71447-3

71447-3

NO. 71447-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MORRIS TALAGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NAMI KIM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

1. A defendant's declaration of his intent to commit harm does not qualify as propensity evidence because it is neither an "act" under ER 404(b) nor does it comprise character evidence offered to show conformity therewith. Here, the defendant, who was charged with assault in the first degree, posted on his Facebook account: "[J]ust leave me alone and we got no problems, test me & u [sic] just might b [sic] on YouTube f[or] da [sic] most epic knockout." Was his declaration of intent an admission and statement against party opponent rather than an "act" under ER 404(b) offered as propensity evidence?

2. ER 404(b) permits the admission of other crimes, wrongs or acts to prove intent and state of mind. Here, the defendant placed the issue of his intent in controversy by invoking self-defense, arguing that he reasonably believed that he was about to be injured and used no more force than necessary. Did the trial court properly admit his verbalized desire to deliver the "most epic knockout" as evidence of his intent and state of mind? Even if the trial court erred, was any error harmless where surveillance video showed the defendant stomping on and punching the victim's head twelve times as he lay motionless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Morris Talaga was charged by amended information with Assault in the First Degree. CP 13. The State alleged that on August 28, 2011, Talaga punched and stomped on Montrae Gooden's head, causing a traumatic brain injury. CP 3-5, 13. The jury trial began on November 7, 2013. 2RP 1.[1] The jury convicted Talaga as charged. CP 56. The trial court sentenced him to a standard range sentence of 216 months. CP 79.

2. SUBSTANTIVE FACTS.

On the evening of August 27, 2011, Montrae Gooden left his common-law wife, Heather Sevaaetasi, and their three children at their home in Renton to go out with his friend Leslie McCraney to a bar called Jimmy T's. 7RP 41-42, 58, 61, 74-76, 86-87. The bar, located in Kent, had a reputation among local police as a "problem ba[r], probably the biggest problem on East Hill and Valley combined." 5RP 42-43. It was well-known for frequent fights at closing time in the parking lot. 5RP 12, 43.

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[1] The verbatim report of proceedings consists of eleven non-consecutively numbered volumes, which will be referred to as follows: 1RP (10/15/12, 10/29/13, 11/7/13, 11/27/13 and 1/10/14); 2RP (11/7/13); 3RP (11/12/13); 4RP (11/13/13); 5RP (11/14/13); 6RP (11/18/13); 7RP (11/19/13); 8RP (11/21/13); 9RP (11/25/13); 10RP (11/26/13); 11RP (11/27/13).

That night, defendant Morris Talaga was working as a security guard at Jimmy T's. 9RP 37-38. He had gotten the job through a friend and club promoter named Brian Gatewood (known as "BG"). 9RP 38-39. Talaga testified that he had seen and stopped "lots" of fights in the parking lot. 9RP 39. That night, he got off work early at about 12:30 a.m. 9RP 45, 87.

The bar was equipped with eight surveillance cameras, some of which captured the events of that evening. 6RP 13, 17, 19. Forensic video analyst Grant Fredericks extracted the relevant images for trial and sequenced the individual frames into PDF files with slide numbers and date-time stamps for reference. 6RP 6, 8. From these, he developed five separate PDF files, each showing about 1-2 minutes of video from various angles. Ex. 9.[2] Cameras 4 and 8 looked out into the parking lot, allowing Fredericks to capture individual people as they moved outside by tracking their pixels. 6RP 23, 29-31. Fredericks tracked Talaga, Montrae Gooden, Leslie McCraney, and three individuals named Joseph Jackson, Male #1 (later identified as "BG") and Male #2 ("Audi," BG's cousin) that night. 5RP 18; 6RP 15-17.

[2] Ex. 9 contains five PDF files that will be referred to in chronological order: Video 1 ("Victims' Vehicle Arrival"); Video 2 ("Victims Enter Parking Lot"); Video 3 ("Contact Between Jackson and Talaga"); Video 4 ("Contact with Gooden & McCraney"); Video 5 ("Male 1 and Male 2 Exit Dark Sedan").

After Talaga finished work early, surveillance video showed him at the bar at around 1:31 a.m., quickly downing two shots of liquor before pouring two more into a large glass.[3] 6RP 31-32. Talaga admitted drinking 3-4 rum and coke cocktails that night. 9RP 45-46, 87-88. He then went outside to the parking lot, riding around on the running board of a blue car, before approaching Montrae Gooden and Leslie McCraney, who had arrived in the parking lot at 1:47 a.m. 6RP 39, 41-43; 9RP 49-50; Video 1.

Although Talaga was not on duty, he confronted Gooden and McCraney about whether they owned the car next to them. 9RP 50. Talaga later admitted that he never identified himself as off-duty security. 9RP 91. When Gooden asked why it was Talaga's business, Talaga told him to leave the car alone if it was not his. 9RP 52. Talaga claimed that Gooden started "running off at the mouth," telling Talaga, "I will kick your ass." 9RP 53. Talaga stated that this made him afraid for his safety, claiming that Gooden then followed him throughout the parking lot as Talaga attempted several times to walk away: "I just wish [Gooden] would have just left the situation alone when I walked away, and it wouldn't have went on as far as it did." 9RP 53, 61-62, 201.

