

No. 34417-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

RICHARD ELLIOTT CAIN,

Appellant

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

NO. 11-1-00627-5

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Response to Assignment of Error 1 (“The trial court erred in refusing to provide the jury with a limiting instruction” Br. of Appellant at 2): The defendant failed to timely object to the trial court’s decision not to give this instruction. The trial court was correct in not giving the instruction.

- B. Response to Assignment of Error 2 (“The trial court erred in failing to suppress photographs of bondage evidence created as a result of the [search] warrant” Br. of Appellant at 16): The defendant did not seek to suppress evidence of bondage. The search warrant was valid for bondage evidence. Any error is harmless because the defendant, victim, and victim’s mother all testified that the defendant liked bondage.

- C. Response to 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” Br. of Appellant at 2): There was probable cause for a search for bondage evidence; the warrant was not overbroad. In any event, the bondage evidence was testified to by the victim, victim’s mother and defendant; if the search warrant was invalid, the

evidence bondage practices obtained by the search warrant was harmless.

II. STATEMENT OF FACTS

A. Facts relating to substance of the crime

1. The defendant had access to D.M.-G.

Lisa Madson began dating the defendant in 2004. RP¹ at 338. She had two children by a previous relationship, D.M.-G., whose date of birth is August 10, 1999, and Tristan, who was 2 and ½ years younger. RP at 335, 338. Ms. Madson and the defendant had a child together, Ivy, who was born on March 27, 2009. RP at 341.

Ms. Madson broke up with the defendant in 2010. RP at 349. However, the defendant continued to have contact with her and her children, including a period in March 2011 when Ms. Madson took a trip to vacation in Las Vegas. RP at 375-76.

During their time together, Ms. Madson worked jobs at night, including working at Bern's Tavern in Prosser and a VFW bar. RP at 337, 354. She later also worked at a Starbucks and a day care. RP at 357-58. She also started going to college. RP at 359. She later returned to her VFW job. RP at 361. Because of her work, the defendant admitted he

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings transcribed by Renee Munoz, labeled Volumes I through VI.

spent a significant amount of time alone with Ms. Madson's children. RP at 997.

Tristan noted that there were times when D.M.-G. and the defendant would be in the defendant's bedroom, with the door locked, leaving him alone in the living room. RP at 715. Joanne Carow, D.M.-G.'s maternal grandmother, also testified about times when she walked into the residence to find D.M.-G. and the defendant snuggled together on a couch with D.M.-G. not wearing a shirt and when they were asleep, spooning, on the living room floor. RP at 838-39, 842-43.

2. D.M.-G. states the defendant had sexual contact with her.

In June 2011, Ms. Madson questioned her children about whether anyone had touched them inappropriately. RP at 405. D.M.-G. stated that she had been touched inappropriately by the defendant. RP at 405.

D.M.-G. testified that the sexual contact began when the defendant came out of his room, picked her up, took her into his room, locked the door, and undressed her and himself. RP at 735-36. She further testified that he rubbed his private part on her back side (back side meaning butt cheeks). RP at 737-38. Thereafter, the sexual contact continued and included his attempting to put his penis in her, putting his mouth on her

private area, and was ongoing, including the period her mother was vacationing in Las Vegas. RP at 745-46, 762.

3. D.M.-G. describes sex acts—bondage—which the defendant practiced with Ms. Madson.

The defendant frequently tied up Ms. Madson during sex. RP at 382. To Ms. Madson, D.M.-G.'s description of the defendant's sexual acts sounded exactly what he had done with her. RP at 411. D.M.-G. testified that the defendant would tie her hands with the ties from her mother's robe and then touch her private area. RP at 751.

The defendant admitted this:

Q: Did you hear [D.M.-G.] describe various kinds of sex acts?

A: Yes, sir.

Q; Have you engaged in sex acts like that with anybody?

A: Yes, sir. Her mother.

RP at 915.

He further testified that he likes to bind women during sex “[i]f that’s what they desire” (RP at 999); that he had lots of things to bind women with (RP at 1005); and that even after breaking up with Ms. Madson, he still had a bag (exhibit 34), referred to as a sex kit, at his residence for use when having sex with women (RP at 1006). Exhibit 34 was a bag with rope inside. RP at 640-41.

