IN THE COURT OF APPEALS OF IOWA

No. 1999-461 (9-718) / 98-1987
Filed March 15, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES VERNON BROWN,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

On appeal from his conviction for second-degree sexual abuse, the defendant contends the district court erred in admitting videotape evidence depicting gay pornographic material found at the defendant's house.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, John P. Messina, Assistant State Appellate Defender, and Ryan Rohlfsen, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Defendant James V. Brown was convicted, following trial by jury, of sexual abuse in the second degree. He appeals, claiming the district court erred in allowing a videotape of explicit homosexual sex made from images found on floppy disks in his home to be admitted into evidence. We affirm.

I. Factual and Procedural Background

Certain facts could be found from the evidence presented at trial. Peggy Zeadow hired James Brown to provide care for her son, B.C., then almost nine years of age, for the summer of 1997. B.C. suffers from Attention Deficit Hyperactivity Disorder, or ADHD, and is on medication for this disorder. Brown was a music teacher and had previously provided childcare to other people.

B.C. never complained about Brown over the summer break, although toward the end of the summer he said to his mother that he did not want to spend time with Brown. However, he would not specify any reason. On a "couple of occasions" that summer, B.C. showed his mom some toilet paper he had used after a bowel movement that had blood on it. B.C.'s mom attributed it to hemorrhoids, and did not check further.

It was almost a year later, on May 15, 1998, when B.C. told his mom that Brown had done "nasty things," made him look at very nasty pictures on the computer. The next day he told her of sexual acts Brown had performed on him. B.C.'s mother then contacted his regular doctor's office, called and made a report to the Department of Human Services, and then took B.C. to the Child Protection Center for an interview and examination. B.C.'s regular physician, Dr. Opdebeeck, conducted a physical examination. Based on an investigation by the police and DHS workers, and the examination done by Dr. Opdebeeck, the

police obtained an arrest warrant for Brown and a search warrant for his apartment.

Upon Brown's arrest the police executed the search warrant for his apartment. There they discovered several floppy disks containing graphic homosexual pornography, apparently downloaded from the internet. The State transposed these images, 223 in all, into videotape format. Several magazines and videos containing homosexual pornography were also found. A trial information was filed on June 3, 1998, charging Brown with sexual abuse in the second degree.

Prior to trial, Brown filed a motion in limine to exclude the videotape made from the floppy disks, the magazines and videos depicting male homosexual sex, and statements he made to the police that he was gay. He urged all were "completely irrelevant" and that the material's "potential prejudice . . . far outweigh[ed] any probative value." He was willing to stipulate that pornography was available on the internet. The trial court noted that the victim was expected to testify that the defendant had shown him pornographic images on the defendant's computer. It concluded the video composed of images found on floppy disks was relevant as tending to corroborate B.C.'s statements that he had seen or been shown some of those images in Brown's apartment. By overruling that part of the motion dealing with the videotape made from images found on the floppy disks, and overruling a similar objection at trial, the trial court implicitly found the video tape's probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did, however, exclude statements made by Brown as to his sexual preference as irrelevant, and

excluded magazines and seven pornographic videos as irrelevant for lack of evidence B.C. had seen them.

Trial commenced September 21, 1998. B.C. testified that after playing in the sprinkler, Brown changed clothes in B.C.'s room while B.C. was present. Although B.C. wanted to change out of his swimsuit in the bathroom, Brown had him change in front of him. At this time, while both were naked, B.C. testified that Brown placed his penis in B.C.'s mouth. At a later date, B.C. testified Brown showed him some pornography on Brown's computer. B.C. testified that the picture he saw depicted "people peeing in other people's mouth." Brown asked what B.C. thought of these pictures, and B.C. told Brown they were bad and he did not like them. B.C. testified Brown thought the pictures were "cool looking." Although not clear from B.C.'s testimony, it appears there is no claim that any sex act occurred at this particular time.

B.C. further testified that at another time, he was playing a game called "munchies" on Brown's computer, when Brown laid on top of B.C., took off B.C.'s clothes, and placed his penis in B.C.'s anus. B.C. testified that Brown had anal intercourse with him four times over the summer. Additionally, B.C. testified that they played a game of "hot potato" once where when B.C. lost, B.C. had to take his clothes off.

Dr. Opdebeeck testified that she had examined the rectal area of B.C., and found scarring which was consistent with sexual abuse, but which also could have been caused by bowel movements. Dr. Opdebeeck testified that in her professional opinion sexual abuse caused the scarring. The State showed the twelve-minute videotape. Because 223 images were shown in twelve minutes, each would have been shown for approximately three seconds. Evidence

indicated that three images depicted boys under the age of fourteen, and about twenty images depicted boys under the age of eighteen.

Brown testified in his own defense. He testified that in all of his interactions with children, no one had lodged any complaints against him. He testified about B.C.'s poor behavior during the summer, and that B.C. had threatened often to tell his mom that Brown had "messed with" him.

Brown further testified that B.C. did have access to his computer, but that to his knowledge B.C. had never seen any pornography on the internet and had never accessed any of the pornography Brown had on disks. He testified he had never allowed B.C. to see pornography. He testified he had never had any kind of sexual contact or relations with B.C. He also testified that there were not any "kids or kiddy porn" on any of the disks that he had.

The jury found Brown guilty and the court entered a judgment of conviction and sentenced him to a term of imprisonment. The sole issue on appeal is Brown's claim that admission of the videotape was unfairly prejudicial.

II. Scope of Review

On appellate review of an evidentiary ruling concerning Iowa Rule of Evidence 403, we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). To show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). For us to hold that the trial court abused its discretion in determining the danger of unfair prejudice created by admission of evidence did not substantially outweigh its probative value, the complaining party

must show that the trial court's action was unreasonable in the light of attendant circumstances. *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979).

III. Merits

A. The Law.

Evidence is relevant when it has "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." Iowa R. Evid. 401. "The test is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence.'" *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[07], at 401-48 (1986)).

However, even relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 403. In considering the presence of prejudice, our focus is on unfair prejudice. *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). Relevant evidence is inherently prejudicial in the sense of being detrimental to the opposing party's case. *Id.* We look beyond this type of inherent prejudice to whether the evidence has an undue tendency to suggest a decision on an improper basis, appeals to the sympathies of the jury, or otherwise might cause the jury to base their decision on something other than the relevant legal propositions. *Id.* The complaining party has the burden of establishing that the trial court abused its discretion in the balancing process under rule 403. *Cott*, 283 N.W.2d at 329.

In *State v. Brown*, our Supreme Court stated that "unfair prejudice" as used in rule 403 is "an undue tendency to suggest decisions by the fact finder

based on an improper basis, often an emotional one," and defined "unfairly prejudicial evidence" as evidence that:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Brown, 569 N.W.2d 113, 117 (Iowa 1997) (citation omitted).

The defendant concedes that the evidence has at least some probative value, corroboration of B.C.'s testimony about what he was shown. He argues, however, that any such probative value is minimal and that the trial court abused its discretion in determining its probative value was not substantially outweighed by the danger of unfair prejudice.

B. Application to the Facts

1. Probative Value

Although relevance is conceded, we must still gauge the evidence's relevance in order to determine whether the trial court abused its discretion. We conclude that the pornographic videotape was relevant both to corroborate the testimony of the victim and as an instrument of the crime.

a. Corroboration of the Victim's Testimony

B.C. testified that Brown had shown him pornographic pictures on the computer, and was able to describe one of them. Although there appears to be no case law in Iowa directly on this point, other courts have ruled that such evidence is admissible to corroborate the testimony of the victim. *See, e.g., People v. Sharbnow,* 435 N.W.2d 772, 777 (Mich. Ct. App. 1989) (holding in criminal sexual conduct case that pornography viewed by minor victim was admissible to rebut contention of defendant the victim was not credible); *State v.*

Sebasky, 547 N.W.2d 93, 98-99 (Minn. Ct. App. 1996) (holding in criminal sexual conduct with a minor case pamphlets advocating "Man-Boy" love viewed by a victim was relevant to corroborate victim's testimony). We agree with the analysis of these courts.

We believe, as did the trial court, that the evidence tended to corroborate the victim's testimony. B.C. told investigators Brown had the pornography on a computer in the defendant's bedroom, and that is where the State found it. B.C. further was able to describe in detail the type of pornography the State would find at that location.[1] It is highly unlikely that nine-year-old B.C. would be able to describe the pornography which was found unless he had actually seen it. The evidence was therefore relevant to corroborate the victim's testimony. *See* Iowa R. Evid. 401.

b. Instrumentality of the Crime.

The State argues the pornography was used to entice the victim, thus was an instrumentality of the crime. Other states have ruled pornography found in the possession of the defendant is relevant for such a purpose. *See Hoggard v. State*, 640 S.W.2d 102, 106 (Ark. 1982) (stating where child was encouraged to look at the pornography and then encouraged to engage in those acts the "value of the evidence as proof of the crime is obvious"); *State v. Natzke*, 544 P.2d 1121, 1123 (Ariz. Ct. App. 1976) (holding sexually oriented literature found in the defendant's possession was relevant and admissible because the victim testified the defendant had shown her the material and he wished her to perform sexual acts); *People v. Mason*, 578 N.E.2d 1351, 1355 (Ill. Ct. App. 1991) (stating "[e]vidence indicating the defendant showed [victim] pornography suggests his intent at self-arousal and could be logically interpreted as a scheme to seduce the child"); *State v. Lee*, 525 N.W.2d 179, 183 (Neb. 1994) (holding pornography

[1] B.C. described the pictures as containing mostly "males," and described one picture as "people peeing in people's mouths." One of the pictures found and displayed to the jury depicted a male ejaculating into another male's mouth.

shown to victim to sexually arouse the victim was relevant to defendant's plan or scheme); *Commonwealth v. Impellizzeri*, 661 A.2d 422, 431 (Pa. Super. Ct. 1995) (stating in dicta that had defendant showed the pornography to the victim the probative value "would be more obvious").

The victim testified at the time he and Brown were looking at the pornography, Brown asked him what he thought of the pictures. B.C. testified that he replied that he did not like them, but Brown indicated he thought they were "cool-looking." While evidence presented by the State shows this conversation occurred after an oral sex incident, it did occur before the anal sex incidents. Thus, as the State argues, the pictures tend to make the "recruitment" of B.C. to willingly engage in the crime charged more probable than had the pictures not been displayed. The jury could understand, with the aid of the pornography, Brown's preparation and plan for carrying out the crime charged. Therefore, the evidence was also relevant for this purpose. *See* Iowa R. Evid. 401.

2. Unfair Prejudicial Effect

Evidence of homosexuality is viewed by some courts as generally being extremely prejudicial. *See, e.g., Guam v. Shymanovitz*, 157 F.3d 1154, 1160 (9th Cir. 1998). Such evidence can tend to raise an inference in the jury's mind that because the defendant is homosexual, he deviated from traditional sexual norms in other ways, specifically that he committed the crime charged. *See id. See also Hoggard v. State*, 640 S.W.2d 102, 106 (Ark. 1982) ("We readily agree the [pamphlet containing photographs of boys engaged in sexual acts] was prejudicial, it could hardly be otherwise.").

However, in contrast to the facts of *Shymanovitz*, in this case the trial court and prosecutor went to great lengths to avoid the danger of this prejudice. *See State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997) ("The appellate court

may conclude that 'unfair prejudice' occurred because an insufficient effort was made below to avoid the dangers of prejudice."). The trial court excluded evidence that Brown admitted to the police he was gay. The trial court also excluded several other pornographic magazines and video's found in Brown's apartment. Only limited reference was made to the pornographic materials. Additionally, the prosecutor during closing arguments made it clear the evidence was not about pornography, but about corroborating the victim's testimony.

