68814-6

68814-6

NO. 68814-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RONALD GRAY, III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Other Jurisdictions:

Rules and Regulations

Federal:

Washington State:

A. ISSUE PRESENTED

Evidence Rule (ER) 404 prohibits the admission of other crimes in order to prove a person's propensity to commit a wrongful act. While a defendant has the constitutional right to present a defense, he must do so within the bounds of the rules of evidence. At trial, Gray sought to admit evidence of the victim's prior misdemeanor assault convictions in order to argue that the victim was the first aggressor in the current case. Did the trial court act within its discretion when it disallowed evidence of the victim's prior convictions to show the victim's alleged propensity for violence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Ronald Gray, III was convicted by a jury of attempted murder in the first degree and assault in the first degree, both with a deadly weapon enhancement for using a knife to stab LeRoy Travers. CP 7-60. Because both charges arose from the same act, the assault in the first degree was subsequently vacated, and Gray was sentenced to the low end of his standard range sentence, 234.75 months in custody, which included the sentence for the weapon enhancement. CP 69, 149-57.

2. SUBSTANTIVE FACTS.

On the night of August 7, 2011, Gray and two of his friends approached three teenagers, including 17-year-old Jordan Kirk, who were walking home from a convenience store. 2RP 32-34.[1] The teenagers watched Gray and his friends "trying to start fights with everybody" who walked by them. 2RP 32. Then Gray's group turned their attention to Kirk and challenged him to a fight. 2RP 38. Kirk went into his house and told his father, who went outside and ordered Gray and his friends to leave, telling them that he had a gun. 2RP 39, 82. Gray and his two friends grabbed their waistbands, insinuating that they, too, had guns, but then continued working their way down the street. 2RP 40, 82-83.

Sometime after 10:00 PM on that same night, LeRoy Travers and his girlfriend, Coral Williams, were returning from a rafting trip along the Green River. 4RP 109. They drove into the same Auburn cul-de-sac where Gray and his friends were threatening neighbors, and saw the group in the street, being "disruptive." 4RP 111. The moment Travers and Williams pulled up in their car, the three men approached, saying that they were "Crips" and

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[1] The Verbatim Report of Proceedings will be designated as follows: 1RP (11/17/11, 11/21/11, 11/28/11); 2RP (11/29/11); 3RP (11/30/11); 4RP (12/1/11, 1/6/12, 1/13/12, 2/1/12); 5RP 12/5-6/11).

threatening Travers and his girlfriend. 4RP 113. As Travers began to unload the rafting equipment from the car, Gray and his friends walked toward them, saying "Fuck you, nigger." 4RP 113. Travers, who was barefoot and still wearing only shorts and a tank top from the rafting trip, told them to leave. 4RP 115. Travers heard Gray call Williams a "bitch" and then Gray threatened to shoot Travers. 4RP 143.

After hearing the insults and threats, Travers approached Gray, who punched him in the face. 4RP 144. Travers told Gray that he punched "like a bitch," and then punched Gray in the face, knocking him to the ground. 4RP 145. Then Travers kicked Gray in the face with his bare foot, shoved one of his friends who was approaching, and returned to his car, where Williams was still unpacking the rafting equipment. 4RP 145.

Gray lifted himself off of the ground and told Travers that he knew where he lived, and threatened Travers' home and his family. 4RP 117. Gray said that he was going to get a gun, come back to Travers' home and rape his wife, and then kill them both. 4RP 146. Travers walked back up to Gray and grabbed him by the shoulders; Gray responded by stabbing him four times in the stomach with a knife. 4RP 148, 150.

Just as Travers went to grab Gray, police cars pulled up; the stabbing is captured on the dash camera of one of the police cars, and was admitted as State's Exhibit 6 at trial.[2] The police had arrived in response to several 911 calls from witnesses who saw Gray and his friends trying to start fights in the neighborhood; these witnesses also testified and confirmed Travers' account of the incident. 2RP 29-55, 57-88; 3RP 16-30, 65-80.