[3] Talaga was wearing his yellow Jimmy T's security shirt, covered by a blue jacket per club policy since he was drinking while off the clock. 9RP 48, 87-88.

The surveillance video did not support this account. Between 1:48 and 1:50 a.m., shortly after Gooden's arrival in the parking lot, it showed Gooden, McCraney, Talaga and Jackson standing in a loose group in the center of the parking lot. 6RP 43-46; Video 2, slide 417. As Gooden and McCraney left the group at 1:50 a.m., it was Talaga who circled and followed them until they finally walked off camera to their left. 6RP 43-46; Video 2, slides 417-551; Video 3, slides 1-115. At no point did McCraney or Gooden pursue Talaga, who then proceeded to stalk toward the bar entrance, waving his jacket in the air and lifting his shirt up in a confrontational posture in an attempt to re-engage with Jackson. 6RP 46-40; Video 3, slides 116-397.

At that point, Talaga admitted that he was "upset" and "trying to calm [him]self down" as he threw his jacket on the ground, after which Jackson hugged him and told him to "just calm down, everything is all right, just leave the situation alone, I will make sure I handle everything." 9RP 55. Talaga admitted that Gooden and McCraney were at this point some distance away from him and were in fact no longer even on-screen. 9RP 55, 57; Video 3, 80-95.

The ensuing assault was captured by Video 4, which displayed a split-screen view of images from Camera 8 on the left

side and Camera 4 on the right. Video 4, slides 2, 278-446.[4] Talaga could be seen pacing in front of the club entrance as Gooden and McCraney eventually re-entered camera view some distance away in the parking lot. 6RP 49-51; Video 4, slides 1-108. Despite the fact that Gooden had not engaged Talaga any further, Talaga turned back toward Gooden and McCraney and walked toward them. 6RP 51; Video 4, slides 109-30. A circle had formed around Gooden and McCraney, including Jackson, Talaga's friend BG, and BG's cousin "Audi." 7RP 21; Video 4, slides 127, 180.

As BG and Audi moved toward Gooden, Talaga began circling the group again. Video 4, slides 180-228, 255. BG then punched Gooden, sending Gooden's hat flying in midair and Gooden to the ground. 6RP 53; Video 4, slides 278-81. As Gooden tried to raise his head, BG stood over him and punched him in the head again. 6RP 56; Video 4, slides 302-04. Gooden raised his arms up as if to protect himself. 6RP 56; Video 4, slide 307.

As Gooden lay on the ground, Talaga advanced upon him and crouched down, extending his left arm all the way behind him and punching Gooden in the head so hard that Gooden's head

[4] Video 4 is 1 minute, 34 seconds long. It runs from 01:51:21 a.m.-01:52:55 a.m. Individual slides are cited to pinpoint the exact moment of each action described.

rolled forward. 6RP 56-58; Video 4, slides 308-15. Talaga immediately reached back and punched him a second time before punching McCraney, who had run toward Gooden. 6RP 61-62; Video 4, slides 316-18, 319-30. Gooden remained motionless on the ground, his back to the camera. 6RP 63; Video 4, slide 331.

Talaga returned his attention to Gooden, raising his right leg so high that he had to raise both arms for balance before stomping his foot down on Gooden's head. 6RP 63; Video 4, slides 337-39. The force caused Gooden's body to roll forward. Video 4, slide 339. Talaga repeated this move three more times, causing Gooden's shoulders to move and his head to bounce off the pavement. 6RP 63, 67-68; Video 4, slides 345-49, 352-61. Meanwhile, BG and Audi continued attacking McCraney and then Jackson. 6RP 56, 62-63; Video 4, slides 292-93, 319-20, 346-50.

As Gooden continued to lie motionless, Talaga drew back both arms all the way behind him and swung his left fist at Gooden's head a third, fourth, fifth and sixth time. 6RP 68-69; Video 4, slides 363-81. A security guard and another man in a dark shirt approached and gestured at Talaga to back away from Gooden. 6RP 69; Video 4, slides 382-93. Instead, Talaga walked around Gooden's motionless body, reached down, and punched

him a final, seventh time, causing Gooden's head to bounce off the pavement. 6RP 70; Video 4, slides 383-402. After the same man in the dark shirt motioned Talaga away from Gooden, Talaga quickly walked away. 6RP 70; Video 4, slides 408-33. Gooden remained motionless on the ground. Video 4, slide 434.

At trial, McCraney recalled how he and Gooden had started walking toward the entrance to the bar at Jimmy T's that night when "the next thing I know, we was being surrounded by some guys we never seen before." 7RP 43. McCraney, who was significantly injured and suffered brain damage that night, believed that they had been attacked for being at the "[w]rong place, wrong time," as neither he nor Gooden had said anything to instigate it. 7RP 45, 47-50; Ex. 4.

