IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65935-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOHN EDWIN ERICKSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 2, 2012
	)	

Lau, J. — John Erickson appeals his conviction for child molestation in the first degree. The trial court admitted evidence of Erickson bathing naked with his daughter and his alleged possession of pornography to show common scheme or plan evidence under ER 404(b) and to show context for Erickson's admissions. Because admission of this evidence was well within the trial court's discretion, we find no error. The State concedes that certain conditions of community custody are not crime related and are therefore invalid. We accept the State's concession and remand with instructions to strike those conditions. We otherwise affirm.

FACTS

Witnesses at trial testified to the following events: In November 2008, when JS

was five years old, she lived with John Erickson, his wife Riana, their two young children, and Shaun, Erickson's adult son from a previous relationship.[1] Shaun is the former long-term boyfriend of Lindsey Smith, JS's mother. While not JS's biological father, Shaun has treated JS as his daughter since she was born. Erickson and Riana took care of JS when she was not in school and Shaun was working.

Smith's mother, Karen Vangog often looked after JS on weekends. One day around this time, while Vangog was bathing her, JS said, "Papa John showed me how to have a baby." 4 Report of Proceedings (RP) (May 5, 2010) at 639. Vangog asked how he did that, and JS said, "[H]e got on top of me." 4 RP (May 5, 2010) at 640. Vangog told Smith about what JS had said but took no further action.

When Shaun returned home midday on November 15, 2008, he did not see JS with other family members in the living area and went up to the bedroom he shared with JS. The bedroom door was closed, and when he opened it, Shaun discovered JS watching one of his pornographic films. Shaun turned it off and told JS that what she was watching was not appropriate for children. JS appeared to be "confused" and responded, "Why is that, Daddy? Me and Papa John do stuff like that." 3 RP (May 4, 2010) at 432, 437. Shaun asked JS what she meant by "stuff" and she said, "stuff like what she saw on TV." 3 RP (May 4, 2010) at 438. Shaun also asked, "[A]re you sure you mean Papa John?" and JS said, "'Yes, Daddy, Papa John.'" 3 RP (May 4, 2010) at

[1] Because several family members share the same last name, we refer to John Erickson as "Erickson" and Shaun and Riana Erickson by their first names to avoid confusion.

438.

Several months later, a child interview specialist interviewed JS and JS eventually told the interviewer that "Pepper John" did some "bad things" and told her it was a "secret." Ex. 14, at 5, 11, 18. She described a "pee pee thing" where "he rubs the pee pee and then you rub and the seeds come out." Ex. 14, at 25. JS said this happed in Erickson's bedroom while she was lying on the bed in her underwear with her clothes off so they would not get "all seedy." Ex. 14, at 28. She recounted that "Pepper John" was standing beside the bed, unzipped his zipper, and that his "pee pee" was "just like a stick." Ex. 14, at 27. She said he used his hand to rub himself and "seeds . . . squirt out" and she felt the "seeds" on her "pee pee." Ex. 14, at 31. JS said it happened more than one time.

The State charged Erickson with one count of child molestation in the first degree. After a hearing, the court determined that JS was competent to testify. At trial, JS reluctantly testified that "Papa John" touched his "private," touched her body with his "private part," and that "white stuff" came out and got on her private part. 3 RP (May 4, 2010) at 527, 529.

Several witnesses testified about statements Erickson made over the years about children and sex. According to Shaun, his father expressed the view that people, specifically girls, "should experience sex as young as they can." 3 RP (May 4, 2010) at 427. A family friend, Shannon Casey, recalled a conversation in which she told Erickson that she lost her virginity before she was thirteen years old, which she believed was a detrimental experience. Erickson responded, "Well I want my daughter

to experience sex as soon as possible." 6 RP (May 10, 2010) at 899. Casey told Erikson that she thought thirteen was nevertheless "a little young." 6 RP (May 10, 2010) at 899. Erickson looked at her and reiterated, "As soon as possible." 6 RP (May 10, 2010) at 899. Vangog also testified that Erickson told her on one occasion that "kids should learn about sex early on and the younger they are, the better." 4 RP (May 5, 2010) at 635.

