's passions will be inflamed by seeing a naked nine-year-old *when it doesn't portray a sexual performance*" goes towards his argument, at the time, that the material in the images did not constitute a sexual performance by a minor under KRS 531.335. (Emphasis

[8] The Commonwealth displayed each image for ten seconds and displayed approximately ten seconds of each video once the alleged illicit behavior was apparent.

added). Not only is Fields's argument under KRS 403 not properly preserved, it is disingenuous for Fields to argue to the trial court that the images were *merely* "erotica" and did not rise to the level of child pornography under the statute, yet also argue to this Court that the images were so prejudicial that they should have been excluded under KRE 403. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (citing *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976))). "'[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court.'" *Id.*

"It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (internal citation omitted). "[P]rocedural requirements generally do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated." *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977). Fields did not request that this Court conduct a palpable error review pursuant to RCr[9] 10.26.[10] "Absent extreme circumstances amounting to a

[9] Kentucky Rule of Criminal Procedure.

substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). Accordingly, we decline to review Fields's argument pursuant to KRE 403 regarding the images and videos associated with the indictment that were shown to the jury.

B. Directed Verdict[11]

Fields argues that the trial court erred in denying his motion for directed verdict, which was based upon what he asserts was the Commonwealth's failure to prove, beyond a reasonable doubt, that he "[k]nowingly ha[d] in his . . .

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[10] Under RCr 10.26, an unpreserved error may be noticed on appeal only if the error is palpable and affects the substantial rights of a party, and even then relief is appropriate only upon a determination that manifest injustice has resulted from the error. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (internal quotations omitted).

[11] At the outset, we note that Fields argues that he moved for a directed verdict at the close of the Commonwealth's case and again at the close of all evidence. The Commonwealth argues that it is "unclear from the record whether this issue is properly preserved." The record before us does not contain Fields's initial motion for directed verdict. The video recording in the record cuts off at the close of the Commonwealth's case. At that time, the court dismissed the jury and informed the parties that the court was taking a break "so you [Fields] can go ahead and make your motion." The recording of the proceedings resumes with the defense calling its first witness, Donna Fields. However, at the close of all evidence, Fields stated to the trial court that he was renewing his motion for directed verdict and argues that no fact finder could determine the "knowingly" element required by KRS 531.335 based on the sheer number of files that Fields had downloaded. Therefore, we treat the issue as preserved for appeal. A motion for a directed verdict made at the close of the Commonwealth's case is not sufficient to preserve error *unless renewed at the close of all the evidence*. *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977) (emphasis added).

possession or control any matter which visually depicts an actual sexual performance by a minor person[.]" KRS 531.335(1)(a). We disagree.

The standard for a directed verdict is outlined in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> 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.

A reviewing Court does not make determinations regarding credibility or weight of the evidence. *Id.* at 187. Rather, the appellate Court is "to affirm . . . unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (citations omitted). With these standards in mind, we review whether the trial court erroneously denied Fields's motion for a directed verdict.

Fields testified at trial. He has consistently maintained that the images and videos contained in the indictment were downloaded via Limewire unbeknownst to him.[12] He testified that he used Limewire to obtain music and adult pornography. He stated that the adult pornography "was right there next to the music. It came down the same way." If he saw that another host had music that he liked, he would simply download every file that the other host had available, including adult pornography. The defendant's wife, Donna Fields, testified that the couple viewed the adult pornography. However, Fields denied having any knowledge that child pornography was also downloaded with music and adult pornography. He stated that he "didn't really pay attention" to file names and that he "didn't see anything that alarmed" him. He asserts that the presence of child pornography on his computer was completely unknown to him (*i.e.*, that he did not knowingly possess it).

KRS 531.335(1)(a) states that "[a] person is guilty of possessing or viewing 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: [k]nowingly has in his or her possession or control any matter which

[12] During his testimony at trial, Fields acknowledged that he was aware that downloading copyrighted music from other individuals on Limewire was illegal. He also acknowledged that downloading copyrighted adult pornography was illegal. Fields has not been charged with an offense related to the illegal download of music or adult pornography.

visually depicts an actual sexual performance by a minor person[.]" Thus, there are two separate mental states implicated: the defendant must know the content and character of the images and videos, and the defendant must knowingly possess the images or videos. *Crabtree v. Commonwealth*, 455 S.W.3d 390, 396 (Ky. 2014). On appeal, Fields argues only that he did not knowingly possess the images and videos.

