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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 94550-1

No. 74107-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAVIER MACIAS-CAMPOS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Javier Macias-Campos, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Macias-Campos appealed his King County Superior Court convictions for assault in the fourth degree, felony harassment, unlawful imprisonment, and witness tampering – all in the context of a domestic violence relationship. The Court of Appeals affirmed these convictions in an unpublished decision, on April 17, 2017. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

Before propensity evidence may be introduced at trial pursuant to ER 404(b), the court must conduct a full evidentiary hearing on the record, making a determination that the evidence is relevant and more probative than prejudicial. Where the trial court erroneously admitted propensity evidence for an improper purpose under ER 404(b), was Mr. Macias-Campos deprived of his right to a fair trial, and was the Court of Appeals affirmance therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

Mercedes Olsen, a longtime heroin and methamphetamine user, was chronically homeless at the time she became involved with Javier Macias-Campos, who provided her with a place to live. 8/6/15 RP 57-59. The two shared a platonic relationship for some time, committing crimes together in various motels in Seattle, Edmonds, and Everett. Id. at 59-61. At one point in the fall of 2014, Ms. Olsen and Mr. Macias-Campos's girlfriend at the time, Rochelle, also lived with them, until Rochelle went to jail for approximately a month.¹ Id. at 62.

According to Ms. Olsen, on February 7, 2015, she and Mr. Macias-Campos were staying at the Hillside Motel on Aurora Avenue; by then, they had become intimate. Id. at 77. She had been using heroin, and Mr. Macias-Campos had been using methamphetamine and cocaine. Id. at 75, 77. Ms. Olsen sent a Facebook message to her mother, stating that she did not feel free to leave and felt afraid of Mr. Macias-Campos. Id. at 85-86.

Ms. Olsen claimed that while she was in the motel room with Mr. Macias-Campos, he punched her in the head and stomach and threatened her with a screwdriver. Id. at 88-91. Ms. Olsen also stated that Mr. Macias-Campos took a wire hanger from the bathroom trash can and

¹ Only a first name is used in the record. 8/6/15 RP 61.

bound her wrists behind her back, and then choked her from behind. Id. at 91-93.

Officers from the Seattle Police Department responded to the Hillside Motel, prompted by a 911 call of “suspicious circumstances.” 8/4/15 RP 139-43. A team of officers removed Ms. Olsen from the room and arrested Mr. Macias-Campos, recovering a small folding knife, as well as a “beat-up coat hanger” from the bathroom. Id. at 148-49, 151-53, 156.

Mr. Macias-Campos was charged with assault in the second degree, felony harassment, and unlawful imprisonment, each with a domestic violence aggravator. CP 1-8. Two counts of tampering with a witness were later added, following the disclosure of recorded telephone calls allegedly made by Mr. Macias-Campos from the King County Jail. CP 9-12; RCW 9A.36.021(1)(g); RCW 9A.40.010(6); RCW 9A.46.020; RCW 9A.72.120; RCW 10.99.020.

Before trial, Mr. Macias-Campos moved to exclude evidence of his prior conduct with his ex-girlfriend Rochelle, pursuant to ER 404(b). CP 40. The State argued Mr. Macias-Campos told Ms. Olsen that he beat and kidnapped Rochelle; therefore, it was relevant to Ms. Olsen’s reasonable fear of him. 8/6/15 RP 50-51. Mr. Macias-Campos argued the court must hold a hearing in order to decide the ER 404(b) issue. CP 40.

Ms. Olsen testified at a hearing regarding her stated intention to “take the Fifth” during her trial testimony. 8/6/15 RP 5. Following the hearing, the court overruled the defense objection to the admission of the prior acts involving Rochelle. Id. at 52. The court ruled it would permit introduction of the prior misconduct of Mr. Macias-Campos toward Rochelle, and would give a limiting instruction as to this evidence. Id.

At trial, the State presented the testimony of Ms. Olsen, as well as that of her mother, who had received the Facebook message. Id.; 8/10/15 RP 9-20. Ms. Olsen testified that Mr. Macias-Campos previously told her about hitting his former girlfriend Rochelle in the head with a gun, and that he had driven around with Rochelle tied up in the trunk of his car. 8/6/15 RP 70-71. The court gave a limiting instruction to the jury at the time this evidence was admitted. Id. at 71.

At the close of the evidence, the court gave a final instruction, directing that the ER 404(b) evidence was to be used for a limited purpose, to show the reasonableness of Ms. Olsen’s fear of Mr. Macias-Campos’s alleged threats, and her lack of consent to any restraint. CP 52 (Jury Instruction 7). Mr. Macias-Campos objected to this final instruction and argued the ER 404(b) evidence was not admissible for that purpose. 8/10/15 RP 31. The court also granted the request for a lesser-included instruction on assault in the fourth degree. CP 59-61.

Mr. Macias-Campos was convicted of unlawful imprisonment, felony harassment, two counts of tampering with a witness, and assault in the fourth degree. CP 86-91. The jury found the couple to be members of the same household. Id.

Mr. Macias-Campos appealed, arguing the court had abused its discretion by admitting the ER 404(b) evidence. On April 17, 2017, the Court of Appeals affirmed his convictions. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. This Court should grant review because Rule 404(b) prohibits the admission of propensity evidence.

ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

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). The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

This Court has held there is no “domestic violence exception” carved into the Rules of Evidence for certain cases. State v. Gunderson, 181 Wn.2d 916, 925 n.3, 337 P.3d 1090 (2014). Before admitting such evidence of other crimes, wrongs or acts, a trial court must find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997).

If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

2. The trial court improperly admitted propensity evidence and the Court of Appeals affirmed this error.

The trial court admitted testimony of purported prior domestic violence incidents between Mr. Macias-Campos and his ex-girlfriend, over defense objection, ostensibly as evidence of the “reasonableness” of Ms. Olsen’s fear, and whether or not she felt free to leave. 8/6/15 RP 52. The court likely reasoned Ms. Olsen’s credibility would be at issue during the trial, since she was a reluctant witness, testifying in custody, as well as a self-proclaimed drug addict.

The trial court’s denial of Mr. Macias-Campos’s motion to exclude the ER 404(b) evidence was erroneous for two reasons. First, this was not a recantation case; and second, this Court’s decision in Gunderson controls. 181 Wn.2d at 925. Ms. Olsen did not recant a prior statement during her testimony, and there was no claim of recent fabrication. Ms. Olsen’s testimony at trial was consistent with her previous statements to police officers. 8/6/15 RP 88-94, 149-53.

Because Ms. Olsen had never recanted, her credibility was no more at issue than any other witness’s. Gunderson established that there are meaningful limits to admitting prior acts of domestic violence for purposes of establishing “credibility.” 181 Wn.2d at 925. To be admissible, the probative value of a prior act of domestic violence must be “overriding.”

Id. Otherwise, the inherent risk of unfair prejudice associated with this type of evidence is too great. Id.

In general, included in the sufficiently probative category are cases where the witness gives conflicting statements about the alleged act, such as a recantation. Id. In the inadmissible category are cases where the witness's account is merely contradicted by evidence from another source, such as here, where the physical evidence simply did not corroborate Ms. Olsen's story of a second degree assault. See id. at 924-25. Here, for example, Officer James Norton testified he saw no marks on Ms. Olsen's arms, wrists, neck, or face. 8/6/15 RP 155-59.²

In Gunderson, this Court specifically rejected "a domestic violence exception for prior bad acts that is untethered to the rules of evidence." 181 Wn.2d 925 n.3. In holding that ER 404(b) was not satisfied, this Court distinguished its earlier opinion in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). The Court refused to extend Magers to cases where other external evidence conflicts with the witness's account. Gunderson, 181 Wn.2d at 924-25. This Court reasoned this was inadequate to create

² Even the trial court acknowledged at sentencing:

Here is what's difficult for the Court, I'm just going to be blunt with everybody: The jury couldn't fully believe the alleged victim here, and therefore the jury did not accept the State's theory with regard to assault in the second degree.

10/2/15 RP 7.

the necessary overriding probative value because there are many reasons 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.

Id. (emphasis added).

Not only was the ER 404(b) evidence not probative here, but it ran an extraordinary risk of unfair prejudice. For the jury to hear evidence of prior allegations of graphic domestic violence, such as the jury heard here, was overly prejudicial.³ In admitting the highly prejudicial ER 404(b) testimony of prior incidents, the trial court abused its discretion.

³ The jury heard the following graphic testimony concerning Rochelle, the ex-girlfriend:

He had told me that he -- he wouldn't let her leave the room that they were in and that he had hit her over the head with a gun, and her head was cut open, and there was a lot of blood, and that he then tied her up and put her in the trunk of his car and drove around for a little while.

