IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GAMADA ABDULLAHI, and Defendant, DONTA JAMALL WALTERS, and each of them, Appellant.	)	NO. 65205-2-I DIVISION ONE UNPUBLISHED OPINION FILED: September 24, 2012

Appelwick, J. — Walters was convicted of promoting commercial sexual abuse of a minor and conspiracy to promote prostitution. He argues that the trial court erred by not giving a limiting instruction regarding the use of gang evidence and that the to-convict instruction given to the jury was broader than the crime he was charged with. He also argues in a statement of additional grounds that a State witness had a conflict of interest. Finding no error, we affirm.

FACTS

The State charged Donta Walters and Gamada Abdullahi with promoting

commercial sexual abuse of a minor and conspiracy to promote prostitution. It specifically alleged that Walters was a pimp to FS. Although Walters and Abdullahi were tried together, this opinion concerns only Walters.

At trial, the evidence established that Walters was a member of the West Side Street Mobb. Walters testified that he had given up his affiliation. Detective Joseph Gagliardi testified that the gang operates as a for-profit gang, as opposed to a turf gang. Accordingly, its primary motivation is making money. He explained that West Side Street Mobb's primary moneymaking activity is prostitution. Seattle Officer Ryan Long testified that pimps typically recruit prostitutes by beginning romantic relationships and then manipulating the girls into prostitution through emotional and physical coercion. The pimps control prostitutes with force and violence. The pimp decides how much the prostitute charges, where she works, and whether she has worked long enough. The prostitutes risk being beaten and abused if they do not "respect" their pimps.

The primary disputed issue at trial was whether Walters acted as FS's pimp. FS admitted she made money from prostitution, but testified that Walters was not her pimp. To the contrary, she claimed that she and Walters were in an on-again, off-again relationship. Walters testified that FS gave him some money she made as a prostitute, but that it was mutual and he gave her money as well. At the time of trial, FS was pregnant with Walters' child.

But, another gang member and another prostitute testified that Walters was FS's pimp. They claimed that Walters sometimes dropped FS off to work and that FS gave

Walters the money she made.

The jury found Walters guilty as charged. He appeals.

DISCUSSION

I. Limiting Instruction

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). Evidence of gang affiliation would generally fall within that exclusion, but is admissible when the State establishes a nexus between the charged crime and gang membership. State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009). Even when ER 404(b) evidence is properly admitted, the trial court, "upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105; State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

After a hearing to determine if the gang evidence was admissible, the trial court ruled, "[T]he State has proved by a preponderance that both of the Defendants are affiliated with that gang. I hesitate to use the words membership based upon Detective Gagliardi's testimony since it's not a kind of formal thing, but they have affiliations with the gang."

It continued:

> [T]here's no question the gang affiliation is prejudicial, and it's only admissible upon a showing of a nexus between the gang activities and the charged crimes. I think the evidence establishes that there is a connection between the gang's purpose and values and the offenses committed, and that is the, what you might call the 404(b) hook by which the gang evidence is admissible against each Defendant.

> I will, however, limit the State in its testimony about the gang to the gang's alleged pimping behavior, but not any other criminal behavior from the gang since that is not charged . . . .

After both sides rested, Walters' counsel proposed a limiting instruction for the use of ER 404(b) evidence. He proposed that the instruction read, "'evidence has been introduced in this case that "Street Mobb" is a "gang" for the limited purpose of promoting prostitution. . . .'" The State objected, arguing that the jury should be permitted to consider the evidence for the purpose of proving commercial sexual abuse of a minor as well. Eventually, the parties agreed that the gang evidence could be used for the "limited purpose of proving conspiracy to promote prostitution and limited purpose of proving . . . Commercial Sexual Abuse of a Minor and it can't be used for any other purpose." The trial court stated, "[T]ype up an instruction and I'll give it consideration tomorrow morning." It noted, "[T]he point being it can't be used just to smear [Walters]." Walters' counsel agreed, and the trial court responded, "Okay, write that one up, I'll give it." The next day, the parties discussed jury instructions again, but defense counsel neither requested nor submitted a limiting instruction. Accordingly, no limiting instruction was given to the jury.

The trial court's duty to give a limiting instruction arises only upon request for such an instruction. ER 105. There is no affirmative duty on the part of the trial court to sua sponte give a limiting instruction. Russell, 171 Wn.2d at 123. And, a party who fails to request a limiting instruction waives any argument on appeal that the instruction should have been given. State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007).

Walters argues that he satisfied his burden to request a limiting instruction by raising the issue with the trial court. He claims that defense counsel merely "forgot to email the court the final written instruction" and that he had already requested the instruction even though defense counsel "may have forgotten to forward the final written version to the trial court . . . ."[1]

But, the trial court first informed defense counsel that it would accept a written instruction to take under consideration. It then instructed that it would give the instruction, but only if defense counsel wrote one up. For unknown reasons, defense counsel did not follow the trial court's instructions. The next day, defense counsel had an additional opportunity to raise the issue and even requested, and received, a limiting instruction concerning a prior conviction. On these facts, we cannot say that Walters requested an instruction or that the trial court erred by not giving such an instruction.

Alternatively, Walters argues that defense counsel provided ineffective assistance by failing to request the limiting instruction. To establish ineffective assistance of counsel, a defendant must show that the attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists where there is a reasonable probability that, but for counsel's performance, the result would have been different. State v. Thomas, 109

[1] This issue was not raised below and not factually developed. There is nothing in the record to support Walters' factual assertion that defense counsel "forgot" to submit a written instruction.

Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice does not require a showing that counsel's actions more likely than not altered the outcome, but the likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

Walters argues, "The trial court was rightly concerned the jury could use that evidence 'just to smear' Walters." In particular, he argues that the lack of a limiting instruction was prejudicial, because the State's argument that Walters commercially exploited FS was weak. He contends that the State "broadly contended" that the fact that FS denied Walters was her pimp "was explained by the gang and the gang's alleged ability to intimidate young women into subservience.

FS denied that Walters was her pimp. She stated that the money she made went to her friends and family, not Walters. But, others testified that Walters acted as a pimp to FS and others. Specifically, Mycah Johnson, another gang member, and TG, another prostitute, testified that Walters was FS's pimp. TG further testified that Walters would drop her and FS off to work and that FS would give Walters the money she made. TG testified that she, FS, Walters, and another gang member took a Greyhound bus to Las Vegas together. The plan was for TG and FS to work there, and Walters, in fact, dropped them off to work. They had been working for a day or two when FS was arrested. TG, Walters, and the other gang member then flew home together. TG testified that Walters paid for his ticket with money he got from FS. In light of this testimony, whether to believe FS was ultimately a credibility determination for the jury.

The trial court ruled that the gang evidence was directly relevant to the charged crimes. Walters has not shown that the evidence was used for any other improper purpose and has not established a reasonable probability that he was prejudiced by the lack of a limiting instruction.

II. To-Convict Instruction

The State originally alleged that Walters conspired "with one or more persons to engage in and cause the performance" of promoting prostitution in the first degree. Before trial began, the trial court ordered the State to provide a bill of particulars specifying the alleged co-conspirators. The court informed the State that it was free to use "and/or" language in the list. The State then submitted a list of co-conspirators that indicated the conspiracy was between Walters and/or 13 other specifically named individuals. It also stated the conspiracy was with "others unknown." But, the to-convict instruction given to the jury listed 16 co-conspirators.

Because an accused may not be convicted of an uncharged offense, an instruction cannot be more far-reaching than the charging document. See State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983); State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). In Brown, the charging document specifically named alleged co-conspirators. Brown, 45 Wn. App. at 572-73. The to-convict instruction, however, required only that the jury find the defendant conspired with "one or more persons." Brown, 45 Wn. App. at 574 n.2. The instruction constituted error because it was more far-reaching than the original charge. Brown, 45 Wn. App. at 575-76. Similarly, in State v. Jain, 151 Wn. App. 117, 123-24, 210 P.3d 1061 (2009), reversal

was required when the charging document alleged money laundering for transactions related to two named properties and the to-convict instruction allowed conviction for transactions related to any properties.

Walters argues that reversal is required, because the to-convict instruction was broader than the bill of particulars. But, the pretrial list of co-conspirators included "others unknown." Such a charge is permissible as long as the evidence supports the proposition that such a co-conspirator did exist and that the defendant did conspire with him. Brown, 45 Wn. App. at 577 (citing Rogers v. United States, 340 U.S. 367, 375, 71 S. Ct. 438, 443, 95 L. Ed. 344 (1951); United States v. Cepeda, 768 F.2d 1515, 1517 (2d Cir. 1985). During trial, specific evidence was given that identified "others" involved with the gang, and those individuals were subsequently included in the to-convict instruction. The to-convict instruction was not broader than the bill of particulars, and reversal is not required under Brown and Jain.

Moreover, the evidence suggests that the State provided a revised list of co-conspirators before the close of trial. The State filed a revised list after trial, but claims that it submitted the list to defense counsel during trial. This contention is supported by the fact that defense counsel did not object when evidence regarding the three additional co-conspirators was presented and did not object to the jury instruction that listed 16 co-conspirators.[2] In fact, the State's proposed jury instruction did not list any

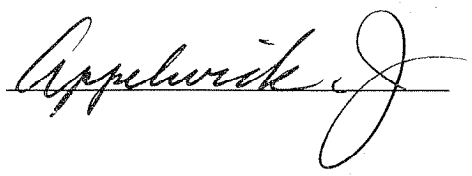
[2] We recognize that Walters claims a manifest constitutional error that can be raised for the first time on appeal. State v. Garcia, 65 Wn. App. 681, 686 n.3, 829 P.2d 241 (1992).

co-conspirators. It stated only that Walters "agreed with one or more person to engage in or cause the performance" of promoting prostitution in the first degree. There is no suggestion that the trial court proposed its own instruction. Thus, the list of co-conspirators must have come from defense counsel. Indeed, Abdullahi's counsel submitted a proposed jury instruction that listed all 16 co-conspirators.[3] That proposed instruction strongly corroborates the State's assertion that it provided a revised list before the close of trial.

III. Statement of Additional Grounds

Walters claims in a statement of additional grounds that the trial court erred in not allowing conflict of interest evidence after TG was arrested and referred to another detective as "my detective." Walters claims TG stated she had the detective's home and cellular telephone numbers. This argument does not sufficiently identify additional grounds for review, because it does not inform the court of the nature and occurrence of the alleged errors. See State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

We affirm.



[3] Walters' counsel submitted jury instructions to the trial court, but apparently did not file them. We are unable to determinate if his proposed to-convict instruction also included all 16 co-conspirators. If it did, his challenge would be barred under the invited error doctrine. See, e.g., City of Seattle v Patu, 147 Wn.2d 717, 719-20, 58 P.3d 273 (2002).

WE CONCUR:

Deyr, J.

Becker, J.