

Docket No. 13-1386

United States Court of Appeals
For the Seventh Circuit

United States of America,

Plaintiff-Appellee,

v.

David Foley,

Defendant-Appellant.

Appeal from a judgment of conviction entered in the United States
District Court for the Eastern District of Wisconsin, the Hon. J.P.
Stadtmueller, presiding
District Court No. 11-CR-264

Brief and Short Appendix of the Appellant, David Foley

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Appellate Court No. **13-1386**

Short Caption: **United States v. David Foley**

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David Foley

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(3) If the party or amicus is a corporation:

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Attorney's Signature: /s/ **Jeffrey W. Jensen**

Date: **April 4, 2013**

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **X** Yes No

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Jurisdictional Statement

A. The Court of Appeals has jurisdiction of this matter because it is an appeal from a criminal conviction in the United States District Court (ED-Wis). *See*, 28 USCS § 1291. The District Court has jurisdiction because an indictment was returned alleging a violation of 18 U.S.C. § 2256(8)(A), and others, and the defendant was convicted following a jury trial.

B. The judgment of conviction was entered on February 15, 2013. Foley filed a notice of appeal on February 21, 2013; and, therefore, the appeal is timely.

C. There have been no motions that have tolled the time limits

D. The appeal is from a final judgment of conviction in a criminal case and, therefore, the appeal is from a final judgment that disposes of all parties' claims.

E. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues Presented for Review

I. Whether the evidence was sufficient as a matter of law to convict the appellant, Foley, of production of child pornography where the government failed to present evidence as to where the camera used to record the digital video images was manufactured?

Answered by the District Court: Yes

II. Whether the district court erred in permitting the government to introduce character evidence under Rule 413 where the defendant was not charged with sexual assault?

Answered by the District Court: Yes

Statement of the Case

The defendant-appellant, David Foley (hereinafter “Foley”) was named in an indictment charging him with one count of distribution of child pornography (Count One), three counts of production of child pornography (Counts Two, Three, and Four), with one count of taking a child across state lines for the purpose of committing a sex act (Count Five), and with one count of possession of child pornography (Count 6). (Doc. 1) Foley entered not guilty pleas to all counts.

Prior to trial, the government filed a motion seeking to admit the testimony of Minor Male B pursuant to Rules 413 or 414. FRE. (Doc. 45) The motion alleged that on an earlier occasion, Foley had fondled MMB’s genitals while they were together in a changing room at a YMCA. Foley opposed the motion. Over Foley’s objection, the district court ordered

that the evidence was admissible. (Doc. 101, p. 414)

The matter was tried to a jury beginning on November 26, 2012. After three and one-half days of testimony, the jury returned verdicts finding Foley guilty on all counts. (Doc. 103, p. 654)

Foley timely filed a motion a motion for acquittal pursuant to Rule 29 F.R.Cr.P., challenging the sufficiency of the evidence to support the verdicts on the production counts (Counts Two, Three, and Four). (Doc. 70) By memorandum decision, the district court denied the motion. (Doc. 73)

On February 15, 2013, the district court sentenced Foley to a total of 336 months in prison consecutive to state court sentences that Foley was already serving¹. The court also ordered Foley to serve ten years on extended supervision. (Doc. 87)

Foley timely filed a notice of appeal. (Doc. 89)

Statement of the Facts

Beginning in February, 2010, David Foley-- along with several partners, including Rick Bystra-- leased a building from Andy Garrison, where, eventually, Foley ran a barbershop. (Doc. 100, p.102) The business operated under the name “Sport-N-Cuts Clubhouse

¹ At the time of sentencing, Foley was serving approximately ten years on Wisconsin state court sentences. Thus, the district court’s sentence in this case makes it very likely that Foley will die in prison.

Barbershop”. (Doc. 100, p.178)

At the time the lease was signed, the building was not built-out as a barbershop. According to Garrison, it was “understood” that Foley and his partners would be responsible for bearing the expense of building out the space so that it could operate as a barbershop. (Doc. 100, p.134) It was Garrison’s understanding that Foley spent between \$50,000 and \$100,000 to build out the space before he was able to begin operating it as a barbershop. *Id.* In that regard, Bystra testified that he invested \$50,000 in the barbershop venture. (Doc. 100, p.199) Moreover, the accountant for the barbershop, Lance Gordon, testified that he did not believe that Foley fully understood that he had signed a “triple-net”² lease with Garrison, and that rent was due the first month even though there had not been time to build-out the shop. (Doc. 101, p. 251) Thus, Foley was obligated to Garrison for rent before the shop was even opened. This caused a significant rift between Foley and Garrison.

Bystra described the relationship between Foley and Garrison as “rocky” right from the start. (Doc. 100, p.179) Bystra testified that, according to what Foley told him, Garrison was attempting to give instructions and to involve himself in the build-out of the barbershop. *Id.*

As the relationship with Garrison worsened, Foley told several people that Andy Garrison had sexually harassed a boy, Minor Male A (“MMA”), who Foley identified as his son. (Doc. 100, p.129) Anthony Coleman, who worked at the barbershop, testified that³ Foley asked

² The lessor is responsible for rent, property tax, and utility expense

³ Coleman testified that the year was 2011; however, it was probably 2010

whether he (Coleman) had a younger sibling who would be willing to say that Garrison sexually assaulted him. (Doc. 101, p. 261) Foley offered Coleman money. *Id.* Coleman declined.

The feud continued. In the late summer or early fall of 2010 Garrison distributed a leaflet to the local business community concerning Foley, and Garrison admitted that the purpose of the leaflet was to damage Foley's business. (Doc. 100, p.136)

Bystra recalled a telephone conversation that he had with Foley in which Foley claimed that a "dumpster diver" had found a DVD with some "dirt" on Garrison. (Doc. 100, p.181) Additionally, David Brozovich testified that he was a friend of Foley's, and that he would come to the barbershop from time-to-time for a haircut. Brozovich said that on one occasion he came in for a haircut, and Foley told him that a "dumtper diver" had found a DVD in the dumpster with child pornography on it. (Doc. 100, p.149) Foley said that he believed the DVD belonged to Andy Garrison. Foley indicated that he was going to call the police, and he urged Brozovich to tell Garrison that he was in trouble. *Id.*

Finally, in August, 2010, Bryan Polcyn, an investigative reporter for Fox 6 News, received a cardboard mailer, addressed to the television station. (Doc. 100, p.160) It was sent anonymously, it bore a cancelled United States postage stamp, and contained a typed letter and a Phillips brand DVD disc. *Id.* The letter stated that the sender had discovered the disc in a dumpster that was behind "Andy Garrison's building at 400 East Silver Spring," and that the sender found the content to be

“shocking and disturbing.” Polcyn opened the DVD and observed that it contained numerous images of child pornography. (Doc. 100, p.164,165) Thereafter, Polcyn turned the disk over to law enforcement. (Doc. 100, p.168)

An examination of the disc by forensic analyst Christine Byars revealed that the disc contained pornographic material in the form of images and videos of young boys engaged in sexually explicit conduct. The images were in a folder with a user profile of “Andy’s Favorites, and in a sub-file entitled “Andy Garrison’s Private files.” (Doc. 101, p. 445) The sub-file also contained an additional sub-file entitled “boys,” which contained additional child pornography. At trial, Garrison denied that he had ever produced or possessed child pornography. (Doc. 100, p.125)

In total, Byars observed that there were 179 pornographic images and 22 pornographic videos contained on the disc. Byars determined that the child pornography had been “burned” or copied to the disc on August 10, 2010, just a few days before its delivery to the TV station (Doc. 101, p. 455).

Later, in early December of 2010, Foley called Bystra and stated that a laptop computer bag had been found behind the barbershop near where Garrison’s car had been parked. (Doc. 100, p.182) He informed Bystra that he had plugged it in to see what was on it, and discovered that it contained folders with pictures of naked children. Bystra arranged to have his friend, Ronald “Mike” Gull, a private investigator, meet Foley to take possession of the laptop. (Doc. 100, p.184) On approximately

December 9, 2010, Gull met Foley at his apartment located on Wilson Street, in Shorewood. Foley told Gull that he found the computer bag outside the barbershop after Andy Garrison had left from that location, and that he was concerned about its contents. Gull observed that the bag contained a manilla folder which contained numerous printed images of children in pornographic poses, a Toshiba laptop computer, and a white t-shirt with printing advertising a bicycle race which was sponsored by Andy Garrison and his brother. Gull opened the laptop computer, noted that it was not password protected, and that it contained a business letter purportedly written by Garrison (Doc. 100, p.216) and a file containing child pornography which was labeled “Andy’s Favorites.” (Doc. 100, p.210)

Gull turned the computer bag and its contents over to the FBI on December 15, 2010 (Doc. 100, p. 216) Examination of the computer revealed that until November 19, 2010, this Toshiba computer was owned by a man named Quentin Hopkins, who posted it for sale on Craig’s List. (Doc. 101, p. 273) On November 18, 2010, Hopkins was contacted by e-mail from an account belonging to Foley. (Doc. 101, p. 275) Telephone records reflect that thereafter several calls were exchanged between Foley’s Sprint Nextel number and a number subscribed to by Hopkins. (Doc. 101, p. 279) Hopkins testified that on November 19, 2010, in the early afternoon, he sold the computer to the man with whom he had exchanged messages, and who he met at McDonalds. (Doc. 101, p. 285). Child pornography was first uploaded to the Toshiba laptop on November

21, 2010.

Forensic Analyst Andrew Schoeneck (Doc. 102, p. 480) analyzed the DVD that was sent to Fox 6 News, and the computer Foley gave to Gull, and compared their contents and artifacts to two computers that were recovered from Foley's Shorewood apartment during the execution of a search warrant at that location. Schoeneck determined that the laptop Foley gave to Gull on December 9, 2010, Exhibit 107, contained numerous images of child pornography, including six videos. (Doc. 102, p. 491) The three computers contained numerous images of child pornography and references to images of child pornography that were identical or highly similar to the images on the DVD that was sent to Fox-6.

