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Court of Appeals
Division III
State of Washington

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

Initial Brief of Appellant

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

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INTRODUCTION

Mr. Cain was charged by amended information with Rape of a Child in the First Degree, and First Degree Child Molestation. After two mistrials, Mr. Cain's third trial resulted in a conviction for First Degree Child Molestation. He was found not guilty of the crime of First Degree Rape of a Child.

Pretrial, the defense sought to suppress evidence seized pursuant to a warrant which had previously been determined to be faulty in certain respects. The trial court declined, finding the warrant severable, and the evidence was admitted at trial.

During trial, both parties discussed the victim's state of mind insofar as her failure to timely report the alleged abuse was concerned. In order to demonstrate that the delay was reasonable, the State admitted character and prior acts evidence to show the victim's fear of Mr. Cain. Both prior to, and during trial, the defense requested a limiting instruction on the prior acts evidence, however the trial court refused to give one, even after a renewed objection by counsel.

Mr. Cain asks this Court to find that the trial court erred in not only failing to appropriately instruct the jury as to the proper use of ER 404(b) evidence, but also in failing to suppress evidence obtained as the result of a non-severable, and faulty warrant. Finally, Mr. Cain asks this Court to

exercise its discretion to decline the award of costs should the State substantially prevail on appeal.

ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in refusing to provide the jury with a limiting instruction after permitting character and propensity evidence pursuant to ER 404(b) and ER 403, particularly where the defense requested such an instruction.

ASSIGNMENT OF ERROR 2: The trial court erred in finding that the search warrant for Mr. Cain's premises was severable because it did not meet each element of that test.

ASSIGNMENT OF ERROR 3: The search warrant was invalid insofar as the bondage evidence was concerned because the warrant lacked both probable cause and was likewise overbroad in its request for that evidence.

ISSUES

Whether the Trial Court erred in failing to give the jury a limiting instruction after permitting propensity evidence under ER 404(b) and ER 403 when the instruction was requested by the defense?

Whether the trial court erred in finding the search warrant severable , and if so, whether Mr. Cain suffered prejudice?

Whether the warrant was invalid insofar as it sought bondage evidence because it lacked probable cause and was also overbroad?

Whether this Court should exercise its discretion to decline to award costs if, *arguendo*, the State substantially prevails upon appeal.

MATERIAL FACTS¹

Richard Cain was charged by amended information with First Degree Rape of a Child and First Degree Child Molestation – with the position of trust aggravator included. Clerk’s Papers (CP) at 7-8. Specific instances were not charged, and the State elected to simply charge that the acts took place between July 10, 2006 and April 1, 2011. *Id.* The charges arose from allegations that Mr. Cain had sexually abused the daughter of a former girlfriend, with whom he had a daughter in common.

The alleged victim, D.G., did not report the abuse to her mother until well after the events had taken place, which she alleged took place throughout many residences over a number of years. Verbatim Report of Proceedings (VRP) at 734-769, 823-825. The police investigation included a forensic interview, physical examination of D.G., and the execution of a search warrant. VRP at 88-101, 538 *et seq.*, 620-23, 661. The affidavit for the search warrant relied in large part upon the information obtained as a result of the forensic interview. VRP at CP at 31-43. Specifically, the warrant sought:

- (1) Photographs of the residence and bedroom of Richard Elliot Cain (6/11/65);

¹ Additional detailed facts are included in the argument below where applicable.

- (2) Rope, Scarves, Ties or any other device that can be used for binding;
- (3) All VHS, 8mm, photographs, electronic storage devices to include but not limited to computers hard drives CD's, floppy disks, diskettes, iPods, cell phones w/camera features, and flash drives that could be used to store any depictions of child pornography;
- (4) Documents of dominion.

CP at 32.

In executing the search warrant, law enforcement officials discovered a video of Mr. Cain and D.G.'s mother engaged in sexual bondage. VRP at 88-100. The officers also found substantial evidence of a marijuana operation, and, after one hour of searching the premises, withdrew to request a telephonic amendment to the warrant, which was granted. *Id.*; CP at 32. Pertinently, the officers seized documents related to Mr. Cain's ownership of the house, took a great many photographs of the house and bedroom, including so-called "sex kits" with bondage equipment discovered in various storage areas, and also seized a great deal of evidence related to marijuana. VRP at 88-100, 101-114.

