

NO. 42174-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY JARVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00080-0

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

James Reese
612 Sidney Ave.
Port Orchard, WA 98366

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 December 20, 2011, Port Orchard, WA 
Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

CASES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY.....2

 B. FACTS3

III. ARGUMENT9

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT’S PRIOR ACTS OF DOMESTIC VIOLENCE PURSUANT TO ER 404(B) BECAUSE: (1) THE EVIDENCE WAS PROPERLY ADMITTED TO SHOW THE STATUTORY ELEMENT THAT THE VICTIM REASONABLY FEARED THE DEFENDANT; (2) THE JURY WAS ENTITLED TO EVALUATE THE VICTIM’S CREDIBILITY WITH FULL KNOWLEDGE OF THE DYNAMICS OF HER RELATIONSHIP WITH THE DEFENDANT; (3) THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE; AND (4) THE TRIAL COURT MINIMIZED THE DANGER OF ANY UNFAIR PREJUDICE BY GIVING THE APPROPRIATE LIMITING INSTRUCTION.9

 1. The trial court did not abuse its discretion in admitting the ER 404(b) evidence as this evidence was properly admitted to show the statutory element that the victim reasonably feared the Defendant.11

 2. The evidence regarding the Defendant’s prior acts was also properly admitted because the jury was entitled to evaluate the victim’s credibility with full

	knowledge of the dynamic of her relationship with the Defendant.....	14
B.	THE DEFENDANT’S CLAIM OF INSUFFICIENT EVIDENCE IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ELEMENTS OF THE CRIME OF STALKING BEYOND A REASONABLE DOUBT.	18
C.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO SEVER THE CHARGE OF ASSAULT IN THE SECOND DEGREE BECAUSE: (1) GIVEN THE SHORT TRIAL AND THE CLARITY OF THE ISSUES THE TRIAL COURT COULD REASONABLY EXPECT THAT JURY COULD COMPARTMENTALIZE THE EVIDENCE AT TRIAL; (2) THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT EACH COUNT WAS TO BE CONSIDERED SEPARATELY; AND, (3) THE RECORD SHOWS THAT THE JURY WAS ABLE TO CONSIDER THE COUNTS SEPARATELY SINCE IT ULTIMATELY ACQUITTED THE DEFENDANT ON THE ASSAULT IN THE SECOND DEGREE CHARGE.....	21
IV.	CONCLUSION.....	25

TABLE OF AUTHORITIES
CASES

<i>State v. Americk</i> , 42 Wn. 2d 504, 256 P.2d 278 (1953).....	14
<i>State v. Anderson</i> , 15 Wn. App. 82, 546 P.2d 1243 (1976).....	10
<i>State v. Askham</i> , 120 Wn. App. 872, 86 P.3d 1224 (2004).....	11
<i>State v Baker</i> , 162 Wn. App. 468, 259 P.3d 270 (2011).....	13-16
<i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000).....	12
<i>State v. Bythrow</i> , 114 Wn. 2d 713, 790 P.2d 154 (1990).....	21-23
<i>State v. Camarillo</i> , 115 Wn. 2d 60, 794 P.2d 850 (1990).....	18, 19
<i>State v. Cook</i> , 131 Wn. App. 845, 129 P.3d 834 (2006).....	16
<i>State v. Delmarter</i> , 94 Wn. 2d 634, 618 P.2d 99 (1980)	18
<i>State v. Eastabrook</i> , 58 Wn. App. 805, 795 P.2d 151 (1990).....	10
<i>State v. Fualaau</i> , 155 Wn. App. 347, 228 P.3d 771 (2010).....	9, 10
<i>State v. Gates</i> , 28 Wn. 689, 69 P. 385 (1902).....	14
<i>State v. Grant</i> , 83 Wn. App. 98, 920 P.2d 609 (1996).....	9, 16
<i>State v. Green</i> , 94 Wn. 2d 216, 616 P.2d 628 (1980)	18
<i>State v. Kalakosky</i> , 121 Wn. 2d 525, 852 P.2d 1064 (1993)	21
<i>State v. Magers</i> , 164 Wn. 2d 174, 189 P.3d 126 (2008).....	10-12, 15-16
<i>State v. Moles</i> , 130 Wn. App. 461, 123 P.3d 132 (2005)	18
<i>State v. Pirtle</i> , 127 Wn. 2d 628, 904 P.2d 245 (1995).....	18
<i>State v. Powell</i> , 126 Wn. 2d 244, 893 P.2d 615 (1995).....	14

