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Court of Appeals
Division I
State of Washington

No. 92134-2
COA No. 71447-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MORRIS TALAGA,

Petitioner.

FILED
AUG 25 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
E CRF

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Morris Talaga asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Morris Talaga*, No. 71447-3-I (July 27, 2015). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Prior acts of a defendant are not admissible simply to prove he acted in conformity with a character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404(b). The Court of Appeals ruled that the evidence admitted by the trial court was merely a statement and not an “act,” thus analysis under ER 404(b) was not required. Is an issue of substantial public interest presented which requires this Court to determine whether a statement can also be an “act” for the purposes of ER 404(b)?

2. The federal and Washington State Constitution guarantee a defendant the right to be informed of the charges he is facing. Here, the

State failed to charge Mr. Talaga with being an accomplice but instructed the jury on accomplice liability. Is a substantial issue under the United States and Washington Constitutions presented where the failure to charge Mr. Talaga with being an accomplice violated his constitutionally protected right to notice?

3. The Washington Constitution guarantees jury verdicts are unanimous. To ensure jury unanimity when the State proves several acts which could constitute an assault, the State must either elect which act upon which it relies, or the trial court must instruct the jury on unanimity. Is a substantial issue arising under the Washington Constitution presented here when the State presented several acts which could constitute the assault, but the State never elected and the court never instructed on jury unanimity?

D. STATEMENT OF THE CASE

In August 2011, Morris Talaga was working security at Jimmy T's bar in Kent. 11/25/2013RP 37, 42. The clientele at Jimmy T's was described as "pretty aggressive." 11/25/2013RP 39. On August 27, 2011, Mr. Talaga began work at 9:00 p.m., but was allowed to leave early because it was a quiet night. 11/19/2013RP 13; 11/25/2013RP 45-46.

Mr. Talaga remained at the bar, socializing and drinking. 11/25/2013RP 46. After some time had passed, Mr. Talaga and his friends went outside where they continued to socialize with other patrons in the parking lot. 11/25/2013RP 49. While in the parking lot, Mr. Talaga confronted two men who he observed looking into cars. 11/25/2013RP 50.¹ One of these men was Allen Gooden, who went by his middle name, Montrae. 11/19/2013RP 58.

This confrontation escalated to the point where Mr. Talaga felt the need to defend himself. 11/25/2013RP 52-56. Mr. Talaga engaged one man, then turned his attention to Mr. Gooden, who was prone on the ground, but still moving, and according to Mr. Talaga, still a threat. 11/25/2013RP 56-59. Mr. Talaga struck Mr. Gooden several times with his fists and his feet, not waiting to determine if Mr. Gooden could get up and again become a threat. 11/25/2013RP 60. When he no longer deemed Mr. Gooden a threat, Mr. Talaga left and went home. 11/25/2013RP 74.

Other witnesses in the parking lot saw a skirmish break out among several people, with shouting, then fisticuffs. 11/19/2013RP 15-

¹ Mr. Talaga did not identify himself to these individuals as working for Jimmy T's security, but he was still wearing his "Jimmy T's Security" shirt. 11/19/2013RP 17; 11/25/2013RP 91.

18, 129. These people stated that Mr. Talaga was not the aggressor, but that he struck and kicked Mr. Gooden while he was on the ground.

11/19/2013RP 18-33, 129. Mr. Gooden was taken to Harborview Hospital suffering from a potential head injury. 11/19/2013RP 147-49. Mr. Gooden was subsequently diagnosed as suffering significant head trauma. 11/21/2013RP 31.

Kent Police were initially unable to identify Mr. Talaga, but were told his nickname was “Mo,” and that he was Samoan 11/14/2013RP 16; 11/19/2013RP 96. Mr. Gooden’s partner, Heather Sevaaetsai, began looking on the website, Facebook, for a Samoan with the nickname “Mo,” and discovered Mr. Talaga’s Facebook page. 11/19/2013RP 98. Ms. Sevaaetsai forwarded this information to the Kent Police. 11/19/2013RP 98. Based on this information and further investigation, the police arrested Mr. Talaga. 11/14/2013RP 41, 56.