Fields was found guilty on Counts 2, 4, 6, and 9 of the amended indictment. Despite his arguments to the lower court prior to trial that the images[13] were merely "erotica" or did not depict an individual under the age of eighteen, there is no question that the images for which he was found guilty of possessing "visually depict[ed] an actual sexual performance by a minor person." The images were clearly child pornography. Fields does not contest that issue on appeal.

Investigator Bell was the Commonwealth's expert witness. He testified regarding the process a user must go through to download files on Limewire.[14] He also gave a visual demonstration of the process to the jury. First, the user must enter a search term. File names from other hosts then begin to populate the computer screen as search results. Files are returned in a search only

[13] Fields was not convicted of possession of either of the two videos contained in the indictment.

[14] Although Limewire is now defunct, we refer to it in the present tense in this opinion for the sake of clarity.

when the search term appears in the file name or in the file's metadata.[15] Bell testified that there are known buzzwords related to child pornography that are frequently used as search terms. These buzzwords produce results whose file names or metadata contain the search term. However, even if a file name contains child pornography-related buzzwords, that does not necessarily mean that the file itself is child pornography. Furthermore, a search using purely innocuous terms could turn up file names or metadata containing child pornography. Bell testified to and showed the jury that file names are readily visible to the user on the screen before the user chooses to download the files. To download a file from the list of files visible to the user, one would click the file name and then click again when the software asked if the user wanted to download the file. It is also possible to select multiple files at once for download. Once a file starts to download, but prior to completion, Limewire software stores the data in a default "incomplete" folder. Once downloaded, the file automatically moves to Limewire's default "saved" folder or whatever default folder the user designates for downloaded material.[16] The images and videos for which Fields was convicted had been completely downloaded.

[15] Metadata is, essentially, data about other data. As an example, Bell explained that the metadata for any given image file could contain information regarding the make and model of the camera used to take the photo, even though that information would not necessarily show up in the file name or in the image itself.

[16] Fields's default folders were entitled "Music" and/or "Music/Entertainment."

The images and videos contained in the indictment were found either on the hard drive of Fields's desktop computer (located in the recycle bin) or in the external hard drive attached to the desktop computer.[17] The file names of the images and videos contained in the indictment leave no doubt that a person who chooses to download such files expects them to contain child pornography. We note that the Commonwealth presented no evidence as to the actual search terms used by Fields. However, the file names are rife with buzzwords and phrases associated with child pornography, including but not limited to, "pedo," "young child," "underage," "9 y[ear] o[ld]," "lolita," "pthc,"[18] "ptsc,"[19] "kiddie," "pedofilia" [sic], and "preteen nude." In some instances, the entire file name consists of nothing other than a continuous string of child pornography-related buzzwords and phrases. Not only would the file names of the images and videos contained in the indictment have been visible to Fields prior to downloading, but he had to take an affirmative step to download the material (*i.e.*, clicking on the file, or multiple files, to download). Fields had to then take another affirmative step to move the files to the location that they were ultimately found by Bell (the recycle bin or the external hard drive).

[17] No images or videos depicting child pornography were found on the laptop computer seized from Fields's living room.

[18] Expert testimony was that this term means "preteen hard core."

[19] Expert testimony was that this term means "preteen soft core."

Fields argues that he should have been granted a directed verdict because he could not have knowingly possessed the images for which he was convicted. He testified that he did not know child pornography was available on Limewire along with the adult pornography and music that he sought. He argues that he downloaded files in bulk from Limewire rather than individually. Therefore, he asserts that he never saw individual file names. The Commonwealth did not present evidence that Fields had downloaded individual files. Fields testified that not only did he not see the file names, he had never seen the images and videos that were displayed to the jury. We disagree.

