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No. 36539-5-III

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

STATE OF WASHINGTON, Plaintiff/Respondent

v.

ANTONIO ABONZA, Defendant/Appellant

BRIEF OF RESPONDENT

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RESTATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion when it admitted evidence under rule 404b?
2. Should the \$200 filing fee be struck?

BRIEF ANSWERS

1. No. The appellant entered a plea of guilty to the trespass charge and therefore whether evidence from the criminal trespass should have been admitted in the rape trial needed to be analyzed under ER 404b, and the trial court did not abuse its discretion in admitting this evidence.
2. Yes. The state agrees with the appellant that this fee should be struck.

STATEMENT OF THE CASE

On October 26, 2018, the State filed a second amended information, charging Antonio Abonza with count one - Rape in the Third Degree, and count two, Criminal Trespass First Degree. CP 9-11. Prior to trial, Mr. Abonza filed a motion to sever the two counts and a hearing on the issue was held on December 12, 2018. RP 5-25. During the hearing, the trial court found that there was no specific defense other than a general defense of "I didn't do it" or "denial" as to both counts. RP 14, 18. There was no offer of proof

from the defendant as to any claim of prejudice or any issues in testifying on one count versus the other count. RP 19. The Court also found that there were common circumstances in each count, including the same victim, same house/location, with common events and facts that overlapped and were cross-admissible. RP 16.

Most important to the issue at hand on this appeal is that the trial court analyzed whether the evidence from each count would be admissible in separate trials under Evidence Rule 404b. RP 19-20. The trial court went on to find that even though the two counts were not part of a single scheme or plan the two crimes were of a same or similar character and connected in their actions. RP 20. Finally, the trial court did find that any relevance was not substantially outweighed by the prejudice. RP 23, CP 51.

In a tactical decision as a result of the trial court ruling that it would not sever the two counts, the appellant entered a plea of guilty as to count 2, Criminal Trespass in the first degree. RP 27, 31. The plea was entered into knowingly, voluntarily and intelligently. RP 34. Regardless of the plea, the trial court found that the evidence from either count would be admissible even in

separate trials due to the res gestae exception of evidence rule 404b. CP 51. The Court also found that the evidence from both counts would be admissible in separate trials for each charge under ER 404b to prove absence of mistake, intent, knowledge, preparation, plan or knowledge. CP 51, RP 19-20, 29-30. Therefore, the trial court ruled that evidence from the Criminal Trespass conviction was admissible under ER 404b in the rape trial. CP 51, RP 19-20, 29-30.

During the trial, the jury heard opening statements from both the state and the appellant's counsel, and then from several witnesses including the appellant. RP 157-166. Defense counsel first revealed at this time that part of the theory of the case was that A.R.M. didn't report the rape until several weeks later because she was scorned due to the fact that Mr. Abonza said he would get a hold of her but never contacted her after the "consensual sexual encounter." RP 166.

A.R.M. testified she was a student at Washington State University and knew the appellant from a class they had together. RP 168. A.R.M. and the appellant had worked on one project together for about two weeks. RP 170. After the class ended in

December of 2017, they didn't see each other or communicate directly for months, until April 14, 2018. RP 170-71, 243-44. Both the appellant and A.R.M. testified that at no time during their work on the class, in the intervening months from December 2018 up to and including the night of April 14, 2018, was there ever a discussion about either of the two being romantically or sexually interested in each other, or any intention to have sexual intercourse on April 14, 2019. RP 170-71, 182-83, 213, 244, 259.

On April 14, 2018, A.R.M. had been out with friends earlier and had been drinking. RP 171-72. Around 1:00 a.m., she was at a local bar in Pullman trying to find her sister, but after walking around for a while she didn't find her sister and decided to go home. *Id.* Before A.R.M. left the bar, she and the appellant saw each other, and after she got home he texted her asking to come hang out with her and she said ok. RP 171-73, 202-203. A.R.M. was waiting in her room in the basement when she heard footsteps upstairs in the kitchen around 2:00 a.m. RP 173, 183. She had not given the appellant permission to enter the home without knocking, and he did not text her that he had arrived like her friends usually would have. RP 173-74. They briefly talked about the hedgehog

that A.R.M. had in her room, then he undressed down to his boxers and got into her bed where she was getting ready to watch a show on her computer. RP 182. It was customary for A.R.M. to watch videos on her computer using the internet as their home didn't have cable or a central television. RP 174, 179-80. A.R.M. was wearing her usual pajamas which consisted of a t-shirt or tank top, shorts and underwear. RP 184.

A.R.M. was in shock that the appellant had stripped down to his underwear and gotten in the bed with her. RP 183. A.R.M. fell asleep and last remembered her laptop being open and being fully dressed. RP 184-85. When A.R.M. woke up it was around 7:00 a.m. in the morning, she was naked, laying on her side, and her vagina was sore. RP 184-86. The appellant was rubbing her side, so A.R.M. rolled onto her back to see what was happening as she was disoriented, and the appellant then got on top of her and started to kiss her. RP 186-87. A.R.M. told the appellant "no, I don't want to" have sex as many as five times over the course of 10 minutes, though he did not stop having sex with for several minutes after she last asked him to stop. RP 186-88. After the rape was over, both got dressed and A.R.M. escorted the appellant out of her

house through a basement exit and then almost immediately texted her best friend that she had been assaulted. RP 188-89. A.R.M. did not report the incident to law enforcement due to fears of not being believed, reliving the event and being scared. RP 192-93.

A.R.M. did not see or communicate with Mr. Abonza after that for several weeks, until the night of May 1, and the early morning hours of May 2, 2018. RP 193. A.R.M. saw Mr. Abonza at the same bar she had seen him at back in April but tried to avoid him and then went home. RP 193. There was no conversation or communication between them that night, but both A.R.M. and Mr. Abonza testified that around 4:00 a.m. Mr. Abonza entered her house; woke up the other roommate in the basement by entering her room; jiggled the locked door handle for almost 5 minutes on A.R.M.'s door; and called out A.R.M.'s name despite no response from her nor any invitation to come over. RP 193-95, 242-43. Mr. Abonza heard other roommates looking for him, hid in the bathroom right by A.R.M.'s room, and was eventually confronted and told to leave by another man in the house. RP 197-98. Two of A.R.M.'s roommates testified that they also saw Mr. Abonza in or near the house on May 2nd and that he had to be told forcibly to leave more

than once. RP 215-226, 229-235. In fact, Mr. Abonza lingered in the front yard *after* being removed from the basement and Ms. Quilty had to yell to him before he finally left the area. RP 233. Mr. Abonza testified that he knew he shouldn't have been in there, but was "a good guy and wanted to see where her mind was at" (referring to A.R.M.) because he believed she was upset that he hadn't contacted her since their sexual encounter 2.5 weeks earlier. RP 242-43, 260, 262. During the incident on May 2nd, 911 was called and a Pullman Police officer showed up to investigate the criminal trespass. RP 198-99. When asked if anyone knew the appellant, A.R.M. spoke up and said that she did, and then reported the rape incident from several weeks before. RP 199. A.R.M. told the officer about the rape because she was scared for herself and her roommates that Mr. Abonza had returned uninvited. *Id.*

Mr. Abonza testified that the sex was consensual and he believed the only time A.R.M. told him to stop he ceased having sex with her. RP 246-49. Mr. Abonza then testified that after the sex, as she was escorting him out of the house, he told A.R.M. he would keep in touch and text her when he got back from a camping trip. RP 256-57. Mr. Abonza stated that when he saw her at the bar

two and a half weeks later she seemed upset because he told her he would contact her and yet he never did. RP 242, 260. He also testified he called and texted A.R.M. several times from jail the next morning and she never responded to the calls or texts. RP 200-201, 263-65. In those texts he said that A.R.M. was one of the only people that understood him and he wanted to explain what was going on to her, despite them having little to no meaningful conversation outside of their class project. RP 201.

During the closing argument the State emphasized instruction number 9, which informed the jury they couldn't use the evidence from the trespass to infer that because of the trespass he committed the rape. RP 286. Mr. Abonza's lawyer argued that A.R.M. was upset because Mr. Abonza wasn't a gentleman and failed to treat her with decency when he failed to contact her after the event. RP 290.

ARGUMENT

I. The trial court did not abuse its discretion when it admitted the 404b evidence of Mr. Abonza's actions during the May 2nd trespass incident as it was both res gestae of the rape event and evidence of motive.

The issue in the case at bar is not one of whether or not the trial court should have severed the two counts before trial as that issue was nullified by the defendant's knowing, voluntarily and intelligently entered plea of guilty as to count 2, the criminal trespass charge. After that plea, the issue then becomes was the evidence admissible under Evidence Rule 404(b). ER 404(b) states:

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.

Determining whether 404(b) evidence should be admitted requires the trial court to determine (1) that the evidence is logically relevant to a material issue before the jury and (2) determine that any prejudicial effect is outweighed by the probative value. *State v. Robtoy*, 98 Wn.2d 30, 42 (1982). In addition the trial court must commit a third step and properly limit the purpose for which the jury may consider the evidence." *State v. Watkins*, 53 Wn.App. 264, 270 (1989). If the trial court exercises its discretion in weighing the probative value against the prejudicial effect, then the decision will

only be reversed on appeal if it is found that the trial court abused its discretion. *Robtoy*, 98 Wn.2d at 42.

In the case at bar, the trial court met all three factors. Instruction number nine informed the jury that the evidence admitted pursuant to the criminal trespass may not be considered for any other purpose than to see if the factors listed in 404b existed. RP 279. The State and the defense both spoke to this in their closing arguments. RP 286, 289. As to the second factor, the court determined on the record that the prejudice did not substantially outweigh the probative value of the evidence. RP 23, CP 51.