B. Facts relating to issues raised by defendant

1. Failure to give the proposed limiting instruction regarding evidence the defendant acted violently.

The defendant requested the court exclude evidence of his mean, intimidating, aggressive, or violent acts unless it was witnessed by D.M.-G. CP 363-65; RP at 226-28. The State sought this evidence to show why D.M.-G. would be fearful of reporting the sexual abuse and requested that both D.M.-G. and Tristan be allowed to testify if the acts occurred to them at the same time. RP at 226-28. The defendant agreed. RP at 226-28.

The defendant proposed a jury instruction stating that “Mr. Cain committed acts of physical and emotional abuse. That testimony may be considered by you only for the purpose of determining the credibility of the State’s witnesses” CP 385; RP at 1036-37. The prosecutor requested time to review the instruction. RP at 1038.

From there, it appears the defendant lost track of the instruction: In the same session, the court reminded the parties that there were two instructions to work on, the concluding instruction and the *Petrich* instruction, possibly forgetting about the proposed limiting instruction. RP at 1054. The defendant replied, “Sounds good.” RP at 1054. The court gave the defendant and prosecutor copies of the final set of proposed instructions and asked for exceptions and requests. RP at 1066. The

defendant did not object to the failure to give the proposed instruction. RP at 1067-68.

C. Facts relating to search warrant

While the State introduced photos of various ropes, bindings, and handcuffs found at the defendant's residence, the defendant, Ms. Madson, and D.M.-G. independently testified that the defendant practiced bondage. RP at 642-43; *see supra* § II.A.2: "D.M.-G. describes sex acts—bondage—which the defendant practiced with Ms. Madson."

The issues regarding the validity of the search warrant will be addressed in the argument section.

III. ARGUMENT

A. Response to Argument No. 1 ("The trial court erred in refusing to provide the defense limiting instruction regarding prior acts" Br. of Appellant at 7): The defendant failed to preserve his objection; the proposed instruction was incorrect and should not have been given, and it had no effect on the trial.

1. It is at least arguable that the defendant failed to object at trial and should not be allowed to raise the issue on appeal.

CrR 6.15(c) states that the court must supply counsel with proposed numbered jury instructions and afford counsel an opportunity to object to the refusal to give a requested instruction. A party must state the reasons for an objection, including the particular part of the instruction to be given or refused. Here, the defendant failed to object when afforded the

opportunity to the trial court's omission of the proposed instruction. This is necessary under CrR 6.15(c). *State v. Sublett*, 156 Wn. App. 160, 190, 231 P.3d 231 (2010).

Cases interpreting CR 51(f) have held that a party must sufficiently apprise the court of the basis for the objection to the court's refusal to give an instruction. *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993). Here, the defendant did not object until, at the trial court's invitation, the court was in the middle of reading the instructions to the jury.

2. The defendant has mischaracterized the evidence as ER 404(b). It is actually admissible under ER 402. ER 105 is the relevant rule on limiting instructions.

The proposed instruction refers to "acts of physical and emotional abuse" which can be considered to determine the "credibility of the State's witnesses." CP 385. However, D.M.-G. testified the defendant had guns, was strong, and spanked and harshly disciplined her and Tristan. RP at 730, 829. These attributes or behaviors are not the "crimes, wrongs, or acts" contemplated by ER 404(b).

A victim's fear is admissible to explain a delay in reporting a crime. *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). Thus, in *Wilson* the defendant's physical assaults against the victim were admissible as ER 404(b) evidence to show why the victim did not report

sexual abuse. The evidence herein explains why D.M.-G. was afraid of the defendant, but is not in itself prejudicial. Why would an Eastern Washington jury think less of the defendant if he owned guns and worked out?

Where evidence is truly limited, an instruction informing the jury is appropriate. For example, it is appropriate to inform a jury that prior inconsistent statements are to be considered only in determining the credibility of the witness. *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1986).

However, for general evidence there is no need to explain the relevance of evidence for jurors. In this case, there was no need to instruct jurors that the testimony that Ms. Madson worked in bars should only be considered to determine if the defendant had access to D.M.-G., or that the testimony that the defendant liked bondage would be admissible to bolster D.M.-G.'s testimony.

Therefore, the request for a limiting instruction should be analyzed under ER 105. The guidelines for limiting instructions on ER 404(b) evidence set forth in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), are not applicable. Specifically, the trial court was under no duty to correctly instruct the jury, *Gresham*, 173 Wn.2d at 424-25, since the evidence in this case was not admitted under ER 404.