<i>State v. Sanders</i> , 66 Wn. App. 878, 833 P.2d 452 (1992)	21, 22
<i>State v. Scoby</i> , 117 Wn. 2d 55, 810 P.2d 1358 (1991).....	18
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	18, 19
<i>State v. Watkins</i> , 53 Wn. App. 264, 766 P.2d 484 (1989)	23

STATUTES

RCW 9.94A.535	2
RCW 9A.46.110	10-11
RCW 10.14.020	11
RCW 10.99.020	2

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in admitting evidence of the Defendant's prior acts of domestic violence pursuant to ER 404(b) when: (1) the evidence was properly admitted to show the statutory element that the victim reasonably feared the Defendant; (2) the jury was entitled to evaluate the victim's credibility with full knowledge of the dynamics of her relationship with the Defendant; (3) the probative value of the evidence outweighed the danger of unfair prejudice; and (4) the trial court minimized the danger of any unfair prejudice by giving the appropriate limiting instruction?

2. Whether the Defendant's claim of insufficient evidence is without merit when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the elements of the crime of stalking beyond a reasonable doubt?

3. Whether the trial court abused its discretion in denying the Defendant's motion to sever the charge of assault in the second degree when: (1) given the short trial and the clarity of the issues the trial court could reasonably expect that jury could compartmentalize the evidence at trial; (2) the trial court properly instructed the jury that each count was to be considered separately; and, (3) the record shows that the jury was able to

consider the counts separately since it ultimately acquitted the Defendant on the assault in the second degree charge?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Bradley Jarvis was charged by amended information filed in Kitsap County Superior Court with felony stalking, assault in the second degree, bail jumping, and two counts of violation of a court order. CP 105. The trial court severed the bail jumping charge as requested by the Defendant. RP 4-5. The remaining counts all contained allegations that the crimes were committed against a family or household member pursuant to RCW 10.99.020, and the stalking charge also included a domestic violence aggravating circumstance pursuant to RCW 9.94A.535. CP 105.

Following a jury trial, the Defendant was convicted of stalking and the jury also found that the State had proved the aggravating circumstance. CP 214-24. The jury found the Defendant not guilty of assault in the second degree, but found him guilty of the lesser included offense of assault in the fourth degree. CP 214-24. Although the jury found the Defendant guilty of the two violation of a court order charges, these counts were merged with the stalking charge at sentencing. CP 225. This appeal followed.

B. FACTS

The victim in the present case, Larisa Turville, met the Defendant in January of 2008 and the two immediately began dating and became “boyfriend and girlfriend.” RP 53. Over the course of the relationship there were several arguments, including physical altercations, but Ms. Turville did not immediately report these to the police. RP 74, 122-23, 142. The last of these incidents occurred in September 2009, where Ms. Turville stated that the Defendant became enraged and started yelling at her, throwing items out of the garage and into the driveway, and then assault her by grabbing her by the neck and lifting her upwards onto her “tippy toes.” RP 77-79. Ms. Turville stated that she was unable to breathe for several seconds and was frightened. RP 80. Although Ms. Turville again did not report this incident to the police, she did terminate her relationship with the Defendant. Ms. Turville subsequently sought and obtained a protection order in October of 2009. RP 91-95, Exhibit 18, 19.

Despite being aware of the protection order, the Defendant repeatedly attempted to call or text message the victim. RP 95-96; CP 166. The Defendant also attempted to contact the victim via Facebook, by calling her children’s phone, and by having third parties call her. RP 96. Ms. Turville eventually placed “blocks” on the phones so that the Defendant could not contact her. RP 96.

The “blocks,” however, apparently expired after a few months and in January of 2010 Ms. Turville again began receiving text messages from the Defendant. RP 96-97. Ms. Turville explained that she received multiple messages a day from the Defendant. RP 97. Phone records from the relevant dates were admitted at trial and showed dozens of calls and text messages had been made in violation of the protection order. RP 97- 103, Exhibits 11-14.

