IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. William Hopkins, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070941-CA F I L E D (June 18, 2009) 2009 UT App 165

Fourth District, Provo Department, 071402045
The Honorable Gary D. Stott

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Bench, Orme, and McHugh.

PER CURIAM:

Defendant William Hopkins appeals his convictions, following a jury trial, of enticing a minor over the internet, a second degree felony, and attempted dealing in materials harmful to a minor, a class A misdemeanor.

On March 15, 2007 and April 12, 2007, Detective Lance Smith of the Utah County Sex Crimes Task Force was on the internet in a Yahoo chat room posing as a thirteen-year-old girl using the name Tiffaniegurl05. Detective Smith had two chats with Hopkins on March 15 and one chat on April 12. During the first chat, Hopkins discussed having sex with Tiffany and sent Detective Smith five sexually graphic videos over the internet. One video depicted a young, undeveloped woman with glasses and braces disrobing and being directed as she performed oral sex on a male. Referring to that video, Hopkins told Tiffany that he wanted her "to look like this chick." Detective Smith confirmed that it was the undeveloped girl with glasses. During the April 12 chat, Hopkins asked Tiffany her age. After Tiffany indicated that she was thirteen, Hopkins began talking about having sex with her and her underage girlfriend and sent four videos showing sex acts.

During Detective Smith's testimony, the State sought admission of two DVD's containing the videos Hopkins sent to Tiffany. Defense counsel objected to the admission of the videos under rule 403 of the Utah Rules of Evidence, claiming the evidence would be highly prejudicial and that Detective Smith could describe its content during his testimony. The defense stipulated that the materials would be harmful to a minor. The district court denied the defense motion to exclude the videotapes, ruling that the jury would be told that Hopkins stipulated that the videos that he sent to Tiffany were harmful materials for a minor. However, the district court ruled that the videotapes would each be shown for a very short period of time to be determined by the court so that the jury could see the type of information Hopkins distributed.

The sole issue presented on appeal is whether the district court abused its discretion in determining that the probative value of the portions of the videos played to the jury was not substantially outweighed by any resulting prejudice to Hopkins. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Utah R. Evid. 403. In State v. Moore, 788 P.2d 525 (Utah Ct. App. 1990), the defendant challenged the admission of the videos at a jury trial as unfairly prejudicial because he had stipulated that the videotapes were pornographic, contained a live performance by a nude female, were for the purpose of sexual arousal, and contained material harmful to a minor. Noting that "[a]n offer to stipulate regarding the content of offered evidence is only one factor to consider when applying the rule 403 balancing test," the supreme court concluded that the admission of the evidence was not error. 788 P.2d at 527. In State v. Gulbransen, 2005 UT 7, 106 P.3d 734, a defendant charged with sodomy on a child claimed that photos of the victim's injuries were not relevant evidence because he did not dispute that the victim was repeatedly sexually abused, although he claimed that he was not the perpetrator. The Utah Supreme Court characterized the argument as, "since the existence of the injuries is not disputed, the photographs depicting those injuries have no probative value." Id. ¶ 36. However, the supreme court disagreed, stating that "a stipulation of fact by defense counsel does not make evidence less relevant, nor is it a basis for depriving the prosecution [of] the opportunity of profiting from the 'legitimate moral force' of its evidence in persuading a jury." Id. ¶ 37 (citation omitted). Likewise, "the fact that the same evidence could have been provided by purely testimonial means does not necessarily make a photograph inadmissible." Id. ¶ 38. The supreme court held that while the evidence might be slightly unnecessary or cumulative given the live testimony, the district court did not abuse its discretion in admitting the photos at trial. See id. ¶ 42.

To convict Hopkins of enticing a minor over the internet, the State was required to prove that Hopkins "knowingly use[d] a computer to solicit, seduce, lure, or entice a minor or a person the defendant believes to be a minor to engage in any sexual activity which is a violation of state criminal law." Utah Code Ann. § 76-4-401(1)(a) (2008). To convict Hopkins of attempted dealing in material harmful to a minor, the State had to prove that knowing the person was a minor or "having negligently failed to determine the proper age of a minor," he intentionally took a substantial step to "distribute[] . . . to a minor any material harmful to minors." Id. §§ 76-10-1206(1)(a), 76-4-101. The videos were relevant and highly probative of Hopkins's guilt of both crimes. In addition, the stipulation that the videos would be harmful to a minor was clearly tailored to address only the distribution charge. However, the videos are also relevant to the enticing a minor charge because Hopkins referenced the videos to identify sex acts he was interested in engaging in with Tiffany and to indicate how he hoped she might look. Neither the stipulation nor the availability of Detective Smith's testimony rendered the videos inadmissible per se. We review a district court's decision to admit evidence under rule 403 for an abuse of discretion. Under the circumstances, the district court did not abuse its discretion in allowing portions of the videotapes to be admitted in this case.

Accordingly, we affirm.

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Russell W. Bench, Judge

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Gregory K. Orme, Judge

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Carolyn B. McHugh, Judge