

68116-8

68116-8

RECEIVED
COURT OF APPEALS
DIVISION ONE

NFC 287017

NO. 68116-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GUNDERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SUSAN HARRISON
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

APPROVED FOR SIGNATURE
DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY
W

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR INCIDENTS OF DOMESTIC VIOLENCE COMMITTED BY THE DEFENDANT AGAINST THE VICTIM PURSUANT TO ER 404(b).....	6
a. Relevant Facts	7
b. Trial Court's Findings And Conclusions	7
c. The Trial Court Did Not Err in Its Interpretation Or Application Of ER 404(b)	9
d. The Trial Court Did Not Abuse Its Discretion By Allowing Evidence Of The Prior Incidents.....	15
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Baker, 162 Wn. App. 468,
259 P.3d 270 (2011)..... 2, 7, 11, 12, 13, 14, 16

State v. DeVincentis, 150 Wn.2d 11,
74 P.3d 119 (2003)..... 15

State v. Fualaau, 155 Wn. App. 347,
228 P.3d 771, *review denied*,
169 Wn.2d 1023, 238 P.3d 503 (2010)..... 9

State v. Grant, 83 Wn. App. 98,
920 P.2d 609 (1996)..... 9, 11, 12, 13, 14

State v. Johnson, 124 Wn.2d 57,
873 P.2d 514 (1994)..... 16

State v. Kilgore, 147 Wn.2d 288,
53 P.3d 974 (2002)..... 9

State v. Lough, 125 Wn.2d 847,
889 P.2d 487 (1995)..... 9, 15

State v. Magers, 164 Wn.2d 174,
190 P.3d 126 (2008)..... 11, 12, 13

State v. Rehak, 67 Wn. App. 157,
834 P.2d 651 (1992)..... 15

Rules and Regulations

Washington State:

ER 404 2, 6, 7, 9, 11, 16

A. ISSUE PRESENTED

1. Evidence of prior bad acts is generally inadmissible to prove the character of a person and a propensity to act in conformity therewith, but may be admissible as relevant to the jury's assessment of a victim's credibility if: 1) the prior acts are proved by a preponderance of the evidence; 2) admitted for the purpose of assisting the jury in evaluating the credibility of the victim with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim; 3) relevant to prove an element of the crime charged; and 4) more probative than unfairly prejudicial. Following a pretrial hearing, the court granted the State's motion to offer evidence of two prior incidents of domestic violence committed by the defendant against the victim because the acts had been proven by a preponderance, were admissible for the purpose of assisting the jury to evaluate the credibility of the victim, who minimized the assault, were relevant to prove an element of the crime charged, and the evidence was more probative than unfairly prejudicial. The trial court also reduced the prejudicial effect by giving a limiting instruction to the jury. Did the trial court abuse its discretion?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State proceeded to trial against Daniel Gunderson on one count of felony violation of a no contact order-domestic violence, alleged to have been committed against victim Christina Moore¹, a family or household member. The State also alleged that the crime was committed with the aggravating factor of having occurred within the sight or sound of Gunderson and Christina Moore's two-year-old daughter. CP 7-8. After a pretrial hearing, the trial court granted the State's motion to present evidence of two prior incidents of assaultive behavior committed by the defendant against Christina Moore, under the exception to ER 404(b) recognized in *State v. Baker*, 162 Wn. App. 468, 259 P.3d 270 (2011).

¹ The victim in this case, Christina Moore, and her mother, Bonnie Moore, both testified in this trial. Each will be referred to by their full name to avoid confusion.

5RP 52-56.² The jury convicted Gunderson as charged, and found that Gunderson and Christina Moore were family or household members, and the crime had been committed within the sight or sound of the couple's minor child. CP 49, 50-51. The trial court sentenced Gunderson within the standard range: 29 months in prison. CP 86-94.

2. SUBSTANTIVE FACTS

Daniel Gunderson and Christina Moore were in a dating relationship for approximately seven or eight years. 5RP 40-41, 59. Their relationship produced a daughter, F.G.³ 5RP 59. On September 15, 2010, Christina Moore and F.G. were living with Christina Moore's mother, Bonnie Moore, and had been for approximately five to six months. 5RP 60-61. Gunderson was living in Longview. 5RP 62. Christina Moore testified that arrangements had been made for Gunderson to pick up F.G. and take her to his home in Longview. 5RP 62. Gunderson drove to

² The Verbatim Report of Proceedings consists of seven volumes. The State has adopted the following reference system: 1RP (10/17/11), 2RP (10/18/11), 3RP (10/19/11), 4RP (10/20/11), 5RP (10/24/11), 6RP (10/25/11), and 7RP (12/16/11).

³ The daughter of Gunderson and Christina Moore is referred to by her initials, as she is a minor.

Seattle and stayed overnight in the apartment of Bonnie Moore; Christina Moore, Bonnie Moore, and F.G., who was two years old at the time, were all present. 5RP 63-64.

At some point on September 15, 2010, Gunderson left the apartment with F.G. 4RP 22-23. Bonnie Moore testified that she and Christina Moore also exited the apartment, and a scuffle took place between the three adults, with Bonnie and Christina Moore trying to keep Gunderson from taking F.G. with him. 4RP 23, 25-28. Bonnie Moore testified that during the scuffle, she was halfway in and halfway out of the truck, Gunderson was seated in the truck, F.G. was on the floorboard of the truck, and Christina Moore was inside the truck as well. 4RP 26-27.

A call was made to 911 while this scuffle was taking place, and Bonnie Moore spoke with police after Gunderson drove away in the truck with F.G. and Christina Moore still inside. 4RP 24, 25-26. Bonnie Moore next communicated with Christina Moore a week after this incident. 4RP 36.

Seattle Police Officer Andrew Wilkes responded to the apartment complex in response to Bonnie Moore's 911 call. 5RP 20. He took a statement from Bonnie Moore. She stated that Gunderson suddenly grabbed F.G. and ran toward a silver truck,

Washington B95259E. 5RP 23. Bonnie Moore reported that Christina yelled at her that Gunderson was trying to take F.G., and Bonnie Moore ran to the truck and tried to lock the door, while Gunderson threw F.G. in the truck and drove off. She was dragged approximately 75 feet before falling off. 5RP 23. Bonnie Moore reported that as Gunderson drove the truck away toward the freeway, she saw him hitting Christina. 5RP 23.

Christina Moore testified that when Gunderson left Bonnie Moore's apartment with F.G., Bonnie Moore went outside as well. 5RP 64. Christina Moore testified that Gunderson and Bonnie Moore had an argument outside by his truck, but she flatly denied that Gunderson hit her or Bonnie Moore. 5RP 67-71. Christina Moore testified that despite having no plans to go for a drive and having no overnight bag or any possessions with her, she calmly entered the truck and they left. 5RP 70-73. 3RP 119.

Christina Moore testified on direct examination that on an occasion prior to September 15, 2010, sometime in 2008, Gunderson pushed her during an argument and she called 911. 5RP 73-74. She also testified about another previous incident where Gunderson argued with her friend Brooke Waits, then

grabbed Christina Moore's sweater as she sat in a car, after which Waits called 911. 5RP 75-76.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR INCIDENTS OF DOMESTIC VIOLENCE COMMITTED BY THE DEFENDANT AGAINST THE VICTIM PURSUANT TO ER 404(B).

Gunderson contends that the trial court abused its discretion by allowing the testimony of Christina Moore regarding two previous acts of domestic violence. This argument should be rejected because the trial court properly concluded that such evidence was admissible to aid the jury's assessment of Christina Moore's credibility. The trial court properly weighed the probative value of the evidence against the prejudicial effect on the jury, and gave the jury a limiting instruction. The trial court properly exercised its discretion.

Prior to trial, the State moved to be allowed to admit evidence of two previous domestic violence incidents where Gunderson assaulted Christina Moore. When first addressed by the trial court, the State did not know if Christina Moore would appear for trial. When Christina Moore did appear for trial, the

State made an offer of proof regarding the two prior incidents and the trial court heard testimony from Christina Moore regarding them outside of the presence of the jury. The State sought to admit this evidence under the exception to ER 404(b) explained in *State v. Baker*, 162 Wn. App. 468, 259 P.3d 270 (2011). After hearing the offer of proof and argument, the trial court granted the State's motion and permitted Christina Moore to be questioned about those two incidents.

a. Relevant Facts.

At a pretrial hearing, the State proffered certified copies of two prior convictions of Gunderson for domestic violence assault. At a subsequent hearing during trial, but outside the presence of the jury, the State also proffered the expected testimony of Christina Moore, 2RP 2-11; 5RP 39-48. This proffer was also made in part in the form of the State's trial brief, specifically in pages four through eight. 1RP 14; Supp. CP __ (Sub No. 71B, Trial Memorandum/State).

b. Trial Court's Findings And Conclusions.

Following the hearing, the trial court made oral findings, outlining the requirements under ER 404(b) and the evidence the State would be allowed to present in its case-in-chief regarding the prior incidents. 5RP 52-56.

The trial court found by a preponderance of evidence that the 2008 and 2010 domestic violence incidents where Gunderson was the defendant and Christina Moore was the victim had occurred. 5RP 53. The trial court ruled that evidence of both was admissible to assist the jury in determining the credibility of Christina Moore, should she testify in a manner that denied or minimized the assault that was alleged to have happened on September 15, 2010. 5RP 52-56. The trial court ruled that the probative value outweighed any unfair prejudice. 5RP 52-53.

Acknowledging that the evidence of the prior incidents may have a prejudicial effect upon the jury, the court provided a limiting instruction to the jury, telling them that the evidence of the prior incidents had been admitted only for a limited purpose, and that it could be considered by the jury only for the purpose of evaluating Christina Moore's testimony. 5RP 131. This limiting instruction was proposed by defense counsel and was read to the jury. 5RP 125-28, 131.

c. The Trial Court Did Not Err in Its Interpretation Or Application Of ER 404(b).

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, 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); see *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). When the State wishes to admit evidence of a defendant's prior acts, the trial court must (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is relevant to that purpose, and (4) balance the probative value of the evidence against its prejudicial effect. *State v. Fualaau*, 155 Wn. App. 347, 356-57, 228 P.3d 771, review denied, 169 Wn.2d 1023, 238 P.3d 503 (2010); *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Here, the State offered evidence of the two prior incidents if Christina Moore testified in a way that denied or minimized that an assault had taken place on September 15, 2010; the State's basis was that it would allow the jury to evaluate Christina Moore's credibility with knowledge that her relationship with Gunderson has been marked by domestic violence. 2RP 2-11, 5RP 48-51. The State clarified that the basis on which it was seeking to admit evidence of these prior incidents was that Christina Moore was minimizing what happened, or outright denying what happened, because of prior violence. 5RP 54-55. The trial court clarified that the evidence of the two prior incidents was relevant to the State's theory that, to the extent Christina Moore testified that Gunderson did not assault her, the prior incidents were relevant to show that her denial or minimization was not credible. 5RP 55.

On appeal, Gunderson argues that the trial court concluded the evidence of the prior acts was admissible simply because Christina Moore's testimony contradicted that of other witnesses. *Appellant's brief at 6*. As discussed above, this is not correct. The trial court did initially include potential contradiction between the testimony of Christina Moore and Bonnie Moore as a basis to admit evidence of the prior acts, but after further argument and

clarification from the State that this was *not* a basis under which such evidence was being offered, the trial court amended its ruling. The trial court admitted the evidence because it would allow the jury to evaluate Christina Moore's credibility, as she may have been minimizing because of the cycle of domestic violence and because she had been involved in incidents before where she had been assaulted by the defendant. 5RP 55-56.

Gunderson argues that this case is distinguishable from *Baker*, and that because Christina Moore did not give any statement regarding this case other than her testimony at trial, no credibility problem existed. *Appellant's brief at 6*. He argues that this evidence was not necessary to prove a necessary element of the offense. *Appellant's brief at 7*.

In *Baker*, this Court of Appeals found the reasoning in *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996) and *State v. Magers*, 164 Wn.2d 174, 186, 190 P.3d 126 (2008) to be applicable.

In *State v. Grant*, involving a conviction for domestic violence felony violation of a post-sentence court order, the victim initially denied that the defendant assaulted her, and later changed her story. This Court of Appeals held that evidence of the defendant's

prior assaults on that victim was admissible under ER 404(b), because the evidence helped the jury assess the credibility of the victim at trial and to understand why she told conflicting stories. *State v. Baker*, 162 Wn.App. 468, 474.

In *State v. Magers*, involving convictions for domestic violence offenses of second degree assault, unlawful imprisonment, and misdemeanor violation of a no-contact order, the victim initially denied that the defendant was present in her home in violation of the no-contact order, then admitted that he was there, and expressed fear of him. The defendant was arrested and subsequently charged. The victim then recanted her statements in the form of two letters sent to the prosecutor's office and in her testimony at trial. The trial court admitted evidence of prior acts of domestic violence committed by the defendant against the victim, and gave a limiting instruction specifying that such evidence had been introduced for the limited purpose of the victim's state of mind and her credibility. *State v. Magers*, 164 Wn.2d 174, 178-180, 189 P.3d 126 (2008). The Washington State Supreme Court adopted the rationale in *Grant* and concluded 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.” *Id.* at 186.

In *State v. Baker*, the defendant was charged with two counts of assault in the second degree-domestic violence. The State offered evidence of two prior incidents of domestic violence assault committed by the defendant against the victim; the victim had not reported either incident out of love for and fear of the defendant and the reaction of his family if she did so. *State v. Baker*, 162 Wn.App. 468, 470-471, 259 P.3d 270 (2011). The trial court in *Baker* admitted evidence of the prior assaults to show motive and absence of mistake or accident and to assist the jury in assessing the victim’s credibility as a witness. *Id.* at 472.

The defendant in *Baker* sought to distinguish that case from *Grant* and *Magers* because the victim in *Baker* was not recanting, as the victims in *Grant* and *Magers* had done. This Court of Appeals rejected that argument, affirmed the trial court’s admission of evidence of the prior assaults, and held that the jury was entitled to evaluate the victim’s credibility with full knowledge of the dynamics of her relationship with the defendant. *Baker* at 475.

Here, Christina Moore testified that she and Gunderson’s grandmother were both present when the 2008 incident took place,

and the police only arrived because she had to call 911 when Gunderson's grandmother fell, though Christina Moore denied that this injury was due to Gunderson. 5RP 43-44, 73-74. Christina Moore also testified that, though police arrived after the 2010 incident, it was only because her friend Brooke Waits had called police. 5RP 75. In the incident on September 15, 2010, Christina Moore did not call 911, and she did not stay around to talk to police; she did not give any statements about the incident until she testified at trial. Jurors would have been extremely likely to wonder why Christina Moore, the victim in this assault, would not have called 911 or given any statement if this assault took place on September 15, 2010.

Just as in *Grant* and *Baker*, Christina Moore and Gunderson were in contact with each other despite the existence of two no contact orders; in fact, Christina Moore was found at Gunderson's house during the trial in the case at bar. 5RP 34-37. It was only after Christina Moore was found at Gunderson's house that the State was able to have her personally served with a subpoena at that location. 5RP 91-92. Evidence of the prior incidents allowed the jury to evaluate Christina Moore's credibility when she denied that Gunderson had assaulted her on September 15, 2010, just as

she minimized his assaults of her in the 2008 or 2010 incidents, although he was convicted of both offenses. 5RP 41-48, 73-76.

An appellate court reviews the correct interpretation of an evidentiary rule de novo as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.* An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). A trial court's finding by a preponderance of the evidence that the misconduct actually occurred will be affirmed if supported by substantial evidence in the record. *Lough*, 125 Wn.2d at 864.

d. The Trial Court Did Not Abuse Its Discretion By Allowing Evidence Of The Prior Incidents.

Here, the trial court's ruling was not manifestly unreasonable. The proffer, contained in the State's trial brief and in Christina Moore's testimony outside the presence of the jury, showed clearly that the prior incidents were acts of domestic violence committed by Gunderson against Christina Moore.

The trial court conducted the required analysis, properly concluding that: 1) the State had proven the prior misconduct by a preponderance of the evidence, 2) the prior bad acts were relevant to allowing the jury to evaluate the credibility of Christina Moore if she denied or minimized the assault in the case at bar; and 3) the evidence was not more prejudicial than probative. 5RP 52-56.

Because the trial court did not abuse its discretion in concluding that evidence of Gunderson's prior acts of domestic violence assault against Christina Moore were admissible under the exception to ER 404(b) explained in *Baker*, and because the court reduced the prejudicial effect of the evidence by giving an appropriate limiting instruction to the jury, which the jury is presumed to have followed⁴, Gunderson's conviction for felony violation of a no contact order-domestic violence should be affirmed.

⁴ *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Gunderson's conviction.

DATED this 20th day of December, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

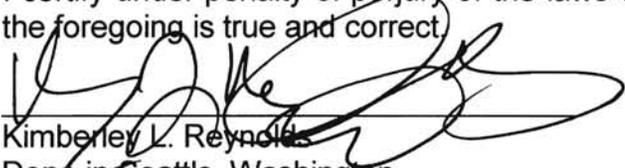
By: 

SUSAN HARRISON, WSBA #40719
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 C. 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. DANIEL GUNDERSON, Cause No. 68116-8-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.



Kimberley L. Reynolds
Done in Seattle, Washington

12/28/12
Date