FOURTH DIVISION
December 18, 2014

No. 1-13-1203

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12102
	)	
EDUARDO GONZALEZ,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to prove that defendant possessed child pornography with the intent to disseminate it. Defendant's 10-year sentence for aggravated child pornography did not violate the proportionate penalties clause.

¶ 2 After a bench trial, defendant Eduardo Gonzalez was convicted of 13 counts of aggravated child pornography and sentenced to 10 years' incarceration. Defendant appeals, asserting: (1) that the State failed to prove that he intended to disseminate the child pornography found on his computer; and (2) that his sentence is unconstitutionally disproportionate to the nature of his offense. We hold that the State's evidence was sufficient to prove that defendant intended to disseminate child pornography, where it showed that defendant downloaded and shared child pornography over an online peer-to-peer network. We also conclude that defendant's

10-year sentence was not unconstitutionally disproportionate. We affirm defendant's convictions and sentence.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with 49 counts relating to the possession or distribution of child pornography. The 13 counts at issue in this appeal each alleged that defendant "possessed with intent to disseminate" various depictions of child pornography.

¶ 5 At defendant's bench trial, Detective James Browne, a member of the Chicago police department's Internet crimes against children task force (ICAC), testified as an expert in the investigation of Internet child pornography. Browne described Gnutella, an online file-sharing network, as "a network *** basically used to trade information between two computers." Browne testified that Gnutella provided users with "an option to share certain files that [they] have on [their] hard drive[s]." Browne stated, "Either files that you've downloaded using the software, you can make available for trade or you can physically put files from your hard drive *** into a folder that typically is known as the shared *** folder." Browne testified that Bear Share was a publicly available peer-to-peer program used to operate on the Gnutella network.

¶ 6 Browne testified that, as part of his duties with ICAC, he monitored the Gnutella network for child pornography. Browne entered search terms associated with images or movies of child pornography and received results showing which users had shared files labeled with such terms. Those results also displayed the Internet provider (IP) address of the user who had made those files available for sharing. Once the search yielded results, Browne could download those files shared from other users' hard drives. Browne could also conduct a "browse host request," which provided him the "option of querying [an] IP address and ask them what else you are sharing."

The browse host request reported to Brown "all the contents inside the shared folder" of the targeted IP address.

¶ 7 Browne testified that, on February 15, 2011, he conducted a browse host request for terms associated with child pornography over Gnutella and "a computer that was located in Illinois reported back [its] IP address and stated that [it] had a file with that search term in it." Browne said that IP address 75.32.35.127 had a file available for download through Bear Share. Browne downloaded the file and described it as a nude photograph of a young girl. Browne testified that he downloaded 94 additional images and videos from the same IP address.

¶ 8 Browne testified that he used a website "known as Maxmind.com" to determine the Internet service provider (ISP) for the IP address and "generally where it's located." After running that search, Browne ascertained that the ISP for IP address 75.32.35.127 was SBC Global. Browne then prepared a request for a grand jury subpoena to be sent to SBC Global so that he could obtain the home address of the individual associated with that IP address. The subpoena revealed that IP address 75.32.35.127 was associated with the address 4639 South Rockwell Street in Chicago.

¶ 9 On June 28, 2011, Browne and three other officers executed a search warrant of 4639 South Rockwell. Browne knocked on the door of the house and defendant answered. Browne and the other officers seized several computers, a black Asus laptop, and wireless Internet modem. Browne conducted a "forensic preview" of the laptop's contents. Browne described a "forensic preview" as "a way to access a person's computer hardware *** so you're not changing any of the data on that hard drive or digital media." Browne testified that "the hard drive of that laptop contained [images] of child pornography." Browne asserted that he found these images in folders

other than the shared folder created by the Bear Share program. The State introduced several images that Browne had recovered into evidence.

¶ 10 On cross-examination, Browne stated that he did not know whether defendant installed Bear Share on the laptop. Browne asserted that, when a user downloaded Bear Share, the software offered the user the option to opt out of using a shared folder on Gnutella. Browne testified that, if defendant did not install Bear Share, he would not have seen a prompt asking whether he wanted to opt out of sharing his files. Browne testified that a user of Bear Share can opt out of sharing files at any time.

