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No. 89297-1 - I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,  
v.  
DANIEL GUNDERSON,  
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

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SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. INTRODUCTION

Evidence of another person's conduct is not, by itself, logically relevant to assess the credibility of a witness at trial. That is especially so where the witness has not placed her credibility at issue by contradicting or recanting earlier statements. ER 404(b) does not permit admission of other acts evidence in that circumstance.

Here, the trial court permitted the State to offer evidence of prior acts of assault by Daniel Gunderson, purportedly to assist the jury in assessing the credibility of the alleged victim, Christina Moore. But Christina had never offered contradictory statements or testimony, as, prior to trial, she had not provided a statement regarding the incident to law enforcement.<sup>1</sup> Further, neither the trial court nor the Court of Appeals offered any analysis of how the evidence assisted the jury's credibility evaluation except as propensity evidence.

The analysis of the lower courts creates a nearly limitless rule of admissibility of other acts evidence. This court should reject that expansion of ER 404(b) and reverse Mr. Gunderson's conviction.

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<sup>1</sup> Because both Christina and her mother, Bonnie Moore, who was also a witness, share the same last name they will be referred to by their first names.

B. STATEMENT OF THE CASE

Mr. Gunderson and Christina are the parents of a daughter, Faith. The two did not have a parenting or custody plan in place for Faith. 10/29/11 RP 32, 10/24/11 RP 80. However, a no-contact order barred Mr. Gunderson from having contact with Christina, and a separate no-contact order barred Christina from contacting Mr. Gunderson. 10/24/1184. Despite that, arrangements had been made for Mr. Gunderson to pick up Faith in Seattle so that she could stay with him for a period at his Kelso home. 10/24/11 RP 62.

As arranged, Mr. Gunderson gathered Faith and her belongings and took her to his truck. 10/24/11 RP 62. Along the way, Mr. Gunderson and Bonnie Moore, Christina's mother, became involved in an argument. 10/20/11 RP 26. Bonnie testified the two scuffled while Mr. Gunderson was in his truck, but described Mr. Gunderson as "defending himself." 10/20/11 RP 44.

Mr. Gunderson, Christina and Faith drove away. Bonnie Moore called police. 10/20/11 RP 23-24.

The State charged Mr. Gunderson with violating a no-contact order. CP 7-8.

Prior to trial, Christina did not make any statements regarding the events. It is not clear whether police ever contacted her to obtain a statement.

At trial and over Mr. Gunderson's objections, the court admitted evidence of two prior assaults involving Mr. Gunderson and Christina, from 2008 and 2010. 10/24/11 RP 52-53. The trial court allowed the evidence ostensibly as relevant evidence of Christina's credibility. *Id.* Even though Christina had not contradicted, recanted or retracted any prior statement she had made regarding the events, the court reasoned Christina's credibility was sufficiently at issue to permit the State to admit evidence of Mr. Gunderson's prior acts. The trial court reached that conclusion on the basis that Christina's testimony regarding the event differed from that of other witnesses offered by the state. *Id.* at 53.

A jury convicted Mr. Gunderson as charged. CP 49.

The Court of Appeals affirmed the trial court, applying reasoning that would make such evidence admissible in nearly all cases. Specifically, the court concluded it did not matter that Christina had not contradicted her own prior statements or placed her credibility at issue in any manner. Opinion at 6. Although it did not explain how,

the court reasoned the evidence of Mr. Gunderson's prior conduct assisted the jury in evaluating Christina's credibility. *Id.* at 6-7.

C. ARGUMENT

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a).

ER 404(b) provides:

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.

“Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

This Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper

purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

*Id.* at 362-63. Second, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the analysis, the identification of consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) (citing *Saltarelli*, 98 n.2d at 362). Neither consideration was satisfied here.

**1. In the absence of any internal contradictions in a witness's statements, the witness's credibility is not sufficiently material to permit admission of another person's prior acts.**

Here, credibility was not a consequential purpose for admission of other-acts evidence. In the absence of any internal contradiction in her own statements, Christina's credibility was not at issue any more than that of any other witness in this case. For that matter, her

credibility was not at issue to any degree **beyond** that of any other witness in any other case.

A witness's credibility is at stake in every trial. Witnesses describing the same event may describe it differently and adamantly maintain their view is the correct one. Witnesses may offer divergent and contradictory testimony for a myriad of reasons. To permit "credibility" in its broadest sense to be a valid basis for admitting evidence of a defendant's prior acts risks eviscerating ER 404(b) as there will be few if any instances in which credibility could not suffice as a purpose for admission of such evidence.

Instead, cases give guidance for when "credibility" provides a proper purpose for admitting evidence under 404(b). In *State v. Magers*, for example, a witness had previously made statements accusing the defendant of assault. 164 Wn.2d 174, 179, 189 P.3d 126 (2008). Prior to trial, however, she recanted those statements. *Id.* This Court found "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). Thus, this Court found the

evidence relevant to enable the jury to assess the victim's credibility where she had given "conflicting statements." *Id.*

In *State v. Grant*, in her initial statements to police made in her husband's presence, the alleged victim would not identify her husband as the person who assaulted her. 83 Wn. App. 98, 102, 920 P.2d 609 (1996). Once her husband was removed from the scene, however, the victim did identify him as the person who assaulted her. *Id.* At trial, the State sought to admit evidence of prior assaults between the two. *Id.* at 103. The State sought as a witness the victim's therapist who would testify "that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim." *Id.* at 108-09. The Court of Appeals found the therapist's testimony was relevant and admissible under ER 404(b). *Grant*, 83 Wn. App at 109.

In each, case, the witnesses' credibility was in question not because of contradictions offered by other witness, but rather by contradictions they themselves created. In a normal case with conflicts between two witnesses a jury could compare the view of two witnesses with consideration of their opportunity to observe events, the vantage point, or their competing biases. In such a case, the jury could compare the witnesses' demeanor on the stand or use any of the tools at the

disposal of every jury when faced with contradictory testimony of witnesses. But where the conflict is internal to the witness's own statements, jurors are without those normal tools. In such a case credibility is consequential in a unique way.

Here, as the trial court recognized, there was no recantation. Christina never made a prior statement to police, prosecutors, or anyone. 10/24/11 54. Christina never offered any statement which contradicted her testimony at trial. Here, the jury heard only one statement by Christina. That simply does not raise the same credibility problem presented in *Magers* or *Grant*. Christina's credibility was not at issue any more than that of any other witness. Instead, evidence of Mr. Gunderson's prior acts was offered, simply because Christina's testimony contradicted that of other witnesses. 10/24/11 RP 54.

The Court of Appeals opines this was not the basis of admission, concluding instead that the trial court admitted the evidence because Christina was minimizing or denying the events. Opinion at 7. But that is a distinction without a difference. Because she had never offered any prior statement, much less a more detailed explanation, there are only two bases on which to conclude she was minimizing in her sworn testimony. First, one could conclude she was minimizing

because her testimony contradicted that of her mother. Second, one could simply conclude that because Mr. Gunderson allegedly assaulted her previously Christina must be lying. Neither properly establishes that Christina was minimizing or denying anything.

If credibility in its broadest sense is enough to permit admission of another person prior acts, there are few circumstances in which that threshold would not be met. It is a different scenario where a witness's credibility opens the door to their own prior acts. But under the Court of Appeals's view, the State could readily argue that merely by proceeding to trial rather than pleading guilty a defendant has placed the State's witnesses' credibility at issue, thus opening wide the door to other acts evidence.

In the absence of contradictory statements, credibility was not consequential in the manner necessary to admit other acts evidence.

**2. Even if her credibility was a material purpose for admitting evidence of Mr. Gunderson's prior acts, those acts are not logically relevant to Christina's credibility beyond their use as propensity evidence.**

Logical relevance is demonstrated if the identified fact for which the evidence is admitted is "of consequence to the outcome of the action" and tends to make the existence of that identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 362–63. Again, it must

establish the fact by some logical theory other than propensity. *Wade*, 98 Wn. App. at 334-35. Thus, other-acts evidence offered to establish credibility must make credibility more or less likely free of its use as propensity evidence. The evidence at issue here did not meet this standard.