Travers suffered severe injuries from the four separate stab wounds in his stomach and was in a coma for three days. 4RP 150. The surgeon who treated Travers testified at trial that, because of complications with intestinal leakage, Travers required three major surgeries, and the resulting scar tissue may cause him problems in the future. 4RP 82-85.

3. FACTS REGARDING TRAVERS' PRIOR CONVICTIONS.

During pretrial hearings, the prosecutor moved to suppress evidence of Travers' prior convictions, and Gray's defense attorney

[2] State's Exhibit 6 has been designated for this Court's review. This very short video captures Gray swinging the knife into Travers' stomach in wide, long, repeated swings.

moved to suppress evidence of Gray's prior convictions under ER 404(b).[3] 1RP 68-135.

The prosecutor sought to impeach Gray under ER 609[4] with Gray's convictions for robbery in the second degree and assault in the third degree from 2010, and several misdemeanor theft convictions. 1RP 68-69. After conducting an ER 609 analysis, the trial court ruled that the robbery and the theft convictions would be admissible if Gray testified. 1RP 74.

Gray's attorney sought to admit evidence of Travers' prior criminal history, but began his argument by seeking to introduce evidence of Coral Williams' 2007 harassment conviction. 1RP 101, 103. The defense attorney argued that Williams' conviction should come in under 404(b), "because this essentially is a mutual harassment fact pattern... [a]nd as modus operandi go, that's all the same..." 1RP 103. When the trial judge asked Gray's attorney to provide some analysis of the rule that would permit the admission of such evidence, the attorney responded:

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[3] ER 404(b) excludes evidence of other crimes, wrongs, or acts to prove "action in conformity therewith," but stipulates that such evidence may be admissible for another purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[4] ER 609 provides for impeachment of a witness' credibility where the witness has been convicted of a felony or involved "dishonesty or false statement" where the "determines that the probative value of admitting this evidence outweighs the prejudice..."

> Well, the – factual assertion in this case that we're making is that in their – right near their front yards, LeRoy Travers, [Williams'] boyfriend, and my client, Mr. Gray, are arguing, and it's – it's just a lot of smack talk back and forth between the two of those gentlemen. And [Williams] will testify that at a point where Mr. Gray offended her with language, she jumps in and – and pardon my saying, she says, "Well, no, fuck you," and she becomes a verbal part of this argument.
>
> And the point that I would like to make with the Court is that's what 404(b) is about. It's – it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, prior knowledge, or absence of mistake or accident. She – she becomes part of this incident, and it's also part of her past criminal history that she does this.

1RP 103-04.

The trial judge denied the defense attorney's request, saying that he did not believe "that it would be appropriate under the reading of this 404(b)" to permit evidence of Williams' prior harassment conviction. 1RP 108. The trial court did, however, admit evidence of Williams' prior crimes of dishonesty under an ER 609 analysis. 1RP 108.

Gray's attorney used the same argument to attempt to introduce evidence of Travers' criminal history, which included two assault in the fourth degree convictions and one "tampering with

property" conviction.[5] 1RP 109. To advance this position, Gray's attorney referred to his prior argument regarding the admissibility of Williams' prior harassment: "I would just reiterate my 404(b) analysis on this assault four, two times conviction for Mr. Travers and ask the Court to allow us to admit that." 1RP 109. He also asked the trial court to admit two juvenile convictions against Travers from 2000 and 1995. 1RP 109.

The trial judge denied the admission of both the assaults and the juvenile convictions:

> The criminal history of Mr. Travers w[ill] be excluded... The 404(b) analysis – this – allowing these in ostensibly under 404(b) actually only comes out to another way of saying that this person did the assault back then and he probably did again.
>
> It is propensity evidence and there's nothing about these convictions that would advance the search for truth as far as I'm concerned in terms of Mr. Travers' credibility.

1RP 109.

