No. 03-509

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 219

STATE OF MONTANA,

Plaintiff and Respondent,

v.

CHERYL IRISH CLIFFORD,

Defendant and Appellant.

APPEAL FROM: The District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDC 2001-104,
Honorable Thomas C. Honzel, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Palmer A. Hoovestal, Hoovestal, Kakuk & Fanning, PLLC,
Helena, Montana

For Respondent:

Honorable Mike McGrath, Attorney General; Mark W. Mattioli,
Assistant Attorney General, Helena

Robert Deschamps III and Kirsten LaCroix, Special Lewis and Clark
Deputy County Attorneys, Missoula, Montana

Submitted on Briefs: January 11, 2005

Decided: September 6, 2005

Filed:

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Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 The jury found Cheryl Clifford (Cheryl) guilty of tampering with or fabricating physical evidence in violation of § 45-7-207, MCA (1995), and threats and other improper influence in official and political matters in violation of § 45-7-102(1)(a)(ii), MCA (1999). Cheryl appeals various evidentiary decisions. We affirm.

PROCEDURAL BACKGROUND

¶2 The State filed an information charging Cheryl with four offenses. Count One charged Cheryl with tampering with or fabricating physical evidence in violation of § 45-7-207, MCA (1995), because she sent letters to members of the Church of Jesus Christ of Latter Day Saints (the Church) and others intending to mislead law enforcement officers in their investigation. The State filed the second, third, and fourth charges against Cheryl for threats and other improper influence in official and political matters in violation of § 45-7-102(1)(a)(ii), MCA (1999). Count Two charged Cheryl with placing posters in East Helena, Montana, intending to influence East Helena Police Department (EHPD) chief, Mac Cummings, by threatening to harm persons at Capital High School; residents at 302 Clark Street, East Helena; and EHPD officials. Count Three charged Cheryl with sending .38 Special cartridges to the EHPD intending to influence Cummings. Count Four charged Cheryl with sending a letter to Officer Deborah Drynan to improperly influence her by threatening her and her children. The jury found Cheryl not guilty of the second and third counts, but guilty of the first and fourth counts.

FACTUAL BACKGROUND

¶3 In 1991, Cynthia Hurst and her three children, Daniel, Kalina, and Wesley, moved from New Mexico to East Helena. During the next year, some missionaries from the Church came

proselytizing to her door. By May 1992, she had joined the Church. Cheryl and Larry Clifford were also members. Cheryl was a process server and private investigator, and Larry was an officer at the EHPD. The Cliffords had two living children, Megan and Lance.

¶4 While the missionaries were encouraging Hurst to join the Church, Hurst began leaving her children with her friend, Charles Scott. Charles Scott lived with his twenty-four-year-old son, Michael Scott. At first, Hurst took the children to Charles's house because they had chicken pox, and could go neither to school nor to daycare. Later, the children wanted to go over there to "play Nintendo." Charles and Hurst would let them stay the night. Over the course of a year and a half, the children went to Charles's house about a dozen times.

¶5 In 1994, Hurst's son, Daniel, called Hurst from school and cried as he told her that Michael Scott had been molesting him. Hurst filed charges with the EHPD, where Larry was on duty. During the investigation phase, Cheryl called Hurst and told her the police were going to charge Hurst because Hurst knew that Michael Scott was a child molester when Hurst left her children with him. In November 1995, the court sentenced Michael Scott to forty years in prison.

¶6 Larry was upset that the Deputy County Attorney would not charge Hurst for failing to protect her children. That November, in his capacity as a police officer, Larry filed a complaint against Hurst for negligent endangerment under § 45-5-208, MCA (1995). The Church helped Hurst hire a lawyer, who successfully moved the court to dismiss the charges because the statute of limitations had run.

