No. 69326-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARREN PATRICK BARKER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The court erred in admitting evidence that Mr. Barker viewed "incest-related pornography"**

The State contends the defense motion in limine—which the trial court granted—was "to exclude the fact that the defendant had been fired for viewing child pornography on his work computer," and not to exclude "the defendant's statement that he had admitted to viewing what was represented to be incest pornography." SRB at 20. This contention is not supported by the record. The written motion stated the purpose of the motion was

> [t]o exclude evidence that Mr. Barker was fired from a job before the date of violation because of his unauthorized viewing of pornography on his work computer. There is no evidence to suggest that Mr. Barker viewed child pornography. Such evidence is not related to the charges here and would not be relevant for any other purpose than showing Mr. Barker [sic]. ER 401, 403, 404(a), 404(b).

CP 28. The State had no objection to this motion. CP 38. In granting the motion, the court demonstrated its understanding that the motion was to exclude evidence that Mr. Barker viewed pornography on his work computer. The court stated, "We're not going to into [sic] whether there is any evidence about pornography on the computer." 8/06/12RP 6.

During trial, the deputy prosecutor violated the in limine ruling by asking Detective Hagglund, "After Mr. Barker told you about this incident with [C.B.], his stepdaughter, did you have a conversation with him regarding incest-related pornography?" 8/08/12RP 10. The court reversed its in limine ruling by overruling defense counsel's objection to the question. 8/08/12RP 10. In overruling the objection, the court mistakenly said, "We discussed this. Overruled." 8/08/12RP 10. The detective then testified, "[Mr. Barker] explained that he had viewed incest-related pornography." 8/08/12RP 11.

The State contends the evidence that Mr. Barker viewed "incest-related pornography" was relevant and admissible to prove the element of "sexual contact," which requires proof that he acted for the purpose of sexual gratification.[1] SRB at 21-25. This argument must be rejected for at least two reasons: (1) evidence that an accused viewed pornography that had no connection to the charged crime is not admissible to prove intent in a prosecution for a sex offense because

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[1] Confusingly, the State also asserts, "[Mr. Barker's] admission goes to show the defendant's acknowledgement of the wrongfulness of the conduct with his step-daughter and as result [sic] is an admission of the crime." SRB at 22. Mr. Barker's admission to viewing "incest-related pornography" is not an admission that he molested his stepdaughter. Mr. Barker consistently denied touching C.B. 8/07/12RP 42; 8/08/12RP 10, 13, 50.

there is no logical theory, other than propensity, demonstrating that an interest in pornography connects to the intent required to commit the hands-on sex offense; and (2) the other bad act evidence was not admissible to prove intent because intent was not at issue in the case.

a. The evidence was not admissible to prove intent because it was not logically relevant to show intent through any theory other than propensity

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). "Critically, there are no 'exceptions' to this rule." Id. The second sentence of ER 404(b) provides a list of "other purposes" for which other bad act evidence may be admitted. Id. But these are not exceptions to the categorical bar on propensity evidence. Id. In other words, other bad act evidence is not admissible to prove "intent," for example, if the only way the evidence is relevant to the issue of intent is by showing the defendant's character and action in conformity with that character. Id.

In deciding whether other misconduct evidence is admissible, the trial court must determine if the evidence is logically relevant to a material issue through a theory other than propensity. State v.

Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). "When the State offers evidence of prior acts to demonstrate 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." State v. Wade, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999). Even if intent is at issue in the case and the other bad act evidence is logically relevant to the issue of intent, "[t]hat a prior act 'goes to intent' is not a 'magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].'" Id. (quoting Saltarelli, 98 Wn.2d at 364). There must be an intermediate step in the inferential process that does not turn on propensity. Wade, 98 Wn. App. at 335. That is, the jury may not be permitted to infer that because the defendant had a particular intent in performing an act on a prior occasion, he probably had the same intent in performing the current act. Id. "If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case." Id.

The rule barring propensity evidence rests on the principle that even logically relevant evidence is not admissible if it is not also legally relevant. State v. Holmes, 43 Wn. App. 397, 399, 717 P.2d 766

(1986). "Logically relevant evidence may be declared inadmissible on policy grounds." Id. Propensity evidence may be logically relevant if one accepts the basic premise of once a criminal, always a criminal. Id. at 400. But it is not legally relevant. Id.; ER 404(b). The policy reason for precluding propensity evidence "is rooted in the fundamental American criminal law belief in innocence until proven guilty." Wade, 98 Wn. App. at 336. It is also rooted in the equally fundamental notion that a defendant may not be tried for an offense not charged. State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916 (2009).

If the sole purpose of other crimes evidence is to show some propensity to commit the crime at trial, the evidence is unequivocally inadmissible. Holmes, 43 Wn. App. at 400. In that circumstance, the court does not engage in a balancing to determine whether the probative value of the evidence outweighs its prejudicial effect. Id. "The court's discretion does not include the right to ignore the basic rule that other crimes are excluded; rather, it lies in the other direction in empowering the judge to exclude other crimes evidence even when it has substantial independent relevancy, when in his judgment its probative value is outweighed by danger of prejudice." Id.

