**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2013

**Diane M. Fremgen
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP68-CR

Cir. Ct. No. 2010CF439

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NEIL R. KLETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Neil R. Klett appeals an order of commitment after a two-part jury trial where, in phase one, a jury found him guilty of seven counts of possession of child pornography, but, during phase two, found him not guilty by reason of mental disease or defect. Klett contends that there was insufficient

evidence to support the jury's verdicts in phase one. We disagree and affirm the order.

¶2 In November 2010, Germantown police learned that Klett had a warrant for a speeding violation and stopped his car. The car had to be towed, and the police conducted an inventory of the property inside the vehicle. During the inventory, they discovered a gray and green toolbox containing images of males who appeared to be under the age of eighteen. Some were nude or being exposed to other males.

¶3 The State subsequently charged Klett with seven counts of possession of child pornography. The images which became the bases for the counts were (1) a photograph depicting two postpubescent young men in a sexually suggestive pose; (2) a photograph depicting a postpubescent young man and a sexual organ of an unseen male; (3) a photograph depicting two postpubescent young men, with one behind the other in a sexually suggestive pose; (4) a photograph depicting three postpubescent young men in a sexually suggestive pose; (5) a photograph depicting a postpubescent young man in a sexually suggestive pose; (6) a photograph depicting a postpubescent young man in a sexually suggestive pose; and (7) a photograph depicting the lower portion of a face and a male sex organ.

¶4 Klett entered pleas of not guilty and not guilty by reason of mental disease or defect. Following the first phase of his jury trial, Klett was found guilty of all seven counts of possession of child pornography. Following the second phase of his jury trial, Klett was found not guilty by reason of mental disease or defect. The circuit court then issued an order of commitment, placing Klett on conditional release for eight years. This appeal follows.

¶5 On appeal, Klett challenges the guilty verdicts in phase one of his jury trial. He maintains that in the absence of expert testimony from the State, the evidence was insufficient to establish that the photographs in counts one through six were of children or that he knew or reasonably should have known that they were children. Klett further maintains that the evidence was insufficient to establish that the photograph in count seven records a child actually engaging in sexually explicit activity rather than merely appearing to do so as a result of photo editing.[1]

¶6 To convict a person of possession of child pornography, in violation of WIS. STAT. § 948.12(1m) (2009-10), the State is required to prove that the person (1) knew that he or she possessed the material at issue, (2) knew the character and content of the sexually explicit conduct depicted, and (3) knew or reasonably should have known "that the child engaged in sexually explicit conduct has not attained the age of 18 years." ***Id.***; *see also* ***State v. Van Buren***, 2008 WI App 26, ¶6, 307 Wis. 2d 447, 746 N.W.2d 545. To fall within the statute, the images must be of actual children engaged in sexually explicit conduct. ***Id.***, ¶8.

¶7 In reviewing the sufficiency of the evidence, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorable to the State and the jury's finding, "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate

[1] Klett does not dispute that the jury reasonably could find that the individual depicted in the image at issue in count seven was a child.

inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶8 Viewing the evidence here in the light most favorable to the State and the jury's finding, we conclude that the photographs introduced into evidence for counts one through six were sufficient to prove beyond a reasonable doubt that the persons depicted in them were children and that Klett knew or reasonably should have known that. As noted by the State, there are several features that distinguish children from adults, including body stature, musculature, head to body proportions, cheeks, other facial features, and pubic, face, and body hair. Knowing this and applying their own expertise at determining age gained from life experience, the jury could have reasonably reached the verdicts that it did without the benefit of formal expert testimony.[2]

¶9 We also conclude that the evidence was sufficient to establish beyond a reasonable doubt that the photograph in count seven records a child actually engaging in sexually explicit activity rather than merely appearing to do so as a result of photo editing. After all, a photograph is evidence of the reality of the thing it depicts. ***Van Buren***, 307 Wis. 2d 447, ¶9. In the absence of any evidence that would call the photograph into question (i.e., evidence that what is shown is not real but virtual, produced by the use of technology), the jury could

[2] Although not a formal expert, the jury did hear from the investigating officer who had more than ordinary experience in assessing age because he was often required to do so in his nineteen years with the police. He explained that he had had to estimate age by looking at appearance and, sometimes, by focusing on whether the skin of the face evidenced postpuberty and at the broadness of shoulders and hips. He also gave estimates as to the ages of the persons depicted in the photographs.

have reasonably found that the sexually explicit conduct was real. *See* ***id.***, ¶¶10-12.

¶10 For these reasons, we conclude that the evidence was sufficient to support the jury's verdicts in phase one of Klett's trial. Accordingly, we affirm the circuit court order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).