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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

LISA O'NEILL,

Defendant.

No. 10-1-00675-0 KNT

STATE'S MOTION TO ADMIT PRIOR
ASSAULTS UNDER ER 404(b)

I. INTRODUCTION

At trial, the State intends to introduce evidence of the defendant hitting and pushing the alleged victim, Leonard Swenson, during the time period when they lived together from the fall of 2006 through July 2008, and prior to the charged assault. The State anticipates this trial testimony to include: 1) that the defendant would push and shove Leonard Swenson almost daily; 2) that the defendant once struck Leonard with a rusty tool; and 3) that the defendant once hit him with a saw; and 4) that the defendant hit him with a cell phone. All of the above evidence is relevant and admissible under ER 404(b).

1 **II. PROPOSED EVIDENCE**

2 The State sets forth below a brief summary of the testimony of Leonard Swenson
3 regarding the defendant's hitting and pushing of him prior to the charged assault. For purposes
4 of providing context to these statements, some additional information may be included that the
5 State does not seek to admit under ER 404(b).

6 Just after Leonard Swenson finally left the defendant's home, his daughter drove him to
7 the Renton Police Department in order to report what had happened to him to the police. In a
8 statement to Renton Police Officer Rice on July 11, 2008 at 5:05 p.m., Swenson stated that
9 during the time that he lived with her, the Defendant yelled at him frequently. He stated that
10 early in his relationship with the Defendant he helped her, and then things got worse between
11 them. Specifically, Swenson identified the following prior assaults by the Defendant:

- 12 • That beginning at some point in their relationship, the Defendant pushed him
13 around almost every day;
- 14 • That, a few days earlier, the Defendant hit him in the face with a cell phone.

15 (Renton Police Department Statement of July 11, 2008. Attachment A.)

16 When interviewed in depth by Renton Police Detective Pete Montemayor on April 15,
17 2009, Leonard Swenson recounted the prior physical assaults by the Defendant in detail:

- 18 • That a couple of months before he left the Defendant's house, she hit him with the
19 portable house phone. It didn't leave any marks but it hurt him. (Leonard
20 Swenson Interview p. 50, lines 15 - 21. See Attachment B);
- 21 • About the first week of May in 2008, the Defendant threw a saw at Swenson.
22 (Leonard Swenson Interview p. 51, lines 4 - 6); and

- 1 • About two weeks later, the Defendant left out an old cutting tool that was getting
2 rusty. She was angry, and hit him with the tool. The tool cut his arm and the
3 Defendant did nothing to treat the injury. (Leonard Swenson Interview p. 51,
4 lines 6 - 11).

5 When interviewed by defense counsel Edwin Aralica on August 31, 2010, Leonard
6 Swenson was asked whether the defendant ever hit him when he was living with her. (Defense
7 interview of Leonard Swenson p. 59, line 8. See Attachment C.) Swenson responded that the
8 defendant would push him around and knock off his hat with her hands. (Defense interview of
9 Leonard Swenson p. 59, line 11-12.) The defense did not inquire further regarding this issue.

10 **III. ARGUMENT**

11 The evidence described above is admissible in the State's case-in-chief under ER 404(b)
12 because they show the nature of the relationship between the defendant and Leonard Swenson,
13 are an inseparable part of the crime charged (*res gestae*), because they establish the defendant's
14 motive, and because they show absence of mistake.

15 **A. Admissibility of Prior Bad Act Evidence**

16 Evidence Rule 404(b) provides:

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

21 ER 404 (b); State v. Baker, 162 Wash. App. 468, 259 P.3rd 270 (2011). This list of exceptions that
22 allows admission of prior bad act evidence for certain purposes is not exclusive. State v. Grant, 83
23 Wash. App. 98, 105, 920 P.2d 609 (1996).

24 To admit evidence of a defendant's other wrongs, the trial court must:

1. find by a preponderance of the evidence that the wrongs 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 with which the defendant is charged; and
4. weigh the probative value of the evidence against any unfair prejudicial effect.

State v. Baker, 162 Wash. App. at 473, citing State v. Fualaau, 155 Wash. App. 347, 356-57, 228 P.3rd 771, review denied, 169 Wn.2d 1023, 238 P.3d 502 (2010). Although the trial court must conduct the analysis outlined above, it is not required to conduct an evidentiary hearing to determine whether alleged uncharged acts probably occurred. State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002). The State may make an offer of proof as to each prior bad act.

Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).

The decision to admit evidence under ER 404(b) falls within the trial court's discretion. The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. When ER 404(b) evidence is admitted on several bases, the trial court's decision will be upheld if any one of them is justified. State v. Powell, 126 Wn.2d 244, 258, 264, 893 P.2d 615 (1995).

Defendant's prior wrongs are admissible under ER 404(b) because they show the nature of the relationship between the Defendant and Leonard Swenson, are inseparable evidence of the crime charged, are evidence of motive, and show the absence of mistake.

- a. The nature of the defendant and Leonard Swenson's relationship is relevant to assessing Swenson's credibility in this domestic violence case.

Evidence of prior bad acts by defendants has been admitted in cases of domestic violence as relevant to the jury's assessment of the alleged victim's credibility. Most recently, in State v. Baker, 162 Wash. App. at 474, where the defendant was charged with assault in the second degree by strangulation, the State sought to introduce prior assaults of the victim by the

1 defendant. The Court of Appeals held that evidence of these prior assaults was admissible to
2 assist the jury in assessing the victim's credibility. The evidence was deemed admissible to
3 explain why the victim had not contacted the police after the prior strangulations and why she
4 did not call the police after the charged incident. The court concluded that the evidence helped
5 the jury to understand that the victim's inaction was due to the fact that she was ashamed, afraid
6 of the repercussions of reporting, and afraid to upset the defendant's family and the defendant
7 himself. The court found that the evidence allowed the jury to evaluate the victim's credibility
8 with full knowledge of the dynamic of a relationship marked by domestic violence and the effect
9 such a relationship had on the victim. Baker at 475, citing State v. Grant 83 Wash. App. 98, 107-
10 108, 920 P.2d 609 (Div. 1 1996).

11 In State v. Grant, supra, the court permitted testimony of the defendant's prior assaults on
12 and threats towards the victim as relevant and necessary to the jury's ability to assess a domestic
13 violence victim's credibility as a witness and to prove that the crime of assault had actually
14 occurred. In its decision, the court in Grant thoroughly examined the reasons why a domestic
15 violence victim would minimize or even recant events. Id. at 107. See also, State v. Wilson, 60
16 Wn. App. 887, 808 P.2d 754 (1991) (evidence of prior assaults admissible to show victim's fear
17 of the defendant, thus explaining her delay in reporting the incident). The Grant court found
18 that, "the jury was entitled to evaluate her credibility with full knowledge of the dynamics of a
19 relationship marked by domestic violence and the effect such a relationship had on the victim."
20 Grant, 83 Wn. App. at 108.

21 Here, evidence of the defendant's prior assaults of Leonard Swenson is essential to the jury's
22 complete understanding of the relationship between the two. Swenson will testify that his
23 relationship with the defendant was marked by incidents of hitting and pushing. He will state that he
24

1 did not leave the situation or tell others of the abuse in part because he did not want to upset the
2 defendant, and also because he hoped that they might one day be married. The evidence of the
3 defendant's mistreatment of Swenson will give the jury a complete picture of the relationship, and
4 will assist the jury in assessing Swenson's credibility and the reasonableness of his decision not to
5 seek outside help from his family, not to report the abuse to the police, not to confront the defendant,
6 and not to leave her home.

7 b. Evidence of the Defendant's Prior Hitting and Pushing of
8 Leonard Swenson is Relevant to the Defendant's Motive.

9 The defendant's animus towards and prior assaults of Leonard Swenson are admissible
10 under ER 404(b) as motive evidence of the assault charge. In State v. Baker, 162 Wash. App. at
11 474, the court considered whether prior incidents of strangulation of the victim were admissible
12 as motive evidence. The court concluded the evidence was relevant and admissible of motive
13 under ER 404(b). The court stated that motive is broadly defined, "goes beyond gain and can
14 demonstrate an impulse, desire, or any other moving power which causes an individual to act."
15 Baker at 474, citing State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Further, the
16 court noted that evidence of a hostile relationship between the defendant and the victim has been
17 held admissible in murder trials to show motive. Powell, 126 Wn.2d at 260; State v. Hoyer, 105
18 Wn.2d 160, 177 P. 683 (1919).

19 Here, the jury is entitled to know of the defendant's prior incidents of hitting and pushing of
20 Leonard Swenson during the period of time that he lived with her at her home, as such incidents are
21 evidence of a developing hostile relationship between the two. Such evidence, combined with the
22 verbal and emotional abuse the defendant inflicted on the victim, is revealing of the defendant's
23 impulses, and is necessary to the jury's ability to fully assess the circumstances giving rise to the
24 charged assault.

1 c. Evidence of the Defendant's Prior Hitting and Pushing of Leonard
2 Swenson is Relevant to Prove Lack of Accident or Mistake.

3 Should the defendant argue that she did not intend to push Leonard down the stairs in
4 April 2008, evidence of prior physical acts against Leonard is admissible to show that the
5 defendant's actions were intentional on the date of the charged offense. When the defendant admits
6 committing a physical act but denies acting with intent, evidence of similar past misconduct
7 becomes relevant to prove the defendant's present mental state and "is useful as reducing the
8 possibility that the act in question was done with innocent intent." 2 J. Wigmore, Evidence § 302, at
9 245 (1979).

10 d. Evidence of the Defendant's Prior Assaults of Leonard are
11 an Inseparable Part of All of the Crimes Charged and are
12 Therefore Admissible Under the Theory of Res Gestae.

13 "Other misconduct is admissible if it is so connected in time, place, circumstances, or means
14 employed that proof of such other misconduct is necessary for a complete description of the crime
15 charged, or constitutes proof of the history of the crime charged." State v. Tharp, 96 Wn.2d 591,
16 637 P.2d 961 (1981). "[Evidence of other crimes or bad acts is admissible to complete the story of a
17 crime or to provide the immediate context for events close in both time and place to the charged
18 crime."

19 Here, the defendant is charged with thefts of Swenson's assets from December, 2006 through
20 July, 2008--virtually the entire time that he resided with her. Over that time period, the defendant
21 took virtually all of the defendant's assets from him. The defense claims that the victim consented to
22 these transactions. Evidence of the defendant's verbal and physical abuse and intimidation of
23 Leonard Swenson as their relationship progressed is essential to the jury's complete understanding of
24 the story of what happened to the victim, and provides the jury with a context for how these takings

1 occurred. Further, it gives the jury insight into why Swenson may have consented to some of these
2 financial transactions. Finally, such evidence is essential to the State's theory of the case: that the
3 defendant obtained Leonard's "consent" to the financial transactions through tactics such as
4 deception, intimidation, and verbal, emotional, and physical abuse.

5 **C. Defendant's Prior Wrongs May also be Admissible if the**
6 **Defendant Opens the Door to Such Evidence.**

7 Should the defendant raise the issue of her past conduct, the State may question the
8 Defendant about this conduct on cross-examination and may introduce extrinsic evidence of this
9 past conduct in rebuttal. This allows the State to "complete the story" about a matter partially
10 raised by the defense. See generally State v. Bennett, 42 Wash. App. 125, 708 P.2d 1232 (1985);
11 State v. Beel, 32 Wash. App. 437, 442-43, 648 P.2d 443 (1982); State v. Griggs, 33 Wash. App.
12 496, 656 P.2d 529 (1982); Washington Practice, Evidence, supra § 120, at 432.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the State respectfully asks this Court to admit the above-
15 summarized evidence in the State's case-in-chief.

16 DATED this 9th day of December, 2011.

17 For DAN SATTERBERG, King County Prosecuting Attorney

18 By: _____
19 KATHY VAN OLST, WSBA No. 21186
20 Senior Deputy Prosecuting Attorney

21 By: _____
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