8/6/15 RP 70.

3. Because the erroneous admission of the 404(b) evidence affected the outcome of the trial, review should be granted.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. Gunderson, 181 Wn.2d at 926; State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599.

In Gunderson, when this Court confronted a similar ER 404(b) error, this Court held the error was not harmless as to the conviction for felony violation of a court order. 181 Wn.2d at 926. This 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.” Id. This was despite the fact that the trial court had given an appropriate limiting instruction, as did the trial court here. CP 52.

The Court of Appeals decision is in conflict with Gunderson. The evidence that Mr. Macias-Campos had allegedly threatened a former girlfriend was highly prejudicial, considering the extreme prejudice from the other acts evidence. Ms. Olsen, the complaining witness, testified in custody, due to her own unresolved criminal issues. She also stated she was using heroin at the time of the alleged incident, and had been using

for years. 8/6/15 RP 57, 77. Ms. Olsen's lack of credibility was evident to the jury, which did not accept her version of the facts and acquitted Mr. Macias-Campos of assault in the second degree. CP 86; 8/6/15 RP 155-59 (officers noted lack of physical injury).

In addition, the jury struggled to reach a verdict on the felony harassment count for some time, sending two jury questions about the procedure, should they be unable to agree on the harassment count. CP 79, 81.

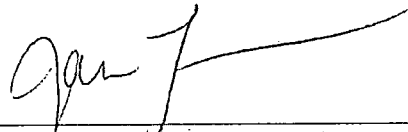
Accordingly, the Court of Appeals affirmance is in conflict with this Court's decisions. Gunderson, 181 Wn.2d at 925; Gresham, 173 Wn.2d at 420. This Court should grant review. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 17th day of May, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAVIER ALEJANDRO MACIAS-CAMPOS,

Appellant.

No. 74107-1-1

DIVISION ONE

UNPUBLISHED

FILED: April 17, 2017

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

Cox, J. – Javier Macias-Campos appeals his judgment and sentence. We hold that the trial court did not abuse its discretion in admitting testimony concerning Macias-Campos's previous acts of domestic violence. Such testimony was relevant to essential elements of the charged crimes and was not unduly prejudicial. Accordingly, we affirm.

In 2014, Macias-Campos and M.O. became friends and lived together temporarily, along with Macias-Campos's girlfriend R. Eventually M.O. decided to leave.

Later that year, Macias-Campos and M.O. reconciled and returned to living together. They also became intimate. But Macias-Campos began to abuse M.O. He became controlling and jealous. When M.O. attempted to reach out to a friend, Macias-Campos responded by hitting her and then having sex with her against her wishes. M.O. escaped for a time and then returned. Around this time, Macias-Campos told M.O. about how he had restrained R. during their

relationship. He explained how he had violently hit her in the head with a gun and tied her up in the trunk of his car while he drove around.

In early 2015, Macias-Campos and M.O. booked a room at the Hillside Motel on Aurora Avenue. M.O. managed to send a Facebook message to her mother explaining that she felt she could not leave and that she was scared.

But Macias-Campos became enraged when he found out that M.O. was communicating with her mother and a friend. He told her she could not leave the motel room. She retreated to the bathroom but he followed, accusing her of cheating with a former boyfriend. He began hitting her. He threatened her with a screwdriver and a knife. He said he would "do what the cartel does with girlfriends who cheat." And he tied her hands behind her back with a twisted coat hanger.

Eventually he relented and M.O. furtively contacted her mother to alert the motel staff. Police were notified and, responding, arrested Macias-Campos. The State charged Macias-Campos with felony harassment and unlawful imprisonment, amongst other crimes, each with a domestic violence aggravator.

Pretrial, Macias-Campos moved to exclude evidence of his prior misconduct under ER 404(b). It later appeared that such evidence concerned M.O.'s testimony about what Macias-Campos had told her of how he treated R. The trial court declined to exclude such evidence but later provided a limiting instruction. It explained that it admitted the challenged testimony for the limited purpose of showing that M.O. could reasonably fear that Macias-Campos would

act on his threats and that he could intimidate M.O. into remaining constrained in the bathroom against her will.

The jury found Macias-Campos guilty of fourth degree assault, felony harassment, unlawful imprisonment, and witness tampering. The jury also found these crimes occurred in a domestic relationship. The trial court entered its judgment and sentence in accordance with the jury's verdict.

