

NO. 65198-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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COURT OF APPEALS  
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STATE OF WASHINGTON,  
Respondent,  
v.  
DONALD GRAY,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE JAMES ROGERS

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**BRIEF OF RESPONDENT**

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**A. ISSUE**

1. The proponent of evidence of prior misconduct under the "common scheme or plan" exception to ER 404(b) must establish by a preponderance that the prior misconduct occurred, and that it had a substantial similarity to an identifiable plan. The defense offered evidence of prior misconduct by a police officer but did not provide any admissible evidence or specific facts about alleged misconduct. Did the trial court properly exercise its discretion when it found the offer of proof insufficient?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Donald Gray, aka Scott Sanbeg<sup>1</sup>, was charged by Information with assault in the third degree. CP 8. The State alleged that on September 6, 2008, Sanbeg assaulted a police officer by kicking him in the groin. CP 1-3. The trial

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<sup>1</sup> The defendant explained that his true name is Scott Sanbeg, but acknowledged that many years ago he used Donald Gray as an alias. 5RP 15. He was previously convicted of robbery under the name Donald Gray. Id. When he was booked into the jail for the robbery he gave the alias Donald Gray and it remains his primary name in the law enforcement records. Id. Throughout the trial the parties used the name Scott Sanbeg, and the State will continue to refer to the defendant as Sanbeg.

commenced on March 2, 2010. 1RP 1<sup>2</sup>. The jury found Sanbeg guilty as charged of assault in the third degree. CP 38. Sanbeg received a standard range sentence. CP 44-50.

## **2. SUBSTANTIVE FACTS**

On September 6, 2008, Officers Duncan McKay and Glenn Shackatano were on uniformed patrol in Kirkland. 2RP 30; 3RP 97. At approximately 1:30 a.m. McKay saw Sanbeg passed out in a chair in front of a coffee shop. 2RP 50-51; 3RP 108. Nearby bars were closing down and the officers believed Sanbeg may have been intoxicated. 2RP 51; 3RP 111. The officers approached simply to check to see if Sanbeg needed medical attention, and to be sure he could get home safely. 3RP 7, 116-17.

Officer McKay gently tapped Sanbeg's leg with his flashlight to wake him. 3RP 10, 117-18. Sanbeg kicked McKay in the leg. 3RP 11, 119. McKay testified he believed this was an involuntary, startled, reaction and did not think Sanbeg intended to assault him. 3RP 119. McKay clearly identified himself as a Kirkland police officer and told Sanbeg not to kick him again. 3RP 12, 121.

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<sup>2</sup> The verbatim report of proceedings consists of five volumes, which will be referred to in this brief as follows: 1RP (3/2/10), 2RP (3/3/10), 3RP (3/4/10), 4RP (3/8/10), and 5RP (3/26/10).

Sanbeg opened his eyes and looked at Officer McKay. 3RP 12, 123. He smirked, grabbed the arms of the chair to brace himself, and kicked McKay in the groin. 3RP 125.

The officers attempted to place Sanbeg under arrest for assault and a struggle ensued. 3RP 14-17, 126-33. Sanbeg was yelling obscenities at the officers as they fought. Id. The officers were unable to gain control of Sanbeg. 3RP 18, 135. They backed up and drew their tasers. 3RP 18, 135. They ordered Sanbeg to get on the ground, but Sanbeg did not comply. 3RP 21-23, 138-39. Officer Shackatano fired his taser. 3RP 22, 139. Sanbeg complied with the officers' orders after he was tased, and he was placed under arrest. 3RP 27, 144.

Approximately a week before the trial the prosecutor had a conversation with a Kirkland detective who was not involved in this case. 1RP 64; CP \_\_ Sub#42 at 8. The detective made a comment that Officer McKay gets "assaulted and ends up tasing people a lot." 1RP 56; CP \_\_ Sub#42 at 8. The prosecution, in an abundance of caution, disclosed the remark to the defense. The detective, Joseph Indahl, indicated he had no firsthand knowledge of any of McKay's uses of force, and could only offer hearsay.

1RP 58; CP \_\_\_ Sub #42, at 8. Detective Indahl did not know of any wrongful uses of force by Officer McKay. CP \_\_\_ Sub#42 at 9, 10.

Sanbeg claimed he was acting in self-defense, and sought to admit evidence of Officer McKay's prior conduct to prove he used "excessive" force during the arrest. 1RP 58. The offer of proof contained in the defense trial brief was limited to alleging that Officer McKay "uses his taser a lot because he gets kicked in the balls frequently." CP 17. Sanbeg offered no other facts about these allegations during the pretrial hearings. See 1RP 56-65. The trial court denied the defense request to admit the proffered evidence.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED PRIOR BAD ACTS EVIDENCE OFFERED BY SANBEG.**

Sanbeg argues that the trial court erred because it refused to admit evidence of "other acts of excessive force" to show Officer McKay fabricated his claims of being assaulted by Sanbeg. Brief of Appellant, at 7. However, Sanbeg's offer of proof contained absolutely no evidence that McKay had ever used "excessive

force," nor any evidence that McKay had fabricated assaults to justify the use of force. The trial court properly found that Sanbeg's offer of proof was insufficient.

This Court reviews the correct interpretation of an evidentiary rule de novo. See State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

When analyzing evidence under ER 404(b) the trial court must:

(1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.

State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). The party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct

actually occurred. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The trial court may make preliminary decisions on the admissibility of such evidence based solely on an offer of proof<sup>3</sup>. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

The offer of proof contained in Sanbeg's trial brief was limited solely to alleging that Officer McKay "uses his taser a lot because he gets kicked in the balls frequently." CP 17. It bears repeating that Officer McKay did not deploy his taser on Mr. Sanbeg; Officer Shackatano fired the taser in this case.

Sanbeg claimed the offer of proof was relevant to show a modus operandi and common scheme or plan. CP 18. Sanbeg's theory was that Officer McKay engages in a common practice of fabricating claims of assault to justify excessive uses of force. Brief of Appellant, at 7. However, there was no evidence in Sanbeg's offer of proof to support that claim. There was no evidence that McKay had ever used excessive force. There was no evidence that McKay had fabricated claims of assault. Sanbeg offered no

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<sup>3</sup> Sanbeg did not request an evidentiary hearing nor object to the court ruling based on the proffers of the State and defense.

admissible evidence in his offer of proof. His offer of proof was limited to the bare assertion that a fellow officer had heard that McKay had been assaulted and resorted to his taser in the past.

The trial court denied the defense motion to admit evidence of Officer McKay's history of being assaulted and using his taser. The court noted that the defense had failed to provide sufficient evidence to analyze under ER 404(b). The court began its ruling by noting: "[M]y real problem is that in order for me to analyze this kind of evidence of modus operandi or common scheme or plan, I need to have very specific facts about the prior incidents." 1RP 65. Sanbeg's offer of proof contained no specific facts about the prior incidents. The court concluded its ruling by pointing out that "I would simply need more facts to be able to make a decision, but simply the bare fact, that somebody has been assaulted a number of times and has tased people is not sufficient." 1RP 66-67. Sanbeg failed to demonstrate that any misconduct actually occurred, and the trial court properly rejected his proposed evidence. See State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

Sanbeg argues that the trial court erred by concluding that modus operandi and common scheme or plan evidence is limited to proving the identity of the person who committed an act. Brief of Appellant, at 4. Sanbeg is incorrect. While the trial court noted that this evidence is often used to prove identity, the court clearly understood it was not limited exclusively to prove identity. The court noted:

Modus operandi is used to show a system or course of conduct that connects a person to particular act. Typically, in other words, it is used to show identity. *Not exclusively*, but often to show that a person actually committed a particular crime in that way.

1RP 66 (emphasis added). The court went on to note that the proponent of modus operandi evidence must be able to point to some distinctive or unusual facts. 1RP 65-66. Sanbeg offered no specific facts about the alleged prior misconduct of Officer McKay.

Sanbeg also alleges that the trial court misinterpreted the law regarding a common scheme or plan. The court briefly discussed the common scheme or plan exception to ER 404(b):

Common scheme or plan *is a broader exception* to 404(b). It was *most often* employed prior to the enactment of rules on sex crimes. It was used in cases involving sex crimes with children and also under the Lough case. Also having to do with *proving that a person did a particular kind of crime*, and they were guilty of that crime when there was a dispute as

to whether or not they actually committed it. Lough involved a fireman who drugged women and sexually assaulted them, for example, and Lough *disputed those occurred at all*. So these exceptions really are usually used to prove identity, and *that somebody actually did something*.

1RP 66 (emphasis added). The trial court recognized that common scheme or plan evidence could be used to establish that the crime, or misconduct, had actually occurred. The defendant in Lough conceded that he had a sexual encounter with the victim. State v. Lough, 125 Wn.2d 847, 849, 889 P.2d 487 (1995). He argued that the victim consented, hence there was no rape. Id. The trial court was correct when it said that "Lough disputed those occurred at all," because Lough denied committing the crime.

Finally, even if the court misinterpreted the Lough case, Sanbeg's proffered evidence was clearly not admissible<sup>4</sup>. There is no interpretation of Lough that would support admission of Sanbeg's proffered evidence. The Supreme Court in Lough held:

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<sup>4</sup> The trial court's ruling can be affirmed on other grounds when supported by the record. State v. Butler, 53 Wn. App. 214, 217, 766 P.2d 505 (1989). The Court could find McKay's prior use of the taser is not relevant under ER 401 because he did not use his taser on Sanbeg; Shackatano fired the taser. The Court could find the evidence was not relevant under ER 401 because, absent any showing McKay's prior use of force was excessive, the evidence failed to make it more likely McKay's use of force against Sanbeg was excessive. Finally, the only proposed testimony by Sanbeg was inadmissible hearsay from Detective Indahl. ER 801.

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

Lough, 125 Wn.2d at 860. The Supreme Court emphasized that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial. State v. DeVincentis, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). The Court explained that there must be an "identifiable plan," and random similarities are not enough. Id. at 18.

For example, in Lough four women gave direct and detailed testimony that Lough had raped them using the exact same methods as alleged in the charged crime (by drugging them). Lough, 125 Wn.2d at 850-52. Sanbeg, in contrast, proffered testimony from a Kirkland police officer who had heard that McKay had been assaulted and used his taser in the past, but did not offer direct evidence that the use of force was inappropriate. If the State in Lough had merely offered evidence that a witness had heard Lough had committed similar acts, the evidence would not have been admitted. Sanbeg's proffer contained no evidence that McKay had previously done anything inappropriate by using force,

and simply invited the jury to infer that something untoward occurred without a basis. This is not the standard for admitting evidence under ER 404(b). The trial court was correct when it ruled that "simply the bare fact, that somebody has been assaulted a number of times and has tased people is not sufficient." 1RP 66-67. The trial court properly refused to admit Sanbeg's unsubstantiated allegations that McKay used excessive force.

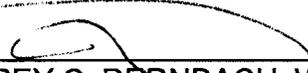
**D. CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm Sanbeg's conviction for assault in the third degree.

DATED this 27<sup>th</sup> day of January, 2011.

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. DONALD GRAY, Cause No. 65198-6-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.

U Brame

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Done in Seattle, Washington

1/28/11

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