No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

APPENDIX

Gregory P. Bartunek

29948-047

Federal Correctional Institution

P.O. Box 9000

Seagoville, TX 75159

United States Court of Appeals
For the Eighth Circuit

No. 19-1584

United States of America,

Plaintiff - Appellee,

v.

Gregory Bartunek,

Defendant - Appellant.

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: May 14, 2020
Filed: August 12, 2020

Before COLLOTON, WOLLMAN, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

After a jury trial, Gregory Bartunek was convicted of distribution of child pornography and possession of a visual depiction involving a minor engaged in sexually explicit conduct. *See* 18 U.S.C. §§ 2252A(a)(2), 2252(a)(4)(B). On appeal, Bartunek challenges two evidentiary rulings and the denial of a motion for a mistrial. We conclude that there was no reversible error and therefore affirm.

I.

In March 2016, law enforcement officers received a tip that an internet protocol address at Bartunek's residence had uploaded child pornography to a website called Omegle. Investigators executed a search warrant at the residence and determined that Bartunek was the sole occupant. Officers seized two computer hard drives and a thumb drive that together contained over 400 images of child pornography. Some of the images bore a stamp showing that they were downloaded from the Omegle website.

A grand jury charged Bartunek with one count of distribution of child pornography, *see* 18 U.S.C. § 2252A(a)(2), and one count of possession of a visual depiction involving a minor engaged in sexually explicit conduct. *See id.* § 2252(a)(4)(B). The case proceeded to trial, and a jury convicted Bartunek on both counts. The district court[1] sentenced him to a term of 204 months' imprisonment.

II.

On appeal, Bartunek challenges the district court's admission of photographs of four life-sized dolls found in his bedroom. The dolls were replicas of children, ranging in age from infancy to five years, and were dressed in children's underwear. Some of the dolls were altered to include a rubber nodule that appeared to be a penis.

Before trial, Bartunek moved to exclude the photographs on the ground that they were inadmissible character evidence. The court denied the motion, saying that the photographs were admissible under Federal Rule of Evidence 404(b), but provided that Bartunek could raise an objection at trial. The government responded

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[1]The Honorable Robert F. Rossiter, Jr., United States District Judge for the District of Nebraska.

that the dolls should be admissible without limitation as evidence "inextricably intertwined" with the charged offense. The court reserved ruling on that contention. When Bartunek objected at trial, the court apparently adopted the government's position. The court explained that "at the very least it's a 404(b) issue," but given "the timing, what the search warrant was for, [and] what was found on the search warrant," the doll evidence rose "to the level of circumstantial evidence and it's not propensity evidence in this case." The court also determined that the probative value of the evidence was not substantially outweighed by unfair prejudice.

Bartunek argues that the court erred because he lawfully possessed the dolls, and they were unrelated to possession or distribution of child pornography. He complains that the evidence was character evidence that is inadmissible under Rule 404(b). We review the district court's evidentiary rulings for abuse of discretion. *United States v. Steinmetz*, 900 F.3d 595, 600 (8th Cir. 2018).

Rule 401 provides that evidence is relevant if it tends to make a fact more or less probable and the fact is of consequence in determining the action. Fed. R. Evid. 401. Even where evidence is relevant under Rule 401, however, Rule 404(b)(1) prohibits use of a defendant's prior act to prove his character in order to show that on a particular occasion he acted in accordance with the character. This prohibition does not extend to evidence that is "intrinsic" to the charged offense, including evidence that is "inextricably intertwined" with the alleged crime. *See United States v. Guzman*, 926 F.3d 991, 999-1000 (8th Cir. 2019).

We are skeptical of the government's position that the doll evidence was "inextricably intertwined" with the charged child pornography offenses, and thus outside the limitations on character evidence under Rule 404. This court has ruled that evidence of "child erotica" found on a defendant's Secure Digital memory card, and offered to show his sexual interest in children and knowledge of child pornography images on the same card, was not intrinsic to charges of transporting and

receiving child pornography. *United States v. Fechner*, 952 F.3d 954, 961 (8th Cir. 2020). So too, evidence that a defendant had sexual contact with his stepdaughter was not intrinsic to charges that he possessed sexually explicit photographs of the stepdaughter that were taken on occasions distinct from the sexual contact. *United States v. Heidebur*, 122 F.3d 577, 580 (8th Cir. 1997). The government's examples of "inextricably intertwined" evidence are not analogous to the setting here. *See United States v. Moberg*, 888 F.3d 966, 969 (8th Cir. 2018) (per curiam) (defendant's admission that he was familiar with the "Jenny" series of child pornography was intrinsic to charge that he knowingly possessed images from the "Jenny" series); *United States v. Shores*, 700 F.3d 366, 370-71 (8th Cir. 2012) (evidence that defendant conducted drug transaction just outside a residence was intrinsic to charge that he controlled the residence for purpose of distributing drugs); *United States v. O'Dell*, 204 F.3d 829, 833-34 (8th Cir. 2000) (evidence that defendant possessed drugs during period of charged drug conspiracy was intrinsic to conspiracy charge).

But the district court's initial ruling that the doll evidence was admissible under Rule 404(b) was sound. Bartunek's theory of defense was that someone else accessed his internet service, downloaded images to his devices, and distributed the child pornography. The dolls were relevant to overcome the defense by showing Bartunek's motive for acquiring and distributing child pornography. That Bartunek derived gratification from the replicas of young children gave him a motive to possess and distribute child pornography. *See Fechner*, 952 F.3d at 961; *United States v. Furman*, 867 F.3d 981, 988 (8th Cir. 2017).

Ordinarily, evidence admitted under Rule 404(b) is accompanied by a limiting instruction that directs the jury to consider the evidence only for a limited purpose or purposes. The district court, having accepted the government's position that the evidence should be received without limitation, gave no limiting instruction here. Under the circumstances, however, we conclude that any error is harmless. Any potential that the jury considered the doll evidence to show Bartunek's "propensity"

largely overlapped on these facts with the permissible use of the evidence to show motive. An instruction directing the jury to consider the doll photographs only as evidence of Bartunek's motive for possessing or distributing child pornography would not have changed appreciably how the jury weighed the evidence here.

Bartunek also argues that the district court erred in admitting the photos because their "sordid" nature made them unfairly prejudicial. Relevant evidence in a child pornography case often is disturbing, yet "that alone cannot be the reason to exclude the evidence." *United States v. Evans*, 802 F.3d 942, 946 (8th Cir. 2015). The government bore the burden to establish that Bartunek knowingly possessed and distributed the child pornography. Especially in light of Bartunek's theory of defense that someone else was responsible for the images, the district court properly determined that the probative value of the doll evidence was not substantially outweighed by unfair prejudice. We therefore conclude that the district court's admission of the photographs was not reversible error.

III.

Bartunek next disputes the admission of testimony from a witness with the initials S.P. about his relationship with Bartunek between 1999 and 2002. S.P. testified that when he was 14 years old, Bartunek began to show him child pornography. S.P. said that the relationship and the viewing of child pornography continued "[u]ntil 2002 when I got arrested."

During cross examination, defense counsel asked S.P. why he was arrested, and S.P. responded: "Sexual assault on an autistic boy." S.P. then volunteered without objection that his victim "was also Greg's victim too." Defense counsel concluded by asking S.P. whether he was aware that charges filed against Bartunek "based in general on some of the things you testified about today" were dismissed, and S.P. said he was aware. On re-direct examination, the court allowed the government to elicit

from S.P. that he was convicted at age 16 of a misdemeanor for an incident with a 13-year-old autistic boy, and that Bartunek knew the victim through S.P.

Before trial, the government provided notice of its intent to elicit testimony from S.P. about viewing child pornography with Bartunek. Bartunek moved in limine to exclude this testimony, and the court denied the motion without prejudice to renewing it at trial. The court concluded before trial that the evidence was admissible under Rule 414. That rule provides that the court in a child pornography case may admit "evidence that the defendant committed any other child molestation," where "child molestation" is defined to include conduct prohibited by the federal laws on child pornography. Fed. R. Evid. 414(a), (d).

At trial, Bartunek objected when the government called S.P. as a witness. This time, the court referred back to its tentative pretrial ruling, which allowed the testimony under Rule 414, and added that S.P.'s testimony was admissible under Rule 404(b) and not subject to exclusion under Rule 403. The court instructed the jury that the testimony could be used "to decide defendant's knowledge, intent, or lack of mistake," but cautioned that it should not convict the defendant simply because he may have committed similar acts at other times.

Bartunek argues that even if S.P.'s testimony was admissible under Rule 414, it was highly prejudicial and should have been excluded under Rule 403. S.P.'s testimony that Bartunek showed him child pornography was probative of Bartunek's sexual interest in underage children, and it was therefore admissible under Rule 414. *United States v. Emmert*, 825 F.3d 906, 909 (8th Cir. 2016). Rule 414(a) permits evidence that shows the defendant's character or propensity to commit certain acts in a child molestation case, so any prejudice to Bartunek from S.P.'s testimony was not "unfair" within the meaning of Rule 403. *United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001). S.P.'s statement that his victim was also Bartunek's victim entered the record on cross-examination without objection, and the court did not

plainly err in declining *sua sponte* to strike evidence that Bartunek had an underage "victim."

That the events occurred nearly twenty years before trial did not establish unfair prejudice. Congress placed no time limit on admissibility of evidence under Rule 414, and this court has concluded that twenty-year-old evidence of child molestation can be probative and admissible where, as here, it is similar to the charged offense. *Gabe*, 237 F.3d at 960. In this case, Bartunek benefitted from a limiting instruction to which he was not entitled under Rule 414, and that guidance to the jury further demonstrates the absence of unfair prejudice. The district court did not abuse its discretion in addressing the testimony of S.P.

IV.

Bartunek also challenges the district court's denial of his motion for a mistrial in response to testimony by the lead investigator from the Omaha Police Department. During his testimony, the investigator explained that he visited Bartunek's residence in 2013 to investigate an anonymous tip that Bartunek possessed child pornography. The court overruled Bartunek's objection that the testimony was inadmissible under Rule 403.

In response to the prosecutor's question whether he saw anything "unusual" in 2013, the investigator testified that as he approached Bartunek's residence, he observed a large traffic cone on a vehicle in the driveway with the word "chimo" written near the bottom. He proceeded to describe his interaction with Bartunek at the house. When the investigator finished his testimony about the 2013 encounter, Bartunek moved to strike the entire line of testimony based on Rules 401 (relevance), 403 (unfair prejudice), and 404 (character evidence). He also moved for a mistrial on the ground that the investigator referred to "a tip was for child pornography." The government argued that Bartunek's "evasive" reaction to investigators in 2013 was

similar to evasiveness that he exhibited in 2016, and therefore was relevant to the prosecution.

The court denied the motion for mistrial and instructed the jury that the information could be considered only "as background and context" regarding the investigator's history with Bartunek. The court advised the jury that the testimony was not "evidence of any crime at that time or evidence that the crime was committed that the defendant was charged with."

Bartunek argues that the court erred by denying his motion for a mistrial because the reference to "chimo" was inadmissible under Rule 404(b) and Rule 403, and was so prejudicial that the only available remedy was a mistrial. Unstated in the briefs and record is the assumption that "chimo" is an acronym for "child molester." While Bartunek moved to strike all of the investigator's testimony about the 2013 encounter, he did not specify an objection to the traffic cone or advise the district court of his heightened concern about it.

An objection to testimony about the word "chimo" printed on a traffic cone in Bartunek's driveway in 2013 would have been well taken. Even accepting that Bartunek's reaction to the visit from investigators had marginal relevance to this case, the traffic cone was not part of Bartunek's reaction. There was no testimony that Bartunek authored the inscription, and the government does not argue that it was an admission by the defendant. If some unidentified third party sought to label Bartunek as a child molester in 2013, then the statement was obviously hearsay and inadmissible for the truth of the matter asserted.

Even so, the question here is whether the investigator's statement about the traffic cone was so prejudicial that the district court was required to grant a mistrial. We think not. The court gave a limiting instruction that the jury should not consider the entire line of testimony from the investigator as evidence of any crime. The

reference to "chimo" was an isolated comment by one witness. There was no explanation of the meaning of the term. The prosecution did not mention the traffic cone during opening statement or closing arguments. In light of the extensive evidence of child pornography seized from Bartunek's residence, other evidence about Bartunek's sexual interest in minors and history of viewing child pornography, and the minimal likely impact of the traffic cone when viewed in context of the entire trial, we conclude that there was no abuse of discretion in denying a mistrial.

* * *

The judgment of the district court is affirmed.

9/24/20

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1584

United States of America

Appellee

v.

Gregory Bartunek

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:17-cr-00028-RFR-1)

ORDER

Appellant's motion for appointment of new counsel is denied. Appellant is granted an extension of time to file a petition for rehearing. The petition for rehearing is due October 20, 2020.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

September 18, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix [2]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Case No. 19-1584

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY BARTUNEK,

Defendant - appellant.

PETITION FOR ENBANC REHEARING

From

Judgment of the Court of Appeals Panel

Before

COLLOTON, WOLLMAN, and BENTON, Circuit Judges

Filed: August 12, 2020

GREGORY BARTUNEK

Plaintiff-appellant

Gregory P. Bartunek
29948-047
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

The panel decision conflicts with a decision of the United States Supreme Court and of this court to which the petition is addressed, and consideration by the full court is therefore necessary to secure and maintain uniformity of the courts decisions.