3. The proposed instruction was inaccurate and confusing; it should not have been given.

The proposed instruction referred to “certain evidence . . . that Mr. Cain committed acts of physical and emotional abuse.” CP 385. Actually, he was the only individual testifying about physical abuse: he, and he alone, testified that Ms. Madson would beat her children. RP at 940, 942, 946. So, what does the proposed instruction refer to? His practice of bondage? His ownership of guns? His spanking of Tristan and D.M.-G.?

If the first sentence was not confusing enough, the second sentence did not help. “The testimony may be considered by you only for the purpose of determining the *credibility* of the State’s *witnesses*.” CP 385 (emphasis added). The plural “witnesses” is incorrect; D.M.-G. was the only witness affected by the referred-to evidence. CP 385. However, referring to witnesses (plural) could lead the jury to think that the bondage evidence should be considered to determine D.M.-G.’s and Ms. Madson’s credibility.

Likewise, the evidence that D.M.-G. was in fear of the defendant and the basis for that fear was the reason it was admitted. The proposed instruction should have stated that the purpose of the evidence “was to

explain a delay in reporting the alleged crime” or “to determine if D.M.-G. was in fear of the defendant.”

The trial court had no duty under ER 105 to try to clean up the defendant’s proposed instruction. The court could properly refuse to give an incorrect instruction. *Gresham*, 173 Wn.2d at 424.

4. There was no harm in failing to give the instruction.

Failure to give an ER 404(b) limiting instruction 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. For several reasons, any error in failing to give the instruction meets this definition.

First, the deputy prosecutor told the jury in closing argument that the evidence was for the purpose of proving D.M.-G. was afraid of the defendant, causing her not to report the sexual abuse. “Why did she not tell? . . . She was scared of him. Do you have any doubt that she was scared of him? . . . He had guns. . . . He kept food from her. He would hit her. . . . And he was a black belt in Karate.” RP at 1106.

Second, any reasonable person would understand that a child would be afraid of an adult who was sexually abusing her. A jury did not

need to be told that there may be reasons for a child to fear reporting sexual abuse.

Third, the jury instructions as a whole properly identified the issues. The defendant was found guilty based on:

- the believability of D.M.-G.,
 - his practice of bondage on both D.M.-G. and her mother, and
 - the observations in hindsight of Tristan, Joanne Carow (D.M.-G.'s grandmother), and Ms. Madson concerning the defendant's cuddling and spooning with D.M.-G.
5. **The defendant's citation to *State v. Gresham* and *State v. Scherner* is not applicable.**

State v. Scherner, the companion case with *Gresham*, dealt with a limiting instruction regarding evidence that the defendant had committed sex offenses against four girls in the past. 173 Wn.2d at 415-16. The Court held that this evidence was admissible under ER 404(b) to prove a common scheme or plan. *Id.* at 416. The Court further held that a limiting instruction should have been given. *Id.* at 424.

However, the failure to give the instruction was harmless because the evidence of guilt was sufficient. In *Scherner*, the evidence in

question—the defendant’s molestation of four girls on prior occasions—was much more important than the evidence in question here.

In *Gresham*, the Court did not get to the question of the failure to give a limiting instruction was harmless. The Court held that the evidence of prior sexual offenses should not have been admitted in Mr. Gresham’s case. *Id.* at 429-30.

B. Response to Arguments 2 and 3 (“The trial court erred in failing to suppress photographs of bondage evidence . . . because the warrant was not severable”; and “Evidence related to bondage was poisoned fruit because the warrant lacked probable cause therefore, and was overbroad in scope.” Br. of Appellant at 16, 23):

1. Introduction of the photographs showing bondage equipment was harmless since D.M.-G., Ms. Madson, and the defendant independently testified about the defendant’s interest in bondage.

The defendant said he engaged in bondage. Ms. Madson said he engaged in bondage. D.M.-G. said he engaged in bondage. If a search warrant had never been executed, they would have testified. The police found handcuffs and ropes, which the defendant used to tie up sex partners. The photographs of those items merely confirmed D.M.-G.’s and Ms. Madson’s testimony. The defendant’s testimony resolved any doubt: the defendant liked bondage.

Photos of the defendant's bondage gadgets did nothing to add to the testimony of the three individuals. The jury knew he engaged in bondage without the photos. The defendant was not prejudiced by the search warrant.

2. Nevertheless, the trial court correctly allowed introduction of the bondage items.

a. There is a strong presumption for the validity of a search warrant.

