

NO. 45173-5-II

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

STATE OF WASHINGTON, Respondent

v.

BARON DEL ASHLEY JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00992-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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- A. RESPONSE TO ASSIGNMENTS OF ERROR
 - I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO ER 404b
 - II. THE OFFENDER SCORE WAS PROPERLY CALCULATED
 - III. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS
- B. STATEMENT OF THE CASE

Baron Ashley, Jr. (hereafter ‘Ashley’) was charged by information with Unlawful Imprisonment Domestic Violence pursuant to RCW 9A.40.040 and RCW 10.99.020 for an incident that occurred against Makayla Gamble on May 27, 2013. CP 5, 50.

At trial, the evidence showed that Ms. Gamble had previously been in a relationship with Ashley for five years and had two children with him. 1B RP at 185-86. Ms. Gamble was visiting the home of Ashley’s sister over the Memorial Day weekend. 1B RP at 187-88. During her visit, police visited the residence and Ashley’s sister was scared and asked everyone to be quiet. 1B RP at 189. Ms. Gamble believed the police were at the residence for Ashley’s sister. 1B RP at 189. Ms. Gamble stayed the night at Ashley’s sister’s residence with Ashley and their children. 1B RP at 191. The police visited the residence a second time that weekend when

Ms. Gamble, Ashley, and their children were at the residence. 1B RP at 192. Ashley told Ms. Gamble and their children to go upstairs because they were being too loud. 1B RP at 192. Ms. Gamble had her baby with her. Ashley felt her baby was too loud so he put her and her young child in the bathroom and closed the door. 1B RP at 193. While she was in the bathroom, Ms. Gamble attempted to open the bathroom door three or four times. 1B RP at 194. Every time she tried to open the door, Ashley would close the door on her while she remained in the bathroom. 1B RP at 194. While in the bathroom, Ms. Gamble told Ashley she wanted to leave the bathroom on two occasions. 1B RP at 195.

Ms. Gamble testified that she had been previously abused by Ashley. 1B RP at 195. She testified that in 2000 Ashley choked her while they were at her mother's house. 1B RP at 195. In 2001, while she was pregnant, Ashley gave Ms. Gamble a "couple" of black eyes. 1B RP at 196. In 2004, Ashley slapped Ms. Gamble over and over until he popped her eardrum and gave her a black eye. 1B RP at 196-97. Police were involved in that incident, but Ms. Gamble recanted her statement to police because she loved Ashley. 1B RP at 197. Ashley pushed Ms. Gamble down the stairs once while she was pregnant, and another time while she was pregnant, he spilled beer on her face, slapped her, and spit on her face. 1B RP at 197. This prior abuse made Ms. Gamble fear Ashley and when

she was in the bathroom she handled the situation differently than she would have had there been no history of prior abuse. 1B RP at 198.

Ms. Gamble testified that when he ordered her into the bathroom on that Memorial Day weekend she complied because she knows his history and his temper and feared what he would do. 1B RP at 199. Ms. Gamble was in the bathroom for approximately an hour. 1RP at 200.

When police finally made entry into the residence, Ashley told Ms. Gamble to go downstairs and tell police that he was not there. 1RP at 200. However, Ms. Gamble told police that Ashley was indeed in the residence. 1RP at 200.

Prior to trial, the trial court heard the State's motion to admit evidence of the prior abuse against Ms. Gamble by Ashley in order to show Ms. Gamble's state of mind and for the jury to assess her credibility. 1A RP at 84-97. The trial court allowed admission of this evidence. 1A RP at 96-97. The jury returned a verdict of Guilty on the Unlawful Imprisonment charge and returned a special verdict finding that Ashley and Ms. Gamble were family or household members. CP 74-75.

At sentencing, the trial court calculated Ashley's offender score as a 7, based in part on a finding that Ashley's prior conviction for Attempted Assault in the Second Degree counted as 1 point. CP 102; 1B RP at 327-28. The trial court imposed legal financial obligations as part of Ashley's

sentence, however did not make a finding that Ashley had the present or future ability to pay. CP 93; 1B RP at 321.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO ER 404b

Ashley alleges the trial court erred in admitting evidence of his prior abuse against the victim. The trial court did not abuse its discretion in admitting this evidence and should be affirmed.

A trial court's decision as to the admissibility of evidence is within its sound discretion and only reversible for abuse of that discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Smith*, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). A trial court abuses its discretion if its decision is based on untenable grounds or made for untenable reasons. *State v. Baker*, 162 Wn.App. 468, 473, 259 P.3d 270 (2011) (citing *State v. Fualaau*, 155 Wn.App. 347, 356, 228 P.3d 771, *rev. denied*, 169 Wn.2d 1023, 238 P.3d 503 (2010)).

