

NO. 46916-2--II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID R. BINGMAN,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the trial court properly admit the Appellant's internet search history as 404(b) evidence?
2. If the trial court improperly admitted the internet search history, was it harmless error?

II. SHORT ANSWERS

1. Yes, the trial court properly admitted the Appellant's internet search history as evidence of intent, to rebut a claim of accident or mistake, and as lustful disposition. In doing so, the trial court properly weighed the probative value of the evidence against its prejudicial effect.
2. Yes, any error in admitting the internet search history was harmless because the outcome of the trial would not have been different.

III. FACTS

On July 11, 2013, the Cowlitz County Prosecutor's Office charged David Bingman, the Appellant, with five counts of Child Molestation in the Second Degree DV and one count of Unlawful Imprisonment DV. CP 1. The victim in counts I through IV was the Appellant's step-daughter N.L.¹ The victim in counts V and VI was the Appellant's biological daughter N.B.²

N.L. testified at trial that between July 2011 and July 2012, the Appellant on one occasion put his hand inside of her shirt and grabbed her

¹ N.L. was 14 years old at the time of trial in August 2014. Due to her minority age, the State will refrain from using her name.

² N.B. was 15 years old at the time of trial in August 2014. Due to her minority age, the State will refrain from using her name.

breast. 1RP at 141-42.³ N.L. also described a second incident where the Appellant placed his hands down the back of her pants and grabbed her buttocks. 1RP at 147. N.L. also described a third incident where the Appellant cornered her in the bathroom and placed his hands on her breasts and in her pubic hair. 1RP at 154-55. N.B. testified that between July 2011 and July 2012, the Appellant on one occasion grabbed her breast while they were inside of their home. 1RP at 98. N.B. also testified about a second incident where the Appellant placed his hands inside of her shirt and grabbed her breast. 1RP at 106. N.B. also described an incident where the Appellant attempted to see her naked while she was taking a shower. 1RP at 110-12.

Nicole Bingman, the Appellant's wife and the victims' biological mother, testified that after N.L. and N.B. had disclosed the Appellant's actions, she observed his internet search history. 1RP at 128. She described the searches as "pornographic sites that were not the normal pornographic sites he looked at." 1RP at 128. Ms. Bingman took photos of the internet search history to preserve them for law enforcement. 1RP at 128.

Longview Police Officer Chris Blanchard responded to the report that the Appellant had been abusing N.L. and N.B. 1RP at 180. After

³ The record on appeal includes two volumes of verbatim reports that are not continuously numbered. The State will refer to August 19-20, 2014 report as "1RP" and the August 21, 2014/November 5, 2014 report as "2RP".

interview the victims, Officer Blanchard went to contact the Appellant. Upon arriving at the house, Officer Blanchard located the Appellant attempting to hide from him. 1RP at 182-83. Officer Blanchard interviewed the Appellant about N.L.'s allegations against him. The Appellant admitted to Officer Blanchard that he had "likely reached under her waistband to give her a wedgie." 1RP at 184. Officer Blanchard also testified that the Appellant "later said that me might have reached under her clothes, but could not specifically remember if he had or not." 1RP at 185. The Appellant also told Officer Blanchard that he "may have reached under her shirt." 1RP at 185.

Longview Police Department Investigator Olga Lozano also interviewed the Appellant about N.L.'s allegations. The Appellant told Investigator Lozano that if he had touched N.L.'s breasts, "it was an accident." 1RP at 195. In reference to the bathroom incident, the Appellant told Investigator Lozano that he unintentionally put his hands on N.L.'s breasts. 1RP at 198. Investigator Lozano questioned the Appellant about his computer and his internet search history. The Appellant stated "he knew one day this would come back and bite him." 1RP at 198-99.

Washington State Patrol Detective Jason Keays conducted a digital forensic analysis of the Appellant's computer. 1RP at 209. Detective Keays was able to locate numerous internet searches and internet artifacts relating

to incest, child pornography, child rape, father-and-child incest or rape. 1RP at 211-12. Detective Keays was able to differentiate actual searches for these topics from pop-up advertisements. 1RP at 212-13.

At trial, the State sought to admit the internet search history as evidence of lustful disposition, intent and to rebut a claim of accident or mistake. 1RP at 57-60; 64-66; CP 41. The trial court conducted a 404(b) analysis and found that the misconduct had occurred, the evidence was to show intent and to satisfy the sexual gratification element of the charges. 1RP at 67-68. The trial court also held that the internet search history was evidence of lustful disposition towards N.L. and N.B – “the allegation here are very specifically the daughter and step-daughter.” 1RP at 68. The trial court determined that the internet search history must be redacted prior to be admitted into evidence and that only the searches related to incest and father/daughter were admissible. 1RP at 68.

The Appellant’s trial counsel requested a limiting instruction in regards to the internet search history. 1RP at 174. The trial court agreed that a limiting instruction was needed, but noted that the Appellant’s counsel’s proposed instruction failed to include the intent and rebut a claim of accident or mistake factors. 1RP at 176. The Appellant’s counsel drafted a new limiting instruction that included the additional factors. CP 7 at 24.

