73201-3

NO. 73201-3-I

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

FILED
Jan 15, 2016
Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

LONNIE RAY DILLMAN,

Appellant.

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

The Honorable Kimberley Prochnau

BRIEF OF APPELLANT

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KING COUNTY DEPARTMENT
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No. 3. The superior court erred in affirming the trial court's ruling and appellant's conviction for assault in the fourth degree.

No. 4. The superior court erred in failing to apply the Washington Supreme Court's decisions in *State v. Magers* and *State v. Gunderson, infra.*

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3. Did the superior court err in affirming the trial court's ruling and appellant's conviction for assault in the fourth degree?

4. Did the superior court err in failing to apply the Washington Supreme Court's decisions in *State v. Magers* and *State v. Gunderson*?

5. If this Court concludes it was error to admit evidence of appellant's prior alleged history of domestic violence with other women, is

the error harmless?

II. STATEMENT OF THE CASE

A. Procedural Facts

On January 20, 2012, Lonnie Ray Dillman was charged with assault in the fourth degree – domestic violence, contrary to RCW 9A.36.041 and RCW 10.99.020, for acts alleging to have occurred on December 17, 2011, against Wylene Lloyd. Prior to trial, the defense moved to exclude any evidence of Mr. Dillman's prior bad acts. This issue was reserved to the trial court. CP 344 RP (4-02-13) at 4). Counsel also made a motion to exclude Mr. Dillman's prior convictions. This motion was granted. *Id.* Trial was subsequently held in front of the Honorable Mark Eide on April 3, 2013.

A jury found Mr. Dillman guilty as charged, and he was sentenced on April 10, 2013, before the Honorable Charles Delaurenti. Mr. Dillman timely appealed.

On appeal, the superior court affirmed Mr. Dillman's conviction. CP 643-45. A copy of the ruling is attached as Appendix A. On October 8, 2015, this Court granted Mr. Dillman's motion for discretionary review. A copy of the ruling is attached as Appendix B.

B. Facts Relevant to Issues Presented

During motions *in limine*, the State sought to introduce two pieces

of evidence regarding Mr. Dillman's prior acts of domestic violence. First, the State moved to admit evidence of a recording of the 911 call Ms. Lloyd made on December 17, 2011, in which she mentioned that Mr. Dillman has a "history of this type of thing." CP 346 (RP (4-03-13) at 6).

Second, the State sought to admit evidence of Mr. Dillman's prior acts that the State had just uncovered that morning: that on December 27, 2011, ten days *after* the charged incident, Ms. Lloyd made a 911 call and police were dispatched to her residence. CP 346 (RP (4-02-13) at 6). According to the police report, Ms. Lloyd stated that she knew of prior incidents of domestic violence that Mr. Dillman was involved in with *other* women. Because the State believed that Ms. Lloyd was recanting her earlier statements, the State sought to introduce both pieces of evidence to try to show that Ms. Lloyd was afraid of Mr. Dillman and thereby impeach her credibility. CP 347 (RP (4-02-13) at 7).

The defense moved to exclude the evidence, in part, on the basis that the parties had agreed that ER 404(b) evidence would be limited to what the complainant knew when she made the statement, but this incident occurred ten days after the charged incident. CP 352 (RP (4-02-13) at 12). Additionally, the evidence was not admissible because it involved prior acts with a *different* complainant. CP 360 (RP (4-02-13) at 20). Ultimately, the court found that the late discovery was not due to

mismanagement by the State, that the evidence was not easily discoverable, and that it had only been discovered by coincidence.[1] The court further stated that under ER 613(a), extrinsic evidence of prior inconsistent statements is admissible. Although the court recognized that the evidence was certainly prejudicial to Mr. Dillman, the court found the prejudice was outweighed by its probative value. CP 385-87 (RP (4-02-13) at 45-47).

At trial, Ms. Lloyd testified that on December 17, 2011, she had been studying all day for finals when Mr. Dillman invited her over for dinner. They had been dating for about 5 or 6 months at the time. Ms. Lloyd stayed at Mr. Dillman's house after dinner, and was still playing games with his daughter when he went to bed. They were playing games on Mr. Dillman's Blackberry. CP 497-99 (RP (4-03-13) at 53-55). At some point, an email popped open that indicated Mr. Dillman had spent the previous night with Ms. Lloyd. Ms. Lloyd knew this was not true and became very upset. She confronted Mr. Dillman, and the two got into an argument that got pretty loud. It ended when Mr. Dillman asked Ms. Lloyd to leave. CP 499-500, 532-34 (RP (4-03-13) at 55-56, 88-90).

Ms. Lloyd was initially reluctant and unhappy about leaving, but grabbed her belongings and left. Before driving away, however, she

[1] Mr. Dillman has not sought discretionary review of the admission of the 911 tape itself.

noticed her dog was not with her. Feeling angry and upset over the thought that Mr. Dillman was cheating on her and their argument, she now believed he was holding her dog hostage. Ms. Lloyd testified that she stomped up the stairs, slipped on the first stair and again on the top stair and hit the screen door. CP 500-02 (RP (4-03-13) at 56-58). She stated that she was "pissed," noticing that Mr. Dillman had locked the door and turned off the lights. CP 500 (RP (4-03-13) at 56). Mr. Dillman lives in a fairly secluded area and there is little light and visibility outside of the house. CP 508 (RP (4-03-13) at 64). Ms. Lloyd knocked on the door and requested her dog. Mr. Dillman picked up the dog and shoved him outside. Her dog weighs between 75 and 80 pounds. She testified the dog is like a child to her and so she is very protective of him. CP 503, 511 (RP (4-03-13) at 59, 67). Ms. Lloyd testified she called the police because she was angry at Mr. Dillman. CP 510-11 (RP (4-03-13) at 66-67).

Around 11:00 p.m., King County Sheriff's Deputy Enrico Donaglia was dispatched to the Issaquah Hobart store, and he arrived at the store at 12:18 a.m. After contacting Ms. Lloyd, Deputy Donaglia noticed that there was a little bit of blood on her nose, and she was a little upset. CP 467-70 (RP (4-03-13) at 23-26). He took photographs of Ms. Lloyd which depicted "just a little bit" of swelling and redness on Ms. Lloyd's lip and blood just at the end of her nose. CP 471, 475 (RP (4-03-13) at 27, 31).

The Deputy also noticed there was potentially a small cut on her bottom lip. He testified that these injuries could be consistent with someone being punched in the face. CP 475 (RP (4-03-13) at 31). He also testified, however, that he did not notice any other injuries. There was no blood on Ms. Lloyd's clothing, nor any bruising. CP 488, 491 (RP (4-03-13) at 44, 47). He further testified there were no reports of prior abuse between Ms. Lloyd and Mr. Dillman. CP 493 (RP (4-03-13) at 49). Ms. Lloyd did not complain about pain anywhere besides her nose and mouth, and declined medical aid. CP 494 (RP (4-03-13) at 50).

Deputy Donaglia further testified that Ms. Lloyd told him that, after confronting Mr. Dillman regarding the email, he cornered her in the kitchen, pushed her to the floor, and punched her a few times in the face. CP 479, 520 (RP (4-03-13) at 35, 76). Ms. Lloyd further told him that she did not recall how many times she had been punched and her bloody nose and fat lip were a result of the punches. CP 490, 520 (RP (4-03-13) at 46, 76). Ms. Lloyd testified that she lied to Deputy Donaglia about the incident because she was angry with Mr. Dillman. CP 520-21 (RP (4-03-13) at 77-78).

According to the police, on December 27, 2011, ten days after the charged incident, Mr. Dillman went to Ms. Lloyd's home in Kirkland, and Ms. Lloyd called the police. CP 523 (RP (4-03-13) at 79). According to

the police report taken at the time, Ms. Lloyd stated that she was afraid of Mr. Dillman because he hit her and threw her dog on December 17th. CP 528 (RP (4-03-13) at 84). Ms. Lloyd also mentioned to the police officers that she had talked to Mr. Dillman's former girlfriend who had made "allegations that Mr. Dillman had assaulted her" and that Mr. Dillman's former wife had a no-contact order against him. CP 528 240-41 (RP (4-03-13) at 84, 97-98).[2] Ms. Lloyd also mentioned she had received a note from Mr. Dillman that essentially indicated that he was sorry and really wanted to speak with her. CP 528 (RP (4-03-13) at 84).

Ms. Lloyd testified that when Mr. Dillman came to her house on December 27, she was still angry with him, so she called 911. CP 524, 530 (RP (4-03-13) at 80, 86, 97). She testified that she had been in contact with Mr. Dillman's former girlfriend, and that the girlfriend told Ms. Lloyd what to do and convinced her that Mr. Dillman was cheating on her. Mr. Dillman's former girlfriend had actually called Ms. Lloyd shortly before Mr. Dillman showed up at her door, and advised Ms. Lloyd to call the police and say that she was scared. CP 242-43 (RP (4-03-13) at 97-98). Later, Ms. Lloyd found out that Mr. Dillman's girlfriend had ulterior motives for these conversations and this advice - she wanted to get back

[2] The transcript for the April 3, 2013 proceedings was completed in two parts and appears to have been separated in the Clerk's Papers.

together with Mr. Dillman. Ms. Lloyd thought Mr. Dillman's former girlfriend was a "liar" and a "manipulator." CP 243-44 (RP (4-03-13) at 98-99).

Ms. Lloyd further testified that Mr. Dillman did not hit her on December 17th, and he had never hit her throughout their entire relationship. CP 258 (RP (4-03-13) at 113). Their anger never escalated into physical contact. CP 509 (RP (4-03-13) at 65). Ms. Lloyd testified that she was not afraid of Mr. Dillman on December 17th, and has never been afraid of him. CP 516 (RP (4-03-13) at 72). She testified that she lied to Deputy Donaglia on the 17th, but was telling the truth in court. CP 530 (RP (4-03-13) at 86). At the time of trial, Ms. Lloyd and Mr. Dillman had resumed their relationship, moved in together, and had been dating for almost two years. CP 497 (RP (4-03-13) at 53).

C. Facts Pertaining to Superior Court Decision on RALJ

The case came on for oral argument on November 20, 2014. That very morning, the Washington Supreme Court issued its decision in *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014). The superior court affirmed Mr. Dillman's conviction but stated that either party could move for reconsideration after reviewing the decision in *Gunderson*. To that end, the defense asked for reconsideration and a hearing was held on February 10, 2015. The superior court held that Gunderson was

distinguishable and affirmed its earlier ruling, affirming Mr. Dillman's conviction. CP 643-45 (Appendix A); CP 622-42.

III. ARGUMENT

A. The District Court and Superior Court Decisions Conflict With the Washington Supreme Court's Decisions in State v. Gunderson and State v. Magers.

Mr. Dillman's conviction should be reversed because the trial court erred in allowing the State to admit evidence of Mr. Dillman's alleged prior incidents of domestic violence involving different victims, and the superior court erred in affirming his conviction. The superior court erred in affirming that ruling because it conflicts with *State v. Magers, supra*, and *State v. Gunderson, supra.*

ER 404(b) excludes evidence of character or prior conduct that is offered for no other reason than to suggest that the current alleged offense is in conformity with the prior conduct and that guilt is, therefore, more likely. Appellate courts review lower courts' interpretations of ER 404(b) *de novo*. *State v. Fisher*, 165 Wn.2d 727, 744 202 P.3d 937 (2000). The ruling to admit or exclude evidence is reviewed for an abuse of discretion. *Id.* A court abuses its discretion when its ruling is "manifestly unreasonable or based on untenable grounds." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Evidence that a defendant has committed other crimes or alleged

bad acts is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). Character evidence is only admissible for non-propensity purposes. ER 404(b). There are no exceptions to this rule. *Id.* Even prior act evidence introduced for non-propensity purposes, however, has strict limitations to its admission.

In *State v. Gunderson, supra*, 181 Wn.2d 916, the Washington Supreme Court held that the probative value of evidence of a prior domestic violence incident between the defendant and one of the alleged victims was outweighed by its prejudicial effect, and that the trial court's error in admitting the evidence was not harmless. As happened in this case, the trial judge admitted Gunderson's criminal history to impeach the victim's testimony. Unlike this case, the evidence in *Gunderson* concerned prior incidents of domestic violence between the defendant and his accuser. Gunderson argued that because the victim 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.

The Supreme Court agreed. The Court first noted that evidence a defendant has committed other crimes or alleged bad acts is presumptively inadmissible. *Id.* at 922, citing *Gresham*, 173 Wn.2d at 420. In order for evidence of prior bad acts to be admissible at trial, the court must first "(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." *Gunderson* at 923, citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)). This balancing and conscious determination must be done on the record. *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

The *Gunderson* Court further noted that in *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008),

> we took great care to specifically establish that "evidence that [the defendant] had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of [the complaining witness] who gave conflicting statements about [the defendant's] conduct."

Gunderson, 181 Wn.2d at 923-24, quoting *Magers*, 164 Wn.2d at 186.

Because the victim "gave no conflicting statements about Gunderson's conduct", the Court held the trial court erred in admitting the evidence. 181 Wn.2d at 924. The Supreme Court further agreed that the evidence was unduly prejudicial under ER 403. *Id.* at 924-25.

> 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. *See Magers*, 164 Wn.2d at 186, 189 P.3d 126. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose. *See State v. Brown*, 113 Wn.2d 520, 531, 782 P.2d 1013 (1989) (Brachtenbach, J., lead opinion).

Gunderson, 181 Wn.2d at 925.

So too in this case should this Court hold that it is reversible error to admit evidence of prior acts of domestic violence alleged to have occurred against another person to impeach the credibility of a recanting witness. The admission of such evidence is particularly problematic where, as here, the witness learns of the prior acts *after* the alleged crime has occurred.

While prior acts of domestic violence between the defendant and his accuser may help the jury assess the credibility of the witness and understand why the witness told conflicting stories, *see Magers*, 164 Wn.2d at 185-86, such acts are not relevant when they do not involve the defendant and his current accuser. To evaluate a witness's credibility, a jury may be entitled to the "full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." *State v. Baker,* 162 Wn. App. 468, 475, 259 P.3d 270 (2011) (citation omitted). However, to assure the policy rationale behind this rule is met, Washington courts have only allowed the

admission of prior acts of domestic violence to assess the credibility of a recanting victim if the prior incidents involved the defendant and the *same victim*. *Magers*, 164 Wn.2d 186.

Here, the alleged incidents of prior domestic violence did not involve Ms. Lloyd. The prior acts were relayed to Ms. Lloyd by Mr. Dillman's former wife and former girlfriend. As such, they are hearsay, and they are not relevant or necessary to assess Ms. Lloyd's credibility as a witness, nor to assess why Ms. Lloyd told conflicting stories.

The rationale for admitting evidence of prior acts of domestic violence stems from the unique "dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." *Magers* at 186, citing *State v. Grant*, 83 Wn. App. 98, 106, 108, 920 P.609 (1996), and 5D Karl B. Tegland, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ch. 5, at 234 (2007-08). Those dynamics are not present in this case. As the concurrence aptly noted in *Magers,* acts not involving the current victim do not help explain the recantation of a witness because they are not part of the dynamic of domestic violence. *Magers*, 165 Wn.2d at 194 (Madsen, J. concurring).

Furthermore, it is not clear from the record whether Ms. Lloyd even believed that the prior acts actually occurred. In fact, she testified

she thought Mr. Dillman's former girlfriend was a liar and a manipulator, and had ulterior motives in discussing these acts with Ms. Lloyd, namely she herself wanted to get back together with Mr. Dillman. The record also indicates that Mr. Dillman's former girlfriend was the person who continued to initiate contact with Ms. Lloyd. She was the one who suggested Ms. Lloyd call the police and tell them she was scared when Mr. Dillman came to her home in December. Moreover, because the prior acts did not involve Ms. Lloyd, the trial court did not make a finding as to whether the alleged misconduct actually occurred. Thus, the trial court's ruling conflicts with *Magers* and other cases where prior acts of domestic violence were deemed admissible.

The trial court's admission of these alleged acts, and the superior court's affirmance of that decision, significantly expands Washington precedent. Never before have prior alleged acts of domestic violence involving a different victim been admitted to assess the current alleged victim's credibility. Such a ruling essentially allows the admission of any and all hearsay allegations of prior acts concerning an accused in order to evaluate a witness's credibility. The potential for prejudice is significantly increased where, as here, there has been no determination as to whether the acts actually occurred and whether the witness herself even believed the allegations. This is dangerous precedent that impermissibly expands

the scope of ER 404(b) and directly conflict with *Magers* and *Gunderson*.

B. The Error Is Not Harmless.

Even if the trial court was correct and the evidence had some probative value, the prejudicial effect of the evidence outweighed any probative value. ER 403. Evidence of prior misconduct is presumed to be highly prejudicial. *Lough*, 125 Wn.2d at 862. This is so because its admission "inevitably shifts the jury's attention to the defendant's general propensity for criminality" thus stripping away the normal presumption of innocence. *State v. Bowen*, 48 Wn. App. 187, 196, 738 P.2d 316 (1987).. In analyzing the erroneous admission of evidence in violation of ER 404(b), Washington courts apply the non-constitutional harmless error standard. *Gunderson*, 181 Wn.2d at 926 (citations omitted). The test is whether "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Id.* (citations omitted).

Applying this test to Mr. Dillman's case, the admission of evidence concerning allegations of domestic violence with other women is prejudicial error. As noted above, such evidence does not explain why Ms. Lloyd would provide conflicting statements, nor does it help the jurors assess her credibility. Rather, the evidence inevitably shifted the jury's

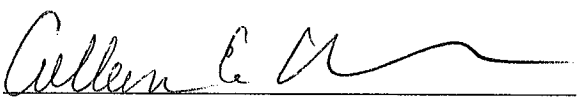
attention to Mr. Dillman's alleged propensity for criminality. There was no determination as to whether the alleged domestic violence actually occurred, nor how much of a history Mr. Dillman actually had. The jury was left entirely to speculate on these questions. Clearly, the minimal, if any, probative value of the evidence is outweighed by its prejudicial effect. ER 403.

Accordingly, it is reasonably probable that absent the highly prejudicial evidence of Mr. Dillman's alleged past violence the jury would have reached a different verdict. *Gunderson* at 926-27, citing *Gresham, supra*, at 433.

IV. CONCLUSION

For all of the foregoing reasons, this Court should reverse Mr. Dillman's conviction and remand for a new trial.

Respectfully Submitted this 14th day of January, 2016.



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APPENDIX A

(Decision on RALJ Appeal)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff/Respondent, vs. LONNIE DILLMAN, Defendant/Appellant.	No. 13-1-11853-6 SEA DECISION ON RALJ (King County District Court Cause No. 411282187, South Division, MRJC) [proposed]

On November 20, 2014, this matter came before the Court for oral argument pursuant to RALJ 8.3. After considering the record on appeal, the briefing submitted by the parties, and oral argument, the conviction is AFFIRMED.

I. 911 Call

Dillman abandons his challenge to the trial court's decision to admit the 911 call. Based on a review of the supplemental record (transcript of the 911 call), Dillman concedes that this issue is waived. As such, this Court does not consider this assignment of error.

II. Statements to Kirkland Police

Daniel T. Satterberg, Prosecuting Attorney
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A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Admission of evidence of prior acts under ER 404(b) requires that the evidence: (1) serve a legitimate purpose; (2) is relevant to prove an element of the crime charged; and (3) the probative value outweighs its prejudicial effect. Id. at 184. The enumerated purposes in ER 404(b) are not exclusive. Evidence of prior acts of violence are also admissible in a domestic violence criminal case in order to assist the jury with assessing a recanting victim's credibility. Id. Such acts are likewise admissible to demonstrate a victim's state of mind. Id. at 182-83. State v. Gunderson does not overrule Magers with regard to recanting witnesses. No. 89297-1, Slip Op. *7-8 (Wash. Sup. Ct. Nov. 20, 2014).

In this case, the trial court admitted Lloyd's statements to Kirkland police about Dillman's ex-girlfriend. The trial court properly performed the required analysis under ER 404(b), concluding that the probative value of the statements outweighed the prejudicial effect. Lloyd had been informed that Dillman previously assaulted others in what amounted to uncharged domestic violence incidents. In a domestic violence case, the jury is entitled to evaluate a victim's credibility with full knowledge of the dynamics of the relationship. State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270 (2011). Thus, once Lloyd recanted her earlier sworn statement, the State could properly present her statements to demonstrate to the jury to impeach her credibility and explain why she changed her testimony. The trial court did not abuse its discretion in concluding that the probative value of the statements outweighed their prejudicial effect.

IT IS HEREBY ORDERED that the conviction is AFFIRMED.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

DATED: 2/10/15

JUDGE: _____
HON. JUDGE KIMBERLEY PROCHNAU
King County Superior Court

Presented by:

/s/ Daniel Shickich
DANIEL SHICKICH, WSBA #46479
Deputy Prosecuting Attorney
Attorney for Respondent

Notice/Copy Received: Objection waived

_____
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APPENDIX B

(Ruling on Discretionary Review)

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CASE #: 73201-3-I
State of Washington, Resp. vs. Lonnie R. Dillman, Pet.
King County No. 13-1-11853-6 SEA

Counsel:

The following is the ruling of the Commissioner entered on October 8, 2015 in the above case.

RULING ON DISCRETIONARY REVIEW
State v. Dillman
No. 73201-3-I
October 8, 2015

In this matter Lonnie Dillman seeks discretionary review of the superior court decision on RALJ appeal affirming his conviction for assault in the fourth degree – domestic violence. At issue is the decision of the trial court to admit the victim's statement to police ten days after the charged incident that she had heard of other incidents of domestic violence between Dillman and other women. For the reasons stated below, review is granted.

Dillman was charged with assaulting his girlfriend, Wylene Lloyd, based on a December 17, 2011 incident. The facts involving the incident are set out at length in the briefs and need not be repeated here. Briefly, after leaving Dillman's residence, Lloyd called 911 and reported that Dillman had hit her and hurt her dog. She stated that Dillman has a history of domestic violence. Lloyd met a deputy sheriff at a nearby parking lot, where she stated that Dillman had punched her in the face multiple times. The officer observed blood on Lloyd's nose and an injury to her upper lip. The deputy photographed Lloyd's injuries.

Nine days later, Dillman left a note on Lloyd's car saying that he was sorry, he had messed up, and he loved her, and asking her to talk to him. Dillman went to Lloyd's home the next day, December 27. Lloyd called 911 when he pounded on the door. When police arrived, Lloyd told them that she was afraid of Dillman based on the December 17 incident. She also said that she knew of prior incidents of domestic violence between Dillman and other women.

At trial, Lloyd recanted. She explained that on the night of the incident she had accused Dillman of cheating on her and insisted on answers until he told her to leave. Lloyd said that she injured her face when she slipped on the steps while leaving and hit the screen door. She denied that Dillman ever assaulted or hit her and denied she was ever afraid of him. Lloyd also testified that she did not recall making some of the statements attributed to her and that her statements to police were lies. Lloyd testified that she called 911 on December 27th because she was still angry at Dillman. She testified about her contact with Dillman's former girlfriend. Lloyd said that the girlfriend told her Dillman was cheating on her and told Lloyd to call police and say she was scared. Lloyd testified that she had since learned the girlfriend had an ulterior motive and was a liar and manipulator. At the time of trial, Lloyd and Dillman had resumed their relationship.