Mr. Cain stood trial in March of 2013, and June of 2014. Both ended in a mistrial, took place in front of the same judge, and the State was represented in each by the same prosecutor, Anita Petra. VRP at 178, 197. For his third trial, Mr. Cain was represented by David Marshall and Aimee Sutton.

Pretrial, the court ruled portions of the warrant invalid, and suppressed evidence related to the video seized, as well as any evidence related to marijuana. VRP at 101-114. During further pretrial matters, the defense sought to suppress evidence arising from the search warrant, arguing that the warrant was not severable. CP at 101, VRP at 101-114. The State disagreed, and the court ultimately sided with the State, permitting information obtained as a result of the search to be admitted. The court did acknowledge that there may have been a general search of Mr. Cain's premises, but indicated that it did not believe the subject evidence was gained as a result of that search. VRP at 114. The photographs pertaining to bondage equipment were admitted at length during trial, and relied upon by the State in its closing. VRP at 638-648, 1091.

During a mid-trial conference, the parties and the court discussed jury instructions, and the defense requested a limiting instruction regarding this ER 404(b) information. The Court reserved on the question because the State wished for more time to review the matter, though it indicated it did not really object to the instruction. VRP at 1036-38.

Once testimony had finished, the parties further discussed the jury instructions with the court. The record, however, is silent regarding Defense Instruction No. 5. *See* VRP at 1054-1068. However, when

actually instructing the jury, the Court paused after the first instruction, and had the following sidebar with counsel:

THE COURT: I just -- as I was reading, I noticed that I did not give the instruction on the limited value --

MR. MARSHALL: Oh.

THE COURT: -- of the evidence --

MR. MARSHALL: Yes, right.

THE COURT: -- of abuse or neglect, and that was intentional on my part. I don't believe that evidence is so limited -- I don't think it was limited to credibility. It was more offered to explain why the alleged victim did not raise her complaints, and I'm sorry, but I wanted to bring you at side bar so that nobody guessed about that later on and give you some time to think now as I read the instructions about how you might do your closings.

MS. PETRA: Right.

MR. MARSHALL: Sure. Your Honor, I will take exception to the Court's not giving that instruction.

THE COURT: He just took exception.

MS. PETRA: Okay.

(Whereupon the brief side-bar conference had on the record outside the presence of the jury was concluded.)

THE COURT: Thank you for your patience. The Court made a slight error, and I wanted to bring that to their attention in a timely manner.

VRP at 1073-74. After closing arguments, the Court dismissed the jury to lunch, and then deliberation. VRP at 1137. After the jury was dismissed, the following colloquy took place:

MR. MARSHALL: All right. I do want to amplify my exception to the Court's not giving the limiting instruction that we had proposed, the instruction that the jury not consider evidence of physical or emotional abuse by Mr. Cain except as it bore on credibility of the State's witnesses. We object to the Court's refusal to give that instruction on the basis that it violates Mr. Cain's rights to due process of

law under the State and federal constitutions and, to make sure the record is completely clear on this, I will now ask the Court to give that as a supplemental instruction since I'm doing this because I didn't take the exception before the Court gave the initial packet of instructions.

THE COURT: All right. I want the record to reflect, and then I'm gonna ask Ms. Petra to respond, that I don't believe your exception is untimely because I did take the step of trying to point out to you differences between the instructions I actually gave and what had been presented, and I left that one out

MR. MARSHALL: Okay.

THE COURT: And so I did not alert you to that, and I wanted the record to reflect that. Ms. Petra?

MS. PETRA: No further argument.

THE COURT: Okay. Well, the case has now been argued without that instruction. I think it would be clear error to give the instruction at this point in time, and, besides, I did not give it because, as I stated earlier, I believe that evidence was probative on more than just the credibility of Destiny. It was probative on the question of why she delayed in reporting.

VRP at 1138-1140.

Ultimately, the jury found Mr. Cain not guilty of First Degree Rape of a Child, and guilty of First Degree Child Molestation. CP at 549, 551. The jury also found that Mr. Cain violated a position of trust in committing the molestation offense. CP at 589. Mr. Cain was sentenced within the standard range according to his offender score of 0, and this appeal timely followed. CP at 573-90, 594.

ARGUMENT

1. The trial court erred in refusing to provide the defense limiting instruction regarding prior acts, and in so doing, violated Mr. Cain's

constitutional right to a fair trial by permitting the jury to contemplate evidence for propensity purposes.