Based on the evidence presented by the Commonwealth, it would not be clearly unreasonable for a jury to find that, for the four counts on which he was convicted, Fields knowingly possessed child pornography. First, as previously stated, the file names were riddled with child pornography buzzwords. In each instance, there was no reason to believe that the files contained anything other than child pornography. Based on the content of the file names, the fact that they were made visible to Fields on his computer screen before downloading (even if among numerous other file names) and the various steps Fields had to take to search, download, and move the files, a reasonable juror could find Fields's testimony that he never saw the file names was not credible. Second, although some of the images were found in the recycle bin (and had been placed there at the same time

as numerous other files unrelated to child pornography), Bell testified and produced evidence that the images had been on Fields's computer for approximately one month before they were moved to the recycle bin. A reasonable juror could infer that Fields saw the file names in the amount of time that they were on his computer before being moved to the recycle bin. Finally, the Commonwealth produced evidence that the images related to Counts 2, 4, 6, and 9 had been opened and viewed. These were the counts on which Fields was convicted. Bell testified that he could tell that these files had been opened due to the Windows Explorer history obtained from Fields's computer. He stated that, once a file has been opened, it is logged in the Explorer main history with the unique prefix of "file:///C:." Commonwealth's Exhibit 18 shows that the images related to Counts 2, 4, 6, and 9 had been logged in Windows Explorer with this unique prefix. A reasonable juror could find, and did find, that these four images had been viewed on Fields's computer and that because they were viewed and clearly contained child pornography, Fields knowingly possessed the images.

Accordingly, when considered in the light most favorable to the Commonwealth, the jury was presented with sufficient evidence that Fields knowingly possessed the child pornography images for which he was convicted. The trial court did not err when it denied Fields's motion for a directed verdict.

C. Admission of Commonwealth's Exhibits 11-14 and 18

Fields argues the trial court erred in admitting Commonwealth's Exhibits 11 – 14 and 18. He argues that the only purpose of these exhibits was "to inflame the jury to return a guilty verdict." At trial, Fields objected because none of the file names contained in Commonwealth's Exhibits 11-13 were part of the indictment.[20] Moreover, Fields argued the Commonwealth could not prove that any of the files listed in the exhibits actually contained child pornography. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Commonwealth v. Bell*, 400 S.W.3d 278, 283 (Ky. 2013). Trial courts are afforded great discretion determining the admissibility of all evidence. An appellate court will review a trial court's evidentiary rulings and will determine that a trial court acted within its discretion absent a showing that its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Commonwealth's Exhibits 11-14 are logs of data obtained from Fields's computer by Bell. Exhibit 11 shows image files (*i.e.*, files ending in

[20] We note that Fields did not object to Exhibit 14 at the trial. Therefore, his argument regarding this issue is not preserved for appeal. However, Fields did object to admission of Exhibits 11-13. Due to the similarity of the contents and stated purpose of Exhibits 11-14, we address the admission of Exhibit 14 with the others.

".jpeg") that had been recently viewed on Fields's computer. Exhibit 12 lists video files that had been recently viewed in the Windows Media Player on Fields's computer.[21] Exhibit 13 shows videos recently viewed in Real Player on Fields's computer. Bell testified that file names in Exhibit 13 that contain the term "Preview-T" had been previewed before being downloaded. Exhibit 14 lists video files that had been recently viewed in Microsoft Media Player on Fields's computer. None of the images and videos in Exhibits 11-14 are the subject of the indictment.

Several of the file names in Exhibits 11-14 are innocent. However, many contain buzzwords and phrases associated with child pornography. As previously stated, Fields has maintained that because he always downloaded files in bulk, he never saw file names or viewed files that would have alerted him to the presence of child pornography on his computer. Commonwealth's Exhibits 11-14 refute Fields's assertion. Whether the files actually contained child pornography is irrelevant. The exhibits were not admitted to show that the files contained child pornography. Rather, the exhibits were admitted to show that, based on the file names, one would *expect* these files to contain child pornography. Bell testified, and Exhibits 11-14 show, that images and videos having file names replete with child pornography buzzwords and phrases had been opened and viewed in various

[21] Exhibits 12-14 are video files ending in the file extension ".mpg".

programs on Fields's computer. A reasonable juror could infer that Fields saw these file names prior to opening them in the associated program, thus discrediting his testimony that he had never seen and had never been alerted to file names indicative of child pornography on his computer (regardless of whether the files actually contained child pornography). Accordingly, the trial court did not abuse its discretion in admitting Commonwealth's exhibits 11-14 into evidence.

Fields also argues that the trial court abused its discretion in admitting Commonwealth's Exhibit 18. He asserts that, "Exhibit 18 purports to list four files that contained the images referenced in Counts 2, 4, 6, and 9 of the indictment, giving the false impression that they were downloaded separately. It, too, contains equally offensive and vile titles. Yet Bell is forced to concede that those files . . . were downloaded with other non-offending files–again consistent with Fields's testimony." He argues that this exhibit was meant to "impassion the jury and inflame their bias against Defendant." We disagree.