A search warrant is entitled to a presumption of validity. The decision to issue a search warrant is highly discretionary. Generally, doubts regarding probable cause are resolved in favor of the validity of the search warrant. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

b. There was probable cause to issue the warrant for bondage items.

The search warrant affidavit states both mother and daughter state the defendant bound their hands and feet during sex. CP 39, 42. This provides probable cause that bondage devices would be at the defendant's residence. The issuing magistrate did not abuse his discretion in signing the warrant.

The defendant argues that the specific devices used to bind D.M.-G. had been destroyed. True, but evidence that the defendant liked bondage and had devices to bind sex partners could be very important.

Indeed, the police would have been negligent in not attempting to verify this claim. The defendant would have complained.

a. The warrant for bondage devices was not overbroad and could be severed from the invalid portions of the warrant.

1) Overbroad

A description of the items sought in a search warrant is valid if it is as specific as the circumstances and the nature of the activity under investigation permits. The use of a generic term or a general description is not per se a violation of the particularity requirement of the 4th Amendment of the United States Constitution. *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992).

Here, the defendant argues that the italicized phrase, “Rope, scarves, ties *or any other device that can be used for bonds*” is overbroad. CP 32. However, the word “device” is important. A “device” used for bondage would not allow for seizure of any household item, but would refer to specific bondage items, including the two types of handcuffs found at the defendant’s residence. The description was as specific as the circumstances allowed.

2) Severance

The trial court correctly concluded that the search for bondage items can be severed from the invalid parts of the warrant. RP at 115.

The State agrees with the defendant's citations to *Perrone* and *Maddox* as providing the test for severance.

- “[T]he warrant must lawfully have authorized entry into the premises.” *State v. Maddox*, 116 Wn. App. 796, 807-08, 67 P.3d 1135 (2003).

It did so. The defendant did not contest this factor.

- “[T]he warrant must include one or more particularly described items for which there is probable cause.” *Id.*

Again, the defendant did not contest this factor.

- “[T]he part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole.” *Id.*

The warrant allowed for the search of items in four categories: 1) photos of the residence and bedroom; 2) bondage devices; 3) video of child pornography; and 4) dominion evidence. CP 32. Categories 1 and 4 are for the basic investigation. The police did not know if there would be any videos of child pornography, particularly between the defendant and D.M.-G. But, the bondage evidence was highly significant. The police had information from Ms. Madson and D.M.-G. that the defendant liked bondage. It would be important to determine if they were truthful about that.

- *“[T]he searching officers must have found and seized the disputed items while executing the valid part of the warrant” Maddox, 116 Wn. App. at 808.*

Det. Runge found a scarf and handkerchiefs that were wound in a way to be used for binding under the bed in the master bedroom. RP at 91-92. He also found a “sex kit” in the top shelf of the master bedroom closet that had handcuffs, rope, Velcro straps, and more handkerchiefs and scarves. RP at 92. The trial court found that this search was not part of the search for marijuana, but was located in places where bondage devices might be found. RP at 114-15.

- *“[T]he officers must not have conducted a general search, i.e., a search in which they ‘flagrantly disregarded’ the warrant’s scope.” Id.*

There is no evidence that the police rummaged through the defendant’s residence looking for any incriminating evidence.

The trial court correctly concluded that the bondage evidence found at the defendant’s house would be admissible.

C. The State will not seek appellate costs in this matter.

Because the trial court did not impose discretionary costs, the State will not request this Court to do so.

IV. CONCLUSION

The conviction should be affirmed. Regarding the proposed instruction limiting use of certain evidence, the defendant did not properly object to the failure to give this instruction. Further, the instruction as written was confusing and inaccurate. The instruction was on a minor point and had no effect on the verdict.

The defendant's other argument regarding the search warrant also should not result in a reversal of the conviction. The State introduced some photos showing the defendant had bondage devices at his residence. The defendant, Ms. Madson, and the victim all testified that he had bondage equipment. The trial court was correct in ruling that the evidence was admissible, but the photos had little to no influence on the verdict.

RESPECTFULLY SUBMITTED this 15th day of June, 2017.

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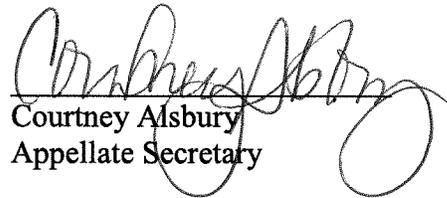
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 15, 2017.


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