

65549-3

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No. 65549-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ROBIN PARROTT-HORJES,

Appellant,

v.

MARNI G. RICE,

Respondent.

APPELLANT'S REPLY

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I. SUMMARY OF REPLY

Respondent has not meaningfully addressed the logical inconsistency between a special finding of battery and a special finding of no intentional act. This alone necessitates a new trial. Respondent has not distinguished the clear line of Washington cases holding that self-defense evidence or argument is improper when a defendant claims either accident or ignorance. The trial court should not have admitted any evidence of alleged prior bad acts occurring other than on the night Michele Parrott was killed.

II. REPLY

A. Rice is not entitled to all reasonable inferences to resolve an inconsistent verdict, and the special interrogatories are logically inconsistent.

In order to challenge an inconsistent verdict, an appellant must object before the jury is discharged. *State v. Barnes*, 85 Wn.App. 639, 668 (Div 2. 1997). It is undisputed that appellant objected to the verdict, on the grounds of its inherent inconsistency, prior to discharge of the jury. (TP 4/16/2010 p. 19):

Counsel: I need to object to the form of the verdict, and – I don't know – has the jury been discharged?

The Court: No. Form of the (inaudible)?

Counsel: Well, they found – there’s an inconsistency within this verdict. They found that Marni Rice’s battery caused the death of Michele Parrott, but then they also found that she did not intentionally cause or recklessly cause the death of Michele Parrott –

The Court: Right.

Counsel: -- and that’s an inconsistency.

The Court: Okay. I think that’s something that we don’t turn around and address, give back to the jury.

Although the trial courts (and appellate courts) must try to reconcile answers to special interrogatories, they should do so on the basis of logic, not “reasonable inferences” in favor of one party or another. There is no priority of one answer over another when the answers are inconsistent. See *e.g. Freeman v. Chicago Park Dist.*, 189 F.3d 613,614 (7th Cir. 1999)(construing FRCP 49).

Brashear v. Puget Sound Power & Light, 100 Wn.2d 204, 209, cited by Respondent at p. 32 of her brief, does not stand for the proposition that she is entitled to all reasonable inferences in favor of harmonizing two separate answers to special interrogatories. Rather, that case discusses the standard for determining whether or

not a motion for J.N.O.V. should be granted.

The jury unequivocally found (in a special interrogatory) that Marni Rice committed a battery which caused Michele Parrott's death. It also found (in a special interrogatory) that Marni Rice did not act intentionally or recklessly in a manner which caused Michele Parrott's death. These two positions are logically inapposite. Despite Respondent's artful speculation as to what the jury meant by its verdict, there is no priority of one answer over the other. As neither the trial court nor the appellant court may substitute their respective judgment for that within the province of the jury, the only proper recourse is a new trial. *Blue Chelan, Inc. v. Department of Labor & Indus.*, 101 Wn.2d 512, 515, (1984).

Further, and contrary to Rice's briefing, the jury was *not* instructed that in order to prevail on the federal slayer claim that "Marni Rice committed first or second degree murder under Washington law." Nor was the jury instructed that Rice had to intend the death of Michele Parrott. Rice provides no authority in the record (or the law) for these statements. The jury was simply instructed that in order to prevail on the slayer claim it must find that

1. The defendant engaged in intentional or reckless conduct; and
2. That Michele Parrott died as a result of defendant's intentional or reckless acts.

Court's Instructions to Jury No. 6 (CP 618). See, e.g., Mounts v. USA, 838 F.Supp. 1187, 1194 (E.D. KY 1993). The jury's finding of a battery causing death is inconsistent with the finding of no intentional conduct.¹

Finally, the Appellant did not invite error. The jury was not discharged when the inconsistency was brought to the trial court's attention by Appellant's counsel. The trial court could have corrected the error by further instructing the jury as to the inconsistency and sending the jury back to deliberate. Appellant is not challenging the instructions given to the jury. Rather, the Appellant is challenging the inconsistent answers given by the jury which the trial court refused to rectify prior to the jury's discharge.

¹ As explained in the Opening Brief, a finding of no battery could be consistent with a finding of reckless conduct, however.

B. Evidence of “Self-Defense” was improperly admitted.²

Respondent attempts to distinguish, without authority, the cases cited by Appellant for the proposition that one must admit intent before one may assert self-defense. See e.g. *State v. Aleshire*, 89 Wn.2d 67, 71 (1977); *State v. Pottorf*, 138 Wn.App. 343, 348 (2007); *State v. Dyson*, 90 Wn.App. 433, 439 (1997); *State v. Gogolin*, 45 Wn.App. 640, 643 (1986); *State v. Barragan*, 102 Wn.App. 754, 762 (2000). The fact that those cases involved jury instructions rather than *in limine* rulings is a distinction without a difference. The salient issue is whether or not the self-defense evidence and argument were properly before the jury on the version of events proffered by the defendant.

Marni Rice gave deposition answers and Answers to Requests for Admission to the effect that she did not commit any intentional act that caused Michele Parrott to fall.

REQUEST FOR ADMISSION NO. 6: Admit that Michele Parrott never fell on November 5th or November 6th 2007 ***as a result of any act by you.***

² Respondent appears to argue that because a summary judgment motion was not filed, a motion to exclude evidence of self-defense should not have been entertained at all. This is unsupported by any authority, and contrary to case law. See *Zimny v. Lovric*, 59 Wn.App. 737, 741 (1990)(granting of dispositive motion *in limine* shortly before trial not error).

Admitted.

(CP 349, 352-353).

She absolutely refused to admit that a battery occurred or that there was any causation between her actions and Michele Parrott's injuries and death. (CP 346) Just as a party is not permitted to contradict her own deposition testimony in opposition to a summary judgment, she should not be able to present evidence and argument contradicting that testimony at trial, especially when the matter is brought to the court's attention *in limine*. See *Marshall v. AC & S, Inc.*, 56 Wn.App. 181, 185 (1989).

C. Prior Bad Acts were improperly admitted.

1. Alleged prior bad acts of a decedent are not admissible from an alleged *victim* to prove the *victim's* state of mind when the *victim* is not acting inconsistently.

Rice argues that *State v. Cook*, permits introduction of prior bad act evidence to prove state of mind. However, the very passage cited by Rice establishes that it is the state of mind of the alleged *victim* of abuse that may be at issue and only when the victim recants or acts inconsistently with abuse. *Id.* at 851-852. In this case, Rice offered the evidence as *consistent* evidence of abuse, to

show conformity therewith on the night in question. This is exactly the improper purpose addressed and prohibited by ER 404(b).

2. Alleged prior bad acts occurring months before the incident are not admissible under the *res gestae* exception.

Rice next argues that the *res gestae* exception to ER 404(b) permits admission of the alleged prior bad acts to “complete the story of a crime or to provide the immediate context.” *State v. Lillard*, 122 Wn.App. 422, 431-32 (2004). Other than the alleged events of the night in question (which, although disputed, were not objected to on ER 404(b) grounds), all of the alleged prior bad acts occurred months or years prior. The *Lillard* case involves a prior bad act occurring the day before. Sporadic incidents of domestic violence occurring months before the incident in question do not provide the “story” of the events of November 5, 2007.

3. The prejudicial effect of domestic violence allegations outweighed the probative value.

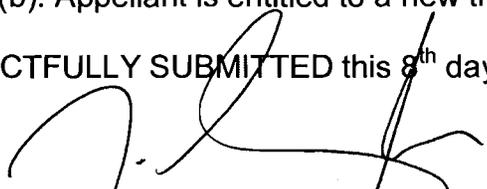
The evidence should also have been excluded because its probative value was outweighed by the danger of unfair prejudice. *State v. Tharp*, 96 Wn.2d 591 (1981). The prior alleged acts of violence were unnecessary for Marni Rice to establish a self-

defense claim. (assuming such a claim was proper for other reasons). Her story of the night in question involved a prior assault that evening (being slapped in the face), an assault against a pet that evening, a handgun, and an attempted violent incursion through doors into the bedroom. Evidence of prior bad acts was simply offered to make it seem more likely to the jury that Michele Parrott acted in conformity with the alleged prior behavior.

III. CONCLUSION

The judgment must be reversed because the special interrogatories are inconsistent and the trial court refused to instruct the jury on the inconsistency. The judgment must also be reversed because the trial court permitted evidence and argument of self-defense despite the defendant's insistence that she committed no intentional acts which harmed the decedent, and the trial court permitted evidence of prior bad acts of the decedent in violation of ER 404(b). Appellant is entitled to a new trial.

RESPECTFULLY SUBMITTED this 8th day of July 2011.



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