Conflicting Cases Sited

Other Cases From the Eighth Circuit

Cases from Other Circuits

THE COURT ERRED IN ADMITTING EXHIBITS AND TESTIMONY UNRELATED TO THE CRIMES FOR WHICH THE DEFENDANT WAS CHARGED

Bartunek's trial was unfairly prejudiced by exhibits and testimony unrelated to the crimes for which he was charged: Evidence of the dolls and children's underwear; Testimony of S.P.; and Pecha's 2013 Visit testimony. Not only did the court abuse its discretion in admitting this evidence, the prosecutor's misconduct & Vindictiveness, and Bartunek's Ineffective counsel were instrumental in Bartunek not receiving a fair trial.

All prior act evidence should have been excluded pursuant to Rule 403 because according to the government, the evidence was not needed to prove its case. (Appellee's Brief at pp. 11, 13, 21, 31, 35) ("Moreover given the overwelming evidence of guilt presented at trial, any error is harmless."). If the government's assertion is accepted as true, the admission of the prior act evidence violated Rule 403:

> "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, waisting time, or needlessly presenting cumulative evidence." (Id.)

Taken individually, the errors made during the trial may not have affected the fairness of the trial. But taken together, they did.

> The district court failed to "balance the alleged errors against the record as a shole and evaluate the fairness of the trial" to determine whether a mistrial or new trial was appropriate." United States v. McBride, 862 F.2d 1316, 1319 (8th Cir. 1988).

The true reason that the government was using this prior act evidence to prove that Bartunek was a disturbed "sexual

preditor" -- a "child molester" -- in order to convince the jury to convict him because he was a bad man deserving punishment. The government successfully used this same evidence to deny Bartunek bail. (Government's Appeal of Detention - Doc. 24; 02/28/2017 Detention Hearing - Docs. 27, 28). Other individuals with the same charges, even a with a criminal history, had been released in the past. (Id. at9:15-17). Judge Rossiter's bias against Bartunek were so strong, he didn't care if his decisions were right or wrong. (03/20/2018 Hearing at 23:4-25), and that no facts would change his beliefs. (Id. at 15:17-16:17). Judge Rossiter's biased actions during the trial reinforced his engrained belief that Bartunek should be found guilty and punished, no matter what.

> "in such circumstances it cannot be said that the "wild card" introduced by the prosecutor's portrail of the defendant as a criminal type did not hold sway it cannot be said that the error[s] did not inflame the jury." United States v. Sheldon, 628 F.2d 54, 58 (D.C. Cir. 1980).

The S.P prior act and the Pecha 2013 Crimestoppers Tip were not "supported by sufficient evidence to support a finding by a jury that the defendant committed the prior act[s]." under Rule 404(b). United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006). Nor did the court consider "how clearly the prior act[s] [were] proved." United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) under Rule 414. The S.P. testimony was incongruent and inconsistent with other evidence in the record from detention hearings and other pretrial hearings. (02/23/2017 Hearing and Exhibits; 06/22/2017 Hearing and Exhibits; and 04/22/2017 Hearing and Exhibits). S.P. testified about child

pornography, however, none was ever found. (02/28/2017 Hearing at 7:3-5); See also court records and police records). And, the 2013 allegations were based on hearsay evidence from an anonymous informant with insufficient evidence to even issue a search warrant.

The Motion in Limine was tentively overruled prior to the trial. (Trial at 2:21-11:23). However, Judge Rossiter's rulings on admission of the prior act evidence were unclear as to why they were admitted or under what rule they were admitted.

> The court failed to identify the 404(b) or 414 components that formed the basis of the rulings. United States v. Brown, 923 F.2d 109, 111 (8th Cir. 1991). "Rather than making broad references which merely restate the components of the rule, the district court should specify which components of the rule form the basis of its ruling and why." United States v. Harvey, 845 F.2d 760, 762 (8th Cir. 1998).

No balancing was done prior to admitting the underwear evidence. (Trial at 219:24-220:10), the doll evidence (Id. at 211:13-212:3, 214:7-215:17), the 2013 prior act (Id. at 279:17-280:11), or when the S.P. assault evidence was introduced. (Id. at 268:3-275:9).

> "Reversal is appropriate only if the trial court failed to engage in the required balancing process or where it is impossible to determine from the record whether it did or not." United States v. Riepe, 858 F.3d 552, 560-61 (8th Cir. 2017), United States v. Horn, 523 F.3d 882, 888 (8th Cir. 2008).

