

No. 64511-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAKER,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 AUG 17 PM 4:19

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

BRIEF OF APPELLANT

GREGORY C. LINK
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Court Rules

ER 404	passim
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A. ASSIGNMENT OF ERROR

The trial court erred in admitting prior-acts evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

ER 404 does not permit admission of a person's prior acts as propensity evidence. However, if it is offered for some other purpose, such evidence is admissible if the court determines the evidence is relevant to prove an element of the crime charged and the court provides an instruction properly limiting the jury's use of the evidence. Did the trial court err where it admitted allegations of prior assaults by Michal Baker where that evidence was not necessary nor relevant to prove an element of the current offense?

C. STATEMENT OF THE CASE

Mr. Baker drove his girlfriend, Jennifer Ingram home after she had spent an evening drinking with a friend. 10/20/09 RP 342-44. Upon their arrival at Ms. Ingram's apartment, the two began arguing. 10/20/09 RP 319. Ms. Ingram alleged Mr. Baker then began strangling her. Id. After the alleged assault ended, Ms. Ingram went to a neighboring apartment to call police. 10/20/09 RP 328-29. Responding officers testified they saw redness on Ms. Ingram's neck. 10/21/09 RP 423. Despite her claimed injuries, Ms. Ingram declined medical attention. 10/21/09 RP 429. For

reasons that are not entirely clear, Mr. Baker was apparently not arrested that evening.

Ms. Ingram testified that ten days later she and Mr. Baker were again at her apartment. 10/20/09 RP 355. According to Ms. Ingram as she sat on a couch eating, Mr. Baker inexplicably began strangling her. Id. Ms. Ingram testified Mr. Baker stopped when her neighbor knocked on the door. 10/20/09 RP 359. Ms. Ingram did not call police.

The State charged Mr. Baker with two counts of second degree assault. CP 25-26.

In addition to her description of the two alleged assaults at the heart of the present charges, the trial court permitted Ms. Ingram to testify to two prior alleged assaults by Mr. Baker. Specifically, Ms. Ingram testified that on two occasions several months prior to the allegations at issue in the present trial, Mr. Baker had strangled her. 10/20/09 RP 296, 304-06.

The jury acquitted Mr. Baker of one of the charged counts but convicted him of the other. CP 70-71.

D. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING
PROPENSITY EVIDENCE

1. Absent a specific exception, propensity evidence is inadmissible. Generally, evidence of prior acts of the defendant admitted solely to prove propensity to commit an offense is not admissible. ER 404(a). But, 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.

The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In doubtful cases, the evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

To admit evidence of other acts, the trial court 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. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

ER 404(b) 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.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting Lough, 125 Wn.2d at 859).

This analysis must be conducted on the record. Smith, 106 Wn.2d at 776 (citing State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)). If the evidence is admitted, a limiting instruction must be given to the jury. Foxhoven, 161 Wn.2d at 175

2. The trial court improperly admitted propensity evidence.

The evidence admitted here was not necessary to establish an essential element of the crime and did not rise beyond mere propensity evidence.

The trial court concluded the evidence of the prior allegations of assault was relevant "to show the nature of the relationship of the defendant and the alleged victim." 10/15/09 RP 116. The court also concluded it was admissible as evidence of

motive and “to show the absence of mistake.” Id. Finally, relying on an expansive reading of this Court’s decision in State v. Grant, 83 Wn.App. 98, 920 P.2d 609 (1996), the court concluded the propensity evidence was admissible to allow the jury to assess Ms. Ingram’s credibility.” Id. at 116-17.

But, there was no evidence before the jury that Mr. Baker had accidentally choked Ms. Ingram. Nor was his motive relevant to any material element in this case. Finally, the evidence was not relevant to an assessment of Ms. Ingram’s credibility

Prior acts evidence is logically relevant evidence of intent in two ways: (1) where offered to rebut a claim that the present acts were unintentional or (2) as bald propensity evidence. The first is not at issue here, as Mr. Baker denied choking Ms. Ingram not merely that he did so inadvertently. The second is prohibited by ER 404(a). Because, the volitional nature of the alleged acts was not at issue, the evidence was not admissible to show Mr. Baker’s intent or the absence of mistake.

Aside from failing to prove intent, the propensity evidence does not tend to prove motive other than to suggest that because Mr. Baker is the type who has choked his girlfriend before he must have done so on this occasion. Motive is not the same as *mens*

rea. *Mens rea* describes the purposefulness with which an act is committed. Motive on the other hand is “[a]n inducement, or that which leads or tempts the mind to indulge a criminal act.” State v. Saltarelli, 98 Wn.2d 358, 365, 655 P.2d 697 (1982) (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); and Black's Law Dictionary, p 1164 (4th rev. ed. 1968)). Why Mr. Baker may have committed the current alleged acts is irrelevant to the current charge. Second, the State's evidence in no way explains how the alleged prior acts induced or tempted Mr. Baker to commit the alleged acts giving rise to the charges here. Instead, the only relevance of the prior acts is to suggest that because he acted in this manner before he must have done so again, i.e., that he has a propensity to choke his girlfriend. But that is not a proper use of prior acts evidence. ER 404(b). Thus, the evidence was not relevant to motive. See, Saltarelli, 98 Wn.2d at 365.

Further, the evidence was not relevant to a proper assessment of Ms. Ingram's credibility. Grant concerned a victim's recantation of her accusations of abuse. Because of that, Grant concluded the defendant's prior convictions of assaultive conduct against the same victim were relevant to assess the credibility of her current accusations and/or recantation.

But here there was no recantation. Unlike Grant the only value of the evidence was as propensity. The only way the prior acts evidence tends to prove Ms. Ingram's "credibility" is by the conclusion that the number of allegations somehow lends weight to their credibility. But that is simply propensity evidence, especially where the prior acts are not criminal convictions but merely allegations. By contrast, in Grant consideration of prior criminal convictions for domestic violence against a now recanting witness had logical relevancy aside from bald propensity, even if only marginally so, as it allowed jurors a framework in which to determine which of the victim's current statements – allegation versus recantation – was correct. In that circumstance the nature of the parties' prior relationship is relevant to assess the credibility of the recanting victim.

To be sure there is no domestic violence exception within ER 404(b) nor even in the case law expanding that breadth of that rule. Instead, prior acts evidence, even prior acts of domestic violence, must still be necessary to prove a necessary element of the offense. And, it must do so based upon some logical relevancy aside from propensity. The evidence here does not do that and was not properly admitted under ER 404(b).

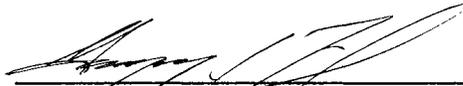
3. The error in admitting the other acts evidence requires reversal. The erroneous admission of ER 404(b) evidence, requires reversal if the error, within reasonable probability, materially affected the outcome.” State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Acosta, 123 Wn.App. 424, 438, 98 P.2d 503 (2004).

The weight of the state’s case was not so strong. Only when presented with evidence corroborating Ms. Ingram’s allegations did the jury convict Mr. Baker. With respect to the second charge, based entirely upon Ms. Ingram’s allegations, the jury acquitted Mr. Baker. Against the relative weakness of the State’s case, the inherent prejudice of propensity evidence had a likely effect upon the jury’s verdict.

F. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court must reverse Mr. Baker's sentence.

Respectfully submitted this 17th day of August, 2010.



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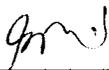
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF AUGUST, 2010, 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:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF AUGUST, 2010.

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