Commonwealth's Exhibit 18 was not admitted into evidence to demonstrate that the files contained therein had been downloaded individually. It was admitted to show which files contained in the indictment had not only been downloaded by Fields, but also opened and viewed on his computer. On cross-examination, defense counsel was able to point out that many other innocuous files had been opened in close succession to the images associated with Counts 2, 4, 6,

and 9. Bell explained that, for the purpose of creating Exhibit 18, he had extracted the information regarding these four files out of many others for the sake of simplicity.[22] Bell testified that he knew the files were opened based on the presence of a unique prefix assigned to the file by Windows Explorer once the file had been opened. This unique prefix is seen in the "URL" column of Exhibit 18. A reasonable juror could infer that although Fields may have obtained the files in a bulk download, they were in fact opened and viewed individually.

Fields is correct that the files had "offensive and vile titles." However, the jury had been made aware of the titles prior to admission of Exhibit 18. During his testimony, Bell read the full names of the files aloud prior to showing each image or video on the screen. Fields did not object. The "offensive and vile titles" were a result of the nature of the crime involved and did not make the evidence inadmissible. *Little v. Commonwealth*, 272 S.W.3d 180, 188 (Ky. 2008). The trial court did not abuse its discretion in admitting Commonwealth's Exhibit 18 into evidence.

D. Exclusion of testimony of the defense's expert witness.

Fields argues that the trial court improperly excluded the testimony of his expert witness, Matthew Considine. We disagree.

[22] Defense counsel acknowledged, in his objection, that the information contained in Exhibit 18 was present in Bell's report, but that it was "buried."

KRE 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]" Whether a witness is qualified to give an expert opinion rests in the discretion of the trial court. Therefore, a trial court's determination as to whether a witness is qualified to give expert testimony under KRE 702 is reviewed for an abuse of discretion. *Fugate v. Commonwealth,* 993 S.W.2d 931, 935 (Ky. 1999).

Considine testified for approximately six minutes before the Commonwealth objected to his qualifications as an expert. At that time, the trial court dismissed the jury and allowed the parties to question Considine regarding his qualifications. After ruling that he did not qualify as an expert, the trial court allowed Considine's testimony by avowal for the purpose of this appeal.

Considine testified that he had been working in digital forensics at Cyber Agents, Inc. in Lexington, Kentucky, for almost two years at the time of the trial. He received a Bachelor of Science degree in digital forensics in 2014 from Champlain College in Vermont. Considine testified that he attends a yearly training conference, but the conference is not specific to Limewire or peer-to-peer networking. At the time of trial, Considine possessed no certifications, but was in

the process of taking a test to be certified in Encase software,[23] used for forensic analysis of computers.[24] Considine had never offered an expert opinion at a trial, but testified that he had "consulted" in trials. He had not used Limewire in his professional capacity, but testified that he examined Fields's computer. He testified that he had experience using Limewire "as a child" in 2007 or 2008. Any other direct experience with Limewire was "not for cases, but for [his] own education." Considine had no specific education courses on peer-to-peer networking, but testified that he had one or two class sessions in college that dealt with Limewire. Considine also testified that he considered his co-worker, Trent Strutman, an expert regarding Limewire. He stated that Strutman was available on-the-job to answer any questions he may have.

The trial court did not abuse its discretion in excluding Considine's testimony. There was nothing in his stated qualifications to indicate that he had any sort of specialized knowledge that would have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue." He had only two years of

[23] Considine testified he had completed part one of a two-part examination.

[24] Bell testified that he had been certified to use Encase software since 2009.

professional experience, no certifications, no specialized training, and his direct experience with Limewire was primarily informal and when he "was a child."[25]

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Scott Circuit Court.

GOODWINE, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURS: I concur with the majority's well-written analysis because I cannot say the experienced trial judge in this case erred or abused his discretion. Nor can I say the jury's verdict is not supported by substantial evidence. However, this case should be read as a cautionary tale of the digital age.