Mr. Talaga was charged with one count of Assault in the First Degree. CP 13. Prior to trial, Mr. Talaga moved to exclude any other acts evidence under ER 404(b). CP 23. At a pretrial hearing, the court asked the prosecutor whether he had any prior act evidence he wished to admit. 11/7/2013RP17. The prosecutor proffered two pieces of evidence that he averred fit within this rubric: a copy of Mr. Talaga’s

Facebook page and a copy of picture of Mr. Talaga from that page.

11/7/2013RP 18-19. Specifically, the prosecutor noted:

So it's the page that has writing on it, and it was a post by the defendant, who, I guess, goes by dose or Doze, DOZE, and the relevant portion that we think is relevant to this case, about half-way through it, it says, "Just leave me alone and we got no problems. Test me, you just might be on YouTube, the most epic knockout." And it is the State's position that this is Mr. Talaga indicating what he does to people who cross him. It is consistent with his actions that night while at the Jimmy T's. As the Court read the certification in the State's summary of the facts, I think, *if there is anything classified as an epic knockout, it is what the State is alleging the defendant did to Mr. Gooden that night*. So we believe it is relevant to his state of mind and to his intent, especially in a case like this, when defense counsel seems to be indicating their claim of self-defense. So that's why I think it is relevant.

11/7/2013RP 19-20 (emphasis added). Mr. Talaga immediately objected, noting that this rationale for admission was nothing more than admission of improper propensity evidence, and even if relevant, the evidence was substantially more prejudicial than probative.

11/7/2013RP 20. Further, Mr. Talaga sought a limiting instruction should the evidence be admitted. 11/7/2013RP 21. The court reserved ruling on the admissibility, but noted:

I think it will likely come in, but with a limiting instruction . . . But I do think, especially in self-defense, and the State of mind intent [sic], that's why it would come in.

...
The relevance aspect of it, I don't have a problem with. Most people don't say things like this unless they mean it, but that doesn't mean it is admissible just because it is relevant.

11/7/2013RP 21.

The court later ruled the evidence was admissible at trial:

I do think 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.

11/12/2013RP 5-6. The two items were admitted at trial during the testimony of Ms. Sevaaetsai. CP 145, Exhibit 15 (photo of Mr. Talaga), Exhibit 16 (snapshot of Mr. Talaga's Facebook profile page);

11/19/2013RP 116-17.

Pursuant to Mr. Talaga's request, the jury was instructed on lawful use of force. CP 48-50. The jury subsequently convicted Mr. Talaga as charged. CP 56.

The Court of Appeals rejected Mr. Talaga's argument concerning the admission of the Facebook page, finding it merely a statement and not an "act," thus no ER 404(b) analysis was required. Decision at 8-10. In addition, the Court rejected Mr. Talaga's arguments concerning the adequacy of the notice given in the

Information and the lack of instruction on jury unanimity. Decision at 11-13.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The evidence admitted pursuant to ER 404 (b) proved nothing more than Mr. Talaga acted in conformity his boasts which violated his right to a fair trial.**

ER 404 (b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.² ER 404(b) was designed “to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) is intended to prevent application by jurors of the common assumption “that ‘since he did it once, he did it again.’” *State v. Bacotqarcia*, 59 Wn.App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991). “This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” *Foxhoven*, 161

² “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ER 404 (a).

Wn.2d at 175. This rule is “not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *Id.* “In no case . . . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The same evidence may be admissible for other purposes though, depending on its relevance and the balancing of the probative value and danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404 (b) includes a nonexclusive list of permissible purposes for admitting evidence of a person’s other bad acts.³

The law resists criminal convictions based upon the jury’s view that the defendant is a bad person or has a history of bad conduct. Therefore, the trial court must begin with the presumption that evidence

³ “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.” ER 404(b).

of prior misconduct is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, when demonstrated, such evidence may be admissible for purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), quoting ER 404(b). Before the trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. The latter factor inserts an ER 403 examination into an ER 404(b) analysis. “Unfair prejudice” is caused by evidence that is likely to arouse an emotional response rather than a rational decision. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987).

The Court of Appeals ruled that the evidence amounted to nothing more than a statement by Mr. Talaga, not an “act.” Decision at 9. The Court ruled that statements are not “acts,” thus an ER 404(b) analysis was not required. Decision at 9. The Court also ruled that Mr.

