No. 99599-1

Court of Appeals # 53433-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL P. BAKKER,

Petitioner.

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

The Honorable Carol Murphy, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER/DECISION BELOW

Daniel P. Bakker, Petitioner, asks this Court to grant review under RAP 13.4(b) of the unpublished decision of the Court of Appeals, Division Two, in State v. Bakker, __ Wn. App. ___ (2021 WL 689189) (No. 53433-9-II), entered on February 23, 2021. A copy of the decision is attached as an Appendix.

B. OVERVIEW OF ARGUMENT FOR REVIEW

Over defense objection, the trial court admitted evidence of Petitioner Daniel Bakker's lawful gun ownership, even though there was no use or or threat to use the weapon during the lengthy incident and the only threats were to "beat" people up. The State argued the evidence was relevant to prove the victim had "reasonable fear" of Mr. Bakker for the misdemeanor harassment charge and that it showed why his girlfriend, a victim, wanted to keep Mr. Bakker from the bedroom where he was trying to go to sleep, because the gun was in a closet in that room. The evidence at trial already included testimony from the girlfriend that she had removed steak knives from the dinner table out of fear.

Mr. Bakker argued that the evidence he lawfully possessed a gun was highly prejudicial and would likely cause the jury to see it as "propensity" evidence of Mr. Bakker as a "dangerous" guy and thus more likely to commit the charged crimes.

The trial court first held that ER 404(b) did not apply because the State did not want to admit the evidence for "propensity." The

court then applied the general ER 403 analysis and said there was "some prejudice" from the evidence but only minimal because the evidence involved lawful gun ownership not any use of a gun in a crime. The Court of Appeals held that ER 404(b) did not apply because the State was not offering the gun evidence as "character evidence." App. A at 8. The appellate court also held that the potential prejudice did not outweigh the probative value under ER 403, because even if "being a gun owner is inherently a prejudicial activity," the evidence would be admissible unless that prejudice "substantially outweighed its probative value" under ER 403. App. A at 11. The Court found it relevant and probative for the jury to understand Ms. Pardo trying to keep Mr. Bakker out of the bedroom. App. A at 11.

This Court should grant review and should hold that ER 404(b) applies in cases where, as here, the State seeks to introduce evidence of lawful gun ownership against the accused in a trial where no gun was ever used or threatened to be used and a proper ER 404(b) objection is made. Further, the trial court and Division Two glossed over the very significant prejudice lawful gun ownership engenders despite this Court's recognition in Rupe that such prejudice exists. In addition, Article 1, § 24, and the Second Amendment protect the right to lawful gun ownership, so the issue involves the State attempting to use constitutionally protected behavior against an accused at trial, which requires the reviewing

court consider not only the prejudice the gun evidence itself will cause but also the chilling effect on those constitutional rights. Where, as here, the evidence of that exercise is cumulative of other evidence of "reasonable fear" and only minimally relevant, this Court should hold that the admission of evidence of lawful gun ownership is far more prejudicial than probative.

C. ISSUES PRESENTED FOR REVIEW

1. Does ER 404(b) apply when the State seeks to introduce evidence of lawful gun ownership into a trial in which the gun was never used or threatened to be used and did the trial court and the Court of Appeals err in holding otherwise?

2. In State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), this Court recognized the inherent prejudice of evidence of even lawful gun ownership, based on the strong, personal reactions such evidence engenders and the extreme risk it will be used as improper "propensity" evidence of dangerousness. Does the ruling of the Court of Appeals run afoul of Rupe by minimizing that prejudice?

3. Article 1, § 24, and the Second Amendment protect the right to lawful gun ownership, subject only to reasonable limits under the State's police power. Where the State seeks to use evidence of such constitutionally protected behavior against an accused at trial, must the reviewing court consider not only the prejudice the gun evidence itself will cause but also the chilling effect on those constitutional rights?

4. Was the evidence inadmissible under ER 404(b), because it was cumulative, only minimally relevant and extremely prejudicial and must the case be reversed and remanded for a new trial?

D. STATEMENT OF THE CASE

Petitioner Daniel Bakker was charged in Thurston county

with second-degree assault, fourth-degree assault ("domestic violence"), harassment ("domestic violence"), and bail jumping. CP 29-30; RCW 9A.36.021(1)(a); RCW 9A.36.041(4); RCW 9A.46.020(1); RCW 9A.76.170(3)(c); RCW 10.99.020.

After trial, the jury did not agree with the State's claims regarding the second-degree assault and found Mr. Bakker not guilty of that charge but instead guilty of a "lesser" of fourth-degree assault and the other crimes as charged. CP 324-26.

The charges stemmed from an incident involving Mr. Bakker, his girlfriend, Kaela Pardo, and a work friend, Zackary Quisenberry, at Bakker and Pardo's home. CP 327-31; TRP 179, 181, 308, 345, 489, 569. Everyone admitted that Pardo's dog got kept getting out and that was a big part of the dispute. TRP 200, 234-35, 309-12, 347, 516-32. But Quisenberry, Pardo and Bakker had different versions of events. To understand why review should be granted, a brief overview of the evidence is requried.

Mr. Quisenberry and Ms. Pardo agreed that Mr. Bakker had been drinking and was angry about the two men having to keep going to find Ms. Pardo's dog because he kept getting out. TRP 200, 234-35. Mr. Quisenberry and Ms. Pardo had some other points of agreement about the incident, but there was much they remembered quite differently.

