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King County Prosecutor  
Appellate Unit

NO. 68814-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD GRAY, III

Appellant.

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

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to present a complete defense when the trial court excluded his proffered reverse-404(b) evidence.<sup>1</sup>

Issue Pertaining to Assignment of Error

The core issue determining appellant's guilt was whether he acted in self-defense when he stabbed the alleged victim. Proof of this defense would have negated the State's ability to establish the element of intent. In furtherance of this defense, appellant sought to introduce the alleged victim's prior assault convictions. The trial court excluded the evidence under ER 404(b). The question presented here is whether a criminal defendant has a constitutional right to present reverse-404(b) evidence in support of his self-defense theory where that evidence is relevant under ER 401 and is more probative than prejudicial under ER 403?

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<sup>1</sup> "Reverse-404(b) evidence" is evidence regarding a third-party's misconduct that is offered by a defendant as a means of negating the his guilt. E.g., United States v. Wilson, 307 F.3d 596, 601 (7th Cir.2002).

B. STATEMENT OF THE CASE

1. Procedural History

On August 11, 2011, the King County prosecutor charged appellant Ronald Gray with one count of first degree assault while armed with a deadly weapon. CP 1-5. On October 7, 2011, the information was amended, and the prosecutor added one count of attempted murder in the first degree. CP 8-9. A jury convicted Gray as charged. CP 57-60. The counts were merged and Gray was sentenced to a term of 234.75 months. CP 69, 149-57. He appeals his conviction. CP 158.

2. Substantive Facts

On August 7, 2011 around 10:30 p.m. Gray was outside a convenience store in Auburn, hanging out with two friends and “trash-talking” to others. 2RP 32-34.<sup>2</sup> They had been drinking. 3RP 42. Gray and his friends eventually moved on and walked through a local neighborhood. 2RP 34-38. They attempted to pick a fight with Jordan Kirk and Tyler Hudgens, residents in the neighborhood who were walking home. 2RP 30, 38, 61. Jordan

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<sup>2</sup> The transcripts are referred to as follows: 1RP (Nov. 17 and 21); 2RP (Nov. 29); 3RP (Nov. 30); 4RP (Dec. 1 – Feb. 1); 5RP (Dec. 5); 6RP (Dec. 7); 7RP (March 14); 8RP (April 12); 9RP (May 10 and 14).

went into his house to tell his dad, Mathew Kirk, that he was being harassed. 2RP 38. Mathew came out and told Gray and his friends to go away, warning them that he had a license to carry a concealed weapon and would use it if they walked onto his property. 2RP 39, 82. Gray and his friends began yelling and grabbing their waists as if they had guns. 2RP 40, 82-83. However, based on what Gray was wearing, it was highly unlikely Gray was carrying a gun. 3RP 67.

Gray and his friends moved on down the street, continuing to be verbally disruptive. 2RP 41, 83; 4RP 113. At that time, LeRoy Travers and his girlfriend Coral Williams were returning from a rafting trip and unloading the car. 4RP 112. Travers told Gray and his friends to leave. 4RP 113. A physical confrontation ensued with Travers punching Gray to his knees and then kicking him to the ground.<sup>3</sup> 4RP 114-16, 159.

Traverse and Gray began to separate, but both continued to yell aggressively toward one another. 3RP 17, 38, 41, 42, 79. A witness saw Gray make a motion as if he was pulling a gun. 3RP 16; 4RP 117. However, Gray was walking away. 3RP 16. At this

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<sup>3</sup> Travers claimed Gray hit him first. 4RP 144. No other witness corroborated this.

point, Gray was not a physical threat to Travers. 3RP 64. Eventually, Gray said something that provoked Travers (i.e. "I am going to kill your whore" or "I am going to rape your wife"). 3RP 18, 69, 71; 4RP 117. Travers – whose adrenaline was pumping – came running across the street and grabbed Gray's shoulders. 3RP 20, 42-43, 58; 4RP 146, 164; 5RP 6. . While holding Travers off, Gray stabbed him several times. 3RP 72, 89-90.

Police arrived. 3RP 87. Gray got up and ran, throwing the knife away.<sup>4</sup> 3RP 23-24, 88. Although the responding officer was unable to catch Gray, he recognized Gray from a previous encounter. 3RP 88-89. Other officers were dispatched to Gray's home, and Gray was eventually arrested nearby. 3RP 107-09. Meanwhile, Travers was taken to the hospital and treated for multiple stab wounds and a lacerated intestine. 4RP 71-82.

