28818-8-III

FILED
OCT 28 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY J. HARRISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Andrew J. Metts
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I.

APPELLANT'S 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.

II.

ISSUE PRESENTED

A. DID THE TRIAL COURT ERR IN ADMITTING TESTIMONY FROM A PRIOR INCIDENT?

III.

STATEMENT OF THE CASE

The defendant was charged by information in Spokane County Superior Court with one count of malicious mischief and one count of unlawful imprisonment. The State dismissed the malicious mischief charge at trial and proceeded on the single count of unlawful imprisonment.

Ms. Helen Harrison is the defendant's mother. RP 51. Ms. Harrison testified that in the previous Spring, the defendant drank some "rot-gut whiskey" and damaged the inside of Ms. Harrison's trailer. RP 52. At the time, the defendant was staying with his mother in the trailer. RP 51. The police were called and the defendant was arrested for malicious mischief. RP 15.

Ms. Harrison minimized nearly every statement in her testimony stating, "Well, I don't like testifying here against him at all." RP 53.

The actions leading to this case occurred on November, 23, 2009. RP 91. The state played recordings of the 911 call made by Ms. Harrison. RP 54-55. Ms. Harrison again minimized her son's involvement, saying her son's friend was drunk and falling. RP 56. According to Ms. Harrison, this friend [Clinton Morris] was the only one who broke anything inside the trailer. RP 56, 61.

Ms. Harrison testified that she knew she was not as strong as her son who was blocking the doorway. RP 57. Ms. Harrison stated, "I knew I couldn't and I didn't want him to hit me, so I didn't." RP 57.

Ms. Harrison denied that her son pushed her down the hallway to her bedroom. RP 58. She did admit that the defendant had been drinking. RP 58. Ms. Harrison denied telling officers that she had been pushed in the chest area. RP 59. According to Ms. Harrison, the defendant

stumbled and fell against her, knocking her into a doorknob in the hallway door. RP 59.

Eller Morris testified that she received a call from Ms. Harrison and Ms. Harrison said, "Help me." When the witness was outside her residence which is across the street from Ms. Harrison, the witness heard Ms. Harrison screaming and Ms. Harrison sounded scared. RP 68. As Ms. Morris entered Ms. Harrison's trailer, she heard Ms. Harrison say, "Don't hurt me, "Don't hurt me." RP 68-69. Ms. Morris testified that Ms. Harrison could not leave the bedroom because the defendant was holding her against a door. RP 69. Ms. Morris' testimony was that the defendant had the bedroom door blocked and Ms. Harrison was not able to leave the bedroom. RP 72.

Spokane Sheriff's Deputy Ken Dodge testified that he responded to the Harrison residence on May 14, 2009. RP 75-76. Ms. Harrison told the deputy that her son, the defendant, was upset and angry and was becoming increasingly violent with each drunken episode. RP 80. Ms. Harrison told the deputy that the defendant had "...torn the house apart." RP 80. Ms. Harrison directly stated to the deputy that the defendant had done the damages to her trailer. RP 80.

Deputy Dave Lawhorn responded to Ms. Harrison's address as well on May 14, 2009. RP 81. Ms. Harrison told Dep. Lawhorn that the defendant damaged the interior of her trailer. RP 86.

Deputy Charles Sciortino stated that he responded to the address in question on November 23, 2009. RP 91. Dep. Sciortino heard a woman who appeared to be in distress yelling and screaming. RP 93. At one point the deputy heard the female yell, "Let go of me." RP 93. The deputy also heard a male voice yell, "I'm going to kill you." RP 93. Deputy Sciortino attempted to yell commands to the defendant who "...still seemed to be struggling with the elderly woman in the hallway area." RP 96.

Deputy Kevin Mosher spoke with Ms. Harrison on the November date and she stated that the defendant continued to tell her he was going to kill her. RP 111. Ms. Harrison also told the deputy that the defendant physically pushed on her chest and shoulder area to make Ms. Harrison move to the bedroom area. RP 111. Ms. Harrison stated that the defendant prevented her from leaving the bedroom of the residence by blocking the way. RP 111.

The defendant took the stand and denied threatening to kill his mother. RP 142. The defendant stated that he was attempting to protect

his mother by preventing her from driving. The defendant did not think Ms. Harrison was capable of driving at night. RP 137.

The jury found the defendant guilty of unlawful imprisonment. CP 20. The defendant then filed this appeal. CP 66-88.

IV.

ARGUMENT

The defendant argues that the trial court erred when it permitted testimony from Ms. Harrison regarding a prior incident involving the defendant and his mother, Ms. Harrison. The date of the previous event was May 14, 2009.and the crime for which the defendant was convicted occurred on November 23, 2009.

Prior to the jury being brought in, the defendant moved to suppress the evidence of the prior similar incident claiming that the prior incident was not admissible under ER 404(b). The defendant continued to lodge protests regarding admission of the prior incident at various points in Ms. Harrison's testimony.