Later during the trial, Gray's defense attorney renewed his motion, specifically moving to allow admissibility of Travers' two prior assault convictions from 2009, but this time under

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[5] The record does not list each conviction with any detail; the parties refer instead to "page 4" of the defense attorney's trial memorandum, which was never filed with the court and is not available for review. 1RP 101, 109. Gray's appellate brief refers to them only vaguely as "prior assault convictions." Brief of Appellant at 4.

ER 404(a)(2),[6] arguing that the priors are "evidence of a pertinent trait or character" of the victim. 2RP 101. Gray's lawyer argued that because the case involved "mutually assaultive behaviors" in a "street fight," the trial judge should admit the assaults. 2RP 101. The State responded that ER 404(a) does not cover convictions, and pointed out that the prior assaults referred to by defense were in fact domestic violence assaults against Travers' sister. 2RP 102. The court asked for briefing from the parties and then recessed. 2RP 102-03.

The following day, Gray's defense attorney retracted his request to admit Travers' prior convictions under ER 404(a)(2), acknowledging that, after doing research, he did not think the motion would be "successful with the court." 3RP 6.

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[6] ER 404(a)(2) reads:

> 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, except:
>
> ...
>
> (2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

4. FACTS REGARDING JURY INSTRUCTIONS.

The jury was instructed that the "use of force" is lawful "when used by a person who reasonably believes that he is threatened with death or great personal injury." CP 48. The same instruction told the jury that the "State has the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful." CP 48. The jury was also provided with an instruction saying that a "person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury..." CP 47. The jury was told that it is "lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force," and that "[t]he law does not impose a duty to retreat." CP 51.

The trial court's instructions also included a "first aggressor" instruction:

> No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond

> a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. Words alone are not sufficient provocation.

CP 25.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED GRAY'S PROFFERED EVIDENCE THAT TRAVERS HAD A PROPENSITY TO COMMIT ASSAULTS.

Gray contends that the trial court violated his constitutional right to present a defense by excluding what he admits is propensity evidence. But ER 404 precludes *any* party from offering evidence to prove the character of a person, except under certain circumstances not relevant here. A defendant's right to present a defense does not overcome the strictures of ER 404. Moreover, the federal cases Gray relies upon do not recognize a constitutional right to admit propensity evidence. There was, therefore, no error. Finally, even if this Court somehow finds that the trial court erred in suppressing evidence of Travers' prior convictions, any error was harmless.

a. The Trial Court Correctly Applied Evidence Rule 404 To Exclude Gray's Proffered Propensity Evidence.

A trial court's decision to admit or exclude evidence is given considerable deference. Thus, the trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In order to reverse a trial court's ruling, the challenging party must show that the decision was manifestly unreasonable, or that discretion was exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In assessing whether evidence of prior acts is admissible pursuant to ER 404(b), the court must engage in a four-step analysis. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). First, the court must find by a preponderance of the evidence that the alleged misconduct occurred. Second, the court must identify the purpose for which the evidence is being offered. Third, the trial court must conclude that the evidence proffered is relevant to the identified purpose. Fourth, the court must find that the probative value of the evidence outweighs its unfair prejudicial effect. Lough, 125 Wn.2d at 853; State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997). The last step is of special note.

Although ER 403 operates to exclude relevant evidence only if its probative value is substantially outweighed by the danger of unfair prejudice, Washington cases have occasionally inverted that test in the context of ER 404(b), requiring its probative value to outweigh the danger of unfair prejudice. See, e.g., Baker, 89 Wn. App. at 732.

Here, Gray sought to introduce evidence that his stabbing victim had two misdemeanor assault convictions from three years earlier. CP 109. He admitted below, and acknowledges on appeal, that this evidence was offered solely for propensity: to show that Travers, and not Gray, was the first aggressor. Brief of Appellant at 15. Such evidence is explicitly prohibited by ER 404 and the trial court was required to exclude it. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) ("Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.").

