28818-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY J. HARRISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence relating to the incident of May 14, 2009.

2. The admission of evidence relating to the May 14, 2009 incident was improper ER 404(b) evidence and should have been excluded.

B. ISSUE

1. Where the victim's credibility is not at issue, does the trial court err by admitting evidence of a prior, similar incident?

C. STATEMENT OF THE CASE

Larry J. Harrison, a 66-year-old man, lives occasionally with his mother, Helen Harrison, at 19625 East Wellesley, Otis Orchards, trailer 82. (RP 51; 60) One day in November, 2009, Mr. Harrison arrived home with his friend Clinton Morris, and both men were intoxicated. (RP 55-56; 68-69) Mrs. Harrison became frightened because the men were drunk and fighting, so she called 911. (See Exhibits S1 & S2, CP 81) Mr. Harrison was verbally belligerent and threatened his mother while she was on the phone with the 911 operator. (Exhibits S1 & S2, CP 82-90)

During the incident, Mrs. Harrison also called her neighbor, Eller Morris. Mrs. Harrison wanted Mrs. Morris to remove her drunk son Clinton from Mrs. Harrison's trailer. (RP 66-67) When Mrs. Morris arrived at the trailer, Mr. Harrison was holding his mother against a wall, and her son was passed out in the living room. (RP 68-69) The police arrived immediately after Mrs. Morris. (RP 70)

Mr. Harrison was charged with unlawful imprisonment and second degree malicious mischief. (CP 1)

Prior to trial, the State moved to admit ER 404(b) evidence of prior bad acts. (RP 4) The act the State wanted to introduce was an incident on May 14, 2009, where Spokane County sheriff's deputies responded to a 911 call at the same address, for the same crime committed by Mr. Harrison. (RP 7-14) Mr. Harrison objected. (RP 7-17)

The trial court ruled that the evidence was admissible because of the similarities in the two crimes, and that "this wasn't a misunderstanding or a nonintentional sort of accidental thing." (RP 34) The court reasoned that the testimony about what happened on a different date during a similar call "would tend to show, for example, lack of mistake and perception . . . ." (CP 35) The court opined that "we have a string of connected offenses." (CP 35) The court also found that the evidence was probative, and not unduly prejudicial. (RP 35-36)

The State also moved to admit two recordings of 911 calls made from Mrs. Harrison and a neighbor regarding the incident. (RP 38) Mr. Harrison objected that the calls were inadmissible hearsay, as well as cumulative and in violation of ER 404(b). (RP 39; 47) The court ruled that the recordings were admissible because the callers were going to testify, and the statements made during the call were excited utterances. (RP 40-41; 47)

When the State began asking Mrs. Harrison about the May incident, Mr. Harrison raised a continuing objection. (RP 52) At one point, the State asked Mrs. Harrison: "Do you remember telling the officers in May that every time that your son was drinking, that he would become more and more violent?" (RP 54)

The State played the 911 recording for the jury, and followed up by asking multiple questions about what Mrs. Harrison told the police. (RP 55-59)

Spokane County Sheriff Deputy Ken Dodge testified at length about responding to the call in May, 2009. (RP 74-81) The deputy testified that during that call, Mrs. Harrison told the deputy that her son was becoming "increasingly violent with each drunken episode" and she was upset about this "continual problem." (RP 80)

Spokane County Sheriff Deputy Dave Lawhorn also testified – over objection – about the prior May incident. (RP 82; 85) Deputy Lawhorn testified that Mrs. Harrison said her son had broken things and made a mess in her house while he was drunk, so she called 911. (RP 85-87) Deputy Lawhorn said that he asked Mrs. Harrison if she wanted to press charges, and she said no. (RP 87)

Another officer, Charles Sciortino, testified that he was first on the scene. (RP 92) He said he heard yelling and decided to kick in the door and enter the trailer alone. (RP 94) He testified that when he burst into the trailer, he first saw Mr. Morris, appearing drunk and shocked, and next he saw Mr. Harrison down the hall, struggling with his mother. (RP 95-96)

Mr. Harrison testified that he wanted to prevent his mother from leaving because he was worried she wanted to drive, and she couldn't see well at night. (RP 138) He admitted he was trying to prevent her from leaving. (RP 138)

At the close of the State's case, the State conceded it failed to establish a dollar amount for any alleged damage done to the trailer, so the court dismissed the malicious mischief count. (RP 132-33)

The jury convicted Mr. Harrison of unlawful imprisonment. (CP 48-58) The court sentenced Mr. Harrison to 20 months' incarceration, with 24 months' community custody. (RP 192) He appeals.

D. ARGUMENT

1. THE COURT'S ADMISSION OF EVIDENCE RELATED TO MR. HARRISON'S PRIOR MISCONDUCT WAS AN ABUSE OF DISCRETION BECAUSE WITNESS CREDIBILITY WAS NOT AT ISSUE.

Evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused's propensity to commit the crime charged. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009); *see also State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (rejecting the "once a thief, always a thief" rationale for admitting evidence). However, ER 404(b) allows the introduction of prior misconduct for other purposes such as demonstrating motive, intent, absence of mistake or accident. Washington courts have recognized that evidence of misconduct is admissible to prove the alleged victim's state of mind. *See, e.g.*, *State v. Nelson*, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006) (allowing evidence of past physical abuse to demonstrate the victim's fear of the defendant and explain the apparent inconsistency of the victim not reporting the full extent of the abuse earlier).

The trial court must find that the evidence is logically relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting prior bad acts as evidence in a

criminal prosecution. *State v. Barragan*, 102 Wn. App. 754, 758, 9 P.3d 942 (2000); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The court then balances the probative value of the evidence against its potential for prejudice. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Lough*, 125 Wn.2d at 853; *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The appellate court reviews the trial court's interpretation of ER 404(b) *de novo* as a matter of law. *Foxhoven*, 161 Wn.2d at 174. If the trial court interprets ER 404(b) correctly, the appellate court reviews the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.*

The court may admit evidence of past domestic violence where the credibility of the victim is a central issue in the case. In *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996), the court admitted evidence related to prior domestic violence. The court found that the prior domestic

violence incidents were relevant and necessary for the fact finder to assess the victim's credibility. In that case, the victim permitted the defendant to see her despite a no-contact order, and she minimized the degree of violence that occurred, thus putting her credibility at issue. *Id.*

In *Nelson*, the State wanted to introduce evidence of Mr. Nelson's previous violent and abusive demeanor after drinking to show that his wife was afraid of him. The court found that this was relevant to explain her inconsistent reports to the police. The victim minimized the attack immediately after the incident. Significantly, Mr. Nelson argued that his wife was lying, and he used her inconsistent statements as proof of that. *Nelson,* 131 Wn. App. at 115-16.

Division Three held that the evidence of the history of abuse was relevant to establish a plausible alternative explanation for Ms. Nelson's inconsistent statements and to rebut Mr. Nelson's claim that it showed she fabricated the assault. *Nelson,* 131 Wn. App. at 116. The admission thus fell within the requirements of ER 404(b).

This case is distinguishable from the cases where evidence of prior domestic violence is admissible. Mr. Harrison did not claim his mother was lying, and did assert she was making any inconsistent statements. In fact, Mrs. Harrison did not make any material inconsistent statements, but instead on the stand, she simply minimized her son's behavior.

Nor did defense counsel argue that Mrs. Harrison was lying. (*See* RP 165-68) Instead, Mr. Harrison's defense was that the restraint was not substantial, and thus no crime was committed. (RP 169)

In sum, Mrs. Harrison's credibility was not at issue whatsoever; the only issue was whether she was substantially restrained from moving about by her son. The effect of admitting Mr. Harrison's prior drunken incident with his mother was to inform the jury that this is Mr. Harrison's character trait, and he acted in conformity with that again in the present case.

The reasons for allowing the prior bad acts in *Nelson* are not present in this case. The court should reverse and remand for a new trial with instructions to exclude any evidence of the May incident.

E. CONCLUSION

In this case, the court's decision to admit evidence of Mr. Harrison's prior intoxicated episode involving his mother was in error. The evidence was irrelevant, and the prejudice of this character evidence

far outweighed the nonexistent probative value. This court should reverse and remand.

Dated this 2nd day of September, 2010.

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