

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RICHARD MONROE HARDING, Appellant.

RESPONDENT'S BRIEF

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ANSWERS TO ASSIGNMENTS OF ERROR & ISSUES RAISED

1. In a county which only has the capacity to hear one Superior Court jury trial at a time, the trial court did not violate the appellant's constitutional right to a public trial by resetting the appellant's trial date "in chambers" because the appellant had a public hearing, at which he was present, and at which the parties argued when the appellant's case should be set for trial, within speedy trial, the day before the trial court reset the appellant's trial date, after another case, which had priority, proceeded to trial, and appellant's counsel was present and advised. The appellant was subsequently afforded a public trial, within speedy trial, at which a jury convicted him of Assault in the Second Degree – Domestic Violence for strangling his girlfriend.
 - a. The trial court's reset of the appellant's trial date, within speedy trial, does not implicate the public trial right under the Supreme Court's two-part "experience and logic" test because the appellant already had a public hearing, at which he was present, and at which the parties argued when the appellant's case should be set for trial, within speedy trial, the day before the trial court reset the appellant's trial date, after another case, which had priority, proceeded to trial, and appellant's counsel was present and advised.
 - b. The trial court did not need to do a Bone-Club analysis to determine whether to close the proceedings to the public because the record does not reflect that the trial court closed the court proceedings or any part filed a motion for the same.
 - c. The record does not reflect that the trial court entered a scheduling order in chambers. Therefore, rescheduling a trial within speedy trial does not require consideration of the Bone-Club criteria.
 - d. There was no closure, therefore, no error.
 - e. The appellant's public trial right is not structural error

because his public trial right was not implicated, thereby requiring a Bone-Club analysis.

2. The trial court did not err in admitting evidence of the appellant's prior bad acts of domestic violence he committed against the victim, under ER 404(b) when the trial court read the two cases, on which the state relied, set out the reasons for its ruling, and balanced the probative value against its prejudicial effect.
 - a. The trial court did not abuse its discretion because it relied upon the State's narrative offer of proof of two specific incidents - both of which involved the same victim, the same investigating police officer, similar fact patterns, and one of the two incidents resulted in the appellant being convicted.
 - b. The trial court expressly cited a Division III and Division I case in allowing evidence of prior acts of domestic violence to be admitted for the dual purposes of rebutting appellant's claim that the victim had fabricated the most recent allegation and to allow the jury to evaluate the victim's credibility.
 - c. The trial court balanced the probative value against its prejudicial effect.
 - d. Evidence of prior misconduct is always unfairly prejudicial. The question is whether it is outweighed by the probative value when the appellant told the investigating police officer that the victim had fabricated the allegation and the appellant had previously been convicted of assaulting the victim under similar circumstances.
 - e. It is not reasonably probable that wrongful admission of the ER 404 (b) evidence affected the outcome of the case because the jury heard from both the victim and the appellant, leaving the jury to decide whether the victim had fabricated the most recent allegation and was not credible.

STATEMENT OF THE CASE

Kittitas County has two elected Superior Court Judges and one Superior Court courtroom where all jury trials are held. This is a fact which the Respondent is asking this court take judicial notice of in evaluating this appeal.

On July 31, 2013, a Kittitas County jury convicted the Appellant of Assault in the Second Degree – Domestic Violence under two alternative theories: that he either strangled or suffocated her or, alternatively, assaulted the victim and inflicted substantial bodily harm when he threw her out his residence, rendering her unconscious. CP 33.

The Appellant's case was originally scheduled for trial on July 9, 2013 with a Omnibus/Pre-Trial/Status hearing scheduled the day before trial on July 8, 2013. The Appellant's time for trial was scheduled to expire on August 2, 2013 based upon the Appellant's arraignment on June 3, 2013. CP 82.

On July 8, 2013, the Appellant's attorney, with the Appellant present in court, announced: "Your Honor, we are asking to go to trial tomorrow." RP 10.

The State requested a continuance, within the Appellant's time for trial, because the assigned prosecutor was on military orders. RP 10. The

State also advised the trial court that another case (*State of Washington v. Michael Foradory*) had priority to proceed to trial because that individual's expiration for time for trial was earlier than the Appellant's expiration on August 2, 2013. RP 11.