Macias-Campos appeals.

PRIOR ACTS EVIDENCE

Macias-Campos argues that the trial court abused its discretion in admitting evidence under ER 404(b) of his alleged past acts of domestic violence against R. We disagree.

ER 404(b) provides:

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.

Thus, the rule bars admission of certain evidence when used to prove character but not when used to prove a proper purpose. In order to determine whether evidence is admissible in a particular instance, the trial court conducts a four part test.

It must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to

prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.¹

The proponent of the evidence has the burden to prove the first three elements.² We review for an abuse of discretion the trial court's decision to admit or exclude evidence under such a rule.³ The appellant bears the burden of proving an abuse of discretion.⁴

Regarding the first element, Macias-Campos does not contest whether his misconduct towards R. occurred or whether M.O. believed it had. Thus, this element is undisputed.

But regarding the second element, the parties dispute the purpose for which the evidence was proffered. Macias-Campos argues that the trial court "likely" admitted the contested evidence in order to allow the impeachment of M.O. But the State argues that the evidence was admitted because it went to elements of the charged crimes. Specifically, the State contends that it was necessary to show M.O. reasonably feared Macias-Campos in order to prove she was restrained, and that it was necessary to prove an element of the felony harassment charge.

Here, the court explained its reasoning for admitting the challenged testimony and gave a limiting instruction consistent with this purpose. Specifically, it explained that the jury could consider the testimony for "the limited

¹ State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

² State v. Ashley, 186 Wn.2d 32, 39, 375 P.3d 673 (2016).

³ Id. at 38-39.

⁴ Id. at 39.

assessment of whether or not [M.O.'s] purported fear of the defendant was reasonable and whether or not she felt free to leave, with regard to the unlawful imprisonment, but not for any other purpose." After M.O. testified, the trial court provided a limiting instruction. It explained:

Alleged past behavior by Mr. Macias-Campos toward this witness is admissible only for two purposes: Purpose number one is to assess whether or not there was a reasonable basis for this witness to be in reasonable fear with regard to any alleged threats that were made to her on the date charged, and the other purpose for which you can consider this testimony is whether or not the alleged restraint of her on the date alleged was accomplished by intimidation in some way. All right? Not for any other purpose.⁵

Jury Instruction 7 is substantively identical to this oral instruction.

Thus, the record indicates that the court admitted the challenged testimony to show whether there was a reasonable basis for M.O.'s fear of Macias-Campos's threat, and whether Macias-Campos restrained her by intimidation. Contrary to Macias-Campos's argument, it was not admitted to impeach or bolster M.O.'s credibility.

The third element requires the trial court to determine whether the evidence is relevant to prove an element of the crime charged. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁶

⁵ Report of Proceedings (August 6, 2015) at 71.

⁶ ER 401.

Evidence of past domestic violence is probative of a victim's state of mind.⁷ The supreme court has specifically found evidence of a defendant's past bad acts against a victim relevant "highly probative" to show restraint by intimidation.⁸ And this court has held admissible evidence of past acts directed against a third party if "necessary to put the threats [against the victim] in context."⁹

Here, Macias-Campos does not appear to contest the relevance of this evidence. And the elements of the charged crimes demonstrates the relevance of the testimony.

To prove unlawful imprisonment, the State must show that the defendant "knowingly restrain[ed] another person."¹⁰ RCW 9A.40.010(6) defines restraint as the restriction of "a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by (a) physical force, intimidation, or deception"

The felony harassment statute requires the State to prove the defendant threatened the victim and, in so doing, "place[d] the person threatened in reasonable fear that the threat will be carried out."¹¹

⁷ State v. Fisher, 165 Wn.2d 727, 744-45, 202 P.3d 937 (2009).

⁸ Ashley, 186 Wn.2d at 48.

⁹ State v. Ragin, 94 Wn. App. 407, 412, 972 P.2d 519 (1999).

¹⁰ RCW 9A.40.040(1).

¹¹ RCW 9A.46.020(b).

Here, the testimony was probative of the elements in these charging statutes. As discussed above, the trial court admitted the testimony to show that any restraint was nonconsensual because Macias-Campos accomplished it by intimidating M.O. The testimony was also admitted to show the reasonableness of M.O.'s fear in regard to the threats Macias-Campos made. As such, the testimony was relevant to proof of both of these crimes.