Evidence rule (ER) 404(b) generally prohibits evidence of prior acts in order to demonstrate a defendant's propensity to commit the charged offense(s). *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (stating "once a thief always a thief" is not a valid basis upon which to admit evidence), *review denied*, 106 Wn.2d 1003 (1986). However, such acts are admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." ER 404(b). These permitted exceptions to the general rule are not exclusive, and therefore the trial court has discretion to permit such evidence for other purposes. *State v. Kidd*, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

Evidence submitted pursuant to ER 404(b) must however, be viewed in conjunction ER 403 in order to ensure that the probative value of such evidence is not substantially outweighed by its prejudicial effect upon the jury. *State v. Cook*, 131 Wn. App. 845, 850, 129 P.3d 835 (2006). A trial court's decision in this regard is reviewed by this Court for an abuse of discretion. *State v. Womac*, 130 Wn. App. 450, 456, 23 P.3d 528 (2005). A trial court abuses its evidentiary discretion where it fails to abide by the requirements of the applicable rules. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Certainly, a failure to abide by the rules also meets

the oft-used expression that a trial court abuses its discretion where its decision is manifestly unreasonable, or is not based upon tenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Amongst the myriad of reasons to include prior acts is where the State seeks to rebut a defense contention that the delay in a victim's reporting sexual abuse impacts victim credibility. *E.g.*, *Cook*, 165 Wn.2d at 851-52; *State v. Nelson*, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006); Most often, this is expressed as going to the mindset of the alleged victim, particularly in explaining a delay reporting the abuse. *Fisher*, 165 Wn.2d at 744-45 (citing *Nelson*, 131 Wn. App. at 116); *State v. Ashley*, 186 Wn.2d 32, 44, 375 P.3d 673 (2016) (citing *Fischer*, 165 Wn.2d at 744-45).

However, where such ER 404(b) information is admitted, it has been the long-standing rule in Washington that “the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should shall be the court’s duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.” *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950). This rule was recently enhanced by our Supreme Court who stated that, in the context of ER 404(b), once a defendant requests a limiting instruction, the trial court has a *duty* to correctly instruct the jury regardless of whether the proffered instruction is a correct statement of the law. *State v. Gresham*,

173 Wn.2d 405, 424-25, 268 P.3d 207 (2012). Crucially, the instruction must inform the jury that the evidence is to be used only for the proper purpose for which it was admitted; it may not be used to prove the character of a person in order to show that the person acted in conformity with that character. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Despite a trial court's duty to correctly instruct the jury regarding ER 404(b) evidence, the omission of such an instruction can nonetheless constitute harmless error. *Id.* at 425. Error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

In the case at bar there was substantial ER 404(b) testimony sought by State, and inquired into by the defense regarding prior actions of Mr. Cain purporting to influence D.G.'s failure to timely report his alleged sexual abuse, and the children's fear of him. Briefly summarized, the information adduced regarded various occasions when Mr. Cain would discipline the children with force, require the children to pick up rocks in a certain manner, yell abuses at the children, threaten D.G. not to say anything that would put him in jail, shot a rabbit in front of D.G., his ownership and display of many firearms, and D.G.'s oft-repeated statement that she was

fearful of him. VRP at 713, 729-30, 734, 765-66, 769, 781-83, 806-7, 809-10, 823-25, 829-30.

The record makes abundantly plain that the parties both contemplated the admission of this evidence. In particular, the defense submitted a proposed instruction specifically to limit the use of such information – a limitation expressly conveyed in pretrial matters. CP at 504; VRP at 226-28. Moreover, during a colloquy on instructions, the defense reaffirmed its desire for the instruction upon court inquiry, and the state indicated that it did not object to the motion, but wanted to further research the matter to be certain of its position. VRP at 1036-38.

The matter was not raised in subsequent instructions discussions, and was next discussed at sidebar while the jury was empaneled for purposes of receiving court instructions. However, in that discussion, the trial court simply gave notice to the defense that it had *sua sponte* removed the instruction because it did not feel it was accurate, the evidence being offered to explain why the victim did not promptly disclose the abuse, rather than just for purposes of credibility. The defense promptly took exception to the decision. VRP at 1073-74.

