

FILED  
12-16-15  
Court of Appeals  
Division I  
State of Washington

No. 72723-1- I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON,  
Appellant,**

**v.**

**DARRIN MARTINS  
Respondent.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the trial court abused its discretion in admitting limited evidence that Martin had previously threatened to skin his estranged wife, Katherine, alive pursuant to ER 404(b) where this limited evidence admitted to show Katherine's state of mind at the time Martins assaulted her in her apartment in violation of a no contact order and was relevant to demonstrating Katherine was fearful of bodily injury and explaining equivocal testimony.

**C. FACTS**

**1. Procedural facts.**

Appellant Darrin Martins was charged with felony violation of a no contact order and assault in the fourth degree. CP 4-5. The state moved to dismiss the second count of assault in the fourth degree following the presentation of the state's case to the jury. Martins was subsequently found guilty of felony violation of a no contact order, with a special verdict finding that Martins and his victim, Katherine Martins, were domestic partners. The jury did not conclude however, as also alleged by the state, that the offense occurred while within the sight and sound of the Martins' children. CP 54-55. Martins was given a standard range sentence of eight months. CP 56-66. Martins timely appeals. CP 69-80.

**2. Substantive facts.**

On July 28<sup>th</sup> 2015, Katherine Martins returned to the apartment she shared with her three children and a cat named Leonard, to find her estranged husband sitting on the steps just outside her apartment. RP 108. Katherine Martins was returning home with her children, and her neighbor, Tracy O'Dell, having just rescued the Martins' family cat from the local animal shelter. Katherine Martins had a civil no contact order prohibiting Martins from contacting her or being at her apartment. RP 107, 95.

Martins followed Katherine into her apartment where Katherine went in the bathroom and tried to close the door. RP 109. Martins physically pushed on the bathroom door and reached around and into the bathroom with his arm and grabbed some of Katherine's hair. RP 110, 111. At the scene, Katherine told officer Johnson Martins had kicked her in the shins, grabbed her face and her hair. RP 153. At trial however, Katherine, who stands at 6'0, testified she wasn't sure if Martins intended to grab her hair and speculated that maybe he was just trying to get to their cat, Leonard. Id. She also testified Martins didn't kick her with his toe and was evasive when asked if in her petition for protection she outlined a history of violence between her and Martins. RP 117. Katherine eventually acknowledged at trial that Martins had kicked her and that she

had contemplated trying to escape from the bathroom during the incident but otherwise was vague when answering questions about the incident and was reluctant to talk about any previous domestic violence history between her and Martins. RP 111-113.

Neighbor Tracy O'Dell, concerned with hearing a male voice screaming and yelling from within the Martins apartment after Katherine and Martins entered Katherine's apartment, went into the apartment to try to figure out what was going on. RP 113, 130. Prior to entering Katherine's apartment O'Dell sent her and the Martins' children she was then with, to her apartment and told them to go inside, lock the door and not to let anyone in. RP 131. O'Dell then entered Katherine's apartment, looked down a hallway and saw that Martins had Katherine pinned up against a bathroom wall looking terrified. RP 132. O'Dell immediately ran down the hallway and screamed to Martins to "get the hell off of her." Id. Martins startled by the confrontation, released Katherine enough from his grip to allow O'Dell to wrap her arms around Katherine and forcibly remove her from the situation. RP 114, 133.

Katherine testified she wasn't sure if she was scared when Martins' was trying to get into the bathroom and thought maybe he was just trying to get the cat. RP 115. When asked about prior incidents of domestic violence detailed in a protection order petition, Katherine testified that she

exaggerated claims in a previous protection order petition that Martins' had previously threatened to skin her alive. RP 116. The trial court permitted this limited questioning under ER 404(b) over Martins' objection but nonetheless, gave a verbal limiting instruction immediately after she testified that she had previously exaggerated claims of threats, advising the jury:

There are times during a trial when it's appropriate for me to give you an instruction about the law rather than waiting until later in the trial and so that's what this is. It's an instruction about the law and it's something that you should bear in mind as you hear and consider the testimony of this witness and that is this; evidence of other crimes or wrongs or acts, things which occurred before July 28<sup>th</sup> 2014, may be considered by you but only for a limited purpose. They may be considered for the limited purpose of determining the reasonableness of Ms.Martin's fear. Whether that, whether she has that fear and whether she had a fear and whether that fear was reasonable, but the evidence is only to be used for that purpose. So the evidence of other crimes or wrongs or acts shouldn't be considered by you for purposes of determining that the character of a person or actions of a person are in conformity with those prior bad acts, only for the limited purpose of determining the reasonableness of any fear that Ms.Martins may have had, that's the purpose for her testimony about prior bad acts, which are not part of the charge here today.

RP 120-121.

On cross examination, after this limiting instruction, Katherine subsequently acknowledged she was nervous and slightly afraid when Martins' entered her apartment mainly because she knew she had a no contact order that prohibited Martins' from contact. RP 123.

After Katherine fled to O'Dell's apartment, Martins knocked on O'Dell's apartment door seeking to check on the Martins cat, Leonard. RP 134. According to O'Dell, Martins came into her apartment after convincing one of his kids to open her door. Martins, she recalled, was petting Leonard the cat and blaming Katherine for the cat's unhealthy condition. RP 135. O'Dell had Katherine wait in another room while Martins saw the cat and when Martins was done, asked him to leave. RP 135.

Soon after Martins left O'Dell's apartment, O'Dell and Katherine realized the Martins youngest child, Max was with Martins back in Katherine's apartment. RP 138. O'Dell then went to Katherine's apartment and tried to convince Martins to let Max join his siblings at her apartment. Id. Martins refused, stating he was going to take Max with him and that Katherine was crazy. RP 138. Martins, who appeared agitated and pacing in the apartment, then began calling O'Dell names. RP 138. O'Dell retreated to her apartment and called the police. Id.

While waiting for the police, Martins left Katherine's apartment to pace, scream and pound on O'Dell's apartment door. RP 140. Later, O'Dell determined that Katherine had been hesitant to call the police because Martins had threatened to kill her and O'Dell if law enforcement got involved. RP 140.

Officer Osterkamp responded to the scene and contacted Martins just outside of Katherine's apartment complex. RP 96. Martins initially told him the no contact order with Katherine wasn't current but eventually conceded that there was a current no contact order prohibiting him from contact with Katherine or being within 100 feet of her residence. Id. Martins was convicted of felony violation of a no contact order. CP 54-44.

#### **D. ARGUMENT**

- 1. The trial court did not abuse its discretion permitting limited questioning of Katherine inquiring of Martins prior threat against her pursuant to ER 404(b) to give context's to her state of mind, the she reasonably feared bodily injury during the alleged incident and to give context to the conflict between Katherine's trial testimony and prior statements she made immediately following the incident.**

Martins claims the trial court abused its discretion pursuant to ER 404(b) and misapplied the case of State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), in permitting the state to question his estranged wife, Katherine about Martins prior threat to skin her alive and request for protection because, according to him, Katherine didn't recant or deny that Martins had assaulted her when she testified. Br. of App. at 8. Martins argues therefore, that pursuant to State v. Gunderson, 181 Wash. 2d 916,

337 P.3d 1090 (2014), this limited questioning was inadmissible and was unduly prejudicial to Martins ability to obtain a fair trial. Br. of App. at 8.

Martins' argument is not supported by the record. Katherine's testimony, while not an outright recantation of her previous statements, did conflict with her prior statements and her testimony was internally inconsistent and perplexing. This limited evidence of a prior threat was therefore relevant in assisting the jury in assessing Katherine's credibility and give context to her conflicting statements.

Moreover, evidence that Katherine had previously alleged in a protection order request that Martins had made threats against her was relevant to explaining her state of mind and whether she reasonably feared being assaulted by Martins when he violated the no contact order in this instance. Under these circumstances, the trial court did not abuse its discretion admitting this relevant evidence for these limited purposes.

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. 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.

In order to admit evidence under ER 404(b), the evidence of other wrongs or misconduct must be admissible for a purpose other than to prove character or actions in conformance therewith. State v. Powell, 126 Wash. 2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002). A trial courts interpretation of ER 404 (b) is reviewed de novo as a matter of law. State v. Fisher, 165 Wash. 2d 727, 745, 202 P.3d 937 (2009). As long as the court correctly interprets the evidence rule, a trial court's decision to admit or exclude the evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wash. 2d 11, 17, 74 P.3d 119 (2003).