The trial court also admitted evidence of several prior alleged acts. Casey testified about one time when she visited Erickson's house and he was upstairs bathing three children, including JS and his own three-year-old daughter. When Erickson emerged from the bathroom with the children, he was clothed, but his hair and beard were wet. Another time when Casey visited, Erickson was bathing his daughter and JS. Casey opened the door and saw that Erickson was wet and naked, although Casey could only see him from the waist up.

Another witness, Karen Skaggs, testified about a different bathtub incident and about Erickson's views on sexuality and children. Skaggs was in a relationship with Erickson and lived with him between 2000 and 2002. She testified that over the course of the relationship, Erickson made numerous comments about the propriety of exposing children to sex that made her increasingly uncomfortable about his views. Skaggs also testified that each year in the summer, Erickson's daughter from a prior relationship, BS,[2] visited from Arizona. One time when BS was about five or six, Skaggs returned

[2] Although the limiting instruction and the briefs refer to "B.E.," according to Erikson's testimony, his daughter's initials are "B.S."

from the grocery store to find the bathroom door locked. When Erickson eventually opened the door for Skaggs, BS was in the bathtub and he was wet and wearing only a towel. Skaggs later confronted Erickson and he said he "was just having a bath with her; that it was very natural; that [it] was important that young girls see their fathers naked; that they learn sexuality from their parents." 6 RP (May 10, 2010) at 836.

Skaggs also testified that she moved out of Erickson's home after finding some "images" on his computer. 6 RP (May 10, 2010) at 845. Following this discovery, Skaggs said she became "fairly hysterical" and confronted him. 6 RP (May 10, 2010) at 849. According to Skaggs, Erickson at first denied knowing anything about the images, but then admitted they were his, insisted it was a "natural thing" and mentioned the organization "NAMBLA" (North American Man/Boy Love Association). Skaggs said that eventually Erickson cried and begged her not to do anything.[3]

The State argued pretrial that the bathing incidents evidence was admissible as evidence of a common scheme or plan. Erickson maintained that the incidents were not relevant to the allegations raised by JS. The court ruled that the bathing incidents showed a "common plan or scheme with respect to attempting to gain access to young girls, to engage in grooming type activity with respect to young girls, and to have access to them for improper purposes" and that the evidence was more probative than prejudicial. 1 RP (Apr. 22, 2010) at 86. The court did not rule, however, that evidence of possession of pornography was admissible as common scheme or plan evidence.

[3] In addition to excluding evidence of the nature of the images, the court also excluded Skaggs's testimony that she reported the incident to the police.

Concerned about the inflammatory nature of this evidence, the court determined that Skaggs's testimony should be "sanitized" and she could testify only that she saw some images as a means to explain the conversation that followed. 1 RP (Apr. 22, 2010) at 85. The court determined that what Erickson said in response to Skaggs after she made the discovery was "highly probative" and admissible. 1 RP (Apr. 22, 2010) at 83.

Following both Skaggs's and Casey's testimony, the court gave oral limiting instructions, cautioning the jury that Erickson was not on trial for any conduct that was not charged in the information, that evidence of prior bad acts was, on its own, not sufficient to prove that the defendant committed the charged crime, and that the State had the burden to prove each element of the crime. The court also provided the jury with a similar written instruction on the bathing evidence.[4]

Erickson testified and denied molesting JS. He disavowed the beliefs about sexuality and children as testified to by Shaun, Skaggs, Casey, and Vangog. He claimed that JS was exposed to extensive amounts of pornography and her allegations described what she viewed, rather than what she experienced.