The defendant asserts that he did not argue that his mother was lying or making inconsistent statements. The defendant claims that his mother made no material inconsistent statement. This is incorrect. Ms. Harrison told police that the defendant had damaged items in the residence

on May 14, 2009. When Ms. Harrison testified, she stated that the defendant's friend (Clinton Morris) did all the damage to the interior of her trailer. RP 61. Ms. Harrison denied that she was afraid of the defendant but the neighbor heard Ms. Harrison screaming in fear. RP 68.

Contrary to the defendant's claims on appeal, Ms. Harrison's testimony, taken as a whole, was one large inconsistent statement. To claim otherwise is to ignore the record. Ms. Harrison took the stand and did her best to minimize her son's actions. She stated that she did not want to testify against him and "softened" most of her responses with language claiming that the defendant was a good person and it was only the drinking that made him behave badly.

Amongst a series of contradictory statements, Ms. Harrison testified that Larry didn't break anything." RP 56. Ms. Harrison testified that she did not try to leave the bedroom because: "...I didn't want him to hit me, so I didn't." RP 57. Yet, even after stating testifying that she did not want to be hit by the defendant, she stated, "Because he never hit me." RP 58. Obviously, if the defendant never struck Ms. Harrison, there was no reason for her to state that she did not want him to hit her. The statement that she did not try to leave the bedroom is inconsistent with testimony by the neighbor and police officers.

Ms. Harrison was asked if she remembered telling a police officer that the defendant had pushed her "down the hallway and into the bedroom." RP 58. Ms. Harrison responded: "Well, no he didn't." RP 58. Ms. Harrison denied telling police that the defendant pushed her on her chest. RP 59. Ms. Harrison stated that the defendant stumbled and fell against her but did not do that on purpose. RP 59.

Ms. Harrison blamed the entire incident on Clinton Morris. RP 63.

The testimony of the deputies showed that Ms. Harrison told them a completely different story at the time of the incident.

Deputy Sciortino testified that he could hear yelling and screaming coming from the residence trailer. RP 93. He heard a woman yell, "Let go of me." RP 93. Dep. Sciortino heard a male voice yell, "I'm going to kill you." RP 93.

Deputy Kevin Mosher stated that he spoke to Ms. Harrison. RP 111. She told the deputy that the defendant was physically pushing her down the hallway. RP 111. Ms. Harrison also told the deputy that the defendant blocked her from leaving the bedroom and she was pinned against the wall pushing her back into a doorknob. RP 112.

The diametrically opposed testimony of Ms. Harrison, when contrasted with what the officers heard and what Ms. Harrison told them,

made the admission of the prior incident very relevant to establish that the events actually occurred and to put Ms. Harrison's testimony into context.

According to the Washington State Supreme Court, the admission of evidence is governed by an abuse of discretion standard. *State v. Magers,* 164 Wn.2d 174, 181, 189 P.3d 126 (2008); *citing State v. Pirtle,* 127 Wn.2d 628, 648, 904 P.2d 245 (1995). The Court stated that it "will not disturb a trial court's rulings on ... the admissibility of evidence absent an abuse of the court's discretion." *Id.* at 181*; citing State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In his appellate briefing, the defendant points out that he did not argue that Ms. Harrison was lying. This is irrelevant. It is faulty argument to insinuate that since the defendant did not first raise the issue of Ms. Harrison's credibility, the evidence of the May 14, 2009 incident would not be admissible. A "not guilty" plea by the defendant places the burden on the State to prove every essential element of a crime beyond a reasonable doubt. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). All elements were in play at the trial and the defendant cannot inhibit the State's ability to prove its case simply by not staying quite on a particular issue.

As noted by the defendant on appeal, evidence pertaining to prior wrongs is generally not admissible under ER 404(b) to show character of

the defendant or action in conformity with earlier actions. ER 404(b). Evidence of prior wrongs is admissible, however, for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). In this case, the trial court focused on the element of "absence of mistake or accident." RP 34. Evidence of prior wrongs is admissible if its probative value outweighs its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The State in *State v. Grant,* 83 Wn. App. 98, 920 P.2d 609 (1996) argued that the evidence of the defendant's prior assaults was admissible because the evidence bore on the question of witness credibility as well as the question of whether the assaults at issue actually occurred. *Id.* at 105. The court of appeals agreed with the State. *Id.* The Washington State Supreme Court agreed with the *Grant* court in *State v. Magers,* 164 Wn.2d at 105.

It would be proper to admit the May 14, 2009, for the purposes of making it more likely that the events involved in this trial actually occurred. The issue of explaining and expanding on Ms. Harrison's credibility was a second reason for admission. The events occurring on May 14, 2009, and the events involved in this case were remarkably similar and not far apart in time. RP 35. The trial court held that the prior

evidence was admissible to show that there was no misunderstanding or an accidental situation. RP 34.

The trial court found that the proffered evidence was probative on the question of whether or not the charged acts were committed. RP 35. The trial court ruled that the proffered evidence was not unduly prejudicial.

The May 14, 2009 evidence was admitted. RP 36. Under *Grant, supra* and *Magers, supra* the trial court did not abuse its discretion and the trial court had clear caselaw support for admitting testimony of a prior incident in a domestic violence situation.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 8TH day of October, 2010.

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