

NO. 43410-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MADERIOUS LEVON CASH,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state over defense objection to elicit propensity evidence under ER404(b) which was more prejudicial than probative.

Issues Pertaining to Assignment of Error

In a case in which the defendant is charged with strangling his live in girlfriend and unlawful imprisonment, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state over defense objection to elicit evidence from the complaining witness that the defendant physically abused her on three prior occasions?

STATEMENT OF THE CASE

Factual History

During the evening of Friday, February 22, 2012, the defendant Madrious Levon Cash and his girlfriend Maryiah Wright were together in their bedroom at one end of a house in Vancouver owned by an acquaintance by the name of Debbie. RP 99-102¹. Debbie lived in the other end of the house along with her large dog and had allowed the defendant and Maryiah to move in rent free the first part of January, 2012. *Id.* On that evening Debbie had a guest visiting. RP 175-176. At some point during the evening, the defendant and Maryiah got into an argument in which they began yelling and pushing at each other. RP 102-108.

According to Maryiah, when she shoved the defendant he grabbed her under her armpits, applied pressure, pushed her against the wall and held her there as she struggled to get free. RP 102-108. She was eventually able to push him away, but he came back and put her in a bear hug. *Id.* As he did this she bit him on the ear. RP 108-112. He then let go and started hitting her with open-handed blows to the mouth, nose and eyes. *Id.* When he stopped she could feel her left eye swelling and blood coming out of her mouth. *Id.* She asked if she could go into the bathroom and he refused to let

¹The record in this case includes two volumes of continuously numbered verbatim reports of the jury trial and sentencing hearing. There are referred herein as “RP [page #].”

her but relented after more arguing. *Id.* He continued to yell at her while she was in the bathroom. *Id.* She then walked out into the bedroom. *Id.*

Maryiah went on to claim that after walking into the bedroom she made a dash out of the bedroom and down the hall in an attempt to exit the front door and get away. RP 116-124. However, the defendant ran up from behind and tackled her to the floor. *Id.* Maryiah responded by screaming for help from Debbie. *Id.* As she did, the defendant grabbed her around the throat with both hands, held her to the floor and strangled her to the point she felt lifeless and almost passed out. *Id.* He then let go of her neck, grabbed her by the hair, and started dragging her back down the hall toward the bedroom. *Id.* At this point, she was able to grab one of his hands and bend the thumb back to the point she thought she had broken it. *Id.* He responded by kicking her a number of times in the head. *Id.* He then again tried to drag her into the bedroom with her resisting. *Id.* During this process she sustained a number of cuts and scrapes from nails that were protruding from a door frame in which she tried to wedge herself. *Id.*

At some point after the defendant again attempted to drag her down the hall, Maryiah was able to get up and bite the defendant on a finger down to the bone. RP 117-120. After this, they both ended up going back into the bedroom and the fight ended, although they continued to argue until they went to bed and slept. *Id.* According to Maryiah, she and the defendant

stayed in the house the next day (Saturday) and watched movies until they went to bed that night. RP 125-127.

On Sunday Maryiah went down to the local 7-11 to meet her father, who was going to pay her some money he owed her. RP 127-130. Before going she applied heavy makeup and wore sunglasses in an attempt to cover up her bruises and black eye. *Id.* However, both the clerk at the store and her father saw her injuries, as did her father's girlfriend. *Id.* After talking to her father for about 45 minutes, she returned home and got into an argument with the defendant about how long she had been gone. *Id.*

The next day, which was Monday, Maryiah got up and went to work at a business one of her uncles owns. RP 131 After talking with her uncle, she decided to call the police for a "civil assist" to help her get her possessions so she could leave the defendant and move in with her mother. *Id.* In response to this call, Detective Cynthia Bull of the Vancouver Police Department met with Maryiah, took oral and written statements from her, took pictures of Maryiah's injuries, and then accompanied Maryiah to Debbie's house. RP 218-222. When the defendant answered the door, Detective Bull placed him under arrest. *Id.* Maryiah then went in, retrieved her possessions, and left. *Id.*

According to Detective Bull, she observed a number of injuries to Maryiah, including a black eye, bruises to her face, and bruises under her

armpits. RP 219-222, 224-246. However, she did not see any marks of manual strangulation on Maryiah's throat, she did not see any injuries to Maryiah's scalp, and she did not see any missing hair on Maryiah's head. *Id.*

