RENDERED: AUGUST 17, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000452-MR

SAMUEL A. CRABTREE — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 09-CR-00258

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

COMBS, JUDGE: Samuel Crabtree appeals his conviction in the Madison Circuit Court of multiple counts of possession of materials portraying a sexual performance by a minor. After our review of the record and the law, we affirm.

In late October 2009, Crabtree was a student at Eastern Kentucky University (EKU). He experienced problems with his computer – primarily, that it was

running too slowly. Believing that his computer was infected with malware,[1] he took it to Resnet, a vendor that provides computer services for EKU's students. While working on Crabtree's computer, one of the Resnet technicians discovered some suspicious filenames. Resnet contacted the campus police. EKU police then confiscated the computer and transported it to the Kentucky State Police laboratory in Frankfort.

When Crabtree contacted Resnet to retrieve his computer, he was advised to contact EKU police. He went to the station unannounced and spoke to Detective Brandon Collins, who told Crabtree that his computer had been confiscated. Crabtree readily admitted that he had used the internet to look up shock videos and that he had viewed some videos and still images that were child pornography. Crabtree told Detective Collins that the material sickened him; and so he had tried to delete them. Crabtree wrote down his account of what happened for Detective Collins.

The KSP Electronics Branch performed a forensic analysis of Crabtree's computer. Even though it had already been partially cleaned by Resnet, the technician discovered five videos containing child pornography in a system file labeled "Saved." She also identified sixty-two images in some hidden files that she flagged as child pornography. A grand jury indicted Crabtree on sixty-seven (67) counts of possession of matter portraying a sexual performance by a minor.

[1] A term derived from the combination of *malicious* and *software*. *Malware* is the general term for viruses, spyware, and other infections which may damage or disable computers and/or computer software.

In January 2011, the court held a jury trial. At the close of the prosecution's case, Crabtree made a motion for a directed verdict, which the court denied. The jury acquitted Crabtree of one count, and the court combined the counts that pertained to duplicate images. Ultimately, Crabtree was convicted of sixty-five counts of possession of matter portraying a sexual performance by a minor and one count of criminal attempt to possess matter portraying a sexual performance by a minor. He was sentenced to five years in prison for each possession count and one year for the attempt account – all to be served concurrently. This appeal follows.

Crabtree's first argument is that the evidence was insufficient to prove that he knowingly possessed the illegal images on his computer. We disagree.

The Due Process clause of the Fourteenth Amendment of the United States Constitution prevents a state from convicting a defendant of a crime except when the government proves every fact necessary to constitute the charged crime. *Fiore v. White*, 531 U.S. 225, 228-29, 121 S.Ct. 712, 714, 148 L.Ed.2d 629 (2001); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Kentucky Rule of Criminal Procedure (RCr) 10.24 safeguards this right by authorizing a convicted defendant to move for a verdict of acquittal. If a defendant has argued that the evidence presented was insufficient to sustain a conviction, he may move for a judgment of conviction to be set aside. *Id*. An appellate court's review determines whether there was enough evidence of substance for a reasonable juror to believe beyond a reasonable doubt that the defendant was

guilty. If not, a directed verdict should have been granted. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Even though circumstantial evidence is acceptable, "if the evidence be as consistent with [the] defendant's innocence as with his guilt, it is insufficient to support a conviction." *Dority v. Commonwealth*, 269 Ky. 201, 106 S.W.2d 645, 647 (1937) (*quoting Marcum v. Commonwealth*, 212 Ky. 212, 278 S.W. 611, 614 (1925) (internal citations omitted)). More recently, our Supreme Court has emphasized that:

> [One's] mere presence on the property where [evidence of a crime] was found is insufficient to support his convictions . . . . Likewise, mere knowledge that a crime is occurring is insufficient to support a conviction of that crime, as is mere association with the persons involved at the time of its commission. Even mere ownership of the property on which contraband is found is insufficient to sustain a conviction. A true criminal must be distinguished from a mere ordinary "bystander." . . . .
>
> . . . .
>
> . . . The evidence must constitute more than mere suspicion.

Hayes v. Commonwealth, 175 S.W.3d 574, 590-91 (Ky. 2005) (citations omitted).

Crabtree argues that the evidence did not support a charge that he knowingly possessed the illegal materials.

> A person is guilty of possession 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 knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person.