¶ 11 Browne testified that he arrested defendant and questioned him in the presence of Assistant State's Attorney Amanda Pillsbury. Browne testified that Pillsbury typed the statement, which defendant read and signed. Browne did not ask defendant whether he was aware that he could opt out of sharing files on Bear Share.

¶ 12 The State introduced a copy of defendant's typed statement into evidence. The statement indicated that defendant admitted that he owned the black Asus laptop found in his home. Defendant stated that "he [was] the only person that use[d] his computer because everyone else who live[d] in the house ha[d] their own computer." Defendant admitted that "he use[d] a peer to peer file sharing program, BearShare [*sic*], to download child pornography." Defendant said that the files he saved the files he downloaded into a folder called "BearShare [*sic*] downloads" and moved the images "from the BearShare [*sic*] folder into folders he created within the BearShare [*sic*] folder." He said that "the pictures and videos that he download[ed] from BearShare [*sic*] can be accessed by others and he can access other people's pictures and videos. He state[d] he use[d] the program to share files with others and share[d] other people's files too." The statement did not indicate whether defendant had installed Bear Share on the laptop.

¶ 13 Detective Charles Hollendoner testified that he assisted in the execution of the search warrant on June 28, 2011. Hollendoner testified that defendant was sitting on a couch in the living room of the house when he entered. Hollendoner said that there was a laptop on the floor next to defendant. Hollendoner testified that defendant admitted that he owned the laptop, that "there [were] illegal things on the computer," and that "he had downloaded Bear Share, which is a file sharing program that he used to find child pornography on the internet." Hollendoner asserted that defendant also admitted that he "knew that if he downloaded them to Bear Share file, they would be accessible to other people to download from his computer." Hollendoner testified that defendant told him that he never printed out any of the images, burned them to a disc, or put them on a flash drive.

¶ 14 Detective John Clisham, who was assigned to the Chicago police's Regional Computer Forensic Laboratory, testified as an expert in the field of forensic examination of computers. Clisham testified that, in July 2011, he examined the laptop seized from defendant's home. Clisham testified that he made copied the contents of the laptop's hard drive onto a blu-ray disc. The State introduced a copy of that disc into evidence. Clisham testified that, by viewing the pictures, he could not tell whether defendant downloaded them off of Bear Share or not.

¶ 15 The trial court first found that the State proved that defendant possessed child pornography, citing defendant's admissions in his statement. With respect to defendant's intent, the trial court made the following findings:

> "Remember what he said in his statement. [Defendant] states that the pictures and videos that he downloads from BearShare [*sic*] can be accessed by others and he can access other people's pictures and videos. He states he uses the program to share files with others and share other people's files too. Disseminate means to sell, distribute,

exchange or transfer possession whether with or without consideration or to make a depiction by computer available for distribution or downloading to the facilities of any telecommunications network.

In this Court's opinion the Prosecution has proved that he possessed *** child pornography with the intent to disseminate ***. I believe that he possessed this knowing that other people could access this filthy, despicable display and knowing that he could share by being on this particular program other people's files."

The court found defendant guilty of 13 counts of aggravated child pornography, each count relating to different images found on defendant's computer. The trial court sentenced defendant to concurrent terms of 10 years' incarceration on each count. Defendant appeals.

¶ 16 II. ANALYSIS

¶ 17 A. The Sufficiency of the Evidence of Defendant's Intent

¶ 18 The State charged defendant with aggravated child pornography pursuant to 11-20.3(a)(2) of the Criminal Code of 1963 (720 ILCS 5/11-20.3(a)(2) (West 2010)), alleging that defendant possessed child pornography with the intent to disseminate it.[1] Defendant claims that that provision did not apply to him, an "end user" of child pornography. Defendant asserts that he did not intend to make any child pornography available through his computer; rather, he claims that the State's evidence simply proved that he downloaded child pornography and retained it on his computer. The State avers that defendant's statements, in which he said that he knew that others could access the child pornography he had downloaded through the peer-to-peer network, proved that he had intended to make that pornography available over the Internet.

[1] In light of the State's allegations, we do not consider whether defendant's act of downloading child pornography constituted "reproduc[tion]" of the pornography under section 11-20.3(a)(2). 720 ILCS 5/11-20.3(a)(2) (West 2010).

