S. Ct. No. 98562-6
COA No. 79082-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE R. ENGBERG,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Shane R. Engberg asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

He seeks review of the decision of the Court of Appeals, Division I, filed on April 20, 2020, affirming his conviction and sentence. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court abuse its discretion by admitting ER 404(b) evidence of "other bad acts" when the attempted assault of a child conviction was not admitted in the aggravator phase of the trial even though it was admitted during the guilt phase and its prior erroneous admission greatly prejudiced Mr. Engberg in both phases of the trial?

2. Did the erroneous admission of ER 404(b) evidence so taint the proceedings that the convictions should be reversed and a new trial ordered?

3. Did the court err by denying the defense motion to strike the aggravated domestic violence offense aggravator because it is void for vagueness?

4. Did the court err by refusing to give the defense's

proposed limiting instruction insofar as it declined to give the wording the evidence could be considered "if you find it reliable"?

5. Did the court err by applying the aggravating circumstance of an "aggravated domestic violence offense" at sentencing when it is void for vagueness?

D. STATEMENT OF THE CASE

Mr. Engberg was charged by amended information with count 1: second degree rape, count 2: second degree assault by strangulation, count 3: unlawful imprisonment, count 4: felony harassment, and count 5: tampering with a witness, all with domestic violence allegations and the aggravating factor the offenses were part of an ongoing pattern of psychological, physical, or sexual abuse. (CP 13-16). Because of the ER 404(b) evidence that was found admissible, the court determined the case would be bifurcated between the guilt phase and the domestic violence aggravator phase. (6/25/18 RP 142, 146-50). The court had earlier denied a defense motion to strike the aggravator on vagueness grounds. (*Id*. at 124). The case proceeded to trial.

Deputy Whitney Richtmyer was on duty December 6, 2017, and was dispatched to a home in King County, Washington. (7/2/18 RP 28). The deputy made contact with M.C., who was

crying and visibly upset. (*Id*. at 30). Her voice was hoarse and scratchy. (*Id*.). She was holding up her stretch pants, which Mr. Engberg had forcefully pulled down. He pushed her down and strangled her to the point of unconsciousness. (*Id*. at 31). M.C. also told the deputy she was saying no and Mr. Engberg put a water bottle about an inch inside her vagina. (*Id*.). When he left the room, she went into the bathroom, found his cell phone, and called her son. (*Id*. at 32). The State then questioned Deputy Richtmyer about Mr. Engberg's daughter and a prior incident of injury, whereupon the court read the limiting instruction on consideration of this evidence. (*Id*. at 32-33). M.C. indicated she knew of his prior conviction involving his injured daughter and he told her that she knew what he had done to his daughter and could do the same to her. (*Id*. at 33).

Leaving the scene, the deputy and M.C. went to the police station in White Center where he took her statement. (7/2/18 RP 36). She did not go for any medical treatment or testing, but she had visible injuries. (*Id*. at 40-41). A warrant was subsequently issued and Deputy Richtmyer arrested Mr. Engberg on December 28, 2017. M.C. was in the car. (*Id.* at 44).

She knew Mr. Engberg from grade school. (7/2/18 RP 49). From then until 2016, they did not hang out. (*Id*. at 50). They got together again from Facebook around December 27, 2016. (*Id*.). From then on, M.C. did not go home and was with Mr. Engberg at his house. (*Id*. at 51). They dated right away and things were OK at the beginning. (*Id*. at 51-52). Her youngest son, Alex, used to visit, but not after the abuse started about three months into the relationship. (*Id*. at 53). The court read the limiting instruction to the jury. (*Id*.).

In the first incident, M.C. got a black eye when Mr. Engberg grabbed her phone and hit her in the eye. (7/2/18 RP 54). She had two cell phones and a tablet, all broken by him. (*Id*. at 54-55). She had worked at the Dollar Store for three months and liked it. (*Id*. at 55). M.C. saw an old boyfriend there. Mr. Engberg got jealous and wanted her to quit. (*Id*. at 56). The first incident happened shortly after she quit her job. (*Id*.). They lived at his parents' home along with his mother, father, and brother. (*Id*. at 56-57). The physical abuse went on from March-December 2017. (*Id*. at 57-58).

She said Mr. Engberg would hit her, give her black eyes, and they all ran together. (*Id*. at 58). He would squeeze her hands

until they bruised, tore her mouth, and had head-butted her. She went back to him anyway as she had nowhere else to go. (*Id*.). M.C. recounted an incident that happened just before December 6, 2017, when he bit her arm while she was in the car. (*Id.* at 64-65).

On December 6, 2017, she and Mr. Engberg had left to go eat at a pho restaurant. (7/2/18 RP 66). A black man was at one of the tables and Mr. Engberg started squeezing her leg and hands, saying she liked black men. (*Id*.). When she got up to walk out, he followed and grabbed the back of her hair to pull her back in. He let go when a man asked where they were going as their food had arrived. (*Id*. at 67). The man left so Mr. Engberg grabbed her and pulled her into the car. M.C. got out, but he dragged her back again and took off. (*Id*.).

They went back to their bedroom in the house where they got into an argument over black men. (7/2/18 RP 68). He grabbed M.C. by the neck and choked her, while telling her about his daughter and what he could do to her. (*Id*.). She had to go to the bathroom, where his coat was hanging with a cell phone in it. (*Id*. at 69). She called her son and told him to get her. (*Id*.). M.C. went back upstairs to get her stuff, but Mr. Engberg would not let her go. He was jealous for no reason since she was always with

him anyway. (*Id*.). He put his hands around her neck after the phone call also. (*Id*. at 70). She did not pass out, but she felt the strangulation effects, including a hurting throat and marks on her neck, for about 4 days. M.C. could not breathe while his hands were around her neck. (*Id.* at 71).

M.C. was aware of Mr. Engberg's conviction for attempted assault of a child. (7/2/18 RP 71). His daughter had been gravely injured. (*Id*.). She believed he was innocent. (*Id*. at 72). M.C. was afraid when he strangled her and he specifically told her he would kill her. (*Id*.).

After she had made the phone call, Mr. Engberg was angry and pulled her down on the bedroom floor. (7/2/18 RP 73). He tried to have sex with her, but was unable. She was on her back when he got a water bottle and shoved the top of it in her vagina until it broke. (*Id*. at 74). He stopped so she got her pants on. He still tried to keep her in the room. (*Id*.). She heard her son outside yelling and asking if she was OK. She went back downstairs when Mr. Engberg finally let her go. Her son was there with his father and she tried to get into their car. (*Id.* at 75). Mr. Engberg chased her and dragged her back into the home. The police then showed up because her son had called them. (*Id*.). He let her go and went

back into the house. Her ex-husband was in his car, her son was outside, and they saw everything. (*Id*. at 77).

Two police officers responded to the Engberg home. (7/2/18 RP 80). M.C.'s ex-husband and son went with her to the police station. (*Id.*). She told the police she had been sexually assaulted, restrained, and threatened. (*Id.* at 81). The police suggested medical treatment, but she did not go. (*Id*. at 84). A detective called her afterward about the case, but she did not answer. (*Id*. at 86). M.C. went back to Mr. Engberg about a week later, having nowhere else to go. (*Id*.). He apologized and she hoped things would get better. She was there when he was arrested at the Engberg home. (*Id*. at 87).

M.C. talked to him while he was in the King County jail. (7/2/18 RP 89). She spoke to Mr. Engberg after the arrest and before a no contact order was entered. (*Id*. at 91). One call was to tell his mother she was pregnant so she could move back in with his parents. (*Id*. at 93). She was not pregnant, however. (*Id*.). The plan was to tell the prosecutors she was drunk so she was not going forward to press charges. (*Id*. at 95). M.C. wanted to help Mr. Engberg at that time. (*Id*.).

A second call involved a discussion about recanting. (7/2/18

RP 96). M.C. ended up recanting. (*Id*.). She wrote one statement after looking online, but she wrote a second based on directions from Mr. Engberg. (*Id*. at 96-97). She testified the first statement was generally all untrue. (*Id*. at 98). The second was more specific, geared to court. (*Id*.). M.C. said the recanting statements were not accurate. (*Id*.). On another call, Mr. Engberg told her "no victim, no case," which she took to mean that if she did not tell what happened, there was no case. (*Id*. at 101-02).

Deputy Donald Scherk was on duty on November 27, 2017, when he was went to the Engberg residence on a 911 call over a domestic violence incident the night before and contacted M.C. (7/3/18 RP 219). She was apologetic, crying, and had a bite mark on the back of her left bicep. (*Id*. at 221).

Two DOC employees, Gregory Cobb and Angela Coker, testified they supervised Mr. Engberg due to his attempted assault of a child in the first degree conviction and both informed M.C. about it so she would be aware of the abuse. (*Id*. at 223-229).

Mr. Engberg excepted to the court's limiting instruction because it did not include the language "if you find it reliable" after the words "any evidence." (7/10/18 RP 245-46).

Mr. Engberg was convicted on all five counts, along with the domestic violence allegations, as charged. (7/11/18 RP 342; CP 83-94). In the aggravator phase, the jury found the aggravating circumstance of an "aggravated domestic violence offense" as to all five counts. *Id*. at 364).

Although allowed in the guilt phase, evidence of the attempted assault of a child was not allowed in the aggravator phase because it was too remote. (7/10/18 RP 314, 316). The defense again raised the vagueness defense to the aggravating factor. (*Id*. at 316). The court denied the motion, noting there was no vagueness even if the doctrine applied to the aggravator of an ongoing pattern of psychological, physical, or sexual abuse of the same victim. (*Id*. at 338). No new evidence was presented in the aggravator phase.

The jury found Mr. Engberg guilty as charged and the domestic violence aggravator applied to the five counts. The court imposed an indeterminate sentence of 280 months to life in prison. The Court of Appeals affirmed in an unpublished opinion.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Engberg asks this Court to accept review because the

decision of the Court of Appeals conflicts with other appellate decisions. RAP 13.4(b)(1), (2). It also presents an issue of substantial public interest that should be determined by the Supreme Court. RAP13.4(b)(4).

The admission of ER 404(b) evidence of his conviction for attempted assault of a child in the first degree was improper. There was no need to admit evidence of that conviction because it was remote in time, occurring some eight years earlier, and was unduly prejudicial. The court was aware of the impact of this particularly damaging evidence:

> Okay, I'm going to grant the Defense motion in this regard. I agree that just as a matter of human nature it would be difficult for any jury to compart-mentalize to the degree of considering the 404(b) evidence and the res gestae prior conviction evidence just for the reason I outlined. And then at the same time be considering it with respect to whether there's a pattern of domestic violence is sort of contradictory.
>
> And the whole problem is that when you talk about a pattern, that means acting in – that means a certain kind of behavior. It's very close to conformity to – and predisposition. So this is a very reasonable way of dealing with that problem. I don't really see any downside to it except that it may take a very short amount of time longer than it otherwise would. I think it would reduce the prejudice to Mr. Engberg pretty substantially so I'll grant that request. All the evidence, of course, comes in during the unitary trial. (6/25/18 RP 150-51).

At the aggravator phase of the bifurcated trial, the court did not allow evidence of the attempted assault of a child to be considered as it was too remote. (7/10/18 RP 314, 316). It stated:

> I just don't see that there's sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that there is a pattern here based on a 2010 conviction for assault of a child and domestic violence incidents against [M.C.] that occurred in 2017. So I'm not going to allow that. (7/10/18 RP 316).

The problem is the jury already heard in the guilt phase about the attempted assault of a child conviction where the victim was gravely injured. (*See*, *e.g.*, 7/2/18 RP 32-33, 71; 7/9/18 RP 224). The bell had already been rung and simply could not be unrung by excluding the attempted assault in the aggravator phase. There was no overriding probative value for admitting the conviction for attempted assault of a child as ER 404(b) evidence in the guilt phase as it was too remote in time (as recognized by the court) and unduly prejudicial. There was no need for bringing it up in this trial at all since M.C. testified regarding her fear of Mr. Engberg and what she had gone through. The attempted assault also did not involve her child. Admission of the conviction thus constituted propensity evidence forbidden by ER 404(b).

The Court of Appeals erroneously stated Mr. Engberg relied on *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014), as support for his claim the court's balancing was improper. The admissibility of prior acts of domestic violence is confined to cases where the State establishes their overriding probative value, such as to explain a witness's otherwise inexplicable recantation. *Id*. at 925, *Gunderson* was only cited for the rules of law stated in the opinion and not as controlling on its facts. Indeed, the State established no overriding probative value for admitting the attempted assault of a child conviction.

The Court of Appeals noted the State offered the conviction to prove the reasonable fear element as to the felony harassment charge and to prove the intimidation element of the unlawful imprisonment charge. (Op. at 5). The State had offered evidence of a threat Mr. Engberg had made to M.C. to the effect that if he done what he did to his own daughter, M.C. could just imagine what he would do to her and the ones she loves. But the Court of Appeals ignored M.C.'s own testimony that she believed Mr. Engberg was innocent of the attempted assault. (7/2/18 RP 72). This threat was thus unnecessary to prove the elements of reasonable fear and intimidation for the two charges.

But the trial court found this evidence of the attempted assault was highly probative in determining whether M.C.'s fear was reasonable. The Court of Appeals opined "[i]ntuitively, M.C.'s knowledge of this prior conviction goes to the reasonableness of her belief that Engberg would carry out his threats against her." (Op. at 6). Its observation is flawed because M.C. believed Mr. Engberg was innocent. The evidence was irrelevant to the elements of the harassment and unlawful imprisonment charges. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The Court of Appeals determined the probative value of this evidence outweighed its prejudicial value. In light of M.C.'s testimony, however, the conviction evidence was unnecessary as she testified regarding prior incidents of domestic violence. The attempted assault of a child conviction was remote in time, did not involve M.C.'s child, and added nothing to the evidence the State already had to present its case. There was no probative value in the conviction; rather, it served to insure Mr. Engberg would be found guilty because of the very mention of the attempted assault of a child. Contrary to the Court of Appeal's observation, the trial court's ruling on relevance was not a thoughtful means of reducing the potentially prejudicial effect of the evidence. (Op. at 6). Its

clear prejudicial value tainted the guilt phase of the trial and the same jury knew of it at the aggravator phase. The trial court and the Court of Appeals erred. *Thang*, *supra*. Review is appropriate under RAP 13.4(b)(1) and (2) as Division I's decision conflicts with *Gunderson* and *Thang*.

Mr. Engberg challenged the trial court's refusal to give the defense's proposed wording in the ER 404(b) evidence limiting instruction. WPIC 5.30. The Court of Appeals determined the proposed instruction given was not an accurate statement of the law. The only change to the pattern instruction was the added phrase, "if you find it reliable," regarding the ER 404(b) evidence. The rejected phrase, however, is a correct statement of the law because the trial court must have found by a preponderance of the evidence that the misconduct occurred in doing its analysis for admitting the evidence in the first place. *Thang*, 145 Wn.2d at 642.

It is also not a comment on the law by the judge since it necessarily found the misconduct took place by a preponderance before admitting the evidence. M.C. testified she believed Mr. Engberg was innocent of the attempted assault of a child. (7/2/18 RP 72). Faced with conflicting testimony, the jury determines credibility so the phrase "if you find it reliable" was proper and

should have been included in the jury instruction. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Without the words "if you find it reliable", the limiting instruction essentially stated the "other bad acts" were verities. An instruction that could be interpreted by a reasonable juror as a mandatory presumption violates fundamental due process rights. *City of Seattle v. Gellein*, 112 Wn.2d 58, 768 P.2d 470, 775 P.2d 448 (1989). The instruction given by the court here requires the jury to find the existence of the elemental fact of an "ongoing pattern of abuse" since, by its very language, it told the jury the State proved certain predicate facts. The Court of Appeals decision conflicts with *Hutton* and *Gellein*. RAP 13.4(b)(1), (2).

Mr. Engberg also challenged the denial of the defense's motion to strike the aggravator for vagueness. He argued *State v. Baldwin*, 150 Wn.2d 446, 78 P.3d 1005 (2003), is no longer controlling in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). Mr. Engberg was aware of *State v. Brush*, 5 Wn. App.2d 40, 425 P.3d 545 (2018), *review denied*, 192 Wn.2d 1012 (2019), and similar Court of Appeals' cases addressing this issue. He also acknowledges these intermediate appellate court opinions are on point with the defense

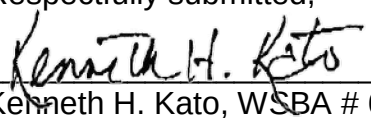
argument presented at trial and on appeal. But there is no direction from the Supreme Court since *Baldwin*. Moreover, in light of *State v. Allen*, 192 Wn.2d 526. 431 P.3d 117 (2018), the issue needs authoritative resolution. *State v. Santos*, 2020 Wash. App. LEXIS 1244 (Wash. Ct. App., April 30, 2020), Pennell, J., dissent at 49-51 (unpublished opinion cited as persuasive authority only). The vagueness challenge involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Engberg respectfully urges this Court to grant his Petition for Review.

DATED this 19th day of May, 2020.

Respectfully submitted,



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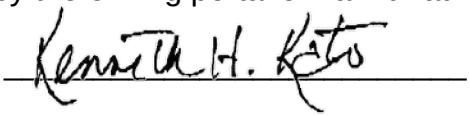
CERTIFICATE OF SERVICE

I certify that on May 19, 2020, I served a copy of the petition for review by USPS on Shane R. Engberg, # 376597, 191 Constantine Way, Aberdeen, WA 98520; and by the eFiling portal on Ian Ith at his email address.



APPENDIX

FILED
4/20/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. SHANE RICHARD ENGBERG, Respondent.	)	No. 79082-0-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Shane R. Engberg was convicted at trial of rape in the second degree, assault in the second degree, unlawful imprisonment, felony harassment, and witness tampering—all of which included a domestic violence designation. In a bifurcated proceeding, the jury further found the statutory domestic violence aggravating factor applied to all five counts. Engberg argues the trial court improperly admitted ER 404(b) evidence regarding a prior conviction which he directly implicated in his threats to the victim. He also argues the court erred in denying his modified jury instruction and that the domestic violence aggravator statute is void for vagueness. The trial court did not abuse its discretion as to the admission of prior bad act evidence or denial of the modified jury instruction and binding precedent defeats Engberg's vagueness challenge to the aggravator statute. We affirm.

FACTS

On December 6, 2017, Shane Engberg and M. C. began arguing while out at a restaurant. This argument continued when they returned home and escalated to the point that Engberg refused to let M.C. leave. Eventually he choked her by the neck and threatened to kill M.C., her 12-year old son, and anyone else she loved. Engberg had previously been convicted of attempted assault of a child in the first degree. M.C. had been informed of this conviction by Engberg's assigned Community Corrections Officer, pursuant to his Department of Corrections supervision. During the dispute, Engberg told M.C. if he had done that to his own daughter, to "imagine what he would do" to M.C. and the ones she loved.

M.C. struggled to leave but Engberg continued to grab and push her. M.C. eventually convinced Engberg to allow her to go to the bathroom and on the way, she retrieved Engberg's cell phone. M.C. called her son to have her ex-husband come get her. When she returned to Engberg, he strangled M.C. to the point she almost passed out, and continued to assault her. Engberg vaginally penetrated M.C. with a water bottle and repeated his threats to her, referencing his prior conviction. As the assault continued, M.C.'s son was outside the room, asking if she was OK. Engberg eventually allowed M.C. to go downstairs to tell her son and ex-husband to leave.

When M.C.'s ex-husband saw her injuries and visible fear, he told their son to call 911. King County Sheriff's deputies arrived and Engberg fled into the house. He locked the door and acted as if no one was home. M.C. showed visible signs

of violence and informed the deputies of what had happened, but she declined medical attention. She did provide a statement to law enforcement.

On December 28, 2017, a warrant was issued for Engberg's arrest and he was arrested as he arrived home with M.C., who continued living with him. Engberg was charged with rape in the second degree, assault in the second degree, unlawful imprisonment, felony harassment, and witness tampering. All charges included a domestic violence designation and an aggravating factor that the conduct was part of an ongoing pattern of psychological, physical or sexual abuse. While the case was pending, M.C. made a recanting statement to law enforcement, but ultimately testified at trial consistent with her original statement at trial.

Engberg's trial was bifurcated between the guilt phase and the aggravator. Engberg was found guilty as charged at trial and the jury found that the domestic violence aggravator applied to all five counts. The court imposed an indeterminate sentence of 280 months to life in prison. Engberg timely appealed.

ANALYSIS

I. Admission of ER 404(b) Prior Bad Act Evidence

Engberg first argues that the court improperly admitted evidence of prior bad acts. His briefing acknowledges that the court admitted both his conviction for attempted assault of a child in the first degree for an incident involving his daughter and allegations of prior abuse of M.C. under ER 404(b). However, he only challenges the admission of the conviction involving his daughter. We review a trial court's admission of evidence for abuse of discretion. State v. Magers, 164

Wn.2d 174, 181, 189 P.3d 126 (2008). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"ER 404(b) is a categorical bar to admission of evidence 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 same evidence may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Id. (Emphasis in original). As such, the court must engage in careful analysis when determining admissibility of such evidence:

> To admit evidence of other wrongs, 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.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court's prior bad act analysis under ER 404(b) must be conducted on the record. State v. Foxhaven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Here, Engberg argues the evidence of his prior attempted assault of a child in the first degree conviction was more prejudicial than probative. For this argument Engberg relies on State v. Gunderson to aver that the court's balancing was improper since the prior conviction was a domestic violence charge. 181 Wn.2d 916, 337 P.3d 1090 (2014). However, Gunderson is not instructive here. Gunderson did involve evidence of the defendant's prior domestic violence

convictions. Id. at 923. There, however, the trial court had admitted the prior convictions to impeach a victim's testimony that she had never been assaulted. Id. at 920. Critical to the analysis in Gunderson was that the victim's testimony had been consistent since the crime was initially reported. Id. at 924-25. This was not a case in which the prior conviction was being admitted to prove an element of the crime and is therefore distinguishable.

Here, the trial court provided its analysis on the record as to the necessary steps in determining admissibility. The first step is finding by a preponderance of the evidence that the conduct occurred. Neither party challenges the court's finding as to this step of the test. Furthermore, a guilty plea is an admission of factual guilt. In re Pers. Restraint Petition of Reise, 146 Wn. App. 772, 782, 192 P.3d 949 (2008). Engberg's plea to this earlier crime was provided to the trial court here and is contained in the record on appeal. This first step is properly established.

The second step is to identify the purpose for which the evidence is being introduced. The State offered it to prove the element of reasonable fear as to the felony harassment charge and to prove the intimidation element of the unlawful imprisonment charge. The prior conviction was also being offered as res gestae, to help provide context for the threat M.C. testified Engberg made, that if he had done what he did to his own daughter, "just imagine what he would do to [M.C.] and the ones that [she] love[s]." This threat was the underlying factual basis for two charges, felony harassment and unlawful imprisonment, for which Engberg

was tried. The trial court properly identified why the prior conviction was being offered into evidence.

The third step in examining admissibility is for the trial court to determine whether the evidence is relevant to prove an element of the crime(s) charged. Here, the State argued that the prior conviction was relevant to prove an essential element of each of two serious felonies of the five for which Engberg was being tried. The trial court agreed; the oral ruling emphasized that this evidence was highly probative as to a determination of whether M.C.'s fear was reasonable. Intuitively, M.C.'s knowledge of this prior conviction goes to the reasonableness of her belief that Engberg would carry out his threats against her. For these same reasons, it is relevant to the intimidation element of the unlawful imprisonment charge. The trial court properly determined that the prior conviction was directly relevant to prove elements of two of the charges.

The final step in the analysis is to weigh the probative value of the evidence against the prejudicial effect it may have. Here, the court clearly weighed the probative nature against the potential for prejudice, which is illustrated by the discussion on the record as to how to sanitize the prior conviction for the jury. Additionally, the record indicates the concerns of prejudice were an instrumental reason for the ruling to bifurcate the guilt and aggravator phases of the trial. Given the court's ruling on relevance, this was a thoughtful means of reducing the potentially prejudicial effect of the evidence. The final step in the ER 404(b) analysis is satisfied.

Engberg has not met his burden of proving that the trial court abused its discretion by admitting the prior bad act evidence. Further, it is a challenge to reconcile the fact that Engberg relied on his conviction to provide credibility to the threats he made against M.C. and then argue at trial that the prejudicial effect outweighs the probative value as to the elements of the charges stemming from those threats. We affirm the trial court's ruling on admissibility of this prior bad act evidence under ER 404(b).

II. Denial of Defense's Proposed Jury Instruction

Engberg next argues that his due process rights were violated by the court declining to include the phrase "if you find it reliable" in a jury instruction regarding the ER 404(b) evidence that was admitted. We disagree.

If prior bad act evidence is admitted under ER 404(b), the trial court must give a limiting instruction to the jury. Gunderson, 181 Wn.2d at 923. "We review a trial court's rejection of a party's jury instruction for an abuse of discretion." City of Seattle v. Pearson, 192 Wn. App. 802, 820, 369 P.3d 194 (2016). Jury instructions are sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly convey the applicable law to the jury. Id. at 821.

Here, Enberg's proposed jury instruction was as follows:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a prior conviction for attempted assault of a child, allegations of prior assaults by Mr. Engberg upon [M. C.], including on November 27, 2018, allegations that Mr. Engberg broke cell phones belonging to [M. C.], that he locked her social media accounts, and didn't allow her to be alone. This evidence, if you find it reliable, may be considered by you only for the purpose of determining whether [M. C.] was placed in reasonable fear that the defendant would carry out alleged threats, and to assess

> [M. C.]'s credibility in light of her different statements. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

(Emphasis added). This final instruction proposed by Engberg was a slight, but significant, modification of Washington Pattern Jury Instructions (WPIC) 5.30. The judge denied Engberg's request for this customized limiting instruction out of concern that the added phrase "if you find it reliable" could be considered a comment on the evidence and that it was not a correct statement of the law. Though Engberg makes claims of due process violations, he cites no support for that proposition.

During trial, when Engberg's prior conviction came up in testimony, the court gave the oral limiting instruction provided by the defense, without objection from the State. The instruction provided:

> Jurors, I have this instruction to read to you. I'm allowing this evidence, but you may consider the answers only for the purpose of determining whether [M. C.] was placed in reasonable fear that the defendant would carry out alleged threats and to assess [M. C.]'s credibility in light of her recantations. You may not consider the answers for any other purpose.

This instruction was also given when testimony was presented regarding past abuse of M.C. by Engberg.

Engberg only challenges trial court's denial of his proposed final jury instruction; the modified WPIC 5.30 instruction. At the time he proposed the instruction, Engberg argued that the additional language was important to prompt the jurors to consider the reliability of the evidence. "[T]he general rule is that the trial court may properly refuse to give the requested instruction if it is incorrect." Gresham, 173 Wn.2d at 424. In Gresham, our supreme court found error when

the trial court rejected a 404(b) limiting instruction that was improper, but then gave no limiting instruction at all. Id. However, the Gresham court determined that such an error was harmless. Id. at 425.

In Engberg's case the trial court merely rejected the defense's proposed final limiting instruction based on concerns that the modification could be taken as a judicial comment on evidence, which would be improper. See WASH. CONST. art. IV § 16. The trial court gave Engberg's proposed oral limiting instruction which expressly raised consideration of M.C.'s credibility and the standard 5.30 WPIC. Engberg fails to provide the necessary support and analysis to argue the standard WPIC was not an accurate statement of the law. We hold the trial court did not abuse its broad discretion in rejecting Engberg's modified jury instruction.

III. Denial of Defense Motion to Strike the Aggravator for Vagueness

Engberg's final argument is that the trial court improperly denied his motion to strike the aggravating factor that the offenses were part of an ongoing pattern of psychological, physical, or sexual abuse over a prolonged period of time. See RCW 9.94A.535(3)(h)(i). More specifically, Engberg argued in a pretrial hearing that the "ongoing pattern" aggravator was void for vagueness. Both at the trial court and now, Engberg focuses on the fact that State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) is no longer binding precedent following Blakely v. Wash., 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). The main issue presented is whether a defendant is still precluded from challenging the sentencing aggravators in RCW 9.94A.535(3) on vagueness grounds.

Engberg fails to address multiple recent opinions by this court that have provided guidance on this issue. We decline to overrule our recent precedent. The State correctly points out that this court has expressed that Baldwin is still good law as to the proposition that aggravators are not subject to vagueness challenges. See State v. Brush, 5 Wn. App.2d 40, 56-63, 425 P.3d 545 (2018); See also State v. DeVore, 2 Wn. App.2d 651, 660-65, 413 P.3d 58 (2018).

Brush explicitly states, "[w]e hold that Baldwin remains good law. Accordingly, we apply Baldwin and hold that Brush cannot assert a vagueness challenge to RCW 9.94A.535(3)(h)(i)." 5 Wn. App.2d at 63. Brush is directly on point, providing a thorough analysis of the defendant's vagueness challenge to RCW 9.94A.525(3)(h)(i) in light of Blakely. Engberg's briefing fails to acknowledge Brush. He does not offer the necessary support to confront his constitutional challenge or provide argument as to why we should not adhere to precedent. For these reasons, Engberg's argument is not well taken and, in reviewing Brush, we do not find any reason to doubt our decision there. As such, the court's denial of Engberg's pretrial motion challenging the aggravator as void for vagueness was proper.

Affirmed.

WE CONCUR:

May 19, 2020 - 3:04 PM

Filing Petition for Review

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