

NO. 42174-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

BRADLEY C. JARVIS,

Appellant.

11 OCT 24 AM 8:14  
STATE OF WASHINGTON  
BY                       
DEPUTY  
COURT OF APPEALS  
DIVISION II

---

APPELLANT'S BRIEF

---

James L. Reese, III  
WSBA #7806  
Attorney for Appellant

612 Sidney Avenue  
Port Orchard, WA 98366  
(360)876-1028

*pm 10/21/11*

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR .....	1
Assignments of Error .....	1
No. 1- No.3 .....	1
Issues Pertaining to Assignments of Error .....	1
No. 1- No.3 .....	1
B. STATEMENT OF THE CASE .....	2
<i>Procedure</i> .....	2
<i>Testimony</i> .....	3
C. ARGUMENT .....	13
I. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE’S MOTION TO ADMIT EVIDENCE PROHIBITED BY ER 404(b). .....	13
<i>ER 404(b) Evidence Should Not be Admissible         To Bolster the Victim’s Credibility</i> .....	15
<i>State v. Cook</i> .....	17
<i>The Trial Court Should Have Considered Other         Evidence In the Case to Show the Victim’s         Credibility and Fear</i> .....	18
II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT’S MOTION TO SEVER COURT II FROM THE REMAINING THREE COUNTS. ....	20
<i>Standard of Review</i> .....	20
III. THE DEFENDANT WAS DENIED DUE PROCESS	

BASED ON THE INSUFFICIENCY OF THE EVIDENCE WITH REGARD TO THE STALKING CHARGE. ....	24
---	----

<i>Standard of Review</i> .....	25
---------------------------------	----

<i>No Police Contacts</i> .....	26
---------------------------------	----

D. CONCLUSION .....	28
---------------------	----

E. APPENDIX

ER 401 .....	A
ER 403 .....	A
ER 404(b) .....	A
CrR 4.3 .....	B
CrR 4.4 .....	C
Fourteenth Amendment .....	D
RCW 9A.46.110 .....	E

TABLE OF AUTHORITIES

TABLE OF CASES

<i>State v. Barragan</i> , 102 Wn.App. 754, 9 P.3d 942 (2000) .....	14
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986) .....	25
<i>State v. Carter</i> , 4 Wn.App. 103, 480 P.2d 794 (1971) .....	21
<i>State v. Cook</i> , 131 Wn.App. 845, 129 P.3d 834 (2006) .....	14,17,18
<i>State v. Devincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003) .....	14
<i>State v. Gatalski</i> , 40 Wn.App. 601, 699 P.2d 804 (1985) .....	20

<i>State v. Grant</i> , 83 Wn.App. 98, 920 P.2d 609 (1996) .....	15,16,17
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	25
<i>State v. Harris</i> , 36 Wn.App. 746, 677 P.2d 202 (1984) .....	20,23
<i>State v. Hentz</i> , 32 Wn.App. 186, 647 P.2d 39 (1982), <i>rev'd on other grounds</i> , 99 Wn.2d 538 (1983) .....	23
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986) .....	25
<i>State v. Kinsey</i> , 7 Wn.App. 773, 502 P.2d 470 (1972) .....	21
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995) .....	14,19
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 186 (2008) .....	15,16
<i>State v. Nelson</i> , 131 Wn.App. 108, 125 P.2d 1008 (Div. III 2006) .....	14
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....	14
<i>State v. Ramirez</i> , 46 Wn.App. 223, 730 P.2d 98 (Div. II 1986) .....	23
<i>State v. Russell</i> , 125 Wn.2d 24, 802 P.2d 747 (1994) .....	21,22,24
<i>State v. Smith</i> , 74 Wn.2d 744, 446 P.2d 571, <i>vacated in part</i> , 408 U.S. 934 (1972), <i>overruled on other</i>	

*grounds by, State v. Cosby*,  
85 Wn.2d 758, 539 P.2d 680 (1975) ..... 23,24

*State v. Watkins*, 53 Wn.App. 264,  
766 P.2d 484 (1989) ..... 24

*State v. Weddel*, 29 Wn.App. 461,  
629 P.2d 902 (1981) ..... 20,21

---

*Drew v. United States*, 331 F.2d 85  
(D.C. Cir. 1964) ..... 20

*In re Winship*, 397 U.S. 358,  
90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 25

*Jackson v. Virginia*, 443 U.S. 307,  
61 L.Ed.2d 560, 99 S.Ct. 2781 ..... 25

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment ..... 1,24

STATUTES

REGULATIONS AND RULES

CrR 4.3 ..... 21,23  
CrR 4.4 ..... 1,20  
ER 404(b) ..... 1,13,14,15,16,17,19  
RCW 9a.46.110(1)(B) ..... 25

OTHER AUTHORITIES

Ferguson, Royce A., Jr., *12 Washington Practice* 384  
(3<sup>rd</sup> Ed. 2004) ..... 21,23

A. Assignments of Error

Assignments of Error

1. The trial court erred when it granted the state's motion to admit ER 404(b) evidence of uncharged, prior bad acts.
2. The trial court erred when it denied the defendant's motion to sever count II from counts I, IV and V.
3. The defendant was denied due process of law in violation the Fourteenth Amendment because there was not sufficient evidence to support a conviction for the crime of Stalking [Felony].