However, the trial court denied the State's request for a continuance and ordered both cases to proceed to trial the next day, explaining: "What we are going to do is work off of the assumption that Foradory is going to trial tomorrow and we are going to trail your (Appellant) matter for tomorrow in the event that Mr. Foradory pleads guilty or continues it or --."

The next day (July 9, 2014), the transcript of which the Appellant's attorney did not include, Appellant's attorney appeared in court to inquire if the Appellant's case would proceed to trial. The trial court advised Appellant's attorney that the Appellant's case would not proceed to trial because the Foradory case was going to trial. CP 86-87.

The parties then discussed which of the two cases had priority under the speedy trial rule because it was believed Mr. Foradory had failed to appear at his last court appearance which would have restarted his speedy trial time, resulting in the Appellant's case being given priority. However, the State attorney, assigned to prosecute the Foradory case, told the trial court that Foradory had only come to court late which, she argued,

would not reset the commencement date of his time for trial. The trial court ultimately decided: “Well, we are going to proceed today with the *State of Washington versus Michael Foradory.*” CP 87-89.

The trial court subsequently entered an Amended Scheduling Order resetting the Appellant’s trial to July 30, 2013, three days before his time for trial expired. The trial court signed the scheduling date the same date at the hearing at which Appellant’s attorney appeared: July 9, 2013. CP 85.

On the day of Appellant’s trial, the State moved to introduce two prior incidents of domestic violence in which the Appellant assaulted the victim under ER 404 (b). The State told the court the first incident occurred in July 2012 and resulted in the defendant being convicted of Assault in the Fourth Degree – Domestic Violence for which the State proffered a “bona fide Judgment and Sentence.” RP 36.

The State advised that the second incident, in March 2013, was dismissed. The State set out a narrative offer of proof of both incidents. RP 33-35.

The State described, in detail, what happened in each incident, pointing out that the two prior incidents and current incident all shared similarities to include having occurred at the Appellant’s residence, involved strangulation, being forcibly ejected from the Appellant’s

residence, and having her personal effects thrown at her while she sat outside the Appellant's residence. RP 33-35.

The State told the court that it was seeking to introduce the evidence to both rebut the Appellant's claim to law enforcement that the victim had fabricated the current allegation and to allow the jury to assess her credibility. RP 32.

The State cited legal authority from Karl B Tegland's Courtroom Handbook on Washington Evidence under the ER 404 (b) notes section: State v. Nelson, 131 Wash.App. 108, 125 P.3d 1008 (Div. 3 2006) and State v. Baker, 162 Wash.App. 468, 259 P.3d 270 (Div. 1 2011). RP 31-32.

In Nelson, this court held that defendant's previous acts of violence against the victim were admissible to rebut the defendant's claim that the victim had fabricated the most recent charges.

In Baker, Division I held that that the State could introduce two prior domestic violence incidents, even though the victim had not recanted, in order for the jury to evaluate the victim's credibility in light of the dynamics of domestic violence relationships.

The Appellant objected to the admissibility of the evidence, essentially arguing that it would be "highly prejudicial." RP 36.

The trial court took a recess to review the two cases. RP 39.

The trial court returned to the bench and advised the parties that after reviewing the two cases cited by the State, it concluded that the evidence was relevant and probative particularly as to the victim's credibility, in light of the Appellant's assertion that the victim had fabricated the recent account. RP 40.

The trial court acknowledged the evidence was "potentially prejudicial but I think it's also probative as to those particular issues." RP 41.

At trial, both the Victim and Appellant testified about their respective versions of both the prior and current offenses.

The jury found the Appellant guilty as charged.

This appeal followed.

ARGUMENT

- 1. In a county which only has the capacity to seat one Superior Court jury at a time, the trial court did not violate the appellant's constitutional right to a public trial by resetting the appellant's trial date "in chambers" because the appellant had a public hearing, at which he was present, and at which the parties argued when the appellant's case should be set for trial, within speedy trial, the day before the trial court reset the appellant's trial date, after another case, which had priority, proceeded to trial, and appellant's counsel was present and advised. The appellant was subsequently afforded a public trial, within speedy trial, at which a jury convicted him of Assault in the Second Degree – Domestic Violence for strangling his girlfriend.**

Respondent accepts the law as stated by Appellant but simply argues that his constitutional right to a public trial was not implicated because the record does not reflect that the trial court set the Appellant's new trial date, within his time for trial, "in chambers."