"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." Wade, 98 Wn. App. at 335. In Wade, the defendant was charged with possession of cocaine with intent to deliver. Id. at 331. At trial, the State presented evidence that Wade had sold cocaine on two prior occasions in order to prove he had the intent to deliver on the present occasion. Id. at 332. The Court held the evidence was inadmissible because it invited the jury to infer that because Wade had the intent to distribute drugs previously, he must have possessed the same intent on the current occasion. Id. at 336-37 (citing ER 404(b)). Because there was no connection between the prior acts and the current offense,

> [t]he only reasonable inference to be drawn from Wade's prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion. Such evidence and inference merely establish Wade's propensity to commit drug sale offenses.

Id. at 337. No matter how relevant such propensity evidence may be, ER 404(b) requires it be excluded. Id. at 337.

Similarly, in Holmes, Holmes was charged with attempted second degree burglary, which required the State to prove an intent to

commit theft inside the house.[2] 43 Wn. App. at 398-99. To prove the element of intent, the State produced two of Holmes's prior convictions for theft. Id. The Court held the evidence was inadmissible because "[t]he only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b)." Id. at 399-400.

In accordance with these fundamental and long-standing principles, evidence that a defendant viewed pornography on an unrelated occasion is not admissible in a prosecution for a sex offense if the only relevance of the evidence is to show that because the defendant has a particular prurient sexual interest, he must have had the requisite intent to commit the charged crime. The cases cited in the opening brief are consistent with this conclusion. See Sutherby, 165 Wn.2d at 886 (evidence that defendant possessed child pornography on unrelated occasion would not be cross-admissible in separate trial on charges of child rape and child molestation because "the evidence would merely show Sutherby's predisposition toward molesting

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[2] At that time, in order to prove the crime of burglary, the State was required to prove an intent to commit a particular crime inside the burgled building. Now, the State need prove only an intent to commit *a*

children and is subject to exclusion under ER 404(b)"; State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158 (1990) (evidence that defendant possessed x-rated videotape cassettes with children's film titles on them was inadmissible in prosecution for second degree statutory rape because there was no evidence that the alleged victim ever watched the movies). Also in support is State v. Bush, 164 N.C. App. 254, 261, 595 S.E.2d 715 (2004) (evidence that Bush owned and watched pornographic videos of young women having sex was not admissible at trial on a charge of first degree sexual assault of a child because there was no evidence that Bush provided pornographic videotapes to the child or employed the tapes to seduce her; "[a]bsent proof that the tapes were so utilized, such evidence, so tenuously related to the crime charged, impermissibly injected defendant's character into the case to raise the question of whether defendant acted in conformity therewith at the times in question.").[3]

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crime, not a specific crime. See State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

[3] United States v. Chambers, 642 F.3d 588 (7th Cir. 2011), on which the State relies, is distinguishable because in that case, there was a connection between the pornography Chambers possessed and the charged crimes. Chambers was charged with knowingly transporting child pornography in interstate commerce and attempting to entice a minor under the age of 18 to engage in sexual activity. The evidence showed he used pornography in an attempt to entice underage girls into engaging in sexual activity.

Here, the only relevance of the evidence that Mr. Barker viewed "incest-related pornography" on an unrelated occasion was to encourage the jury to infer that because he had a prurient interest in incestuous sex, he must have molested his stepdaughter. There was no other connection between the pornography and the charged offense. There was no evidence that Mr. Barker ever encouraged C.B. to watch pornography or that he ever took pornographic images of her. Even if the evidence was *logically* relevant to prove "intent," it was not *legally* relevant or admissible. Wade, 98 Wn. App. at 334-35; Holmes, 43 Wn. App. at 399. Because the only relevance of the evidence was to show propensity, it was categorically barred by ER 404(b). Gresham, 173 Wn.2d 420-21.

b. The other bad act evidence was not admissible to prove intent because intent was not a fact of consequence to the outcome of the case

Evidence of a defendant's other bad acts may be admissible to prove intent under a theory other than propensity. ER 404(b). But in order for other bad act evidence to be admissible to prove intent, intent must be a fact "of consequence to the outcome of the case." Saltarelli, 98 Wn.2d at 363. In Saltarelli, for example, evidence that the defendant tried to rape a different woman on a prior occasion was not

admissible to prove his intent at trial on the current charge for second degree rape because intent was not a fact of consequence to the outcome of the case. Id. at 365-67. Saltarelli admitted to having sexual intercourse with the alleged victim and did not raise an issue of intent. He argued instead that the victim consented to sexual intercourse. Id. "Therefore, intent was not an essential point which the state was required to establish" and the prior bad act evidence was inadmissible. Id. at 366 (internal quotation marks and citation omitted).

