STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0930

State of Minnesota,
Respondent,

vs.

Alex Gordon Sillerud,
Appellant.

Filed April 16, 2018
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CR-16-1107

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Anaissa S. Kimelman, Certified Student Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Joseph P. Tamburino, Hillary B. Parsons, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant contends that the state's evidence was legally insufficient to prove beyond a reasonable doubt that he knowingly possessed child pornography. He also argues that the district court erred in denying his motion for a downward departure. We affirm.

FACTS

Saint Paul police officers executed a search warrant at the home of appellant Alex Sillerud on July 10, 2015, to search for child pornography. An officer interviewed Sillerud while other officers conducted the search. The officer informed Sillerud that he was not under arrest, that he did not have to talk with the officer, and that he was free to leave. Sillerud admitted that he had searched for child pornography on his computer and that child pornography would be found.

Police seized Sillerud's computer, and a forensic examination identified 195 images suspected of being child pornography. Those images were sent to the National Center for Missing and Exploited Children and compared against its database of previously identified minors. At least 11 images were identified as pornography containing previously identified minors.

The state charged Sillerud with one count for each image, for a total of 11 counts of possession of child pornography, in violation of Minn. Stat. § 617.247, subd. 4(a) (2014). Ten of the charged images were found on the computer's "thumb cache." A thumb cache is a hidden collection of images automatically created by the operating system to display previews of images or allow faster recall of an image when it is accessed later, and it cannot

be accessed by the computer user without special software. The remaining charged image, the Bianca image, was found in the computer's recycle bin. A recycle bin is a folder in which the computer user can place files to mark them for deletion. It is common knowledge among most computer users that files placed in the recycle bin are not deleted from the computer until the recycle bin is emptied.

The Bianca image had "modified" and "created" dates associated with the file. The state's expert testified that the created date, June 28, 2015, indicated that the file was placed inside the recycle bin at that time, and that the modified date of July 4, 2015, indicated that the file was either opened and saved on that date, or was taken out of the recycle bin and returned on that date. Sillerud's expert testified that the created date was when the file was first downloaded and created on that computer, and that the modified date is when the file was placed in the recycle bin. The district court found that both interpretations showed that Sillerud actively moved the Bianca image into the recycle bin shortly before the search warrant was executed, and showed that he was aware of the existence of the image.

Sillerud's computer also contained the file-sharing software eMule, which allows users to setup their computers to share files with other file-sharing software users without a central server. While file-sharing software is legal, the state's expert testified that people who possess and trade child pornography commonly have file-sharing software on their computers. Ninety percent of the file names that Sillerud downloaded through eMule contained acronyms and words synonymous with child pornography, including: "Lolita;" "PTHC," which stands for pre-teen hard core; "kid cam;" "hussy fan;" and "Ray Gold." The file in the recycle bin was named "$RZ512JY.jpg."

After a bench trial, the district court found Sillerud not guilty of the ten counts relating to images found on the computer's thumb cache because he did not knowingly possess those images. However, the district court found Sillerud guilty of the one remaining count of child pornography, finding that he knowingly possessed the Bianca image. At his sentencing hearing, Sillerud moved the district court for a downward departure, asking for a gross-misdemeanor disposition. The district court imposed a stayed presumptive sentence of 15 months, placing Sillerud on probation for five years. *See* Minn. Sent. Guidelines 4.B (2016).

D E C I S I O N

I. Sufficiency of the Evidence

When reviewing whether the state presented sufficient evidence to support a verdict, Minnesota appellate courts "conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict." *State v. Hayes*, 826 N.W.2d 799, 805 (Minn. 2013) (quotation omitted); *see also State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) ("[Appellate courts] use the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.").

Possession of child pornography requires proof that the individual in possession of the child pornography does so "knowing or with reason to know its content and character," Minn. Stat. § 617.247, subd. 4(a), which means that the individual "is subjectively aware of a 'substantial and unjustifiable risk' that the work involves a minor," *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007). "Proof of either actual knowledge or reason to know

that a pornographic work involves a minor may . . . be made by circumstantial evidence." *Mauer*, 741 N.W.2d at 115.