Kentucky Revised Statute[s] (KRS) 531.335(1). The Ninth Circuit has held that "a person does knowingly receive and possess child pornography images when he seeks them out over the internet and then downloads them to his computer." *U.S. v. Kuchinski*, 469 F.3d 853, 861 (9th Cir. 2006) (footnote omitted). It has also articulated a more stringent standard, holding that downloading is not a prerequisite to the crime of possession of child pornography: "In the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it." *U.S. v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006) (*citing U.S. v. Tucker*, 305 F.3d 1193, 1204 (10th Cir. 2002)). A viewer is deemed to have control while the image is on the screen because at that moment, he has the ability to enlarge, save, print, or share the image. *Id.*

The Commonwealth's evidence was threefold, consisting of: the videos, the still images, and Crabtree's confession. The videos were discovered in the *Saved* and *Incomplete* folders in an application called Limewire, a now-defunct[2] "peer-to-peer" sharing network. Such a network allows users to share files with other users – be they music, photographs, documents, or videos. Special software was required in order to access that network.

Users obtained files on Limewire by typing in search criteria. Limewire then returned a list of files related to the search words. A user would then click once on the file that he wished to download. Limewire would respond with a

[2] Limewire is no longer active due to an injunction that resulted from copyright violations.

dialog box asking if the user was sure he wanted to download the file. The download would not commence until the user confirmed the instruction by again clicking on the "yes" button. Thus, the application gave the user *two opportunities* to consider whether he actually wanted a file to be downloaded to his computer.

When a user downloaded a file through Limewire, the completed download would be automatically stored in the *Saved* folder. If a file failed to download even a miniscule piece of information, the application would automatically place it in the *Incomplete* folder. However, many files could still be viewed even if Limewire labeled them as Incomplete. Crabtree argues that the crime lab was unable to conclusively say that he had watched the videos. Neither, however, could the lab determine that the videos had not been watched.

The still images were found in the thumbcache[3] of Crabtree's computer. *Thumbcache* is a type of file that is automatically generated with certain versions of the Windows operating system. The catalogued images include photographs that were viewed as well as the opening frame of videos that had been watched, generating a "thumbnail" marker of the original file. *Thumbnails* are reduced versions of larger images; they are stored in files and used for identifying and organizing photo and video files. Thumbcache files are hidden; most casual computer users are not aware of their existence, and special software is required to view the contents. Because thumbcache creates a brand-new, separate file of an image that is viewed, the thumbnail remains stored in the thumbcache even if the

[3] Crabtree's laptop had the Windows Vista operating system. In earlier versions of Windows, the thumbcache was known as thumbs.db; the new filename is thumbcache.dll.

original file is deleted. It is essentially a collection of fingerprints of images that have been on the computer.

The crime lab flagged sixty-seven images from the thumbcache of Crabtree's computer. Some were recognized as opening frames of videos which are well-known to collectors of child pornography and to law enforcement specialists. The KSP expert testified that it was impossible to determine which ones had been watched or viewed. However, in order to be located in the thumbcache, the images *had to have appeared* on the screen: thus, to have had possession. The evidence was "beyond mere suspicion" that Crabtree had possessed the images found.

Finally, the Commonwealth relied on Crabtree's confession. His confession corroborated what was found in the Limewire folders and in the thumbcache. Crabtree signed the following statement:

> A while ago, out of boredom and curiosity I looked at some mature content using limewire [*sic*]. Limewire is a file sharing program. I looked to find disturbing images or videos that would shock me. Some of these could be classified as child pornography. I tried to delete these things from my laptop. . . . I realize that looking at this type of stuff was wrong and I feel sick because I did look at things that I should not have looked at. However I did not realize that anyone would find out.

The thumbcache images corroborate Crabtree's assertion that he deleted illegal images of child pornography. Furthermore, in his discussion with Detective Collins, Crabtree described a video that he had watched in detail. Traces of this video were not found on the computer. The expert testified that it was possible

that an innocuous image in the thumbcache could have been the opening frame of that video, causing it to not be flagged in the forensic analysis. The confession – along with the Limewire content and the thumbcache images – demonstrated that it was reasonable for a jury to believe that Crabtree had sought out and had either downloaded or viewed the illegal images. He had control of them and he possessed them.

Crabtree urges us to consider that his merely viewing child pornography images before deleting them should not be deemed to constitute actual possession. After reviewing the facts of this case, we are not persuaded that this is a valid argument in light of the Ninth Circuit's definition of *possession* in *Romm, supra*: that the act of seeking out child pornography and exercising control over it constitutes criminal possession – regardless of whether it is downloaded. Crabtree admitted to seeking out the material and to having it on his computer. Some of the videos remained, and numerous videos and images left their traces in the thumbcache. His attempt to clean up the computer by deleting the files does not purge him of the crime committed.[4] Rather, it clearly illustrates an attempt at a cover-up after the fact. Furthermore, as *Romm* holds, Crabtree had the images in his control: he could have saved, printed, or shared them before he deleted them.