Jessie Thomas, the Jimmy T's security guard seen gesturing Talaga away from Gooden on the video, had heard Talaga (whom he knew as "Mo") yell, "I will beat your ass." 7RP 15-17; 9RP 60. Thomas ran outside to see Talaga in his yellow Jimmy T's shirt "squaring off" with several men. 7RP 16-17. Thomas initially believed that there were three men who were "trying to get" Talaga when BG and Audi ran in and "knocked out" two of them, including

Gooden, who "went to sleep. And that's when Mo came up, gave it to him":

> [D]ude was already knocked out and . . . [Talaga] came and started giving it to him on the ground and [I] was trying to like, 'Dude, he is done,' you know, 'He is done,' you know, 'Stop.' [. . .] [Talaga] just . . . ran up and super agro, and [was] just, like, kicking this guy in the face and punching him in the face while he was already on the ground.

7RP 19-21, 30-31.

Gooden, who Thomas described as "lights out" and "asleep already," was not doing anything to protect himself at that point: "Once dude hit the ground, he was -- there was nothing coming out of him." 7RP 20. Nonetheless, Thomas saw Talaga punch him 2-3 times and stomp on his head 2-3 times before Talaga "got out of there." 7RP 20-21.

Natasha Jackson,[5] a bystander, heard a commotion outside the club at closing time and saw a man in a yellow security-type shirt standing over another man on the ground and "stomping on his head." 7RP 127-29. She knew neither man. 7RP 133-34. She saw the man on the ground choking on the blood all over his face and making a gasping, gargling noise, so she turned him so that he would not choke to death on his own blood. 7RP 131-32.

[5] Natasha Jackson and Joseph Jackson are not related. 7RP 125.

Kent Police officers Randy Brennan and Luke Brandeberry arrived within minutes of their dispatch at 1:54 a.m. 5RP 11-12, 42. EMT Jessica Nemans arrived at 2:02 a.m. 7RP 145-46. All three saw Gooden on the ground unconscious, with a large pool of blood under his head, and completely non-responsive to shaking or shouting. 5RP 13, 44, 48; 7RP 145-47. The officers noted his "agonal breathing," described as labored, snoring breath or gasping and grunting, "the kind of last breath you have before death." 5RP 15, 44. Nemans testified that Gooden's snoring respirations indicated diminished breathing and evidence of head injury. 7RP 145-46. She intubated him and manually squeezed air into his lungs to help him breathe. 7RP 148-49; Ex. 19. Although the crowd was hostile and not forthcoming about the incident, one woman told police that the assailant was a Samoan male. 5RP 21-22, 49. The officers photographed Gooden's severe injuries. 5RP 29-30, 51-55; Ex. 5-7.

Gooden spent almost three weeks in the Harborview Intensive Care Unit and was not discharged until September 16, 2011. 8RP 31, 36-38. He arrived with a Glasgow Coma Scale (GCS) score of 6, akin to a comatose person. 8RP 32-34. Trauma surgeon Grant O'Keefe, Gooden's discharge physician, rendered

six diagnoses for Gooden, including a nasal bone fracture and orbital fracture. 8RP 23, 30, 39. Gooden also suffered a subdural hematoma (bleeding around the brain), a potentially permanent type of brain damage normally caused by a hard impact to the brain and accompanied by a 50% mortality rate. 8RP 34-35, 39-41, 46-47.

Gooden's other diagnoses were also typical of brain injury and hard blows to the head and neck, including inflammation of his lung from inhaling vomit, air pockets in his chest, and a bruise to his hippocampus, a deep part of the brain that directs the body's movements. 8RP 43-47. Gooden was unable to breathe on his own for almost a week and a half and required intubation without which, O'Keefe testified, he would have died. 8RP 55-56. O'Keefe said there was a high chance that Gooden would never return to his previous level of functioning. 8RP 52.

Gooden spent almost four additional weeks in inpatient rehabilitation. 9RP 9-10. Dr. Peter Esselman, his attending physician, classified Gooden's brain injury as severe and noted his significant cognitive and physical impairments, typical of brain injury. 9RP 11-18. Esselman agreed that Gooden would have died without treatment. 9RP 21. Because of the severity of his injuries,

Esselman anticipated that Gooden would have ongoing problems with higher-level attention, concentration, memory and cognition and was "confident" that any cognitive or physical deficits still present one year post-assault would be permanent. 9RP 18-20.

Heather Sevaaetasi, Gooden's common-law wife, testified that two years later, Gooden was so impaired that he could no longer take care of himself independently, work, cook, or watch his children, and was mentally the same age as his 15-year-old son. 7RP 78-79, 85. She had to assist Gooden in bathing, shaving, and using the toilet. 7RP 85. After leaving rehabilitation, he had ceased any further improvement entirely. 7RP 82.

Gooden testified that he was learning how to respell words and do math. 7RP 60. He remained unable to work, drive, perform household tasks or play with his children, and could not help his children with their homework because "it's like I'm practicing myself, too." 7RP 66-67. He struggled with memory and balance. 7RP 64, 68. Because of the brain damage, he could not remember what had happened after leaving his house the night of August 27, 2011, recalling only waking up paralyzed in the hospital. 7RP 61-64.