¶7 For the present case, the District Court admitted over seventy letters, but many more were received. Bradley Peterson was a Bishop in the Church. In October 1996, the first letter arrived at his personal residence. During the next four years, letters bearing the same scrawling script arrived

at the homes of members of the Church and the Cliffords, the Helena Independent Record newspaper, the EHPD, the Montana Highway Patrol, and Officer Drynan's office. The letters were vicious and lascivious, gory and disturbed, and twisted and disgusting. Some of the letters contained adult pornography and sexually explicit and threatening messages reminiscent of horror films. *Inter alia*, the letters threatened the defendant, Cheryl; her daughter, Megan; Bishop Peterson of the Church; and the police. If the sender had licked the envelopes or the stamps, authorities could have used DNA testing on the saliva, but the perpetrator sealed the envelopes with tape and used self-adhesive stamps. These methods led law-enforcement officers to believe that the sender may have been especially sophisticated about forensic techniques.

¶8 In early March 2000, William Cordes was working for the Criminal Investigation Bureau (CIB). The United States Secret Service had given him questioned-documents-examination training, and he had worked on document investigation cases in the past. The CIB chief had assigned him to this case. After bringing himself up to speed and reading the reports, Cordes decided to interview Cheryl and Larry. The Cliffords showed Cordes two fairly recent letters they said they had received in the mail. One of the envelopes had a postmark with a small "tx" constituting the only legible word on the postmark. The other had a "2 JAN" postmark from "LYkES" "SC." Both of the envelopes had the suspicious writing similar to the writing that appeared on the other letters. Instead of giving the letters to Cordes, the Cliffords made copies for him on their fax machine.

¶9 In his application for a search warrant of the Cliffords' house, Cordes testified that three of the letters contained references to the Cliffords, Cheryl claimed to have seen *Hustler* magazine pages in the ditch along a major Helena street while she was driving at 6:30 p.m. during the winter, a search warrant executed at the Hurst residence revealed no evidence connecting the Hursts to the

letters, and the Cliffords had been extremely vocal in accusing Daniel and his parents of writing the letters. The Cliffords had an envelope from "LYkES, SC." Upon contacting the nearest post office, Cordes discovered that Lykes is an abbreviation for Lykesland, which is the name for an unincorporated voting district. Neither "Lykes" nor Lykesland have post offices. The Cliffords had told Cordes that Daniel was in Army training in South Carolina at the time the letter was mailed. Based on this evidence, Cordes contended that probable cause existed to search the Cliffords' residence. A district court issued a search warrant for the Cliffords' house.

¶10 On March 14, 2000, Cordes and three other agents searched the Cliffords' house. Inside, one of the agents found two stamp kits with individual rubber characters for making stamps. One of the kits had all the characters still glued and connected. The other had all the characters still glued together, except: 'L,' 'Y,' 'k,' 'E,' 'S,' '2,' 'J,' 'A,' 'N,' 'X,' and ','.

¶11 Following the search of the Cliffords' house, only one more letter arrived. A year after the search, in March 2001, a churchgoer received a letter marked "Return to Sender" with the same scrawled handwriting.

¶12 The Lewis and Clark County Sheriff's Office first contacted James Blanco about this case in December 1998. Blanco is one of about 150 experts in the United States and Canada certified by the American Board of Forensic Document Examiners. This is the only certification recognized by crime laboratories in the majority of governmental agencies, including the United States Secret Service; the Internal Revenue Service; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. In his first of five reports, Blanco could neither identify nor eliminate Cheryl, Larry, or Daniel as writers of the anonymous letters. After the search of the Cliffords' house, Cordes sent Blanco another batch of documents to analyze for the writer's identity. This time, Blanco had more success. He identified Cheryl as the author of the Lykes envelope and the author of the "tx"

envelope. In his final three reports, Blanco identified Cheryl as having written even more of the suspicious letters and envelopes.