While Crabtree alludes to the possibility that the files mysteriously appeared on his computer by some accident, he did not present any evidence at trial to

[4] It is axiomatic that criminals try to clean up after themselves -- a fact that the General Assembly has impliedly acknowledged by enacting statutes to criminalize tampering with evidence.

support this theory. On the contrary, in order for the videos in the Limewire folders to have been downloaded, Crabtree *had to click twice* – once on each file name, and then again to confirm the download. The filenames were explicit. They are too vulgar to be repeated in an opinion of this Court, but it is beyond dispute that the filenames clearly stated sexual content and included the ages of the children depicted in them.

We note that this case demonstrates a need for technical training among legal professionals. There were several instances during the trial when it appeared that counsel for each party attempted to elicit testimony from the experts but failed because of confusion of technical terms. In this particular case, the evidence of guilt was overwhelming, but we anticipate that this communication gap could be damaging in cases with weaker evidence.

Crabtree next argues that it was error for the court not to provide the jury with an instruction regarding temporary innocent possession. The trial court denied the request at a hearing for a motion for a new trial on March 3, 2011.

"Temporary innocent possession" is a defense recognized by our Supreme Court in the context of controlled substances. *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011). It is available when a person has taken "possession of a controlled substance without any unlawful intent." *Id*. at 263. Common examples of where it applies are: parents confiscating drugs from their children, teachers confiscating drugs from students, or homeowners finding medications left behind by guests. *Id*. at 264.

We agree with the trial court that the facts of this case do not warrant an innocent possession instruction. As we have already discussed, the elements for possession of electronic illegal images are satisfied when a person seeks them and downloads them. The evidence – including Crabtree's own statement – indicated that Crabtree sought out child pornography and downloaded it to his computer. Crabtree did not present any contradicting evidence. We hold that the defense of innocent possession could not be invoked in this case, which involved obvious and lurid filenames of videos that were downloaded, a clear confession, and numerous images that remained after professionals had begun cleaning off the computer's history. The facts of this case did not render it appropriate for analysis of this defense. Therefore, the trial court did not err in refusing to instruct the jury on innocent possession.

Crabtree also contends that it was error for the jury to consider whether he had knowingly possessed the images because that issue was a matter of law rather than of fact. He relies on *Kenton Cnty. Fiscal Court v. Elfers*, 981 S.W.2d 553 (Ky. App. 1998), to emphasize that statutory interpretation belongs to courts – not to juries. However, in *Elfers*, the issue involved an undefined phrase left open for the jury to construe and interpret. In this case, the jury was provided statutory definitions of *knowingly* and *possession* that it could apply to the facts. We cannot conclude that the jury instructions were erroneous nor that it was error for the jury to consider Crabtree's conduct pursuant to these definitions.

Crabtree further alleges that the trial court erred by not permitting him to admit testimony from a character witness. However, the trial court did allow a character witness to enter testimony by avowal. The Commonwealth has declined to address this issue, contending that the claim of error is unpreserved and that the avowal evidence was not in the record. We have examined the record, which does contain the avowal, and we have watched the avowal testimony presented on the second day of the trial.

Our standard of review for evidentiary issues is whether the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). It has long been the rule that a criminal defendant has the right to introduce character evidence "for the purpose of showing that he would not and did not commit the crime for which he was charged." *Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky. 1994). If character is not an essential element of a charge or defense, testimony concerning a defendant's reputation alone is admissible. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky. 2005). Kentucky Rule of Evidence (KRE) 405 provides as follows:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation in the community or by testimony in the form of opinion.
>
> . . . .
>
> (c) Specific instances of conduct. In cases in which

> character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In this case, the avowal testimony did not shed any light on whether Crabtree had committed the crime of possessing child pornography. The character witness testified that he had known Crabtree for Crabtree's entire life and that Crabtree had a good reputation in the community. He agreed that if illegal material had accidentally appeared on Crabtree's computer, it would be wrong for Crabtree to go to jail. But he testified that he was not there and did not know what had happened.

Crabtree claims that it was error for the jury not to hear this testimony because he alleges that the Commonwealth had attacked his character during the trial. We disagree. The Commonwealth did not present any testimony relating to Crabtree's reputation or character. It presented facts alone. The Commonwealth speculated that Crabtree had minimized the nature of the offense in his confession. However, the Commonwealth also stated that most people who are caught in wrongdoing seek to downplay their involvement. His behavior – not his character – was at issue. In light of all the evidence, we do not agree that the jury was prejudiced by not hearing the brief and generalized testimony of a friend of Crabtree's family.

Finally, Crabtree argues that he should be granted a new trial as a result of cumulative error. We are not persuaded that the trial court committed any

prejudicial error – much less enough errors to warrant reversal. "In view of the fact that the individual allegations have no merit, they can have no cumulative value." *McQueen v. Commonwealth,* 721 S.W.2d 694, 701 (Ky. 1986).

We affirm the judgment of the Madison Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Fred E. Peters
Rhey Mills
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David Abner
Assistant Attorney General
Frankfort, Kentucky