

66906-1

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No. 66906-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

LYNDA RAE HOLMAN,

Appellant.

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

The Honorable Charles R. Snyder

BRIEF OF APPELLANT

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APPELLATE COURT
JAN 19 10 18 AM '01

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting evidence of prior acts that were relevant solely to prove Ms. Holman's propensity to commit the charged offense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

ER 404(b) prohibits the admission of evidence of other acts to prove propensity to commit the charged crime. Because of its strong potential to engender prejudice, evidence admitted under ER 404(b) must be relevant to prove an essential element of the crime charged. Evidence of prior alleged assaults against the victim of the charged offense was not relevant to prove motive, intent or absence of mistake or accident. Where this evidence prejudiced Ms. Holman's right to a fair trial, does the erroneous admission of the evidence require reversal of the convictions?

C. STATEMENT OF THE CASE

On February 16, 2010, Whatcom County Sheriff's deputies were called to Mark McCollum's residence and found him dead of a gunshot wound. RP 149-50. Linda Holman, Mr. McCollum's partner, was found distraught nearby and told the deputies she and Mr. McCollum had lived together for 13 years. The night before, they had an argument where Ms. Holman ended up grabbing a

nearby shotgun and putting it under her chin, telling him: "Well hell, I'll just shoot myself too." RP 157. Ms. Holman said as she was returning the gun to the gunrack, the gun went off, accidentally striking Mr. McCollum in the chest. RP 157.

Deputies searching the inside of the house discovered a note beside the bed in which Mr. McCollum's body had been discovered, which had handwriting on it stating:

I keep holding back for you and I, Mark.
[hand drawn frowning face] I can't keep holding back
my emotions for you.

RP 230. On the mirror in the bathroom, there was more handwriting, stating:

One more kiss could mean everything – but one more
lie could end everything.

RP 234. Ms. Holman admitted writing this phrase but cautioned that it had nothing to do with infidelity. RP 279.

Based upon Ms. Holman's admissions and the deputies' investigation, Ms. Holman was charged with second degree murder with a firearm. CP 115-16.¹

On October 14, 2010, prior to trial, the State gave notice, and moved *in limine*, that it intended to admit several prior acts

¹ Ms. Holman was also charged with unlawful possession of a firearm in the first degree, to which she pleaded guilty prior to trial. CP 78-85, 115-16.

under ER 404(b), which related to Ms. Holman and Mark McCollum's troubled romantic relationship. CP 106. Specifically, the State stated:

Evidence will be offered through telephone messages that the Defendant left on the phone of the victim's mother, Shirley McKeever, testimony of Shirley McKeever, testimony of Scott McCollum, the brother of the deceased, testimony of co-workers of Mark McCollum, and a note written on a mirror in the residence in which Defendant lived with Mark McCollum, that the relationship between Defendant, mark [sic] McCollum was subject to a great deal of discord.

CP 106. The State sought to admit this evidence as evidence of intent, motive, *res gestae*, and a lack of accident or mistake. CP 102-04.

Ms. Holman objected to the State's motion and the trial court held a hearing, at the conclusion of which it granted the State's motion. 1RP 55-58.² The trial court admitted the majority of the proffered evidence as evidence of intent, motive, or lack of accident or mistake, relevant to show an on-going dispute and hostility between Mr. McCollum and Ms. Holman. CP 63-66. The court also found the probative nature of the evidence outweighed any prejudice that would be suffered by Ms. Holman. CP 66; 1RP 58-

² The trial transcript will be referred to as "RP," and the lone pretrial transcript will be referred to as "1RP."

61.³ The trial court allowed Ms. Holman to have a continuing objection to the admission of the evidence:

Yes, I think that's appropriate. That should be a standing objection. That is much better than popping up and having the jury having to deal with all of the objections. So it will be treated as a standing objection throughout the trial.

1RP 61-62.⁴

At trial, Shirley McKeever, Mr. McCollum's mother, testified that the relationship between Mr. McCollum and Ms. Holman was troubled in 2009 and worsened as the year went on. RP 336. Ms. McKeever stated that on occasion, Mr. McCollum would come to her house to sleep before going to work. RP 337. On these occasions, according to Ms. McKeever, Ms. Holman would either telephone several times or come over to the house and repeatedly knock on the door. RP 337. Ms. McKeever said that on those

³ The trial court made no ruling regarding *res gestae*.

⁴ The challenge to the trial court's ruling would be deemed preserved even without the court's ruling:

Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, "[u]nless the trial court indicates that further objections at trial are required when making its ruling."

State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995), quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

occasions, she would frequently unplug the telephone. RP 338.

On other occasions, Ms. McKeever said Mr. McCollum would go to motels in Ferndale to sleep. RP 339.

Ms. McKeever testified that at some point in the relationship, Mr. McCollum threw Ms. Holman's clothing out of the back door of the home they shared into the yard, where the clothing stayed for a period of time. RP 338-39. Ms. McKeever testified about times Ms. Holman turned the couple's stereo up quite loud, which Mr. McCollum feared would damage the stereo when he was out talking to his mother or his brother, so he would return to his house to speak to Ms. Holman. RP 340, 348. On February 14, 2010, Ms. McKeever found telephone messages from Ms. Holman on her voicemail which stated:

Hey Shirley, I need you to please call the cops here, because I don't know, uh, Mark obviously didn't [approve] anything or anything, but, um, I want to report a stolen vehicle in the shop and all of [unintelligible]. So you can call the cops on me or anything? Hello. Okay. Well I'm gonna call them on my own. I don't have a problem with that and you know what, you're involved in that, because you got your car in there and you're that – you're involved. You're protecting stolen fucking goods. So is Mark, so [unintelligible].

. . .
Well I'm not promising or threatening. I'm promising, matter of fact, I'm not threatening. Because by morning, I want Mark's shit out of here, because I'm

calling the cops in here and you better call them on me first, because I do really want the cops here, so whoever is brave enough, bring it on little boys. Mark, you started this, I'll finish it. Happy V-fucking D.

...
Well Shirley, I'm glad that I don't qualify this family, but since you couldn't call the cops, I did. And I suppose that you and Mark don't have time to hide the car, but thanks.

CP 64; RP 194, 342

Ms. McKeever testified on February 16, 2010, she received a telephone call from Ms. Holman telling her that she had shot Mr. McCollum. RP 342.

Scott McCollum, Mr. McCollum's younger brother, testified he owned a 1975 Pontiac Trans Am which he kept in a garage adjacent to his brother's house. RP 349. He testified the car was not stolen. RP 349-50.

Following the jury trial, Ms. Holman was found guilty as charged. CP 32-33; RP 614.

D. ARGUMENT

THE EVIDENCE OF MS. HOLMAN'S PRIOR ACTS CONSTITUTED INADMISSIBLE CHARACTER EVIDENCE AND THE TRIAL COURT ERRED IN ADMITTING IT

1. The admission of the prior acts violated Ms. Holman's constitutionally protected right to due process. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant a fair trial. Erroneous evidentiary rulings which render the defendant's trial fundamentally unfair violate due process. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1990) (the introduction of improper evidence does not deprive a defendant of due process "unless the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'"), *quoting Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

The erroneous admission of other acts evidence under ER 404(b) where there were *no* permissible inferences the jury could have drawn from the evidence (in other words, no inference other than conduct in conformity therewith), violates due process because it renders the trial fundamentally unfair. *McKinney v.*

Rees, 993 F.2d 1378, 1384-86 (9th Cir. 1993); *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

2. Evidence of a defendant's character is inadmissible to prove she acted in conformity with a particular trait of that character. ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). However such 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). To admit evidence of other wrongs the trial court must (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 and necessary to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "In no case . . . may the evidence be admitted to prove the

character of the accused in order to show that he acted in conformity therewith.” *Saltarelli*, 98 Wn.2d at 362.

The trial court here found the disputed evidence was admissible as evidence of intent, motive, and absence of accident or mistake, without parsing out each purpose.

3. The evidence was not admissible to prove Ms. Holman’s intent or the absence of accident. Intent is generally proven by the criminal act itself, the circumstances of the criminal act, or inferences deducible from the circumstances. *State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995). Prior misconduct is only admissible under this exception to ER 404(b) where intent is at issue or when proof of the commission of the charged act does not conclusively establish intent. *Id.* “Otherwise the intent exception would swallow the rule.” *Id.*

When evidence of prior acts is offered to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. *State v. Wade*, 98 Wn.App. 328, 334, 989 P.2d 576 (1999). “Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant.” *Id.* at 335. “To use prior acts for

a nonpropensity based theory, there must be some similarity among the facts of the acts themselves.” *Id.* Stated another way, the facts of the prior act “must have some additional relevancy beyond mere propensity.” *Id.* at 336, quoting *State v. Holmes*, 43 Wn.App. 397, 400-01, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986).

Absence of accident is the other side of intent. When the State proves intent, it necessarily disproves accident. Evidence of prior conduct is generally admissible to show intent and the absence of accident when a defendant admits doing the act, but claims that he did not have the requisite state of mind to commit the charged offense. *State v. Hieb*, 39 Wn.App. 273, 284, 693 P.2d 145 (1984). When evidence is offered to demonstrate absence of mistake or accident, the evidence must directly negate such a defense. See *State v. Price*, 127 Wn.App. 193, 205, 110 P.3d 1171 (2005), *aff'd*, 158 Wn.2d 630 (2006).

i. The writings on the bedside notepad and the mirror fail to provide any evidence of an intent to harm or intent to kill. The handwriting on the notepad and the mirror are innocuous and failed to infer an intent by Ms. Holman to harm Mr. McCollum. The writings certainly are not threatening or violent in nature, being more philosophical than homicidal. There was no context to the writing established; whether the couple wrote notes like this to each other on a regular basis or whether this writing was done just prior to Mr. McCollum's death. The trial court's analysis provided no assistance in these respects, as the court simply made a conclusory ruling that "the writings would be relevant to the issue of intent . . ." 1RP 57. This evidence should not have been admitted.

ii. Ms. Holman's telephone messages to Ms. McKeever failed to provide proof of an intent to harm Mr. McCollum. The telephone messages show that a serious rift may have existed in the relationship between Ms. Holman and Ms. McKeever, but does nothing to prove an intent by Ms. Homan to harm or kill Mr. McCollum. Further, Ms. Holman's repeated statements of her intent to call the police in the messages would imply the opposite of an intent to harm or an intent to engage in any criminal activity.

The trial court recognized the fact the messages, especially the first and second messages, had little or no relevance, but nevertheless allowed admission of all the messages based on its finding that the third phone call showed an on-going dispute between Mr. McCollum and Ms. Holman. 1RP 58. Read in context with the other messages, however, the comments about Mr. McCollum do not show an intent to harm him, and certainly not to kill him. The trial court erred in admitting this evidence

iii. The generic evidence of the nature of the relationship between Ms. Holman and Mr. McCollum failed to rise to the level showing an intent to harm or intent to kill. The rest of the proffered evidence was generic evidence about the relationship between a couple involved in a long-term committed romantic relationship. The trial court admitted the other events as evidence of the on-going quarrels between Ms. Holman and Mr. McCollum, thus supposedly establishing an intent to harm Mr. McCollum. 1RP 55-57.

Evidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, particularly where malice or premeditation is at issue. *Powell*, 126 Wn.2d at 262. "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 and premeditation.” *State v. Davis*, 6 Wash.2d 696, 705, 108 P.2d 641 (1940) (citations omitted).

In *Powell*, the seminal case in this area for example, the Court found evidence of prior quarrels and disputes between the defendant and victim was improperly admitted to show intent, as intent to kill was not a disputed issue in light of the fact the victim was strangled, but the court admitted it as to motive. 126 Wn.2d at 260-62. The insignificant quarrels here pale in comparison to what the Supreme Court found admissible in *Powell*. In *Powell*, which involved the murder of one spouse by another, witnesses testified to an incident where the victim came to another’s home to get away from her husband. 126 Wn.2d at 260. Witnesses also testified about assaults on the victim by Mr. Powell, some of which ended with Mr. Powell attempting to strangle the victim. *Id.* at 260-61.

Here, none of the evidence regarding quarrels between Ms. Holman and Mr. McCollum is anywhere near what occurred in *Powell*. There was no evidence of assaults, serious or otherwise, between the two. The Supreme Court referenced the “quarrels” in

Powell as hostilities. *Powell*, 126 Wn.2d at 263. Here, the evidence admitted amounted to evidence of a couple wrestling with their relationship at a time when they were dealing with stressful issues. The evidence certainly did not provide evidence of an intent to harm or kill the other of the magnitude of that found to be admissible in *Powell*. The trial court therefore improperly admitted the prior acts evidence under the intent exception to ER 404(b).

3. The evidence was not probative of Ms. Holman's motive.

Motive is distinguishable from intent in that it refers to what prompts a person to act or fail to act. Motive goes beyond the possible receipt of gains from the charged offense, and applies to any impulse, desire, or other moving power which causes an individual to act. *Powell*, 126 Wn.2d at 261. Evidence of "previous quarrels or ill-feeling" may be admissible to prove motive. *Id.*; *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). "However, such evidence must also be of consequence to the action to justify its admission." *Powell*, 126 Wn.2d at 261. Evidence tending to establish a motive may be of consequence to the action where the evidence establishing guilt is circumstantial. *Id.*, citing Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 3.6, at 227 (2d ed. 1986).

Once again, the disputed evidence here pales in comparison to that found admissible in *Powell*. As argued, *supra*, here, the evidence does not suggest a motive to harm or to kill, rather the evidence only shows the struggles of a young couple. The trial court erred in admitting this evidence.

4. The admission of the disputed evidence prejudiced Ms. Holman. Reversal is required where the error was not harmless. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). When evidence that is not otherwise admissible is nonetheless admitted, the question is whether the error is harmless error. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Ms. Holman urges this Court to find the error in admitting the prejudicial evidence infringed her right to due process and a fundamentally fair trial. U.S. Const. amends. V; XIV. In such instances, this Court must reverse the conviction unless the Court is persuaded, beyond a reasonable doubt, that the error was harmless. *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State cannot meet its burden here. Ms. Holman's defense was that the shooting was an accident. She consistently told the deputies who interviewed her on multiple occasions that it was an accident. The improperly admitted evidence encouraged

the jury to view Ms. Holman as an unstable person who had the ability to act violently, without being probative on any pertinent issue under any exception to ER 404(b). Once this evidence was admitted, it allowed the State to argue to the jury that the relationship between Mr. McCollum and Ms. Holman had failed and Ms. Holman was unstable enough to want to kill Mr. McCollum. RP 524-29, 558-59.

There's no accident here. The only misfortune is the fact that Mark was killed, but it was done intentionally, and there's certainly no excusable homicide in this case. The evidence is very, very clear. Evidence is clear, and it adds up to a very, very failed relationship, that Mark was actually chased out of his home, had to stay with his mother, was repeatedly being bothered, and that failed relationship resulted in the problems we are here addressing today, in this courtroom, and they were problems that related to the shooting with the gun, and *you can see all the way through here, this relationship is really the basis, and it gives us the threshold for what happened.*

RP 558-59 (emphasis added).

This eviscerated her defense, thus substantially prejudicing her and denying her a fair trial.

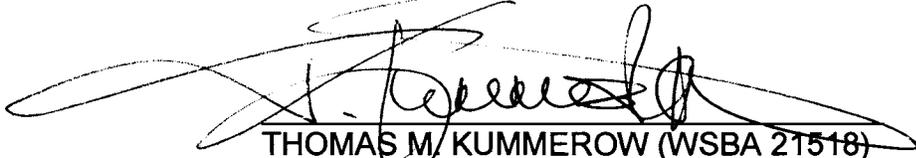
Because the evidence of the prior acts prejudiced Ms. Holman, this Court should reverse her conviction and remand for a new trial at which the evidence will be excluded.

F. CONCLUSION

For the reasons stated, Ms. Holman requests that this Court reverse her conviction for second degree murder with a firearm and remand for a new trial.

DATED this 18th day of November 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66906-1-I
)	
LYNDA HOLMAN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2011, 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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