[Cite as *State v. Knisley*, 2010-Ohio-116.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22897
v.	:	T.C. NO. 06 CR 1792
ALEXANDER KNISLEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 15th day of January, 2010.

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FROELICH, J.

{¶ 1} Alexander Knisley was found guilty of eight counts of rape of a child under the age of 13 and ten counts of illegal use of a minor in a nudity-oriented material or performance following a bench trial in the Montgomery County Court of Common Pleas. The trial court sentenced Knisley to the maximum term for each

offense, with some sentences to be served consecutively and some to be served concurrently. His aggregate term of imprisonment was fifty-five years. Knisley appeals.

{¶ 2} The trial court did not abuse its discretion in denying Knisley's motion to sever rape charges from charges for illegal use of a minor in nudity-oriented material; the evidence as to each was simple and distinct. In a trial to the court, the trial court did not abuse its discretion in denying Knisley's motion to suppress after weighing conflicting evidence about whether his wife had voluntarily consented to a search of their home. The trial court acted within its discretion in calling an additional witness at the suppression hearing pursuant to Evid.R. 614(A). The amount of pretrial bail set by the trial court cannot be challenged on direct appeal. The State presented sufficient evidence that the children depicted in nudity-oriented material were "real" children, rather than "virtual" ones. Finally, the trial court's imposition of maximum sentences was not an abuse of discretion. Because we find no merit in Knisley's arguments, the trial court's judgment will be affirmed.

I

{¶ 3} In February 2006, Knisley's stepdaughter, A.V., reported to a school counselor that she had been sexually abused by Knisley. Following an investigation and search of Knisley's house, Knisley was indicted on eight counts of rape of a child under the age of 13, ten counts of illegal use of a minor in nudity-oriented material or performance,[1] and one count of dissemination of

[1]To simplify our discussion, we will refer to the illegal use of a minor in nudity-oriented material or performance as "child pornography."

material harmful to a minor. The dissemination charge was subsequently dismissed without prejudice. Knisley filed a Motion to Sever the rapes from the other charges for trial. He also filed a Motion to Suppress evidence that was found on the computers at his home. Both motions were overruled. Knisley waived his right to a jury trial, and a bench trial was held on June 24-27, 2008.

{¶ 4} Knisley was convicted on all of the rapes and all of the counts of child pornography. He was sentenced to ten years on each of the rapes; the first five counts were to be served consecutively, and the remaining counts were to be served concurrently with the first five counts, for a total of 50 years on the rapes. He was sentenced to twelve months on each of the ten counts of child pornography; the first five counts were to be served consecutively, and the remaning five counts were to be served concurrently with the others, for a total of five years on these offenses. Thus, Knisley's aggregate term was 55 years of imprisonment.

II

{¶ 5} The State's evidence at trial established the following facts:

{¶ 6} A.V. was Knisley's step-daughter. Knisley had married A.V.'s mother, A.K., when A.V. was six months old. A.K. and Knisley subsequently had two more children together.

{¶ 7} A.V. was twelve years old at the time of the alleged offenses. At trial, she recounted at least seven occasions on which Knisley had vaginal intercourse with her and one occasion on which he digitally penetrated her. The first incident occurred in the early spring of 2005, when Knisley followed A.V. into the bathroom,

pulled down her pants, sat her on the sink, and inserted his penis into her vagina. A.V. testified that she resisted at first, but ultimately complied because she was afraid of Knisley's temper and "what he might do." This was the first time A.V. had had sexual intercourse or seen a penis "in real life."

{¶ 8} Over the next several months, Knisley had sexual intercourse with A.V. several more times in her bedroom and in his, while her mother was at work. On one occasion, A.V.'s younger brother was sleeping in her room with her when Knisley came into her room, "drug" her to his room against her will, and had vaginal intercourse with her. On another occasion, Knisley came into A.V.'s room, took off her pajamas, and photographed her vagina while she pretended to sleep, before having vaginal intercourse with her. One time he alternated between vaginal intercourse with A.V. and masturbation. On the last occasion, Knisley digitally penetrated A.V. in the kitchen of their home while everyone in the family was at home and awake. A.V. also testified that Knisley had told her that she had "porn star boobs" and that she was "as hot as [her] mother."

{¶ 9} During her testimony, A.V. was shown pictures of a vagina from a floppy disc found at the house. A familiar blanket, which had been made by Knisley's mother, appeared in the pictures. A.V. stated that the pictures could have been the ones Knisley had taken of her before one of the rapes.