No limiting instruction was given for the underwear. (Trial at 219), the doll evidence (Id. at 211, 214), or after the S.P. assault evidence was introduced. (Id. at 268).

> "The presense of a limiting instruction diminishes the danger of any unfair prejudice arising from the admission of other acts." United States v. Lindsey, 702 F.3d 1092, 1099 (8th Cir. 1997).

Without a limiting instruction, the jury was free to consider the

evidence for any purpose, including that Bartunek acted in accordance with his alleged character of being a child molester.

All three prior acts were admitted under an improper Rule of evidence. The doll and underwear evidence was admitted under Rule 401 [not 404(b)] as intrinsic evidence. The S.P. evidence was admitted under Rule 404(b) [not 414] for knowledge, intent, or lack of mistake. And, the 2013 visit evidence was admitted under Rule 401 [not 404(b) or 414] as background and context. The district court erred in admitting this prior act evidence because it "declined to apply the proper [or any] balancing test." United States v. Sumner, 119 F.3d 658, 658 (8th 1997).

> "It is up to the district court [not the appellate court] to conduct the [proper] balancing test in the first instance." Id. at 662. Remand was necessary. Id. at 658.

The Dolls and Underwear

The government stated that the doll and underwear evidence went towards intent. (Trial at 493:15-19). The Court of Appeals ("COA") ruled that it went to motive. However, Bartunek only denied the criminal act. (Id. at 117:16-17, 250:12-14). Intent, motive, and knowledge go towards "state of mind."

> "When a defendant denies only the criminal act, he does not place his state of mind in issue, and therefore Rule 404(b) renders this type of evidence inadmissable." United States v. Jenkins, 7 F.3d 803, 806 (8th Cir. 1993); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997).

The COA correctly ruled that the photographs of the dolls evidence was not intrinsic to the charged offense. However, it erred in concluding the dolls were relevant to Bartunek's motive because he derived sexual gratification from the dolls. No evidence was admitted to the district court to support this

claim. The COA abandoned its judicial role, and assumed the role of a witness for the government. "A trial judge should never assume the role of advocate. United States v. Gunter, 631 F.3d 583, 587 (8th Cir. 1980). It follows that neither should an appellate judge. A legal opinion does not qualify as an expert opinion. Furthermore:

> "[A] lay witness, unqualified as an expert in human sexuality, cannot characterize an item as "erotica" because the witness cannot properly offer an opinion that a defendant gained sexual gratification from the admittedly (non-pornographic) item." United States v. Caldwell, 1999 U.S. App. LEXIS 7417 *14 (6th Cir. 1999).

Wilson filed a motion in limine to exclude the doll evidence, but failed to do so regarding the underwear. He also failed to object to admitting testimony about it at trial. (Trial at 219:24-220:10; 227:12-230:12). As with the dolls, there was no evidenc that Bartunek derived sexual gratification from these items. Furthermore, the evidence clearly showed that it was a drawer of men's and women's underwear, not childrens. (Id., Exs. 27, 28). The discovery of the dolls and underwear, other than suggesting that Bartunke is somone who liked anotomically correct dolls dressed in underwear and other clothiing, does nothing to further the claim that he knowingly distributed or possed child pornography. United States v. Johnson, 439 F.3d 884, 889 (8th Cir. 2005) (where two printed stories about raping childen were improperly admitted as 404(b) evidence). See also United States v. Heidibur, 122 F.3d 577, 581 n.5 (8th Cir. 1997).

Even if the court did not error in admitting the doll and underwear evidence under Rule 401 or 404(b), it still erred

in admitting it because it was from an illegal search. The items were not listed on the warrant, nor in the proximity of other items seized. Stigge stated he took the pictures "[j]ust -- there was a bit of unusualness to it, so I wanted to document it in the best we could. (Trial at 218:16-17). Although the dolls and underwear were in plain sight, there was no probable cause to believe they were associated with any criminal activity. Coolidge v. New Hampshire, 403 US 443, 465-471 (1971). Furthermore the police moved the dolls, undressed them, and posed them to take their pictures. (Trial at 213:4; 06/22/2017 Hearing at 52:12). Clearly, the actions by the officers constituted an illegal search. See Arizon v. Hicks, 480 US 321 (1987) (where moving a piece of stereo equipment constituted an illegal search). Finally, the pictures are inadmissable under 403 because their prejudicial value heavily outweighed their probative value. See United States v. Sebolt, 460 F.3d 910 (7th Cir. 2006) (where a pair of boys underpants should have been suppressed for the same reasons).