Soon after the assault, Sevaaetasi had found Talaga's Facebook page, printed off his entire account and sent it to the

police department. 7RP 96-99. On Talaga's profile page, which was printed on November 20, 2011, he had written the following statement: "[J]ust leave me alone and we got no problems, test me & u [sic] just might b [sic] on YouTube f[or] da [sic] most epic knockout." Ex. 16. Talaga later attempted to minimize this quote by claiming he had simply cut and pasted it. 9RP 78.

Talaga was arrested on January 3, 2012. 5RP 56. When Officer Brandeberry told him that he was under arrest for a felony assault stemming from an incident at Jimmy T's, Talaga responded, "Oh, that mess from a while back?" 5RP 60-61. He added, "I used to work security at Jimmy T's until that mess." 5RP 62.

At trial, despite video evidence to the contrary, Talaga insisted that after Gooden had allegedly pursued him in the parking lot, McCraney had tried to attack him. 9RP 58-62. Talaga therefore punched McCraney and then, he said, "I went after Mr. Gooden." 9RP 58. Despite the screenshots of Gooden's motionless body, Talaga insisted that Gooden was moving and that "[Gooden] already posed a threat to me, he already said he was going to kick my ass, so I felt that's what he wanted to do." 9RP 59.

Despite the fact that two minutes had passed between Gooden's alleged threat and Talaga's assault,[6] and the fact that Talaga never claimed any act of physical violence by Gooden, Talaga insisted, "I had to make sure he didn't hurt me, you know, I felt harm from him. I felt he could harm me, so I made sure he didn't do that." 9RP 59. Asked why he had hit the victim so many times, Talaga said, "I just didn't want him to get back up and injure me or harm me." 9RP 60. When asked by the prosecutor if the reason he "punched Montrae Gooden in the head two times and stomped on his head four times and punched him in the head four more times and then came back and punched him in the head two times is because [you] did not want him to get back up and injure or harm [you]," Talaga simply said, "Yes." 9RP 62.

Talaga agreed that each time he punched and stomped on Gooden's head, he meant to do so, that stomping on someone's head could significantly injure that person, and that he had stopped many fights because he knew that people could get harmed. 9RP 63, 71. Despite club policy to notify the security director as

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[6] Gooden's claimed threat had allegedly occurred when Talaga first approached Gooden and McCraney in the parking lot between 1:48 a.m. and 1:50 a.m. Video 2, slide 417. Surveillance video showed Gooden walking away from Talaga at 1:50 a.m. Video 2, slide 551. Talaga began assaulting Gooden at 1:52:19 a.m. 6RP 56; Video 4, slide 308.

soon as he saw someone starting a fight, Talaga acknowledged not doing so. 9RP 84, 94. When asked why he had simply gone home without telling anyone his story, he said, "I just didn't tell nobody." 9RP 75.

As Talaga went step by step through the assault shown on Video 4, he attested to his fear that Gooden could harm him despite the large group of people in between them, and his own admission that Gooden was not a threat as he lay on the ground with BG standing over him. 9RP 90, 105-06. Nevertheless, after first punching McCraney, Talaga decided that as Gooden lay on the ground facing the other direction, punched out by someone else, Gooden "still posed a threat to me." 9RP 106-07. Narrating alongside Video 4, Talaga insisted that after each of his seven punches and four head-stomps, Gooden "still posed a threat to me," even after admitting that he no longer knew if Gooden was even moving after the sixth punch. 9RP 106-15. He agreed that the danger had ceased by the time security guard Jessie Thomas gestured him away from Gooden. 9RP 114-15. Nevertheless, he punched Gooden one more time, a punch that he claimed at trial he did not remember. 9RP 115.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF TALAGA'S STATEMENT OF INTENT FROM HIS FACEBOOK ACCOUNT.

Talaga argues that the trial court erred when it admitted his Facebook post. This argument should be rejected. Talaga's declaration of intent was neither an "act" under ER 404(b) nor did it constitute propensity evidence. In any event, any error was harmless given the overwhelming evidence of guilt.

a. Pretrial Rulings.

Before trial, the State moved to admit Talaga's Facebook post as evidence of his intent and state of mind. 2RP 17-21; Ex. 16. The record reflects the parties' uncertainty about whether the post even constituted ER 404(b) evidence. Defense counsel, who had received the Facebook post prior to trial, wrote in his trial brief that the State "ha[d] not provided the Defendant with specific conduct it may seek to admit under ER 404(b)." Supp. CP (sub 116 at 3, Trial Memorandum - Def). The State did not include an ER 404(b) motion in its trial memorandum. Supp. CP __ (sub 115C, Trial Memorandum / State).

When the trial court inquired as to any ER 404(b) evidence, the State responded: "There may be one small piece, I'm not [sic] if it is 404(b) evidence or not." 2RP 17. The record is unclear about the basis of defense counsel's objection. Although he initially equivocated, he ultimately objected to the evidence on three grounds: (1) the uncertainty of when Talaga posted the information, (2) the evidence's prejudicial effect versus its probative value, and (3) the lack of authentication. 2RP 19-21.

