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COA NO. 66624-0-1

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

REC'D
OCT 21 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,
 Respondent,
 v.
 J.C. JOHNSON,
 Appellant.

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

The Honorable Michael Heavey, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of prior misconduct under ER 404(b).

2. The information was defective because it omitted essential elements of the crime of unlawful imprisonment. CP 18.

3. The judgment and sentence contains a clerical error in the offender score.

Issues Pertaining to Assignments of Error

1. Did the court commit reversible error in ruling evidence of appellant's prior misconduct was admissible under ER 404(b) where (1) the court did not balance its probative value with its prejudicial effect on the record; and (2) the evidence, which was likely to cause jurors to render a decision based on emotion, was otherwise inadmissible due to irrelevancy or unfair prejudice?

2. A charging document must properly notify a defendant of the charge by including the essential elements of the crime. Is reversal of the unlawful imprisonment conviction required because the information failed to allege appellant knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged J.C. Johnson with three counts of second degree assault (counts I, II, III), one count of felony harassment (count IV), and one count of unlawful imprisonment (count V) against his wife, Jena Johnson. CP 15-19. The State alleged two aggravating circumstances for each count: (1) the defendant's conduct during the commission of the crime manifested deliberate cruelty and (2) the crime was an aggravated domestic violence offense. CP 15-19. The State also sought deadly weapon enhancements for counts III and IV. CP 17-18.

The jury convicted on all counts, returning special verdicts finding the domestic violence aggravator but not the deliberate cruelty aggravator. CP 132-40, 144-46, 149-51. The jury also returned special deadly weapon verdicts, although the special verdict for count IV specified a weapon for which Johnson was not charged. CP 15-19; 141-43, 147-48.

The court vacated count IV on double jeopardy grounds. CP 184; 14RP¹ 5-6. It did not impose an exceptional sentence, but sentenced Johnson to life without the possibility of parole because counts I, II and III

¹ The verbatim report of proceedings is referenced as follows: 1RP - 11/29/10; 2RP - 11/30/10 (morning session); 3RP - 11/30/10 (later session); 4RP - 12/1/10 (voir dire); 5RP - 12/1/10; 6RP - 12/2/10; 7RP - 12/6/10; 8RP - 12/7/10; 9RP - 12/8/10; 10RP - 12/13/10; 11RP - 12/14/10;

each constituted a "third strike" under the Persistent Offender Accountability Act. CP 176, 178. It further imposed 60 months confinement for count V. CP 178. This appeal follows. CP 185-94.

2. Pre-Charging Period Evidence

J.C. Johnson and Jena Johnson² married in February 2007 after a whirlwind romance lasting a few months. 7RP 44-45, 47, 109, 115. According to Jena, about six months into the relationship she woke on occasion to find her husband sitting on her chest and choking her in bed. 7RP 49-50, 118. The frequency of choking increased leading up to the three day charging period of May 4-6, 2009, and three times she lost control of her bladder. 7RP 51, 53, 54; 8RP 52. Jena said she had a scar on her upper lip caused by her ring scratching her face when she tried to push Johnson off while he was strangling her in 2008. 7RP 56, 125. Johnson was aware she had thyroid surgery on her throat. 8RP 18, 39-40.

Johnson acknowledged there was friction in their relationship because he suspected Jena was seeing another man. 10RP 83; 11RP 16. Arguments became physical and they pushed one another, but Johnson denied choking her. 10RP 82-84.

12RP - 12/15/10; 13RP - 12/16/10; 14RP - 12/17/10; 15RP - 1/26/11.

² For purposes of clarity, Jena Johnson will be referred to as "Jena" in this brief.

Johnson accused Jena of cheating on him, which she denied. 7RP 50-52, 61-63. Jena did not spend time with family or friends outside of her husband's presence. 7RP 59. Jena's mother saw the couple every other week or two, but did not see her daughter alone during the marriage. 8RP 110-11. One of Jena's adult daughters said she rarely saw her mother alone during the marriage. 9RP 32, 46. Johnson denied not letting Jena see her family without him being present. 10RP 85-86.

Johnson drove Jena to and from work. 7RP 61. Jena said she wore a Bluetooth phone device at work, which Johnson called to make sure she was not talking to other men. 7RP 54-55. Johnson denied constantly calling her at work and denied making her wear a Bluetooth so that he could monitor her. 10RP 85, 87-88.

Jena said her husband threatened to hurt her adult children from a previous marriage if she talked to other men, although the "threat" described by Jena consisted of her husband saying "I don't want to hurt your daughter, she's never done anything to me." 7RP 43-44, 55.

