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Supreme Court of Kentucky

2022-SC-0179-MR

LEWIS CARPENTER — APPELLANT

v.

ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
NO. 20-CR-00351

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

In this case, Appellant Lewis Carpenter (Carpenter), was convicted by a jury of one count of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities and six counts of possession of matter portraying a sexual act by a minor (also referred to herein as "possession of child pornography"). Carpenter only challenges the possession of child pornography convictions. He challenges all six convictions on the basis that he was entitled to a directed verdict because there was insufficient proof that he knowingly possessed two thumbnail images and four videos containing child pornography. He challenges the four convictions for possessing child pornography videos on the basis that the trial court did not conduct the Kentucky Rule of Evidence (KRE) 403 balancing test before allowing the videos into evidence. Upon review, we conclude that Carpenter was not entitled to a

directed verdict. We do, however, conclude that the convictions for possessing the child pornography videos must be reversed. Consequently, the Boyd Circuit Court's judgment is affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2020, West Virginia Detective Weaver posed on a dating app as a teenage girl named "Ally" as part of his work with an FBI task force investigating crimes against children. "Ally" received a message from Carpenter. Although "Ally's" profile indicated that she was 18 years old, the age required by the app for users to create a profile, she immediately disclosed to Carpenter that she was 14 years old and in high school. Nevertheless, the conversation soon turned sexual, and Carpenter began discussing meeting "Ally." The two messaged back and forth for about two weeks. At one point, Carpenter requested "Ally's" phone number and they began exchanging text messages. The tone of the conversation over text messages remained the same. Even though "Ally" again disclosed that she was 14 years old and lived with her mother, Carpenter discussed taking drugs and meeting up for sex.

After Carpenter began sending text messages to "Ally," the detective traced the phone number to Lewis Carpenter in Ashland, Kentucky. The detective contacted the Ashland Police Department and transferred the investigation to it. At Sergeant Daniel's direction, Ashland Police Officer Bailey went to Carpenter's apartment. Officer Bailey performed a "welfare check" as a ruse to determine whether anyone else lived at the residence or used the phone associated with that number. Carpenter answered the door when Officer

Bailey knocked. In response to Officer Bailey's questions, Carpenter stated that he was the only one who lived there and that no one had called 911 and hung up. Carpenter confirmed the phone number was his.

Carpenter was arrested on September 1, 2020, and charged with one count of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities.[1] Pursuant to a search warrant, several electronic devices were recovered from Carpenter's apartment, including a laptop computer. Following a forensic examination of the laptop computer, Carpenter's indictment was amended to include six counts of possession of matter portraying a sexual performance by a minor.[2]

Sergeant Daniels testified about his forensic investigation. As the jury heard from Sergeant Daniels, aided by a PowerPoint presentation, a forensic analysis of the laptop computer revealed various accounts in the allocated space, space containing active files. These accounts contained artifacts, i.e., filenames, suggestive of a user downloading child pornography. The examination also found within the unallocated space, space containing deleted data, pictures and videos containing child pornography. As explained by Sergeant Daniels, the data in the unallocated space is deleted from the allocated space by the user or as automatically programmed and the deleted data remains in the unallocated space until that portion of the hard drive is written over with new data.

[1] Kentucky Revised Statute (KRS) 510.155.

[2] KRS 531.335(1).

Specifically, the forensic examination revealed that within the allocated space, there was a password-protected Windows user account under the name "Lewis" and inactive password-protected "default" Windows user accounts, such as a guest account, created by the computer. An email address was also found on the computer under the "Lewis" user account which contained Carpenter's name. A Skype account was also found in the allocated space which contained Carpenter's name; the account was created April 3, 2017. Also registered under Carpenter's name was an installed media player application, used for playing videos, and an installed peer-to-peer file-sharing software program, which allows file sharing across the internet. Additional programs found on the hard drive included "C-Cleaner," used to delete unused files from a hard drive, and a Linux operating system. Sergeant Daniels explained that the existence of the "C-Cleaner" and the Linux operating system on the computer was not illegal, but in his opinion, they indicated that the user was "somewhat advanced."