The jury was instructed as to the Appellant's counsel's requested limiting instruction. 2RP at 26-27.

The jury found the Appellant guilty of three counts of Child Molestation in the Second Degree and two counts of Assault in the Fourth Degree. 2RP 86-89. The jury, by way of special verdicts, found that the Appellant was a household/family member of N.L. and N.B. at the time the offenses occurred. CP 61, 62, 64, and 68. The Appellant was sentenced within the standard range. 2RP at 99-100. The Appellant timely filed this appeal. CP 79.

IV. ARGUMENTS

1. **THE INTERNET SEARCH HISTORY DOCUMENTS WERE PROPERLY ADMITTED AS 404(B) EVIDENCE OF INTENT AND TO REBUT ANY CLAIM OF MISTAKE OR ACCIDENT.**

In general, evidence of other crimes, wrongs, or acts is inadmissible to show action in conformity therewith. ER 404(b) (2010), *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). The purpose of Evidence Rule 404(b) is to prohibit admission of evidence designed simply to prove bad character, it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Such evidence may be admissible to show proof of motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident. ER 404(b). They are also admissible to show lustful disposition toward the victim. *State v. Ray*, 116 Wn.2d 531, 546-48, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wn.2d 131, 133, 134, 667 P.2d 68 (1983); *State v. Medcalf*, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990).

In general to admit evidence of other acts, the trial court must engage in the following four steps:

- (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charge[d], and (4) weigh the probative value against the prejudicial effect.

State v. Thach, 126 Wn. App. 297, 310, 106 P.3d 782, 789 (2005), quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In considering the fourth step, a court must not admit the evidence if its relevance is outweighed by the prejudice to the defendant. *See State v. Terry*, 10 Wn. App. 874, 520 P.2d 1297 (1974) *overruled on other grounds State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007). This amounts to a Rule 403 balancing test. *See State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005) *overruled on other grounds State v. Womac*, 157 Wn.2d 1021, 142 P.3d 171 (2006). A trial court's decision to admit ER 404(b) evidence is reviewed for an

abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.*

Here, the Appellant narrowly argues that the trial court's admission of his internet search history was solely based upon a finding of the lustful disposition exception. This argument ignores the full record. The State's argument in support of its motion in limine clearly stated that this evidence would also go "to rebut any claim of accident or mistake and also to show the intent of the defendant when he was committing these allegations against the two victims." 1RP at 58.

The State pointed out to the trial court that two of its witnesses, Officer Blanchard and Investigator Lozano, would testify that the Appellant admitted to touching his daughters, but that it was not an intentional act. 1RP at 59, 65. The State also argued that the internet history, specifically the father/daughter incest/sex videos, clearly established his intent when he placed his hands down his daughters' pants and up their shirts. 1RP at 60, 65. The trial court, although somewhat vaguely, does rule that the evidence was admissible to show intent: "that the evidence being sought to be introduced and based on that argument and the motions as well as the evidence one through five that it can be shown for the intent and the sexual gratification as an element." 1RP 67-68.

Additionally, the understanding of the State, the Appellant, and the trial court was that the evidence was also admissible to show intent and to rebut a claim of accident and mistake. This is evident based upon a review of the full record. The Appellant's trial counsel proposed a limiting instruction. The State pointed out to the court that the proposed limiting instruction failed to include the two factors of intent and rebut a claim of accident and mistake. IRP at 174. The trial court ruled that the proposed limiting instruction did not accurately state the court's ruling and needed to be modified to properly reflect what the court had actually held. IRP at 175. The Appellant's counsel clarified that the missing factors were intent and absence of mistake. IRP at 174. The trial court instructed the Appellant's counsel to include those additional factors prior to the limiting instruction being included in the final packet of jury instructions. IRP at 174.

The limiting instruction, as modified by the Appellant's counsel, read as follows:

Evidence has been introduced regarding the contents of a computer seized from the defendant's home. That evidence may only be considered to determine if the defendant has a lustful disposition towards N.B. or N.L., to rebut any claim of accident or mistake, and to determine the defendant's intent and for no other purpose.

CP 7 at 124. Thus, it is clear from the record that the trial court did in fact find that the evidence was admissible to show intent and to rebut any claim of accident or mistake. As such, the internet search history was properly admitted and the Appellant's conviction must be affirmed.

2. THE TRIAL COURT PROPERLY ADMITTED THE INTERNET SEARCH HISTORY AS EVIDENCE OF LUSTFUL DISPOSITION.

Evidence is admissible for the purpose of showing lustful disposition towards the victim, which in turns makes it more probable that the defendant committed the offense. *Ferguson*, 100 Wn.2d at 133-34; *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953). The present matter is distinguishable from the case law cited by the Appellant. The *Medcalf* court's ruling was based upon a lack of connection between the victim and the defendant's pornographic movies, due to the fact that the victim had never observed these specific videos let alone any videos with the defendant. In *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991), the court allowed the lustful disposition evidence in because there had been three previous occasions of sexual contact between the defendant and the victim. Thus, in *Ray*, there is actual prior sexual contact, while in *Medcalf*, there is no connection between the victim and the videos.

