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COURT OF APPEALS OF THE STATE OF WASHINGTON  
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NO. 64511-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAKER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Prior bad acts are admissible under ER 404(b) if the acts are relevant to prove an element of the crime or to assist the jury in assessing a victim's credibility. Here, Defendant claimed that he was guilty of only simple assault in one count for placing his hand over the victim's mouth, and the victim's credibility was at issue due to delayed reporting and poor memory. Did the trial court properly exercise its discretion when it admitted evidence of two other strangulation assaults to show motive, lack of mistake or accident, and to help the jury assess the victim's credibility and state of mind?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Defendant Michael Baker was tried before a jury on two counts of assault in the second degree - domestic violence for strangling his ex-girlfriend Jennifer Ingram. CP 25-26. The jury convicted Baker of count one and acquitted him of count two. CP 71-72. He received a standard-range prison sentence. CP 89-97. He now appeals. CP 101-02.

## 2. SUBSTANTIVE FACTS

Jennifer Ingram dated Baker for almost one year, starting in February, 2008. 1RP 280-85.<sup>1</sup> Shortly after they started dating, Ingram moved in to the condominium that Baker rented from his employer, although she kept her own apartment. 1RP 280. In the autumn of 2008, Baker's employer decided to sell the condominium and Baker moved into another property owned by his employer, a dilapidated house near a high-crime area (hereafter, the Yesler house). 1RP 289-93. Around this time, Baker's behavior began to change and he became violent. 1RP 296. Baker strangled Ingram at least four times during their relationship; twice at the Yesler house in November through December, 2008, and twice at Ingram's apartment in January, 2009, after Ingram moved out of the Yesler house. 1RP 296-338, 355-59. The State charged Baker with the two January incidents and offered evidence of the two prior strangulations that occurred in the Yesler house under ER 404(b).

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<sup>1</sup> The report of proceedings consists of five consecutively paginated volumes (October 14, 15, 19, 20, and 21, 2009), which are referred to as 1RP and two independently paginated volumes (October 22, 2009 and November 20, 2009), which are cited as 2RP and 3RP, respectively.

**The assaults offered under ER 404(b):**

In the first assault, Baker and Ingram were arguing in their bedroom. Baker suddenly lunged at Ingram and strangled her with his hands around her neck, hurting her neck and preventing her from breathing. 1RP 297-98. Baker's housemate, Jesse, saw the assault as he walked past the bedroom and told Ingram to stop moving and not to make noise so Baker would stop. 1RP 297.

In the second incident, Baker came into their bedroom while Ingram was attempting to take a contraceptive pill. 1RP 302. Baker became enraged and grabbed Ingram's face and hand and removed the pill. 1RP 302. Baker then strangled Ingram until she passed out and fell off the bed. 1RP 304. After Ingram regained consciousness, Baker intimated that he would kill her and wrap her body in the shower curtain; he told her that no one would know it was him because they lived in a bad neighborhood. 1RP 305-06.

Ingram moved out of the Yesler house on December 21, 2008, but continued to see Baker occasionally. 1RP 309-10.

**The charged assaults:**

On January 9, 2009, Ingram was drinking wine at a friend's house and asked Baker to give her a ride home. 1RP 343. Baker and Ingram argued on the way to Ingram's apartment, where Baker

strangled Ingram on her bed. 1RP 319-20. Ingram struggled against Baker and kicked her window blinds down, trying to make noise so that a neighbor would call police. 1RP 321-23. She could neither breathe, nor scream. RP 324. Baker eventually released his grip and left Ingram's apartment, taking her cellular telephone, debit card, and keys. 1RP 327. Ingram called police from a neighbor's telephone. 1RP 328-30.

On January 20, 2009, Baker and two friends showed up unexpectedly at Ingram's school; the friends dropped Ingram off at an appointment, and left Baker to wait for her. 1RP 349. Ingram did not want to be with Baker; he was behaving strangely and Ingram could tell that he had not eaten or slept in some time. 1RP 350-52. However, Ingram believed that she would be safer if she brought Baker back to her apartment, so she would know where he was and Baker could eat something and go to sleep. 1RP 352-54.

After they arrived at Ingram's apartment, Baker saw Ingram using her cellular phone and believed she was calling the police to have him arrested.<sup>2</sup> 1RP 355-56. Baker lunged at Ingram and

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<sup>2</sup> Baker had fled and was not arrested after the January 10 assault. 1RP 348, 430.

strangled her for what felt like a very long time to her, releasing then reapplying pressure, until she stopped struggling.

1RP 356-59.

Additional facts are incorporated as necessary below.

**C. ARGUMENT**

**1. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING EVIDENCE OF THE TWO PRIOR ASSAULTS AGAINST INGRAM.**

Baker argues that the trial court committed reversible error by admitting evidence of his prior assaults pursuant to ER 404(b). Specifically, Baker claims that the evidence was only relevant to show propensity and irrelevant to show motive, lack of mistake or accident, or to help the jury assess Ingram's credibility. In light of the defense theory and issues relating to Ingram's credibility, Baker's argument must be rejected.

A trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable

grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

In a criminal case, evidence of prior bad acts is generally inadmissible to prove that the defendant acted in conformity with previous behavior. ER 404(b); State v. Burkins, 94 Wn. App. 677, 973 P.2d 15 (1999); State v. Hepton, 113 Wn. App. 673, 54 P.3d 233 (2002). However, prior bad acts or other character evidence may be admissible, “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

The rule, although it sets out particular bases for admission, is not exclusive. See State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If evidence of prior bad acts is admitted for purposes other than those set forth in 404(b), then the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Courts have deviated from the non-exclusive list, allowing 404(b) evidence to be admitted for diverse purposes. See Powell, 126 Wn.2d 244 (allowing evidence of defendant’s prior assaults and threats against murder victim to complete the context of the

murder – as “res gestae”); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991) (evidence of prior assaults admissible to show victim’s fear of the defendant, thus explaining her delay in reporting the incident).

Courts have specifically deviated from the non-exclusive list in domestic violence cases, recognizing the unique circumstances that such cases present. Evidence of a defendant's prior acts of violence against a victim are generally admissible in a domestic violence trial to help the jury assess the victim's credibility and to explain to the jury any recantations or minimizations by the victim. See State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); Wilson, 60 Wn. App. at 890.

Before admitting evidence of prior acts, the trial court should: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court may find that there is

sufficient evidence of a prior act based solely on the State's offer of proof. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

Here, Ingram testified in a pretrial hearing and the trial court found that the State proved by a preponderance of the evidence that the two strangulations in the Yesler house occurred. 1RP 116. The court then ruled that the evidence was more probative than prejudicial and was admissible to show motive and absence of mistake or accident, as well as to assess Ingram's credibility and to show the context of the parties' relationship, as set forth in Grant, *supra*. 1RP 117.

The prior acts evidence was properly admitted under all the bases cited by the trial court. First, the evidence was relevant to show motive. While motive need not be proven by the State, it is relevant evidence in a homicide prosecution. Powell, 126 Wn.2d 244; State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). Motive goes beyond gain and demonstrates an impulse, desire, or any other moving power that causes an individual to act. Powell, 126 Wn.2d at 259.

In Stenson, the court allowed the defendant's statements expressing ill-will towards his wife, the murder victim, holding that the evidence was admissible to show motive, because "such

evidence tends to show the relationship of the parties and their feelings one toward the other and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice or premeditation." Stenson, 132 Wn.2d at 702, citing Powell, 126 Wn.2d at 259 (allowing evidence of husband-defendant's hostile behavior toward victim-wife to show motive).

Here, as in Stenson and Powell, evidence of the prior strangulations was relevant to show Baker's state of mind and his impulse to physically control and harm Ingram when he became upset, and corroborated Ingram's testimony about Baker's controlling behavior. 1RP 286-87.

Nonetheless, Baker argues that the evidence could only be used for propensity because there was no motive to rebut. Baker relies on Saltarelli, however that case is inapposite. 98 Wn.2d 358, 365, 655 P.2d 697 (1982). The prior act at issue in Saltarelli was a sexual assault that had occurred five years prior, on a woman other than the victim in the charged crime. The court held that the prior act was irrelevant to show motive when the defense was consent. Id. Here, Baker strangled the same victim four times; three times on a bed. The rationale in Stenson and Powell, not Saltarelli, applies here.

Second, the prior acts were relevant to show Baker's intent to strangle Ingram and therefore a lack of mistake or accident, particularly with regard to count one. Baker testified that in that incident, Ingram was intoxicated and argumentative. 1RP 487-93. Frustrated with her behavior, he put his hand over her mouth and with his other hand on her chest as he attempted to help her undress for bed. 1RP 493. Based on his testimony, Baker requested and received an instruction on the lesser included offense of assault in the fourth degree. CP 64-65.

Thus, contrary to Baker's claim that there was no evidence of mistake or accident to rebut, Baker's own defense to count one supported the admission of the evidence, which the trial court noted in granting the State's version of the limiting instruction. See CP 56, instruction 6. "Especially with respect to testimony of the incident that Mr. Baker testified he put his hand over her mouth. This would support the mistake or lack of accident, as well." 1RP 518.

Third, the prior acts were relevant to help the jury assess Ingram's credibility. In Grant, this Court held that evidence of the defendant's prior assaults was relevant and necessary to prove that the crime of assault actually occurred, because the history of

domestic violence explained the domestic violence victim's actions. Grant, 83 Wn. App. at 108 (“Ms. Grant’s [the victim’s] credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect of such a relationship has on the victim.”).

This Court held that the reasons for recantation and inconsistency by a domestic violence victim are multiple and make prior domestic violence between the parties an exception to the typical preclusions under 404(b).<sup>3</sup> Grant, 83 Wn. App. at 107-08. The evidence does not show propensity, but is instead offered to give the jury the whole picture, and not give undue credibility to a denial or recantation or inconsistent testimony by the victim. Id. The supreme court affirmed the holdings and rationale of Grant in State v. Magers, 164 Wn.2d 174.

Although Ingram did not recant, as did the victims in Grant and Magers, her credibility and state of mind were still at issue.

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<sup>3</sup> The Grant court thoroughly examined the reasons why a domestic violence victim may minimize or recant at trial, acknowledging that victims may be coerced into lying or changing their story; and victims may minimize or deny abuse out of a sense of hopelessness or mistrust of the ability of judicial system to help them; and many victims stay with their abusers out of fear of escalating violence, as most victims know from past experience that the violence often heightens once they seek help. Grant, 83 Wn. App. at 107-08.

Ingram reported only the January 10 incident to police, and did not mention the other three incidents until she met with the prosecutor and defense counsel at the defense interview in September.

1RP 45-55. On cross examination and in argument, defense counsel exploited the fact that Ingram had struggled during that interview and had a difficult time remembering dates and details, such as what she and Baker had been doing the evening before the assault on January 10. 1RP 371-81; 2RP 7-14. Baker testified that Ingram's moods were highly variable and suggested that she had a drinking problem. 1RP 487-91, 497-501, 514.

Thus, the prior acts evidence helped the jury understand why Ingram had reported only one incident; that she was ashamed, she hoped Baker's behavior would change, and she did not believe she was supposed to tell on someone she loved. 1RP 294, 301-02, 304-08.

Nonetheless, Baker claims that the trial court relied on "an expansive reading" of Grant, claiming that prior acts admissibility under Grant is only available where the victim recants. Br. of Appellant at 5, 7. Baker's interpretation of Grant is too narrow and should be rejected. Although both Grant and Magers involved recanting victims, the essence of both holdings is that prior acts

evidence is relevant to help the jury assess a victim's credibility when she testifies inconsistently with her initial report, or has given conflicting statements. See Grant, 83 Wn. App. at 107; Magers, 164 Wn.2d at 186. Under Wilson, such evidence is also admissible under these circumstances because it rebuts a *defendant's* denial of the abuse and prevents it from having undue credibility. Wilson, 60 Wn. App. at 890 (emphasis added). Ingram's delayed reporting of the incidents at the Yesler house and the January 20 incident were additional, and thus, inconsistent with her original report, and as in Wilson, Baker denied assaulting Ingram and the majority of the remaining evidence was circumstantial. The trial court's admission of the prior acts evidence here was within its discretion and consistent with Grant, Magers, and Wilson. Baker's argument should be rejected.

Finally, this Court must reject Baker's claim that any error was reversible. The trial court gave a limiting instruction,<sup>4</sup> as well as instructing the jury that they must decide each count separately

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<sup>4</sup> "Evidence has been introduced in this case regarding allegations of prior incidents of abuse by the defendant against Jennifer Ingram for the limited purpose of the defendant's motive, lack of mistake or accident, and for assessing Ms. Ingram's credibility and evaluating her state of mind as it relates to the charges of Assault in the Second Degree. You must not consider this evidence for any other purpose." CP 56; WPIC 5.30 (modified).

and that their verdict on one count should not control their verdict on any other count. CP 57; WPIC 3.01. By convicting on one count, but not the other, the jury obviously followed the court's instructions and did not use the prior acts evidence for propensity.

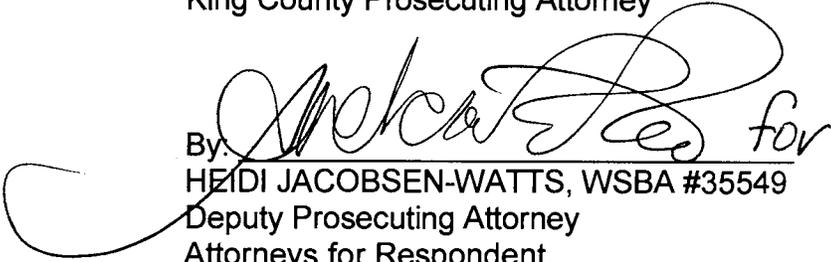
**D. CONCLUSION**

For all the foregoing reasons, the trial court properly admitted evidence of Baker's prior assaults against Ingram and his conviction should be affirmed.

DATED this 14<sup>th</sup> day of October, 2010.

Respectfully submitted,

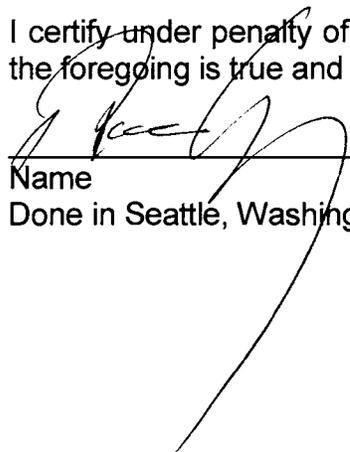
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL BAKER, Cause No. 64511-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name

Done in Seattle, Washington

  
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Date