

NO. 42135-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD OLSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-01567-6

BRIEF OF RESPONDENT

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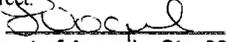
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 17, 2012, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly admitted Olsen's prior threats to kill Devenny to rebut his claim that he accidentally poured gasoline on her, and to show his premeditated intent to kill her?
2. Whether the trial court properly defined "true threat" with regard to the harassment charge?
3. Whether the California crime of terroristic threats was comparable to the Washington offense of felony harassment where Olsen, as a matter of law under California precedent, pled guilty to threatening to kill Devenny?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Edward Olsen was charged by second amended information filed in Kitsap County Superior Court with the felony offenses of attempted first-degree murder, attempted second-degree murder, first-degree burglary, felony harassment (threat to kill), and the gross misdemeanor of third-degree malicious mischief (a). CP 163-70. All felony counts included an allegation that the crimes were aggravated domestic violence offenses for purposes of RCW 9.94A.535. *Id.* The victim was the mother of Olsen's children, Bonnie Devenny. *Id.*

A jury acquitted Olsen of attempted first-degree murder. CP 256. The jury convicted Olsen as charged on the remaining counts, including the aggravating circumstances. CP 256-64.

The trial court imposed an exceptional sentence of 360 months. CP 281.

B. FACTS

Terrence Black worked the graveyard shift at the Wyatt House Retirement Center on Bainbridge Island. 3RP 229. Devenny was a co-worker. 3RP 230.

On November 29, 2009, Devenny showed up around 4:00 a.m., screaming and banging on the front door of Wyatt House. 3RP 230-31, 239. Black let her and her 12-year-old son in. 3RP 230.

Devenny screamed that someone had broken into her house and poured gas on her while she was sleeping in bed. 3RP 231. She was hysterical; Black could barely understand her. 3RP 231. All he could really make out was that someone had broken in and poured gasoline on her. 3RP 231. She identified the person, but he could not understand who. 3RP 231. She did not appear injured, but said her legs were burning from the gas. 3RP 231. Black called 911 about five minutes after she got there. 3RP 232. Devenny could be heard in the background of the 911 recording. 3RP 233.

Bainbridge Island patrol officer Michael Tovar responded to the call from the Wyatt House. 3RP 239-40. He received the call from the dispatch center at 4:45 a.m. 3RP 241. He arrived two minutes later. 3RP 241.

Devenny and her son were seated on the floor of the lobby when Tovar arrived. 3RP 242. She was hyperventilating and hysterical. 3RP 242. She was wearing shorts and the top of both her legs were very red. 3RP 242.

Tovar asked her what was going on and Devenny responded that she was in bed and was awoken by her ex-husband, Olsen, pouring gasoline on her. 3RP 246. Olsen said, "Die, bitch, die." 3RP 246.

She jumped up and knocked Olsen back. 3RP 246. They tried to exit through the hallway, but Olsen blocked the way. 3RP 246. Devenny then went into the bathroom and yelled for help. 3RP 246. She crawled out the bathroom window and ran to the Wyatt House, which was about a block from her home. 3RP 246.

Officer Walt Berg arrived at the Wyatt House a few minutes after Tovar. It was about 4:45 a.m. 3RP 296. When he arrived, Devenny was telling Tovar that she had awoken to her ex-husband pour gasoline on her and yelling "Die, bitch." Berg could smell gasoline when he walked in to the Wyatt House. 3RP 299. It was coming from Devenny. 3RP 299.

Devenny appeared upset when Berg arrived, she was crying and

looked scared. 3RP 305. Devenny was wearing shorts and a T-shirt and was barefoot. 3RP 313. Her son, JEO, also appeared upset. 3RP 313.

Tovar and Officer Berg left Devenny with the paramedics and went to check the house. 3RP 248. There was a green Ford station wagon parked in front. 3RP 250. The front passenger's window of the Ford was broken out. 3RP 253. There was a large rock in the driver's-side floor. 3RP 253. There was an indentation from a garage-door opener in the visor of the Ford, but the opener was missing. 3RP 256.

When Tovar approached the house, he noticed that a window was open on the front of the house. 3RP 249. The front door was wide open. 3RP 250. They went in, looking for Olsen. 3RP 250. They did a sweep of the house. 3RP 250. There was no one in the house. 3RP 250.