To the contrary, the trial court held a public hearing, the day before Appellant's scheduled trial date, at which time the parties argued at length about whether the Appellant's case or another case should proceed to trial, based upon their speedy trial expirations.

The trial court then told the Appellant that his case would "trail" the first case, in the event the first case did not proceed to trial.

The next day, the record, which Appellant counsel apparently forgot to request (**NOTE:** Understandable because it is the record for the case which preceded Appellant's case to trial: State v. Foradory), demonstrates that Appellant's attorney appeared to determine if the Appellant's case would proceed to trial.

The trial court advised the Appellant's attorney that the first case would proceed to trial and subsequently executed an Amended Scheduling Order dated the same day as the public hearing.

Therefore, this issue is moot.

- a. The trial court's reset of the appellant's trial date, within speedy trial, does not implicate the public trial right under the Supreme Court's two-part "experience and logic" test because the appellant already had a public hearing, at which he was present, and at which the parties argued when the appellant's case should be set

for trial, within speedy trial, the day before the trial court reset the appellant's trial date, after another case, which had priority, proceeded to trial, and appellant's counsel was present and advised.

Similarly, the record does not demonstrate that the trial court took any action outside the courtroom. However, even if the trial court actually executed the Amended Scheduling Order "in chambers," the action was purely ministerial since the trial court had already decided, at two public hearings, that Appellant's case would not proceed to trial.

Under the "experience and logic" test, the execution of the Amended Scheduling Order, following two public hearings which addressed the Appellant's trial date, would not have historically constituted a hearing that needed to open to the public public (experience prong) nor would the public have played a significant positive role in the functioning of the particular process in question (logic prong).

In addition, it is unclear from the record whether the trial court actually executed the Amended Scheduling Order "in chambers."

Therefore, the public trial right does not attach under the facts and circumstances of this case.

- b. The trial court did not need to do a Bone-Club analysis to determine whether to close the proceedings to the public because the record does not reflect that the trial court closed the court proceedings or any part filed a motion for the same.

If the public trial right, as argued above, is not implicated, then there was no need for the trial court to consider, on the record, the five criteria enumerated in State v. Bone-Club, 128 Wn.2d 254 254, 906 P.2d 325 (2006).

In addition, the Bone-Club facts and the court's ruling are easily distinguishable from this case. In Bone-Club, the trial court closed the courtroom, on the State's motion, at a pre-trial suppression hearing regarding the admissibility of the Defendant's statement to law enforcement.

Our State's Supreme Court then set out a weighing test that the trial court had to undertake before closing the courtroom.

In this case, there was no motion to close the courtroom. The parties were present at two hearings at which it was decided that the Appellant's case would be reset because another case had priority.

Therefore, the trial court had no cause to conduct a Bone-Club analysis.

- c. The record does not reflect that the trial court entered a scheduling order in chambers. Therefore, rescheduling a trial within speedy trial does not require consideration of the Bone-Club criteria.

For the same reasons argued above, the trial court had no reason to conduct a Bone-Club analysis, based upon the record of the two public hearings which were conducted.

- d. There was no closure. Therefore, there was no error.

- e. The appellant's public trial right is not structural error because his public trial right was not implicated, thereby requiring a Bone-Club analysis.

The violation of the public trial right would constitute structural error and not be subject to harmless error analysis. But the Appellant's public trial right was not implicated, under the facts and circumstances of this case, borne out by the record filed for this case and excerpts from the record of the case (State v. Foradory) which actually proceeded to trial on the date the Appellant wanted to proceed to trial.

Therefore, reversal is not warranted.

- 2. The trial court did not err in admitting evidence of the appellant's prior bad acts of domestic violence he committed against the victim, under ER 404(b) when the trial court read the two cases, on which the state relied, set out the reasons for its ruling, and balanced the probative value against its prejudicial effect.**

Evidence Rule 404 (b) provides that:

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.

ER 404 (b) evidence has also been held admissible for other miscellaneous purposes to include evidence to demonstrate the victim's fear of the defendant.

As Karl B Tegland notes in his 2013-2014 Courtroom Handbook on Washington Evidence under the ER 404 (b), courts are increasingly admitting prior acts of domestic violence noting that this evidence can be both highly probative and highly prejudicial. Tegland cites: State v. Nelson, 131 Wash.App. 108, 125 P.3d 1008 (Div. 3 2006) and State v. Baker, 162 Wash.App. 468, 259 P.3d 270 (Div. 1 2011). RP 31-32.

