NO. 72627-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LUIS VELA,

Appellant.

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

The Honorable Monica J. Benton, Judge
The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY[1]

1. THE TRIAL COURT ERRED IN ADMITTING ER 404(B) DOMESTIC VIOLENCE EVIDENCE.

As set forth in the opening brief, Vela argues the trial court erred in admitting other alleged uncharged acts of domestic violence between Vela and Lopez-Nunez under ER 404(b) for several improper purposes and because the ER 404(b) evidence was admitted without expert testimony to explain the dynamics of a domestic violence relationship. Brief of Appellant (BOA) at 12-19, 24-28.

a. The Uncharged Acts Were Not Relevant To Assess Fear of Bodily Injury.

Vela maintains the uncharged acts were improperly admitted, in part, because Lopez-Nunez's "reasonable fear" was not relevant to the charged second and third degree assaults because they were predicated upon completed unlawful touchings. BOA at 16-17; 1RP 102-03, 468. The State does not dispute that both assaults involved completed acts. Brief of Respondent (BOR) at 23. Rather, the State argues the uncharged acts were relevant to the jury's determination of whether Lopez-Nunez

[1] The State's arguments regarding defense counsel's failure to properly request an ER 404(b) limiting instruction have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

reasonably feared bodily injury at the time Vela touched her with the knife. BOR at 21-24. This argument fails for several reasons.

First, as the State recognizes, the trial court did not explicitly admit the uncharged physical acts for purposes of proving whether Lopez-Nunez reasonably feared Vela. BOR at 19 (citing 1RP 103, 109-15). Indeed, the trial court's comments suggest it was not admitting the uncharged physical acts on that basis: "let's assume the Court's not persuaded on that prong, but rather on the question of delay and credibility." 1RP 103.

Second, even assuming the trial court admitted the prior uncharged acts for purposes of proving Lopez-Nunez's fear, under the specific facts of this case, the prior acts were not necessary to prove Lopez-Nunez's state of mind. Evidence of prior misconduct is relevant on the issue of apprehension and fear of bodily injury only when the charged act does not itself conclusively establish that element. See State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008) (upholding admission of prior violent misconduct evidence on the issue of assessing whether the complaining witnesses' apprehension and fear of bodily injury was objectively reasonable, since the charged assault did not itself conclusively establish "reasonable fear of bodily injury."); State v. Freigang, 115 Wn. App. 496, 505 n. 11, 61 P.3d 343 (2002) (recognizing that whether complaining witness subjectively feared Freigang was not a material element of the

charged assault with a deadly weapon because admissible evidence sufficiently established that Freigang was armed and uttered a threat to kill), rev. denied, 149 Wn.2d 1028 (2003).

Here, Lopez-Nunez alleged that Vela touched her genitals with a knife while simultaneously making threats that he would harm her. 1RP 199-202. Thus, the prior uncharged physical acts were not necessary to establish that Lopez-Nunez reasonably feared bodily injury because the charged assault conclusively established that fact. Moreover, although Lopez-Nunez testified she was fearful that Vela would hurt her with the knife, she did not connect that fear to Vela's prior alleged acts of violence. 1RP 202. Thus, there was no nexus between the prior alleged acts of violence and Lopez-Nunez's fear regarding the knife.

b. The Uncharged Acts Were Not Relevant To Explain Delay In Reporting or Inconsistent Statements.

Vela also argues the uncharged acts were not admissible to explain a delay in reporting or inconsistent statements by Lopez-Nunez. BOA at 15-16. Although acknowledging that Vela objected during trial to admission of the uncharged acts to explain Lopez-Nunez's lack of delay in reporting the May 5th incident, the State nonetheless suggests Vela raises this argument for the first time on appeal. BOR at 26, n. 11. This argument is without merit. An objection need only be specific enough to

alert the trial court to the type of error involved. See e.g. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (noting ER 103(a)(1)[2] allows appellate review when grounds for objection, though not specifically lodged at trial, are readily apparent from circumstances); 5 Karl B. Tegland, Washington Practice: Evidence Law And Practice § 103.11, at 58-59 (5th ed.2007) (even where no specific objection made, under ER 103(a) "the propriety of the ruling will be examined on appeal if the specific basis for the objection was 'apparent from the context.'" (quoting ER 103(a)(1)). Vela's objection below to admission of the evidence because Lopez-Nunez did not delay in reporting the May 5th incident is more than sufficient to preserve the issue on appeal.

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[2] ER 103(a) provides:

> "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

The State next tries to circumnavigate the Court's recognition in State v. Fisher[3] that alleged prior misconduct may properly be conditioned upon the defense's making an issue of the complaining witnesses' delayed reporting. BOA at 15-16. As Fisher recognized, that condition makes sense when, as in Vela's case, the accused was not on trial for or charged with the physical abuse at issue. This is because extreme prejudice generated by such evidence may substantially outweigh its probative value if no issue is made of delayed reporting. Fisher, 165 Wn.2d at 746. The State nevertheless suggests such a rule would "allow defense to lie in wait and make an issue of the delay only in closing argument, when it is too late for the State to present evidence of prior abuse to explain the delay." BOR at 27. The State cites no authority for this proposition.

Finally, the State suggests the uncharged acts were admissible to explain Lopez-Nunez's inconsistent statements. BOR at 24-26, 28. The only allegedly inconsistent statements the State points to however, are statements Lopez-Nunez supposedly made to her daughters about the source of her bruises, "telling her daughters that they were from work but testifying at trial that they were inflicted by Vela." BOR at 24-25 (citing 1RP 192, 249, 301.). The State cites to W.C.'s testimony explaining that Lopez-Nunez told her the bruises were caused by work. See 1RP 301.

[3]State v. Fisher 165 Wn.2d 727, 745-46, 202 P.3d 937 (2009).

The State cites nowhere in the record however, where Lopez-Nunez actually testified she told her daughters the bruises were caused by Vela rather than work. Indeed, contrary to the State's assertions, Lopez-Nunez's other daughter, J.C. testified that Lopez-Nunez, "never told me and I never asked where the bruises came from." 1RP 259-60, 262.

In any event, as explained in the opening brief, State v. Gunderson was concerned with the complaining witnesses' own statements being inconsistent; not that other evidence or testimony may have shown her other statements were in fact inconsistent. BOA at 14-15 (citing 181 Wn.2d 916, 920, 924, 337 P.3d 1090 (2014)) (recognizing that the complaining witness gave no conflicting statements about Gunderson's conduct and her testimony was not inconsistent with any prior statements that she had made to the police or the prosecutor's office). Gunderson rejected the argument the State appears to put forth here: that the prior uncharged acts were properly admitted because other evidence contradicted Lopez-Nunez's account of the charged incident. 181 Wn.2d at 924. Here, the state does not dispute that Lopez-Nunez gave no conflicting statements about Vela's alleged conduct to the police or the prosecutor's office.

No proper purpose supported admission of the uncharged incidents between Vela and Lopez-Nunez. Admission of the evidence unfairly

prejudiced Vela because it allowed the jury to infer that Vela had a propensity for violence against Lopez-Nunez. BOA at 17-19 (citing Gunderson, 181 Wn.2d at 925 (recognizing the "risk of unfair prejudice is very high" in domestic violence cases)).

2. THE TRIAL COURT ERRED IN ADMITTING ER 404 (b) EVIDENCE WITHOUT REQUIRING AN EXPERT TO EXPLAIN THE DYNAMICS OF DOMESTIC VIOLENCE RELATIONSHIPS.

Vela also argues the ER 404(b) evidence was improperly admitted without expert testimony to explain the dynamics of a domestic violence relationship. BOA at 24-28. The State maintains such expert testimony is unnecessary because "the average juror today," understands domestic violence may cause the complaining witness to delay reporting or make inconsistent statements. BOR at 31-32.

This argument is contradicted by the State's own argument at trial that the uncharged acts were necessary to explain the dynamics of the alleged relationship between Vela and Lopez-Nunez. As the prosecutor explained at trial:

> They are also relevant to explain what might be unusual behavior to jurors who aren't experienced with issues of domestic violence, which is to say, having been the victim of this assault, a particularly bad assault on April 30th, she still remained with the Defendant up through the May 5th incident for a few days, and in fact, was voluntarily still with the Defendant's company, doing things like going to the movies and going shopping with him on May 30th.

1RP 99.

The risk of unfair prejudice is "very high" when prior acts of domestic violence are admitted. Gunderson, 181 Wn.2d at 925. While some jurors are undoubtedly familiar with the complicated dynamics of domestic violence relationships, they are beyond the common knowledge of the average lay person. The prosecutor acknowledged as much. 1RP 99. Expert testimony is therefore necessary to prevent jurors from using prior acts as propensity evidence. Because no expert testified here, this Court should reverse Vela's conviction and remand for a new trial.

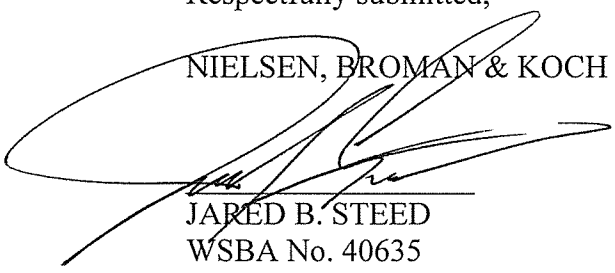
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Vela's convictions and remand for a new trial.

DATED this 16th day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF DECEMBER 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LUIS VELA
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER 2015.

X Patrick Mayovsky