NO. 48047-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN POWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Rules

A. ASSIGNMENTS OF ERROR

1. Appellant was entitled to an evidentiary hearing on his motion to set aside the search warrant.

2. The trial court erroneously admitted unfairly prejudicial evidence of appellant's prior conduct.

Issues pertaining to assignments of error

1. Where appellant submitted an offer of proof in support of his motion to set aside the search warrant which showed that material misrepresentations and omissions in the search warrant affidavit impacted the probable cause determination, was he entitled to an evidentiary hearing?

2. Over defense objection the trial court admitted a passage from a journal appellant wrote in 2004, seven years before the charged offense, to establish his intent to commit the crime charged. Where the acts referred to in the journal entry are not similar enough to the charged acts to support an inference other than that appellant has a propensity to commit the charged offense, was admission of the journal entry unfairly prejudicial to appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

In 2011, the Pierce County Prosecuting Attorney charged appellant Steven Powell with 14 counts of voyeurism and one count of second degree possession of depictions of minors engaged in sexually explicit conduct. CP 1-8. The trial court dismissed the possession charge prior to trial, and Powell was convicted on the remaining counts. CP 9. Powell and the State appealed. This Court affirmed the convictions and reversed the dismissal of the possession count. State v. Powell, 181 Wn. App. 716, 326 P.3d 859, review denied, 181 Wn.2d 1011 (2014). The State refiled the charge on October 27, 2014. CP 12-13.

Powell moved to suppress evidence seized during execution of a search warrant and requested a Franks[1] hearing, arguing that material misrepresentations and omissions in the warrant affidavit affected the probable cause determination. CP 14-142. He submitted an offer of proof with his motion, including affidavits and transcripts. Id. The court ruled that Powell had not shown that a hearing was necessary and denied the motion. RP 42-44.

The case proceeded to jury trial, and the jury returned a guilty verdict. CP 229. The court denied the defense request for an exceptional sentence below the standard range and imposed a standard range sentence of 60 months, directing that it be served consecutive to any other time

[1] Franks v. Delaware, 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

served on the 2012 Judgment and Sentence. CP 277; RP 273-74, 283. Powell filed this timely appeal. CP 292.

2. Substantive Facts

Joshua Powell was married to Susan Powell, who disappeared from their home in Utah in December 2009 under suspicious circumstances. Utah police investigated the case as a kidnapping and murder, and Joshua was a person of interest. CP 17. In January 2010 Joshua moved to Washington with his sons, moving in with his father Steven Powell. Id. Steven Powell participated in interviews and allowed law enforcement to search his home more than once. The children were interviewed in Pierce County. CP 21.

After police found Susan Powell's journal at her place of work, Joshua and Steven Powell reported to media and friends that they had some of Susan Powell's earlier journals that might contain information relevant to the investigation. CP 22. Joshua and Steven Powell met with law enforcement and agreed to provide copies of the journals they had, in exchange for a copy of the journal police had. CP 22. The exchange never occurred, and instead law enforcement sought a search warrant for Powell's home. CP 22-23.

On August 25, 2011, law enforcement officers from Pierce County and West Valley City Utah executed the search warrant. RP 84. Among

the items removed from the house was a cardboard box found in the master bedroom, which contained numerous computer disks. RP 114, 166-67. The officer tasked with reviewing the computer disks found photographs captured from videos of two minor females in a bathroom changing clothes, bathing, and using the toilet, clothed and unclothed. RP 168-69, 200-01. The disk also contained photos of Powell masturbating and photos of fully clothed women in the neighborhood. RP 108, 123-25.

Utah police informed Pierce County law enforcement what they had found, and Pierce County investigated. RP 85-86, 118. They learned that the girls in the photos had lived next door to Powell in 2006 and 2007. RP 98, 102, 137, 142. The window through which the pictures were taken was visible from Powell's master bedroom window. RP 105-06. Police found a camera of the same type used to take the photos in Powell's bedroom. RP 170-72. They also found numerous journals Powell had kept over the years. In 2004, Powell had written, "Also, I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use these images for self-stimulation." RP 202.

C. ARGUMENT

1. POWELL MADE THE NECESSARY SHOWING FOR AN EVIDENTIARY HEARING ON THE VALIDITY OF THE SEARCH WARRANT.

A criminal defendant may challenge the veracity of factual allegations made in a facially valid search warrant affidavit, and an evidentiary hearing on the challenge is mandated where the defendant makes a substantial preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); State v. Wolken, 103 Wn.2d 823, 827-28, 700 P.2d 319, 322 (1985). The test for material misrepresentations applies to allegations of material omissions as well. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Allegations of deliberate or reckless falsehoods or omissions must be accompanied by an offer of proof. Franks, 438 U.S. at 171. But the defendant's burden is a burden of production. Proof by a preponderance of the evidence is not required until the evidentiary hearing itself. United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014).

If the defendant satisfies the burden of production, the affidavit must be examined with the false information deleted or the omitted material inserted. If the altered content is insufficient to support a finding

of probable cause, the defendant is entitled to an evidentiary hearing. Franks, 438 U.S. at 171-72.

Here, Powell moved to set aside the search warrant executed at his house in August 2011. CP 14-142. In the motion, Powell argued that the warrant affidavit omitted or misstated the following material information: (1) that Powell had made the journals available to law enforcement, (2) the extent to which Powell had already cooperated with law enforcement, (3) the number of times the Powell children had been available for questioning, and (4) the extent of the ongoing surveillance of the Powell residence and phones by law enforcement. CP 24-25. Powell argued that absent these material misrepresentations and omissions, the search warrant would not have issued. CP 26.

Pierce County Sheriff's Detective Gary Sanders prepared the search warrant affidavit in which he set forth facts he claimed established the need for the warrant to obtain Susan Powell's journals. Much of the information about the investigation came from West Valley City Police Detective Ellis Maxwell. Sanders accepted the information as good information, without attempting to validate it. CP 63. The primary thrust of the affidavit was that a warrant was necessary because Joshua and Steven Powell had obstructed the investigation into Susan Powell's disappearance. CP 34. This conclusory statement was seemingly

contradicted by information that "a second consent search" of Powell's home had been conducted in May 2010 and that Powell had been interviewed multiple times by law enforcement. CP 38.

The defense argued that the claim that Joshua and Steven Powell had obstructed the investigation was a misrepresentation of the facts, because Steven Powell had made himself available for multiple interviews with law enforcement, had consented to searches of his home, and had offered to provide additional information to law enforcement. CP 17-18, 41.

The search warrant affidavit also stated that a forensic interview with one of the children was conducted in Utah in December 2009, but since that time the children had not been returned to or been available for further interviews in the state of Utah. CP 37-38. The defense argued that the affidavit was again misleading because it omitted information that the children had been interviewed in Pierce County as part of the investigation into Susan Powell's disappearance. CP 21. In fact, Sanders admitted in an interview with defense counsel in preparation for this motion that he had done a couple of interviews with the Powell children and had them interviewed at the Child Advocacy Center in Pierce County. CP 58. This information was not included in the search warrant affidavit. See CP 32-41.

The search warrant affidavit stated that after offering to exchange copies of Susan Powell's earlier journals for the more recent journal police had possession of, Steven Powell informed law enforcement they were no longer willing to release the journals and would not cooperate any longer. CP 39.

Powell stated in his affidavit in support of the motion to set aside the warrant that he did not refuse to provide copies of Susan Powell's journals to law enforcement. In fact, he told law enforcement he and Joshua had the journals and offered to provide the originals or copies, asking for a copy of the journal law enforcement had. He prepared copies of the journals in his possession and emailed U.S. Marshal Spencer that they were ready. Spencer replied that law enforcement were not willing to provide a copy of the journal they had. He never contacted Powell about obtaining the copies Powell had prepared. CP 41-42.

The search warrant affidavit stated that the journals were necessary to the investigation, and with the lack of cooperation and criminally obstructive behavior from Steven and Joshua Powell refusing to provide the journals to law enforcement, a search warrant was necessary to recover this evidence. CP 40. Defense counsel argued that the overall impression from the warrant affidavit was that Powell was being obstructionist and uncooperative and that the journals would not be provided without a

search warrant, but the evidence suggests the opposite. Steven and Joshua Powell had been cooperative, and the warrant affidavit was misleading. RP 22-23.

After reviewing the pleadings and hearing argument, the court denied the motion for an evidentiary hearing. RP 42. The court ruled that Powell had not made a substantial preliminary showing of intentional or reckless material misrepresentation or omission. RP 42-43. The court found that none of the details omitted from the affidavit amounted to a material misrepresentation, and it did not believe that inserting the omitted information would affect the probable cause determination. RP 44.

"By reporting less than the total story, an affiant can manipulate the inferences the magistrate will draw." United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985). Therefore, where material facts are deliberately or recklessly omitted from a warrant application in a manner that tends to mislead, the defendant is entitled to a Franks hearing, unless the warrant would still establish probable cause with the omitted information inserted. Id. at 780-81. In this case, Powell's offer of proof established that Sanders omitted material details regarding Powell's cooperation with the investigation. Powell's affidavit and the transcripts from interviews with the Sanders and Maxwell provided circumstantial evidence of intentional or reckless deception. In the warrant affidavit

Sanders attempted to create the impression that the only way the journals would be obtained was through execution of a search warrant. The affidavit starts with the conclusory statement that Powell was obstructing justice, and the allegations are set forth so that the magistrate will accept that statement and further conclude that Powell's lack of cooperation made the search warrant necessary. To achieve this, Sanders omitted information which would have precluded that conclusion, details which showed Powell had been cooperating with the investigation.

Powell was not required to prove by a preponderance of the evidence that Sanders deliberately or recklessly made material misrepresentations or omissions. That showing would be required at the evidentiary hearing itself. To be entitled to an evidentiary hearing, Powell was only required to make a preliminary showing. The offer of proof here met that requirement, and his motion for an evidentiary hearing should be granted.

