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8-28-15  
Court of Appeals  
Division I  
State of Washington

NO. 72723-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DARRIN MARTINS,

Appellant.

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

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OPENING BRIEF OF APPELLANT

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**Rules**

ER 404(b)..... 6, 7, 10, 11, 12

A. ASSIGNMENT OF ERROR.

The trial court erred when it improperly admitted testimony concerning propensity evidence under ER 404(b).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Before propensity evidence may be introduced at trial pursuant to ER 404(b), the court must conduct a full evidentiary hearing on the record and must make a determination that the evidence is relevant and more probative than prejudicial. Here, where the trial court admitted propensity evidence which did not satisfy the criteria of ER 404(b), and was not necessary to prove an element of the offense, was Mr. Martins deprived of his right to a fair trial?

C. STATEMENT OF THE CASE

On July 28, 2014, Darrin Martins returned home to see his wife and children, as well as the family cat, which had just been rescued from a storm drain by animal control after being lost for over a month. RP 122, 129. Although Mr. Martins knew he was not permitted to visit the home, due to a civil no-contact order, he was so desperate to see this sickly cat, he went anyway. RP 6, 134.

Following a discussion with his wife over the cat's treatment, Mr. Martins was arrested and charged with felony violation of a no-contact order and assault in the fourth degree.<sup>1</sup>

Prior to the trial, Mr. Martins agreed to stipulate to the existence and the validity of the underlying Ferndale no-contact order excluding him from the residence of Mrs. Martins – he intended to dispute only the assaultive conduct alleged by the State. RP 6-7; Ex. 7; Ex. 8. Mr. Martins also moved pursuant to ER 404(b) to preclude the State from introducing evidence of prior acts of misconduct. RP 6; CP 12-13. The State claimed there was a history of domestic violence incidents between the parties, although other than the incident resulting in the underlying Ferndale no-contact order, none of the purported prior acts had resulted in the arrest of Mr. Martins. RP 6-9. The trial court heard brief argument on Mr. Martins's motion to exclude; the court declined to take testimony

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<sup>1</sup> Following the presentation of evidence, the State moved to dismiss Count II, assault in the fourth degree, citing a lack of sufficient evidence to sustain the additional assault count, and presumably, double jeopardy concerns on appeal. RP 208. Mr. Martins's alleged assaultive conduct remained the predicate for the felony violation of a court order charge which remained.

concerning the alleged prior incidents. RP 6-10.<sup>2</sup> Mr. Martins argued that admission of the prior incidents would be overly prejudicial and irrelevant, and that further, Mr. Martins could not stipulate to Mrs. Martins's state of mind, which was irrelevant. CP 12-13; RP 10-12 (limiting stipulation to the words of the affidavit in support of no-contact order).

The court ruled the prior incidents between Mr. and Mrs. Martins were admissible to show Mrs. Martins's "state of mind," citing State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008); RP 10. The court also found "the reasonableness of the victim's apprehension" to be an element, finding the court was "going to have to permit the State to put that evidence in. Otherwise I don't think they are in a position to prove" their case. RP 12.

The following day, before the commencement of trial, the deputy prosecutor requested the trial court make a more complete record of its ER 404(b) findings, "rather than seeing it for the first time on appeal." RP 56-57. The court clarified its ruling, but still declined to elicit

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<sup>2</sup> Later at trial, Mrs. Martins stated the prior incidents had been "exaggerated" when she had applied for the no-contact order. She also stated, in front of the jury, that the deputy prosecutor had assured her that she would not be questioned about the prior incidents. RP 116.

testimony concerning any prior incidents. RP 58. The court found that if the complaining witness's testimony at trial proved to be similar to her statements in the supporting affidavit for the petition for the no-contact order, the court made a finding by a preponderance of the evidence that the prior allegations had actually occurred. RP 58.

The court further found that the purpose for which this prior act testimony would be admitted would be for the jury to assess, based on the new conduct alleged, whether Mrs. Martins had an apprehension of bodily harm, and if she did, whether that apprehension was reasonable. The court found that history relevant to an element of the crime charged, as part of the State's burden. RP 58-59. The court found the probative value of the admission of the evidence outweighed any prejudice accorded to Mr. Martins, and that a limiting instruction would be given to the jury if requested by the defense. RP 59.

At trial, the State presented the testimony of Katherine Martins and neighbor Tracey O'Dell, both of whom described a chaotic scene at the Martins apartment. RP 110-11, 130-34. Ms. O'Dell had returned to the apartment building with the Martins family's sickly cat, which had just been rescued from the local animal shelter. RP 129. A distraught

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Mr. Martins rushed over to the apartment, after being notified by Mrs. Martin that the missing cat had finally been found, and was alive, but very ill. RP 106, 122, 129-30.<sup>3</sup>

Ms. O'Dell testified that following Mr. Martins's argument with his wife in the bathroom, he continued to yell and argue with his wife, and even with Ms. O'Dell. RP 140. At trial, Mrs. Martins denied that her husband assaulted her, saying that he grabbed at her hair, but that he may have been grasping for the cat. RP 111-12. She also stated that Mr. Martins kicked at her legs, but not with his toes.<sup>4</sup> Ms. O'Dell described Mr. Martins roughly holding his wife against the wall, and then making threats to Ms. O'Dell's life for calling the police – conduct quite outside the court's ER 404(b) ruling. RP 132, 140.

At the close of the evidence, the court granted Mr. Martins's request for a lesser included instruction on misdemeanor violation of a

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<sup>3</sup> The implication in the record is that either Mrs. Martin or one of the Martin children invited appellant to the apartment to see the cat or to pick it up, since the cat belonged to him. RP 122, 134. This was not disputed by the State, since it is not a defense to a charge of violation of a no-contact order that the person protected by the order consented to the contact. CP 40 (Instruction 10).

<sup>4</sup> The fact that this is difficult to imagine is supported by the lack of injuries sustained by Mrs. Martin, who describes herself as nearly six feet tall. RP 111. She describes her fear as mostly regarding losing her public housing due to Mr. Martins's disruption. RP 123, 142.

no-contact order, but denied the request for an instruction on disorderly conduct as a lesser-included of assault in the fourth degree. RP 208-18.

Mr. Martins was convicted of the felony count. CP 52-53; RP 267. The jury concluded Mr. and Mrs. Martins were domestic partners, but declined to find the aggravator that the offense occurred within the sight and sound of their children. CP 54-55; RP 267.

Mr. Martins appeals. CP 69-80.

D. ARGUMENT

THE TRIAL COURT ERRED WHEN IT ADMITTED  
PREJUDICIAL ER 404(b) EVIDENCE.

1. Evidence Rule 404(b) prohibits the admission of  
propensity evidence.

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

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).

ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Furthermore, there is no "domestic violence exception" carved into the rules of evidence for certain cases. State v. Gunderson, 181 Wn.2d 916, 925 n.3, 337 P.3d 1090 (2014).

Before admitting such evidence, a trial court must first find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be "relevant and necessary to prove an essential ingredient of the crime charged." State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

2. The trial court improperly admitted propensity evidence.

The trial court admitted testimony of purported prior domestic violence incidents, over defense objection, ostensibly as evidence of the complainant, Mrs. Martins's, "state of mind" and the "reasonableness" of her fear. RP 10-12, 59. The court may have reasoned the complainant's credibility would be at issue during the trial, since she was a reluctant witness, testifying pursuant to subpoena. RP 100.

In State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008), the Supreme Court held that prior acts of domestic violence involving the accused and the victim may be admissible when a victim recants, and the jury must assess the victim's credibility. The trial court here applied Magers when it denied Mr. Martins's objection to ER 404(b) evidence and allowed the jury to hear the propensity evidence against him. This was error for two reasons.

First, this was not a recantation case, and second, State v. Gunderson controls. 181 Wn.2d at 925. Mrs. Martins did not recant a prior statement during her testimony, but only stated that she lacked a clear memory of the incident, and that it was all somewhat blurry. RP 111. Mrs. Martins stated she recalled Mr. Martins had been pushing on

the door and might have been reaching for the cat. RP 111. Her fear was that she would lose her public housing for having Mr. Martins on the property; this was consistent with her statement that day to her neighbor, Ms. O'Dell. RP 134.

Because Mrs. Martins had never recanted, her credibility was no more at issue than any other witness's. Gunderson established that there are meaningful limits to admitting prior acts of domestic violence for purposes of establishing "credibility." 181 Wn.2d at 925. To be admissible, the probative value of a prior act of domestic violence must be "overriding." Id. Otherwise, the inherent risk of unfair prejudice associated with this type of evidence is too great. Id. In general, included in the sufficiently probative category are cases where the witness gives conflicting statements about the alleged act, such as a recantation. Id. In the inadmissible category are cases where the witness's account is merely contradicted by evidence from another source, such as here, where a neighbor simply gave a differing account. See id. at 924-25. The Gunderson Court specifically rejected "a domestic violence exception for prior bad acts that is untethered to the rules of evidence." Id. at 925 n.3.

In holding that ER 404(b) was not satisfied, the Gunderson Court distinguished its earlier opinion in Magers, 164 Wn.2d at 189. The Court refused to extend Magers to cases where other external evidence conflicts with the witness's account. Gunderson, 181 Wn.2d at 924-25. The Gunderson Court reasoned this was inadequate to create the necessary overriding probative value because there are many reasons a witness's testimony may vary from other evidence:

That other evidence from a different source contradicted the witness's testimony does not, by itself, make the history of domestic violence especially probative of the witness's credibility. There are a variety of reasons why one witness's testimony may deviate from the other evidence in a given case. In other words, the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable.

Id. (emphasis added).

For the jury to hear evidence of prior allegations of domestic violence, particularly of inflammatory threats, such as the jury heard in this case, was overly prejudicial.<sup>5</sup> In admitting the highly prejudicial ER 404(b) testimony of prior incidents, the trial court erred, despite timely defense objections. RP 10-14, 118.

3. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. Gunderson, 181 Wn.2d at 926; State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599.

The Gunderson Court, when confronting a similar ER 404(b) error, held the error was not harmless as to the conviction for felony violation of a court order. 181 Wn.2d at 926. The Court reasoned that while there was sufficient evidence for the jury to find Gunderson guilty, it was “reasonably probable that absent the highly prejudicial evidence of Gunderson’s past violence the jury would have reached a different verdict.” Id. This was despite the fact that the trial court had given an appropriate limiting instruction, as did the trial court in Mr. Martins’s case. Id. at 923; RP 120.

This case is materially indistinguishable. The evidence that Mr. Martins had previously threatened his wife was highly prejudicial,

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<sup>5</sup> The jury heard that Mr. Martins allegedly “had threatened to skin [her] alive in the front yard.” RP 116. Mrs. Martins replied that this “was a long time ago and, um, yeah.” Id.

considering the overall lack of evidence. The neighbor, Ms. O’Dell, had a lengthy criminal record, was a domestic violence survivor, and was prone to anxiety attacks; officers stated Ms. O’Dell was difficult to understand during the incident because she was “freaked out.” RP 142-44, 155.<sup>6</sup> Accordingly, there is a reasonable probability that the ER 404(b) evidence affected the jury’s decision. The conviction should be reversed. Gunderson, 181 Wn.2d at 925; Gresham, 173 Wn.2d at 420.

E. CONCLUSION

For the foregoing reasons, Mr. Martins respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 28<sup>th</sup> day of August, 2015.

Respectfully submitted,

s/ Jan Trasen

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<sup>6</sup> The neighbor, Ms. O’Dell, also testified about statements made by Mr. Martins, following the incident at the apartment, in which he allegedly threatened to kill her and his wife for calling the police. RP 140. This uncharged conduct was also inadmissible under ER 404(b).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 72723-1-I
	)	
DARRIN MARTINS,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF AUGUST, 2015.

X \_\_\_\_\_ 

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