Talaga's claim in his Facebook page did not "refer to a prior act, such as an assault or other episode of violence committed before the attack on Mr. Gooden". *Id.* Besides simply being wrong, the Court of Appeals ruling is far too narrow and ignores the evidence that was admitted.

This Court should accept review to determine whether a statement can also be an "act" for the purposes of ER 404(b). The Court should then reverse Mr. Talaga's conviction and remand for a new trial.

2. The Information failed to provide sufficient notice as required by the state and federal constitutions.

The accused in a criminal case has a constitutional right to notice of the alleged crime the State intends to prove. U.S. Const. amend. VI; Const. art. I, § 22 *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), *citing Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932). Notice is provided through the information. CrR 2.1(a)(1). The State must include all essential statutory and court imposed elements of an alleged crime in the information. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). The purpose of this essential elements rule is to sufficiently apprise the defendant of the charges against them so that he or she may prepare a defense. *Id.* at 101.

Here the State failed to allege Mr. Talaga acted as an accomplice, yet over defense objections, the trial court instructed the jury on accomplice liability. Mr. Talaga submits this denied his constitutionally protected right to notice because it denied him the opportunity to prepare a defense.

This Court should accept review and find Mr. Talaga's right to notice was violated requiring a new trial.

3. The trial court violated Mr. Talaga's right to a unanimous jury.

A criminal conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. Art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts resulting in a single charge, either the prosecutor must either elect which act she is relying on as the basis for the charge, or the trial court must instruct the jurors that they must unanimously agree that the State proved a single act beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). *See also State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (“[w]hen the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, *either the State must elect*

which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.”) (emphasis added). If the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error stemming from the possibility that some jurors may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Whether the trial court was required to instruct the jury on unanimity is reviewed by this Court *de novo*. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

The right to a unanimous verdict is part of the fundamental constitutional right to a jury trial that may be raised for the first time on appeal. *State v. Bobenhouse*, 166 Wn.2d 881, 912, 214 P.3d 907 (2009).

Mr. Talaga submits the State presented several acts which could have constituted the assault in this case, some of which could have supported his claim of self-defense, and some of which were committed by persons the State contended were accomplices. As such, Mr. Talaga contends the court violated his right to a unanimous jury verdict when

it failed to instruct the jury it had to be unanimous on the act which constituted the assault.

This Court should grant review and find that the failure to instruct on jury unanimity requires reversal of Mr. Talaga's conviction.

F. CONCLUSION

For the reasons stated, Mr. Talaga asks this Court to grant review and reverse his conviction.

DATED this 21st day of August 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 71447-3-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
MORRIS TALAGA,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>July 27, 2015</u>

SPEARMAN, C.J. — In a trial for assault in the first degree, the court admitted evidence of statements Morris Talaga had posted on his Facebook account before the alleged assault. Talaga argues that the evidence should have been excluded as prior acts evidence under ER 404(b). In a statement of additional grounds, he also argues that the charging information was insufficient and the jury instructions failed to require unanimity as to which act constituted degree assault. Finding no error, we affirm.

FACTS

Morris “Mo” Talaga was charged with one count of first degree assault arising from an attack on Montrae Gooden in the early hours of August 28, 2011. At trial, Talaga did not deny attacking Gooden, but argued that he had acted lawfully in self-defense. The jury convicted Talaga as charged on the following evidence.

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On the evening of August 27, 2011, Gooden left his home in Renton, Washington to go out with his friend Leslie McCraney to a bar called Jimmy T's. The bar, located in Kent, Washington, had a reputation among local police as a "problem ba[r], probably the biggest problem on East Hill and the Valley combined." 5 Verbatim Report of Proceedings (VRP) at 42-43.¹ It was well known for frequent fights at closing time in the parking lot.

That night, Talaga was working as a security guard at the bar. When he got off work around 12:30 a.m., he went inside for some drinks with friends. He drank 3-4 cocktails before going out into the parking lot with friends.

Surveillance footage shows Gooden, McCraney, and Talaga standing in a loose group with other men in the center of the parking lot shortly after Gooden and McCraney's arrival. As Gooden and McCraney left the group at 1:50 a.m., Talaga circled and followed them until they finally walked out of range of the cameras. Neither McCraney nor Gooden appeared to follow Talaga. Talaga moved toward the bar entrance, waved his jacket in the air and lifted his shirt up, apparently challenging the other men.

