NO. 48047-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN CRAIG POWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 11-1-03893-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied defendant's motion for a ***Franks*** hearing when defendant failed to meet the preliminary showing that an evidentiary hearing was necessary?

2. Whether the trial court's decision to admit defendant's journal entry under ER 404(b) was proper when the probative value of proving defendant's intent in possessing the photographs and that he was the actual possessor of the photographs was not substantially outweighed by any prejudicial effect?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2011, the Pierce County Prosecutor's Office charged STEVEN CRAIG POWELL, hereinafter "defendant", with 14 counts of voyeurism and one count of possession of depictions of minor engaged in sexually explicit conduct in the second degree. CP 1-8. The court dismissed the possession count prior to trial and defendant was convicted of all the other charges[1]. CP 9; ***State v. Powell***, 181 Wn. App.

[1] Two counts were vacated prior to sentencing to avoid violating double jeopardy. ***Powell***, 181 Wn. App. at 722.

716, 722, 326 P.3d 859, *review denied*, 181 Wn.2d 1011, 335 P.3d 940 (2014). Defendant appealed and the State cross appealed. ***Powell***, 181 Wn. App. at 722. This Court affirmed defendant's convictions and reversed the dismissal of the possession count. ***Powell***, 181 Wn. App. at 729.

On October 27, 2014, the State re-filed the possession charge. CP 12-13. Prior to trial, defendant filed a motion to suppress evidence obtained pursuant to a search warrant. CP 14-142. Specifically, he requested a ***Franks***[2] hearing, arguing that there were material misrepresentations and/or omissions of material facts in the search warrant affidavit which affected the probable cause determination. *Id*; RP 15-29. After argument, the trial court denied the request for a ***Franks*** hearing finding that the defendant had failed to show material misrepresentations or omissions in the affidavit and even if he had, they would not have affected the existence of probable cause in the search warrant. RP 42-45.

The case proceeded to trial and a jury convicted defendant of one count of possession of depictions of minor engaged in sexually explicit conduct in the second degree. RP 258; CP 229. Defendant was sentenced to 60 months in custody. RP 283; CP 285-87. He filed a timely notice of appeal. CP 292.

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

2. Facts

Joshua Powell was married to Susan Powell, who disappeared in December of 2009 in West Valley City, Utah, under suspicious circumstances. CP 34, 167; ***Powell***, 181 Wn. App. at 719. Utah police investigated Susan's disappearance as a kidnapping and murder and Joshua Powell was a person of interest in her disappearance. CP 34, 167; ***Powell***, 181 Wn. App. at 719. Shortly after Susan's disappearance, Joshua Powell and his two young boys moved from West Valley City, Utah into the defendant's residence in Pierce County, Washington. CP 37, 170. The defendant is Joshua Powell's father. CP 34, 167. There were two other adult relatives also living in the home. RP 116.

After Utah police found a journal of Susan Powell's at her workplace, Joshua Powell and the defendant admitted to the media that they had over 2,000 pages of additional journal entries by Susan. CP 39, 172; ***Powell***, 181 Wn. App. at 719. They also described the importance of the journals into the investigation of Susan Powell's disappearance. CP 40, 173. Working with the West Valley City police, Detective Gary Sanders of the Pierce County Sheriff's Department requested a search warrant to search the Powell's house and seize physical and digital copies of Susan's journals. CP 32-41, 165-174; ***Powell***, 181 Wn. App. at 719.

On August 25, 2011, officers served a search warrant on the Powells' home and removed numerous items, including a computer disk from a box in the defendant's bedroom. RP 84, 109-111. On the disk,

officers discovered thousands of images depicting young naked children. RP 169. One folder on the disc entitled "neighbors" had several sub folders titled "Taking Bath – 1, Taking Bath – 2, and Open Window in Back House." RP 86, 123. They contained images of a window that looked through another window into the bathroom of a home and appeared to be still photographic captures taken from videos called "looping". RP 88-97.

One image showed someone sitting on a toilet. RP 89. Several others showed a female with her back to the camera and a younger female sitting on the toilet displaying her in the process of wiping after using the restroom. RP 88-90. Several others showed the young female putting on underwear and pajama bottoms, with several shots focused on her exposed vaginal area. RP 89-91. More images also showed a slightly older female putting on clothes and using the restroom and had also focused on her exposed genital area. RP 92-95. Some also showed a third young female getting dressed along with the two other girls. RP 96-97. Several photos had been cropped to only show the girls' exposed genital areas. RP 99-101.

