Appeal No. 2008AP1763-CR **Cir. Ct. No. 2005CF306**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN W. MERCER,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Snyder and Neubauer, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2007-08)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

The law in Wisconsin is clear that a person knowingly possesses child pornography when he or she views a digital image of child pornography and manipulates or otherwise acts on the digital image knowing that the Web browser will automatically save the image on his or her computer.[2] However, no court,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* ***State v. Lindgren***, 2004 WI App 159, ¶¶26-27, 275 Wis. 2d 851, 687 N.W.2d 60.

and, importantly, no Wisconsin court, has decided whether the defendant may be convicted of knowing possession when the evidence supporting those charges neither shows that the defendant manipulated or acted on the digital image nor that the defendant knew the images would automatically be saved. The issue here concerns this situation. So, the question certified is:

Does a person knowingly possess child pornography when he or she merely views a digital image of child pornography?

BACKGROUND

In December 2002, Benjamin W. Mercer's employer installed a software monitoring package that monitored and stored a log of employees' computer usage on all employee computers. The software logged the date and time of the employee's Internet activity and use of other computer programs. In 2004, his employer activated the software's alert function, so that it would receive an e-mail alert when an employee typed a vulgar, threatening or otherwise questionable word. The alert listed the employee who typed the word and what program the employee was in. Mercer had more alerts from his computer usage than other employees, so his employer had the City of Fond du Lac Police Department review the logs of Mercer's Internet activity. The logs revealed visits to a number of Web sites displaying images of children posing in various states of undress or in the nude.

On October 27, 2005, the State filed an information charging Mercer, inter alia, with fourteen counts of possession of child pornography in

violation of WIS. STAT. § 948.12(1m). The State's evidence for these charges was the logs and the images recreated from the Web sites recorded in the logs.[3]

It should be noted that the State also charged Mercer with an additional nineteen counts of possession of child pornography based on digital images stored on Mercer's hard drive. These nineteen counts were based on other evidence not derived from the software program logs. The evidence for these counts included images on the unallocated hard drive space of Mercer's computer. The complaint stated that "those images were apparently temporarily stored on the hard drive in that 'unallocated space' after having been accessed and viewed through that computer and then deleted by the user." In other words, Mercer did manipulate the images in counts 1-19 by clicking on thumbnails. The court dismissed three of the counts and the jury found him not guilty on the rest of these counts. Therefore, these counts are not relevant to the issue being certified.

As to the fourteen counts that are the subject of the certification, these counts also went before the jury and the trial court gave the following instruction:

> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography

[3] A Wisconsin DOJ special agent did testify that when he interviewed Mercer, Mercer admitted to knowing that "he was deleting temporary Internet files, cookies and history files." But, Mercer denies knowing that his actions would save the image on his computer. More to the point, though, the State did not provide any evidence that the images charged in these fourteen counts (counts 20-33) were ever automatically saved when Mercer viewed them. The State's computer forensic expert testified that there was no evidence that any of those images ever "made it to [Mercer's] machine," either in the temporary Internet files or in the unallocated hard drive space, which is where the images would go when the temporary Internet files are deleted. The State, however, contends that the lack of evidence of the images on Mercer's hard drive is irrelevant.

> image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.

In formulating this jury instruction, the trial court explained that it closely followed ***State v. Lindgren***, 2004 WI App 159, ¶27, 275 Wis. 2d 851, 687 N.W.2d 60, which we will discuss below. The jury found Mercer guilty of all fourteen counts. On appeal, Mercer challenges the trial court's jury instruction on the meaning of knowing possession.[4]

DISCUSSION

Knowing possession is the first of four elements that the State must prove to support a possession of child pornography charge. WIS. STAT. § 948.12(1m)(a); WIS JI-CRIMINAL 2146A. The statute states, in relevant part, "(**1m**) Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances [is guilty of a Class D felony]: (a) The person knows that he or she possesses the material." § 948.12(1m), (1m)(a) and (3).

In ***Lindgren***, we explained that the defendant knowingly possessed child pornography when he "repeatedly visited child pornography Web sites, clicked on thumbnail images to create larger pictures for viewing, accessed five images twice, and saved at least one image to his personal folder." ***Lindgren***, 275

[4] The defendant raises additional issues; however, we have omitted the facts relevant to those issues because we believe the certified issue must be resolved in any event.

Wis. 2d 851, ¶27. ***Lindgren*** based its conclusion on the reasoning in ***United States v. Tucker***, 305 F.3d 1193 (10th Cir. 2002).

In ***Tucker***, the Tenth Circuit found that the defendant had knowing possession of the images saved in his Web browser cache file despite the defendant's argument that he did not possess the files because the computer's automatic saving of thumbnail pictures was involuntary. ***Lindgren***, 275 Wis. 2d 851, ¶¶25-26 (citing ***Tucker***, 305 F.3d at 1204-05). At Tucker's trial, the government's computer expert testified that images in a cache file can be accessed and used like other saved files—attached to an e-mail, posted to a newsgroup, placed on a Web site, or printed to a hard copy. ***Tucker***, 305 F.3d at 1204. The ***Tucker*** court explained that even if the defendant did not want his computer to automatically save the images, he knew it was doing so when he clicked on the thumbnail images, so his possession was voluntary. ***Id.*** at 1205. Therefore, the court concluded that he knowingly acquired and possessed the images each time he intentionally sought out and viewed child pornography with his Web browser. ***Id.***

Mercer argues that ***Lindgren*** and ***Tucker*** create requirements that apply to all findings of knowing possession based on digital images. He posits that the jury *must* find that he viewed the digital images of child pornography *and* acted on or manipulated the images *and* knew that his Web browser would automatically save the images so that he could access them later. Thus, he asserts that the jury instruction was inappropriate because it would allow the jury to find knowing possession when the defendant merely viewed digital images of child pornography on a Web site.

The State counters that the extra evidence is not always necessary. It asserts that ***Lindgren*** and ***Tucker*** present only examples of knowing possession, not requirements. Therefore, it contends that the jury could find possession without determining that the defendant either "acted on or manipulated the child pornography image" or "viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file."

Separate from the parties arguments, we independently note that the ***Tucker*** court also made a point of saying it was not deciding the issue presented in this appeal, where there is no evidence of the charged images on Mercer's computer's temporary Internet files or cache, nor any evidence that Mercer otherwise saved or manipulated the images. ***Tucker***, 305 F.3d at 1205 n.16. We have found no court that has clearly addressed this issue head on. Essentially, this case offers our supreme court the opportunity to be the first court to address whether knowing possession may include merely viewing a digital image on a Web site with a factual situation where the charges are based solely on the accused viewing digital images.

We note further that the defendant in ***Lindgren*** suggested certain consequences of a decision which would allow a finding of knowing possession when an accused merely views digital images on a Web site. *See* ***Lindgren***, 275 Wis. 2d 851, ¶23. He pointed out that Internet users are often bombarded with unwanted "pop-up" ads which often appear when a user is on the Internet, and alleged that they may display unintended or undesired information. ***Id.*** A decision by the supreme court in this case will be able to discuss that concern as well as similar concerns, which reasonable minds might ponder. For example, if the State's theory is accepted, will a person be subjected to criminal prosecution if he or she is Googling a legitimate nonsexual topic, believes that a certain, listed

Web site result might provide the wanted information, clicks on it and only then finds that the selected Web site contains unlawful pornographic viewing? In sum, a decision on this issue will affect practically all Wisconsin citizens who use the Internet. Such a question of *publicae jurae* is well-suited for a decision by our state's highest court. We respectfully tender this case and the issue raised to the Wisconsin Supreme Court**.**