

NO. 74107-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAVIER MACIAS-CAMPOS,

Appellant.

FILED  
Sep 26, 2016  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

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A. ISSUE PRESENTED

Whether, pursuant to ER 404(b), the trial court properly exercised its discretion in admitting evidence of prior acts of domestic violence known to the victim where they were relevant to the victim's statement of mind and thus highly probative of elements of the charged crimes: whether the victim was restrained without her consent by the defendant, and whether she was placed in reasonable fear of the defendant.

B. STATEMENT OF CASE

1. PROCEDURAL FACTS.

Javier Alejandro Macias-Campos was charged by amended information with the crimes of assault in the second degree (count 1), unlawful imprisonment (count 2), felony harassment (count 3) and two counts of tampering with a witness (count 4 and 5). CP 9-11. A jury found him not guilty of count 1, assault in the second degree, but guilty of the lesser degree of assault in the fourth degree. CP 86, 88. The jury found him guilty as charged of the other four counts. CP 86-87. The jury also answered affirmatively to the domestic violence allegation on each count.

CP 89-91. The court sentenced Macias-Campos to 29 months of total confinement. CP 105.

## 2. FACTS OF THE CRIME.

Macias-Campos and Mercedes Olson were in a dating relationship in early 2015. 8/6/15 RP 59, 64-65. Olson testified at trial that she met Macias-Campos, whom she called "Alex," in August of 2014, and they became friends. 8/6/15 RP 59. Olson was addicted to heroin and methamphetamine and began staying with Macias-Campos in various motels. 8/6/15 RP 58, 59, 64. The two did not become romantically involved until December. 8/6/15 RP 65. Almost immediately after that, Macias-Campos became emotionally abusive and extremely jealous, although he would often apologize for his behavior. 8/6/15 RP 65-66, 68. Macias-Campos told Olson that he had hit a prior girlfriend, Rochelle, in the head with a pistol and then tied her up in the trunk of his car. RP 8/6/15 RP 70.

After weeks of emotional abuse, Olson became too scared to leave. 8/6/15 RP 70. When Macias-Campos discovered that she had emailed a friend, he became enraged and hit her repeatedly in the face. 8/6/15 RP 70-71. Afterward, he had sex

with her against her wishes. 8/6/15 RP 73. When Macias-Campos fell asleep, Olson escaped from him for several days, but agreed to meet him after he contacted her because he “seemed different.” 8/6/15 RP 73-74. However, as soon as Olson entered Macias-Campos's car, he drove her to the Hillside Motel and told her that she could not leave. 8/6/15 RP 74. He told her that if she left him he would find her, that he knew where her family lived in North Dakota, and that he would harm her mother. 8/6/15 RP 76.

On February 1, 2015, Olson's mother, in North Dakota, received a Facebook message from Olson saying she was afraid of Macias-Campos but urging her mother that he must not find out that Olson had contacted her. 8/6/15 RP 81-85; 8/10/15 RP 9, 12-13. The message read:

That guy, Alex, won't let me leave, and he's really mean, and I'm really scared of him, mom.  
He keeps telling me that no matter where I go, he will always find me. I'm really scared, mom. I don't know what to do, and he can't know that I messaged you that or that I asked you to help me, because it will not be good.

8/10/15 RP 12-13. There was no further contact from Olson for several days. 8/10/15 RP 13.

On February 7, 2015, Macias-Campos became very upset when he discovered that Olson had been communicating with

others, including another man. 8/6/15 RP 87, 89. Macias-Campos followed Olson into the bathroom and began hitting her in the head and stomach, and then threatened her with a screwdriver and knife. 8/6/15 RP 90-91. He told her that she was going to die, and that he would "do what the cartel does with girlfriends who cheat." 8/6/15 RP 90. He asked her what she wanted to do with the "last hour of her life," and then tied her hands behind her back with a broken wire hanger. 8/6/15 RP 92. He started choking her and she felt that she briefly lost consciousness. 8/6/15 RP 93. She lied to him about suspecting that she was pregnant in order to trick him into stopping the assault. 8/6/15 RP 93-94.

Olson's mother received a brief phone call from Olson, in which Olson, in a whispered hush, urged her mother to check her message on Facebook. 8/10/15 RP 13. She found this message on Facebook:

Call this number, tell them Mercedes needs help, and that she is [sic] in the Hillside, room one.

8/10/15 RP 14. Olson's mother contacted the motel. 8/10/15 RP 15. The manager of the motel went to the room and told Macias-Campos that someone had called. 8/6/15 RP 99.

Olson's mother received a phone call from Macias-Campos, asking who she was. 8/10/15 RP 15. Macias-Campos put Olson on the phone, and Olson, sounding uncharacteristically upbeat, asked "What's going on? Why did you have somebody come check at the hotel?" 8/10/15 RP 15. Her mother asked her if it was safe to talk, and she responded "Kind of." 8/10/15 RP 16.

Police officers were dispatched to the Hillside Motel upon receiving a report of someone being held against their will, and they knocked on the door of unit one. 8/4/15 RP 143-45. They announced who they were. 8/4/15 RP 145. Macias-Campos came to the window for a moment, and the police instructed him to open the door. 8/4/15 RP 146. Macias-Campos receded from the window and then returned with Olson, who looked worried and afraid. 8/4/15 RP 147; 8/6/15 RP 149. The police asked her if she was "OK," and Olson shook her head. 8/4/15 RP 147. The police again asked Macias-Campos to open the door, but he opened the window instead. 8/4/15 RP 148. The police helped Olson out through the window and then placed Macias-Campos under arrest. 8/4/15 RP 148. They found a folding knife in his pocket. 8/4/15 RP 152. They also found a twisted fragment of wire hanger. 8/6/15 RP 151, 155.

C. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO ER 404(b).

Macias-Campos contends that the trial court abused its discretion in allowing testimony by the victim that Macias-Campos told her that he had seriously assaulted a prior girlfriend and held her captive in the trunk of his car. Macias-Campos argues that this was inadmissible propensity evidence. But the evidence was admissible pursuant to ER 404(b) because it was highly probative of the victim's state of mind as she was threatened and held captive by Macias-Campos, and thus was highly probative of an element of unlawful imprisonment, restraint without consent, as well as an element of felony harassment, reasonable fear.

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 the purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). ER 404(b) prohibits prior acts from being used "to prove the character of a person in order to show action in conformity therewith," but allows that same evidence to be

introduced if relevant for other purposes, depending on a balancing of its probative value against the danger of unfair prejudice. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Washington courts use a four-part test to determine if ER 404(b) evidence is admissible:

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 to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 421 (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The trial court must conduct this inquiry on the record, but an evidentiary hearing is not required. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Kilgore, 147 Wn.2d 288, 294, 53 P.3d 974 (2002). Once the evidence is admitted, the trial court must provide a limiting instruction to the jury if one is requested by the defense.<sup>1</sup>

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<sup>1</sup> In this case, the court gave the following limiting instruction proposed by the State: "Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of allegations of prior wrongdoing by the defendant and may be considered by you only for the purpose of determining whether or not any threat, if made, placed another person in reasonable fear that it would be carried out. And whether a reasonable person would have consented to any alleged restraint. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation." CP 52; 8/10/15 RP 31. The court also gave limiting instructions during the testimony. 8/6/15 RP 69, 71.

Gresham, 173 Wn.2d at 420. Unless the trial court's ruling is based on a misinterpretation of the evidence rule, the appellate court reviews a trial court's decision to admit evidence pursuant to ER 404(b) for abuse of discretion. Foxhoven, 161 Wn.2d at 174. The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

In this case, the State bore the burden of establishing every element of unlawful imprisonment beyond a reasonable doubt.

That crime is defined as follows:

A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.

RCW 9A.40.040. For purposes of this statute, restraint is statutorily defined, in relevant part, as follows:

"Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception . . . .

RCW 9A.40.010(6). The State was required to prove beyond a reasonable doubt that Olson's movements were restricted without her consent by force or intimidation. Thus, both her state of mind and the defendant's intimidation of her were at issue. The evidence regarding his prior violence toward Rochelle was relevant to both of

these aspects of restraint. The State was properly allowed to present the prior act testimony to prove the restraint element of the crime of unlawful imprisonment. As such, the evidence was not used for propensity purposes.

The recent Washington Supreme Court case, State v. Ashley, \_\_\_ Wn.2d \_\_\_, 375 P.3d 673 (2016), is almost directly on point. In Ashley, the defendant, like Macias-Campos, was charged with unlawful imprisonment and the state supreme court concluded that evidence of prior domestic violence was “relevant to establish lack of consent as an element of the crime.” Id. at 678.

In Ashley, the defendant and victim had previously dated for several years and had two children in common. Id. at 675. The police sought to arrest Ashley for a robbery. Id. Officers attempted to contact Ashley at an apartment. Although Ashley, the victim and her children were inside the apartment, no one answered the knock on the door. Id. The officers returned to the apartment a few days later, heard voices and obtained entry, finding the victim, the defendant and their children inside. Id.

The victim testified that she had been held captive by Ashley in the apartment for days. Id. She testified that Ashley would not allow her or her children to leave the bathroom. Id. The trial court

allowed the State to introduce evidence of Ashley's prior domestic violence against the victim. Id. The State argued that this evidence was necessary to enable the jury to understand how Ashley was able to control and restrain the victim. Id. at 675.

The state supreme court affirmed, finding that the evidence of prior domestic violence was highly probative. The court concluded, "This evidence helped the jury assess Gamble's state of mind—that is, whether she was restrained against her will because she was intimidated." Id. at 680. Significantly, the supreme court rejected the defense claim that the evidence was unnecessary because there was "enough evidence" of restraint without it. Id. at 678 n.4. "Ashley did not concede this element of the crime during trial, and the State is entitled to present its case so that it can satisfy its burden of proving every essential element of a crime beyond a reasonable doubt." Id.

In the present case, the evidence that Macias-Campos told Olson that he had hit his former girlfriend and restrained her in the trunk of his car was relevant to prove the intimidation he used to restrain Olson. Indeed, it would appear that Macias-Campos shared this information with Olson for the express purpose of making her afraid of him. This evidence helped the jury assess

Olson's state of mind and determine whether she was in fact restrained against her will through intimidation. Although there was evidence of actual force against Olson in addition to intimidation, the jury obviously had a question as to the level of force, demonstrated by their acquittal in regard to assault in the second degree. As in Ashley, the evidence helped show that the victim's behavior "was not inexplicable, not unreasonable, and that she was held without consent." Id. at 680.

Moreover, Macias-Campos's statements about his abuse of Rochelle was also highly probative of the felony harassment charge. As to that charge, the State bore the burden of proving that Macias-Campos knowingly threatened to kill Olson and placed her in reasonable fear that the threat will be carried out. RCW 9A.46.200; CP 67. Prior bad acts that the defendant tells the victim about are probative of the reasonableness of a victim's fear. State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999). See also State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (citing Ragin with approval, and noting that prior violence, known by the victim, is admissible to prove reasonable fear).

Macias-Campos's attempt to rely on State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014), is misplaced. As explained in Ashley, the court in Gunderson "rejected evidence of prior domestic violence when the State sought to admit the evidence for the purpose of witness credibility where there has been no change in the victim's testimony." Ashley, 375 P.3d at 679. The court clarified, "we do not recognize a blanket exception to the required ER 404(b) analysis for domestic violence, nor do we limit the use of such evidence to cases in which a witness has recanted or made inconsistent statements." Ashley, 375 P.3d at 680. In other words, the fact the evidence is not admissible to prove the victim's credibility pursuant to Gunderson does not mean the evidence is not admissible for some other purpose, such as to prove an element of the crime. As in Ashley, the evidence of Macias-Campos's boasts of assaulting his ex-girlfriend and driving around with her tied up in the trunk of his car was relevant to explain to the jury why Olson was afraid of Macias-Campos, why she did not try to resist him more, and how he used intimidation to restrain her without her consent. The evidence was highly probative of

elements of the crimes charged, and the probative value was not substantially outweighed by the danger of unfair prejudice.

Moreover, even if this Court finds that the trial court abused its discretion, the admission of the evidence was harmless. Erroneous admission of evidence in violation of ER 404(b) is harmless unless there is a reasonable probability that the verdict would have been materially different but for the error. Gresham, 173 Wn.2d at 433. The defense in this case was to attack Olson's credibility as a witness overall, not to dispute the elements of the crime. However, Olson's testimony was substantially corroborated by evidence of her Facebook posts, the knife found on Macias-Campos, and a twisted wire hanger found in the motel room. Moreover, the statements about Macias-Campos's prior violence toward Rochelle was just part of the prior misconduct evidence that was admitted. The jury heard more detailed evidence of Macias-Campos's prior violence toward Olson, which is not challenged on appeal. There is no reasonable probability that the challenged evidence affected the verdicts.

D. CONCLUSION

Macias-Campos's convictions should be affirmed.

DATED this *21st* day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jan Trasen, the attorney for the appellant, at Jan@washapp.org, containing a copy of the Brief of Respondent in State v. Javier Alejandr Macias-Campos, Cause No. 74107-1, 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.

Dated this 26<sup>th</sup> day of September, 2016.

U Brame

Name:

Done in Seattle, Washington