

FILED
Dec 23, 2015
Court of Appeals
Division I
State of Washington

No. 72922-5-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JACOB JOHANSEN,

Petitioner.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The trial court erred and denied Mr. Johansen a fair trial by permitting the State to offer other acts evidence.

At trial, the State sought to admit, in its case-in-chief, testimony by Ms. Boring and her parents alleging Mr. Johansen had engaged in assaultive conduct against her for a number of years. The court reasoned the jury could not fairly decide whether Mr. Johansen was guilty of the crime without knowing he was alleged to have previously committed similar acts. RP 98.

State v. Gunderson, explained other acts evidence could be admitted as relevant evidence of the witness's credibility only where the State first established "why or how the witness's testimony is unreliable." 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). Moreover, the Court limited this class of evidence to instances in which the State can establish its "overriding probative value." *Id.* The threshold for admission is "*conflicting statements about [the defendant's] conduct.*" *Gunderson*, 181 Wn.2d at 924 (emphasis and brackets in original) (citing *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)).

Gunderson requires that before other-acts evidence may be admitted, the State must first show Ms. Boring's testimony was

“unreliable” as demonstrated by conflicting statements about Mr. Johansen’s conduct. 181 Wn.2d at 924. The evidence in this case did not meet that standard. Nonetheless, the State maintains it did not need to establish the Ms. Boring’s unreliability as a threshold for admitting the. Brief of Respondent at 21. But *Gunderson* plainly states “the State [has] the burden of establishing why or how the witness’s testimony is unreliable.” 181 Wn.2d at 925.

Indeed, if the evidence is relevant to both explain inconsistencies, as *Gunderson* allowed, and to corroborate consistent statements, as the State urges here, there are few, if any circumstances, in which the evidence would be inadmissible. In short, the state advocates for the very “domestic violence exception” which *Gunderson* expressly rejected. 181 Wn.2d at 925 n.3. It is just that sort of exception which the trial court mistakenly believed permitted admission of the evidence in this case. As the court stated, had this been anything other than a domestic violence charge the court would not have admitted the evidence. RP 253-54.

The State has never contended Ms. Boring’s testimony was unreliable. Ms. Boring never made a statement denying the incident or in any way contradicting her trial testimony. To the contrary, the court

reasoned the evidence was relevant because Ms. Boring had told others about the alleged prior abuse. RP 274. *Gunderson* does not permit admission of the other acts evidence in such circumstances.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The court acknowledged there was “certainly a danger that this evidence could be misused as propensity evidence.” RP 98. Against this acknowledged risk of prejudice, the court weighed the evidence’s supposed probative value. The court concluded “[t]he jury cannot fairly weigh the evidence and make a determination concerning Ms. Boring’s credibility if they must assume that alleged assault on the night in question was an isolated incident that somehow came out of the blue.” *Id.* Thus, the court concluded the risk that the jury would misuse the evidence as propensity was outweighed by the unfairness of preventing the jury from using the evidence as propensity evidence. That reasoning is both illogical and contrary to ER 404(b).

As in *Gunderson*, the error requires reversal.

B. CONCLUSION

As set forth in his initial brief and above, because the trial court improperly admitted propensity evidence this Court should reverse Mr. Johansen's conviction.

Respectfully submitted this 23rd day of December, 2015.

s/ Gregory C. Link
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Attorney for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
)	
JACOB JOHANSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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