No. 70704-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN WILHELM,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ARGUMENT

Under State v. Gunderson and ER 404(b), the trial court abused its discretion in admitting the defendant's prior assault conviction.

1. Introduction

The Washington Supreme Court's recent opinion in State v. Gunderson establishes that the use of ER 404(b) to admit evidence of prior acts of domestic violence has limits. The Court rejected "a domestic violence exception for prior bad acts that is untethered to the rules of evidence." State v. Gunderson, __ Wn.2d __, 337 P.3d 1090, 1094 n.3 (2014). To be admissible, the probative value of a prior act of domestic violence must be "overriding." Gunderson, 337 P.3d at 1094. Otherwise, the inherent risk of unfair prejudice associated with this type of evidence is too great. Gunderson, 337 P.3d at 1095. Included in the sufficiently probative category are cases where the witness gives conflicting statements about the alleged act, such as a recantation. Gunderson, 337 P.3d at 1094-95. In the inadmissible category are cases where the witness's account is merely contradicted by evidence from another source. Gunderson, 337 P.3d at 1094.

This case does not fit into the admissible category because Leah Hensel did not recant or give conflicting statements about Wilhelm's conduct. Hensel spoke with the police on the night at issue. She did not

say that Damian Wilhelm assaulted her. At trial, she testified that she could not remember much that night, including what she had said to the police, because she had been very intoxicated. Contrary to the State's argument and the trial court's ruling, Hensel's testimony did not conflict with what she told police. Like in Gunderson, the State failed to establish that the probative value of the evidence (if any) outweighed the risk of unfair prejudice. Thus, the trial court erred in admitting the prior assault conviction. Because the error was prejudicial, this Court should reverse.

2. Gunderson confines the admissibility of prior acts of domestic violence to cases where the overriding probative value is established.

In Gunderson, the defendant had an altercation with Christina Moore, his ex-girlfriend, and Christina's mother, Bonnie Moore. Gunderson, 337 P.3d at 1091-92. Bonnie called the police and said that Gunderson hit her and Christina. Gunderson, 337 P.3d at 1092. Based on the altercation between himself and Christina, Gunderson was charged with domestic violence felony violation of a court order. Gunderson, 337 P.3d at 1092. At trial, Christina testified that Gunderson had not hit her or Bonnie. Gunderson, 337 P.3d at 1092. This testimony was not inconsistent with any prior statement Christina had made. Gunderson, 337 P.3d at 1092. Seeking to attack Christina's credibility, the State sought to admit evidence of two prior domestic violence episodes between

Gunderson and Christina. Gunderson, 337 P.3d at 1092. The trial court admitted the evidence under ER 404(b). Gunderson, 337 P.3d at 1092.

On appeal, Gunderson argued that "because Christina did not recant or contradict any of her prior statements, the trial court erred in admitting evidence of his prior acts of domestic violence against her." Gunderson, 337 P.3d at 1093. Our Supreme Court agreed and reversed. Gunderson, 337 P.3d at 1093. The Court held that any probative value of the evidence was outweighed by its significant prejudicial effect. Gunderson, 337 P.3d at 1094.

In so holding, the Court reasoned that the risk of unfair prejudice from this type of evidence was very high and accordingly confined admissibility to cases where the probative value of the evidence is "overriding," such as when the witness recants or gives a conflicting account:

> [C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high. To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

Gunderson, 337 P.3d at 1094-95 (internal citations omitted) (emphasis added).

3. Gunderson distinguishes and limits the precedent.

In holding that ER 404(b) was not satisfied, the Court distinguished its earlier opinion in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). There, the prior acts of domestic violence were sufficiently probative as to the credibility of the complaining witness because the witness recanted and gave a conflicting account of events. Magers, 164 Wn.2d at 186. The Court refused to extend Magers to cases where other external evidence contradicts the witness's account. Gunderson, 337 P.3d at 1094. The Court reasoned that this was inadequate to create the necessary overriding probative value because there are many reasons why a witness's testimony may vary from other evidence:

> That other evidence from a different source contradicted the witness's testimony does not, by itself, make the history of domestic violence especially probative of the witness's credibility. There are a variety of reasons why one witness's testimony may deviate from the other evidence in a given case. In other words, the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable.

Gunderson, 337 P.3d at 1094 (emphasis added).

Here, to the extent that Hensel's testimony arguably deviated from other evidence, there were other reasons to explain the deviation, such as the evidence that Hensel and Heather Wilmore were very intoxicated. Under Gunderson, that Hensel's testimony arguably conflicted with other evidence was not an adequate basis to admit the prior bad act.