But Gray relies on what has come to be known as "reverse 404(b) evidence," where some federal cases hold that "a defendant can introduce evidence of someone else's conduct if it tends to negate the defendant's guilt." United States v. Wilson, 307 F.3d 596, 601 (7th Cir. 2002). Even in this situation, however, the "trial

court is entitled to exclude this kind of evidence if, upon a balancing of the evidence's probative value against considerations such as prejudice, undue waste of time, and confusion of the issues under Rules 401 and 403 of the Federal Rules of Evidence, it concludes that the evidence would not be beneficial." Id. Like other evidentiary rulings, reverse 404(b) rulings are "reviewed with deference." Id., citing United States v. Walton, 217 F.3d 443, 450 (7th Cir.2000).

Even in the limited number of federal cases that permit "reverse 404(b) evidence," the evidence that the defendants sought to offer still needed to "have played a major role in disproving [a defendant's] guilt," before a "reverse 404(b)" analysis could be triggered. Wilson, 307 F3d at 601. Evidence of Travers' two misdemeanor assaults against his sister three years before Gray stabbed him would play no role, "major" or otherwise, in "disproving" Gray's guilt in the current case. As the trial court pointed out, there "is nothing about these convictions that would advance the search for truth in terms of Mr. Travers' credibility." 1RP 109. There is, therefore, no basis for disturbing the trial court's ruling.

b. Gray's Argument That Evidence Rule 404(b) Does Not Apply To Criminal Defendants Is Unpersuasive.

Recognizing the fact that ER 404 requires the exclusion of his proffered propensity evidence, Gray nevertheless argues that the policy reasons behind ER 404(b) are "considerably weakened" when it is the defense, and not the State, that "seeks to submit this type of evidence." Brief of Appellant at 9. In making this argument, Gray relies on his constitutional right to present a defense and federal cases interpreting the parallel federal rule. Neither of these supports his position that ER 404(b) violated Gray's constitutional right to present a defense.

i. The trial court's adherence to ER 404(b) did not violate Gray's constitutional right to present a defense.

A criminal defendant has a due process right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). This right has two constitutional components: the right to offer the testimony of witnesses and compel their presence at trial if necessary, and the right to confront and cross-examine the prosecution's witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). "It is well settled,

however, that the right to present a defense is not absolute. . . . The right to present a defense does not extend to irrelevant or *inadmissible* evidence." State v. Strizheus, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011) (citations omitted) (emphasis added), rev. denied, 173 Wn. 2d 1030 (2012); see also State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) ("Although Aguirre does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence.").

The constitutional right to present a defense has not been read to trump the rules of evidence. See, e.g., Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) ("[A]ny number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence."); State v. Rafay, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012) ("A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible."), rev. denied, __

Wn. 2d __ (2013); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (same). Instead, examples abound of defendants being precluded from presenting even relevant evidence because of routine applications of the rules of evidence.

For instance, in State v. Thomas, this Court held that the exclusion of a defense expert's testimony under ER 702 – on the grounds that the evidence was not helpful to the trier of fact – did not violate the constitutional right to present a defense. 123 Wn. App. 771, 781, 98 P.3d 1258 (2004); see also State v. Willis, 113 Wn. App. 389, 54 P.3d 184 (2002), aff'd in part, rev'd in part, 151 Wn.2d 255, 87 P.3d 1164 (2004) (same). In State v. Finch, the Washington Supreme Court held that the exclusion of the defendant's self-serving hearsay did not violate his right to present a defense. 137 Wn.2d 792, 825, 975 P.2d 967 (1999) ("A defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). In Rehak, Division II held that foundational requirements for admissibility of other-suspect evidence do not violate a defendant's right to present a defense. 67 Wn. App. at 162-63.

By contrast, Gray does not offer a single case in which the rules of evidence were suspended so that a defendant could present his defense. Gray's claim that he had a constitutional right to ignore the strictures of ER 404(b) so that he could present propensity evidence relating to Travers must be rejected.

ii. Federal case law does not support suspending the operation of ER 404(b) when evidence is offered by a defendant.

Gray points to numerous federal cases in support of his argument that ER 404(b) should not apply to evidence offered by criminal defendants. But federal cases interpreting federal rules of evidence are persuasive only if the language of the rule at issue is ambiguous and in need of interpretation. Moreover, the federal criminal cases cited do not support Gray's argument. While several federal circuits are inconsistent in their approach to ER 404(b) analysis, none has allowed the admission of pure propensity evidence, and none has suggested that the application of Rule 404(b) to exclude evidence proffered by a defendant deprives that defendant of his constitutional right to present a defense.

To interpret a rule of evidence, a court employs the same principles used to construe statutes. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Although the court must discern the intent of the drafting body in construing any rule, the starting point is the rule's plain language. Id. If the rule is unambiguous, the court gives effect to its plain meaning. Id.

Here, the rules of evidence unambiguously apply to all parties to any litigation. Evidence Rule 101 provides: "These rules govern proceedings in the courts of the State of Washington to the extent and with exceptions stated in Rule 1101." There is no provision that in any way limits the application of the rules to the prosecution alone. Moreover, ER 404(b) has no language limiting its scope to evidence offered by the prosecution or to acts committed by a defendant. Instead, the rule prohibits evidence to prove the character "of a person," not any particular person. ER 404(b). Indeed, the only case cited by Gray for the proposition that "reverse 404(b) evidence" has been recognized in Washington stands exactly for the principle urged here: the strictures of ER 404(b) apply to both parties in a criminal case. State v. Young, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987) (reversing a conviction because Young's proffered evidence should have been

admitted pursuant to ER 404(b) as proof of identity, control, and absence of mistake).

Despite the unambiguous nature of the evidence rules, Gray turns to federal cases to support his argument that ER 404(b) does not apply to evidence offered by defendants. The State agrees that, when faced with interpreting an ambiguous Washington rule of evidence, federal cases may provide persuasive authority. In re Pouncy, 168 Wn.2d 382, 392 & n.9, 229 P.3d 678 (2010). But, as discussed above, Washington's rule is not ambiguous. Moreover, the federal cases Gray cites do not support his position that exclusion of sheer propensity evidence violates his constitutional right to present a defense.

The seminal case on "reverse 404(b) evidence" is United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991). As explained in that case, "reverse 404(b) evidence" is merely evidence, admitted pursuant to Federal Rule of Evidence (FRE) 404(b), that is offered by the defendant instead of (as is more commonly the case) the prosecution.[7] Id. at 1401-02. As such, the case primarily stands for the unremarkable proposition that the rules of evidence apply with

[7] Indeed, Judge Richard Posner has suggested a more apt name for the evidence would be "nondefendant Rule 404(b) evidence." United States v. Murray, 474 F.3d 938, 939 (7th Cir. 2007).

equal force to both parties in a criminal case. Id. at 1404 (rejecting the government's contention that defendants may offer evidence pursuant to FRE 404(b) only under limited circumstances). The Stevens court further observed that, once evidence meets the admissibility criteria of FRE 404(b), it would be subject to the balancing of probative value against prejudicial effect as required by FRE 403. Id. at 1404-05 (citing State v. Garfole, 76 N.J. 445, 388 A.2d 587 (1978), with approval).

The only notable holding of the Stevens court is that, in evaluating the admissibility of other crimes committed by other suspects in order to prove identity (i.e., to prove that the other individual who committed the other crime likely committed the crime at issue as well), the standard of similarity is lower than it would be if the State were offering the evidence, because the prejudicial effect is lower. Id. at 1403-05. This is effectively an observation about balancing under ER 403 – where prejudicial effect is lower, the probative value of the evidence may be lower without rendering the evidence inadmissible.