Fields's defense began with an explanation that he downloaded numerous files in batch or in bulk using a now defunct file-sharing platform and in doing so unwittingly downloaded four files containing child pornography. One

[25] Fields also argues that Considine's testimony would have bolstered his own. Although the Commonwealth objected only to Considine's qualifications as an expert and not to the duplicative nature of his testimony, Considine's testimony by avowal did not reveal any information that was not previously testified to by Bell. Particularly that, with regard to Limewire: (1) file names are not always indicative of the contents of the file; (2) the file name that is visible on the screen might not have the specific search term that was used, but the metadata might contain the term; and (3) a user is not able to filter adult content from other files, a user can filter only by file type (*i.e.*, image or video or audio). Considine did not offer, and was not asked to give, an explanation as to why Commonwealth's Exhibit 18 showed that four of the images contained in the indictment had been viewed on Fields's computer, if in fact they had not.

might ask whether that is possible. Can one download child pornography just as unintentionally as one downloads a virus? Nothing suggests otherwise. And the verdict does not mean otherwise. In itself, this was not Fields's crime.

The crime Fields was found to have committed was "Knowingly ha[ving] in his . . . possession or control any matter which visually depicts an actual sexual performance by a minor person; or . . . Intentionally view[ing] any matter which visually depicts an actual sexual performance by a minor person." KRS 531.335(1)(a)-(b). The Commonwealth had to prove Fields either knew he had child pornography on his computer or intentionally viewed it. The jury was not persuaded by Fields's attestation that he neither knowingly possessed nor intentionally viewed child pornography. However, it was persuaded to the contrary on the strength of a single witness, Tom Bell. Mr. Bell was both the cybercrimes investigator who traced the illicit files to Fields's computer and the Commonwealth's only witness; he was the only expert on computers the jury heard testify. He was the only person in the case who spoke the digital language.

Mr. Bell created and presented to the jury demonstrative exhibits, including Exhibit 17 and Exhibit 18. These set out information generated by running an analysis of Fields's computer using a forensic software program known as Encase. Isolating the results of the Encase analysis to the counts on which Fields was convicted, Mr. Bell's Exhibit 17 offered the following:

Count 2:

File Creation Date: 2/26/2010 08:34:51 AM
File Location: External Hard Drive
File Path: C\Itunes1\Folder 2\Folder 1\ENTERTAINMENT\
Is Deleted: No
Corresponding link file or other interaction: Yes
Last Visited Date: 01/27/2010 06:41:32 AM UTC
Location of file when link created:
C:/Users/computer/Music (Comp 1 HDD2)
User: Computer
(also exists in the Recycle Bin of Computer 1 HDD 2)
Original Creation Date: 01/27/2010 12:33:04 AM
Date placed in recycle bin: 02:26:2010 08:56:14

. . . .

Count 4:

File Creation Date: 01/27/2010 12:04:34 AM
File Location: Computer 1 Hard Drive 2
File Path: E\$Recycle.Bin
Is Deleted: No
Corresponding link file or other interaction: Yes
Last Visited Date: 01/27/2010 05:31:33 AM
Location of file when link created:
C:/Users/computer/Music (Comp 1_HDD2)

. . . .

Count 6:

File Creation Date: 01/27/2010 12:35:31 AM
File Location: Computer 1 Hard Drive 2
File Path: E\$Recycle.Bin\
Is Deleted: No
Date Placed in Recycle Bin: 02/26/2010 08:56:17 AM
Corresponding link file or other interaction: Yes
Last Visited Date: 01/27/2010 06:55:52 Am UTC
Location of file when link created:

C:/Users/computer/Music (Comp 1_HDD2)
User: Computer
. . . .

Count 9:
File Creation Date: 01/27/2010 12:04:45 AM
File Location: Computer 1 Hard Drive 2
File Path: E\$Recycle.Bin\
Is Deleted: No
Corresponding link file or other interaction: Yes
Last Visited Date: 10/27/2009 02:53:05 AM UTC
Location of file when link created:
C:/Users/Computer/Music (Comp 1 HDD2)

(Record (R.) at 250-52).

Many people, if not most, would need an interpreter of sorts to explain the meaning of these entries and their significance. Why, for example, does the "Last Visited Date" precede the "File Creation Date" on Counts 2 and 9 but are the reverse on Counts 4 and 6? Answering such questions was one of Mr. Bell's roles for the Commonwealth.

