

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:
	:
vs.	: NO. 1414-2010
	:
JAY HARTSOCK,	: CRIMINAL ACTION - LAW
Defendant	:

ORDER

AND NOW, this 21st day of **January, 2011**, this order is entered after an on the record argument held January 18, 2011 regarding Defendant Jay Hartsock’s Motion in Limine, filed January 5, 2011 by Robin Buzas, Esquire of the Public Defenders’ Office. The motion is hereby DENIED.

Mr. Hartsock is charged with 96 counts of Sexual Abuse of Children under Section 6312 of the Crimes Code for his alleged possession or control of 96 different images of child pornography. In his Motion in Limine, Mr. Hartsock stipulates that, for the purposes of trial, the ninety-six images intended to be presented by the Commonwealth as evidence against him qualify as child pornography under Pennsylvania law. Mr. Hartsock requests that the Court order the images inadmissible at his trial pursuant to Pennsylvania Rule of Evidence 403. Pa.R.E. 403 states that “although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

Mr. Hartsock specifically contends that, in light of his stipulation that the photographs constitute child pornography, the images themselves are not admissible pursuant to Pa.R.E. 403 because the images' probative value is outweighed by the danger of unfair prejudice and confusion of the issues. Mr. Hartsock argues that "there is no doubt an extraordinarily elevated danger of prejudice and confusion due to the aversion and repugnance a person may naturally experience after viewing the images." Defendant's Motion in Limine.

Mr. Hartsock contends that *Old Chief v. United States*, 519 U.S. 172 (1997) is the controlling law and functions to preclude the admission of the images themselves into evidence. In *Old Chief*, the fact that the defendant was a felon was inadmissible because he stipulated that he was a felon for the purposes of the trial. That case involved, among the charges, the charge of felon not to possess a firearm. This Court is aware that it is prejudicial to admit evidence of this kind because the jury should be shielded from the fact that the defendant was convicted of a felony in his or her past. A stipulation to this point serves the purpose of avoiding a severance of the charges and possibly having to conduct two separate trials. This Court disagrees that this case is controlling regarding whether or not to admit the images Mr. Hartsock allegedly possessed or controlled in a trial to determine whether or not he possessed or controlled those images.

"It is the task of the trial judge to balance the probative value of the evidence against any prejudicial effect." *Brinich v. Jencka*, 757 A.2d 388, 396 (Pa. Super. 2000). In the case of demonstrative evidence, the Court must follow a two-step test to determine admissibility. First, the Court must decide whether the evidence is "gruesome or potentially

inflammatory...” *Commonwealth v. McCutchen*, 454 A.2d 547, 549 (Pa. 1982). Then, if the Court decides that the evidence is “gruesome or inflammatory,” the court must determine whether the evidence is “of such evidentiary value that the need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.” *Commonwealth v. Marinelli*, 690 A.2d 203, 216-217 (Pa. 1977).

Under the first prong of the test, images that are of a “gruesome nature” do not automatically render that the images are legally “gruesome or potentially inflammatory.” *Commonwealth v. Robinson*, 864 A.2d 460, 502-503 (Pa. 2004). It has been decided that photographic images of injuries inflicted in criminal homicide are not per se “gruesome or potentially inflammatory” but are “merely consonant with the brutality of the subject of inquiry.” *McCutchen*, 454 A.2d at 549. The Pennsylvania Supreme Court has clearly stated this notion: “It was the atrocity of the crimes that rendered the testimony so damaging, and [the Defendant] cannot complain his crime was so offensive that the facts of the crime cannot be submitted to the jury because he would be prejudiced by such offensiveness.” *Commonwealth v. Rigler*, 412 A.2d 846 (Pa. 1980). In this same vein, in a trial to determine whether a defendant is guilty of Sexual Abuse of Children pursuant to Section 6312 for the possession or control of child pornography, the images of child pornography that the defendant allegedly possessed or controlled are not per se “gruesome or potentially inflammatory” and the images themselves are admissible against the defendant.

It is only when demonstrative evidence unduly depicts the crime of the accused, like where it is designed to inflame a desire to punish the accused, that it becomes “gruesome or potentially inflammatory.” This would be the case, for instance, where computer generated

images depicted the accused with a malicious look on their face while committing the alleged crime. See *Commonwealth v. Serge*, 896 A.2d 1170, 1183 (Pa. 2006).

It cannot be said that the images of child pornography that Mr. Hartsock allegedly possessed or controlled, were designed to inflame a desire to punish Mr. Hartsock for his possession or control of such images. Rather, as Mr. Hartsock has stipulated, the images were designed “for the purpose of sexual stimulation or gratification of any person who might view such depiction.” 18 Pa.C.S. 6312. Thus, Mr. Hartsock has failed to show the first prong of the test and the images are admissible as evidence against the Defendant.

Mr. Hartsock cannot argue that because the images are admittedly of child pornography and “there is no doubt an extraordinarily elevated danger of prejudice and confusion due to the aversion and repugnance a person may naturally experience after viewing the images,” that the images themselves are inadmissible because their “probative value is outweighed by the danger of unfair prejudice [or] confusion of the issues.” Mr. Hartsock is on trial for possession or control of those images of child pornography. Admitting the images themselves into evidence will not result in unfair prejudice or confusion of the issues as against Mr. Hartsock.

BY THE COURT,

Joy Reynolds McCoy, Judge