

No. 68116-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GUNDERSON,

Appellant.

2014 JUN 11 10:41 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
1000 4TH AVENUE
SEATTLE WA 98101
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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ER 404.....	passim
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A. ASSIGNMENT OF ERROR

The trial court erred in admitting prior-acts evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

ER 404 does not permit admission of a person's prior acts as propensity evidence. However, if it is offered for some other purpose, such evidence is admissible if the court determines that purpose is relevant to prove an element of the crime charged and the court provides an instruction properly limiting the jury's use of the evidence. Did the trial court err where it admitted allegations of prior assaults by Daniel Gunderson where that evidence was neither necessary nor relevant to prove an element of the current offense?

C. STATEMENT OF THE CASE

Mr. Gunderson and Christina Moore are the parents of a daughter, Faith. The two did not have a parenting or custody plan in place for Faith. 10/29/11 RP 32, 10/24/11 RP 80. However, a no-contact order barred Mr. Gunderson from having contact with Christina, and a separate no-contact order barred Christina from contacting Mr. Gunderson.¹ 10/24/1184. Despite that, arrangements had

¹ Because both Christina and her mother, Bonnie Moore, share the same last name they will be referred to by their first names.

been made for Mr. Gunderson to pick up Faith in Seattle so that she could stay with him for a period at his Kelso home. 10/24/11 RP 62.

As arranged, Mr. Gunderson gathered Faith and her belongings and took her to his truck. 10/24/11 RP 62. Along the way, Mr. Gunderson and Bonnie Moore became involved in an argument. 10/20/11 RP 26. Bonnie testified the two scuffled while Mr. Gunderson was in his truck, but described Mr. Gunderson as “defending himself.” 10/20/11 RP 44.

Mr. Gunderson, Christina and Faith drove away. Bonnie Moore called police. 10/20/11 RP 23-24.

The State charged Mr. Gunderson with violating a no-contact order. CP 7-8.

A jury convicted Mr. Gunderson as charged. CP 49.

D. ARGUMENT

The trial court erred in admitting propensity evidence.

1. Propensity evidence is inadmissible.

The trial court permitted the State to admit evidence of prior assaults involving Mr. Gunderson and Christina, ostensibly as relevant evidence of Christina’s credibility. 10/24/11 RP 52-53. The court reasoned the evidence Christina’s credibility was at issue if her

testimony regarding the event differed from that of other witnesses offered by the state. *Id.* at 53.

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a).

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

To admit evidence of other acts 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 that purpose 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); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *Lough*, 125 Wn.2d at 859).

2. The trial court improperly admitted propensity evidence.

The evidence admitted here was not necessary to establish an essential element of the crime and did not rise beyond mere propensity evidence.

The trial court concluded the evidence of prior allegations of assault would become relevant to Christina’s credibility if she testified inconsistently with her mother’s testimony. 10/24/11 RP 53. The evidence was not relevant to an assessment of Christina’s credibility.

The Supreme Court has previously held “that prior acts of domestic violence, involving the defendant and the crime victim, are

admissible in order to assist the jury in judging the credibility of a recanting victim.” *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). *State v. Grant* also involved a victim’s recantation of prior accusations of abuse. 83 Wn. App. 98, 920 P.2d 609 (1996). Because of that, *Grant* concluded the defendant’s prior convictions of assaultive conduct against the same victim were relevant to assess the credibility of her current accusations and/or recantation.

Here, as the trial court recognized, there was no recantation. Christina never made a prior statement to police, prosecutors, or anyone. 10/24/11 54. Unlike *Magers* or *Grant* the only value of the evidence was as propensity. Because she had never recanted, Christina’s credibility was not at issue any more than any other witness’s.

In *State v. Baker*, this Court broadened the holdings of *Magers* and *Grant* to permit admission of other-acts evidence where the victim did not recant but testified that she had not reported prior instances of abuse. 162 Wn. App. 468, 475, 259 P.3d 270, *review denied*, 173 Wash.2d 1004 (2011). The Court reasoned the jury was “entitled” to hear that evidence to understand the “dynamics” of the victim’s relationship with the defendant. *Id.* That holding ignores the narrow

holding of *Magers* that such evidence is relevant only to “judge the credibility of a recanting victim.” 164 Wn.2d at 186. The logical relevance of the evidence offered in *Baker* depends entirely upon propensity - the number of allegations, reported or otherwise, somehow lends weight to the current charge. That ignores the categorical bar to propensity evidence found in ER 404.

Baker adopted a rule that permits other-acts evidence even where the victim’s credibility is not at issue. Even assuming there is any relevance to the evidence in a scenario like *Baker*, here the trial court goes beyond that. The trial court, here, concluded the evidence was admissible simply because the alleged victim’s testimony contradicted that of other witnesses. 10/24/11 RP 54. If the State did not believe Christina was a credible witness, it seems the only reason the State presented her was to admit the prior-acts evidence. But, it is improper for a party to call a witness merely to introduce otherwise improper evidence under the guise of impeachment. *State v. Lavaris*, 106 Wn. 2d 340, 345, 721 P.2d 515, 518 (1986).

Here, the jury heard only one statement by Christina. That simply does not raise the same credibility problem presented in *Magers*, *Grant*, or even *Baker*. To be sure there is no domestic violence

exception within ER 404(b) or even in the case law expanding that breadth of that rule. Instead, prior acts evidence, even prior acts of domestic violence, must still be necessary to prove a necessary element of the offense. And, it must do so based upon some logical relevancy aside from propensity. The evidence here does not do that and was not properly admitted under ER 404(b).

3. The error in admitting the other-acts evidence requires reversal.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The weight of the state's case was not so strong. Christina unambiguously stated that Mr. Gunderson did not hit her. Bonnie Moore had little recollection of the events, but recalled it was more a scuffle involving her and Mr. Gunderson, and that Mr. Gunderson was mainly defending himself. 10/20/11 RP 26, 44. With the paucity of

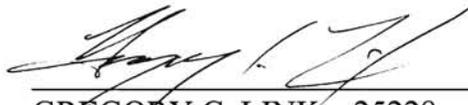
evidence, the impact of the improperly admitted propensity evidence cannot be discounted.

This Court should reverse Mr. Gunderson's conviction and remand for a new trial.

E. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court should reverse Mr. Gunderson's conviction.

Respectfully submitted this 1st day of October, 2012.

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

GREGORY C. LINK - 25228
Attorney for Appellant

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DANIEL GUNDERSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF OCTOBER, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF OCTOBER, 2012.

X _____ *gml*

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