Prior to permitting the state to ask limited questions of Katherine regarding a prior threat of Martins to skin her alive made in a protection order petition under oath, the trial court considered and found by a preponderance of the evidence that the misconduct alleged in the protection order petition signed under oath by Katherine, occurred and that this previous allegation was relevant and admissible to show Katherine's

state of mind and the reasonableness of her fear of bodily harm. After conducting a balancing test, the court concluded the probative value of this evidence outweighed any potential prejudice so long as a limiting instruction was also given to the jury. RP 58, Supp. CP \_\_\_\_ (Findings of fact and conclusions of law re:ER 404(b)).

In State v. Magers, the Washington state supreme court held prior bad acts of domestic violence *may* be admissible under ER 404(b) to show the victims mental state at the time of the alleged assault *and* to assist the jury in assessing the victims' credibility. The ER 404(b) evidence in Magers consisted of the defendant having been in trouble for fighting while incarcerated and evidence that the defendant had been arrested for domestic violence which resulted in a no-contact order with the alleged victim, with which he was charged with violating. Magers, 164 Wash. 2d at 177-78, 180.

The majority found that evidence of the defendant's fighting was admissible to prove the victim's state of mind in that case because the State had to prove that the victim reasonably feared that the defendant would cause her bodily injury. *Id.* at 182-83. As was referenced by the majority opinion in Magers, both State v. Ragin, 94 Wash. App. 407, 972 P.2d 519 (1999) and State v. Barragan, 102 Wash. App. 754, 9 P.3d 942 (2000), previously held consistent with this holding that a defendants'

prior violent acts are relevant and admissible in order to demonstrate that the victim reasonably feared the defendants' threats. Magers, 164 Wash. 2d at 182(citing, Ragin, 94 Wash. App. 407 and Barragan, 102 Wash. App. 754); *see also*, State v. Binkin, 79 Wash. App. 284, 291-93, 902 P.2d 673 (1995) abrogated by State v. Kilgore, 147 Wash. 2d 288, 53 P.3d 974 (2002), *overruled on other grounds*, State v. Kilgore, 147 Wash. 2d 288, 53 P.3d 974 (2002) (defendant's prior threat to kill estranged wife's child was relevant to prove whether victim's fear that defendant would kill her was objectively reasonable and therefore admissible under ER 404(b)). The majority in Magers also found the evidence of the domestic violence arrest was admissible to assist the jury in assessing the credibility of the victim in light of her inconsistent statements. *Id.* at 181-82.

The concurrence agreed with the majority in Magers regarding the domestic violence arrest, but disagreed with the admissibility of the evidence of defendant's fighting, fighting that did not involve the victim, even though she had been aware of it. *Id.* at 194-95. The concurrence concluded that while prior bad acts can be admissible to explain a domestic violence victim's recantation, the fighting was not admissible because it did not involve the same victim and therefore was not relevant. *Id.* at 194-95.

The trial court appropriately permitted the state, pursuant to the reasoning in *Magers*, to admit evidence of Martins prior threat to skin Katherine alive because Katherine did testify inconsistently to the statements she provided to investigators immediately following the alleged violation. Under the majority opinion in *Magers* this evidence was admissible to show Katherine's state of mind and to enable the jury to assess the credibility of her internally and external inconsistent testimony.

While the concurrence in *Magers* stated it did not think the victim's state of mind was relevant to prove the assault element that the victim reasonably feared bodily injury, the concurrence did not address the part of the assault definition that requires the State to prove that the defendant did "in fact create in another a reasonable apprehension and imminent fear of bodily injury ..." Id at 183. A victim's state of mind therefore is clearly relevant to proof of the means of assaulting of another by creating reasonable fear of bodily injury. Moreover, even under the concurrence's rationale, the victim's state of mind would be relevant because the concurrence stated that the proof required was that of a "reasonable person *under the same circumstances.*" Id. at 194. A jury would not be able to determine whether a reasonable person under the same circumstances would fear bodily injury unless they knew the history

of violence between the victim and the defendant, particularly in the context of domestic violence.