2. POWELL'S 2004 JOURNAL ENTRY SHOULD HAVE BEEN EXCLUDED AS UNFAIRLY PREJUDICIAL AND TOO REMOTE TO BE RELEVANT.

Prior to trial Powell moved to exclude his journals. CP 180-82; RP 51, 53. The State offered a passage from August 2004, in which Powell wrote "Also, I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use these images for self-

stimulation." RP 54, 202. The State argued that the passage went to show Powell's intent, that he took the photographs he was charged with possessing, and his motivation for possessing them. RP 53-55. Defense counsel asked the court to exclude this passage. RP 53.

The court granted the defense motion to exclude the journals except for the passage offered by the State. It ruled that the passage was a statement by party opponent relevant to the element of intent the State had to prove, and that the probative value of the evidence outweighed any potential prejudice. RP 56. The journal entry was admitted over defense objection. RP 202. After the journal entry was admitted, the court made a record that it found the entry particularly relevant to whether the depictions Powell was charged with possessing were intended for sexual gratification. The relevance outweighed potential prejudice even though the journal entry was made in 2004. RP 212.

Powell was charged with second degree possession of depiction of a minor engaged in sexually explicit conduct. To convict Powell, the State had to prove he knowingly possessed any "depiction of the genitals or unclothed public or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer, whether or not the minor knows that he or she is participating in the described conduct." CP 224; RCW 9.68A.070(2)(a); RCW 9.68A.011(4)(f). The

State's theory was that Powell created the images found on the computer disk for the purpose of his sexual stimulation and that the journal entry was relevant to prove his intent in creating and possessing the images.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court has noted the reasoning underlying this rule:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)), review denied, 124 Wn.2d 1022 (1994).

To be admissible under ER 404(b), evidence of other conduct must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Salterelli, 98 Wn.2d at 361-62.

While evidence of prior conduct is never admissible to prove the defendant's propensity to commit a crime, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); Wade, 98 Wn. App. at 333. But before such evidence can be admitted the court must balance its probative value against its prejudicial effect, and evidence that is unfairly prejudicial must be excluded. Wade, 98 Wn. App. at 333-34. "Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." Wade, 98 Wn. App. at 334 (citing Saltarelli, 98 Wn.2d at 362).

The State offered and the court admitted Powell's 2004 journal entry to prove his intent in committing the charged offense. When the State offers evidence of prior acts to prove the defendant's intent, there

must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. Wade, 98 Wn. App. at 334. To use the prior acts for a non-propensity theory, there must be some similarity among the facts of the prior conduct and the charged offense. Id.

In Wade, the defendant was charged with possession of cocaine with intent to deliver, and the court admitted evidence of two prior drug dealing acts to prove his intent. Wade, 98 Wn. App. at 331-32. The Court of Appeals noted, however, that the facts of the charged offense differed significantly from the facts of the previous offenses. In the prior cases, the defendant was observed selling drugs, while in the current case he simply saw an officer, emptied the contents of his pockets, and ran. Even though the prior acts occurred in the same general location as the charged act, the facts did not support an inference of intent to deliver. The only reasonable inference from the prior acts was that the defendant was predisposed to have the same intent on the current occasion. Thus, the trial court erred in admitting evidence of the prior acts. Id. at 337.

Here, as in Wade, the journal entry merely supports a propensity inference and therefore it should have been excluded. Powell's journal entry refers to taking videos shots of women of all ages in shorts and skirts and using them for self-stimulation. The inference relied on by the State is

that because he used those images for sexual stimulation, he must have had the same intent with the images he was charged with possessing. But the journal does not reference minors or exposed intimate body parts. There is not enough similarity between the conduct described in Powell's journal and the charged acts to prove intent other than by a propensity inference.

Moreover, the journal entry was too remote in time to be sufficiently probative of the charged offense. When considering whether past conduct is relevant to intent, the court should ask if the prior act indicates an intent on the date the charged offense was alleged to have occurred. State v. Acosta, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). If the prior act is too remote in time, it loses its probative value. See State v. Sargent, 40 Wn. App. 340, 352, 698 P.2d 598 (1985).

The journal entry admitted in this case was made in 2004, but Powell was charged with possessing depictions of minors in 2011. With seven years elapsed, the journal entry was too remote in time to shed light on Powell's intent in the current offense. Even if the relevant time is when the depictions were created, that was still two or three years after journal entry was made. The only purpose of this evidence was to show that Powell is the type of person who takes photos for self-stimulation and was therefore more likely to have done so in this instance, making him

guilty of the charged offense. This propensity inference is impermissible, and the trial court erred in admitting the evidence.

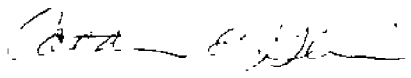
Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." Id. As defense counsel pointed out, there were unanswered questions regarding how the images in question were created, or by whom, or for whose purpose. Without the forbidden propensity inference raised by admission of Powell's journal entry, there is a reasonable probability the jury would not have found Powell guilty beyond a reasonable doubt. His conviction must be reversed.

D. CONCLUSION

For the reasons addressed above, Powell's conviction must be reversed and the case remanded for a new trial.

DATED February 1, 2016.

Respectfully submitted,



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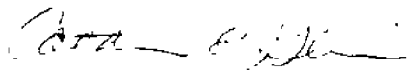

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