When reviewing a conviction based on circumstantial evidence, appellate courts employ a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). The first step is to "identify the circumstances proved." *Id.* "[W]e defer to the [fact-finder's] acceptance of the proof of th[o]se circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* at 598–99 (quotation omitted). Step two involves evaluating "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). To do so, we review the evidence as a whole, and "must determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *Id.*; *see also State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) ("Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.").

The circumstances found by the district court are consistent with Sillerud knowingly possessing the Bianca image, and inconsistent with any rational hypothesis except that Sillerud was aware of a substantial and unjustifiable risk that the Bianca image involved a minor. Sillerud admitted that he had searched for child pornography, and that child pornography would be found on his computer. The download logs from eMule showed that 90% of the files he downloaded contained names synonymous with child pornography,

which is compelling evidence that Sillerud was taking a substantial and unjustified risk that he was downloading pornography involving minors. Additionally, the Bianca image's location in the recycle bin—where it was still easily accessible to Sillerud—and the difference between the modified and created dates on the image file, show that Sillerud actively moved the image into the recycle bin and was therefore aware of its existence. *See United States v. Breton*, 740 F.3d 1, 17 (1st Cir. 2014) ("[A] defendant's intentional attempt to delete child pornography files, such as by placing them in a computer's recycle bin, can suggest he was aware of the files and their contents.").

Sillerud argues that the evidence supports a reasonable inference of inadvertent possession. He alleges that file-sharing software has legitimate purposes, that his expert disagreed that 90% of the files he downloaded contained terms synonymous with child porn, and that the file name of the charged image, "$RZ512JY.jpg," was not synonymous with child pornography. But the fact-finder believed the testimony of the state's expert that 90% of the files Sillerud downloaded contained terms synonymous with child pornography, and it is the prerogative of the fact-finder to determine the credibility of witnesses. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) ("The weight and credibility of the testimony of individual witnesses is for the [fact-finder] to determine.").

Moreover, Sillerud's own expert agreed that the terms "Lolita," "kid cam," and "PTHC," three of the terms present in file names on Sillerud's download log, are all strongly suggestive that the file contains child pornography. The combination of Sillerud's confession that child pornography would be found on his computer, his admission that he had searched for child pornography, and the fact that a vast majority of the names of his

downloaded files contained terms synonymous with child pornography, do not support a reasonable inference of inadvertent possession. While it might be reasonable to infer, as Sillerud claims, that files containing these search terms could also have come up when searching for adult pornography, Sillerud's decision to *download* files containing terms synonymous with child pornography does not support such an inference.

Next, Sillerud argues that his confession does not show that he was aware that the specific file in the recycle bin, the Bianca image, was child pornography. But Sillerud admitted to searching for child pornography, and admitted that there would be child pornography found on his computer. While Sillerud's confession may not explicitly state his knowledge that the specific Bianca image was child pornography, it adds to the circumstances proved by the state and strongly supports the inference that he knew the image was child pornography. Sillerud claims that his admission was only that there might be child pornography on his computer, and therefore his admission is equally supportive of accidental download. But combined with his admission that he searched for child pornography, the fact that his computer log showed he downloaded a very high percentage of files with names containing terms synonymous with child pornography, and his interaction with the file by moving it to the recycle bin, the only reasonable inference drawn from the evidence as a whole is that Sillerud was subjectively aware of a substantial and unjustifiable risk that the Bianca image involved a minor.[1]

[1] Sillerud also points to circumstantial evidence that was found in other cases, but was not present in his case. But those comparisons are irrelevant because the evidence presented is sufficient to sustain his conviction. *Cf. State v. Landin*, 472 N.W.2d 854, 858 (Minn. 1991) (discussing appellant's argument about "the lack of evidence identifying him as the

Sillerud also relies on *Mauer* to support how strong the evidence must be to prove knowing possession. In *Mauer*, the appellant ordered videos "describ[ing] sexual acts depicted in the videos and the ages of individuals involved in them, including references to a '12 year old,' 'preteens,' 'young girls 11–13 years old,' and '[performers] from 9 to 14 years old.'" *See* 741 N.W.2d at 109. While Sillerud is correct that the supreme court reversed and remanded appellant's conviction in *Mauer*, it did so because the court clarified the scienter requirement in child pornography cases. *Id.* at 115–16. The supreme court then determined that the district court's findings of fact were unclear if it had found that the appellant was "subjectively aware of a substantial and unjustifiable risk that the videos would involve children," the standard adopted by the court. *Id.* at 116. The reversal in *Mauer* was not about the sufficiency of the evidence, and therefore the case does not help Sillerud's argument.

