

SUPREME COURT OF ARKANSAS

Klosky v. State

2014 Ark. 403 (2014) · No. CR-13-698 · Decided October 2, 2014

SUMMARY

The Arkansas Supreme Court affirmed Daniel Klosky Jr.'s convictions on 38 counts under Arkansas Code Annotated section 5-27-602(a)(1) for distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. The court held that the statute does not require the State to prove knowing receipt of the material for the purpose of distribution. Justice Hart, joined by Justices Baker and Goodson, dissented, arguing that the appeal challenged the sufficiency of proof regarding the required knowing mens rea and should have been decided on the merits.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Per curiam; Jim Hannah, Chief Justice; Baker, Justice; Goodson, Justice; Hart, Justice
JURISDICTION	Arkansas
DECIDED	October 2, 2014
DOCKET	CR-13-698
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a bench-trial conviction in the Faulkner County Circuit Court; the Arkansas Supreme Court accepted certification from the Arkansas Court of Appeals.
STANDARD OF REVIEW	The opinion reviews the denial of a motion to dismiss based on sufficiency of the evidence; the text does not expressly state a separate standard-of-review formulation.
PRECEDENTIAL VALUE	Published Arkansas Supreme Court opinion; precedential.
PARTIES	Daniel Klosky, Jr. v. State of Arkansas

TOPICS

- statutory interpretation
- criminal procedure
- evidence
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Arkansas Code Annotated section 5-27-602(a)(1) requires the State to prove that the defendant knowingly received child pornography for the purpose of distribution.
2. Whether the circuit court erred in denying Klosky's motion to dismiss for insufficient evidence.

HOLDINGS

1. The statute does not require the State to prove knowing receipt of child pornography for the purpose of distribution. The statutory elements require proof that the defendant knowingly engaged in one of the specifically listed acts involving material depicting a child engaging in sexually explicit conduct.
2. The circuit court did not err in denying Klosky's motion to dismiss, and the convictions were affirmed.

KEY QUOTATIONS

“A review of the plain language of the statute reveals that “knowing receipt for the purpose of distribution” is not among the elements that the State must prove to sustain a charge of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child.” (at 3)

FACTUAL BACKGROUND

Klosky was tried to the court and convicted of thirty-eight counts involving distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. The charges concerned files or images found on his computer, and Klosky argued that the State failed to prove he knowingly received the files for the purpose of redistribution. He received concurrent forty-eight-month prison sentences on all counts.

PROCEDURAL HISTORY

Following a bench trial, the Faulkner County Circuit Court convicted Klosky of thirty-eight counts under Arkansas Code Annotated section 5-27-602(a)(1) and imposed concurrent forty-eight-month sentences. Klosky moved to dismiss at the close of the evidence, arguing that the State failed to prove that he knowingly received child pornography for the purpose of distribution. The circuit court denied the motion and entered judgment, and the Arkansas Court of Appeals recommended certification to the Arkansas Supreme Court because the case presented an issue of first impression and a significant issue requiring development of the law. The Supreme Court accepted certification and affirmed.

DISPOSITION

affirmed

OPINION

PER CURIAM.

Cite as 2014 Ark. 403 SUPREME COURT OF ARKANSAS No. CR-13-698 DANIEL KLOSKY, JR. Opinion Delivered October 2, 2014 APPELLANT APPEAL FROM THE FAULKNER V. COUNTY CIRCUIT COURT [NO. 23CR-09-1571] STATE OF ARKANSAS HONORABLE CHARLES E. APPELLEE CLAWSON, JR., JUDGE AFFIRMED. JIM HANNAH, Chief Justice Following a bench trial, the Faulkner County Circuit Court convicted appellant, Daniel Klosky, Jr., of thirty-eight counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, in violation of Arkansas Code Annotated section 5-27-602(a)(1) (Repl.

2006). He was sentenced to forty-eight months' imprisonment on each count, with all sentences to be served concurrently. Klosky filed a written motion to dismiss¹ at the close of all the evidence, and the State filed a written response to the motion.

In a letter order filed January 15, 2013, the circuit court found Klosky guilty on all counts. Klosky originally appealed that order to the Arkansas Court of Appeals, which recommended certification to this court because the case involved an issue ¹ Although Klosky styled his motion as one for directed verdict, in a bench trial, a challenge to the sufficiency of the evidence is a motion for dismissal.