¶ 19 Defendant frames much of his argument as an issue of statutory interpretation, arguing that *de novo* review applies. The State contends that defendant has challenged the sufficiency of the evidence against him and urges this court to apply the deferential standard applicable to such claims. To the extent that defendant's argument requires us to decipher the meaning of terms in the aggravated child pornography statute—a question of statutory interpretation—we apply *de novo* review. *People v. Stoecker*, 2014 IL 115756, ¶ 21. To the extent that defendant asserts that the evidence at trial failed to prove beyond a reasonable doubts the elements in that statute, we review whether a rational trier of fact could have found that the evidence at trial, when viewed in the light most favorable to the State, proved beyond a reasonable doubt each of the elements of the charged offense. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007).

¶ 20 Section 11-20.3(a) of the Criminal Code of 1963 provides, in relevant part, that a defendant commits aggravated child pornography when he or she:

> "with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or possesses with intent to disseminate any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child whom the person knows or reasonably should know to be under the age of 13 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]" 720 ILCS 5/11-20.3(a)(2) (West 2010).

The statute defines the term "disseminate" as:

> "(i) to sell, distribute, exchange or transfer possession, whether with or without consideration or (ii) to make a depiction by computer available for distribution or downloading through the facilities of any telecommunications network or through any

other means of transferring computer programs or data to a computer." 720 ILCS 5/11-20.3(f) (West 2010).

The Criminal Code of 1963 states that a defendant "intends" to do something "when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2010).

¶ 21 In *People v. Phillips*, 215 Ill. 2d 554, 575 (2005), the Illinois Supreme Court held that evidence that the defendant had admitted that "he would exchange child pornography on the Internet using his computer" was sufficient to prove that the defendant possessed child pornography with the intent to disseminate it. In that case, the State presented evidence that the defendant admitted that he "exchanged child pornography over the Internet" and "would post child pornography on Web sites in order to become a member." *Id.* at 560.

¶ 22 In this case, the State's evidence was similar to the evidence presented in *Phillips*. Here, the State presented evidence that defendant admitted to using a peer-to-peer network to download child pornography from the Internet. Defendant admitted to saving those files to the shared folder on his computer and that he used this folder "to share files with others and share other people's files too." Viewing this evidence in the light most favorable to the State, the State proved that defendant's actions reflected a conscious objective or purpose "to make [child pornography] by computer available for *** downloading through the facilities of any telecommunications network ***." 720 ILCS 5/11-20.3(f)(ii) (West 2010).

¶ 23 Defendant maintains that this evidence did not prove that he intended to "make [child pornography] available" (720 ILCS 5/11-20.3(f)(ii) (West 2010)) because he simply downloaded and saved child pornography someone else had already made available on the Internet. Defendant reasons that he could not intend to make child pornography available where it was

already available over the peer-to-peer network. Defendant neglects the fact that, by downloading files containing child pornography and saving them to his shared folder, he introduced additional copies of those files to the existing supply of child pornography on the peer-to-peer network. In *U.S. v. Sullivan*, 451 F.3d 884, 891 (D.C. Cir. 2006), the D.C. Circuit Court of Appeals explained this "viral character" of online child pornography:

> "[E]very time one user downloads an image, he simultaneously produces a duplicate version of that image. *** [T]ransfers of digital pornography *** multiply the existing supply of the commodity, so that even if the initial possessor's holdings are destroyed, subsequent possessors may further propagate the images. *This means that each new possessor increases the available supply of pornographic images*." (Emphasis added.)

¶ 24 The State's evidence in this case supports the description of the *Sullivan* court. Detective Browne testified that a user who downloads files from a peer-to-peer network has the "option to share certain files that [he or she] ha[s] on [his or her] hard drive." By saving files downloaded from the network into a shared file, as defendant did, "other members that are participating on the *** network [were] able to download those files from [his] computer." Browne testified that, when another user searches over a peer-to-peer network, he or she can identify all of the hard drives sharing files matching his or her search terms:

> "Once you put [a] word into the search bar into that software package, your computer goes and sends a digest message out over the network and computers that match on the other side, the sharing people's computers that have files with those search terms associated with them reports back to my computer and tells me this is my IP address. I have a file with the search term that you're looking for as part of my search

terms. And then it gets displayed on my computer so that I can select that particular file and download it."