As Talaga paced back and forth near the club entrance, Gooden and McCraney eventually reentered camera view some distance away in the parking lot. Talaga walked toward them. Soon Gooden and McCraney were surrounded by several men, including Talaga and two of his friends. As two of Talaga's

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

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friends moved toward Gooden, Talaga began circling the group again. One of Talaga's friends punched Gooden and knocked him to the ground. As Gooden tried to raise his head, the assailant stood over him and punched him in the head again. Gooden raised his arms up as if to protect himself.

As Gooden lay on the ground, Talaga approached him, crouched down and punched Gooden twice in the head. The blow caused Gooden's head to roll forward. When McCraney approached to assist Gooden, Talaga also punched him. Talaga then returned his attention to Gooden who remained motionless on the ground. Talaga raised his right leg and stomped on Gooden's head. The force caused Gooden's body to roll forward. Talaga repeated this move three more times, causing Gooden's shoulders to move and his head to bounce off the pavement. Meanwhile, Talaga's friends continued attacking McCraney and another man present. As Gooden continued to lie motionless, Talaga drew back and punched Gooden's head a third, fourth, fifth and sixth time.

A security guard and another man in a dark shirt approached and gestured at Talaga to back away from Gooden. He did not. Instead, he walked around Gooden's motionless body, reached down, and punched him a final, seventh time, causing Gooden's head to bounce off the pavement. The security guard and the man in the dark shirt again motioned Talaga away from Gooden. This time he walked away, leaving Gooden lying motionless on the ground.

At trial, Talaga claimed that Gooden provoked the assault by "running off at the mouth," telling Talaga, "I will kick your ass." 9VRP at 53. Talaga stated that Gooden's words and conduct made him afraid for his safety, claiming that

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Gooden had followed him throughout the parking lot as he attempted several times to walk away. Talaga testified, "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." 9VRP at 53; 61-62. Talaga claimed he engaged McCraney because he felt threatened. He turned his attention back to Gooden, who was prone on the ground, because, according to Talaga, he was still moving and still a threat. Talaga admitted striking Gooden several times with his fists and his feet, not waiting between blows to determine if Gooden could get up and again become a threat. When he no longer felt threatened by Gooden, Talaga left the parking lot and went home.

The State offered the testimony of an eyewitness, a Jimmy T's security guard, who heard Talaga yelling "I will beat your ass," 7VRP at 15-17; 9VRP at 60) and saw Talaga "'squaring up' with several men (7VRP at 16-17). The witness testified that Talaga's friends had "knocked out" Gooden, who "went to sleep. And that's when [Talaga] 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." 7VRP at 19-21, 30-31. The witness repeatedly testified that Gooden was unconscious when Talaga was assaulting him, describing Gooden as "lights out," "asleep already," and "[o]nce dude hit the ground, he was -- there was nothing coming out of him." 7VRP at 20.

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McRaney testified that neither he nor Gooden had said or done anything to instigate the attack by Talaga and the others.

And the jury heard testimony from three first responders, who each testified that they found Gooden on the ground, unconscious, with a large pool of blood under his head, and completely non-responsive to shaking or shouting. They noted his "agonal breathing," described as labored, snoring breath or gasping and grunting, the "kind of last breath you have before death." 5VRP at 15. And one witness testified that she had to be intubate Gooden at the scene in order to help him breathe.

Following the assault, Gooden spent almost three weeks in the Harborview Intensive Care Unit and was not discharged until September 16, 2011. He arrived with a Glasgow Coma Scale (GCS) score of 6, akin to a comatose person. Trauma surgeon Grant O'Keefe, Gooden's discharge physician, rendered six diagnoses for Gooden, including a nasal bone fracture and orbital fracture. 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 fifty percent mortality rate. 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. Gooden was unable to breathe on his own for almost a week and a half and required intubation without which, O'Keefe testified,

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he would have died. O'Keefe said there was a high chance that Gooden would never return to his previous level of functioning.

Gooden spent almost four additional weeks in inpatient rehabilitation. 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. Dr. Esselman agreed that Gooden would have died without treatment. Because of the severity of his injuries, Dr. 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. 9VRP at 18-20.