See Ark. R. Crim. P. 33.1(b) (2014). Therefore, we will refer to Klosky's motion as a motion to dismiss. Cite as 2014 Ark. 403 of first impression and a significant issue requiring development of the law. This court accepted certification, and our jurisdiction is proper pursuant to Arkansas Supreme Court Rule 1-2(b)(1), (5) (2014).

We affirm. Klosky's sole argument on appeal is that the circuit court erred in denying his motion to dismiss because the State failed to prove thirty-eight counts of knowing receipt of child pornography for the purpose of distribution. Specifically, he contends that [a] consideration of all the evidence in the case shows that this case of alleged knowing receipt of child pornography for the purpose of distribution, how it is charged, does not rise above speculation and conjecture that defendant knew that he had this child pornography on his computer on or about December 21, 2009 for the purpose of redistribution....

The defendant is charged with having files for redistribution to others. All we have, however, is the [Faulkner County Sheriff's Office] going into his computer and taking them. We have utterly no idea that the files were there for redistribution to others. Klosky's challenge to the sufficiency of the evidence is premised on a misunderstanding of the statute.

Arkansas Code Annotated section 5-27-602(a)(1) states that [a] person commits the offense of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child if the person knowingly: Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any

means, including the Internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

(Emphasis added.) See also AMI Crim. 2d 2701.2 2 Arkansas Model Jury Instruction–Criminal 2d 2701 states in relevant part: DISTRIBUTING, POSSESSING, OR VIEWING MATTER DEPICTING SEXUALLY EXPLICIT CONDUCT INVOLVING A CHILD 2 Cite as 2014 Ark. 403 A review of the plain language of the statute reveals that “knowing receipt for the purpose of distribution” is not among the elements that the State must prove to sustain a charge of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child.

Accordingly, we affirm the circuit court’s denial of Klosky’s motion to dismiss. Affirmed. BAKER, GOODSON, and HART, JJ., dissent. JOSEPHINE LINKER HART, Justice, dissenting. I respectfully dissent. The majority makes a fundamental error when it summarily affirms this case based on its conclusion that Klosky’s challenge to the sufficiency of the evidence is premised on a “misunderstanding” of _____(Defendant) is charged with the offense of (distributing) (possessing) (or) (viewing) matter depicting sexually explicit conduct involving a child.

To sustain this charge, the state must prove the following things beyond a reasonable doubt: First, that _____(Defendant) [(received for the purpose of selling) (sold) (procured) (manufactured) (gave) (provided) (lent) (traded) (mailed) (delivered) (transferred) (published) (distributed) (circulated) (disseminated) (presented) (exhibited) (advertised) (offered) (or) (agreed to offer) through (any means) (the Internet) a (photograph) (film) (videotape) (computer program or file) (video game) (or) (any other reproduction or reconstruction) which depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

Second, that _____(Defendant) did so knowingly. 3 Cite as 2014 Ark. 403 Arkansas Code Annotated section 5-27-602(a)(1). The majority selectively reads Klosky’s brief to create a procedural bar that simply does not exist.

To accomplish this, the majority focuses on a few sentences out of Klosky’s eight-page argument, ignoring the numerous sub- points that disprove their holding that Klosky did not discuss the failure of proof in relation to statutory elements. Klosky’s argument focused on whether the State proved that he possessed the knowing mens rea for the proscribed conduct listed in section 5-27-602(a)(1), i.e., “sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer,” which he summarizes as “redistribution.” Klosky argues that the State failed to prove that he knowingly offered the images to others because it did not prove that he “knew” the images were on his computer.

He bolsters this argument with the assertion that there was no evidence to show he overtly offered the images to others, as would be the case if he offered them to police in some sort of sting operation, and nothing in his browser history to establish that anyone else sought the images. Likewise, he argues that the State failed to show that he “manipulated” the images, or even opened the files.

Further, he argues that finding cache files or images in unallocated space “cannot be considered ‘knowingly possessed.’” Because cache files are created without the computer owner’s action or knowledge. Additionally, Klosky argues that images found in unallocated space cannot satisfy the “knowing” mens rea because they have been deleted and cannot be accessed by other LimeWire subscribers.

All of these subpoints were preserved in the circuit 4 Cite as 2014 Ark. 403 court by the ten-page motion to dismiss that Klosky filed. Finally, the majority does not explain why it found it sufficient to cite as its only authority a jury instruction—Klosky was tried in a bench trial. I would decide this case on the merits. BAKER and GOODSON, JJ., join. John Wesley Hall, Jr., and Sarah M. Pourhosseini, for appellant.

Dustin McDaniel, Att’y Gen., by: Brad Newman, Ass’t Att’y Gen., for appellee. 5