The COA sited two cases to support their conclusion that the doll evidence was admissable: United States v. Fechner, 952 F.3d 954 (8th Cir. 2020); and United States v. Furman, 867 F.3d 981 (8th Cir. 2017). However, these cases are distinguishable from Bartunek's case. In Fechner, child erotica, pictures of actual children which were sexual in nature, were found on the same device as child pornography. In Furman, he sexually assaulted his daughter, a crime, prior to his child pornography charges, which contained similar images as in the rape.

Also, Furman's evidence was introduced under Rule 414 not 401 or 404(b). These cases contrast with Bartunek's case which involved dolls, not real children, and underwear, that were nowhere near the alleged child pornography.

Testimony of S.P

The COA erred in concluding that S.P.'s testimony was admissable under either Rule 404(b) or 414. As with the doll evidence, the COA used the wrong rule of evidence to determine admissability. Judge Rossiter was unsure that Rule 414 applied. (Trial at 4:16-19). However, its clear the S.P. evidence was admitted under Rule 404(b) and the 403 balancing test was done pursuant to that rule alone. (Id. at 257:2-258:20). See Sumner at 662.

The S.P. prior act was not similar enough to the charged crimes to be admitted under either Rule 404(b) or 414. "No presumption of admissability is warranted", "where the past act is not substantially similar to the act for which the defendant is being tried", or "cannot be demonstrated with sufficient specificty." Johnson v. Elk Lake School Dist., 283 F.3d 138, 156 (3rd Cir. 2002). According to S.P., he viewed child pornography with Bartunek (Trial at 263:1-264:5). However, Norris claimed that in 2016, Bartunek acted alone. (Id. at 113:1-6, 493:18-19, 506:12-15, 509:16-18). S.P. testified about videos of boys having sex with eachother. (Id. at 264:6-22). According to Pecha, the images found on the devices in Bartunek's residence included a hodge-podge of images involving child erotica and a variety of sex and non-sex acts by men,

women, girls, and boys. (Id. at 323:20-357:6). No similar videos were found either. (Id.) S.P. testified that he viewed videos of child pornography that were stored locally. (Id. at 265:14-18). S.P. did not mention the Internet, or that he watched videos on-line, or that Bartunek sent or received child pornography, or showed it to anyone. This was in contrast to Bartunek's alleged Omegle experience, involving distribution of child pornography. While Norris didn't solicit direct testimony from S.P. regarding the alleged assaults, he certainly painted a clear picture of Bartunek, using the alcohol, drugs, and gifts as "groomin' tools" to prepare S.P. for such an assault. This was a picture that the jury could not ignore.

But more importantly, S.P. testified that Bartunek sexually assaulted a friend of his, whom he also assaulted. (Id. at 267:13-268:22). Surely this convinced the jury that Bartunek was a child molester and commited sexual assault, a crime for which Bartunek was not charged. Clearly, these differences show that the past act and the act that Bartunek was charged with were too dissimilar to warrant admissibility under either Rule 404(b) or 414. United States v. Crow Eagle, 705 F.3d 325, 327 (8th Cir. 2013). (The prior offences must be similar enough to the charged offense to be probative of the defendant's propensity to commit that specific offense).

> "Raping is a more serious-and thus more prejudicial-offense than child pornography and thus "inflamed the jury" and ran "the risk of confusing the issues in the trial and waisted valuable time, which it did. United States v. Johnson, 238 F.3d 138, 156 (3rd Cir. 2002).

Furthermore, both S.P. and his friend were 14 years of age or

older, not children as defined by Rule 414(d)(1), making this evidence inadmissable under Rule 414(d)(2). Although S.P claimed he as 16 and his friend was 13 at the time, this was not true. (Trial at 269:3-18). S.P. was 14 years old when he met Bartunek in 1999, and was attending junior high in Bellevue, NE. (Id. at 260:15-22). He didn't meet his friend until he was 16 attending Platteview high school in 2001. (Id. at 269:1-18, 276:13-14). That would make his friend at least 15 years old, not 13 as S.P. claimed. (A person enrolls in kindergarten at age 5. In 9th grade, the start of high school, he would be 10 years older, or 15 years old.) Since both S.P. and his friend were 14 years old or older, the S.P. testimony was inadmissable pursuant to the age requirement in Rule 414.

In order for evidence to be admissable under Rule 404(b) or 414, the prior must be close in time to the charged crime. In this case, the S.P. prior act occurred over 17 years prior to trial. The passage of time increases the prejudice value of the evidence because of memory loss, problems getting exculpatory evidence, and obtaining witnesses.

> We have "upheld the introduction of evidence relating to acts or crimes which occured 13 years prior to the conduct charged," United States v. McCarthy, 97 F.3d 1562, 1573 (8th Cir. 1996), we have "been reluctant to go beyond [that] limitation." See also: United States v. Mejia-Uribe, 75 F.3d 395, 398 (8th Cir. 2995).

Pecha's Testimony Regarding His 2013 Visit

The COA erred in concluding that Pecha's testimony regarding his 2013 "Knock and Talk" visit with Bartunek was admissable under any Rule of Evidence. The evidence was totally irrelevant

because it was admitted to show why the case was assigned to Pecha. (Trial at 199:4-201:15). The visit was prompted by an Anonymous Crimestoppers Tip, which did not even rise to the level of probable cause to issue a warrant. (Id. at 238:4-5). Certainly this was not sufficient to support that a jury could find Bartunek guilty of the prior act. The government then claimed that it was relevant to show that Bartunke was evasive. (Id. at 287:4-18). Allowing Pecha to testify on those grounds constituted Prosecutoral Vindictiveness, because Norris was trying to get Pecha to show that Bartunek was a "bad person", a Lier", for being cautious when he was approached by two undercover plain-clothed officers. But more importantly, for asking the officers to get a search warrant, exercising his Fourth Amendment Rights to be secure in his home.

> "An out-of-court statement may be admissible for the limited purpose of explaining to the jury why a police investigation was undertaken." United States v. Blake, 107 F.3d 651, 653 (8th Cir. 1997). However, it was offered as hearsay evidence to show why Pecha was assigned to the case, to show that Bartunek was a bad person who child pornography crimes in the past.
>
> "Allowing agents to narriate the course of their investigation, and thus spread before jurors daming information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and hearsay rule. United States v. Silva, 380 F.3d 1010, 1020 (7th Cir. 2004).

Not only was Pecha's testimony in violation of the rules of evidence, but because of Wilson's Ineffective Counsel and Judge Rossiter's abuse of discretion, Bartunek's Fourth and Sixth Amendment rights were violated. This alone requires remand.

Another Constitutional Violation

Several times during the trial, Norris violated Bartunek's right to silence and due process, violating his Fifth and Sixth Amendment rights. See Trial at 240:19-249:19, 313:6-316:25, 360:20-361:16, 506:1-8. Testimony about the May 24, 2016 police interrogation revealed" Bartunek's common refrain was, "I just don't know what to say ; Bartunek didn't answer questions directly; Bartunek didn't blame anyone else; and Bartunek asked for a lawyer. In a bench conference Norris even admitted, "[I]t still looks like we violated his rights." (Id. at 245:24-246:1). Norris' actions were meant to impeach Bartunek's presumption of innocense, and claim of actual innocense. See Dole v. Ohio, 46 US 610 (1976).

> "[T]o notify the jury that the defendant did not tell his story promptly" and that "the jury is likely to draw" a "strong inference" from the fact that he did not admit any guilt or blame someone else, violated his Fifth Amendment rights. Green v. Miller, 483 US 756, 770 (1987).

The errors Were Not Harmless

Both the COA and the government claimed that the errors were harmless. This argument is meritless. All the evidence in this case is based on snapshots in time. These snapshots are subject to speculation and fail to tell the true story. The physical evidence is from the NCMEC report from Omegle.com of "snapshots" obtained from an Omegle video chat form an Internet Protocol ("IP") address, and from devices seized from the defendant's residence. The IP address was linked to the defendant's shared modem that was connected to a wireless router. However, the reliability of the IP information from

COX is questionable, as COX stated that it "cannot guarantee that they necessarily represent information linking the identified customer to your investigation" and the information was "not for law enforcement or litigation matters." (06/22/2017 Hearing, Ex. 104). Although COX identified Bartunek as the subscriber of the IP address:

> "the assumption that the person who pays for the Internet access at a given location is th same individual who allegedly [uploaded] a single [photograph] is tenuous, and one that has grown over time." BitTorrent Adult Film Copyright Infringement Cases, by U.S. Magistrate Judge Gary Brown, 296 F.R.D. 80 (E.D.N.Y. 2012).
>
> "Thus it is no more likely that the subscriber to an IP address carried out a particular computer function - here the purported illegal [upload] of a single [photograph] - than to say an individual who pays for the telephone bill made a specific phone call. (Id. at 82).