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it interpreted ER 404(b) and granted the prosecutor's motion to introduce evidence of multiple, uncharged, prior bad acts pursuant to ER 404(b)? (Assignment of Error 1.)
2. Whether the trial court abused its discretion pursuant to CrR 4.4 when it denied the defendant's motion to sever count II (Assault in the Second Degree 9/15-9/30/2009) from Count I (Stalking [Felony] 10/20/2009-1/31/2010); from Count IV (Violation of a Court Order 1/14/-1/15/2010) and from Count V (Violation of a Court Order 1/17-2010)? (Assignment of Error 2.)
3. Whether there was sufficient evidence to support a conviction for the

crime of Stalking [Felony] and the element of whether the victim reasonably feared that the defendant intended to injure her?

No police were contacted involving prior bad act incidents between the parties- over the course of one and a half years- until the defendant was arrested. Then Ms. Turville, the alleged victim, cooperated with the police and removed a telephone block in order to gather additional evidence of contacts by the defendant to support charges of violation of an Order of Protection. (Assignment of Error 3.)

#### B. Statement of the Case

##### *Procedure*

Mr. Jarvis was charged with a five count amended information CP 105-112. Count I alleged Stalking [Felony} between October 20, 2009 and January 31, 2010. Count I also alleged special allegations of Domestic Violence, Aggravating Circumstances-domestic violence and Sexual Motivation. CP 105-07. Count II alleged Assault in the Second Degree with special allegations of Domestic Violence and Aggravating Circumstances-Domestic Violence. CP 107-8. Count III alleged Bail Jumping but was ordered severed based on a conflict of interest with the defendant's attorney. CP 108. Count IV alleged Violation of a Court Order between January 14-15, 2010 with a special allegation of Domestic Violence. CP 109. Count V alleged Violation of a Court Order on January

17, 2010 with the same allegation of Domestic Violence. CP 109-11.

Mr. Jarvis was convicted of all counts except the jury found him guilty of the lesser included offense of Assault in the Fourth Degree .CP 223. The jury did not find that Mr. Jarvis committed the crime of stalking with a sexual motivation. CP 218. They did find that he committed Stalking as part of an “ongoing pattern of abuse” of multiple incidents over a prolonged period of time. CP 217. His standard ranges were 6-12 months for count I and 365 days for count II. CP 226. At sentencing Counts IV and V merged with Count I. CP 225. Jarvis was sentenced to an exceptional sentence of concurrent counts of 24 months for Stalking [Felony] and 365 days for the misdemeanor assault. CP 227. On May 27, 2011 he filed a notice of appeal. CP 241.

*Testimony*

Larisa Turville testified that between September 2008 and January 2009 she lived in her primary home in Bellevue and in another home in Kitsap county. II RP 52. She had two boys ages 11 and 14. RP 53. She and Mr. Jarvis were described as “boyfriend and girlfriend.” id. They first met in January 2008.<sup>1</sup>

By February 2008-six weeks into their relationship- they were

---

<sup>1</sup> Ms. Turville was five feet ten inches tall. RP 117. Mr. Jarvis was six feet nine inches tall. III RP 236.

vacationing in South Beach, Florida. RP 54. They were sitting by a bar near the pool at their hotel surrounded by other people. Mr. Jarvis returned from using the restroom. They had been drinking by the pool that day. Jarvis saw another person talking to Ms. Turville. He became angry and grabbed her by the arm and "...kind of drug me, you know, up the length of the pool and into the bedroom." RP 55. He allegedly told the other gentleman "That's my fucking girlfriend." id.

Once in the bedroom he followed Mr. Turville up a staircase to the bedroom area yelling: "You fucking bitch. You cunt." RP 56. Turville testified that she was "shocked." And "standing there sort of in disbelief." id. "...this was the first time I ever saw him do rage like this." id. In the bedroom area Mr. Jarvis hurled two water bottles at Ms. Turville. They struck the wall and shattered. She began screaming at that point and sustained small cuts to her feet from the glass.

Two security guards arrived and removed Mr. Jarvis from the room. RP 57. He returned to the room about 5:00 a.m. the next morning. The parties stayed together at the beach for another five or six days. RP 58.

The next incident Ms. Turville described occurred at her beach house in Kitsap County. Mr. Jarvis left to meet some of his friends and returned after several hours. RP 59. He had been drinking and again became angry. "I think he was mad that he wanted me to go out, and I

didn't go out with him and his friends." RP 60. Turville testified: "He—he would chase me through the house, screaming at me, like, from room to room. You know, had his fingers – pointing his fingers in my face. You're a fuckin' cunt. The usual, all the words again." id.

He grabbed Ms. Turville by her arms. She threatened to call the police unless he left. He went outside and she locked him out. " So he would go around the house and try to see where I was in the house." RP 61. He knocked on the doors and windows. He was yelling to open the door. She closed the shades. He eventually got into his truck and held the horn down for "half hour, 45 minutes." Ms. Turville testified: "I was scared. I was absolutely scared." id. Mr. Jarvis left about 5:00 a.m.

The next uncharged incident that she described occurred during the middle of their relationship at Ms. Turville's home in Bellevue. This incident concerned a Buddha statue RP 62, 69. The parties four children were present. Bradley became upset again. The parties were consuming alcohol. She testified: "I think what made him mad that night, he started in saying that I was swaying his children against him, that his kids liked me better. I was turning them against him...." RP 64.

During this incident Ms. Turville summonsed her nanny, Julie Berry, to return to the residence because "...I knew he was going to lose it." id. Ms. Turville testified: "By the time Julie came through the door, he

was raging, chasing me through the house, screaming..."You're a fucking cunt." "You're turning my kids against me." "You fuckin' bitch." "RP 65. The children were present.<sup>2</sup>

After being chased from room to room Ms. Turville went into the master bedroom. RP 66. Jarvis locked the door and picked up a clay statue which was about three feet tall and one and a half feet wide. He then smashed it on the tile floor at her feet. Ms. Turville described that she was in "shock", "disbelief" and "scared." RP 67-8. After smashing the statute Bradley allegedly "...grabbed me by my arms and slammed me down on the bed. Was just screaming with his finger in my face." RP 68.

