

FILED
SUPREME COURT
STATE OF WASHINGTON
4/26/2021 3:15 PM
BY SUSAN L. CARLSON
CLERK

No. 99599-1
COA No. 53433-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL P. BAKKER
Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 18-1-00641-34

ANSWER TO PETITION FOR REVIEW

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT.....10

 1. The holding of the Court of Appeals does not conflict with this Court's prior holding regarding ER 404(b), and properly followed case law regarding the admission of evidence related to the constitutional right to bear arms.11

 2. Th Court of Appeals decision affirming the trial court's ruling was not inconsistent with case law and the trial court properly balanced the risk of unfair prejudice against the probative value 14

D. CONCLUSION16

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Everybodytalksabout,
145 Wn.2d 345, 39 P.3d 294 (2002).....11, 12

State v. Foxhoven,
161 Wn.2d 168, 163 P.3d 786 (2007).....11, 12

State v. Hancock,
109 Wn.2d 760, 748 P.2d 611 (1988).....13, 14

State v. Jeffries,
105 Wn.2d 398, 717 P.2d 722, *cert. denied*,
479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301(1986)13, 14

State v. Lord
161 Wn.2d 276, 294, 165 P.3d 1251 (2007).....15

State v. Robinson
24 Wn.2d 909, 167 P.2d 986 (1946).....13

State v. Rupe,
101 Wn.2d 664, 682 P.2d 571 (1984).....11, 12, 13

State v. Tharp
96 Wn.2d 591, 697 P.2d 961 (1981).....15

Decisions Of The Court Of Appeals

State v. Bajardi
3 Wn. App.2d 726, 730, 418 P.3d 164 (2018).....15

U.S. Supreme Court Decisions

State v. Lloyd
138 Wash. 8, 244 P. 130 (1926).13

Statutes and Rules

ER 401.....7

ER 403.....	7, 8
ER 404.....	1, 7, 9, 10, 11, 12, 13, 16
RAP 13.4.....	10

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether this Court should accept review where the decision of the Court of Appeals follows decisions of this Court regarding the ER 404(b) and the admission of evidence of gun ownership.

2. Whether this Court should accept review where both the trial court and the Court of Appeals properly balanced the prejudice with the probative value.

B. STATEMENT OF THE CASE

The appellant, Daniel P. Bakker, was charged by way of criminal information with assault in the second degree, assault in the fourth degree/domestic violence and harassment/domestic violence. CP 15. Those charges were the result of an incident involving Bakker, Kaela Pardo, who was Mr. Bakker's girlfriend, and a friend, Zackary Quisenberry. RP 179, 181, 308, 345, 489, 569. An additional charge of bail jumping was later added in a first amended information. CP 29-30.

The jury returned verdicts of not guilty on the charge of assault in the second degree and the lesser offense of assault in the third degree, but guilty of the lesser included offense fourth-degree assault on count one, and guilty of assault in the fourth

degree/domestic violence, harassment/domestic violence, and bail jumping as charged in counts two through four. CP 327-331. The trial court sentenced Bakker to 60 days on the bail jumping count and 364 days with 304 days suspended on each of the gross misdemeanor offenses with work release authorized if eligible and approved. CP 334-343; RP 754-795.¹

The assault charges and the harassment charges stemmed from a series of altercations that occurred during the evening, which included Bakker grabbing Pardo on multiple instances and charging into Quisenberry injuring his knee. 201, 262-263, 333, 388. Bakker also threatened to “beat the shit” of Pardo with a stick and told her “if she didn’t start cooking dinner, he would “knock her upside the head.” RP 226, 232, 313. Pardo testified that Bakker made threats to beat Pardo and stated he should beat her with a stick while Quisenberry was at the store. RP 313.

Pardo testified that while Quisenberry was at the store, Bakker made derogatory comments to her and was in a rage, threatening to “beat” her. RP 312, 349, 334. At one-point Bakker grabbed her wrists and restrained her, which she said hurt. RP

¹ The sequentially paginated jury trial May 6-10, 2019 will be referred to as RP in this brief. Verbatim reports of proceedings from other hearings will separately identified as necessary.