Evidence Rule (ER) 404(b) provides for the admission of other crimes, wrongs or acts for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ER 404(b). This is not an exclusive list of permissible purposes

for admitting evidence pursuant to this rule. *State v. Grant*, 83 Wn.App. 98, 105, 920 P.2d 609 (1996). To admit evidence of a defendant's prior bad acts, the trial court must find four factors have been met: 1) sufficient evidence to show by a preponderance of the evidence that the prior acts 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 of the evidence against its prejudicial effect. *Fualaau*, 155 Wn.App. at 356-57.

Ashley argues that it was untenable for the trial court to conclude that the prior acts of violence occurred. Br. of Appellant, p. 6. However, the trial court is in the best position to determine the credibility of the witness regarding these incidents, and to determine whether the prior incidents were proved by a preponderance of the evidence. *See State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003) (finding the trial court was in the best position to make a factual determination because the issue was dependent on the facts and the totality of the circumstances). There is no requirement that corroboration of the prior acts of violence have occurred as Ashley seems to suggest the trial court should have required prior to finding the prior incidents had been proved by a preponderance of the evidence. The trial court clearly has the authority to determine whether something has been proved by a preponderance based solely on the

testimony of a witness. The trial court did not abuse its discretion in finding the victim credible enough to find the prior abuse occurred by a preponderance of the evidence.

Ashley also argues the trial court admitted the prior incidents for an improper purpose, that the evidence of the prior abuse was not relevant and that the prejudicial effect outweighed any probative value. Case law supports the admission of prior acts of domestic violence in a current domestic violence prosecution for a number of reasons. If prior acts of domestic violence directly relate to a specific element of the current offense, for example harassment, to show the reasonableness of the victim's fear, the prior incidents are likely admissible. *See State v. Barragan*, 102 Wn.App. 754, 760, 9 P.3d 942 (2000). Prior acts of domestic violence may also be admissible in order to give the jury an opportunity to evaluate the victim's credibility "with full knowledge of the dynamics of a relationship marked by domestic violence and the effect that such a relationship has on the victim." *Grant*, 83 Wn.App. at 108. In *State v. Baker*, 162 Wn.App. 468, 259 P.3d 270, *rev. denied*, 173 Wn.2d 1004, 268 P.3d 942 (2011), the Court found prior acts of domestic violence were admissible even though the victim did not recant. *Baker*, 162 Wn.App. at 475. The Court reasoned that the jury was "entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of

a relationship marked by domestic violence and the effect such a relationship has on the victim.” *Id.* And finally, in *State v. Johnson*, 172 Wn.App. 112, 297 P.3d 710 (2012), *review granted in part on other grounds*, 178 Wn.2d 1001, 308 P.3d 642 (2013), the Court found the defendant’s prior acts of domestic violence against the victim were admissible to show the victim’s state of mind. *Johnson*, 172 Wn.App. at 121. In *Johnson*, the victim’s state of mind was relevant because putting the victim in reasonable fear of bodily harm was an element of the crime charged—assault.

In *State v. Baker*, 162 Wn.App. 468, 259 P.3d 270 (2011), this Court found evidence of prior incidents of domestic violence were admissible even though the victim was not recanting her allegations at the time of trial. *Baker*, 162 Wn.App. at 475. The defendant in *Baker* was charged with two counts of Assault in the Second Degree Domestic Violence. *Id.* at 472. At trial, the trial court admitted evidence of prior assaults on the victim to show motive, absence of mistake or accident, and to assist the jury in assessing the victim’s credibility. *Id.* On appeal, the Court affirmed the admission of this evidence finding, in part, the evidence was admissible to allow the jury to assess the victim’s credibility. *Id.* at 475. The Court made this finding despite the fact that the victim did not recant; this evidence was admissible to explain why the

victim did not immediately contact the police, given the dynamics of the situation. *Id.* In making its decision, the Court reflected upon the *Grant*

Court's comments:

As reflected in the present case, victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others....

Id. (quoting *Grant*, 83 Wn.App. at 107-08).

It follows that a victim of repeated domestic violence may not question someone who tells them to stay in a room, to not answer the door. The prior abuse would also explain why a victim would feel intimidated when the defendant says no when she asks to leave a room. Without the context of the prior abuse, the jury would likely find the victim's tale less credible because it would not make sense to them that someone would not simply force their way out of an enclosed room as the victim in this case found herself.

Ashley was charged with Unlawful Imprisonment, a domestic violence offense pursuant to RCW 9A.40.040. CP 5. To prove Unlawful Imprisonment, the State had to show that Ashley knowingly restrained the victim. "Restrain" is defined as "restrict[ing] a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is 'without consent' if it is

accomplished by (a) physical force, intimidation, or deception....” RCW 9A.40.010(6). The State therefore had to show that Ashley restricted the victim’s movements without her consent. One way to show that is by intimidation. *See* RCW 9A.40.010(6). A victim who has a history of violence with a perpetrator is much more easily intimidated than maybe someone who has no knowledge of the perpetrator’s propensity for violence. The prior violence therefore is directly relevant to an element of the crime, the State’s burden to show unlawful restraint. Further, given the facts of this case, the victim’s credibility would be questioned by any jury as her actions were not necessarily typical. The jury has the right to evaluate the victim’s credibility “with full knowledge of the dynamics of a relationship marked by domestic violence and the effect that such a relationship has on the victim.” *Grant*, 83 Wn.App. at 108. By admitting the evidence of the prior abuse, the trial court ensured the jury had the information it needed to properly assess the victim’s credibility, and also to have all relevant evidence available to assess whether the State proved all elements of the crime beyond a reasonable doubt.

Ashley also argues the prior abuse is too remote in time to be probative. However, this defies common sense. Once a victim has been abused in a relationship, that entire relationship is marked by the prior abuse. It can affect all future decisions and actions by that victim in the

relationship. Clearly this victim's prior abuse at the hands of Ashley affected her actions on the day of the Unlawful Imprisonment. 1A RP at 74-75. This shows the prior abuse was relevant to an adequate assessment of her credibility and also relevant to prove the element of non-consent of Unlawful Imprisonment. Ashley's claim fails.

The trial court, in making its decision, indicated it had read through relevant case law, found the incidents had occurred by a preponderance of the evidence, and found the probative value out-weighed any prejudicial effect. 1A RP at 96-98. The Court also gave a limiting instruction on the evidence and invited Ashley and his attorney to propose any limiting instruction they wanted. CP 55; 1A RP at 98. There was clearly support in the law for the admission of this evidence in this case. *See Baker, supra, Grant, supra, Johnson, supra, and State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). The trial court made its decision for tenable reasons and based its decision on the proper application of ER 404(b) and relevant case law. The trial court did not abuse its discretion and should be affirmed.

II. THE OFFENDER SCORE WAS PROPERLY CALCULATED

Ashley argues the trial court miscalculated his offender score because it counted a prior conviction for Attempted Assault in the Second

Degree as a violent offense. However, Attempted Assault in the Second Degree is not a violent offense, but still counts as 1 point in Ashley's offender score because the SRA directs trial courts to treat anticipatory offenses the same as completed offenses for purposes of calculating an offender score. Given that provision, the trial court properly calculated Ashley's offender score by assigning 1 point to his prior Attempted Assault in the Second Degree conviction. Ashley's argument fails.

RCW 9.94A.525 governs offender score calculations. This statute explicitly provides that anticipatory offenses are to be treated the same as completed offenses. The rationale of *State v. Becker*, 59 Wn.App. 848, 801 P.2d 1015 (1990) is still valid because the statute's language was not changed when it was recodified and the court in *Becker* addressed nearly this exact issue. In *Becker*, the Court confirmed that second degree attempted robbery is not itself a "violent offense," however in determining the defendant's offender score, the prior attempted robbery is treated the same as the completed offense. *Id.* at 852-55. The completed offense, robbery in the second degree, is a violence crime and therefore receives two points. *Id.* at 852.

The Court in *Becker* reasoned:

The apparent conflict in the sections is based on the assumption that the attempted robbery can only receive two points if it is a 'violent offense.' Contrary to *Becker's*

contention, the offense does not receive two points because it is a violent offense, but rather, it receives two points because the completed crime of robbery in the second degree would receive two points and the attempted robbery is to be treated as a completed crime. According to the plain language of RCW 9.94A.360(5) the attempt must be treated the same as the completed crime. Such a reading of the two sections gives effect to each section and does not distort the language of the sections.

Id. at 852.

This Court found the more general definition section of the SRA applies to several sections of the SRA, not simply those sections that deal with the calculation of an offender score. RCW 9.94A.525 tells the court how to calculate anticipatory offenses for purposes of calculating an offender score. *Id.* at 853-54. The trial court is instructed to score prior convictions for felony anticipatory offenses the same as if they were convictions for completed offenses. RCW 9.94A.525(4). RCW 9.94A.525(7) requires the court to a prior juvenile violent offense as one point for a present nonviolent offense conviction. Assault in the second degree is a violent offense. RCW 9.94A.030(54)(viii). The Court in *State v. Knight*, 134 Wn.App. 103, 138 P.3d 1114 (2006) followed the reasoning of *Becker* and found that a defendant's conviction for conspiracy to commit robbery in the second degree had to be treated the same as the

completed crime for purposes of calculating the offender score. *Knight*, 134 Wn.App. at 109. The holding in *Becker* applies to Ashley's case as well.