Still another uncharged prior bad act was described in detail about an incident that occurred during Whaling Days celebration in Silverdale, Washington. RP 69. Mr. Jarvis and some of his friends were on Ms. Turville's boat that was tied to a dock among other boaters. RP 70. Allegedly, Mr. Jarvis became some-what jealous of his friends flirting with her. One of Mr. Jarvis friends took him up-town to cool off.

In the meantime Ms. Turville went to the end of the dock and was visiting with some celebrants on their boat. RP 71. When Mr. Jarvis

---

<sup>2</sup> Ms. Turville explained that Mr. Jarvis' older son and her older son went downstairs to "get out of the way." RP 65. Her youngest son and his daughter were in the kitchen watching the parties. Id.

discovered where she was located he became angry. Id. According to Ms. Turville Mr. Jarvis “Started yelling at me in front of this other couple, and then he took me by the arm and, again, marched me down the dock towards my boat.” id. He grabbed her “hard” by the arm and was asking “Where in the fuck did you think you were going?” Apparently he was mad that she did not stay on her boat. “He just grabbed me hard...” id.

When they arrived at Ms. Turville’s boat she crawled into a small berth and locked the door. RP 72. “He was screaming and pounding on the door and telling me to get the fuck out and pulling at the door handle, just yelling, ranting.” id. Ms. Turville testified that she was “[s]cared.

By September 2009 they were at Ms. Turville’s beach house near Silverdale. Her two boys and her girlfriends’ two smaller boys were present. RP 75. Mr. Jarvis was present for a planned barbeque along with his two children. Also present was a groundskeeper as well as Sealie’s boyfriend. RP 75. Ms. Turville was in the recovery process from a laser facial treatment. Id. She was taking Xanax. RP 76. The parties were also drinking that evening. Id. Mr. Jarvis became angry about the presence of Ms. Turville’s girlfriend’s boyfriend being at the house. Id.

According to Turville she was sitting on the back patio when Jarvis “...came out and just started to rant and rage at me.” RP 77. Mr. Jarvis allegedly threw terra cottas pots off the deck and they broke on the lower

yard. Id. The children went to their bedrooms. They were able to see the disturbance that later carried out front by Mr. Jarvis' truck where Ms. Turville told him that he needed to leave, "...to get, in his truck and leave." id.

The argument extended to the garage. Ms. Turville testified: "He grabbed me by my wrist in the garage. Pulled my wrists, held my hands above my head. And then he grabbed my neck..so he reached out and had me by my neck." RP 78. He further explained: "He just grabbed me. Got my hands free and grabbed me (indicating) so my feet were - - I was kind of up on my tippy toes (indicating)." RP 80. She described being lifted in an upward direction and she was not able to breath for "...maybe five, ten seconds." id.

Ms. Turville tried to lock herself in her bedroom. Mr. Jarvis followed her and "Again, grabbed me by the arms, threw me down on the bed screaming at me. So I was just asking or pleading with him to calm down." id. Later outside near his truck he "...smashed the top of my hand, just a slap (indicating) on the top of my hand." RP 81.

One of Ms. Turville's girlfriends children came outside and screamed at Mr. Jarvis to stop and then yelled at him "don't ever touch her again." id. Mr. Jarvis turned and punched the hood of his truck and left with his children. Id.

A day or so later, Ms. Turville returned to her doctor who did laser surgery. Several photographs of her neck, arms, hand and leg were taken. RP 86; exs. 2-9. Other exhibits showed that on October 20, 2009 she obtained a temporary order of protection in the Redmond Court system. Ex. 18; RP 93. Then, on November 2, 2009 she obtained a Final Order of Protection. ex.19; RP 94.

Thereafter, according to Ms. Turville's testimony Mr. Jarvis attempted to contact her by text messaging her, leaving a telephone message or having his friends call from their telephones. RP 95. She placed a block on her telephone. RP 96. Mr. Jarvis also attempted to contact her "By Facebook or on my children's phones or on Julie Berry's or Julie's husband's phone. His children calling my children." id.

The block on Ms. Turville's telephone lapsed after 90 days. Later when she was in Mexico for New Year's Eve she started receiving multiple messages from Mr. Jarvis. RP 97; exs. 11,12,13,14. On January 14, 15<sup>th</sup> and 17<sup>th</sup> 2010 she received 10 text messages from Mr. Jarvis. RP 102. Previously, on December 28, 2009 she received 8 messages from him and one on December 30, 2009. RP 103.

Ms. Turville testified that when she received the text messages she felt "scared" and "frightened." She testified: "So it was pretty unnerving."

RP 104. While in Mexico she received a picture from the defendant of his penis. RP 105; exs. 15,16. One picture contained the message: "Just in case you forgot what it looks like." id., ex. 16. Turville testified that after receiving these photographs: "It made me feel afraid, it made me feel panicked that, how are we going to stay protected? How were the kids and I going to be safe from him. And especially that long after, you know, no contact still trying to contact me." RP 106.

When she returned from Mexico Ms. Turville put the block back on her phone. RP 107. However, at the behest of the Bellevue Police Department she left the block off her phone "...so we could document that he was still trying to contact." id. The contacts resumed between January 13<sup>th</sup> through 17<sup>th</sup>, [2010]. Id. The text message sent on January 14<sup>th</sup> read: "Hi, baby. Playing in a pool league and my phone went dead and had a feeling you called me. XO, Bradley." RP 109, ex. 17.