314. When Quisenberry returned, Quisenberry told Bakker to take his hands off of Pardo. RP 314. Verbal altercations continued regarding whether Bakker was too inebriated to drive and Pardo stated that Quisenberry and Bakker struggled with the keys for “maybe 20, 30 minutes.” RP 315.

When they were all back in the house, Pardo testified that Bakker was “still clearly very angry with [her].” RP 317. While Quisenberry was making dinner, Bakker got off the couch and Pardo again attempted to take his keys to keep him from driving. RP 317-318. After she was able to get the keys and tossed them to Quisenberry, Bakker again grabbed her wrists and wouldn’t let her go. RP 318. She kned him in the genitalia to get him to let go of her. RP 318. Bakker fell to the floor and pulled Pardo “down onto the floor with him.” RP 318. She fell onto her knees and later testified that he would not let her up and it was hurting her. RP 318.

Pardo stated that after she was able to get up, they had dinner and Bakker continued belligerent behavior, which included trying to force Quisenberry to eat steak with a fork aggressively. RP 318. She indicated that she removed steak knives during this time because she “felt like there was a threat there.” RP 318. At

one point, Bakker put Quisenberry in a headlock. RP 226-227, 320.

After dinner, Pardo indicated that Bakker “decided he wanted to wrestle with Zach,” and despite Quisenberry stating he did not want to fight, Bakker began wrestling with Quisenberry. RP 319. Pardo testified that Bakker took Quisenberry “down from behind at the knees and kicked him.” RP 319. She stated “he was clearly hurt when he had fallen down on the ground. He could barely get up.” RP 320. Quisenberry testified that his knee was swollen the next day and he went to the emergency room. RP 207. He indicated that he had a limp at work during the next week, his knee was painful, and he had to ice it every few hours. RP 208.

During Pardo’s testimony at trial, the prosecutor asked if Bakker said anything or made any threats to her that were concerning. RP 322. Pardo responded, “he threatened to beat the shit out of me, said he was going to beat me with a stick, continued through the evening saying that he would beat me.” RP 322. When asked how that made her feel, Pardo responded, “Unsafe. I certainly believed that—I don’t know how much to tell or to go into as to why.” RP 322.

At that point, the prosecutor asked for a recess and requested to address evidentiary issues outside the presence of the jury. RP 322-323. Issues regarding previous acts and possession of weapons had been discussed previously during the proceedings but had not been ruled upon. RP 152-156, 198-199. The prosecutor informed the trial court,

The State doesn't intend to introduce prior incidents and ask Ms. Pardo about those. We'll limit the reasonableness for her fear that the threats would be carried out to what she experienced and witnessed on this particular evening.

RP 324. The prosecutor acknowledged that the State had not filed an ER 404 motion or indicate that such a hearing was necessary prior to trial. RP 324.

At that point the trial court asked the prosecutor, "what does the State plan to introduce in terms of - - and I think you indicated there's guns and knives, right?" RP 324. The prosecutor responded,

My understanding from the testimony I would anticipate from Ms. Pardo is she is aware that there was a gun in the bedroom, that Mr. Bakker owns a firearm, and part of her efforts, I believe, to not want Mr. Bakker in the room is because there was a gun in there, and she was fearful of him having access to it. And I do not believe that that fact would be overly prejudicial to Mr. Bakker.

RP 324-325. The prosecutor continued,

The fact that he owns a firearm is no indication that he's a bad person or something that would lead to the inference. Simply it would go to her state of mind that she was so fearful of his actions of what he was saying and physically doing to her, that that was on her mind, that she did not want him to access weapons, similar to the fact that she removed steak knives from the kitchen because of his - - what she was witnesses cause that fear and concern. And I think it goes to - - it would be introduced to show her state of mind and the fear she had because of what she was witnessing from Mr. Bakker...

