

NO. 46146-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

OMAR MORENO-VALENTIN,

Appellant.

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

The Honorable David Gregerson, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of prior misconduct under ER 404(b).

2. The court erred in giving a flawed limiting instruction for ER 404(b) evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court committed reversible error in ruling evidence of Mr. Moreno's prior misconduct was admissible under ER 404(b) when the court admitted the evidence for improper purposes?

2. Whether the court committed reversible error in issuing a limiting instruction for the ER 404(b) evidence that allowed the jury to consider the evidence for improper evidentiary purposes?

C. STATEMENT OF THE CASE

1. Procedural history

The State charged Omar Moreno-Valentin¹ with Assault in the Second Degree. RCW 9A.36.021(1)(g). The Information alleged Mr. Moreno strangled his girlfriend, Diana Ruiz Dominguez.² CP 1. It also put Mr. Moreno on notice that the State intended to seek an exceptional sentence if it proved the incident occurred within the sight or sound of the couple's young son. CP 1.

¹ hereafter "Mr. Moreno"

² hereafter "Ms. Ruiz"

The jury found Mr. Moreno guilty. CP 3. It also returned special verdicts that the offense occurred between members of the same family or household and within the sight or sound of their son. CP 3, 4.

The court used the sight or sound aggravating factor to give Mr. Moreno an exceptional sentence of 366 days in prison on a standard range of 3-9 months. CP 8, 9.

Mr. Moreno appeals all portions of his judgment and sentence. CP 19-33.

2. Argument and ruling on ER 404(b) evidence

The court heard motions in limine at the start of trial. RP1³ 32-137. The State sought to admit alleged prior instances of Mr. Moreno's conduct under ER 404(b).⁴ RP1 32-128. The State characterized the relationship as a domestic violence relationship and argued for admission of Mr. Moreno's alleged prior instances of aggressive behavior for purposes of jury assessment of Ms. Ruiz's credibility and the dynamics of domestic violence, and to rebut a claim of self-defense by Mr. Moreno.

³ The record consists of four consecutively numbered volumes of verbatim herein referenced as "RP1", "RP2", "RP3," and "RP4."

⁴ ER 404(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.

RP1 40-41. Mr. Moreno objected to the admission of any alleged prior acts. RP1 129-32.

The State made an offer of proof through the testimony of Ms. Ruiz. RP1 104-25. Ms. Ruiz told the court that when Mr. Moreno got angry, he sometimes shouted and called her a bitch or a slut. RP1 107, 112, 133. The name calling occasionally occurred in front of their three-year old son. RP1 112. On two occasions, during arguments, Mr. Moreno punched and broke doors in their shared apartment. RP1 105, 108. She blamed Mr. Moreno for her lack of friends. RP1 109. Because he was jealous, he would not allow her to talk to co-workers. RP1 110. At times he was angry about the way she dressed. RP1 110. There was one instance where he shook their child in anger and then threw the child against the couch. RP1 113. Arguments sometimes included pushing and shoving. RP1 112. During arguments, he sometimes threw video game controllers and broke them. RP1 110.

The court held the State could admit the door punching and use of angry language. RP1 133. The court excluded any reference to the shaking or throwing of the child. RP1 133. Ms. Ruiz could also testify about routine practices of jealousy or isolation. RP1 133.

3. Trial testimony

Diana Ruiz and Omar Moreno had been together as a couple for about five years. RP2 216. They shared an apartment and had a three year-old son, Eric. RP2 215, 297. From Ms. Ruiz's standpoint, the relationship had diminished over time. RP2 216, 218. In anger, Mr. Moreno sometimes called her names like bitch and slut. RP2 235-36. The name-calling sometimes occurred in front of Eric. RP2 236. All of this made her feel bad. RP2 220, 223. During separate arguments, Mr. Moreno punched and broke two of the apartment's doors. RP2 221. Sometimes he would also throw computer game controls. RP2 221. Occasionally their arguments led to pushing and shoving. RP2 222. She blamed Mr. Moreno for all of the arguments. RP2 224.

Ms. Ruiz was at work early on the morning of December 2, 2013. RP2 27-71. Mr. Moreno contacted her and asked her to come home as soon as possible. RP2 272. When she arrived home, Mr. Moreno was angry. RP2 225. He accused her of cheating on him. RP2 234. He confronted her about some texts he had found on her phone. RP2 234. He pulled her hair and threw her against a couch. RP2 225. She hit her head on the wooden frame and it caused bruising to her face. RP2 225.

She did not call 911 right away. RP2 233. Instead, Mr. Moreno left with the child and she stayed home and cried. RP2 232. She did not

have a phone with her. RP2 233. Her phone had been dropped sometime earlier and was damaged. RP2 234. Mr. Moreno had a working cell phone but he kept it with him. RP2 223-24. When Mr. Moreno returned home, they continued to argue about the text messages. RP2 233. She admitted to having an affair. RP2 304; RP3 397. He called her a bitch and a slut. RP2 235-36. He reached out and grabbed her by the throat and squeezed hard for about two seconds. RP2 237-38. It was hard for her to breathe. RP2 238. She thought he would kill her. RP2 239. He told her the only reason she was not dead was because the child was there. RP2 240. Ms. Ruiz testified the child was in the room when Mr. Moreno squeezed her neck. RP2 240.

Mr. Moreno also pushed her against the metal stair rail causing a cut to her hand. RP2 241.

Ms. Ruiz remained at the apartment. She grabbed a knife and told Mr. Moreno she would slit her wrists if he took the child from her. RP2 246. She went into the bathroom with the knife and closed herself off. RP2 246. She did this to frighten Mr. Moreno. RP2 246-47.

Mr. Moreno refused to give her a phone. RP2 241. She went next door to Mr. Moreno's uncle's apartment and asked to use a phone. RP2 243; RP3 343. He did not have his cell phone. RP3 345. He did not let her into his apartment to use his home phone. RP3 346.

After staying at her apartment for a couple of hours, she left and walked to her cousin's house where she used a phone to call 911. RP2 244-45. She called the police because Mr. Moreno kept threatening to take her son from her. RP2 245. She returned to the apartment because her son was there. RP2 245.

The police arrived. One of the officers observed a horizontal red mark on Ms. Ruiz's neck consistent with finger marks. RP2 188-89, 194. Photos of her neck were admitted as evidence. RP2 188-89.

Mr. Moreno testified Ms. Ruiz was at work. RP3 387. The screen on the phone she usually used was broken so she had taken his phone to work with her. RP3 386-88. He had her phone. RP3 389. After a text came through on the phone, he started looking at the contacts and text history. RP3 390-91. He discovered Ms. Ruiz had a relationship "between couples" he was unaware of. RP3 391. He reviewed the texts which lead him to conclude she was having an affair. RP3 391. He could not believe it; he was devastated. RP3 391.

He drove to where Ms. Ruiz was supposed to be working and found the plant was dark and there were no cars in the parking lot. RP3 393. After returning home, he sent her a text message asking her to call him. RP3 394-95. When she called, he used a ruse to get her home by

telling her their son was ill and they needed to take him to the hospital. RP3 395.

When Ms. Ruiz arrived home, he confronted her about the text messages and about his concern over an affair. RP3 396. He did not grab her by the hair or throw her. RP3 396. Ms. Ruiz admitted the affair. RP3 397. She was concerned that she was pregnant with the other man's child. RP3 397. Both Mr. Moreno and Ms. Ruiz cried. RP3 398. They argued for about an hour. RP3 398. They parted and went to separate areas in the house. RP3 398-99. He tried to sleep as he had to work in the morning. RP3 399. He could not sleep. He went downstairs. The argument flared up. RP3 401. He had her cell phone in his pocket. RP3 401.

Before Mr. Moreno left for work, they struggled over the phone. Ms. Ruiz wanted it. Mr. Moreno did not want to give it to her. RP3 410-11. She tried blocking him from leaving the apartment. When that did not work, she stood behind his car. RP3 410-13. He gave her the phone before leaving but only after assigning it a password she did not know. RP3 414.

Mr. Moreno stayed at work until around noon. RP3 415. A co-worker noticed a bruise on Mr. Moreno's forehead. RP3 330. Mr. Moreno assumed he got the bruise when struggling over the phone with Ms. Ruiz. RP3 415-16.

As soon as he arrived home, Ms. Ruiz demanded the phone's password. RP3 417. He refused to give it to her. RP3 418. He kept telling Ms. Ruiz over and over again how sad he was. RP3 419. He yelled at her. RP3 419. She ran to the kitchen and got a knife. RP3 419. She threatened to kill herself if he did not give her access to the phone. RP3 419. He believed she was really set on doing so and took the knife away from her. RP3 419. Ms. Ruiz got the knife two more times. Mr. Moreno took it from her both times. RP3 420-23.

They were both upstairs. RP3 424. He was walking down the stairs when Ms. Ruiz grabbed his arm and pulled. He sat down. RP3 424. She demanded the phone's password. RP3 425. He was afraid she would delete the texts. RP3 425. She started to bite his arm. RP3 425. He pulled on her. RP3 426. They struggled on the stairs. RP3 426-27. Somehow her finger got cut on the stairs. RP3 428.

He took their son and went next door to his uncle's apartment. RP3 428-29. He returned to his apartment later that afternoon. RP3 430. Ms. Ruiz was there and he told her he intended to stay at the apartment. RP3 433. She seemed uncomfortable with that and threatened to call the police. RP3 433. He was with Ms. Ruiz when she called 911 from their apartment. RP 433-34.

Mr. Moreno denied ever grabbing and squeezing Ms. Ruiz's throat.

RP3 438.

4. Limiting instruction

The only limiting instruction concerning the ER 404(b) instances was the following instruction given as part of the jury instructions.

The court allowed testimony about prior acts by the defendant leading up to the incident for which he is presently charged. That evidence was admitted only for the purpose of evaluating the credibility of Ms. Ruiz, the dynamics of the relationship with defendant, and/or whether defendant acted in self-defense. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 4A (sub. nom.51).

5. Self-defense instruction and closing argument

Ms. Ruiz requested and the trial court gave a self-defense instruction as follows:

It is a defense to a charge of Assault in the Second Degree that the force used, attempted, or offered to be used, was lawful as defined in this instruction.

The use, attempt to use, offer to use force upon or toward the person of another is lawful when used, attempted, offered by a person who reasonably believes that he is about to be injured and when the force is not more than necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person,

taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, offered to be used by the defendant was not lawful. If you find that the State had not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Supp. DCP, Court's Instructions to the Jury, Instruction 10.

In closing, defense counsel did not argue Mr. Moreno intentionally put his hands on Ms. Ruiz's throat. Instead, she argued the finger-like mark on Ms. Ruiz's throat may have happened when she and Mr. Moreno were flailing around on the stairs.

D. ARGUMENT

IMPROPER ADMISSION OF ER 404(B) PRIOR ABUSIVE BEHAVIOR EVIDENCE AND A FLAWED LIMITING INSTRUCTION INVITED THE JURY TO CONSIDER MR. MORENO'S PROPENSITY FOR VIOLENCE PREJUDICING THE OUTCOME OF THE TRIAL.

The trial court erred in admitting testimony about prior abusive behavior under ER 404(b). The evidence was inadmissible for juror use to evaluate Ms. Ruiz's credibility, understand the dynamics of the Ruiz-Moreno relationship, and evaluate the defense of self-defense. In addition, the limiting instruction for the ER 404(b) evidence allowed the jury to use the evidence for an improper purpose. Reversal of the conviction is required.

1. ER 404(b) overview

Under ER 404(b), “[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. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident.” ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2013) “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime” *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal ‘presumption of innocence’ is stripped away.” *Bowen*, 48 Wn. App. at 195. “This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept

that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." *Wade*, 98 Wn. App. at 336.

Evidence of prior misconduct "may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *Gresham*, 173 Wn.2d at 420. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402⁵ and 403."⁶ *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. *Saltarelli*, 98 Wn.2d at 361-62. The evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient if its probative value is substantially outweighed by the danger of unfair prejudice." *Id.* at 361-62. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. *Wade*, 98 Wn. App. at 334.

⁵ 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.

⁶ 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.

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. *Foxhoven*, 161 Wn.2d at 175.

“If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for abuse of discretion.” *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when it applies the wrong legal standard, basis its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *Foxhoven*, 161 Wn.2d at 174.

2. The trial court abused its discretion in admitting the ER 404(b) evidence.

The trial court admitted evidence of prior abusive acts on the theory that it goes to the question of the dynamics of the couple’s

relationship and the credibility of Ms. Ruiz. That rationale is too broad, in effect creating a per se rule that evidence of prior misconduct is admissible in every domestic violence case to show the dynamic of the relationship, even when the dynamic is not helpful in explaining the alleged victim's state of mind.

In the domestic violence context, prior acts of domestic violence involving the defendant and the crime victim are admissible to assist the jury in judging the credibility of a recanting victim. *State v. Magers*, 164 Wn.2d174, 186, 189 P.3d 126 (2008); *State v. Grant*, 83 Wn. App. 98, 107-08, 920 P.2d 609 (1996). Evidence of prior acts of violence toward the victim help the jury assess the credibility of the victim and understand why the recanting victim told conflicting stories. *Magers*, 164 Wn.2d at 185-86. Evidence of prior domestic violence were properly admitted in *Grant* and *Magers* to explain statements and conduct that might have otherwise appeared inconsistent with the charges. *Id.*; *Grant*, 83 Wn. App. at 107-09.

This feature is missing from Mr. Moreno's case. Ms. Ruiz did not recant. She did not unduly delay reporting. She told the jury she was just waiting to get to a phone so she could call 911. She did not tell conflicting stories. She acted like someone who had in fact been assaulted and threatened. She did nothing seemingly inconsistent with her alleged

victim status. Ms. Ruiz's credibility was at issue, but only in the sense that the defense challenged whether the crime really occurred. The defense did not attack Ms. Ruiz's credibility by seeking to exploit a dynamic in the domestic relationship. There was nothing to exploit in that regard.

As for self-defense, there never was a true claim of self-defense at issue in the case. In fact, it is not clear why the court instructed on self-defense. *State v. Ponce*, 166 Wn. App. 409, 419, 269 P.3d 408 (2012) (sufficient evidence must support defense theory of case before instructing jury on same).

The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

3. It is reasonably probable wrongful admission of the ER 404(b) evidence affected the outcome.

Evidentiary error is prejudicial if, with reasonable probabilities, the error materially affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial, or of minor significance in reference to the evidence as a whole, and in no way

affected the outcome. *State v. Oswalt*, 62 Wn. 2d 118, 122, 381 P.2d 617 (1963).

Reversal of Mr. Moreno's conviction is required because there is a reasonable probability that juror consideration of the improperly admitted ER 404(b) evidence influenced deliberation on whether the State proved Mr. Moreno committed the charged assault beyond a reasonable doubt. This evidence made Mr. Moreno look like a bad husband, a bad father, and a bad person. It showed he was the type of person who would commit the act for which he was charged, the very inference ER 404(b) is designed to prohibit. The jury's consideration of the evidence cannot be considered trivial because such evidence stripped the presumption of innocence from Mr. Moreno. *Bowen*, 48 Wn. App. at 195. And it likely elicited an emotional rather than rational response from jurors as they deliberated on Mr. Moreno's fate. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

The limiting instruction on the ER 404(b) evidence cannot fairly be said to have prevented jurors from considering the ER 404(b) evidence as evidence of Mr. Moreno's propensity to be angry and violent. Supp. DCP, Court's Instructions to the Jury, Instruction 4A. A limiting instruction under some circumstances may be "a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody

else's." *Bruton v. United States*, 391 U.S. 123, 134, n.8, 88 S.Ct. 1620, 20 L.Ed 2d 476 (1968) (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2 Cir. 1932)). In those circumstances, the limiting instruction is nothing more than a "judicial lie" – a placebo device that satisfies form while violating substance. *Cronin*, 391 U.S. at 134 n.8; *Nash*, 54 F.2d at 1007.

Courts nevertheless often indulge in the "sanctioned ritual" that jurors are capable of using evidence for one permissible purpose while disregarding it for an impermissible one as a matter of practical expediency. *Shepard v. United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 78 L.Ed. 196 (1933). Jurors are presumed to follow instructions, but there are some contexts in which the practical and human limitation of the jury system cannot be ignored. *State v. Dent*, 123 Wn.2d 467, 486, 869 P.2d 392 (1994).

This case provides an illustration. Troubling evidence of a boyfriend's misconduct against a long-term girlfriend and mother of his child cannot help but incite an emotional response. Jurors cannot be legitimately expected to use this ER 404(b) evidence only for its delineated purpose. Evidence of other bad acts inevitably shifts the jury's attention to the defendant's general propensity for criminality. *Bowen*, 48 Wn. App. at 195. The proper and improper uses of this evidence are so intertwined that they cannot be compartmentalized from one another. To

jurors, propensity evidence is logically relevant. *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986).

A jury's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991). The admission of the ER 404(b) evidence allowed the jury to follow its natural inclination and infer Mr. Moreno acted in conformity with his character and therefore likely committed the criminal act charged by the State.

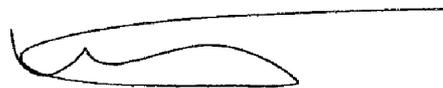
Even if the limiting instruction retained efficacy, prejudice still results because there is a reasonable probability that the outcome would have differed had the jury not heard the ER 404(b) evidence.

E. CONCLUSION

Mr. Moreno-Valentin's conviction should be reversed and remanded to the trial court for retrial.

Dated this 24th day of December 2014.

Respectfully submitted,



LISA E. TABBUT, WSBA #21344
Attorney for Omar Moreno-Valentin

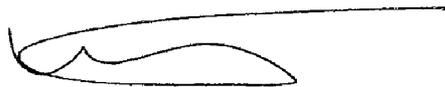
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II. I will provide a copy to Mr. Moreno-Valentin when I locate him.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 24, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Omar Moreno-Valentin

COWLITZ COUNTY ASSIGNED COUNSEL

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