In light of Lloyd's recanting, the State offered Lloyd's statements that she knew of Dillmans' history of domestic violence with other women to impeach her credibility. Over Dillmans' objection, the trial court admitted the evidence, along with a limiting instruction. Dillman was convicted as charged of fourth degree assault – domestic violence.

On appeal to the superior court, Dillman argued that the trial court erred in admitting Lloyd's statements about Dillman's history of domestic violence with other women. Dillman apparently abandoned his argument regarding the 911 tape. As to Lloyd's December 27 statements, the superior court reasoned that the trial court had conducted the required ER 404(b) analysis, that evidence of prior acts of violence are admissible in a domestic violence criminal case to assist the jury, that Lloyd had been informed that Dillman previously assaulted others in what amounted to uncharged domestic violence incidents, that the jury was entitled to evaluate a victim's credibility with full knowledge of the dynamics of the relationship, and that the trial court did not abuse its discretion in ruling that the probative value of the statements outweighed their prejudicial effect.

Dillman seeks discretionary review under RAP 2.3(d)(1) (superior court decision is in conflict with an appellate decision), (2) (decision involves a significant question of constitutional law), and (3) (decision involves an issue of public interest which should be determined by an appellate court).

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

> To admit evidence of a person's prior misconduct, "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."

(citations omitted). Gresham, 173 Wn.2d at 421.

In State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), the court held that "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." The court explained that evidence Magers had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of the victim who gave conflicting statements about Magers conduct. Magers, 164 Wn.2d at 186. The court adopted in part the rationale of State v. Grant, 83 Wn. App. 98, 920 P.609 (1996), as discussed by Tegland:

> [T]he defendant [in Grant] was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was "relevant and necessary to assess . . . [the victim's] credibility as a witness . . . . "The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim."

Magers, 164 Wn.2d at 186 (quoting 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washing Evidence ch. 5, at 234 (2007-08).

In State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014), the State charged Daniel Gunderson with domestic violence felony violation of a court order involving his ex-girlfriend Christina. At trial Christina testified that no assault occurred. "Although she had not made any prior statement about the incident, let alone an inconsistent statement, the State sought to introduce evidence of Gunderson's prior domestic violence against her to impeach her." Gunderson, 181 Wn.2d at 918. The court noted that the trial court had conducted the proper four-step analysis and gave a limiting instruction, but it was an abuse of discretion to not exclude the evidence. The court reiterated the rule in Magers, but declined to extend it:

> The State concedes that Christina's testimony was internally consistent but argues that the trial court's admission of Gunderson's prior bad acts was nonetheless proper because other evidence contradicted Christina's account. We decline to extend Magers to apply in such circumstances. 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. . . .
>
> [C]ourts must be careful and methodical in weighing the probative value against 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. Accordingly, we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements.

Gunderson, 181 Wn.2d at 924.

As Dillman argues, Gunderson is important because it emphasizes the risk of such testimony. But as the State argues, the court's decision here in allowing the State to introduce Lloyd's statements is not directly in conflict with Gunderson; unlike the victim in Gunderson who made no inconsistent statements, here Lloyd's trial testimony was entirely inconsistent with her prior statements.

But the court's decision allowing Lloyd's statement that she had heard Dillman had a history of domestic violence with other women is at least potentially in conflict with Magers. In Magers, all nine justices agreed with the rule set out by the four member plurality, that prior acts of domestic violence *involving the defendant and the victim* may be admissible to assist the jury

Certificate of Service

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directly to the following counsel:

Attorneys for Plaintiff:
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containing a copy of Brief of Appellant to be transmitted to the Court of Appeals, Division One, in State of Washington v. Lonnie R. Dillman, Sup. Ct. No. 13-1-11853-6 SEA, COA No. 73201-3-I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of January, 2016, in Seattle, Washington.

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