¶13 To support the motion to file the information, the State's affidavit set forth, *inter alia*, Cheryl's and Larry's occupations and membership in the Church, details about the Michael Scott sexual molestation case, Larry's issuance of the negligent endangerment complaint, and the subsequent commencement of the letters. The affidavit described Cordes enlisting Blanco and Blanco's conclusions that Cheryl authored many of the letters. Further, it recited that John Wardell, who was also a member of the Church, had been delivering a small cargo container to the Hurst residence when he saw a vehicle driving by that looked exactly like a vehicle the Cliffords owned. Two days later, Wardell's daughter received a handwritten mailing referencing Wardell's trip to the Hurst residence.

¶14 The affidavit asserts that the Lewis and Clark Sheriff's Office had searched the Hurst residence years earlier, when they suspected Daniel, but had found no incriminating evidence there. It recounts the many instances in which Blanco identified Cheryl as having written various letters including the ones sent to the Montana Highway Patrol, the Lewis and Clark County Sheriff's Office, and the Helena Independent Record newspaper. The affidavit also states that, in April 1999, Larry found a greeting card and a flower on Megan's car windshield, and the Helena Police Department traced the card to Van's Thriftway. Owner-clerk Paula VanderJagt picked Cheryl out of a six-woman lineup as the card's purchaser. Based on these allegations, the District Court granted leave to file informations against Cheryl and Larry Clifford in May 2001.

¶15 In November 2001, Cheryl's and Larry's lawyers took Blanco's deposition. Blanco came prepared to give representative details of the methods of analysis by which he concluded that Cheryl had authored various letters, but he was not prepared to explain every detail of every comparison

between the letters. At trial, Blanco had overhead projections and blown-up trial exhibits comparing the distinctive elements of the characters in the letters.

¶16 After the State rested, Cheryl moved for a directed verdict, contending that Blanco's testimony was the only concrete evidence, and it was insufficient as a matter of law to convict her. The District Court denied the motion. In presenting her defense, Cheryl intended to call Mark Denbeaux as a handwriting expert. The State objected, and the District Court excluded him.

¶17 We restate the issues Cheryl raises as follows:

¶18 1. Whether Rule 702, M.R.Evid., required a *Daubert v. Merrell Dow Pharms., Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, hearing before admitting Blanco's testimony.

¶19 2. Whether the affidavit accompanying the motion to file the information had inadequate probable cause upon which to file the information.

¶20 3. Whether the State failed to provide Blanco's reasons for concluding that Cheryl authored the documents so a continuance became necessary.

¶21 4. Whether Blanco's opinion testimony was sufficient as a matter of law to connect Cheryl and the questioned documents.

¶22 5. Whether Rule 702, M.R.Evid., requires the admission of expert testimony that handwriting evidence lacks reliability.

¶23 6. Whether Rule 404(b), M.R.Evid., requires the admission of particular evidence linking Daniel Hurst to the threatening letters.

¶24 7. Whether Cordes misrepresented the facts in his search warrant application for the Cliffords' house, so *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, required suppression of the evidence obtained in that search.

STANDARDS OF REVIEW

¶25 This Court reviews a district court's evidentiary rulings for abuse of discretion. *State v. Cameron*, 2005 MT 32, ¶ 14, 326 Mont. 51, ¶ 14, 106 P.3d 1189, ¶ 14. This Court reviews district court decisions on motions to continue to determine whether the district court abused its discretion. *State v. DeMary*, 2003 MT 307, ¶ 24, 318 Mont. 200, ¶ 24, 79 P.3d 817, ¶ 24. This Court reviews district courts denials of motions to suppress to determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of the law is correct. *State v. Minez*, 2004 MT 115, ¶ 16, 321 Mont. 148, ¶ 16, 89 P.3d 966, ¶ 16.

DISCUSSION

I. Rule 702, M.R.Evid.

¶26 Cheryl argues that, since Blanco, in his deposition, could explain neither how nor why he concluded that Cheryl authored the documents, the District Court should have held a hearing pursuant to *Daubert* and *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238.