The appellant argues that the two charges did not share the same character nor were connected acts, and therefore were not logically relevant to any issue before the jury and therefore not admissible under ER 404(b). Appellant's Brief 8. However, both Mr. Abonza and A.R.M. testified that the criminal trespass was directly connected to the rape, and therefore the criminal trespass can either go to show motive or in the alternative is part of the *res gestae* of the rape. "Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character

and show action in conformity therewith.” *State v. Powell*, 126 Wn.2d 244, 258 (1995). “However, when demonstrated, such evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”. *Id.*

I.A. The Res Gestae Exception

“In addition to the exceptions identified in 404(b), our courts have previously recognized a ‘res gestae’ or ‘same transaction’ exception, in which ‘evidence of other crimes is admissible ‘[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’” *State v. Lane*, 125 Wn.2d 825, 831 (1995), *citing State v. Tharp*, 27 Wn.App. 198, 204 (1980). “A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events.” *State v. Lillard*, 122 Wn.App. 422, 431-32 (2004). “Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the

immediate context for events close in both time and place to the charged crime.” *Id.* at 432. In the case at bar, the Defendant’s actions on April 14 and May 2, 2018, are related.

Both dates involved the Defendant, A.R.M., and the type of contact between them. The two charged incidents involve unwanted contact within the home. In addition, part of the defense presentation was that A.R.M. reported several weeks later because she was upset that Mr. Abonza had not contacted her and therefore felt scorned about the consensual sex, therefore it wasn’t rape. This was mentioned in opening, during Mr. Abonza’s testimony, and during closing. Without the explanation that Mr. Abonza was in A.R.M.’s home uninvited on May 2nd, 2018, this would have seemed like an odd time for A.R.M. to report the incident, especially since she had informed her best friend the day of the incident. In addition, Mr. Abonza testified that he knew he should not have been at A.R.M.’s residence on the night of May 2nd, and that he went anyway. Furthermore, prior to trial, it was unknown whether or not the defendant would testify, and if he did it was unknown whether he would make any statements or admissions to sexual contact or knowing where A.R.M.’s residence was. In order to prove

the state's case beyond a reasonable doubt, it was directly relevant and necessary material information to demonstrate that the defendant knew the location of not only the residence, but A.R.M.'s room located in the basement. In addition, two roommates had seen him there as well and therefore able to corroborate that Mr. Abonza knew the location of the home and A.R.M.'s room.

Finally, it should be noted in arguing all of these factors in advance, it was unknown by the State whether or not Mr. Abonza would testify, and whether he would testify that he never went to the house, never knew where A.R.M. lived, etc. RP 27. The only known defense prior to trial was a general denial, not the consent defense that came out through Mr. Abonza's testimony after the state rested.

Per the *res gestae* exception, the defendant should not be allowed to commit both of these crimes and then claim evidence of bad character, thus forcing the State to present a fragmented version of the rape event and benefit the appellant in this way. The State was properly allowed to complete the story of the crime committed in the case at bar and provide the context for both events charged.

1.B. Motive Exception

Though motive was not effectively argued or mentioned at the trial court, a reviewing court can still decide that a proper basis existed on which other misconduct evidence was properly admitted. *State v. Powell*, 126 Wn.2d at 259. "... [M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act." *Id.* "Since establishing motive is often necessary when only circumstantial proof of guilt exists, prior misconduct evidence that demonstrates motive is of consequence to the action in a case such as this." *Id.* at 260.

In the case at bar, Mr. Abonza had the motive to ignore A.R.M.'s wishes both on the rape, and later during the criminal trespass. During both incidents, he failed to abide by her desire. During the rape it was proceeding to have sexual intercourse with her for 10 minutes, despite at least 5 direct statements from her that she told Mr. Abonza she did not want to have sex and that she wanted him to stop. In the criminal trespass case, he showed up at her home, near her bedroom, at almost 4:00 a.m. He frightened her and at least two of her roommates and knew that he didn't belong there but he was "a good guy and wanted to see where her mind

was at.” Again, he stated it was because he believed A.R.M. was upset that he hadn’t contacted her since their sexual encounter 2.5 weeks earlier. Even after he was forcibly removed from the house another roommate had to tell him to leave as he was lingering on the lawn. All of this is strong evidence of his motive, of his impulse, desire, or any other moving power which causes an individual to act,” just as the *Powell* court discussed.

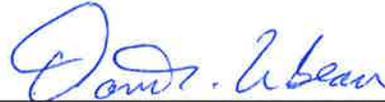
II. The \$200 filing fee should not have been imposed.

The appellants brief properly addresses this issue and the State has nothing to add.

CONCLUSION

For the above reasons, the State respectfully requests that this court affirm the trial court’s decision that 404b evidence was admissible and uphold the conviction. However, the State concedes that the \$200 filing fee should not have been imposed.

Dated this 24th day of January, 2020.



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