Gunderson also provides much needed context for reading this Court's opinions in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996) and State v. Baker, 162 Wn. App. 468, 259 P.3d 270 (2011). Disagreeing with this Court, the Supreme Court in Gunderson held that the evidence was not admissible under either Grant or Baker. Gunderson, 337 P.3d at 1094 n.2. The Supreme Court noted that in Grant, the evidence of domestic violence was admitted through the testimony of an expert, which could assist the juror with understanding the dynamics of domestic violence. Gunderson, 337 P.3d 1094 n.2. As for Baker, the Supreme Court noted that while Baker suggested that prior acts of domestic violence might always be admissible, the evidence was plainly admissible in that case to explain why the witness had not reported previous times the defendant had tried to strangle her and to rebut the defense theory of accident. Gunderson, 337 P.3d 1094 n.2.

Unlike in Grant, there was not expert testimony presented to put the history of domestic violence in context. And unlike in Baker, there

were no other alternative ER 404(b) justifications for admitting the evidence. Thus, viewed through the lens of Gunderson, neither of these cases justified the admission of the prior bad act under ER 404(b).

4. The trial court's understanding of the precedent is contrary to Gunderson.

In admitting the evidence under ER 404(b), the trial court read the precedent too broadly, specifically Baker. In its oral ruling, the trial court erroneously recounted that Baker "opened" up the admissibility of prior acts of domestic violence to a wide variety of circumstances:

> The real issue is whether the probative value outweighs the prejudicial effect. It is clear under Makers (phonetic) [sic] that if we have a recanting victim, this type of evidence is admissible for determining credibility. In Baker, the court opened that up further to explain prior failures to report, minimization of violence, conflict in history, violations of prior court orders or committed contact. Those issues are applicable in this case. The probative value is high. The prejudicial effect obviously is high as well.
>
> . . .
>
> I think what the court will do is I will admit the [the prior bad act] pursuant to Makers [sic] and Baker.

7/9/2013RP 62, 64 (emphasis added).

This broad reading of Baker cannot be squared with Gunderson and the Supreme Court's reading of Baker. Under Gunderson, Baker did not open up a new universe where evidence of prior acts of domestic violence will be sufficiently probative. The trial court's determination that

the evidence was highly probative was erroneous under Gunderson. If Gunderson had been decided when the trial court had made its ruling, it is likely that the court would have rejected admissibility. Given the misreading of the precedent, this Court should hold that the trial court abused its discretion in admitting the evidence. Gunderson, 337 P.3d at 1093 (misconstruction of a rule is an abuse of discretion); Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion). Additionally, under Gunderson, the State did not establish that the evidence was sufficiently probative.

5. Under Gunderson, the error was prejudicial.

Nonconstitutional error is harmless if there is a reasonable probability that had the error not occurred, the outcome would have been materially affected. Gunderson, 337 P.3d at 1095. Gunderson held that the error in that case was not harmless as to the jury's decision to convict Gunderson of felony violation of a court order. Gunderson, 337 P.3d at 1095. The conviction was premised on Gunderson assaulting Christina. Gunderson, 337 P.3d at 1095. The Court reasoned that while there was sufficient evidence for the jury to find Gunderson guilty, it was "reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different

verdict." Gunderson, 337 P.3d at 1095. This was despite that the trial court had given an appropriate limiting instruction. Gunderson, 337 P.3d at 1093.

Wilhelm's case is materially indistinguishable. The evidence that Wilhelm had previously assaulted Hensel was highly prejudicial. The evidence in the case was also weak and circumstantial. The only testifying eyewitness to the purported assault was Heather Wilmore. However, she was also intoxicated and uncertain about what happened. 7/11/13RP 101, 109. Accordingly, there is a reasonable probability that the evidence affected the jury's decision. The conviction for fourth degree assault should be reversed.

The conviction for felony violation of a court order should also be reversed. As the jury convicted Wilhelm of fourth degree assault, it is probable that this conviction was premised upon assault. While the jury was given the alternative of convicting Wilhelm of this offense for twice violating the provisions of a court order, the jury was not given a special verdict form. Thus, it is impossible for this Court to say on what basis the jury convicted upon.

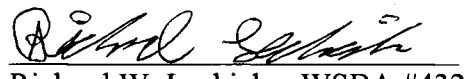
B. CONCLUSION

Under the reasoning expressed in Gunderson, the trial court abused its discretion in admitting evidence that Wilhelm had previously assaulted

Hensel. The evidence was not overridingly probative. The trial court also misread the precedent. Because the error was prejudicial as to both convictions, this Court should reverse.

DATED this 29th day of December, 2014.

Respectfully submitted,



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DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DAMIEN WILHELM, Appellant.	)))))))))	NO. 70704-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL 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:

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