However, defense counsel later withdrew the objection and deferred to the trial court on the issue of the post:

> THE COURT: . . . Did you wish to argue on the 404(b) issues on the Facebook posting?
>
> MR. WOMACK: Your Honor, I am -- I reviewed the Facebook postings, and that one particular area, the State is inclined to bring that in. I don't think it is particularly relevant or probative of anything [.] *Frankly, honestly, I don't know if it -- that is prejudicial, as well. I will defer to the Court on that.*

3RP 5 (italics added). The trial court admitted the Facebook post, ruling:

> I do think that it is relevant in terms of the state of mind and intent, and especially also because it is a claim of self-defense in this case, the jury will weigh how probative it is, ultimately, but I think it is admissible for those reasons, not to show he is a bad guy and he acted in conformity, obviously, assuming there is a foundation.

3RP 5-6. After the court clarified that the purpose of the ER 404(b) evidence was to address Talaga's state of mind, intent and absence of self-defense, defense counsel responded, "So state of mind, self-defense [sic] and sense [sic] of self-defense, *I would object on the last basis*." 3RP 7 (emphasis added).

Midtrial, outside the presence of the jury, defense counsel then engaged in the following exchange:

> MR. WOMACK: . . . I don't think it should be admitted at all. *If it is going to be admitted, it should be admitted for that purpose, state of mind. If not, we would not be submitting a limiting instruction.*
> THE COURT: *Okay. I said state of mind and intent.*
> MR. WOMACK: *Oh, I can put that in, but you said something about absence of self-defense.*

3RP 105-06 (italics added).

During Heather Sevaaetasi's testimony about how she found Talaga's Facebook post, defense counsel objected solely to authentication. 7RP 97-105; Ex. 14, 15, 16. During a break in testimony, defense counsel lodged an additional objection to the post as improper character evidence under ER 404(a), discussed the issue of propensity "just to give the Court some context," and re-initiated his argument that "there's no absence of self-defense. I know the Court was talking about intent, but it's really the reverse of everything else." 8RP 12-14.

After the trial court clarified that the evidence was admitted *only* as evidence of state of mind and intent since they were "clearly in issue," it found by a preponderance that Talaga had posted the words on his Facebook account and that the evidence was not unduly prejudicial. 8RP 14. Counsel's only response when the State moved to admit the post was that "we previously objected to that. We have no further argument." 9RP 30; Ex. 16. When the State finally introduced the contents of the post during cross-examination of Talaga, counsel objected but identified no specific grounds. 9RP 78. The trial court overruled the objection. 9RP 78.

b. Talaga's Declaration Of Intent Was Not An "Act" Under ER 404(b).

An appellate court reviews the interpretation of an evidentiary rule de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, the trial court's decision to admit or exclude evidence under a correctly interpreted rule is reviewed for an abuse of discretion. Id. Discretion is abused only where no reasonable person would take the position adopted by the trial court. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

ER 404(b) states: "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." See also State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995).

By its very terms, ER 404(b) requires that any evidence reviewed under that rule must be a "crime, wrong, or other act." A generalized statement of intent to deliver an "epic knockout" if one is ever "test[ed]" is not a "crime" or "wrong." Such proclamations are not against the law, unless directed at a specific person who must receive the message and, in most instances, feel reasonable fear. See e.g. RCW 9A.46.020. Thus, Talaga must establish that his statement of intent on Facebook constituted an "act." He cannot.

An "act" is defined as "**a** : a thing done or being done . . . **b** *law* : an external manifestation of the will." Webster's Third International Dictionary 20 (1993). The supreme court has previously defined the word "act" as "the process of doing or performing something; an action or deed or something that is done or performed." State v. Kincaid, 103 Wn.2d 304, 314-15, 692 P.2d 823 (1985). These definitions envision a physical action or deed and correspond with how the word "act" is used in the text of ER 404(b).

Under the well-settled rule of *ejusdem generis*, general words that follow specific words are to be construed to embrace only similar objects. State v. K.L.B., 180 Wn.2d 735, 740-41, 328 P.3d 886 (2014). ER 404(b) states: "Evidence of other crimes, wrongs, *or acts* is not admissible to prove the character of a person . . ." The rule's use of the word "act" therefore envisions something similar to "crimes" or "wrongs" (by their nature *actions* or *deeds*).

A person's statement of intent or words revealing his own state of mind do not meet the above definitions. They therefore do not constitute an "other act" that must be analyzed under ER 404(b). If this was the case, every statement of intent by a defendant made either prior to the commission of a crime or subsequently, as a confession, would demand analysis under ER 404(b). No such practice exists, and Talaga can point to no such requirement in caselaw.

In State v. Israel, a witness testified that the defendant had professed concern about dropping a note on which he had written directions to the site of a robbery after committing a home-invasion robbery; a note connected to the defendant had, in fact, been found at the robbery victim's home. 113 Wn. App. 243, 256-57, 54 P.3d 1218 (2002). This Court held that the defendant's admission

regarding his written note did not constitute an "other act" under ER 404(b):

> The State was not attempting to prove that [the defendant] left notes at his robberies as a "signature" or that [he] was a robber generally, but that [he] dropped the particular note left at the scene of the Hwang robbery. . . [The witness'] testimony, therefore, was relevant not because it showed prior bad acts of [defendant], but because it made it more likely that the piece of paper [defendant] told [the witness] about was the same piece of paper that was found, with [defendant's] fingerprint on it, at Mira Hwang's house after the robbery. Thus, this evidence is not subject to analysis under ER 404(b).

