IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARREN PATRICK BARKER, Appellant.	)	No. 69326-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 28, 2014

APPELWICK, J. — Barker appeals his conviction for second degree child molestation, arguing that the introduction of pornography evidence deprived him of a fair trial. Because he fails to establish reversible error, we affirm the conviction. Because the trial court erroneously imposed a community custody condition prohibiting conduct not directly related to Barker's crime, we remand to the trial court to strike the challenged condition.

FACTS

Michelle Hutcheson married Darren Barker when C., her daughter from a previous marriage, was four years old. Hutcheson and Barker had three children together. In March 2007, Hutcheson took their youngest child to Texas for a week, leaving Barker at their home in Darrington, Washington, to care for the other children, including C., who was then 13 years old. One night, when Hutcheson called home, no one answered. After she had called several times, Barker finally answered. He told Hutcheson that he had been talking to C. about sex and had had her take off her clothes and look at her private parts with a hand mirror. Hutcheson was angry and insisted on speaking to C., who did not provide any additional details of the incident.

In April 2007, Barker was fired from his job in information technology at a hospital for viewing pornography on his work computer. His employer referred the matter to Child Protective Services (CPS), alleging that he viewed child pornography. An investigation by Edmonds police revealed that the pornography at issue involved only adults. But, the resulting CPS investigation into the family led to Barker moving out of the house as part of a safety plan. Barker moved back in six months later.

In December 2009, Hutcheson received a disturbing anonymous e-mail referring to sexual matters about C. Hutcheson searched the computer she shared with Barker and learned that he had recently created a new e-mail account with the same service from which the anonymous message originated. When Hutcheson confronted C. about the e-mail, C. told her mother for the first time that Barker had touched her private parts during the March 2007 incident. Hutcheson made Barker move out of the house and called the police. The State charged Barker with second degree child molestation. Prior to trial, the trial court granted Barker's motion to exclude any references to the fact that Barker had been fired from his job for accessing pornography on his work computer.

At trial, C. testified that in March 2007, Barker made her try on clothes in front of him. When she tried to keep herself covered, Barker told her that she was too self-conscious about her body and took her into his bedroom and locked the door. Barker told her he wanted to talk to her about sex and told her to take off her shirt and bra. When she refused, he "forcefully" took off her shirt and bra. C. testified, "[S]o I was covering myself, and he made me touch my breasts, and

then he touched my breasts." While C. cried loudly, Barker "forcefully" took off her jeans and pulled her underwear down to her ankles. He positioned her on the bed with her knees apart and gave her a mirror to hold between her legs so she could see while "he would touch a part, and explain what it was and what it was for." As C. continued crying, Barker touched her vaginal area in "about five" places for "five to fifteen seconds" while he explained each part. C. testified that the telephone was ringing repeatedly throughout these events until Barker told her to get dressed and he answered the telephone.

C. testified that she did not initially report the touching because she was afraid of Barker. C. explained that she decided to tell her mother the details in December 2009 because she was having nightmares that it would happen again, Barker was giving her gifts and making "weird" comments, and she was worried for her safety and that of her siblings. She also testified that when she was discussing underwear with her mother, Barker "came out of his room to listen and got an erection while we were having this conversation."

Hutcheson testified that Barker admitted to her over the phone immediately after the March 2007 incident that "he had screwed up" and had "gone overboard." Hutcheson described her efforts to speak with C. about the incident and testified that C. "said everything was fine," "but she seemed very scared." Hutcheson also testified that shortly before December 2009, she was telling C. that "thong underwear" was not "appropriate attire for a young lady," when Barker came into the room with an erection and appeared to be listening to their conversation. Hutcheson also testified that Barker's behavior toward C.

changed in 2009 in that he started to secretly buy her gifts and spoke of C. as "attractive" in a way that Hutcheson said, "[J]ust made me sick to my stomach." Hutcheson also testified that she found C.'s underwear, with white residue that she believed to be semen, in Barker's drawer and in the bathroom, leading her to believe that Barker "was masturbating into my daughter's underwear."

Before presenting the testimony of Detective Ben Hagglund, who interviewed Barker in April 2007, the prosecutor advised the court and Barker that she intended to present evidence that Barker admitted to viewing incest-related pornography. The prosecutor argued that the evidence was relevant to prove Barker touched C. for the purpose of sexual gratification. She argued, "And he is in a father role, basically, engaging in incest, and when he is combining incest pornography with that, it's relevant to show sexual gratification. He is interested in incest, and he's carrying it out." The trial court determined that the probative value outweighed the prejudice, stating, "In this case it's relevant. We're talking about incest sites visited on a computer, and the nature of the charge involves an allegation of an attempted incestual relationship, so it's relevant there."

Detective Hagglund testified that Barker admitted that he had C. take off her clothes and examine herself but denied touching her. According to Detective Hagglund, Barker admitted that he was "mad" when C. was uncomfortable changing in front of her siblings, but that he made "a mistake" and was "naïve." The prosecutor then asked the detective whether he had "a conversation with [Barker] regarding incest-related pornography." The trial court overruled Barker's

objection and Detective Hagglund answered, "He explained that he had viewed incest-related pornography, but he wasn't certain that it was incest-related, that was just what the information was" on the website.

The jury found Barker guilty of second degree child molestation and bail jumping. The trial court imposed a standard range sentence.

Barker appeals.