Procedural History

By information filed February 29, 2012, the Clark County Prosecutor charged the defendant Maderious Lavon Cash with one count of Second Degree Assault by strangulation and one count of Unlawful Imprisonment. CP 217-218. The state also alleged that (1) the defendant committed the offense against a family or household member, and (2) that the crimes constituted aggravated domestic violence offenses. *Id.* Prior to trial, the state moved for leave to introduce evidence of prior assaults, including prior incidents of strangulation, that the defendant had committed against Maryiah. CP 20-44. Following argument on this issue, the court granted the state's motion over defense objection. RP 22-38, 72-86.

At trial, the state called three witnesses: Maryiah Wright, Dustin Miszczak (the 7-11 clerk) and Detective Bull. RP 53, 139, 217. They testified to the facts contained in the preceding factual history. *See* Factual History. In addition, during Maryiah's testimony, she outlined three prior incidents in which she claimed that the defendant assaulted and strangled her. RP 166-174. In the first, she stated that in August of 2011, she and the defendant were living in a tent in a park. RP 166-170. On one day during

that time they got into an argument, during which she tried to take her possessions and leave. *Id.* He refused to let her go and then he started hitting her. *Id.* When he did, she started screaming, at which point he hit her again and then grabbed her around the throat and began strangling her to make her stop screaming. *Id.*

Maryiah also told the jury the following about the second incident. RP 170-172. She stated that in mid-January, right after moving into Debbie's house, she and the defendant got into an argument. *Id.* During the argument he began hitting her in the face and then ripped off her shirt. *Id.* Although Debbie was in the house, she screamed for help and no one responded. *Id.* Maryiah went on to tell the jury that in the beginning of February of 2012 there was a third incident in which she and the defendant got into a physical altercation while in their bedroom at Debbie's house. *Id.* When she started to scream the defendant grabbed her by the throat and strangled her to keep her from yelling. *Id.*

Following the close of the state's case the defense also closed without calling any witnesses. RP 247, 249-254. The court then instructed the jury without objection from the defense. RP 264-275, 276, 296; CP 148-180. Pursuant to the defendant's request, the court instructed the jury on fourth degree assault as a lesser included offense to second degree assault. *Id.* The court also instructed the jury that the state had the burden of proving that the

defendant did not act in self-defense as to the fourth degree assault. *Id.* Following argument by counsel the jury retired for deliberation. RP 296-348, 353. The jury eventually returned verdicts as follows: (1) not guilty to the charge of second degree assault, (2) guilty to the lesser included charge of fourth degree assault, and (3) guilty to the charge of unlawful imprisonment. CP 181-183.

After the jury returned its verdicts, the court gave instructions on the aggravators charged. RP 357-362. Following argument by counsel, the jury again retired for deliberation and then returned special verdicts finding that (1) the defendant committed the offenses against a family or household member, but (2) the state had failed to prove that the crimes constituted aggravated domestic violence offenses. RP 363-364; CP 184-185. The court later imposed a sentence within the standard range, after which the defendant filed timely notice of appeal. CP 190-198, 199-212, 213.

ARGUMENT

THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO ELICIT PROPENSITY EVIDENCE UNDER ER404(b) WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham’s treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a

defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant’s claim under this standard, the court first found that the error was “extremely serious” in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the “paucity of credible evidence against [the defendant]” and the

inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar, the trial court erred when it admitted the three other claims of abuse by the defendant for three reasons: (1) the court failed to perform a balancing as is required under ER 404(b), (2) the court admitted the evidence to address issues that were not relevant, or only marginally relevant, and (3) the prejudicial effect of the evidence far outweighed its relevance. The following addresses these arguments.

Under ER 404(b) the court is required to perform a balancing before admitting other wrongs or bad acts to ensure the evidence is not more prejudicial than probative. *State v. Carleton*, 82 Wn.App. 680, 919 P.2d 128 (1996). In the case at bar, the trial court acknowledged this obligation, but none the less failed to perform the balancing. The court states as follows on this issues:

Get down to doing the last portion of the tests that the Court has to go through is weigh and balance the probative value versus the prejudicial – unfair, as I mentioned, prejudicial effect. When you

take a look at the line of our cases – and they made change in about 2003 is kind of where I determined – prior to 2003, I think the courts were a little tighter than they have been at this point, but since the rulings have started coming out, I think this is within line of the prior appellate rulings and the idea behind them. I am going to allow this.

RP 87.

As is apparent from the ruling at this point, the court did not perform any type of balancing in which it attempted to examine the unfair prejudice that would occur should the other prior bad acts be admitted. Neither did the court attempt to weigh the relative importance of the evidence to prove a fact at issue in the case.

Second, a careful review of the court’s ruling on this issue reveals that it admitted the three prior claims of abuse for two reasons: (1) to explain “lateness” of reporting this incident, and (2) to show a common scheme or plan. The court’s statements on these issues was as follows:

Now, the question then is, is the Defense going to be asking that I issue a limiting instruction? If this was being introduced by the Defense, I wouldn’t need that, but with it being introduced by the Defense (sic) – it’s not automatic, but I certainly, probably am inclined to give a limiting instruction at the time of the testimony and I would invite you, Mr. Pascoe, to think about that and when we get there, maybe before, we can even talk about a little about word smithing that limited instruction – limiting instruction. You know, something along the line – I haven’t really attempted to write one myself yet, but, you know, saying along the line, “I’m allowing – I’m allowing this evidence, but you should consider the evidence only for the purposes of” – and what I’d be putting here potentially – “common scheme or plan or explain – and/or explain delay in reporting. You must not consider the evidence for any other purpose, such as guilt or innocence on this particular charge.” Something to

that effect.

RP 87-88.

The error in the court's ruling is that there was no evidence of late reporting, and in any event, the defense had made no argument that there was late reporting or that if there was that it had any relevance to the issues before the court. The fact was that the complaining witness stated that the incident occurred late Friday, and that she reported it to her father and his girlfriend on Sunday and her uncle and the police on Monday, which was the first opportunity she had to report. Thus, the claim that the prior bad acts were admissible to "explain delay in reporting" was truly a red herring. It was used to divert attention to the state's real purpose in introducing the evidence of prior bad acts, which was to attempt to get the jury to view the defendant as a person with a propensity to commit the exact crimes with which the state had charged him.

Additionally, the idea that the prior bad acts were admissible to prove "common scheme or plan" in this case and under these facts ignores the requirement that there may be some unique similarity in the prior bad acts beyond the fact that each set of acts constitutes the commission of the same offense. In this case the evidence of the prior bad acts indicated that on some occasions the defendant hit the complaining witness but did not attempt to strangle her and that sometimes he did. Sometimes the complaining witness

defended herself and struck the defendant and sometimes she did not. Sometimes there was no one in close proximity and sometimes there was. Basically, to allow this type of prior bad acts into evidence to prove “common scheme or plan” is simply a sophisticated way of saying that the evidence is admissible to prove that the defendant committed the same type of crime in the past so he must have committed the crime in this incident.

Third, in this case the evidence of the prior bad acts was far more prejudicial than probative, particularly given the marginal relevance the prior bad acts had under the issues before the jury. On this issue the facts of this case are similar to those in *Escalona*. In *Escalona* the defendant was charged with Second Degree Assault with a knife, and the complaining witness introduced evidence that the defendant had committed the same act in the past upon another person. The court found this evidence so inherently prejudicial that no curative instruction could ensure the defendant a fair trial. Similarly, in the case at bar, the prior bad acts alleged were the same claims of strangulation and unlawful imprisonment committed by the same person against the same complaining witness. In such a case the probability of unfair prejudice is extremely high. By contrast, the relevance of the evidence to any fact at issue before the jury was marginal at best, as was discussed previously. Thus, the evidence was more prejudicial than probative and not properly admissible under ER 404(b).

As was stated in *State v. Pogue, supra*, “the erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome.” *State v. Pogue*, 104 Wn.2d at 987-988 (citing *State v. Halstien, supra*). In the case at bar there was such a reasonable possibility given the weakness of the state’s evidence. Although the complaining witness told an undoubtedly harrowing story of continued abuse, the problem with the state’s case was that the facts did not support her story. First, she claimed a fairly egregious incident of manual strangulation which should have produced bruising around her neck. In spite of this fact, Deputy Bull saw no such injuries. Second, she claimed that others were present in the house during this violent, loud assault and that she called out for help repeatedly. In spite of this fact, the state failed to call either of the person’s present in the house to corroborate these claims. Third, she claimed that the defendant had violently drug her down the hallway by her hair with her struggling the entire way. In spite of this claim, Deputy Bull had to admit to the jury that she looked for scalp injuries and loss of hair and found none when she in her experience and training expected to find this corroborative evidence.

Finally, it is true in this case that the complaining witness did suffer significant injuries to her face and torso. However, as Deputy Bull testified and as the complaining witness had to admit, the defendant also suffered

significant injuries during the altercation, including a damaged thumb, a bite to the ear, and a finger bitten down to the bone. Thus, it was well within the province of the jury to disregard the questionable claims of the complaining witness in lieu of a scenario that better suited all of the evidence, which was that this was an incident of mutual fighting in which each participant gave as much as he or she got. Indeed, the jury acquitted the defendant of the second degree assault charge and failed to find that there was aggravated domestic abuse. Under these facts, it is highly likely that the admission of the three prior bad acts materially affected the outcome on the fourth degree assault charge and the unlawful imprisonment charge. As a result, this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

The admission of prior bad acts in this case denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

DATED this 11th day of February, 2013.

Respectfully submitted,

A handwritten signature in black ink that reads "John A. Hays". The signature is written in a cursive style and is positioned above a horizontal line.

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . . .

ER 402

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403

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.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. 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, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Respondent,

vs.

MADERIOUS L. CASH,
Appellant.

NO. 43410-5-II

AFFIRMATION OF
OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On February 11th, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

TONY GOLIK
CLARK CO. PROS ATTY
P.O. BOX 5000
VANCOUVER, WA 98666

MADERIOUS L. CASH #894647
LARCH CORRECTION CTR
15314 NE DOLE VALLEY RD.
YACOLT, WA 98675

Dated this 11TH day of February, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

NO. 43410-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MADERIOUS LEVON CASH,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state over defense objection to elicit propensity evidence under ER404(b) which was more prejudicial than probative.

Issues Pertaining to Assignment of Error

In a case in which the defendant is charged with strangling his live in girlfriend and unlawful imprisonment, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state over defense objection to elicit evidence from the complaining witness that the defendant physically abused her on three prior occasions?

STATEMENT OF THE CASE

Factual History

During the evening of Friday, February 22, 2012, the defendant Madrious Levon Cash and his girlfriend Maryiah Wright were together in their bedroom at one end of a house in Vancouver owned by an acquaintance by the name of Debbie. RP 99-102¹. Debbie lived in the other end of the house along with her large dog and had allowed the defendant and Maryiah to move in rent free the first part of January, 2012. *Id.* On that evening Debbie had a guest visiting. RP 175-176. At some point during the evening, the defendant and Maryiah got into an argument in which they began yelling and pushing at each other. RP 102-108.

According to Maryiah, when she shoved the defendant he grabbed her under her armpits, applied pressure, pushed her against the wall and held her there as she struggled to get free. RP 102-108. She was eventually able to push him away, but he came back and put her in a bear hug. *Id.* As he did this she bit him on the ear. RP 108-112. He then let go and started hitting her with open-handed blows to the mouth, nose and eyes. *Id.* When he stopped she could feel her left eye swelling and blood coming out of her mouth. *Id.* She asked if she could go into the bathroom and he refused to let

¹The record in this case includes two volumes of continuously numbered verbatim reports of the jury trial and sentencing hearing. There are referred herein as “RP [page #].”

her but relented after more arguing. *Id.* He continued to yell at her while she was in the bathroom. *Id.* She then walked out into the bedroom. *Id.*

Maryiah went on to claim that after walking into the bedroom she made a dash out of the bedroom and down the hall in an attempt to exit the front door and get away. RP 116-124. However, the defendant ran up from behind and tackled her to the floor. *Id.* Maryiah responded by screaming for help from Debbie. *Id.* As she did, the defendant grabbed her around the throat with both hands, held her to the floor and strangled her to the point she felt lifeless and almost passed out. *Id.* He then let go of her neck, grabbed her by the hair, and started dragging her back down the hall toward the bedroom. *Id.* At this point, she was able to grab one of his hands and bend the thumb back to the point she thought she had broken it. *Id.* He responded by kicking her a number of times in the head. *Id.* He then again tried to drag her into the bedroom with her resisting. *Id.* During this process she sustained a number of cuts and scrapes from nails that were protruding from a door frame in which she tried to wedge herself. *Id.*

At some point after the defendant again attempted to drag her down the hall, Maryiah was able to get up and bite the defendant on a finger down to the bone. RP 117-120. After this, they both ended up going back into the bedroom and the fight ended, although they continued to argue until they went to bed and slept. *Id.* According to Maryiah, she and the defendant

stayed in the house the next day (Saturday) and watched movies until they went to bed that night. RP 125-127.

On Sunday Maryiah went down to the local 7-11 to meet her father, who was going to pay her some money he owed her. RP 127-130. Before going she applied heavy makeup and wore sunglasses in an attempt to cover up her bruises and black eye. *Id.* However, both the clerk at the store and her father saw her injuries, as did her father's girlfriend. *Id.* After talking to her father for about 45 minutes, she returned home and got into an argument with the defendant about how long she had been gone. *Id.*

The next day, which was Monday, Maryiah got up and went to work at a business one of her uncles owns. RP 131 After talking with her uncle, she decided to call the police for a "civil assist" to help her get her possessions so she could leave the defendant and move in with her mother. *Id.* In response to this call, Detective Cynthia Bull of the Vancouver Police Department met with Maryiah, took oral and written statements from her, took pictures of Maryiah's injuries, and then accompanied Maryiah to Debbie's house. RP 218-222. When the defendant answered the door, Detective Bull placed him under arrest. *Id.* Maryiah then went in, retrieved her possessions, and left. *Id.*

According to Detective Bull, she observed a number of injuries to Maryiah, including a black eye, bruises to her face, and bruises under her

armpits. RP 219-222, 224-246. However, she did not see any marks of manual strangulation on Maryiah's throat, she did not see any injuries to Maryiah's scalp, and she did not see any missing hair on Maryiah's head. *Id.*

Procedural History

By information filed February 29, 2012, the Clark County Prosecutor charged the defendant Maderious Lavon Cash with one count of Second Degree Assault by strangulation and one count of Unlawful Imprisonment. CP 217-218. The state also alleged that (1) the defendant committed the offense against a family or household member, and (2) that the crimes constituted aggravated domestic violence offenses. *Id.* Prior to trial, the state moved for leave to introduce evidence of prior assaults, including prior incidents of strangulation, that the defendant had committed against Maryiah. CP 20-44. Following argument on this issue, the court granted the state's motion over defense objection. RP 22-38, 72-86.

At trial, the state called three witnesses: Maryiah Wright, Dustin Miszczak (the 7-11 clerk) and Detective Bull. RP 53, 139, 217. They testified to the facts contained in the preceding factual history. *See* Factual History. In addition, during Maryiah's testimony, she outlined three prior incidents in which she claimed that the defendant assaulted and strangled her. RP 166-174. In the first, she stated that in August of 2011, she and the defendant were living in a tent in a park. RP 166-170. On one day during

that time they got into an argument, during which she tried to take her possessions and leave. *Id.* He refused to let her go and then he started hitting her. *Id.* When he did, she started screaming, at which point he hit her again and then grabbed her around the throat and began strangling her to make her stop screaming. *Id.*

Maryiah also told the jury the following about the second incident. RP 170-172. She stated that in mid-January, right after moving into Debbie's house, she and the defendant got into an argument. *Id.* During the argument he began hitting her in the face and then ripped off her shirt. *Id.* Although Debbie was in the house, she screamed for help and no one responded. *Id.* Maryiah went on to tell the jury that in the beginning of February of 2012 there was a third incident in which she and the defendant got into a physical altercation while in their bedroom at Debbie's house. *Id.* When she started to scream the defendant grabbed her by the throat and strangled her to keep her from yelling. *Id.*

Following the close of the state's case the defense also closed without calling any witnesses. RP 247, 249-254. The court then instructed the jury without objection from the defense. RP 264-275, 276, 296; CP 148-180. Pursuant to the defendant's request, the court instructed the jury on fourth degree assault as a lesser included offense to second degree assault. *Id.* The court also instructed the jury that the state had the burden of proving that the

defendant did not act in self-defense as to the fourth degree assault. *Id.* Following argument by counsel the jury retired for deliberation. RP 296-348, 353. The jury eventually returned verdicts as follows: (1) not guilty to the charge of second degree assault, (2) guilty to the lesser included charge of fourth degree assault, and (3) guilty to the charge of unlawful imprisonment. CP 181-183.

After the jury returned its verdicts, the court gave instructions on the aggravators charged. RP 357-362. Following argument by counsel, the jury again retired for deliberation and then returned special verdicts finding that (1) the defendant committed the offenses against a family or household member, but (2) the state had failed to prove that the crimes constituted aggravated domestic violence offenses. RP 363-364; CP 184-185. The court later imposed a sentence within the standard range, after which the defendant filed timely notice of appeal. CP 190-198, 199-212, 213.

ARGUMENT

THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO ELICIT PROPENSITY EVIDENCE UNDER ER404(b) WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham’s treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a

defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant’s claim under this standard, the court first found that the error was “extremely serious” in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the “paucity of credible evidence against [the defendant]” and the

inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar, the trial court erred when it admitted the three other claims of abuse by the defendant for three reasons: (1) the court failed to perform a balancing as is required under ER 404(b), (2) the court admitted the evidence to address issues that were not relevant, or only marginally relevant, and (3) the prejudicial effect of the evidence far outweighed its relevance. The following addresses these arguments.

Under ER 404(b) the court is required to perform a balancing before admitting other wrongs or bad acts to ensure the evidence is not more prejudicial than probative. *State v. Carleton*, 82 Wn.App. 680, 919 P.2d 128 (1996). In the case at bar, the trial court acknowledged this obligation, but none the less failed to perform the balancing. The court states as follows on this issues:

Get down to doing the last portion of the tests that the Court has to go through is weigh and balance the probative value versus the prejudicial – unfair, as I mentioned, prejudicial effect. When you

take a look at the line of our cases – and they made change in about 2003 is kind of where I determined – prior to 2003, I think the courts were a little tighter than they have been at this point, but since the rulings have started coming out, I think this is within line of the prior appellate rulings and the idea behind them. I am going to allow this.

RP 87.

As is apparent from the ruling at this point, the court did not perform any type of balancing in which it attempted to examine the unfair prejudice that would occur should the other prior bad acts be admitted. Neither did the court attempt to weigh the relative importance of the evidence to prove a fact at issue in the case.

Second, a careful review of the court’s ruling on this issue reveals that it admitted the three prior claims of abuse for two reasons: (1) to explain “lateness” of reporting this incident, and (2) to show a common scheme or plan. The court’s statements on these issues was as follows:

Now, the question then is, is the Defense going to be asking that I issue a limiting instruction? If this was being introduced by the Defense, I wouldn’t need that, but with it being introduced by the Defense (sic) – it’s not automatic, but I certainly, probably am inclined to give a limiting instruction at the time of the testimony and I would invite you, Mr. Pascoe, to think about that and when we get there, maybe before, we can even talk about a little about word smithing that limited instruction – limiting instruction. You know, something along the line – I haven’t really attempted to write one myself yet, but, you know, saying along the line, “I’m allowing – I’m allowing this evidence, but you should consider the evidence only for the purposes of” – and what I’d be putting here potentially – “common scheme or plan or explain – and/or explain delay in reporting. You must not consider the evidence for any other purpose, such as guilt or innocence on this particular charge.” Something to

that effect.

RP 87-88.

The error in the court's ruling is that there was no evidence of late reporting, and in any event, the defense had made no argument that there was late reporting or that if there was that it had any relevance to the issues before the court. The fact was that the complaining witness stated that the incident occurred late Friday, and that she reported it to her father and his girlfriend on Sunday and her uncle and the police on Monday, which was the first opportunity she had to report. Thus, the claim that the prior bad acts were admissible to "explain delay in reporting" was truly a red herring. It was used to divert attention to the state's real purpose in introducing the evidence of prior bad acts, which was to attempt to get the jury to view the defendant as a person with a propensity to commit the exact crimes with which the state had charged him.

Additionally, the idea that the prior bad acts were admissible to prove "common scheme or plan" in this case and under these facts ignores the requirement that there may be some unique similarity in the prior bad acts beyond the fact that each set of acts constitutes the commission of the same offense. In this case the evidence of the prior bad acts indicated that on some occasions the defendant hit the complaining witness but did not attempt to strangle her and that sometimes he did. Sometimes the complaining witness

defended herself and struck the defendant and sometimes she did not. Sometimes there was no one in close proximity and sometimes there was. Basically, to allow this type of prior bad acts into evidence to prove “common scheme or plan” is simply a sophisticated way of saying that the evidence is admissible to prove that the defendant committed the same type of crime in the past so he must have committed the crime in this incident.

Third, in this case the evidence of the prior bad acts was far more prejudicial than probative, particularly given the marginal relevance the prior bad acts had under the issues before the jury. On this issue the facts of this case are similar to those in *Escalona*. In *Escalona* the defendant was charged with Second Degree Assault with a knife, and the complaining witness introduced evidence that the defendant had committed the same act in the past upon another person. The court found this evidence so inherently prejudicial that no curative instruction could ensure the defendant a fair trial. Similarly, in the case at bar, the prior bad acts alleged were the same claims of strangulation and unlawful imprisonment committed by the same person against the same complaining witness. In such a case the probability of unfair prejudice is extremely high. By contrast, the relevance of the evidence to any fact at issue before the jury was marginal at best, as was discussed previously. Thus, the evidence was more prejudicial than probative and not properly admissible under ER 404(b).

As was stated in *State v. Pogue, supra*, “the erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome.” *State v. Pogue*, 104 Wn.2d at 987-988 (citing *State v. Halstien, supra*). In the case at bar there was such a reasonable possibility given the weakness of the state’s evidence. Although the complaining witness told an undoubtedly harrowing story of continued abuse, the problem with the state’s case was that the facts did not support her story. First, she claimed a fairly egregious incident of manual strangulation which should have produced bruising around her neck. In spite of this fact, Deputy Bull saw no such injuries. Second, she claimed that others were present in the house during this violent, loud assault and that she called out for help repeatedly. In spite of this fact, the state failed to call either of the person’s present in the house to corroborate these claims. Third, she claimed that the defendant had violently drug her down the hallway by her hair with her struggling the entire way. In spite of this claim, Deputy Bull had to admit to the jury that she looked for scalp injuries and loss of hair and found none when she in her experience and training expected to find this corroborative evidence.

Finally, it is true in this case that the complaining witness did suffer significant injuries to her face and torso. However, as Deputy Bull testified and as the complaining witness had to admit, the defendant also suffered

significant injuries during the altercation, including a damaged thumb, a bite to the ear, and a finger bitten down to the bone. Thus, it was well within the province of the jury to disregard the questionable claims of the complaining witness in lieu of a scenario that better suited all of the evidence, which was that this was an incident of mutual fighting in which each participant gave as much as he or she got. Indeed, the jury acquitted the defendant of the second degree assault charge and failed to find that there was aggravated domestic abuse. Under these facts, it is highly likely that the admission of the three prior bad acts materially affected the outcome on the fourth degree assault charge and the unlawful imprisonment charge. As a result, this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

The admission of prior bad acts in this case denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

DATED this 11th day of February, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . . .

ER 402

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403

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.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. 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, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Respondent,

vs.

MADERIOUS L. CASH,
Appellant.

NO. 43410-5-II

AFFIRMATION OF
OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On February 11th, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

TONY GOLIK
CLARK CO. PROS ATTY
P.O. BOX 5000
VANCOUVER, WA 98666

MADERIOUS L. CASH #894647
LARCH CORRECTION CTR
15314 NE DOLE VALLEY RD.
YACOLT, WA 98675

Dated this 11TH day of February, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

HAYS LAW OFFICE

February 11, 2013 - 3:03 PM

Transmittal Letter

Document Uploaded: 434105-Appellants' Brief.pdf

Case Name: State vs Cash

Court of Appeals Case Number: 43410-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellants'
- Statement of Additional Authorities
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- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:
jennifer.casey@clark.wa.gov