¶ 25 By downloading the files from the peer-to-peer network and saving them to his hard drive, defendant created digital copies of those files. He then made those copies—which were not previously available on the peer-to-peer network—available for other users to download by saving them in his shared file. According to the State's evidence, defendant admitted knowing that he was making these copies available to other users on the network by saving them in his shared file. Defendant's argument that he did not intend to "make *** available" those files for download is thus unavailing. 720 ILCS 5/11-20.3(f)(ii) (West 2010). We conclude that, viewing the evidence in the light most favorable to the State, the State proved that defendant possessed child pornography with the intent to disseminate it beyond a reasonable doubt.

¶ 26 B. The Proportionate Penalties Clause

¶ 27 Defendant next asserts that the sentencing scheme for aggravated child pornography is unconstitutional because it prescribes the same sentencing range for individuals who actually produce child pornography and individuals, like defendant, who simply possess child pornography. Defendant also claims that his sentence is disproportionate to the nature of his offense such that his 10-year sentence shocks the moral sense of the community.

¶ 28 Initially, we reject the premise that defendant simply possessed child pornography. As explained above, the State's evidence proved that defendant possessed child pornography with the intent to disseminate it. *Supra* ¶¶ 18-25. We thus evaluate defendant's sentence as it applies to his act of possessing child pornography with the intent to disseminate it, not to the act of merely possessing child pornography. As stated below, we find that defendant's sentence is not unconstitutionally disproportionate to that offense.

¶ 29 The Illinois Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A criminal sentence may violate the proportionate penalties clause in two ways: (1) "if it is greater than the sentence for an offense with identical elements"; or (2) "if it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community. *People v. Hauschild*, 226 Ill. 2d 63, 74, 76 (2007). The Illinois Supreme Court has "never defined what kind of punishment constitutes "cruel," "degrading," or "so wholly disproportioned to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 339 (2002). "This is so because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id.*

¶ 30 Defendant's sentence does not violate the proportionate penalties clause in either of the ways listed above. Defendant is correct that the aggravated child pornography statute prescribes the same range of sentences for a person who "films, videotapes, photographs, or otherwise depicts" child pornography as someone, like defendant, who possesses child pornography with the intent to disseminate it. 720 ILCS 5/11-20.3(a)(1), (a)(2), (c)(1) (West 2010). In *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005), however, the Illinois Supreme Court expressly rejected using "the proportionate penalties clause to judge a penalty in relation to the penalty for an offense with different elements." As the offenses defendant highlights possess different elements than the offense he was convicted of, we cannot conclude that the aggravated child pornography statute violates the proportionate penalties clause under the identical elements test.

¶ 31 We also disagree that defendant's sentence was so disproportionate to his offense as to shock the moral sense of the community. In *New York v. Ferber*, 458 U.S. 747, 759, n.10 (1982),

the United States Supreme Court described the lasting harm that the distribution of child pornography can cause to the victims of the abuse depicted in it:

> " '[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.' " (Alteration in original.) (quoting David P. Shouvlin, *Preventing Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)).

The *Ferber* Court also highlighted that, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.* at 759.

¶ 32 In this case, defendant was convicted of possessing child pornography with the intent to disseminate it. The sentencing range for defendant's offense was 6 to 30 years' incarceration. 720 ILCS 5/11-20.3(c)(2) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). The trial court sentenced defendant to concurrent terms of 10 years' incarceration for each of the counts of aggravated child pornography of which he was convicted. Defendant, who was 37 years old at the time of the offense, admitted to sharing numerous depictions of child pornography over the Internet, perpetuating and contributing to the abuse of the children in those depictions. The trial judge described the images defendant possessed as "some of the most [vile] and despicable images [he had] ever seen in [his] life." In sentencing defendant, the trial court expressly made note of his lack of a criminal background and defendant's "decent side that people loved and respected." We cannot say that defendant's sentence was disproportionate to the harm caused

defendant's offense or failed to appreciate defendant's capacity to be restored to useful citizenship. We thus affirm defendant's sentence.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's conviction and sentence.

¶ 35 Affirmed.