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NO. 33731-2-II
Cowlitz Co. Cause NO. 05-1-00713-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BRANDON JAMES HARVILL,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FIVE OTHER ACTS COMMITTED BY THE DEFENDANT IN ORDER TO DEMONSTRATE THE VICTIM'S REASONABLE FEAR OF THE DEFENDANT. SHOULD THE COURT DISAGREE, THE ERROR IN ADMITTING OTHER ACTS EVIDENCE WAS HARMLESS, AS THE RESULT OF THE TRIAL WOULD NOT HAVE CHANGED WERE THE EVIDENCE EXCLUDED.**
 - A. The State's offer of proof was sufficient to prove by a preponderance of the evidence the other acts committed by the defendant occurred.**
 - B. The other acts committed by the defendant were properly admitted to show the victim's reasonable fear the defendant's threat to kill her would be carried out.**
 - C. Although the trial court did not balance the probative value of the evidence of other acts committed by the defendant against its prejudicial effect on the record, the record is sufficient to allow effective appellate review.**
 - D. Should the Court find the evidence of other acts committed by the defendant was improperly admitted, the error was harmless, as the result of the trial would not have changed were the evidence excluded.**

- 2. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO FACTUAL EVIDENCE THE DEFENDANT WAS ARRESTED AND IN JAIL.**
 - A. The defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object to factual evidence the defendant was arrested and in jail, because the evidence of his arrest and custody was fact, not opinion evidence of guilt.**

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

- 1. WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FIVE OTHER ACTS COMMITTED BY THE DEFENDANT IN ORDER TO DEMONSTRATE THE VICTIM'S REASONABLE FEAR OF THE DEFENDANT. IF THE COURT DETERMINES THE ADMISSION WAS IMPROPER, WHETHER THE ERROR WAS HARMLESS, BECAUSE THE RESULT OF THE TRIAL WOULD NOT HAVE CHANGED WERE THE EVIDENCE EXCLUDED.**
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 - A. Whether the State's cross-examination of the defendant regarding the elements of the crimes charged was a comment on the credibility of the victim.**
 - B. If the State's cross-examination was a comment on the credibility of the victim, whether trial counsel properly objected.**
 - C. If counsel failed to properly object, whether such failure constituted ineffective assistance of counsel.**
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III. STATEMENT OF THE CASE

1. Statement of Facts

The amended information, filed on August 17, 2005, charged the defendant with residential burglary – domestic violence (count I), felony harassment – domestic violence (count II), and violation of a no contact order – domestic violence (count III). CP 27. On August 17, 2005, the trial court held a pretrial hearing. RP 8-17-05. Among other motions, the trial court ruled on the State’s motion to admit other acts evidence. RP 8-17-05 14-31. The State had previously notified the defendant’s trial counsel of its intent to offer other acts evidence. App. B. The trial court ruled that evidence of ten other acts committed by the defendant were admissible. RP 8-17-05 14-31.

The defendant was tried by a jury, the Honorable James E. Warne presiding, on August 18-19, 2005. RP 1-289. The State called five witnesses during its case-in-chief: Brandi Harvill, Brianna Harvill, Officer Jeremy Johnson, David Voelker, and Chris Olson. RP 11-166.

The facts presented at trial were as follows. Brandi Harvill lived at 3408 Jimmer Place, in Longview, along with her two daughters¹, Brianna

¹ The defendant is the biological father of Brittany Harvill. RP 12-13. Although the defendant is not the biological father of Brianna Harvill, Brandi Harvill testified that the defendant is the only father Brianna has ever known. RP 13. Additionally, Brianna Harvill identifies the defendant as her dad. RP 104. Therefore, both Brittany and Brianna will be referred to as the defendant’s daughters herein.

and Brittany Harvill. RP 11-12.² She was married to the defendant for approximately two years before filing for divorce in March 2005. RP 25. The defendant lived at the home on Jimmer Place until the court presiding over the divorce entered a restraining order on April 15, 2005, gave possession of the home to Brandi Harvill, and ordered the defendant to vacate the home. RP 26; App. A. The restraining order prohibited both parties from contacting each other. *See* App. A.

On the night of June 13, 2005, Brandi Harvill, fearful of the defendant, took a baseball bat, a cordless telephone, and her purse with her to bed. RP 35-36. At approximately 4:30 a.m. on June 14, 2005, the sound of breaking glass woke her. RP 37. Initially, she thought the sound might have been her daughter Brittany, who frequently got up at night to go to the bathroom. RP 37. However, upon hearing the sound of breaking glass a second time, Brandi Harvill became concerned. RP 37. She grabbed the bat, walked out of her bedroom, first checked on her daughters, and then walked down the hallway. RP 37. As she was walking, she heard the sound of breaking glass a third time. RP 37-38.

² The record in this case consists of four volumes of verbatim reports of the proceedings. The first volume, a report of the pretrial hearing held on August 17, 2005, is referred to herein as “RP 8-17-05.” The second and third volumes, a continuously numbered report of the first day of the trial, August 18, 2005, are referred to herein as “RP.” The fourth volume, a report of the second day of the trial, August 19, 2005, is referred to herein as “RP 8-19-05.”

She stopped, standing in the doorway of the kitchen, and saw an intruder entering the home through a kitchen window. RP 38.

The intruder crouched on the kitchen countertop after coming through the window. RP 39. Brandi Harvill was standing approximately ten feet away. RP 39. Upon making eye contact with the intruder, the intruder yelled, "I'm going to kill you, you fucking bitch." RP 40-41. Running for her life, Brandi Harvill went down the hallway, grabbed the cordless phone, and ran into her daughter Brittany's room. RP 41. She closed and barricaded the door to the room, and called 911. RP 41-42. While in the bedroom, it dawned on Brandi Harvill that she recognized the voice of the intruder. RP 42-43. It was her husband, the defendant. RP 42-43. The defendant continued to yell while Brandi and Brittany Harvill were in the bedroom. RP 43-44. Brandi Harvill also heard the intruder stomping, making "monster" sounds, saying "sic her, sic her," as if he were giving dog commands, and stuff being knocked over and thrown around in her bedroom. RP 44-45. At trial, Brandi Harvill testified that during this incident, she thought she was going to die. RP 41-42.

Brandi Harvill waited in the bedroom until she heard the alarm she had placed on the front door sound. RP 45. Thinking the defendant had left, she cautiously checked on her daughters, who were both in bed with their blankets over their heads. RP 47. She then went to her bedroom,

and noticed that her purse was missing and the defendant threw things out of her closet. RP 46-47. The police arrived approximately 10 minutes after the 911 call ended. RP 49. Brandi Harvill also called her grandfather, who arrived at the same time as the police. RP 54. She spoke with Officer Jeremy Johnson of the City of Longview Police Department. RP 54; 111-112.

