IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29562-1-III
Respondent,	)	
	)	
v.	)	
	)	
AARON RAMIREZ ESPINOZA,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	

Siddoway, A.C.J. — Aaron Ramirez Espinoza was convicted of felony harassment on evidence that included testimony concerning his prior assault of the same victim: his girl friend and the mother of his child. The evidence was admitted in reliance on ER 404(b). On appeal, Mr. Espinoza challenges the trial court's asserted failures (1) to conduct the full analysis required by ER 404(b) on the record and (2) to give an instruction, sua sponte, limiting the jury's use of the ER 404(b) evidence. Because any failure by the trial court to conduct a complete ER 404(b) analysis on the record was harmless, Mr. Espinoza waived a limiting instruction by failing to request one, and Mr. Espinoza's statement of additional grounds raises no issues having merit, we affirm his

judgment and sentence.

FACTS AND PROCEDURAL BACKGROUND

In August 2010, Aaron Espinoza repeatedly struck Jennifer Redburn, his on-again-off-again girl friend, at a carwash in Yakima. Ms. Redburn called 911 shortly after the assault and reported that Mr. Espinoza had punched her once in the face, several times in the stomach (she was then pregnant), and had threatened to "kill [her] right there at the car wash" while displaying a pistol. Report of Proceedings (RP) (Nov. 8, 2010) at 12. All of this occurred in front of her three children, the youngest of which is also Mr. Espinoza's child. Mr. Espinoza was arrested shortly thereafter and charged with several crimes including felony harassment under RCW 9A.46.020(1)(a)(i) for threatening to kill Ms. Redburn.

In the State's trial memorandum, submitted prior to trial, it included a section devoted to "assault offered under ER 404(b)" in which it recapped evidence it wished to offer of a 911 call and complaint made by Ms. Redburn on an evening in mid-June 2010. Clerk's Papers (CP) at 12-14. As described by the State, Ms. Redburn, upset and crying, had reported during the 911 call that Mr. Espinoza had hit her during an argument, that he had "'slammed the car into park, messed [her] car up, and continued to hit [her].'" *Id.* at 12 (alterations in original). Yakima Police Officers Eric Horbatko and Mike Durbin responded to the call. The State's offer represented that Ms. Redburn provided the

officers with additional background on her argument with Mr. Espinoza and repeated her allegations of his assault. Officers took her to the police station where she gave a taped statement and they photographed her injuries. Months later, she declared that her report made in June was untrue.

The State believed Ms. Redburn might again recant or minimize the August events relied upon for the pending charges. Its trial memorandum urged admission of evidence of the June incident as relevant to Ms. Redburn's credibility.

On the first morning of trial, the lawyers argued whether the State should be permitted to offer the testimony of Officer Durbin to the June 16, 2010 instance of domestic violence. Mr. Espinoza objected to the evidence on grounds that there was no proof that the prior incident actually happened, that it could only serve as impermissible evidence of propensity, and that there was no reason to credit Ms. Redburn's earlier accounts of abuse over her subsequent recantations.

The trial court disagreed. Citing to Tegland's discussion of ER 404(b),[1] the court noted that "the . . . cases [cited by Tegland] seem to be saying one way or another that defendant's previous acts of domestic violence are admissible to demonstrate the credibility of the victim's initial complaint particularly in cases in which the victim later

[1] Evidently citing 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence Rule 404(b) author's cmt. 19, at 250-51 (2009-2010 ed.); *see* RP (Nov. 5, 2010) at 152.

recants." RP (Nov. 5, 2010) at 152. It concluded:

> I'm going to allow [the testimony]. I think these cases, you know, there has been a lot more liberal application [of ER 404(b)] because of their unique circumstances involving domestic violence and how alleged victims are reacting to certain situations. It in no way prohibits the defense from raising the exact issues that [it] is arguing to the trier of fact.
>
> This [prior] incident involves her seeing Mr. Espinoza in a car with another woman. She picks him up and an argument ensues. Whatever inferences the jury wants to draw from that, as in this other incident, it doesn't prohibit that at all.

Id. at 153. The court did not make an express finding that the prior misconduct occurred, nor, on the record, did it balance the probative value of this evidence against its prejudicial effect. No limiting instruction was ever requested by Mr. Espinoza.

At trial, responding Officer Elaine Gonzalez testified that she was the first to contact Ms. Redburn in response to the 911 call made in August. Ms. Redburn told the officer that Mr. Espinoza was armed with a pistol during his attack on her. Officer Kimberly Hipner spoke with Ms. Redburn next. Ms. Redburn informed Officer Hipner that Mr. Espinoza was armed, that he had threatened to kill both her and their child, and that she had feared for her life. Officer Hipner noticed fresh scrapes on Ms. Redburn's face and hands.

As anticipated by the State, Ms. Redburn's trial testimony differed significantly from the version of events she recounted shortly after the assault occurred. After her 911 call was played for the jury, Ms. Redburn disavowed several representations she made

during that call. She testified that while Mr. Espinoza did punch her repeatedly in the stomach, he never hit her in the face, he was not armed, and she did not think he had ever threatened to kill her. In response to the State's questioning her about the events of June 16, she denied that Mr. Espinoza hit her on that occasion, after which the State introduced Officer Durbin's testimony that Ms. Redburn reported being hit twice by Mr. Espinoza on that date. Officer Durbin also testified that he photographed an apparent injury on Ms. Redburn's back following that assault.

The jury found Mr. Espinoza guilty of felony harassment for threatening to kill Ms. Redburn. It found him not guilty of the charge of felony harassment for threatening to kill his young child. By special verdict, it found that he was not armed at the time the threats were made, but did determine that the crime amounted to an aggravated domestic violence offense. Mr. Espinoza received an exceptional sentence of 24 months and this appeal followed.

ANALYSIS

Mr. Espinoza assigns error to the trial court's decision to allow testimony regarding the prior instance of domestic violence alleged to have taken place on June 16. He claims that the trial court abused its discretion by admitting the evidence without first finding that the prior misconduct actually occurred or balancing the prejudicial effect of the evidence against its probative value on the record. He also suggests that the trial

court was required to give a limiting instruction sua sponte. We address the two issues in turn.

I

We review the trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.* This standard is also violated when the trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

ER 404(b) is a categorical bar to admission of evidence of prior misconduct for the purpose of proving a person's character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The purpose of the rule is to prohibit the admission of such evidence to show that the defendant is a "criminal type" and thus likely guilty of committing the crime charged, while allowing its admission for other, legitimate purposes such as proof of motive or intent. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The analytical approach to determine the admissibility of a person's prior crimes, wrongs, or acts under ER 404(b) is thorough and well settled. To admit evidence of a person's prior misconduct, 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.'" *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The trial court must conduct this analysis on the record. *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231, *review granted*, 170 Wn.2d 2016 (2010).

Mr. Espinoza argues that the trial court committed reversible error by not evaluating the first and fourth steps on the record. With respect to the first—whether, by a preponderance of evidence, the misconduct occurred—the record adequately reflects the court's belief that the prior misconduct did occur as described in the offer of proof included in the State's trial memorandum. When performing its ER 404(b) analysis, a trial court may rely on an offer of proof by the lawyer offering the evidence, explaining what the evidence will show if admitted. *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). Where a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, we can excuse the trial court's lack of an explicit finding. *State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007).

With respect to the fourth step, however, there is nothing in the record—either argument by the lawyers or comments by the court—referring to ER 403 balancing. If

anything, the record suggests that the trial court regarded ER 404(b) admissibility standards as relaxed in the domestic violence context. While it is true that our Supreme Court has recognized 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," it also noted that the probative value must still outweigh the prejudicial effect. *State v. Magers*, 164 Wn.2d 174, 186, 184, 189 P.3d 126 (2008).

Even granting that the trial court failed to make an adequate record, it is reversible error (being nonconstitutional error) only if Mr. Espinoza shows "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Alams*, 93 Wn. App. 754, 759, 970 P.2d 367 (1999) (internal quotation marks omitted) (quoting *State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013, 787 P.2d 906 (1989)). He has not even undertaken to meet his burden.

There are at least two different circumstances in which the failure to weigh prejudice on the record under ER 404(b) is harmless error. The first is when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. *State v. Carleton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996); *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). Given the trial court's discussion in admitting the evidence, there is no reason to believe it would have reached a different result had it

conducted an ER 403 balancing analysis. Depending on Ms. Redburn's testimony, the evidence had the potential to become highly relevant to her credibility. Given the evidence as a whole, it was not significantly prejudicial in respect to the felony harassment charge. Mr. Espinoza has not shown any reasonable likelihood that the trial court would have excluded the evidence had he pressed it to balance probative value and prejudice on the record.

Such an error may also be considered harmless when, considering the untainted evidence, the appellate court can conclude that the result would have been the same even if the trial court had not admitted the evidence at issue. *Carleton*, 82 Wn. App. at 686-87. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole and did not affect the outcome of the trial. *Id*. at 687; *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here the jury was played a 911 tape that captured a frantic Ms. Redburn relaying that Mr. Espinoza had threatened to kill her during the course of an assault. She repeated this information to responding officers. Ms. Redburn admitted at trial that her memory of the event had faded and that Mr. Espinoza may have instead previously told her that he "wish[ed she was] dead." RP (Nov. 8, 2010) at 21. Any error in admitting the evidence was harmless given the balance of the trial record.

II

Mr. Espinoza's second assignment of error—that the trial court was required to give a limiting instruction despite his failure to request one—ignores well-settled law that the failure to request such an instruction waives the trial court's obligation to so instruct. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011); *State v. Williams*, 156 Wn. App. 482, 492, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010). Mr. Espinoza cannot complain at this late date that the trial court failed to give such an instruction.

STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds, Mr. Espinoza asserts possible inconsistencies in the officers' testimony and alleges that Ms. Redburn fabricated her story so that he would be arrested. He fails to cite to the record or to any legal authority. While reference to the record and citation to authorities are not necessary or required, the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c). At best, Mr. Espinoza's challenge appears to be a sufficiency of evidence challenge. As previously addressed, the State's evidence, even excluding evidence of the June 2010 domestic violence incident, was clearly sufficient to sustain the jury's verdict.

Affirmed.

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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Siddoway, A.C.J.

WE CONCUR:

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Sweeney, J. Kulik, J.