Tovar and Berg immediately smelled the odor of gasoline when he entered the house. 3RP 250, 300. The odor became stronger as he went down the hallway. 3RP 301. The gas odor was strongest in the master bedroom. 3RP 251, 302.

In the master bedroom there was a small red plastic gas can on the floor at the foot of the bed. 3RP 253. The blankets and bed sheets were off the bed and messed up on the floor at the foot of the bed. 3RP 253-54, 302.

Tovar noticed that the back door was ajar. 3RP 250. In the back yard

the gate was open. 3RP 252. Berg stationed himself outside the house and Tovar returned to the victims. 3RP 303. Berg called for crime scene detectives, and waited until they arrived. 3RP 303, 305.

After getting her a change of clothing, Tovar placed Devenny's gas-soaked clothes into evidence. 3RP 257. The boxer shorts that Devenny was wearing smelled of gasoline when he collected them. 3RP 286.

Bainbridge Island Detective Trevor Ziemba arrived at the fire station around 5:00 a.m. 4RP 322. Devenny had been taken there to clean the gasoline off. 4RP 323. Devenny and her son had been taken to the fire station by ambulance. 4RP 325.

When Ziemba arrived, she was still on the gurney in the back of the ambulance. 4RP 325. JEO was sitting next to her on the jump seat. 4RP 325. They both seemed shocked, very overwhelmed, confused and scared. 4RP 326-27. JEO did not want to leave his mother to talk to Ziemba. 4RP 327. Devenny had an injury on her leg. 4RP 326. Ziemba could smell the odor of gasoline, even though they had already changed clothes. 4RP 326.

Ziemba was with the victims no more than 30 minutes. 4RP 327. After talking to them, Ziemba went to the house. 4RP 328. Ziemba had called his partner, Christian Hemion and asked him to go to the house as well. 4RP 323, 390.

The screen from the bathroom window was laying in the yard. 4RP 330. There was an overpowering smell of gasoline in the house. 4RP 330, 392. It was strongest in the master bedroom. 4RP 393. The odor of gasoline in the bedroom was so strong it made Ziemba nauseous. 4RP 331.

The master bedroom was in disarray; the bed clothes had been thrown off the bed and were on the floor. 4RP 331, 393. The comforter was wet. 4RP 337, 445.

Ziemba saw a lighter on the night stand next to the bed.¹ 4RP 332, 393. He took it into evidence. 4RP 333. There was a gas can on the floor. 4RP 393. The can was near the corner of the bed closest to the door. 4RP 398. The can did not have a cap on it. 4RP 446. It was a one gallon, four ounce can. 4RP 447. There was a small amount of gas left in it. 4RP 447. There was not any other gasoline in the house. 4RP 447.

Bainbridge Island Lieutenant Denise Guintoli also came to the house. 5RP 539. Guintoli corralled Devenny's dog, which had been running loose in the neighborhood. 5RP 541. The dog was not wet and did not smell of gasoline. 5RP 542.

Olsen subsequently turned himself in to the authorities in Arizona. 4RP 339. Ziemba and Hemion flew down to bring Olsen back to

¹ Devenny usually kept the candle lighter in the junk drawer in the kitchen. 5RP 612.

Washington. 4RP 339. On the drive from the airport to the jail in Port Orchard, Olsen was advised of his rights and agreed to talk to Hemion. 4RP 352.

Olsen said he had come to the house to get recover some of his belongings. 4RP 424. Olsen told them he had broken the window in Devenny's car and taken the opener to get into the garage. 4RP 352, 424. Olsen claimed he thought no one was home at the time. 4RP 353, 425. He said he was upset over the fact that Devenny was seeing a new boyfriend, and felt that may have been part of the reason he was no longer welcome at the house. 4RP 431.

Olsen said that he went into the house, and ate a casserole, drank some rum, and watched TV. 4RP 352, 424. After a bit, he went to use the bathroom, but the dog was in it and became aggressive and tried to bite him. 4RP 352, 424. He need to use the bathroom badly, so he first tried to coax the dog out with the casserole. 4RP 425. When that did not work, he got the gas can from the garage and poured some on the dog. 4RP 353, 425. The dog then ran and jumped on the bed where Devenny and JEO were sleeping. 4RP 353, 425. Olsen said that after the dog ran into the bedroom, Devenny came out screaming. 4RP 430.

After the incident, Olsen said that he hid in a neighbor's shed, and

then caught a ferry. 4RP 354, 431. In Seattle, he joined to religious organization, intending to make his way to Florida. 4RP 354, 427, 432. From Seattle, where he got a ride to Spokane, then to Idaho and Nevada and ended up in Arizona. 4RP 354, 427. Olsen said he was contacted by Idaho officers, but gave them a false name, because he thought law enforcement was looking for him. 4RP 432.

JEO and Devenny also testified. JEO noted that Olsen was his father. 5RP 579. Olsen had shown up in October, and stayed at their house for a while. 5RP 579. They would hang out most days, and Olsen and the three boys would go to the gym. 5RP 579. Devenny went with them once. 5RP 579. Olsen had a “traveling backpack” in the closet, but JEO did not believe he had much else in the house. 5RP 580.

Olsen and Devenny had a fight between Halloween and the incident. 5RP 581. They were in the bedroom and JEO, who was in the living room could hear yelling. 5RP 581. The fight was physical and he tried to break it up. 5RP 582. Only his mother was injured. 5RP 582. She had a bloody eyebrow and “seemed kind of swollen.” 5RP 582.

On the night of the incident, JEO got home around 1:00 a.m. 5RP 583. No one was in the living room when JEO got home. 5RP 606. He went into his mother’s room to watch a Husky game, which his aunt had recorded.

5RP 583. He fell asleep about an hour into the game. 5RP 584. He heard noises and woke up. 5RP 584. He told his mother, but she told him to go back to sleep. 5RP 584.

Later, JEO woke up again and heard his dog pacing and whimpering. 5RP 584. Then he awoke to his mother screaming and someone pouring gasoline on them. 5RP 584. JEO saw it was his father, and tried to stop him. 5RP 585. The gas can looked like the one they kept in the garage. 5RP 586. Olsen said, "Where is Frank?" and "You are going to die." 5RP 587.

JEO and Olsen ended up struggling in the hallway and his mother escaped through the bathroom window. 5RP 585. The dog got involved in the altercation and ended up biting JEO. 5RP 587. The dog came down the hallway from the living room. 5RP 587. JEO fell to the floor, and when he got up, Olsen was gone. 5RP 585.

JEO ran out the front door. 5RP 585. When he ran out of the house, he heard his mother screaming and ran after her. 5RP 588. They went to the home where she worked and someone let them in. 5RP 588. The police came and took them to the firehouse where they showered. 5RP 588. JEO was wearing only his boxers and some sox. 5RP 589.

Devenny had three children, EJD, JMO, and JEO, the youngest. 5RP 607. After the trial court gave a limiting instruction Devenny briefly

described prior incidents in which Olsen had attacked her. 5RP 618.

In 1998, when she was living in Washington, Devenny and Olsen had another altercation and he tied her up with an electrical cord and choked her. 5RP 621. Olsen told her was going to leave her in the woods, so she should say good bye to her children. 5RP 622.

In 2000, they were living in California. 5RP 622. Their boys were all under six at the time. 5RP 622. Olsen bound Devenny with duct tape. 5RP 623. He told her that if he could not have her, no one would, and that he was going to chop her up and put her in a blue bin. 5RP 623. He was referring to a storage tote they had. 5RP 623. Despite the 1998 and 2000 incidents, she had let Olsen stay in the house so he could see his children. 5RP 637. She had hoped her family could be “whole.” 5RP 652. She hoped that by having Olsen in her life, her other two other sons could come home. 5RP 652.

A few weeks before the incident, she and Olsen had a physical altercation and he struck her six times in the face. 5RP 619. She suffered a cut above her left eye. 5RP 620. She did not report it to the police because Olsen said she would be sorry if she did. 5RP 620.

The day of the incident, she went to bed around 10:00. 5RP 624. At that time, her car was parked in the driveway. 5RP 609. There was a garage door opener on the visor, and the windows were intact when she went to bed.

5RP 609.

JEO came in around 1:30 and asked if he could sleep in her room because he had heard noises. 5RP 624. He watched TV for some time and fell asleep. 5RP 625.

She had not seen Olsen for over a week the night of the incident. 5RP 617. She had previously told him he could no longer stay at the house. 5RP 617. She had developed a relationship with Frank Fullner between Halloween and the date of the incident. 5RP 617. Fullner stayed over a few times when Olsen was staying there. 5RP 618.

Devenny awoke to Olsen pouring gasoline on her. 5RP 625. She struggled to get up, and Olsen told her he had a lighter and that she was “going to die this time, bitch.” 5RP 626. He had the lighter in his hand and was swinging it around. 5RP 627. She took the threat seriously. 5RP 627.

JEO lunged at Olsen and forced him into the hallway. 5RP 635. She ran into the bathroom and escaped through the window. 5RP 635. She fled to the Wyatt House, where she had worked for several years. 5RP 636. She did not see the dog that night. 5RP 635. The dog was not in the room when he poured the gas on her. 5RP 635.

On cross-examination Devenny stated that she wrote a letter recanting the California incident it would have been because he talked her into it, and

so that Olsen could come home and be with the boys. 5RP 680, 6RP 739. He promised he would not drink if she did. 6RP 741. She “candy-coated” the event the letter. 6RP 741. In the letter, she said they had argued and he had slapped her, but that was all. 6RP 742.

In his defense, Olsen called Tovar and Ziemba who both stated that Devenny never said that Olsen had a lighter in his hand. 6RP 747, 750.

He also called JEO’s older brother, JMO, who testified that when he was four, and they were living in California, Olsen came home to find Devenny hitting JMO and his brothers. 6RP 786. Olsen stopped her and began to tape up her wrists as the boys left the house. 6RP 786. They went to a neighbors house, and then in a while, JMO saw the police drive Olsen away. 6RP 787.

JMO also stated that he heard but did not see the fight a few weeks before the incident. 6RP 789. JMO did not see any injuries to Devenny afterward. 6RP 790. He also stated that Devenny had encouraged him to not tell the truth in the past. 6RP 791.

Olsen’s mother, Patricia, who candidly admitted that she did not like Devenny, 6RP 796, 798, testified that she saw Devenny about two weeks before Thanksgiving, but did not see any injuries on her. 6RP 797.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED OLSEN’S PRIOR THREATS TO KILL DEVENNY TO REBUT HIS CLAIM THAT HE ACCIDENTALLY POURED GASOLINE ON HER, AND TO SHOW HIS PREMEDITATED INTENT TO KILL HER.

Olsen argues that the trial court abused its discretion in admitting ER 404(b) evidence, that the State misused the evidence and that the alleged errors require reversal. These claim are without merit as will be discussed.

1. The trial court properly admitted Olsen’s prior threats to kill Devenny to rebut his claim that he accidentally poured gasoline on her, and to show his intent to kill her.

a. The evidence was relevant.

Contrary to Olsen’s claims, the “use of other crimes and acts to rebut a claim of accident, or to rebut ‘any material assertion by a party’ is a well-established exception to ER 404(b).” *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999) (*quoting* 5 Teglund, *Wash. Prac. Evid.* § 114, at 391, § 117, at 411 (3rd ed. 1989)), *review denied*, 140 Wn.2d 1015 (2000). Before admitting evidence under ER 404(b), a trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the proffered evidence is introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its

prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

Olsen appears to challenge only the third and fourth findings of the trial court.² In *Hernandez*, the defendant was charged with murdering the victim. The defendant asserted that the death was an accident. This Court concluded that the evidence was properly admitted under ER 404(b) to show the defendant's intent:

[T]he element of intent was at issue, and evidence of an ongoing pattern of abuse became logically relevant, as it tended to make Hernandez's accident account less probable.

Hernandez, 99 Wn. App. at 322. In reaching this conclusion, the Court cited two previous cases: *State v. Gogolin*, 45 Wn. App. 640, 727 P.2d 683 (1986), and *State v. Bell*, 10 Wn. App. 957, 961, 521 P.2d 70, *review denied*, 84 Wn.2d 1006 (1974). In *Gogolin*, the defendant was charged with assaulting his ex-wife by striking her on the head with a revolver. The defendant claimed that she had been injured when she fell backward down the stairs during an argument. At trial, the victim was permitted to testify about a prior incident of assault. This Court held that the evidence was relevant and probative since it tended to rebut the defense of accident by demonstrating

² Olsen affirmatively conceded before trial that the prior acts had been established by a preponderance of the evidence. RP (6/15) 56.

defendant's history of hostility and abusive conduct toward the victim. "Thus, the evidence tended to make more probable the fact that her injuries resulted from an intentional assault rather than an accident." Gogolin, 45 Wn. App. at 646. In *Bell*, the Court similarly concluded that evidence of prior beatings inflicted on the child victim was properly admitted in a prosecution for the second degree murder of the child where defendant claimed she had injured herself by falling from her crib.

The Supreme Court's long-established jurisprudence also supports the trial court's conclusion. "It is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent." *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (*quoting State v. Parr*, 93 Wn.2d 95, 102, 606 P.2d 263 (1980), and *citing State v. Americk*, 42 Wn.2d 504, 506–08, 256 P.2d 278 (1953), *State v. Spangler*, 92 Wash. 636, 638, 159 P. 810 (1916), *State v. Guerzon*, 23 Wn.2d 242, 160 P.2d 603 (1945), and *State v. Quinn*, 56 Wash. 295, 105 P. 818 (1909)). *See also State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997), *vacated on other grounds, In re Stenson*, ___ Wn.2d ___, 2012 WL 1638035 (May 10, 2012) (evidence of quarrels and ill-feeling may be admissible to show motive, and evidence of prior threats is also admissible to show motive or malice). The only caveat is that the evidence must be necessary to prove a

material issue. *Powell*, 126 Wn.2d at 262. Therefore, prior misconduct evidence is only necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent. *Id.* Here, Olsen specifically told the police that his gasoline assault on Devenny was an accident that occurred as he was trying to douse the dog. As such, the trial court properly admitted the evidence to show intent.

The cases cited by Olsen are easily distinguishable. In *State v. Holmes*, 43 Wn. App. 397, 717 P.2d 766 (1986), the defendant was charged with burglary, but the only evidence regarding the crime was that the defendant had removed a screen from the building. Under these circumstances the Court concluded that two utterly unrelated juvenile thefts were relevant only to show “once a thief always a thief,” and thus improper under ER 404(b). *Holmes*, 43 Wn. App. at 400. Here, on the other hand, the prior acts involved the same victim, involved similar murder threats, and went to rebut the Olsen’s specific assertion that his pouring gas on Devenny was an accident.

Nor is *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999), on point.³ In *Wade*, the Court held that in order to use prior bad acts “for a nonpropensity based theory, there must be some similarity among the facts of

³ *State v. Pogue*, 104 Wn. App. 981, 17 P.3d 1272 (2001), the final case on which Olsen relies, is factually and legally indistinguishable from *Wade*, and indeed, was reversed based

the acts themselves.” *Wade*, 98 Wn. App. at 335. There, to prove the current charge that the defendant possessed drugs with intent to deliver, the State offered evidence that the defendant had previously sold drugs. Here, the State offered the history of abuse, not to prove that Olsen physically abused Devenny at the time of the killing, but to rebut his claim that the attempted killing was accidental. Olsen did not dispute the history of abuse.⁴ Thus, the evidence was not offered to prove these facts. Rather, the evidence was offered to prove that Olsen, when he poured the gas on the bed, it was in an attempt to kill Devenny, not scare the dog. And it was relevant on this issue because it showed that Olsen, when angry with Devenny, physically hurt her. The trial court did not abuse its discretion in concluding that the evidence was relevant.

b. The evidence was more probative than prejudicial.

Olsen also claims that the evidence was more prejudicial than probative. However, the trial court carefully weighed the evidence under ER 403:

So the last element that the Court has to weigh is probative value against prejudicial affect. In this case the

on the State’s concession that *Wade* controlled.

⁴ See Olsen’s closing argument: “I think that it comes down to a family dynamic: If you can’t have them -- if I can’t have them, you can’t have them. There is a long history of violence, you know, that has happened here in this house in the past and in the present. It wasn’t an intent to murder. It was an intent to harass, to vex, annoy, control, whatever the reason was. ... A sad situation. Is it absolutely harassment? Sure it is.” 7RP 935.

Court needs to consider how directly the misconduct evidence tends to prove the crimes charged. If it is highly probative, the balance usually is tipped towards admissibility. If it is of only marginal relevance because of remoteness in time or other considerations, the balance may be tipped towards exclusion.

This was not specifically argued in the briefing by counsel with respect to probative versus prejudicial, but in terms of this issue, I have weighed the evidence. And while the two incidents do stem back to 1998 and 2000, I am mindful that they are against the same victim. I also have in mind the fact that the -- as a result of the 2000 incident, the defendant went to prison, and according to the representation of the State, largely was in and out of prison over the last nine years because of parole violations.

And the fact that these two continue to carry on a relationship and the evidence proffer indicated that he did come up here to share his birthday with his son and his ex-girlfriend, Ms Devenny, around October 31 does indicate that they do continue to be involved in a relationship with each other.

And so while normally remoteness in time would mitigate against the probative value or the -- yeah, the probative value in this particular case because of the nature of domestic violence and because of the continuing relationship between these parties, remoteness in time does not mitigate against the probative value.

As I stated earlier in this decision, the evidence rebutting does have a high degree of value to proving the intent and motive. It also does have a high degree of value in rebutting [sic] absence of mistake. It is prejudicial. There is no question, but that evidence of this type is prejudicial in a case of this type.

The courts that have allowed evidence of this type -- and there are many in murder cases -- where evidence of this type is admitted do admit the evidence with limiting instructions to counter the prejudicial effect that the evidence may have with the jury.

Having been a former defense attorney, I can tell you that my argument was the same as Mr. Silverthorn's in that I

didn't really believe that jurors could unring the bell. It has been my experience, however, to the contrary with jurors since I have been on the bench that they take great pain to follow the Court's instructions and to compartmentalize evidence as they are instructed to do so.

And so for that reason, I do find that any prejudicial affect of the evidence can be minimized to the extent that it can by limiting instructions, both at the time of the admission of the evidence, and in the final argument to the jury.

And so for that reason, I find that the probative value of the evidence does outweigh the prejudicial effect, and I allow the prior acts to be admitted under 404(b) with limiting instructions to be proposed at both incidents.

RP (6/18)⁵ 15-17.

Olsen utterly fails to explain *why* the evidence was more prejudicial than probative. He merely cites the facts of the prior offenses. Brief of Appellant, at 12.

Olsen was charged with attempted premeditated murder by pouring gasoline on Devenny and threatening to light it. There were only two witnesses to the attack, Devenny and her 13-year-old son. Olsen claimed he was throwing the gas at the dog and accidentally got it on Devenny. The son could neither confirm nor refute that Olsen had a lighter and was threatening to use it. Devenny was clearly a troubled woman. She had significant difficulties with memory and was extensively cross-examined by the defense

⁵ The report of proceedings indicates that the ruling was delivered on June, 18, 2011, but from the context, it is clear that the hearing was held June 18, 2010, before trial.

to that effect. The evidence, as the trial court noted, and as both this Court and the Supreme Court have noted in similar cases, was highly probative of Olsen's motive and intent, and to prove a lack of accident or mistake. Under such circumstances the probative value outweighs the prejudicial effect. *See State v. Sexsmith*, 138 Wn. App. 497, ¶ 26, 157 P.3d 901, *review denied* 163 Wn.2d 1014 (2007).

2. *The State did not improperly use the ER 404(b) evidence to argue propensity.*

Olsen also claims that the State misused the evidence in its closing argument. This contention is baseless. Before discussing the evidence, the State highlighted the limiting instructions:

Now, I want to be clear about this. You are instructed that you are only to consider this evidence for one purpose. Okay? You need to be careful about that. This is what your instructions say. This evidence cannot be used to prove the character of the defendant to show that he acted in conformity therewith and may be considered by you only for the purpose of evaluating the defendant's motive and intent to commit the crimes that he is currently charged with; these five counts. You may not consider it for any other purpose, and any discussion of the evidence during your deliberations must be consistent with this limitation. It's important that you remember that.

7RP 874. The prosecutor then briefly discussed each of the three prior incidents. The argument consumed less than two full pages of the 39-page closing. 7RP 874-76. The prosecutor then concluded that “[w]e can infer from this incident that the defendant had premeditated intent during the

November 29 incident. It's kind of consistent in these three instances." 7RP 876. The evidence was never mentioned in the rebuttal argument. No impropriety occurred.

3. ***Any error relating to the ER 404(b) evidence would be harmless where the jury acquitted Olsen on the charge to which it pertained and where the specific acts of which he was convicted were not disputed by any evidence.***

Finally, even if the trial court or the prosecutor erred, it would be harmless. An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *Stenson*, 132 Wn.2d at 709.

Here, the most salient point is that the evidence was admitted and argued to show that Olsen premeditated the attempted murder. The jury, however, acquitted on this charge. Moreover, as noted in the previous section of the brief, the State's argument only mentioned the evidence very briefly in its lengthy closing and not at all in its rebuttal. The jury was instructed twice on the uses to which they could put the evidence, and both the State and the defense reminded the jury of the limiting instructions. 5RP 618, 7RP 784, 935, CP 250.

Additionally, Olsen introduced evidence that questioned the occurrence of the earlier November 2009 assault through both his son JMO

and his mother. He also introduced evidence that the 2000 assault was in reaction to Devenny beating their sons. And, as noted, he extensively cross-examined Devenny herself as whether her recollection of the prior assaults was accurate.

Finally, the other evidence at trial was largely unrebutted. The jury heard the 911 call the night of the attack. They heard the testimony of Devenny's coworkers and the police about how distraught she was and how she and the whole house smelled of gas. JEO confirmed that his father, who he loved, had said "Die bitch" when he poured the gas on his mother. The jury heard how the dog, on whom the gas was supposedly poured, did not smell of gas. They heard uncontradicted testimony that Olsen admitted he broke the window on the car, and used the clicker to enter the house through the garage. They saw the photographs showing the candle lighter at the scene of the assault, and of the kitchen junk drawer, where the lighter was kept, left in an open position. They heard Olsen's preposterous story that the dog would not let him into the bathroom, and that rather than simply using the second bathroom one door down the hall, he went out to the garage and got a gas can and came back and tried to pour it on the dog, and then when the dog ran from the bathroom, instead of using the bathroom, Olsen continued to chase and douse the dog with gas. They heard his admission that after the assault he hid in a neighbor's shed, then fled to Seattle and Idaho, where he

lied to the police about his identity, and ultimately fled to Arizona. Finally, Olsen himself conceded that he was guilty of malicious mischief and harassment. 7RP 899, 933, 935. There is simply no likelihood the outcome would have been different had the ER 404(b) evidence from 1998 and 2000 been excluded.

B. THE TRIAL COURT PROPERLY DEFINED “TRUE THREAT” WITH REGARD TO THE HARASSMENT CHARGE.

Olsen next claims that the instructions on harassment were deficient because they did not limit the threat in question to a “true threat.” This claim is without merit because the jury was given a definitional instruction of “threat” that limited threats to true threats.

In *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010), in which the Supreme Court reversed a harassment conviction for failing to define a threat as a “true threat,” the Court specifically noted that the issue would have been resolved by giving the new definition of “threat” found in WPI 2.24 (2008):

Although the instructions in this case erroneously failed to limit the statute’s scope to “true threats,” the problem is unlikely to arise in future cases. After our opinion in *Johnston* limited the bomb threat statute’s scope to “true threats,” the Washington Pattern Jury Instructions Committee amended the pattern instruction defining “threat” so that it matches the definition of “true threat.” 11 Wash. Prac.: WPI 2.24, at 72 (3d ed. 2008) (“To be a threat, a statement or act must occur in a context ... where a reasonable person, in the position of the speaker, would foresee that the statement or

act would be interpreted as a serious expression of intention to carry out the threat....”). Cases employing the new instruction defining “threat” will therefore incorporate the constitutional mens rea as to the result.

Schaler, 169 Wn.2d at ¶ 24 n.5. Here, WPIC 2.24 was given to the jury:

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 240. As Olsen and the Court in *Schaler* note, this Court has concluded that the definition is adequate and the true threat language does not need to be in the to-convict instruction. *State v. Tellez*, 141 Wn. App. 479, ¶¶ 3-5, 170 P.3d 75 (2007); *accord*, *State v. Atkins*, 156 Wn. App. 799, ¶¶ 14-20, 236 P.3d 897 (2010); *State v. Allen*, 161 Wn. App. 727, ¶¶ 36-49, 255 P.3d 784, *review granted*, 172 Wn.2d 1014 (2011); *State v. Sloan*, 149 Wn. App. 736, ¶ 26, 205 P.3d 172, *review denied*, 220 P.3d 783 (2009).

Further, even if the instruction should have been included in the to-convict instruction, any error would be harmless. An omission of an essential element from the jury instructions may be harmless when it is clear that the omission did not contribute to the verdict. *Schaler*, 169 Wn.2d at ¶ 25. This is clear, for example, when the omitted element is supported by uncontroverted evidence. *Id.* On the other hand, error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could

have convicted on improper grounds. *Id.*

Here, the threat was based on Olsen's act of pouring gasoline on Devenny, waving a lighter and saying, "Die, bitch, die" or that she was "going to die this time, bitch." The same acts supported the charge of attempted second-degree murder, of which Olsen was found guilty.⁶

Further, as noted the jury was instructed that a threat was defined as a true threat, and the State pointed this out in closing argument, not once, but twice:

The threat was made or received at Bonnie's house, and remember, we are putting ourselves -- yourselves, a reasonable person, in a position of the speaker that would foresee that the threat is interpreted as serious. Think about it. If you were pouring gasoline on someone and telling them they were going to die, do you think that someone would believe that?