Apparently a series of messages were sent on January 15<sup>th</sup>. One read: "Miss me a little?" A second one on January 15<sup>th</sup> stated: "Hi, Risa. Miss you baby. Lots of dreams of you last night. Hope to chat soon LU Bradley." RP 110. At 3:38 p.m. another one read "I know you miss me, darlin. I can feel it in my heart." The one at 4:35 stated; "Are you coming to the beach house with the kiddies this weekend, baby?" At 8:52 the message read: "I do miss you, so hope you realize that. Don't know what

else to say except that I love you. Have nothing left, XO.” Another at 9:13 p.m. read: “I’m worried about you.” At 9:44 p.m.: “I’m the one person that will always be there to protect you. Remember that, baby.” At 11:03 “Love you. Sweet dreams.” RP 111.<sup>3</sup>

When asked how she felt when she received the defendant’s text messages she replied: “It’s like he – they all sound like we’re in contact, like we’re having a relationship, we’re ongoing, we’re together. That was very frightening.” RP 110. The messages were sent when she was in at her home in Silverdale. RP 111.

Cross-examination of Ms. Turville revealed that at the South Beach incident they were surrounded by other people, some of whom could hear the parties yelling at each other. RP 114-122. No report was made to the police about the incident by Ms. Turville. RP 122-23. Mr. Jarvis and the security guards consumed a bottle of tequila before he returned to the room. RP 123.

She described the chase at her home in Bellevue during the Buddha incident as a “Walking chase” “And he was following– me.” RP 127. At the Whaling Says incident the parties were drinking beer and tequila. RP 130. “People everywhere.” RP 131.

---

<sup>3</sup> A final text message sent on January 17, 2010 at 1849 stated: “I want to make love to you.” and “Hey, baby, kisses.” RP 111.

Bradley Jarvis testified that Larisa Turville was communicating with him through a third party. III RP 237. The third party advised Bradley that she had unblocked her telephone so they could “talk” and “try to figure things out and move on from there.” id. As a result he admitted sending the text messages. Ms. Turville never responded. RP 245-6.

He described the incident in September as occurring on Saturday the 26<sup>th</sup>. RP 239. When he arrived at Ms. Turville’s beach house she was “absolutely intoxicated to the point where she couldn’t even stand up And just was wobbling and falling all over the place.” RP 239.

Mr. Jarvis gave her a shower and put her to bed. RP 240. About an hour later she awoke and “she came screaming out of the bedroom.” RP 242. Mr. Jarvis and Ms. Turnville were going through the house yelling obscenities at each other. Bradley grabbed a steak that he had previously cooked and slammed it on the hood of her car as he left with his children. RP 243. He testified that he did not put his hands on her neck or choke her.” RP 243.

Mr. Jarvis concluded his testimony by describing that: “We had a very volatile relationship. It was very up and down and way too much alcohol involved to be anywhere in the norm. Just way too much drinking to be anywhere near a normal relationship.” RP 243.

### C. Argument

#### I. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO ADMIT EVIDENCE PROHIBITED BY ER 404(b).

The prosecutor argued in its memorandum that the “prior bad act” evidence was admissible to allow the jury to assess the victim’s credibility. CP 33. They argued: “The two main reasons the state is seeking to admit this evidence is so the jury can assess the victim’s credibility.” I RP 7. The prosecutor also argued that these past acts were admissible to show that Ms. Turville was fearful that Mr. Jarvis would injure her in the future.<sup>4</sup> II RP 233.

These multiple incidents occurred during their relationship over a period of one and half years. The alleged on-going pattern of abuse included South Beach, Whaling Days and the Buddha statute incidents. None of these recited events were reported to the police by either Ms. Turville or by any of the numerous bystanders, witnesses, friends or family. RP 74.

---

<sup>4</sup> The prosecutor argued that why the victim did not report the assault charge to law enforcement affected her credibility. Apparently, the prior bad acts were sought to be admitted because the alleged victim did not report those incidents either, thereby establishing her credibility.

The prosecutor also argued that since the defendant was charged with Stalking the ER 404(b) evidence was admissible on that charge to show the victim’s fear. CP 34.

The trial court agreed, granted the prosecutor's request and authorized admission of this ER 404(b) evidence.

ER 404(b) prohibits evidence of past misdeeds solely to prove a defendant's criminal propensity. *State v. Cook*, 131 Wn.App. 845, 129 P.3d 834 (2006). ER 404(b) states in pertinent part.

“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.”

#### *Standard of Review*

A court's interpretation of ER 404(b) is reviewed de novo. It is a question of law. *State v. Nelson*, 131 Wn.App. 108, 115, 125 P.3d 1008 (Div. III 2006) (citing *State v. DeVincentis*, 150 Wn.2d 11,17, 74 P.3d 119 (2003)). The admission of evidence is reviewed for an abuse of discretion only if the trial court's interpretation of the rule is correct. *id.*

“The trial court must find that the evidence is logically relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting prior bad acts evidence in a criminal prosecution. *State v. Barragan*, 102 Wn.App. 754,758, 9 P.3d 942 (2000); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The court then balances the probative value of the evidence against its potential for prejudice. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 847, 889 P.2d 487 (1995).”

*State v. Nelson* at 115.

