

NO. 70704-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

DAMIAN WILHELM,

Appellant.

---

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 DEC 29 PM 2:57

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN RIETSCHL

---

**SUPPLEMENTAL BRIEF OF RESPONDENT  
IN LIGHT OF GUNDERSON**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

NAMI KIM  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

## TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>ARGUMENT</u> .....	1
C. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Baker, 162 Wn. App. 468,  
259 P.3d 270 (2011)..... 6, 7, 8, 9

State v. Grant, 83 Wn. App. 98,  
920 P.2d 609 (1996)..... 6, 7, 8, 9

State v. Gunderson, \_\_\_ Wn.2d \_\_\_,  
337 P.3d 1090 (2014)..... 1, 3, 5, 6, 8, 9, 10

State v. Magers, 164 Wn.2d 174,  
189 P.3d 126 (2008)..... 2, 3, 5, 6

Rules and Regulations

Washington State:

ER 404 ..... 1, 3, 7, 8

**A. INTRODUCTION**

Following the filing of opening briefs in this case, the Washington State Supreme Court issued State v. Gunderson, \_\_\_ Wn.2d \_\_\_, 337 P.3d 1090 (2014). This Court requested supplemental briefing. Gunderson held that prior acts of domestic violence are properly admitted under ER 404(b) to explain a victim's recantation or conflicting account of events, but not if she produces consistent testimony and bears no obvious injuries. Id. at 1095. Here, the victim gave multiple conflicting accounts to the police, prosecutors, and jury about her injuries, claiming alternately that she had fallen down, that someone else had cut her, that she loved the defendant and didn't want him to get in trouble, that she "just want[ed] him to get better," and finally, that she had blacked out at the exact moment of the assault. Given her conflicting accounts of events, evidence of the defendant's prior assault against the victim was properly admitted under Gunderson.

**B. ARGUMENT**

In Gunderson, the defendant's ex-girlfriend, Christina Moore, voluntarily contacted him at her mother's home despite the existence of a no contact order. Gunderson, 337 P.3d at 1091-92. Moore's

mother called 911 in a panic the next morning as Gunderson was leaving, reporting that he had hit Moore. Id. at 1092. Gunderson and Moore were gone by the time police arrived, so no statement was taken from Moore. Id.

At Gunderson's trial for felony violation of a court order, Moore's mother recanted her 911 statements, claiming that her memory was "a big blur" and characterizing Gunderson as "[p]robably defending himself." Id. A police officer testified to the description of the assault that Moore's mother gave at the scene. Id. Moore then testified that the incident was merely a verbal argument without physical violence and that their contact had been consensual. Id. As a result, the trial court admitted evidence of two prior domestic violence incidents involving Gunderson and Moore to assist the jury in evaluating Moore's credibility. Id.

The supreme court reversed based on the lack of any prior inconsistent statements made by Moore, choosing to "confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events." Id. at 1094-95. In doing so, the court invoked its prior decision in in State v. Magers, which declared such past acts

relevant to assess the credibility of a witness who gives conflicting statements. Id. at 1094 (citing Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)). The Gunderson court held that “we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements.” Id. at 1095.

Gunderson does not change the outcome of the case at bar. The primary issue troubling the court in Gunderson was the fact that Christina Moore provided no statements at all prior to court, much less an inconsistent one. Id. at 1094 n.2 (“Christina never spoke to officers or prosecutors and only gave one account of events on (or as far as we know, off) the stand.”). In cases involving inconsistent statements, however, the court upheld the admission of prior acts of domestic violence because they offer “overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or *conflicting account of events*.” Id. at 1094-95 (emphasis added).

Crucially, the court did not require a *recantation* (an initial incriminating statement and subsequent retraction) for prior acts of domestic violence to pass muster under ER 404(b), only the existence of *conflicting* statements. The court repeatedly referenced these two separate bases for admission in Gunderson,

restricting prior acts of domestic violence to cases where “the witness neither recants *nor* contradicts prior statements.” Id. at 1095 (emphasis added). See also id. at 1094 (noting that victim Moore “gave no *conflicting statements*”) (emphasis added).

Here, as noted in the brief of respondent, there was ample conflicting testimony by victim Leah Hensel to both the police and the prosecution. BOR 22-25. Hensel, who was first observed by officers wandering the parking lot injured, crying and “hysterical,” first told them that she had fallen down, then changed stories and said that she had gotten cut during a fight with her friend, Heather Wilmore. 5RP 161, 163-64, 183; 6RP 10-13, 31-32. When confronted by officers about being a victim of domestic violence, she did not deny it, responding only that she loved Wilhelm and did not want him to get in trouble. 6RP 16.

Pending trial, Hensel wrote letters to the prosecutor’s office, never once claiming memory loss as to what had happened, only declaring her love for Wilhelm. 5RP 131-32. She repeated those sentiments on the stand and stated, “I just want him to get better.” This conflicted with her earlier statements to police regarding the cause of her injuries; if Wilhelm had not assaulted her, there would be no reason for him to “get better.” Contrary to her earlier

statements about falling or getting into a fight with Wilmore, she testified at trial that she had simply “blacked out” at the exact moment when it apparently happened, although she was able to remember events before and after the assault. 5RP 123-25, 127. Thus, Hensel’s testimony was not only internally inconsistent from the start (alleging both a fall and a fight with a third party), but directly contradicted her testimony on the stand (memory loss).

These facts are clearly distinguishable from those in Gunderson, where Christina Moore had never spoken to anyone prior to trial and was “unequivocal in stating that Gunderson did not hit her or [her mother]” during her testimony. Gunderson, 337 P.3d at 1095. Moore only ever gave a single statement regarding the incident, thus presenting nothing with which to “conflict.”

The Gunderson court also noted two other facts favoring suppression of the prior bad acts that are not present here. First, it noted the lack of any testimony about Christina Moore’s demeanor at the scene, since she was gone by the time the police arrived. The Gunderson court compared this lack of information to the officers’ testimony in Magars regarding that victim’s tears and traumatized appearance. Gunderson, 337 P.3d at 1094 n.2. Second, the Gunderson court noted the complete lack of any

physical evidence of assault in the charged incident: “[W]e decline to extend Magars to cases where there is *no evidence of injuries* to the alleged victim and the witness neither recants nor contradicts prior statements.” Gunderson, 337 P.3d at 1095.

Neither of those two circumstances exists here. The State introduced ample witness testimony and pictures depicting Hensel as crying, distraught, and injured with a cut on her face immediately after the assault. Ex. 3, 4; 5RP 20-21, 85, 108, 161, 163; 6RP 10-13, 16, 31-32. The three officers who spoke to and photographed her that night, as well as store clerk Gary Morrison, described Hensel as hysterical, nervous, anxious and upset. 5RP 20-21, 161, 163; 6RP 10-13, 31-32.

Finally, it is important to underscore that Gunderson, while invoking Magars as the framework for its analysis, did not overrule this Court’s decisions in State v. Grant,<sup>1</sup> 83 Wn. App. 98, 920 P.2d 609 (1996), or State v. Baker, 162 Wn. App. 468, 259 P.3d 270 (2011). Nor did the Gunderson court squarely address (or excise from the equation) the issue of inconsistent *acts* discussed in those two cases. This is significant because Hensel displayed

---

<sup>1</sup> Indeed, as Justice Madsen wrote in her dissent, the supreme court explicitly adopted the rationale in Grant when deciding Magars. Gunderson, 337 P.3d at 1096.

inexplicably inconsistent *behavior* (invited contact despite a no contact order, failure to call police, insistence on maintaining a relationship) that benefitted from further explanation by way of the past acts of domestic violence inflicted upon her, a phenomenon that both Grant and Baker held as valid bases for the introduction of ER 404(b) evidence.

Grant did not involve a recantation but rather a series of inconsistent acts by the victim who failed to call police when the defendant first violated an existing court order, allowed him to accompany her despite violence, and initially lied to police. Grant, 83 Wn. App. at 101. The court held that prior incidents of domestic violence were admissible to “explain [the victim’s] statements *and conduct* which might otherwise appear inconsistent with her testimony of the assault at issue.” Id. at 106 (emphasis added). The prior bad acts “thus explained why Mrs. Grant permitted Grant to see her despite the no-contact order and . . . minimized the degree of violence.” Id. at 108.

Baker also involved inconsistent acts. There, the victim called 911 after only one of the two charged incidents of strangulation. Baker, 162 Wn. App. at 470-72. The trial court admitted two uncharged acts of strangulation where the victim also

failed to call 911. Id. at 472. This Court rejected the argument that recantation is required to justify admission, holding that “the trial court properly admitted evidence of Baker’s prior assaults . . . as relevant to the jury’s assessment of [the victim’s] credibility.” Id. at 474-75.

Gunderson did not negate the rationale used in Grant or Baker, nor address the applicability of ER 404(b) evidence in light of a victim’s inconsistent acts. The court took care to state that its opinion “should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness.” Gunderson, 337 P.3d at 1095 n.4. Instead, the court expressly quoted, without criticism, the language used in Grant regarding that victim’s inconsistent “statements *and conduct*” as a valid basis for admission in that case. Gunderson, 337 P.3d 1094 n.2 (emphasis added).

While the majority may have hinted at the proffer of expert testimony as an important differentiating factor in Grant, it did not ultimately require expert testimony in situations involving

recantation or conflicting statements.<sup>2</sup> Id. at 1095 n.4. It follows that Gunderson also did not establish a requirement for expert testimony in situations involving inconsistent acts. Nor does there seem to be a logical basis to make such a distinction. If evidence of prior acts of domestic violence are admissible without expert testimony to explain a victim's decision to retract or change her statements, no sound reason exists why a victim's inconsistent acts, such as delayed report or invited contact, would require such testimony. Indeed, the Gunderson court explicitly recognized the validity of inconsistent behavior as a basis for admission when it stated that the previous acts of violence in Baker were "clearly admissible to explain why the victim [in Baker] did not report prior times the defendant attempted to strangle her." Gunderson, 337 P.3d at 1094 n.2.

As discussed in the Brief of Respondent, this case involved substantially inconsistent behavior on Hensel's part, including her invited contact with the defendant despite a no contact order, her attempt to follow him out of the store after witnesses saw him strike

---

<sup>2</sup> While the court noted that it was "inclined to agree" that prior bad acts "may be helpful to explain the dynamics of domestic violence when offered in conjunction with expert testimony," this was in reference to situations where a victim minimizes violence as described in the dissent. Id. at 1095 n.4, 1096-97 (Madsen, C.J., dissenting). Gunderson did not foreclose the rationale employed in Baker or Grant regarding inconsistent acts as grounds for admission.

her with objects and call her names, her failure to call the police, and her insistence that she and Wilhelm would again be together despite multiple no contact orders. BOR 25-26.

Given the meaningful distinctions between the facts in Gunderson and those presented here, this Court should find that the trial court properly admitted evidence of Wilhelm's prior acts of domestic violence against Hensel.

**C. CONCLUSION**

For the foregoing reasons, and for the reasons stated in the Brief of Respondent, the State respectfully asks this Court to affirm Wilhelm's conviction.

DATED this 29 day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

NAMI KIM, WSBA #36633  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at [richard@washapp.org](mailto:richard@washapp.org), containing a copy of the Supplemental Brief of Respondent in Light of Gunderson, in State v. Damian Macintosh Wilhelm, Cause No. 70704-3, 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 29<sup>th</sup> day of December, 2014.

UBrame

Name:

Done in Seattle, Washington