

FILED
Court of Appeals
Division II
State of Washington
12/24/2018 1:17 PM

NO. 50445-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NESTER POZO-RIVERA,

Appellant.

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

The Honorable Gretchen Leanderson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL STATEMENT OF THE CASE

The trial court initially ruled¹ Cassie could not testify about unreported Domestic Violence (DV), finding it more prejudicial than probative. 1RP 100. But the court also held that SMM could testify about the DV she observed Pozo-Rivera commit against Cassie, finding it relevant to why she waited four days to report the alleged offenses, and agreed with the prosecutor that “there are some reasons, such as her motivation for the delay, and also for her credibility.” 1RP 101.

The prosecutor asked to revisit the issue at trial. 1RP 141-42. Following voir dire of Cassie, the court admitted evidence of a February 2015 incident, finding “that it does go towards motivation for the reason for the delay [in reporting.]” 1RP 161. The defense objected. 1RP 162.

Cassie claimed Pozo-Rivera assaulted her in February 2015, and called SMM to watch, telling her “that’s what was going to happen to her because she’s going to be like me.” 1RP 170-72. SMM testified they moved after Pozo-Rivera beat her mother, a beating that made her dislike him even more. 1RP 390-91. The court instructed jurors they could only

¹ Defense counsel moved pretrial to exclude evidence of unreported acts of DV allegedly committed by Pozo-Rivera against Cassie, arguing it was irrelevant, constituted improper propensity evidence and should be excluded under ER 404(b). 1RP 93. The prosecutor disagreed, arguing it was relevant to why SMM delayed four days before reported the alleged offenses. 1RP 94.

consider the evidence “to the extent you find it relevant to issues of delayed disclosure,” and no other purpose. 1RP 184.

B. ARGUMENT

THE TRIAL COURT ERRED BY ADMITTING DV EVIDENCE.

ER 404(b) is a categorical bar to admission of prior bad act 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 (2012); ER 404(b). But such evidence may be admissible for another purpose, depending on its relevance, probative value and prejudicial effect. Id.

Before admitting evidence of a person’s prior misconduct, the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify a legitimate purpose for which the evidence may be admitted; (3) determine if the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect.²

Prior bad act evidence is presumed inadmissible and the court must resolve any doubt in the defendant’s favor.³ A trial court’s interpretation

² State v. Ashley, 186 Wn.2d 32, 39, 375 P.3d 673 (2016).

³ State v. Fuller, 169 Wn. App. 797, 829, 282 P.3d 126 (2012).

of ER 404(b) is reviewed de novo.⁴ If the trial court interprets ER 404(b) correctly, the Court reviews the trial court’s decision to admit misconduct evidence for an abuse of discretion, which occurs when the rules requirements are not followed. Id.

“[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high.⁵ To guard against this heightened prejudicial effect, the admissibility of prior acts of domestic violence is confined to cases where the State establishes their “overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events.” Id. Otherwise, the jury may well put too great a weight on a past offense and use the evidence for an improper purpose. Id.

Where prior bad act evidence is offered in a DV case to help the jury assess the credibility of the complaining witness, the evidence generally has “overriding probative value” only if the witness’s own conduct or statements raise questions of credibility. Id., at 921, 923-24. If the witness’s statements about the defendant’s guilt are consistent, prior

⁴ State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

⁵ State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

bad act evidence is not probative of the witness's credibility.⁶ Even if other evidence from a different source contradicts the complaining witness's testimony, evidence of prior DV is not probative of the witness's credibility if the witness's statements about the defendant's guilt are consistent. Gunderson, at 924-25.

The evidence of Pozo-Rivera's prior assault of Cassie was not probative of SMM's credibility because her statements about Pozo-Rivera's guilt were consistent. 1RP 199-200, 339, 401-11, 414-15; Ex. 6A. The court therefore erred in admitting evidence of a prior DV act on the basis that it was relevant to SMM's "credibility." 1RP 101.

The admission of the prior DV evidence was not harmless. The risk of unfair prejudice from prior bad act evidence is "very high" in domestic violence cases. Gunderson at 925. When prior bad act evidence is erroneously admitted, the conviction must be reversed if, within

⁶ In Gunderson, for instance, the complaining witness testified the defendant did not assault her. Id. at 920. Her testimony was not inconsistent with prior statements, as she was never asked to give a statement before trial. Id. Under these circumstances, the prejudicial impact outweighed its probative value. Id. at 923.

Similarly, in Ashley, the evidence of prior DV did not have "overriding probative value" because the complaining witness statements were consistent. Ashley, 186 Wn.2d at 47. Because her testimony was consistent with her statements to police, the evidence of prior domestic violence was not probative of her credibility. Id.

reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id. at 926.

The err was not harmless here because there is reasonably probable it materially affected the outcome of the trial. SMM molestation claim was uncorroborated. Evidence that Pozo-Rivera allegedly assaulted SMM's mother and made her watch likely led the jury to place undue emphasis on the evidence prior DV acts to conclude he must have engaged in the conduct SMM claimed he had. Under these circumstances, the erroneous admission of the prior bad act evidence was not harmless and the convictions must be reversed.

D. CONCLUSION

For the reasons stated here, this Court should reverse and remand for a new, fair trial. In the alternative, for the reasons stated in the Brief of Appellant, this Court should remand for resentencing.

DATED this 24th day of December 2018.

Respectfully submitted,

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December 24, 2018 - 1:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50445-6
Appellate Court Case Title: State of Washington, Respondent v. Nestor Pozos Rivera, Appellant
Superior Court Case Number: 16-1-03115-5

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