These prior bad acts, which constituted the basis of prior assaults of Ms. Turville by Mr. Jarvis, should not have been admitted because they showed a propensity to commit assaults on the victim. The defense argued that these prior bad acts should not be admitted unless the court was willing to sever the Stalking count from Assault in the Second degree. Mr. Jarvis was charged with assault in the second degree by strangulation. See Instr. 15-19: (“That on or about September 15, 2009 through September 30, 2009 the defendant assaulted Larisa M. Turville by strangulation;”) CP. 194-198.<sup>5</sup> These prior acts were cumulative and prejudicial in relation to that count.

*ER 404(b) Evidence Should Not be Admissible  
to Bolster the Victim’s Credibility*

The state argued and the trial court relied on *State v. Magers*, 164 Wn.2d 174, 189 P.3d 186 (2008) to support its respective arguments and rulings.<sup>6</sup> CP 34. However, *Magers* is distinguishable. In *Magers* the court allowed ER 404(b) evidence in order “...to bolster the victim’s credibility

---

<sup>5</sup> Instruction No. 17 defined this alleged assault as: “An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.” CP 196.

<sup>6</sup> ‘THE COURT...And your position, Counsel, is that you need this to bolster her credibility? MS. SCHNEPF: Your Honor, the *Magers’s* court and the *Grant* court allow it for that purpose.’ I RP 21.

because she had recanted her initial allegations of wrongdoing by Magers.” CP 97. Also, in *Magers* the victim’s initial statement was admitted pursuant to the excited utterance rule. Subsequently, she attempted to recant her prior statement. CP 97. Here, there was no recantation of accusations. The defense argued that Ms. Turville was embellishing the allegations rather than recanting any of them. I RP 16, 22.

The Supreme Court in *Magers* adopted the reasoning of *State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996). “The *Grant* court determined that it was proper to introduce allegations of prior domestic abuse because “victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others.” *Grant*, 83 Wn.App. At 107.” CP 97. Yet, none of those reasons is applicable to the case at bench.

The *Magers* decision was limited to the holding that: “prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of the recanting witness.” 164 Wn. 2d at 186.<sup>7</sup>

---

<sup>7</sup> The defense argued in its written response to the state’s motion to allow ER 404(b) evidence to bolster count I: “The alleged victim in this case has not recanted the allegations of Stalking. There is significant evidence independent of the alleged victim’s statements that if believed by the jury, would show two or more contacts by text messaging from Mr. Jarvis to the alleged victim. From all indications, there is no change to the

*State v. Cook*

The trial court's ruling is contrary and inconsistent with this court's decision in *State v. Cook*, supra, 131 Wn.App. 845. That court defined the limits of ER 404(b) evidence when it determined:

“We agree with *Grant* that a defendant's prior acts of domestic abuse against the alleged victim may be admissible under ER 404(b). But for the reasons that follow, we disagree with *Grant* that such evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility.”

Id. at 851. Not only was the trial court's decision to admit Jarvis' prior bad acts to show the victim's credibility or the basis of the alleged victim's fear's erroneous, but according to *Cook* the limiting instruction was also erroneous. And it was inadequate to prevent the jury from using prior acts of domestic violence to show that Jarvis had a propensity to assault Turville.<sup>8</sup>

---

story about how those text messages were sent and how she received them. There is no need to bolster the basic allegations concerning the text messages.” CP 97.

<sup>8</sup> Instruction 30 given as a result of the trial court's ER 404(b) rulings stated: “Certain evidence has been admitted in this case for only a limited purpose. The evidence of acts of Mr. Jarvis occurring prior to September 2009 may be considered by you only for the purpose of determining the credibility of the alleged victim and the reasonableness of her fear. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.” CP 209. Compare erroneous instruction in *Cook*, at 849.

*Cook* held that evidence of prior, domestic violence, bad acts is only admissible to show the alleged victim's relevant state of mind at the time of the inconsistent act. It is not admissible to enhance the victim's credibility. On point here, the holding in *Cook* is as follows:

“When an alleged victim acts inconsistently with a disclosure of abuse, such as failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act.”

*Id.* at 851 (footnote omitted). Jarvis' prior, bad acts were only admissible to show Ms. Turville's state of mind at the time of the alleged incidents as to why she did not report them.

*The Trial Court Should Have Considered Other Evidence  
In the Case to Show the Victim's Credibility and Fear*

There was ample evidence of text messages sent by the defendant and received by Ms. Tunville. Indeed, Ms. Tunville cooperated with the Bellevue Police Department and took the block off her cell phone in order to gather additional evidence of text messages from Mr. Jarvis after she had obtained a protection order. Two of the four counts that were tried to the jury alleged Violation of a Court Order. CP 109-10. There was testimony available from multiple witnesses and there were exhibits admitted into evidence that showed multiple contacts by Mr. Jarvis that may have caused Ms. Turnville to become fearful of him rather than

because of prior bad acts.<sup>9</sup>

The evidence of prior, uncharged acts that was admitted into evidence was prejudicial because it was unnecessary. Other methods of proof existed which were not of such a nature to show a propensity to commit the type of assault that was charged. This is the very purpose of ER 404(b). For instance, at the time of the alleged assault at the beach house in Silverdale on September 26, 2009 the following adult witnesses were available: Ms. Turville's girlfriend Sealie, her boyfriend and the groundskeeper. Among the six children present were Ms. Turville's two boys ages 11 and 14 and Sealie's two boys, one of which confronted Mr. Jarvis. RP 75-6, 81.

The potential for prejudice far outweighed any probative value and these acts should not have been admitted into evidence. *State v. Lough*, 125 Wn.2d at 853. 889 P.2d 487 (1995).

---

<sup>9</sup> See the following exhibits from which the victim testified caused her to fear the defendant:

- Exhibit 11 Jarvis Phone Records
- Exhibit 12 Jarvis Phone Records complete Print Out
- Exhibit 13 Turville Phone Records
- Exhibit 14 Turville Phone Records Complete Print Out
- Exhibit 15 Penis Picture
- Exhibit 16 Penis Picture with text message
- Exhibit 17 Text Messages sent 1/14/10-1/17/10. CP 173.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SEVER COUNT II FROM THE REMAINING THREE COUNTS.

The trial court erred when it denied the defendant’s motion to sever count II from counts I, IV and V. I RP 23. The defendant moved to sever Court II of the Second Amended Information which alleged Assault in the Second Degree with Special Allegations of Domestic Violence and “Aggravating Circumstance” Domestic Violence. CP 90-94. The defense argued in its motion: “There is other evidence to bolster the credibility of the alleged victim making the bad act testimony unnecessary.” CP 93. According to *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964) joint trial of offenses creates the danger that the jury may accumulate the evidence and also conclude that the defendant has a propensity to commit crimes.

*Standard of Review*

The decision to grant separate trial lies within the sound discretion of the court. This decision will not be reversed absent a manifest abuse of discretion. *State v. Weddel*, 29 Wn.App. 461, 629 P.2d 902 (1981); *State v. Harris*, 36 Wn.App. 746, 677 P.2d 202 (1984) and *State v. Gataliski*, 40 Wn.App. 601, 699 P.2d 804 (1985).

CrR 4.4 entitled “Severance of Offenses and Defendants states:

“(a) **Timeliness of Motion-Waiver.**

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion."

The State alleged Stalking as Court I. CP 105. The criminal elements for this charge include "the requirement to prove the fear of the alleged victim as well as the reasonableness of that fear." CP 192.

According to Royce A. Ferguson, Jr., *12 Washington Practice* 384 (3<sup>rd</sup> Ed. 2004):

"Even though the court rule or statutory grounds for joinder are met, offenses may not be joined if prosecution of all charges in a single trial would prejudice the defendant."

(citing *State v. Carter*, 4 Wn.App. 103, 480 P.2d 794 (1971) and *State v. Weddel*, supra.) (CrR 4.3 Joinder of Offenses and Defendants- see appendix.)

In each case the court must determine, evaluate and weigh prejudice to the accused caused by the joinder against considerations of judicial economy. *State v. Kinsey*, 7 Wn.App. 773, 502 P.2d 470 (1972). Here, the trial court did virtually no balancing on the record. I RP 223.

*State v. Russell*, 125 Wn.2d 24,62-68, 802 P.2d 747 (1994)

establishes the mandatory criteria the trial court must examine when it decides a motion to sever the counts. That court established the following factors:

“ In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial...In addition any residual prejudice must be weighted against the need for judicial economy.” Id. at 63 (citations omitted.)

The court should consider the strength of the evidence on each count, the defenses and whether evidence of the other crimes would be admitted if the counts were separated for trial. *Russell* at 63. Here, the trial court did not address any of the *Russell* factors in detail. Instead the trial court summarily reached its conclusion to deny the motion to sever.<sup>10</sup>

According to Ferguson all the reasons justifying severance were met in this case:

“Joinder will be upheld unless prosecution of all crimes in a single trial will embarrass or confound the defendant in presenting separate defenses or the defendant will be

---

<sup>10</sup> THE COURT: “...I’m satisfied that under the current status of the law that the evidence does not automatically taint the defendant’s rights with regard to Count 2 and the motion to sever is denied.” I RP 23.

erroneously prejudiced by cumulative evidence and hostility engendered by the totality of the evidence (sic) is presented.”<sup>11</sup>

<sup>12</sup> *Washington Practice* at 385. (citing *State v. Ramirez*, 46 Wn.App. 223, 730 P.2d 98 (Div. II 1986)).<sup>12</sup> *Ramirez* decided that: “If the defendant can demonstrate substantial prejudice; the trial court’s failure to sever is an abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 647 P.2d 39 (1982), *rev’d on other grounds*, 99 Wn.2d 538 (1983).”

Appellate courts recognize that joinder is inherently prejudicial. *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571, *vacated in part*, 408 U.S. 934 (1972) *overruled on other grounds by*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). *State v. Harris*, 36 Wn.App. 746, 677 P.2d 202 (1984) held that it was an abuse of discretion to deny a motion to sever because the prejudice-mitigating factor: that evidence of each crime would be admissible in a separate trial for the other-was absent. That is the case

---

<sup>11</sup> CrR 4.3(a) authorizes joinder where the offenses are of the same or similar character. According to *Russell*: “Joinder of counts should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him or her a substantial right.” *id.* 125 Wn.2d at 62 (citing *State v. Smith*, *infra*, 74 Wn.2d at 754-55.)

<sup>12</sup>In *Ramirez* Court I alleged Indecent Liberties in August 1983 with an 8 year old female friend of his son at a drive-in movie. Count II alleged Indecent Liberties of another of his son’s playmates in the bedroom of his home. The court held: “because proof of one count could not have been adduced at a separate trial for the other, it was error to deny defendant’s timely motion to sever counts for separate trials.” *id.* at 226.

at bench. In particular,

“Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer criminal disposition. *State v. Watkins*, 53 Wn.App. 264,268, 766 P.2d 484 (1989) (citing *Smith*, 74 Wn.2d at 754-55).”

*Russell*, 125 Wn.2d at 62-63.

In the case at bench, evidence of Assault in the Second degree by strangulation would not be admissible in a separate trial for Stalking [Felony] where the victim feared the defendant. The evidence would not be admissible because fear of the defendant was not an element of Assault in the Second degree or of a lesser included charge of Assault in the Fourth Degree.<sup>13</sup> The trial court erred by denying severance.