Prior to trial, defense counsel sought to have Travers' prior assault convictions admitted in support of Gray's self-defense claim. 1RP 109. The State argued the convictions should be excluded under ER 404(b). 1RP 110. The trial court agreed and

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<sup>4</sup> A neighbor found the knife the next morning. 3RP 29, 124. Its blade was "just over" 3 inches and it had Travers' blood on it. 3RP 37, 4RP 101. Gray later explained he did not remember having a knife. 4RP 52, 54.

excluded the evidence under ER 404(b)'s bar on propensity evidence. 1RP 111.

C. ARGUMENT

GRAY WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED EVIDENCE OF TRAVERS' PRIOR ASSAULT CONVICTIONS.

Gray sought to introduce Travers' prior assaultive conduct in support of his defense. The trial court excluded the evidence under ER 404(b). 2RP 171, 193. Thus, the essential question here is whether a traditional ER 404(b) applies when evidence is offered by a defendant in support of his defense,<sup>5</sup> or whether a straightforward relevancy/prejudice inquiry applies. This is an issue of first impression in Washington.<sup>6</sup> The Standard of review is *de novo*.<sup>7</sup>

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<sup>5</sup> A traditional 404(b) inquiry requires the trial court to: (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. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). Additionally, it requires the exclusion of all propensity evidence. State v. Fuller, \_\_\_ Wn. App. \_\_\_, 282 P.3d 126, 142-43 (2012).

<sup>6</sup> At least one Washington Court has held the defendant's right to present a defense includes the right to present reverse-404(b) evidence when it is relevant to show someone other than the defendant was responsible for the crime. State v. Young, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987). The case never used the

The Sixth and Fourteenth Amendments to the United States Constitution,<sup>8</sup> and article 1, § 22 of the Washington Constitution,<sup>9</sup>

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term “reverse 404(b).” However, it involved evidence of a third party’s prior bad acts that was proffered by the defendant. Because Young framed the issue as a traditional ER 404(b) question, however, that court never reached the issue presented here, *i.e.* whether reverse-404(b)evidence is subject to a relaxed standard of admissibility and, if so, what is that standard?

<sup>7</sup> See, Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011) (explaining constitutional violations are reviewed *de novo*); State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012) (explaining the interpretation of an evidentiary rule is a question of law that is reviewed *de novo*).

<sup>8</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

<sup>9</sup> Article 1, § 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public

guarantee a defendant the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

Evidence rules of exclusion that are disproportionate to the purposes they serve must yield to when a legitimate constitutional right to present a complete defense is at stake.<sup>10</sup> For this reason, case law shows the constitutional right to present a defense is often found to be limited only by the following requirements: (1) the evidence sought to be admitted must be relevant; and (2) the relevant evidence must be balanced against the State's compelling interest in

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trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...

<sup>10</sup> E.g., Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006) (concluding a rule that excluded evidence implicating third parties violated the defendant's right to have a meaningful opportunity to present his defense); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (holding unconstitutional a rule prohibiting hypnotically refreshed testimony); Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (overturning a decision that prevented the defendant from attempting to show at trial that his confession was unreliable); Chambers, 410 U.S. at 284 (finding unconstitutional Mississippi's evidentiary rules which denied the defendant the right to impeach his own witnesses and admit statements against penal interest).

precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See, Washington v. Texas, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37 (1992).

Although the issue of reverse-404(b) evidence is one of first impression in Washington, there is a substantial body of case law from federal circuit courts and other state courts that addresses the issue. Because Washington's 404(b) rule is substantially similar to the federal version, interpretation of FRE 404(b) is instructive.<sup>11</sup> State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994).

Federal circuit courts have developed two approaches for determining the admissibility of reverse-404(b) evidence. The majority of circuits hold ER 404(b) does not apply when evidence is offered by a defendant in support of his defense; instead a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues is applied.<sup>12</sup> These courts find the traditional 404(b) analysis

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<sup>11</sup> Reliance on federal decisions is also appropriate since Gray is raising an issue pertaining to his right to present a defense under both the federal and state constitutions.

<sup>12</sup> This approach is adhered to by the First, Second, Fifth, Seventh, Tenth and Eleventh Circuits. United States v. Seals, 419 F.3d 600,

does not apply because the policy reasons behind the rule are considerably weakened when the defense seeks to submit this type of evidence. Consequently, they hold the defendant's right to present a defense trumps the evidence rule.

