

No. 71447-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MORRIS TALAGA,

Appellant.

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

The Honorable James D. Cayce

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in allowing the State to admit prejudicial prior act evidence under ER 404(b).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Prior acts of a defendant are not admissible simply to prove he acted in conformity with a character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404(b). Here, the trial court admitted under ER 404(b) a photo Mr. Talaga took of himself as well as a copy of his Facebook page, ostensibly to counter his self-defense claim. Must this Court reverse Mr. Talaga's conviction where the photo and copy of the internet page were improper propensity evidence used solely to prove Mr. Talaga acted in conformity with a character trait, and the trial court's error was not harmless where the overwhelming prejudice of this evidence outweighed any limited probative value?

C. STATEMENT OF THE CASE

In August 2011, Morris Talaga was working security at Jimmy T's bar in Kent. 11/25/2013RP 37, 42. The clientele at Jimmy T's was described as "pretty aggressive." 11/25/2013RP 39. On August 27, 2011, Mr. Talaga began work at 9:00 p.m., but was allowed to leave

early because it was a quiet night. 11/19/2013RP 13; 11/25/2013RP 45-46.

Mr. Talaga remained at the bar, socializing and drinking. 11/25/2013RP 46. After some time had passed, Mr. Talaga and his friends went outside where they continued to socialize with other patrons in the parking lot. 11/25/2013RP 49. While in the parking lot, Mr. Talaga confronted two men who he observed looking into cars. 11/25/2013RP 50.¹ One of these men was Allen Gooden, who went by his middle name, Montrae. 11/19/2013RP 58.

This confrontation escalated to the point where Mr. Talaga felt the need to defend himself. 11/25/2013RP 52-56. Mr. Talaga engaged one man, then turned his attention to Mr. Gooden, who was prone on the ground, but still moving, and according to Mr. Talaga, still a threat. 11/25/2013RP 56-59. Mr. Talaga struck Mr. Gooden several times with his fists and his feet, not waiting to determine if Mr. Gooden could get up and again become a threat. 11/25/2013RP 60. When he no longer deemed Mr. Gooden a threat, Mr. Talaga left and went home. 11/25/2013RP 74.

¹ Mr. Talaga did not identify himself to these individuals as working for Jimmy T's security, but he was still wearing his "Jimmy T's Security" shirt. 11/19/2013RP 17; 11/25/2013RP 91.

Other witnesses in the parking lot saw a skirmish break out among several people, with shouting, then fisticuffs. 11/19/2013RP 15-18, 129. These people stated that Mr. Talaga was not the aggressor, but that he struck and kicked Mr. Gooden while he was on the ground. 11/19/2013RP 18-33, 129. Mr. Gooden was taken to Harborview Hospital suffering from a potential head injury. 11/19/2013RP 147-49. Mr. Gooden was subsequently diagnosed as suffering significant head trauma. 11/21/2013RP 31.

Kent Police were initially unable to identify Mr. Talaga, but were told his nickname was "Mo," and that he was Samoan 11/14/2013RP 16; 11/19/2013RP 96. Mr. Gooden's partner, Heather Sevaaetsai, began looking on the website, Facebook, for a Samoan with the nickname "Mo," and discovered Mr. Talaga's Facebook page. 11/19/2013RP 98. Ms. Sevaaetsai forwarded this information to the Kent Police. 11/19/2013RP 98. Based on this information and further investigation, the police arrested Mr. Talaga. 11/14/2013RP 41, 56.

Mr. Talaga was charged with one count of Assault in the First Degree. CP 13. Prior to trial, Mr. Talaga moved to exclude any other acts evidence under ER 404(b). CP 23. At a pretrial hearing, the court asked the prosecutor whether he had any prior act evidence he wished

to admit. 11/7/2013RP17. The prosecutor proffered two pieces of evidence that he averred fit within this rubric: a copy of Mr. Talaga's Facebook page and a copy of picture of Mr. Talaga from that page.

11/7/2013RP 18-19. Specifically, the prosecutor noted:

So it's the page that has writing on it, and it was a post by the defendant, who, I guess, goes by dose or Doze, DOZE, and the relevant portion that we think is relevant to this case, about half-way through it, it says, "Just leave me alone and we got no problems. Test me, you just might be on YouTube, the most epic knockout." And it is the State's position that this is Mr. Talaga indicating what he does to people who cross him. It is consistent with his actions that night while at the Jimmy T's. As the Court read the certification in the State's summary of the facts, I think, *if there is anything classified as an epic knockout, it is what the State is alleging the defendant did to Mr. Gooden that night*. So we believe it is relevant to his state of mind and to his intent, especially in a case like this, when defense counsel seems to be indicating their claim of self-defense. So that's why I think it is relevant.

11/7/2013RP 19-20 (emphasis added). Mr. Talaga immediately objected, noting that this rationale for admission was nothing more than admission of improper propensity evidence, and even if relevant, the evidence was substantially more prejudicial than probative.