Sergeant Daniels described the filenames found under the "allocated space" indicative of child pornography. Within the Windows "Users" folder, there was a subfolder "Lewis" which contained a subfolder "downloads." The forensic examination revealed that some filenames contained graphic terms, such as "9yo birthday fuck," and at one time the "downloads" folder contained a video file with the name containing the term "9yo"; two video files with the names containing the term "12yo," accessed April 1, 2017 (one of these files had been in subfolder "porn"); a video file with the name containing the term

"6yo," accessed April 1, 2017; a video file with the name containing the term toddler (and "black baby deep throat"), accessed April 1, 2017; and a video file with the name containing the term "8yo," accessed April 2, 2017. The forensic examination also revealed that the media player had within its recently played list files with filenames including terms "6yo," "bedtime" and a file with the term "9yo," having the same filename as that within the "downloads" folder. The forensic examination further revealed a search within the peer-to-peer file sharing program inclusive of the term "9yo." Although the filenames were suggestive of child pornography, no actual images or videos associated with the filenames were located or recovered.

Two thumbnails and four videos of child pornography were found in the "unallocated space" on the hard drive. The forensic examination did not reveal any information identifying the thumbnails or video files, such as a filename, download date or time. No information was found for the thumbnails or videos which directly tied them to Carpenter.

Sergeant Daniels' PowerPoint presentation displayed images of the two thumbnails, displaying multiple pornographic photos of the child, and screenshots taken from the videos. Sergeant Daniels described the first thumbnail as containing images of a small child in a pink shirt about five to seven years old and the second thumbnail as containing images of a child about eight to nine years old. The first screenshot was of a young boy masturbating in a chair. The second screenshot showed a young boy masturbating on a couch; Sergeant Daniels estimated the child to be four to

seven years old. The third screen shot showed an infant boy with a pacifier in his mouth, lying down with no pants on and a clean diaper nearby. The fourth screenshot showed a young boy performing oral sex on another male.

After seeing the PowerPoint images, over defense counsel's objection and renewal of the pretrial suppression arguments, the jury watched the videos in full. The first video, 5 minutes in length, showed the infant boy lying down with a pacifier in his mouth while a man took photos of the child's genitalia (first minute) and the man subsequently performing oral sex on the child while intermingling other photo taking (four minutes). The second video, three minutes in length, showed two young boys kissing (first minute) and then engaging in anal and oral sexual acts (two minutes). The third video, four minutes in length, showed a young boy sitting on a couch masturbating. The fourth video, one and one-half minutes in length, showed a young boy masturbating while a man watches and then performs oral sex on the boy (about five seconds).

As noted above, the jury convicted Carpenter on all counts. For solicitation of the minor, the jury recommended that Carpenter serve five years in prison. For the four counts of possessing the videos portraying a sexual act by a minor, the jury recommended that Carpenter serve the maximum five years on each charge and that the five-year sentences run consecutively. For possessing the thumbnails portraying a sexual act by a minor, the jury recommended that Carpenter serve one year on each charge, and the sentences on those two charges run concurrently, but consecutively to the other

sentences. While the jury recommended Carpenter be sentenced to a total of twenty-six years in prison, in accordance with KRS 532.110 and KRS 532.080(6)(b), the trial court sentenced Carpenter to the statutory maximum of twenty years in prison. This appeal followed.

ANALYSIS

Carpenter presents two arguments on appeal. First, Carpenter argues that the trial court erred by denying his pretrial motion to suppress and overruling his trial objection to playing the four videos in full. Second, Carpenter argues that the trial court erred by denying a directed verdict on the possession of pornography charges. These arguments are addressed in turn.

I. The trial court abused its discretion under KRE 403 when it failed to review the child pornography videos before the videos were admitted in evidence.

Carpenter argues that the trial court abused its discretion, making a decision which was arbitrary, unreasonable, unfair, or unsupported by sound legal principles,[3] when it denied his KRE 403[4] pretrial and trial motions to suppress.[5] The Commonwealth argues that the content of the videos was probative and not unduly prejudicial.

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[3] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[4] KRE 403 states in full: "Although 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."

