72407-0

FILED
July 15, 2015
Court of Appeals
Division I
State of Washington

NO. 72407-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH E. KAYSER,

Appellant.

BRIEF OF RESPONDENT

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2. Did the trial court error by admitting defendant's internet search terms, website names, and legally possessed erotica as ER 404(b) evidence of knowledge?

3. If it was error to admit the 404(b) evidence was it harmless?

4. Did the trial court error by refusing to use the defendant's proposed jury instruction when it was a misstatement of the law?

II. STATEMENT OF THE CASE

On September 8, 2011 Det. Kowalchyk of the Everett Police Department served a search warrant on the defendant's residence as a result of an investigation started when NCMEC reported 4 images of suspect child pornography had been uploaded by a specific internet protocol (IP) address associated with the defendant. Pursuant to the search warrant the police seized a laptop belonging to the defendant, numerous computer hard drives, CDs, DVDs, thumb drives, and cameras from the defendant's residence all of which were tied to the defendant either by his own

admission or the testimony of his girlfriend. 6/24/14 RP 56-59, 60-62, 69-70, 6/25/14 RP 12-15.

In an interview with Det. Kowalchyk the defendant admitted the computer items seized by the police belonged to him. The defendant admitted he frequently viewed pornography on his Toshiba laptop computer. When questioned further, the defendant admitted he "liked them young". The defendant admitted he was sexually aroused by minors, 13 to 16 year old females, and that he would use search terms such as "young nude naked". The defendant admitted to having looked for images of pre-pubescent girls.

Law enforcement's forensic search of the laptop computer revealed three accounts associated with that computer: TNT; Katie; and, Guest. All three accounts were password protected. "Katie" is the name of the defendant's girlfriend and the contents of the account confirm that she was the likely user of that account. No suspected child pornography was found associated with the "Katie" account. The suspected images of child pornography were predominantly found associated with the TNT account with some associated with the "guest" account. The defendant admitted in his interview that the TNT account was his. Documents found in the

TNT account confirm the defendant was the user of that account. Many of the images found in the TNT account and the Guest account were identical. At the time the search warrant was served, the defendant and Katie were living in a residence with a number of other people, but they had recently moved there from a place where they were the only residents and as the prosecutor pointed out in his closing argument, most of the bookmarked items dated from before the move. Katie testified at trial that she and the defendant purchased the Toshiba laptop new from Office Depot. She also testified that, while at their prior residence, she had seen the defendant with a picture of a nude child on the computer and it made her mad. 2 RP 121, 123, 127.

The State charged the defendant by amended information with two counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree and one count of possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP 135-36.

Trial commenced on June 23, 2014. On the first day of trial, the court held a number of pre-trial motions and motions in limine. The defendant moved to suppress all evidence of his two prior convictions for first degree rape of a child. The state agreed the

prejudicial effect of the convictions would outweigh any probative value. The state provided a redacted version of the defendant's statement to Det. Kowalchyk and the court went through it line by line to ensure there were no references to the convictions or any subsequent probation violations before allowing the statement to be presented to the jury. 6/23/14 RP 32-33; 77-96.

Prior to trial, the court also held a hearing on the admissibility of images, internet cookies, and search terms located on the defendant's computer. The State initially offered approximately 160 items of evidence retrieved from the defendant's electronic devices. The State identified these items as Bookmarks. The defendant objected to a majority of the bookmarks under ER 404. The defendant objected to bookmarks 1 through 4, 7 through 9 and 11 through 46 arguing that there was not sufficient proof the individuals depicted were minors and/or they were not engaged in sexually explicit conduct. Bookmarks 1 through 47 were images, found in the defendant's possession, of probable or possible minors engaged in explicit sexual conduct or posing naked. These images were being offered as evidence supporting the charged counts. The court allowed these images as the age of the individuals depicted and/or whether they were engaged in sexually explicit

conduct was an issue of fact for the jury to decide. The court did require the State review and eliminate some of the images as the court felt there were more images than necessary and that the sheer volume of images could be prejudicial. The State agreed to eliminate bookmarks 12, 14, 15, 17, 18, 22, 27 and 45. The defendant objected to bookmarks 48-66 arguing that in the defendant's opinion, they did not meet the definition of child pornography so they were not relevant. Bookmarks 48 through 66 were photos and videos of child erotica; girls who appeared to be roughly between the ages of 10 and 15 wearing skimpy clothing and many in sexually suggestive poses. The state was seeking to admit some of these images as evidence of count 3 and others to prove intent and knowledge. The court ruled the images were admissible evidence under ER 404(b) and proceeded to the balancing test. The court found the images were relevant to show knowledge and that their probative value outweighed the prejudicial effect. However, the court again, required the State to eliminate some of the images as they were repetitive and in that way too prejudicial. The State eliminated 12 of the 18 images in this section. 6/23/14 RP 39-47, 75, CP 94-131.