Id. at 268 n.5.

As in Israel, Talaga's written words on his Facebook post did not constitute an "act" or the "a thing . . . being done" (such as a prior assault) invoked to argue that he was a violent person generally. Rather, it was a declaration of his own intent and state of mind that made it more likely that his intent with Gooden was to deliver "an epic knockout," and less likely that his intent was to use only the amount of force necessary to protect himself.

Talaga attempts to bridge this definitional distinction by equating his statement of intent with evidence of an actual act of assault, arguing that the State had failed to substantiate that he had "assaulted anyone on a prior occasion," "that any of his boastful

claims were even true," or that had exhibited a "pattern of assaultive conduct." BOA 10-12. But Talaga misses the critical point: the State was not attempting to substantiate and admit evidence of *actual prior assaults*, which very well would have actually constituted "acts" requiring analysis under ER 404(b). The State was attempting to introduce a *statement of intent*. There was no requirement to prove that Talaga's "boastful claims were true" because proving a prior assault was not the objective; the point was to convey his self-professed state of mind, which is not an "act."[7]

Not only was the statement not an "act," it did not even refer to an "act," like a prior assault or action; it was simply a declaration of intent. Cf. State v. Brockob, 159 Wn.2d 311, 348-49, 150 P.3d 59 (2006) (defendant's confession to previously buying drugs analyzed under ER 404(b)). It thus did not fall under the rubric of ER 404(b). Rather, it can more properly be considered an admission or statement of party opponent under ER 801(d)(2), and need only be

[7] Nor was the "act" one of posting the threat to Facebook. The aspect that Talaga finds objectionable is not the act of posting, but the contents of the post, i.e., his own thoughts. Had the defendant simply told someone his intent to deliver an "epic knockout," his declaration would never be deemed subject to ER 404(b). It would simply qualify as an admission under ER 401 and 403.

analyzed for probative value relative to prejudice under ER 403 and relevance under ER 401.[8]

The trial court found that Talaga did in fact post the comment, and that it was not unduly prejudicial, satisfying both ER 801(d)(2) and ER 403. 8RP 14. The evidence was also relevant because it made it more likely that Talaga's intent at the time of the assault was to deliver an "epic knockout" rather than to defend himself, and to beat someone severely rather than limit his use of force to that necessary to effect a lawful purpose. It also made it less likely that his state of mind was fear, given his boastful willingness to render an "epic knockout," but rather a desire for revenge or punishment.

c. Talaga's Statement Of Intent And State Of Mind Did Not Constitute Propensity Evidence.

Even if this Court deems Talaga's statement an "other act" under ER 404(b), the statement did not constitute propensity evidence. It was properly admitted as a statement of intent and state of mind under ER 404(b).

Courts may admit ER 404(b) evidence "to prove the defendant's state of mind where the misconduct comes to bear on

[8] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

the defendant's mental state at the time of the alleged offense." State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is related to that purpose, and (4) balance the probative value of the evidence against the prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002).

"Rule 404(b) . . . provides that prior misconduct is not admissible to show that a defendant is a 'criminal type,' and is thus likely to have committed the crime for which he or she is presently charged." Lough, 125 Wn.2d at 853. The type of propensity argument forbidden by the court is "once a thief, always a thief." State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). However, while "[t]he purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character . . . it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case." Id. at 859.

Intent, a specifically enumerated basis for admission under ER 404(b), is defined as "the purpose or design with which the act is done" and the "design, resolve, or determination with which

[a] person acts . . . [a] state of mind in which a person seeks to accomplish a given result through a course of action." State v. Powell, 126 Wn.2d 244, 260-61, 893 P.2d 615 (1995) (quoting Black's Law Dictionary 810, 1014 (6th ed.1990)). Evidence of intent is relevant when the defendant has placed intent into controversy. Id. at 262.

A claim of self-defense negates the element of intent in an assault because it involves the lawful use of force and rebuts the "unlawful" element of assault; it thus requires the State to disprove lawful intent beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

A trial court may properly admit a defendant's own comments about his previous bad acts to prove his intent regarding the charged crime. Brockob, 159 Wn.2d at 348-49. In Brockob, the supreme court held that a defendant's confession to previously buying ephedrine for a methamphetamine manufacturer was properly admitted to establish his intent to aid in the crime of manufacturing. Id. The court held that because the issue of Brockob's intent "was a key component of the State's case," which

was largely circumstantial, "the statement was properly offered as evidence of intent rather than evidence of character." Id. at 349.

