STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DOUGLAS BRENT LAZARUS,

Defendant-Appellee.

UNPUBLISHED
December 23, 2008

No. 277925
Jackson Circuit Court
LC No. 06-004536-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN EDWARD FLICK,

Defendant-Appellant.

No. 278531
Jackson Circuit Court
LC No. 06-003884-FH

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

These consolidated cases require us to decide whether the purchase of access to a child pornography website may constitute knowing possession of child sexually abusive material, in violation of MCL 750.145c(4). In Docket No. 277925, the prosecutor appeals as of right the circuit court's order quashing the information and dismissing the case against defendant Douglas Lazarus. In Docket No. 278531, defendant Steven Flick appeals by leave granted the circuit court's order denying his motion to quash the information and dismiss the case. In both cases, we conclude that the prosecutor established probable cause to believe that defendants knowingly possessed child sexually abusive material, as contemplated by the plain language of MCL 750.145c(1)(*l*) and (4). Accordingly, in Docket No. 277925, we reverse, and in Docket No. 278531, we affirm.

I. Facts and Proceedings

A. Docket No. 277925, *People v Lazarus*

In 2002, agents of the Department of Homeland Security, Bureau of Immigration and Customs Enforcement (ICE), conducted an investigation of Regpay, a Florida company that processed credit card payments for subscriptions to child pornography websites accessed through the Internet. Federal agents seized all of Regpay's transactional data, allowing them to identify subscribers to Internet child pornography websites. ICE agents connected defendant Lazarus's email address to an online child pornography subscription purchased using his credit card.

A computer forensic expert conducted a consensual search of defendant's computer and found evidence that defendant had visited "a large number of websites that contained titles indicative of child pornography." All of the child pornographic images resided in the computer's temporary Internet files.[1] The police interviewed defendant regarding the child pornography purchases, and defendant admitted to paying for access to child pornography websites with his credit card. In October 2006, the prosecutor charged defendant with knowing possession of child sexually abusive material, contrary to MCL 750.145c(4).

On January 23, 2007, the district court conducted a preliminary examination. Joshua Edwards, a computer forensics expert, testified that he found approximately 26 child pornographic images within the hard drive of defendant's computer. Edwards described that "12 or 14" images resided in the hard drive's "allocated space," which he defined as "files that are not deleted and are still on a hard drive that the user could access." When defense counsel inquired of Edwards whether "images in the temporary Internet file [are] considered allocated space[,]" Edwards replied, "Yes, they are." At the preliminary examination's conclusion, counsel for defendant moved to quash the information, arguing that the mere presence of child sexually abusive images within the temporary Internet files of defendant's computer did not establish "knowing possession" of the contraband. The district court denied defendant's motion and bound him over for trial.

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[1] The Internet encyclopedia Wikipedia describes temporary Internet files as follows:

> Each time a user visits a website using Microsoft Internet Explorer, files downloaded with each web page (including html, images, Cascading Style Sheets and JavaScript scripts) are saved to the Temporary Internet Files folder, creating a cache of the web page on the local computer's hard disk, or other form of digital data storage. The next time the user visits the cached website, only changed content needs to be downloaded from the Internet; the unchanged data is available in the cache.
>
> Despite the name 'temporary,' the cache of a website remains stored on the hard disk until the user manually clears the cache. . . . [http://en.wikipedia.org/wiki/Temporary_Internet_File (last accessed November 24, 2008).]

Defendant then moved in the circuit court to quash the information, contending that "the passive viewing of the images on [defendant's] computer screen" did not constitute possession for the purposes of the criminal law. The circuit court agreed, and in a bench opinion ruled that defendant did not "possess[]" the child pornography because "[s]omething more has to be done to make it possession." The prosecution then filed this appeal.

B. Docket No. 278531, *People v Flick*

ICE agents identified defendant Flick as having purchased access to an Internet website containing child pornography during April, September and October 2002. In May 2006, United States agents and a Jackson County detective obtained a search warrant for defendant's computer. A forensic examiner found child pornographic images on the computer's hard drive, and the prosecutor charged defendant with possession of child sexually abusive material, contrary to MCL 750.145c(4). In an interview with a Jackson County detective, defendant admitted that "out of curiosity" he had downloaded child pornographic images to his computer. Defendant further admitted that he had used his credit card to pay for access to Internet web sites that sold child pornographic images for potential downloading to the purchaser's computer.

Larry Dalman, a private computer forensic analyst, examined defendant's computer in the presence of several federal agents. Dalman found "numerous" child pornographic images within defendant's hard drive, but Dalman reported that all of the images were deleted after they appeared on the computer screen, and that the images remained present only in the computer's temporary Internet files.

Defendant brought a motion to dismiss in the district court, contending that he did not "possess" child pornography. Defendant insisted that MCL 750.145c(4) "was not designed to prohibit viewing child pornography," and because he did not "save child pornography to a file, to a folder, send it by way of e-mail, print and possess images or burn it to a disc," the statute did not permit his prosecution. The district court denied defendant's motion, explaining as follows in its written opinion:

> This court is not too computer literate, but is of the opinion that it stretches the imagination somewhat to argue that a person does not possess child pornography where he admits he purchased it and downloaded it no matter where it appears on his computer system. The Defendant in this case does not state he received it from an e-mail attachment that he opened or was even merely browsing such sites on the internet. He paid for it and he downloaded it on his system. That, to this court, is knowingly possessing child pornography on a computer. Hence, the Defendant's motion to dismiss will be denied and this matter will proceed to preliminary examination.

Defendant renewed his motion in the circuit court, challenging whether the prosecution's evidence demonstrated probable cause that he *knowingly* possessed child sexually abusive material. According to defendant, the evidence revealed that he merely "viewed" child pornography and took no affirmative actions to "knowingly possess" the images found on his computer's hard drive. The parties stipulated to the facts and agreed to waive the preliminary examination. The circuit court denied defendant's motion and bound him over for trial. This Court granted defendant's application for leave to appeal and consolidated his case with the

prosecutor's appeal in *Lazarus* (Docket No. 277925). *People v Flick*, unpublished order of the Court of Appeals, entered August 21, 2007 (Docket No. 278531).

II. Standard of Review

We review for an abuse of discretion a circuit court's ruling regarding a motion to quash the information and a district court's decision to bind over a defendant. *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000). "However, where the decision entails a question of statutory interpretation, i.e., whether the alleged conduct falls within the scope of a penal statute, the issue is a question of law that we review de novo." *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

III. Analysis

A. Purpose of a Preliminary Examination

A preliminary examination serves two functions: to determine whether a felony was committed, and to ascertain whether probable cause exists to believe the defendant committed it. *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). "At the examination, evidence from which at least an inference may be drawn establishing the elements of the crime charged must be presented." *Id*. at 126. The establishment of probable cause requires proof less rigorous than that required to prove guilt beyond a reasonable doubt. *Id*. Probable cause "requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *Id*., quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

B. Penal Statutes at Issue

In these consolidated cases, we must determine whether the prosecution established at the preliminary examinations probable cause to believe that defendants "knowingly possessed" the child sexually abusive images found in their computers. We begin with the language of the governing statute, MCL 750.145c(4):

> A person who *knowingly possesses* any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. . . . [Emphasis added.]

The statute defines "child sexually abusive material" as

> any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, *computer*,

> *computer storage device*, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording. [MCL 750.145c(1)(*l*)[2] (emphasis added).]

Defendants do not contest that the images found in their computers qualified as depictions of "a child or appear[] to include a child engaging in a listed sexual act."

C. Principles of Statutory Construction

When construing a statute, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "If the statutory language is clear and unambiguous, the statute is enforced as written." *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005), mod on other grounds in *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006). Our Supreme Court has explained that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). In ascertaining Legislative intent, we "give effect to every word, phrase, and clause in [the] statute." *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) (internal quotation omitted). "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *Hill, supra* at 515. We must consider the plain meaning of critical words or phrases used in the statute, as well as their placement and purpose in the statutory scheme. *Id*. When a statute fails to provide the definition of certain terms, we utilize their ordinary meanings. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006).

D. Discussion

Defendants first contend that the mere presence of the child sexually abusive images within the temporary Internet files of their computers does not constitute "possession" because they merely viewed the contraband images, which their computers automatically stored. According to defendant Lazarus, "passive viewing on the [I]nternet of [child pornography] does not violate the law because viewing does not constitute possession." Defendant Flick contends that the statute requires "actual corporeal possession and not just viewing."

But defendants do not contest their possession of the seized computers. The plain language of Michigan's statute punishes the possession of "computers" containing child sexually abusive material. In MCL 750.145c(1)(*l*), the Legislature broadly defined "child sexually abusive material" to encompass more than the typical child pornographic media, such as magazines, photographs, films and books. In addition to those formats, the statute specifically defines as "child sexually abusive material" "a … *computer*, *computer storage device* . . . *containing*" various incarnations of prohibited child pornographic images, including an "electronic visual image" of "a child engaging in a listed sexual act." (Emphasis added).

[2] After amendment by 2004 PA 478, former § 145c(1)(*l*) now resides at § 145c(1)(m).

Because defendants unquestionably possessed the computers in which the detectives found multiple contraband images of child pornography, we reject that the prosecutor failed to establish probable cause of the "possession" element of MCL 750.145c(4).

Defendants next assert that during their preliminary examinations, the prosecutor failed to present evidence giving rise to probable cause that they "knowingly" possessed child pornography. Defendant Flick argues that his Internet purchase of child pornography, standing alone, does not establish "knowing possession" of the images. Defendant Lazarus contends that the prosecutor failed to present evidence that he "had any knowledge of the temporary [I]nternet file and the manner in which it functions." In support of their arguments that the prosecutor failed to demonstrate probable cause of "knowing possession," both defendants cite *People v Girard*, 269 Mich App 15, 20; 709 NW2d 229 (2005), in which this Court observed that to convict a defendant under MCL 750.145c(4), "the prosecution had 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."

Here, the evidence adduced at defendants' preliminary examinations reveals that both used their credit cards to purchase access to the child sexually abusive material found in their computers' temporary Internet files. Defendants do not dispute that they paid for the opportunity to download Internet child pornography onto their computers, using their credit cards to open otherwise closed cyberspace doors. Therefore, neither defendant qualifies as a casual Internet browser who accidentally happened on a child pornographic web site while engaged in otherwise innocent Internet activity. The contraband images in defendants' seized computers did not find their way to defendants' temporary Internet files by happenstance, but because of deliberate acts by defendants to purchase subscriptions to websites offering child sexually abusive material.

Although the prosecutor presented evidence that defendants intentionally purchased child sexually abusive materials and that the images remained retrievable in the computers' hard drives, this evidence, without more, may ultimately prove insufficient to convict defendants of the charged offense beyond a reasonable doubt. But a preliminary examination "is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *People v Drake*, 246 Mich App 637, 640; 633 NW2d 469 (2001), quoting *Barber v Page*, 390 US 719, 725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a bindover." *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Because of the difficulties involved in proving an actor's state of mind, only minimal circumstantial evidence is required. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

In summary, the evidence that defendants sought, paid for, received and viewed the child pornographic images, and that the images continued to reside in their computers, suffices to establish a reasonable inference that defendants knowingly possessed the contraband. Consequently, in Docket No. 277925, the circuit court erred by granting defendant Lazarus's motion to quash the information, and in Docket No. 278531, the circuit court correctly denied defendant Flick's motion to quash.

We reverse in Docket No. 277925. We affirm in Docket No. 278531. We remand both cases for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher