

NO. 45248-1-II

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

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STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER EDWARD EGER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00224-3

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #27944  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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A. **RESPONSE TO ASSIGNMENT OF ERROR**

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEPICTIONS OF MINORS FOUND IN EGER'S POSSESSION

B. **STATEMENT OF THE CASE**

The State charged Christopher Eger (hereafter 'Eger') with Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. CP 155. The charges were based on digital photographs the police found on Eger's home computer and laptop computer.

The facts at trial showed that Eger's wife, Di Eger, called police on February 4, 2010, after she found concerning images which she believed to be "child pornography" on the home computer. RP 276-66. After a detective viewed the images Di Eger had found, it was determined that the images were not illegal and did not meet the definition of minors engaged in sexually explicit conduct. RP 278-79, 414, 603-04. Approximately one week later, Mrs. Eger again called police and indicated she found additional photographs. RP 281. This time, Mrs. Eger showed police digital photographs that the detective viewing them determined did meet the statutory definition of depictions of minors engaged in sexually explicit conduct. RP 280-81, 349-52. The police officer seized the home

computer, flash drive, and external hard drives. RP 340-42, 353-59. The police applied for and were granted a search warrant for the computers and digital media storage devices. RP 281. At the time, Eger was on a business trip to Texas and had a laptop computer with him. RP 349.

Police met Eger as he stepped out of the airport shuttle in front of his home in Vancouver, Washington, returning from his trip. RP 281. The officers arrested Eger and seized his laptop computer that was in his possession. RP 282-83. Eger spoke with police and admitted he had “child pornography” on his computers; Eger provided an access code for his laptop. RP 283-84. Eger admitted to police that he had downloaded the “child pornography” and encrypted the files with a password. RP 328, 617-19.

Pursuant to the search warrant, the computers were analyzed and 287 images depicting “child pornography” were discovered. RP 418-22, 432-36, 457-75, 540-46, 563-71. One folder that had been encrypted was created on a specific date, January 24, 2010. RP 425-33. Eger presented evidence at trial that he went on an all day hike on January 24, 2010, and did not use a computer all day. RP 757-63.

At trial, Eger argued that his wife framed him in order to gain custody of their children and used her computer know-how to accomplish this task. Eger also argued his statements to police were not a confession because the term “child pornography” was not made clear. RP 992-1032.

During motions in limine, defense counsel asked the trial court to require the photographs admitted into evidence be “sanitized,” or better that they not be admitted at all based on a possible stipulation. RP 183-84, 234. The State did not agree to a stipulation, or to the admission of “sanitized” images. The trial court allowed admission of some of the digital photographs found on Eger’s computers. RP 431-36, 457-73, 517-22.

The jury found Eger guilty of one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. CP 251. The trial court sentenced Eger to a standard range sentence of 13 months. CP 259-77. Eger timely filed this notice of appeal.

C. **ARGUMENT**

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
ADMITTING EVIDENCE OF THE DEPICTIONS OF MINORS  
FOUND IN EGER’S POSSESSION

Eger assigns error to the trial court’s admission of photographs that police found on his computer. Eger alleges the trial court abused its

discretion because the photographs were unnecessarily prejudicial and he had offered to stipulate to their content. The State has the burden of proving the elements of the crime to the finder of fact, and the photographs were relevant and not overly prejudicial. The trial court did not abuse its discretion and Eger's conviction should be affirmed.

The appellate courts review a trial court's admission of evidence for abuse of discretion. *State v. Matthews*, 75 Wn.App. 278, 877 P.2d 252 (1994), *rev. denied*, 125 Wn.2d 1022, 890 P.2d 463 (1995). A trial court abuses its discretion when it makes a decision for an untenable reason or based upon untenable grounds. *State v. Rice*, 48 Wn.App. 7, 11, 737 P.2d 726 (1987). Here, the trial court did not abuse its discretion in admitting the photographs.

Eger was charged with Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct. CP 155. The State has the burden of proving every element of the crime. One such element is to prove that the depictions in Eger's possession depicted minors engaged in sexually explicit conduct. RCW 9.68A.070. In order to prove the elements of this crime, the State must prove the photographs depicted minors engaged in sexually explicit conduct. The actual photographs are relevant under ER 401 and are not unduly prejudicial.

In *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), the Supreme Court considered whether photographs of a murder victim, which the State sought to introduce to prove the identity of the victim, were properly admitted despite defense's request to stipulate to the identity of the victim. The Court considered this issue under ER 401 and ER 403. *Id.* at 651. When defense offers to stipulate to information contained within photographs to prevent their admission into evidence, and the State refuses the stipulation, the propriety of the admission of the photographs is properly analyzed under ER 401 and ER 403. See *State v. Rice*, 110 Wn.2d 577, 598, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S. Ct. 3200, 105 L.Ed.2d 707 (1989); *Pirtle*, 127 Wn.2d at 651. ER 401 defines "relevant evidence" as

...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401.