A trial court may also properly admit a defendant's own comments about his prior bad acts to reveal his state of mind. Powell, 166 Wn.2d at 81 ("Courts may admit ER 404(b) evidence to prove the defendant's state of mind where the misconduct comes to bear on the defendant's mental state at the time of the alleged offense."). Powell cited State v. Lord as an example, noting that the trial court there had properly admitted Lord's confession to earlier ingesting marijuana and alcohol, because he admitted that when he did, "he becomes a different person and he loses control." Powell, 166 Wn.2d at 81 (quoting Lord, 117 Wn.2d 829, 872, 822 P.2d 177 (1991)). Lord held that "the evidence was admissible as an explanation for Lord's conduct, not to prove character" and thus pertained to his state of mind during the commission of the crime. 117 Wn.2d at 872-73.

Here, Talaga's own statement that he would deliver "an epic knockout" if tested was properly admitted as evidence of his intent and state of mind. Talaga placed the issue of intent squarely into controversy when he claimed self-defense. The jury was instructed that the State had to prove beyond a reasonable doubt that he acted

with intent to inflict great bodily harm and that assault requires an "intentional touching . . . with unlawful force." CP 39, 42. The trial court also gave the jury the following instructions regarding self-defense:

> The use of force upon or toward the person of another is lawful when used *by a person who reasonably believes that he is about to be injured* or in preventing or attempting to prevent an offense against the person, *and when the force is not more than necessary.*
>
> The person using the force may employ *such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person . . .*

CP 48 (emphasis added).[9]

By claiming that he acted only to prevent physical danger to himself, Talaga put into play the issue of his intent, i.e., the "purpose or design with which the act is done" and the "design, resolve, or determination with which [a] person acts." His declaration that he would deliver "an epic knockout" if tested was

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[9] The jury was also instructed that:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 49.

highly probative of the purpose or the design, resolve or determination with which he acted on the night in question. As in Brockob, intent was a "key component" of the State's case; Talaga's incriminating statements were "properly offered as evidence of intent rather than evidence of character." Brockob, 159 Wn.2d at 349.

Talaga not only placed into controversy the issue of his intent but also his state of mind in general, calling upon the jury to examine whether he reasonably believed he was about to be injured and used only the amount of force that reasonably appeared to him to be necessary to effect the lawful purpose intended. The boastful nature of his announcement on Facebook called into question any fear that he professed to have and the accuracy of his claim that he used tremendous force solely to ensure his own safety rather than execute an "epic knockout." His admissions were thus similar to those made by the defendant in Lord, whose acknowledgment that he lost control and became a "different person" when using drugs was "admissible as an explanation for Lord's conduct, not to prove character," and thus

pertained to his state of mind during the commission of the crime. Lord, 117 Wn.2d at 872-73.[10]

Talaga's declaration to "knock out" anyone who "test[ed]" him was not propensity evidence, used to argue "once a criminal, always a criminal." The State clearly argued in closing argument that "[t]his is being offered and was admitted for one purpose and one purpose only: To show the defendant's intent." 10RP 10. Unless Talaga's declaration by itself had constituted a crime, and the post had been used to prove his intent to commit a similar crime, then there is no propensity argument to be made.

Talaga nonetheless cites to State v. Thompson, 47 Wn. App. 1, 753 P.2d 584 (1987), to argue that because the State showed no "pattern of assaultive conduct by Mr. Talaga similar to that in by [sic] the defendant in Thompson," Talaga's Facebook post was "purely propensity evidence." BOA 11. But Thompson is inapplicable. First, the trial court here specifically excluded

[10] It was not established when Talaga's Facebook comments, which were printed out on November 20, 2011,were posted. Ex. 16. The uncertainty of the timing of the Facebook post is of no moment. As the supreme court noted in State v. Brown, "Rule 404(b) applies to evidence of other crimes or misconduct regardless whether they occurred *before or after* the conduct for which a defendant is currently charged." 132 Wn.2d 529, 576, 940 P.2d 546 (1997). In Lord, the timing of the defendant's marijuana use was not conclusively shown to coincide exactly with the date of the crime; the murder occurred on September 16, and the defendant stated he had last used drugs "approximately 3 weeks" prior to September 30. 116 Wn.2d at 845-46.

absence of self-defense as a basis for admission. 8RP 14. Second, Thompson held that a "continuing course of provocative conduct" could be admitted as evidence of the absence of self-defense and res gestae. 47 Wn. App. at 12. Talaga's case, however, involved a verbalized announcement of intent as evidence of intent.

Talaga next cites to a Division 2 case, State v. Wade, for the proposition that "[u]se of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves." 98 Wn. App. 328, 335, 989 P.2d 576 (1999).

Wade is distinguishable on several points. First, the prior bad acts introduced in Wade were true *acts* in the most traditional sense of the word: prior *convictions* for possession with intent, admitted to prove Wade's same intent in the new charge. Id. at 331-32. By referring to the need for "similarity among the facts of the acts themselves" and the facts of charged versus previous "offenses," it is clear that Division 2 envisioned criminal convictions and other such acts. Id. at 335-37. Second, unlike Talaga, Wade

had never put intent into play: "Wade offered no defense; nor did he claim mistake, inadvertent possession, or misidentification." Id. at 336. Had he done so, the court implied, those defenses might have justified admission. Id.

Most critically, Wade limited its holding to prior acts embodying a certain mens rea, used to argue the same mens rea later: "Because the previous convictions are for the same type of crime, *including the requisite intent*, Wade was [alleged to be] predisposed to have that same intent on the current occasion." Id. at 337 (emphasis added). Here, it was Talaga's *actual and explicit declaration of intent* that was being used to establish his intent at the time of the crime, not a previous conviction from which one had to divine similar intent. It thus required no forbidden inferences or assumptions based on one's actions or character.

d. Any Error Was Harmless.

Even if this Court finds that the trial court abused its discretion in admitting the Facebook post, any error was harmless.

"It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error." State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). A nonconstitutional error is harmless if there

is no reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Talaga states in a conclusory manner that it was reasonably probable that the introduction of the ER 404(b) evidence materially affected the verdict. In doing so, he disregards the substantial quantum of evidence against him and invokes only the State's closing argument for support. During argument, the prosecutor explicitly cautioned the jury against using the Facebook post as propensity evidence: "This is being offered and was admitted for one purpose and one purpose only: To show the defendant's intent." 10RP 10. This was a correct statement of both the law and the court's ruling. The prosecutor later quoted directly from the post and linked it to Talaga's intent that night, not his character or his propensity to commit crimes:

> "Just leave me alone and we got no problems. Test me and you just might be on YouTube for the most epic knockout." And what happened that night? He was tested. He was tested, he said. He says Mr. Gooden said, "I will kick your ass." He was tested. We don't have the YouTube video of that, but we do have the video of the most epic knockout, all inflicted by the defendant. All inflicted on Mr. Gooden. All inflicted by -- without any other kind of provocation other than, "I will kick your ass."

11RP 11.

Talaga makes no mention of the significant volume of evidence against him. At trial, he did not contest any of the elements of assault in the first degree: he identified himself in the video and acknowledged that he meant every stomp and blow each time he struck Gooden in the video. 9RP 63. Nor does he argue on appeal that the State failed to satisfy the requisite degree of injury. He disputes only the lawfulness of his actions.

The evidence refuting self-defense was overwhelming. Surveillance video showed in graphic detail how Talaga brutally stomped on Gooden's head four times and followed that up with seven punches, all while Gooden lay motionless on the ground. It depicts how Talaga lifted his right leg up so high past his left knee that he had to raise his arms to maintain balance before bringing it down on Gooden's head. It portrays him not just punching Gooden, but pulling back his right arm (and at one point both arms) all the way behind his body before swinging with full force at Gooden's head. Despite Talaga's claims to the contrary, Gooden never moved except when bouncing or shaking from the force of Talaga's blows. Even after the video showed a third party trying to pull Talaga away, he returned one more time to deliver a final blow. The persuasive strength of the video was underscored by the jury's

two written requests to watch it during deliberations. Supp. CP __ (sub 126-27, Jury Inquiry and Court's Response).

Talaga also disregards the photographs of Gooden's injuries taken minutes after the assault, which show the obvious and devastating results of Talaga's degree of violence. Talaga never alleged that Gooden ever touched him, wielded a weapon, or even threatened to use one; the only alleged threat of violence was Gooden's alleged statement that he would "kick [Talaga's] ass," made more than two minutes before the assault. According to Talaga's own testimony, Gooden never approached him again or initiated contact prior to the assault; it was Talaga who kept trying to re-engage despite the distance and number of people between them. The disparity between the degree of damage Talaga inflicted compared to his own total lack of injuries was extreme.

Testimony about the effects of Gooden's injuries also countered Talaga's self-defense claim. Dr. O'Keefe noted injuries consistent with severe force, recalling Gooden's inability to breathe on his own for almost a week and a half. 8RP 34-35, 39-47, 46-47, 55-56. The EMT noted his gasps for breath consistent with someone in serious distress minutes after the attack. 7RP 145-46. Gooden's rehabilitative physician testified that Gooden had been

injured so severely that he would have died without treatment, and would likely never recover normal brain function. 9RP 18-21. Heather Sevaaetasi and Gooden confirmed that he could no longer use the bathroom by himself, retain memories properly, or cook or care for his children. 7RP 60-85.

Given such strong evidence of guilt, any error in admitting the Facebook post was harmless. This Court should deny Talaga's request for reversal.

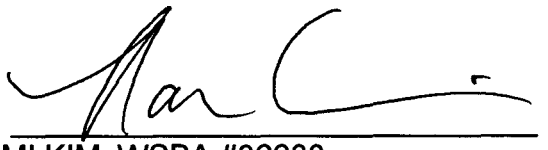
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Talaga's conviction.

DATED this 23 day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

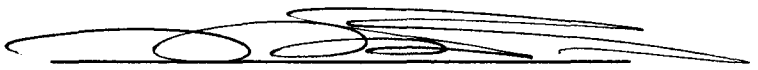


By: _____
NAMI KIM, WSBA #36633
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to THOMAS KUMMEROW, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MORRIS TALAGA, Cause No. 71447-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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