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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39945-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jay Calderon,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00294-3

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Calderon's conviction for felony harassment infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The state failed to prove that Mr. Calderon's words or conduct placed Jennifer Calderon in reasonable fear that he would kill her.
3. Mr. Calderon's conviction for felony harassment infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove that Jennifer Calderon reasonably feared that Mr. Calderon would kill her.
4. Mr. Calderon's conviction for felony harassment infringed his First and Fourteenth Amendment right to free speech because the court's instructions relieved the state of its burden to prove a "true threat."
5. Mr. Calderon was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
6. Defense counsel was ineffective for failing to object to evidence that was inadmissible under ER 402, ER 403, and ER 404(b).
7. Defense counsel was ineffective for failing to request instructions limiting the jury's consideration of evidence admitted for "other purposes" under ER 404(b).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Calderon of felony harassment, the state was required to prove that his words or conduct placed Jennifer Calderon in reasonable fear that he would kill her. The state did not introduce evidence that Jennifer Calderon feared Mr. Calderon would kill her. Did Mr. Calderon's conviction for felony harassment violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions relieved the state of its burden to show that Jennifer Calderon reasonably feared Mr. Calderon would kill her. Did the trial court's instruction relieve the state of its burden of proof in violation of Mr. Calderon's Fourteenth Amendment right to due process?
3. The First Amendment requires the trial court to instruct a jury considering a felony harassment charge of the requirement that the state prove a "true threat." In this case, the trial judge did not instruct the jury on the "true threat" requirement. Did Mr. Calderon's felony harassment conviction violate his First and Fourteenth Amendment rights?
4. An accused person has a constitutional right to the effective assistance of counsel. Mr. Calderon's attorney failed to object to inadmissible testimony, and failed to request limiting instructions prohibiting the jury from using such evidence as substantive evidence of guilt. Was Mr. Calderon denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jay Calderon lived with his sister Jennifer Calderon and their mother. RP (10/15/09) 5. Mr. Calderon wanted his sister to give him a ride to a nearby casino, and possibly some money, but she wasn't inclined to help him. RP (10/15/09) 6-9. He continued to ask her, believing that they were lightheartedly talking and jokingly tossing socks while discussing his evening plans. RP (10/15/09) 31-33. His sister perceived Mr. Calderon as "on drugs" and aggressive. RP (10/15/09) 6-8. According to Jennifer, Mr. Calderon said that if she didn't give him money, he would hurt her, and he threw a knife on the ground. RP (10/15/09) 7-8. Jennifer said that she wasn't afraid, and told him to "grow up." RP (10/15/09) 8.

Mr. Calderon then asked his mom to take him to the casino. RP (10/15/09) 9. She declined. (10/15/09) 9. Jennifer told Mr. Calderon to "go outside," and her brother grabbed her around her throat, held his knife to her neck, and said he would kill her if she didn't give him some money. RP (10/15/09) 9. She responded by saying:

I'm sorry. You can hurt me, you can do whatever, it's not going to make it right for me to give what you want right now when I don't even have it.
RP (10/15/09) 9.

Later, when asked “Were you afraid he was going to stab you?” she replied:

Yes. I was scared because he tried to kick me in the face while I was walking by him and he told me - he was saying to himself, you know, I’d like to kick you in the face just to see you cry, break your nose and see. It’s so funny, ha, ha, ha, you know.
RP (10/15/09) 9-10.

Their mother came in, told them to stop arguing, and gave Mr. Calderon a ride to the casino. RP (10/15/09) 10, 14, 32. After talking the incident over with her boyfriend, Jennifer called the police, and Mr. Calderon was arrested at the casino. RP (10/15/09) 10, 17. When placed in a police car, he kicked the car, causing damage. He also made additional threats to kill Jennifer, and to “gut and skin her.” RP (10/15/09) 18-21, 28-30. No evidence was introduced showing that this information was passed on to Jennifer. RP (10/15/09). Officers who had contact with him described him as intoxicated, RP (9/29/09) 7-8; RP (10/15/09) 17.

Mr. Calderon was charged with Felony Harassment and Assault in the Fourth Degree. CP 1. Prior to trial, he wrote a letter to the court asking for a new attorney. Letter to Judge Godfrey (dated 9/24/09, filed 9/29/09), Supp. CP. At the trial readiness hearing, Mr. Calderon told the court that he wanted to fire his attorney. The attorney confirmed that communication had broken down. Mr. Calderon asked to be released from jail so that he could sell items and hire an attorney. RP (9/28/09) 1.

The court denied his requests, ruling: “There is your lawyer. Until I see something different, we are going to trial. If your dad hires somebody else, they have to come in here and take care of business. I am not going to appoint somebody else if you can hire somebody.” RP (9/28/09) 1-2.

At trial, Jennifer testified that Mr. Calderon had previously used drugs, assaulted her, and injured her. RP (10/15/09) 6-7. Defense counsel did not object or request an instruction limiting the jury’s use of this evidence. Jennifer outlined what happened on the day of the incident, but she wasn’t asked—and didn’t testify—that she believed that he would kill her. RP (10/15/09) 4-15.

Neither party proposed an instruction defining a “true threat.” Nor did the court instruct the jury that a conviction for felony harassment required proof that Jennifer reasonably feared that the threat to kill would be carried out. Court’s Instructions to the Jury, Supp. CP. Defense counsel did not propose an intoxication instruction.

Mr. Calderon was convicted as charged, and sentenced to prison. CP 4; RP (10/26/09) 58-59. This timely appeal followed. CP 12.

ARGUMENT

I. MR. CALDERON’S FELONY HARASSMENT CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT JENNIFER CALDERON REASONABLY FEARED HE WOULD CARRY OUT HIS THREAT TO KILL HER.

A. Standard of Review

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Calderon placed Jennifer Calderon in reasonable fear that he would carry out his threat to kill her.

The Due Process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on

insufficient evidence is reversal and dismissal with prejudice. *Smalis v.*

Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116

(1986); *Colquitt, supra*.

In order to convict a person of felony harassment based on a threat to kill, the prosecution must prove beyond a reasonable doubt “that the

person threatened was placed in reasonable fear that the threat to *kill* would be carried out.” *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005) (emphasis added) (citing *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003)). It is not sufficient to prove that the person threatened reasonably feared that a threat to inflict bodily harm would be carried out. *C.G.*, at 609-610.

In *C.G.*, the defendant threatened to kill his school vice principal. *C.G.*, at 607. The vice principal testified that the threat caused him concern, and that he feared the defendant might try to harm him or someone else in the future. *Id.* The Supreme Court reversed the conviction for insufficient evidence, after concluding that the “statute’s plain language requires proof of reasonable fear that the threat to *kill* will be carried out.” *C.G.*, at 608 (emphasis added).

In this case, the prosecution failed to prove that Jennifer feared Mr. Calderon would kill her. Although she testified that he had threatened to kill her, and that she was afraid he might stab her, she did not say she was actually afraid he would kill her. RP (10/15/09) 4-15.

In the absence of such testimony, the evidence was insufficient to prove felony harassment. *C.G.*, *supra*. Accordingly, Mr. Calderon’s conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

II. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Killo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. The court’s instructions relieved the prosecution of its burden to prove that Mr. Calderon made a “true threat” and that Jennifer Calderon reasonably feared he would kill her.

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). In felony harassment cases, the prosecution must prove that the person threatened reasonably feared that the threat to kill would be carried out. RCW 9A.46.020. This requirement must be included in the instructions.¹ *Mills*,

¹ Generally, all essential elements must be included in the court’s “to convict” instruction. *Mills*, at 7. However, “where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form.” *Mills*, at 10.

supra. There is an additional, nonstatutory element: to avoid First Amendment violations, the state must prove the threat constitutes a “true threat” rather than idle chat. U.S. Const. Amend. I; *see State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wn.2d 355, 360-361, 127 P.3d 707 (2006). The trial court failed to instruct the jury on both of these essential elements.

First, the court failed to instruct the jury that conviction required proof that Jennifer reasonably feared Mr. Calderon would kill her. Court’s Instructions to the Jury, Supp. CP. Instead; the court’s instructions paralleled those given in *Mills*: the element was omitted from the instruction defining Harassment, from the “to convict” instruction, from the instruction relating to the special verdict form, and from the special verdict form itself. Instructions Nos. 2, 5, 16, Court’s Instructions to the Jury, Supp. CP; Special Verdict Form, Supp. CP. Rather than correctly instructing the jury in accordance with the Supreme Court’s holding in *Mills*, the trial court told the jury that it could convict if it found that Jennifer reasonably feared Mr. Calderon would carry out a threat to cause bodily injury. Instruction No. 5, Court’s Instructions to the Jury, Supp.

CP. As in *Mills*, the error was not corrected by the subsequent instruction on the special verdict, since that instruction only required proof that Mr. Calderon made a threat to kill, but did not require proof that Jennifer reasonably feared the threat to kill would be carried out. Instruction No. 16, Court's Instructions to the Jury, Supp. CP.

Second, the court failed to instruct the jury on the "true threat" requirement imposed by the First Amendment. U.S. Const. Amend. I; *Johnston, supra*. The words "true threat" did not appear in the "to convict" instruction. Instruction No. 5, Court's Instructions to the Jury, Supp. CP. Nor did the constitutionally required definition of a "true threat" appear elsewhere in the instructions. Court's Instructions to the Jury, Supp. CP.

C. The errors were prejudicial and require reversal.

The omission of an essential element requires reversal. *Mills, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal

is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The errors here are presumed prejudicial. *Toth*, at 615.

Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. First, the evidence was not overwhelming. Jennifer did not testify that she feared her brother would kill her. RP (10/15/09) 4-15. Neither she nor her mother acted like they feared he would carry out his threat to kill Jennifer told him to go ahead and “do whatever,” and her mother told him to “Stop picking on [his] sister.” RP (10/15/09) 9, 10.

Second, the errors were not trivial, formal, or merely academic, because they prejudiced Mr. Calderon and likely affected the final outcome of the case. *Lorang*, at 32. A reasonable jury could have decided that Jennifer did not reasonably fear Mr. Calderon would kill her. Similarly, a reasonable jury could have concluded that Mr. Calderon’s threat was not a “true threat.”

Because the errors were not harmless, Mr. Calderon’s conviction must be reversed. *Id.* The case must be remanded to the trial court for a new trial. *Id.*

III. MR. CALDERON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion, guided by three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006).

An adequate inquiry must include a full airing of the concerns and a meaningful evaluation of the conflict by the trial court. *Id.*, at 610. The proper focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *United States v. Walker*, 915 F.2d 480, 483 (9th Cir. 1990), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

B. Mr. Calderon was guaranteed the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

C. The trial court erroneously refused to inquire after learning that Mr. Calderon’s relationship with his attorney had disintegrated.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *Cross*, at 607. To compel an accused to ““undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.”” *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979), quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970). A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *State v.*

Lopez, 79 Wn.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

In this case, Mr. Calderon wrote to the trial judge on September 24, asking that his attorney be removed and new counsel appointed. Letter to Judge Godfrey (dated 9/24/09, filed 9/29/09), Supp. CP. He made his request in open court over two weeks before trial, and said he planned to hire new counsel.² RP (9/28/09) 1-2. Upon hearing this, defense counsel remarked “I suppose communications have broken down somewhat.” RP (9/28/09) 1-2.

Despite this, the trial court refused to inquire into the reasons for Mr. Calderon’s dissatisfaction or the extent of the problem. This was an abuse of discretion. *Lopez, supra*. The trial court should have examined the extent of the conflict, allowing both Mr. Lopez and trial counsel to describe any problems with their relationship. *Cross, supra*. Although the request was made late in the process, Mr. Calderon had been absent from court pending a competency determination; and the September 28 hearing

² This plan was apparently contingent upon having his bail reduced so he could sell his property to raise money. RP (9/28/09) 1-2.

was apparently his first opportunity to address the judge directly since entry of a competency order on August 31, 2009.³ RP (8/31/09).

Because the trial judge abused his discretion, Mr. Calderon must be granted a new trial. *Cross, supra*. His conviction must be reversed and the case remanded for a new trial. *Id.*

D. Mr. Calderon was denied the effective assistance of counsel by his attorney's failure to object to inadmissible evidence and to propose appropriate instructions.

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no

³ A hearing scheduled for September 21 was not transcribed; however, the clerk's minutes indicate that the case was continued to September 28. Clerk's Minutes (9/21/09) Supp. CP.

conceivable legitimate tactic explaining counsel's performance.

Reichenbach, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

1. Defense counsel should have proposed an instruction on voluntary intoxication.

Evidence that an accused person was intoxicated at the time of the offense may negate the mental element of a crime. A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability to form the requisite mental state. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003). This standard can be met by showing the effects of alcohol on the defendant's mind and body, for example by providing evidence that the accused person blacked out, vomited, slurred speech, and was impervious to pepper spray. *Id.*, at 692.

Where the facts support an intoxication defense, failure to properly present the defense constitutes ineffective assistance. *State v. Tilton*, 149

Wn.2d 775, 784, 72 P.3d 735 (2003); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). Reversal is required if counsel's failure to properly present the defense prejudiced the accused. *Id.*, at 229.

Mr. Calderon was entitled to an instruction on voluntary intoxication. First, both charged crimes included a mental state: the prosecution was required to prove that he "knowingly threatened" Jennifer, and that he "intentionally assaulted" her. Instructions Nos. 5, 7, Court's Instructions to the Jury, Supp. CP.

Second, the evidence included substantial evidence of intoxication. Jennifer testified that Mr. Calderon was "on drugs." RP (10/15/09) 6-7. Officer Strader testified that Mr. Calderon smelled of alcohol, and could have been intoxicated. RP (10/15/09) 17-18. Deputy Lewis testified that Mr. Calderon "passed out" once taken to the jail. RP (10/15/09) 30.

Third, the evidence demonstrated the effects of intoxication on Mr. Calderon's mind and body. His sister testified that he was "[v]ery agitated, aggressive, not himself, and violent" when he took drugs (including on this occasion). RP (10/15/09) 6-7. He'd also been "talking in riddles to himself over and over..." RP (10/15/09) 7.

Under these circumstances, Mr. Calderon was entitled to an instruction on voluntary intoxication. *Kruger, supra*. The defense strategy was (in part) to cast doubt on Mr. Calderon's ability to form the

intent to commit a crime. Taking the evidence in a light most favorable to Mr. Calderon, the jury could have inferred that his intoxication prevented him from forming the required mental state for each crime. Despite this, defense counsel failed to propose a voluntary intoxication instruction.⁴ Given that the defense strategy focused (in part) on Mr. Calderon's voluntary intoxication and his inability to form intent, defense counsel should have proposed an appropriate instruction. Counsel's failure to propose these instructions constituted deficient performance. *Thomas, supra*.

The error prejudiced Mr. Calderon. In the absence of an instruction, the jury was unaware that his intoxication could be taken into account when considering whether or not he "knowingly threatened" or "intentionally assaulted" Jennifer. In the absence of an instruction, the prosecutor was able to argue to the jury that "Drunk and mad is not a defense of this crime. What kind of society would we live in if all you had to do was plead I was drunk and mad." RP (10/15/09) 53. As the Supreme Court said in *Thomas, supra*, "a proper instruction... was crucial...A reasonably competent attorney would have been sufficiently

⁴ According to the docket and court file, apparently neither party proposed any jury instructions.

aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases.” *Thomas*, at 229. Because of defense counsel’s deficient performance, Mr. Calderon was unable to present his theory to the jury. “[W]ithout the instruction[s], the defense was impotent.” *Kruger*, at 695. Accordingly, Mr. Calderon was denied the effective assistance of counsel. *Tilton, supra*. His convictions must be reversed and his case remanded to the trial court for a new trial. *Id.*

2. Defense counsel should have objected to inadmissible evidence and sought limiting instructions.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “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 than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Under ER 404(b), “[e]vidence of other... 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.”

Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, 150 Wn.App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.⁵ *Asaeli*, at 576 n. 34. Doubtful

⁵ However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

In this case, defense counsel failed to object to evidence that should have been excluded under ER 402, ER 403, and ER 404(b). This included Jennifer's testimony that Mr. Calderon had previously used drugs, assaulted her, and injured her. RP (10/15/09) 6-7. Although some of this evidence may have been admissible for "other purposes" under ER 404(b), a proper objection would have required the trial judge to balance the evidence on the record and to give an appropriate limiting instruction. *See State v. Russell*, ___ Wn. App. ___, ___ P.3d ___ (2010) (reversal required where trial court failed to provide a limiting instruction.)

Defense counsel should also have objected to testimony (provided by Officer Strader and Deputy Lewis) that Mr. Calderon kicked the police car after his arrest, and made additional threats against Jennifer. RP (10/15/09) 18-21, 28-30. Since the state did not establish that these incidents were ever communicated to Jennifer, they could not be used to establish the reasonableness of her fear, and should not have been admitted for any purpose. Furthermore, even if they had been admissible for a limited purpose, an objection would have triggered the court's obligation to give a limiting instruction. *Id.*

The admission of this testimony as substantive evidence, without limitation, served no legitimate strategy. Instead, by failing to object and request a limiting instruction, defense counsel permitted the jury to use the evidence for any purpose, including as propensity evidence. Proper objections would likely have been sustained, or resulted in limitations on the jury's use of the evidence, and would have altered the outcome of the trial. *Saunders, supra*. Accordingly, Mr. Calderon's convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Calderon's felony harassment conviction must be reversed and the charge dismissed. In the alternative, if dismissal is not ordered, the felony harassment charge must be remanded for a new trial.

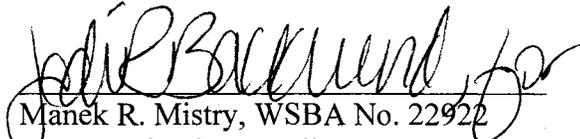
The assault conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on March 26, 2010.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

BY 
DEPUTY

I certify that I mailed a copy of Appellant's Opening Brief to:

Jay Calderon
Grays Harbor County Jail
P. O. Box 630
Montesano, WA 98564

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 26, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 26, 2010.



Jodi R. Backlund, WSBA No. 22917
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