

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

BRIAN D. KNIGHT,

Appellant.

No. 41740-5-II

UNPUBLISHED OPINION

Worswick, C.J. — Brian D. Knight appeals his conviction of possessing depictions of minors engaged in sexually explicit conduct. He claims the evidence was insufficient to show that he knowingly possessed child pornography, and he claims the trial court violated his state and federal confrontation rights by limiting his cross-examination of a key witness. Because sufficient evidence supports Knight’s conviction and because he failed to properly preserve one of his evidentiary objections and the trial court properly limited the scope of his cross-examination as to the other, we affirm.

Facts

Brad Owens and Knight worked together in a small shop and later became friends. There, Owens did mechanical work and Knight ran the shop’s computerized billing and payroll programs. Occasionally, Owens stayed overnight at Knight’s apartment. During these stays, Knight would show Owens how the computerized billing and payroll worked. Owens described himself as computer illiterate, but Knight was teaching him how to do job receipts. Owens was never in the

apartment when Knight was gone and only used a laptop computer in the kitchen while Knight was present.

In January 2009, Knight was showing Owens some things on the bedroom desktop computer when Knight brought up a picture of a topless five- or six-year-old female. When Knight closed the picture, Owens could see multiple pictures of naked children ranging in age from six to nine years old. When he asked Knight about the images, Knight closed down the program, stating, “[T]hat’s nothing.” Report of Proceedings (RP) at 22-23. The episode lasted three to five seconds and when Owens told Knight that what he had shown was disturbing, Knight told Owens to leave and that he was no longer welcome in his home. Knight then told Owens that “he could push one button and erase everything on his computer, and he can outsmart the chief of police.” RP at 19.

During the next day or two, Owens went to the Elma Police Department and told Police Chief Jeff Troumbley what he had seen. This led to the police executing a search warrant on Knight’s apartment on April 24, 2009. When Knight answered the door and Chief Troumbley explained that he had a search warrant, Knight responded, “I was expecting you.” RP at 28. Knight explained that his attorney had told him that the police would be getting a warrant. The officers seized Knight’s computer, several hard drives and thumb drives, hundreds of CDs and DVDs, and a camera. The police then sent the seized evidence to the Washington State Patrol High Tech Crimes Unit for analysis, which resulted in the discovery of images depicting prepubescent children engaged in sexually explicit conduct. The State charged Knight with

possession of depictions of minors engaged in sexually explicit conduct.

During a preliminary hearing, Knight sought permission to question Owens about two separate incidents. First, Knight claimed that he kicked Owens out of his apartment because he saw Owens selling Knight's prescription narcotics to an underage teenager. Second, Knight sought to question Owens about an incident at a Texaco gas station that occurred on March 27, 2009, when the two had a physical confrontation and Owens threatened to kill Knight. Knight argued that both incidents demonstrated Owens's bias. The trial court ruled that Knight could question Owens about whether Knight kicked him out but he could not ask him about selling narcotics. As to the threat to kill, the trial court found it to be irrelevant but was willing to reconsider once the evidence developed at trial. Knight did not renew his motion during his cross-examination of Owens.

At trial, Owens and Chief Troumbley testified as we described above. Also, Anthony Doughty from the High Tech Crimes Unit testified that he examined the media seized from Knight's bedroom. Using a forensic software program to examine the two hard drives and two thumb drives, he located seventeen photographs of minors engaged in sexually explicit conduct. He located these images in the unallocated space on the drives. He also recovered a list of recently viewed pedophilia videos under a media player profile for Brian D. Knight. He discovered a list of downloaded files from a file-sharing site called eMule that included child pornography titles. And he discovered an email from Knight in which Knight describes coming out as a pedophile to his family, expresses an interest in young girls, and mentions "pedo-friendly"

websites that he recommended. Chief Troumbley testified that when he told Knight that the forensic technician had found contraband on his hard drives, Knight responded, “[T]echnically there was nothing on my computer, so if it were there, you put it there.” RP at 38.

Pediatrician William Steven Hutton, who examined four of the recovered images, also testified. He described the children in the images as aging from prepubescent to 12 or 13 years old.

Barry Walden, a computer forensic examiner, testified that the images located on Knight’s hard drive were in unallocated space, an area of the hard drive inaccessible unless the computer user has sophisticated forensic software. He explained that when the user deletes a file on a Windows based system, it goes into the recycle bin, which is in allocated space, but when the user empties the recycle bin, the files are then in unallocated space. He also explained that when a file is in unallocated space, its time and date stamp no longer exists and therefore it is impossible to determine when the file was first copied to the computer, how it was organized, or when it was deleted.

A jury found Knight guilty and the trial court imposed a standard range sentence. Knight appeals.

## Discussion

### I. Sufficiency of the Evidence

Knight first claims that insufficient evidence supports his conviction. Specifically, he argues that the State failed to prove that he knowingly possessed images depicting minors

engaged in sexually explicit conduct. He claims this because (1) the images were stored on inaccessible space on the hard drives, (2) Owens had access to his computers, and (3) the time and date stamps were stripped from the images showing when the files were downloaded.

Knight compares his situation to that in *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001). There, the police discovered a handgun during a search for drugs at a teenage hangout apartment. 105 Wn. App. at 217. They also discovered some of Alvarez's personal property in the same room as the handgun. 105 Wn. App. at 218. But because the evidence did not show that Alvarez had dominion and control of that room, the reviewing court held that the State had failed to show constructive possession and it reversed Alvarez's conviction. 105 Wn. App. at 223.

But Knight's case is more like that in *State v. Williams*, 135 Wn. App. 915, 146 P.3d 481 (2006). Williams was a resident of the McNeil Island Special Commitment Center (SCC) when SCC staff searched his computer and found a photograph of a minor engaged in sexually explicit conduct. 135 Wn. App. at 919-20. Williams challenged the sufficiency of the evidence that he knew the image was on his computer but this court affirmed, reasoning that the computer was in Williams's room and no other residents had access to it. 135 Wn. App. at 926. There was also evidence introduced that the image was found on a secondary, unauthorized hard drive, that the SCC computers did not have internet access, and that the image's creation date was after Williams had installed the secondary drive. 135 Wn. App. at 919-20, 926.

As in *Williams*, the evidence here was sufficient to support the conviction. When facing a

challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In order to convict Knight, the State had to prove the following, based on RCW

9.68A.070:

- (1) That on or about April 24, 2009, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;
- (2) That the defendant knew the person depicted was a minor; and
- (3) That this act occurred in the State of Washington.

CP at 119 (Jury Instruction 6). Because Knight argues only that the State failed to prove that he knowingly possessed the images, we address only that element.

Taking the evidence in a light most favorable to the State, the State met its burden of proof. First, the police seized four drives from Knight's bedroom. The two hard drives were connected to the bedroom computer, one flash drive was plugged into that same computer, and the other flash drive was in Knight's bedroom closet. Second, Owens testified that he only used the laptop computer in the kitchen, that only Knight used the computer in Knight's bedroom, that Knight never left him alone in the apartment, and that he first saw the images when Knight brought them up on the bedroom computer screen. Third, the media player recently viewed file

list, the eMule log, and Knight's email professing his pedophilia all provide circumstantial evidence that Knight knowingly possessed these images. Finally, the evidence that these images were inaccessible without sophisticated software has little relevance when considered with the evidence that Knight told Owens he could delete the images with the push of a button and with the evidence that Knight knew beforehand that the police were coming to his apartment with a search warrant. It is an obvious inference, if not an explanation, that Knight simply deleted the contraband before the police arrived. Knight's claim of insufficient evidence fails.

## II. Scope of Cross-Examination

Knight next claims that the trial court violated his state<sup>1</sup> and federal constitutional right<sup>2</sup> to confront witnesses against him when it limited the scope of his cross-examination of Owens by not allowing him to ask about Owens's threat to kill Knight or about Knight's theory of why he kicked Owens out of his apartment. Knight argued below that these incidents were relevant to show Owens's bias as a witness.

A party has a right to cross-examine a witness to reveal bias. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). But the trial court retains discretion to control the scope of cross-examination. 475 U.S. at 679; *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). We review a trial court's decision limiting the scope of cross-examination for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 752-53, 202 P.3d 937 (2009).

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<sup>1</sup> Washington State Constitution, article I, section 22.

<sup>2</sup> United States Constitution, Sixth Amendment.

In order to obtain review of a ruling on the admissibility of evidence, the appellant must show that the trial court made a final ruling:

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

*State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds*, *State v. Brown*, 113 W.2d 520, 540, 782 P.2d 1013 (1989).

A. *Threat to Kill*

Knight argues that the trial court improperly limited his cross-examination of Owens by not letting him ask Owens about his threat to kill Knight. He argued that because Owens's testimony was necessary to establish that Knight knew the images were on his computer, Owens's credibility was critical and he should have been allowed to explore this incident to show bias.

The trial court ruled:

And while *I will certainly listen to objections made at the time*, it appears to me that the incident involving Mr. Owens outside the gas station in Elma simply is not relevant. Any minimal relevance there may be is certainly outweighed by the prejudicial effect. I do not believe that shows bias regarding his testimony in this case, *but if something happens between now and then, I will listen to it.*

RP at 8 (emphasis added). Knight did not renew his request to question Owens about the threat to kill during Owens's testimony. As such, he waived review of this claim: “[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” *State v. Powell*, 126 Wn.2d 244, 257,

893 P.2d 615 (1995) (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)).

Because Knight waived this claim, we do not consider it.

B. *Prescription Drugs*

Knight also claims that the trial court violated his confrontation rights when it limited his cross-examination of Owens to the fact that he kicked Owens out and did not let him question Owens about selling Knight's prescription narcotics to a minor. Because this occurred before Owens gave his statement to the police, he argued that this evidence was relevant to Owens's credibility as a State's witness.

The trial court agreed, in part:

Given the timing of the decision by Mr. Knight to kick Mr. Owens out of the apartment, I would be inclined to allow evidence that happened, but not for the underlying reason that you have described. So, you may [elicit] testimony that Mr. Owens was ordered to leave Mr. Knight's apartment, and that was over a dispute, but I would not want any testimony regarding the allegations that there were prescription medications being used or distributed improperly.

RP at 11. The trial court then asked the prosecuting attorney, "Miss Svoboda, do you wish to be heard on this? I didn't rule. I would be inclined to rule that way. I don't want to preclude you from being heard on this matter." RP at 11-12. We disagree with the State that this was only a tentative ruling and therefore nonreviewable. We examine then whether the trial court abused its discretion in limiting Knight's cross-examination of Owens. *Fisher*, 165 Wn.2d at 752.

Knight wanted to attack Owens's credibility by showing that Owens went to the police because he was angry at Knight for throwing him out of the apartment. Other than claiming that Knight's reason for doing so demonstrated bias, he did not explain to the trial court why Knight's

reason had any relevance or further demonstrated bias. And while the short time that elapsed between when Knight threw Owens out and when Owens went to the police shows there was a likely correlation between the two, the trial court's limitation excluded tangentially relevant but highly prejudicial evidence while still allowing Knight to attack Owens's credibility. The trial court did not abuse its discretion. *See Fisher*, 165 Wn.2d at 753 (trial court properly limited cross-examination to fact of witness's animus toward defendant, disallowing questions about the financial details of their acrimonious divorce).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Worswick, C.J.

We concur:

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Quinn-Brintnall, J.

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Penoyar, J.