In *State v. Rice*, a murder case, the Court found that any evidence tending to prove the identity of the victim was relevant under ER 401 because the State had the burden of proving the victim's identity. *Rice*, 110 Wn.2d at 598-99. Here, the State has the burden of proving that the

photographs found in Eger's possession were depictions of minors engaged in sexually explicit conduct as defined by the statute. CP 155.

Once it is shown that evidence is relevant under ER 401, the court should consider ER 403 which discusses whether evidence is overly prejudicial. ER 403 requires a balancing test wherein the court determines if the evidence's probative value is substantially outweighed by the danger of unfair prejudice. ER 403. It is a fact that all evidence against a defendant is somewhat prejudicial to the defendant – it attempts to show the defendant committed a crime.

In *Pirtle*, the Supreme Court found the admission of crime scene photographs of a murder victim proper. The Court stated,

The fact the photographs were gruesome and therefore potentially inflammatory does not change the result. This was a gruesome and horrible crime. It simply cannot be presented to a jury in a way that glosses over that fact.

*Pirtle*, 127 Wn.2d at 655.

This is similar to the crime Eger was charged with – Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. There is simply no way to present evidence of this crime to a jury that satisfies the State's burden by glossing over the truth of this crime. ER 403 only prohibits evidence whose probative value is *substantially* outweighed by the danger of unfair prejudice. Here, the images themselves are the crime.

It is only fair and just to allow the State to present this evidence. Furthermore, in this instance, it was not unduly prejudicial to the defendant's case to have the contents of the photographs admitted. Eger's defense was a mixture of alibi (not present at the house when the photographs were downloaded) and that he was framed by his conniving ex-wife (she planted the photographs on his computer). RP 992-1032. The jury's viewing of the depictions in no way took away from his defense. The line of cases generally cited for the proposition that a court must accept a stipulation to prevent admission of prejudicial evidence deals with admission of prior convictions and preventing a jury from knowing what the defendant's prior record includes. *See e.g. State v. Johnson*, 90 Wn.App. 54, 950 P.2d 981 (1998) and *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 651, 136 L.Ed.2d 574 (1997). Here, the admission of the photographs in no way prevented the jury from believing Eger's tale and in no way convinced the jury to convict because they believe Eger is a bad man. In Eger's side of things, he did not know of these photographs so how could they be used against him?

Eger's argument is essentially that a trial court must always accept a defendant's offer to stipulate to an element of the crime and refuse to allow the State to present evidence relating to that agreed element. In *State v. Johnson*, this Court recognized that "a defendant's Rule 403 objection

offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *State v. Johnson*, 90 Wn.App. 54, 62, 950 P.2d 981 (1998) (quoting *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 651, 136 L.Ed.2d 574 (1997)). In *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), the Supreme Court found, "[t]he State need not accept as a stipulation as to identity and may insist on proving the issue in the manner it wishes." *Finch*, 137 Wn.2d at 811. In *Finch and Pirtle, supra*, the State offered photographs to prove the identity of the victim, an element of the crime. Here, in Eger's trial, the State offered photographs to show the images the defendant possessed did indeed meet the statutory definition of the crime shown.

Furthermore, a stipulation in this case would have been insufficient to assure the jury the defendant indeed knowingly possessed images of minors engaged in sexually explicit conduct. As Eger argued at trial and continues to on appeal, he only admitted to police that he possessed "child pornography" and this phrase is vague and may not mean the type of images that are indeed illegal under the statute. The State had to show the jury that the images met the statutory definition, but also that anyone possessing them would know from looking at them what they were. If the State had been prohibited from showing the photographs to the jury, the

jury may not have been convinced Eger knowingly possessed the images and could have found that Eger believed he possessed images that were legal “child pornography.”

Eger also seems to argue that showing depictions of minors engaged in sexually explicit conduct to a jury will always be overly prejudicial to a defendant. How would this be different if a defendant does not offer to stipulate? Nothing changes between a defendant who offers to stipulate and one who does not in this situation. Should the State not be allowed to offer this evidence in this type of trial ever? Of course not. This is an element of the crime and it must be decided by a jury. In order to decide whether the State met its burden, the State must be allowed to present evidence to satisfy its burden. That is what occurred in Eger’s trial. The State was properly allowed to admit evidence to prove its case. The trial court did not abuse its discretion and the conviction should be affirmed.

D. **CONCLUSION**

The State was properly allowed to admit evidence to prove its case. This evidence was relevant under ER 401 to prove an element of the crime, and was not unduly prejudicial in compliance with ER 403. The



## CLARK COUNTY PROSECUTOR

September 15, 2014 - 3:26 PM

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[nielsene@nwattorney.net](mailto:nielsene@nwattorney.net)

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