[5] As noted above, Carpenter objected to the Commonwealth playing the four videos in full at trial, renewing his suppression motion. With evidence of the videos' contents having been presented at that time, his objection incorporated arguments related to the impact of that evidence on the KRE 403 balancing test. Because the

Pretrial, Carpenter moved to suppress any playing of the videos, presenting multiple arguments.[6] Pertinently, Carpenter argued in his written motion and during the suppression hearing that the videos should be excluded under the KRE 403 balancing test and *Hall v. Commonwealth*[7] because the graphic, shocking nature of the videos made the videos unduly prejudicial, especially when he did not intend to challenge whether the video evidence was child pornography.[8] Defense counsel asserted that under *Hall* the trial court must go through the KRE 403 three-part analysis. Defense counsel advocated that *Hall*'s logic, although speaking on the subject of gruesome photos in a murder case, applies equally to the playing of graphic videos of child pornography in a jury trial. Defense counsel further advocated that child pornography is no less shocking, or perhaps even more so, than the images of dead bodies referenced in *Hall*. Regarding the prejudicial effect of the videos,

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KRE 403 balancing test principles apparently would apply at either point in this case, we focus on Carpenter's pretrial suppression motion.

[6] Carpenter also moved to suppress any mention of electronic searches of files or filenames recovered from the computer. That issue is not presented on appeal.

[7] 468 S.W.3d 814 (Ky. 2015).

[8] Carpenter conceded that the videos contained child pornography and was willing to stipulate to the contents of the video and the age of the persons depicted. Carpenter argued that with that stipulation, the videos offered very little probative value, were needlessly cumulative, and the only remaining factual issue for the jury was whether he knowingly possessed the pornography. Carpenter's brief emphasizes the offer of stipulation. While issues regarding a defendant's stipulation appear relatively common in child pornography cases, *see*, *e.g.*, *Helton v. Commonwealth*, 595 S.W.3d 128 (Ky. 2020), we need not address Carpenter's stipulation arguments to resolve this appeal. We note, however, *Helton* explains that a defendant's offer to stipulate has little, if any, bearing if the Commonwealth does not agree to the stipulation. *See* 595 S.W.3d at 136.

defense counsel argued that the main issue was whether the shocking images cause emotion to cloud judgment, the risk being that a jury would see the images and be so shocked that its verdict would be out of disdain for the defendant and not based on the facts or whether the prosecution had proven its case beyond a reasonable doubt.

The Commonwealth argued at the hearing that *Hall*, a murder case, was not pertinent in this possession of child pornography case. The Commonwealth further argued that in this case, the videos are the evidence of the crime and although prejudicial, the videos are probative and it should be allowed to play the videos. The trial court denied the motion to suppress.[9]

As the Kentucky Rules of Evidence explain, all relevant evidence is admissible unless an exception applies.[10] Relevant evidence is "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."[11] And under KRE 403, 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."

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[9] The trial court ruled that the Commonwealth was entitled to show the images and that, even with a stipulation, the jury must make a finding that the images or videos in question constitute child pornography.

[10] KRE 402.

[11] KRE 401.

> What is contemplated as "unfairly" or "unduly" prejudicial is evidence that is harmful beyond its natural probative force: "Evidence is unfairly prejudicial only if . . . it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.'"[12]

Carpenter maintains his arguments that the videos were unduly prejudicial and complains that the trial court did not view the videos as it was required to do in accordance with the principles espoused in *Hall* and *Jones*. In *Jones*, decided prior to *Hall*, this Court stated:

> [W]e note that the trial court specifically stated that it purposely never viewed the sexually explicit images before they were exhibited to the jury. In its role as a gatekeeper of evidence, a trial court must view and consider any disputed evidence to determine its admissibility on relevancy grounds, regardless of the revolting nature of that evidence. Stated another way: how could the trial court properly weigh the prejudicial effect of these images against their putative, probative value without first seeing them? On remand, the trial court must not abdicate its gatekeeping role by ruling in a vacuum as to the admissibility of unseen images or objects.[13]

The Commonwealth agrees that *Hall* provides direction for the KRE 403 balancing test when dealing with "gruesome or repulsive" evidence and that when determining the admissibility of particularly gruesome or shocking evidence, for proffered evidence, the trial court must assess its probative worth, its risk of harmful consequences or undue prejudice if the evidence is admitted, and then whether the probative value is substantially outweighed by

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[12] *McLemore v. Commonwealth*, 590 S.W.3d 229, 234 (Ky. 2019) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.10[4][b] (4th ed. 2003) (internal citations omitted)).