Although the text messages were sent in violation of the protection order, the messages themselves did not contain threatening language; rather, the messages typically expressed the Defendant’s desire to reunite with Ms. Turville. See, RP 108-11, Exhibit 17.¹ Ms Turville, however, felt that the messages were “very frightening” as the Defendant was undeterred by the protection order and the content of the messages seemed to show that the Defendant thought the relationship was somehow ongoing. RP 106, 110. Ms. Turville also feared that the Defendant would make future attempts to harm her, and the messages made her feel “afraid” and “panicked” and she wondered how she and her kids were going to be “safe from him.” RP 112, 106.²

¹ In one of the text messages the Defendant also sent a photograph of his penis with accompanying text that stated, “Just in case you forgot what it looked like.” RP 105. No direct threats of harm, however, were made.

² After Ms. Turville obtained the protection she never made any attempt to contact the

Eventually, Ms. Turville contacted the police on several occasions and reported the violations. RP 107-08. These contacts resulted in the present charges.

Prior to trial in the present case, the State sought to admit evidence regarding a number of the altercations that had occurred during the relationship between the Defendant and Ms. Turville. CP 25-37, 38-80. The State explained that there were two reasons for this request. First, the stalking charge required the State to prove that the victim reasonably feared that the Defendant would injure her. Thus, the evidence of the prior altercations was critical evidence for the State, as it had the burden of proving that Ms. Turville's fear was reasonable despite the fact that the actual wording of the text messages was not violent or threatening. CP 35-36, RP 8-10.³ Secondly, the State argued that since Ms. Turville had not immediately reported the September 2009 assault (nor any of the other altercations) the jury should be allowed to hear the State's proposed ER 404(b) evidence in order to properly evaluate the victim's delay in reporting and her credibility. CP 33-35, RP 7-8.⁴

Defendant and did not send him any text messages, nor did she ever call him. RP 106-07.

³ Defense counsel at trial acknowledged that the requirement that the State must show that the victim reasonably feared the Defendant did, in fact, provide "some basis" for the State's request regarding the ER 404(b) evidence. RP 15.

⁴ The State also argued that it believed that at trial the defense would be arguing that the victim's credibility was suspect because she did not immediately call the police. Defense

The specific ER 404(b) evidence that the State sought to admit was summarized as follows:

The “South Beach” Incident. Shortly after the Defendant and Ms. Turville began dating the two vacationed together in South Beach, Florida. During the trip the Defendant became angry when he saw Ms. Turville talking to another man. The Defendant then grabbed Ms. Turville’s arm and pulled he back to their room. The Defendant screamed at Ms. Turville and threw two glass water bottles at her. The bottles hit a wall and shattered onto the floor. Hotel Security eventually came to the room and removed the Defendant. CP 27-28, RP 54-57.

The “Beach House” incident. Sometime in the middle of their relationship the Defendant and the Ms. Turville got into an argument at Ms. Turville’s beach house in Kitsap County. The Defendant was angry because Ms. Turville did not go out with him and some friends that night. The Defendant was intoxicated and threw some items around the house and refused to leave when asked to do so. When the Defendant eventually went outside Ms. Turville locked him out. The Defendant then went around the house rattling the doors and banging on the windows. Ms. Turville explained that she was quite fearful He then went to his truck and blew the horn for 30-45 minutes, before eventually sleeping in his truck in the driveway and then leaving in the morning. CP 28, RP 59-62.

The “Buddha Statue” Incident. On another occasion the Defendant became upset about Ms. Turville’s relationship with the Defendant’s daughter. He began yelling and cursing at Ms. Turville in front of his children and the Ms. Turville’s

counsel acknowledged that at trial it intended to argue that the victim had in fact “embellished the allegations” against the Defendant. RP 16. Not surprisingly, the defense returned to this theme repeatedly at trial and repeatedly raised the point that Ms. Turville had not called the police immediately after the alleged assault in the second degree. RP 158, 160. Defense counsel raised this same failure to immediately call the police with respect to the other incidents as well. RP 122-23, 142. Finally, in closing argument defense counsel repeatedly argued that he victim’s failure to contact the police called her credibility into question and raised questions about whether she even feared the Defendant at all. See, RP 302, 306-08

children. The Defendant chased Ms. Turville around the kitchen and into a bedroom. The Defendant picked up a Buddha statue and Ms. Turville thought he was going to throw it at her but the Defendant instead threw it to the floor at her feet, smashing it on the tile floor. The Defendant then grabbed Ms. Turville by the arms and slammed her down on the bed and screamed at her. CP 28, RP 62- 68.