¶27 Rule 702, M.R.Evid., provides as follows:

> **Testimony by experts.**
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

A. Daubert/Kumho Tire Co. Hearing

¶28 Questions concerning expert testimony's reliability are threefold under Rule 702, M.R.Evid.: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts. First, the district court determines whether the expert field is reliable. Second, the district court determines whether the witness is qualified as an expert in that reliable field. If the court deems the expert qualified, the testimony based on the results from that field is admissible—shaky as that evidence may be. Third, the question whether that qualified expert reliably applied the principles of that reliable field to the facts of the case is not a question for the trial court to resolve. Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798, 125 L.Ed.2d at 484; *contra* Fed. R. Evid. 702(3) (giving trial courts the decision whether the qualified expert witness reliably applied the reliable field to the facts).

¶29 The *Daubert* test helps determine the reliability of a field of expert methods. 509 U.S. at 592, 113 S.Ct. at 2796, 125 L.Ed.2d at 482; *accord State v. Moore* (1994), 268 Mont. 20, 41, 885 P.2d 457, 470. In *Daubert*, the United States Supreme Court adopted a four-factor test, of which the factors are neither necessary nor sufficient to determine whether the field of scientific evidence that the expert is proposing is reliable. 509 U.S. at 592-95, 113 S.Ct. at 2796-98, 125 L.Ed.2d at 482-84; *accord Moore*, 268 Mont. at 41, 885 P.2d at 470-71. The Supreme Court expanded this test to cover technical or other specialized expert testimony. *Kumho Tire Co.*, 526 U.S. at 141, 119 S.Ct. at 1171, 143 L.Ed.2d at 246.

¶30 The *Daubert* test does not require a district court to determine whether the expert reliably applied expert methods to the facts. Rather, if the witness is a qualified expert in the field, he may

testify. Under a *Daubert* analysis, the reliability of Blanco's application of his expert field to the facts is immaterial in determining the reliability of that expert field. Rule 702, M.R.Evid., did not require the District Court to hold a *Daubert* hearing.

B. Handwriting Expert's Opinion on an Ultimate Issue

¶31 Cheryl argues, under Rule 702, M.R.Evid., that, although the District Court properly allowed Blanco to testify to similarities and dissimilarities between documents of unknown authorship and documents that Cheryl had written, it should not have allowed Blanco to testify to the ultimate conclusion that Cheryl authored the documents in question. Cheryl cites *United States v. Paul* (11th Cir. 1999), 175 F.3d 906, *United States v. Hines* (D. Mass. 1999), 55 F.Supp.2d 62, and two other federal district court cases for the proposition that, because the jury could have come to the ultimate conclusion without help from Blanco, Blanco need not have testified to that ultimate conclusion.[1]

¶32 Rule 704, M.R.Evid., provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This rule allows Blanco to testify to the ultimate conclusion of who wrote the letters.

C. Qualifying a Witness as an Expert

¶33 Cheryl argues that, because Blanco, in his deposition, could not state the basis for his conclusion that Cheryl authored the letters, he had no scientific, technical, or specialized knowledge under Rule 702, M.R.Evid. Cheryl misapprehends the force behind Rule 702, M.R.Evid. To restate this rule, *if* a reliable field helps the trier of fact, *and* the court deems the witness qualified as an expert, *then* he may testify. Whether the witness has scientific, technical, or specialized knowledge

[1]Cheryl preserved this issue for appeal in her January 2, 2002, motion to prohibit Blanco from making ultimate conclusions.

bears on the question whether the witness qualifies as an expert. Although the District Court did not specifically rule that Blanco qualified as an expert, Cheryl did not object to his testimony for lack of qualification. This Court does not address issues raised for the first time in this Court. *State v. White Bear*, 2005 MT 7, ¶ 10, 325 Mont. 337, ¶ 10, 106 P.3d 516, ¶ 10. We decline to address this argument.