Finally, Sillerud relies on *State v. Myrland* for the proposition that a computer user does not always have control over images that are accessible by a computer. *See* 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). However, *Myrland* involved images and text found in unallocated space on the hard drive, and the state's expert testified that "there was no way to tell who had viewed [the images] or if they had been viewed at all." *Id.* at 418–19; *see also United States v. Hill*, 750 F.3d 982, 987–88 n.6 (8th Cir. 2014) ("Unallocated space is space on a hard drive that contains deleted data,

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perpetrator, i.e., no eyewitnesses, fingerprints, footprints, fiber samples or shell casings," the supreme court noted that "[a] lack of incriminating physical evidence does not, however, necessarily undermine a guilty verdict").

usually emptied from the operating system's trash or recycle bin folder, that cannot be seen or accessed by the user without the use of forensic software. Such space is available to be written over to store new information." (emphasis omitted) (quotations omitted)). The appellant in *Myrland* also "admitted on cross-examination that some of the websites referenced could have been accessed inadvertently or could have appeared on the screen when a computer user accessed another site." 681 N.W.2d at 419. Here, however, there was no testimony by either expert that the Bianca image was found in unallocated space or that it may have inadvertently appeared on Sillerud's computer as a result of visiting websites containing adult pornography. And the act of deleting a file without a descriptive file name suggests that the user actually opened the file to see what it contained before deleting it. Because the Bianca image was found in the recycle bin, *Myrland* does not support Sillerud's argument that he did not have control over the image. *See United States v. Hill*, 750 F.3d 982, 987 ("Unlike 'unallocated space,' the recycle bin is an accessible folder on the computer's hard drive in which a user places files to be deleted." (quotations omitted)).

II. Downward Departure Motion

We review the denial of a motion for a downward departure for an abuse of discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). "A district court must impose the presumptive guidelines sentence absent identifiable, substantial, and compelling circumstances justifying departure. Substantial and compelling circumstances are those which make the facts of a particular case different from a typical case." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotations and citation omitted),

review denied (Minn. Sept. 17, 2013). "[I]t would be a rare case which would warrant reversal of the refusal to depart." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Sillerud argues that because his conviction was based on possessing only a single image, this fact alone is sufficient to reverse the district court. But the supreme court has upheld charging an individual for each pornographic work possessed, holding that the statute unambiguously criminalizes possession of each pornographic work. *State v. Bakken*, 883 N.W.2d 264, 268–70 (Minn. 2016). This is contrary to Sillerud's assertion that his is a rare case because he was only convicted for one image. And, Sillerud does not cite any cases which support his assertion that many child pornography cases involve thousands of images. *Cf. id.* at 268 (seven images, seven counts); *State v. McNitt*, No. A17-0092, 2017 WL 3379191, at *1, 7 (Minn. App. Aug. 7, 2017), *review denied* (Minn. Oct. 17, 2017) (three files, three counts);[2] *State v. Mauer*, 726 N.W.2d 810, 812 (Minn. App. 2007) (four discs, three counts), *aff'd in part, rev'd in part*, 741 N.W.2d 107 (Minn. 2007).

Finally, Sillerud argues that the fact that he made efforts to delete almost every file containing child pornography from his computer supports a downward departure. But even if the district court had found that Sillerud, as he claims, had "made efforts[] whenever such an image was downloaded into his computer[] to delete every single file from his computer," that fact would support his intent to avoid prosecution as much as it would establish a mitigating factor. Because Sillerud has failed to present any substantial and

[2] *McNitt* is unpublished and is cited only for factual comparison. *See* Minn. Stat. § 480A.08, subd. 3 (2016).

compelling circumstance justifying a downward departure, we conclude that the district court did not abuse its discretion in denying his motion for a downward departure.

Affirmed.