NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. A.M., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1705 WDA 2011

Appeal from the Judgment of Sentence Entered September 23, 2011
In the Court of Common Pleas of Venango County
Criminal Division at No(s):
CP-61-CR-0000210-2010
CR. No. 210-2010

BEFORE: BENDER, P.J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY BENDER, P.J. FILED: December 5, 2013

Appellant, A.M., appeals from the judgment of sentence of an aggregate term of 36 to 252 months' incarceration, imposed after a jury convicted him of ten counts of sexual abuse of children - possession of child pornography, 18 Pa.C.S. § 6312.[1] Appellant challenges the sufficiency of the evidence to sustain his convictions, as well as the jurisdiction of the Commonwealth of Pennsylvania to prosecute him for those offenses. We affirm.

The facts of this case, which are not in dispute, are summarized as follows. While living in Maryland, Appellant sexually abused his three

[1] Because the minor victim in this case is Appellant's stepdaughter and shares his last name, we have changed his and the victim's names to initials to protect the victim's identity.

stepdaughters, who at the time of his offenses were 11, 6, and 3 years old. Appellant's abuse included taking pornographic pictures of the three girls on a digital camera. The mother of the children, Appellant's wife (Mother), allegedly participated in Appellant's photographing her daughters.

In September of 2009, Appellant and the three-year old victim, J.M., relocated to Pennsylvania.[2] While residing in this Commonwealth, Appellant began talking online with a woman named Delores Simas. During one of their conversations on November 6, 2009, Appellant told Ms. Simas that "he liked to be naked in front of his daughter and his daughter liked to be naked in front of him, and that he would have sex with other people in front of his daughter." N.T. Trial, 4/19/11, at 73. Then, using a webcam, Appellant showed Ms. Simas a naked picture of J.M. ***Id.*** at 74. Realizing that J.M. was a young child, Ms. Simas contacted police and reported her conversation with Appellant, as well as his name and address. ***Id.*** at 74-76. Based on Ms. Simas' allegations, police obtained a search warrant and seized Appellant's computer tower, laptop, and an "SD" card from Appellant's digital camera. Forensic computer analysis of those items revealed numerous pornographic photographs of J.M. and her two minor sisters stored on the devices' deleted and/or unallocated drive space.[3]

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[2] At that time, Mother was deployed on active service in the United States Military.

[3] The computer expert explained these terms as follows:

(Footnote Continued Next Page)

Appellant was arrested and charged with numerous offenses, including ten counts of sexual abuse of children - possession of child pornography, criminal conspiracy (with Mother), endangering the welfare of a child, and corruption of minors. He filed a pretrial motion for writ of *habeas corpus*, arguing that all of the offenses occurred outside of the Commonwealth of Pennsylvania, primarily at a military base located in Maryland. The trial court described the disposition of this motion, as follows:

> After briefing and argument[,] the Honorable Fred Anthony, Senior Judge, Specially Presiding in this court, denied the *habeas corpus* as to the counts relating to Possession of Child Pornography[,] but granted the *habeas corpus* as to the other counts…. The Commonwealth, Judge Anthony concluded, was unable to establish that the alleged conduct occurred in the Commonwealth of Pennsylvania. Judge Anthony concluded that

(Footnote Continued) ———————

> [Expert]: Allocated drive space is just space on the computer that the computer and the user can see that there are files stored there. Unallocated space is just space that [neither] the computer nor the user can see. It is still – you know, when you delete a file it remains in the directory structure for a short period of time depending on usage. So, I might delete a file and then if I take many pictures, say pictures or create word documents or whatever, shortly thereafter the tendency would be to overwrite whatever file held that spot. So, once you delete it, it is still in the directory structure for a short time. It is just that the first character is replaced with, we call it a hexy-5, basically a zero. So you can still see the remaining part of the name, etcetera, and the pictures are there. Unallocated drive space, after time, the file will be removed from the directory structure as well so all information identifying that file is gone, but that doesn't mean that the file itself is gone. We just have to manually go in there and carve it out.

N.T. Trial, 4/18/11, at 130-131.

> the possession of the pornographic pictures in Pennsylvania, if proved, was a distinct offense.

Trial Court Opinion (TCO), 11/21/12, at 2-3.

Appellant's case proceeded to a jury trial and, at the close thereof, the jury convicted him of ten counts of sexual abuse of children – possession of child pornography. He was subsequently sentenced as stated *supra*, and filed a timely notice of appeal. Appellant also filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On appeal, he raises two issues for our review:

> 1. Whether [] the evidence was sufficient to convict [Appellant] when the [C]ommonwealth could not establish that [Appellant] possessed the child pornographic photographs[?]
>
> 2. Whether the Commonwealth of Pennsylvania had jurisdiction to prosecute this crime of possession of child pornography when the Commonwealth of Pennsylvania could not establish that [Appellant] possessed the child pornographic pictures in the Commonwealth of Pennsylvania[?]

Appellant's Brief at 5.