Heather Sevaaetasi, Gooden's partner, testified that after leaving rehabilitation, Gooden had ceased any further improvement entirely. 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. She had to assist him in bathing, shaving, and using the toilet.

Gooden testified that he was learning how to respell words and do math. 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." 7VRP at 67. He struggled with memory and balance. 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.

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Police were unable to locate a suspect for several months following the assault. They had learned from bystanders at Jimmy T's bar that the assailant was a Samoan man with the nickname "Mo." 5VRP at 16. Based on this information, Gooden's partner, Sevaaetsai, began looking on Facebook for a Samoan man with the nickname "Mo." In November 2011, she discovered Talaga's Facebook page. At the time, the "Basic Information" section of Talaga's profile contained the following comment: "... just leave me alone & we got no problems, test me & u just might b on YouTube f[or] da most epic knockout. . . ." Ex. 16. Sevaaetsai forwarded this information to the Kent Police, who subsequently arrested Talaga.

DISCUSSION

Talaga argues that the trial court erred when it admitted evidence of the comment on his Facebook page over his objection because, in his view, the evidence was improper propensity evidence under ER 404(b).² In response, the State argues that the comment was not a "prior act" subject to analysis under the rule. Instead, the State contends that the comment was a written expression of

² ER 404(b) provides:

Other Crimes, Wrongs, or Acts. 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.

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Talaga's state of mind, more appropriately analyzed as an "admission by party-opponent" under ER 801(d)(2).³ We agree with the State.

Appellate courts review 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. "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) (citing State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

ER 404(b) governs the admissibility of "[e]vidence of other crimes, wrongs, or acts. . . ." Talaga does not argue that the comment on his Facebook page, which was not directed at any particular person, was either a "crime" or "wrong" within the meaning of the rule. And we conclude that it was not an "act" that must be analyzed under the rule.

³ ER 801(d)(2) provides:

Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

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Although ER 404 does not define the term, we have recognized the plain and ordinary meaning of the word “act” as: “the process of doing or performing something; an action ... a deed ... something that is done or performed. State v. Forrester, 21 Wn. App. 855, 867, 587 P.2d 179 (1978); see also, State v. Kincaid, 103 Wn.2d 304, 314-15, 692 P.2d 823 (1985). Here, there can be no rational argument that the substance of the comment on Talaga’s Facebook page amounted to a “process of doing” or “action.” As such, it was not an act. Nor did it refer to a prior act, such as an assault or other episode of violence committed before the attack on Gooden. Accordingly, the evidence was not subject to analysis as a “prior act” under ER 404(b). Cf. State v. Brockob, 159 Wn.2d 311, 348-49, 150 P.3d 59 (2006) (in a prosecution for possession with intent to manufacture, defendant’s confession to previously buying drugs analyzed under ER 404(b)).

The comment on Talaga’s Facebook page is more properly analyzed under ER 801(a)(1), which defines “statement” as “an oral or written assertion,” and ER 801(d)(2), which sets forth an exemption to the rule against hearsay for admissions by a party-opponent.

Because the Facebook comment was not prior acts evidence under ER 404(b) and was an admission by party opponent under ER 801(d)(2), not subject to the rule against hearsay, the trial court needed only to consider its relevance under ER 401 and potential for undue prejudice under ER 403 before admitting it. The trial court expressly found that the evidence was relevant because it was probative of Talaga’s state of mind and intent at the time of the assault, both

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disputed elements of Talaga's self-defense claim.⁴ And it found by preponderance of the evidence that the evidence was not unduly prejudicial.⁵ Because the trial court made the requisite findings based on facts supported by the record, we do not find admission of the evidence to be an abuse of discretion.

Next, in his statement of additional grounds, Talaga argues that the charging information was insufficient because it failed to include all essential elements of the crime. We disagree.

An accused has a right to be apprised with reasonable certainty of the nature of charges against that person in order to prepare an adequate defense. State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440 (1990). But that right is not violated when the charging document fails to expressly charge accomplice liability. State v. McDonald, 138 Wn.2d 680, 688, 981 P.2d 443 (1999); State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). It is constitutionally permissible to charge a person as a principal and convict him as an accomplice, as long as the court instructs the jury on accomplice liability. Davenport, 100 Wn.2d at 764-65.