The “Whaling Days” Incident. During a “Whaling Days” festival Ms. Turville and the Defendant took her boat to a dock in Silverdale. While the Defendant went into town Ms. Turville visited with some friends on a nearby boat. When the Defendant returned he grabbed Ms. Turville by the arm back and “marched” her back to her boat, screaming at her. Ms. Turville was able to lock herself inside a sleeping area in the boat’s berth, and the Defendant then yelled at her, pounded on the door, and ripped the handle off of the door trying to get inside to Ms. Turville. CP 29, RP 69-74.

Other Miscellaneous events. Ms. Turville also reported that the Defendant had previously told her about fights he had been in with third parties, such as a previous occasion where he had assaulted a man who had talked to a previous girlfriend. CP 28-29. Ms. Turville also explained that the Defendant had a handgun that he kept in his car. CP 29. The State also offered evidence from several witnesses who had described seeing bruising on Ms. Turville or had observed the Defendant yelling at her at various times. CP 30.

After receiving briefs on the issue and hearing argument, the trial court ruled that some of the State’s proposed evidence was admissible to show the statutory element of the stalking charge (that the victim reasonably feared the Defendant and that the Defendant acted with intent to frighten or harass with knowledge that the victim was reasonably afraid) and was admissible for the purpose of “explaining the victim’s conduct.” RP 19-20. The trial court,

therefore, held that the “South Beach,” “Beach House,” “Buddha Statue,” and “Whaling Days” incidents were admissible. RP 20. The other proposed evidence, however, was excluded, as they were “more prejudicial than probative.” RP 20.

The trial court also considered a motion from the defense to sever the assault in the second degree count from the other counts. CP 87, RP 21-23. Although the trial court found that this was a “more delicate issue, the court ultimately denied the motion, stating,

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 [the assault count], and the motion to sever is denied.

RP 23.

III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR ACTS OF DOMESTIC VIOLENCE PURSUANT TO ER 404(B) BECAUSE: (1) THE EVIDENCE WAS PROPERLY ADMITTED TO SHOW THE STATUTORY ELEMENT THAT THE VICTIM REASONABLY FEARED THE DEFENDANT; (2) THE JURY WAS ENTITLED TO EVALUATE THE VICTIM'S CREDIBILITY WITH FULL KNOWLEDGE OF THE DYNAMICS OF HER RELATIONSHIP WITH THE DEFENDANT; (3) THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE; AND (4) THE TRIAL COURT MINIMIZED THE DANGER OF ANY UNFAIR PREJUDICE BY GIVING THE APPROPRIATE LIMITING INSTRUCTION.**

The Defendant argues that the trial court abused its discretion by admitting evidence pursuant to ER 404(b). App.'s Br. at 13. This claim is without merit because the trial court did not abuse its discretion in admitting the ER 404(b) evidence. To the contrary, this evidence was properly admitted to show the statutory element that the victim reasonably feared the Defendant and because the jury was entitled to evaluate the victim's credibility with full knowledge of the dynamics of her relationship with the Defendant.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404 (b). This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

To admit evidence of a defendant's other wrongs, the trial court must (1) find by a preponderance of the evidence that the wrongs occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime with which the defendant is charged; and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fualaau*, 155 Wn. App. 347, 356–57, 228 P.3d 771, *review denied*, 169 Wn.2d 1023, 238 P.3d 503 (2010). Furthermore, in determining the admissibility of ER 404(b) evidence, the court should be mindful that the State must prove all of the elements of the crime in its case in chief, regardless of the nature of the defense. *State v. Eastabrook*, 58 Wn. App. 805, 813, 795 P.2d 151, *review denied*, 115 Wn.2d 1031 (1990); *State v. Anderson*, 15 Wn. App. 82, 84, 546 P.2d 1243 (1976).

An appellate court reviews a trial court's decision to admit evidence under ER 404(b) for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion if it exercises it

on untenable grounds or for untenable reasons. *Fualaau*, 155 Wn. App. at 356, 228 P.3d 771.

1. ***The trial court did not abuse its discretion in admitting the ER 404(b) evidence as this evidence was properly admitted to show the statutory element that the victim reasonably feared the Defendant.***

In the present case the Defendant was charged with stalking. Stalking requires proof of the following elements: (1) A person intentionally and repeatedly follows or harasses another person. RCW 9A.46.110(1)(a). (2) The victim reasonably fears injury to him—or herself, another, or their property. RCW 9A.46.110(1)(b). (3) The perpetrator either intends to frighten, intimidate, or harass the victim or knows or reasonably should know that the victim feels afraid, intimidated, or harassed by the conduct. RCW 9A.46.110(1)(c)(i), (ii). *See also*, CP 185.