While under *Cook*, *Fisher* and *Nelson*, the trial court was within its discretion to permit such evidence for purposes of explaining the delay in reporting the abuse, the court nevertheless abused its discretion in *sua*

sponte declining to give a correct limiting instruction when requested to do so pursuant to the strict duty imposed by our Supreme Court in *Gresham*. 173 Wn.2d at 424-25. The failure to give the instruction was an abuse of discretion, and that error was not harmless.

As noted above, error is harmless “unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Gresham*, 173 Wn.2d at 425. In *Gresham*, the Supreme Court considered the consolidated cases of Mr. Gresham with another case, *State v. Scherner*, which consisted of a similar fact pattern and challenge to RCW 10.58.090.

Mr. Gresham was charged with four counts of first degree child molestation, and was alleged to have occurred over the span of nearly five years. *Gresham*, 173 Wn.2d at 417-18. The victim did not reveal the molestation to her mother for approximately one year after the final incident had occurred, however the matter was not investigated until the victim disclosed the abuse to her counselor several years later. *Id.* at 418. Prior to trial, the court determined that the State had failed to demonstrate the admissibility of a previous molestation conviction under ER 404(b), though the court did allow the evidence under RCW 10.58.090. Mr. Gresham was convicted of three counts of molestation *and* one count of attempted first

degree child molestation. *Id.* The Court of Appeals affirmed the conviction, and the Supreme Court granted review. *Id.*

In Mr. Scherner's case, he was charged with first degree rape of a child, and first degree child molestation. *Id.* at 414. Prior to trial, the superior court determined that evidence of prior sex offenses were admissible under RCW 10.58.090 and alternatively, ER 404(b) as a common scheme or plan. *Id.* at 415-16. The Court failed to give a limiting instruction although one was requested by the defense. *Id.* at 419-20.

At trial, in addition to the former sex offenses, the state introduced an audio recording that the victim in the charged offenses had made from a telephone call. In that call, Mr. Scherner did not deny the allegation or act surprised; rather, he apologized for his actions. *Id.* at 416-17. The State also presented evidence that Mr. Scherner had sought to flee prosecution. Mr. Scherner was convicted of both crimes. *Id.* at 417.

On review, the Supreme Court concluded that RCW 10.58.090 was unconstitutional, and therefore ER 404(b) was the basis upon which admission of the prior sex acts must be viewed in each case. The court concluded that the trial courts erred in both cases by failing to give a limiting instruction. With regard to Mr. Scherner, the court determined that the error was harmless. *Id.* at 419-20. In reaching that ruling, the Court looked to the "overwhelming" evidence of Mr. Scherner's guilt – the testimony of the

victim, his phone confession, his flight from prosecution, the jury's opportunity to assess his credibility. Taken together, the Court concluded, that there was no reasonable probability that the outcome would have been materially affected by the elimination of the impermissible inference. *Id.* at 425.

Conversely, the Supreme Court found that in Mr. Gresham's case, the error was not harmless. In reaching this determination, the Court looked to the fact that the evidence consisted of the victim's testimony, and her parents' corroboration that Mr. Gresham had the opportunity to commit the charged offenses, and the investigating officer's testimony. There were no eyewitness accounts of the acts charged. *Id.*

The facts of this case are very different from those of Mr. Scherner, and align closely with those in Mr. Gresham's case. Here, as in Mr. Gresham's case, the only evidence of Mr. Cain's guilt comes directly from D.G., and her mother, who testified as to opportunity – there were no other eyewitnesses, no forensic evidence, no confession, and no flight evidence. Moreover, the State relied heavily upon the ER 404(b) domestic violence allegations in questioning Mr. Cain's credibility, and explaining D.G.'s reporting delay. *See* VRP at 1096-97, 1097-98. Most notably, the State explicitly raised the purpose related to the prior acts:

Why did she not tell? All of are you gonna go back there and think about that. Why didn't she tell her grandmother? Why didn't she tell the counselor? Why didn't she tell her friend? Why do kids not tell? Why do kids not tell? She was scared of him. Do you have any doubt that she was scared of him? Is there any doubt? You saw his manner up there testifying. You think that's a warm cat? Warm guy to hang out with? I mean, you see all those pictures where they give you like three of 'em. I mean, what's the first thing -- what's the first thing a child does when a mother puts a camera in front of 'em? I mean, how many mug shots are people smiling in them? Is it strange that [D.G.] would be smiling when a picture was taken of her? On the one occasion that they went camping in four years? He had guns. Tons of guns. You saw -- you heard how many guns he had. He had guns. He even told you he would kill coyotes, stray dogs. You know what else he killed? Little bunnies in front of [D.G.]. You think that freaked her out? He kept food from her. He would hit her. And her brother. And he was a black belt in Karate. We learned a lot about that over the course of this trial.