7RP 865; *also* 7RP 860. Finally, Olsen conceded that the charge had been proved. 7RP 899, 933, 935. There is no reasonable possibility that relocating the true-threat definition to the to-convict instruction would have changed the outcome of the proceedings. *Tellez*, 141 Wn. App. at ¶ 5, n.11. This claim should be rejected.

⁶ The trial court found the two crimes merged and were same criminal conduct for sentencing purposes. RP (4/11) 55-56.

C. THE CALIFORNIA CRIME OF TERRORISTIC THREATS WAS COMPARABLE TO THE WASHINGTON OFFENSE OF FELONY HARASSMENT WHERE OLSEN, AS A MATTER OF LAW UNDER CALIFORNIA PRECEDENT, PLED GUILTY TO THREATENING TO KILL DEVENNY.

Olsen finally claims that his offender score was incorrect because his California conviction of terrorist threats was not comparable to a Washington offense because the statutory elements of the California crime are broader than those of felony harassment under RCW 9A.46.020. This claim is without merit because Olsen specifically pled to allegations that under California law are equivalent to the Washington felony.

RCW 9A.46.020 provides:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
- * * *
- (b) A person who harasses another is guilty of a class C felony if any of the following apply: ... (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person;

Cal. Penal Code § 422 (2000) defined terroristic threats:

Any person who willfully threatens to commit a crime which *will result in death or great bodily injury* to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is

made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(Emphasis supplied). Olsen argues that because the highlighted portion of the statute is presented in the alternative, he could have been convicted only of a threat to commit great bodily harm, which would constitute a gross misdemeanor under RCW 9A.46.020.

Olsen pled no contest to the offense. Exh. 37. Under California law, the “legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes.” *People v. Wallace*, 33 Cal. 4th 738, 749, 93 P.3d 1037, 16 Cal. Rptr. 3d 96 (2004). And a guilty plea admits the allegations of the charging document. *People v. Tuggle*, 232 Cal. App. 3d 147, 154, 283 Cal. Rptr. 422 (1991), *overruled on other grounds*, *People v. Jenkins*, 10 Cal. 4th 234, 893 P.2d 1224, 40 Cal. Rptr. 2d 903 (1995).

The latter principle is important in this case, because under California law, even where the statutory elements are in the disjunctive, if the charging document presents them in the conjunctive, a guilty plea admits *each* of the elements. *Tuggle*, 232 Cal. App. 3d at 154-55. Count I of the information

charged Olsen in the conjunctive:

EDWARD MARK OLSEN did commit a felony ... in that said defendant did willfully and unlawfully threaten to commit a crime which would result in the death *and* great bodily injury to BONNIE MARIE DEVENNY, with the specific intent that the statement be taken as a threat.

Exh. 37 (emphasis supplied). Thus under California precedent, Olsen pled guilty to threatening to kill Devenny, as a matter of law, which makes his prior offense comparable to felony harassment in Washington. As such the trial court did err in including the offense in Olsen's offender score.

Finally, even if Olsen's offender score were incorrect, the case should be remanded, not for resentencing, but for correction of the offender score. "When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." *State v. Rowland*, 160 Wn. App. 316, ¶ 25, 249 P.3d 635, 643 (2011) (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Here, the trial court not only felt the standard range was inadequate punishment for the offense, it rejected the State's requested sentence of 300 months and imposed a sentence of 360 months:

I am going to utilize the opportunity to sentence you above the standard range here because I believe that it's warranted given the facts in this particular case and the

history that you present here. I am going to decline the State's invitation to sentence him to 300 months and instead go higher than that. I think that a sentence of 360 months on the Attempted Murder in the Second Degree is warranted here. That is 30 years.

RP (4/11) 81. The court further noted in its written findings that "the grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid." CP 292. The record is plain that the trial court would impose the same exceptional sentence, which was not dependent of the offender score, regardless of what the score was. Therefore, in the event the Court were to find error, remand for correction of the offender score only would be the proper remedy.

IV. CONCLUSION

For the foregoing reasons, Olsen's convictions and sentence should be affirmed.

DATED May 17, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', written over the printed name of the prosecuting attorney.

RANDALL AVERY SUTTON
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May 17, 2012 - 3:51 PM

Transmittal Letter

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