[13] *Jones v. Commonwealth*, 237 S.W.3d 153, 161 (Ky. 2007).

the harmful consequences.[14] The Commonwealth, however, asserts that *Hall* may be distinguished from Carpenter's case such that the KRE 403 principles which *Hall* applied to the gruesome murder and autopsy photos in that case do not apply here. For example, the Commonwealth argues that *Hall* does not stand for the proposition that the trial court must go through a photo-by-photo or video-by-video analysis of each individual item; that *Little v. Commonwealth*[15] is a case more analogous to Carpenter's case as it involves child pornography, and in that case the Court determined that the trial court did not abuse its discretion when it allowed the introduction of three videotapes in their entirety; and that unlike here, where the videos themselves were the crime, the photographs in *Hall* were not introduced to prove an element of the crime. The Commonwealth contends that it is entitled to prove its case by competent evidence of its own choosing and thus, the trial court properly admitted the videos.

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[14] *Hall*, 468 S.W.3d at 823.

[15] 272 S.W.3d 180 (Ky. 2008). In *Little*, the defendant was convicted of using a minor in a sexual performance and promoting a sexual performance by a minor. The Commonwealth introduced three videos depicting Little's two children, either nude or wearing underwear. *Id.* at 183. The defendant argued that it was unduly prejudicial to allow the introduction of all three videos in their entirety. *Id.* at 186-87. The Court held that the videos were relevant to show Little's intent, which could be inferred from his actions in the videos, and to rebut his defense that the videos were for family purposes. *Id.* at 187. While the Court agreed that the videos may be viewed as repulsive, the Court concluded that they were not unduly prejudicial. *Id.* at 187-88. As we recently noted in *Helton*, a child pornography case in which the defendant's and the Commonwealth's arguments mirror those in this case, *Little* is a case which emphasizes the importance of the KRE 403 balancing test; it is a case which demonstrates that the probative value of child pornography can outweigh the danger of undue prejudice, depending on the unique facts of the case. *Helton*, 595 S.W.3d at 134.

Upon review of *Hall* and *Jones*, we do not find the Commonwealth's arguments persuasive. *Hall* and *Jones* both address the trial court's necessary role in viewing images which have been objected to under KRE 403. *Hall* also addresses that KRE 403 allows a trial court to limit the Commonwealth's presentation of its chosen evidence. Additionally, *Hall*'s comprehensive explanation of KRE 403's application is not limited to the gruesome murder and autopsy photos or evidence that is not itself the crime. For example, *Hall* states:

> [A]ll evidence [is] subject to the balancing test of KRE 403: "Although 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." KRE 403. As Professor Lawson points out, "Rule 403 defines the most important and far-reaching of all the exclusionary rules of the law of evidence." Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.20[6] at 101 (5th ed. 2013). We now make clear that in all cases in which visual media showing gruesome or repulsive depictions of victims are sought to be introduced over objection, as with all other types of evidence, the trial court must conduct the Rule 403 balancing test to determine the admissibility of the proffered evidence.[16]
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> [KRE 403] inquiries are very fact intensive and are "totally incompatible with bright line rules and rulings." Their resolution is highly dependent upon the specific contexts in which they arise. "And, '[s]o often is the Rule invoked, and in such a wide variety of circumstances, that individual cases provide little guidance for future rulings.'"[17]
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> . . . .

[16] *Hall*, 468 S.W.3d at 823.

[17] *Id*. (internal citation omitted).

> We recognize that the Commonwealth does have the typically onerous burden of proving the *corpus delicti* beyond a reasonable doubt, and that photos of a victim's corpse are relevant to show the nature of the injuries inflicted on the victim. *See*, *e.g., Ernst v. Commonwealth*, 160 S.W.3d 744, 757 (Ky. 2005). And we have consistently held that the Commonwealth may "prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see." *Pollini v. Commonwealth*, 172 S.W.3d 418, 424 (Ky. 2005). *But see Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky. 2009) (holding that defendant charged with being a felon in possession of a firearm may stipulate or admit to having been previously convicted of a felony and thus prevent the Commonwealth from introducing evidence of the prior felony). That notwithstanding, the Commonwealth's prerogative in dictating the specific evidence used to prove its case is not without limit, and Rule 403 is perhaps the most important check on the Commonwealth in this respect.[18]
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> This is the prototypical case where Rule 403 required the trial judge to comb through and exclude many of the offered photographs; it required the judge to recognize and safeguard against the enormous risk that emotional reactions to the inflammatory photos would obstruct the jury's careful judgment and improperly influence its decision, and the judge failed to do so.[19]

Helton v. Commonwealth[20] is a recent case illustrative of the KRE 403 balancing test in a possession of child pornography case. The trial court in that case applied these established principles and in consideration of the circumstances, this Court concluded that the trial court did not abuse its discretion in permitting the Commonwealth to introduce limited portions of five

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[18] *Id*. at 825.