RP 325.

Defense counsel argued,

You know, outside of the gun, I think she's testified to enough to create a reasonable fear or apprehension that any threats would be carried out against her. Mr. Quisenberry testified that he witnessed Mr. Bakker putting hands on Ms. Pardo and threatening Ms. Pardo and that he thought Ms. Pardo - - I don't want to put too many words in his mouth but summarizing - - that she looked appropriately concerned. He was concerned for her.

RP 326. He later argued,

So I don't think we need to go into potential 404(b) stuff or invite speculation by the jury that there had ever been an event involving a firearm in the past or inviting the jury to speculate that because there was a gun in the house, that she was at risk by this firearm.

RP 327. Defense counsel indicated, "There are no allegations that the firearm had been inappropriately used. And so I just think it

invites speculation. It's unduly prejudicial, and I think its an end run around for 404(b) potential, Your Honor, if she comes in and testifies there was some prior incident with the gun." RP 327.

The trial court agreed that discussion of a prior incident with a gun would be unduly prejudicial by responding, "Agreed. But that's not what we're talking about, right? What we're talking about is her knowledge that he owns a gun and that, presumably, it was in the residence somewhere." RP 327. Defense counsel acknowledged that the trial court was correct and indicated that his concern was "speculation that that invites by the jury." RP 327. Counsel agreed that the evidence was "marginally relevant" to "her state of mind as far as the harassment allegation goes," but argued that it could not be admitted because it was more prejudicial than probative pursuant to ER 403. RP 328.

The trial court ruled,

The court considers this issue of the proposed testimony of Ms. Pardo that Mr. Bakker owns a firearm and that that firearm, at least to her knowledge, was at the residence, and the court's analysis is under 401 and 403. I don't consider this to be a 404(b) issue because under no circumstances is the court allowing Ms. Pardo to testify about any prior use of the firearm or any prior improper use of the firearm.

RP 328-329. The trial court continued,

My understanding is the only question is about her testimony as to his ownership and possession of a firearm, and the court believes that that evidence is relevant in this case and that it goes to Ms. Pardo's fear or concern that she had. And while it's true there may be other evidence of that as well, I don't think the fact that there's other evidence of it necessarily limits the State to not be able to put on evidence that is relevant.

RP 329. The trial court then conducted an ER 403 balancing test, stating,

And therefore, the court gets to 403 and needs to address whether the probative value is outweighed by the prejudice. And there is certainly prejudice here. The court understands that when you introduce any evidence of even just the existence of a firearm or even someone's understanding of the existence of a firearm, that it has some prejudice in a case. The court also understands, as it already held that there - - the evidence is relevant. In weighing the two, the court determines at this time that the probative value outweighs the prejudice.

RP 329. The trial court identified that the evidence "does go to that state of mind," and allowed "that limited testimony in [the] case so that Ms. Pardo can explain her stated of mind...as it goes to at least one of the counts." RP 330. Defense counsel did not ask for clarification of the trial court's ruling. RP 330-331.

Following the ruling, Pardo testified that the fact that there was a gun in the house was one of the reasons she "didn't want to call 911." RP 331. She opined fear that if they did not do anything,

she “would be left in the house with somebody who had already been threatening to hurt [her] and [beat] her” and who she “had just watched hurt their friend,” and “that he would have access to that gun.” RP 331-332. She testified that the gun was in the bedroom and when asked if she did anything to prevent him from accessing the gun, indicated that when Bakker tried to gain access to the bedroom she “told him he was not invited into the bedroom at that time, that he needed to sleep on the couch.” RP 332-333. She testified that Bakker’s response was “very, very angry, very aggressive,” and that he had her pinned between himself and the door and grabbed her wrists. RP 333. During cross examination, Pardo indicated that the gun was in a locked box in the closet. RP 346-347. She testified that Bakker did not say anything about the gun on the night in question. RP 347.