II. Adequate Probable Cause Upon Which to File an Information and

IV. The Legal Sufficiency of Blanco's Opinion Testimony

¶34 Cheryl asserts, without much coherent argument, that the affidavit in support of the information lacked probable cause. Cheryl fails to provide even the statute requiring probable cause to file an information. Rule 23(a)(4), M.R.App.P., requires an appellant, in her brief, to cite to the authorities, statutes, and pages of the record she relied upon in her arguments to this Court. Absent such citation, we decline to consider the argument. *In re Marriage of Hodge*, 2003 MT 146, ¶ 10, 316 Mont. 194, ¶ 10, 69 P.3d 1192, ¶ 10.

¶35 Cheryl also argues that Blanco's testimony was the only concrete evidence against her, and it was insufficient as a matter of law to convict her. Cheryl did nothing more in her brief than raise the argument. She fails even to cite a case. We decline to consider this argument, also. *In re Marriage of Hodge*, ¶ 10.

III. Blanco's Reasoning

¶36 Cheryl argues the District Court erred in refusing to continue the trial because the State had not provided Blanco's subjective judgments upon which he relied to conclude Cheryl wrote the documents. She cites § 46-15-322(1)(c), MCA (2001), for the proposition that the State must produce the "results of physical examinations, scientific tests, experiments, or comparisons . . . ."

Although the State provided Cheryl with Blanco's five reports in which he related his conclusions, Cheryl claims that Blanco did not reveal his "results."

¶37 During his deposition, Blanco made some comparisons for the benefit of the attorneys. He compared Cheryl's known writings to the unknown writings for similarities. He showed them how he compared Cheryl's voluntary statement to the Helena Police Department with the "LYkES" letter. For example, the writings both had distinctive k's. Further, Blanco provided almost twenty documents on which he had made notations next to specific characters. The notations indicated that those characters had similarities with characters from other documents.

¶38 In January 2002, shortly after the deposition, the prosecution provided Blanco's eighteen-page affidavit in which he reiterated many of his deposition statements and reorganized many of those statements into a clear outline to show his methods. During trial, he testified in more detail.

¶39 Experts should explain their reasoning, so the opposing party can prepare for trial. *See* §§ 46-15-322(1)(c) and 323(3) to (5), MCA (2001). With that information, the opposing party can attack the expert's reasoning as defective instead of merely attacking his conclusions as defective. At his deposition, Blanco provided fourteen of the documents of unknown origin on which he had made notations next to specific characters indicating those characters had similarities with characters from other documents that Cheryl had written. From the volume of similarities, he concluded that Cheryl had written the documents of unknown authorship. This explanation was sufficient for Cheryl's experts to understand Blanco's reasoning and methodology.

¶40 Cheryl also asserts that the District Court erred by denying a continuance so her handwriting expert, Lloyd Cunningham, could recover from an illness so he could testify in person rather than through video depositions. Cheryl did nothing more in her brief than raise the argument. She fails

to develop the argument or cite any authority. Accordingly, we decline to address it. Rule 23(a)(4), M.R.App.P.; *In re Marriage of Hodge*, ¶ 10.

V. Allowing Denbeaux to Testify

¶41 Mark Denbeaux is a law professor at Seton Hall Law School in Newark, New Jersey, who specializes in evidence law. He co-authored an article criticizing handwriting evidence. Denbeaux claims that, after many years of study, he has identified the defects and limitations of forensic handwriting witnesses' opinions and the reasons that handwriting analysis is unreliable. Cheryl argues that the District Court erred by refusing to recognize Denbeaux as a qualified expert and prohibiting him from testifying. She asserts that Denbeaux's testimony would have cast doubt on Blanco's testimony, the reliability of handwriting expert testimony in general, and the weight of that evidence. The Federal Circuit Courts have disagreed on whether to allow Denbeaux's testimony. *Compare United States v. Velasquez* (3d Cir. 1995), 64 F.3d 844, 852 (refusing to admit Denbeaux's testimony *was* an abuse of discretion), *with Paul*, 175 F.3d at 912 (refusing to admit Denbeaux's testimony *was not* an abuse of discretion).

