

No. 89297-1
Court of Appeals No. 68116-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GUNDERSON,

Petitioner.

FILED
SEP 23 2013
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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COURT OF APPEALS
STATE OF WASHINGTON
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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Daniel Gunderson asks this Court to accept review of the opinion in *State v. Gunderson*, 68116-8-I.

B. OPINION BELOW

Daniel Gunderson appealed the trial court's ruling admitting evidence of prior assaults where that evidence was neither necessary nor relevant to prove an element of the current offense. The Court of Appeals affirmed the trial court, applying reasoning that would make such evidence admissible in nearly all cases contrary to the plain intent ER 404 that such evidence is generally not admissible.

C. ISSUE PRESENTED

ER 404 does not permit admission of a person's prior acts as propensity evidence. However, if it is offered for some other purpose, such evidence is admissible if the court determines that purpose is relevant to prove an element of the crime charged and the court provides an instruction properly limiting the jury's use of the evidence. Where a witness has not recanted a prior statement or offered contradictory statements or done anything else to put their credibility is not at issue, can the State offer evidence of prior acts on the theory that such evidence is relevant to the witness's credibility?

D. STATEMENT OF THE CASE

Mr. Gunderson and Christina Moore are the parents of a daughter, Faith. The two did not have a parenting or custody plan in place for Faith. 10/29/11 RP 32, 10/24/11 RP 80. However, a no-contact order barred Mr. Gunderson from having contact with Christina, and a separate no-contact order barred Christina from contacting Mr. Gunderson.¹ 10/24/1184. Despite that, arrangements had been made for Mr. Gunderson to pick up Faith in Seattle so that she could stay with him for a period at his Kelso home. 10/24/11 RP 62.

As arranged, Mr. Gunderson gathered Faith and her belongings and took her to his truck. 10/24/11 RP 62. Along the way, Mr. Gunderson and Bonnie Moore, Christina's mother, became involved in an argument. 10/20/11 RP 26. Bonnie testified the two scuffled while Mr. Gunderson was in his truck, but described Mr. Gunderson as "defending himself." 10/20/11 RP 44.

Mr. Gunderson, Christina and Faith drove away. Bonnie Moore called police. 10/20/11 RP 23-24.

The State charged Mr. Gunderson with violating a no-contact order. CP 7-8.

¹ Because both Christina and her mother, Bonnie Moore, share the same last name they will be referred to by their first names.

A jury convicted Mr. Gunderson as charged. CP 49.

E. ARGUMENT

The opinion of the Court of Appeals represents a substantial retraction of the rule barring the admission of propensity evidence and merits review by this Court.

The trial court permitted the State to admit evidence of prior assaults involving Mr. Gunderson and Christina, ostensibly as relevant evidence of Christina's credibility. 10/24/11 RP 52-53. The court reasoned the evidence Christina's credibility was at issue if her testimony regarding the event differed from that of other witnesses offered by the state. *Id.* at 53.

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a).

ER 404(b) provides:

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.

“Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character.”

State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (Internal quotations omitted).

This Court has previously held “that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.” *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). *State v. Grant* also involved a victim’s recantation of prior accusations of abuse. 83 Wn. App. 98, 920 P.2d 609 (1996). Because of that, *Grant* concluded the defendant’s prior convictions of assaultive conduct against the same victim were relevant to assess the credibility of her current accusations and/or recantation.

Here, as the trial court recognized, there was no recantation. Christina never made a prior statement to police, prosecutors, or anyone. 10/24/11 54. Unlike *Magers* or *Grant* the only value of the evidence was as propensity. Because she had never recanted, Christina's credibility was not at issue any more than any other witness's.

In *State v. Baker*, the Court of Appeals broadened the holdings of *Magers* and *Grant* to permit admission of other-acts evidence where the victim did not recant but testified that she had not reported prior instances of abuse. 162 Wn. App. 468, 475, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011). The court reasoned the jury was "entitled" to hear that evidence to understand the "dynamics" of the victim's relationship with the defendant. *Id.* That holding ignores the narrow holding of *Magers* that such evidence is relevant only to "judge the credibility of a recanting victim." 164 Wn.2d at 186. The logical relevance of the evidence offered in *Baker* depends entirely upon propensity - the number of allegations, reported or otherwise, somehow lends weight to the current charge. That ignores the categorical bar to propensity evidence found in ER 404.

Baker adopted a rule that permits other-acts evidence even where the victim's credibility is not at issue. Even assuming there is any relevance to the evidence in a scenario like *Baker*, here the opinion of the Court of Appeals goes beyond that. The trial court, here, concluded the evidence was admissible simply because the alleged victim's testimony contradicted that of other witnesses. 10/24/11 RP 54. The Court of Appeals opines this was not the basis of admission, concluding instead that the trial court admitted the evidence because Christina was minimizing or denying the events. Opinion at 7. But that is a distinction without a difference. If the State did not believe Christina was a credible witness, then the only reason for the State to call her to testify was to admit the prior-acts evidence. In fact, the Court of Appeals views it as proper for the State to attack the credibility of its own witness. Opinion at 7. But, it is improper for a party to call a witness merely to introduce otherwise improper evidence under the guise of impeachment. *State v. Lavaris*, 106 Wn. 2d 340, 345, 721 P.2d 515, 518 (1986). That is precisely what the Court of Appeals endorses.

Aside from endorsing this improper practice, the evidence is relevant to Christina's credibility only as propensity evidence – that is she is lying about what happened in this case because Mr. Gunderson

has assaulted her before. But the initial premise, that she is lying, is not even established by the evidence as she never provided any other statement to contrary. So the rule becomes that any time the alleged victim testifies in a manner which is not fully supportive of the State's theory the State may then admit prior acts by the defendant. There is no logical theory of relevance in that scenario.

The jury heard only one statement by Christina. That simply does not raise the same credibility problem presented in *Magers, Grant*, or even *Baker*. To be sure there is no domestic violence exception within ER 404(b) or even in the case law expanding that breadth of that rule. Instead, prior acts evidence, even prior acts of domestic violence, must still be necessary to prove a necessary element of the offense. And, it must do so based upon some logical relevancy aside from propensity. The evidence here does not do that and was not properly admitted under ER 404(b).

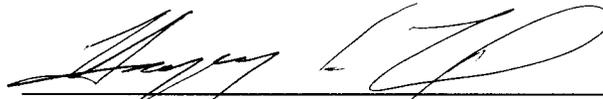
The opinion of the Court of Appeals represents a substantial broadening of the exceptions in ER 404(b) It endorses a process where the State calls a witness solely for the purpose of being able to attack their credibility with prior acts evidence. This is a fundamental

restructuring of the rules of evidence ad is an issue of substantial public interest which calls for this Court to accept review under RAP 13.4.

F. CONCLUSION

For the reasons above, this Court should grant review of the opinion of the Court of Appeals.

Respectfully submitted this 4th day of September, 2013.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 68116-8-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
DANIEL SCOTT GUNDERSON,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: August 5, 2013
_____)	

LAU, J. — Under ER 404(b), evidence of a defendant’s prior crimes, wrongs, or acts is presumptively inadmissible to prove character or propensity. But evidence of the defendant’s prior assaults against a victim of domestic violence is admissible to assist the jury in assessing the victim’s credibility. The trial court properly admitted evidence of Daniel Gunderson’s prior assaults against his former girl friend. We affirm Gunderson’s domestic violence felony violation of a court order conviction.

FACTS

Daniel Gunderson and Christina Moore dated for approximately seven or eight years. The relationship produced a daughter, FG.

In September 2010, Christina and FG lived with Christina's mother, Bonnie Moore, in Seattle.¹ Gunderson lived in Longview. No-contact orders barred Gunderson and Christina from contacting each other. Nonetheless, Christina, Bonnie, and Gunderson arranged for Gunderson to pick up FG and take her to his home in Longview for a visit. Gunderson drove to Seattle on September 14 and stayed overnight at Bonnie's apartment. Christina, Bonnie, and FG were all present.

The next day, September 15, Gunderson gathered FG and her belongings and went to his truck. Bonnie testified that she and Christina followed Gunderson out of the apartment and a "scuffle" took place between the three adults, with Bonnie and Christina trying to stop Gunderson from taking FG. Bonnie testified that during the scuffle, she was halfway in and halfway out of the truck, Gunderson and Christina were sitting in the truck, and FG was on the truck's floorboard. Bonnie called the police during the scuffle. She testified that Gunderson then drove away with Christina and FG.

Officer Andrew Wilkes responded to Bonnie's call and took a written statement. Bonnie told Officer Wilkes that Gunderson suddenly grabbed FG and ran toward a silver truck. Bonnie reported that Christina "yelled at [her] he's trying to take [FG]," and Bonnie ran to the truck and tried to lock the door. Report of Proceedings (RP) (Oct. 24, 2011) at 23. Bonnie stated that Gunderson "threw [FG] in the truck" and drove away with Christina and FG, and Bonnie was dragged for approximately 75 feet before she fell off. RP (Oct. 24, 2011) at 23. As Gunderson drove away, Bonnie saw him hit Christina.

¹ For clarity, we refer to the Moores by their first names.

Christina testified that when Gunderson left Bonnie's apartment on September 15, Bonnie followed him outside to the truck. Christina said that Bonnie and Gunderson argued, but she denied that Gunderson hit her or Bonnie. Christina testified that despite having no plans to go for a drive and having no possessions with her, she calmly entered the truck and left with Gunderson and FG.

The State charged Gunderson with one count of domestic violence felony violation of a court order. The State further alleged the aggravating factor of committing the offense "within sight or sound of the victim's or the offender's minor child under the age of eighteen years" At a pretrial hearing, the State moved to admit Gunderson's two prior fourth degree assault convictions—both committed against Christina—under ER 404(b). The State expected Christina to minimize or recant regarding the September 2010 incident and sought to admit evidence of Gunderson's prior assaultive behavior to "illustrate the credibility of Christina Moore, and place it in the context of the entirety of the relationship." RP (Oct. 24, 2011) at 52.

The court found by a preponderance of the evidence that the prior acts occurred and determined that the evidence was "more probative than prejudicial because it goes squarely to her credibility issue, and the other arguments go to weight, not admissibility." RP (Oct. 24, 2011) at 53. The court clarified,

To the extent that Miss Christina Moore either states that she was not assaulted, or states she cannot remember the assault, then her credibility is in question, then the State may attempt to attack her credibility by bringing up these prior incidents as in support of the State's theory that she may be minimizing what actually happened, or choosing not to remember what actually happened because of the cycle of domestic violence, because she has been involved in incidents before where she has been assaulted.

RP (Oct. 24, 2011) at 55-56.

On direct-examination, the State asked Christina about the prior assaults. She testified that in 2008, Gunderson pushed her during an argument and she called the police.² She also stated that in 2010, Gunderson argued with her friend Brooke, then grabbed Christina's sweater as she sat in a car. Brooke called the police on that occasion. After Christina's testimony, the court read the jury a limiting instruction as requested by defense counsel:

I want to indicate that, previously, I allowed testimony of Miss Christina Moore with regard to a couple of previous incidents involving her and the defendant.

The testimony was only allowed for the purposes of evaluating her testimony - - for the purpose of evaluating her testimony and for no other purpose.

You're not to consider the evidence concerning the other incidents for any other purpose.

RP (Oct. 24, 2011) at 131.

The jury convicted Gunderson as charged. The court imposed a high end standard range sentence. Gunderson appeals.

ANALYSIS

Gunderson argues that the trial court erred in admitting evidence of his prior acts of domestic violence under ER 404(b). Under ER 404(b),

[e]vidence 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.

² This argument occurred at Gunderson's grandmother's house. On cross-examination, Christina said she called the police not because Gunderson pushed her but because Gunderson's grandmother was hurt and needed an ambulance.

“This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” State v. Baker, 162 Wn. App. 468, 473, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). To admit evidence of a defendant’s prior bad acts, the trial court must (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) find that the evidence is relevant to prove an element of the crime charged, and (4) weigh the evidence’s probative value against its prejudicial effect. State v. Fualaau, 155 Wn. App. 347, 356-57, 228 P.3d 771 (2010).

We review a trial court’s decision to admit evidence under ER 404(b) for abuse of discretion. Baker, 162 Wn. App. at 473. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006).

Our courts have addressed ER 404(b) evidence in the domestic violence context. In State v. Grant, 83 Wn. App. 98, 105-06, 920 P.2d 609 (1996), involving a domestic violence felony violation of a postsentence court order, the victim changed her story after initially denying that the defendant assaulted her. We held that evidence of the defendant’s prior assaults on the victim was admissible under ER 404(b) to help the jury assess the victim’s credibility and understand why she told conflicting stories and minimized the degree of violence. Grant, 83 Wn. App. at 106-08. We emphasized that “[t]he jury was entitled to evaluate [the victim’s] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a

relationship has on the victim.” Grant, 83 Wn. App. at 108. In State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008), our Supreme Court adopted Grant’s reasoning in concluding, “[P]rior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.”

In Baker, the trial court admitted evidence of the defendant’s prior unreported domestic violence incidents against the victim to show motive and absence of mistake or accident and to assist the jury in assessing the victim’s credibility as a witness. Baker, 162 Wn. App. at 472. On appeal, the defendant argued that Grant and Magers only apply to cases involving recanting victims and, thus, those cases were inapposite in a case where the victim did not recant. Baker, 162 Wn. App. at 475. We rejected this argument, holding, “[T]he jury was entitled to evaluate [the victim’s] credibility with full knowledge of the dynamics of her relationship with [the defendant].” Baker, 162 Wn. App. at 475.

Here, the State proposed to offer evidence of Gunderson’s prior misconduct if Christina denied or minimized the September 15, 2010 incident during her testimony. The State argued that this evidence would help the jury evaluate Christina’s credibility with knowledge that her relationship with Gunderson included past domestic violence. The State clarified that the basis for introducing evidence of the prior incidents was that Christina was denying or minimizing the September 15 incident because of prior violence. The trial court conducted a full ER 404(b) analysis on the record and made clear that to the extent Christina denied that Gunderson assaulted her on September 15

or minimized the incident, evidence of Gunderson's prior misconduct was relevant to show that Christina's denial or minimization was not credible.

While Gunderson claims that the trial court concluded evidence of the prior acts was "admissible simply because the alleged victim's testimony contradicted that of other witnesses," the record indicates otherwise. Appellant's Br. at 6. The trial court initially discussed potential conflict between Christina and Bonnie's testimony as a basis for admitting evidence of the prior acts. But after further argument and the State's clarification that it was not offering the evidence for that purpose, the court amended its ruling and admitted the evidence solely to help the jury evaluate Christina's credibility. See RP (Oct. 24, 2011) at 55-56 (State's clarification regarding its purpose in offering the evidence and court's conclusion that the State may attack Christina's credibility by introducing the prior incidents to the extent she denied or minimized the September 15 assault).

As the trial court properly found, the prior acts evidence was highly relevant to explain the reasons Christina minimized or denied the September 15 incident—and, thus, relevant to prove whether the crime occurred. The court conducted the required ER 404(b) analysis, finding that (1) the State proved the prior misconduct by a preponderance of the evidence,³ (2) the prior misconduct was relevant to the State's theory that, to the extent Christina denied or minimized the September 15 incident, her testimony was not credible, and (3) the evidence was more probative than prejudicial.

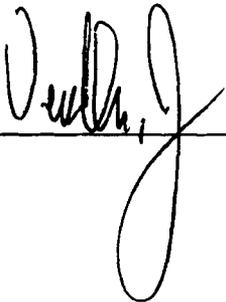
³ Gunderson does not challenge the trial court's determination that the State proved the prior assaults by a preponderance of the evidence. He argues the prejudicial nature of the evidence only in connection with his argument that the error he alleges is not harmless and requires reversal. Because we find no error, we do not undertake a harmless error analysis.

Further, the trial court limited the State's use of the evidence and gave the jurors a limiting instruction, quoted above, prohibiting them from using the evidence except to evaluate Christina's credibility. Jurors are presumed to follow the court's instructions. State v. Russell, 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994). We find no abuse of discretion.

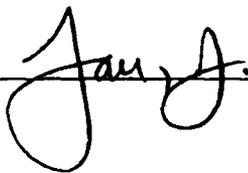
CONCLUSION

The trial court properly admitted evidence of Gunderson's prior acts of domestic violence against Christina to help the jury evaluate her credibility. We affirm.

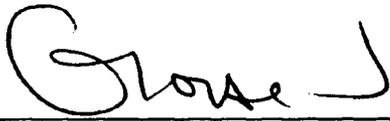
WE CONCUR:



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A handwritten signature in black ink, appearing to be 'Grove J.', written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68116-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Susan Harrison, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 4, 2013

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