Having a wireless router leaves open that someone other than Bartunek, such as a neighbor, outside the residence was "joyriding" or using the IP address to connect to Omegle.com. United States v. Stanley, 753 F.3d 114, 115-117 (3rd Cir. 2014). Finally, Bartunek was not the sole occupant of the residence, but shared it with Kyle St. John, who also used the same IP address to access the Internet. (Trial at 294:3-16). There was no evidence that any of Bartunek's devices had the manditory software required to connect to Omegle.com's video chat session. Without this software, a video chat is impossible. The government argued that the software could have been errased. But that argument carries as much weight as claiming that just because a person has a gun cabinet on May 25, 2016, proves that he had a 22-caliber Smith and Wesson

rifle (that was used in a crime two months earlier), when no evidence of the rifle was found in the cabinet.

There was not extensive evidence of child pornography seized from Bartunek's residence. While Pech claimed there were 357 images of child erotica on a portable thumb drive, he only identified 3 images as possible child pornography, but were not. (Trial, Exs. 34.1-3). There were at most only at most 43 images found, and over half of those were inaccessible to a user, who would have no knowledge that they existed. (Trial, Exs. 35.1-12, 36.1-7, 49.1-24).

Two of the three devices were portable. There was no evidence presented to show where they had been or who had them prior to the search. There was, however, evidence that other people used the devices, because the owner of one computer account was "Jeremy." (Trial, at 405:6-406:9). However, none of the accounts named Bartunek as the owner. Furthermore, Bartunek unequovically stated that there was no child pornography on his computers or devices. (Id. at 361:9-16).

There was no evidence to show that Bartunek commited the crimes, however, evidence was presented that someone else, namely Jeremy, had. Taken as a whole, the facts do not support the conclusion that there was overwelming evidence of Bartunek's guilt of the crimes charged.

During trial, there were nine witness that testified. Six of them were used as foundation witnesses, to explain technology, and to discuss the investigation. Stigge, the fifth witness, discussed the search of Bartunek's resicence,

spending about one-half of his testimony on the dolls and underwear. S.P. was next to testify, right in the middle of the trial. Pecha's testimony followed. The first matter of substance he talked about was the dolls and underwear. He didn't introduce the evidence of child pornography until about half-way into his testimony.

> Testimony of Bartunek's prior "bad acts constituted significant portions of these witnes' testimony and was front-and-center in the trial. We cannot say that the jury was not substantially swayed by the inadmissable evidence, and that it limited its inquiry only to the evidence relevant to the case." United States v. Heidebur, 122 F.3d 577, 581 (8th Cir. 1997)

The panel decision conflicts with the decisions of the afore named cases of the United States Supreme Court and of this court, and consideration by the full court is required to maintain uniformity of the court's decisions.

Conclusion

For all the reasons stated above, Bartunek respectfully submits that this petition be granted and his convictions be reversed on appeal.

Respectfully Submitted,

Gregory P. Bartunek

09/21/2020

Date

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10/23/20

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1584

United States of America

Appellee

v.

Gregory Bartunek

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:17-cr-00028-RFR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of sheech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of brievances.

Appendix [5]

AMENDMENT IV

The right of the people to besecure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix [6]

AMENDMENT V

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use, without just compensation.

Appendix [7]

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix [8]

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land

or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or

foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.

shall be punished as provided in subsection (b); or

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution,

shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1) (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C) [18 USCS § 2256(8)(C)]. A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of evidence. On motion of the government, in any prosecution under this chapter [18 USCS §§ 2251 et seq.] or section 1466A [18 USCS § 1466A], except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil remedies.

(1) In general. Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A [18 USCS § 1466A] may commence a civil action for the relief set forth in paragraph (2).

(2) Relief. In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child exploitation enterprises.

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591 [18 USCS § 1591], section 1201 [18 USCS § 1201] if the victim is a minor, or chapter 109A [18 USCS §§ 2241 et seq.] (involving a minor victim), 110 [18 USCS §§ 2251 et seq.] (except for sections 2257 and 2257A [18 USCS §§ 2257 and 2257A]), or 117 [18 USCS §§ 2421 et seq.] (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

RULE 102

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

RULE 103

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) of the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record--either before or at trial--a party need not renew and objection or offer of proof to prserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

RULE 104

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so decideing, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Appendix [13]

RULE 105

If the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Appendix [14]

RULE 401

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Appendix [15]

RULE 402

Relevant evidence is admittible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Appendix [16]

RULE 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, waisting time, or needlessly presenting cumulative evidence.

Appendix [17]

Rule 404. Character Evidence; Crimes or Other Acts [Effective until December 1, 2020]

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Rule 802. The Rule against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

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Part 2 of 3