Schoeneck concluded that the images on the DVD, which had been downloaded from various child porn web sites, all likely originated from Foley's computers and storage media. (Doc. 102, p. 523) Additionally, Schoeneck located references to a folder entitled "Andy Garrison's private files," in the recycle bin of Foley's laptop computer recovered during the search warrant of his home. (Doc. 101, p. 315) The folder contained files that were named identical to, and reflected dates corresponding to the files in the folder entitled "Andy Garrison's private files," on the DVD sent to Fox 6 News.

Schoeneck also discovered a number of videos on the tower computer that appeared to show MMA in sexually explicit poses, and one of the videos showed Foley giving MMA a naked massage. In the video,

Foley eventually uses his hands to stimulate MMA's erect penis. (Exhibits 51 and 51A)

Schoeneck testified that there was a sticker on the hard-drive from the tower computer⁴ indicating that it was manufactured in Thailand (Doc. 102, p. 487). Similarly, Schoeneck said that the hard-drive from the laptop⁵ was manufactured in China. (Doc. 102, p. 488) There was no evidence presented as to the type of camera used to record the videos of MMA and Foley; much less was there any testimony as to where any such camera might have been manufactured.

In 2011, Foley drove MAA from Milwaukee, Wisconsin to Minneapolis, Minnesota, where the two spent the weekend at a hotel and frequented the Mall of America. They slept in the same bed. (Doc. 101, p. 395) On the second night of the stay, according to MMA, he awoke to find Foley touching his (MMA's) penis. (Doc. 101, p. 402)

Finally, Minor Male B ("MMB") testified that when he was ten or eleven years old, he was involved in the Big Brother Program, and that Foley was assigned as his Big Brother. (Doc. 101, p. 348) On one occasion, he and Foley were in a dressing room at a YMCA, and while MMB was in a stall with the curtain closed, naked, Foley reached over and grabbed MMB's penis. (Doc. 101, p. 357) Foley was wearing only his underwear. *Id.* MMB admitted that he had been with Foley hundreds of times, and this was the only time Foley grabbed his penis. (Doc. 101, p. 361)

⁴ Exhibit 100, the computer seized from Foley's apartment

⁵ Exhibit 107, the laptop from Mike Gull that was found behind the barbershop.

Summary of the Arguments

I. The evidence was insufficient to sustain the jury's verdicts finding Foley guilty of the three production of child pornography counts. In order to prove the jurisdictional element of the production of child pornography counts, it is required that the government establish that the equipment used to produce the images moved in interstate commerce. Here, the only evidence presented concerning jurisdiction was that a hard drive that contained a video of child pornography had moved in interstate commerce. There was no evidence that the camera that was used to record the digital video images moved in interstate commerce. As such, even viewing the evidence in the light most favorable to the verdicts, there was no evidence to establish the jurisdictional element.

The district court found the evidence to be sufficient, though, by finding that the jurisdictional element of the production statute was nearly identical to the jurisdictional element of the possession of child pornography statute, and the appellate courts have held that copying an image to a hard drive that moved in interstate commerce was sufficient to establish the jurisdictional element of a *possession* charge. The district court recognized that this finding blurred the distinction between *possession* of child pornography and *production* of child pornography, but went on to explain that for production there is the additional element

of “coercion” over the child and, therefore, the distinction was sufficient.

II. The district court erred in admitting propensity evidence that Foley, on an earlier occasion, had fondled the genitals of a boy in a YMCA dressing room. Over Foley’s objection, the district court permitted the government to introduce propensity evidence pursuant to Rules 413 and 414 FRE. Specifically, the government presented the testimony of MMB to the effect that, years earlier, Foley had been his “Big Brother” under the Big Brothers Program, and that on one occasion he and Foley were together in a dressing room at a YMCA where Foley fondled MMB’s genitals.

In order for evidence to be admissible under Rule 413, the defendant must be charged with a crime of sexual assault. None of the offenses alleged in the indictment are crimes of sexual assault, nor does proof of any of the offenses require proof that Foley sexually assaulted a child. Thus, under the very terms of the Rule, the propensity evidence was not admissible. Moreover, even if Foley’s present charges are offenses of sexual assault under Rule 413, the proffered evidence is not relevant to any contested issue in the case; and whatever miniscule probative value the evidence might have is outweighed by the monumental prejudicial effect.

Argument

I. The evidence was insufficient as a matter of law to sustain the jury's verdict finding Foley guilty of producing child pornography.

In order to convict Foley of production of child pornography, the jurisdictional element requires that the government prove that the equipment used to produce the images moved in interstate commerce. Although the government presented evidence that the hard drive on which the images were found had been manufactured outside of the United States, there was no evidence that the *camera* that was used to *produce* the images had passed in interstate commerce. Thus, Foley challenged the sufficiency of the evidence to support his convictions for production of child pornography.

The district court found the evidence to be sufficient. The court wrote, “[T]he Court determines that ‘produce,’ as found in the jurisdictional element of 18 U.S.C. § 2251(a), includes the copying of a file onto a hard drive that traveled in interstate commerce.” (Doc. 73, p. 10) Having made that determination, the court had little trouble finding that the evidence was sufficient.