In contrast, a minority of circuits hold ER 404(b) applies to all parties regardless of whether the evidence is being offered to support an accused's defense.<sup>13</sup>

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606–07 (7th Cir.2005) (holding courts must balance the evidence's probative value under FRE 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under FRE 403);\* U.S. v. Montelongo, 420 F.3d 1169 (10<sup>th</sup> Cir. 2005) (same); U.S. v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir.1987) (same); Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311 (11<sup>th</sup> Cir. 1987) (holding that Rule 404(b) did not apply and instead applying a relevance/prejudice balancing approach); U.S. v. Aboumoussallem, 726 F.2d 906 (2d Cir.1984) (same); United States v. Krezdorn, 639 F.2d 1327 (5th Cir.1981) (concluding that 404(b)'s prohibition on propensity evidence does not apply when the evidence will not impugn the defendant's character); see also, Wynne v. Renico, 606 F.3d 867, 874 (6<sup>th</sup> Circuit 2010) (Martin, J. concurring) (departing from the majority on grounds that reverse-404(b) evidence is not subject to 404(b)'s exclusion of propensity evidence); United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004) (Rosen J. concurring) (same).

\*Seals represents a departure from the Seventh Circuit's earlier ruling in Agushi v. Duerr, 196 F.3d 754, 759–761 (7th Cir.1999), where the Court called for a traditional 404(b) analysis regardless of who was offering the evidence.

<sup>13</sup> This approach is adhered to by the Third, Sixth, and Ninth Circuits. See, United States v. Williams, 458 F.3d 312, 315-17 (3d Cir.2006) (holding FRE 404(b) applies to all regardless of whether

The constitutional rights of the defendant and the policy reasons behind ER 404(b) strongly support applying a straightforward relevance/prejudice analysis under ER 401/ER 403. Rule 404(b)'s prohibition finds its source in the common-law protection of the criminal defendant from the risk of a conviction on the basis of evidence of his character. See C. Wright & K. Miller, Federal Practice and Procedure: Evidence § 5239, at 428, 436–37, and 439 (1991); Charles Wigmore, Wigmore's Code of the Rules of Evidence in Trials at Law §§ 355-56, p. 81. (3d ed.1942) The rule addresses two main policy concerns:

(1) that the jury may convict a “bad man” who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes he probably committed the crime charged.

U.S. v. Phillips, 599 F.2d 134, 136 (6th Cir.1979).

The policy concern at the core of Rule 404(b)'s bar on propensity evidence does not apply equally between a defendant

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evidence is offered by the government or the defendant);\* United States v. Lucas, 357 F.3d 599, 605 (6th Cir.2004) (same); U.S. v. McCourt, 925 F.2d 1229 (9<sup>th</sup> Cir. 1991) (same).

\*This represents a narrowing of the Third Circuit's prior holding which appeared only to call for a relevancy/prejudice balancing. See, Stevens, 935 F.2d 1380.

and a third party who is not being tried for a crime. Concern with the poisonous effect on the jury of misconduct evidence is minimal in reverse-404(b) situations. Aboumoussallem, 726 F.2d at 912. The jury is not being asked to judge the third party's guilt so "the primary evil that may result from admitting such evidence against a defendant – by tainting his character – is not present." U.S. v. Murray, 474 F.3d 938, 939 (7<sup>th</sup> Cir. 2007) (citations omitted).

Specifically, a third party who is not on trial for a crime is in no danger whatsoever that the jury will convict him for being a "bad man." Wynne, 606 F.3d at 874 (Martin, J. concurring) (citations omitted). Even if the evidence causes the defendant to be acquitted and the third party is then put on trial, the third party's guilt or innocence will be determined on the basis of the evidence in his case, not on the basis of the other crimes he committed. Id. For these reasons, "the standard of admissibility when a criminal defendant offers [reverse 404(b)] evidence as a shield need not be as restrictive as when the prosecution uses such evidence as a sword." Aboumoussallem, 726 F.2d at 911-12.

Among the majority of circuits adhering to the balancing test there is not yet a clear consensus as to whether a defendant might offer reverse-404(b) evidence to prove only propensity. Some

courts have held that even under the relaxed standard applied to reverse-404(b) evidence, such evidence may not be admitted if its sole purpose is to prove a third party's criminal propensity. E.g., Murray, 474 F.3d at 941 (7<sup>th</sup> Cir. 2007) (citations omitted); United States v. McClure, 546 F.2d 670 (5th Cir.1977); United States v. Cohen, 888 F.2d 770, 776 (11th Cir.1989). Others have reasoned propensity evidence should be admitted if it passes the relevancy/prejudice inquiry. See, U.S. v. Alayeto, 628 F.3d 917, 921 (7<sup>th</sup> 2010) (concluding, while the admission of "propensity evidence" is generally prohibited, a defendant may introduce such evidence regarding a third party's other crimes or conduct to support his defense if it tends, alone or with other evidence, to negate his guilt of the crime charged); Krezdorn, 639 F.2d at 1332 (explaining that where the only purpose served by misconduct evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded; however, when the misconduct was not committed by defendant, 404(b)'s prohibition on propensity evidence is not triggered); Aboumoussallem, 726 F.2d at 911-12 (same); Lucas, 357 F.3d at 614 (Rosen J. concurring) (same); see also, Wynne, 606 F.3d at 874 (Martin, J. concurring) (same).

Given the policy reasons supporting the admission of reverse 404(b) evidence, however, a straightforward application of the relevancy/prejudice analysis is appropriate even when the materiality of the offered evidence relies on a propensity inference.

As the Fifth Circuit has explained:

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. 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.

Krezdorn, 639 F.2d at 1332–1333 (citations omitted).

ER 401 and 403 are sufficiently effective in assuring propensity evidence does not pollute the trial process. These rules ensure that there is some tangible connection between the third-party's other offenses and the defense. Indeed, the United States Supreme Court has previously concluded the application of ER 401 and 403 strikes an appropriate balance between allowing a

defendant to exercise his right to present a complete defense while also maintaining a fair process:

While the Constitution thus prohibits the exclusion of defense evidence under rules ... that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes, 547 U.S. at 326 (citations omitted); see also, State v. Sanchez, \_\_\_ Wn. App. \_\_\_, 288 P.3d 351, 368 (2012) (same).

Along the same line, one judge has concluded, “There is simply no evidentiary policy or purpose served by precluding a propensity consideration by the jury that is not already addressed by the traditional Rule 401/403 evidentiary analysis.” Lucas, 357 F.3d at 614 (Rosen J. concurring); see also, Wynne, 606 F.3d at 874 (Martin, J. concurring) (same).

Applying ER 401 in this context, reverse-404(b) evidence is relevant and has high probative value if it tends to support a defense theory and, thereby, negates an element of the charged crime.<sup>14</sup> As Dean Wigmore points out, propensity evidence “is

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<sup>14</sup> Under ER 401:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of

objectionable not because it has no appreciable probative value but because it has too much.” 1A Wigmore, Evidence § 58.2 at 1212 (Tillers rev. 1983); see also, Michelson v. United States, 335 U.S. 469, 475–76, 69 S.Ct. 213, 218–19, 93 L.Ed. 168 (1948) (same).

Unless the reverse-404(b)evidence being offered merely amounts to nothing more than pointing a finger at a person whose only logical connection to the case is that he has a criminal record showing he is a bad person, such evidence will tend to disprove a fact of consequence (i.e. the defendant's guilt) and is, therefore, relevant. Thus, the true determinative factor of admissibility is whether the third-party's propensity to commit misconduct is material “to prove some fact pertinent to the defense.” Aboumoussalem, 726 F.2d at 91.

In the context of Gray's self-defense theory, the proffered reverse-404 (b) evidence was relevant to the determination of whether Gray or Travers was the first aggressor and whether Gray's fear was reasonable. Travers' prior aggressive contacts tended to make it more probable that he, not Gray, was the

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consequence to the determination of the action more probable or less probable than it would be without the evidence.

aggressor and that he was someone to be feared. Thus, evidence of Travers' prior criminal aggression tended to make it more probable Gray acted lawfully when defending himself against Travers. This in turn would have directly negated Gray's guilt because the "lawfulness" element of self-defense negates the intent element of murder and the knowledge element of assault. State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984), abrogated on other grounds, by State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989)); State v. McCullum, 98 Wn.2d 484, 494–96, 656 P.2d 1064 (1983).

