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Washington State Supreme Court *E*

MAY 20 2014

Ronald R. Carpenter *bjh*
Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondents,)	No. 89297-1
)	
vs.)	
)	STATEMENT OF ADDITIONAL
DANIEL SCOTT GUNDERSON,)	AUTHORITIES
)	
Petitioner,)	
)	
)	
)	

On the question posed by Justice Wiggins at oral argument,¹
and pursuant to RAP 10.8, the State of Washington respectfully
cites the following as additional authority:

State v. Herzog, 73 Wn. App. 34, 49-50, 867 P.2d 648 (1994)
(italics added):

When evidence of an uncharged crime is relevant not only
because it shows the accused's propensities, but also because
it shows "identity" independently of propensity, the balance
between probative value and unfair prejudice is governed by
the second sentence of ER 404(b), and by ER 403. The
second sentence of ER 404(b) provides that evidence of an
uncharged crime may be admissible for a purpose "such as

¹ "How is it that [prior bad acts] are impeaching unless you assume that those
two prior bad acts show a propensity to domestic violence that is being repeated
here, and therefore Christina must be lying?" Recording by TVW, Washington
State's Public Affairs Network, available at <http://www.tvw.org> at 25:11.

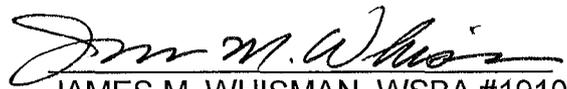
proof of ... identity....” It counteracts the exclusionary language that precedes it, but it does not command that evidence of an uncharged crime be admitted. See R. Aronson, at 404–18; E. Cleary, at 801–03; E. Imwinkelreid, § 3.10, at 23; J. Weinstein and M. Berger, § 404[16], at 127–29. Rather, the question of admissibility turns on ER 403. Robtoy, 98 Wash.2d at 42, 653 P.2d 284; Federal Advisory Committee's Note to FRE 404(b), 56 F.R.D. 183, 221 (1972). Under that rule, evidence is admissible when its probative value is not substantially outweighed by the danger of unfair prejudice, and the balance between probative value and unfair prejudice is a matter for the discretion of the trial court. Stanton, 68 Wash.App. at 861, 845 P.2d 1365; Bowen, 48 Wash.App. at 190, 738 P.2d 316.

* * *

Evidence of an uncharged crime is always relevant to prove [e.g.] the identity of the perpetrator of the crime charged. Usually, it is relevant *solely* because it tends to prove the perpetrator's propensities. Occasionally, it is also relevant without regard to the perpetrator's propensities. When it is relevant solely because of the perpetrator's propensities, it must be excluded. ER 404(a); ER 404(b) (first sentence). When it is relevant independently of the perpetrator's propensities, the trial court has discretion to balance its probative value (when viewed independently of propensity) against the danger of the unfair prejudice. ER 404(b) (second sentence); ER 403.

Dated this 19th day of May, 2014.

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Statement of Additional Authorities, in STATE V. DANIEL SCOTT GUNDERSON, Cause No. 89297-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

u Brame
Name
Done in Seattle, Washington

5/19/14
Date 5/19/14