

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64764-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JASON DRAKE,	)	UNPUBLISHED OPINION
	)	
<u>Appellant.</u>	)	FILED: <u>August 1, 2011</u>

SPEARMAN, J. — A jury convicted Jason Drake of first degree and residential burglary, and found the State had proved the aggravating factor that the crimes were aggravated domestic violence offenses. Drake argues the trial court erroneously admitted evidence of his prior acts of domestic violence against his former girlfriend. We reject this argument because the prior acts were logically relevant to material issues before the jury, and the probative value outweighed any prejudicial effect. Affirmed.

FACTS

Howard Drake repeatedly physically and psychologically abused his girlfriend Vanessa Rose over the course of their five year relationship. Drake shoved Rose's head against the bathroom wall, he punched her in the jaw and knocked her out; and

he threatened to kill her several times, once telling her, "You think I won't kill you, Bitch?." On another occasion, Drake punched Rose in the stomach and back, and then disappeared with her dog. Drake later called Rose, who could hear her dog crying in the background, as if Drake was hitting the dog. When Drake returned the dog several days later, the dog had welts all over its back and was missing a toenail. Rose testified that Drake's abuse made her fear what would happen if she called the police. Drake moved in limine to exclude Rose's allegations of previous incidents of domestic violence under ER 403 and 404(b). After a hearing, the trial court admitted the evidence for a variety of reasons, including for the purpose of demonstrating Rose's reasonable fear of Drake and to explain why she may have delayed reporting Drake's abuse.

Rose attempted to leave Drake several times, but continued to have frequent contact with him, because Drake was not willing to end the relationship. On one such occasion, Drake pushed his way into Rose's house and refused to leave. The two later fought, and Drake grabbed Rose by the neck and threw her against the wall. Rose left and stayed the night with her mother. After work, Rose went home and noticed a number of her possessions were missing. She called the police. The State charged Drake with first-degree burglary, felony harassment, second-degree assault, unlawful imprisonment, residential burglary, and intimidating a witness. A jury acquitted Drake of the felony harassment, assault, unlawful imprisonment, and witness intimidation charges, but convicted Drake of first degree and residential burglary. The jury also

entered special verdicts finding the burglaries were aggravated domestic violence offenses. Drake appeals.

## DISCUSSION

### Admission of Prior Act under ER 404(b)

Drake argues the trial court erred in admitting evidence that was precluded by ER 404(b); namely, that he abused Rose's dog. "This 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) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1969)). "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." DeVincentis, 150 Wn.2d at 17 (citing State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)). A trial court's ruling under ER 404(b) amounts to a manifest abuse of discretion if no reasonable judge would have ruled as the trial court did. State v. Sublett, 156 Wn. App. 160, 194-95, 231 P.3d 231 (2010) rev. granted, 170 Wn.2d 1016, 245 P.3d 775 (2010) (citing State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007)).

Because ER 404(b) explicitly prohibits admission of evidence to prove a defendant has a criminal propensity, a trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing Carson v. Fine, 123 Wn.2d 206, 221, 867 P.2d 610 (1994)). Evidence of prior misconduct may be admissible, however, for other purposes "such as proof of motive, opportunity, intent, preparation,

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plan, knowledge,

identity, or absence of mistake or accident.” ER 404(b).<sup>1</sup> Such evidence is admissible where it is “logically relevant to a material issue before the jury” and the probative value outweighs the prejudicial effect. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Drake contends the evidence that he abused Rose’s dog was not relevant to motive or “any other enumerated ER 404(b) exception.”<sup>2</sup> We disagree. The list in ER 404(b) of purposes for which past acts may be admissible is not exclusive. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). In this case, the trial court admitted the evidence for a variety of reasons, including for the purpose of demonstrating Rose’s reasonable fear of Drake and to explain why she may have delayed reporting Drake’s abuse. We have approved both of these as proper purposes for which evidence of past acts may be admitted. See, e.g., State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999) (evidence of history of threatening behavior admissible to demonstrate “reasonable fear” in felony harassment case) and State v. Wilson, 60 Wn. App. 887, 891, 808 P.2d 754 (evidence of alleged prior assaults admissible to explain victim’s delay in reporting sexual abuse and to rebut implication that molestation did not occur).

Here, Rose testified about both physical and psychological abuse, including one

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<sup>1</sup> ER 404(b) provides:

**Other Crimes, Wrongs, or Acts.** 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.

<sup>2</sup> The State argues Drake did not preserve this argument because he did not specifically object below to the testimony about Rose’s dog. In light of our resolution of this issue, we need not address this argument.

occasion where Drake punched Rose in the stomach and then disappeared with her dog. Drake later called Rose, who could hear her dog crying in the background, as if Drake was hitting the dog. When Drake returned the dog several days later, the dog had welts all over its back and was missing a toenail. She further testified that Drake's abuse made her fear what would happen if she called the police. This testimony was relevant to both the felony harassment and witness intimidation charges. Regarding felony harassment, the State charged Drake with threatening to kill Rose, thereby placing her "in reasonable fear that the threat would be carried out[.]" Regarding witness intimidation, the State charged Drake with threatening Rose to induce her "not to report" information relevant to the criminal investigation of Drake. Moreover, Drake's prior misconduct was relevant to the domestic violence aggravating factors, which the State charged for all of the offenses except the witness intimidation count. To prove the domestic violence aggravating factors, the State was required to present evidence that the crimes were part of "an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time[.]"

The evidence of Drake's prior misconduct was thus "logically relevant to a material issue before the jury." Saltarelli, 98 Wn.2d at 362. Likewise, the probative value of Rose's testimony outweighed any substantial prejudicial effect. The incident with the dog was a small portion of Rose's testimony about Drake's lengthy history of violent behavior. She testified to a litany of assaults and psychological abuse inflicted by Drake, including how Drake shoved her head against the bathroom wall; how Drake

punched her in the jaw and knocked her out; and how Drake said, “You think I won’t kill you, Bitch?”. Moreover, it is difficult to see how the testimony about the dog had any significant prejudicial effect, given the jury heard all of the testimony, but nevertheless acquitted Drake of the charges of felony harassment, second degree assault, unlawful imprisonment, and intimidating a witness.

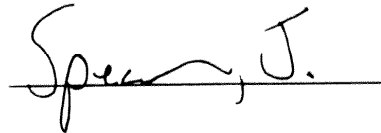
Under these circumstances, we cannot say “no reasonable judge would have ruled as the trial court did.” Sublett, 156 Wn. App. at 194. The trial court did not abuse its discretion in admitting the evidence of Drake’s prior misconduct.

#### Ineffective Assistance of Counsel

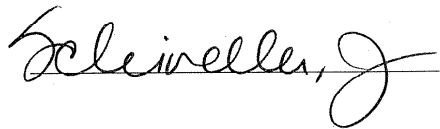
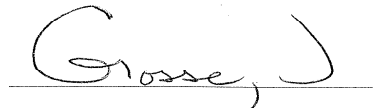
Drake claims his trial attorney provided ineffective assistance of counsel for failing to object to Rose’s testimony about Drake’s abuse of her dog. The purpose of the effective assistance of counsel guaranteed in the Sixth Amendment of the United States Constitution is to ensure that a criminal defendant receives a fair trial. Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, Drake must demonstrate (1) deficient performance, that his attorney’s representation fell below the standard of reasonableness, and (2) resulting prejudice, that but for the deficient performance, the result would have been different. Strickland, 466 U.S. at 687; State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (adopting the standards in Strickland). If a defendant fails to establish either prong, the Court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). As is

described above, the testimony about Drake's prior misconduct was properly admitted. Counsel's performance therefore was not deficient, and we reject Drake's argument on this issue.

Affirmed.

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WE CONCUR:

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