Jena also alleged Johnson hit her and pulled her hair in the two months before the charging period. 7RP 54. On one occasion he smashed her ring when she put her hand up to defend herself. 7RP 102-03. Another time he hit her and caused a lump on her jaw. 7RP 57. He also took to hitting her in the back of her head, eventually while holding a rock

in his hand. 7RP 57-58. Jena said her husband kept a knife in the bedroom for weeks. 8RP 44. She did not tell anyone about the abuse. 7RP 52-53, 127.

Jena's mother never saw injuries on her daughter. 8RP 111. On one occasion, she noticed Jena pulling a sweater up around her neck when they came over to her house. 8RP 116-17. Johnson denied injuring Jena before visiting her mother. 10RP 91. In February 2009, Jena's daughter noticed her mother covering up her face, saying she had hurt herself. 9RP 32, 35-36.

Johnson denied injuring Jena's neck or choking her in the weeks leading up to May 4, 2009. 10RP 92-93. He acknowledged pushing her and an ensuing struggle, but otherwise disclaimed any physical fighting. 10RP 92-93.

3. Charging Period Evidence

Jena alleged Johnson hit her and strangled her throughout the charging period of May 4 through 6, 2009. 7RP 53, 67. Johnson denied doing so. 10RP 130; 11RP 24.

Jena said she hit her head on the bed stand when Johnson threw her to the ground. 7RP 68, 86; 8RP 41. She passed out and Johnson woke her up by throwing water on her, saying she needed to tell the truth. 8RP 41-

42. That same day, he strangled her to the point of urination. 7RP 86; 8RP 9, 41-43.

Johnson testified he picked Jena up from work on evening of May 4. 10RP 93-94. They went shopping, returned home, went for a drive, and returned home again for the night. 10RP 94-98. There was no argument and everything was fine that night. 10RP 97.

According to Johnson, both woke up late in the afternoon on May 5. 10RP 98. They went out to get something to eat, shopped, and then returned to the apartment after dark. 10RP 99-100, 110-11. Jena became angry and argument ensued because Johnson was talking with someone that she did not like. 10RP 112, 126. He acknowledged pushing Jena down during the course of this argument. 10RP 125-26, 128. They got into a "tussle," which consisted mostly of Johnson pushing her and his dog biting her. 10RP 126.

Johnson had a 145-pound Rottweiler named Mac. 7RP 62; 10RP 131. The dog bit Jena during the charging period. 7RP 62, 65-66, 87. According to Jena, Johnson did not direct the dog to bite her, but he did not stop the dog from doing so. 8RP 7-8. Johnson would say "the dog's going to protect me, you know, he's going to do what I say. And you should watch what you do." 7RP 65-66.

Johnson testified the dog, consistent with its training, acted to protect Johnson by biting Jena when Jena yelled at Johnson or became aggressive. 10RP 84, 122, 124-25; 11RP 21. The dog bit her every time she yelled at Johnson on May 5. 10RP 123. Johnson did not tell the dog to bite her and he always intervened. 10RP 123, 131; 11RP 23, 51.

Jena maintained Johnson on May 5 told her that he was going to duct tape her hands, feet and mouth and nose if she did not tell him the truth about who she was sleeping with. 7RP 69, 90-91. She asked, "are you telling me you are going to kill me?" 7RP 69. He said, "you just better tell me the truth" and "I need to let you know that I'm serious." 7RP 69, 91. Johnson did not remember having any conversation about duct tape that day. 10RP 113

Jena accused Johnson of hitting her in back of head while holding a heart shaped rock in his hand. 7RP 88. Johnson denied doing so. 10RP 101-02. Jena said he once attempted to hit her with trailer hitch, but hurt his hand. 7RP 90. Johnson denied threatening to hit her with the hitch. 10RP 128.

Jena said Johnson would not let her remain dressed except for a bra and panties. 7RP 65. At times he told her to get dressed and get out but then demanded she remain or physically forced her back into bed. 7RP 65; 8RP 35. They drove around at night, and once took the dog to the park.

7RP 65-66; 8RP 5. They also went shopping together. 8RP 36. Jena said she did not feel free to leave because she worried he would retaliate against her children, reasoning he hurt her even though she had not done anything to her and so he might do the same to them. 7RP 58, 67, 106. She was also worried he would retaliate against her if her escape was unsuccessful or if she was not believed. 7RP 58-59, 67.

Jena alleged Johnson kept a knife and ice pick in bedroom and that he intimidated her by placing them under his pillow. 7RP 69, 80-81; 8RP 13-15, 44. She told him that scared her and asked what he was doing, but he did not answer. 8RP 44. She did not know what he would do with knife. 7RP 81.

Johnson maintained he did not keep knives or ice picks in bed at night and that he did not display them in a threatening manner or even handle them during any argument with Jena during the charging period. 10RP 117-19; 11RP 35, 47.

According to Jena, Johnson woke her up by strangling her in the early morning of May 6. 5RP 86, 7RP 70, 84. He wanted to know the name of the man she was seeing. 7RP 84. Her lip was cut and she bled onto the bed sheets. 7RP 70, 82, 83. Johnson stopped strangling, left the room, returned with duct tape and put it on the bed stand. 7RP 69-70, 85; 91, 8RP 46-47. She pleaded for her life. 7RP 70. Johnson told her not to

move, told the dog to watch her and then left the bedroom. 7RP 70, 91; 8RP 47. She ran out the front door in her bra and underwear. 7RP 70. The last thing she heard was "oh, shit." 7RP 70. She hid behind some bushes and then knocked on the doors of neighbors. 7RP 71. She saw Johnson drive off in her car. 7RP 72.

Johnson had a different version of events. According to Johnson, he went outside for a few hours on the morning of May 6 with the dog and then returned. 10RP 132. Jena was asleep. 10RP 132. He woke her up and said he was leaving for home. 10RP 132-33. They started arguing again and he pushed her, causing her to hit the head of the bed. 10RP 133; 11RP 32, 34. He knew that by shoving Jena he probably hurt her, but it was not his intent to cause injury. 11RP 39, 56. Jena started yelling and the dog bit her. 11RP 34-35. He told the dog to stop and the dog complied. 11RP 35. Jena ran out the door when he went to the kitchen. 11RP 35. He left in her car. 10RP 134; 11RP 3.

In any event, Jena eventually found a neighbor who answered the door and she asked him to call police. 7RP 31, 72. The neighbor described Jena as upset and close to hysteria. 7RP 36.

Police arrived to find Jena sitting in her bra and underwear without shoes. 6RP 12-14, 20. Deputy Lavin described her as visibly shaken and upset. 6RP 20, 47. Lavin saw welts on her head, scratches around her

neck, a red, swollen right eye, and bruising on her leg and arm. 6RP 20-23; 7RP 25-26. Lavin attributed the neck scratches to being choked or strangled. 6RP 21. Photographs showed the presence of bite or puncture wounds. 6RP 30, 69-71. There was a large bloodstain on the bed sheet, which had soaked into the mattress pad. 6RP 34, 37, 56; 7RP 15.

Jena said that, upon returning to the apartment with police, she noticed an ice pick and knife near the front door, which she had moved to the kitchen the night before. 7RP 69, 76-77, 79. A detective saw a roll of duct tape and a heart shaped rock at the head of the bed. 6RP 34-35, 53. Another detective saw a trailer hitch knob on the bed. 8RP 128.

Johnson testified the duct tape was in a closet, not on the headboard. 10RP 113-14. The trailer hitch was also in the closet. 10RP 128. The knife and ice pick were in the kitchen when he last saw them. 11RP 35-36, 46. He did not put them on the chair inside the door. 11RP 36. Johnson also maintained he left the heart shaped rock on a shelf, not on the headboard. 11RP 37.

Johnson said his initial intent was to return to the apartment after things calmed down but then learned police had become involved. 11RP 45. He dumped the car at a casino and went off with friends. 11RP 38. He knew police were looking for him and left for Mississippi about two weeks later. 11RP 5-6, 39. He wanted to see his ailing father again before

facing charges he knew were pending in Washington. 11RP 5-6, 8, 57. After avoiding police detection, he was eventually arrested and extradited to Washington. 9RP 7-8; 11RP 10-13, 40.

Photographs taken of Jena's injuries showed neck bruising, a bruised eye, and dog bites on the hip, shoulder and arm. 7RP 96-101; 8RP 6-7, 24-25, 31. Jena said the dog caused some bruises but that the dog did not bite her in the neck or head. 8RP 21, 31. She attributed a scar to the struggle occurring at the time of the May 6 strangling. 7RP 89.

Johnson testified bruising on her neck possibly came from when he pushed her against the bed. 11RP 31. According to Johnson, the dog bit Jena on the back of her neck during the May 5 argument. 10RP 126, 128. Blood on the bed sheet came from this bite. 10RP 128. Johnson attributed bruising on Jena's arms to dog bites. 10RP 122, 124-25.

Emergency physician Dr. Tina Neiders treated Jena on May 6 and described her as emotionally distressed. 8RP 76, 81-82. Neiders observed bruises on Jena's neck and head, a red mark on neck, and marks consistent with dog bites on her arms. 8RP 86-87, 89-91. Neiders opined the neck redness could be choke marks consistent with strangulation, while injuries to her face and head were possibly caused by being hit with a hard object multiple times. 8RP 89, 91. Jena had a "mild" closed-head injury. 8RP 94. There was older bruising on the neck. 8RP 104.

Forensic pathologist Dr. Daniel Selove, in looking at a photograph, opined marks on the left side of Jena's neck were consistent with marks made by fingernails pressing on the neck. 10RP 8, 18-20. A dog's paw could have caused the marks as well. 10RP 21. Jena's self-described symptoms and the photograph of the left neck and upper left chest supported the allegation of strangulation. 10RP 52.

The lower right of the neck differed from apparent fingernail marks. 10RP 20-21. The injury to the right side of the neck/head was caused by blunt impact and not by strangulation. 10RP 22-26, 40, 58-59. The likely cause of the right side injury was striking the rounded edge of a hard surface. 10RP 27. Referring to Jena's police statement, the injury could have been caused by the incident on May 5 where Jena alleged Johnson threw her on the ground and hit the bed frame. 10RP 29-33. The bruise on her right temple could have occurred at the same time. 10RP 41. This was not an accidental injury and was inconsistent with a dog mauling. 10RP 42-43, 54-55.

4. Defense Theory

The defense theory of the case for count I was that Johnson committed the lesser offense of fourth degree assault rather than second degree assault by strangulation. CP 46-48; 12RP 52. The defense for count II was that Johnson committed the lesser offense of third degree

assault rather than second degree assault through reckless infliction of substantial bodily harm. CP 51-54; 12RP 53-54. The defense to count III was that the State could not prove beyond a reasonable doubt that Johnson assaulted Ms. Johnson with a knife. 12RP 54-57, 61-62. The defense to count IV was that Johnson committed the lesser offense of misdemeanor harassment as opposed to felony harassment. CP 61-64; 12RP 57-60. The defense for count V was that the State could not prove the elements of unlawful imprisonment beyond a reasonable doubt. 12RP 60-61.

C. ARGUMENT

1. IMPROPER ADMISSION OF PRIOR BAD ACTS
DENIED JOHNSON HIS RIGHT TO A FAIR TRIAL.

The trial court erred in admitting testimony about prior abuse and bad behavior without conducting the requisite balancing analysis on the record under ER 404(b). In addition, the evidence was irrelevant or unfairly prejudicial under ER 404(b). Reversal on all counts is required.

a. The Court Denied The Defense Motion To Exclude ER 404(b) Evidence.

The defense moved in limine to exclude evidence of prior wrongs or acts pursuant to ER 403 and ER 404(b). CP 22. The State, meanwhile, moved to admit such evidence ER 404(b). Supp CP __ (sub no. 55c, State's Trial Memorandum at 9-14, 11/29/10).

The offer of proof for the ER 404(b) evidence included: (1) Johnson choked, hit, punched and shoved Jena on previous occasions (3RP 8-9); (2) Johnson brought knives and ice picks into bed (3RP 9); (3) Johnson threatened to harm Jena's daughter in a manner that was similar to a threat made concerning her daughter during charging period (3RP 9-10); (4) Jena concealed bruising from a prior strangulation while visiting her mother's house (3RP 10); (5) Johnson exhibited controlling and domineering behavior, such as by monitoring her mobile earpiece while she was working, accusing her of cheating, and isolating her from family and friends (2RP 7; 3RP 11, 13).

The State theorized the evidence was admissible to assess Jena's credibility and explain the dynamics of the relationship under State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996) and State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Supp CP ___, (sub no. 55c, supra at 11-12); 2RP 16-17.

The State also maintained the evidence was admissible to explain Jena's fear in the context of the felony harassment charge, the second degree assault with deadly weapon charge, and the unlawful imprisonment charge. Supp CP ___, (sub no. 55c, supra at 10); 1RP 20-21; 2RP 9-11; 3RP 6-7 (citing State v. Binkin, 79 Wn. App. 284, 293, 902 P.2d 673 (1995), abrogated on other grounds, State v. Kilgore, 147 Wn.2d 288, 53

P.3d 974 (2002); State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999); State v. Barragan, 102 Wn. App. 754, 758, 9 P.3d 942 (2000)). The State further sought to introduce the ER 404(b) evidence to prove the aggravating factor that there was an ongoing pattern of domestic violence. 1RP 21; 2RP 9.

Defense counsel was concerned the categories of misconduct were too broad, and that "we're going to have a trial generally based on -- the question is going to be, is this man a bad man or bad husband, controlling husband. And that's the danger here that I think we're getting into. 2RP 11-12. Counsel argued the State had not met its burden of showing any of the proposed ER 404(b) evidence directly tied into the three-day charging period. 2RP 14. He did not "want this trial to become a trial on the relationship." 2RP 14. In regard to showing reasonable fear, counsel maintained the ER 404(b) evidence was unnecessary because the jury could make an assessment based on events during the charging period. 2RP 14.

Counsel distinguished Grant on the ground that it involved a recanting victim. 2RP 13. The judge did not have any indication that Jena was going to recant. 2RP 15. The prosecutor said recantation was not required under Grant. 2RP 15. She argued "the victim's knowledge of the defendant and the way that he has treated her in the past are integral to her beliefs." 2RP 16.

The judge agreed "it" went to Ms. Johnson's reasonable apprehension, but was not sure Grant applied. 2RP 16. The prosecutor responded the defense would attack Jena's credibility, and that jury could not accurately assess her credibility and behavior without knowing the full context of the relationship. 2RP 17-18.

The judge stated, "As you're both aware, 404(b) has a lengthy analysis that needs to be applied." 2RP 18. The judge also said his first impression was that the evidence was admissible, maybe not under Grant and Magers, but probably under "[Binkin] and those cases."³ 2RP 18-19.

Following a recess, the judge gave his general impression that Grant and Magers did not give any indication that a history of domestic violence is admissible when the witness does not recant. 3RP 2. In the midst of listening to further argument, the court said it would conduct the full ER 404(b) analysis when it made its ruling, including whether the probative value was outweighed by the danger of unfair prejudice. 3RP 13-14.

The court initially said, "I think this evidence comes in . . . under felony harassment. If I do allow the evidence in, it's not unlawful imprisonment or the Assault II" with the knife. 3RP 15. The prosecutor responded Jena's reasonable belief in relation to that assault charge was

³ The transcript reads "Bingham" rather than "Binkin," but that is a phonetic error.

similar to the analysis for felony harassment. 3RP 16. The court said, "Right, and there is a case that holds that." 3RP 16.

The court then made its ruling. 3RP 16. It accepted the State's offer of proof and found by a preponderance of the evidence that the misconduct occurred. 3RP 16-17. The court identified the admissible purpose as "the victim's state of mind as to the reasonableness of her fear." 3RP 17. The court determined the evidence was relevant to a material issue," that being it's an element of the crime that her fear was reasonable or that she had, in the case of the assault, that she actually was placed in fear." 3RP 18.

The judge concluded his ruling as follows:

The fourth thing the Court looks at is does the -- 403 says evidence may be excluded that's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, et cetera. So what I look at is, is there a danger of unfair prejudice.

And that gets into why do we have 404(b) anyway, because if a person did something in the past, they are more likely to do it again, it's very relevant. But because it's -- but because it's so powerfully relevant, for some reason we exclude it.

If somebody had stole something five times before and this is a crime for theft, we wouldn't allow those in unless it was impeachment, even though it's very probative. So all evidence is prejudicial.

Relevant means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.

Prior threats, controlling conduct, prior violence directed towards the victim is all relevant to her state of mind and the reasonableness of her apprehension of fear. So in

their case-in-chief, through the testimony of the victim, they may testify to the prior acts that have been outlined.

3RP 18-19.

Defense counsel requested a limiting instruction. 3RP 19. The court said he would give one — "that they are only to consider it as to whether she was placed in fear concerning the assault and the reasonableness of that fear in the felony harassment." 3RP 19-20.

The State later proposed that the limiting instruction direct jurors to consider the evidence "only for the limited purpose of the victim's reasonable fear and reasonable belief -- or, I guess reasonable fear. The victim's frame of mind with respect to counts ... III, IV and V . . . [a]nd with respect to the aggravating circumstances of an aggravating crime." 11RP 63-64.

Defense counsel later proposed the language should read "may be considered by you only for the purposes of determining Jena Johnson's state of mind. Which is essentially the element of reasonable fear, the State has to prove in those counts." 11RP 71. Counsel said that encompassed counts III and IV. 11RP 71. The prosecutor jumped in, claiming "I think it also goes to the threat language in the jury instructions for unlawful imprisonment and why she did not feel free to leave." 11RP 71. Counsel responded, "So state of mind with respect to counts III, IV and V." 11RP 71. The court said "All right" and asked the prosecutor to draft the limiting instruction. 11RP 71.

The following limiting instruction was given:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding alleged acts of domestic violence committed by the defendant against Jena Johnson prior to May 4, 2009. This evidence may be considered by you only for the purposes of assessing Jena Johnson's state of mind with respect to counts III, IV and V, and if you find the defendant guilty of any of the charged offenses or the lesser included offense of Assault in the Third Degree on count II. You may not consider it for any other purpose. Any discussion of the evidence during deliberations must be consistent with this limitation.

CP 38 (Instruction 7).

- b. The Court Erred In Admitting The ER 404(b) Evidence Because It Did Not Balance It Probative Value Against Its Prejudicial Effect On The Record.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336.

Prior misconduct is similarly inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) prohibits admission of evidence to prove bad character. State v.

Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Acts that are unpopular or disgraceful fall within the scope of ER 404(b). Halstien, 122 Wn.2d at 126.

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. Foxhoven, 161 Wn.2d at 175.

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. DeVincentis, 150 Wn.2d at 17. The trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion only if the trial court correctly interprets the rule. Id.

The trial court here abused its discretion in failing to adhere to the requirements of the evidentiary rule. Foxhoven, 161 Wn.2d at 174. The record shows the trial court was aware of the correct rule and the need to

balance the probative value of ER 404(b) evidence against its prejudicial effect. 3RP 13-14, 18. But when it came time to apply that rule to each category of ER 404(b) evidence in this case, the court focused on why the evidence was relevant without balancing that evidence against its prejudicial effect. 3RP 18-19.

The Supreme Court held long ago that "[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The court should not have permitted testimony about any of the ER 404(b) evidence without weighing the probative value of this ER 404(b) evidence against its prejudicial effect on the record. State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005).

c. The ER 404(b) Evidence Was Irrelevant Or Unfairly Prejudicial.

Even if the record could fairly be read to show the trial court conducted the requisite balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed its probative value.

Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Johnson's controlling and domineering behavior was unnecessary to prove any element of the charged crimes. This behavior did not constitute acts of physical violence, which immediately distinguishes this category of evidence from the prior acts or threats of physical violence that have been admitted to show reasonable fear in other cases. See, e.g., Barragan, 102 Wn. App. at 758-60 (victim's knowledge of previous violent acts); Binkin, 79 Wn. App. at 286-87 (prior threat to harm victim's unborn child); Ragin, 94 Wn. App. at 411-12, 972 P.2d 519 (1999) (prior violent acts); see also Magers, 164 Wn.2d at 181-83 (lead opinion) (prior violent misconduct admissible where State needed to prove reasonable fear of bodily injury for assault conviction).

Johnson's controlling behavior, which did not constitute physical violence, was attenuated from the elements of the crimes at issue here. Defense counsel was justifiably concerned the trial would turn into one on whether Johnson was a bad husband. 2RP 11-12. Evidence that Johnson isolated Jena from others, monitored her conversations, and accused her of cheating aroused juror revulsion.

The prosecutor said the controlling behavior went to the reasonableness of Jena's fear and the reasonableness of her actions of not telling anybody, i.e., there was a constant feeling that he was keeping tabs on her. 3RP 11-12. The court accepted the "reasonable fear" basis for admission. 3RP 18-19. But the State made no offer of proof that Jena's fear in fact was influenced by Johnson's controlling behavior. Jena did not testify Johnson's controlling behavior contributed anything to her fear. This was a rationale manufactured by the prosecution, unmoored from Jena's actual perceptions. There was never any explanation for why evidence of Johnson's controlling behavior was necessary to establish Jena's reasonable fear.

Any doubt about the admissibility of ER 404(b) evidence must be resolved in favor of the defendant. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The court should have resolved any doubt in favor of Johnson and not admitted the evidence of controlling behavior due to lack of relevancy or unfair prejudice.

Evidence of prior acts of physical violence was inadmissible as well due to unfair prejudice. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury, or an undue tendency to suggest a decision on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14

P.3d 752 (2000). Evidence that Johnson previously hit and strangled Jena, and brought knives into the bedroom, fits squarely into this category. Regardless of relevance to Jena's state of mind, no juror could be expected to view such evidence dispassionately. Evidence of prior acts of physical violence and threats not only made Johnson look like a bad person, but was also likely to elicit an emotional response of extreme sympathy for Jena.

Defense counsel's argument that this evidence was unnecessary should have been heeded. 2RP 14. The jury heard plenty of evidence stemming from the three-day charging period from which it could have assessed Jena's state of mind, including other acts of violence and threats. "The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence." State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). The record does not show the court considered this factor. The trial court necessarily abuses its discretion when its decision is based on an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Defense counsel did not "want this trial to become a trial on the relationship." 2RP 14. Admission of the ER 404(b) evidence made that concern a reality. Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to

be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of other bad acts "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

The presumption of innocence should not cede to evidence that undermines it, regardless of the relevancy of that evidence. Again, any doubt about the admissibility of ER 404(b) evidence must be resolved in favor of Johnson. Thang, 145 Wn.2d at 642.

The State may argue the ER 404(b) evidence was admissible to show Jena's credibility. Under Grant and Magers, ER 404(b) evidence may be admissible in certain circumstances to support a domestic violence victim's reasonable fear and to support a recanting victim's credibility. Magers, 164 Wn.2d at 181-83 (Alexander, C.J., lead opinion); Grant, 83 Wn. App. at 107-09. In a recent case, the Court of Appeals held evidence of prior assaults was admissible to aid the jury's assessment of the complaining witness's credibility, regardless of whether the complaining

witness recanted her previous allegations or gave inconsistent statements.

State v. Baker, 162 Wn. App. 468, 259 P.3d 270, slip op. at 7-8 (2011).

The trial court, however, did not admit the ER 404(b) evidence for the purpose of assessing credibility. The limiting instruction ultimately given by the court demonstrates the evidence was admitted only to show "state of mind" under counts II, IV and V. CP 38. The state of mind at issue in those counts, as reflected in the discussion on the issue of admissibility, went to Jena's reasonable fear on counts II and IV and intimidation under count V. 3RP 17-20; 11RP 63-64, 71. If the court had admitted the evidence under a Magers/Grant credibility rationale, it would have allowed the jury to consider the evidence in relation to all counts because Jena's credibility was at issue on all counts.

The State may also argue the ER 404(b) evidence was admissible to prove the aggravating factors. The trial court, however, was properly prepared to bifurcate the trial if the ER 404(b) evidence was inadmissible in the State's case-in-chief. 3RP 2, 4-5. It is implausible to argue the ER 404(b) evidence would have been admitted as part of the State's case-in-chief to prove the aggravators had it not admitted to prove elements of the underlying charges.

d. It Is Reasonably Probable Wrongful Admission Of The ER 404(b) Evidence Affected The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

Reversal of the convictions is required because there is a reasonable probability that juror consideration of the ER 404(b) evidence influenced deliberation on whether the State proved Johnson committed the charged crimes beyond a reasonable doubt. This evidence made Johnson look like a bad husband and a bad person. It showed he was the type of person who would commit the acts for which he was charged, the very inference ER 404(b) is designed to prohibit. The jury's consideration of the evidence cannot be considered trivial because such evidence stripped the presumption of innocence from Johnson. Bowen, 48 Wn. App. at 195. And it likely elicited an emotional rather than rational response from jurors as they deliberated on Johnson's fate. Cronin, 142 Wn.2d at 584.

The limiting instruction on the ER 404(b) evidence cannot fairly be said to have prevented jurors from considering the ER 404(b) evidence as evidence of Johnson's propensity to commit crime. CP 38 (Instruction 7). A limiting instruction under some circumstances may be "a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Bruton v. United States, 391 U.S. 123, 134 n.8, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)). In those circumstances, the limiting instruction is nothing more than a "judicial lie" — a placebo device that satisfies form while violating substance. Bruton, 391 U.S. at 134 n.8; Nash, 54 F.2d at 1007.

Courts nevertheless often indulge in the "sanctioned ritual" that jurors are capable of using evidence for one permissible purpose while disregarding it for an impermissible one as a matter of practical expediency. United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.1964); Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933). Jurors are presumed to follow instructions, but there are some contexts in which the practical and human limitations of the jury system cannot be ignored. State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994).

This case provides an illustration. Troubling evidence of a husband's misconduct against a wife cannot help but incite an emotional

response. Jurors are not machines who can legitimately be expected to use this ER 404(b) evidence only for its delineated purpose. Evidence of other bad acts *inevitably* shifts the jury's attention to the defendant's general propensity for criminality. Bowen, 48 Wn. App. at 195. The proper and improper uses of this evidence are so intertwined that they cannot be compartmentalized from one another. To jurors, propensity evidence is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986).

A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The admission of the ER 404(b) evidence allowed the jury to follow its natural inclination and infer he acted in conformity with his character and therefore likely committed the criminal acts charged by the State.

Even if the limiting instruction retained efficacy, prejudice stills results because there is a reasonable probability that the outcome would have differed had the jury not heard the ER 404(b) evidence.

The evidence on count III — second degree assault with a knife — was underwhelming. It consisted of Johnson's bringing a knife and ice pick into the bedroom and placing them under his pillow. 7RP 69, 80-81;

8RP 13-15, 44. Jena did not know what he would do with knife. 7RP 81. Under these circumstances, a reasonable juror could come to the conclusion that the State failed to prove beyond a reasonable doubt that Johnson acted with the intent to create apprehension and fear of bodily injury. CP 8 (Instruction 39); CP 55 (Instruction 24). The ER 404(b) evidence may have tipped the scales in favor of conviction on count III.

In addition, the improperly admitted misconduct evidence may have swayed the jury to convict on counts I and II as charged rather than find Johnson guilty of the inferior degree offenses. The court instructed the jury on the crime of fourth degree assault as a lesser to second degree assault in count I and third degree assault as a lesser to second degree assault in count II. CP 46-48, 51-54. This means the court found, and the State did not dispute, that Johnson was entitled to those lesser instructions because substantial evidence supported the conclusion that a rational jury could find he committed only the lesser offense. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (jury instruction on inferior degree offense should be administered if substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater). The jury would be more inclined to convict Johnson as charged when faced with evidence that he had exhibited the same type of behavior before.

Finally, the jury heard different stories regarding the alleged unlawful imprisonment under count V. Jena said he prevented her from leaving the apartment. 7RP 65; 8RP 35. Johnson's testimony, meanwhile, showed Jena had opportunities to leave. 10RP 112, 132. There is a reasonable probability that the ER 404(b) evidence caused the jury to credit Jena's version of the story. Reversal on all counts is required.

2. THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE UNLAWFUL IMPRISONMENT OFFENSE.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Johnson's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that Johnson knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty. CP 18.

In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040. "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(1).

The definition of "restrain" has four primary components: "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). Warfield held the statutory definition of unlawful imprisonment, to "knowingly restrain," causes the adverb "knowingly" to modify all components of the statutory definition of "restrain." Warfield, 103 Wn. App. at 153-54, 157.

The modified components of the "restrain" definition are thus elements of the crime of unlawful imprisonment. Id. at 158, 159. The conviction in Warfield was reversed due to insufficient evidence where the State failed to prove the defendants knowingly restrained someone without lawful authority: "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id. at 159.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An essential element is one whose specification is necessary to establish the

very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

To convict Johnson of unlawful imprisonment, the State needed to prove he knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty. Warfield, 103 Wn. App. at 157-59. Those facts are necessary to establish the very illegality of the unlawful imprisonment offense and are therefore essential elements that needed to be set forth in the charging document. Feeser, 138 Wn. App. at 743.

In accord with Warfield, the pattern "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates elements of the crime that need to be proved. WPIC 39.16; see State v. Davis, 116 Wn. App. 81, 96 n.47, 64 P.3d 661 (2003) ("While the WPICs are not binding on the court, they are persuasive authority."), aff'd, 154 Wn.2d 291, 111 P.3d 844 (2005), aff'd sub nom., Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The "to convict" instruction in Johnson's case is modeled on WPIC 39.16. CP 66-67 (Instruction 33). Referring to the four components of the

"restrain" definition, the jury was correctly instructed that "The offense is committed only if the person acts knowingly in all these regards." CP 65 (Instruction 32) (patterned on WPIC 39.15).

Proper jury instructions, however, cannot cure a defective information. Vangerpen, 125 Wn.2d at 788. The State charged Johnson by amended information with the offense of unlawful imprisonment as follows:

That the defendant J.C. JOHNSON in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did knowingly restrain Jena Johnson, a human being; Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.

CP 18.

The information does not contain all essential elements of the crime. It does not allege Johnson knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced

by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not fairly imply each of the four elements that Johnson knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty. At most, the language "knowingly restrain" as used in the information notifies the accused that an essential element of the crime is that a person knowingly restricted the movements of another.

The other three elements at issue here cannot be found by any fair construction. The information provides no notice that knowledge of lack of consent, knowledge of lack of legal authority to restrain, and knowledge of the *degree* of restriction (substantial interference) are all essential elements of the crime. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied in the

charging document, this Court must presume prejudice and reverse Johnson's conviction. McCarty, 140 Wn.2d at 425.

3. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO REFLECT THE CORRECT OFFENDER SCORE.

The judgment and sentence contains incorrect offender scores on all surviving counts. The offender score for counts I, II and III should be 18, not 19. CP 176. The offender score for count V should be 14, not 15. CP 176.

Offender scores are reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The error in this case occurred because the offender scores in the judgment and sentence were not corrected to reflect that count IV, the felony harassment offense, was vacated. CP 184.

One point on counts I, II, II and V was added based on the premise that the felony harassment conviction was a current offense to be used in the offender score. CP 176; Supp CP__ (sub no. 72, Presentence Statement of King County Prosecuting Attorney at 1, 13-15, 18, 1/14/11); see RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.589 ("whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the

offender score[.]");RCW 9.94A.525(1) ("Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589."); RCW 9.94A.525(7) (prior felony convictions count as one point where present conviction is for a nonviolent offense); RCW 9.94A.525(8) (prior non-violent felonies count as one point where present conviction is for violent offense);

The remedy is to remand to the trial court for correction of the offender score error in the judgment and sentence. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P .3d 353 (2005) (remanding to trial court for correction of the scrivener's errors in the judgment and sentence).

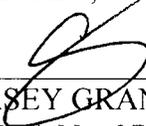
D. CONCLUSION

For the reasons stated, Johnson requests reversal of the convictions.

DATED this 24th day of October, 2011

Respectfully Submitted,

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