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[4] The written instructions instructed the jury as follows:

"Certain evidence has been admitted in this case only for a limited purpose. This evidence may be considered by you for the purpose of determining whether or not the defendant had a common scheme or plan with regard to exposing young girls to sex and/or whether the defendant had a lustful disposition toward J.S. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

"This instruction applies to the testimony presented by Ms. Karen Roblee-Skaggs regarding finding the defendant in the bathroom with his daughter, B.E.

"This instruction also applies to the testimony presented by Ms. Shannon Casey regarding finding the defendant in the bathroom with J.S."

In closing, the State told the jury that the significance of the evidence of the bathing incidents was to determine whether the evidence showed a common scheme or plan for the "purpose of exposing children to sex." 7 RP (May 12, 2010) at 1077. The prosecutor did not mention Erickson's possession of pornography or disturbing images.

The jury found Erickson guilty of the charge, and the court imposed an indeterminate sentence with a minimum term of 68 months and a maximum term of life. Erickson appeals.

Admission of Prior Acts under ER 404(b)

Erickson challenges the admission of Skaggs's testimony that she observed him naked in the bathroom with BS and that she discovered sexually explicit images on his computer under ER 404(b),[5] which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of ER 404(b) is to prohibit the admission of evidence that suggests that the defendant is a "criminal type" and thus likely guilty of committing the crime with which he is charged. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The trial court may admit evidence of prior "crimes, wrongs, or acts" to show a common scheme or plan "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." Lough, 125 Wn.2d at 855. Evidence of a common

[5] Erickson does not challenge Casey's testimony about bathing incidents with JS and other children.

scheme or plan is admissible because it is not an effort to prove the character of the defendant, but is instead offered to show that the defendant has developed a plan and has again put that particular plan into action. State v. Gresham, No. 84148-9, 2012 WL 19664, at *6 (Jan. 5, 2012).

Evidence of a common scheme or plan may be used to show whether the charged incidents actually occurred or whether the victim was fabricating or mistaken. Lough, 125 Wn.2d at 862. Before a court admits evidence under this rule, it must (1) identify the purpose for introducing the evidence, (2) determine relevancy to an element of the crime charged, (3) weigh the probative value against its prejudicial effect, and (4) decide if the evidence preponderates that the misconduct actually occurred. Lough, 125 Wn.2d at 889. For such evidence to be admissible, the other "crimes, wrongs, or acts" must be substantially similar to the charged crime. State v. DeVincentis, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). The other "crimes, wrongs, or acts" and the charged crime must be "naturally explained as individual manifestations of a general plan." DeVincentis, 150 Wn.2d at 21; Lough, 125 Wn.2d at 853. Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. DeVincentis, 150 Wn.2d at 17.

Erickson claims the evidence was inadmissible because neither the bathing incident with BS nor the incident involving explicit images bore substantial similarity to the abuse described by JS. Therefore, he argues that the evidence did not demonstrate a common scheme or plan.

Contrary to Erickson's argument, the record shows that the trial court admitted

no evidence that he possessed sexually explicit images. Because of the inflammatory nature of the evidence, the court excluded any reference to pornography and allowed Skaggs to testify only generically about the images to provide context for Erickson's admissions. Skaggs's testimony had probative value primarily because of Erickson's statements. According to Skaggs, Erickson readily admitted to bathing with his daughter, but maintained that it was appropriate and important for children to see their parents naked so they can learn about sexuality. Erickson also admitted to possessing the images, but insisted there was nothing wrong with doing so and mentioned the NAMBLA organization. Erickson does not argue that his admissions should have been excluded. Nor does he challenge the trial court's determination that the views he expressed were highly relevant. See ER 801(d)(2) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement."); see also 5B Karl B. Tegland, Washington Practice: Evidence § 801.35, at 389 (5th ed.2007) (A party's own statement is admissible if it "is in some way inconsistent with [his] position at trial.").

