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Supreme Court No.91771-0
COA No.45173-5-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BARON DELL ASHLEY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable David Gregerson

SUPPLEMENTAL BRIEF

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ORIGINAL

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A. ISSUES ON REVIEW AND SUMMARY

1. ER 404(b) error. Prior bad acts of the accused that carry no relevance to a proper, non-character, non-propensity purpose, will likely be used by the jury improperly. Did the trial court abuse its discretion in ruling *in limine*, prior to Mr. Ashley's trial on a charge of unlawful imprisonment, to admit his past abusive assaults of the complainant Ms. Gamble -- allowing the State to create a fake controversy regarding the details of precisely *how* she said she was imprisoned, in order to interject Ashley's bad character into the case?

(a). Issue - relevance to credibility - none. The State charged that Mr. Ashley unlawfully imprisoned Ms. Gamble in the bathroom and told her to be quiet, when the Vancouver police came knocking to arrest Ashley at his apartment. On the defense side Ashley argued that Gamble made a false accusation because the police were angry that she seemed to be helping Ashley hide from the authorities.

Under Magers¹ and Gunderson,² where there was no recantation by Ms. Gamble, nor conflicting statements as to whether the incident occurred, and therefore nothing to impeach, did the trial court abuse its

¹ State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008).

² State v. Gunderson, 181 Wn.2d 916, 924-25, 337 P.3d 1090 (2014).

discretion by admitting, prior to trial, Mr. Ashley's 2000, 2001, 2004 and 2008 assaults of Ms. Gamble under ER 404, for "credibility" purposes?

(b). Issue - relevance to element or material state of mind

– **none.** Under the Magers plurality, even if the other basis for ER 404 admissibility of prior bad acts might arguably be for the purpose of proving a crime's reasonable belief element, or a reasonable fear of imminent injury element, did the court err in admitting the evidence for whether Gamble's restraint was without "consent," when unlawful imprisonment contains no reasonableness element, and Gamble thoroughly testified that Ashley angrily made her get into the bathroom and physically kept her in there until the police burst in?

(c). Issue - ER 403 probity/prejudice balancing –

exclusion required. The issue was whether Ms. Gamble fabricated her claim to avoid being accused of obstructing the police. The specific details of her imprisonment allegation (e.g., whether she was imprisoned by fear and/or by Ashley repeatedly actually closing the bathroom door), were of no consequence. Given this, and given the absence or deficit of relevance of Mr. Ashley's prior bad acts to either Gamble's credibility, or her state of mind, did the court abuse its

discretion in conducting the ER 403 prejudice/probity balancing step of ER 404?

2. Reversal. Is reversal required, regardless of whether there was other admissible evidence of imprisonment, where the ER 404 evidence was deeply prejudicial to the defendant, and even more so where the prosecutor used the defendant's prior bad acts to argue that no woman would try and protect a man of such bad character who had abused her for years?

B. FACTS.

1. Facts of incident. In May of 2013, police officers with an arrest warrant for an unrelated matter appeared at the door of Mr. Ashley's townhouse apartment. No one answered despite sounds heard inside. The officers eventually succeeded in getting the door key from a manager and arresting Ashley, after a protracted 45 minutes to 1 hour during which the defendant had apparently been hiding inside the apartment, upstairs. RP 140-44; CP 1, 50.

After Ashley's arrest, the police seemed mad at his sometime girlfriend, Ms. Gamble. She believed the officers were angry and thought she had obstructed their efforts, by not coming to the door, not answering their shouts into the home, and by hiding with Ashley. RP

209-11, 215. One officer asked Ms. Gamble why she had been trying to “save” Ashley. RP 217. Ms. Gamble feared that she would get in trouble and that her children would be taken away from her. RP 201.

Ms. Gamble ultimately claimed that Mr. Ashley had unlawfully imprisoned her, by keeping her non-consensually in the upstairs bathroom. RP 198-202.

However, Ms. Gamble admitted at trial that approximately a day or so before Mr. Ashley’s arrest, one Marquetta Jackson had arrived at the townhouse apartment.³ RP 189-90.

Ms. Jackson told Ms. Gamble that she was fleeing from the police. When police officers arrived at the apartment door soon after, Jackson told Gamble to not answer the door, and they both waited inside until the officers left. RP 189-91, 206-08.

2. ER 404 ruling. For trial, the expected thrust of the defense was going to be that Gamble did for Mr. Ashley exactly as she had done for Ms. Jackson – agreed to go upstairs and hide, and stay quiet, until the police departed, obstructing or delaying the police in execution

³ Ms. Jackson was the co-defendant with Mr. Ashley in the original information which had charged Ashley and Jackson with committing a vehicle robbery together, several days earlier. CP 1, 50.

of their duties or being complicit in Mr. Ashley's hiding. CP 27, 31, 37, 43-44 (defense pre-trial briefing); RP 208, 209-11.

The defense in fact indicated in the pre-trial briefing and in its *in limine* argument that it was understood that Gamble would say that Mr. Ashley physically closed the bathroom door on her repeatedly, and the defense made clear that Mr. Ashley had no intention to dispute Ms. Gamble's particular factual recitations of what she said Mr. Ashley specifically did in detail inside the apartment to unlawfully imprison her. CP 43; RP 89.

Nonetheless, at the pre-trial hearing, the court ruled that Mr. Ashley's ER 404 prior assaults of Gamble were relevant and admissible to (1) her "credibility," and (2) to the fact that Mr. Ashley kept Gamble non-consensually in the bathroom by his angry behavior including the look in his eye when he put and kept Gamble in there. RP 70-98 (offer of proof and ruling); see RP 193-200. Gamble was therefore permitted to testify for the jury about the litany of prior assaults. RP 193-200 (trial testimony). The Court gave the jury a limiting instruction stating that the evidence was admitted for purposes of credibility and the element of non-consent. CP 65 (jury instruction no. 5).

Throughout trial, the defense continued to try and keep the focus of the jury case on Ms. Gamble's specific motivation for making a false accusation. In closing argument, Mr. Ashley's lawyer reminded the jurors that, just as he had told them in opening statement, this case was not really a case about imprisonment, it was a case about obstruction of the police, by Ms. Gamble. RP 268-69.

Mr. Ashley was convicted. CP 74. He appealed. CP 106. The Court of Appeals affirmed, deeming the ER 404 evidence relevant to credibility and to the charged crime, and not overly prejudicial. Decision, at pp. 10-12.

C. ARGUMENT

THE ER 404 EVIDENCE WAS IRRELEVANT TO CREDIBILITY, GAMBLE'S PRECISE MANNER OF IMPRISONMENT WAS NOT THE ISSUE, AND THE PREJUDICE OF THE PRIOR BAD ACTS DRAMATICALLY OUTWEIGHED ANY PROBITY, IF THERE WAS ANY RELEVANCE.

(1). Mr. Ashley's bad character should not have become the issue at trial, and the trial court abused its discretion in admitting the prior assaults under ER 404(b).

Mr. Ashley's prior bad acts were not relevant and certainly carried no "overriding probative value" in the context of this case. See State v. Gunderson, at 925. First, Ms. Gamble had never retracted her allegation of unlawful imprisonment, and there was no other

“credibility” issue arising because she had made conflicting statements about whether the incident at the apartment did or did not occur. The prior bad acts carried only unfair prejudice, rather than any probative value for some sort of “impeachment” that needed to be conducted by the State (of its own witness, no less) in order to explain any recantation or contradiction to the jury as being the product of an abusive relationship dynamic. Magers, at 185-86; Gunderson, at 924-25.

Second, there was no value for proof of any material fact or element. Ms. Gamble testified that Mr. Ashley physically kept her in the bathroom, by shutting the door repeatedly when she tried to open it. RP 194, 198.

This Court has repeatedly stated that matters appearing to be character and prior bad act evidence are presumptively inadmissible under Evidence Rule 404. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404.

To justify the admission of prior bad acts under ER 404(b)’s exceptions to the rule of exclusion, there must be a showing that the evidence serves a legitimate non-character/propensity purpose, is

relevant to prove an element of the crime charged or necessary to prove another material issue, and then that the probative value outweighs its prejudicial effect per ER 403 balancing. State v. Magers, 164 Wn. 2d at 184; State v. Saltarelli, at 361-66; ER 401, ER 402, ER 403.

A. There was no relevance to assessing the “credibility” of a victim who neither recanted nor made inconsistent allegations as to whether the incident occurred.

Prior act evidence of the accused may be admissible to impeach a complainant who recants or makes inconsistent statements. Magers, at 184-85 (victim sent letter of recantation) (citing State v. Grant, 83 Wn. App. 98, 106-08, 920 P.2d 609 (1996) (victim changed or minimized her story to defense counsel after initially claiming the assault)). This credibility rationale for admitting prior bad acts (assuming it also passes the subsequent ER 403 balancing test) was approved again by this Court in Gunderson, but deemed inapplicable in that case because – as here -- there was no recantation by the victim nor inexplicable inconsistency on her part as to whether the incident occurred. Gunderson, at 924-25 (holding that a *third-party* witness’s account that conflicted with the complainant’s sole statement of non-occurrence was not the sort of inconsistency that rendered the accused’s ER 404 prior acts admissible). In this case, there was neither

recantation nor inconsistent making and withdrawing of allegations, nor any minimizing, downplaying, or skewing of the incident because of possible fear of the defendant, or any other basis for the State to impeach its own witness by a showing of bias or interest such as a desire to placate the abuser. Gunderson, at 925 (no recantation or inconsistencies— evidence inadmissible); see also Gunderson, at 927-31 (Madsen, C.J., dissenting) (citing Grant, at 107; ER 607). There was no failure of the victim to report the charged incident, that needed to be explained. State v. Baker, 162 Wn. App. 468, 474-75, 259 P.3d 270 (2011), review denied, 173 Wn.2d 1004 (2011) (besides admissibility to show absence of mistake, prior acts were also admissible to explain victim failure to report the incident).

Thus in Magers, Baker and Grant it was proper for the court to admit evidence of a violent relationship that could explain a recantation, or minimization by the accuser. In this case, this was not an issue. Counsel fought the admission of the evidence and failed. CP 47; RP 89. The State will inevitably claim that the defense mocked Gamble's claim that Ashley imprisoned her without express threat, but it was the State that ignored the defense pre-trial briefing that conceded no dispute with the minutiae of Gamble's assertion and the State that

forced a fake controversy over the manner of imprisonment into the case. CP 43-44 (defense brief). It is true that once the evidence was admitted, and the prosecutor presented the defendant's years of bad conduct in its case in chief, counsel briefly asked Gamble if she was saying she was afraid despite no threat of violence being vocalized. RP 209, 225. Counsel also asked Ms. Gamble if, as to one these past assaults, she had taken back a claim years ago. RP 217. These purely reactive efforts by the defense to counteract the improper ER 404 evidence (in vain) amounted to a fraction of cross-examination. See RP 202 to 223 inclusive. And indeed, counsel noted in closing that he hadn't any idea what possible pertinence the prior bad acts had to do with any credibility question. RP 277. The defense conceded that Ashley was not a nice person over the years (RP 276), and argued that the claim of involuntary imprisonment seemed to be constructed upon meager assertions because it was falsely motivated by Gamble's concern over obstructing charges (RP 282-83), all of which was consistent with the defense sticking to its plan to raise doubt based on Gamble's motivation to tell authorities she was imprisoned versus admit to helping Ashley hide. RP 267 to 287 inclusive (defense closing). Unlike Magers, Grant, and Baker, where the defendants had a

basis to attack the allegations because there was victim recantation or minimization, there were no grounds here for the prosecution to demand advance *carte blanche* to “explain” a victim’s contradictions or inconsistencies as understandable given an abusive relationship – there *were* no such. The State’s pre-trial insertion of Ashley’s past acts into the trial – at best immaterial to the factual details of the bathroom scenario which the defense was never going to make any issue of anyway -- cannot be justified as ‘pre-rebuttal’ to the defense theme, which was that Gamble made up the *overall* claim to avoid being accused of obstructing. The former does not relate to the latter; the two topics have nothing to do with each other, and any contention that the latter justified the former would be to view the case entirely backwards.

Certainly, of course, none of the Magery cases authorizes admission of bad acts as bolstering evidence, only impeachment of a case-weakening statement or silence by the victim. The prosecutor at the pre-trial hearing creatively imagined critiquing questions that a jury could possibly have about how Ashley angrily kept Gamble in the bathroom, RP 86-87, but the fact that the prosecutor can self-devise impeaching inquiries that might be posed to the victim does not place this case within authorities which – in limited circumstances –

authorize admission of 404 acts to rebut the actual victim's own conflicting statements. Gunderson of course established that contradictory statements about the incident made by a third party witness do not make prior abuse between the main parties relevant (there, the victim said the defendant did not hit her, but the victim's mother said he did hit the victim). Gunderson, at 924-25.

Without relevance properly going to credibility by virtue of victim recantation or victim conflicting statements, the ER 404 evidence carried only unfair prejudice. The trial court abused its discretion. Gunderson, at -922 (abuse of discretion in determining applicability of evidence rule where there was no credibility relevance because no recantations or inconsistencies by the victim herself).

B. In this trial on a charge of unlawful imprisonment, the bad act evidence had no relevance to an element or material issue such as reasonableness of a fear that a threat would be carried out (harassment) or reasonableness of a perceived fear of imminent contact (i.e., assault).

There was no relevance of the defendant's prior acts to proof of unlawful imprisonment. The plurality opinion in Magers allowed that prior domestic violence by the defendant against the complainant may be admissible to prove the legitimate necessary aspect of the crime of assault that the complainant reasonably apprehended and feared that

she was about to be struck by battery. Magers, at 182-83 (noting that the assault offenses of RCW 9A.26 *et seq.* require proof of assault which is defined as including *reasonable* apprehension of imminent battery). The Court likened that circumstance to cases where the defendant was charged with harassment, which includes an element of reasonable fear the threat will be carried out. Magers, at 182 (citing State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000); State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1995)).

The offense of unlawful imprisonment does require proof that the victim was restrained without her consent, and the prosecutor could properly argue that Ms. Gamble was, in part, intimidated into staying in the bathroom. See RCW 9A.40.040, RCW 9A.40.010(6). But the prior cases discussing introduction of prior bad acts by the defendant against the victim as going directly to an element have involved crimes with elements of reasonableness, such as assault and harassment. In contrast, the crime of unlawful imprisonment has no “reasonableness” element. See RCW 9A.40.040, 010(6) (defining imprisonment as restraint of a person in a manner which interferes substantially with his

or her liberty, without legal authority or consent); CP 69, 70 (definitional and to-convict instructions).⁴

Further, the reasoning as to the above in the assault case of Magers regarding prior ER 404 acts was not a holding by a majority of this Court of admissibility under a rationale of showing reasonableness of a victim's perception of incoming battery. Magers, at 194 (Madsen, J., agreeing with result only and noting that apprehension-type assault required only proof that a reasonable person in the circumstances would apprehend imminent injury, rather than the particular reasonableness of the victim's state of mind as to fearing injury).⁵

Here, the prior assaults by Ashley carried either no relevance, or at most, *de minimis* probity as to what was (1) at best a completely minor question in the first place; and (2) a question that only the

⁴ The crime of unlawful imprisonment is committed when the defendant knowingly restrains another person. RCW 9A.40.040. Restrain includes restricting a person's movements without consent or legal authority in a manner which interferes substantially with her liberty. RCW 9A.40.010(6). A substantial interference is one that is real and more than a slight inconvenience. State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), aff'd, 92 Wn.2d 357, 597 P.2d 892 (1979).

⁵ Magers also involved an unlawful imprisonment charge in addition to the apprehensive assault as to which the plurality deemed prior conduct relevant. Magers, at 177. The Court did not state that the elements of unlawful imprisonment – which do not include any requirement of reasonableness – were part of what might make the defendant's ER 404 prior acts relevant and admissible.

prosecutor was positing. The details of Gamble's claim of imprisonment were of no consequence in a case where the issue was whether the allegation was untrue from the get-go, regardless of the specific factual nuance that accompanied her wrongly-motivated accusation. Additionally, Ms. Gamble fully testified that she was afraid, and, importantly, also testified in the same breath that Mr. Ashley physically would not let her leave, closing the bathroom door on her every time she tried to open it. RP 194, 198. There was completely adequate testimony from Gamble, and also her daughter Ciara, that Mr. Ashley was behaving angrily, and that his conduct, and demeanor, frightened Gamble into staying quietly seated inside the bathroom, as he allegedly directed her to do when the police came. RP 194-98 (Gamble testimony); RP 176-79 (testimony of Ciara Ashley, who testified that she and her brother were kept in the bedroom by the angry defendant).

C. Prejudice/probity balance – there was no “overriding probative value” to the defendant’s bad acts and violent character.

Even if, for purposes of argument, the prior assaults were technically relevant to the State's self-devised topic of whether Ms. Gamble felt scared to try to exit, or felt kept in the bathroom by fear of

Ashley's angry look and their history, the probity/prejudice balance of ER 404(b) and ER 403 required exclusion, as a matter of law. ER 404(b); see ER 401; ER 402. Such a minute peg of relevance is not justifiably made a hook upon which the prosecution should be allowed to hang the full weight of the dirty linen of the defendant's past wrongdoing and character for violence. With relevance only to this at-best peripheral aspect of the case, upon which further proof was utterly unneeded, and considering the complete absence of relevance to a "credibility" issue (see supra), the prejudice/probity balance must tip on the side of exclusion.

The pivotal ER 403 aspect of ER 404 analysis requires that the probative value of evidence not be outweighed by the danger of unfair prejudice. ER 403, ER 404; Gunderson, at 923-25. When ER 404 evidence actually has little or no legitimate bearing for a non-propensity, non-character purpose, the jury will surely use the evidence to find propensity and bad character. Among Gunderson's contributions to ER 404 doctrine is its reminder and emphasis that a determination that certain prior acts are technically relevant for a non-propensity, non-character purpose *does not end the inquiry* – it is, rather, only a starting point. Gunderson, at 923. The crucial

assessment of the prejudice/probity balance per the Evidence Rule 403 aspect of ER 404 must come next, and that balancing process must be conducted carefully and methodically:

[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high.

Gunderson, at 925. Mr. Ashley submits that the careful and methodical balancing the Gunderson Court was requiring, has to do with looking at the exact base(s) of relevance that the prosecutor proffers as applicable, and examining each one for viability and weight, against the great known prejudice of prior bad conduct and character evidence. In this case, Ms. Gamble testified that Mr. Ashley closed the door and physically kept her in the bathroom, and there was no basis to use the ER 404 evidence as impeachment of any credibility fissure. This dramatically changes the probity/prejudice calculus compared to cases such as Magers and the like. In the end, the evidence had no bearing for a non-propensity, non-character purpose, material to the trial. The lay jury therefore surely used the evidence to find propensity and bad character, and so decided the case. The trial court abused its discretion.

(2). Reversal is required. This case was expected to center around the dispute that Ms. Gamble made a false accusation of

unlawful imprisonment, with the details of how it was claimedly accomplished being of no ultimate moment. CP 31 (defense motion to sever); CP 43 (defense pre-trial brief). The defense used the great bulk of its trial efforts including closing argument to attempt to show the jury that Ms. Gamble had a self-interested motivation to claim that she had been imprisoned, rather than helping to secrete Ashley as the police angrily thought she had. RP 267-287 inclusive (defense closing argument); see RP 267-68 (reminding jury of the defense opening statement that this case was really about obstruction by Gamble, not unlawful imprisonment by the defendant); RP 287 (same).

Mr. Ashley's trial should have turned on that expected central issue -- instead, the defense effort to keep this the focus was unsuccessful. The court's ruling and limiting instruction was that Mr. Ashley's multiple past assaults of the victim were admitted only for credibility and for the fact that Gamble was afraid of Mr. Ashley while in the bathroom. Appellant argues herein that the first purpose fails, and that the second purpose also fails or at best touched on a peripheral aspect of the incident, at most.

However, when the defense argued its attempted theme in closing that Ms. Gamble had a motive to lie about whether, in fact, she

was actually *helping* Mr. Ashley avoid discovery and arrest at the apartment, the prosecution responded that this defense notion was nonsensical -- because no woman would give such help or assistance to a bad man, who had beaten her up over the years, like Mr. Ashley:

To counter that, does it make sense for her, somebody who has been through what she has been through at the hands of the Defendant, somebody who has had her eardrum ruptured by him [2004⁶], who has gotten black eyes on multiple occasions while pregnant [2001, 2004⁷], been assaulted by him [2000⁸], to sit there and aid this person[?].

RP 293-94 (State's rebuttal closing argument).

Baron Ashley respectfully argues that this argument by the prosecutor signaled the completion of this case's thorough devolution into a character trial. The prosecutor had now gone even beyond the then-putatively proper bases for the 404 evidence, and argued for conviction based on Ashley's bad character. This is exactly the danger that is realized when prejudicial prior act evidence that carries little or no probity for a non-propensity, non-character purpose is allowed into a criminal trial. Errors under ER 404 require reversal where, within

⁶ RP 196-97 (trial testimony of complainant Gamble).

⁷ RP 195-96 (trial testimony of Gamble).

⁸ RP 195 (trial testimony of Gamble).

reasonable probabilities, they affected the outcome of trial.

Gunderson, at 925-26 (citing State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) (and noting that prior domestic violence evidence is highly prejudicial, similar to prior bad act evidence in sex offense cases)). This Court should reverse Mr. Ashley's conviction.

D. CONCLUSION

Based on the foregoing, Mr. Ashley asks that this Court reverse his judgment and sentence.

Dated this 11 day of January, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 91771-0
v.)	
)	
BARON ASHLEY,)	
)	
Petitioner.)	

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Supplemental Brief of Petitioner

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