For example, Mr. Quisenberry went to the store early in the evening and when he came back, saw that Mr. Bakker was holding

Ms. Pardo's wrists, but dropped them right away. TRP 314. Ms. Pardo claimed that Mr. Bakker was holding her wrists and did not let go until Mr. Quisenberry ordered him to, but Mr. Quisenberry did not recall having to say anything. TRP 239-40, 314.

In another example, Ms. Pardo was positive that Mr. Bakker was holding Mr. Quisenberry so tight in a headlock at when the two men were "roughhousing" that it "was cutting off" Mr. Quisenberry's air and so severe that Mr. Quisenberry told her to call police. TRP 320. Indeed, Ms. Pardo described Mr. Quisenberry's face as turning red and eyes "bulging." TRP 320. Mr. Quisenberry, however, was positive that he was only briefly in a headlock during the wrestling and could still breathe. TRP 226-27.

The incident lasted several hours with things being fine at points and other moments of alleged aggression by Mr. Bakker, according to Ms. Pardo and Mr. Quisenberry, but with lots of difference in the details. See, e.g., TRP 184-88, 242, 314-56 (question about when Mr. Bakker tried to leave to go to a hotel); TRP 316-17, 360-61 (question of whether Ms. Pardo was outside with Mr. Quisenberry at one point as she recalled or not, as he recalled); TRP 189, 317, 361-62) (question whether at some point Mr. Bakker was "crawling in the grass and watching" Ms. Pardo and Mr. Quisenberry outside as she said or whether Mr. Bakker had lain down in the grass as if he was going to sleep, as Mr. Quisenberry perceived).

Testimony about parts of the incident changed, too, like Ms.

Pardo's initial claim that Mr. Bakker had been yelling at her and grabbed her wrists without any provocation, then contradicted by her ultimate admission on cross-examination that *she* was the one who made first physical contact with *him*, after which he grabbed her wrists. TRP 351-52. Initially Mr. Quisenberry and Mr. Pardo said they told Mr. Bakker not to drive because he was too drunk and Mr. Bakker then walked away from the property. TRP 182, 189, 242. On cross-examination, Mr. Quisenberry admitted that he and Ms. Pardo had confronted Mr. Bakker at his car, physically trying to remove the keys from him, with Mr. Quisenberry not only reaching into the vehicle over Mr. Bakker in the driver's seat to change the gear on the car to park but also grabbing Mr. Bakker from the seat and forcibly pulling him from it - against Mr. Bakker's will. TRP 243-48.

Ultimately, at the end of the evening, when Mr. Bakker tried to go into their bedroom to go to sleep, Ms. Pardo refused to let him in, blocking the way. TRP 332-33. She told him he was "not invited into the bedroom at that time." TRP 332-33. Her dog was in the bedroom and she planned to sleep there, too, she said, so she told Mr. Bakker to go sleep on the couch. TRP 332. This made Bakker very angry and he started yelling, saying he wanted to go to bed. TRP 332-33. Mr. Quisenberry, who was outside, saw Ms. Pardo try to get into their bedroom and it appeared Mr. Bakker wanted to follow and that he had Ms. Pardo up against the wall. TRP 257. When Mr. Quisenberry went inside and told Mr. Bakker to back off, they were

talking and Mr. Bakker "just bent over and charged," hitting Mr. Quisenberry in the knee, causing a sharp pain and making him fall. TRP 202-203, 264.

Mr. Bakker denied being drunk and aggressive that night and described things from the perspective of a more mutual argument with Ms. Pardo. Regarding the alleged assault at the bedroom door, Mr. Bakker testified that he told Mr. Quisenberry, "I've had too much too drink. I'm sorry," and "I'm going to sleep" and Ms. Pardo pushed him away and would not let him in the bedroom TRP 544-46. Mr. Bakker conceded that he grabbed her wrists and told her to "please stop" after she kept pushing him away from the door. TRP 545-57. Mr. Bakker also admitted giving Mr. Quisenberry a "little tackle" at the door. TRP 541, 604.

Before trial, Mr. Bakker had moved to exclude evidence that Ms. Pardo had moved the steak knives from the kitchen table that night because she was afraid of Mr. Bakker grabbing them as weapons. TRP 153-54. The trial court allowed that testimony, which consisted of Ms. Pardo saying that, because Mr. Bakker was "being very aggressive," she had removed the steak knives from the table at dinner, and that she thought there was "a threat there." TRP 318. When the prosecutor asked if she was also "scared that evening," Ms. Pardo responded, "I was scared for my safety, yes." TRP 322. She claimed that Mr. Bakker had threatened to "beat the shit" out of her from the time she arrived home and she felt unsafe. TRP 322. She

also said she was afraid because he said he was going to beat her with a stick and "this was a credible threat based on prior experience." TRP 340-42.

Mr. Quisenberry, in contrast, never heard Mr. Bakker threaten to "beat" Ms. Pardo with a stick or beat the shit out of her: he only heard one threat that night. TRP 226. It was early, and Mr. Bakker had said to Ms. Pardo that "if she didn't start cooking dinner that he would knock her upside the head." TRP 226. Mr. Quisenberry said it did not actually seem like a serious threat but more of an unfunny joke. TRP 226.