During the search of the same box in defendant's bedroom, officers also found a Sony video camera. RP 170-72. Its model number matched the model number of camera that took the photographs of the girls. RP 170-72, 177-78. Officers were also able to determine that based on the angles of the homes, the only way to get a clear shot into the girls'

bathroom was through defendant's bedroom window. RP 105-07, 173-76. Subfolders on the disk also contained numerous naked images of the defendant masturbating and doing sexual things in different locations. RP 108, 209.

Detective Gary Sanders was able to identify the adult female in the photos as D.C. after determining which neighborhood houses were in the line of sight of defendant's bedroom window. RP 97-98. The family had lived next door to the defendant during the summer of 2006, but had since moved out. RP 137-39. Detective Sanders located D.C. and her daughters and recognized and confirmed they were the individuals in the photos. RP 98-103, 144-45.

D.C. testified during the trial that she had two daughters who were ages eight and ten in the summer of 2006 when they lived next door to the defendant. RP 136-39, 142-43. She confirmed the photographs were of her daughters and said she never gave anyone permission to record her daughters when they were in their home. RP 143-47. The defendant's adult daughter also testified during trial and identified the room where the photographs were taken from and where the disk was located as the defendant's bedroom. RP 153.

During the trial, a police officer read a passage from the defendant's 2004 journal which said "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."[3] RP 203. Defendant chose not to testify during the trial. RP 214.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A ***FRANKS*** HEARING WHEN DEFENDANT FAILED TO MEET THE PRELIMINARY SHOWING THAT AN EVIDENTIARY HEARING WAS NECESSARY.

While affidavits supporting search warrants are presumed valid, in ***Franks v. Delaware,*** 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), the United States Supreme Court detailed the specific procedure for a criminal defendant to challenge parts of a search warrant predicated on deliberate falsehoods or statements made with reckless disregard from the truth. ***Franks v. Delaware***, 438 U.S. at 155-156.

> Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

[3] The officer's actual reading of the journal in the transcript reflects "I sometimes use these images to self – for self-stimulation" as he misspoke near the end and corrected himself. RP 203.

Id. This procedure for material misrepresentations has also been extended to material omissions of fact. ***United States v. Martin***, 615 F.2d 318, 328 (5th Cir. 1980); ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In order to even obtain an evidentiary hearing however, the preliminary showing "must be more than conclusory" and must be accompanied by a detailed offer of proof. ***United States v. Colkley***, 899 F.2d 297, 300 (4th Cir. 1990). ***Franks*** only protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate. ***Colkley***, 899 F.2d at 301. Const. art. I § 7 does not require suppression upon proof of a negligent omission or error. ***State v. Chenoweth***, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2007). An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation, and the mere fact that an affiant did not include every conceivable conclusion in the warrant does not taint the validity of the affidavit. ***Colkley***, 899 F.2d at 300-01 (4th Cir. 1990) (*quoting* ***United States v. Burnes***, 816 F.2d 1354, 1358 (9th Cir. 1987)); ***State v. Bockman***, 37 Wn. App. 474, 486, 682 P.2d 925 (1984), *review denied*, 102 Wn.2d 1002 (1985).

Recklessness is shown where the affiant "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." *See* ***State v. O'Conner***, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), *review denied*, 103 Wn.2d 1022 (1985) (*quoting* ***United States v. Davis***, 617 F.2d 677, 694 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980)).

> [S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

O'Conner, 39 Wn. App. at 117. In contrast, a negligent omission occurs when the affiant genuinely believes that the omitted statement was irrelevant, and this belief was reasonable, even if it was incorrect. ***O'Conner***, 39 Wn. App. at 118 (*citing* ***United States v. Melvin***, 596 F.2d 2492, 499-500 (1st Cir. 1979)).

Even if a defendant is able to prove an intentional or reckless misstatement or omission, a defendant must prove they were necessary to the findings of probable cause. He must show that probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included. ***State v. Gentry***, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing. ***State v. Garrison***, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992); ***Franks***, 438 U.S. at 171-72. Omitted information that is potentially relevant, but not dispositive, is not enough to warrant a ***Franks*** hearing. ***Garrison,*** 118 Wn.2d at 874; ***Colkley***, 899 F.2d at 301.

