STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 287662 Monroe Circuit Court
JEFFREY MARTIN FRAUNHOFFER, Defendant-Appellant.	LC No. 07-036401-FH ON RECONSIDERATION

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of disseminating sexually explicit matter to minor, MCL 722.675, and three counts of allowing the consumption of alcoholic liquor in an unlicensed commercial establishment, MCL 436.1913(2). Defendant was sentenced to serve 330 days in jail, with 240 days to be served immediately, and 90 days to be served at the end of a two-year probation period if deemed necessary by the court. The trial court also required defendant to register as a sex offender under the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*. We affirm defendant's convictions and sentences but remand for further proceedings under SORA.

First, defendant argues that the prosecution failed to present sufficient evidence to support defendant's conviction of disseminating sexually explicit matter to a minor. We disagree. When reviewing a sufficiency challenge, we consider the matter "de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). All conflicts in the evidence must be resolved in favor of the prosecution, *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), and to not visit anew the issue of witness credibility, *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

MCL 722.675 provides as follows:

> (1) A person is guilty of disseminating sexually explicit matter to a minor if that person does either of the following:
>
> (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

> (b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.
>
> (2) A person knowingly disseminates sexually explicit matter to a minor if the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.
>
> (3) A person knows the nature of matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content.
>
> (4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

Thus, in order to prove someone guilty of disseminating sexually explicit matter to minor, a prosecutor must establish that: (1) defendant knowingly disseminated to a minor sexually explicit visual or verbal material that is harmful to minors, or knowingly exhibited to a minor a sexually explicit performance that is harmful to minors; (2) defendant was aware of the material's sexually explicit character and content, or recklessly disregarded circumstances suggesting its character and content; and (3) defendant was either aware that the person to whom the dissemination is made is under 18 years of age, or recklessly disregarded a substantial risk that the person to whom the dissemination is made is under 18 years of age. MCL 722.675.

Contrary to defendant's assertion, there is nothing in the statute that requires that the minor be "the target of defendant's dissemination." On the contrary, the statute itself defines disseminate as "to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same." MCL 722.671(b). *Random House Webster's College Dictionary* defines "exhibit" as "to offer or expose to view." *Random House Webster's College Dictionary* (1997). It defines "show" as "to cause or allow to be seen; exhibit; display." Thus, the statute requires that defendant knowingly exposed sexually explicit matter to a minor's view or allowed a minor to see sexually explicit matter.

Defendant's conviction of one count of disseminating sexually explicit matter to minor was based on defendant showing "Men and Women engaging in various sexual acts" on a TV in his restaurant, with knowledge that his minor employees were present and able to view the material. Jessica Jagielski testified that she was 17 when she worked at Jefana's. Jagielski said that one day at work, she and Brauer walked in and saw that the TV behind the bar was tuned to a channel that showed homemade videos where couples were throwing pies at each other, engaging in oral and vaginal sex, and using a "sexual tool" while engaging in sex. Jagielski testified that defendant was sitting at the bar watching the TV. Jagielski said she knew that defendant turned the show on "because [she] watched him with the remote, and [the remote] was also right in front of him." Jagielski said that defendant would change the channel (and then change it back) when he would see cars stopped outside or people walk by the restaurant. She testified that she could see the couple's genitalia and the women's breasts. During the incident

she was "right around" defendant, who was seven or eight feet away from the TV. According to Jagielski, the show was on for 20 or 25 minutes.

Tiara Brauer testified that she was 18 years old when she worked at Jefana's. Brauer stated that she was with Jagielski when they saw and heard videos of sexual intercourse, sex toys, and throwing pies. Brauer said she was able to see male and female genitalia and women's breasts. Brauer testified that defendant had the remote control in front of him, and he would flip back and forth between channels when people would walk by the restaurant. Bauer said that she and Jagielski told defendant the show was gross and that he should turn it off. Brauer recalled that defendant "just kind of laughed it off," and told them not to tell anybody, especially his wife, or they would be fired.

