
No. 34417-7-III

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

STATE OF WASHINGTON

Respondent

v.

RICHARD ELLIOT CAIN

Appellant

Reply Brief of Appellant

Appeal from Benton County Superior Court No. 11-1-00627-5
The Honorable Bruce A. Spanner

John C. Julian, WSBA #43214
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Attorney for Appellant

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ARGUMENT

1. Counsel properly took exception below, and therefore the instructional error is preserved on Appeal. Even if the exception were insufficient, this Court may nonetheless consider the matter pursuant to RAP 2.5(a)(3) because the failure affected a manifest constitutional right.

In its brief, the State attempts to argue that counsel did not properly object to the trial court's omission of the proposed defense limitation instruction. Br. of Respondent at 6. The State also appears to suggest that counsel failed to properly appraise the trial court of the reasons for the objection. *Id.* at 7. Both propositions are simply incorrect.

Preservation of Exception

The State's arguments appear to turn upon the fact that trial counsel was not informed that the trial court had omitted its proposed limiting instruction prior to beginning to instruct the jury. However, the trial court, to its credit, interrupted the jury instructions to discuss the matter with counsel at sidebar since it had neglected to do so previously. VRP at 1073-74. During sidebar, counsel took exception. *Id.* Moreover, at a subsequent colloquy, the trial court expressly stated that it considered counsel's exception timely, the inference being that it could have corrected the instructions had it chosen to do so. VRP at 1138-40. At that same colloquy, counsel informed the trial court that Mr. Cain's due process rights were

affected by the omission of the limiting instruction. *Id.* at 1138-40. As such, the error was amply preserved for appeal.

Even if, *arguendo*, the exception were insufficient, instructional errors affecting a manifest constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Such is the case here, where Mr. Cain's due process rights are necessarily implicated by non-limited ER 404(b) evidence which was relied upon heavily by the State in its closing argument.

2. The evidence adduced by the State is properly understood as ER 404(b) "propensity" evidence, and the State's argument tacitly acknowledges the point.

In its brief, the State attempts to argue that the evidence requiring limiting instruction was not ER 404(b) evidence, or else that an ER 404(b) analysis does not apply. Br. of Respondent at 7-8. However, in its argument the State then appears to acknowledge indirectly that such is the case by arguing the *admissibility* of the evidence under *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991) – a case which discussed the limitation of evidence admitted pursuant to ER 404(b). *Id.* As such, it is manifest that an ER 404(b) analysis applies as discussed in the Initial Brief of Appellant.

Here, the simple fact remains that the state successfully adduced at trial evidence purporting to demonstrate Mr. Cain's character, temperament, and past treatment of the children – all of which could be construed for purposes other than that for which it was expressly intended

– to explain the delay in the victim’s reporting to her mother. A limiting instruction was therefore appropriate, requested by the defense, and denied by the trial court despite its common law duty to so instruct. *State v. Gresham*, 173 Wn.2d 405, 424-25, 268 P.3d 207 (2012). The trial court’s failure to provide a limiting instruction despite a request and a proposed instruction was reversible error and merits a new trial.

CONCLUSION

The trial court erred in declining to give the jury a limiting instruction regarding the ER 404(b) evidence adduced at trial. Such error was prejudicial, and merits reversal and remand for a new trial. Moreover, the trial court likewise erred when it found the warrant in this case to be severable, thereby permitting further propensity evidence to be admitted at trial, again without any limiting instruction. This Court should therefore reverse and remand for a new trial.

Respectfully submitted this 17th day of July, 2017 by:

s/ John C. Julian

WSBA #43214
John C. Julian, Attorney at Law, PLLC
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Telephone: (509) 529-2830
Fax: (509) 529-2504
E-mail: john@jcjulian.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this REPLY BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

Andrew Miller
Benton Co. Pros. Atty.
7122 W. Okanogan Pl.
Building A.
Kennewick, WA 99336
prosecuting@co.benton.wa.us

[X] Electronic

Richard Elliot Cain
DOC # 375332
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

[X] U.S. Mail, Postage Prepaid

DATED this 17th day of July, 2017 by:

s/ John C. Julian

WSBA #43214
John C. Julian, Attorney at Law, PLLC
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Telephone: (509) 529-2830
Fax: (509) 529-2504
E-mail: john@jcjulian.com

JOHN C. JULIAN, ATTORNEY AT LAW, PLLC

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5 W ALDER ST STE 238

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