Following Bakker’s convictions, he appealed arguing that the trial court abused its discretion by admitting evidence that Bakker owned a gun by finding that the testimony was not covered by ER 404(b) and by finding that the probative value of the evidence outweighed the potential prejudicial affect. State v. Bakker, No. 53433-0-II (Unpublished Opinion). The Court of Appeals noted that the evidence in the “instant case was not offered as character

evidence” and the trial court “did not err when it ruled that the proffered testimony was not within the scope of ER 404(b).” *Id.* at 6-7. The Court of Appeals further held that the trial court “did not abuse its discretion when it determined that the danger of unfair prejudice did not substantially outweigh the probative value of the gun evidence.” *Id.* at 7. Bakker now asks this Court to review the ruling of the Court of Appeals.

C. ARGUMENT

A petition for review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Bakker argues the decision of the Court of Appeals conflicts with other case law and that important constitutional rights are involved; however, the decision of the Court of Appeals is consistent with prior case law. There is no reason that this Court should accept review.

1. The holding of the Court of Appeals does not conflict with this Court's prior holdings regarding ER 404(b), and properly followed case law regarding the admission of evidence related to the constitutional right to bear arms.

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." The State merely elicited evidence that there was a firearm in the residence during the incidents in question, which Pardo actively sought to limit access to due to her concerns based on Bakker's threats of bodily injury. There was no other crime, wrong or act elicited. Pardo herself testified that the firearm was not used and no act utilizing the firearm occurred. RP 346-347. In finding that the trial court did not err by holding that ER 404(b) applied, the Court of Appeals discussed and distinguished this case from the holdings of State v. Everybodytalksabout, 145 Wn.2d 345, 39 P.3d 294 (2002), State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007), and State v. Rupe, 101 Wn.2d 664, 703, 682 P.2d 571 (1984). Unpublished Opinion at 6.

In State v. Everybodytalksabout, this Court held that evidence that the defendant acted in a leadership capacity between 1992 and the beginning of 1996 was an irrelevant act, prohibited as

a prior act under ER 404(b), because it was offered to show that he acted in conformity therewith during acts that occurred in February of 1996. 145 Wn.2d at 468.

In State v. Foxhaven, 161 Wn.2d 168, 171, 174-175, 163 P.3d 786 (2007), this Court held that evidence that the defendant had used graffiti tags on previous occasion was evidence of an act likely to be used as propensity or character evidence to prove malicious mischief by graffiti. In discussing the graffiti tags, the Court stated, “In our judgment, all of the evidence at issue here is prohibited by ER 404(b) if offered to prove character.” 161 Wn.2d at 175.

In State v. Rupe, the prosecutor admitted evidence of the defendant’s gun collection during his sentencing hearing in a death penalty case. The prosecutor argued that the gun collection gave the jury an “insight into his personality, because the guns he owned were good for only one purpose, killing others in combat.” 101 Wn.2d at 703-704. Our Supreme Court held that, by “arguing that defendant’s exercise of that constitutional right meant that he deserved the death penalty, the State attempted to draw adverse inferences from defendant’s mere possession of these weapons.” *Id.* at 707. The case was not decided under ER 404(b), but on

constitutional grounds. The Court found that the argument violated Rupe's WA Const. Article 1, §24 right to bear arms. *Id.* at 706-707.

Rupe was later discussed in State v. Hancock, 109 Wn.2d 760, 767-768, 748 P.2d 611 (1988), where this Court noted,

the essential inquiry is relevance. Where a defendant's ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent that evidence from being admitted. The problem in *Rupe* was that the prosecutor sought to admit evidence of the defendant's gun collection in the sentencing proceeding for the sole purpose of portraying the defendant as an extremely dangerous individual.

The Court of Appeals correctly followed the holdings of those cases to find that the evidence admitted in this case did not fall under ER 404(b) because it was not offered to demonstrate character.