11/7/2013RP 20. Further, Mr. Talaga sought a limiting instruction should the evidence be admitted. 11/7/2013RP 21. The court reserved ruling on the admissibility, but noted:

I think it will likely come in, but with a limiting instruction . . . But I do think, especially in self-defense, and the State of mind intent [sic], that's why it would come in.

...

The relevance aspect of it, I don't have a problem with. Most people don't say things like this unless they mean it, but that doesn't mean it is admissible just because it is relevant.

11/7/2013RP 21.

The court later ruled the evidence was admissible at trial:

I do think it is relevant in terms of the state of mind and intent, and especially also because it is a claim of self-defense in this case, the jury will weigh how probative it is, ultimately, but I think it is admissible for those reasons, not to show he is a bad guy and he acted in conformity obviously, assuming there is a foundation.

11/12/2013RP 5-6. The two items were admitted at trial during the testimony of Ms. Sevaaetsai. 11/19/2013RP 116-17. CP Supp ____, Sub No. 122, Exhibit 15 (photo of Mr. Talaga), Exhibit 16 (snapshot of Mr. Talaga's Facebook profile page).

Pursuant to Mr. Talaga's request, the jury was instructed on lawful use of force. CP 48-50. The jury subsequently convicted Mr. Talaga as charged. CP 56.

D. ARGUMENT

THE EVIDENCE ADMITTED PURSUANT TO ER 404(b) PROVED NOTHING MORE THAN MR. TALAGA ACTED IN CONFORMITY HIS BOASTS WHICH VIOLATED HIS RIGHT TO A FAIR TRIAL

1. *Evidence of a person's prior actions cannot be admitted to prove he acted in conformity with that trait.*

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.² ER 404(b) was designed “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). ER 404(b) is intended to prevent application by jurors of the common assumption “that ‘since he did it once, he did it again.’” *State v. Bacotqarcia*, 59 Wn.App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991). “This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” *Foxhoven*, 161

² “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.” ER 404(a).

Wn.2d at 175. This rule 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.” *Id.* “In no case . . . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The same evidence may be admissible for other purposes though, depending on its relevance and the balancing of the probative value and danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404(b) includes a nonexclusive list of permissible purposes for admitting evidence of a person’s other bad acts.³

The law resists criminal convictions based upon the jury’s view that the defendant is a bad person or has a history of bad conduct. Therefore, the trial court must begin with the presumption that evidence

³ “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.” ER 404(b).

of prior misconduct is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, when demonstrated, such evidence may be admissible for purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), quoting ER 404(b). Before the trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. The latter factor inserts an ER 403 examination into an ER 404(b) analysis. “Unfair prejudice” is caused by evidence that is likely to arouse an emotional response rather than a rational decision. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987).

The burden of demonstrating a proper purpose for admitting evidence of a person’s prior bad acts is on the proponent of the evidence. *DeVincentis*, 150 Wn.2d at 17. The court must conduct this

analysis on the record. *State v. Sublett*, 156 Wn.App. 160, 195, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58 (2012).

Appellate courts review a trial court's evidentiary rulings for an abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). In close cases "the scale should be tipped in favor of the defendant." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), *quoting State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983).

The question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant—they are. Evidence that a criminal defendant is a "criminal type" is always relevant. But ER 404(b) reflects the long-standing policy to exclude most character evidence because

it is said to weigh too much with the jury and to so overpersuade them. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

Thus, the question to be answered in applying ER 404(b) is whether the prior acts are relevant for a purpose other than showing propensity.

2. The character evidence admitted under ER 404(b) proved nothing more than that Mr. Talaga acted in conformity with that character trait.

Here, the trial court admitted the evidence under ER 404(b), to prove Mr. Talaga's state of mind and intent as it related to Mr. Talaga's claim of self defense. 11/12/2013RP 5-6. *See Saltarelli*, 98 Wn.2d at 364 ("That a prior act 'goes to intent' is not a 'magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].'",) *citing United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir.1974). The only way for this evidence to prove Mr. Talaga's state of mind or intent was by the jury believing his boasts on his Facebook page and in the accompanying photo. But this was nothing more than propensity evidence; proving Mr. Talaga acted in conformity with his claims in the disputed exhibits. Otherwise, the claims on the Facebook page were simply not relevant.

Further, the evidence was not admissible to counter Mr. Talaga's self-defense claim as argued by the State in seeking its admission. In *State v. Thompson*, the defendant, who was charged with manslaughter, claimed self-defense. 47 Wn.App. 1, 733 P.2d 584 (1987). Three witnesses testified concerning threatening encounters with the defendant earlier in the evening of the crime. Under ER 404(b) the testimony was found to be relevant and admissible because it showed the absence of self-defense by demonstrating a "continuing course of provocative conduct." *Thompson*, 47 Wn.App. at 12.

Initially, the boastful claims allegedly made by Mr. Talaga were unreliable as they were completely unsubstantiated. In fact, there was no evidence that Mr. Talaga had assaulted anyone else on a prior occasion or that any of his boastful claims were even true.