The stalking statute (RCW 9A.46.110) also imports the definition of “harassment” from RCW 10.14.020, which, in turn, requires a course of conduct such as would cause a reasonable person to suffer substantial emotional distress, and actual substantial emotional distress on the part of the victim. *State v. Askham*, 120 Wn. App. 872, 882-83, 86 P.3d 1224 (2004); CP 186. Thus in order to obtain a conviction for stalking, the State is required to produce substantial evidence that the victim experienced substantial emotional distress and that the course of conduct would have

caused substantial emotional distress to a reasonable person. *Askham*, 120 Wn. App. at 883, *citing State v. Noah*, 103 Wn. App. 29, 39, 9 P.3d 858 (2000).

Washington courts have previously held that evidence of prior acts of domestic violence are admissible when the current charges contain an element that requires the State to prove that the victim's fear of the defendant was reasonable. For instance, in *State v. Magers* 164 Wn.2d 174, 189 P.3d 186 (2008) the Washington State Supreme Court held that prior acts of domestic violence between the defendant and victim were admissible to show that the victim reasonably feared bodily injury. *Id* at 183.

The Supreme Court in *Magers* also cited with approval two cases from the Court of Appeals where the appellate court had approved of the admission of ER 404(b) evidence for the purpose of establishing a victim's fear of injury. *Magers*, 164 Wn.2d at 182, *citing State v. Ragin*, 94 Wn. App. 407, 972 P.2d 519 (1999), and *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000). Specifically, the Supreme Court summarized those cases as follows:

In each of those cases, a defendant was charged with the crime of felony harassment. In *Ragin*, the charge was based on the defendant's action in calling the victim on the telephone from jail and threatening him. The Court of Appeals held there that it was not error to admit evidence of certain of the defendant's prior violent acts in order to

demonstrate to the jury that it was reasonable for the victim to be fearful of the defendant's threats. In *Barragan*, a case where a defendant was charged with first degree assault as well as harassment, the trial court admitted evidence of prior assaults by the defendant. The Court of Appeals, Division Three, affirmed the trial court's admission of evidence of the defendant's past violent acts reasoning that the victim's knowledge of the defendant's acts was relevant to the harassment charge in order to show that the victim reasonably feared that the defendant's threats to him would be carried out. We approve of the reasoning of the Court of Appeals in both of these cases.

Magers, 164 Wn.2d at 182.

In the present case, the State's ER 404(b) evidence was directly relevant to the critical issue of whether the victim reasonable feared the defendant and whether she suffered substantial emotional distress. The evidence of the defendant's prior acts, therefore, was necessary to show why the victim was distressed and fearful of the texts messages, which were not in and of themselves threatening. In short, the probative value of the evidence was extremely high and outweighed any danger of unfair prejudice, especially in light of the fact that the jury was given a limiting instruction on the proper use of this evidence. CP 209. Given these facts, the Defendant has failed to show that the trial court abused its discretion.⁵

⁵ The Defendant also argues that the State had other evidence that it could have relied on (namely the numerous text messages themselves) to show the reasonableness of the victim's fear, and that the trial court should have limited the State to this evidence. App.'s Br. at 18. The Defendant's argument, however, is effectively refuted by the Defendant's own subsequent claim that the evidence of the victim's fear was insufficient even with the ER 404(b) evidence. See, App.'s Br. at 24-27.

2. ***The evidence regarding the Defendant's prior acts was also properly admitted because the jury was entitled to evaluate the victim's credibility with full knowledge of the dynamic of her relationship with the Defendant.***

Washington Court's have previously held that although evidence of a defendant's prior crimes, wrongs, or acts is presumptively inadmissible to prove character or to show action in conformity therewith, "Such evidence is, however, admissible for other purposes, such as proof of motive, absence of mistake or accident, or to assist the jury in assessing the credibility of a witness who is the victim of domestic violence at the hands of the defendant." *See, e.g., State v Baker*, 162 Wn. App. 468, 470, 259 P.3d 270 (2011).

In *Baker*, the defendant was charged with two counts of second degree assault and the trial court allowed the State to introduce evidence of two earlier, uncharged, assaults under ER 404(b). *Baker*, 162 Wn. App. at 472. Specifically, the trial court held that the evidence showed the nature of the relationship between the defendant and the victim and was admissible to show motive, the absence of mistake or accident, and to assist the jury in assessing the victim's credibility as a witness. *Baker*, 162 Wn. App. at 472. On appeal Baker argued that the trial court erred in admitting the evidence. *Id* at 472.

The Court of Appeals in *Baker* held that the evidence of a hostile relationship between the defendant and the victim was admissible to show the defendant's motive. *Baker*, 162 Wn. App. at 474, citing, *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).⁶ In addition, the Court held that the trial court properly admitted evidence of the defendant's prior assaults on the victim as relevant to the jury's assessment of the victim's credibility. *Baker*, 162 Wn. App. at 475. The *Baker* Court explained that this ruling was consistent with the Washington Supreme Court's opinion in *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008), where the Court had held that

⁶ The use of ER 404(b) evidence to show motive in domestic violence cases is well established in Washington. For instance, In *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995) the defendant was charged with second degree murder. The victim was his wife. The trial court admitted evidence of numerous prior assaults and hostilities between the defendant and his wife to show motive and the *res gestae* of the crime. *Powell*, 126 Wn.2d at 260-263. The Court found the prior act evidence admissible under motive to demonstrate the impulse or desire that moved the defendant to commit the crime. *Powell*, 126 Wn.2d at 260. In addition, the Supreme Court in *Powell* pointed out the historical precedent for admitting evidence of prior hostilities between the same parties to establish motive:

A number of cases dealing with the admissibility of evidence of prior assaults and quarrels have found that "[e]vidence of previous quarrels and ill-feeling is admissible to show motive". Evidence of prior threats is also admissible to show motive or malice.

Powell, 126 Wn. 2d at 260, citing *State v. Hoyer*, 105 Wn. 160, 163, 177 P. 683 (1919); *State v. Gates*, 28 Wn. 689, 697-98, 69 P. 385 (1902); 1 Charles E. Torcia, Wharton's Criminal Evidence § 110, at 389-90 (14th ed. 1985).

Similarly, in *State v. Americk*, 42 Wn.2d 504, 507, 256 P.2d 278 (1953), the defendant was charged with placing explosives next to car with intent to blow up his ex-wife. The Court allowed the ex-wife to testify that the defendant beat her during their marriage to establish motive:

Prior acts of violence by the defendant against the same person, besides evidencing intent, may also evidence emotion or motive, i.e. a hostility showing him likely to do further violence.

Americk, 42 Wn. 2d 504, at 507.

concluded “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 a recanting victim.” *Baker*, 162 Wn. App. at 475, quoting *Magers*, 164 Wn.2d at 186.

The *Baker* court also rejected the defendant’s claim that *Magers* was distinguishable because the victim in *Magers* had recanted, whereas the victim in *Baker* had not recanted. *Baker*, 162 Wn. App. at 475. Specifically, the Court held that,

We disagree with *Baker* that the fact that *Grant* and *Magers* involved recanting victims renders those cases inapposite here. On the contrary, the court's reasoning in *Grant*, which the court in *Magers* adopted, shows that evidence of Baker's prior assaults on [the victim] was properly admitted to help the jury's assessment of [the victim's] credibility. Although [the victim] did not recant, she testified at trial that she did not contact the police after Baker strangled her the first two times, nor did she call the police after he strangled her on the last occasion.

Baker, 162 Wn. App. at 475. The *Baker* court went on to explain that 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. *Baker*, 162 Wn. App. at 475, citing *Grant*, 83 Wn. App. 98, 107–08, 920 P.2d 609 (1996). Thus, a couple’s history of domestic violence explained why a victim might permit a defendant to see her despite a no-contact order, and why the victim would minimized the degree of violence

when talking to others. *Baker*, 162 Wn. App. at 475.

The *Baker* court then concluded that because the victim's credibility was a central issue at trial, the jury "was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of her relationship with Baker." *Baker*, 162 Wn. App. at 475.⁷

In the present case victim did not immediately report the assault charged in Count II, and the defense (as it said it would) argued at trial that this fact called the victim's credibility into question. Given this fact, the jury "was entitled to evaluate the victim's credibility with full knowledge of the dynamics of her relationship with the Defendant. The trial court, therefore, did not abuse its discretion in admitting some of the State's proposed ER 404(b) evidence. In addition, the trial court took steps to minimize the potential for any unfair prejudice by giving the jury the appropriate limiting instruction. CP 209. The Defendant's claim, therefore, is without merit.

⁷ The Defendant cites *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006) to support his argument that 404(b) evidence cannot be admitted for the generalized purpose of assessing the victim's credibility. App.'s Br. at 17. The holding of *Cook*, however, is inconsistent with the later Supreme Court holding in *Magers*, where the Supreme Court rejected the *Cook* court's analysis and adopted the contrary holding of *State v. Grant*, 83 Wn. App. 98, 107, 920 P.2d 609 (1996)(where the court held that a defendant's prior acts were admissible because the evidence helped the jury assess the credibility of the victim). See *Magers*, 164 Wn.2d at 186. The *Cook* case is also inconsistent with *Baker*. The State acknowledges that the *Magers* opinion was decided with a four justice lead opinion, but even if this Court were to find that the lead opinion in *Magers* was somehow not controlling or persuasive, the State would still ask this court to follow *Grant* and *Baker*, both of which are indistinguishable from the present case, are consistent with the lead opinion in *Magers*, and both of which have not been directly or impliedly overturned.

B. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ELEMENTS OF THE CRIME OF STALKING BEYOND A REASONABLE DOUBT.

The Defendant next claims that the State presented insufficient evidence that Ms. Turville reasonably feared the Defendant, and thus there was insufficient evidence to support the jury's finding of guilt on the stalking charge. App.'s Br. at 24-27. This claim is without merit because the Defendant's sole claim in this regard is that the testimony of Ms. Turville was not credible. Credibility determinations, however, are for the trier of fact and are not subject to review.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618

P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, 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.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

The Defendant’s specific claim with respect to the sufficiency of the evidence regarding the stalking charge is that the State presented insufficient evidence that the victim reasonably feared the Defendant. App.’s Br. at 25, 27. The Defendant, however, acknowledges that Ms. Turville “testified repeatedly about her fears.” App.’s Br. at 27. Nevertheless, the Defendant argues that this testimony should be disregarded because Ms. Turville’s testimony was unreasonable since she did not immediately report the assaults to the police and because she voluntarily took the block off of her phone at the suggestion of the police. App.’s Br. at 27.

While defense counsel was certainly free to argue that Ms. Turville's testimony regarding her "fear" was not credible, such, credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. Furthermore, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Walton*, 64 Wn. App. at 415-16.

The Defendant's claims, therefore, are without merit because (as the defense acknowledges) Ms. Turville explained repeatedly that she feared Defendant and the basis for this fear was laid out in detail throughout her testimony. While the defense was free to argue that Ms. Turville's testimony in this regard was not credible, the jury was equally free to reject the defense argument. On appeal, the evidence must be viewed in a light most favorable to the State. Given the testimony from Ms. Turville, the Defendant has simply failed to show that the evidence was insufficient. His claim, therefore, is clearly without merit.⁸

⁸ In addition, the Defendant's claim that the State presented insufficient evidence regarding the reasonableness of the victim's fears only further demonstrates the State's ER 404(b) was extremely probative on the critical issue in this case and was critical to the State's case in that it was needed to demonstrate that the victim's fears were reasonable. Exclusion of this evidence would have left the jury with an incomplete view of the relationship between the victim and the Defendant and would have deprived the jury of the opportunity of evaluating the reasonableness of the victim's fear in its proper context.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO SEVER THE CHARGE OF ASSAULT IN THE SECOND DEGREE BECAUSE: (1) GIVEN THE SHORT TRIAL AND THE CLARITY OF THE ISSUES THE TRIAL COURT COULD REASONABLY EXPECT THAT JURY COULD COMPARTMENTALIZE THE EVIDENCE AT TRIAL; (2) THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT EACH COUNT WAS TO BE CONSIDERED SEPARATELY; AND, (3) THE RECORD SHOWS THAT THE JURY WAS ABLE TO CONSIDER THE COUNTS SEPARATELY SINCE IT ULTIMATELY ACQUITTED THE DEFENDANT ON THE ASSAULT IN THE SECOND DEGREE CHARGE.