⁴ The State appropriately limited its use of the evidence to this purpose, noting during closing arguments that Talaga "told you about his intent to cause great bodily harm through his Facebook post. . . . This is being offered and was admitted for one purpose and one purpose only: To show the defendant's intent. To show the way the defendant thinks. . . ." 10VRP at 10.

⁵ We note that, even if the Facebook comment were an "act" under ER 404(b), as Talaga suggests, evidence of the comment would likely still be admissible based on these findings, as the rule expressly contemplates admissibility of prior acts to prove intent, subject to "careful consideration of relevance and a realistic balancing of [the] probativeness [of the evidence] against its potential for prejudice." State v. Saltarelli, 98 Wn.2d 358, 365, 655 P.2d 697 (1982).

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In this case, the charging information named only Talaga and did not mention accomplice liability. However, the jury was instructed on accomplice liability. Accordingly, Talaga's conviction was not unconstitutional on these grounds.

Talaga also asserts in his statement of additional grounds that the jury instruction failed to require unanimity as to which act constituted the first degree assault charged in this case. We disagree.

To convict a defendant of a crime, the jury must be unanimous that the defendant committed the criminal act. State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). In cases where there is evidence of multiple acts of similar misconduct that relate to one charge against the defendant, the State is required to elect which act it is relying upon for a conviction. Id. If the State fails to make such an election, the court must instruct the jury that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. Id. at 64. However, where the State presents evidence of multiple acts which indicate a "continuing course of conduct," neither an election nor a unanimity instruction is required. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996) (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)).

In this case, the jury was instructed that, to convict on the first degree assault charge it must find:

- (1) That on or about the 28th day of August, 2011, the defendant assaulted Allen Montrae Gooden;
- (2) That the defendant acted with intent to inflict great bodily harm;
- (3) That the assault

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- (a) was committed by a force or means likely to produce great bodily harm or death; or
- (b) resulted in the infliction of great bodily harm; and
- (4) That this act occurred in the state of Washington.

If you find from the evidence that elements (1), (2) and (4), and either alternative element (3)(a) or (3)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP at 42. Notably, the State did not elect which of the several assaultive acts it alleged supported conviction and the jury was not given a unanimity instruction.

In State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78, (2014), our Supreme Court noted five factors to be considered when determining whether multiple assaultive acts constitute one course of conduct. Those factors are:

- The length of time over which the assaultive acts took place,
- Whether the assaultive acts took place in the same location,
- The defendant's intent or motivation for the different assaultive acts,
- Whether the acts were uninterrupted or whether there were any intervening acts or events, and
- Whether there was an opportunity for the defendant to reconsider his or her actions.

Id.

In this case, the relevant assaultive acts took place rapidly over the course of only a few minutes. They all occurred in the same area of the Jimmy T's parking lot. And there is no evidence that Talaga's intent or motivation changed throughout the attack, that his acts were interrupted, or that he had meaningful opportunity to reconsider his actions. Accordingly, the assaultive acts here

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constituted one course of conduct, for which no election or unanimity instruction was required.

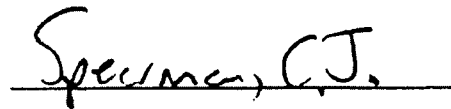
Moreover, the overwhelming evidence in this case, which included numerous video images, the testimony of disinterested eyewitness, and Talaga's own testimony, established that Talaga committed each assaultive act alleged after Gooden was subdued on the ground and, if not unconscious already, nearing that state. Given this evidence, no rational juror could have a reasonable doubt as to whether each assaultive act alleged by the State established the crime of first degree assault beyond a reasonable doubt. Accordingly, even if the assaultive acts in this case did not constitute one course of conduct, any error in failing to instruct the jury on unanimity was harmless. Camarillo, 115 Wn.2d at 60.

Affirm.

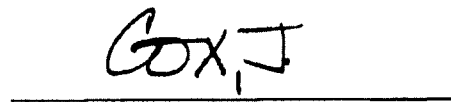
WE CONCUR:



A handwritten signature in cursive script, appearing to read "Apperich", written over a horizontal line.



A handwritten signature in cursive script, appearing to read "Spelman, C.J.", written over a horizontal line.



A handwritten signature in cursive script, appearing to read "COX, J.", written over a horizontal line.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71447-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 21, 2015

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