Further, as opposed to the provocative conduct in *Thompson*, the evidence here was purely propensity evidence. Mr. Gooden did not know Mr. Talaga and there was nothing in the evidence which showed any pattern of assaultive conduct by Mr. Talaga similar to that in by the defendant in *Thompson*. See *State v. Wade*, 98 Wn.App. 328, 335, 989 P.2d 576 (1999) ("Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and

the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves.”). Rather, this appeared to be an act based on the heat of the moment and not a matter of an intentional plan by Mr. Talaga to harm Mr. Gooden. As a result, the trial court erred in ruling the evidence was admissible under ER 404(b).

3. The error in admitting the photo and copy of the Facebook page were not harmless.

When a court erroneously admits prior bad acts evidence under ER 404(b), reversal is required where, “within reasonable probability, materially affected the outcome of the trial.” *Gresham*, 173 Wn.2d at 433.

Once the evidence of Mr. Talaga’s boasts is removed, the evidence at trial established Mr. Talaga assaulted Mr. Gooden, but the question remained for the jury whether it was self-defense. While the evidence was by no means insufficient for a jury to convict a defendant, there was a reasonable probability that absent this highly prejudicial evidence of Mr. Talaga’s unsubstantiated boasting, the jury’s verdict would have been materially affected and it very well may have found that his conduct was justified. Thus, it cannot be said that the erroneous

admission of the evidence of this evidence was a harmless error.

Gresham 173 Wn.2d at 433-34.

Further, Mr. Talaga's Facebook post became an important part of the State's closing argument. In referencing Mr. Talaga's posting, the prosecutor argued:

He also told you his intent to cause great bodily harm through his Facebook post . . . This is being offered and was admitted for one purpose and one purpose only: To show the defendant's intent. *To show the way the defendant thinks . . .* It makes sense what his intent is this night . . . The first thing you will notice, I think, is pretty obvious, that he has a very high opinion of himself . . . But as defense counsel says is buried in the middle, it's not buried in the middle, but it is in the middle, this quote from his profile, his information about himself, "Just leave me alone and we got no problems. Test me and you just might be on YouTube for the most epic knockout." And what happened that night? He was tested. He was tested, he said. He says Mr. Gooden said, "I will kick your ass." He was tested. We don't have the YouTube video of that, but we do have the video of the most epic knockout, all inflicted by the defendant. All inflicted on Mr. Gooden. All inflicted by – without any other kind of provocation other than, "I will kick your ass."

. . .

Did you ever see Mr. Gooden raise his fist? Did you ever see Mr. Gooden take a threatening posture? Did you ever see Mr. Gooden do anything except for get knocked down from behind and lie on the ground defenseless while the defendant beat him? No. *The most epic knockout. The defendant talked about it in his own Facebook post.*

11/26/2013RP 10-11 (emphasis added).

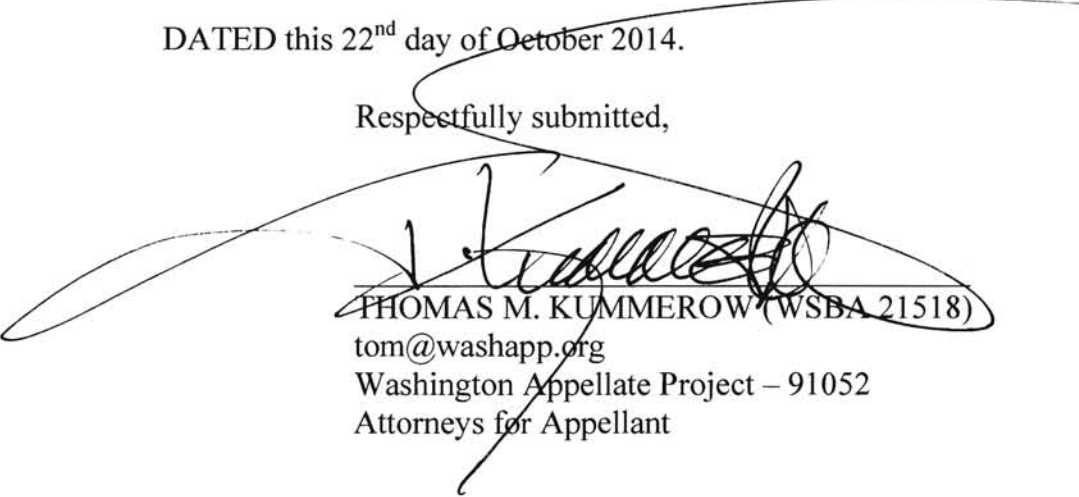
The prosecutor in his argument was stressing to the jury that Mr. Talaga was acting in conformity with his boasts in the Facebook posting, and pointing out for the jury just how violent a man Mr. Talaga was. Thus, without the Facebook evidence, the jury could have reached a different verdict. Mr. Talaga is entitled to reversal of his conviction.

E. CONCLUSION

Mr. Talaga asks this Court to reverse his conviction and remand for a new trial.

DATED this 22nd day of October 2014.

Respectfully submitted,



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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **OPENING 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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