The trial court explained that Erickson's incriminating statements were relevant and probative but not the images on the computer. We conclude the trial court properly exercised its discretion when it limited Skaggs's testimony and excluded any testimony about the content of the images and Skaggs's call to police to report them.

Erickson also claims that evidence he bathed with BS was not sufficiently similar to indicate a scheme or plan. We disagree. The evidence here indicates striking similarities between Erickson's conduct with JS and his conduct with his oldest

daughter BS. Both girls were five years old when Erickson bathed nude with them. The trial court aptly described this conduct as grooming behavior by Erickson to gain access to very young girls. This behavior also furthered Erickson's plan to commit sexual acts against vulnerable-age girls by desensitizing them to adult male nudity. DeVincentis, 150 Wn.2d at 22 (evidence admitted under common scheme or plan exception included evidence that defendant walked around his house in front of preteen victims wearing nothing but "bikini or g-string underwear . . . to reduce the children's natural discomfort or negative reaction"). Erickson's own statements highlight this overarching plan to desensitize children to adult male nudity for the purpose of sexual molestation. For example, he declared that it "was important that young girls see their fathers naked."
6 RP (May 6, 2010) at 836). Nor does the passage of time between the BS and JS incidents defeat admissibility of this evidence. "[W]hen similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." Lough, 125 Wn.2d at 860. And in DeVincentis, our Supreme Court held that the evidence of prior misconduct was relevant to show that he had previously victimized another girl in a markedly similar way under similar circumstances despite the intervening 15 years between the two sexual abuse incidents.

We are also unpersuaded by Erickson's argument that even if this evidence constitutes scheme or plan evidence, its prejudicial effect outweighs any probative value. In State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), we reasoned that in

a child molestation case,

> prior similar acts of sex abuse can be very probative of a common scheme or plan. The need for such proof is unusually great in child sex abuse cases, given the secrecy in which such acts take place, the vulnerability of the victims, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation, the unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses.

Krause, 82 Wn. App. at 696 (quoting State v. Wermerskirchen, 497 N.W.2d 235, 240-41, (Minn. 1993)).

Here, the record shows that the trial court adhered to Lough's four factors analysis in determining to admit the evidence. It specifically found the evidence more probative than prejudicial under ER 403. The court's rationale constitutes tenable grounds supporting admission—"it does show a common plan or scheme with respect to attempting to gain access to young girls, to engage in grooming type activity with such girls, and to have access to them for improper purposes." 1 RP (Apr. 29, 2010) at 86. The court also minimized the prejudicial impact by giving a proper limiting instruction. Jurors are presumed to follow the court's instructions. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

We conclude the trial court properly admitted the challenged evidence.

Conditions of Community Custody

Erickson challenges the community custody condition that he not purchase or possess alcohol and the condition prohibiting him from accessing the Internet without prior approval of his community corrections officer (CCO) and sex offender treatment provider. He argues that the trial court lacked authority to impose these two conditions

because they were not crime related. The State concedes that these two conditions are not crime-related and should be stricken. See Former RCW 9.94.700(5) (2003); State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (prohibition on internet access without preapproval must be crime related in order to be valid). We accept the State's concessions.

Statement of Additional Grounds

Erickson contends that the State had a duty to collect the digital video disk (DVD) that JS was watching when she disclosed the abuse to Shaun and to provide that evidence to him. Erickson claims that the failure to do so amounts to a Brady[6] violation and a violation of his right to due process. The failure to disclose material evidence favorable to the defense violates an accused's due process rights if the evidence is material to guilt or innocence. See Brady, 373 U.S. at 87. No Brady or due process violation occurred here. Erickson neither alleges nor establishes that the State suppressed or destroyed evidence. The record indicates that no DVDs were removed from Erickson's home. The defense found the DVD it believed JS had been watching. And while taking the position that the DVD was not available to him because of the State's actions, Erickson also challenges defense counsel's failure to introduce the DVD as evidence. The record shows that counsel decided against presenting the actual footage to the jury due to its graphic and offensive nature. We are unpersuaded by Erickson's argument that this decision was unreasonable. Nor was he prevented

[6] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

from effectively arguing to the jury that JS's memory was tainted by pornography.