In addition to the knife evidence, however, there was also evidence that Mr. Bakker lawfully possessed a gun. TRP 154-55. Counsel moved to exclude that evidence pretrial and the prosecutor declared that the State was *not* going to present testimony about the gun. TRP 153-54. The State had wanted to ask about prior alleged assaults between Ms. Pardo and Mr. Bakker but had failed to make a motion for an ER 404(b) hearing.

During trial, however, the prosecutor changed his mind. TRP 325. He now argued that the gun evidence was relevant and admissible because the gun being in the bedroom was relevant to show why Ms. Pardo did not want him in there. TRP 325. The prosecutor also averred it would not prejudice Mr. Bakker because having a firearm is not "prejudicial in and of itself." TRP 325.

Mr. Bakker objected, arguing the evidence was highly

prejudicial and improper under ER 404(b), noting that "reasonable fear" was already established by the threats of being "beat." TRP 326-27. He pointed out that jurors were likely to draw negative inferences from the exercise of the right to possess a gun, even though there was no claim Mr. Bakker had ever used or threatened to use a gun the whole night. TRP 327.

The judge held that ER 404(b) did not apply and that the prejudice did not substantially outweigh the relevance to show Ms. Pardo's "fear and concern" that night. TRP 329-30. The judge conceded it was "true that there may be other evidence" to prove that fear but was unconcerned about whether the evidence was cumulative. TRP 329-30.

Ms. Pardo then was allowed to testify that part of her concern about calling police when Mr. Quisenberry was allegedly asking her two was because there was a gun in the house. TRP 331-32. It belonged to Mr. Bakker's family and he had brought it home one day. TRP 331-32. Ms. Pardo opined that she could call the police, they might do nothing and she would be left with someone who had threatened her and hurt his own friend and "would have access to that gun." TRP 331-32. She also testified she was trying to calm Mr. Bakker the whole night but also had the goal of "still keeping him away from gun access," and to keep him "out of the bedroom throughout the evening and remove any potential access to anything that could be used in a violent manner." TRP 334.

Ms. Pardo admitted that Bakker had never threatened to use a gun on her or shoot her that night. TRP 347. The gun was in the closet and in a locked box and might have been also stored away from ammunition. TRP 346-47.

Mr. Bakker was convicted of 1) bail jumping for missing a court date while the case was pending, 2) harassment of Ms. Pardo with a "domestic violence" finding, 3) not second but fourth-degree assault of Mr. Quisenberry, and 4) fourth-degree assault of Ms. Pardo, with a "domestic violence" finding. CP 324-31.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW SHOULD BE GRANTED TO ADDRESS THE SCOPE AND LIMITS OF EVIDENCE RULE 404(b) WHEN THE EVIDENCE IN QUESTION IS CONSTITUTIONALLY PROTECTED CONDUCT WHICH IS ONLY MARGINALLY RELEVANT

This case presents questions of the scope of ER 404(b) and how it is to be applied when the State seeks to introduce evidence that the accused in a criminal case lawfully owned or possessed a gun not used or threatened to be used during the crime. Further, in this case, this Court is presented with the interplay of the evidence rule and the state and federal constitutional rights regarding such "arms." This Court should grant review not only because of the apparent conflicts between the decision in this case and well-settled law regarding ER 404(b), but also because of the important constitutional rights involved.

First, the Court of Appeals holding that ER 404(b) did not

apply is contrary to holdings of this Court and reasoning regarding ER 404(b). This Court has previously recognized that evidence of even lawful gun possession or ownership by the accused is inadmissible if unrelated to the charged crime. See State v. Jeffries, 105 Wn.2d 398, 412, 717 P.2d 722, cert. denied sub nom Jeffries v. Washington. 479 U.S. 922 (1986); State v. Robinson, 24 Wn.2d 909, 167 P.2d 986 (1946); State v. Lloyd, 138 Wash. 8, 244 P. 130 (1926). This Court has also held that ER 404(b) prohibits evidence of the other "crimes, wrongs or acts" of the accused to prove they acted "in conformity" with the "character" these prior incidents seem to infer. See State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). But the Court has not established what standard should be applied when the State seeks to introduce evidence of lawful, constitutionally protected gun ownership or possession and the trial court refuses to apply ER 404(b).

That rule provides, in relevant part:

> 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.

ER 404(b). This rule creates a presumption against admitting evidence of "other crimes, wrongs, or acts." State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). As this Court has noted, "[p]roperly understood," ER 404(b) is a "categorical bar" to admission of improper propensity evidence. State v. Gresham, 173 Wn.2d 405,

420-21, 269 P.3d 207 (2012).

In this case, the trial court and Court of Appeals were apparently convinced that the prejudice of the evidence was minimal, because gun ownership is not itself a "bad act." Indeed, the State argued the evidence was not subject to ER 404(b) for that reason. But this Court has already answered that question. See State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002) (rejecting the State's claim that ER 404(b) is "limited to bad acts, disgraceful acts or unpopular acts").

Instead, ER 404(b) applies when the State seeks to introduce *any* evidence, even of lawful acts, which could be used to imply the "character" of the accused. 145 Wn.2d at 466-67. Thus, in Everybodytalksabout, there was improper propensity evidence under ER 404(b) where the State sought testimony from a defendant about "acts" designed to show the "leadership" skills of the accused to imply that he had acted in that same role in committing the charged crime. Id.