That decision also does not conflict with State v. Jeffries, 105 Wn.2d 398, 412, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986), State v. Robinson, 24 Wn.2d 909, 167 P.2d 986 (1946), or State v. Lloyd, 138 Wash. 8, 244 P. 130 (1926). In Jeffries, the defendant objected to the admission of evidence that he had been in possession of a .22 caliber rifle and .22 caliber bullets arguing that the decisions in Robinson and Lloyd held that weapons that are not used in the crime are inadmissible. The Jeffries Court stated, "The cases, however, do not support that

proposition. Instead they hold that weapons unrelated to the case are not admissible.” 105 Wn.2d at 412. Consistent with those cases, the Court of Appeals in this case noted,

Here, the fact that Pardo knew there was a gun in the bedroom was highly probative and necessary for a jury to understand why she so desperately tried to keep Bakker out of the bedroom. Bakker was exhibiting an alcohol-fueled rage that night, and a major source of his aggression was from Pardo blocking his entry into the bedroom. A jury would need to understand Pardo’s state of mind to judge whether or not her fear of Bakker was reasonable, including whether she had good reason to fear letting him into the bedroom.

Unpublished Opinion at 7. To use the language of Jeffries, the Court of Appeals correctly found that the presence of the weapon was related to the case at issue.

The fact that the evidence involved a gun did not improperly infringe upon the constitutional right to bear arms. As this Court noted in Hancock, “the essential inquiry is relevance.” Hancock, 109 Wn.2d 760. The Court of Appeals in this case properly considered the relevance of the testimony and properly found that the trial court did not abuse its discretion by finding that the probative value outweighed the potential prejudice.

2. The Court of Appeals decision affirming the trial court’s ruling was not inconsistent with case law and the trial

court properly balanced the risk of unfair prejudice against the probative value.

The trial court has wide discretion when balancing the probative value of evidence against the potential affect. State v. Bajardi, 3 Wn. App.2d 726, 730, 418 P.3d 164 (2018). A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). As noted above, the Court of Appeals correctly noted that the evidence that a gun was in the bedroom was highly relevant in explaining Pardo's fear during the incident in question. Unpublished Opinion at 7. After noting the probative value, the Court of Appeals correctly ruled that the trial court did not abuse its discretion by admitting the evidence.

Bakker argues that the decision is contrary to State v. Tharp, 96 Wn.2d 591, 697 P.2d 961 (1981), but an analysis of the Tharp decision quickly reveals that it is not analogous to this case. In Tharp, the trial court did not engage in a balancing test before admitting evidence that the defendant had a prior conviction for auto theft and was on furlough at that time of the offense. Id. at 597-598. This Court stated, "the trial court should weigh the


necessity for its admission against the prejudice that it may engender in the minds of the jury.” *Id.* at 587.

In this case, the trial court did engage in the balancing test. RP 329-330. While there may have been additional evidence that Pardo was afraid of Bakker’s threats, there was no other evidence to explain why she was attempting to prevent Bakker from entering the bedroom in the face of his threats. The trial court did not abuse its discretion in admitting the evidence and the Court of Appeals properly upheld the trial court’s ruling.

D. CONCLUSION

The decision of the Court of Appeals is consistent with this Court’s jurisprudence regarding ER 404(b) as applied to possession of weapons. The State respectfully request that this Court deny review of the Court of Appeals decision.

Respectfully submitted this 26th day of April, 2021.



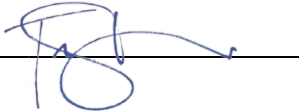
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: April 26, 2021

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

April 26, 2021 - 3:15 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99599-1
Appellate Court Case Title: State of Washington v. Daniel Paul Bakker
Superior Court Case Number: 18-1-00641-8

The following documents have been uploaded:

- 995991_Answer_Reply_20210426151450SC830299_5030.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Bakker Daniel APFR.pdf

A copy of the uploaded files will be sent to:

- KARSdroit@gmail.com
- valerie.kathryn russell selk@gmail.com

Comments:

Sender Name: Tressa Hayes - Email: tressa.hayes@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20210426151450SC830299