As in *Becker, supra*, the trial court did not assign 1 point to Ashley's prior Attempted Assault in the Second Degree conviction because it is a violent offense, but rather the trial court assigned 1 point to this crime because a completed Assault in the Second Degree would have received 1 point and the statute requires the attempted be treated as if it were a completed offense. RCW 9.94A.525(4).

Further, even under a statutory construction analysis, this same result would be had. A more recent specific statute prevails when in conflict with a more general predecessor. *Becker*, 59 Wn.App. at 852 (citing *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 36, 785 P.2d 447 (1990)). Under this rule, the more specific and recent section under RCW 9.94A.525(4) prevails over the general and older section under RCW 9.94A.030. Accepting Ashley's argument regarding statutory interpretation would render RCW 9.94A.525 meaningless. This Court should not construe statutes in a way that would render any portion meaningless or superfluous. *Becker*, 59 Wn.App. at 854. By having RCW 9.94A.525(4) supersede the general definition of violent offender under RCW 9.94A.030, meaning is given to the SRA as a whole.

Ashley's prior conviction for Attempted Assault in the Second Degree was properly assigned 1 point in the calculation of Ashley's offender score. The trial court did not err in calculating this offender score and Ashley's sentence should be affirmed.

III. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS

Ashley alleges the trial court erred in imposing legal financial obligations and in finding that he had a present or future ability to pay. The trial court did not err in finding Ashley had a future ability to pay legal financial obligations, and this issue is not yet ripe for review as the State has not attempted to collect on his fines. The trial court should be affirmed.

The trial court did not make a finding as to whether Ashley had a present or future ability to pay his legal financial obligations. CP 93; 1B RP at 321. In *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011), the Court of Appeals held the trial court's finding that the defendant had the ability to pay was clearly erroneous because the trial court did not take "into account the financial resources of the defendant and the nature of the burden' imposed by LFOs...." *Bertrand*, 165 Wn.App. at 404 (citing *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991)). However, even though it was erroneous for the trial court to make that finding, and

the Court of Appeals reversed that finding, the Court of Appeals did not strike or reverse the imposition of legal financial obligations. *Id.* at 405. The Court held in *Bertrand, supra*, that the trial court must make a determination at a later time that the defendant is able to pay before any of the financial obligations may be collected. *Id.* at fn 16.

Clearly from the record and the judgment and sentence, the trial court did not make a determination of whether Ashley has the present or future ability to pay legal financial obligations. Had the trial court made a determination that Ashley had the ability to pay without any consideration in the record, it may have been erroneous. *See Bertrand*, 165 Wn.App. at 404. However, even in that situation, case law does not support striking the fines and fees as a remedy. The more appropriate and “meaningful time to examine the defendant’s ability to pay is when the government seeks to collect the obligation.” *Baldwin*, 63 Wn.App. at 310 (citing *State v. Curry*, 62 Wn.App. 676, 680, 814 P.2d 1252 (1991)). Prior to attempts to collect on Ashley’s legal financial obligations, the trial court should make a determination of his ability to pay. *See Bertrand*, 165 Wn.App. at 405.

Further, the State has not yet sought to collect on Ashley’s legal financial obligations and therefore his challenge to their imposition is not yet ripe. *Bertrand*, 165 Wn.App. at 405. Ashley’s argument that the trial

court's imposition of legal financial obligations should be vacated is without merit. The trial court should be affirmed.

D. CONCLUSION

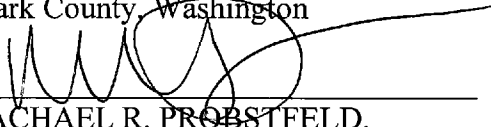
The trial court properly admitted evidence of Ashley's prior abuse of the victim pursuant to ER 404(b). The trial court also properly calculated Ashley's offender score. The trial court should make a determination as to Ashley's ability to pay prior to seeking to collect on the legal financial obligations, but as the State has not sought to collect on these obligations, Ashley's challenge is not yet ripe, and Ashley's proposed remedy is inappropriate. The trial court should be affirmed in all respects.

DATED this 25th day of April, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


RACHAEL R. PROBSTFELD,
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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