

NO. 43410-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

MADERIOUS LAVON CASH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00386-6

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BRIEF OF RESPONDENT

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A. **RESPONSE TO ASSIGNMENT OF ERROR**

I. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR BAD ACTS UNDER ER 404 (b).**

B. **STATEMENT OF THE CASE**

**Factual history**

On February 24, 2012 Maryiah Wright was living in Vancouver with her boyfriend, Maderious Cash. RP 98-99. On that day after work Maryiah and the defendant went on a bike ride to a relative's house and on the way back, an argument developed when the defendant became angry because she was riding her bike too far in front of him rather than right next to him. RP 102. Once they got home she was exhausted and laid down on the couch and the defendant began yelling at her. RP 103. She tried to ignore him and go to sleep but it didn't work. RP 103. The defendant then got close to Maryiah's face and she defensively moved away from him. RP 104. He pushed her and grabbed her by her armpits, pinning her against the wall and pinching her hard, leaving marks. RP 104, 106. He also caused her shirt to tear in the area of the armpits. RP 106. She tried pushing him and was eventually able to push him back. RP 104. He went to grab her again and put her in a bear hug. RP 105-08. Her arms were pinned and as her only defense she bit his ear. RP 105-109. She did

this because she started to panic as this is something that has happened before and she felt like she needed to defend herself. RP 105. The look on the defendant's face was one of rage. RP 105.

The defendant became enraged then and started screaming and yelling at her and began hitting her in the face. RP 110. He also strangled her during this time. RP 112. After he removed his hands from her throat she screamed again and he threatened to hit her with a billy club to get her to stop screaming. RP 120. She began bleeding out of her mouth and nose and could feel her eyes swelling. RP 110. She begged him to let her go to the bathroom so she could rinse the blood and he agreed as long as he could accompany her. RP 110. Once there he began screaming at her again, telling her to go back to the bedroom. RP 111. As she followed him back to the bedroom she turned ran out of the bedroom, making a run for the front door. RP 111. But he caught her and dragged her back to the bedroom by her hair. RP 111. He kicked her in the head several times after dragging her by her hair. RP 117. A struggle ensued at the bedroom door in which the defendant again hit Maryiah, causing her to scream. RP 112. At that point he pinned her down to the floor and began to strangle her again. RP 111. She tried to scream but couldn't. RP 112. Her face began to tingle and her body felt lifeless. RP 112. Just as she felt she was going to lose consciousness he let her go. RP 112. She feared he would kill her. RP

112. After the beating ended the defendant told Maryiah that she brought the beating on herself because she wouldn't listen to him and do what she was told. RP 123-24.

Fearing further violence if she left, Maryiah slept in the same bed with the defendant that night. RP 125. Maryiah remained in the house with the defendant all weekend. RP 126. On that Sunday night Maryiah left the house to meet her dad at a 7-11. RP 127. At the 7-11 Maryiah saw her dad and his girlfriend who immediately asked what had happened to her face. RP 128. She asked them to leave it alone because she didn't want the defendant to go to jail. RP 128. She just wanted to get her stuff and be done with the relationship. RP 128. The clerk at the 7-11 also saw her face. RP 128-29. She was gone for 45 minutes and when her dad brought her home the defendant demanded to know why she was gone so long and what she had been doing. RP 130.

On Monday Maryiah went to work as usual and saw her uncle, who was also her boss. RP 131. That day she finally reported the assault to the police. RP 147. Although she didn't want to get him in trouble, she concluded that she couldn't continue in this abusive and violent situation. RP 147.

Maryiah also testified about three prior instances where the defendant assaulted her, the details of which are outlined below.

**Pre-trial 404 (b) evidence**

Maryiah Wright testified about several instances of prior violence toward her by the defendant. Ms. Wright and the defendant had been living together in various places such as parks, a tent, a friend's house, and, as of about four months prior to the trial, in a house. RP 54. During the time they were living in a tent, on an afternoon around the Fall of 2011, an argument began when the defendant feared that Ms. Wright was going to leave him. RP 55. She tried to leave but each time she tried he got physical with her, pulling her down and choking her. RP 55. Ms. Wright described it this way:

He would start by hitting me, open-handed. And if I, you know, would try to struggle to get away, it would get worse. Um, he would put his hands around my throat when I would start to scream...

I tried to leave, and he wouldn't let me leave. He grabbed me by my throat, and when I started to scream after he had started to hit me. And he got mad, and I tried to get away. He ended up jumping out of the tent, collapsed the tent on me, and then started to kick the tent.

RP 56. She screamed during this incident. RP 57. Ms. Wright testified that it was typical after their fights that the defendant would see the marks on her face or the blood coming from her mouth and would feel remorse and would say he was sorry and promise to stop. RP 56. Despite the assault Ms. Wright slept with the defendant in the tent that night. RP 57. She

believed him when he said he was sorry and that he wouldn't do it again, and she loved him. RP 57-58.

Ms. Wright testified about a second incident which occurred after they moved into their home in January. They were in the bedroom and he became angry with her for reasons she didn't recall. RP 59. He began putting his hands on her, open-handedly hitting her and splitting her lip. RP 59. She screamed. RP 60. He again expressed remorse. RP 60. She slept with him that night in spite of the assault. RP 61.

A few weeks later a third incident occurred in the bedroom. RP 62. The defendant became physical because he felt like he was losing control and being disrespected. RP 63. He began hitting her in the face and pushing her around, and he ripped off her shirt. RP 63. He would not allow her to leave the bedroom. RP 63. She screamed, and as she did he put his hands around her neck. RP 63. He continued hitting her and eventually knocked her to the floor and again put his hands on her throat. RP 64. He was again remorseful after the assault, and she again slept with him that night. RP 64.

**ER 404 (b) ruling**

In arguing against the admission of the prior acts, defense counsel argued that unlike sexual assault, domestic violence is not something that normally occurs in secret and "is not something you normally wait two

days to report...Uh, the call is made fairly quickly. It is not delayed two days.” RP 23. The trial court found that the prior offenses testified to above, occurred by a preponderance of the evidence. RP 84-85. The trial court found that the prior instances were very similar to the allegations of this case, and found that the acts did not need to constitute a signature. RP 85. The court relied on *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995), and *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). RP 85-86. The court found that this case involved a common scheme used repeatedly to perpetuate separate but similar crimes. RP 86. The court said “It has to have a causal connection to the crime that’s charged. It does. I mean, the elements, the stuff we’re talking about is very--almost identical. RP 86. The court identified the purpose of admitting the evidence as to show a common scheme or plan and to explain the delay in reporting the current offense (which defense counsel had raised as an issue--RP 23). RP 86-88. Finally, the court weighed the probative value of this evidence against its prejudicial effect and found that admission of the evidence in this case was in line with prior appellate rulings and “the idea behind them.” RP 87. The court ultimately decided to admit the evidence. RP 87. The court also indicated that if the defendant wanted a limiting instruction, one would, of course, be given. RP 87-88.

**Procedural history**

The defendant was charged assault in the second degree and unlawful imprisonment. CP 217-18. He was convicted of assault in the fourth degree and unlawful imprisonment. CP 182-83. This timely appeal followed.

C. **ARGUMENT**

I. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR BAD ACTS UNDER ER 404 (b).**

Under certain situations the trial court is permitted to admit evidence of a defendant's other acts of misconduct, so long as the evidence is not used to prove character or "to show action in conformity therewith." *State v. Robtoy*, 98 Wn.2d 30, 41-42, 653 P.2d 284 (1982). ER 404 governs when a trial court may admit evidence pertaining to the character of the accused, a victim or a witness. ER 404 (b) provides:

(b) *Other crimes, wrongs, or acts.* 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.

A reviewing court will review the correct interpretation of an evidentiary rule de novo, as it is a question of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Once it is determined that the rule was correctly applied, a trial court’s decision whether to admit evidence of other misconduct under ER 404 (b) will be reviewed for “manifest abuse of discretion.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995). “A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *DeVincentis*, at 17. If the admission of such evidence is erroneous, the standard of review is the nonconstitutional harmless error standard. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). “A ruling under ER 404 (b) is not reversible error unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Ray* at 546. A reviewing court may affirm the trial court on any proper ground for admission, not necessarily the one relied upon by the trial court. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Finally, any error in admitting such evidence is harmless when there is overwhelming evidence of the defendant’s guilt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Sexsmith*, 138 Wn.App. 497, 157 P.3d 901 (2007).

Prior to admitting evidence under ER 404 (b), the court must find the prior acts are (1) proved by a preponderance of the evidence; (2) admitted for a proper purpose; (3) relevant to prove an element of the offense or to rebut a defense; and (4) more probative than prejudicial. *Lough*, supra, at 852.

Prior misconduct is admissible to rebut a defendant's proposed defense. *State v. Wilson*, 60 Wn.App. 887, 891, 808 P.2d 754, review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991). Evidence of prior misconduct may also be admitted in the State's rebuttal case to rebut a material assertion made by the defendant. *State v. Young*, 158 Wn.App. 707, 243 P.3d 172 (2010).

In this case, the State sought admission of the testimony referenced in the Statement of Facts under ER 404 (b) for the purpose of showing a common scheme or plan and to explain the victim's significant delay in reporting. The State further argued the evidence was admissible to assist the jury in assessing Maryiah's credibility in light of her inexplicable decision to stay with the defendant through all of this violence.

The defendant first complains that the trial court did not balance the probative value of this evidence against its prejudicial effect. This is a factual claim and it is mystifying. As noted in the Statement of Facts above, the court did, in fact, performed the required balancing. The court

indicated that it had considered the facts elicited during the offer of proof and had compared them to other cases in which this same type of evidence had been admitted, and found that admission of this evidence was warranted. The court's discussion on this point was admittedly brief, but to the extent that Cash complains that the trial court failed to utter some combination of magic words, his claim fails. The court clearly weighed the probative effect of this evidence against its prejudicial effect, making a very detailed overall ruling. Moreover, where the trial court does not specifically weigh probative value against prejudicial effect, the appellate court will decide the issue if the record as a whole is sufficient to permit meaningful review. *State v. Barragan*, 102 Wn.App. 754, 759, 9 P.3d 942 (2000).

The defendant's second complaint is that the trial court's reasons for admitting the evidence were improper. As to the lateness of the victim's reporting, Cash says "there was no evidence of late reporting[.]" See Brief of Appellant at 18. This assertion is wholly false. Maryiah waited a whopping two and a half days to report this very vicious assault, and she testified as such. No reasonable person would wait even half an hour, much less two and a half days, to report this assault. But such is the nature of domestic violence. Cash also says, without citation to the record, that Monday (after the Friday assault) was the first opportunity that

Maryiah had to report. See Brief of Appellant at 18. This “fact” appears nowhere in the record and should be disregarded by this Court.

Not only was there a significant delay in the reporting in this case, but delay in reporting has been held to be a valid basis for the admission of evidence under ER 404 (b). *State v. Wilson*, 60 Wn.App. 887, 808 P.2d 754 (1991). Again, it is not reasonable, in normal situations, for people to fail to immediately report acts of violence committed against them. The failure to immediately report violence needs to be explained to a jury. Without the evidence that was admitted here under ER 404 (b) the jury would likely have accorded Maryiah’s testimony far less weight because her actions would have been inexplicable. Further, the *Wilson* Court held that exclusion of evidence of prior acts that fell within a common scheme would have given the defendant’s denial of the abuse “unwarranted credibility.” *Wilson* at 890. The trial court did not err in admitting this evidence to explain the substantial delay in reporting this assault. Cash’s claim that Maryiah’s delay in reporting was not relevant is specious in light of defense counsel twice mentioning the delay during the offer of proof, indicating his intent to use that evidence to undermine Maryiah’s credibility. Indeed, defense counsel brought the subject up during cross-examination (see RP at 178), and during closing argument (see RP at 335: “[A]ccording to Maryiah, if you believe her—when she’s pushed by this

gentleman, she doesn't call 9-1-1." The trial court did not abuse its discretion in admitting this evidence.

Second, the trial court admitted the evidence as evidence of a common scheme or plan. The trial court did not abuse its discretion. There are two types of evidence that may be admissible under the common scheme or plan exception to ER 404 (b). The first type of evidence involves "multiple crimes that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged." *Devincentis*, supra, at 19. The second type of evidence is of prior acts which involve the use of a single plan committed on more than one occasion to commit separate and unrelated, but very similar, crimes. *Id.* Whereas the former is used when identity is at issue, the latter is used when the occurrence of the crime or intent are at issue. This second type of common scheme or plan evidence was the type the State sought to admit in this case. Our Supreme Court held in *DeVincentis*, supra, that evidence of this second type may be admissible if the State demonstrates a "sufficiently high level of similarity." The Court, quoting *Lough*, said:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

*Devincentis* at 19, quoting *Lough*, *supra*, at 860.

Here, the similarities between the prior conduct and the current conduct are very similar. In all of the instances of violence the defendant hit Maryiah about the face, causing visible facial injuries, and/or he strangled her, typically to prevent her or stop her from screaming, and to prevent her from leaving. The defendant's faux remorse after the assaults, as well as his controlling behavior that can only be characterized as extreme, were also commonalities between the events. The defendant's actions were designed to control Maryiah and prevent her from leaving him. The defendant's common scheme of hitting Maryiah in the face, causing visible injuries, was a way of exerting control over her movement because it is obviously difficult to leave home and conduct one's life when one has bruises on her face. Indeed, Maryiah didn't leave her home for two days after this assault. Indeed, Professor Karl Tegland has described the admission of prior bad acts under the common scheme or plan exception to ER 404 (b) in domestic violence cases as a "traditional theory" of admissibility. See *Courtroom Handbook on Washington Evidence*, Karl B. Tegland, 2012-2013 Edition, page 259. The trial court did not abuse its discretion in admitting this evidence.

Even if the trial court erred in relying on these two bases on which to admit the evidence, the error was harmless because there were several alternate bases, under ER 404 (b), on which this evidence was admissible. “We will affirm the ruling if there are other proper grounds to admit the testimony.” *State v. Perez*, 137 Wn.App. 97, 107, 151 P.3d 249 (2007); citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) and *State v. Bowen*, 48 Wn.App. 187, 194, 738 P.2d 316 (1987). Under *State v. Baker*, 162 Wn.App. 468, 475, 259 P.3d 270 (2011), cited by the State during the offer of proof, the Court of Appeals held that under ER 404(b) evidence can be admissible because the jury is “entitled to evaluate [the victim’s] credibility with full knowledge of the dynamics” of a domestic violence relationship.” Thus, the court determined that the 404(b) evidence helped the jury to understand why a victim may not report assaults to police, or may try to minimize her injuries or the defendant’s conduct. Similarly here, Maryiah had been abused by Cash for years but never left him, never sought help, and often slept in the same bed with him after an assault (as she did on the night of the assault giving rise to these convictions). Likewise, even after she called the police she was only interested, according to her testimony, with securing a civil standby so she could retrieve her belongings and leave, not to get Cash in trouble. Absent a broader picture of the dynamics of this relationship the jury would have

accorded Maryiah less credibility, particularly where she shared a bed with the defendant on a night when he brutally assaulted her.

Evidence of the prior violence by the defendant against Maryiah was also relevant on the element of intent. “Evidence of prior disputes or quarrels” between the defendant and the victim is relevant to show premeditation, which also makes it relevant to show intent. See e.g. *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995). This evidence has also been held to be relevant to motive in domestic violence homicides. See *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997) (“We have held in a case involving the murder of a wife by her husband that evidence of quarrels and ill-feeling may be admissible to show motive, and evidence of prior threats is also admissible to show motive or malice if the evidence is of consequence to the action. In the *Powell* case, the trial court properly allowed testimony which established a hostile relationship between the defendant and his wife to show motive for the murder.”) (Internal citation omitted).

Finally, evidence of prior bad acts in cases of domestic violence is relevant to rebut a defendant’s claim that the assault never happened or that the victim had engaged in fabrication. *State v. Nelson*, 131 Wn.App. 108, 125 P.3d 1008 (2006).

The defendant's final complaint is that the evidence in question was unduly prejudicial. But prejudice in the context of ER 404 (b) is judged by the same standard as under ER 403, namely, whether the evidence has a tendency to arouse an emotional response rather than a rational decision by the jurors. See *Powell*, supra, at 264. Here, the facts underlying the charged offenses were hair-raising on their own. The assault and unlawful imprisonment described by Maryiah was quite brutal. The additional evidence from the prior assaults was far less inflammatory and detailed than the primary evidence submitted to the jury. The evidence of the prior assaults could have engendered no greater an emotional response than the evidence used to support the charged offenses. The defendant's reliance on *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) is misplaced because *Escalona* was not a case dealing with the admission of evidence under ER 404 (b), and because in *Escalona*, the evidence at issue was that the defendant assaulted another person totally unrelated to the current offense for which he was on trial. Moreover, the testimony violated the court's order in limine excluding the evidence. Cash's reliance on *Escalona* is baffling.

The trial court did not abuse its considerable discretion in admitting this evidence. Additionally, the erroneous admission of this evidence is harmless where there is no reasonable probability that it

affected the outcome of the trial. As noted above, the primary evidence supporting the charged offenses amply supported the convictions in this case, and was far more inflammatory than the evidence of the prior assaults. Moreover, the defendant was *acquitted* of the most serious charge (assault in the second degree) and convicted of the lesser offense of assault in the fourth degree. This conclusively demonstrates that the jury was not unduly influenced by the evidence of the prior assaults. Cash's convictions should be affirmed.

D. **CONCLUSION**

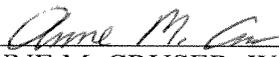
Cash's judgment and sentence should be affirmed.

DATED this 5<sup>th</sup> day of June, 2013.

Respectfully submitted:

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## June 05, 2013 - 4:03 PM

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