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No. 68418-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

2012 JUN 19 PM 4:15
COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RANDY CHAPARRO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence, the trial court erred and deprived Randy Chaparro of due process in entering a conviction for unlawful imprisonment.

2. The trial court erred in admitting propensity evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment's Due Process Clause requires the state prove each element of an offense beyond a reasonable doubt. For the crime of unlawful imprisonment the state must prove the defendant restrained another person. If the restraint is incidental to another offense of which the defendant is convicted, the evidence is insufficient to support a conviction of unlawful imprisonment. Where the State proved only that Mr. Chaparro restrained a person incidental to an attempted assault of that person, for which Mr. Chaparro was convicted, is the State's evidence sufficient to sustain a conviction of unlawful imprisonment?

2. ER 404 does not permit admission of a person's prior acts as propensity evidence. However, if it is offered for some other purpose, such evidence is admissible if the court determines the evidence is relevant to prove an element of the crime charged and the court provides an instruction properly limiting the jury's use of the evidence. Did the trial court err where it admitted allegations of assaults by Mr. Chaparro

where that evidence was not necessary or relevant to prove an element of the current offense?

C. STATEMENT OF THE CASE

Mr. Chaparro returned from work to his parents' home one afternoon. Upon his return, his girlfriend, Najae Stevenson who was also living at the home, became upset that Mr. Chaparro intend to leave again. 12/13/11 RP 170-71. The two began arguing in Mr. Chaparro's bedroom. Id.

Ms. Stevenson claimed that the two became entangled and fell to the floor. She claimed that Mr. Chaparro then pinned her down and placed a pillow over her face telling her to be quiet. 12/12/11 RP 44. Ms. Stevenson alleged that after she freed herself and started down the stairs, Mr. Chaparro hit her in the back of the head. Id. at 48.

According to Ms. Stevenson, when she reached the living room Mr. Chaparro knocked her to the ground and held her to prevent her from leaving. 12/12/11 RP 49-51. Other witnesses, however, stated that while they heard and saw Ms. Stevenson and Mr. Chaparro arguing, Mr. Chaparro did not touch Ms. Stevenson. 12/13/11 RP 159-60.

Edmonds police arrived at the Chaparro home in response to a 911 call from Ms. Stevenson. 12/13/11 RP 116-17. When the officers arrived, neither Mr. Chaparro nor Ms. Stevenson were at the house. Id. Officers

subsequently found Ms. Stevenson a short distance from the house. Id. at 120. The officers then returned to the house and found Mr. Chaparro had returned as well. Id. The officers arrested Mr. Chaparro. Id. at 122-23.

The State charged Mr. Chaparro with second degree assault, unlawful imprisonment and harassment. CP 108-09. The assault charge included only the suffocation-alternative of RCW 9A.36.021(1)(g). CP 108. A jury acquitted Mr. Chaparro of harassment and second degree assault. CP 40-41. The jury, however, convicted him of unlawful imprisonment and the lesser offense of attempted second degree assault. CP 36, 39.

D. ARGUMENT

1. The State presented insufficient evidence to support Mr. Chaparro's conviction of unlawful imprisonment.

a. The State must prove each element of the charge beyond reasonable doubt.

A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re

Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [she] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77 (quoting Gaudin, 515 U.S. at 510).

Here the State did not prove each element of unlawful imprisonment. Specifically the State did not prove any restraint which was independent of the assault.

b. Because it did not prove any restraint independent of the assault, the State did not prove each of the elements of unlawful imprisonment.

To convict Mr. Chaparro of unlawful imprisonment, the State was required to prove he knowingly restrained Ms. Stevenson. RCW

9A.40.040(1). “Restrain” means:

to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception.

RCW 9A.40.010(6).

However, a conviction of unlawful imprisonment cannot rest upon restraint which is merely incidental to another crime of which the defendant was charged and convicted. State v. Korum, 120 Wn. App. 686,

707, 86 P.3d 166 (2004), reversed on other grounds, 157 Wn.2d 614¹ (citing Green, 94 Wn.2d at 227). Instead, the State must offer proof that the restraint serves a purpose other than simply facilitating the other offense. Korum, 120 Wn. App. 705-07.

