STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES QUATRINE, JR.,

Defendant-Appellee.

UNPUBLISHED
March 2, 2006

Nos. 265644; 265645
Macomb Circuit Court
LC Nos. 05-001298-FH;
05-001299-FH

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In these consolidated appeals, the prosecution appeals by leave granted the trial court's orders denying the admission of other acts evidence pursuant to MRE 404(b).[1] We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution's sole issue on appeal is whether the trial court abused its discretion by finding that the probative value of the other acts evidence was substantially outweighed by the unfair prejudice its admission would cause. A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found when an unbiased person, reviewing the same facts on which the trial court acted, would conclude that there is no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

The trial court resolved this issue differently at the evidentiary hearing and in its orders. At the evidentiary hearing, the trial court ruled that the prosecution is only allowed to state that the password-protected file contained personal files of defendant. The actual orders in this case, however, stated, "[t]he trial court ruled that the people may only present evidence that defendant's picture was found in the other files. There is to be no mention of the sexual nature

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[1] In Docket No. 265644, defendant was charged with eavesdropping, MCL 750.539d. In Docket No. 265645, he was charged seven counts of producing child sexual abusive material, MCL 750.145c(2), and two counts of possession of child sexual abusive material, MCL 750.145c(4). The two cases were joined for trial.

of the photographs." A court speaks through its written orders and not through its oral pronouncements. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Therefore, the trial court's ruling was that the prosecution may only present evidence that defendant's picture was found in the other files and there is to be no mention of the sexual nature of the photographs.

The prosecution wished to introduce a video and photographs as evidence pursuant to MRE 404(b). MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion that contains a nonexclusive list of noncharacter grounds on which evidence may be admitted. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) its probative value must not be substantially outweighed by its unfair prejudice under the balancing test of MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Additionally, upon request, the trial court may provide a limiting instruction. *VanderVliet*, *supra* at 75.

The prosecution would first have to show that the evidence was offered for a proper purpose. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet*, *supra* at 74-75. In this case, the prosecution claimed to be offering the evidence in order to show possession and to combat the suggestion that someone else with access to the computer put the material involving the victim into the file. Those are proper purposes and nothing in the record suggests that they were not the actual reasons why the prosecution was offering the evidence.

The prosecution would also have to show that the evidence was relevant. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material. *VanderVliet*, *supra* at 75. Relevant evidence is evidence that is material to any fact that is of consequence in the action and tends to make the existence of the fact more or less probable than it would be without the evidence. *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995); MRE 401. In this case, the question of who created the password-protected file and saved the images of the victim is certainly of consequence in the action. The existence of a pornographic video and photos involving defendant, materials he is more likely to have than others in his household and might want to keep secret, in the password-protected file makes it more probable that defendant was the creator of the file and the images of the victim. We therefore conclude that the evidence was relevant.

The prosecution would also have to show that the probative value of the evidence is not substantially outweighed by its unfair prejudice under the balancing test of MRE 403. Unfair prejudice does not mean damaging. Evidence is unfairly prejudicial if there is a danger that

evidence that is only marginally probative will be given undue or preemptive weight by the jury. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). In this case, the trial court limited what could be admitted because it was concerned that the graphic nature of the evidence, the homoerotic nature of the video, and sexual nature of the evidence, would be unfairly prejudicial.

The trial court limited what evidence could be admitted in part because it feared that the graphic nature of the evidence would be unfairly prejudicial. It stated that it "was totally disgusted by seeing that video" and that the jurors would not be able to separate the initial disgust and feelings they may have from the crime defendant was charged with. In the context of photographs of victims of crimes, photographic evidence is not inadmissible merely because it is shocking. See *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997); *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). In this case, however, looking at the evidence would only be slightly more probative than having the images described to the jurors or informing them that the evidence was sexual in nature and that it involved defendant. As seen in the trial court's concerns, there is a danger that, on the basis of feelings of disgust and shock, the jury would give undue weight to the pornographic nature of the evidence and find defendant guilty. The trial court's concerns are very legitimate and therefore the trial court did not abuse its discretion by refusing to admit the video and photographs themselves because their probative value is substantially outweighed by unfair prejudice.

The trial court also limited what could be admitted because of concerns that the homoerotic nature of the video would unfairly prejudice the jury against defendant. In 1991, then Chief Justice Cavanagh noted, in a dissenting opinion, that there is a "widespread prejudice in our society that homosexuals are generally more likely to sexually molest children." *People v Kosters*, 437 Mich 937, 943; 467 NW2d 311 (1991) (Cavanagh, CJ, dissenting). There is no doubt that the prejudice that Justice Cavanagh wrote about in 1991 is ever more present today. Thus, the trial court correctly found that there was a danger of unfair prejudice on similar reasoning. The homoerotic nature of the video may make it more probable that only defendant, among his household, would have the video and more probable that he would want to keep it secret, but that probative value would be outweighed by the unfair prejudice it may create. We conclude that the trial court properly decided not to admit this evidence.

The trial court also denied disclosure of the sexual nature of the evidence. The trial court noted that child pornography cases are highly sensitive and that legal pornographic material will have a prejudicial effect. Our Supreme Court has expressly rejected the admission of evidence of "lustful disposition" for use as propensity evidence in sex cases in the past, *People v Sabin (After Remand)*, 463 Mich 43, 60-61; 614 NW2d 888 (2000), and, in this case, there seems to be a possibility that disclosure of the pornographic nature of the evidence would have a prejudicial effect. The jury might find it more probable that defendant was guilty of the charged offenses if it learned he kept pornographic material involving himself and there is a danger that it would give such evidence undue weight.

On the other hand, excluding the pornographic nature of the evidence destroys much of its probative value, not because it is sexual in nature but because the pornographic material is private and personal to defendant, and therefore, more likely to be kept secret by defendant. Moreover, the danger of unfair prejudice seems minor. Defendant's past sexual interests and activities were consensual and did not involve any criminal activity. As such, the evidence does

not seem to be unfairly prejudicial, especially because the trial court could have given a limiting instruction. It is well established that jurors are presumed to follow their jury instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court could reasonably have found that the probative value of disclosing the sexual nature of the evidence was not substantially outweighed by the unfair prejudice. Therefore, we conclude that it was not an abuse of discretion when the trial court denied disclosure of the pornographic nature of the evidence.

As discussed above, when deciding what evidence to admit, the trial court was justified in excluding the actual pornographic materials, the homoerotic nature of the video, and the sexual nature of the materials. Because the trial court had stated its justification for its exclusions, it decisions are not an abuse of discretion. The trial court's actual order, however, did constitute an abuse of discretion. The trial court ordered that the prosecution could only present evidence that defendant's picture was found in the files within the password-protected file. Such an order completely destroys the probative value of the evidence because anyone in defendant's household is likely to possess pictures of defendant. The trial court had suggested an alternative that we find balanced the parties' interests. At the evidentiary hearing, the trial court stated that the prosecution could produce evidence that the password-protected file contained personal files of defendant. Such a ruling would insure that the probative value of the evidence was not substantially outweighed by unfair prejudice. It would remove the prejudice the trial court was concerned about, without excluding relevant evidence offered for a proper purpose. Therefore, the trial court abused its discretion when it ordered that the prosecution could only present evidence that defendant's picture was found in files within the password-protected file.

Reversed in part and affirmed in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald