

64404-1

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No. 64404-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,

v.

JEREMIAH RUPE,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey

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REPLY BRIEF

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## A. REPLY ARGUMENT

**THE FAILURE TO BIFURCATE WAS AN ABUSE OF DISCRETION AND REVERSIBLE PREJUDICE IS PLAIN IN A CASE WHERE THE PRIOR BAD ACTS WERE THE SAME CONDUCT AS THE CHARGED CRIME OF SECOND DEGREE ASSAULT AND ITS 63-MONTH SENTENCE.**

The procedural facts of this case speak for themselves. The State sought and obtained a conviction for assault and its 63 month exceptional sentence by taking advantage of erroneous trial court rulings that admitted devastatingly prejudicial prior bad act evidence. On appeal, this Court's view of the entire case allows it to recognize that the evidence came in under the inadequate and unacceptable rationale that the prior acts had – at best, and not conceded – a shadow of relevance to the case, created out of shabby cloth when the State joined insignificant minor charges for the very purpose of securing a verdict guaranteed by the jury's inevitable view of the defendant as a repeat, long time violent batterer – a portrayal the State painted by jamming the bad act evidence into the case by legally unsupportable means. The Opening Brief details Mr. Rupe's argument that the trial court's decision, deeming admissible the objectionable prior act evidence

and thus denying bifurcation under RCW 9.94A.537(4), was error under the new statute.

Mr. Rupe fully acknowledged that his counsel did not initially object, on specific Knapstad<sup>1</sup> sufficiency grounds, to the State's plainly purposefully hindering conduct of amending the information and adding the felony harassment charge to counter his bifurcation request, which was and is motivated by concerns of truly damaging prejudice in this case caused where the bad acts and the charge of assault are the same. See Appellant's Opening Brief, at pp. 6-7, 17-18 (discussing the nature of the bad act evidence and its extreme prejudice).

Mr. Rupe first relies on his arguments in his Opening Brief that this Court has the power and ability to address the bifurcation decision in light of the absence of evidence to support the harassment count, and the Respondent has cited no authority which disallows this Court from very reasonably viewing the inadequacy of the evidence under a Knapstad standard, as part of its power to review the court's decision in the area of this important new statute.

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<sup>1</sup>State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

The State is of course correct that Mr. Rupe's counsel additionally argued below that the State's case would be "sufficient" without bringing in the entire spate of prior bad conduct by the defendant and creating an unfair trial, instead of simply relying on witnesses testifying about the actual incidents charged.

That is of no legal moment at all and the State's argument implying that this becomes some sort of waiver of the entire bifurcation issue under RCW 9.94A.537(4) is not supported by any doctrine, of which the State has cited none anyway. The power of this Court – to consider the Knapstad sufficiency standard in assessing the case – is not somehow unavailable simply because Mr. Rupe made every possible effort to exclude this prejudicial evidence, and it is always relevant in the trial court and in appellate courts to raise issues of the adequacy of the State's case.

Finally, the State's sole cited substantive case does not support a felony harassment charge under the facts here, failing to cure the glaring lack of relevance carried by the prior bad acts that the court below erroneously deemed admissible, in the State's already multi-count prosecution. The case of State v. Hanson, 126 Wn. App. 276, 280, 108 P.3d 177 (2005) (see Respondent's Brief

at p. 15), does not support the claim that the harassment count was supported by sufficient evidence rendering the State's tactical amendment justified. Hanson was primarily about the issue whether recantations affected analysis of a sufficiency appeal, which the Court of Appeals stated it does not, because the jury compares a victim's original statement with her testimony at trial and observes her demeanor, then has its choice to believe the statement over any conflicting testimony at trial. Hanson, 126 Wn. App. at 281-82 (citing State v. Macon, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996)). And the substantive evidence in the case showed multiple, different types of injuries all over the victim's body – thorough physical evidence of an effort to kill or at least proof of her reasonable fear that she would be killed. Hanson, at 280-82.

Furthermore, even though, in general, a trial court's determinations on matters of prejudice versus probity are discretionary decisions, those decisions – critical below – were so unreasonable in this case that they must be deemed abuses of that discretion.

This balance of probity versus prejudice comes into play under the statute 's rule that if the prior bad acts had some de

minimis relevance to a properly added harassment count, and the unlawful imprisonment charge, matters Mr. Rupe in no way concedes, the court reversibly erred in its analysis that under .537(4), the probative value of the prior act evidence was not outweighed by its prejudicial effect “on the jury’s ability to determine guilt or innocence for the underlying crime.” See 9/29/09RP at 39 (court’s ruling); RCW 9.94A.537(4). The case comes again down to the similarity between the prior acts and the assault count.

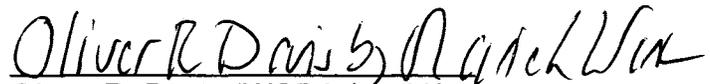
The State’s unacceptable actions in this case can be rebuked by virtue of the clear untenability of the court’s balancing below – the bad acts concerned minor crimes among a multi-count cause but resulted in a trial in which the prior acts seriously prejudiced the defendant’s right to a fair trial on the charge of second degree assault by strangulation, on which he was given his 63-month exceptional term. This Court did not need to be presented in the Opening Brief with an extended recitation of the case law attesting to the serious prejudice of prior bad acts -- in cases where the charge is similar conduct – but Mr. Rupe’s citations there are still on point – the prejudice in such cases is, and in the circumstances of this case was intolerable. See, e.g.,

State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

**B. CONCLUSION**

Mr. Rupe respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 11th day of October, 2010.

  
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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DIVISION ONE  
SEATTLE, WA

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF OCTOBER, 2010.

X \_\_\_\_\_  


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