

**IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

vs.

**JOSEPH “JOE”BAUER, also known as  
JOSEPH V. BAUER,**  
Defendant.

Case No. 2932

**ORDER ON MOTIONS  
UNDER ADVISEMENT**

**DATE OF HEARING:** March 12, 1999, and April 28, 1999.

**DATE OF DECISION:** July 8, 1999.

**APPEARANCES:**

For plaintiff: Avery L. Gurnsey, Keya Paha County Attorney, and Barry Waid,  
Special Deputy Keya Paha County Attorney.

For defendant: Michael S. Borders with defendant.

**SUBJECT OF ORDER:**

- (1) plaintiff’s motion to determine admissibility of other misconduct (“404 motion”) filed 3/12/99 (regarding matters identified by notice filed 3/2/99);
- (2) defendant’s “request for disclosure” filed 3/23/99;
- (3) plaintiff’s motion in limine filed April 1, 1999;
- (4) plaintiff’s motion for reciprocal discovery filed 4/1/99;
- (5) plaintiff’s motion for protective order during deposition of victim filed 4/1/99.

**FINDINGS:** The court finds and concludes that:

**EVIDENCE OF OTHER MISCONDUCT**

1. In *State v. McManus*, 257 Neb. 1, \_\_\_ N.W.2d \_\_\_ (1999), the Nebraska Supreme Court extensively discussed the distinction between logical relevance and relevance for a proper purpose.

a. Rule 401 relevance requires only a rational, probative connection, however slight, between the offered evidence and a fact of consequence. *Id.* The fact that a defendant has committed a crime or other misconduct on another occasion tends to show that the defendant has a propensity to do so, and thus it is at least slightly more probable that the defendant committed the crime at issue than a defendant without such a propensity. *Id.* In other words, under *McManus*, the court recognizes such evidence has logical relevance under rule 401.

b. Nevertheless, rule 404(2) prohibits such evidence for the purpose of showing a defendant's propensity to act in a particular manner. *Id.* Rule 404(2) excludes such evidence because it creates the risk of a decision by the trier of fact on an improper basis. *Id.* It tempts the trier of fact to condemn the defendant for his other bad acts rather than the defendant's guilt of the present charge. *Id.* It creates a danger that the trier of fact will over-estimate its probative value. *Id.* Exclusion protects the presumption of innocence, which is "deeply rooted" in our jurisprudence. *Id.*

c. However, rule 404(2) allows such evidence when offered for a purpose other than propensity.

The key inquiry under rule 404(2) is the basis of the relevance of the acts. Rule 401 asks whether the evidence is relevant, whereas rule 404(2) asks why the evidence is relevant. If the evidence is relevant because it tends to show the defendant's criminal disposition or propensity to commit a certain type of crime, it is relevant for an improper purpose and is inadmissible under rule 404(2). However, if it is relevant to show something other than the defendant's character, then it is relevant for a proper purpose and is admissible under rule 404(2). Thus, the question is whether the evidence of other bad acts is relevant for a proper purpose, not merely whether the evidence is relevant.

*Id.* at 7-8, \_\_\_ N.W.2d at \_\_\_.

d. The Supreme Court then proceeded to determine that the term "independent relevance" is synonymous with "proper purpose." *Id.* The Court favorably cited the rule that "evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third parties." *Id.* at 8, \_\_\_ N.W.2d at \_\_\_. The Court observed that the discussion in *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds*, *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997), regarding determination of a proper purpose was superfluous after a determination of independent relevance. *Id.* In other words, evidence of other *similar sexual conduct* provides a proper purpose for admission in a prosecution for a sexual offense.

2. Of course, these cases limit application of the independent relevance doctrine to instances of *similar* sexual conduct. In the context of sex crimes, the rule 404(2) analysis requires a comparison for similarity to determine that the offered evidence has independent relevance. Once a court concludes that such similarity exists, such independent relevance constitutes the "proper purpose." In *State v. Carter*, *supra*, the Supreme Court stated:

An absolute identity in every detail cannot be expected. *State v. Phelps*, 241 Neb. 707, 722, 490 N.W.2d 676, 688 (1992) (“the prior acts need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value”).

Where there are an overwhelming number of significant similarities, the evidence of prior acts may be admitted. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993). “The term ‘overwhelming’ does not require a mechanical count of the similarities but, rather, a qualitative evaluation.” *Id.* at 576, 858 P.2d at 1179. The question is whether the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *Id.* If so, the evidence may be admitted, and any dissimilarities merely go to the weight of the evidence. *Id.* We agree with the reasoning of the Arizona court in *Bible*.

*Id.* at 964-65, 524 N.W.2d at \_\_\_\_.

3. Once the court has concluded that evidence is offered for a proper purpose, the court must weigh the probative value against the danger of unfair prejudice. *State v. McManus, supra*. In *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996), the Supreme Court observed:

For the purposes of this rule, the probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues in the case. [Citations omitted.] Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. [Citations omitted.]

*Id.* at 241-242, 548 N.W.2d at \_\_\_\_.

4. Rule 404(3) requires a preliminary showing by clear and convincing evidence that the accused committed the other conduct. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Michael B.*, 8 Neb. App. 411, \_\_\_\_ N.W.2d \_\_\_\_ (1999).

5. With regard to the conduct identified in paragraphs 1, 3, 4, and 5 of the plaintiff’s notice (filed 3/2/99), the testimony of witness A.P.G. meets the standard of clear and convincing evidence. However, the court must consider the other requirements for admission.

6. Despite minor differences, the conduct identified in paragraphs 1, 3, 4, and 5 of the plaintiff’s notice reveals substantial similarity.

a. A.P.G. was not related by consanguinity or affinity to the defendant. In this case, the alleged victim is related by consanguinity to the defendant’s wife and by affinity to the defendant.

A.P.G.'s mother and the defendant's wife were close friends. However, in this era of disintegrated families, the closeness of a relationship may be exemplified more by proximity than by formal relationship. While A.P.G. did not reside in the defendant's home, she was a frequent household visitor. In this case, although the alleged victim was at times a resident of the defendant's household, she also resided outside the defendant's home. Both A.P.G. and the alleged victim were treated as members of the family.

b. The events were similar in that they occurred or allegedly occurred in the defendant's home or pickup truck.

c. Both A.P.G. and the alleged victim were subjected to multiple instances of sexual conduct.

d. There is some variation in the sexual acts, comparing penis to vagina intercourse (A.P.G.) with alleged inappropriate touching and digital penetration (this case).

e. The state argues similarity of alcohol use. The defendant furnished alcohol directly to A.P.G. Here, the state claims that the defendant's wife went to bed after consuming alcohol, thus providing the defendant's opportunity to sexually assault the victim. This provides only limited similarity.

f. While there is some difference in the ages of the victims, both were relatively young. While A.P.G. was 15 to 16 years of age, the alleged victim here was eight to 12 years old. Both courses of conduct began with victims incapable, as a matter of law, of giving consent. However, the scope of the conduct was also more limited in this case, with the younger alleged victim receiving more limited sexual contact.

g. Perhaps most importantly, both instances of sexual assaultive behavior occurred or are alleged to have occurred when the defendant had control over the victims.

h. The comparison of the prior conduct to the current case demonstrates that the events are sufficiently similar, unusual, and distinctive to meet the required standard. The court concludes that sufficient similarity exists to establish the independent relevance, i.e. the proper purpose, for the offer of such evidence.

7. It then becomes necessary for the court to conduct the rule 403 balancing. This is an extremely close case. The substantial time elapsed between the A.P.G. events and the present allegations, coupled with the minor differences discussed above, reduce the probative value of the evidence. In the

language of *Newman*, this increases the distance of the particular facts from the issues in this case. Nevertheless, with proper limiting instructions, the evidence does not have the tendency to suggest a decision upon an improper basis. The court cannot conclude that the danger of unfair prejudice substantially outweighs the probative value.

8. The evidence of conduct identified in paragraph 2 of the plaintiff's notice does not meet the standard of clear and convincing evidence, and lacks sufficient similarity to show a proper purpose. Any remote probative value is substantially outweighed by unfair prejudice resulting from the use of such conduct.

9. The conduct identified in paragraph 6 of the plaintiff's notice (prior sexual contact with the alleged victim) meets the standard of clear and convincing evidence, bears sufficient similarity to the charged conduct to demonstrate a proper purpose, and possesses a probative value greater than any unfair prejudice.

10. The conduct specified in paragraph 7 of the plaintiff's notice (kissing witnesses D.C. and C.U.) fails to meet the required standard of proof. The ambiguity of the type of conduct and the acknowledgment by one of the witnesses of the borderline character of the conduct and its susceptibility to multiple interpretations demonstrates the limited probative value of that conduct. Any remote probative value is substantially outweighed by the danger of unfair prejudice.

11. Paragraph 8 of the plaintiff's notice fails to provide any specificity sufficient to advise the court of the conduct sought to be characterized as rule 404(2) misconduct, and the court disregards the same.

#### PROTECTIVE ORDER DURING VICTIM DEPOSITION

12. The "rape shield" statute, § 28-321, limits the use of evidence regarding past sexual behavior of the victim with persons other than the defendant. The statute provides two exceptions.

13. The first exception concerns evidence regarding whether the defendant was or was not, with respect to the victim, the source of physical evidence such as semen, blood, saliva, hair, etc.

a. There is no indication in this case that the state possesses or intends to offer any such evidence, or that such evidence otherwise exists.

b. As a condition of granting the relief specified in the order, the plaintiff should be required to notify the defendant's counsel, at least 15 days prior to any such deposition, of any facts or matters known to the plaintiff bearing on the existence or nonexistence of any such physical evidence.

14. The second exception relates to alleged consent of the victim. Because consent is not relevant to the charged crimes in this case, this exception has no possible application in this case.

15. The statutory protection against the use of the victim's past sexual behavior has no application to evidence of the victim's *statements* regarding past sexual behavior, at least to the extent such statements are not otherwise privileged communications.

#### MOTION FOR DISCOVERY LIMITATION

16. The plaintiff's motion bears the title "Motion In Limine," although it is, in substance, a motion for limitation of discovery.

a. A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury; it is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence; rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

b. Here, the plaintiff inaccurately casts the motion as a motion in limine, but the court nevertheless proceeds to address the merits of the motion as propounded in substance.

17. Except to the extent of the materials for which privilege has been asserted, the motion states no sufficient cause for limitation of discovery.

18. The court has carefully reviewed the materials submitted for in camera review by the court, consisting of:

- a. Clinical Psychological Notes – Dr. Michael Slosnerick (10 pgs.);
- b. Rivendell Psychiatric Discharge Summary (5 pgs.);
- c. Rivendell Family Assessment (3 pgs.);
- d. Rivendell Psychiatric Evaluation (5 pgs.);
- e. Rivendell Therapy Notes (3 pgs.);
- f. Rivendell Physician's Progress Notes (4 pgs.);
- g. Release to Slosnerick (1 pg.);
- h. Clinical Notes – Dr. Slosnerick (8 pgs.);

- i. Rivendell Patient Forms (6 pgs.);
- j. Rivendell Initial Treatment Plan (6 pgs.);
- k. Rivendell Physician Progress Notes (6 pgs.);
- l. Rivendell Therapy Notes (3 pgs.);
- m. Quad City Counseling Center – Illinois (5 pgs.);
- n. Hand Printed Page – When I’m Mad (1 pg.);
- o. Rivendell Miscellaneous Personal Information Forms (12 pgs.);
- p. Psychiatric Rating Form (1 pg.);
- q. Quad City Counseling Center (3 pgs.);
- r. Rivendell Psychiatric Center – Psychiatric Evaluation (7 pgs.);
- s. State Ward Request for Approval – front and back (2 pgs.); and,
- t. Rivendell Master Treatment Plan (3 pgs.).

19. These materials contain no significant direct statements of the alleged victim. The materials contain no significant materials which could be used as prior inconsistent statements of the alleged victim. The materials simply provide no significant information bearing on the alleged events, except the minor purpose of identifying health professionals consulted by the alleged victim. In short, there is no exculpatory material contained therein.

20. The privileges asserted by the plaintiff address the content of communications with the alleged victim and not the identity of such health professionals. The protection of the privileges involved and the defendant’s constitutional rights can both be protected by granting the plaintiff’s motion as to materials for which an applicable privilege has been asserted, but requiring the plaintiff to disclose the names and then-professional affiliations of the health professionals whose identities are disclosed or indicated by such records.

21. In order to protect the defendant’s right to appellate review, at the next hearing in open court the court will receive the materials furnished in evidence under seal against disclosure to anyone other than a higher appellate court to preserve such records for appellate review.

#### MOTIONS FOR DISCOVERY

22. The defendant filed a “request for disclosure” which constitutes under Nebraska law a motion for discovery. NEB. REV. STAT. § 29-1912 (Reissue 1995). In addition to the materials enumerated by § 29-1912, the federal constitution mandates disclosure of certain additional information, although there is no federal constitutional right to discovery. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d

481 (1985); *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). The plaintiff filed its motion for reciprocal discovery. NEB. REV. STAT. § 29-1916 (Reissue 1995). The court has further considered the stipulation for discovery filed by the parties.

23. The court's order grants the reciprocal motions to the extent of the defendant's entitlement to such relief. To the extent denied, the defendant has simply exceeded the bounds of the statutory and constitutional mandates.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:  
EVIDENCE OF OTHER MISCONDUCT

1. The plaintiff's motion to determine admissibility of other misconduct, as supplemented by the notice filed March 2, 1999, is granted to the extent that the plaintiff shall be allowed to present evidence in the plaintiff's case-in-chief regarding allegations that:

- a. The defendant began having sex with A.P.G. while she was babysitting his children, commencing when she was 15 years of age in July of 1971 (paragraph 1 of notice);
- b. The defendant was 36 years of age in July of 1971 (paragraph 3);
- c. There were multiple acts of sexual intercourse between the defendant and A.P.G. (paragraph 4);
- d. The acts took place between 1971 and 1974 (paragraph 5); and,
- e. The acts of sexual contact and penetration with the alleged victim commencing in her first or second school year when she was 6 or 7 years old (paragraph 6).

2. The plaintiff shall notify the court, outside the presence of the jury, before adducing evidence of any such conduct, in order that the court may allow the defendant the opportunity to request a limiting instruction outside the presence of the jury.

3. The defendant shall be entitled to a limiting instruction before such testimony regarding the jury's consideration of any such evidence; however, such limiting instruction will be given only upon request and not on the court's own motion.

4. Except to the extent granted as set forth above with the above-specified conditions, the motion is denied. In denying the motion in part, the court specifically precludes the plaintiff from offering

evidence regarding paragraphs 2 and 7 of the notice, and further precludes the plaintiff from offering evidence regarding unspecified acts of misconduct in reliance on paragraph 8 of the notice.

#### PROTECTIVE ORDER DURING VICTIM DEPOSITION

5. The plaintiff's motion for protective order during deposition of victim is:

a. Granted to the extent that the defendant and defendant's counsel is prohibited from inquiring about specific instances of the defendant's past sexual behavior with persons other than the defendant; and,

b. Otherwise denied.

6. Such relief does not preclude the defendant or the defendant's attorney from inquiring about any of the victim's *non-privileged verbal statements*, or *nonverbal statements intended as an assertion*, regarding any such past sexual behavior or allegations of past sexual behavior.

7. As a condition of granting the relief sought in such motion, the plaintiff shall be required to notify the defendant's counsel, at least 15 days prior to any such deposition, of any facts or matters known to the plaintiff bearing on the existence or nonexistence of any physical evidence within the meaning of § 28-321(2)(a).

#### MOTION FOR DISCOVERY LIMITATION

8. The plaintiff's motion to limit discovery, inaccurately titled as a motion in limine, is granted to the extent of the materials for which privilege has been asserted and which materials have been submitted to the court for in camera examination. Except as granted above, the motion is denied.

9. As a condition of the partial granting of the motion to limit discovery, the plaintiff is ordered to disclose to the defendant's counsel of record, within 15 days from the date of this order, the names and then-professional affiliations of the health professionals whose identities are disclosed or indicated by such records, together with any further identifying information, such as current address, telephone number, and the like, as may be known to the plaintiff's attorneys and its investigating officers in this case.

10. At the next opportunity for hearing on the record, the identified materials examined by the court in camera shall be received in evidence under seal against disclosure to anyone other than a higher appellate court to preserve such records for appellate review.

#### MOTIONS FOR DISCOVERY

11. The defendant's motion for discovery, entitled as "request for disclosure," is granted to the extent of:

a. Paragraphs 1, 2, 4, and 19 are granted in their entirety.

b. Paragraphs 8, 10, 11, 14, 20, and 21 are denied in their entirety, except to the extent to which the same may be granted by other provisions of this order.

c. Paragraphs 3, 8, 12, 13, 15, 16, 17, and 18 are granted only to the extent that such materials are known to, or in the exercise of due diligence may become known to, the prosecution; and this order does **not** require the prosecution to make specific inquiry for such information.

d. Paragraphs 5, 6, 7, and 9 are granted only to the extent that such materials are known to, or in the exercise of due diligence may become known to, the prosecution, but not to the extent of communications with the county attorney or any deputy county attorney or any legal assistant of either; and this order does **not** require the prosecution to make specific inquiry for such information.

12. The plaintiff's motion for reciprocal discovery is granted as to all materials for which the defendant's motion was granted.

13. The plaintiff is allowed 11 days from the date of this order for initial compliance, and the defendant is allowed 7 days thereafter for initial compliance. Such duty to comply shall be deemed continuing in the manner required by NEB. REV. STAT. § 29-1918 (Reissue 1995). The deadline of July 30, 1999, for filing additional pretrial motions remains effective.

Entered: July 8, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

: Note the decision on the trial docket as: 7/8/99 Signed "Order on Motions Under Advisement" entered.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel, District Judge