

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JUSTIN JOHN MCDERMOTT,

Defendant-Appellee.

UNPUBLISHED

November 22, 2002

No. 242224

Jackson Circuit Court

LC No. 02-002274-FH

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant is charged with second-degree criminal sexual conduct involving a nine-year-old girl, MCL 750.520c. The prosecution moved in limine to admit other acts evidence that defendant had touched the buttocks of the complainant's older sister, had accessed and viewed child pornography on the Internet, and had made certain statements to the complainant's mother when she questioned him about the pornography. The trial court held that the complainant's sister would be allowed to testify, but that the pornography evidence was inadmissible. The prosecution sought interlocutory leave to appeal regarding the latter ruling. This Court granted leave and stayed further proceedings pending resolution of this appeal. We now reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, the prosecution argues that the trial court abused its discretion by excluding under MRE 404(b) and MRE 403 evidence that defendant accessed and viewed child pornography on the Internet, as well as the proposed testimony of the complainant's mother regarding defendant's general statements to her about his thoughts on child pornography and a particular statement that he believed ten-year-old girls to be the perfect age. The decision to admit or exclude evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Hine*, 476 Mich 242, 250; 650 NW2d 659 (2002). A ruling constitutes an abuse of discretion when it is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it]" *Id.*, internal citation marks omitted.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime; (2) relevant to an issue or fact of

consequence at trial; and (3) sufficiently probative to prevail under the balancing test of MRE 403. Logically relevant evidence is forbidden by MRE 404, however, when it is “offered solely to show the criminal propensity of an individual.” *Id.* at 65.

Here, the trial court excluded the evidence of child pornography, finding that it lacked probative value of defendant’s intent or motive in touching the complainant, and also finding that its prejudicial impact was significant, stating that it was “99 percent prejudicial versus one percent probative.” We find this ruling to be an abuse of discretion. “[A] plea of not guilty puts the prosecution to its proofs regarding all elements of the crime charged. Thus, a tactical general denial by a defendant does not prevent the prosecutor from introducing other acts evidence at trial.” *VanderVliet, supra* at 78. Second-degree criminal sexual conduct requires proof that defendant engaged in sexual contact with the complainant. MCL 750.520c(1). “Sexual contact” is statutorily defined as the intentional touching of the victim’s intimate parts or of the clothing covering the immediate area of the victim’s intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k).

Clearly, defendant’s predilection toward accessing and viewing child pornography on the Internet, as well as his statements to the complainant’s mother in this regard, is probative of his intent in touching the complainant for the purpose of sexual arousal or gratification. Indeed, the reason that this evidence is damaging and prejudicial is because it is so highly probative of defendant’s intent. The trial court’s analysis of the evidence constituted a misconstruction of the rules of evidence and the well-established standards for admission of other acts evidence under MRE 404(b) and MRE 403. Moreover, while there is no doubt that the child pornography evidence is damaging, it is not unfairly so. The prejudicial impact may be minimized by limiting the testimony of the forensic examiner to the number of downloaded pornographic images, without admission of photocopies of the actual images or any of the content of the websites, and by an appropriate limiting instruction from the trial court. Accordingly, we reverse the trial court’s order to the extent that it excluded the evidence of defendant accessing and viewing child pornography on the Internet, and the proposed testimony of the complainant’s mother regarding defendant’s general and specific statements to her about his thoughts on child pornography.

Reversed and remanded for further proceedings consistent with this opinion. We lift the stay previously imposed by this Court. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski