

NO. 74107-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAVIER MACIAS-CAMPOS,

Appellant.

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FILED  
Jul 07, 2016  
Court of Appeals  
Division I  
State of Washington

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

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it improperly admitted propensity evidence under ER 404(b).

2. The admission of propensity evidence violated Mr. Macias-Campos's right to a fair trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Before propensity evidence may be introduced at trial pursuant to ER 404(b), the court must conduct a full evidentiary hearing on the record and must make a determination that the evidence is relevant and more probative than prejudicial. Here, 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?

C. STATEMENT OF THE CASE

a. Factual Background

Mercedes Olsen had been a drug addict for approximately three years at the time of the incident discussed at this trial. 8/6/15 RP 57. Ms. Olsen, a chronic heroin and methamphetamine user, had been living on the streets or with various friends for years at the time she met Javier Macias-Campos, who provided her with a place to live. Id. at 59.

The two shared a platonic relationship for some time, and Mr. Macias-Campos largely supported Ms. Olsen during this period. Id. at 59-62. Ms. Olsen and Mr. Macias-Campos also committed a variety of crimes together in order to support their lifestyle. Id. at 62. They sold drugs together, they committed petty crimes, and Ms. Olsen eventually stole a car. Id. at 62-64, 108-10.

For a time, the two lived in various motels, moving between Seattle, Edmonds, and Everett. Id. at 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.<sup>1</sup> Id. at 62. When Rochelle was released from jail and returned home to Mr. Macias-Campos, Ms. Olsen no longer felt welcome by the couple, and began sleeping on the streets and in cars again. Id. at 62-63.

In late December 2014, Mr. Macias Campos called Ms. Olsen because he wanted to "hang out." Id. at 64. She went over to hang out with him, "and ended up staying there until February." Id. The pair would "bounce from motel to motel," mostly on Aurora Avenue in Seattle, spending four or five nights in each place. Id. The couple also became intimate during this time period. Id. at 64-65.

According to Ms. Olsen, on February 7th, she and Mr. Macias-Campos were staying at the Hillside Motel on Aurora Avenue. Id. at 77. She had been using heroin, and Mr. Macias-Campos had been using methamphetamine and cocaine. Id. at 75, 77. After an argument in a restaurant, the couple returned to their motel room. Id. at 77-78. 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 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.

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

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.

b. Trial proceedings

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.

Once Ms. Olsen was detained on a material witness order,<sup>2</sup> she appeared in court and a hearing was held, largely regarding Ms. Olsen's intention to "take the Fifth" during her trial testimony. 8/6/15 RP 5.

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<sup>2</sup> Ms. Olsen was also detained on a warrant for violating the terms of her release to CCAP. 8/6/15 RP 138.

Following the hearing, the court overruled the defense objection to the admission of the prior acts involving Rochelle. Id. at 52. The court stated 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 appeals. CP 118-31.

D. ARGUMENT

THE TRIAL COURT ERRED WHEN IT ADMITTED  
UNDULY PREJUDICIAL ER 404(b) EVIDENCE.

1. Evidence 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).

Furthermore, 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.

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.

When the court denied Mr. Macias-Campos’s objection to the ER 404(b) evidence and allowed the jury to hear about Rochelle, this was error for two reasons.

First, this was not a recantation case; and second, State v. 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. He verified that he examined her for any marks or injuries. 8/6/15 RP 155-59.

The Gunderson 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, the Gunderson 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. The Gunderson Court reasoned this was inadequate to create 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, but it ran an extraordinary risk of unfair prejudice. For the jury to hear evidence of prior allegations of domestic violence, particularly of graphic violence, such as the jury heard in this case, was overly prejudicial.<sup>3</sup> In admitting

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<sup>3</sup> 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.

the highly prejudicial ER 404(b) testimony of prior incidents, the trial court abused its discretion.

3. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.

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.

The Gunderson Court, when confronting a similar ER 404(b) error, held the error was not harmless as to the conviction for felony violation of a court order. 181 Wn.2d at 926. The 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 in Mr. Macias-Campos’s case. CP 52.

This case is similar to Gunderson. The evidence that Mr. Macias-Campos had allegedly threatened a former girlfriend was highly

prejudicial, considering the overall weakness of the State's evidence and 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. Officers noted a lack of physical injury, despite their examination of Ms. Olsen. 8/6/15 RP 155-59.<sup>4</sup>

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.<sup>5</sup>

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<sup>4</sup> 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.

<sup>5</sup> The jury ultimately convicted on the lesser included count of assault in the fourth degree and did reach a verdict of guilty on the harassment count. CP 86-88.

Accordingly, there is a reasonable probability that the ER 404(b) evidence affected the jury's decision. The conviction should be reversed. Gunderson, 181 Wn.2d at 925; Gresham, 173 Wn.2d at 420.

E. CONCLUSION

For the foregoing reasons, Mr. Macias-Campos respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 7<sup>th</sup> day of July, 2016.

Respectfully submitted,

s/ Jan Trasen

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74107-1-I
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	)	
JAVIER MACIAS-CAMPOS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF JULY, 2016, 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:

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