The defendant also objected to bookmarks 67-147 under ER 404(b), ER 801 and ER 802. The items depicted in these bookmarks were internet cookies, text fragments, internet search terms and Google search history. Bookmarks 69 through 95 were Internet Cookies showing names of visited websites suggestive of teen sex or child pornography (i.e. literotica.com, naughtylittlebitches.com, young-nude-celebrities.com, nudeyounggirls.net, littlefuckvideos.com, etc.). Bookmarks 96 through 99 were text fragments showing visits to websites that suggested teen sex or child pornography (i.e. teenporngallery.net, virgin18age.com, tinyteenpass.com, and forbiddenpictures.net). Bookmarks 100-103 were evidence of visits to websites devoted to underage girls and offering photos and videos, "Underage Lolita CP Kids Pussy Photos of Preteen Asian Girls" and "Preteen Lolita Pissing Kinder Porn Pedro Parent Director Child Porn Pics"; 'VISIT ULIMATE LOLICON MODELS" "MY PRETEEN FRUITS", NEW!!! FORM with 6-14 y.o. preteen PHOTOS & VIDEOS!!!", "PRETEEN LOLITAS FINE ART", "TINY PRETEEN MODEL TOPLESS PICS"; "You will SEE the Youngest Girls Here!", "Are you looking for Real Little Lolis?", "Check'em wearing tiny underwear...or nothing at all!" and up to 10,000 self shots and private pics PLUS TONS OF

FORBIDDEN..." Bookmarks 103-144 were specific search terms that had been typed on the computers seized from the defendant including "child porn", "little kid porn", "young girls naked", "preteen nude", "sex with daddy", "little girls give daddy a hand job", etc. Det. Roberts also located remnants of a video file named "little 9 Year Old Girl Michelle Nude ____ little young pedo kiddie children rape incest illegal porn pornography girl boy teen underage lesbian xxx Lolita underwear pan.mp4." The court found the only the bookmarks related to underage terms were relevant. For example, the court would not allow a search for "Lolita" even though that term has been associated with underage pornography as it could also be a search for something unrelated. The items that indicated under age searches, websites, etc. were being offered for the purpose of proving the knowledge element. As the prosecutor put it, "that he was going out looking for it demonstrates that he had knowledge he was possessing it as well. The court found the probative value as to the issue of knowledge outweighed the prejudicial effect. 6/23/14 RP 35, 44, 47, 74-75, 84-85, 6/25/14 RP 170-78.

The redacted version of the defendant's statement was played for the jury. Exhibit 32. In his statement, the defendant admitted the Toshiba laptop computer was his and that he

frequently viewed pornography on the computer explaining that he liked them young. The defendant also admitted to using search terms such as "young nude naked." And periodically looking at images of pre-pubescent girls Exhibit 32 pg. 25, 46. The defendant explained to Det. Kowalchyk that he does get sexually aroused by minors, by the younger females, ages 13 to 16. Exhibit 32 pg. 63. An image of a prepubescent female licking a vagina was testified to by law enforcement as being on the defendant's iPod when it was removed from the pocket of a pair of the defendant's jeans. 6/25/14 RP 13-14; 6/26/14 RP 124.

The defendant presented an expert who indicated she had researched and found two of the multitude of pictures found in the defendant's possession in an internet archive. The pictures were found on websites that advertised they were in compliance with federal law. The defendant's expert also testified that the defendant had 1,543 images in his temporary internet files and that he was searching websites such as "Busty Teens, Sexy Young Porn, Porno Home, Drunk Home Party, Teen Sex Movie." The defendant argued that he did not know the persons depicted in the pornography were minors. 6/26/14 RP 25, 30, 31.6/27/14 RP 65.

On June 27, 2014, the defendant was convicted by jury verdict of all three counts as charged in the amended information. CP 42-44.

III. ARGUMENT

A. THE DEFENDANT'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF THE CHILD EROTICA, HIS BROWSING HISTORY, AND INTERNET SEARCH TERMS.