Here, the Court of Appeals held that ER 404(b) did not apply because the State was not explicitly seeking to introduce the evidence specifically to prove Mr. Bakker's "character" as a dangerous man, i.e., "because the evidence was not offered to prove conformity therewith." App. A at 9. According to Division Two, because the State did not argue the "character" part of the evidence, ER 404(b) simply did not apply. App. A at 9.

This Court should grant review. The Court of Appeals decision effectively converts ER 404(b) analysis to a subjective question of "what does the State intend." It eliminates all oversight by the courts of introduction of extremely prejudicial evidence unless the prosecution is unwise enough to admit that the offending evidence is being admitted to cast the defendant as a "dangerous man."

The Court of Appeals decision is also in stark contrast to the analysis this Court has adopted. See DeVincentis, 150 Wn.2d at 17. As this Court has held, "Washington courts have developed a thorough analytical structure for the admission of evidence of a person's prior crimes, wrongs, or acts." Gresham, 173 Wn.2d at 421. In cases like DeVincentis and Gresham, this Court has established that any possible "propensity" evidence may only be introduced for limited purposes and then *only* after the trial court engages in a four-part analysis, where it must 1) find by a preponderance the misconduct the State wants to admit had occurred, 2) identify, on the record, the permissible purpose for the evidence, 3) determine, on the record, whether the evidence is relevant to prove an essential element of the crime charged and then 4) weigh the probative value of the evidence against is prejudicial effect. Gresham, 173 Wn.2d at 421.

Under the holding of the Court of Appeals here, ER 404(b) does not apply if the State gives a reason other than propensity to

admit the evidence. But there would be no reason for the ER 404(b) analysis this Court described in DeVincentis and Gresham to be created if that is the case. There is no need for this Court to have created a four-part structure for a decision on admitting evidence under ER 404(b) if that evidence rule only applies when the State says "we want the evidence to prove character," because the rule categorically excludes all such evidence.

There would also be no need for this Court to have declared that, in questionable cases, the trial judge should err on the side of excluding evidence under ER 404(b), as this Court has done. See State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). And of course, the language of the rule itself belies the interpretaion of the Court of Appeals, providing for introduction of evidence of "other crimes, wrongs, or acts," for "other purposes" besides "character" and "conformity." ER 404(b).

This Court should grant review and should hold the ER 404(b) does, in fact, apply when the State seeks to introduce evidence of lawful gun ownership. The trial court erred in refusing to conduct the required analysis and the Court of Appeals erred in concluding that the trial court's decision was not wrong. The proper interpretation and scope of ER 404(b) is an issue of substantial public importance, as this Court's repeated grant of Petitions in cases like Gresham and others involving those issues has shown.

Because the Court of Appeals held ER 404(b) did not apply, it

then simply looked at the ER 403 "relevance and prejudice" analysis. The trial court did the same. TRP 339. The trial judge also ruled that it was essentially irrelevant that there was already evidence in the record to show Ms. Pardo's "reasonable fear." TRP 339.

Under ER 404(b), however, when the trial court balances the danger of unfair prejudice and the probative value of the evidence, it is required to do so "in view of the availability of other means of proof." State v. Tharp, 96 Wn.2d 591, 595, 637 P.2d 961 (1981). The evidence sought to be admitted must not only be relevant but must also be necessary to prove an essential element of the charged crime in light of the evidence already admitted. Id. Further, evidence which is cumulative of other admissible evidence is not "necessary" under the rule. Id. Thus, if the proper analysis had been applied, the trial court would have been required to consider that the State already had more than sufficient evidence of "reasonable fear" of harm for the misdemeanor harassment.

Notably, when weighing the probative value and prejudice, this Court has declared that, "substantial probative value is needed to outweight the prejudicial effect of ER 404(b) evidence." DeVincentis, 150 Wn.2d at 23.

Both the trial court and Division Two glossed over the extreme prejudice from even lawful gun ownership, with the trial judge believing that it was not "bad" to own a gun. CP 329-30. But this Court has made it clear that "[p]ersonal reactions to the

ownership of guns vary greatly" and "[m]any individuals view guns with great abhorrence and fear." Rupe, 101 Wn.2d at 708. In Rupe, the Court noted that these varying views of even lawful gun ownership share the common risk that jurors "might believe the defendant was a dangerous individual" and thus more likely guilty of the charged crime, "just because he owned guns." Id.

It is also important that both the state and federal constitution provide for gun ownership as a constitutional right. Id. Article 1, § 24, provides in relevant part that the "right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired[.]"[1] The Second Amendment provides a more limited protection but still protects the right of the individual to lawfully possess guns (subject to reasonable regulation). Rupe, 101 Wn.2d at 706; see State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1945).

The intersection of the constitutional rights to gun ownership and our criminal law has required this Court to carve out specific requirements for linkage between a gun in a house an a crime. See State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002) (requiring a "nexus" between the defendant, the crime, and the gun, to find the

[1]Article 1, § 24 provides:

> The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

defendant "armed" with it for a crime committed in the house).

Where a constitutional right is involved, the State is prohibited from 1) taking action which will unnecessarily penalize or "chill" the exercise of the right, or 2) draw any adverse inference from that exercise. See Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (negative inference from failure to testify); State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) (striking old death penalty statute for needlessly chilling the right to demand a jury trial). The impermissible use of constitutionally protected behavior is a violation of due process. Rupe, 101 Wn.2d at 706.