Moreover under Magers, prior evidence of domestic violence may be admissible regarding a victim's credibility even where the victim does not recant. See, Magers, 164 Wash. 2d at 185-86, State v. Baker, 162 Wash. App. 468, 259 P.3d 270 (2011), State v. Grant, 83 Wash. App. 98, 920 P.2d 609 (1996). In Baker, the court concluded that defendant's prior assaults on the victim were relevant to the victim's credibility so that the jury could assess that credibility with full knowledge of the dynamics of the domestic violence victim's relationship with the defendant. Id. at 475.

Katherine's credibility, as the victim in this case was at issue in this case in addition to determining whether she reasonably feared bodily injury when Martins was violating the no contact order. On the stand Katherine contended she lacked a clear memory of the event and speculated that Martins only intent may have been to reach around the bathroom door to get to their cat. Immediately following the alleged violation of the no contact order and assault however, Katherine unequivocally told investigators Martins' kicked her and grabbed her face and hair. As in Baker and Magers, evidence of Martins' previous threat against Katherine was relevant to explaining her equivocal trial testimony, the conflict between her initial statements immediately following the

alleged events and her testimony and, the reasonableness of her fear of bodily injury from Martins. The trial court did not abuse its discretion in admitting Katherine's previous allegation that Martins had threatened physical harm to her under ER 404(b).

Martins contends nevertheless, that Gunderson, 181 Wash. 2d 916, controls instead of Magers because Katherine didn't recant the statements she made at the scene when she testified at trial. Martins argues that in these circumstances Gunderson requires the trial court to exclude prior acts of domestic violence because the risk of unfair prejudice in admitting such evidence is too great.

In Gunderson, the trial court admitted evidence of prior domestic violence between the victim and the defendant under ER 404(b) to impeach the victim even though the victim's testimony at trial did not contradict any prior statements about the alleged assault. The Supreme Court explained in Gunderson that they thought they were careful in Magers to establish that 'evidence of prior domestic violence or related misconduct is relevant only where the jury must assess the credibility of the complaining witness in light of conflicting statements about the defendant's conduct. Because the victim's testimony in Gunderson was consistent and did not conflict with any other evidence or prior statements she made, evidence of her history of domestic violence with the defendant

was not relevant to assessing the victim's credibility. The Court then explained that to guard against the potential of prejudicial effect in admitting domestic violence misconduct, the admissibility of prior acts of domestic violence is confined to cases where the state has:

has established an overriding probative value, such as to explain a witness's inexplicable recanting or conflicting account of events. Otherwise, the jury may well put too great a weight on past conviction and use the evidence for an improper purpose. Accordingly, we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements.

Gunderson, 181 Wash. 2d at 925. Here, Katherine's testimony did conflict with her prior account of events, and was internally inconsistent. Moreover, the state also had to prove that Katherine feared bodily injury, a fact not an issue in Gunderson. Thus, in contrast to Martin's argument, Gunderson does not control and the limited ER 404(b) evidence was appropriately admitted by the trial court under Magers.

Even if the court abused its discretion permitting the state to question Katherine about a prior threat of harm made by Martins, any error was harmless. Erroneous admission of prior misconduct requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. State v. Halstien, 122 Wash. 2d 109, 127, 857 P.2d 270 (1993).

Martins previous threat against Katherine could not have affected the jury verdict when a third party, O'Dell heard and observed Martins violate the no contact order by going into Katherine's apartment and assaulting her. This testimony was consistent with some of Katherine's testimony wherein she explained that she was in her bathroom trying to keep Martins out while she contemplated how she could 'escape.' Given the overwhelming evidence presented below, any error in admitting limited ER 404(b) testimony was harmless beyond a reasonable doubt.

**E. CONCLUSION**

Based on the foregoing, the State requests that Martin's appeal be denied and his convictions for one felony violation of a no contact order be affirmed.

Respectfully submitted this 16<sup>th</sup> day of December 2015.

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**CERTIFICATE**

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, JAN TRASEN, addressed as follows:

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