¶42 First, arguably, Denbeaux is not an expert in the field of handwriting analysis; rather, he is an evidence professor who has, historically, criticized handwriting analysis evidence. It was within the District Court's discretion to conclude that Denbeaux did not qualify as an expert in handwriting analysis. *State v. Southern*, 1999 MT 94, ¶ 48, 294 Mont. 225, ¶ 48, 980 P.3d 3, ¶ 48. Moreover, Cheryl presented the testimony of her own handwriting expert, and performed a thorough cross-examination of Blanco. Thus, even if Denbeaux's testimony might have cast doubt on Blanco's testimony, Cheryl was able to accomplish that task through the testimony of her expert and cross-examination. Under these circumstances, the District Court did not abuse its discretion in precluding Denbeaux's testimony.

VI. Identity Evidence Linking Daniel Hurst to the Threatening Letters

¶43 Cheryl contends that the District Court made numerous evidentiary rulings that violated her rights to present a defense. Specifically, she alleges the District Court erred by excluding Daniel's (1) prior sexual activity, (2) psychological problems, (3) behavioral problems, (4) discharge from the U.S. Army for psychological reasons, (5) commitment to a mental health institution, and (6) conviction of vandalism in East Helena. Cheryl alleges this evidence qualifies under the seldom-used "reverse 404(b)" theory to identify Daniel as the author of the letters. By excluding that evidence, Cheryl contends the District Court violated Rule 404(b), M.R.Evid., her right to present a defense under due process, and the right to confront witnesses against her under the Sixth Amendment to the United States Constitution.

A. Reverse 404(b) Evidence

¶44 Cheryl sought to admit Daniel's prior sexual history and psychological profile to show that he, and not Cheryl, wrote the letters. On occasion, a defendant will use Rule 404(b), M.R.Evid., to introduce evidence to inculpate another person, thus exculpating himself. Courts call evidence introduced for this purpose "reverse 404(b) evidence." *United States v. Stevens* (3d Cir. 1991), 935 F.2d 1380, 1401-02. Since the defendant is offering the reverse 404(b) evidence, courts applying the Rule 403, M.R.Evid., balancing test cannot consider the risk of unfair prejudice to the defendant. *Stevens*, 935 F.2d at 1404-05 ("[T]he admissibility of 'reverse 404(b)' evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues.").

¶45 Although the State raises the specter of prejudice to the government, it fails to develop that theory. Unfair prejudice against the government is rather rare. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not

necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note; *see Southern*, ¶ 67. Thus, the only possible unfair prejudice against the government occurs when the evidence tends to make the jury more likely to find a defendant not guilty *despite* the proof beyond a reasonable doubt. *See, e.g., Old Chief v. United States* (1997), 519 U.S. 172, 185 n.8, 117 S.Ct. 644, 652 n.8, 136 L.Ed.2d 574, 591 n.8. By proving that someone else committed the crime, reverse 404(b) evidence is not likely to generate that risk of jury infidelity, and thus does not generate unfair prejudice. Only in the rarest circumstances will the district court be presented with unfair prejudice to the State in determining the admissibility of reverse 404(b) evidence. Those circumstances are not present here.

B. The Modified Just *Rule*

¶46 The District Court excluded six categories of evidence that pointed toward Daniel. Cheryl argues that this evidence of misidentification was admissible as reverse 404(b) evidence tending to show that Daniel, and not Cheryl, wrote the letters. The District Court granted the State's motion in limine to exclude evidence of Daniel's other crimes, wrongs, or acts. Under Rule 404(b), M.R.Evid., the District Court decided the modified *Just* rule, articulated in *State v. Matt* (1991), 249 Mont. 136, 814 P.2d 52, allowed it to exclude evidence of Daniel's specific acts.