The Third Circuit further addressed its Stevens holding in United States v. Williams, 458 F.3d 312 (3d Cir. 2006). There, the court explained that "the prohibition against propensity evidence

applies regardless of by whom – and against whom – it is offered." Id. at 317. Moreover, the court clarified that there is no need to engage in ER 403 balancing unless and until the court first determines that the evidence is admissible under ER 404(b). Id. Other circuits have agreed with this approach. See, e.g., United States v. McCourt, 925 F.2d 1229, 1234-35 (9th Cir. 1991) ("Evidence of 'other crimes, wrongs, or acts,' no matter by whom offered, is not admissible for the purpose of proving propensity or conforming conduct, although it may be admissible if offered for some other relevant purpose."); United States v. Lucas, 357 F.3d 599, 606 (6th Cir. 2004) ("We therefore hold that the standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime.").

Although Gray characterizes a number of federal cases as holding that FRE 404(b) does not apply when the evidence is offered by a defendant in support of his defense, many of those cases are instead simply a straightforward application of FRE 404(b). For instance, in United States v. Seals, 419 F.3d 600, 606-07 (7th Cir. 2005), the Seventh Circuit approved of the Third Circuit's reasoning in Stevens, yet excluded evidence of other

crimes committed by other suspects because the crimes were too dissimilar to constitute modus operandi to prove identity.[8] In United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005), the Tenth Circuit acknowledged Stevens, and admitted 404(b) evidence as relevant to the defendant's lack of knowledge. In other words, it admitted the evidence for one of the "other purposes" listed in FRE 404(b).

Other federal cases imply a distinction between the use of FRE 404(b) to admit prior acts of the defendant and use of the rule to admit prior acts of third parties, but still appear to apply the rule in all cases. For instance, in United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983), the Eleventh Circuit held that, "Rule 404(b) does not specifically apply to exclude this evidence because it involves an extraneous offense committed by someone other than the defendant." However, the evidence at issue was not propensity evidence, but evidence relevant to identity and common plan, and thus admissible under the rule.

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[8] Gray claims that Seals departed from Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999), which applied a standard FRE 404(b) analysis of the admissibility of other acts evidence offered regarding a third party. This claim is belied not just by the Seals court's own use of FRE 404(b) to evaluate the admissibility of evidence, but by subsequent Seventh Circuit cases that both cite Seals and apply a traditional 404(b) analysis. See, e.g., United States v. Savage, 505 F.3d 754, 760-61 (7th Cir. 2007); United States v. Murray, 474 F.3d 938, 940 (7th Cir. 2007).

Further, the Morano court held that, although FRE 404(b) was not directly applicable, "the exceptions listed in the Rule should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403." Id.; see also Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311-12 (11th Cir. 1987) (citing Morano); United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (recognizing a difference between evidence of acts committed by a defendant and acts committed by a third party, but ultimately characterizing the proffered evidence as relevant to knowledge and plan); United States v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir. 1987) (suggesting that FRE 404(b) does not apply to acts committed by individuals other than the defendant, but approving the admission of the evidence as to intent and to rebut lack of knowledge).

The federal case that perhaps mostly strongly supports Gray's position is United States v. Krezdorn, 639 F.2d 1327, 1332-33 (5th Cir. 1981). There, the Fifth Circuit observed that a primary policy consideration underpinning FRE 404(b) – evidence that a defendant has a criminal disposition will be improperly used by a jury to conclude that he committed the instant offense – is not applicable when the evidence sought to be introduced pertains to a

third person. Therefore, the Krezdorn court recognized that it was arguable that FRE 404(b) would not apply to such evidence. However, the court ultimately declined to decide whether FRE 404(b) applied, holding instead that the challenged evidence was properly admitted either way.[9] Id.

Overall, the federal cases are inconsistent in their consideration of evidence offered pursuant to FRE 404(b) regarding acts done by a person other than the accused. They do have some common threads, however. The cases universally acknowledge the uncontroversial proposition that such evidence of other acts can

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[9] Gray's lengthy quotation from Krezdorn, Appellant's Brief at 13, leaves out some critical language. The entire relevant paragraph reads as follows, with emphasis added to show sentences, other than citations, not quoted by Gray:

> *This evidence involves an extraneous offense committed by a person other than the defendant. Arguably, this is not the kind of evidence to which Rule 404(b) applies.* "The extrinsic acts rule is based on the fear that the jury will use evidence that the defendant has, at other times, committed bad acts to convict him of the charged offense." United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979). Consequently, where the only purpose served by extrinsic offense evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded. When, however, the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable. *It would seem, therefore, that when extrinsic offense evidence is sought to be introduced against a criminal defendant, in order to trigger the application of Rule 404(b) there must be an allegation that the extrinsic offense was committed by the defendant. We need not decide, however, whether Rule 404(b) applies to this situation since the evidence of the monetary payments is admissible whether or not Rule 404(b) applies.*

Krezdorn, 639 F.2d 1327 at 1332-33 (footnote omitted).

be offered by any party to a case when offered for the "other purposes" enunciated in the rule. They do not sanction the use of propensity evidence by any party. And, they do not hold that the exclusion of the defendant's proffered propensity evidence constitutes a violation of his constitutional right to present a defense.

In short, none of the federal cases help Gray. He did not offer evidence pursuant to ER 404(b). Rather, he offered evidence *in spite* of ER 404(b). No matter what standard of balancing pursuant to ER 403 a trial court employed, his evidence would still be inadmissible. Evidence offered to prove propensity is universally barred by ER 404(b).

2. EVEN IF THE TRIAL COURT ERRED IN SUPPRESSING TRAVERS' PRIOR CONVICTIONS, ANY ERROR WAS HARMLESS.

Even if this Court should somehow find that the trial court's suppression of Travers' two misdemeanor assault convictions was an abuse of the court's discretion, the error was harmless because there is no reasonable likelihood that the admission of such evidence would have affected the jury's verdict.

Where the error is not of constitutional magnitude, courts apply the rule that "error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). "Evidentiary errors under ER 404 are not of constitutional magnitude." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). A trial court's erroneous ER 404(b) rulings are not reversible error "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The jury was instructed that "[n]o person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person." CP 25. Here, numerous witnesses described Gray on the night of the stabbing as roaming the neighborhood looking for a fight, threatening innocent bystanders, and aggressively insulting his ultimate victim, Travers. 2RP 32, 38, 82-83, 111. While Gray was armed with a knife when he told Travers that he would return to rape his wife and shoot him, Travers was barefoot and in a tank

top, asking Gray to leave. 4RP 115. The jury instruction, when applied to the evidence, spoke directly to Gray's actions against Travers, and made it unlikely that any reasonable juror, when faced with the testimony of the victim and witnesses, would find that Travers was the first aggressor, even if he had been convicted of assault in the fourth degree against his sister three years earlier.

The likelihood that evidence of Travers' prior assault convictions would have altered the result of the case is more remote when the videotape evidence is considered – Gray stabbed Travers repeatedly on camera, in front of an approaching police vehicle. Exhibit 6. It is extraordinarily unlikely that a reasonable juror who saw the evidence would have been swayed by something as remote and irrelevant as evidence that, three years prior, Travers had been convicted of assaulting his sister. Even as far as propensity evidence goes, two misdemeanor assault convictions against a person's sister hardly speak to that person's propensity for violence in a street fight situation against a grown man. Tellingly, the jury not only convicted Gray of assault in the first degree, but found that his attack on Travers was actually premeditated, by finding him guilty of attempted murder in the first degree. CP 57-60. Any evidence of Travers' past convictions

would not make it more likely that Travers was the first aggressor to a group of jurors that believed that Gray, who did not know Travers at all, had premeditated Travers' death before he stabbed him.

Because the evidence that the trial court suppressed would not have materially affected the outcome of the trial, any error suppressing the prior convictions was harmless, and this Court should affirm the conviction.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed.

DATED this 5 day of April, 2013.

Respectfully submitted,

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King County Prosecuting Attorney

By: _____
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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 JENNIFER DOBSON and DANA NELSON, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT in STATE V. RONALD GRAY, III, Cause No. 68814-6 -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.

Dated this 5th day of April, 2013

Name
Done in Seattle, Washington