IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28818-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LARRY JAMES HARRISON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — Evidence of prior bad acts is not admissible to show that the defendant acted in conformity therewith; but the same evidence is admissible if it shows something other than the propensity to commit a crime or the crime. Here, the court allowed the State to introduce evidence of prior drunk, disorderly, and threatening conduct by the defendant to explain why the victim of this crime, the defendant's mother, changed her story between the time she called police for help and when she testified in court proceedings. We conclude that evidence of the prior bad acts was properly admitted and we affirm the conviction for unlawful imprisonment.

FACTS

Larry H. Harrison drank all day with his friend, Clinton Morris. Mr. Harrison lived with his mother, Helen Harrison, in a mobile home in Otis Orchards, Washington. Mr. Harrison and Mr. Morris began to tear up Ms. Harrison's home. So she called 911 and asked for police to respond and help her. She reported that the men were drunk, that Mr. Harrison was threatening to kill her, and that he had her restrained in her bedroom. Mr. Harrison can be heard on the 911 tape threatening to kill his mother. Ex. S1, at 86.

Spokane County Deputy Sheriff Charles Sciortino responded to the 911 report of domestic violence. He parked his car two lots away, ran to Ms. Harrison's mobile home, and heard Ms. Harrison yell let go of me. He heard Mr. Harrison yell, "'I'm going to kill you.'" Report of Proceedings (RP) at 93. He entered through the front door and saw Mr. Harrison holding his mother in the hallway of her home. He was physically pushing her back into her room and then blocked access so she could not leave.

The State charged Mr. Harrison with one count of malicious mischief and one count of unlawful imprisonment. The case proceeded to trial to a judge sitting with a jury on February 1, 2010.

The State moved to introduce evidence of a prior incident on May 14, 2009, at Ms. Harrison's home where some of the same deputies were called because her son was drunk and violent and she was afraid: "the basis by which the State is seeking to admit that

would be under either the intent res gestae exceptions under [ER] 404(b) or also to explain what the State would anticipate Ms. Harrison's, basically to explain her behavior. I believe that was because she did not want to testify or did not want to prosecute in May." RP at 4. The State later argued that the evidence tended to show intent: "malicious mischief and unlawful imprisonment are both crimes that require that the defendant acts knowingly." RP at 23-24.

The State wanted the evidence of the May 2009 incident because it expected Ms. Harrison to capitulate and minimize her son's conduct by laying blame on Mr. Morris. And she did. She testified she did not come out of her bedroom because she did not want Mr. Harrison to hit her, but then denied that he had ever hit her. She denied that her son pushed her down the hallway into a bedroom, despite her report to a 911 operator to the contrary. The State also argued that the evidence was admissible in a domestic violence setting to explain why the victim, here Ms. Harrison, would tend to minimize the extent of the assault, citing *State v. Grant*.[1] RP at 27-28. The court admitted the evidence on grounds that it was similar domestic violence: "the drinking, the out of control, the physical force, the intimidation." RP at 35.

Mr. Harrison's theory at trial was that he restrained his mother because he did not

[1] *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609 (1996).

want her to drive at night because her vision was bad and she did not drive well. And he so testified. The court dismissed the malicious mischief count on motion, after the State rested, because the State did not show the requisite value of the property damage. Mr. Harrison was convicted of unlawful imprisonment.

DISCUSSION

Mr. Harrison agrees that evidence of prior bad acts may be admissible to explain the inconsistent statements of a victim of domestic violence. *State v. Nelson*, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006); *Grant*, 83 Wn. App. 98. He contends, however, that Ms. Harrison did not make any inconsistent statements; at best, she simply tried to minimize his behavior and that is not enough to invoke the rule.

"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." ER 404(b).

The admission of ER 404(b), or prior bad acts, evidence requires a four-step analysis. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The judge must first find by a preponderance of the evidence that the event happened. *Id.* This prong is not at issue here. The judge must then identify a purpose for admitting the evidence,

other than propensity; the evidence must be relevant. *Id.* This prong is at issue, as Mr. Harrison contends there is no other reason for the State to introduce evidence of this earlier incident other than to show his propensity to commit the crime at issue here. Third, the court must conclude that the proffered evidence actually shows something other than propensity. *Id.* Again, Mr. Harrison argues that the evidence shows nothing other than propensity. Finally, the court must weigh the probative value of the evidence against its potential prejudice to the defendant. *Id.* Again, this prong does not appear to be at issue here.

Whether the evidence of this prior incident shows something relevant to the crimes charged here is a question of law that the court should review de novo. *State v. Gray*, 134 Wn. App. 547, 554, 138 P.3d 1123 (2006); *Nelson*, 131 Wn. App. at 115-16. And, likewise, whether that evidence shows something other than propensity is a question of law that the court should review de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The question in an ER 404(b) analysis is not whether the evidence tends to show propensity; of course, it tends to show propensity. The question is whether it shows something other than propensity. *State v. Womac*, 130 Wn. App. 450, 456, 123 P.3d 528 (2005), *aff'd in part, rev'd in part*, 160 Wn.2d 643, 160 P.3d 40 (2007). The trial judge

here concluded it did.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The State charged Mr. Harrison with unlawful imprisonment. He is guilty of unlawful imprisonment if he knowingly restrained his mother. RCW 9A.40.040 ("Unlawful imprisonment. (1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.").

The State anticipated, correctly, that Ms. Harrison would backpedal from the statements she made to the 911 operator and to the officers who responded after she made the 911 call. The evidence of the earlier incident then bore upon the factual question of whether Mr. Harrison restrained his mother at all and certainly, whether he knowingly restrained her. The State wanted to show that he did; the victim suggested, ambivalently, that he did not.

Ms. Harrison testified that she made the 911 call "because his friend [Mr. Morris] was there and he was falling all over the place. He was so drunk, he couldn't even walk. And he fell and he's the only person that broke anything." RP at 55-56. She testified in response to questions by the State:

> Q. Okay. Do you remember telling the police officers that your son had pushed you down the hallway into your bedroom?
> A. Well, no he didn't.

RP at 58. When asked whether Mr. Harrison physically pushed her, she responded, "[h]e stumbled and fell against me and then I fell against the door in the hallway." RP at 59.

Division One of this court addressed the question of this ER 404(b) evidence in the context of a domestic violence case in *Grant*:

> *Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.*

Grant, 83 Wn. App. at 108 (emphasis added).

Here, like in *Grant*, there is the same defendant and the same victim. Here, there is the same place, Ms. Harrison's mobile home. Mr. Harrison's prior violent drunken escapades in his mother's home helps explain the inconsistencies between the statements she made that evening and her testimony at trial. *Id.*; *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) ("We adopt this rationale and conclude 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.").

The purpose for the evidence of the previous confrontation appears to be twofold. First, under authority of *Grant*, the State wanted to explain to the jury why Ms. Harrison would be reticent to testify against her son despite the events of the evening of

November 23. The explanation was that this is the way victims of repeated acts of domestic violence tend to respond. *Grant*, 83 Wn. App. at 106. Second, Mr. Harrison's theory of the case, supported by his testimony, was that he was trying to stop his mother from driving. Evidence of the previous incident tended to show a necessary element of unlawful imprisonment—knowledge. He certainly was not trying to stop her from driving on May 14, 2009. Evidence he had done it once before when drunk tended to show he had knowledge of what he was doing on the occasion of the November incident.

And, as far as propensity, the May 14 incident was not the same as the November incident. In November 2009, he restrained his mother in a way that a jury was led to conclude amounted to unlawful imprisonment. The May incident involved drunkenness and destruction of property in Ms. Harrison's home. The point was Mr. Harrison gets drunk and gets violent and Ms. Harrison has a reason to be afraid of him despite her testimony that tended to back away from statements made to the 911 operator and the police. But there was no attempt by the State to show propensity to commit unlawful imprisonment, specifically.

Mr. Harrison argues there was no inconsistent statement here to explain and therefore the introduction of evidence of the May 2009 incident was not justified. Even if he is correct, we do not read *Grant* so narrowly. Ms. Harrison tried to minimize, justify,

and exculpate her son when she testified. This is precisely the situation that the *Grant* court tried to address. The 911 tape and Ms. Harrison's statements to the police stand in marked contrast to her testimony in court about her son's behavior on the night of November 23, 2009. The State was then entitled under authority of *Magers*, 164 Wn.2d at 186, to introduce evidence of the earlier incident. Here, the State proposed to introduce evidence of Mr. Harrison's previous violent and abusive demeanor after drinking to show that Ms. Harrison was afraid of him. *See Nelson*, 131 Wn. App. at 116. And this was relevant to explain the inconsistency between her testimony and her reports to police.

We would also conclude that any error, even assuming error, was harmless. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The test is whether, within reasonable probabilities, the outcome of the trial here would have been any different without this evidence. *Id.* We conclude that the outcome here would not have been any different, with or without the evidence of the May 14 incident.

Mr. Harrison's showing was not that he did not restrain his mother. His testimony and argument was that he restrained her to keep her from getting in her car and driving. The State's showing was sufficient to the point of overwhelming; it included the 911 tapes, the testimony of the responding police officers, and the physical evidence of the

layout of the house and its condition. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). There was ample independent testimony that Ms. Harrison was unable to leave her bedroom, until the police removed Mr. Harrison. There is also more than ample evidence to support the threat to kill and restraint by Mr. Harrison of his mother.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Siddoway, J.