David Young, who worked as a cook at Jefana's, testified that one night close to closing time he saw people having sex on the TV screen. Young said that there were waitresses present, but he could not remember which ones. Jordan Barnett, who played piano at Jefana's, testified that he saw a show with homemade videos playing on the TV. Barnett said that while the show was playing, defendant said to the girls, "what do you think about that," apparently referring to the videos.

Alicia Parks testified that she was 15 years old when she worked at Jefana's. Parks said that one night she saw defendant change the TV to a channel where a naked woman was having sexual intercourse. Parks said she asked defendant to change the TV back to the music station, which he did in less than a minute. According to Parks, prior to turning the pornography on, defendant said, "Yes, [I] did it, and [I'll] do it again, [I'll] turn it on."

Based on this evidence, and despite defendant's denials under oath, a rational jury could have found that defendant knowingly disseminated sexual material to a minor. Based on Brauer's testimony that she and Jagielski asked defendant to turn the pornography off, a rational juror could find that at that point, defendant was deliberately or intentionally allowing Jagielski to see the pornography when he did not turn it off. Additionally, a rational juror could conclude the same from Jagielski's testimony that she was "right around" defendant, who was about seven or eight feet away from the TV that was showing pornography, or from Brauer's testimony that defendant knew that she and Jagielski were able to see the TV that was showing pornography. Moreover, it is difficult to see how defendant could not have been deliberately allowing Jagielski and Parks to see the pornography when Barnett testified that defendant specifically asked the girls what they thought about the pornography they were watching.

In sum, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient for a rational jury to find defendant guilty beyond a reasonable doubt of disseminating sexually explicit matter to minor.

Defendant next argues that his convictions must be reversed because evidence of other acts was improperly admitted under MRE 404(b), and because the prosecution failed to file a proper notice of intent to introduce the other acts in accordance with MRE 404(b)(2). We disagree. Because defendant failed to raise these arguments below, review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. However, under MRE 404(b)(1), evidence of prior bad acts is admissible if (1) the evidence is offered for something other than a character or propensity theory, (2) is relevant under MRE 402, and (3) its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

I. DISSEMINATING SEXUALLY EXPLICIT MATTER

Barnett's testimony on this matter is outlined above. Bernard Beneteau testified that one morning after he ate breakfast he saw naked women on the TV. He was told it was the Playboy Channel. According to defendant, the restaurant did not have cable or satellite service at the time the pornography incidents allegedly took place. Beneteau and Barnett's testimony that they saw sexually explicit matter on the TV was offered to show that defendant had an opportunity to commit the crime. This was a proper purpose for its admission, and the relevance of the testimony to this question is clear. MRE 402.

This testimony was also relevant under MRE 402 because the crime of disseminating sexually explicit matter to minor requires that a person "knowingly" disseminate sexually explicit matter. MCL 722.675. This requires that the person "knows the nature of the matter" by either being "aware of its character and content or recklessly disregard[ing] circumstances suggesting its character and content." MCL 722.675(3). Thus, the evidence that defendant watched sexually explicit matter on other occasions was probative of this element because it would help the jury decide whether defendant was aware of the Playboy Channel's character and content when he turned the TV to that channel during the charged offenses. MCL 722.675(3).

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the evidence was significantly probative of defendant's opportunity to commit the crime and knowledge of the character and content of the matter disseminated. These were principal issues at trial. Furthermore, the trial court instructed the jury on the proper use of this evidence, and we presume that they adhered to this instruction. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Thus, there was no plain error in admitting this evidence.

II. CONSUMPTION OF ALCOHOLIC LIQUOR IN AN UNLICENSED COMMERCIAL ESTABLISHMENT

The prosecution charged defendant with three counts of allowing the consumption of alcoholic liquor in an unlicensed commercial establishment. The prosecution based the three charges on incidents where Jagielski, Brauer, and Cullen served alcohol to customers. The allegedly impermissible testimony is as follows. Young testified that he saw defendant serve beer to customers one time. Barnett said that he saw defendant serve customers red wine three to five times. According to Barnett, defendant kept the wine, which defendant referred to as "grape juice," under the counter, behind the bar. Parks testified that defendant told her to come get him

whenever somebody requested liquor; however, she never had a situation like that so she never saw him serve alcohol.