We begin by setting forth our standard of review of Appellant's first issue:

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

The crime of sexual abuse of children - possession of child pornography is defined as follows:

> **(d) Child pornography.--**
>
> (1) Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

18 Pa.C.S. § 6312(d)(1).

In ***Commonwealth v. Diodoro***, 970 A.2d 1100 (Pa. 2009), our Supreme Court held that a person may be convicted under section 6312(d) if he "possesses **or** controls" child pornography. ***Id.*** at 1106 (quoting 18 Pa.C.S. § 6312(d)(1) (emphasis added by ***Diodoro***)). In other words, "under [s]ection 6312(d), a defendant may be convicted of sexual abuse of children for the mere knowing control of child pornography." ***Id.*** at 1106-07. The ***Diodoro*** Court explained that the term "control" means, "[t]o exercise power or influence over." ***Id.*** at 1107. Applying this definition, the Court held that "[a]n individual manifests such knowing control of child pornography when he purposefully searches it out on the internet and intentionally views it on his computer." ***Id.*** The Court reasoned that,

> [s]uch conduct is clearly exercising power and/or influence over the separate images of child pornography because the viewer may, *inter alia,* manipulate, download, copy, print, save or e-mail the images. It is of no import whether an individual actually partakes in such conduct or lacks the intent to partake in such activity because intentionally seeking out child pornography and purposefully making it appear on the computer screen—for however long the defendant elects to view the image—itself

> constitutes knowing control. The use and operation of computers are not the novelty they once were. Control via a computer is little different from the control one exercises by viewing a book or a magazine—whether one purchases the tangible image or not. It is clear that Section 6312(d) should not and cannot be read to allow intentional and purposeful viewing of child pornography on the internet without consequence.

Id.

In the present case, Appellant admits that he took pornographic pictures of his stepdaughters. Appellant's Brief at 9, 10. However, he contends that his conviction cannot stand because the Commonwealth failed to prove that he possessed that child pornography after relocating to Pennsylvania. He further maintains that he also did not "control" child pornography while living in this Commonwealth. Appellant equates "control" with "create," arguing that the Commonwealth was required to show that he took the pornographic pictures in Pennsylvania in order to establish that he controlled the child pornography. Alternatively, he contends that even if his act of deleting the photographs constituted "control" of the images, the Commonwealth did not prove that he deleted the pictures while residing in Pennsylvania.

In examining these arguments, we initially note that Appellant's convictions are based on photographs recovered from deleted and unallocated space on the digital camera card possessed by Appellant. ***See*** N.T. Trial, 4/18/11, at 147-148; Jury Verdict Slip, 4/19/11, at 1-3 (unnumbered pages). Accordingly, we only examine whether the Commonwealth met its burden of presenting sufficient evidence to prove

that Appellant possessed or controlled the photographs recovered from that device while residing in Pennsylvania. After carefully reviewing the record, we conclude that it did.

First, Appellant's own testimony, proffered at the pretrial hearing on his motion for *habeas corpus* and entered into evidence at trial, established that Appellant possessed the pornographic images on his camera card when he moved to this Commonwealth. The testimony was as follows:

> [The Commonwealth]: [Appellant], when you lived in Pennsylvania you lived in Pleasantville, is that right?
>
> [Appellant]: It was Oil Creek Township, Pleasantville address, yes.
>
> [The Commonwealth]: And when you lived in Pleasantville you had that -- you heard about a photo card or that camera card?
>
> [Appellant]: Yes, sir.
>
> [The Commonwealth]: That's where you kept all the photographs that you took of the kids?
>
> [Appellant]: I actually had taken them off of the photo card and put them on the computer and then went through them and deleted most of them off of the computer.
>
> ...
>
> [The Commonwealth]: **So when you came to Pennsylvania you had this camera card that had photographs of, I take it, [J.M.], right?**
>
> [Appellant]: **As far as I know, yes sir.**
>
> [The Commonwealth]: **And it had photographs of [L.B.] also?**
>
> [Appellant]: **Yes.**
>
> [The Commonwealth]: **And photographs of [K.B.], right?**

[Appellant]: **Yes, [K.B.].**

N.T. Suppression Hearing, 6/22/10, at 4-5; ***see also*** N.T. Trial, 4/19/11, at 38-40. Thus, by his own admission, Appellant possessed the at-issue images while residing in this Commonwealth.

Alternatively, we conclude that Appellant "controlled" the unlawful images while living in Pennsylvania. First, we reject Appellant's interpretation of "control" as being synonymous with "create." Applying the definition of "control" set forth by our Supreme Court in ***Diodoro***, it is clear that Appellant exercised power and/or influence over the images when he deleted them from the camera card. ***Diodoro***, 970 A.2d at 1107. Therefore, that act constituted "control" of the images for purposes of section 6312(d).

Moreover, based on Appellant's testimony, *supra*, the jury was able to reasonably infer that Appellant knowingly brought the camera card containing pornographic photographs with him when he moved to Pennsylvania, and then "controlled" those images by deleting them from the camera card while residing in this Commonwealth. This inference was bolstered by circumstantial evidence presented by the Commonwealth, namely, the testimony of Pennsylvania State Trooper Paul Swatzler. Trooper Swatzler testified that he arrived at Appellant's residence on November 7, 2009, to execute a search warrant. N.T. Trial, 4/19/11, at 11-13. The trooper explained to Appellant why he was there and informed Appellant of the allegations against him. ***Id.*** at 18-19. Trooper Swatzler testified that

Appellant became very emotional, and confessed to having sexually molested J.M. in the past. ***Id.*** at 21. Appellant also gave the trooper the camera card and, as the trooper was leaving, Appellant commented, "[T]here's probably stuff on that [camera] card." ***Id.*** at 31. This testimony supported the jury's verdict that Appellant knowingly controlled the pornographic photographs discovered on the camera card while residing in Pennsylvania. Thus, Appellant's challenge to the sufficiency of the evidence fails.

In his second issue, Appellant contends that the Commonwealth did not have jurisdiction to prosecute him because it "could not establish that [] [A]ppellant] controlled the photographs of child pornography in the Commonwealth of Pennsylvania." Appellant's Brief at 14. For the reasons stated *supra*, this claim is meritless.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013