[19] *Id*. at 827.

[20] 595 S.W.3d 128 (Ky. 2020).

videos. In *Helton*, like here, the defendant moved the trial court to prohibit the Commonwealth from playing the child pornography videos found on the defendant's desktop computer.[21] Comparatively, the defendant argued that it was unnecessary to show the videos because the only issue was *who* accessed the videos, not what the videos contained.[22] The Commonwealth responded that the videos were the best evidence available to demonstrate the elements of the charged offenses.[23]

In *Helton*, however, the parties agreed that the trial court needed to view the videos prior to conducting a KRE 403 balancing test. The trial court watched the five videos. The trial court ruled that the videos should be played for the jury to show "what [they are]" but that the videos did not need to be shown in full and particularly, after the point of sexual contact; the trial court explained that the videos were "too graphic" and would be overwhelming to the jury. The trial court further directed the Commonwealth to show only the briefest portion of the videos available to establish the necessary elements. Before the Commonwealth played the videos, the trial court explained to the jury that they were about to see graphic videos, but only a small portion would be played "to avoid repetition and cumulative use" of the graphic videos. A small portion of each video was then played for the jury,

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[21] *Id*. at 132.

[22] *Id*.

[23] *Id*. at 132-33.

followed by the lead investigator's description of the remainder of the video.[24]

The jury convicted the defendant of five counts of possession of matter portraying a sexual performance by a minor.[25] On appeal, the defendant argued that the trial court abused its discretion in permitting the Commonwealth to admit portions of the five videos containing child pornography.[26] Pertinently, the defendant argued that the probative value of the videos was substantially outweighed by the danger of undue influence.[27] This Court expressed that "the videos themselves were highly probative of the fact that they did, in fact, contain child pornography. Obviously, this is a necessary element of the charges of possession and distribution of matter portraying a sexual performance by a minor."[28] We further explained:

> While the very nature of child pornography videos renders them inherently prejudicial, the danger of undue prejudice did not outweigh the probative value of the videos in this case. Each video contained a different video file, which established a separate charge. The trial judge directed the Commonwealth to limit the excerpts shown to the jury to the bare minimum necessary to establish the elements of those charges, and the Commonwealth did so, showing mere seconds of each video. In fact, the longest video shown to the jury was only nine seconds in length, and the

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[24] *Id.* at 133.

[25] The defendant was also found guilty of five counts of distribution of matter portraying a sexual performance by a minor. *Id.* at 132-33.

[26] *Id.* at 132.

[27] *Id.*

[28] *Id.* at 136.

> jury saw, at most, a total of twenty seconds of video.[29] As the trial judge noted, these limitations reduced the cumulative effect of the images and minimized their potential for undue prejudice.[30]

Purdom v. Commonwealth,[31] is an unpublished Court of Appeals' case, but it is a factually comparable case; it is a case in which the trial court did not conduct a KRE 403 analysis after defense counsel objected during trial to introduction of child pornography videos.[32] Like here, neither party suggested that the trial court should view the videos.[33] In *Purdom*, the defendant was on trial for charges of possession and distribution of matter portraying a sexual performance by a minor.[34] After the Commonwealth's witness gave a brief description of the content of each video, defense counsel objected to the anticipated playing of portions of the videos during trial.[35] Defense counsel

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[29] The jury viewed nine seconds of video one in which a nude preteen is dancing while an adult male inserts his finger into the girl's vagina; the video in total was five and one-half minutes long. The jury viewed three to four seconds of video two in which a young female child (three to four years old) is seen standing in front of a partially nude adult male, and the child masturbates the male's erect penis; the video was one minute and five seconds long. The jury viewed approximately three seconds of video three in which the child also depicted in video two is seen standing in front of a partially nude adult male masturbating the male's erect penis; the video was one minute and eight seconds long. The jury viewed approximately one second of video four in which an adult male penis is seen penetrating the anus of a nude toddler (two to four years old); the video was seven seconds long. And the jury viewed two to three seconds of video five in which an adult male penis is seen penetrating the anus of a toddler; the video was fifteen seconds long. *Id.* at 133.