¶47 Rule 404(b), M.R.Evid., provides that

> 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.

To be admissible under Rule 404(b), the modified *Just* rule requires that the other crimes, wrongs, or acts (1) must be similar and (2) not remote in time. *Matt*, 249 Mont. at 142, 814 P.2d at 56. Such evidence (3)

> is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Matt, 249 Mont. at 142, 814 P.2d at 56. Finally, (4) although relevant, a court may exclude evidence if the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence substantially outweighs its probative value. *Matt*, 249 Mont. at 142, 814 P.2d at 56.

C. Propensity Evidence

¶48 "'The difference between the proper use of other acts evidence to prove identity and the improper use of such evidence to prove propensity is a subtle matter.'" *State v. Sweeney*, 2000 MT 74, ¶ 32, 299 Mont. 111, ¶ 32, 999 P.2d 296, ¶ 32 (quoting *United States v. Luna* (9th Cir. 1994), 21 F.3d 874, 882). Indeed, this classification forms the crucial distinction at the basis of the third prong of the modified *Just* test. Specifically, if the proponent for admissibility offers the evidence solely to show propensity, Rule 404(b), M.R.Evid., prohibits courts from admitting that evidence. "When evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged."[2] *United States v. Himelwright* (3d Cir. 1994) , 42 F.3d 777, 782 (interpreting Rule 404(b), Fed. R. Evid.); *People v. Zackowitz* (N.Y. 1930), 172 N.E. 466 (Cardozo, C.J., delivering the opinion of the court).

[2]The Third Circuit, here, refers to "prior bad acts," but Rule 404(b), M.R.Evid., has no requirement that the other acts be "bad." *See* Rule 404(b), M.R.Evid. ("(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes . . . .").

¶49 Of the six categories of evidence that Cheryl offers, four of them (psychological problems, behavioral problems, discharge from the U.S. Army for psychological reasons, and commitment to a mental health institution) provide only propensity evidence. Cheryl contends that Daniel has psychological problems, so he acted in conformity with those problems by writing the letters; he has behavioral problems, so he acted in conformity with those problems by writing the letters; etc. These chains of inferences clearly implicate propensity evidence.

¶50 Someone vandalized the Cliffords' car by spray-painting profanities in pink. Cheryl sought to admit evidence that Daniel had been convicted for vandalizing cars in East Helena. That evidence also creates a chain of inferences implicating propensity evidence: Daniel vandalized cars in East Helena, therefore he is a vandal, therefore he acted in conformity with that character trait when he vandalized the Cliffords' car. Evidence in this category is clearly inadmissible propensity evidence.

¶51 The more difficult question arises when considering the admissibility of specific, prior sexual activities in which Daniel, willingly or unwillingly, participated. At various points, Cheryl wanted the court to admit evidence of or allow examination into various experiences including the specific acts of sodomy to which Michael Scott subjected Daniel, the presence of two other men while Michael Scott molested Daniel, the specifics of Daniel being molested when he was very young, and the specific acts of incest. The District Court admitted references to the acts, but excluded the specific activities. Evidence proving these specific facts is relevant to the identity of the author, Cheryl argues, because the letters refer to specific acts of sodomy, a "buttfuck party," and specific incestuous acts.

¶52 The District Court excluded these categories of evidence under the modified *Just* rule. Unfortunately, we cannot discern which rationale the court used to exclude the evidence. The fourth

prong of that test repeats Rule 403, M.R.Evid. *Compare* Rule 403, M.R.Evid., *with Matt*, 249 Mont. at 142, 814 P.2d at 56. Generally, we review a district court's discretionary Rule 403, M.R.Evid., decisions for abuse of discretion, but we agree with the *Himelwright* court that when a district court rules on a Rule 403, M.R.Evid., question, but its reasons are not apparent from the record, we cannot review its discretion. *Himelwright*, 42 F.3d at 781. In such cases, we may examine the record and balance the factors ourselves. *Himelwright*, 42 F.3d at 781. Accordingly, we will balance the Rule 403 factors de novo.

