

FILED

JAN 12 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295621

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

AARON RAMIREZ ESPINOZA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH E. REUKAUF, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney

Kevin G. Eilmes
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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
1. Whether the trial court abused its discretion in admitting ER 404(b) evidence?.....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
1. The court’s decision to admit the ER 404(b) evidence was well within its discretion, and any failure to make necessary findings before admitting the evidence was harmless error	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	2
IV. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

PAGE

Cases

State v. Benn, 120 Wn.2d 631, 845 P.2d 289,
cert. denied, 510 U.S. 944, 126 L.Ed.2d 331,
114 S.Ct. 382 (1993) 2

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990)..... 2

State v. Grant, 83 Wn.App. 98, 920 P.2d 609 (1996)..... 3

State v. Hernandez, 99 Wn.App. 312, 997 P.2d 923 (1999),
review denied, 140 Wn.2d 1015 (2000)..... 2

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995) 2

State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982) 5

State v. Scott, 110 Wn.2d 682, 751 P.2d 492 (1988)..... 6

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997),
cert. denied, 523 U.S. 1008 (1998)..... 2

State v. Thach, 126 Wn.App. 297, 106 P.3d 782 (2005) 3

State v. Wilson, 60 Wn.App. 887, 808 P.2d 754 (1991) 3

State v. Zunker, 112 Wn.App. 130, 48 P.3d 344 (2002) 3

Rules

ER 404(b) 1, 2, 5

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in admitting ER 404(b) evidence?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court's decision to admit the ER 404(b) evidence was well within its discretion, and any failure to make necessary findings before admitting the evidence was harmless error.

II. STATEMENT OF THE CASE

The State does not dispute the Appellant's Statement of the Case, but supplements that narrative here.

When contacted by Officer Hipner on August 22, 2010, the victim, Jennifer Redburn, looked disheveled and upset. Her hair was messed up, and she displayed injuries including reddening about her neck, and a scratch on the side of her mouth. **(Anderson RP 210; 215-16)**

Ms. Redburn related that Mr. Espinoza told her he would shoot her daughter in the head, and if Ms. Redburn were in relationship with another man, "I will kill you right here." **(Anderson RP 213)** She observed a 9mm pistol on his person, and she was afraid for her life. **(Anderson RP 213)**

III. ARGUMENT

ER 404(b) 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 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.

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value of the evidence against its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995), *citing* State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Additionally, the party offering the evidence has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. Lough, 125 Wn.2d at 853, *citing* State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993). Admission of 404(b) evidence is reviewed for abuse of discretion. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

“An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable.” State v. Zunker, 112 Wn. App. 130, 140, 48 P.3d 344 (2002), *quoted in* State v. Thach, 126 Wn. App. 297, 310, 106 P.3d 782 (2005).

Prior assaultive behavior has been held to be admissible under ER 404(b), particularly in domestic violence cases. In a case in which the defendant was charged with assaulting his wife, his prior assaults were admissible under the theory that the jury was entitled to evaluate the victim’s testimony with full knowledge of the dynamics of domestic violence and its effects on a relationship, including why a victim of domestic violence would minimize the level of violence when speaking to others about it. State v. Grant, 83 Wn. App. 98, 106, 920 P.2d 609 (1996), *citing* State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991).

A similar result was reached in Thach, *supra*, where the State introduced evidence of prior bad acts not to show a propensity for violence, but in part to explain why the victim minimized the violence, blamed herself, and recanted her story during her testimony. Thach, 126 Wn. App. at 310-11.

Here, the State filed a memorandum as an offer of proof for the admission of the June 16, 2010 assault. **(CP 8-22)** Just as in Grant and

Thach, the evidence was offered to explain why Ms. Redburn might choose to recant her earlier statements. “This evidence is therefore critical in allowing the jury to assess Ms. Redburn’s credibility as a witness and accordingly in determining whether the assault occurred.” **(CP 21)**

It is apparent from the record that the court substantially engaged in the process contemplated by both the evidence rule and relevant case law. Outside the presence of the jury, the court drew defense counsel’s attention to Prof. Tegland’s primer on evidence, and identified quickly that the June 16th incident would possibly be relevant in part to explain a recantation, based upon the cases cited therein. **(Anderson RP 152)** The court then ruled:

THE COURT: All right. I’m going to allow it. I think these cases, you know, there has been a lot more liberal application because of their unique circumstances involving domestic violence and how alleged victims are reacting to certain situations. It in no way prohibits the defense from raising the exact issues that Mr. Dalan is arguing to the trier of fact.

(Anderson RP 153)

Within that ruling, the court essentially identified the purpose for which the evidence would be introduced, how it was relevant, and as evidenced by the comments regarding the defense’s ability to cross-examine the victim, necessarily determined that the probative value outweighed its potential prejudicial effect.

On appeal, Mr. Espinoza assigns error to the court's failure to find by a preponderance of the evidence that the prior acts actually occurred. The court admittedly does not make a specific finding that the prior acts were committed, but the court also demonstrates no doubt that the incident occurred. **(Anderson RP 149-53)**

To the extent that the court did not fully address whether the prior acts were proved by a preponderance of the evidence, any error was harmless, and Thach is on point in this regard. In that case, the lack of the necessary finding of proof by a preponderance of the evidence was held to be harmless. There was other evidence of guilt, and the lack of a proper analysis under ER 404(b) was unlikely to have changed the outcome of the trial. Thach, 126 Wn. App. at 311, *citing State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982).

Here, as well, there was evidence of the threatening statement made to the victim in the August incident, she was disheveled, upset, and showed signs of injury to the officers after her encounter with Mr. Espinoza. The court's decision, and the trial's outcome, would not have been different if the necessary finding had been fully articulated.

Espinoza has also addressed the failure on the part of the court to issue a limiting instruction to the jury with respect to the ER 404(b) evidence. However, it does not appear Espinoza proposed such an

instruction, or objected to its absence. He has waived any deficiency in that regard. State v. Scott, 110 Wn.2d 682, 691, 751 P.2d 492 (1988).

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction for felony harassment.

Respectfully submitted this 11th day of January, 2012.


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