The Defendant next claims that the trial court erred in denying his motion to sever the assault in the second degree charge. App.'s Br. at 20. This claim is without merit because the Defendant has failed to point to meet his high burden of showing a manifest abuse of discretion. In addition, the Defendant was unable, either in the trial court or on appeal, to show that one trial for both crimes would be "so manifestly prejudicial as to outweigh the concern for judicial economy." To the contrary, the jury's not guilty verdict on the assault in the second degree count demonstrates that there was no prejudice, and that even if the trial court had erred, any error was harmless.

Whether to sever charges or try them together is within the sound discretion of the trial court, and an appellate court is only to reverse for

manifest abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). In the interests of judicial economy, two or more criminal offenses may be tried together. CrR 4.3(a). The court may sever them in the interests of “a fair determination of the defendant's guilt or innocence of each offense.” CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant must show that one trial for both crimes would be “so manifestly prejudicial as to outweigh the concern for judicial economy.” *Bythrow*, 114 Wn.2d at 718.

A defendant can show prejudice if he would be “embarrassed” in presenting inconsistent defenses or if a single trial would invite the jury to cumulate the evidence or find guilt based on the defendant's criminal disposition. *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992). Certain factors offset any prejudicial effect, including (1) the strength of the State's evidence, (2) the clarity of defenses to each count, (3) whether the court instructed the jury to consider the counts separately, and (4) the cross-admissibility of the evidence if the cases had been tried separately. *Sanders*, 66 Wn. App. at 885.

The Supreme Court, however, has explained that even where the evidence of one count would not be admissible in a separate trial of the other count, severance is not always required nor is reversal required. *Bythrow*, 114 Wn.2d at 720. Rather, in order to support a finding that the trial court

abused its discretion in denying severance, the defendant must be able to point to specific prejudice. *Bythrow*, 114 Wn.2d at 720, citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). In addition, the Court noted that when the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence, and that under these circumstances, there may be no prejudicial effect from joinder even when the evidence would not have been admissible in separate trials. *Bythrow*, 114 Wn.2d at 721.

Furthermore, the Supreme Court in *Bythrow* concluded that any residual prejudice resulting from joinder “must be weighed against the concerns for judicial economy.” *Bythrow*, 114 Wn.2d at 723.

Foremost among these concerns is the conservation of judicial resources and public funds. A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together. Furthermore, the reduced delay on the disposition of the criminal charges, in trial and through the appellate process, serves the public. We find these considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case.

Bythrow, 114 Wn.2d at 723.

The trial in the present case was clearly a very short trial where the jury could reasonably be expected to compartmentalize the evidence. In addition, the trial court properly instructed the jury to consider evidence of

each crime separately, and the jury clearly appears to have done so. CP 184. In fact, the jury found the Defendant not guilty of assault in the second degree, instead finding him guilty of a lesser included offense, despite its knowledge of the stalking charge. Thus, the Defendant cannot point to any specific prejudice in the present case, and the Defendant's claim, therefore, is without merit. *Bythrow*, 114 Wn.2d at 720.

Similarly, Washington courts have previously explained that even where a court errs with respect to a motion to sever, the error is harmless (and thus is not "reversible error") unless the appellate court determines that, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. *State v. Watkins*, 53 Wn. App. 264, 273, 766 P.2d 484 (1989).

The record below aptly demonstrates that the jury was able to fully and fairly consider the assault charge and was not swayed or unduly influenced by the fact that the stalking charge was presented in the same proceeding. This Court, therefore, need not even address the potential merits of the severance motion because any potential error in this regard was clearly harmless given the jury's not guilty verdict on the assault in the second degree charge.

Given these facts, even if it could be said that the trial court erred in failing to sever the charge of assault in the second degree, any error was harmless.

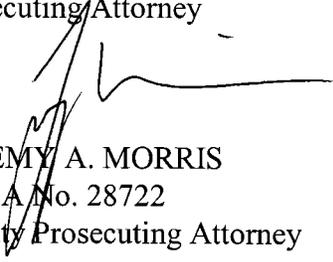
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED December 20, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

KITSAP COUNTY PROSECUTOR

December 20, 2011 - 11:35 AM

Transmittal Letter

Document Uploaded: 421747-Respondent's Brief.pdf

Case Name: State v Bradley Jarvis

Court of Appeals Case Number: 42174-7

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Jeremy A Morris - Email: jmorris@co.kitsap.wa.us