

No. 29562-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

AARON R. ESPINOZA,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....4

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....4

C. STATEMENT OF THE CASE.....4

D. ARGUMENT.....5

The trial court abused its discretion in allowing evidence of other acts contrary to ER 404(b).....5

E. CONCLUSION.....8

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State v. Bennett</i> , 36 Wn.App. 176, 672 P.2d 772 (1983).....	7
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	6
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	8
<i>State v. Myers</i> , 49 Wn.App. 243, 742 P.2d 180 (1987).....	6
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	5
<i>State v. Rice</i> , 48 Wn.App. 7, 737 P.2d 726 (1987).....	6
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	6

<i>State v. Thamert</i> , 45 Wn.App. 143, 723 P.2d 1204, <i>rev. denied</i> , 107 Wn.2d 1014 (1986).....	7
<i>State v. Vy Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	5
<i>State v. Williams</i> , 156 Wn.App. 482, 234 P.3d 1174 (2010).....	5

Court Rules

ER 403.....	6
ER 404(b).....	5
Comment, ER 404(b).....	6

Other Sources

5 K. Tegland, Wash.Prac., Evidence, Comment 404 (2d ed. 1982).....	6
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A. ASSIGNMENT OF ERROR

The trial court erred in allowing evidence of other acts contrary to ER 404(b).

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court abuse its discretion in allowing evidence of other acts contrary to ER 404(b)?

C. STATEMENT OF THE CASE

Aaron Espinoza was convicted by a jury of felony harassment for an incident that occurred on 8/22/10. CP 5, 60. The court allowed testimony by Officer Durbin under ER 404(b) of a prior incident on 6/16/10, where Jennifer Redburn, the same alleged victim in the current offense, told police that Mr. Espinoza assaulted her and damaged her car. Anderson RP 150-54; Allred RP 102-08.¹ Mr. Espinoza objected to this evidence on the basis that there was no proof that the prior incident even happened. Anderson RP 151. The court allowed the evidence under ER 404(b) without making any finding that the prior misconduct occurred, and without balancing the probative value of the evidence against its prejudicial effect. Anderson RP 152-54.

This appeal followed. CP 80-87.

D. ARGUMENT

The trial court abused its discretion in allowing evidence of other acts contrary to ER 404(b).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of prior convictions under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn.App. 482, 490, 234 P.3d 1174 (2010) (citing *State v. Vy Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's prior acts will be reversed showing an abuse of the court's discretion. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995).

¹ Since there were two transcribers for the report of proceedings and their respective volumes are separately numbered, citations to the record will include the name of the transcriber.

Here, Mr. Espinoza objected to evidence of the prior incident on the basis that there was no proof that it even happened. The trial court effectively overruled the objection by allowing the evidence without making any finding that the prior misconduct actually occurred. This omission by the trial court was an abuse of discretion.

The trial court also neglected to balance the probative value of the evidence against its prejudicial effect. A trial court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. *State v. Myers*, 49 Wn.App. 243, 247, 742 P.2d 180 (1987) (citing 5 K. Tegland, Wash.Prac., Evidence, Comment 404, at 258 (2d ed. 1982)). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951

(1986)(quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

Here, in addition to being possibly untrue and thus irrelevant, the evidence was highly prejudicial to Mr. Espinoza because it tended to show he was a "criminal type", and thus likely committed the crime presently charged. Therefore, the court abused its discretion in failing to balance the probative value of the evidence against its prejudicial effect. Since there was doubt that the alleged incident even happened, and the court made no finding to the contrary, the scale should have been tipped in favor of the defendant and exclusion of the evidence.

Even if 404(b) evidence is admitted, the jury must receive a proper instruction limiting the use of the evidence to an announced purpose.

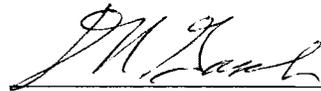
State v. Thamert, 45 Wn.App. 143, 149-50, 723 P.2d 1204, *rev. denied*, 107 Wn.2d 1014 (1986). In *State v. Lough*, the trial court repeatedly gave a limiting instruction to the jury, before each of the witnesses testified to prior druggings and rapes and again in the instructions given to the jury by the court at the conclusion of the trial. In that limiting instruction, the judge told the jury that the evidence of the uncharged allegations could not be considered to prove the character of the defendant in order to show that he acted in conformity therewith, and could only be considered to

determine whether or not it proved a common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). In the present case, the trial court failed to give any limiting instruction to the jury. This too, was an abuse of discretion.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted June 6, 2011.



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