1. Solicitations For Illegal Activities Are Not Protected Speech.

The Supreme Court held in United States v. Williams, 553 U.S. 285, 299, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), that "In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. In the present case, the terms admitted by the court were those terms that were clearly offers or requests for child pornography and were therefore excluded from protection of the First Amendment. The court prohibited the admission of terms that could have been requests for something other than child pornography. For example, the court would not allow the search term, "Lolita" even though that term has been identified as a term used for searching for child pornography because as the court pointed out, it could also be a search for something else, such as a novel.

2. The Protection Of The First Amendment Does Not Bar The Admissibility Of Relevant Evidence.

However, it is also true "that if evidence has probative value, its use is not prohibited simply because constitutional provisions may also be implicated. Evidence of constitutionally protected behavior that is relevant to issues in a case may be admitted, and the trial court has wide discretion in determining whether evidence concerning a criminal defendant's constitutionally protected behavior is relevant and admissible. State v. Luther, 157 Wn.2d 63, 76, 134 P.3d 205, 212 (2006).

In Luther, the defendant was charged with attempted possession of child pornography. The court found that admitting images possessed by the defendant that may not have been minors was relevant evidence towards proving the defendant intent to acquire images of depictions of minors engaged in sexually explicit conduct. The court also found the content of the defendant's on-line chats relevant evidence of his intent to obtain sexually explicit images of minors. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205, 213 (2006).

The admissibility of relevant evidence that may fall under the protection of the First Amendment has long been held admissible in trial.

> Accordingly, if news reporters, newspapers, and television networks have no First Amendment privilege to withhold otherwise relevant evidence from the courts, and if the President of the United States himself is in the same constitutional boat, we do not believe that Curtin or anyone similarly situated can use the First Amendment or any other constitutional principle to exclude relevant evidence from the reach of Rule 401 or 404(b) on the specific ground that the evidence is "reading material" or literature otherwise within constitutional protection in another setting.

United States v. Curtin, 489 F.3d 935, 955 (9th Cir. 2007) (citing United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), and Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978)).

B. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S RELEVANT INTERNET SEARCH TERMS, WEBSITE NAMES, AND LEGALLY POSSESSED EROTICA AS ER 404(b) AS EVIDENCE TENDING TO PROVE KNOWLEDGE.

A trial court's admission of evidence under Rule 404(b) is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for

which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 490 (1995). The trial court has wide discretion in determining whether prejudice outweighs probative value. State v. Evans, 45 Wn. App. 611, 616, 726 P.2d 1009, 1012 (1986).

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615, 624 (1995). In the present case, the State had to prove the defendant knowingly possessed images of minors engaged in sexually explicit conduct. Courts have held prior bad acts are admissible to prove knowledge. "Possession of [child erotica]...tended to disprove any argument that he unknowingly possessed [images of minors engaged in sexually explicit conduct], or attempted to access the Link by accident." United States v. Vosburgh, 602 F.3d 512, 538 (3d Cir.

2010). The court has similarly held in Washington. "Testimony that [the defendant] planned and started a fire in his own home on a prior occasion is relevant to show that he knowingly started this fire." Evans, 45 Wn. App. at 616, 1012.

The Rule 404(b) inquiry, however, applies only to evidence of other acts that are extrinsic to the one charged. Acts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence. Evidence of uncharged conduct is not 'other crimes' evidence subject to Rule 404 if the uncharged conduct arose out of the same series of transactions as the charged offense, or if evidence of the uncharged conduct is necessary to complete the story of the crime on trial. Other criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. United States v. Basham, 561 F.3d 302, 326 (4th Cir. 2009) (see also, State v. Grier, 168 Wn. App. 635, 647, 278 P.3d 225, 231 (2012)).

In the current case, the issue of admissibility was raised during motions in limine. Although a trial court may conduct a hearing to take testimony to determine if the prior bad act occurred, it is not required to do so. State v. Kilgore, 147 Wn.2d 288, 294–95,

53 P.3d 974 (2002). In the current case, the court received an offer of proof and copies of the proposed bookmarks from the parties with regard to the items the state wished to admit as potential 404(b) evidence.

The state argued the purpose of admitting the 404(b) evidence was to prove the knowledge element of the charged crimes. "Your honor, it goes to intent and knowledge." 6/23/14 RP 34. "If he's going out and looking for it, he clearly has knowledge that he's possessing it as well." 6/23/14 RP 35. "And again I point out that he reason those should come in is to prove knowledge, not for the fact in and of themselves that those themselves are considered to be pornography." 6/23/14 RP 42. The defendant acknowledged that the state was offering the 404(b) evidence to "...the State is asking for all this to come in to really go to knowledge or to rebut a claim of accident or mistake." 6/23/14 RP 71. The defendant then argued that he was not challenging his possession of the computer or the other electronic items in the home, so the evidence was not relevant.