VRP at 1106. In so doing, the State essentially requested that the jury consider Mr. Cain's prior actions as propensity evidence, or at a minimum, failed to inform the jury that it could only consider the prior domestic violence evidence for purposes of explaining the delay in disclosure. *See also* VRP at 1096-97.²

² Do you believe the defendant? Who in this courtroom, the only person who has a motive to be dishonest to you? That man (indicating). He's the only one. Did you evaluate his manner while testifying? What did you think? Did he come off as coached? That little banter that they had. Did you feel that he was robotic? Did you feel he was controlling? Did you get a mean vibe from him? It's no wonder these children were scared of the defendant, and did you think his testimony was reasonable in the context of all the other evidence?

The State's manifest reliance upon the ER 404(b) testimony in explaining the reporting delay, and improperly discussing Mr. Cain's prior actions for purposes of showing conformity characteristics plainly required a limiting instruction at a minimum. *Saltarelli*, 98 Wn.2d at 362. This Court should follow the logic of our Supreme Court in *Gresham*, and find that the trial court's error was not harmless. After all, it is "in sex cases ... the prejudice potential of prior acts is at its highest." *Id.* at 363. Given the highly prejudicial nature of the domestic violence allegations in a sex crime case, it cannot be said that the jury properly focused its attention on the appropriate use of the information when that use was never conveyed to it. This Court should therefore reverse Mr. Cain's conviction, and remand for a new trial.

2. The trial court erred in failing to suppress photographs of bondage evidence created as a result of the warrant because the warrant was not severable.

The Fourth Amendment provides that: "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend 4. The particularity requirement is specifically enshrined for purposes of avoiding the evil of the "general warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 l. Ed. 2d 564, 91 S. Ct. 2022 (1971). Specifically, the evil is the "general, exploratory rummaging

in a person's belongings," the goal being to "eliminate the danger of unlimited discretion in the executing officer's determination of what to seize. *State v. Perrone*, 19 Wn.2d 538, 546, 834 P.2d 611 (1992) (quoting *Anderson v. Maryland*, 427 U.S. 463, 480, 49 L. Ed.2d 627, 96 S. Ct. 2737 (1976)). Accordingly, warrants must "enable the searcher to reasonable ascertain and identify the things which are authorized to be seized. *Id.* (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981). Warrants are generally reviewed by this court *de novo*. Though generally challenged raised for the first time on appeal are not reviewable, an exception exists for claims of manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322-33, 899 P.2d 1251 (1995). The asserted error must actually prejudice the defendant. *Id.* Such is the case here.

The trial court below suppressed most fruits of the warrant, to wit: a video showing D.G.'s mother and Mr. Cain engaged in sexual bondage, and evidence related to marijuana sought by the amended warrant, along with any and all electronic information found. VRP at 101-114. However, the court declined to suppress both photographs related evidence of bondage kits found in Mr. Cain's bedroom and as dominion documents on the theory that the warrant – which had already been found partially invalid – was severable. CP at 114. The trial court erred in so doing.

Under the severability doctrine, “Infirmity of a part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require suppression of anything seized pursuant to the valid parts of the warrant.” *Perrone*, 119 Wn.2d at 556 (quoting *United States v. Fitzgerald*, 725 F.2d 633, 637 (8th Cir. 1983), *cert. denied*, 466 U.S. 950, 80 L. Ed. 2d 538, 104 S. Ct. 2151 (1984)). The doctrine applies when a warrant includes both items supported by probable cause and detailed with particularity, and items not supported by probable cause or not described with particularity, and a meaningful separation can be made by “some logical and reasonable basis.” *Id.* 119 Wn.2d at 560.

The doctrine has five requirements which must be met. First, the warrant must lawfully have authorized entry into the premises. Second, the warrant must include at least one or more particularly described items for which there is probable cause. Third, the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. Fourth, the officers executing the warrant must have found and seized the disputed items while exercising the valid part of the warrant. Finally, the officers must not have conducted a general search. *State v. Maddox*, 116 Wn. App. 796, 807-09, 67 P.3d 1135 (2003). Here, the warrant is not severable, particularly as it fails to meet the third, fourth, and fifth elements of the doctrine.