An appellate court reviews a trial court's denial of a Franks hearing for an abuse of discretion. ***State v. Wolken***, 103 Wn.2d 823, 829,

700 P.2d 319 (1985). A trial court's finding on whether an affiant deliberately excluded material facts is a factual determination, upheld unless clearly erroneous. ***State v. Clark***, 143 Wn.2d 731, 752, 24 P.3d 1006 (2001). A factual determination is not clearly erroneous if supported by substantial evidence. ***State v. Atchley***, 142 Wn. App. 147, 154, 173 P.3d 323 (2007). Substantial evidence exists if there is sufficient evidence in the record such that a fair-minded person would be persuaded of the truth of the finding. *Id.*

In the present case, defendant requested a ***Franks*** hearing alleging that Detective Sanders' affidavit contained four material misrepresentations or omissions that altered the sufficiency of probable cause to issue the warrant. The alleged misrepresentations or omissions were:

1. That the journals at issue had been offered to law enforcement by Steven and Josh Powell;

2. The extent of the defendant's cooperation with law enforcement, to include multiple interviews and at least one consent search of his residence;

3. The number of times both of the Powell children had been available for questioning;

4. The extent of the ongoing surveillance, including wiretaps, cell phone intercepts, and visual surveillance of the Powell residence.

CP 24-25, 156.

After hearing argument from both the parties, the trial court denied defendant's motion for a ***Franks*** hearing. RP 42. It found that defendant had not made a "substantial preliminary showing that a false statement, knowingly or intentionally, was included, or an omission, or any matters were omitted with any reckless disregard for the truth" in the warrant affidavit. RP 43. The court also found that even if defendant had made that showing, none of the alleged misrepresentations or omissions "would eviscerate the basis for the finding of probable cause in this particular case." RP 44.

On appeal, defendant argues the trial court erred in denying his motion for a ***Franks*** hearing as his offer of proof was sufficient to make a preliminary showing that an evidentiary hearing was required. However, a review of the record reveals the trial court's conclusions with regard to each of the four alleged misrepresentations or omissions were proper, as was its determination that none of the four alleged misrepresentations or omissions would have altered the existence of probable cause for the warrant. As such, the trial court did not abuse its discretion in denying defendant's motion for a ***Franks*** hearing as defendant failed to meet the preliminary showing necessary for an evidentiary hearing.

a. <u>The availability of the journals</u>

Defendant first alleged that Detective Sanders had omitted or misrepresented the fact that Susan Powell's journals had been offered to law enforcement by the Powells. CP 24; RP 19. He supported this by

stating in an affidavit that he had never refused to provide copies of Susan Powell's journals to the police and that he had emails between himself and the police reflecting a discussion about exchanging the journals for several that were already in police possession, but the police never came to retrieve their copies. CP 51. The State responded by referencing that in his affidavit for a search warrant, Detective Sanders detailed the interaction between the Powells and the police as follows:

> Joshua and Steven Powell agreed to release only a copy of the journals and under the condition that they receive the most recent journal of Susan Powell's that was currently possessed by the West Valley City Police Department, Utah. Subsequent to this meeting, Steven Powell called Deputy USM Spencer and advised that he and Joshua Powell were no longer interested in releasing any journals and they were not going to cooperate any longer.

CP 137; RP 30. The State also pointed out that it was the defendant's burden to provide support for his assertions and he failed to provide any evidence of the emails he claimed to have. CP 137.

The trial court found that there was no misstatement with regard to the journals as "[t]he affidavit clearly indicates, first, that some of the journals were discussed; exchange of the journals was discussed with the officers. That some journal materials were in the possession, already of the detectives." RP 43. The court recognized that defendant's claim that the affidavit left out or misstated "the fact that these Journals had been offered to law enforcement by the Powell's [sic]" was in direct contravention to what was actually contained in the affidavit. CP 24. The

affidavit plainly detailed the conditional offer defendant made which was predicated upon the release of the other journals in the police possession. The trial court properly found that this did not amount to a deliberate falsehood or misrepresentation.

Furthermore, the court also properly recognized that even if there was information in the affidavit that the defendant had agreed to unconditionally release the journals to the police, that would have had no effect on the existence of a nexus between the criminal activity and the items to be seized. CP 158. As such, even if the defendant had shown such a misrepresentation about the journals, it was not material to the finding of probable cause.

b. The extent to which defendant had already cooperated with law enforcement.