It is the State's contention that this matter presents a unique set of facts clearly distinguishable from the above-cited case law. N.B. testified

that the Appellant is her biological father. N.L. testified that the Appellant is her step-father. Both victims resided in the same home as the Appellant and acknowledged him as one of their parental figures. The internet search history that was admitted into evidence specifically referenced two things: father/daughter sex and incest.

The Appellant was directly searching for incest and father/daughter pornography. The Appellant molested his daughter and his step-daughter. Thus, it is logical to conclude that as he was seeking out videos and images of incest and father/daughter sex, he was beginning to act out these fantasies upon his own daughters. This is the connection necessary for lustful disposition. The evidence presented was not simply “pornographic websites” or “young girls” etc. Rather, it was directly focused on the facts of this case – father/daughter sexual conduct and incest. Therefore, there is an actual connection between the evidence and the victims, the court properly admitted the internet search history as evidence of lustful disposition.

3. THE TRIAL COURT PROPERLY WEIGHED INTERNET SEARCH HISTORY'S PROBATIVE VALUE AGAINST ITS PREJUDICIAL EFFECT.

As stated above, before ER 404(b) evidence can be admitted, the trial court must weigh the probative value against the prejudicial effect. A trial court is vested with broad discretion in administering ER 403, and its judgment in the balancing process should be overturned only for manifest abuse of discretion. *State v. Kendrick*, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987). An abuse of discretion exists when the discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Price*, 126 Wn. App. 617, 635, 109 P.3d 27 (2005). There is no set formula for what the trial court must consider in the balancing process. *Kendrick*, 47 Wn. App. at 628. "Where the record reflects that the trial court has adopted the express arguments of one of the parties as to the relative weights of probative value and prejudice, there is...no error." *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (citing *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)).

Here, the trial court heard the arguments of both counsel and observed the internet search history the State sought to admit. The trial court had already determined that this evidence was admissible to show intent, rebut a claim of accident or mistake, and lustful disposition towards

the victims. The trial court also recognized that much of the information in the internet search history was either irrelevant, inadmissible, or prejudicial and ordered that the evidence be redacted. 1RP at 68-69. For example, the trial court determined that searches for anxiety medication and Asian school girls were not admissible. 1RP at 68.

The Appellant's argument does not address what the trial court was asked to determine. The Appellant focuses in on what the actual pornographic images or videos contained. None of that was presented to the jury. The evidence that was admitted was based upon the fact that the Appellant was proactively searching for incest and father/daughter sex on the internet and then acting upon what he was seeking out. The trial court expressly adopted the State's argument; therefore, there was no error in admitting the internet search history.

4. ANY ERROR IN ADMITTING THE INTERNET SEARCH HISTORY WAS HARMLESS.

Evidentiary errors under ER 404 are not of constitutional magnitude. *Jackson*, 102 Wn. 2d at 695. Therefore, the court must determine if the outcome of the trial would have been different if not for the error. *Id.* In the present matter, the outcome would not have been different. Both N.B. and N.L. testified that the Appellant molested them multiple times. Nothing about their testimony was discredited or impeached. The victims both

described a pattern of behavior similar in nature: tickle wars in which the Appellant would grab their breasts, being isolated in the kitchen and the Appellant would grab their breasts, and being isolated in the bathroom where the Appellant would act in a more aggressive manner. No motive for the victims to fabricate these events was ever established. Additionally, as detailed by Officer Blanchard and Investigator Lozano, the Appellant essentially admitted to this conduct. He did, however, attempt to minimize his actions by claiming that any touching was done accidentally.

Therefore, even if the court had not admitted the internet search history, there would have been no change in the verdict. The jury was presented with the direct testimony from the victims. The victims described similar conduct and behavior by the Appellant against them. The Appellant admitted to the conduct. The victims were not effectively impeached or contradicted, nor was any motive for fabrication ever established. Thus, any error in admitting the evidence was harmless.

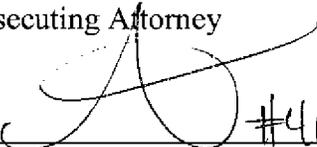
V. CONCLUSION

Appellant's alleged errors are without basis in law or fact. The internet search history was admissible to show intent, rebut a claim of accident or mistake, and lustful disposition. The trial court properly weighed the probative value of the internet search history against its prejudicial effect. In the alternative, if the admission of the internet search

history was improper, it was harmless error. As these claims are without merit, the Court should dismiss this appeal.

Respectfully submitted this 4th day of January, 2016.

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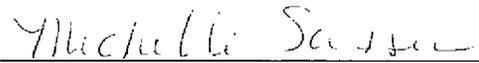
CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 14th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 04, 2016 - 2:16 PM

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