Third Element

The third requirement – significance relative to the rest of the warrant – is not satisfied. In *State v. Higgs*, the Court of Appeals held that the question of significance turns upon the “primary purpose” of the warrant. 177 Wn. App. 414, 432-33, 311 P.3d 1266 (2013). The court likewise noted that in that case before it, a meaningful consideration was whether the valid portions of the warrant authorized the broad search necessary to find the contraband sought to be suppressed. *Id.*

The valid portions of the warrant supported by probable cause – those portions seeking evidence of Mr. Cain’s dominion of the home, and photographs of the home and bedroom, and bondage materials, were not significant relative to the primary purpose of the warrant which was, in the statement of the affiant to obtain video evidence of the alleged crime, and later, to also obtain evidence of marijuana operations. CP at 31-32. Notably, the final statement in the Affidavit, as well as the unlawful amendments to the front of the warrant, makes this plain:

Since there is a correlation between Cain’s fetish for binding and communicating the same time [of] verbal fantasies during sexual acts between [D.G.] and [her mother], it is also reasonably presumed that Cain may have video or digital media of his sex acts with [D.G.] as he did with [her mother].

CP at 43; *also* CP at 32 (noting that the scope was to be increased for purposes of searching outbuildings for evidence of controlled substance activity).

That information properly sought by the warrant, and which was not excluded by the trial court was created solely for purposes of establishing control over the home and its contents – a fact never in dispute – and photographs of the home as it existed in 2011 – corroboration unnecessary given that D.G. lived in the home for quite some time, and would certainly have knowledge of its interior.

Moreover, the affidavit also made plain that law enforcement was aware at the time of its warrant application that the bondage materials specifically described by D.G. were not in Mr. Cain's possession or control, and so it was seeking merely "corroborative" propensity evidence. CP at 32-43. None of these things were of significant evidentiary value to demonstrate First Degree Rape of a Child, particularly relative to the sought-after video and marijuana evidence. As such, the third prong simply fails, particularly in light of the invalidity of the substantive portion of the warrant that was rightly suppressed by the trial court – namely, the video and marijuana evidence seized as a result of the amended warrant.

Fourth Element

The fourth requirement – that officers found and seized the disputed items while executing the valid part of the warrant – is simply not met here. Rather, the valid part of the warrant³ was executed while the officers executed the invalid portion of the warrant – the search for marijuana and electronic storage devices, which, as discussed above and made plain by the warrant – was the primary purpose.

Fifth Element

The trial court properly suppressed the electronic storage device and marijuana portions of the warrant as too broad. However, the result of the overbreadth was that a general search was permitted. It is manifest that the small size of illicit substances and electronic devices such as thumb drives can be hidden virtually anywhere. *See e.g., Higgs*, 177 Wn. App. At 433 (quoting *State v. Chambers*, 88 Wn. App. 640, 645, 945 P.2d 1172). This is a result even acknowledged by the trial court to some degree. VRP at 114.

In finding the warrant severable, the trial court violated a basic tenant of the doctrine, which is that it must not be applied where doing so renders the particularly requirements meaningless. *Perrone*, 119 Wn.2d at

³ As determined by the trial court.

558. That is precisely what occurred here because the court permitted the State to argue poisoned propensity evidence without a limiting instruction, resulting in prejudice to Mr. Cain. This court should therefore find that the trial court erred in failing to suppress the evidence obtained as a result of the warrant.

When the relevant factors are considered, it is manifest that the warrant was not severable – the time delay between the initial entry and the amendment of the warrant, the overbreadth of the warrant’s language, and the tangential purpose of those items lawfully seized make plain that the overriding nature of the warrant was unlawful, and all fruits therefrom should have been suppressed pursuant to *Perrone* and *Maddox*.

Prejudice

As a result of the trial court’s failure to suppress the fruits of the warrant, Mr. Cain suffered prejudice. The State submitted 30 photographs derived from the search – many of which showed the bondage items found by law enforcement. VRP at 629-705. The State relied heavily upon this evidence in its closing arguments, where again, character and propensity evidence was argued without a limiting instruction:

He finds bondage evidence in the defendant's home, and you have to remember that these people had moved out of his house 13 months prior, but his little fetish, the fetish that this man has for tying up women, was kept around, and we know that because of the pictures that Detective Runge took. We

know that from the handcuffs (indicating). We know that from the handkerchiefs that he uses to bind women during sex (indicating). We know that through the rope, the soft rope that Lisa Madson also described was used on her body (indicating). We know the defendant has this desire to bind women.

VRP at 1091. The improper admission of the documents by the trial court, the State's reliance upon the evidence to demonstrate propensity, and the trial court's failure to give the requested limiting instruction, all worked a great prejudice upon Mr. Cain, and this Court should reverse and remand for a new trial while requiring suppression of that evidence seized as a result of the warrant.

3. Evidence related to bondage was poisoned fruit because the warrant lacked probable cause therefore, and was overbroad in scope.

Even if, *arguendo*, the Court finds that the trial court did not err in suppressing all evidence from the warrant based upon the severability doctrine, the underlying warrant itself was unlawful insofar as it lacked probable cause to permit a search for bondage items, and was overbroad in its language, thereby permitting a general search. Given the evidence adduced at trial and the State's reliance upon it, this Court should find that Mr. Cain suffered prejudice as the result of a constitutional violation, and reverse and remand for a new trial with instructions to suppress fruits of the unlawful warrant.

Probable Cause

Probable cause has long been defined by the U.S. Supreme Court as “reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a party is guilty of the offense with which he is charged. *State v. Emory*, 97 U.S. 642, 645, 24 L.Ed. 1035 (1879) That court has applied that definition in the warrant context, and in so doing, determined that the question is “whether the affiant had reasonable grounds at the time of his affidavit and issuance of the warrant to believe that the law violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant. *Dumbra v. United States*, 268 U.S. 435, 441, 45 S. Ct. 546, 69 L. Ed. 1032 (1925).

Here, the warrant affidavit notes expressly that the two robes and the pillow alleged by D.G. to have been used in the crimes were not only in the possession and control of the mother, but had been either destroyed or left out in the elements – a fact of which the officers were aware when they sought the warrant. CP at 39. “[D.G.] stated that Cain used two of her mother’s robes. She describes the robes as being one with clouds and one

with hearts and polka dots.” CP at 39. When according to the detective seeking the warrant, when he inquired of the mother, she stated that:

she discarded them because she read on the Internet that it was good for a child to not be reminded of things that would bring them to their sexual assaults. She did describe her robes as being blue and white with clouds and white, pink, and red polka dot that was valentine themed. She stated that she still had the brown pillow. I asked her about the brown pillow and she stated that Destiny disclosed to her that Cain would use the pillow to prop her up when he had her in a bent over position. I told her that we would like to take possession of the pillow for the case. I asked her how she came about the information about the pillow and she stated that when she discovered the information on the Internet she asked Destiny about any items in the house that reminded her of Cain and Destiny pointed out the robes and pillow.”

CP at 43. Accordingly, it was not only unreasonable for detectives to believe they would find those items identified by D.G. as used in the offense, the detectives had *actual knowledge* that those items had been in the possession and control of D.G.’s mother, and that the robes had been destroyed. CP at 39, 43. Therefore, there was no probable cause to search for “Rope, scarves, ties *or any other device that can be used for bonds*” because the detectives had no knowledge that any of these things were actually used or in any way associated with D.G. CP at 32 (emphasis supplied). This court should therefore find that the warrant lacked probable cause as the items of bondage, and likewise find prejudice to Mr. Cain for

those reasons discussed above. Such a violation of Mr. Cain's constitutional rights requires reversal and remand for a new trial.

Overbreadth

The warrant language permitting the search for items that could be used as bonds was overbroad, as it permitted the executing officers to search for *anything* that could be used as a bond. To wit: "Rope, scarves, ties *or any other device that can be used for bonds.*" CP at 32 (emphasis supplied). Thus, the search was not limited in scope to Mr. Cain's bedroom or the bathroom where the abuse was alleged to have occurred, and permitted the officers unfettered permission to not only search where they wished within the home, but also to seek and seize any item which the imagination could deem usable as a bond for sexual activity. This is clearly contrary to the particularly requirement of the Fourth Amendment, and as a result, the trial court abused its discretion in failing to suppress the photographs.