### III. THE DEFENDANT WAS DENIED DUE PROCESS BASED ON THE INSUFFICIENCY OF THE EVIDENCE WITH REGARD TO THE STALKING CHARGE.

There was not substantial evidence to convict the defendant of the crime of Stalking [Felony] in violation of the Fourteenth Amendment. The defense moved after the state rested to dismiss Count I Stalking with sexual motivation, domestic violence based on the sufficiency of the evidence while looking at the evidence in the light most favorable to the

---

<sup>13</sup> Mr. Jarvis was acquitted of Assault in the Second Degree. He was found guilty of the lesser included offense of Assault in the Fourth Degree. However, no special allegations were alleged or found by the jury.

state. III RP 230. Specifically, the defense argued “...the state has failed to prove the element listed in number two on the jury instructions, that Larisa M. Turville reasonably feared the defendant intended to injure her.” *id.*; See Instr. 14: ”(2) That Larisa M. Turville reasonably feared that the defendant intended to injure her;” CP 192; RCW 9A.46.110(1)(b).

The defendant’s motion was denied. However, at the conclusion of the trial the same argument applies to the entire evidence of the trial.

#### *Standard of Review*

According to *State v. Bingham*.<sup>14</sup>

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).”

*See also, State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer to onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of

---

<sup>14</sup> 105 Wn.2d 820, 823, 719 P.2d 109 (1986).

every element of the offense.”

443 U.S. at 316, 99 S.Ct. at 2787 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

At the conclusion of the trial the evidence showed that Ms. Turville removed the block on her cell phone about mid January. She removed the telephone block prior to the incidents of mid-January that formed the basis of Counts IV and V in an effort to collect evidence against Mr. Jarvis. RP 166, 231. Ms. Turville collected text messages from the defendant on January 14th-17th. RP 166. This is ample circumstantial evidence that Ms Turville did not fear Mr. Jarvis. She was not fearful because she planned to gather evidence to use against him .<sup>15</sup>

#### *No Police Contacts*

Ms. Turville did not contact any police officer during the South Beach Incident. II RP 122. She did not contact the police during the Whaling Day’s incident, although they were present throughout the day. II RP 134. Nor did she contact the police during the Buddha incident in Bellevue. When she sought the Order of Protection on October 20, 2009

---

<sup>15</sup> Stalking was alleged to have occurred between October 20, 2009- the date Ms. Turville obtained a temporary Order of Protection- and January 31, 2010 (Count I). Violation of the Court Orders were alleged to have occurred between January 14 and 15<sup>th</sup>, 2010 (count IV) and on or about January 17, 2010 (Count V). CP 105-111.

she did not mention anything about choking at her Silverdale Beach House that occurred on September 26, 2009. III RP 239. This incident lead to Mr. Jarvis being charged with Assault in the Second Degree alleged to have occurred sometime between September 15<sup>th</sup> and 30, 2009. CP 107. However, no police were contacted when the incident occurred. II RP 158, 160. It was not until January 17, 2010 that the police were contacted and choking was alleged. II RP 160, 167.

Looking at the evidence in the light most favorable to the state the prosecutor argued in part that Ms. Turville was fearful that the defendant might come to her house because she looked over her shoulder in a fearful manner when she was interviewed by the police officer Petersen. RP 269. She concluded her direct examination with: "I was alone at my house when I called the sheriff that night, so I was afraid he was going to come over and try to get in the house." RP" 112.

The jury's findings of guilt for the crime of Stalking [Felony] were not supported by the evidence. Evidence from which any rationale trier of fact could have found all of the elements of Stalking beyond a reasonable doubt. Although Ms. Turville testified repeatedly about her fears, based on the circumstances as set forth above, this testimony as argued by the defense was not reasonable: "See did not reasonably fear. She was collecting evidence." III RP 303.

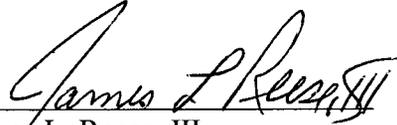
The evidence was not sufficient to support the defendant's conviction for the crime of stalking.

D. Conclusion

This court should reverse the defendant's convictions or remand the case for a new trial.

Dated this 21st day of October, 2011

Respectfully Submitted,



James L. Reese, III  
WSBA #7806  
Court Appointed Attorney  
For Appellant

**TITLE IV. RELEVANCY AND ITS LIMITS**

**RULE 401. DEFINITION OF "RELEVANT EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although 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.

**RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts.** 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.

[Amended effective September 1, 1992.]

**RULE 405. METHODS OF PROVING CHARACTER**

(a) **Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

[Amended effective September 1, 1992.]

**RULE 406. HABIT; ROUTINE PRACTICE**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**RULE 407. SUBSEQUENT REMEDIAL MEASURES**

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**RULE 408. COMPROMISE AND OFFERS TO COMPROMISE**

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Amended effective September 1, 2008.

(h) **Verification by Interpreter.** If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

[Amended effective September 1, 1983; July 1, 1984; September 1, 1986; September 1, 1991; March 19, 1993; September 1, 1995; November 7, 1995; January 2, 1996; September 1, 1996; April 8, 1997; March 9, 1999; September 1, 1999; December 26, 1999; December 26, 2000; April 16, 2002; August 6, 2002; August 3, 2004; August 2, 2005; April 11, 2006; August 1, 2006; July 31, 2007; August 12, 2008; January 12, 2010; July 8, 2010.]

### RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS

(a) **Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be joined in the same charging document:

(1) When each of the defendants is charged with accountability for each offense included;

(2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) [Reserved].

(d) [Reserved].

(e) **Improper Joinder.** Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined.

[Amended effective September 1, 1986; September 1, 1995.]

#### RULE 4.3.1 CONSOLIDATION FOR TRIAL

(a) **Consolidation Generally.** Offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

(b) **Failure to Join Related Offenses.**

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(4) Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

(c) **Authority of Court To Act on Own Motion.** The court may order consolidation for trial of two or more indictments or informations if the offenses or defendants could have been joined in a single charging document under rule 4.3.

[Formerly CrR 4.3A, adopted effective September 1, 1995. Renumbered as CrR 4.3.1 effective April 3, 2001.]

#### RULE 4.3A. CONSOLIDATION FOR TRIAL [RENUMBERED]

[Renumbered as 4.3.1 effective April 3, 2001.]

#### RULE 4.4 SEVERANCE OF OFFENSES AND DEFENDANTS

(a) **Timeliness of Motion—Waiver.**

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice

(h) **Verification by Interpreter.** If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

[Amended effective September 1, 1983; July 1, 1984; September 1, 1986; September 1, 1991; March 19, 1993; September 1, 1995; November 7, 1995; January 2, 1996; September 1, 1996; April 8, 1997; March 9, 1999; September 1, 1999; December 28, 1999; December 26, 2000; April 16, 2002; August 6, 2002; August 3, 2004; August 2, 2005; April 11, 2006; August 1, 2006; July 31, 2007; August 12, 2008; January 12, 2010; July 8, 2010.]

### RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS

(a) **Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be joined in the same charging document:

(1) When each of the defendants is charged with accountability for each offense included;

(2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) [Reserved].

(d) [Reserved].

(e) **Improper Joinder.** Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined.

[Amended effective September 1, 1986; September 1, 1995.]

#### RULE 4.3.1 CONSOLIDATION FOR TRIAL

(a) **Consolidation Generally.** Offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

(b) **Failure to Join Related Offenses.**

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(4) Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

(c) **Authority of Court To Act on Own Motion.** The court may order consolidation for trial of two or more indictments or informations if the offenses or defendants could have been joined in a single charging document under rule 4.3.

[Formerly CrR 4.3A, adopted effective September 1, 1995. Renumbered as CrR 4.3.1 effective April 3, 2001.]

#### RULE 4.3A CONSOLIDATION FOR TRIAL [RENUMBERED]

[Renumbered as 4.3.1 effective April 3, 2001.]

### RULE 4.4 SEVERANCE OF OFFENSES AND DEFENDANTS

(a) **Timeliness of Motion—Waiver.**

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice

require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) **Severance of Offenses.** The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) **Severance of Defendants.**

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

(i) the prosecuting attorney elects not to offer the statement in the case in chief; or

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

(3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

(d) **Failure to Prove Grounds for Joinder of Defendants.** If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) **Authority of Court to Act on Own Motion.** The court may order a severance of offenses or defendants

before trial if a severance could be obtained on motion of a defendant or the prosecution.

[Amended effective December 28, 1990; September 1, 2007.]

**Comment**

Supersedes RCW 10.46.100.

**RULE 4.5 OMNIBUS HEARING**

(a) **When Required.** When a plea of not guilty is entered, the court shall set a time for an omnibus hearing.

(b) **Time.** The time set for the omnibus hearing shall allow sufficient time for counsel to (i) initiate and complete discovery; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

(c) **Checklist.** At the omnibus hearing, the trial court on its own initiative, utilizing a checklist substantially in the form of the omnibus application by plaintiff and defendant (see section (h)) shall:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedite completion;

(iii) make rulings on any motions, other requests then pending, and ascertain whether any additional motions, or requests will be made at the hearing or continued portions thereof;

(iv) ascertain whether there are any procedural or constitutional issues which should be considered;

(v) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference; and

(vi) permit defendant to change his plea.

(d) **Motions.** All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. Checklist forms substantially like the memorandum required by section (h) shall be made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(e) **Continuance.** Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of any issue, the omnibus hearing should be continued from time to time until all matters raised are properly disposed of.

(f) **Record.** A verbatim record (electronic, mechanical or otherwise), shall be made of all proceedings at the hearing.

## AMENDMENT (XIV)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 9A.46.110  
Stalking.

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in \*RCW 9.94A.602, while stalking the person; (v)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Correctional agency" means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(c) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(d) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(e) "Repeatedly" means on two or more separate occasions.

OFFICE OF NOTARIES  
JULIA F. REESE II

11 OCT 24 AM 8:45

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

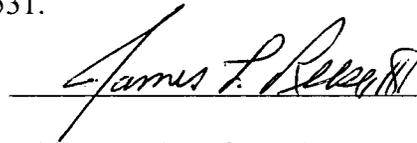
PROOF OF SERVICE

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

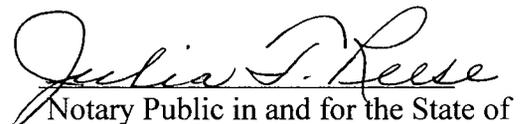
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 21st day of October, 2011, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Bradley C. Jarvis, No. 42174-7-II for filing to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Bradley C. Jarvis, DOC #349~~817~~, Larch Corrections Center, 15314 NE Dole Valley Rd., Yacolt, WA 98675-9531.



Signed and Attested to before me this 21st day of October, 2011 by James L. Reese, III.

  
Notary Public in and for the State of  
Washington residing at Port Orchard.  
My Appointment Expires: 04/04/13