Thus, for example in Korum, a case involving home-invasion robberies, the court found the evidence insufficient to support separate kidnapping charges where:

- (1) The restraints were for the sole purpose of facilitating the robberies—to prevent the victims’ interference with searching their homes for money and drugs to steal;
- (2) forcible restraint of the victims was inherent in these armed robberies;
- (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found;
- (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and
- (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

120 Wn. App. at 707 (citing Green, 94 Wn.2d at 216) (Footnotes omitted.).

While both Korum and Green involved charges of kidnapping as opposed to unlawful imprisonment, the same analysis applies. Unlawful imprisonment is a lesser included offense of kidnapping and similarly

¹ The Supreme Court reversed the Court of Appeals only on the issue of prosecutorial vindictiveness, and let stand the dismissal of the kidnapping charges because they were merely incidental to the robbery. Korum, 157 Wn.2d at 623-24.

requires knowing restraint of another. State v. Russell, 104 Wn. App. 422, 449, 16 P.3d 664 (2001). Logically then, the requirement that restraint be independent of the other crime to sustain a conviction has equal application to unlawful imprisonment.

In addition to unlawful imprisonment, the State charged Mr. Chaparro with second degree assault by suffocation. CP 51, 108. At the State's request, the trial court instructed the jury on the lesser included offense of attempted second degree assault. CP 52-53. The only alternative means of second degree assault on which the jury was instructed was suffocation. The jury acquitted Mr. Chaparro of second degree assault and convicted him only of the lesser offense. CP 39-40.

Whether restraint is incidental to the commission of other crimes is a fact-specific determination. State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, review denied. 169 Wn.2d 1018 (2010).

Unlike an assault committed by a punch or other means, assault by strangulation or suffocation will necessarily involve some significant level of restraint. Under the facts of this case, it is clear the restraint was incidental to the attempted assault.

Recognizing that the State had offered evidence of multiple acts which could separately support the charge of unlawful imprisonment, the court provided the jury a unanimity instruction as requested by Mr.

Chaparro. CP 61, 83. The deputy prosecutor, in his closing argument, specifically elected an act on which it asked the jury to rely; the restraint occurring while Mr. Chaparro allegedly placed a pillow over Ms. Stevenson's face. 12/13/11 RP 216. The deputy prosecutor then stated:

It overlaps somewhat with the Assault in the Second Degree charge. Not only was he holding the pillow over her face at some point, but he also was pinning her down on the ground as she struggled to get free. That's within the definition of Unlawful Imprisonment.

Id. at 217.

But the evidence more than “overlap[ped].” The restraint was for the sole purpose of facilitating the assault. The restraint coincided with the assault. The restraint did not pose any risk of harm independent of the assault.

The trial court recognized the incidental nature of the restraint. The court concluded both charges arose from the same criminal conduct. 3/7/12 RP 2. That conclusion recognizes the acts involved the same victim, occurred at the same time and place, and, most importantly, shared a single criminal intent. RCW 9.94A.589(1)(a). The restraint was merely incidental to the assault. As such, the State did not present sufficient evidence to support the conviction for unlawful imprisonment.

c. The Court must dismiss Mr. Chaparro's conviction for unlawful imprisonment.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove restraint independent of the assault, it failed to prove unlawful imprisonment and the Court must reverse Mr. Chaparro's conviction.

2. The trial court erred in admitting propensity evidence.

a. The trial court admitted propensity evidence.

Prior to trial the State sought permission to offer propensity evidence - Ms. Stevenson's allegation that Mr. Chaparro has assaulted and threatened her on prior occasions. 12/12/11 RP 11. None of the prior allegations resulted in prior criminal charges or convictions. The deputy prosecutor contended the evidence was relevant to "explain the unique and particular dynamics" of domestic violence offenses and also to assess the victim's credibility. Id. Mr. Chaparro objected, arguing in the absence of

a recantation Ms. Stevenson's credibility was not at issue. 12/12/11 RP 13. Mr. Chaparro also contended it was not relevant to prove any element of the offense and the resulting prejudice vastly outweighed any probative value. Id. at 14.

The trial court concluded the State could offer propensity evidence of the prior allegations of assault to prove the reasonableness of Ms. Stevenson's fear for purposes of the harassment charge. 12/12/11 RP 14. Further, the court concluded the propensity evidence was admissible to allow the jury to assess Ms. Stevenson's credibility. Id. at 15

Ms. Stevenson testified to the jury that Mr. Chaparro had previously choked her while riding with her on a bus. 12/12/11 RP 36. Ms. Stevenson also alleged Mr. Chaparro had previously hit her in the eye. Id.

b. Absent a specific exception, propensity evidence is inadmissible.

Generally, evidence of prior acts of the defendant admitted solely to prove propensity to commit an offense is not admissible. ER 404(a).

But, 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 purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In doubtful cases, the evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

To admit evidence of other acts, 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 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting Lough, 125 Wn.2d at 859).

- c. The trial court improperly admitted the propensity evidence.

The evidence admitted here was not necessary to establish an essential element of the crime and did not rise beyond mere propensity evidence.

The trial court concluded the State could offer propensity evidence of the prior allegations of assault to prove the reasonableness of Ms. Stevenson's fear for purposes of the harassment charge. 12/12/11 RP 14. Further, the court concluded the propensity evidence was admissible to allow the jury to assess Ms. Stevenson's credibility. *Id.* at 15. Under either theory the evidence's relevance lies only in its propensity value and was not admissible.

The Supreme Court has previously held "that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). In *State v. Grant*, another case involving a victim's recantation the court concluded the defendant's prior convictions of assaultive conduct against the same victim were relevant to assess the credibility of her current accusations and/or recantation. 83 Wn. App. 98, 920 P.2d 609 (1996).

In this case there are neither prior convictions nor a recantation. Instead, the only value of the evidence was as propensity. The only way

the prior acts evidence tends to prove Ms. Stevenson's "credibility" is by the conclusion that the number of allegations somehow lends weight to their credibility. But that is simply propensity evidence, especially where the prior acts are not criminal convictions but merely allegations. By contrast, in Magers and Grant consideration of prior criminal convictions for domestic violence against a now recanting witness had logical relevancy aside from bald propensity, even if only marginally so, as it allowed jurors a framework in which to determine which of the victim's current statements – allegation versus recantation – was correct. In that circumstance the nature of the parties' prior relationship is relevant to assess the credibility of the recanting victim.

In a case which goes far beyond Magers and Grant and the limitation of ER 404, this Court held that allegations of prior abuse are relevant to an alleged victims credibility regardless of whether that credibility is put at issue by a recantation of other inconsistent statement. State v. Baker, 162 Wn. App. 468, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011). Baker reasoned that credibility is always an issue in domestic violence cases, and thus the State may always introduce evidence of prior incidents. Id. at 474-75. But Baker never explained how a mere allegation, not conviction, of prior abuse has any relevance to the credibility to a witness's current testimony beyond propensity. Indeed, it

does not. That a witness is willing to level more allegations against a defendant, in no way lends credibility to those allegations.

Baker created an exception which swallows the rule. There is no reason to stop at the alleged victim's credibility as the credibility of every prosecution witness is at stake in a domestic violence case. For that matter, there is no reason to stop at domestic violence cases as witness credibility is at stake in every prosecution. Thus, there are few if any circumstances in which prior acts evidence is not admissible.

ER 404, however, reflects an historical recognition that propensity provides little in terms of relevance and thus little as a tool of assessing credibility.

The same is true of the evidence's utility in assessing the reasonableness of Ms. Stevenson's fear. The allegations of prior acts only make the reasonableness of that claimed fear more likely if one believes Mr. Chaparro is the sort of person that assaults others, i.e., propensity. Unless the jury uses it as propensity evidence, the allegation of prior assaults adds nothing to the jury's determination of the reasonableness of the fear.

To be sure, there is no domestic violence exception within ER 404(b) or even in the case law expanding that breadth of that rule. Instead, prior acts evidence, even prior acts of domestic violence, must still be

relevant to a necessary element of the offense. And, it must do so based upon some logical relevancy aside from propensity. The evidence here does not do that and was not properly admitted under ER 404(b).

d. The court's admission of propensity evidence requires reversal.

The erroneous admission of ER 404(b) evidence, requires reversal if the error, within reasonable probability, materially affected the outcome.” State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Acosta, 123 Wn. App. 424, 438, 98 P.2d 503 (2004).

The weight of the state's case was not so strong. A jury acquitted Mr. Chaparro of both harassment and second degree assault. CP 40-41. Against the relative weakness of the State's case, the inherent prejudice of propensity evidence had a likely effect upon the jury's verdict.

E. CONCLUSION

In the absence of any evidence of restraint which was independent of the assault, the State did not present sufficient evidence to support Mr. Chaparro's conviction of unlawful imprisonment. As such, this Court must dismiss that conviction. Further, the erroneous admission of propensity evidence requires a new trial on the remaining charge of attempted second degree assault.

Respectfully submitted this 19th day of June, 2012.



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