In fairness, on cross-examination, some of Mr. Bell's answers boded well for Fields. He clarified that the line of each count entry above identified as "Last Visited Date" did not necessarily mean it was the last time a file was viewed on the computer monitor. That would require a compatible application or program to open the file in a viewable format. Mr. Bell acknowledged that any program interacting with the file – such as virus scanning software or other programs that

run in the background – could trigger a "Last Visited Date." Mr. Bell prepared Exhibit 18 to show that these files were "visited."

Exhibit 18 identified four files from thousands that Fields had almost simultaneously downloaded, and set them out as follows:[26]

> file:///C:/USERS/computer/Music/9yo%20Jenny%20nude%20with%20legs%20 . . . %20underage%20Lolita%20 . . . .jpg
>
> file:///C:/USERS/computer/Music/Kids%20Teens%20Women%20 . . . Underage-Girls-Children-Pedophilia . . . .jpg
>
> file:///C:/USERS/computer/Music/9yo%20Jenny%20nude%20doggystyle%20%20 underage . . . .jpg
>
> file:///C:/USERS/computer/Music/Real%20Private%20Daughter%20 . . . .jpg

Mr. Bell explained that the number of forward slashes immediately following "file:" indicates that the file was "visited," *i.e.*, that some application interacted with the file.

Mr. Bell interpreted the data mined from Fields's computer using Encase software as establishing these illicit files were actually viewed using the

[26] The type on the copy of this exhibit is so small and grainy that the full file name could not be read or set out here with confidence of its accuracy. They are not set out in their entirety for that reason and because it is not necessary to do so to demonstrate (1) that each has three forward slashes indicating they were "visited" by some application, (2) that some of the "language" used is not commonly understood by laypersons, and (3) some of the language were indicators of child pornography. One should note, however, that they do not correlate to the charges in sequence; the first listed file name relates to Count 4, the second to Count 6, the third to Count 2, and the fourth to Count 9.

native program or another, such as Internet Explorer, that generated images of child pornography on the computer's monitor. That is the substantial evidence upon which the jury could hang its hat. Because of that, I concur with the majority that the trial court did not err when it denied the directed verdict motion. The elements of the crime of possessing illicit material were satisfied.

Yet something still seems awry. Conviction for this offense does not require proof that Fields intentionally sought out child pornography to download. It is not necessary or appropriate to reverse this conviction to make the point, but it should be made nonetheless – the statute makes no distinction between violators who possess child pornography intentionally, negligently, or accidentally; the only requirement is that they possess it knowingly and that requirement is met when there is proof the violator accessed it on a computer under his control.

A closer call in this case is whether Mr. Considine was properly disallowed as Fields's expert. The fact that Mr. Considine was only mildly familiar with the file-sharing platform software – the means of delivering the illicit files to Fields's computer – is irrelevant to whether he had specialized knowledge to aid the jury in understanding the forensics of Fields's computer itself.

A file-sharing platform can be analogized to a postal service that delivers a sealed letter written in a foreign language that becomes evidence in a trial. Knowledge of how the postal service operates is irrelevant to the real

question whether the recipient opened the envelope and knew what the letter said. A witness with expertise in envelopes, letter opening, and the foreign language used in the letter is what the jury needs in such a case. Mr. Considine had the analogous special ability to assist the jury in determining whether the message was "opened" and "read" not only by the computer itself, but by Fields. Mr. Considine knew the digital and forensic language even if his knowledge of the delivery system was lacking. His education required that he understand Encase, the very software program Mr. Bell used to generate the reports interpreting the digital information on the computer.

However, it would be wrong to say the trial court abused its discretion in rejecting Mr. Considine as an expert witness even if other judges would have or might have allowed his expert testimony. Furthermore, Fields's counsel had more than enough time to secure an expert whose credentials were no longer in the developmental stage. During the time when Fields was represented by the Department of Public Advocacy, funds for an expert were sought, but sought so close to trial that it certainly lessened the possibility of finding an expert who was both fully qualified and prepared for trial.

In the final analysis, this cautionary tale of Fields's crime does not appear to have begun with his intentional and targeted search for child pornography. Even the Commonwealth takes no pains to challenge Fields's

assertion that the child pornography arrived on his computer as part of bulk downloads, like an unwanted virus.

Still, I cannot disagree with the majority's conclusion that the trial judge's decisions regarding evidence and expert witness qualification are sound, and the jury's verdict does not lack substantial evidence. For these reasons, I concur.

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