In *Perrone*, our Supreme Court struck down a warrant for insufficient particularly where it sought evidence of "child pornography" on the basis that, like obscenity, such depictions are presumptively protected First Amendment speech. *Id.* at 550. The Court went on to state that, in such circumstances, the degree of particularly required is greater than where unprotected materials are sought, and therefore, "scrupulous exactitude" is required. *Id.* at 547-48.

In 2007, our Supreme Court again struck down a warrant, the operative term being “child sex.” *State v. Reep*, 161 Wn.2d 808, 815-817, 167 P.3d 1156 (2007). Citing *Perrone*, the court deemed the term to be even more broad and unambiguous than the term “child pornography,” the undesired result being unbridled discretion on the part of the executing officer to decide what things to seize. *Id.* at 815.

Recently, in 2015, our Supreme Court found warrant language overbroad where it indicated that the crime under investigation was “Possession of Child Pornography RCW 9.68A.070.” *State v. Besola*, 184 Wn.2d 605, 608, 359 P.3d 799 (2015). The warrant indicated that “the following evidence in material to the investigation or prosecution of the above described felony.”:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

Id. at 608-09. Ultimately, several electronic devices were seized, and child pornography found on them. Both defendants were convicted, and their convictions affirmed by the Court of Appeals. The Supreme Court accepted review only as to the warrant and to convict instruction. *Id.* Citing *Perrone*,

the Supreme Court noted that the language was simply overbroad because it provided for the seizure of materials which were legal to possess. *Id.* at 613.

Here, as in *Perrone*, *Reep*, and *Besola*, the language in the warrant related to the bondage items was simply overbroad. In the warrant, law enforcement stated it sought: “Rope, scarves, ties or any other device that can be used for bonds.” CP at 32. This language was simply overbroad because it permits the officer to utilize his or her imagination to determine what could be used for bondage. Moreover, such items could be found virtually anywhere in the household, and so, this language also permits an inappropriate general search, similar to that suppressed by the trial court related to the electronic media storage. Finally, the evidence sought was not of the variety described by D.G. in her interview, upon which law enforcement relied in its affidavit. CP at 31-43. Accordingly, the warrant language was simply overbroad and requires suppression of all photographs related to the bondage equipment. Mr. Cain, as stated previously, was certainly prejudiced by the admission of those documents and the State’s reliance upon it in closing arguments.

4. If, *arguendo*, the State nonetheless prevails on appeal, Mr. Cain request that the Court exercise its discretion and decline to award costs to the State.

RCW 10.73.160 and RAP Title 14 provide for the recoupment of appellate costs from a convicted defendant upon request by the State. However, this court has discretion to waive costs if it determines that the award will work a hardship upon the defendant or his or her immediate family. RCW 10.73.160(1); RAP Title 14.

This court presumes a defendant's indigency throughout the review or his or her appeal, unless the court finds that a party's financial condition has improved so that he or she is no longer indigent. RAP 15.2(e). However, that need not be the case once review is completed, and therefore, this Court has enacted a general rule requiring information confirming the ongoing indigency of the appellant, consistent with the Supreme Court's holding in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

In this matter, the trial court found Mr. Cain to be indigent, and signed an order permitting his appellate costs to be forwarded at public expense. Sentencing VRP at 29; CP at 595-599. However, as his Report as to Continued Indigency will demonstrate,⁴ he is not only unable to repay the obligation, but is likely to be unable to repay the obligation in the foreseeable future given his substantial debt obligations. As such, this Court should find that Mr. Cain's indigency is ongoing, and exercise its

⁴ To be filed shortly after this brief.

equitable discretion to decline the award of costs to the State should it substantially prevail on appeal.

CONCLUSION

The trial court erred in declining to give the jury a limiting instruction regarding the ER 404(b) evidence adduced at trial, particularly in light of the heavy emphasis placed upon it, particularly by the State. 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 propensity evidence to be admitted at trial, again without any limiting instruction. Even if the trial court did not err in finding the warrant severable, the portion of that warrant pertaining to bondage certainly lacked probable cause while being overbroad in nature. Either ground is sufficient to find the admission of the accompanying photographs to be prejudicial in light of the State's reliance thereon.

Mr. Cain was denied the right to a fair trial, and this Court should reverse and remand for a new trial.

Respectfully submitted this 6th day of February, 2017 by:

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CERTIFICATE OF SERVICE

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

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