In Nelson, this court held that Defendant's previous acts of violence against the victim were admissible to rebut the Defendant's claim that the Victim had fabricated the most recent charges.

In Baker, Division I held that that the State could introduce two prior domestic violence incidents, even though the Victim had not recanted, in order for the jury to evaluate the Victim's credibility in light of the dynamics of domestic violence relationships.

The court may rely upon a narrative offer of proof by the attorney offering the evidence, explaining what the evidence will show if admitted. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

In order to justify admission of 404 (b) evidence, the trial court must balance the **probative value** of permitting the introduction of the

prior misconduct **against the prejudicial effect.** State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984). In its analysis, the court should consider how probative the evidence is, specifically whether the misconduct proves the crime charged as opposed to having only marginal relevance. State v. Boggs, 80 Wn.2d 427, 495 P.2d 321 (1972).

- a. The trial court did not abuse its discretion because it relied upon the State's narrative offer of proof of two specific incidents - both of which involved the same victim, the same investigating police officer, similar fact patterns, and one of the two incidents resulted in the appellant being convicted.

In this case, the trial court did not abuse its discretion in admitting this evidence, following a lengthy offer of proof by the State to include citation to Tegland and the two before cited cases: State v. Nelson, 131 Wash.App. 108, 125 P.3d 1008 (Div. 3 2006) and State v. Baker, 162 Wash.App. 468, 259 P.3d 270 (Div. 1 2011).

Both prior incidents involved the same victim, the same investigating police officer, similar fact patterns, and one of the two incidents resulted in the Appellant being convicted.

Therefore, the trial court had more than a preponderance of evidence on which to reach its decision. Any argument to the contrary is merely semantical because the trial court specifically told the parties that it was relying upon the two cases cited after hearing the State's offer of proof.

- b. The trial court expressly cited a Division III and Division I case in allowing evidence of prior acts of domestic violence to be admitted for the dual purposes of rebutting appellant's claim that the victim had fabricated the most recent allegation and to allow the jury to evaluate the victim's credibility.

Similar argument as stated above.

- c. The trial court balanced the probative value against its prejudicial effect.

After reviewing the two cases cited, the trial court returned to the bench and advised the parties that it was ruling that the evidence was relevant and probative particularly as to the victim's credibility, in light of the Appellant's assertion that the victim had fabricated the recent account.

RP 40.

The trial court acknowledged the evidence was "potentially prejudicial but I think it's also probative as to those particular issues." RP 41.

- d. Evidence of prior misconduct is always unfairly prejudicial. The question is whether it is outweighed by the probative value when the appellant told the investigating police officer that the victim had fabricated the allegation and the appellant had previously been convicted of assaulting the victim under similar circumstances.

In this case, the trial court found that the probative value outweighed the prejudice because the prior bad acts rebutted Appellant's

claim that the Victim had fabricated the incident and served to offer the jury evidence to assess the Victim's credibility or even lack thereof.

Therefore, it is insufficient for the Appellant to simply assert that the evidence was prejudicial without addressing the probative value found by the trial court.

- e. It is not reasonably probable that wrongful admission of the ER 404 (b) evidence affected the outcome of the case because the jury heard from both the victim and the appellant, leaving the jury to decide whether the victim had fabricated the most recent allegation and was not credible.

The jury heard evidence of the two prior incidents in which one resulted in the Appellant's conviction and the second was *dismissed*. The latter is particularly significant because, just as the trial court ruled, the jury had information in its possession in which one of the Victim's allegations was validated by the Appellant's conviction but the second was not – going to the Victim's credibility or lack thereof.

In making that credibility assessment, the jury could then decide whether the Victim had fabricated the current allegations.

Because the Appellant chose to testify and offer his count, the jury, as trier of fact, was able to compare and contrast the two prior incidents, in judging the credibility of the Victim's testimony versus the Appellant's testimony.

Therefore, it is not reasonably probable that admission of the 404 (b) evidence affected the outcome of the case.

CONCLUSION

Based upon the foregoing legal analysis, the State of Washington respectfully requests that this court deny the Appellant's request to vacate his conviction and remand for a new trial.

Dated this 13th day of June 2014.

Respectfully submitted,

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