It is true that, in general, ER 404(b) issues are not considered constitutional. See, State v. Jackson, 102 Wn.2d 689, 696, 689 P.2d 76 (1984). Where, as here, the State seeks to introduce evidence that a defendant has exercised his constitutional right to lawfully have a gun against the accused at trial, this Court has not yet held that special scrutiny is required. But because of the possible chilling effect to those rights and to avoid the risk of improper use of the evidence the defendant exercised those rights, this Court should give special scrutiny to the admission of that evidence. This Court should grant review, hold that ER 404(b) applied and that the evidence was inadmissible under the rule in this case.

F. CONCLUSION

Both the trial court and the Court of Appeals erred in holding that ER 404(b) does not apply where, as here, the State seeks to introduce evidence of the constitutionally protected conduct of lawful gun ownership or possession against the accused at trial. This Court should grant review and should so hold, applying special scrutiny because of the constitutional rights involved.

DATED this 25th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via this Court's upload service and to Mr. Bakker at 6349 Elizan Street NW, Olympia, WA. 98502.

DATED this 25th day of March, 2021.

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Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Daniel Paul BAKKER, Appellant.

No. 53433-9-II
|
Filed February 23, 2021

Appeal from Thurston Superior Court, Docket No: 18-1-00641-8, Honorable Carol A. Murphy, Judge.

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UNPUBLISHED OPINION

Worswick, J.

***1** Daniel Bakker appeals his conviction for two counts of fourth degree assault and one count of harassment. Bakker argues that the trial court erred when it ruled that the State's proffered testimony that Bakker owned a gun and that the gun was in his bedroom during an alcohol-fueled, violent altercation with his girlfriend, was not within the scope of ER 404(b).[1] Bakker further argues that the trial court erred when it ruled that the danger of unfair prejudice did not substantially outweigh the probative value of such evidence under ER 403. Because the trial court did not abuse its discretion in determining that the evidence was not barred by either ER 404(b) or ER 403, we affirm Bakker's convictions.

1 ER 404(b) limits evidence of other crimes, wrongs, or acts to prove the character of a person in order to show they acted in conformity therewith.

FACTS

I. THE CRIME

On the evening of March 24, 2018, Daniel Bakker got into a dispute with his girlfriend, Kaela Pardo, at their home. Zachary Quisenberry, Bakker's friend was also present at the home. Bakker was intoxicated. During the course of the evening, Bakker, Pardo, and Quisenberry were involved in various altercations and arguments, which included Bakker physically grabbing Pardo on multiple instances and charging into Quisenberry and injuring his knee. Bakker also threatened to "beat the s**t" out of Pardo with a stick, and told her that "if she didn't start cooking dinner, he would "knock her upside the head." Verbatim Report of Proceedings (VRP) at 226, 232. Bakker was so intoxicated that Quisenberry and Pardo had to physically restrain him to prevent him from driving away.

Bakker fought with Quisenberry while they ate dinner, causing Pardo to remove steak knives set on the table, fearing that they would be "a threat." VRP at 318. Bakker put Quisenberry into a headlock and Pardo had to intervene to prevent Quisenberry from passing out. After dinner, Bakker and Pardo got into a physical altercation again when Pardo refused to let Bakker into the bedroom. Bakker grabbed Pardo by the arm, physically moved her from the doorway, and pinned her up against the wall. Quisenberry yelled at Bakker to stop and to take his hands off of Pardo. Bakker turned and charged at Quisenberry, striking his knee and causing a serious injury that would require medical attention. Pardo and Quisenberry both left the house.

The State charged Bakker with second degree assault,[2] fourth degree assault—domestic violence,[3] harassment—domestic violence.[4] The State later added a charge of bail jumping[5] for Bakker's failure to appear at a November 1, 2018 hearing.

2 RCW 9A.36.021(1)(a).

3 RCW 9A.36.041(1), (2).

4 RCW 9A.36.041(4).

5 RCW 9A.76.170(3)(c).

II. TRIAL

At trial before opening statements, the trial court heard arguments on motions in limine. Bakker moved to suppress Pardo's testimony about any prior abuse or assault, and about weapons, specifically removing the knives from the kitchen table during the altercation. The State objected, arguing that evidence of prior physical violence by Bakker was necessary to establish the necessary element of Pardo's reasonable fear to prove the charge of harassment. At that time, the State said that it did not intend to elicit testimony that Bakker possessed a gun which was in the house the night of the incident, but sought to admit evidence regarding the steak knives. The State also said that it would not be seeking to introduce 404(b) evidence. The Court stated that it would address the possibility of 404(b) evidence at a later time. [6]

6 The trial transcript refers to a defense motions in limine memorandum, but this document is not part of the record on appeal.

***2** Trial proceeded and witnesses testified to the facts described above. Specifically, Pardo testified that Bakker made threats throughout that evening to beat her. Pardo also testified that Bakker's threats made her feel unsafe, and that she believed they were real. During her direct examination, the State interrupted Pardo and asked the court for a short recess, which was granted.