DISCUSSION

Barker contends the trial court erroneously admitted Detective Hagglund's testimony regarding incest-related pornography in violation of ER 404(b). The State argues the evidence was relevant to prove intent, that is, that Barker touched C. for the purpose of sexual gratification, an element required to prove the charge of second degree child molestation. See State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Evidence of other crimes, wrongs, or acts is inadmissible to "prove the character of a person in order to show action in conformity therewith." ER 404(b). Such evidence may, however, be admissible to prove intent. ER 404(b). But, "evidence should not be admitted to show intent . . . if intent is of no consequence to the outcome of the action." State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). And, use of prior acts to demonstrate intent requires "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, 989 P.2d 576 (1999). "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice

against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363.

An error which is not of constitutional magnitude, such as the erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Improper admission of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The inquiry is whether the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Barker claims that the pornography evidence was highly inflammatory and probably changed the outcome of the trial. He notes that C.'s trial testimony contradicted several of her earlier statements. He asserts C. had a motive to fabricate the allegations after Barker made her uncomfortable and disciplined her harshly. Assuming that the admission of the pornography evidence was error, Barker nonetheless fails to establish the error was not harmless.

Barker's defense was a general denial of any touching, but the State presented a strong case that the touching actually occurred. C., who was 18 years old at the time of trial, testified in a clear and detailed manner about the incident and acknowledged that she had not originally reported the touching. She articulated her reasons for her delay and her ultimate decision to report the touching consistently throughout an exhaustive cross-examination. Hutcheson's

testimony about C.'s behavior shortly after the incident and her own increasing concern over Barker's escalating inappropriate behavior towards C. in 2009 supported C.'s explanation for her delay in reporting.

If the jury believed that the touching occurred, other evidence supported an inference that Barker's purpose was his own sexual gratification. Hutcheson testified that she and Barker had agreed previously that she would be the one to educate C. about sex. And, the State presented the following significant detailed evidence suggesting Barker had a particular sexual interest in C: he ordered her to leave the bathroom door open; he interrupted C. when she was naked in the shower; he had an erection when C. and Hutcheson discussed C.'s underwear; Hutcheson found C.'s underwear, stained with what appeared to be semen, in his drawer and bathroom; he rubbed up against C.'s body with his privates; he spoke of C. in a sexually suggestive manner that made Hutcheson "sick to [her] stomach"; he secretly gave C. expensive gifts; and he arranged to spend time alone with C., helping her get a job at his workplace and driving her to work and to school.

On the other hand, Detective Hagglund's reference to Barker's admission to viewing incest-related pornography was brief and limited. No party mentioned pornography again during the trial. Under these circumstances, there is no reasonable probability that the verdict would have been different had the jury not heard the reference to incest-related pornography.

Barker also challenges a community custody condition limiting his access to the Internet, social media, and cell phones or other electronic devices without

permission of his community corrections officer. He argues that the evidence before the sentencing court did not show that such conduct was directly related to his crime.

The court has discretion to impose "crime-related prohibitions" as conditions of community custody. Former RCW 9.94A.700(5)(e) (2003) (LAWS OF 2003, ch. 379 § 4), recodified as RCW 9.94A.703(3)(f). Specifically, the court may prohibit "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Former RCW 9.94A.030(12) (2006) (LAWS OF 2006, ch. 139 § 5). Although the existence of a relationship between the prohibited conduct and the circumstances of the crime "'will always be subjective,'" the requirement of a direct relationship limits such prohibitions to "'a relatively narrow range of conduct.'" State v. Barclay, 51 Wn. App. 404, 407, 753 P.2d 1015 (1988) (emphasis omitted) (quoting David Boerner, Sentencing in Washington § 4.4 (1985)). We review the trial court's determination that a condition of community custody is crime-related for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

A court may not impose Internet restrictions where there is no evidence that the Internet contributed to the crime. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). In O'Cain, the defendant was convicted of second degree rape, but there was "no evidence that O'Cain accessed the Internet before the rape or that Internet use contributed in any way to the crime." Id. at 774-75. This court struck the condition, distinguishing other cases involving a

crime "where a defendant used the Internet to contact and lure a victim into an illegal sexual encounter." Id. at 775.

At sentencing, the trial court mentioned the O'Cain opinion, and then found "a computer nexus here," observing that "in this case there were computer elements throughout the course of the case." The State contends that the trial court properly relied on Barker's admission to viewing incest-related pornography in April 2007 and Hutcheson's suspicions regarding Barker's involvement in the anonymous e-mail message in December 2009. We disagree.

The circumstances of Barker's crime of second degree child molestation were limited to the following events occurring in March 2007: he directed C. to change her clothes in his presence; he took C. into his bedroom and locked the door; he forcibly removed C's clothing; he touched her breasts with his hands; and he gave her a mirror or held a mirror for her to watch while he repeatedly touched her vaginal area with his finger.

There was no evidence that Barker accessed the Internet, social media, cell phones, or other electronic devices before or during the incident and no evidence that any of those items contributed to or furthered his criminal conduct. Nothing in the record indicates that Barker used any of these means or devices to view or access illegal materials involving minors or to contact, groom, or lure any minor or other victim into any illegal activity. There was evidence presented at trial that Barker accessed incest-related pornography on his work computer in the month after the crime, but the State acknowledges that the police investigation revealed that the pornography featured only adults. And, the

certification for probable cause indicates only that Hutcheson believed that Barker sent her a disturbing e-mail about C. in December 2009. Under these circumstances, we conclude that the prohibited conduct is not directly related to Barker's crime, and the trial court abused its discretion by imposing the condition.[1]

We affirm Barker's conviction, but remand to the trial court to strike the challenged community custody condition.

Cuppelwick, J.

WE CONCUR:

Leach, J.

Jay, J.

[1] Because we agree with Barker that the condition must be stricken, we need not address his additional claim that the condition is unconstitutionally overbroad.