[30] *Id.* at 136-37.

[31] No. 2014-CA-002079-MR, 2016 WL 2586080 (Ky. App. Apr. 22, 2016).

[32] *Id.* at **2-3.

[33] *Id.* at *4.

[34] *Id.* at *1.

[35] *Id.* at *2.

argued that the videos' prejudice outweighed any probative value and playing any part of them was cumulative and unnecessary because the Commonwealth's witness had already and would again verbally describe the activity depicted in the clips the Commonwealth wanted to play.[36] Defense counsel asked the trial court to exclude all the videos.[37]

The Commonwealth argued that it was necessary to play the videos to establish the elements of both crimes. The Commonwealth also stated that it would only play enough of each video to establish it contained a sexual performance by a minor. The trial court overruled defense counsel's objection. Across seven videos, the Commonwealth played clips ranging from two seconds to two minutes and fifty-two seconds.[38]

The Court of Appeals agreed with the defendant that the trial court abandoned its role as a gatekeeper by admitting the videos without first viewing them and performing the KRE 403 balancing test.[39] The Court of Appeals described *Jones* and *Hall* as cases which direct trial courts to view potentially inflammatory material before allowing it to be shown to a jury.[40] The Court of Appeals explained that even though no one ever suggested that the trial court view the videos, that did not relieve the trial

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[36] *Id.*

[37] *Id.*

[38] *Id.* at *3.

[39] *Id.*

[40] *Id.* at *4.

court of its responsibility to do the required balancing test.[41] The Court of Appeals, in a 2-1 decision, reversed the defendant's convictions.[42]

In the instant case, in consideration of *Jones*, *Hall*, and *Purdom*, we conclude that the trial court abused its discretion by not viewing the videos before ruling that the videos were not unduly prejudicial and allowing them in evidence. The trial court needed to know what was in the videos to assess the potential prejudice to Carpenter against the evidence's probative value and properly exercise its discretion under KRE 403.

While Carpenter argues that the prejudicial effect of the videos is apparent in the jury's sentencing recommendation, the Commonwealth argues that any error in the admission of the videos was harmless error because Carpenter did not contest that the videos depicted child pornography and the jury would not have been surprised by what the videos depicted. Like in *Helton*, while it can easily be said that little of each video needed to be viewed for the jury to know that it contained child pornography, it was incumbent upon the trial court to weigh the prejudicial impact of the jury viewing approximately twelve to thirteen minutes of the pornographic images. In this case, the jury recommended that Carpenter be sentenced differently for knowingly possessing the thumbnails (one year on each charge to be served

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[41] *Id.*

[42] The Court of Appeals' opinion was authored by then-Court of Appeals Judge Nickell. Then-Court of Appeals Judge VanMeter dissented, stating that "the record discloses any error of the trial court constituted harmless error." *Id.* at *6.

concurrently) and knowingly possessing the videos (five years on each charge to be served consecutively).

> A non-constitutional evidentiary error may be deemed harmless, . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[43]

We cannot say with fair assurance that the judgment was not substantially swayed by the error or that the error did not affect the defendant's substantial rights.[44] Carpenter's four convictions resulting from possessing videos containing child pornography must be reversed.

II. The trial court did not err by denying a directed verdict.

Carpenter argues that there was insufficient evidence proving that he knowingly possessed the child pornographic images and videos on his computer. Carpenter raised this argument when he moved for a directed verdict at the close of the Commonwealth's case and at the close of the defense's case.[45] The Commonwealth argues that although the evidence was circumstantial, it was sufficient to prove knowing possession.

When ruling on a motion for a directed verdict,

> the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is

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[43] *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009) (internal citations omitted).

[44] Kentucky Rule of Criminal Procedure (RCr) 9.24.

[45] Carpenter also raised the same claims in a motion for judgment not withstanding the verdict and a motion for a new trial.

> 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.[46]

"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."[47] With that standard in mind, we turn to the elements of KRS 531.335(1)(a), which the Commonwealth was required to prove beyond a reasonable doubt.

> (1) A person is guilty of possession 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:
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> (a) Knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person; or
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> (b) Intentionally views any matter which visually depicts an actual sexual performance by a minor person.