Erickson argues that his counsel was ineffective because he was not allowed to elicit testimony about an alleged touching incident that occurred between JS and a boy at school. But counsel advocated for admission of the testimony. The trial court excluded it because there was insufficient evidence that the incident actually occurred. Even if it had occurred, the allegations bore no similarity or relationship to JS's allegations against Erickson.

Erickson claims defense counsel was ineffective with respect to the cross examination of several witnesses, including JS, Vangog, Smith, and Shaun. But Erickson points to no material discrepancies that counsel failed to address. Counsel discussed testimony that was favorable to the defense and discrepancies to the extent they were relevant to Erickson's theory. Moreover, the jury heard the testimony, was aware of inconsistencies in certain details, and was able to assess credibility accordingly.

Erickson argues that the prosecutor engaged in misconduct and expressed her personal beliefs in closing argument when she argued to the jury that JS told the truth and that he was guilty of molestation. Properly viewed in the context of the argument as a whole, these were arguments based on the evidence, not on the prosecutor's personal opinions.

Erickson also maintains that the prosecutor intentionally misstated JS's age during the charging period as five to six years old rather than four to five years old, in order to bolster the argument that it was inappropriate for Erickson to bathe with her.

But Erickson cannot establish that this comment was flagrant and ill intentioned or that any resulting prejudice could not have been cured by a prompt instruction. See State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Erickson alleges that during Skaggs's testimony, the prosecutor referred to BS's statements that had been excluded. However, the prosecutor did not ask about any statements made by BS. She asked only about Erickson's reaction to Skaggs. Even though Skaggs volunteered that Erickson remarked that his daughter "wasn't telling the truth," as the court noted, this testimony did not contravene the court's ruling. 6 RP (May 10, 2010) at 836. The court excluded the substance of BS's statements but not Erickson's admissions.

Erickson argues that the court erred in finding JS competent to testify because JS failed to demonstrate that she had sufficient memory of events that occurred during the charging period when she was four to five and a half years old. Appellate courts give great deference to the trial court's determination of a child's competency to testify and will not disturb the court's determination absent proof of a manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

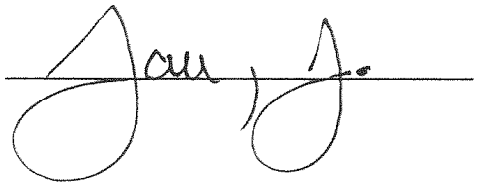
Erickson focuses solely on the competency hearing and contends that because the court asked JS only about her last birthday, her sixth birthday, and the previous Christmas, the testimony failed to establish that she had the capacity to remember the events of 2007 and 2008. However, we may examine the entire record when a competency determination is appealed. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). The record as a whole establishes that JS could recollect the period

of time that she lived at Erickson's house and the sexual contact with him. The court's decision does not constitute a manifest abuse of discretion.

Erickson also claims the court erroneously ruled that JS would be allowed to hold a doll while she testified. But the record does not indicate whether JS testified while holding a doll or any other object. Even if she did, in light of JS's age and the fact that it was not mentioned during her testimony, we cannot say that the court's ruling amounted to an abuse of discretion. See State v. Hakimi, 124 Wn. App. 15, 98 P.3d 809 (2004)

Erickson also raises numerous additional claims that involve facts outside of the trial record. These claims cannot be reviewed on direct appeal. See State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). The appropriate means of raising these claims is through a personal restraint petition. McFarland, 127 Wn.2d at 338.

We affirm Erickson's conviction. We remand to strike that portion of community custody condition 22, which prohibits the purchase and possession of alcohol. We remand to strike community custody condition 23 regarding Internet access in its entirety.



WE CONCUR: