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NO. 65198-6

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

2010 NOV 23 11:11 AM
COURT OF APPEALS
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STATE OF WASHINGTON,

Respondent,

v.

DONALD GRAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENT OF ERROR.

The trial court erred in excluding other acts evidence of a police officer's misconduct.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Evidence of other acts by a witness is admissible to prove matters other than a propensity to act in a certain way, so long as the purpose is identified and that purpose is relevant to a material fact. Here, the trial court excluded evidence of other acts by the alleged police officer victim which tended to prove the alleged assault did not occur. Did the trial court err in excluding the evidence?

C. STATEMENT OF THE CASE.

After spending an evening at a Kirkland bar, Scott Sanbeg¹ fell asleep in a chair outside a closed coffee shop waiting for a taxi. 3/8/10 RP 13. Mr. Sanbeg was awakened by a metal object striking his leg. Id. at 13-15. Mr. Sanbeg then realized someone was attempting to restrain his arms. Id. Because he did not know who was attacking him, Mr. Sanbeg fought back and threw several punches. Id. at 19.

Kirkland Police Officer Duncan McKay testified he observed Mr. Sanbeg in the chair and decided to check on his welfare. 3/24/10 RP 117. After Officer Glen Shackatano arrived, Officer McKay struck Mr. Sanbeg's knee three separate times with a flashlight in an attempt to wake him up. Id. Officer McKay claimed that after waking up, Mr. Sanbeg looked at him, smiled, and kicked him in the testicles. 3/4/10 RP 123. Officer McKay did not testify to seeking medical attention for his claimed injury. According to the officer, immediately following this claimed injury he began attempting to restrain Mr. Sanbeg's arms and, in the course of that struggle, punched Mr. Sanbeg in the head three times. Id. at 129-30. Officer Shackatano then used his taser on Mr. Sanbeg and he was arrested. Id. at 26-30.

The State charged Mr. Sanbeg with one count of third degree assault. CP 8. A jury convicted Mr. Sanbeg. CP 38.

¹ Although the charging documents name "Donald Gray" as the defendant, the court and parties referred to Mr. Sanbeg by his real name. For sake of clarity this brief will also refer Mr. Sanbeg by his real name.

D. ARGUMENT.

THE TRIAL COURT IMPROPERLY EXCLUDED
EVIDENCE OF OTHER ACTS OF MISCONDUCT OF
THE ALLEGED POLICE-OFFICER VICTIM

1. The trial court excluded relevant evidence of other acts of excessive force by Officer McKay. Mr. Sanbeg sought to admit evidence from a Kirkland police detective that, in the deputy prosecutor's words, "Officer McKay had assaulted a lot or ends up tasing people a lot." 3/2/10 RP 56. The detective had explained he never been attacked before, yet Officer McKay seemed to be victimized repeatedly. Id. at 60-61. Mr. Sanbeg clarified the evidence he sought to admit centered on the fact that on several prior occasions Officer McKay claimed a person had kicked him in the testicles resulting in the officer's use of a taser. Id. Mr. Sanbeg contended these prior incidents established a common scheme and was relevant to Mr. Sanbeg's general-denial defense

The State claimed evidence of a common scheme is relevant only where the act is in dispute. 3/2/10 RP 64-65. Because there was no dispute that officers used a taser on Mr. Sanbeg, the State contended evidence of a common scheme was not relevant.

The trial court excluded the evidence concluding the common-scheme exception is limited to proving the identity of a person who committed an act. 3/2/10 RP 66. Thus, the court concluded because that fact was not in dispute the evidence was not admissible.

2. Other acts evidence is admissible to prove matters other than propensity. ER 404(b) permits admission of evidence of other acts committed by a witness where offered to prove something other than propensity. For example such evidence may be admitted to prove motive, intent or plan. ER 404(b). To admit evidence under ER 404(b), a court need only (1) find the other acts occurred, (2) determine the purpose for which the evidence is offered, (3) determine whether the evidence is relevant, and (4) weight the probative value against the potential prejudice. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). ER 404(b) allows admission of other acts of a witness in the same manner it allows such evidence offered against a defendant. State v. Young, 48 Wn.App. 406, 412-13, 739 P.2d 1170 (1987).

3. The trial court erred in excluding relevant evidence of other acts of excessive force by Officer McKay. A court's interpretation of ER 404(b) is a question of law subject to de novo review. State v. DeVincentis, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). If a court has properly interpreted the rule a reviewing court reviews its decision regarding the admission of evidence for an abuse of discretion. Id

Because there is no case law creating such a limitation, Mr. Gray contends the trial court's limitation of prior acts evidence to circumstances in which either identity or the doing of the act is in dispute misinterprets the rule and is subject to de novo review. Alternatively, the court abused its discretion in excluding evidence that Officer McKay often resorted to excessive force.

a. The court misinterpreted the common scheme exception of ER 404(b) as limited to cases where identity was in dispute. The trial court concluded cases such as Lough have limited the common scheme exception to instances where identity is in dispute or where the doing of the act is in dispute. 3/2/10 RP 66. But neither of those facts were in dispute in Lough, and thus that a case did not limit common scheme evidence in the manner suggested by the court.

In Lough, the defendant was charged with rape committed after he allegedly drugged the victim. The defendant did not dispute that he and the alleged victim had sex, but contended the victim consented. Lough, 125 Wn.2d at 849. The State offered testimony of four other women that the Mr. Lough had drugged them and had nonconsensual intercourse while they were incapacitated. Id. at 850-51. Thus neither Mr. Lough's identity nor the act was in dispute. Rather, the Court found

The evidence was relevant to a material assertion of the Defendant that the victim had consented to sexual intercourse and to the question whether he rendered her so helpless that she was unable to refuse. The credibility of the complaining witness was difficult to assess because of faulty memory and the evidence of prior similar conduct was thus highly relevant to show the existence of a plan to drug, render unconscious and rape women with whom the Defendant had a personal relationship.

Id. at 861-62.

In light of the plain holding of Lough, the trial court's conclusion that it limited common scheme evidence to cases in which it is offered to prove identity or the doing of an act is a plain misinterpretation of ER 404(b).

b. Evidence of other acts of excessive force by Officer McKay was relevant in this case. Generally, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. With respect to other-acts evidence, the evidence is relevant if the identified purpose is of consequence to the outcome of the action and makes the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). In this case, the proffered evidence easily satisfied both prongs.

Evidence that Officer McKay has claimed to have been kicked in the testicles or otherwise similarly assaulted on several occasions, which then led to his use of a taser, tends to make more probable Mr. Sanbeg’s contention that the officer was overly aggressive and fabricated his claim that Mr. Sanbeg kicked him in the testicles. The observation by a police detective that Officer McKay uses his taser frequently lends further weight to Mr. Sanbeg’s claim. So too, the detective’s comment that while Officer McKay has claimed to be the victim of a specific type of assault on several occasions, the detective had never been assaulted in any form in the course of his duties. The proffered testimony paints a

picture of an overly aggressive officer who quickly resorts to use of his taser. The sheer repetition of the claim of being kicked in the testicles as provocation for use of a taser, coupled with a reviewing detective's testimony that he had never been assaulted in any way, makes more likely the fact that the officer was not kicked by Mr. Sanbeg, but instead used that claim as a justification of his use of force. The evidence was relevant to a material fact and the court erred in excluding it.

4. The trial court's erroneous exclusion of relevant evidence of other acts of excessive force by Officer McKay requires reversal of Mr. Sanbeg's conviction. Evidentiary errors require reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991); State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). The State's case depended upon the jury believing the officers' testimony of what occurred. The proffered testimony cast considerable doubt on that version of events, and instead supported Mr. Sanbeg's testimony. There is a reasonable probability that had the jury heard the evidence of the officer other acts the outcome would have been different.

E. CONCLUSION.

For the reasons above, this Court must reverse Mr.
Sanbeg's conviction.

Respectfully submitted this 30th day of November, 2010.

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

GREGORY C. LINK -25228
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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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)	
Respondent,)	
)	
v.)	NO. 65198-6-I
)	
DONALD GRAY,)	
)	
Appellant.)	

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2010.

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