

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

REC'D

JUL 31 2012

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

LONG PHUC TRAN,

Appellant.

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 404(b) by permitting Lan Phan to testify to prior bad act evidence that was not logically relevant to a material fact and unfairly prejudicial.

2. The trial court erred under ER 404(b) by permitting Hang Phan to testify to prior bad act evidence that was not logically relevant to a material fact and unfairly prejudicial.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion by permitting Lan and Hang Phan to testify that Tran was physically beating Phan's children where this prior bad act evidence was irrelevant to the current charges and was more prejudicial than probative.

B. STATEMENT OF THE CASE

1. Procedural Facts:

On April 11, 2011, Tran was charged with one count of theft in the second degree, burglary in the second degree, two counts of theft of a motor vehicle, and felony harassment. CP 1-3. Prior to trial, the court granted Tran's motion to sever count two, second-degree burglary, and one count of theft of a motor vehicle from the

remaining three charges. 1RP 17¹. The charges were later amended to add a charge of telephone harassment. 3RP 7. Trial commenced on four counts: second degree theft, theft of a motor vehicle, felony harassment, and telephone harassment. CP 20-22.

Following jury trial, Tran was found guilty of second-degree theft, theft of a motor vehicle, and telephone harassment. 10RP 5-6. He was acquitted of felony harassment. 10RP 6. Tran later pled guilty to second-degree burglary and a second count of theft of a motor vehicle via an Alford² plea. CP 79-100; 11RP 10, 20-24.

Tran was sentenced to the top of the standard range for each count, for a total concurrent sentence of 22 months. CP 105; 12RP 28. This appeal timely follows. CP 115.

2. ER 404(b) Motion:

The State moved in limine to permit Lan Phan's testimony regarding alleged incidents of Tran's physical abuse of her children in 2009. 3RP 42. The State argued that this evidence was

¹ This brief refers to the Verbatim Report of Proceedings as follows: 1RP: 10/5/11; 2RP: 10/17/11; 3RP: 10/18/11; 4RP: 10/19/11; 5RP: 10/20/11; 6RP: 10/21/11; 7RP: 10/25/11; 8RP: 10/26/11; 9RP: 10/27/11; 10RP: 10/28/11; 11RP: 11/1/11; 12RP: 11/15/11.

² North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

admissible under ER 404(b) to prove Phan's reasonable fear for the harassment charge. 3RP 42. Tran objected and argued that this evidence was not relevant to Phan's reasonable fear that Tran would carry out a threat to her and was more prejudicial than probative. 3RP 42-43.

The Court ruled that Phan could testify to two incidents she claimed she saw, one with her twelve-year-old daughter in which Tran was alleged to have had her kneel and then struck her feet, and a second incident in which Tran was alleged to have had her two boys, aged seven, kneel and struck their feet with a branch. 3RP 53-54, 63-64. Both alleged incidents occurred two years prior to the alleged threat in September of 2009. RP 10/18/11 8.

The Court found, based on Phan's statements, that the events she described occurred by a preponderance of the evidence. 4RP 90. The Court ruled the collateral testimony was relevant to showing Phan's reasonable fear. 3RP 53-54; 4RP 90. Tran's renewed objection to the testimony was also overruled. RP 10/18/11 6, 8; 4RP 89.

The State was also permitted to have Phan's oldest daughter, Hang Phan, testify to incidents of Tran abusing the children, over the defense objection. 5RP 44-46, 51-53. Tran

argued that Hang Phan's experience was not relevant to her mother's "reasonable fear." 5RP 44-46, 51-53. The trial court ruled that Hang Phan could testify to witnessing the same two incidents her mother would testify to, to corroborate Phan's testimony. 5RP 50, 54, 58.

3. CrR 3.5 Hearing:

A CrR 3.5 hearing was held on the admissibility of Tran's statements to police and his alleged initials on some surveillance photos. 3RP. The court ruled that Tran's statements were admissible under CrR 3.5, finding that Tran was advised of his rights and made a knowing, voluntary and intelligent waiver. 3RP 153-54.

4. Jury Trial:

a. Second Degree Theft:

On January 12, 2011, two tires were stolen from a 2010 Mercedes C300 parked in a Microsoft parking garage. RP 10/18/11 10-12. The car belonged to Marius Sutano. RP 10/18/11 15, 25. Video surveillance showed the car arriving in the garage at 12:25 p.m. RP 10/18/11 15. The video showed an older white Lexus parking next to the Mercedes at 12:32. RP 10/18/11 64, 4RP 24-

25. The male driver of the Lexus went out of sight beside the Mercedes a few times, once with something metal in his hand. 4RP 50.

The front and back license plates of the Lexus were noted, but the suspect was not clear enough in the video for identification. 4RP 52, 67-68. The suspect appeared to be either Asian or Hispanic, slight, with long "scruffy" hair. 5RP 23-24. The Lexus drove away at 12:44 p.m. RP 66. No one else was near the Mercedes for longer than a minute. 4RP 52.

Mr. Sutano testified that he paid \$2,443.55 to the Mercedes dealer to replace the two tires. 4RP 37.

Officer David Quiggle interviewed Tran. 5RP 77. According to Officer Quiggle, Tran denied stealing the wheels, but when shown a picture of the suspect and the Lexus from the surveillance video, he pointed at the still picture of the suspect, indicated it was him, and also said the Lexus was his. 5RP 80, 84. Quiggle said he wrote on the picture "That's me" and asked Tran to sign his acknowledgement. 5RP 83. The letter "P" is written on the signature line. 5RP 83. Quiggle said Tran told him he was in the garage to change his wife's flat tire. 5RP 84. Tran denied writing on the picture or saying it was him. 8RP 83.

b. Felony Harassment and Auto Theft:

Lan Phan testified that she and Tran were in a long-term relationship. 5RP 135-36. They lived together from 2002 until March of 2011. 5RP 135-36. Phan has eight children, ranging from nineteen to two years old. 4RP 95-96. The younger two children were hers with Tran. 4RP 96.

Phan worked nights as a janitor for Microsoft. 4RP 97. On Thursday, April 7, 2011, around 6:00 p.m., Phan drove her Dodge Caravan to Microsoft and parked it in the garage for building 109. 4RP 99. Phan testified that when she returned to collect her lunch from her Caravan, she found that it was gone, and there was glass in the parking stall where she had parked. 4RP 100-101. Phan reported the theft to police that night. 4RP 101.

The surveillance video showed the Caravan arriving at 6:05 p.m. 7RP 34. At 7:18 p.m., a man walked down the ramp in the garage. 7RP 32. The video did not show the man leaving the garage, but there were internal exits not visible on the video. 7RP 32. The Caravan exited the garage at 7:28 p.m. 7RP 31.

The Caravan was found on April 8 and returned to Phan on April 12. 6RP 44, 47-48. The passenger window was broken, the

ignition lock had been damaged, and the battery was gone. 4RP 101-102.

According to Phan, she suspected her boyfriend, Tran, stole her van. 4RP 105. Phan testified that she was afraid of Tran because he yelled at her daily when they were together. 5RP 126. Phan also testified that she was “fearful” because whenever she tried to break up with Tran, something would happen to her car to prevent it from starting. 5RP 136, 136. Phan said she believed Tran was sabotaging the car because it would happen after they argued. 6RP 92. When this happened, she would pay Tran to fix it. 6RP 93.

Phan testified to two specific incidents where she saw Tran hit the children.³ In one incident, in August of 2009, Tran had her teenage daughter, K.K., kneel with videos in each hand and then slapped and kicked her until she fell. 5RP 130. Phan said when

³ The court gave a limiting instruction for Lan Phan’s ER 404(b) testimony, 5RP 127, and again for Hang Phan’s testimony, 6RP 72. See also CP 48 (“Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony that Mr. Tran hit some of the children. You may only consider this testimony for the purpose of whether Ms. Phan’s fear of Mr. Tran was reasonable. You may not consider it for any other purpose.”)

she saw the incident, she told K.K. to put her pens away and wash up. 5RP 132.

Phan also testified that shortly before the incident with K.K., she saw Tran punish her two boys (then seven years old) by forcing them to kneel with videos in hand and hitting their feet with a branch. 5RP 133; 6RP 136.

Hang Phan, Lan Phan's 19-year-old daughter, testified that she saw Tran punish K.K. by having her kneel and hitting her, possibly in the head. 6RP 70-71. Hang Phan said her mother was there when it happened. 6RP 70-71. Hang Phan also testified that she saw Tran hit her brothers with a tree branch as they kneeled, holding videos. 6RP 75-76. According to Phan, Tran often punished the children this way, forcing them to kneel for an hour or two. 6RP 78.

Lan Phan testified that she received six voicemail messages from Tran on her cell phone. 6RP 106. The messages were in Vietnamese. 8RP 7. Phan said the last two messages were from the Sunday after her van was stolen. 6RP 98-99. Phan said Tran called her to ask her to return his food stamp card. 6RP 99. She refused and told him she had lost the card, then hung up on him. 6RP 99. Two messages followed. 6RP 100. Phan reported the

voicemails to police on April 11. 7RP 65. She said the other four messages from her phone were from the month before. 6RP 106-107. There was no date or time stamp on the messages. 6RP 107. Phan said she was "afraid" when she heard the messages. 6RP 101.

Hang Phan also testified to listening to voicemails her mother played her from her cell phone sometime in the spring of 2011. 6RP 80, 84. She thought she heard them around a month after her mother's car was stolen. 6RP 81. Hang Phan said her mother seemed upset and angry when she played the voicemails. 6RP 81.

A Vietnamese translator testified to the content of the voicemail messages. 8RP 7. Although all of the messages were read into the record, and two contain purported threats to Phan, the State focused on message six for the harassment charge. 9RP 66-67. In that message, Tran says:

Hey, Lan. Why would you keep testing me. Fuck. I could kill you now and not when you go to work this afternoon. You can either get a ride or, fuck, take a bus. But if you use your car, get a tow truck ready or have some guy bring a lot of spare tires. You have no tires, the car will never start again. I make it a piece of junk. Don't fuck with me. You fuck with me I'll fuck with you right back. Just wait there. I'm not bluffing.

Tonight you see me—you see me out of work. I'll kill you at work. I'm going there now. I wait for you there.

8RP 15-16.

Tran testified at trial. He acknowledged leaving the voicemail messages. 8RP 50, 53, 55, 57, 60, 64. However, he said he was upset and was just talking, but did not mean any serious threat to Phan. 8RP 60. Tran said he often talks that way when he is upset, but does not mean anything by it. 8RP 60. Tran also disputed Phan's dates for when the messages were left. Tran said message four was left in January, 2011; message five in February before Valentine's day; and message six one week later. 8RP 57, 60, 64.

Tran also acknowledged that he had punished K.K. and the boys with kneeling and striking their feet in 2009. 8RP 26, 28-29. He said that was his punishment as a kid, so he thought that was the correct punishment. 8RP 31.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY PERMITTING LAN AND HANG PHAN TO TESTIFY THAT TRAN WAS PHYSICALLY BEATING PHAN'S CHILDREN WHERE THIS PRIOR BAD ACT EVIDENCE WAS IRRELEVANT TO THE CURRENT CHARGES AND WAS MORE PREJUDICIAL THAN PROBATIVE.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404 prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. ER 404(a) addresses character evidence generally and ER 404(b) is specific to evidence of "other crimes, wrongs, or acts" brought in to show the character of a person.

The evidence rules forbid the use of character evidence to show a person's propensity to commit a certain criminal act. Wade, 98 Wn. App. at 336. Such evidence is similarly inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404 prohibits the admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Admission of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of prior acts must be excluded unless the court first determines (1) that the act probably occurred by a preponderance of the evidence, (2) that the evidence is materially relevant to a permissible purpose, and (3) that the probative value of the evidence outweighs any unfair prejudicial effect the evidence may have upon the fact-finder. Pirtle, 127 Wn.2d at 649. Prior bad act evidence is admissible only where it is “logically relevant to a material issue before the jury” and the probative value outweighs the prejudicial effect. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The evidence here was inadmissible under ER 404(b) because it was not “logically relevant” to proving Lan’s “reasonable fear” that the death threat against her would be carried out. The State argued that Lan and Hang Phan’s testimony about child abuse was relevant to proving Lan Phan’s reasonable fear for the

harassment charge, and more probative than prejudicial. 3RP 42. The trial court admitted the evidence for that purpose, over the defense's repeated objection. 3RP 53-54. The court also overruled the defense objection to Hang Phan's testimony about witnessing Tran's punishment of the children, ruling that this evidence was admissible because it bolstered Lan Phan's "credibility." 3RP 59, 63-64.

A victim's reasonable fear that the threat will be carried out is an element of harassment. See RCW 9A.46.020(1)(b) ("A person is guilty of harassment if ... [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out."). The State must show that the person threatened subjectively felt fear that the specific threat (a threat to kill) would be carried out, and the jury must find that subjective fear was reasonable. State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003); State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002).

The court below relied on State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), and State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999). In Barragan, under ER 404(b), the Court permitted the admission of statements made by Barragan to the victim in which Barragan bragged about earlier assaults against

fellow inmates as evidence of the victim's reasonable fear that Barragan's threats against him would be carried out. 102 Wn. App. at 758. Thus, the prior bad acts were of a similar nature to the threats made against the victim, which made them "logically relevant" to showing the victim's reasonable fear that Barragan's threat against him would be carried out.

In Ragin, the Court validated the admission of testimony that the defendant himself told the victim about his prior violent acts and convictions. 94 Wn. App. at 409. Ragin threatened to build a bomb and blow up a church with everyone inside and told the victim he had access to firearms and bomb-making materials. 94 Wn. App. at 409-410. Thus, like Barragan, the prior bad acts in Ragin were of a similar nature to the death threats made against the victim and "logically relevant" to the victim's "reasonable fear."

Unlike Barragan and Ragin, however, the threat here was to kill Lan Phan and the evidence admitted had no relevance to whether she reasonably believed Tran would carry out his threat to kill her. Lan Phan testified that Tran never beat her—that he was verbally abusive only. 5RP 126-127. There is no evidence that Tran's punishment of the children was directed in any way at Phan, rather than his misguided attempt at correcting the children's

behavior. Lan Phan said that Tran was punishing the children for what he perceived as their misbehavior. 5RP 133.

When asked by the prosecutor to articulate how Tran's punishments of the children "made you fearful," Phan could only say that "when he hits the kids he has to make it worth it so they would learn." 6RP 110. Without a connection between Tran's punishment of the children and his threats to Phan, these prior acts bear no logical relevance to whether Phan believed Tran's threats against her. The alleged death threats in the telephone messages were to Phan herself, not her children or her family. Thus, the prior bad acts alleged here were not relevant to her "reasonable fear" that Tran would carry out his threat to kill her.

Moreover, the two alleged incidents here occurred more than two years before the charged threat—minimizing even further the potential relevance to Phan's "reasonable fear." See 5RP 128. Whether Tran was physically abusive to three of Phan's children in 2009 has no relevance to whether Phan had a reasonable fear that Tran would carry out his alleged threat to kill *her* in 2011. In 2009, the couple was still living together. 6RP 63. By 2011, they lived separately and Tran did not know the address of Phan's home with the children. 6RP 65. The temporal distance between the prior

bad acts and the current allegations decreased their logical relevance.

The trial court abused its discretion in permitting Lan and Hang Phan to testify to these prior bad acts because they were not “logically relevant” to proving Lan Phan’s “reasonable fear” that Tran would carry out his death threat against her.

Reversal is required where ER 404(b) evidence is erroneously admitted if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.” State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

Here, although the trial court gave a limiting instruction, CP 48, because the evidence of child abuse should never have been admitted, what the jury really needed was a curative instruction. See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002) (curative instruction necessary once jury hears improperly admitted evidence under ER 404(b)).

The combined testimony of Hang and Lan Phan was unfairly prejudicial because it painted Tran as a child abuser. Once hearing this, the jury was bound to look unfavorably on Tran even though

Tran was not on trial for his actions against the children. The witnesses were permitted to go into great detail about how the children were forced to kneel, that they knelt for over an hour, and that they were holding up videos in their hands during this. 6RP 70-71, 75-78; 5RP 129-133. The witnesses were even asked how long and thick the branch used to hit the children's feet was. 6RP 75; 5RP 133-134.

The prosecutor reiterated all of these details for the jury in closing. 9RP 84, 87, 118-119, 124. Moreover, because the court permitted not only Lan but also Hang to testify to the abuse, the evidence was magnified for the jury, making it even more likely that the jury would be unable to set it aside in exercising judgment in the case. There are few allegations more likely to arouse the passions and prejudices of the jury than child abuse. The other evidence admitted in the case was not overwhelming and was circumstantial. Thus, it is likely the erroneously admitted evidence affected the outcome of the case.

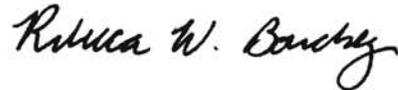
D. CONCLUSION

The trial court abused its discretion in admitting evidence that Tran had abused Phan's children, which was inadmissible prior bad act evidence that was not logically relevant to a material issue in this case. Because this evidence likely affected the result in the case, the error requires the reversal of Tran's convictions.

DATED: July 31, 2012

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
vs.)	COA NO. 68074-9-1
)	
LONG TRAN,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LONG TRAN
1220 115TH AVENUE SOUTH
SEATTLE, WA 98168

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2012.

x Patrick Mayovsky

2012 JUL 31 PM 4:30
COURT OF APPEALS
STATE OF WASHINGTON