The fourth element requires that the trial court weigh the probative value against the prejudicial effect. Macias-Campos argues that the trial court abused its discretion in admitting the challenged testimony because its prejudicial effect outweighed its probative value. Not so.

We remain mindful that “courts 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.”¹² These acute concerns require the State to prove the “overriding probative value” of the challenged evidence.¹³

State v. Ashley¹⁴ is instructive. Baron Ashley and Makayla Gamble had dated for several years.¹⁵ During this time, Ashley had violently abused

¹² State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

¹³ Id.

¹⁴ 186 Wn.2d 32, 375 P.3d 673 (2016).

¹⁵ Id. at 35.

Gamble.¹⁶ Eventually the two separated and, for several years following, they saw each other sporadically.¹⁷

Sometime later, police went to arrest Ashley and his sister for robbery and motor vehicle theft.¹⁸ When they did so, Ashley, his sister, and Gamble were at the sister's home.¹⁹ The police left, returning a few days later.²⁰ They knocked on the door but no one answered.²¹ After obtaining a key, police entered the house.²² They met Gamble in the living room.²³

They asked her if Ashley was inside and she told them he was upstairs.²⁴ After arresting him, police asked Gamble why she had "helped Ashley hide."²⁵ She explained that Ashley had detained her in the bathroom and only allowed her to leave once police entered the home.²⁶

¹⁶ Id. at 40.

¹⁷ Id. at 35.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

The State charged Ashley with unlawful imprisonment with domestic violence.²⁷ It moved pretrial to introduce evidence of Ashley's earlier domestic violence against Gamble in order to show that Ashley had intimidated Gamble into remaining constrained to the bathroom.²⁸ The trial court granted that motion.²⁹

On review, the supreme court affirmed the admission, explaining that it was reasonable to conclude "that Gamble, whom Ashley allegedly abused numerous times over an eight-year period, could continue to fear or be intimidated into obeying Ashley years after the most recent incident."³⁰ As such, the trial court had properly found that the State proved the "overriding probative value of this evidence because the evidence went directly to a necessary element of the crime."³¹ The evidence was vital to help the jury assess whether Ashley restrained Gamble by intimidation.³² It showed that Gamble's response "was not inexplicable, not unreasonable, and that she was [held] without consent."³³

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id. at 45.

³¹ Id.

³² Id.

³³ Id. at 46-47.

Here, the State had to prove, for the felony harassment charge, that M.O. could reasonably fear that Macias-Campos would carry out his threats. And it had to prove, for the unlawful imprisonment charge, that M.O. did not consent to her restraint, perhaps out of intimidation. For both, it had to show the reasonable basis for M.O.'s fear.

Thus, it offered evidence that M.O. knew Macias-Campos had committed previous acts of domestic violence against R. This evidence "went directly to a necessary element of the crime[s]."³⁴ It explained M.O.'s actions and put them in appropriate context. As in Ashley, such evidence had the "overriding probative value" to support its admission, even in the sensitive context of a domestic violence trial.³⁵ Thus, the trial court did not abuse its discretion in admitting the challenged testimony.

But Macias-Campos argues that the supreme court's decision in State v. Gunderson³⁶ bars admission. This argument is unpersuasive.

In that case, the State brought a domestic violence charge against Daniel Gunderson.³⁷ At trial, one of the alleged victims, Christina Moore, testified that no such incident took place.³⁸ The State, in response, offered evidence of Gunderson's two prior acts of domestic violence against Moore in order to

³⁴ Id. at 45.

³⁵ Id. at 48.

³⁶ 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

³⁷ Id. at 918.

³⁸ Id. at 920.

impeach her testimony.³⁹ The court concluded that the evidence was sufficiently relevant to Moore's credibility and admitted it.⁴⁰

The supreme court reversed, holding that prior act evidence was not admissible to impeach a victim's credibility when the victim had "neither recant[ed] nor contradict[ed] prior statements."⁴¹ Admitting such evidence outside those circumstances was an abuse of discretion.⁴²

Here, Gunderson is not on point. As discussed above, the State offered, and the trial court admitted, the challenged testimony to show necessary and essential elements of the charged crimes. It was not admitted to bolster or impeach credibility. Thus, Gunderson and Macias-Campos's argument that M.O. had not recanted her testimony are irrelevant to this determination. Ashley and similar cited cases control.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

³⁹ Id. at 920-21.

⁴⁰ Id. at 921.

⁴¹ Id. at 925.

⁴² Id.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74107-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

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