{¶ 10} According to A.V., over the course of these events, her anger toward Knisley grew and her relationship with Knisley and her other family members deteriorated. She felt that Knisley was trying to turn others against her. On February 15, 2006, she was very upset on the way to school about an argument

she had had with her mother and Knisley the previous night. When asked by her best friend why she was upset, A.V. told the friend about Knisley's abuse. The friend encouraged A.V. to tell a counselor at school about the abuse, and A.V. did so the same day.

{¶ 11} The school counselor called the police department. Detective Anthony Ashley responded to the school and interviewed A.V., who reported Knisley's sexual conduct and his use of pornography. Detective Ashley and other officers later decided to move the interviews to the police station and to pick up A.V.'s younger siblings from their school to prevent them from returning to the family home. Detective Tom Milligan went to the house and asked Knisley and A.V.'s mother to come to the police station, which they did.

{¶ 12} At the police station, Detective Milligan interviewed Knisley. He began by questioning Knisley about A.V.'s statements that she had seen Knisley looking at nude pictures on their home computer, which was located in the dining room. When confronted with this claim, Knisley immediately admitted to having nude pictures of children on his computer, but he claimed that the images were "not pornographic in nature" because the children were "not in any sexual oriented position or poses." Knisley claimed he had obtained the images for free from the Internet. Knisley denied taking any nude pictures of A.V. or his younger children, because he was "not a pervert." He admitted, however, that he had viewed pornography in the home while the children were in the house. According to Detective Milligan, Knisley admitted that the children had seen him masturbating at the computer, although he had not intended for this to happen. Knisley did not

claim that the images on his computer were computer-generated. Knisley consented to a search of his computer and provided Detective Milligan with his password.

{¶ 13} Next, Detective Milligan asked Knisley about A.V.'s claims of "inappropriate touching." Knisley admitted that he had been in the bathroom when A.V. was in the shower and that he had mentioned to A.V. that her breasts were bigger than her mother's. He denied engaging in any sexual activity with A.V.

{¶ 14} While Detective Milligan was interviewing Knisley, Detective Ashley interviewed A.K., and a Children Services' caseworker created a safety plan whereby A.K. agreed to send the children to stay with her mother during an investigation. A.K. also consented in writing to a search of the house.

{¶ 15} Police officers executed the search of the house immediately thereafter, before Knisley and A.K. returned to the home. The police confiscated one computer tower, one laptop computer, numerous discs and floppy discs, and a memory card. They also found commercially-made adult pornography and a floppy disc that contained nude pictures that appeared to have been taken at the Knisley house. The data devices, including the computers, were sent to the Miami Valley Regional Crime Lab ("MVRCL").

{¶ 16} The computer tower, which had been connected to the desktop computer in the family's dining room, was admitted at trial as State's Exhibit 2. The MVRCL's computer forensic examiner, Ervin Burnham, testified that he had examined Exhibit 2 at the lab and had found 27,000 images on the computer. The images ranged from fully-clothed to provocatively-posed nude adolescent females,

or others made to appear as adolescents. From State's Exhibit 2, Burnham created a disc containing ten "series" of photos which formed the bases of the ten charges of child pornography. The disc was introduced at trial as State's Exhibit 4-A. Burnhman testified, over Knisley's objection, that in his expert opinion, the images in State's Exhibit 4-A were not "virtual child pornography," meaning that they were not images that had been generated entirely from a computer. He also did not believe that the images were "morphed child pornography," meaning that part of one picture had been placed on another picture to make it look like a new, original picture. Burnham testified that, in his opinion, the people depicted in State's Exhibit 4-A were under the age of 16, but that he could not determine their exact ages.

{¶ 17} Lori Vavul-Roediger, a forensic pediatrician from Dayton Children's Medical Center's Department of Child Advocacy and CARE House, also testified on behalf of the State. Knisley did not challenge her qualifications as an expert, and she was accepted by the court as an expert in child sexual abuse and child development. Vavul-Roediger testified that she evaluated the pictures in State's Exhibit 4-A using "Tanner staging" for child development during puberty, which rates a young, undeveloped child as a "1" and a fully mature adolescent as a "5" based on the amount of sexual organ development, pubic hair, and the like. Vavul-Roediger testified that, in her opinion, all of the children depicted in the pictures contained in Exhibit 4-A were under the age of eighteen to a reasonable degree of medical certainty. Some were in Tanner stage 1, which would mean that

they were five to eleven years old. Others were in stage 2 or 3, but none, in Vavul-Roediger's opinion, was beyond Tanner stage 3.

{¶ 18} Knisley and his mother testified for the defense. With respect to the nude photographs of children, Knisley testified that many people had used the dining room computer (State's Exhibit 2) at his house and that other people could have been responsible for the images that were found on that computer. He acknowledged, however, that in his interview with Detective Milligan, he had admitted to downloading nude photographs of children onto the computer. Knisley testified that he usually looked at the computer at night when his children would not see the content. He claimed that some of the images that the State claimed had come from the dining room computer had actually been on his work laptop or on a floppy disc that was in the bag for his work computer. Knisley claimed that the pictures that appeared to have been taken at the home depicted A.K. (his wife), rather than A.V., and stated that A.K. shaved her pubic hair.

{¶ 19} Knisley denied that he had ever touched A.V. in an inappropriate way. He testified that the family had been discussing a possible move to Georgia and that A.V. did not want to move, suggesting that her desire to avoid the move was a possible motive for her accusations. He also claimed that they had been having lots of problems, such as lying and stealing, with A.V. before she made these accusations.

{¶ 20} Knisley's mother testified that the three children had stayed with her in Washington Courthouse the entire summer of 2005, which overlapped with the time frame in which the victim claimed some of the rapes had occurred. However,

Knisley testified himself that the children had come back and forth from his mother's house that summer.

{¶ 21} Knisley attempted to call A.K. and Lana Mayhew-Schommer to testify. However, A.K. invoked her Fifth Amendment right to remain silent and refused to testify. Mayhew-Schommer, a former therapist at Good Samaritan Hospital who had treated A.V., was not permitted to testify because neither A.V. nor her grandmother, who was her legal guardian, had signed a release permitting her to testify about A.V.'s treatment. As discussed above, Knisley was convicted on all counts.

III

{¶ 22} Before we turn to Knisley's arguments, we note that the numbering of the assignments of error listed in the Table of Contents of his brief does not correspond with the order in which the arguments are presented. Additionally, one assignment is discussed in the brief that does not appear in the Table of Contents at all. As such, we will address the assignments of error in the order that facilitates our discussion, without regard to the "numbering" in Knisley's brief.

IV

{¶ 23} "THE TRIAL COURT ERRED IN THE EXERCISE OF ITS DISCRETION WHEN IT SET BAIL AT THE EXTREMELY EXCESSIVE AMOUNT OF $1,000,000.00 AND THEREAFTER DENIED APPELLANT'S MOTION TO REDUCE OR TERMINATE BAIL."

{¶ 24} Knisley claims that the amount of bail set by the trial court – $1 million – was excessive because he was not a flight risk and had no "prior related allegations" against him.

{¶ 25} Habeas corpus is the proper remedy to raise a claim of excessive bail in pretrial-release cases. See *Chari v. Vore* (2001), 91 Ohio St.3d 323, 325. After conviction, any error concerning pretrial bail is moot, and this issue may not be raised on direct appeal from a conviction. *State v. Towns*, Cuyahoga App. No. 88059, 2007-Ohio-529, at ¶20. Because Knisley's argument is moot, we will not address it.

{¶ 26} Under this assignment of error, Knisley claims that he filed a "Writ of Habeas Corpus, which was dismissed by this court [the Court of Appeals]," while his case was pending in the trial court. He also attempted to appeal from a trial court order refusing to reduce or terminate bail. We concluded that the decision overruling a motion to reduce or terminate bail is not a final appealable order and, with the agreement of defense counsel, we dismissed the appeal. *State v. Knisley* (June 10, 2008), Montgomery App. No. 22711, Decision and Final Judgment Entry. The petition for a writ of habeas corpus was likewise overruled by this court. *Knisley v. Vore* (June 16, 2008), Montgomery App. No. 22790, Decision and Final Judgment Entry.

{¶ 27} The assignment of error related to excessive bail is overruled.

V

{¶ 28} "THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS EVIDENCE SINCE THE POLICE ONLY HAD CONSENT TO SEARCH THE

HOUSE AND DID NOT HAVE CONSENT OR A WARRANT TO SEARCH THE COMPUTER."

{¶ 29} Knisley claims that his wife's consent to search the family home was "invalid" because it was given under duress after she was threatened that her children would be taken away if she did not consent. He claims that, in the absence of such pressure, A.K. "would have left the decision of consent for [the search of] the computer up to [him]." Knisley also argues that he had a "valid expectation of privacy" in the computer because a password was required to log on to the computer.

{¶ 30} In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford* (1994), 93 Ohio App.3d 586, 592 (citation omitted). Accordingly, when we review suppression decisions, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. "Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." Id.

{¶ 31} Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are "per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564, and *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576.

One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (citations omitted). The State is required to establish, by clear and convincing evidence, that consent to the search was freely and voluntarily given. *State v. Posey* (1988), 40 Ohio St.3d 420, 427; *State v. Connors-Camp*, Montgomery App. No. 20850, 2006-Ohio-409, at ¶29. Furthermore, "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *State v. Hilton,* Champaign App. No. 08-CA-18, 2009-Ohio-5744, at ¶23, citing *Schneckloth,* 412 U.S. at 227.

{¶ 32} "'[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' *U.S. v. Matlock* (1973), 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242. 'The authority which justifies the third-party consent does not rest upon the law of property *** but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' Id., fn. 7." *State v. Jefferson*, Montgomery App. No. 22511, 2008-Ohio-2888, at ¶14.

{¶ 33} At the suppression hearing, the State presented evidence that Knisley's wife, A.K., consented to the search of their home.[2] The evidence offered at the suppression hearing with respect to the voluntariness of A.K.'s consent was as follows:

{¶ 34} A.K. testified that, after she had gone to the police station at an officer's request, she talked with Detective Ashley while a Children Services worker, Jane Walker, was in the room. A.K. claimed that, before she consented to the search, she was told that her kids might be taken away from her. According to A.K., this was a "major reason" for her cooperation. After A.K. indicated that she would be willing to sign a consent form, Detective Ashley left the room to get the form, leaving A.K. in the room with Walker. A.K. testified that, during this period, Walker told A.K. that she would need to sign the consent form to get her kids back. Detective Ashley then returned with the form and explained it to A.K., whereupon she signed it.

{¶ 35} Detective Ashley also testified at the hearing, and his account differed from A.K.'s account of their interview in some important respects. According to Detective Ashley, he initially explained to A.K. the allegations A.V. had made and that, in his mind, the level of detail in A.V.'s account gave it some legitimacy. A.K. admitted that she had seen Knisley looking at nude pictures of juveniles, but she stated that the girls in the pictures she had seen were just posing and were not involved in sex acts. According to Detective Ashley, he explained to A.K. that the

[2]At trial, Detective Milligan testified that Knisley had also consented to the search, but this evidence was not offered at the suppression hearing.

police needed to search her house for data storage devices, and she agreed. Detective Ashley corroborated A.K.'s account that Walker had been in the room during the conversation in which A.K. had consented to the search and that he had briefly left the room to get a consent form. He denied that he had threatened to take A.K.'s children if she did not consent, and he denied that he had "used" Walker to put pressure on A.K. To Detective Ashley's knowledge, no such threats had been made.

{¶ 36} After these two witnesses testified at the suppression hearing, the State indicated that it did not intend to call any additional witnesses. Knisley also indicated that he had no witnesses to call. Thereafter, the trial judge stated that he wanted to continue the hearing and subpoena Jane Walker. The prosecutor explained that she had been unable to subpoena Walker for the hearing because Walker was out of state on vacation. Knisley objected to the trial court's plan to call Walker, arguing that the court's need for further testimony demonstrated that the State had failed to meet its burden of proof on the motion to suppress. The judge responded:

{¶ 37} "Let me say this right now. If I had to decide right now, it's going against you [Knisley] based on the proof I hear. I wanna hear – I wanna make sure. *** I'm doing this in the Defendant's interest to try and figure it out – I think – if I weigh it by a preponderance of the evidence, I'm going with what I've heard from the detective, which – which is that nothin' was said by Ms. Walker. But I wanna be certain. I think I'd rather have one more certainty than that goin' into somethin'

as important as this. [Knisley] faces quite a bit of trouble here. And I'd rather have more certainty. That's what I'm asking for."

{¶ 38} When the hearing reconvened and Walker testified, she recounted that she had been called to A.V.'s school, and had later gone to the police station, due to the allegation of sexual abuse. Based on what she was told, Walker had some concerns that A.K. was "not completely a non-offending parent" because of the sexual behaviors she had tolerated and participated in at home, which had created a "very sexually charged household." Walker worked with A.K. that day to develop a safety plan for the children, which would not remove them from A.K.'s legal custody but would insure their safety and prevent Knisley from having contact with the victim. The safety plan that they developed called for A.K. to voluntarily place the children with her mother until an investigation could occur. According to Walker, she placed great emphasis on the need to protect the children in her conversations with A.K., but the safety plan was not conditioned on A.K.'s cooperation with the police. She also characterized their conversation as a "discussion," not an "interrogation." Walker testified that she could not have threatened to keep the children away from A.K. because A.K. still had custody, and only the juvenile court had the authority to take the children away from her. Walker did not recall being left alone with A.K.

{¶ 39} After considering all of this testimony and Walker's notes from her interviews with A.K., the trial court found that A.K.'s claim that her consent had been coerced was not credible, and it overruled the Motion to Suppress.

{¶ 40} The trial court was presented with two different versions of events, and it chose to believe Detective Ashley's and Walker's testimony that A.K. was not coerced into giving her consent with threats that she would lose custody of her children if she did not do so. The trial court's conclusion was supported by competent, credible evidence, and we accept its factual findings as true. These factual conclusions support the legal conclusion that A.K.'s consent was not obtained through duress or coercion and, thus, that her consent to the search of the home was voluntary. Based on the evidence offered at the suppression hearing, the trial court's conclusion that A.K. consented to the search conducted by the detectives was supported by clear and convicing evidence.

{¶ 41} Knisley also argues that he had a valid expectation of privacy in the dining room computer because it required a password to log on and that, even if A.K.'s consent to the search of the home were valid, she could not have provided a valid consent to the search of the computer files. Although Knisley raised this argument in his motion to suppress, the evidence upon which he now relies to substantiate this claim comes from his testimony at trial. We must confine our review of the trial court's decision on the motion to suppress to the evidence before the trial court at that time. *State v. Curry* (Aug. 29, 2000), Franklin App. No. 99AP-1319; *State v. Hunter* (Oct. 8, 1999), Montgomery App. No. 17541.

{¶ 42} At the suppression hearing, A.K. testified that there had been three computers in the family's home: a computer with Internet access in the dining room; a laptop in the living room that was Knisley's "work computer;" and a computer without Internet access in A.V.'s room. A.K. stated that everyone in the family, and

some of their friends, used the computer in the dining room. A.K. testified that, when she gave her consent to search, she understood that detectives were going to take the dining room computer and Knisley's work computer from the home. A.K. testified that she had seen Knisley looking at nude pictures on the dining room computer, but that she had not been able to ascertain the age of the subjects. She identified Knisley's guns, his work computer, and the bag for the work computer as the only items in the house that were his "alone," although she admitted that she had occasionally used the work computer.

{¶ 43} Detective Ashley testified that, when he asked A.K. about Knisley's computer use, she started to cry and admitted that she had seen him looking at pictures of nude juvenile girls on the computer. According to Detective Ashley, he explained to A.K. that he needed to search the house for data storage devices and "went through a list of things as far as whether it be computers, *** C.D.'s, *** memory sticks, floppy disks, digital cameras *** – any device that could store any type of data like that, *** that we would need *** to have it analyzed to further investigate the matter." He then asked for her consent to search the residence; she agreed and executed a consent to search her residence.

{¶ 44} No other evidence was presented at the suppression hearing about the family's computer usage or property in the home over which Knisley had exclusive control. The pornographic images which form the basis of the charges against Knisley were found on the dining room computer.

{¶ 45} The State presented evidence that the dining room computer was used by all family members and that the property over which Knisley had exclusive

control did not include that computer. Knisley did not offer any evidence *at the suppression hearing* to rebut A.K.'s testimony on this point, and his testimony at trial that he had installed a password on the dining room computer to restrict access by other members of the household cannot be considered in our review of the trial court's decision on the motion to suppress. The assignment challenging the trial court's decision on the motion to suppress is overruled.

VI

{¶ 46} "THE TRIAL COURT ERRED WHEN IT POSTPONED THE HEARING ON THE APPELLANT'S MOTION TO SUPPRESS IN ORDER TO CALL ITS OWN WITNESS, AFTER THE PROSECUTION HAD PRESENTED ALL OF ITS EVIDENCE AND HAD NOT PLANNED TO CALL THE WITNESS TO TESTIFY."

{¶ 47} Knisley contends that the trial court erred in calling a witness after the State "had not called any witnesses" at the suppression hearing. He suggests that the trial court did not act impartially in doing so and infers from the trial court's action that the State had failed, up to that point, to meet its burden of proof on the issues raised in the motion to suppress.

{¶ 48} Knisley's assertion that the State had not called any witnesses at the suppression hearing before the court called Jane Walker is incorrect. A.K. and Detective Ashley had already testified for the State when the court invoked Evid.R. 614(A) and called Walker to testify. As discussed above, Detective Ashley and A.K. presented conflicting accounts of the circumstances under which A.K. consented to the search of the family's home. Although the trial court stated that it

was inclined to believe the detective's account, which did not involve any coercion to obtain A.K.'s consent, the judge wanted to give Knisley the benefit of any testimony that Walker could add for "more certainty" and "in the Defendant's interest."

{¶ 49} Evid.R. 614(A) provides: "The court may, on its own motion or at the suggestions of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The only restriction is that any interrogation by the court must be conducted in an impartial manner. Evid.R. 614(B); *State v. Granderson*, 177 Ohio App.3d 424, 2008-Ohio-3757, at ¶64. The decision whether to call its own witnesses is left to the court's sound discretion. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 50} The trial court acted reasonably in calling Walker as a witness so that it could further consider the credibility of A.K.'s account that she had been pressured into giving consent to the search of the home. The questions asked by the judge were impartial and narrow in scope. The prosecutor and defense counsel were then permitted to thoroughly cross-examine Walker. The trial court did not abuse its discretion in calling Walker as a witness or in its interrogation of her.

{¶ 51} The assignment of error challenging the trial court's decision to call Walker as a witness at the suppression hearing is overruled.

VII

{¶ 52} "THE TRIAL COURT ERRED IN ITS EXERCISE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO SEVER FOR SEPARATE TRIALS,

WHEREBY EXTREMELY PREJUDICIAL TESTIMONY AND EVIDENCE PREJUDICIAL TO APPELLANT'S CASE WAS UNFAIRLY AND UNREASONABLY ADMITTED INTO EVIDENCE."

{¶ 53} Knisley claims that the trial court erred in refusing to sever the rape charges from the child pornography charges for trial because the evidence of child pornography would not have been admissible in a trial for rape, and the evidence was not "inextricably related."

{¶ 54} Pursuant to Crim.R. 8(A), joinder of multiple offenses is permitted when the charged offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." As a general rule, joinder of offenses is favored to prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish inconvenience to the witnesses. *State v. Torres* (1981), 66 Ohio St.2d 340, 343, *State v. Powell* (Dec. 15, 2000), Montgomery App. No. 18095.

{¶ 55} If offenses are properly joined, a defendant may move to sever under Crim.R. 14. A defendant claiming error in the joinder of multiple counts in a single trial must make an affirmative showing that his rights would be prejudiced. *Torres,* supra, at 343. A defendant cannot demonstrate prejudice where evidence of each of the offenses joined at trial is simple and direct. *State v. Franklin* (1991), 62 Ohio St.3d 118, 122. Where the evidence is uncomplicated, the finder of fact is believed capable of segregating the proof on multiple charges. *State v. Brooks*

(1989), 44 Ohio St.3d 185, 194. For an appellate court to reverse a trial court ruling that denies severance, the accused must show that the trial court abused its discretion. *State v. Franklin,* supra*,* at 122.

{¶ 56} In his "Motion to Sever the Trials," Knisley argued that a trial at which evidence of both the rape charges and the child pornography charges would be presented would violate his due process rights by "bolster[ing] the credibility of the complaining witness to the prejudice of [Knisley]," misleading or confusing the jury, and suggesting that he had a propensity to commit criminal acts. He also claimed that, because he had alibi defenses to present on some of the charges, "the jury would be required to separate the actions and locations based on multiple parties' testimony" and "the resulting confusion would also create a prejudicial effect."

{¶ 57} The State opposed the Motion to Sever, arguing that many of the witnesses it would call to testify about the offenses overlapped – particularly the victim, her mother, and her siblings – and because the rapes and pornography "show[ed] a course of criminal activity that occurred in the home." The State argued that there would be no benefit to severance because the evidence of the use of pornography in the home was relevant to the "sexualized environment" there and would be admissible at a trial on the rapes counts. The State also argued that, pursuant to Evid.R. 404(B), evidence of child pornography would have been admissible at a separate trial on the rapes. Further, because the evidence offered on the child pornography counts did not include photographs of A.V., the State argued that the evidence was distinct and that Knisley would not be prejudiced.

{¶ 58} We agree with the State that the evidence on the child pornography and rape charges was simple and direct. However, the evidence of a common scheme or plan was weak. The State did not offer any evidence to show that Knisley's use of child pornography for sexual gratification made it more likely that he would engage in sexual conduct with A.V. or that the "sexualized environment" in the home was part of a plan to rape A.V. As such, Knisley's use of child pornography was not inextricably related to the rapes. We are unpersuaded by the State's argument that, if the counts of pornography and rape had been severed, the evidence that Knisl`ey had possessed child pornography would have been relevant and admissible at a separate trial on the rapes. Even if the evidence of child pornography had been relevant to the rape allegations, it may not have been admissible at a separate trial "if its probative value [was] substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403.

{¶ 59} Furthermore, evidence of other crimes or wrongs is not admissible to prove the character of a person in order to show action in conformity therewith, although it may be used for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B). "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68 ***. This danger

is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, ***. The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible." *State v. Schaim* (1992), 65 Ohio St.3d 51, 59. In our view, if evidence of Knisley's possession of child pornography were offered at a separate trial on the rapes, it would be the type of evidence precluded by Evid.R. 404(B) because it would be stronger evidence of his character than of his motive or intent.

{¶ 60} Although the State's argument that Knisley's use of child pornography and rapes of A.V. were part of a common scheme or plan is without merit, we are unpersuaded that Knisley was prejudiced by the trial court's refusal to sever the rape and pornography charges for trial. The holding in *Schaim* and the language of Evid.R. 403 point to a particular concern about the effect of other acts or inflammatory evidence on a jury. Knisley was trial by a judge, not by a jury. A trial judge is presumed to be capable of separating the evidence on different offenses and to have considered only relevant, material,` and competent evidence as to each offense. See *In re Walker*, 162 Ohio App.3d 303, 2005-Ohio-3773, at ¶18; *State v. Brown*, Cuyahoga App. No. 87947, 2007-Ohio-287, at ¶15. The evidence with respect to the rape and pornography charges in this case was distinct, and there is nothing in the record to suggest that the trial court confused the issues or relied on improper evidence in convicting Knisley. Accordingly, even if the trial

court abused its discretion in failing to sever the rape and pornography offenses for trial, Knisley was not prejudiced by the error.

{¶ 61} The assignment of error challenging the denial of Knisley's motion to sever is overruled.

VIII

{¶ 62} "THE TRIAL COURT ERRED WHEN IT CONVICTED APPELLANT WITHOUT 'SUBSTANTIAL EVIDENCE' THAT HIS PHOTOS WERE CHILD PORNOGRAPHY.

{¶ 63} "THE TRIAL COURT ERRED BY INFERRING THE IMAGES DEPICTED IN THE COMPUTER IMAGES WERE MINORS WITHOUT REQUIRING THE PROSECUTION TO MEET ITS BURDEN OF PROOF."

{¶ 64} Knisley contends that the State presented insufficient evidence that the pornographic images found on his computer depicted real, minor children. He contends that the trier of fact is prohibited from inferring or relying on circumstantial evidence in determining whether the participant was or was not a minor. Knisley also reiterates portions of his argument on the issue of severance, but we have already addressed this argument and will not address it further under these assignments.

{¶ 65} Knisley claims that, because R.C. 2907.321 and R.C. 2907.322 expressly permit the trier of fact to infer that the person depicted in a pornographic material or performance is a minor, and R.C. 2907.323 (of which Knisley was convicted) does not contain such a provision for the illegal use of a minor in nudity oriented material, we must reach "the logical conclusion [that] the Ohio legislature

specifically prohibited such an inference under [R.C.] 2907.323." Knisley cites *State v. Tooley,* 114 Ohio St.3d 366, 2007-Ohio-3698, in support of this argument.

{¶ 66} R.C. 2907.321 defines the offense of Pandering Obscenity Involving a Minor, R.C. 2907.322 defines the offense of Pandering Sexually Oriented Matter Involving a Minor, and R.C. 2907.323 defines the offense of Illegal Use of a Minor in Nudity-Oriented Material or Performance. R.C. 2907.321(B)(3) and R.C. 2907.322(B)(3) contain the provision that "the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor." R.C. 2907.323 does not contain this language.

{¶ 67} *Tooley* does not support Knisley's argument that, because R.C. 2907.321 and 2907.322 expressly permit an inference that a child depicted in a pornographic image is a "real" child, rather than a virtual one, and R.C. 2907.323 does not, we must conclude that such an inference is not permitted in a prosecution under R.C. 2907.323. *Tooley* held that the "evidentiary inference" permitted under R.C. 2907.322(B)(3) "merely allows a fact-finder to consider circumstantial evidence to determine that the person depicted is a minor." Id. at ¶2. "The permissive inference *** simply allows what the common law has always permitted: that is, it allows the state to prove its case with circumstantial evidence." Id. at ¶33. The Supreme Court's characterization of this language as a mere embodiment of the common law rule on the use of circumstantial evidence undercuts Knisley's claim that the absence of this language in R.C. 2907.323 is of great significance.

{¶ 68} Knisley also claims that the expert testimony in this case about the ages of the children in the photographs found on his computer "fails to meet the standard set" in *United States v. Halter* (C.A.6, 2008), 259 Fed.Appx 738, *United States v. Farrell*y (C.A.6, 2004), 389 F.3d 649, superseded on other grounds, as discussed in *United States v. Williams* (C.A.6, 2005), 411 F.3d 675, 678, n. 1, and *United States v. Hughes* (C.A.6, 2007), 505 F.3d 578.

{¶ 69} *Halter*, *Farrelly*, and *Hughes* have little in common. The offense in *Hughes* was insider trading; that case relates to Knisley's only in that it permitted the use of circumstantial evidence. *Halter* held that a jury can distinguish sexually explicit images of actual children from images of simulated children, and this holding does not help Knisley in this case. Similarly, *Farrelly* held that "juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge." *Farrelly,* 389 F.3d at 655. In our view, none of these holdings supports Knisley's assertion that the State "has clearly failed to close the gaps in their hypothesis 'substantial evidence.'"

{¶ 70} The State presented evidence that the children depicted in the photographs on Knisley's computer were "real" children and not virtual children. Computer forensic examiner Burnham testified that, based on his experience, the images were not virtual images, and he detected no evidence of "morphing or cropping" in the images. This evidence supported the fact finder's conclusion that the children in the pictures were real. The trial court was also competent to draw its own conclusions about the pictures. The trial court's conclusion that the State

had proven, beyond a reasonable doubt, that the children depicted in the pictures were real was supported by sufficient evidence.

{¶ 71} The assignments of error challenging whether the children in the computer images were "real" are overruled.

IX

{¶ 72} "THE TRIAL COURT ERRED IN THE EXERCISE OF ITS DISCRETION WHEN IT IMPOSED THE MAXIMUM SENTENCES UPON APPELLANT.

{¶ 73} "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCES FOR THE CRIMES SINCE THE COURT FAILED TO STATE ON THE RECORD THE REQUIREMENTS OF R.C. 2929.14(B)."

{¶ 74} Knisley claims that the trial court erred in imposing the maximum sentences for his offenses.[3]

{¶ 75} We review a felony sentence using a two-step procedure. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4. "The first step is to 'examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.'" *State v. Stevens,* 179 Ohio App.3d 97, 2008-Ohio-5775, at ¶ 4, quoting *Kalish* at ¶ 4. "If this step is satisfied, the second step requires that the trial

[3]As stated above, although Knisley did receive the maximum sentence on each count, some of the sentences run concurrently, so that the aggregate sentence is not the maximum aggregate sentence that the court could have imposed.

court's decision be 'reviewed under an abuse-of-discretion standard.'" Id. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 76} Since *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has discretion to impose a sentence within the statutory range, and the court is no longer required to make findings or give its reasons for imposing a maximum sentence. Id. at ¶100; *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, at ¶35. In exercising its discretion, however, the trial court must carefully consider the statutes that apply to every felony offense, including R.C. 2929.11 and 2929.12. *Mathis* at ¶38; *State v. Gabbard,* Clark App. No. 07 CA 133, 2009-Ohio-2739, at ¶6. "Even though *Foster* frees the trial judge from making the findings, support for the sentence should appear in the record to facilitate the appellate court's review. *Ohio Felony Sentencing Law,* 2007 Edition, Griffin and Katz, at 208." *State v. Bowsher*, Clark App. No. 08-CA-58, 2009-Ohio-3429, at ¶11.

{¶ 77} R.C. 2929.11(B) requires that the sentence imposed for a felony "be reasonably calculated to achieve the two overriding purposes of felony sentencing, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11(A).

{¶ 78} At the sentencing hearing, the trial court stated that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. The court did not otherwise elaborate on its reasons for imposing the sentence that it did. However, considering that nature of the crimes, the need to protect the public from future crimes, the harm suffered by A.V. and by the victims of the child pornography, and Knisley's relationship with the victim, the trial court did not abuse its discretion in imposing the sentences that it did.

{¶ 79} The assignments of error challenging the length of the sentence are overruled.

X

{¶ 80} The judgment of the trial court will be affirmed.

. . . . . .

GRADY, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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