

No. 46314-8-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF TACOMA,
Respondent

v.

KENNETH DRISCOLL,
Petitioner.

ON PETITION FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine Stolz, Reviewing Judge

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUE

Whether the trial court abused its discretion by denying the defendant's motion to admit the uncorroborated prior bad acts of the victim when the purported offenses were remote in time and the defendant did not know when they actually occurred?

II. ARGUMENT

Factual and Procedural Background

On May 31, 2013, the Tacoma City Attorney's Office charged KENNETH LEE DRISCOLL (hereinafter "defendant") with one count of domestic violence assault against Lisa Miles. CP (Criminal Complaint).

On June 12, 2013, Tacoma Municipal Court received a Notice of Withdrawal and Substitution of Court Appointed Attorney from the Department of Assigned Counsel confirming Seth Doherty is now the attorney of record. CP Docket.

On June 26, 2013, a pre-trial conference was held and matter was set for a jury trial. City filed its witness list, request to discovery and pursuant to CrRLJ 4.7b, for defendant to disclose all materials and information enumerated therein. CP Docket.

On July 8, 2013, defense files its witness list reserving the right to call 3 witnesses. No contact information was provided, no anticipated

testimony was provided contrary to CrRLJ 4.7b on defendant's obligations regarding discovery. Defense also files a Notice of Special Defense asserting defense of self. In the notice defense further objects to City's discovery demands "being required to provide the substance of any oral statement of defense witnesses to the prosecution, on the basis the material requested is work product" and also "being required to provide any books, papers, documents, or tangible objects which defendant intends to use at trial and which would be subject to defendant's Fifth Amendment privilege." Attached to the notice was Declaration of Determination of Probable Cause alleging Lisa Miles attempted to stab Mr. Driscoll with a pair of scissors on March 22, 2010. In October of 2010, Ms. Miles ultimately entered an Alford plea to the amended charge of Malicious Mischief 1 because Mr. Driscoll recanted his statement. Statement of Defendant on Plea of Guilty, Prosecutor's Statement Regarding Amended Information. No briefing was attached to explain how the March 22, 2010 incident is relevant to the case at bar.

On July 15, 2013, defense files another witness list reserving the right to call 1 witness. Address was listed for the witness but no contact information was provided, no anticipated testimony was provided contrary to CrRLJ 4.7b on defendant's obligations on discovery. Defense Witness List.

On July 23, 2013, the day of trial, defense files trial brief with motions to suppress any evidence concerning defendant's alleged other or prior bad acts under 404(b) and prior convictions under 609 (b). No briefing was filed regarding intentions to use the victim's alleged prior bad acts. Defense nonetheless argued that evidence of Ms. Miles' prior assaults against Mr. Driscoll were necessary to establish Mr. Driscoll's state of mind at the time he acted in self-defense against Ms. Miles on May 30, 2013. Defense gave an offer of proof that he would testify about three incidents: 1) the 2010 incident involving the scissors; 2) a 2009 incident where Ms. Miles threatened him with a meat cleaver at the Gold Lion Hotel; and 3) another incident in the late 2009 or early 2010 where Ms. Miles threw a rock at Mr. Driscoll while they were both inside a Pierce Transit bus. RP 17-22. Defense concedes there were no arrest documents to substantiate the 2nd and 3rd incidents. RP 20-21. In fact defense counsel stated "it is a little unclear on the dates it was hard to hunt um the legal documents." RP 22.

City objected on multiple grounds as outlined in defense's brief. The court held that the 2009 incidents involving the meat cleaver and rock were not admissible and reserved ruling on the admissibility of the 2010 incident involving the scissors until the court had heard further testimony regarding the incident Mr. Driscoll was being prosecuted for. RP 27-28,

31. After listening to testimony from Mr. Driscoll the court eventually allowed Mr. Driscoll to testify that there was an incident involving Ms. Miles pulling a pair of scissors out of her purse and threatened to stab Mr. Driscoll with them. RP 142-143.

Written jury instructions were provided to the jury including self-defense instructions # 9, 10, and 11. RP 172.

The matter proceeded to a jury trial on July 23, 2013, and the jury returned a verdict of guilty on July 24, 2013. CP (Docket). The court sentenced the defendant to 364 days with 289 days suspended, 55 days credit for time served, provided a free referral for batterer's treatment, victim's impact panel, no contact with the victim, have law abiding behavior. CP (Docket).

From entry of the trial court's judgment and sentence, the defendant filed a timely notice of appeal on August 22, 2013. CP (Notice of Appeal).

On November 22, 2013, Mr. Driscoll's case was remanded back to the trial court for entry of findings of fact and conclusions of law.

On March 11, 2014, the trial court entered the missing findings of fact and conclusions of law. The trial court concluded that evidence of the prior attacks were not relevant under ER 401 with respect to two incidents concerning the meat cleaver and the rock throwing incidents because they

did not have a tendency to make existence of fact or consequence more or less probably than without the evidence. Additionally they were inadmissible under ER 402 because the accuracy and credibility of offered testimony by defendant regarding the two incidents have no corroboration. This was made more serious because of fact that victim wasn't available to testify at trial. CP Plaintiff's Proposed Findings and Conclusions.

On May 27, 2014, the Superior Court affirmed defendant's convictions in a written ruling holding that "it was within the trial court's authority to rule on admissibility of evidence. Trial court did not abuse its discretion." CP 360-361.

Notice of Discretionary Review to this Court was filed on May 27, 2014. CP 371-374.

At trial, witness Mr. McPherson, the lead maintenance mechanic for Pierce Transit, observed a man, later identified as defendant Mr. Driscoll, kneeling a woman, later identified as Ms. Miles, laying on a bench in a bus shelter. RP 92-93. He observed Ms. Miles in a prone position on the bench and Mr. Driscoll, with one hand supporting his weight, and the other hand he had on Ms. Miles, kneeling her repeatedly in the face approximately 8 times. RP 95. Mr. McPherson didn't see Ms. Miles being aggressive or showing any signs of aggression and stated to his partner in the vehicle that she must have been pretty tough because it

would have knocked him out. RP 95-96. He noticed that one eye was swollen shut and there was redness on Ms. Miles' face. RP 96. Ms. Miles and then Mr. Driscoll began walking away. RP 97.

Tacoma police Sergeant Jepson responded to the area and when he arrived, Mr. Driscoll had already been taken into custody by other police officers. RP 107-108. When Officer Jepson contacted Ms. Miles, she was reluctant to talk to him and initially indicated she just wanted to walk away, leave the incident behind her, and not pursue any issues. RP 108. Officer Jepson noted her left cheek was swollen and her left eye was swollen shut. RP 108.

After speaking with Ms. Miles, Officer Jepson contacted Mr. Driscoll. RP 108. Mr. Driscoll told Officer Jepson that Ms. Miles was his ex-girlfriend and that she had slapped him and broke his glass, and he had to defend himself. RP 109-110. Officer Jepson noted Mr. Driscoll is about 6'1, 275 pounds roughly and Ms. Miles is about 5'6, 150 pounds. RP 111.

III. ARGUMENT

Defendant contends that the trial court erred by not admitting victim's prior bad acts of the meat cleaver and rock throwing incidents.

Brief of Appellant, at 9. Defendant has not established that the trial court abused its discretion by rejecting this evidence. His conviction, therefore, must be affirmed.

A. STANDARD OF REVIEW

Ordinarily, a trial court's exclusion of certain defense evidence implicates noconstitutional consideration because the Constitution gives trial judges wide latitude to exclude evidence. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 624, 106 S. Ct. 1431(1986); *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). The applicable test, therefore, for harmless error is whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982); *State v. Alexander*, 52 Wn. App. 897, 902, 765 P.2d 321 (1988). A trial court's ruling excluding evidence will not constitute reversible error absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); *Maehren v. Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938 (1981); *State v. Hughes*, 106 Wn.2d 176, 201, 721 P.2d 902 (1986); *State v. Bell*, 60 Wn. App. 561, 565, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991). Judicial discretion is

only abused when the court exercises its discretion on untenable grounds, or for untenable reasons. State ex rel. *Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In other words, an abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). If a specific objection is sustained and evidence is excluded, an appellate court will not reverse if there is any valid basis for excluding the evidence. E.g., *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989); *Hein v. Taco Bell, Inc.*, 60 Wn. App.325, 332, 803 P.2d 329 (1991); *National Bank of Commerce of Seattle v. Lutheran Brotherhood*, 40 Wn.2d 790, 246 P.2d 843 (1952).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE OF VICTIM'S PRIOR UNSUPPORTED BAD ACTS WHEN THERE WAS INSUFFICIENT PROOF.

Generally, evidence of a person's character is inadmissible to prove conformity therewith on a particular occasion. ER 404(a). An exception to this rule, however, provides that "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused is admissible. ER 404(a)(2). The admissibility of the victim's character pursuant to ER 404(a)(2) is confined almost entirely to cases in which the defense is self-defense. See, e.g., *State v. Stafford*, 24 Wn. App. 783, 604 P.2d 980 (1979), review denied, 93 Wn.2d 1026 (1980).

When the defendant presents evidence of self-defense, two issues are introduced into the case. First, the question of whether the victim was the first aggressor comes into play. Second, the question of the reasonableness of the defendant's apprehension of danger. The admissibility of the victim's reputation and/or the victim's prior specific bad acts depend upon which issue the evidence is being offered to establish.

Acceptable methods of proof are defined by ER 405 and, in general, are limited to evidence of reputation. See ER 405(a). Specific instances of conduct is only admissible "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim or defense." ER 405(b). In self-defense cases, a victim's character trait for violence is not an essential element of a defendant's claim of self-defense. *Alexander*, 52 Wn. App. at 901. Evidence of a victim's specific acts such as fights, quarrels, and insulting words may be admissible despite ER 405(b) on the issue of reasonable apprehension of danger on the part of the defendant. This exception only applies if the defendant knew of the specific acts. See generally, *Bell*, 60 Wn. App. at 564 n.1, quoting 5K. Tegland, Wash. Prac., Evidence Law and Practice § 111, at 380 (3d. ed. 1989); *State v. Negrin*, 37 Wn. App. 516, 681 P.2d 1287, review denied, 102 Wn.2d 1002

(1984); *State v. Cloud*, 7 Wn. App. 211, 217-19, 498 P.2d 907, review denied, 81 Wn.2d 1005 (1972).

Despite the limitations contained in ER405(b), courts will occasionally admit evidence of specific acts committed by the victim to prove who was the first aggressor if the specific acts satisfy the test established in ER 404(b) . See, 6 e.g., *United States v. Talamante*, 981 F.2d 1153, 1156-57, 37 Fed. R. Evid. Serv. 840 (10th Cir. 1992), cert. denied, 113 S. Ct. 1876 (1993); *Negrin*, 37 Wn. App. at 525; 5 K. Tegland, *supra*, ER 404(b) limits the admission of other misconduct. It provides:

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 that he acted 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. §114, at 394-95.

Courts use this theory of admission sparingly because the probative value of the evidence is generally outweighed by its prejudicial effect. Courts are concerned that the admission of prior misconduct committed by a victim might cause a jury to "find a homicide justifiable

for the wrong reason--i.e., that the deceased was unworthy of life".

Williams v. Lord, 996 F.2d 1481, 1483 (2nd Cir. 1993), cert. denied, 114 S. Ct. 1073 (1994), quoting *People v. Miller*, 39 N.Y.2d 543, 551, 384 N.Y.S.2d 741, 349 N.E.2d 841 (1976). Accord, *Bell*, 60 Wn. App. at 565 (affirming the trial court's suppression of the victim's homosexuality on the grounds that the jury might misuse this evidence and reach its verdict on an improper basis). Courts also use the ER 404(b) exception to ER 405 sparingly in order to avoid collateral mini-trials in which the defense would characterize a prior incident of misconduct one way and the government would have found witnesses who would have disputed the claims of defense witnesses. *Talamante*, 981 F.2d at 1156 n.5;

United States v. Waloke, 962 F.2d 824, 830 (8th Cir. 1992).

Washington courts have rejected defendants' attempts to admit evidence of a victim's prior bad acts, of which the defendant did not have knowledge, to show who was the first aggressor if the bad acts were remote in time and speculative in nature. See, e.g., *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976), review denied, 88 Wn.2d 1007 (1977); *State v. Walker*, 13 Wn. App. 545, 549-50, 536 P.2d 657, review denied, 86 Wn.2d 1005 (1975). An additional impediment to the admissibility of "bad act" evidence under the ER 404(b) exception to ER 405 is that the bad act must be proven by a preponderance of the evidence

through nonhearsay, first person testimony. *Cloud*, 7 Wn. App. at 219; *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981); 5 K. Tegland, *supra*, § 121 at 439-41.

Here, the trial court declined admit the two prior, unsubstantiated bad acts of the victims based on them not relevant under ER 401 and 402. (findings of facts and conclusion of law). While defendant may have knowledge of what these two acts were, there's no evidence as to when, and if they actually occurred. The trial court, in applying the preponderance of the evidence standard, correctly held they were speculative in nature. This record conclusively demonstrates that the trial court did not abuse its discretion.

The admission of the two prior, unsubstantiated bad acts of the victim would not have changed the result of the defendant's trial. The jury heard the Fred Meyer incident whereby the victim purportedly wielded a knife and threatened to stab him. CP 224-225. The defendant also testified that he was punched by the victim and breaking his glasses. CP 221-222. The jury was furnished with a self-defense instruction and found the absence of self-defense. His claim of apprehension of harm was incredible when one realizes that according to witness McPherson, defendant was kneeing her repeatedly in the face approximately 8 times with the victim not being aggressive or showing any signs of aggression.

RP 95. He noted that one eye of the victim was swollen shut and there was redness to the victim's face. RP 96.

IV. CONCLUSION

Defendant was convicted on the basis of overwhelming evidence. His incredible claim of self-defense was not unduly affected by the trial court's rejection of the victim's 2 prior, unsubstantiated bad acts when the jury had an opportunity to fully evaluate all of the evidence, including 1 prior bad act of the victim that was substantiated. The defendant's conviction should be affirmed.

Respectfully submitted April 6th, 2015.

/s/ 
Pedro S. Chou, WSBA# 36274
Attorney for Respondent

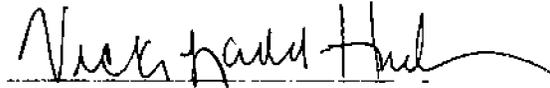
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On April 6, 2015, I placed to be mailed, via Pre-Paid U.S. Postage a copy of the following document(s): BRIEF OF RESPONDENT in the above-entitled matter to the Appellant's Attorney at the address below listed.

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ATTORNEY AT LAW
3800 BRIDGEPORT WAY W STE A #23
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

April 6, 2015, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read "Vicki Ladd-Hudson", written over a horizontal line.

Vicki Ladd-Hudson, Paralegal

TACOMA MUNICIPAL COURT

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