The challenged evidence was offered to show that defendant had a common scheme, plan, or system of doing an act, which is a proper purpose under MRE 404(b)(1). The challenged evidence shows that defendant instructed the waitresses to come get him when a customer would ask for alcohol. Defendant would then get the alcohol from behind the bar and pour it himself. After pouring the alcohol, which defendant referred to as "grape juice," defendant or a waitress would serve it to the customer. The uncharged acts were sufficiently similar to the charged acts to show a common scheme, plan, or system and were therefore permissibly offered under MRE 402 on a contested issue at trial.

Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Here, the evidence was significantly probative of whether defendant served alcohol to customers using a common scheme or plan, and that he employed that plan in the charged offenses. This was a principal issue at trial. Additionally, the trial court instructed the jury on the proper use of this evidence, which, again, they are presumed to have followed, *Mette*, 243 Mich App at 330-331. Thus, there was no plain error in admitting this evidence.

Defendant's argument that his trial counsel was ineffective for failing to object to the introduction of the allegedly impermissible evidence is without merit. Because the trial court correctly admitted the other acts evidence, defense counsel was not ineffective for failing to lodge a meritless objection to its admissibility. *People v Thomas*, 438 Mich 448, 457; 475 NW2d 288 (1991).

Defendant also argues that the prosecution's notice of intent to introduce other acts in accordance with MRE 404(b)(2) was no notice at all, but was a laundry list of any and all possible bases for admission of other acts evidence. Because defendant failed to object at trial, review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 766-767.

MRE 404(b)(2) states:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The prosecution's notice indicated that it intended to offer evidence regarding defendant playing pornographic material and allowing the consumption of alcohol on occasions other than the charged incidents. The notice further indicated that "these statements are contained within the police report and preliminary examination transcripts" and are admissible to show "motive, opportunity, intent, preparation, scheme, plan or system in doing an act, or his knowledge,

identity, or absence of mistake or accident relative to the charged offenses." This notice of intent provided reasonable notice in advance of trial of the general nature of the proposed evidence, and the rationale for its admission.

Defendant also argues that the court erred in requiring him to register under SORA because disseminating sexually explicit matter to minor is not by its nature a sexual offense. The construction and application of the SORA is a question of law that this Court reviews de novo. *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007).

Under the SORA, an individual convicted of a listed offense after October 1, 1995, is required to register as a sex offender. *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009). "Listed offense" is defined by MCL 28.722(e), and includes a "catchall" provision that requires registration for "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age." MCL 28.722(e)(*xi*); see *Anderson*, 284 Mich App at 14. In this case, the trial court determined that the catchall provision requiring defendant to register as a sex offender applied.

This provision requires the simultaneous existence of three conditions: "(1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, 'by its nature,' constitute a 'sexual offense,' and (3) the victim of the violation must be under 18 years of age." *Golba*, 273 Mich App at 607. There is no dispute that defendant was convicted under state law and that Jagielski was under the age of 18 at the time of the charged act. Defendant's argument is that (1) the violation was not by its nature a sexual offense, and (2) the violation was not *against* an individual who is less than 18 years of age.

Whether the violation by its nature constitutes a sexual offense "is not to be determined solely by reference to the legal elements" of the convicted offense. *Anderson*, 284 Mich App at 14. Instead, the Court must look to the particular facts of the violation. *People v Althoff*, 280 Mich App 524, 534; 760 NW2d 764 (2008). However, "[t]here can be no debate that conduct violating a state criminal law or municipal ordinance that has inherent qualities pertaining to or involving sex fits this second element." *People v Meyers*, 250 Mich App 637, 647; 649 NW2d 123 (2002)

Here, there is little doubt that the violation was by its nature a sexual offense. First, the state criminal law that defendant violated, disseminating sexually explicit matter to minor, MCL 722.675, clearly has inherent qualities pertaining to or involving sex. The statute prohibits a person from knowingly disseminating to a minor sexually explicit visual or verbal material that is harmful to minors. MCL 722.675. Disseminating sexually explicit matter to minor therefore includes criminal conduct that is by definition sexual in nature. Second, the conduct at issue concerned defendant allowing a minor to see a video of men and women engaging in various sexual acts. Thus, defendant has committed an inherently sexual offense for purposes of the SORA. See *Golba*, 273 Mich App at 607.

Defendant's violation was also against an individual who is less than 18 years of age. As noted above, there is no dispute that Jagielski was under the age of 18 at the time of the charged act. In *Althoff*, this Court examined the term "against" in the context of MCL 28.722(e)(*xi*):

> The general definition of the term "against" is broad, and indicates that, under MCL 28.722(e)(*xi*), the offense must be "in opposition or hostility to" the individual. We find the term "against" to be no less inclusive than the term "victim," which is defined as a "person harmed by a crime, tort, or other wrong" in Black's Law Dictionary (8th ed), or as a person who "is acted on and usually adversely affected by a force or agent" in *Merriam-Webster's Collegiate Dictionary* (2007). Furthermore, as indicated earlier, this Court has already interpreted the language in MCL 28.722(e)(*xi*) to mean that "the victim of the violation must be under 18 years of age." See *Golba* [273 Mich App] at 607. [*Althoff*, 280 Mich App at 536-537.]

Based on the interpretation of this statute by *Althoff* and *Golba*, a violation is against a minor if the violation caused harm to a minor. Contrary to defendant's assertion, there is no requirement that defendant deliberately intended harm or, as in this case, that defendant forced the minor to look at the sexually explicit material. All that is required is that the violation caused harm to a person under the age of 18. *Id*.

MCL 722.675 prohibits one from "[k]nowingly disseminat[ing] to a minor sexually explicit visual or verbal material that is harmful to minors." Accordingly, defendant's conduct in violating this statute by definition caused harm to a minor. Moreover, Jagielski testified that she felt "[v]iolated and embarrassed" while the sexually explicit material was playing. Under these circumstances, defendant's violation was against a minor because the violation caused harm to Jagielski, a person under the age of 18.

Defendant also argues that the trial court failed to comply with MCL 769.1(13), which states as follows:

> If the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(*i*) to (*ix*) and (*xi*) to (*xiii*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(*x*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, *and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence.* [MCL 769.1(13) (emphasis added).]

In this case, the trial court determined that the catchall provision requiring defendant to register as a sex offender applied. Thus, the court was required to make a determination whether the offense was a violation that by its nature constitutes a sexual offense against a victim less than 18 years of age, and "include the basis for that determination on the record and include the determination in the judgment of sentence." MCL 769.1(13). Considering the record, the trial court failed to include on the record the basis for its determination that the violation was by its nature a sexual offense against Jagielski. The trial court's statements about the matter at sentencing were not sufficient to satisfy the dictates of MCL 769.1(13).

We affirm defendant's convictions and sentences. The case is remanded to the trial court so that it may analyze the facts of this particular case and make a record, as required by MCL 769.1(13), as to why defendant should be subject to the SORA catchall provision. We retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

People of MI v Jeffrey Martin Fraunhoffer

Docket No. 287662

LC No. 07-036401-FH

David H. Sawyer
Presiding Judge

Henry William Saad

Douglas B. Shapiro
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 16, 2010, is hereby VACATED. A new opinion is attached to this order.

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 21 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, on remand, after analyzing the facts of this particular case, the trial court shall make a record, as required by MCL 769.1(13), as to why defendant should be subject to the Sex Offender Registration Act catchall provision. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 18 2010
Date

Sandra Schultz Mengel
Chief Clerk