Assuming Christina's credibility is a consequential purpose, even in the absence of an internal contradiction, missing from either the trial court or the Court of Appeals's analysis is any explanation of how the prior-acts evidence assisted the jury, i.e., how Mr. Gunderson's prior acts made Christina more or less credible except as propensity evidence? The Court of Appeals opined that "the evidence was highly relevant to explain the reasons Christina minimized or denied the September 15, incident . . . ." Opinion at 7. The Court suggested that the evidence "would help the jury evaluate Christina's credibility with knowledge that her relationship with [Mr. Gunderson] included past domestic violence." Opinion at 6. But, the never court never explained how this was so.

First, the terms "minimize or denied" presuppose the current events **did** occur and that the Christina's present testimony is not the truth. There is no reason to believe that is the case. Because she had not

provided a prior statement which assigned a greater degree of culpability to Mr. Gunderson, there is no basis on which to conclude she was now minimizing his culpability.

Second, the Court of Appeals' opinion does not explain how this knowledge of prior acts in any way assisted the jury in assessing Christina's credibility other than as propensity evidence. Instead, one can only characterize her as "minimizing" and only conclude the prior acts evidence relevant to that by first concluding that because Mr. Gunderson has assaulted her previously he must have done so on this occasion and therefore Christina is not credible in denying such an assault occurred. That is the only logical use of the evidence yet at the same time is a patently improper use.

By contrast in *Grant*, the State actually sought to establish for the jury how denial and minimization fit within the context of domestic violence. 83 Wn. App at 108. To explain the variance in the witness's testimony, the State did far more than merely offer evidence of prior acts. Instead, the State sought to do so by use of an expert. *Id.* The prior acts evidence was not the sum of the evidence. Rather it was just one piece of the evidence to be placed in context by expert testimony. *Id.* In that way, the State could credibly argue that the evidence of prior acts

was relevant to help explain the victim's inconsistent statements. As the court explained, that combination of evidence allowed the jury "full knowledge of the dynamics" of a domestic violence relationship which the jury could use to evaluate the witness's credibility.

Here, the State did not even attempt to provide the jury "full knowledge of the dynamics" of domestic violence. Indeed, there was no evidence of those dynamics. Instead, there was just evidence of prior acts. Other-acts evidence does not by itself explain either the dynamics of domestic violence or why a person's sworn testimony should be disbelieved. In *Grant* the State sought to prove the dynamics of domestic violence; here the State made no such effort.

Beyond the example of *Grant*, other-acts evidence might be relevant if the State first established the prior assaultive acts occurred as a reprisal for the witness testifying. But there was no evidence to suggest that was the case. Simply hearing other-acts evidence in a vacuum does nothing to assist a jury to assess a witness's credibility or anything else beyond inviting jurors to view the evidence as propensity evidence.

The trial court erred in admitting prior-acts evidence.

**3. The error in admitting the other-acts evidence requires reversal.**

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Christina unambiguously stated that Mr. Gunderson did not hit her. Bonnie Moore had little recollection of the events, but recalled it was more a scuffle involving her and Mr. Gunderson, and that Mr. Gunderson was mainly defending himself. 10/20/11 RP 26, 44. With the paucity of evidence, the impact of the improperly admitted propensity evidence cannot be discounted.

This Court should reverse Mr. Gunderson's conviction and remand for a new trial.

D. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court should reverse Mr. Gunderson's conviction.

Respectfully submitted this 17<sup>th</sup> day of March, 2014.

*s/ Gregory C. Link*  
GREGORY C. LINK – 25228  
Attorney for Petitioner

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 ) NO. 89297-1  
 v. )  
 )  
 DANIEL GUNDERSON, )  
 )  
 Petitioner. )

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**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MARCH, 2014.

  
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### **Supplemental Brief of Petitioner**

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