The defendant further argues because he offered to stipulate that such pornography is available on the internet, the trial court could have taken more steps to avoid the potential prejudicial effect. However, it has long been the law in Iowa that the "State has the right, undiluted by stipulation, to present relevant evidence of the crime committed." *State v. Moore*, 276 N.W.2d 437, 441 (Iowa 1979). *See also State v. Nowlin*, 244 N.W.2d 596, 600 (Iowa 1976); *State v. Griffin*, 218 Iowa 1301, 254 N.W. 841, 846 (1934); *State v. Stansberry*, 182 Iowa 908, 166 N.W. 359, 360-61 (1918).

Upon our review of the record, we conclude that there was no improper use of the evidence, such as punishing the defendant because of his possession of this pornography or his sexual orientation. The prosecutor did not argue or suggest Brown should be punished for his possession of the pornography. Nor did the prosecutor argue or suggest mere possession of child pornography proved the defendant did in fact commit the crime charged. Brown's sexual orientation was not mentioned. On the record before us, Brown has not carried his burden of showing the theory on which the evidence was offered, or the purposes for which it was relevant, would tend to elicit an unjustified response from the jury.

The evidence had substantial probative value. Our close reading of the record indicates there was a need for the evidence in light of the otherwise limited evidence available to the State. Without the evidence, the State's case would have consisted mainly of the testimony of the victim and the examining physician. Further, evidence of the plan or scheme through which one seeks to entice another into sexual activities does not tend to suggest a decision on an improper basis. *Lee*, 525 N.W.2d at 183. The defendant has not met his burden of proving the danger of unfair prejudice from admission of the videotape substantially outweighed the videotape's probative value. In light of the evidence the trial court excluded, we cannot say the trial court's decision to admit the videotape constituted an abuse of discretion.

AFFIRMED.

Zimmer, J. concurs, Sackett, C.J. dissents.

SACKETT, C.J. (dissents)

I dissent. I cannot agree with the majority's conclusion that the district court did not abuse its discretion in admitting a twelve-minute prejudicial videotape with 223 images of homosexual activity never identified as being relevant to or a part of the events surrounding the defendant's charge.

This is a close and difficult case as recognized by the majority in saying, "Our close reading of the record indicates there was a need for the evidence in light of the otherwise limited evidence available to the State."

The only real question in this case is whether the alleged perpetrator or the alleged victim is telling the truth. The alleged victim, who suffers from Attention Hyperactivity Disorder and is on medication did not report the alleged abuse for a year. The main corroboration was a physician's testimony that the victim had injuries consistent with sexual abuse but also consistent with a damaging bowel movement.

The alleged perpetrator admittedly enjoys homosexual pornography such as was shown on the video tape. Yet there was no evidence the images on the videotape were a part of the alleged abuse. In fact, the state's expert was unable to show they were in defendant's possession either before or during the time he was caring for the victim.

In *Guam v. Shymanovitz,* 157 F.3d 1154, 1158-59 (9th Cir. 1998), the court discussed the fact that mere possession of reading material that describes a particular type of sexual activity makes it neither more nor less likely that a defendant would intentionally engage in the described type of conduct. And as the majority clearly points out in *Guam* the court went on to say that "Evidence of homosexuality is extremely prejudicial." *Id.* at 1160.

I note the majority has justified the admission in part finding it was highly unlikely that the victim, then nine-years old, would have been able to describe one instance of pornography found on the video had he not actually seen it. I concede the majority probably is correct in making this statement. Yet I fail to find this conclusion in any way supports the majority's position. Unfortunately this type of material is available to our children in many different forms. Absent a showing that the material on the videotape was connected to the alleged event the fact that the child described only means he saw it somewhere. And there is not a basis to assume he saw it in defendant's presence.

In a case with as little evidence as the state had, I cannot assume that biases and prejudices from viewing the challenged tape did not effect the jury's decision. In fact as the majority has found this challenged evidence was needed by the state for its case. The defendant should have a new trial. I would reverse for this purpose.