As will be set forth in more detail below, the Seventh Circuit should find that the act of copying or storing an image onto a hard drive does not constitute production of child pornography. As the district court noted, if this act amounts to *production*, then there is no real difference

between producing child pornography and merely possessing child pornography.

A. Standard of Appellate Review

On appeal from a trial court's denial of a motion for judgment of acquittal, the appellate court must review the evidence in the light most favorable to the government to determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hill*, 187 F.3d 698, 700 (7th Cir. 1999) Under this standard, a guilty verdict may be overturned only if there is "no evidence from which a jury could convict." *Id.* This standard of review is reserved for cases where the defendant renews his motion for judgment of acquittal at the close of all the evidence or within seven days after the jury is discharged. *See United States v. Hickok*, 77 F.3d 992, 1002 (7th Cir. 1996); Fed. R. Crim. Proc. 29(c).

Foley did file a motion for acquittal under Fed. R. Crim. Proc. and, therefore, this is the standard that applies.

B. Elements of production of child pornography

In counts 2 through 4 of the Indictment, Foley is charged with production of child pornography, contrary to 18 U.S.C. 2251(a).⁶

⁶ In its entirety, that section provides: "(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such

Concerning the jurisdictional element, the government's theory was that the visual depiction of MMA was produced or transmitted using equipment that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.⁷ Under the statute, federal jurisdiction is also established if the defendant acted with the intent to transmit the images in interstate commerce, including by computer; or if the images actually were so transmitted.

The question, then, is whether the jurisdictional element presented to the jury in this case is met where the government presented no evidence as to what sort of camera was used to *produce*-- that is, to record in a digital format-- the images. Where there is no evidence concerning the camera, there can be no evidence that the camera used to produce the child pornography moved in interstate commerce.

At the outset of the discussion, it must be emphasized that there is a critical distinction between mere possession of child pornography

conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, ***if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer***, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed." Emphasis provided to indicate the government's theory of how the jurisdictional element was met.

⁷ See the jury instruction submitted by the government, and given by the court, where the jury was instructed that, "The visual depiction was produced using equipment or materials that had been mailed, shipped, transported across state lines or in foreign commerce."

[prohibited by 18 U.S.C. 2252A(a)(5)(B)]⁸, and production of child pornography [prohibited by 18 U.S.C. 2251] For one thing, production of child pornography carries a fifteen year minimum mandatory sentence, and mere possession does not.

Concerning mere possession of child pornography, the Seventh Circuit has held that evidence that a hard drive which contained images of child pornography was manufactured outside of the United States was sufficient to prove the jurisdictional element for *possession*. See, *United States v. Anderson*, 280 F.3d 1121, 1125 (7th Cir. Wis. 2002). There, the court wrote:

At trial, the government established the jurisdictional element of 18 U.S.C. § 2252A(a)(5)(B) with testimony that the hard drive had previously been transported in interstate commerce. Additionally, the government proved by overwhelming evidence that Anderson downloaded or copied the images of child pornography using his computer hard drive. Anderson's own testimony bolstered the government's proof of this fact. Computerized images are produced when computer equipment is used to copy or download the images. *United States v. Angle*, 234 F.3d 326, 341 (7th Cir. 2000). The government's evidence that Anderson downloaded such images satisfies 18 U.S.C. § 2252A(a)(5)(B), which requires that a hard drive produce the illegal images. *Id.* Thus, all the elements of the offense were established at trial.

⁸ “(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;”

Where there is no evidence of the camera that was used to produce the images, though, there is no basis to distinguish between mere possession of child pornography and production of child pornography. In other words, where there is only the hard drive, how do we know that the defendant did not simply download the images from some other source (as opposed to producing the image)?

The Seventh Circuit does not appear to have confronted this specific issue; however, the Eighth Circuit has been prolific in addressing this issue. For example, the Eighth Circuit found that the jurisdictional element for *production* of child pornography was met where the pornographic images were stored on a “memory stick”. However, the court’s recitation of the facts suggests that there was evidence of a *digital camera* in that case that was used to record the images, and that the memory stick was an integral part of the camera. The court wrote,

Mugan used a digital camera to take sexually explicit photographs of himself having intercourse with his 13 year old daughter. The photographs were stored on a digital memory stick that had previously been shipped in interstate and foreign commerce. Because the photographs were stored in this way, they were capable of immediate and widespread distribution over the internet. Law enforcement officials discovered the memory card while executing a warrant at Mugan's residence. At that time they also found a videotape of Mugan's daughter dancing while the camera zoomed in on her pubic area.

United States v. Mugan, 441 F.3d 622, 625-626 (8th Cir. Iowa 2006).⁹ If

⁹ The *Mugan* judgment was vacated because of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), but the discussion concerning the constitutionality of the

there were any doubt about whether it was the *camera* that was the important factor in *Mugan*, the Eighth Circuit later made it explicit. The court wrote, “Our court has on a number of occasions held that the use of a *camera* that has moved in interstate commerce provides a sufficient jurisdictional nexus to punish the production of child pornography under the Commerce Clause. *See, e.g., United States v. Mugan*, 441 F.3d 622 (8th Cir. 2006), cert. denied, 127 S. Ct. 191, 166 L. Ed. 2d 157 (2006).” *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. Iowa 2007). *See also, United States v. Nichols*, 574 F.3d 633, 635 (8th Cir. Ark. 2009), where it was, “undisputed that the *camera*, computer, and disk Nichols used to photograph, download, and store the illegal photographs were all manufactured outside the state of Arkansas.”

Thus, because there was no evidence of the type of camera used to record the digital videos in this case, the jurisdictional element cannot be satisfied.

Despite recognizing the issue, the district court reasoned that:

But, in the end, that is not the case. 18 U.S.C. § 2251(a) requires the affirmative action of coercion or enticement of a minor for purposes of producing a visual depiction—an element that the possession charges do not contain. Therefore, 18 U.S.C. § 2251(a) differs in a meaningful way from the possession statutes. And, because the “production” aspect of 18 U.S.C. § 2251(a) is contained in the action of coercing or enticing a minor for purposes of producing a visual depiction, it is logical to believe that the jurisdictional element may be somewhat broader than requiring the actual filming or photographing of a minor, and have the same meaning as the practically identical jurisdictional elements found in the related possession statutes.

child pornography statutes is nonetheless persuasive.

(Doc. 73, p. 9)

It is difficult to comprehend, though, and the district court does not explain, how the fact that coercion of the child is required to prove *production* could in any way affect the jurisdictional requirement. Coercion of the child would seem to be wholly external to the requirement that the equipment used to produce the images must have moved in interstate commerce. Thus, the Seventh Circuit should reject the district court's attempt to use this as a means to distinguish the jurisdictional element of production from the jurisdictional element of possession.

The remaining question, then, is whether the fact that Foley appeared in the video makes a difference. In viewing the evidence in the light most favorable to the government, as the court is obligated to do, there exists a plausible inference that Foley played some role in producing the pornographic video. That is, the scene was apparently shot within the confines of Foley's home, and the remnants of the video were located on a hard drive that was found inside Foley's home. Circumstantially, this evidence may suggest that Foley intended to sell or to otherwise transmit the video in interstate commerce. This inference, though, does nothing to address the jurisdictional question that was actually presented to the jury.

Concerning the jurisdictional element, the government chose to have the court instruct the jury that the *equipment used to produce the video* moved in interstate commerce. There are two other jurisdictional

possibilities under the statute. They are that the defendant produced the video “with intent to transmit it in interstate commerce”, or that the image was actually transmitted in interstate commerce.

Even though the court must view the evidence in the light most favorable to the government, the court is not permitted to salvage a verdict by making a finding of fact on a question that was not presented to the jury. To do so violates the defendant’s right to a jury trial on all necessary questions of fact. *See, e.g., In re Winship*, 397 U.S. 358, 364 (U.S. 1970). Thus, it is not permissible for the court to find that the jurisdictional element was satisfied because, in this case, Foley appeared in the video and, therefore, he must have been motivated by lucre or by some other desire to transmit the video in interstate commerce. Similarly, the court is not permitted to salvage the verdict by finding that, because the image was on the computer’s hard drive, it must have been transmitted there by the use of computer equipment. These questions were not presented to the jury.

The mere fact that Foley appeared in the video, though, permits no inference as to the type of camera used to record the video; much less does it permit any inference that the camera moved in interstate commerce.

II. The district court erred in permitting the Government to present character evidence under Rule 14

Over Foley's objection, the district court permitted the government to introduce propensity evidence pursuant to Rules 413 and 414 FRE. *See* Appendix C (Doc. 101, p. 414) for the district court's full bench decision. Specifically, the government presented the testimony of Minor Male B to the effect that, years earlier, Foley had been his "Big Brother" under the Big Brothers Program, and that on one occasion he and Foley were together in a dressing room at a YMCA where Foley fondled B's genitals. As will be set forth in more detail below, in order for evidence to be admissible under Rule 413, the defendant must first be charged with a crime of sexual assault. None of the offenses alleged in the indictment are crimes of sexual assault, nor does proof of any of the offenses require proof that Foley sexually assaulted a child. The fact that proof of these offenses in the present case might involve evidence of a sexual assault does not change the legal nature of the offense. Thus, under the very terms of Rule 413, the propensity evidence was not admissible.

A. Standard of Appellate Review

The admissibility of evidence under Rule 413 FRE is a two-step process. Firstly, it must be true that the defendant is accused of an offense of sexual assault as defined in the statute, and the prior incident must also be a sexual assault; and, secondly, the court must find, in its

discretion, that admission of the evidence is fair. The Court of Appeals will, “[R]eview a district court's interpretation of the rules of evidence *de novo* and we review its decision to admit or exclude evidence for abuse of discretion.” *United States v. Rogers*, 587 F.3d 816, 819 (7th Cir. Ill. 2009). Here, Foley’s first claim is that he was not presently charged with an offense of sexual assault. Therefore, the appellate court reviews the issue *de novo*. Foley also contends that even if the present offense is properly interpreted as an offense of sexual assault, the proffered propensity evidence is not relevant; and any probative value is substantially outweighed by its unfair prejudicial effect.

B. Foley is not charged with sexual assault

In order for evidence to be properly admitted under Rule 413 FRE, it must first be true that Foley is charged with an offense of sexual assault. Here, he was not. “Sexual assault” is defined in Rule 413. It reads:

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body--or an object--and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Whether the crimes with which Foley was charged are crimes of sexual assault must be determined as a matter of law by an examination of the elements of the offense. In this case, none of the crimes alleged in the indictment have as an element any of the behavior described in Rule 413 as being “sexual assault.” Foley was charged with three counts of producing child pornography in violation of 18 U.S.C. § 2251(a), one count of transporting a minor across state lines to engage in a sex act in violation of 18 U.S.C. § 2423(a), one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).

The elements of none of these crimes requires proof that Foley performed any of the acts described as “sexual assault” in Rule 413(d).

18 USC § 2251 provides:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if

such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

As the Eighth Circuit observed, a violation of 18 USC 2251(a) does not require that the image depicts any sort of sexual *contact* or sexual act at all. The crime is committed where the image is of a sexually explicit display of the child's genitals. The court wrote:

"Sexually explicit conduct" in the context of child pornography includes "lascivious exhibition of the genitals or pubic area of any person." *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999) (quoting 18 U.S.C. § 2256(2)(E)). n2 "The meaning of the phrase 'lascivious exhibition of the genitals or pubic area' is a matter of law which we review de novo." *Id.* But "the question whether materials depict 'lascivious exhibition of the genitals,' an element of the crime, is for the finder of fact." *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001). "Nudity alone does not fit this description; there must be an 'exhibition' of the genital area and this exhibition must be 'lascivious.'" *Horn*, 187 F.3d at 789; see also *United States v. Kemmerling*, 285 F.3d 644, 645-46 (8th Cir. 2002)

United States v. Wallenfang, 568 F.3d 649, 656-657 (8th Cir. Iowa 2009).

The crimes of possessing, producing, or distributing child pornography, then, do not of necessity *involve*, "[C]ontact, without consent, between any part of the defendant's body--or an object--and another person's genitals or anus." See Rule 413(d)(2) FRE As such, Foley not charged with a crime of sexual assault in the pornography-related counts.

Similarly, the crime of taking a minor across state lines for the purpose of engaging in a sex act is not a crime of sexual assault as contemplated by Rule 413. To obtain a conviction under § 2423(a), the government must prove beyond a reasonable doubt that the defendant: "(1) knowingly transported a minor across state lines, (2) with the intent to engage in sexual activity with the minor, and (3) that the minor was under eighteen at the time of the offense." *United States v. Chambers*, 441 F.3d 438, 450 (6th Cir. 2006). The *actus reus* of this offense is the crossing of a state line while having the intent to commit a sex act. The crime is complete upon crossing the state line with the requisite intent. This crime is not one of solicitation to commit sexual assault, nor is an attempted sexual assault. Proof of the offense does *not* require that any sex act actually occurred. As such, this is not a crime of sexual assault, either.

C. In determining whether Foley is presently charged with an offense of sexual assault, the court must take a categorical approach that looks only to the elements of the offense, not to the nature of Foley's actual alleged conduct.

Before the district court, the government's argued that in this case Foley was charged with offenses of sexual assault because the evidence it intended to present against him involved an *image*-- that is, a video-- of Foley using his hand to stimulate the penis of a child.¹⁰ Thus, according

¹⁰ The government's position was based upon the Seventh Circuit's holding in *Rogers, supra*.

to the government's logic, the present offense does, in fact, "involve" the sexual assault of a child. Thus, it meets the requirements of Rule 413.

Whether or not, as a matter of law, a charged offense is a crime of sexual assault cannot not depend upon the factual basis alleged. Rather, the court must take a categorical approach that looks only to the elements of the offense. Either the crime is a crime of sexual assault, or it is not. It simply cannot be, as a matter of law, that in some instances, possession of child pornography is an offense of sexual assault; while, in other instances, it is not, all depending upon the factual basis alleged for the offense.

Other than the discussion in *Rogers, supra*, there seems to be a

In *Rogers*, in 2006 the defendant used the Internet to chat with what he believed to be a fourteen year-old girl named "Emily". It was really a police officer. During various chat episodes, Rogers attempted to persuade the "girl" to meet him for a sexual encounter. Consequently, Rogers was charged with attempting to entice a minor to engage in sexual activity, 18 U.S.C. § 2442(b). The government, pursuant to Rule 413 FRE, sought to introduce evidence of similar behavior that occurred the year before, in 2005, where Rogers used the Internet to chat with a real fourteen year-old girl, and he persuaded her to send him an image of her genitalia. In that 2005 case, Rogers was charged with a violation of 18 U.S.C. § 2251(a), which is the same offense that Foley is charged with in this case. The district court denied the government's motion to use the propensity evidence, and the government appealed. On appeal, the Seventh Circuit noted that, "The first question we must address is whether the district court correctly found that the 2005 conduct [producing child pornography] does not qualify as an "offense of sexual assault" 587 F.3d at 820. In other words, the Seventh Circuit indicated that it intended to specifically determine whether or not the crime of producing child pornography is a crime of sexual assault under Rule 413. Rogers' argument was very different, though, than the argument that Foley makes here (i.e. that the elements of the offense determine whether it is a crime of sexual assault). Rogers argued that in the 2005 case there was consent in fact and, therefore, it was not a sexual assault. The Seventh Circuit rejected that argument-- based on an *assumption*-- and wrote, in a footnote, "For the purpose of this appeal, we have *assumed* that [producing child pornography] could properly be characterized as attempted sexual contact. We recognize that the line between solicitation and attempt can be difficult to draw, (internal citations omitted) and we do not mean to foreclose further attention to that point on remand." *Id.* Plainly, then, the issue of whether producing child pornography is a crime of sexual assault is not settled.

dearth of case law guiding the courts in determining whether a charged offense is an “offense of sexual assault” for purposes of Rule 413. There is an abundant body of case law applying to similar sorts of determinations, though. For example, in determining whether a crime is a “violent felony” for purposes of the Armed Career Criminal enhancement, the Seventh Circuit has explained:

In evaluating whether a crime constitutes a "violent felony," courts are instructed to examine "the crime of conviction, not the defendant's actual conduct or the details of the proceedings in state court." (internal citations omitted) While the Supreme Court has made clear that district courts "generally must use 'a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions,'"

United States v. Spells, 537 F.3d 743, 748-749 (7th Cir. Ind. 2008).

Similarly, then, in determining whether Foley is charged in this case with an “offense of sexual assault”, the court ought to take a categorical approach¹¹, looking only to the elements of the offense. The court should reject the government’s admonition to look to the nature of Foley’s actual conduct in determining whether the present offense is an offense of sexual assault.

¹¹ It would certainly seem that the categorical approach would be more in keeping with the “question of law” standard of review applicable to whether the defendant’s offense is a crime of sexual assault. If the court is permitted to evaluate the quality of the defendant’s alleged conduct in determining whether a crime is one of sexual assault, it would be nearly impossible to apply a question of law standard.

D. The district court abused its discretion in admitting the propensity evidence because it is not relevant.

Even if the court were to construe Foley's present charges as a crime of sexual assault, the proffered Rule 413 evidence is not relevant. Rule 401 FRE provides that:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

The problem with the propensity evidence presented here is that it does not tend to establish any fact that is of consequence in determining the action.

First, the identity of the man in the video was not an issue. Secondly, Foley's motive, or his intent, in stroking the child's penis-- as shown in the video-- is not an element of producing child pornography, nor is it a defense to the charge. Finally, with regard to the charge of taking a child across state lines, the proffered evidence tells us nothing about *when* Foley formed the intent to commit a sex act# with the child (the intent must exist prior to the crossing of the state line).

Propensity evidence might be relevant if the identity of the perpetrator, or his motive, were in issue. If the defendant had committed a similar crime-- perhaps even a "signature crime"-- on an earlier occasion, the propensity evidence makes it much more likely that the

defendant committed the crime in the present case. In other words, because Foley had a “taste” for homosexual activity with underaged boys, it might make it more likely that he possessed the child pornography in this case. Here, though, identity was not an issue. As mentioned above, whether or not an image of a child is lascivious is determined by the finder of fact based on the image itself. It is not even required that there be any sexual contact depicted. Thus, the *identity* of the man in the video who was shown stroking the penis of the child was simply not an issue in this case. The government did not need to prove that it was Foley who is shown in the video. It simply does not matter who the man is. It does not even matter whether he is present in the video.

Similarly, with regard to the possession count for the child pornography that was found in Foley’s home, identity was not an issue. Foley did not testify at trial and, therefore, he did not create an issue as to whether he knew the pornography was in his home (in which case it might have been relevant to establish that it was Foley depicted in the video).

Propensity evidence might also have been relevant if Foley’s motive or intent to be sexually aroused became an issue. Here, though, as to the producing child pornography charges, it was not. In a sexual assault case, the man stroking the child’s penis might make the claim that it was by accident, or that he did not do it for purposes of sexual gratification. Again, as mentioned above, the lascivious nature of the image is determined by what is depicted in the image. The intent or the motive of

the persons depicted in the image is simply not relevant. Foley could not have defended the charges of production of child pornography by claiming that-- if it is he in the video-- that he *accidentally* stroked the child's penis while giving the child a massage. It is not an element of the offense that he acted for purposes of sexual gratification. And, certainly, the lack of such intent is not a defense.

It is a much closer call, though, as related to the "crossing state lines" charge. Intent to engage in a sex act is an element of the offense. Foley's alleged propensity to stroke the genitals of adolescent boys may have some bearing on his intent to commit a sex act when he crossed state lines, except for the fact that-- according to Minor Male A's testimony-- Foley *did commit a sex act* once he got to Minnesota. In other words, intent to commit a sex act is not the issue here. The issue is whether Foley formed that intent prior to crossing state lines. As the court noted in *United States v. Broxmeyer*, 616 F.3d 120, 129 (2d Cir. N.Y. 2010), "The plain wording of the statute requires that the *mens rea* of intent coincide with the *actus reus* of crossing state lines." In other words, the intent to commit a sex act must have formed *before* the crossing of the state lines. The fact that Foley may have a proclivity to stroke the penises of adolescent boys tells us nothing about whether he formed the intent to fondle Minor Male A's genitals before or after they crossed into Minnesota.

Thus, the proffered Rule 413 evidence is not relevant to the charge of taking a child across state lines for the purposes of committing a sex

act.

E. Whatever minuscule probative value that the Rule 413 evidence possesses is outweighed by the unfair prejudice of admitting it.

Even if the Court of Appeals were to find that the district court did not abuse its discretion in finding the proffered evidence to be relevant, the court must still determine whether the unfair prejudice of admitting the evidence outweighs the probative value. In, *Rogers*, 587 F.3d at 822-823, the court explained:

Even if the evidence does not create unfair prejudice solely because it rests on propensity, it may still risk a decision on the basis of something like passion or bias--that is, an improper basis. Even though Congress has made the propensity inference permissible, it has not said that evidence falling within Rule 413 is per se non-prejudicial. To the contrary, a jury might use such evidence, for example, to convict a defendant because it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged. *See Old Chief*, 519 U.S. at 180-81. Or a jury, uncertain of guilt, may convict a defendant because they think the defendant is a bad person generally deserving of punishment. *See id.* We mention these dangers only as examples; our list does not purport to be exhaustive. Rule 403 remains an important safeguard against the admission of prejudicial evidence, and courts enjoy wide discretion in applying the rule. (internal citation omitted). When exercising that discretion, however, courts must recognize that, for Rule 413 evidence, the propensity inference must be viewed differently.

Here, the unfair prejudice was that: (1) Foley has never been charged with nor convicted of any offense relating to Minor Male B; and,

(2) the testimony of Minor Male B likely invoked feelings of hatred and revulsion against Foley; and (3) The evidence did not tend to make any contested fact more or less likely to be true.

The testimony of Minor Male B was very disturbing. If true, it meant that Foley involved himself in a charitable organization (Big Brothers), the goal of which is to provide troubled children with an adult role model. Rather than being a role model, Foley's alleged behavior with Minor Male B was despicable. However, the truth of the claims has never been determined. It was profoundly unfair to Foley to expect him to be prepared to defend against these serious claims-- claims which, if charged, would be be a serious felony.

Thus, Minor Male B's claims plainly subjected Foley to hatred and revulsion by the jury, and breaches the possibility that the jury will found Foley guilty not because the evidence proved him to be, but because he is a despicable person who escaped punishment for the Minor Male B incident.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse Foley's convictions for production of child pornography, and order that a judgment of acquittal be entered on those counts. On the remaining counts, it is requested that the court vacate the convictions and order a new trial.

Dated at Milwaukee, Wisconsin, this 19th day of April, 2013:

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for Appellant
/s/ Jeffrey W. Jensen

Certification as to Form and Length

The undersigned hereby certifies that this brief meets the length and format requirements of Fed. R. App. P. 32(a)(7). A fourteen point "Georgia" font was used with justification and automatic hyphenation. The length of the brief is 7,559 words not counting the table of authority and table of contents. The word count was determined using the word count function of the word processing software *Google Docs*.

Dated at Milwaukee, Wisconsin, this 19th day of April, 2013:

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/s/ Jeffrey W. Jensen

Circuit Rule 31(e) Statement

An electronic copy of this brief consisting of digital media has been uploaded to the Seventh Circuit Court of Appeals Legal Brief System. I certify that the file does not contain a computer virus. I additionally certify that, pursuant to Circuit Rule 31(e)(4), a digital copy of the brief has been served upon each party individually represented by counsel.

Dated at Milwaukee, Wisconsin, this 19th day of April, 2013:

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/s/ Jeffrey W. Jensen

Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in the attached appendix.

Dated at Milwaukee, Wisconsin, this 19th day of April, 2013:

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Certificate of Service

I hereby certify that on April 19, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

(For paper copy of the brief only) Fifteen copies of this brief will be served and filed at the Clerk of Court Office, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Chicago, Illinois on or before April 28, 2013 by placing the same in the United States Mail. Two copies of this brief will be served on Jonathan Koenig, Asst. United

States Attorney, by placing the same in the United States Mail.

Dated at Milwaukee, Wisconsin, this 19th day of April, 2013:

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Docket No. 13-1386

United States Court of Appeals
For the Seventh Circuit

United States of America,

Plaintiff-Appellee,

v.

David Foley,

Defendant-Appellant.

Brief and Short Appendix of the Appellant, David Foley

A. Relevant docket entries

B. Indictment

C. District Court's bench decision admitting propensity evidence (Doc. 101, p. 414)

D. Judgment of Conviction

E. District Court's memorandum decision on Rule 29 motion