RENDERED: APRIL 22, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002079-MR

EDGAR N. PURDOM, JR. APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CR-00001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND VANMETER, JUDGES.

NICKELL, JUDGE: Edgar N. Purdom, Jr., appeals a sentence of fifteen years imposed by the Lawrence Circuit Court after a jury found him guilty of distribution of matter portraying a sexual performance by a minor[1] (four counts) and possession of matter portraying a sexual performance by a minor[2] (one count). After a three-

[1] Kentucky Revised Statutes (KRS) 531.340, a Class D felony.

[2] KRS 531.335, a Class D felony.

day trial, jurors fixed punishment at three years on each of the five counts, with the terms to be served consecutively, a sentence the trial court imposed without change. On appeal, Purdom claims the trial court should have excluded all sexually explicit videos, especially since he offered to stipulate they contained child pornography, and should have granted his directed verdict motion. Having reviewed the briefs, the record and the law, we reverse and remand for further proceedings due to the trial court's failure to conduct the balancing test required by case law and KRE[3] 403.[4]

FACTS

Due to our resolution, we provide a truncated statement of facts. We deem the challenge to denial of the directed verdict moot and say nothing more about it.

This prosecution resulted from an undercover operation launched in September 2008 by the Office of the Kentucky Attorney General (OAG) to catch persons using peer-to-peer (P2P) software to traffic in child pornography via the internet. In 2013, Investigator Kathryn Reed noticed suspicious online activity involving an internet protocol (IP) address assigned to Purdom in Louisa, Kentucky. At the time, Purdom was president of the Louisa Community Bank and had been involved in commercial banking for three decades.

[3] Kentucky Rules of Evidence.

[4] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

On Sunday, February 24, 2013, Reed identified a computer with Purdom's IP address as a potential source from which 35 files believed to contain child pornography could be downloaded. That evening and the next day, Reed successfully downloaded five videos, each between six and 26 minutes in length. On July 16 and 17, 2013, Reed downloaded more videos, these were between ten and 14 minutes in length.

On September 9 and 10, 2013, Reed noticed more suspicious activity associated with Purdom's IP address and downloaded still more files. On these two days, cookies[5] associated with Purdom's IP address indicated the user had visited several adult and child pornography websites.

On October 3, 2013, a search warrant was executed at Purdom's Louisa apartment. Various electronic devices—including a desktop computer, a laptop computer, an iPad and cellphones—were seized from the apartment. Purdom agreed to collect and provide more devices during a subsequent meeting.

While Purdom alone used his home desktop computer, and he alone knew its password, he professed shock when investigators apprised him of the contraband files and pornographic websites linked to his IP address. Purdom ultimately deflected culpability from himself to a Portuguese immigrant who

[5] On the internet, a "cookie" is "a small file or part of a file stored on a World Wide Web user's computer, created and subsequently read by a Web site server, and containing personal information (as a user identification code, customized preferences, or a record of pages visited)." Merriam–Webster Dictionary 254 (10th ed. 2002).

cleans the bank parking lot, does not drive, lacks a valid visa, and has repaired Purdom's computer ten or more times.

The case was tried November 24-26, 2014. According to Purdom's brief, a pre-trial hearing occurred ten days before trial, but no such hearing appears in the certified record[6] provided to us.

During *voir dire,* jurors were made aware of the nature of the case. The prosecutor told jurors they might be shown images containing child pornography. That revelation prompted several potential jurors to approach the bench and be excused from consideration. During defense counsel's questioning, he referred to Purdom's alleged conduct as "horrific and disgusting."

Once a jury was sworn, the Commonwealth stated in its opening remarks that it was unclear whether videos would be shown to the jury during trial. Defense counsel reserved opening statement.

Reed was the Commonwealth's first witness. For nearly two hours she gave highly technical and methodical testimony about computers, the internet, and how her investigation unfolded. In detailing the times at which she downloaded videos, she gave a brief description of the content of each video similar to the information

[6] Absent the filing of a designation of record, a pre-trial hearing will not be included in the appellate record. Kentucky Rules of Civil Procedure (CR) 98(3). No designation of record having been filed in this case, we do not know what transpired at that hearing because it is not part of the certified record. Purdom claims during the hearing he asked the trial court to exclude the videos from the upcoming jury trial because they were graphic and highly inflammatory. He also says he offered to stipulate the videos contained child pornography. "Matters not disclosed by the record cannot be considered on appeal." *Montgomery v. Koch*, 251 S.W.2d 235, 237 (Ky. 1952). The appellant—in this case Purdom—bore responsibility for presenting a "complete record" to this Court. *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). He did not.

she had provided in an affidavit in support of the search warrant executed at Purdom's apartment. The written description of the first video read:

> [t]his video is 7 minutes and 9 seconds in length and depicts a pre-pubescent female child seen performing oral sex on an adult male, masturbating, and being anally penetrated by the male's penis.[7]

After the lunch break, while at the bench discussing proposed instructions, defense counsel formally objected to the anticipated playing of portions of the videos during trial. He argued their prejudice outweighed any probative value, and playing any portion of any of them—apparently even one second—was cumulative and unnecessary because Reed had already and would again verbally describe the activity depicted in the clips the Commonwealth wanted to play. Purdom urged the court to exercise its discretion under KRE 403 and exclude all the videos. This was the only objection voiced by defense counsel in the certified record.

In response, the Commonwealth argued it was necessary to play the videos to establish an element of both crimes charged—that Purdom knew the "content and character" of the videos—something uniquely within Purdom's mind—and he possessed and distributed the material with that specific knowledge. The prosecutor stated Purdom's offer to stipulate[8] the videos contained sexual performances by minors was wholly insufficient in light of the elements the

[7] Jurors saw only twelve seconds of this video, depicting an adult male and a female child, both nude, on a bed, with the child stroking the man's penis.

[8] With near uniformity, courts agree "admission of child pornography images or videos is appropriate, even where the defendant has stipulated, or offered to stipulate, that those images or videos contained child pornography." *United States v. Cunningham*, 694 F.3d 372, 391 (3d Cir. 2012) (internal citations omitted).

Commonwealth had to prove. The prosecutor went on to say, "I'm only going to play enough of each [video] to establish it's a sexual performance by a minor," and "I'm only going to play one off of each day." The trial court then ruled, saying, "Okay. All right. Thank you. Overruled." Thereafter, Reed resumed testifying.

About eight minutes into the afternoon session, twelve seconds of the first video was played; followed by two minutes and 52 seconds of the second video. About six minutes later, 32 seconds of the third video was played, followed by 11 seconds of the fourth video. On the afternoon of the second day of trial, during testimony from OAG Investigator and Digital Forensic Examiner Tom Bell, snippets of three more videos were played—one was a 30 second repeat[9] of a clip shown on the opening day of trial to confirm Bell had located that particular video on a FireLight external hard drive Purdom had provided to Reed; the second was only two seconds long, but played twice because it was "very quick;" and, the third was nine seconds long.

After deliberating 22 minutes, jurors convicted Purdom on all five counts, but they did not sentence him to the maximum term of five years on each charge. Instead, they fixed punishment at three years on each count, to be served consecutively for a total of 15 years. It is from this judgment, entered in conformity with the jury's verdict, that Purdom now appeals.

ANALYSIS

[9] By mistake, four seconds of this video was played a third time while searching for a different video.

Purdom's first and most compelling argument is the trial court abused its considerable discretion by not excluding all videos from trial. More specifically, he claims the trial court abandoned its role as a gatekeeper by admitting the videos without first viewing them and balancing their potential for undue prejudice against their purported probative worth. We agree.

A trial court has wide discretion in admitting evidence. *Daugherty v. Commonwealth*, 467 S.W.3d 222, 231 (Ky. 2015). On appeal, we will not disturb a trial court's decision to admit evidence absent an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). To overturn the trial court's ruling, we must be convinced the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

"Relevant evidence," defined as that "having 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," KRE 401, is admissible. In this case, relevance was undisputed by the parties.

While considerable, a trial court's discretion is not boundless, *Brock v. Commonwealth*, 947 S.W.2d 24, 29 (Ky. 1997), and requires a balancing of the proof's probative value against "the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. If the dangers substantially outweigh the probative value, the relevant evidence *may* be excluded. *Id.*

The mandatory balancing test has been explored in various cases, most recently, *Hall v. Commonwealth,* 468 S.W.3d 814 (Ky. 2015), wherein a conviction for intentional murder and first-degree wanton endangerment was reversed due to admission of 28 crime scene and autopsy photos. The problem in *Hall* was the admissibility of the photos "was determined all at once as a group, with no emphasis on their relative or incremental probative value." *Id.* at 827. Particularly troubling to the Court was the "needlessly cumulative and often duplicative nature" of the photos making it hard "to surmise any reason for introducing all 28 photos other than to elicit unduly prejudicial emotional responses from the jurors." *Id.* The Court went on to write,

> [i]n the absence of specific findings in the record explaining the trial court's reasons for its decision, we cannot conclude that the admission of all 28 graphic crime scene and autopsy photos proffered by the Commonwealth was anything but "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945.

Hall, at 827. As in *Hall,* here we have no findings of fact at all.

Still, *Hall* is factually distinct from our case. In this prosecution, each video was different in content, established a separate charge, and the Commonwealth had refined the portion of each video shown to the bare minimum. Not only did the Commonwealth not show portions of all 58 salacious videos in Purdom's possession, it showed mere seconds of most, with two minutes and 52 seconds being the longest clip and the trio of children depicted therein was clothed during much of it.

While we can factually distinguish *Hall,* it is but the latest pronouncement directing trial courts to view potentially inflammatory material before allowing it to be shown to a jury. *Jones v. Commonwealth,* 237 S.W.3d 153 (Ky. 2007), makes the point with even stronger language than that used in *Hall*.

> [W]e note that the trial court specifically stated that it purposely never viewed the sexually explicit images before they were exhibited to the jury. In its role as a gatekeeper of evidence, a trial court must view and consider any disputed evidence to determine its admissibility on relevancy grounds, regardless of the revolting nature of that evidence. Stated another way: how could the trial court properly weigh the prejudicial effect of these images against their putative, probative value without first seeing them? On remand, the trial court must not abdicate its gatekeeping role by ruling in a vacuum as to the admissibility of unseen images or objects.

Id. at 161. Unlike the judge in *Jones,* the trial court never refused to view the videos introduced at Purdom's trial. Frankly, no one ever suggested the court view the videos, but that does not excuse the trial court's failure to conduct the balancing test which has been required for some time.

Often we find counsel's failure to ask for findings fatal to review of a claim, CR 52.04, but in this case we cannot ignore our Supreme Court's directive that at least some findings of fact are critical when a party has asked a court to exclude evidence it characterizes as highly inflammatory. In this case we have nothing on which we can rely to say with confidence the trial court conducted any balancing test under KRE 403.

The Commonwealth would have us consider this to be a *silent record* which we must presume to support the trial court's ruling. But that is not our understanding of *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Here, there is no indication the trial court made any findings or explained his action that were then simply omitted from the record such that we could assume the trial court's rationale was expressed and just not included in the certified record. Were we to apply the Commonwealth's logic, we would be making something out of whole cloth and this we are loathe to do.

Kentucky is not alone in requiring trial courts to view sexually explicit material before it is displayed to jurors. From *United States v. Loughry*, 660 F.3d 965, 971-72 (7th Cir. 2011) we quote at length:

> The safest course, however, is for the court to review the contested evidence for itself. In this case, relying on the parties' descriptions was insufficient. Few, if any, details were provided to the court when it was deciding whether to admit the evidence. The government's only description of the various challenged exhibits was that some of them depicted pornography that was similar to that on the Cache and that others depicted "hard core" pornography. Based on that vague description, the court could not have properly weighed the prejudicial impact of the challenged evidence against whatever probative value the court believed the evidence had.
>
> Contrary to the government's contention at oral argument, the slightly more detailed narrative description provided by the government's witness before the videos were shown to the jury (and after the court had already decided to admit the evidence) did not suffice either. For example, the government's witness stated that one of the videos depicted "[an] adult male performing a sex act on [a] female minor." That explanation does not tell the

court which acts are shown in the video. While all depictions of an adult engaging in sexual acts with a young child are bound to be repulsive, the impact on the jury will depend upon the nature and severity of the acts depicted.

The challenged videos include the kind of highly reprehensible and offensive content that might lead a jury to convict because it thinks that the defendant is a bad person and deserves punishment, regardless of whether the defendant committed the charged crime. Given the inflammatory nature of the evidence, the district court needed to know what was in the photographs and videos in order for it to properly exercise its discretion under Rule 403.[10] Without looking at the videos for itself, the court could not have fully assessed the potential prejudice to Loughry and weighed it against the evidence's probative value. *See Curtin*, 489 F.3d at 958 ("One cannot evaluate in a Rule 403 context what one has not seen or read."). We therefore hold that, in light of the evidence in this case, the district court abused its discretion under Rule 403 when it failed to review the challenged videos before they were admitted in evidence.

3. Inadequacy of Explanation

The district court also erred in failing to explain how it balanced the Rule 403 factors. During trial, the court explained its decision not to exclude the evidence under Rule 403 as follows: "[t]he Court does look at the balancing test under 403 and finds that even under that, [the challenged exhibits] indeed [come] in." The court later memorialized its decision in a written order, but did not offer any additional explanation, stating only: "the Court conducted the Rule 403 balancing test and concluded that the probative value of the Government's evidence was not substantially outweighed by the danger of unfair recitation."

[10] While *Loughry* addresses Federal Rules of Evidence (FRE) 403, the language is synonymous with KRE 403.

> A pro-forma recitation of the Rule 403 balancing test does not allow an appellate court to conduct a proper review of the district court's analysis. In *United States v. Ciesiolka,* we held that a district court erred when it failed to articulate its reasoning in considering a Rule 403 challenge. 614 F.3d 347, 357 (7th Cir. 2010). We said:
>
> > [T]he district court abused its discretion in failing to propound reasons for its conclusion that the probative value of the [disputed evidence] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript . . . but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."
>
> *Id.* Here, similarly, the court erred in not explaining why it believed that the probative value of the challenged exhibits was not outweighed by the risk of unfair prejudice. *See id.*

[Footnote added]. In light of the foregoing, we must conclude the trial court abused its discretion and abandoned its role as gatekeeper. The only other issue raised on appeal is whether the trial court should have granted a directed verdict. In light of our resolution of the KRE 403 issue, and the need for remand to the trial court, whether a directed verdict should have been granted is moot.

WHEREFORE, we reverse and remand the judgment for further proceedings consistent with this Opinion. If a retrial is scheduled, and the Commonwealth seeks to play sexually explicit videos to which Purdom objects, the trial court must view the material, conduct the balancing test required by KRE

403 and case law, make appropriate findings of fact as discussed in *Hall*, and rule on whether any, all or none of the videos may be played for the jury.

DIXON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent as the record discloses any error of the trial court constituted harmless error. RCr 9.24.

BRIEFS FOR APPELLANT:

Michael R. Mazzoli
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Taylor Payne
Assistant Attorney General
Frankfort, Kentucky