Defendant also alleged that Detective Sanders' affidavit misrepresented and omitted "the extent to which Steven Powell had already cooperated with law enforcement, allowing consensual searches of his home and participating in multiple interviews." CP 24; RP 19. He argued that the affidavit portrayed him as having obstructed the ongoing investigation by the West Valley Utah Police Department and stated in his affidavit that he had made himself available for multiple interviews and twice consented to a search of his home. CP 51. The State responded by pointing out the various places in the affidavit where the affidavit

contained information relating to this claim. CP 159-160; RP 30-31. That included:

> On May 11, 2010, a second consent search of Steven and Joshua Powell's residence was conducted...
>
> ...
>
> Steven Powell has been interviewed multiple times by law enforcement to include the West Valley City Police, FBI, and the USM...
>
> ...
>
> Your Affiant was informed by Detective Maxwell that on November 16, 2010, Lieutenant William Meritt of the West Valley City Police Department and Deputy USM Spencer made contact with Joshua and Steven Powell at their residence in Puyallup, Washington...

CP 38-39, 171-172. The trial court found that "the affidavit makes it clear that the defendant, Steven Powell, at times had interviews with law enforcement; basically, was cooperative to an extent, at times." RP 43. Again, the affidavit itself plainly described the information defendant claimed it had left out or misrepresented. The trial court properly found that defendant's claim here was without merit. In addition, since the information defendant claimed was omitted or misrepresented was explicitly detailed in the affidavit, any inquiry into whether it was material to a finding of probable cause is irrelevant since it was already a part of the finding of probable cause.

c. The number of times the Powell children had been available for questioning

Defendant also claimed that Detective Sanders' affidavit misrepresented or omitted the number of times the Powell children had been available for questioning by the police. CP 24-25; RP 19. Defendant stated in his affidavit:

> Allegations that after Joshua Powell moved to Puyallup, his sons were unavailable to be interviewed are false. The boys were interviewed at least once while they were living in Pierce County, prior to the August 24, 2011 Search Warrant. Those interviews took place over a period of 8 hours on about March 4, 2004[4].

CP 51. Defendant also provided the transcript of an interview with Detective Sanders where he discussed a second interview with the children of Susan Powell at the Child Advocacy Center in Tacoma. CP 21, 58. In its response, the State described how Detective Sanders' affidavit stated that the children had not returned to and were not available for "further interviews *in the State of Utah.*" CP 160, 171; RP 31-33. They also detailed how the search warrant contained information stating that Detective Sanders had assisted in coordinating and conducting interviews with C.P., the oldest son of Susan Powell. CP 160, 174; RP 31-33.

The trial court found defendant's claim was frivolous as the affidavit contained information that "at least one of the children of Susan

[4] This is a likely scrivener's error and should reflect 2011. The children had not yet been born in 2004. CP 35, 168.

Powell had a forensic interview in Utah and had one here in Tacoma ... [and] [t]he prior contact that law enforcement had with the children is apparent on the face of the affidavit." RP 43. This decision was proper as the defendant's claim ignored the explicit qualification in the affidavit that the children were unavailable for interviews *in Utah* and contained information reflecting that the children had been interviewed at least once in Tacoma, consistent with defendant's allegation. Again, even assuming the availability of the children was in some way omitted or misrepresented in the affidavit, it had no material relevance to the existence of probable cause in the warrant.

d. The extent of ongoing surveillance by law enforcement.

The final allegation of misrepresentation or omission by the defendant involved "the extent of the ongoing surveillance by law enforcement, including wire taps, cell phone intercepts, [and] visual surveillance of the Powell residence." CP 25. The State pointed out that while the defendant made this claim in his motion, he failed to provide any support as to how the affidavit misrepresented or omitted that information and even further, how that information would have altered the existence of probable cause for the warrant. CP 161-62; RP 33-34. In finding defendant's claim was without merit, the trial court also discussed how "the officer clearly indicates that he had sought previous warrants, a number of investigative warrants here in Pierce County, and he describes

those. So the fact that other investigations were going on is evident on the fact of the affidavit." RP 43. A short time later in the conversation, the court again stated "it's apparent that there were ongoing investigations that were happening, and they admitted as much without going into some of the detail about those other searches and investigative techniques." RP 46.

The trial court's conclusion on this issue was proper as defendant's claim that there was a misrepresentation about the ongoing investigation was completely unsupported and as the court discussed, the affidavit itself contained information referencing the ongoing investigation. In addition, there was no information to support or argue how even if there had been some misrepresentation or omission, it would have affected the existence of probable cause.

Defendant essentially made four allegations of misrepresentations or omissions that were simply unsupported, false or plainly contradicted by the affidavit itself. He further failed to detail how even if any of the four claims had any merit, how they would have had any material impact on the existence of probable cause for the search. The trial court properly found that defendant had failed to make the preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by Detective Sanders in the warrant affidavit, let alone show how such a statement was necessary to the finding of probable cause in the warrant. As such, the trial court did not abuse its discretion in denying defendant's motion for a ***Franks*** hearing.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEFENDANT'S JOURNAL ENTRY UNDER ER 404(B) TO PROVE THE DEFENDANT'S INTENT IN POSSESSING THE PHOTOGRAPHS AND THAT HE WAS THE ACTUAL POSSESSOR OF THE PHOTOGRAPHS AS THE PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY PREJUDICIAL EFFECT.

In general, evidence of a defendant's prior crimes, wrongs or acts are inadmissible to demonstrate the person's character or general propensities. However, such evidence 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).

To admit evidence of other wrongs under ER 404(b), the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. ***State v. Boot***, 89 Wn. App. 780, 788, 950 P.2d 964 (1998) (*citing* ***State v. Saltarelli***, 98 Wn.2d 358, 362, 655 P.2d

697 (1982)). The admission or refusal of evidence lies largely within the sound discretion of the trial court and its decision will not be reversed on appeal absent an abuse of discretion. ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). An abuse of discretion occurs when there is a clear showing the trial court's decision was manifestly unreasonable, or based on untenable grounds, or for untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

During motions in limine in the present case, defendant moved to exclude numerous journal entries written by him that totaled several thousands of pages of writing. CP 177-182; RP 51-56. The majority of them detailed the defendant's obsession and love for Susan Powell, and discussed him repeatedly videotaping her without her knowledge. CP 304-05[5]. The State indicated it was only seeking to admit one journal entry believed to be from August 17, 2004, where the defendant 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." CP 305; RP 203.

[5] The State is filing a supplemental designation of clerk's papers to include the State's original trial brief filed in the first trial prior to the court dismissing the child pornography count. In the present case, the State indicated it was relying on this brief to support their arguments as many were unchanged from the original trial (the defense filed a new trial brief which was essentially the same as its original from the first trial). RP 4-5.

The State argued that that entry was admissible under ER 404(b) for identification purposes to prove it was in fact the defendant who took the photographs of the neighbor girls and to prove the defendant's intent and motivation in possessing the photographs. They argued that the relevant probative value of the journal entry for those reasons was not substantially outweighed by any prejudice. CP 305-08; RP 52-56. The trial court granted the defendant's motion to exclude the journal entries in part, but allowed the State to introduce the singular journal entry saying:

> No. 1, it is a statement by party opponent, so it's admissible.
>
> No. 2, it's relevant, particularly pursuant to the mandate of the Court of Appeals.
>
> At this point, the issue – one of the elements that has to be proven is that the purpose of the photos involves the sexual stimulation of the viewer, and the admission at this point that, I sometimes use those images for self-stimulation, and I take photos of women of all ages, are both probative, and the probative value of those statements outweigh any potential prejudice in this case by a large margin.

RP 56.

Defendant argues that the trial court abused its discretion in admitting the journal entry claiming that its admission only amounted to propensity evidence. He relies on ***State v. Wade***, 98 Wn. App. 328, 335, 989 P.2d 576 (1999), where this Court held that in order to use prior bad acts "for a nonpropensity based theory, there must be some similarity among the facts of the acts themselves." In that case, this Court found that

it was error to admit a defendant's previous drug offenses to prove his intent to deliver in his current case when the only similarity between the two instances was their geographic location and the defendant had declined to offer a defense during the trial. ***Wade***, at 336-37. In essence, the facts in that case and the record below reflected that the only reasonable inference that could be drawn from Wade's prior acts was his propensity to commit drug sale offenses. *Id.*

In this case, defendant contends that like in ***Wade***, there was not enough similarity between the conduct described in his journal and his charged crime to show they were admitted for any other purpose besides propensity evidence. Brief of Appellant, at 14-15. Specifically, he contends that because the journal entry described him taking videos of women in shorts and skirts it was of limited relation to the acts of the crime he was charged with which was possessing photographs which depicted exposed areas of minor girls. But defendant neglects to consider numerous factual similarities and his defense at trial in his claim of error.

In order to prove defendant was guilty of possession of depictions of minor engaged in sexually explicit conduct in the second degree, the State was required to prove the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct. CP 212-228 (Instruction No. 5); RCW 9.68A.070(2)(a). Sexually explicit conduct is defined as "actual or simulated depiction of the genitals or unclothed pubic 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 212-228 (Instruction No. 10); RCW 9.68A.011(4)(f). Thus, the State was required to prove that the individual who had possessed the photographs had done so for the purpose of sexual stimulation.

While defendant's journal entry did not discuss photographs or naked minor girls specifically, it described in a broader manner the defendant's purpose of using his personal photography of the female body for sexual stimulation at later times. It detailed how he liked to video girls and women "of every age", encompassing the same age group the photographs depicted. It described taking video shots of the shorts and skirts, emphasizing the same area of the body the defendant zoomed in on in many of the photographs of the neighbor girls. RP 86-97. The journal entry also described how defendant liked to take video of the women and girls and the photographs found of the neighbor girls actually appeared to be screen captures from a video. RP 90-91. Thus, the commonality between the journal entry and the charged crimes was more than just the defendant. *See* ***Wade***, 98 Wn. App. at 335 ("Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant.")

In addition, defendant's claim at trial was that the State had failed to prove that he was the possessor of the photographs. While no other suspect evidence was admitted, the defense attempted to argue that the

State had failed to meet its burden in proving it was actually the defendant who possessed the CD in the box that the photographs were found on. RP 241-48. Besides the photographs of the naked minor neighbor girls, the CD also contained multiple folders with numerous photographs of young women doing various things like playing basketball, changing, walking on the sidewalk and walking to and from their vehicles. RP 108, 123-25. As such, defendant's journal entry was relevant as evidence to rebut his claim that someone else possessed the photographs of the neighbor girls as the CD also contained images he described in his journal entry as liking to photograph. The trial court did not abuse its discretion in finding that the journal entry was admissible under ER 404(b) for the purpose of proving the identity of the possessor and defendant's intent in possessing the photographs.

Defendant also argues that the date the journal entry was written made it too remote in time to contain any probative value. Whether prior misconduct is too remote in time to have probative value is a decision within the trial court's discretion. ***State v. Ray***, 116, Wn.2d 531, 547, 806 P.2d 1220 (1991). The time interval between a prior bad act and present offense goes to weight, not admissibility. ***State v. Evans***, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986) (*citing* ***State v. Bouchard***, 31 Wn. App. 381, 386, 639 P.2d 761, *review denied*, 97 Wn.2d 1021 (1982)). The journal entry was believed to have been written in 2004, the photographs were believed to have been taken in 2006 and the defendant was charged

with possessing them in 2011. RP 137, 205; CP 1-8. Defendant argues the gaps in time made the journal entry of no probative value. But the journal entry described how defendant would take videos and then "sometimes use [those] images for self-stimulation." CP 305. Thus, the journal entry itself detailed how defendant would take videos, then keep them for use later on, making it probative to the issue of defendant's intent in possessing the photographs irrespective of any time lapse.

For all of these reasons, the trial court correctly recognized that the journal entry was of significant probative value. It is likely that any prejudicial effect stemming from the knowledge gained from the journal entry would have been abated given that the jury was also aware there were numerous nude photographs on the CD of the defendant masturbating and doing sexual things to himself in various locations. RP 108, 209-210. As a result, the journal entry's probative value cannot be said to have been substantially outweighed by any prejudicial effect.

The journal entry was relevant to prove defendant's intent to use the photographs for sexual stimulation and as further evidence of the identity of the possessor of the photographs. The gap in time did not decrease the probative value of the journal entry and its probative value was not substantially outweighed by any prejudicial effect. The trial court did not abuse its discretion in admitting the defendant's journal entry.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: April 15, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-15 [illegible]
Date Signature

PIERCE COUNTY PROSECUTOR

April 15, 2016 - 2:09 PM

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