

73607-8
NO. ~~71607-8-10~~

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JASON HARRIS,

Appellant,

v.

LEANNE HARRIS,

Respondent.

BRIEF IN REPLY

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APPLICABLE FACTS IN REPLY

Respondent Leanne Harris, (hereafter, Leanne) states baldly in her Response: On October 5, 2014, Jason raped Leanne. Response, page 3. Such an erroneous conclusion is worthy of discussion here.

To state that Jason raped Leanne is an accusation of enormous impact, and implies that he has been convicted of such an offense. Nothing is further from the truth. In fact, Jason was not even detained or excluded from his residence the day after the consensual sex as initiated by Leanne took place. The responding officer didn't even bother to create a report, and Leanne offers no such report here.

Jason was not arrested. Jason was not charged. Jason was not tried. Jason was not convicted. Jason was not sentenced. In fact, Leanne never pressed charges of any sort. Jason did not rape Leanne, and the entire record bears witness to this fact, including the record the court refused to admit.

The issues presented before the court are whether the court abused its discretion in entering a one year domestic violence protection order and order to surrender weapons based upon testimony which is nothing more than he said / she said, which does not exceed the preponderance of the evidence.

Again, the record is completely devoid of any corroborating evidence of Leanne's claims. While it is admitted that sexual intercourse took place, Leanne, well after the fact, claims it was non-consensual, and Jason claims it was consensual and initiated by Leanne.

The issue of credibility raised before the lower court went to several issues. First, Leanne had a specific motive to fabricate a story about non-consensual marital intercourse. As was pointed out in Appellant's Brief, it is not enough to allege merely domestic violence to secure a visa, but a significant charge such as rape.

Second, Leanne's marital history was not offered to prove that she had a prior marital history, but that she was still married at the time she married Jason, and that she was in the commission of the crime of bigamy. This evidence is outside the scope of ER 412, and should have been considered by the lower court. It wasn't.

In short, the record substantiates that Leanne had a motive to lie, and that she was in commission of a crime at the time she filed her declaration in support of her motion for a protection order. The weight of credibility falls against her in favor of Jason's testimony.

Nonetheless, Leanne makes the open accusation that Jason raped Leanne. However, Jason's right to be presumed innocent until proven

guilty beyond a reasonable doubt is an inherent right. *State v. Sanders*, 66 Wash.App. 380, 387, 832 P.2d 1326 (1992); *State v. Orange*, 78 Wash.2d 571, 573, 478 P.2d 220 (1970) (right to proof beyond a reasonable doubt). Leanne does not have proof beyond a reasonable doubt. She doesn't have a preponderance of the evidence. She has no evidence whatsoever.

ARGUMENT IN REPLY

Generally, any circumstance is admissible which reasonably tends to establish the theory of the party offering it, to explain, qualify or disprove the testimony of his adversary. *State v. Young*, 48 Wn. App. 406, 410, 739 P.2d 1170 (1987), citing *Rothman v. North Am. Life & Cas. Co.*, 7 Wn. App. 453, 500 P.2d 1288, review denied, 81 Wn.2d 1008 (1972). The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *State v. Young, supra*, citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidentiary errors under ER 404 are not of constitutional magnitude, but are judged by the harmless error test. *State v. Young, supra*, citing *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Generally, a person's prior conduct is not admissible for the purpose of proving that he acted in conformity therewith on a particular

occasion. *State v. Young, supra, citing* ER 404(a); *Calbom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964); *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). It may, however, be admitted when it is relevant and material under ER 404(a)(2): “Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same ... Nevertheless, the admissibility of specific acts, even if relevant, may be denied if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *State v. Young*, at 410-411, *citing* ER 403; *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

Evidence of a victim's character is relevant in cases where the defense to a charge of homicide is suicide, *State v. Young*, at 411, *citing State v. Brooks*, 16 Wn. App. 535, 557 P.2d 362 (1976), *review denied*, 88 Wn.2d 1012 (1977), or self-defense, *State v. Safford*, 24 Wn. App. 783, 604 P.2d 980 (1979), *review denied*, 93 Wn.2d 1026 (1980). Admissibility is confined almost always to these two situations. 5 K. Tegland, Wash. Prac., Evidence § 111 (2d ed. 1982). The only other situation where character evidence is admissible in a criminal case is when consent is at

issue in a prosecution for rape. *State v. Young*, at 411, *citing* RCW 9A.44.020; *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984).

ER 406 provides that “[e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” Unlike ER 404, a habit is admissible to prove the person acted in conformity therewith on the occasion in question. In determining whether the conduct rises to the level of a habit, the court must consider the regularity of the acts and the similarity of circumstances. *State v. Young*, at 411-412, *citing* *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 752-54, 509 P.2d 398 (1973). As defined in *E. Cleary*, at 575, habit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct.

The admission of other acts under ER 404(b) has been used primarily where the prosecution offers the evidence to prove an essential element of the crime or rebut a defense of mistake. *State v. Young*, *op. cit.* *State v. Dinges*, 48 Wn.2d 152, 292 P.2d 361 (1956); *State v. Brown*, 30 Wn. App. 344, 633 P.2d 1351 (1981) (two prior convictions for

prostitution were admissible to prove intent on a charge of prostitution loitering); *State v. Fernandez*, 28 Wn. App. 944, 628 P.2d 818 (1980) (admission of similar acts to prove modus operandi, identity, and rebut the defense's explanation of accident); *State v. Bloomstrom*, 12 Wn. App. 416, 529 P.2d 1124 (1974) (acts of interest in other children admissible to show injury to victim was not accidental), *review denied*, 85 Wn.2d 1009 (1975); *State v. Messinger*, 8 Wn. App. 829, 509 P.2d 382 (defendant's subsequent acts of misconduct admitted to show consciousness of guilt and identity), *review denied*, 82 Wn.2d 1010, *cert. denied*, 415 U.S. 926 (1973); *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971) (prior threat to kill wife admissible in arson case to show husband's identity and willfulness of act), *review denied*, 80 Wn.2d 1004 (1972); *State v. Stationak*, 1 Wn. App. 558, 463 P.2d 260 (1969) (evidence of unrelated crime committed 5 1/2 months before admissible to rebut the defense's claim of accident).

Weighing the probative value of evidence under ER 403 against the dangers of confusion or prejudice, the general rule requires the balance be struck in favor of admissibility. *United States v. Dennis*, 625 F.2d 782 (8th Cir.1980). ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense. 5 K.

Tegland, Wash. Prac. § 105; *United States v. Wasman*, 641 F.2d 326 (5th Cir.1981).

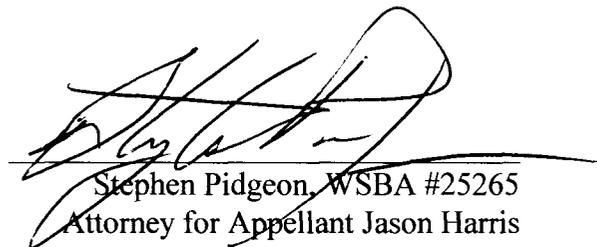
The evidence of Leanne's ongoing marriage to another man currently living in Italy was not properly considered by the court, and is evidence which does not fall under the protection of ER 412. The evidence of motive to fabricate this particular story of rape given the federal statutes governing visa admittance to the United States, and the representations made by Leanne is also evidence which does not fall under the protection of ER 412, but is admissible evidence pursuant to ER 403 and ER 404(b).

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). Chapter 26.50 RCW authorizes the issuance of a protection order if the party seeking it alleges "the existence of domestic violence and . . . [declares] the specific facts and circumstances from which relief is sought." RCW 26.50.030(1). Domestic violence includes "the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010(1)(a). Because an order for protection is a civil remedy, it must be supported by a preponderance of the evidence. *Reese v. Stroh*, 128

Wn.2d 300, 312, 907 P.2d 282 (1995); *City of Tacoma v. State*, 117 Wn.2d 348, 351-52, 816 P.2d 7 (1991). This standard required the commissioner to find that it was more likely than not that domestic violence occurred. *Freeman v. Freeman*, 169 Wn.2d 664, 673, 239 P.3d 557 (2010).

The facts do not support the decision of the lower court, and given that the record demonstrates that Leanne had a strong motive to tell a false story, that there is no corroborating evidence to her story, and that at the time she represented herself in court, she was in the commission of the crime of bigamy, the court abused its discretion in granting the domestic violence restraining order in all of its forms.

Signed in Everett, this 30th day of March, 2016.



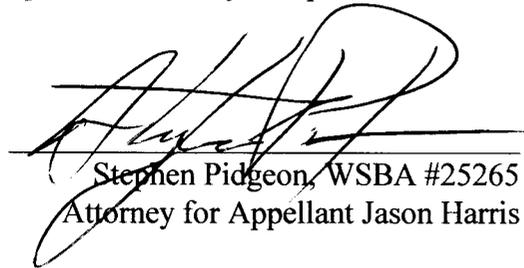
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CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of Appellants' Brief in Reply in this action was served on the following:

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by first class, U.S. Mail, postage prepaid, this 1st day of April, 2016.



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