During that recess, the State asked the court to resolve the disputed evidentiary issues with Pardo's potential testimony discussed during pretrial. The State changed its position from the pretrial arguments, and said it now would like to elicit limited testimony from Pardo about Pardo's knowledge and awareness of Bakker's gun in the bedroom as evidence of her reasonable fear of Bakker, but that it did not plan to elicit any testimony about any prior incident involving the gun. The State argued that this evidence was necessary to provide context to the jury as to why Pardo tried to prevent Bakker's access to the bedroom. The State argued that the purpose of the gun testimony would be the same as for Pardo's testimony she gave about removing the knives from the kitchen during the altercation as evidence of her reasonable fear of Bakker. The State argued that there was no need for a hearing on ER 404 because evidence that Bakker had a gun in the bedroom was not evidence of a prior bad act or "that he's a bad person or something that would lead to that inference." VRP at 325.

Referring to Bakker's memorandum, the court clarified on the record what exactly Bakker was objecting to:

The Court: ....

> [Defense counsel], do you understand the testimony that you are objecting to is this witness testifying as to her knowledge that there would be a firearm and that Mr. Bakker owns a firearm? Is that your understanding?
>
> Defense counsel: I think that is—yes. And that she was concerned that if he had access to it, something bad would happen.
>
> The Court: So I just want to be clear about the testimony that we're talking about. I think the parties are agreed that that is the substance of the testimony that is the subject of the contested motion.
>
> Defense counsel: That's right. Yeah.

VRP at 325-26.

Bakker argued that the testimony about the gun would be cumulative because Quisenberry had already testified that Bakker had physically assaulted her and that she looked afraid. Bakker argued against a "need to go into potential 404(b) stuff or invite speculation by the jury that there had ever been an event involving a firearm in the past or inviting the jury to speculate that because there was a gun in the house, that she was at risk by this firearm." VRP at 327. Bakker argued that eliciting testimony about the firearm would be "an end run around for 404(b) potential ... if she comes in and testifies there was some prior incident with the gun." VRP at 327.

The court again interjected to clarify the nature of Bakker's objection:

> The Court: Agreed. But that's not what we're talking about, right? What we're talking about is her knowledge that he owns a gun and that, presumably, it was in the residence somewhere.
>
> Defense Counsel: That's correct, Your Honor, and my concern is the speculation that that invites by the jury.
>
> The Court: Would you agree that that evidence would be relevant?
>
> Defense Counsel: Yes, marginally relevant, in that it goes to, potentially, her state of mind as far as the harassment allegation goes. But I don't think we could get to it, because I think under [ER] 403, I think it's more prejudicial than probative. But I think there's simply enough facts to get to reasonable fear or apprehension without anything outside of what she's already testified to.

***3** VRP at 327-28.

The court ruled that the proffered evidence was not covered under ER 404(b) stating:

> The court considers this issue of the proposed testimony of Ms. Pardo that Mr. Bakker owns a firearm and that that firearm, at least to her knowledge, was at the residence, and the court's analysis is under 401 and 403. I don't consider this to be a 404(b) issue because under no circumstances is the court allowing Ms. Pardo to testify about any prior use of the firearm or any prior improper use of the firearm.

VRP at 328-29.

The court also ruled that the testimony about the gun in the bedroom would be admissible as relevant evidence under ER 402:

> My understanding is the only question is about her testimony as to his ownership and possession of a firearm, and the court believes that that evidence is relevant in this case and that it goes to Ms. Pardo's fear or concern she had. And while it's true that there may be other evidence of that as well, I don't think the fact that there's other evidence of it necessarily limits the State to not be able to put on evidence that is relevant.
>
> And so it certainly goes to an element of at least one of the counts in this case, and it is relevant.

VRP at 329.[7]

[7] ER 402 provides: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

The court then performed an ER 403 analysis. The trial court explained that evidence that there was a gun or Pardo's knowledge of a gun "has some prejudice," but that the probative value outweighed that prejudice. VRP at 329.

The court again clarified that it was ruling only on the proffered testimony as being non-404(b) evidence, and it explained that its ruling applied only insofar as Pardo's testimony did not exceed that limitation:

> In other words, the prejudice here is in the ownership and possession of a firearm is not as great as it would be if there were some testimony that it was used in

> a particular way or some more specific evidence as to Mr. Bakker's use of the firearm. It does go to that state of mind. And so the court is allowing that limited testimony in this case so that Ms. Pardo can explain her state of mind as it ... goes to at least one of the counts. But no further than as I've described. Simply her understanding of the ownership and possession of it. And I'm not requiring that that testimony be elicited. I'm only allowing it if the question is otherwise proper.

VRP at 329-30.

The jury returned, and direct examination of Pardo resumed. Pardo testified about the gun:

A: Well, he had [Quisenberry] in a headlock, as I stated before. And I had 911 dialed. I didn't want to call 911. I had many reasons for that. There was a gun in the house, and that is one of the biggest reasons. What if the police were to show up and they could potentially arrest me, or nothing happened at all, and then I would be left in the house with somebody who had already been threatening to hurt me and beat me, and who I had just watched hurt their friend, their very good friend, and that he would have access to that gun.

***4** Q: And did you—were you aware of where the gun was?

A: It was in the bedroom.

Q: Do you know who that gun belonged to?

A: It was the family's gun. [Bakker] brought it home from their home one day.

VRP at 331-32.

Pardo testified that she tried to keep Bakker out of the bedroom in an effort to prevent Bakker's access to that gun. Pardo testified that Bakker was very angry and very aggressive. Pardo testified that Bakker grabbed her and the two had a physical altercation at the doorway to the bedroom, and that Quisenberry intervened while she gathered her belongings to leave the house. Pardo testified about her fear of Bakker gaining access to the bedroom:

> You know, I tried as best I could to keep my demeanor calm and tried to calm him while still keeping him away from gun access, and I tried to keep him—and keep him out of the bedroom throughout the evening and remove any potential access to anything that could be used in a violent manner.

VRP at 334.

Bakker did not object to any of the testimony about the gun during the trial. Bakker cross-examined Pardo about the gun. Pardo testified that the gun was stored in the bedroom closet, inside of a locked box. Pardo also testified that Bakker did not mention anything about the gun during the night in question. On redirect examination, Pardo again testified that she did not want Bakker entering the bedroom because the gun was in there.

In closing arguments, Bakker discussed the gun evidence:

> Now, she has this story she didn't want him to go in there because there was a gun. She testified she never saw the gun, there was no mention of the gun, the gun was locked up in the closet. She was in the bedroom. She had the opportunity—if she was concerned at that time, she could have removed the gun, she could have hidden the gun, thrown the gun out the window. She could have done anything with the gun. The gun was not the concern.
>
> The gun is a complete canard. It's something that she trotted out there in trial to look at and say, "Ooh, gun. Bad guy, scary guy." Obviously at the time of these events, there wasn't an issue, because she had control over that.
>
> It wasn't until later where she said, gosh, you know what, I didn't have a good reason for physically stopping him from getting into the room.

VRP at 711-12.

The jury found Bakker not guilty on the charge of second degree assault, but found him guilty of the lesser-included charge of fourth degree assault of Quisenberry and also found him guilty of fourth degree assault of Pardo, harassment, and bail jumping.

Bakker appeals his convictions for assault and harassment. [8]

8 Bakker's notice of appeal challenges all his convictions, but his brief addresses only his second degree assault conviction.

ANALYSIS

Bakker argues the trial court abused its discretion in two ways by admitting evidence that Bakker owned a gun. First, Bakker argues that the trial court erred when it concluded that Pardo's testimony that Bakker had a gun in the bedroom was not covered under ER 404(b). Bakker argues that we

should review this issue de novo. Second, Bakker argues that the trial court erred when it ruled that the potential prejudice of the gun evidence did not outweigh the potential probative value under ER 403.

***5** The State argues that Bakker failed to first raise a claim of error on the basis of ER 404(b) at the trial court level, and is thus barred from review under RAP 2.5(a). The State alternatively argues that any such error under ER 404(b) was harmless because the evidence would have been admitted. The State also argues that the trial court did not err when it ruled that the potential prejudice of the gun evidence did not outweigh the potential probative value under an ER 403 balancing test.

We hold that the trial court did not err when it ruled that evidence of Bakker's gun ownership, without being offered as character evidence, was not within the scope of ER 404(b). Additionally, we hold that the trial court did not abuse its discretion when it ruled that the potential prejudice of the gun evidence did not outweigh the potential probative value under ER 403. Accordingly, we affirm Bakker's conviction.

I. OTHER CRIMES, WRONGS, OR ACTS

A. *RAP 2.5(a)(3)*

As an initial matter, the State argues that Bakker's ER 404(b) argument is being raised for the first time on appeal and should not be considered under RAP 2.5(a). Bakker does not address RAP 2.5 in his brief. Instead, he argues that the trial court permitted Pardo's testimony about the gun "over defense objection." Br. of Appellant at 23. We hold that Bakker sufficiently preserved the ER 404(b) issue for review.

Ordinarily, we do not consider unpreserved errors raised for the first time on review. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019). Our refusal to review unpreserved errors "encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

On appeal, Bakker argues that the trial court erred in permitting Pardo's limited testimony about her knowledge of the gun in the bedroom under ER 404(b). In the trial court, Bakker objected, based on ER 404(b), to the proffered testimony that Pardo knew Bakker possessed a gun and that gun was in the bedroom. Bakker specifically argued that allowing Pardo's proffered testimony invited the jury to speculate that Bakker had prior misconduct involving the firearm and would be an "end run" around ER 404(b), which sufficiently articulated that he was objecting to this evidence as character evidence under ER 404(b). VRP at 327. Thus, we review the merits of Bakker's argument.

B. *Merits of 404(b) Ruling*

The trial court allowed the State to introduce evidence that Bakker owned a gun. The trial court stated that ER 404(b) applied only to "any prior use of the firearm or any prior improper use of the firearm." VRP at 329. Bakker argues that the trial court erred when it concluded that ER 404(b) does not cover gun ownership because gun ownership itself is prejudicial. The State argues that its proffered testimony was not covered by ER 404(b) because it was not offered to prove Bakker's character in order to show action in conformity therewith. We hold that the trial court did not err because the evidence was not offered to prove conformity therewith.

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." The rule does not define the term "acts," but historically, the rule has been interpreted to include " 'acts that are merely unpopular or disgraceful.' " *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE § 114, at 383-84 (3d ed. 1989)).

***6** We review a trial court's interpretation of an evidentiary rule de novo as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Court rules are interpreted in the same manner as statutes. If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent." *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013).

Evidence of other crimes, wrongs, or acts are inadmissible to prove the character of a person or to show that a person acted in conformity with that character. ER 404(b). A trial court must always begin with the assumption that such evidence is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11 at 17. Such evidence, however, can be admitted for other limited purposes, including intent, knowledge, or absence of mistake. ER 404(b). Before a trial court admits evidence covered by ER 404(b), it 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. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). The third and fourth elements ensure compliance with ER 402 and ER 403, respectively. *Gresham*, 173 Wn.2d at 421. The four pronged ER 404(b) analysis must be performed on the record. *State v. Olsen*, 175 Wn. App. 269, 281, 309 P.3d 518 (2013).

Here, Bakker's lawful ownership of a gun may not rise to the level of "misconduct," but such ownership is certainly an "act" which the jury could find was unpopular, and this act was relevant to prove Pardo's reasonable fear that Bakker's threats would be carried out. As such, the act of owning a gun potentially falls within ER 404(b). However, because the evidence was not offered to "show action in conformity therewith," ER 404(b) did not operate to exclude the gun evidence.

Relying on *State v. Everybodytalksabout*,[9] and *State v. Foxhoven*,[10] Bakker argues that his lawful ownership of a gun in the home is an "other crime, wrong[ ], or act" under ER 404(b). Br. of App. at 38. However, because the evidence in the instant case was not offered as character evidence, neither of these cases supports Bakker's argument here. Bakker also argues that *State v. Rupe*[11] supports the proposition that the trial court violated his constitutional rights by allowing the State to offer his lawful ownership of a gun as character evidence, but this argument also fails for the same reason.

9 145 Wn.2d 345, 39 P.3d 294 (2002) (holding that past leadership, though not misconduct, unpopular or disgraceful, could fall within ER 404(b) if offered as character evidence to prove conformity therewith).

10 161 Wn.2d 168, 163 P.3d 786 (2007) (holding that pictures and drawings of graffiti, though not graffiti themselves, were still covered by ER 404(b) if offered as character evidence to prove conformity therewith.).

11 101 Wn.2d 664, 703, 683 P.2d 571 (1984) (reversing a death sentence where a defendant's ownership of a gun collection was used as evidence to support an aggravating factor, reasoning that it was a violation of due process to draw an adverse inference from a defendant's exercise of a constitutional right); *C.f.* *State v. Hancock*, 109 Wn.2d 760, 766, 748 P.2d 611 (1988) (clarifying that *Rupe* only applied when the adverse inference was irrelevant).

***7** Accordingly, we hold that the trial court did not err when it ruled that the proffered testimony was not within the scope of ER 404(b).

II. RULE 403

Bakker argues that the trial court erred when it ruled that the danger of unfair prejudice did not substantially outweigh the probative value of the gun evidence. Specifically, Bakker argues that lawful gun ownership is inherently prejudicial to a jury, and that such evidence was unnecessary and cumulative to prove Pardo's reasonable fear. The State argues that the trial court properly

balanced the potential for unfair prejudice against the probative value, and this is evidenced by the trial court limiting the testimony of Pardo to prevent her from mentioning any prior conduct involving the gun. We hold that the trial court did not abuse its discretion when it determined that the danger of unfair prejudice did not substantially outweigh the probative value of the gun evidence.

A. *Legal Principles and Standard of Review*

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Evidence is unfairly prejudicial when it is more likely to create an emotional, impassioned response from a jury than a rational decision. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 648, 201 P.3d 315 (2009). Unfair prejudice also arises when evidence elicits erroneous inferences undermining the goal of the rules to promote accurate fact finding and fairness. *Hedlund*, 165 Wn.2d at 648.

The trial court has wide discretion when balancing the probative value of evidence against the potential prejudicial affect. *State v. Bajardi*, 3 Wn. App.2d 726, 730, 418 P.3d 164 (2018). We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or when it reaches its decision based on untenable grounds or untenable reasons. *State v. Ramirez*, 7 Wn. App.2d 277, 286, 432 P.3d 454 (2019), *review denied*, 193 Wn.2d 1025 (2019); *Lord*, 161 Wn.2d at 283.

Bakker's argument that lawful gun ownership is inherently prejudicial is premised upon the conclusion that being a gun owner is inherently a prejudicial activity. Even if lawful gun ownership were inherently prejudicial, this evidence would still be admissible unless its prejudice substantially outweighed its probative value. Here, the fact that Pardo knew there was a gun in the bedroom was highly probative and necessary for a jury to understand why she so desperately tried to keep Bakker out of the bedroom. Bakker was exhibiting an alcohol-fueled rage that night, and a major source of his aggression was from Pardo blocking his entry into the bedroom. A jury would need to understand Pardo's state of mind to judge whether or not her fear of Bakker was reasonable, including whether she had good reason to fear letting him into the bedroom.

The fact that Bakker did not make any overt threats about using a gun against Pardo does not mean the trial court abused its discretion. It would not be manifestly unreasonable, based on untenable grounds, or on untenable reasons for the trial court to determine that the lack of this specific threat did not necessarily mean the evidence had unfair prejudice that substantially outweighed its probative value. Pardo explained that she was afraid of Bakker's access to the gun based on his overall aggressive conduct and threatening behavior that evening. We hold that the trial court

did not abuse its discretion when it ruled that the danger of unfair prejudice did not substantially outweigh the probative value of the gun evidence.

CONCLUSION

***8** In conclusion, Bakker's claim of error regarding the trial court's ruling on ER 404(b) was properly preserved for our review, but we hold that the trial court did not err. Further, the trial court did not abuse its discretion when it ruled that the danger of unfair prejudice did not substantially outweigh the probative value of the gun evidence. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Lee, C.J.

Glasgow, J.

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