Brandi Harvill also testified to five other acts committed by the defendant, which the trial court previously ruled admissible during the pretrial hearing: (1) an incident in January 2005 in which the defendant threw her on the bed and threw her head against the wall; (2) an incident on February 17, 2005 in which the defendant pointed a handgun at her while telling her she could not leave him; (3) an incident on February 26, 2005 in which the defendant choked her in front of her daughter, and charged her upon her return to their home later in the day; (4) an incident on March 21, 2005 in which she discovered that their home had been broken into, and she believed that the defendant was the perpetrator; and (5) an incident on May 24, 2005 in which the defendant impersonated her in an attempt to pay off a loan he owed, using a credit card that was stolen from her on March 21, 2005. RP 13-33. Incidents (1)-(5) were offered by the State to show the victim's fear of the defendant and the reasonableness of her believing the threat to kill her, and her state of mind, concerning

how far the defendant was willing to go, for purposes of the felony harassment charge. RP 8-17-05 17-25.

Also on June 14, 2005, Officer David Voelker of the City of Kelso Police Department contacted the defendant at his home, 614 Fourth Avenue North³, in Kelso. RP 147-48. The defendant was taken into custody and transported to jail. RP 148.

Brianna Harvill testified that her dad, the defendant, was the intruder who entered the home on June 14, 2005. RP 102-109. The testimony was as follows:

The State: Okay. Do you remember the night that someone broke into your house?

Brianna Harvill: Yes.

The State: Okay. Where were you?

Brianna Harvill: In my room.

...

The State: Okay. What woke you up that night?

Brianna Harvill: When someone was yelling.

The State: Yelling, okay. Do you know where they were yelling from? Did you see them yelling?

Brianna Harvill: Next to the door.

³ There is conflicting testimony as to the defendant's address. The defendant testified that he lived at 613 North Fourth, in Kelso, and that he had never lived at 614 North Fourth. RP 252.

The State: Was there someone standing there?

Brianna Harvill: Yes.

The State: Okay. What did that someone look like? Do you recall what that person was wearing?

Brianna Harvill: A black coat.

The State: A black coat, okay. Did you – could you see the hair?

Brianna Harvill: (witness nods head 'yes').

The State: What color was the hair?

Brianna Harvill: Brownish-blackish.

The State: Okay. Could you see the face?

Brianna Harvill: No.

The State: Why couldn't you see the face?

Brianna Harvill: Because it was – he was walking down the hall and I could only see his cheek.

The State: His cheek, okay. Did you recognize that person?

Brianna Harvill: Yes.

The State: Who was that person?

Brianna Harvill: My dad.

The State: Oh, okay. Now, you said that person was yelling. Did you hear that person's voice?

Brianna Harvill: Yes.

The State: Was it your dad's voice?

Brianna Harvill: Yes.

RP 102-104.

Officer Johnson and Officer Voelker testified, in part, that the defendant was arrested and held in jail. RP 119-125; RP 148. Chris Olson testified regarding comments the defendant had made to him concerning Brandi Harvill. RP 157-164. The trial court ruled Mr. Olson's testimony on these matters admissible during the pretrial hearing. RP 8-17-05 29-31.

The defendant called three witnesses at trial: Melissa Brink, his girlfriend, Charles Wynn, an alibi witness, and the defendant also took the stand. RP 172-281. Melissa Brink testified the defendant was home with her during the early morning hours of June 14, 2005, except for a period of time, prior to 2:00 a.m., when he left home to go to the store. RP 173-176. Charles Wynn testified that he broke into the home at 3408 Jimmer Place on June 14, 2005, threatened Brandi Harvill, and stole her purse. RP 192-209.

The defendant testified that he was at home during the evening hours of June 13, 2005 and early morning hours of June 14, 2005, except for a trip to the store. RP 253-255. The defendant testified that he was arrested and taken into custody. RP 255-257. With respect to the arrest and custody, his testimony was as follows:

Defense Counsel: Yeah. You didn't have smores, so what did you do after that – after that?

The Defendant: Well, I ended up – ended up falling asleep on the couch. I don't remember much after – after that, I woke up – Melissa to get me upstairs [inaudible] work me up to go upstairs, and then I fell asleep, and then I was awakened by her saying that there was officers [inaudible].

Defense Counsel: Did you have – what do you mean, you didn't believe her?

The Defendant: I thought she was joking with me.

Defense Counsel: Okay. And did you have any idea why the cops were at the door, at that point?

The Defendant: Not one bit. I walked down – she handed me a pair of sweats and I walked downstairs in a pair of sweats.

Defense Counsel: Whose sweats were they?

The Defendant: They were hers.

Defense Counsel: So you're wearing –

The Defendant: They were awfully small, but I didn't think about it, I just hobbled myself down the stairs and out – out the door, and I went and the cops got me, they were there to arrest me [inaudible], and I was all, well, what for, you know, I just kind of baffled. 5:00 o'clock in the morning, just waking up from a couple hours of sleep, I didn't really know what was going on.

Defense Counsel: Did you ask the officer what – what you were under arrest for?

The Defendant: Yes.

Defense Counsel: Okay. And, so, then were you taken into custody?

The Defendant: Yes, I was. They put a sweatshirt over me, Melissa gave them a sweatshirt to put over me, after I was already handcuffed, and then I got the shirt on.

RP 256-257.

During cross-examination, the defendant stated he spoke to Melissa Brink while he was in jail. RP 278. Also on cross-examination, the State questioned the defendant regarding the incident that occurred at 3408 Jimmer Place on June 14, 2005. RP 260-281. The questioning was as follows:

The State: Now, just so I get this straight, you're not denying that somebody broke into Brandi's house; right?

The Defendant: Obviously, they did [inaudible].

The State: So you're agreeing that somebody broke into Brandi's house.

The Defendant: Obviously, I'm here.

The State: And they did so without permission; right?

The Defendant: Yes.

The State: Okay. And that the house was a dwelling, clearly?

The Defendant: A dwelling?

The State: Yeah.

The Defendant: Is it?

The State: Somebody sleeps there?

The Defendant: Yes.

The State: Okay. And the person who entered that house, entered it with the intent to commit a crime?

The Defendant: Yes.

RP 260-261.

Following an objection that the last question called for a legal conclusion, which was overruled by the trial court, the testimony continued:

The State: Let me just rephrase it. The person who entered the house threatened to kill Brandi, right? You're not disagreeing with that?

The Defendant: From the statement.

The State: Is that a "yes"?

The Defendant: Well, yeah.

The State: Okay. And that somebody stole her purse? You're not disagreeing with that?

The Defendant: No, I don't know what's going on through his mind when he did this. Is there a purse stolen? That's what she said, yeah, there was a purse stolen.

The State: Okay. So you're agreeing that her purse was stolen; right?

The Defendant: Yeah –

The State: Okay.

The Defendant: - there was a purse stolen, I guess. That's what the police say and that's what she's saying.

The State: Okay. And you're not disagreeing that the person that threatened to kill her did that knowingly?

RP 262.

The defendant's trial counsel then objected, on the basis that the defendant lacked personal knowledge. RP 262. The court sustained the objection, and the State continued in its cross-examination of the Defendant:

The State: Are you contradicting that Brandi was frightened at all?

The Defendant: Well, I would've been frightened myself.

The State: And that fear was reasonable?

The Defendant: Well, yeah, because I would've been scared – scared too, if someone was in my house.

RP 262-263.