The court in the current case ruled that if knowledge is an issue in this case, then the evidence would be admissible. The State pointed out that knowledge was an element of the offense, so

the 404(b) evidence was admissible. The court ruled the evidence was relevant then indicated it needed to do a balancing test to weigh the probative value as it was "obviously prejudicial to the defendant". 6/23/14 RP 72-74. The court found that the danger of unfair prejudice was substantially outweighed by the probative value. 6/23/14 RP 75. The court then proceeded to tell the prosecutor to limit the number of photographs and told the prosecutor to eliminate any repetitive or borderline photos or child erotica. The court also properly instructed the jury to limit the use of the proposed 404(b) evidence only for the purpose of determining knowledge. CP 70, 71.

Although the defendant argued to the court at trial and again on appeal that the court improperly applied the federal standards in this case, it is clear the court followed the test set out in State v. Lough, (supra) and not United States v. Tanguay, 982 F. Supp. 2d 119 (D.N.H. 2013). The court asked for the proposed purpose, determined the relevance of the evidence to that purpose then weighed the probative value of the evidence against the prejudicial effect as set forth in Lough, 125 Wn.2d at 853.

C. EVEN IF THE COURT FOUND THE ER 404(B) EVIDENCE WAS IMPROPERLY ADMITTED IT WAS HARMLESS ERROR.

Evidentiary errors under ER 404 are not of constitutional magnitude. They are subject to the harmless error standard of review. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76, 79-80 (1984). The State's case was strong. The State produced a number of photos of girls aged approximately 10 to 15 years old engaged in sexually explicit conduct. The photo found on the defendant's iPod was described as an approximately 10 year old girl licking a vagina. The defendant admitted to possessing the photos, including the photo of the approximately 10 year old girl but then deleting it. The defendant's statement to Det. Kowalchyk indicated he had possession of the last photograph for 10 minutes or so, as he studied it to determine if it was really of the girl licking a vagina or had been photo-shopped. It is reasonably probable the outcome of the trial would not have been different if the 404(b) evidence in this case had not been admitted.

1. The Trial Court Properly Refused To Use The Defendant's Proposed Jury Instruction That Misstated The Law?

Alleged errors of law in jury instructions are reviewed de novo. Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a

reasonable doubt. Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt. Due process also requires that the jury be fully instructed on the defense theory of the case. Jury instructions are sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. State v. Garbaccio, 151 Wn. App. 716, 732, 214 P.3d 168, 176 (2009).

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. However, he is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502, 507 (1994).

In Garbaccio, the trial court also refused to give the defendant's proposed instruction that the State must prove that he knew he was downloading files containing child pornography at the time of download. State v. Garbaccio, 151 Wn. App. 716, 726, 214 P.3d 168, 173 (2009). The court held the court was not required to give the requested instruction because it misstated the law. The court found the standard instructions given allowed the defendant

to argue his theory of the case, that the State had not proven the element of possession. The court found that the defendant could have proposed an instruction defining possession which would have been appropriate to give and it might have aided the defendant in arguing his theory of the case, but "Because [the defendant] did not propose an appropriate definitional instruction, he cannot obtain appellate relief based upon its absence. State v. Garbaccio, 151 Wn. App. 716, 736-37, 214 P.3d 168, 178 (2009).

In the current case, the defendant's proposed an instruction that stated,

> The First Amendment to the United States Constitution protects possession of material depicting a person who "appears to be" "a minor engaging in sexually explicit conduct."
>
> CP 80.

This is at best misleading because it does not specify that the person who appears to be a minor is actually not a minor. A minor likely would "appear to be" a minor and the First Amendment does not protect possession of depictions of a minor engaging in sexually explicit conduct. This instruction would be confusing to the jury and appears to misstate the law. It was properly excluded from the court's instructions to the jury. Furthermore, even if it had

properly stated the law, it was unnecessary for the defendant to argue his theory of the case. In the "to convict" instructions, represented by the court's instruction to the jury numbers 7, 8, and 17, each instruction specifically indicates an element of the charge that the State must prove beyond a reasonable doubt is that "the defendant knew the person depicted was a minor." CP 56, 57, 66. The defendant was free to argue the state had not proven he knew the persons depicted in the images were minors as they were represented as adults posing as minors and he reasonably believed the representation.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction.

Respectfully submitted on July 15, 2015.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. KEITH E. KAYSER, Appellant.	No. 72407-0-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 15th day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Maureen M. Cyr, Washington Appellate Project, maureen@washapp.org and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of July, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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