The next step in determining the admissibility of reverse-404 (b) evidence is applying ER 403 to determine whether admission creates unfair prejudice.<sup>15</sup> The "unfair prejudice" ER 403 is concerned with is prejudice caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. Roark, 753 F.2d 991, 994

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<sup>15</sup> ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(1985); see also, 5 K. Tegland, Wash.Prac., Evidence § 106, at 349 (3d ed. 1989). To this end, evidence may be unfairly prejudicial under ER 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." 1 J. Weinstein & M. Berger, Evidence § 403, at 403-36 (1985). Reverse-404(b) evidence generally does not unfairly prejudice the State, however, because "[a] jury is unlikely to acquit a defendant even if it thinks there's someone else out there who has a propensity to commit such crimes...." Murray, 474 F.3d at 939; see also, Hedge, 297 Conn. at 652; Clifford, 328 Mont. at 311. As one court has explained:

"Unfair prejudice against the government [in this context] is rather rare. Unfair prejudice [to the government] means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.... Thus, the only possible unfair prejudice against the government occurs when ... evidence [of other crimes, wrongs or acts] tends to make the jury more likely to find a defendant not guilty despite the proof beyond a reasonable doubt.... By proving that someone else committed the crime, [however] reverse 404(b) evidence is not likely to generate that risk of jury infidelity, and thus does not generate unfair prejudice. Only in the rarest circumstances will the [trial] court be presented with unfair prejudice to the State in [the context] ... of reverse 404(b) evidence."

State v. Hedge, 297 Conn. 621, 652, 1 A.3d 1051 (2010) (quoting State v. Clifford, 328 Mont. 300, 311, 121 P.3d 489 (2005)).<sup>16</sup>

Applying ER 403 to this case, it is apparent that the probative value of the proffered reverse-404 (b) evidence substantially outweighs any unfair prejudice. None of the prejudice concerns embodied in ER 403 exist here. As explained above, the probative force of the proffered reverse-404(b)evidence is not scant -- the evidence was relevant to proving Gray was not the first aggressor and that he legitimately acted in self -defense. The defense was not seeking admission solely for the sake of prejudicing the State but, instead, had a legitimate defensive purpose. Moreover, the evidence was not cumulative and would not have caused considerable delay or waste. Given the lack of prejudice to the State or the process that would have resulted from

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<sup>16</sup> While it may at first appear unfair to allow the defendant to introduce propensity evidence in support of his defense, while at the same time bar the State from presenting such evidence in support of its theory of the case, this type of asymmetrical application of the bar against propensity evidence is in keeping with the notion that the State that must bear the higher burden in criminal prosecutions. Additionally, it is consistent with the policy of protecting fairness of the process by limiting undue prejudice to the defendant. See, Aboumoussallem, 726 F.2d at 912, n. 5 (explaining that the rules of evidence contemplate asymmetrical application); Hedge, 297 Conn. at 633, 652-53 (applying an asymmetrical application of the rule when holding that reverse-404 (b) evidence should not have been excluded).

admitting Travers' prior criminal assaults, there were no grounds to exclude it under ER 403. See, Young, 48 Wn. App. at 413 (explaining that the general rule under ER 403 requires the balance be struck in favor of admissibility). As such, it should have been admitted.

In sum, a defendant's constitutional right to present a defense includes the right to present reverse 404(b) evidence if it passes scrutiny under ER 401 and ER 403. In this case, the evidence of Travers' prior convictions was relevant to Gray's defense and was not unfairly prejudicial. Consequently, the trial committed constitutional error when it did not permit Gray to support his defense with evidence of Travers' prior misconduct.

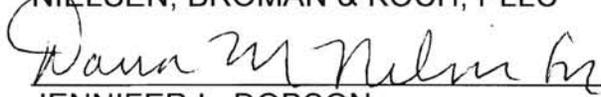
D. CONCLUSION

For the reasons stated above, this Court should reverse Gray's convictions.

DATED this 7<sup>th</sup> day of February, 2013.

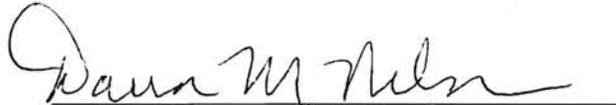
Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68814-6-1
	)	
RONALD GRAY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF FEBRUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD GRAY  
DOC NO. 345750  
WASHINGTON STATE PENITENTARY  
1313 N. 13TH AVENUE  
WALLA WALLA, WA 99362

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 FEB - 7 PM 4:16

SIGNED IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2013.

x Patrick Mayovsky