At trial, the Commonwealth's theory was that Carpenter knowingly had the thumbnails and videos, which depicted actual sexual performance by a minor, in his possession or control. "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

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[46] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

[47] *Id.* (citation omitted).

exists."[48] "Possession" means "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object."[49]

As this Court has previously explained in *Crabtree v. Commonwealth*[50] when addressing the sufficiency of proof in that seminal child pornography case, direct proof of knowledge is not necessary. We stated:

> "[P]roof of actual knowledge can be by circumstantial evidence." *Love v. Commonwealth*, 55 S.W.3d 816, 825 (Ky. 2001). Thus, "'proof 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, *supra*, § 2–2(c)(l), at 45).[51]

Carpenter argues that there was a lack of evidence tying the thumbnail images and videos to him and therefore the evidence was insufficient to prove that he knowingly possessed or was aware of the thumbnails and videos in the unallocated space of the computer. He asserts that because it could not be determined when the thumbnails or videos were created, downloaded, or deleted, or no other identifying characteristics were retrieved, it was not a fair and reasonable inference that he knowingly possessed the pornographic matter on his computer. He also points out that none of the additional computers, cellphones or thumb drives at his apartment contained child pornography.

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[48] KRS 501.020(2).

[49] KRS 500.080(17).

[50] 455 S.W.3d 390 (Ky. 2014).

[51] *Id.* at 399.

In support of his argument that the evidence in this case only supported a reasonable inference that he *may* have known that he had child pornography on his computer, Carpenter cites a statement from *United States v. Keefer*[52] as representing the proof here, that is,

> The court noted that the proof established only that the images "were *present* on [the] computer at some point," and that their '[p]resence . . . d[id] not inherently require knowing possession or access, as anyone who has received spam email or visited one website only to have another, inadvertently accessed, website pop-up knows all too well.'[53]

The Commonwealth rebuts Carpenter's argument that the evidence only supported a reasonable inference that he *might* have knowingly possessed child pornography by pointing to Sergeant Daniel's testimony about evidence found on the allocated space on Carpenter's computer. As described above, Sergeant Daniels testified that email and Skype accounts tied to Lewis Carpenter were located in the allocated space; the "downloads" folder, located under the username "Lewis" did not contain actual files but contained evidence of video filenames indicative of child pornography; the media player's "recently played" files, also not containing actual files, contained file names indicative of child pornography; and in the registry file associated with the file-sharing program, there was evidence that someone searched using a term indicative of child pornography.

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[52] 405 F.App'x 955, 958 (6th Cir. 2010).

[53] *Crabtree*, 455 S.W.3d 390, 408 (Ky. 2014) (quoting *Keefer*, 405 F.App'x at 958) (internal citations omitted).

The trial court concluded that a reasonable jury could find Carpenter did not obtain the images and videos located within the unallocated space by mistake or circumstance and that based upon the file names indicative of searches for pornography within the allocated space, Carpenter did indeed download and knowingly possess the items located within the unallocated space.

> "Circumstantial evidence has its limits." *Commonwealth v. Goss*, 428 S.W.3d 619, 626 (Ky. 2014). The "proof 'must do more than point the finger of suspicion.'" *Id.* (quoting *Rogers v. Commonwealth*, 315 S.W.3d 303, 311 (Ky. 2010)). Moreover, "[a] conviction obtained by circumstantial evidence cannot be sustained 'if [the evidence] is as consistent with innocence as with guilt.'" *Id.* (quoting *Collinsworth v. Commonwealth*, 476 S.W.2d 201, 202 (Ky. 1972)).[54]

When considering the sufficiency of circumstantial evidence of knowing possession, "it is clear that there must be an evidentiary nexus between the evidence that could show knowledge and the illegal images found on the computer."[55] We agree with the trial court that nexus existed here. Considering the evidence as a whole, it was not clearly unreasonable for the jury to find Carpenter guilty of possession of child pornography. The denial of the directed verdict was proper.

CONCLUSION

The Boyd Circuit Court's judgment is affirmed in part and reversed in part. Carpenter's convictions for possession of matter portraying a sexual act

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[54] *Crabtree*, 455 S.W.3d at 408.

[55] *Id.*

by a minor in the videos are reversed. All other convictions stand. This case is remanded for further proceedings consistent with this Opinion.

All sitting. VanMeter, C.J.; Bisig, Conley, Nickell, and Thompson, JJ., concur. Keller, J., concurs in result only.

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