No. 71813-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD HURN,

Appellant.

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

REPLY BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. The trial court erred and deprived Mr. Hurn a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

a. *The court erred when it admitted allegations of unrelated thefts by Mr. Hurn.*

The trial court erred in admitting propensity evidence regarding Mr. Hurn's prior thefts.

ER 404(b) provides:

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

"Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

> ER 404(b) 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.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (Internal quotations omitted).

It should be beyond dispute that evidence that a person "regularly" does something is nothing more than propensity: the words "regularly" and "propensity" are interchangeable. The trial court, and State on appeal, misread ER 404(b). The court reasoned that propensity evidence was admissible so long as it identified some other purpose. That ignores the caution of *Gresham* that propensity evidence is inadmissible for any reason. Instead, what the rule permits is admission of evidence of other acts offered for some purpose wholly unrelated to its propensity value. The State's brief simply ignores *Gresham*.

By its plain terms ER 404(b) does not permit evidence that a person has a propensity to steal cars as evidence and thus it cannot permit evidence that Mr. Hurn regularly stole cars. That is so even is the trial court believes Mr. Hurn's propensity to steal is relevant to proof of any number of other facts. "ER 404(b) is a categorical bar" to propensity evidence. *Gresham*, 173 Wn.2d at 420. The evidence of prior acts must have relevance independent of its propensity value. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) *(*citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Here unrelated allegations of theft are wholly unrelated to any necessary element in this case.

b. *The court erred when it admitted allegations that Mr. Hurn previously hit or threatened Brown or made inappropriate comments to Ms. Barnhardt.*

The court allowed Ms. Brown to testify that Mr. Hurn had hit and spit on her, had threatened to sell her to "the Mexicans," and had once stood outside her window with a gun. CP 787-88; RP 1212. The court posited this evidence was relevant in to explain why she minimized her criminal involvement when first confronted by police. CP 788. The Court also reasoned that "like in domestic violence cases" this evidence explained "the context of their relationship." *Id.*

State v. Gunderson limits this sort evidence, if admissible at all, could be admitted as relevant evidence of the witness's credibility but only where the State first established "why or how the witness's testimony is unreliable." 181 Wn.2d 916, 925, 337 P.3d 916 (2014). The Court limited this class of evidence to instances in which the State can establish its "overriding probative value." *Id.* Thus, it is not enough to admit other acts evidence "to allow the jury to assess her overall credibility. Brief of Respondent at 15. Instead, the State must first show Brown and Barnhardt's testimony regarding Mr. Hurn's acts was "unreliable." The State has never acknowledged much less satisfied that burden.

In its brief the State points to inconsistent statements by Ms. Barnhardt and Ms. Brown regarding their own behavior as establishing the necessary unreliability to permit admission of evidence of Mr. Hurn's prior acts. Brief of Respondent at 17. It would certainly be a curious rule, if not an extraordinarily useful one for the prosecutor, to permit other acts evidence in simply because Ms. Barnhardt lied about her identity because she feared she has an outstanding arrest warrant. Unfortunately for the State, that is not rule. Rather, the threshold is "*conflicting statements about [the defendant's] conduct*." *Gunderson*, 181 Wn.2d 916 (Emphasis and brackets in original) (citing *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)).

Finally, and once again despite *Gunderson*, the State maintains the evidence was admissible "to explain the relationship and dynamic." Brief of Respondent at 15. But *Gunderson* rejected the notion that such evidence is broadly admissible for these amorphous purposes. Instead, the Court endorsed a far more limited rule, allowing such evidence "may be helpful to explain the dynamics of domestic violence *when offered in conjunction with expert testimony* to assist the jury in assessing such evidence." *Id.* at 925 n.4 (Emphasis added). Here, the there was no effort to offer expert testimony to explain the dynamics. In its place, the State simply offered propensity.

The trial court's conclusion here that the prior-acts evidence was admissible as in domestic violence cases misses the point that such evidence is generally not admissible in those cases. The evidence was not properly admitted.

c. *Claims that Mr. Hurn "hit on" and said "nasty things" and "inappropriate" things to Karla Barnhardt were not admissible.*

The court permitted Ms. Barnhardt to testify that on prior unrelated occasions Mr. Hurn had "hit on her" and made inappropriate sexual comments to her. CP 788. The court also permitted her to testify that he threatened to "sell" her and made threats against her. Again the court found this evidence admissible to explain the "context" of her relationship with Mr. Hurn. CP 788. Further the court found the evidence relevant to the "reasonable fear" element of second degree assault.

For the same reasons discussed above, this evidence was not admissible to explain the "context" or "dynamic" of Ms. Barnhardt's relationship with Mr. Hurn. Moreover, there is no logical relevance between Mr. Hurn's "inappropriate" language or acts and his alleged assaultive conduct.

As spelled out in Mr. Hurn's opening brief, a five-justice majority in *Magers* concluded use a defendant's prior acts to prove that

another's fear of them is reasonable is not a permissible exception under ER 404. *Magers*, 164 Wn.2d at 194-95 (Madsen, J., concurring); *Id.* at 195-99 (C. Johnson, J., dissenting). The State responds by urging the Court to ignore *Magers*. Brief of Respondent at 19-20. The State goes so far as to suggest the concurring opinion lacks precedential effect because it fails to cite to authority. Brief of Respondent at 19. But the Supreme Court has explained "[e]ven if we [did] not cite authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it. *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Citation to authority or not, *Magers* controls this case. And, given that the evidence of prior acts was held to be inadmissible in *Magers*, it was certainly inadmissible here.

d. *Evidence of Mr. Hurn's prior drug use was in no way relevant to the charges.*

As discussed above evidence that a person "regularly" does an act is in no way distinguishable from evidence that a person has a propensity to do that act. Moreover, ER 404(b) does not permit admission of propensity evidence to prove some identified fact. Rather, ER 404(b). Rather propensity evidence is "categorical[ly] bar[red" *Gresham*, 173 Wn.2d at 420.

e. *The error in admitting the other-acts evidence requires reversal.*

Gunderson recognized in that case "[a]lthough the evidence may be sufficient to find Gunderson guilty, it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." 181 Wn.2d at 926.

The State brushes aside as insufficient the indisputable fact that the overwhelming majority of Brown and Barnhardt's testimony at trial focused on Mr. Hurn's prior acts rather than the current offense. Brief of Respondent at 23. What effect any piece of evidence had on a jury can never be known. But this Court can examine the actions of the parties to assist in its assessment of the impact of the evidence. Presumably, the State did not waste the time of the jury and court parading such evidence before them on the belief that it was ineffectual and meaningless. Instead, two prosecutors, familiar with the type and strength of the evidence, made the strategic decision to repeatedly label Mr. Hurn a thief, a drug user, and all-around bad person precisely because they understood the impact such evidence would have on the jury. But this Court should certainly consider and credit the State's own belief in the influence of this evidence as illustrated by its litigation strategy.

2. The trial court erred in denying Mr. Hurn's motion to sever.

Mr. Hurn contends the court erred in denying his motion to sever. His arguments are fully set forth in his initial brief.

3. The State did not prove Mr. Hurn committed second degree assault.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitle[s] a criminal defendant to a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476-77 (Internal quotations and citations omitted).

As set forth in his opening brief, to convict Mr. Hurn of assault here, the State had to prove Mr. Hurn acted with the specific intent to cause Ms. Barnhardt to fear he would injure her when he fired the gun. RCW 9A.36.021; *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). It is not enough that the State proved Ms. Barnhardt was scared of him, or that she may have feared future harm. The State had to prove that she feared the act of firing the gun would injure her. The State did not

prove that element. Mt Hurn did not point the gun at her. RP 925. He did not fire the gun in her direction. Instead, by her account he simply pointed the gun through the sunroof and fired it. But it does not establish he specifically intended her to believe she was in imminent danger of being shot.

4. Mr. Hurn invoked his rights including his right have counsel present during any questioning.

Mr. Hurn's argument regarding the denial of counsel during questioning is fully set forth in his initial brief.

E. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court should reverse Mr. Hurn's conviction.

Respectfully submitted this 10th day of August, 2015.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant

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CHAD HURN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER JOSEPH, DPA [paoappellateunitmail@kingcounty.gov] [jennifer.joseph@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] CHAD HURN 884673 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF AUGUST, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710