Following questioning on other matters, the testimony at issue resumed:

The State: Now, it's your testimony that everything that Brandi described as happening in the house is correct, other than it wasn't you, right?

RP 280.

The defendant's trial counsel objected to this question on the basis that the State was asking the defendant to comment on another person's testimony. RP 280-81. The trial court sustained the objection. RP 281. The State concluded its cross-examination with the following questions:

The State: You're not disagreeing that the burglary happened?

The Defendant: I don't know what to tell you what was going on in the house.

The State: You're just saying it's not you?

The Defendant: Yes.

RP 281.

Subsequent to the defendant's testimony, the State called Brandi Harvill as a rebuttal witness. RP 282-286. This concluded the evidence in the case. RP 286.

Following its deliberations, the jury found the defendant guilty of residential burglary-domestic violence, felony harassment-domestic violence, and violation of a protection order-domestic violence. CP 34-39. On August 25, 2006, the defendant was sentenced to 17 months for the residential burglary-domestic violence (count I), 9 months for the felony harassment -domestic violence (count II), and 3 months for the violation of a protection order-domestic violence (count III). CP 46. The sentences for counts I and II were to be served concurrent, and the sentence for count III was to be served consecutive. CP 46. The defendant filed a timely notice of appeal on August 25, 2005. CP 48.

IV. ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FIVE OTHER ACTS COMMITTED BY THE

DEFENDANT IN ORDER TO DEMONSTRATE THE VICTIM'S REASONABLE FEAR OF THE DEFENDANT. SHOULD THE COURT DISAGREE, THE ERROR IN ADMITTING OTHER ACTS EVIDENCE WAS HARMLESS, AS THE RESULT OF THE TRIAL WOULD NOT HAVE CHANGED WERE THE EVIDENCE EXCLUDED.

The defendant argues the trial court erred in admitting five other acts committed by the defendant, under Washington Rule of Evidence (ER) 404(b). The defendant claims the State offered this evidence in order to convince the jury that because the defendant had committed similar acts in the past, the defendant had the propensity to commit the charged crimes.

Pursuant to ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, *be admissible for other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) (emphasis added).

Furthermore, “[t]he ‘other purposes’ listed in ER 404(b) are not exclusive.” *State v. Kidd*, 36 Wash.App. 503, 505, 674 P.2d 674, 676 (1983). In order to admit evidence of other wrongs, the trial court must engage in the following four steps:

“(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 charge[d], and (4) weigh the probative value against the prejudicial effect.”

State v. Thach, 126 Wash.App. 297, 310, 106 P.3d 782, 789 (2005), quoting *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002).

Here, the trial court ruled on the admissibility of the other acts evidence during a pretrial hearing. RP 8-17-05 14-26. Prior to ruling that the evidence at issue was admissible, the trial court failed to follow all four steps of the required procedure. RP 8-17-05 14-26. Specifically, the trial court did not find by a preponderance of the evidence that the other acts occurred, and it did not weigh the probative value of the other acts evidence against its prejudicial effect. RP 8-17-05 14-26. However, as set forth below, this failure to comply with all four steps of the required procedure is not reversible error, for four reasons: first, the State’s offer of proof was sufficient to prove by a preponderance of the evidence that the other acts occurred; second, the other acts were properly admitted to show the victim’s reasonable fear that the defendant’s threat to kill her would be carried out, a required element of the felony harassment charge; third, although the trial court did not balance the probative value of the other acts evidence against its prejudicial effect on the record, the record is sufficient to allow effective appellate review; and fourth, should the Court

find that the other acts evidence was not properly admitted, the error was harmless, as the result of the trial would not have been different had the evidence not been admitted.

A. The State’s offer of proof was sufficient to prove by a preponderance of the evidence the other acts committed by the defendant occurred.

A trial court is not required to conduct an evidentiary hearing prior to admitting other acts evidence under ER 404(b). *See State v. Kilgore*, 147 Wash.2d 288, 289, 53 P.3d 974, 975 (2002). In *State v. Kilgore*, the trial court admitted evidence of other acts allegedly committed by the defendant, following an offer of proof by the prosecuting attorney specifying the other acts that would be testified to by the alleged victims. *See Id.*, at 290-91, 53 P.3d at 975. The alleged victims testified at trial consistent with the offer of proof. *See Id.* at 291, 53 P.3d at 975. Following a jury verdict of guilty, Kilgore appealed on the ground the trial court was required to hold an evidentiary hearing to determine whether, by a preponderance of the evidence, the alleged other acts occurred. *See Id.* at 292, 53 P.3d at 976. The Supreme Court of Washington held the trial court did not err in admitting the other acts evidence following the offer of proof by the prosecution. *Id.* at 295, 53 P.3d at 977-78. The court reasoned “that the trial court is in the best position to determine whether it

can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.” *Id.* at 295, 53 P.3d at 977.

Here, the State made an offer of proof during the pretrial hearing specifying the other acts committed by the defendant, to which the victim would testify. RP 8-17-05 14-26. The victim testified at trial consistent with this offer of proof. RP 13-33. Although the trial court did not make a finding on the record the other acts occurred by a preponderance of the evidence, pursuant to *Kilgore*, the State’s offer of proof was sufficient to merit such a finding. Therefore, the State requests the Court find that the trial court’s failure to make a finding on the record was harmless and not reversible error.

B. The other acts committed by the defendant were properly admitted to show the victim’s reasonable fear the defendant’s threat to kill her would be carried out.

In *State v. Barragan*, the defendant was charged with attempted first degree murder, first degree assault, and felony harassment, following an altercation with a fellow inmate while residing in Grant County jail. *See State v. Barragan*, 102 Wash.App. 754, 757, 9 P.3d 942, 945 (2000). The State sought to admit evidence, pursuant to ER 404(b), that the defendant made statements to the victim about earlier assaults against fellow inmates, to show the victim feared the defendant would carry out the threat. *See Id.* at 758, 9 P.3d at 945. The victim testified that the

defendant threatened him during the altercation by stating “[y]ou’re gonna die.” *Id.* at 757, P.3d at 945. The trial court admitted the evidence of the defendant’s prior statements to the victim, finding the statements relevant to the charge of felony harassment to demonstrate the victim was in reasonable fear the threat would be carried out. *See Id.* at 758-59, 9 P.3d at 945-46. Following a conviction by jury of first degree assault, the defendant appealed, arguing that the trial court erred by admitting the statements under ER 404(b). *See id.* at 758, 9 P.3d at 945.

The court stated that “[b]efore admitting evidence of prior acts, the trial court must first determine whether the evidence is logically relevant to a material issue.” *Id.*, citing *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995); *State v. Ragin*, 94 Wash.App. 407, 411, 972 P.2d 519 (1999). Additionally, the court stated that “[w]e review the trial court’s decision to admit evidence of a defendant’s prior acts for abuse of discretion.” *Id.* at 758, 9 P.3d at 945-46. The court found the victim’s knowledge of the defendant’s prior assaults against other inmates was relevant to the reasonable fear element of felony harassment. *See id.* at 759, 9 P.3d at 946. The court held “[t]he trial court properly identified on the record this purpose for admitting the evidence and did not abuse its discretion in admitting the evidence on this basis.” *Id.*, citing *State v. Brown*, 132 Wash.2d 529, 571, 940 P.2d 546 (1997).

Here, the State presented evidence of five other acts committed by the defendant. This evidence included (1) an incident in January 2005 in which the defendant threw the victim on the bed and threw her head against the wall; (2) an incident on February 17, 2005 in which the defendant pointed a handgun at the victim while telling her she could not leave him; (3) an incident on February 26, 2005 in which the defendant choked the victim in front of her daughter, and charged her upon her return to their home later in the day; (4) an incident on March 21, 2005 in which the victim discovered that their home had been broken into, and the victim believed that the defendant was the perpetrator; and (5) an incident on May 24, 2005 in which the defendant impersonated the victim in an attempt to pay off a loan he owed, using a credit card that was stolen from the victim on March 21, 2005. RP 13-33. Incidents (1)-(5) were offered by the State to show the victim's fear of the defendant and the reasonableness of her believing the threat to kill her, and her state of mind, concerning how far the defendant was willing to go, for purposes of the felony harassment charge. RP 8-17-05 17-25.

The defendant argues that because he did not defend against the felony harassment charge by questioning the reasonableness of the victim's fears, the State had no reason to offer the other acts evidence, other than to show the defendant's propensity to commit the charged

crimes. In support of this argument, the defendant points to the fact that he took the stand and admitted that he would have been in fear for his life, as would have any reasonable person, had he been in her situation. Def.'s Br. at 18-19. However, the State had no way to know the defendant would take the stand, or the information to which he would testify. Because the State has the burden of proving each element of the crimes charged, the State is entitled to put forth evidence to prove its case. Therefore, pursuant to *Barragan*, the trial court properly admitted these other acts evidence to show the victim's reasonable fear that the defendant's threat to kill would be carried out. The State requests the Court find the trial court did not abuse its discretion in admitting evidence of the other acts committed by the defendant.

C. Although the trial court did not balance the probative value of the evidence of other acts committed by the defendant against its prejudicial effect on the record, the record is sufficient to allow effective appellate review.

The final step in the admitting other acts evidence requires the trial court to balance the probative value of the evidence against its prejudicial effect. *See Thach*, 126 Wash.App. at 310, 106 P.3d at 789, quoting *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002). The trial court must engage in this balancing process on the record. *See State v. Donald*, 68 Wash.App. 543, 547, 844 P.2d 447, 449 (1993), citing *State v. Jackson*,

102 Wash.2d 689, 694, 689 P.2d 76 (1984). If the trial court fails to do so, “an appellate court will review the matter only if the record as a whole is sufficient to allow effective appellate review.” *Donald*, 68 Wash.App. at 547, 844 P.2d at 449, citing *State v. Gogolin*, 45 Wash.App. 640, 727 P.2d 683 (1986); *State v. Mutchler*, 53 Wash.App. 898, 771 P.2d 1168 (1989).

In *State v. Barragan*, the trial court did not balance the probative value of the prior acts evidence against its prejudicial effect. See *Barragan*, 102 Wash.App. at 759, 9 P.3d at 946. Nonetheless, the court found the record was “sufficient to permit meaningful review of this . . . requirement for ER 404(b) evidence admission.” *Id.*, citing *State v. Donald*, 68 Wash.App. 543, 547, 844 P.2d 447 (1993). The court stated that the prior acts evidence was not overly prejudicial, in light of other testimony describing the defendant’s rage and threats against the victim. See *Id.* at 759-60, 9 P.3d at 946. The court further stated “the jury was entitled to know what [the victim] knew at the time [the defendant] threatened him, to better decide whether a reasonable person with that knowledge would believe that [the defendant] would carry out his threats.” *Id.* at 760, 9 P.3d at 946; see also *State v. Ragin*, 94 Wash.App. 407, 412, 972 P.2d 519, 521 (1999) (applying the same reasoning in upholding the admission of other acts evidence in a case charging felony harassment).

The court found that “[u]nder the circumstances, the probative value of the evidence outweigh[ed] its prejudicial effect.” *Id.*

Here, the evidence of other acts committed by the defendant was not overly prejudicial, in light of other testimony describing the conduct of the defendant. This includes the victim’s testimony regarding the defendant’s conduct on June 14, 2005, and Brianna Harvill’s emphatic testimony identifying the defendant as the individual who broke into the house on June 13, 2005. RP 39-45; 102-109.

Furthermore, the evidence of other acts committed by the defendant was highly probative of the nature of the relationship between the defendant and the victim. The jury was entitled to know what the victim knew at the time the defendant threatened to kill her. Specifically, that even though they were once husband and wife, the relationship was violent, the violence was not stopped by the children’s presence, and after the divorce the defendant wanted to hurt Brandi Harvill both financially and physically. Without this information, the jury could not fairly evaluate whether a reasonable person with the knowledge of Brandi Harvill would believe the defendant would carry out this threat. Therefore, the State requests the Court find the failure of the trial court to balance the probative value of the evidence against its prejudicial effect on the record is not reversible error.

D. Should the Court find the evidence of other acts committed by the defendant was improperly admitted, the error was harmless, as the result of the trial would not have changed were the evidence excluded.

In *State v. Thach*, the defendant was charged with second-degree assault – domestic violence and unlawful imprisonment – domestic violence. *See State v. Thach*, 126 Wash.App. 297, 305, 106 P.3d 782, 787 (2005). During the testimony of the victim, the State had the victim read portions of the written statement she gave to the police, which included the defendant had abused her in the past. *See Id.* The jury found the defendant guilty of second-degree assault – domestic violence, and the defendant appealed, arguing in part, the trial court erred in admitting the evidence of previous abuse against the victim. *See Id.* at 307, 310, 106 P.3d at 788, 789.

On appeal, the court found the trial court should have followed the four-step procedure for admitting evidence of prior bad acts. *See Id.* at 310-11, 106 P.3d at 789-90. Nonetheless, the court stated that “[e]videntiary errors under ER 404 are not of constitutional magnitude, so we must determine whether the trial outcome would have differed if the error had not occurred.” *Id.* at 311, 106 P.3d at 790, citing *State v. Robtoy*, 98 Wash.2d 30, 653 P.2d 284 (1982); *State v. Jackson*, 102 Wash.2d 689, 689 P.2d 76 (1984). In *Thach*, the court found the outcome would not

have differed “because [the victim] testified to all of the elements of the offense, verified that she had made the statement to the police, made the same statement of assault to the treating physician, and had injuries consistent with her physical examination in the emergency room.” *Id.* Accordingly, the court held the failure to follow the four-step procedure was harmless error. *See Id.*

Here, the trial court failed to follow all four steps of the required procedure to admit other acts evidence. RP 8-17-05 14-26. Should the Court find that because of this failure, the other acts evidence was improperly admitted, the result of the trial would not have changed had the evidence been excluded. Absent the other acts evidence, there was sufficient evidence to support a jury finding of the victim’s reasonable fear that the defendant’s threat to kill would be carried out. The victim, Brandi Harvill testified that in the early morning hours of June 14, 2005, she heard glass break and subsequently saw an intruder come through her kitchen window. RP 37-38. She testified that upon making eye contact with the intruder, he stated, “I’m going to kill you, you fucking bitch.” RP 40-41. The victim said that from this threat she recognized the intruder’s voice as the defendant’s. RP 42-43. Furthermore, Brandi Harvill testified she thought she was going to die. RP 41-42. In addition to this testimony, the jury was aware there was a restraining order prohibiting the defendant

from contacting the victim. RP 33; App. A. Based upon the victim's testimony of the events, including how the defendant entered her home, and the existence of the restraining order, the jury could have found it was reasonable for the victim to believe the defendant's threat to kill her would be carried out. Therefore, should the Court find that the other acts evidence was improperly admitted, the State requests the Court find the admission of other acts committed by the defendant was harmless error.

II. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO FACTUAL EVIDENCE THE DEFENDANT WAS ARRESTED AND IN JAIL.

The defendant argues that his trial counsel's failure to object to opinion evidence of guilt denied him the right to effective assistance of counsel. The alleged opinion evidence of guilt includes (1) testimony of Officer Johnson and Officer Voelker that the defendant was arrested and held in jail, and (2) testimony of the defendant on cross-examination that he spoke to Melissa Brink while he was in jail. RP 119-125; RP 148; RP 278.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wash.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. Const. Amend. VI, Wash. Const. Art. 1, § 22. "[T]he substance of this guarantee is that courts must

make ‘effective’ appointments of counsel.” *Jury*, 19 Wash.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wash.2d 419, 424, 545 P.2d 538 (1976). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122 (1986).

The defendant failed to establish ineffective assistance of counsel with respect to his trial counsel’s failure to object to factual evidence the defendant was arrested and in jail, for three alternative reasons: first, the

evidence that the defendant was arrested and held in jail was fact, not opinion evidence of guilt; second, should the Court find this evidence was opinion evidence of guilt, the defendant was not denied effective representation by his trial counsel's failure to object to such evidence; and third, should the Court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by his trial counsel's failure to object to opinion evidence of guilt.

A. The defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object to factual evidence the defendant was arrested and in jail, because the evidence of his arrest and custody was fact, not opinion evidence of guilt.

It is true that “[a]n opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wash.App. 698, 701, 700 P.2d 323, 325 (1995), *rev’d on other grounds*, *Seattle v. Heatley*, 70 Wash.App. 573, 854 P.2d 658 (1993), citing *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812 (1980). However, the defendant cites no cases stating that the fact of an arrest or the fact that the defendant is in custody constitute opinion evidence of the defendant’s guilt. Furthermore, the State is not aware of any cases supporting this argument. The defendant cites *Warren v. Hart*, however,

this case is not on point. *See Warren v. Hart*, 71 Wash.2d 512, 429 P.2d 873 (1967). *Warren v. Hart* is a civil personal injury case concerning a traffic accident and the non-issuance of citations by law enforcement to the parties involved. *See Id.* at 514, 429 P.2d at 874. In *Warren*, the defendant argued in closing that the officer's failure to issue a citation was evidence the officer did not believe him negligent. *See Id.* at 516-17, 429 P.2d at 875-76. The *Warren* court found the plaintiff was entitled to a new trial, based solely upon the improper use of this evidence by the defendant in closing argument. *See Id.* at 516-19, 429 P.2d at 875-77. In contrast, in the present case, the State did not argue in closing argument that the defendant was guilty because he was arrested and held in jail. RP 8-19-05 18-34.

“[T]he general rule is that witnesses are to state facts, not inferences or opinions.” *Carlin*, 40 Wash.App. at 700, 700 P.2d at 325. Here, in testifying the defendant was arrested and held in jail, Officer Johnson and Officer Voelker were stating facts. The State did not ask any of these witnesses their opinion as to why the defendant was arrested and held in jail. Moreover, the defendant admitted on direct examination the fact of his arrest and custody. RP 255-258. Additionally, the defendant's testimony on cross-examination that he spoke to Melissa Brink while he was in jail was also a fact. Being arrested is like being charged, and both

are mere evidence of facts and not opinion. The jury was instructed that even though the defendant was charged, this was not opinion evidence of guilt. RP 8-19-05 7. Therefore, the State requests the Court find the testimony was not opinion evidence of guilt.

B. Should the Court find the evidence of the defendant's arrest and custody was opinion evidence of guilt, the defendant failed to establish ineffective assistance of counsel, because he was not denied effective representation.

The defendant argues that no tactical reason existed for counsel's failure to object to testimony the defendant was arrested and held in jail. Accordingly, the defendant argues this failure to object satisfies the first prong of the test for ineffective assistance of counsel, the denial of effective representation.

"In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Ermert*, 94 Wash.2d 839, 849, 621 P.2d 121, 126 (1980). Despite the defendant's argument here, a tactical reason for not objecting to testimony that the defendant was arrested and held in jail did exist. The defendant put on an alibi witness who confessed to the breaking into the home and threatening the victim. RP 192-209. Trial counsel may have not objected to testimony the defendant was arrested and held in jail in

order to demonstrate to the jury that the defendant did not have an opportunity to talk to the alibi witness. Specifically, if the defendant was in jail, he could not have communicated the details of the crimes to the alibi witness. The defendant's direct testimony supports this trial tactic:

The Defendant's attorney: Okay. And, so, when was the next time you had any contact with Mr. Wynn?

The Defendant: The next time I was in contact with him is he – let's see, when was it? I don't think I was in contact with him at all, until just recently, just now, I was in jail.

RP 259.

Because the failure to object to testimony that the defendant was arrested and held in jail could have been a trial tactic, the defendant's trial counsel functioned as a reasonably competent attorney would under the circumstances. Therefore, should the court find the evidence of the defendant's arrest and custody was opinion evidence of guilt, the state requests the court find the defendant was not denied effective representation by his trial counsel as it was a legitimate trial tactic.

C. Should the Court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by such failure.

Even if the Court finds the defendant was denied effective representation with respect to his trial counsel's failure to object to opinion evidence of guilt, the defendant must establish he was prejudiced

by such failure. In order to do so, the defendant must prove “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122 (1986). Specifically, the defendant must prove that if his trial counsel had objected to the testimony he was arrested and held in jail, he would not have been convicted.

Absent evidence of the defendant’s arrest and custody, there was sufficient evidence for the jury to find the defendant guilty of the charged crimes. The victim testified that it was the defendant who broke into the home on June 14, 2005, and threatened to kill her. RP 35-42. Additionally, the defendant’s daughter positively identified the defendant as the person who broke into and entered the home. RP 102-109. Appellate counsel alleges that because another individual confessed to the crime and the defendant had an alibi, were the evidence excluded, the jury would have acquitted the defendant. Def.’s Br. at 28. However, this supposes the jury would have found Mr. Wynn credible. Determinations of credibility are the province of the jury and will not be disturbed on appeal. *See State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850, 855 (1990) citing *State v. Casbeer*, 48 Wash.App. 539, 542, 740 P.2d 335 (1987). The State presented the jury with Brandi Harvill and Brianna

Harvill's testimony. The jury chose not to believe the contrary testimony of the defendant and his alibi witness, and found the defendant guilty as charged. Furthermore, the jury was aware, from direct examination of the defendant, that he was arrested and held in jail. RP 255-257. Therefore, should the court find the defendant was denied effective representation, the state requests the court find the defendant was not prejudiced as a result.

III. THE DEFENDANT FAILED TO ESTABLISH HE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO HIS TRIAL COUNSEL'S ALLEGED FAILURE TO OBJECT TO THE STATE'S CROSS-EXAMINATION OF DEFENDANT AS TO THE ELEMENTS OF THE CHARGED CRIMES.

The defendant argues his trial counsel's alleged failure to object to the state's cross-examination of the defendant regarding his agreement with the elements of the charged crimes denied him the right to effective assistance of counsel. The testimony at issue is as follows:

The State: Now, just so I get this straight, you're not denying that somebody broke into Brandi's house; right?

The Defendant: Obviously, they did [inaudible].

The State: So you're agreeing that somebody broke into Brandi's house.

The Defendant: Obviously, I'm here.

The State: And they did so without permission; right?

The Defendant: Yes.

The State: Okay. And that the house was a dwelling, clearly?

The Defendant: A dwelling?

The State: Yeah.

The Defendant: Is it?

The State: Somebody sleeps there?

The Defendant: Yes.

The State: Okay. And the person who entered that house, entered it with the intent to commit a crime?

The Defendant: Yes.

RP 260-261.

Following an objection that the last question called for a legal conclusion, which was overruled by the trial court, the testimony continued:

The State: Let me just rephrase it. The person who entered the house threatened to kill Brandi; right? You're not disagreeing with that?

The Defendant: From the statement.

The State: Is that a "yes"?

The Defendant: Well, yeah.

The State: Okay. And that somebody stole her purse? You're not disagreeing with that?

The Defendant: No, I don't know what's going on through his mind when he did this. Is there a purse stolen? That's what she said, yeah, there was a purse stolen.

The State: Okay. So you're agreeing that her purse was stolen; right?

The Defendant: Yeah –

The State: Okay.

The Defendant: - there was a purse stolen, I guess. That's what the police say and that's what she's saying.

The State: Okay. And you're not disagreeing that the person that threatened to kill her did that knowingly?

RP 262.

The defendant's trial counsel then objected, on the basis that the defendant lacked personal knowledge. RP 262. The court sustained the objection, and the state continued in its cross-examination of the defendant:

The State: Are you contradicting that Brandi was frightened at all?

The Defendant: Well, I would've been frightened myself.

The State: And that fear was reasonable?

The Defendant: Well, yeah, because I would've been scared – scared too, if someone was in my house.

RP 262-263.

Following questioning on other matters, the testimony at issue resumed:

The State: Now, it's your testimony that everything that Brandi described as happening in the house is correct, other than it wasn't you, right?

RP 280.

The defendant's trial counsel objected to this question on the basis that the state was asking the defendant to comment on another person's testimony. RP 280-81. The trial court sustained the objection. RP 281.

The state concluded its cross-examination with the following questions:

The State: You're not disagreeing that the burglary happened?

The Defendant: I don't know what to tell you what was going on in the house.

The State: You're just saying it's not you?

The Defendant: Yes.

RP 281.

The defendant failed to establish he was denied the right to effective assistance of counsel with respect to his trial counsel's alleged failure to object to the state's cross-examination of the defendant in regards to his agreement with the elements of the charged crimes, for three alternative reasons: first, the state's questioning was an attempt to narrow the issue to the alibi defense, rather than get the defendant to comment on the credibility of the victim; second, should the court find the cross-examination was a comment on the credibility of the victim, the defendant

was not denied effective representation, because his trial counsel did object to the questioning; and third, should the court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by trial counsel's alleged failure to object to the cross-examination.

A. The failure of counsel to object to the State's cross-examination of the defendant was not error as the State was narrowing the defense of alibi by having the defendant concede all of the other elements of the crime.

It is true that "Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth." *State v. Casteneda-Perez*, 61 Wash.App. 354, 360, 810 P.2d 74, 78 (1991), citing *State v. Swenson*, 62 Wash.2d 259, 283, 382 P.2d 614 (1963); *State v. Fitzgerald*, 39 Wash.App. 652, 657, 694 P.2d 1117 (1985); *State v. Maule*, 35 Wash.App. 287, 297, 667 P.2d 96 (1983); 5A K. Tegland, Wash.Prac. § 292, at 39 n. 4 (2d ed. 1982). In *Casteneda-Perez*, the defendant appealed his conviction by jury of delivery of a controlled substance, on the basis that "the persistent effort by the prosecutor to get the witnesses and defendant to say the officer witnesses were lying was improper, prejudicial, and denied him a fair trial." *Id.* at 359, 810 P.2d at 77. At trial, the prosecutor asked the defendant and two

defense witnesses a series of questions aimed at eliciting testimony that the officer witnesses lied in their testimony. *See id.* at 357-59, 810 P.2d at 76-77. The *Casteneda-Perez* court stated that “[u]nquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury.” *Id.* at 362, 810 P.2d at 79. The court found the questioning improper, however, it affirmed the defendant’s conviction on the basis that the improper questioning was harmless error. *See Id.* 363-65, 810 P.2d at 79-80.

Here, however, the State’s cross-examination did not seek to elicit the defendant’s opinion on whether the victim was lying. Rather, the state’s cross-examination was an attempt to narrow the issue to the alibi defense. Specifically, the state was trying to elicit from the defendant whether the primary issue for the jury was not whether the crimes occurred, but who committed the crimes. The state’s questioning was for the defendant to concede every element, other than identity. Because the defense’s theory was that Mr. Wynn committed the crimes and the defendant was elsewhere when the crimes occurred, the line of questioning was not a comment on the victim’s credibility. Moreover, counsel’s failure to object was legitimate trial strategy, by limiting the defense to alibi and not arguing facts the defense conceded with its

witness Charles Wynn. *See State v. Ermert*, 94 Wash.2d 839, 849, 621 P.2d 121, 126 (1980) (stating “[i]n considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics.”). The state requests the court find the state’s questioning was a permissible attempt to narrow the issue to the alibi defense, rather than an impermissible attempt to get the defendant to comment on the credibility of the victim.

B. Should the Court find the cross-examination was a comment on the credibility of the victim, the defendant failed to establish ineffective assistance of counsel, because he was not denied effective representation.

If the court finds the state’s questioning of the defendant at issue here was impermissible, defendant was not denied effective representation, because his trial counsel did object to the questioning. In order to show that he was denied effective representation, the defendant must demonstrate “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122 (1986).

Here, during the testimony at issue, the defendant's trial attorney made three objections. RP 261; 262; 280-281. His objection that the state was asking the defendant to comment on another person's testimony was made following the only question eliciting comment on the victim's testimony, "[n]ow it's your testimony that everything that Brandi described as happening in the house is correct, other than it wasn't you, right?" RP 280. By promptly objecting to this question, defendant's trial counsel functioned as a reasonably competent attorney would under the circumstances. After the trial court sustained the objection, the state rephrased its question as not to elicit comment on the victim's testimony, "[y]ou're not disagreeing that the burglary happened?". RP 281. Therefore, it was reasonable for defendant's trial counsel not to raise another objection. The state requests the court find the defendant was not denied effective representation, because his trial counsel did object to the only question eliciting comment on the victim's testimony.

C. Should the Court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by such failure.

Even if the court finds the defendant was denied effective representation with respect to his trial counsel's alleged failure to object, the defendant must establish he was prejudiced by such failure. Accordingly, the defendant must prove "that there is a reasonable

probability that, but for the counsel's errors, the result of the proceeding would have been different." *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122 (1986). Specifically, the defendant must prove that if his trial counsel made additional objections to the state's attempt on cross-examination to get the defendant to comment on the credibility of the victim, he would not have been convicted.

The defense alleges that the defendant's "plausible" alibi coupled with the testimony of Mr. Wynn raised a reasonable probability the jury would return a not guilty verdict. Def.'s Br. at 28. However, the defendant's testimony on cross-examination was an agreement the burglary happened, not that he committed the burglary. Thus, the determination of credibility left to the jury was whether to believe Charles Wynn. Even without the defendant's concession on cross-examination, there was sufficient evidence for the jury to find the defendant guilty of the charged crimes, because the victim testified it was the defendant who broke into her home and threatened to kill her, and the defendant's daughter identified the defendant as the person who entered the home. RP 35-42; RP 102-109. Therefore, should the court find the defendant was denied effective representation with respect to his trial counsel's alleged

failure to object, the state requests the court find the defendant was not prejudiced as a result.

IV. THE DEFENDANT FAILED TO ESTABLISH THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING ITS CROSS-EXAMINATION OF THE DEFENDANT IN REGARDS TO HIS CONCESSION OF THE ELEMENTS OF THE CHARGED CRIMES. SHOULD THE COURT DISAGREE, THE PROSECUTORIAL MISCONDUCT DOES NOT REQUIRE REVERSAL.

Although the defendant does not argue prosecutorial misconduct as a basis for appeal, he does mention prosecutorial misconduct in his ineffective assistance of counsel argument. Therefore, the state briefly addresses this issue below.

“A prosecutor commits misconduct when his or her cross-examination seeks to compel a witness’ opinion as to whether another witness is telling the truth.” *State v. Jerrels*, 83 Wash.App. 503, 507, 925 P.2d 209, 211 (1996), citing *State v. Suarez-Bravo*, 72 Wash.App. 359, 366, 864 P.2d 426 (1994); *State v. Casteneda-Perez*, 61 Wash.App. 354, 362, 810 P.2d 74 (1991). However, “[p]rosecutorial misconduct requires reversal only when there is a substantial likelihood the jury’s verdict was affected.” *State v. Suarez-Bravo*, 72 Wash.App. 359, 366, 864 P.2d 426, 431 (1994), citing *State v. Barrow*, 60 Wash.App. 869, 876, 809 P.2d 209 (1991); *State v. Mak*, 105 Wash.2d 692, 718 P.2d 407 (1986); *State v. Stith*, 71 Wash.App. 14, 19, 856 P.2d 415 (1993). Furthermore,

Some of the factors considered in determining whether the misconduct likely affected the verdict are whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying, whether the State's witness's testimony was believable and/or corroborated, and whether the defense witness's testimony was believable and/or corroborated.

Id. at 366-67, 864 P.2d at 431, citing *State v. Padilla*, 69 Wash.App. 295, 301, 846 P.2d 564 (1993).

Here, the state did not seek to compel the defendant on cross-examination to state his opinion as to whether the victim was lying in her testimony. Rather, the state sought to narrow the issue to the alibi defense and have the defense concede elements of the offense which were not in issue. Therefore, the state's line of questioning was not prosecutorial misconduct.

Should the court find that the state's line of questioning amounted to a comment on the victim's credibility and misconduct, the prosecutorial misconduct does not require reversal. First, the state did not provoke the defendant to testify that the victim was lying in her testimony. Second, there was sufficient evidence of identity from the victim's testimony, corroborated by the defendant's daughter, to find the defendant guilty of the charged crimes. Therefore, should the court find the state's examination was misconduct, there was not a substantial likelihood it

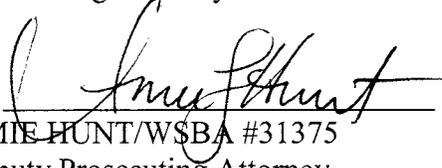
affected the verdict. The state requests the court reject the defendant's prosecutorial misconduct allegations on the aforementioned grounds.

V. CONCLUSION

The state requests the court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 24th day of October, 2006

SUSAN I. BAUR
Prosecuting Attorney

By 
AMIE HUNT/WSBA #31375
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX A

1 A motion for temporary order was presented to this court and the court finds reasonable
2 cause to issue the order.

3
4 III. ORDER

5 It is ORDERED that:

6 3.1 RESTRAINING ORDER.

7 **VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A**
8 **CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT**
9 **THE VIOLATOR TO ARREST. RCW 26.09.060.**

- 10 a. Both parties are restrained and enjoined from molesting or disturbing the
11 peace of the other party or of any child.
- 12 b. Both parties are restrained and enjoined from going onto the grounds of or
13 entering the home, work place or school of the other party.
- 14 c. Respondent is restrained and enjoined from going onto the grounds of the
15 daycare or school of the following children: Briana and Britnee Harvill.

16 *(except for school scheduled activities w/ monitor)* ✓ *Jmg*
17 CLERK'S ACTION/LAW ENFORCEMENT ACTION:

18 This order shall be filed forthwith in the clerk's office and entered of record. The
19 clerk of the court shall forward a copy of this order on or before the next judicial
20 day to the appropriate law enforcement agency, which shall forthwith enter this
21 order into any computer-based criminal intelligence system available in this state
22 used by law enforcement agencies to list outstanding warrants. (A law
23 enforcement information sheet must be completed by the party or the party's
attorney and provided with this order before this order will be entered into the law
enforcement computer system.)

SERVICE:

- a. The restrained party or attorney appeared in court or signed this order;
service of this order is not required.

EXPIRATION DATE:

This restraining order will expire in 12 months and shall be removed from any
computer-based criminal intelligence system available in this state used by law
enforcement agencies to list outstanding warrants, unless a new order is issued.

ROBERT H. FALKENSTEIN

ATTORNEY AT LAW
950 - 12th Avenue, Suite 100
P.O. Box 868
Longview, WA 98632

Telephone : (360) 577-8995
Fax : (360) 577-8997

1 3.2 TEMPORARY RELIEF.

- 2 a. Child support shall be paid in accordance with the order of child support
3 signed by the court.
- 4 b. The parties shall comply with the Temporary Parenting Plan signed by the
5 court.
- 6 c. Both parties are restrained and enjoined from transferring, removing,
7 encumbering, concealing or in any way disposing of any property except in
8 the usual course of business or for the necessities of life and requiring each
9 party to notify the other of any extraordinary expenditures made after the
10 order is issued.
- 11 d. Both parties are restrained from any further use of community credit cards.
- 12 e. Further, the husband is to take appropriate steps to release any of the parties
13 real or personal property that has been pledged as collateral for bail to be
14 released and to provide proof of said release to wife's attorney.
- 15 f. Both parties are restrained and enjoined from assigning, transferring,
16 borrowing, lapsing, surrendering or changing entitlement of any insurance
17 policies of either or both parties whether medical, health, life or auto
18 insurance.
- 19 g. Each party shall be immediately responsible for their own future debts
20 whether incurred by credit card or loan, security interest or mortgage.
- 21 h. Responsibility for the debts of the parties is divided as follows:
- 22 Wife shall pay the residential home mortgage, car payment, Visa, and
23 Sears.
- Husband shall pay for any debts he has incurred since the separation of
 the parties and any credit card debt in his name.
- 24 i. The family home shall be occupied by the wife.
- 25 j. Use of property shall be as follows:
- Each party shall have the temporary use and possession of the property
 currently in that party's possession.

1 Wife is specifically granted the temporary use and possession of the
2 personal property currently in her possession with the exception of
3 husband's tools and clothing. The attorneys are to work out an
4 arrangement for an exchange of tools and clothing.

5 Husband shall have the temporary use and possession of the vehicles and
6 personal property in his possession including the Ford Mustang, 1987
7 Honda Accord and the 1964 Chevrolet. Husband is to return any of wife's
8 jewelry or clothing, if he has possession of the same.

9 If husband has possession of the children's US Savings Bonds, he is to
10 immediately turn those savings bonds over to his attorney for safe
11 keeping. If husband's attorney receives those bonds, he is to provide said
12 information to wife's attorney.

13 3.3 BOND OR SECURITY.

14 Does not apply.

15 3.4 OTHER:

16 Wife is to sign insurance check at Columbia Ford to effect the release of the Ford
17 Mustang and cause such vehicle to be released to husband.

18 DATED: _____

4/15/05


J. Johanson
JUDGE

19 Presented by:



20 ROBERT H. FALKENSTEIN, #4903
21 Attorney for Petitioner

22 Signature above is actual notice of this order.

23 Approved as to form and notice
of presentation waived:

CRAIG M. MCREARY, #26367
Attorney for Respondent

Signature above is actual notice of this order.

APPENDIX B

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTORNEY

CHIEF CIVIL DEPUTY
Ronald S. Marshall



CHIEF CRIMINAL DEPUTY
J. Tobin Krauel

Heiko Philipp Coppola
Amie L. Hunt
Melody Overton
Barbara Vining

DEPUTY PROSECUTING ATTORNEYS
Arne O. Denny
Mike Nguyen
Dustin D. Richardson

G. Tim Gojio
Michelle E. Nisle
Michelle L. Shaffer
Alyssa R. Zach

Deri Moore, Administrative Assistant

Angie Gogerty, Victim-Witness Coordinator

August 1, 2005

Donald Frey
600 Royal W., Suite B
Kelso, WA 98626

Re: State of Washington v. Branden Harvill
Cause number: 05-1-00713-1

Mr. Frey,

Below is a list of other acts the State intends to rely on in trial:

- 1) January 2005: There were troubles in the marriage and the two tried counseling. During one session, the defendant blew up at the counselor Rick Lado and threatened him.
- 2) January 2005: Brandi went out for dinner with some girlfriends. The defendant became upset when he couldn't find her. When she returned home, the defendant was in her face, shoved her and pushed her on the beg. He broke the phone and the door. The tirade lasted approximately four to five hours before he left. Brandi was upset and scared to leave, she was afraid that he would hurt her.
- 3) February 17, 2005: At 1:00 am that morning, Brandi went into the garage and told defendant that she was leaving tomorrow with the kids to live with her mother. An argument ensued and the matter escalated. Brandi went into the house and the defendant followed her. He pushed her into the nightstand/dresser, grabbed her throat, and threw her. He went back to the garage, came back with a .44 ruger hand gun and pointed the gun at her. He told her that she was not leaving. He disconnected that phones and took the cell phone. Later he became suicidal and went back to the garage. Brandi was able to slip in, grab the gun and unload it. She then hid the gun.
- 4) February 26, 2005: the defendant choked Brandi in front of her daughter. She left the house afterwards and took the children to the grandmothers. She went back to the house one hour later after she called to make sure he wasn't there (no answer to the phone). She went into the house, the defendant was there

- and he charged her. She left immediately, called the police. Longview PD responded and escorted her inside. The report number is 05-4672.
- 5) February 28, 2005: Brandi obtained a restraining order.
 - 6) March 17, 2005: The defendant attempted to get a second mortgage on the house without her knowledge at Secure Funding.
 - 7) March 21, 2005: Someone broke into the house. Brandi thinks it was the defendant because he called the house around 10:00 am (caller id). The items stolen from the house were the kids bonds, old pieces of identification, an old social security card with her maiden name, and old bank card, old driver's license. His mail was missing, as well as a t-shirt of his and other of his personal items. Nothing else was missing.
 - 8) March 2005: the defendant put all the vehicles and house up for collateral on bail for other convicts and he forged her name on the title of the Honda.
 - 9) March 23, 2005: defendant came to house with Melissa Brink. A neighbor caught them in front of the house and called her. Brandi called the police. Later that night the defendant called her from a pay phone and said "you fucking bitch." He continued to call all that night until at least 10:00pm.
 - 10) April 4, 2005: the defendant forged Brandi's name on the check to Columbia Ford for the mustang and spent the money.
 - 11) May 4, 2005: The defendant attempted to get another mortgage on the home with U.S. Bank.
 - 12) May 24, 2005: The defendant attempted to impersonate Brandi and pay off his loan with her credit card. She was on the phone with the bank when Branden called back and she listened to the call.
 - 13) May 26, 2005: defendant attempted to use Brandi's credit card to purchase a new computer at Charisma.
 - 14) June 2, 2005: Another attempt to refinance the home.
 - 15) June 7, 2005: the defendant was held in contempt of court for the above mortgage.
 - 16) June 12-13 2005: Brandi receives a call from Chris Olson, a former roommate of the defendant's. Olson tells Brandi that the defendant is trying to hire someone to kill her – jump her and hurt her. He said that after the divorce proceedings on June 3, 2005 regarding the house and car, the defendant was very mad and spent an hour on the phone trying to hire someone to shoot and kill her. Brandi reported this to the police on June 13.

Please let me know if you have any questions.

Sincerely,
SUSAN I. BAUR
Prosecuting Attorney

/copy/

Amie L. Hunt
Deputy Prosecuting Attorney

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 BRANDON JAMES HARVILL,)
)
 Appellant.)
 _____)

NO. 33731-2-II
Cowlitz County No.
05-1-00713-1

CERTIFICATE OF
MAILING

FILED
COURT OF APPEALS
OCT 26 PM 1:56
TACOMA, WA

I, Audrey J. Gilliam, certify and declare:

That on the 24 day of October, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of October, 2006.


Audrey J. Gilliam