

NO. 46311-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BERNARDO MONCADA,

Appellant.

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

The Honorable Robert Lewis, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. SMALL BRUISES LASTING ONLY SEVEN DAYS ARE NOT SUBSTANTIAL BODILY HARM.

The State asserts the bruising on R.B.'s buttocks lasted for 10 days—specifically, seven days from when R.B. returned home, which was three days after the spanking incident. Br. of Resp't, 3-4. This is unsupported by the record. Jessica B. agreed “the redness lasted approximately five days *from when this happened*, and that the bruising lasted approximately seven days.” RP 163 (emphasis added). This is not seven days from the time R.B. came home, but seven days total. Detective Jason Hafer also said the bruising lasted seven days. RP 188. This is significant because it demonstrates how minor and fleeting the bruising was. The State's assertion of 10 days is mistaken.

The State also makes much of the fact that Jessica B. called the doctor when she saw the bruising on R.B.'s buttocks. Br. of Resp't, 3, 10. However, equally important is the doctor told her it was unnecessary to bring R.B. in, because there was no broken skin. RP 143, 162-63. This also demonstrates the bruising was minor.

The State further emphasizes Detective Hafer's testimony that Moncada told him there were seven trips to the bathroom for spankings. Br. of Resp't, 9; RP 184. However, the number of spankings is unclear

from the record. Moncada clarified he misspoke and meant to say “several” when he talked with Hafer. RP 226. Moncada’s wife corroborated this testimony, and said there were only three or four rounds of spankings. RP 209. R.B. remembered going to the bathroom only twice for a spanking. RP 122.

The small bruises on R.B.’s buttocks, which lasted only seven days, did not amount to substantial bodily harm. Br. of Appellant, 12-16. The child hearsay should have been excluded, and retrial is required.

2. THE STATE IMPROPERLY ELICITED OTHER ACTS OF PHYSICAL DISCIPLINE, VIOLATING THE COURT’S RULING IN LIMINE.

The State attempts to split hairs and argue the court excluded only *past* instances of physical discipline. Br. of Resp’t, 13-14. But the court’s ruling in limine specifically prohibited all ER 404(b) evidence: “you should tell your witnesses that we’re not going to get into *other discipline*.” RP 17 (emphasis added). ER 404(b) broadly prohibits “[e]vidence of other crimes, wrongs, or acts.” It is not limited to acts occurring before the charged crime. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989) (“ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after the alleged crime for which the defendant is being tried.”). Simply because the slipper incident occurred after the belt spanking

does not mean it falls outside the scope of the court's ER 404(b) ruling. This Court should reject the State's argument to the contrary.

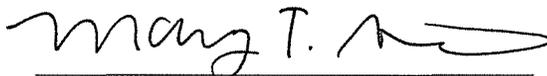
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Moncada's conviction and remand for a new trial.

DATED this 24th day of February, 2015.

Respectfully submitted,

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DIVISION TWO

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Respondent,)	
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v.)	COA NO. 46311-3-II
)	
BERNARDO MONCADA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BERNARDO MONCADA
 1040 SE COLUMBIA RIDGE DR.
 APT. #2
 VANCOUVER, WA 98664

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF FEBRUARY 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

February 24, 2015 - 5:00 PM

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