¶53 Rule 403, M.R.Evid., provides that,

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"The greater contains the less." Section 1-3-227, MCA. The District Court admitted copious amounts of evidence that Michael Scott had molested Daniel. No fewer than six witnesses testified that Michael Scott had molested Daniel, and that theme pervaded the case. As stated earlier, because these categories of evidence constitute reverse 404(b) evidence, this Court may not consider the danger of unfair prejudice in its balancing. Nevertheless, the jury need not have heard the multiple, graphic details painstakingly recounting the horrors through which Michael Scott put Daniel. The jury's imagination could quickly fill in the gaps without such detailed evidence. Thus, the probative value is very low. Taken together, the waste of time and needless presentation of cumulative evidence from such technical, detailed, and vivid explanations substantially outweigh the low probative value of that evidence. A similar analysis shows the District Court properly excluded specific evidence of Daniel's molestation.

¶54 In addition, the District Court allowed questions as to whether Daniel committed incest, but did not allow questions as to the specific acts. As above, the waste of time and needless presentation of cumulative evidence substantially outweigh the probative value of dwelling upon the specific instances. The District Court properly excluded this evidence.

¶55 Finally, the District Court also admitted evidence that other boys participated in the molestations at Michael Scott's home. Given this evidence that Daniel experienced a "buttfuck party," evidence that two other men were present at other times amounts to needless presentation of cumulative evidence. The needless presentation of that cumulative evidence substantially outweighs the negligible probative value. Because these evidentiary items fail one prong of the modified *Just* test, we need not address the remaining prongs for admissibility. The District Court did not err by excluding this evidence.

D. Right to Put on a Defense

¶56 Cheryl cites *State v. Johnson*, 1998 MT 107, 288 Mont. 513, 958 P.2d 1182, for the proposition that the reliable nature of the "identity" evidence was sufficient to tip the scales in favor of Cheryl's constitutional right to present a defense. *Johnson* addresses the balance between the defendant's right to present a defense and the victim's rights under the rape shield statute. ¶ 18-34. Cheryl's argument is very sparse and she fails to identify even the two interests on the scales. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer* (1998), 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413, 418. Cheryl has not shown that these evidentiary restrictions are unreasonable, so we hold that they do not violate her right to present a defense.

VII. Cordes Facts in the Application for the Search Warrant

¶57 Cheryl asserts that the application for a search warrant for the Cliffords' residence contained nothing more than the subjective beliefs of Cordes. Cheryl argues that the whole affidavit in support of the application for the search warrant contains only subjective beliefs, false statements, and misrepresentations. Cheryl cites *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676, 57 L.Ed.2d at 672, for the proposition that a court must excise false statements and consider the remaining statements to determine whether probable cause existed for the issuance of the search warrant.

¶58 In her argument, Cheryl fails to recognize that *State v. Worrall*, 1999 MT 55, ¶¶ 29- 34, 293 Mont. 439, ¶¶ 29-34, 976 P.2d 968, ¶¶ 29-34, requires her to prove by a preponderance of the evidence that the statements in the affidavit were false. *Franks*, 438 U.S. at 164-65, 98 S.Ct. at 2681, 57 L.Ed.2d at 677-78; *Worrall*, ¶¶ 32-35. Without providing any evidence, Cheryl merely claims that the assertions were subjective beliefs, false statements, and misrepresentations. Because Cheryl did not establish falsity as required under *Worrall* or *Franks*, the District Court did not err by refusing to exclude the evidence obtained in the search.

¶59 Affirmed.

/S/ W. WILLIAM LEAPHART

We Concur:

/S/ PATRICIA O. COTTER
/S/ JAMES C. NELSON
/S/ JOHN WARNER
/S/ BRIAN MORRIS