In a prosecution for child molestation or indecent liberties, intent is not a fact of consequence to the outcome of the case if the defendant denies touching the "sexual or intimate" parts of the alleged victim. State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986). In Ramirez, the defendant was charged with indecent liberties, which, like the crime of child molestation, required the State to prove the defendant had "sexual contact" with the alleged victim. Id. at 224-25; RCW 9A.44.100. To prove "sexual contact," the State had to prove Ramirez touched the girl's "sexual or other intimate parts . . . for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Ramirez denied touching the "sexual or intimate parts" of the girl. Ramirez, 46 Wn. App. at 225. Therefore, the Court

explained, intent was not at issue because "the mere doing of the act conclusively demonstrates the accompanying criminal intent. Here, once the act of touching is proven, it follows that the defendant touched for purposes of sexual gratification." Id. at 227. If Ramirez had not denied touching the sexual or intimate parts of the alleged victim, but rather admitted the touching while claiming it was for a purpose other than his sexual gratification, then intent would be at issue. Id. But because "the intent follows from the act itself," Ramirez's denial of the act meant intent was not a fact of consequence to the outcome of the case. Id. Thus, evidence that Ramirez had fondled a different girl on an unrelated occasion was not admissible to prove he intended to have "sexual contact" with the alleged victim of the current charge. Id. at 226-27; ER 404(b).

Ramirez is indistinguishable from this case. Here, Mr. Barker consistently denied touching the "sexual or other intimate parts" of C.B. 8/07/12RP 42; 8/08/12RP 10, 13, 50. Had Mr. Barker touched C.B.'s "sexual or intimate parts," absent some other explanation, the mere doing of the act would have conclusively demonstrated the requisite accompanying criminal intent. Ramirez, 46 Wn. App. at 227. Had he not denied touching C.B.'s "sexual or intimate parts" but

argued the touching was for a purpose other than his sexual gratification, then intent would be at issue and the other bad act evidence would potentially be admissible to demonstrate intent. Id. But because Mr. Barker denied the touching itself, intent was not a fact of consequence to the outcome of the case and the prior bad act evidence was not admissible to demonstrate he had the requisite intent. Id.; ER 404(b).

In sum, the trial court erred in concluding ER 404(b) permitted the State to introduce evidence that Mr. Barker had viewed "incest-related pornography" on another, unrelated occasion. The evidence was relevant only to show his propensity for criminality and was therefore categorically barred by ER 404(b). For the reasons provided in the opening brief, the evidence was highly inflammatory and unfairly prejudiced Mr. Barker. The conviction must be reversed.

2. The community custody condition prohibiting Mr. Barker from using the internet is unconstitutionally overbroad and not authorized by statute

The State asserts the community custody condition is not a "bar" on internet use because it is subject to approval by the community corrections officer. SRB at 31. This is a distinction without a difference. In State v. O'Cain, 144 Wn. App. 772, 774, 184

P.3d 1262 (2008), the Court struck down a condition barring O'Cain from using the internet without the prior approval of his supervising community corrections officer and sex offender treatment provider. The Court struck down the condition because there was no evidence that internet use contributed to the crime. Id. It did not matter that the community corrections officer could approve O'Cain's internet use.

Just as in O'Cain, there is no evidence that internet use contributed to the crime in this case. The community custody condition barring Mr. Barker from using the internet—even subject to the approval of his community corrections officer—is unauthorized because it is not "crime-related."

The State's assertion that the trial court found there were computer elements throughout the course of the case is not supported by the record. SRB at 32 (citing 9/12/12/RP 97). In fact, the court merely found "I think there is a computer nexus here." 9/12/12RP 97. The court made no other finding about internet use.

Finally, this Court should reject the State's contention that a community custody condition barring internet use is statutorily authorized and constitutionally permissible as long as internet use is somehow "relate[d] to the circumstances of the offense." SRB at 33-

34. To the contrary, the case law provides that a crime-related condition must be "*directly* related" to the crime. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993) (emphasis added). This means that a community custody condition barring internet use is authorized only if the offender used the internet to facilitate commission of the crime. Id. at 37; State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000).

More important, a community custody condition that infringes an offender's First Amendment rights must be "sensitively imposed" and "narrowly drawn." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008). Such a condition must be "reasonably necessary to accomplish the essential needs of the State and public order." Rainey, 168 Wn.2d at 374. There must be no reasonable alternative way to achieve the State's interest. Warren, 165 Wn.2d at 34-35.

A community custody condition that bars an offender from using the internet, where internet use did not facilitate commission of the crime, is not "sensitively imposed" or "narrowly drawn." It is not necessary to accomplish the needs of the State or the public order. To the contrary, the condition unreasonably infringes Free Speech rights.

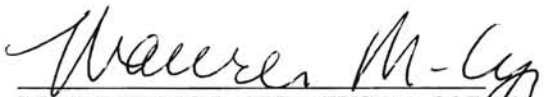
The State ignores the strict standard of review that applies to conditions that so significantly limit an individual's ability to access and transmit communications that are protected by the First Amendment.

Because the condition barring internet use is not directly related to the crime, it must be stricken.

B. CONCLUSION

For the reasons given above and in the opening brief, the conviction must be reversed and remanded for a new trial at which the evidence that Mr. Barker viewed "incest-related pornography" is not admitted. In the alternative, the community custody condition barring Mr. Barker from using the internet or social media must be stricken.

Respectfully submitted this 13th day of December, 2013.



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	)	
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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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