

NO. 45006-2-II

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

STATE OF WASHINGTON,

Respondent

v.

LEO B. BUNKER,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James W. Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The charging document for counts IV and V, violation of a protection order, failed to list the essential element identifying the statute under which the order was issued.
2. The state failed to prove two separate counts of rape in the second degree.
3. The state failed to provide a necessary *Petrich* instruction for count IV.
4. The community custody conditions related to minors are unconstitutional in violation of the First Amendment.
5. The community custody conditions related to minors are and not crime related.
6. The state failed to prove an egregious lack of remorse to support the exceptional sentence.
7. The trial court abused its discretion by admitting ER 404(b) evidence.
8. The state failed to prove two distinct acts of violation of a protection order.

Issues Presented on Appeal

1. Did the charging document for counts IV and V, violation of a protection order, fail to list the essential element identifying the statute under which the order was issued?
2. Did the state fail to prove two separate counts of rape in the second degree?
3. Did the state fail to provide a necessary *Petrich* instruction for count IV?
4. Are the community custody conditions related to minors unconstitutional in violation of the First Amendment and not crime related?
5. Did the state fail to prove an egregious lack of remorse to support the exceptional sentence?
6. Did the trial court abuse its discretion by admitting ER 404(b) evidence?
7. Did the state fail to prove two distinct acts of violation of a protection order?

B. STATEMENT OF THE CASE

Leo Bunker was charged with two counts of rape in the second

degree occurring on separate dates, two counts of violation of a protection order and one count of harassment - threat to kill, all with domestic violence as an element. CP 188-192. Mr. Bunker was convicted as charged. CP 233-248.

a. Information

The Fifth Amended Information charged all of the offenses as domestic violence offenses under RCW 10.99.020. CP 188-192. The two counts of violation of an order for protection stated that Mr. Bunker violated an order of protection issued in cause “No. 111-2-013 92-6,” and that he had two prior convictions for violating the provisions of an order issued under RCW Chapter 26.50, 9.90, 10.99, 26.09, 26,10, 26.26 or 27.34 contrary to the Revised Code of Washington 26.50.110(1) and (5)”. CP 188-192.

b. Jury Instructions

Jury Instruction no .22 provided a *Petrich* instruction for Count V distinct from count IV. Both counts are for violation of protection orders, occurring between November 8-11, 2011 The Counts are identical, except that Count V required the jury to find a violation later than the incident in count V, and count IV required an incident earlier than in count V. CP 198-232.

c. Judgment and Sentence and Community
Custody Conditions

Mr. Bunker stipulated to an offender score of 17. CP 257-259. The trial court imposed an exceptional sentence based on egregious lack of remorse, unpunished crimes due to an offender score over 9 points, and aggravated offenses against a family member. The Court noted that any single factor would be sufficient for the imposition of an exceptional sentence. CP 263-268; RP 576-577. The total confinement ordered was 460 months; counts I, III, IV and V were run consecutively and all enhancements were run consecutive to the balance of the sentence. Counts I and II were run concurrently. CP 263-268.

The trial court imposed conditions of community custody related to children.

Defendant shall not frequent locations where minors are known to congregate unless approved by CCO and sexual deviancy treatment provider ...Defendant shall not have any contact with minor children unless approved by CCO and sexual deviancy treatment provider..... Defendant shall not develop any romantic relationship with another person who had minor children in their care or custody unless approved by CCO and sexual deviancy treatment provider ...

CP 263-278.

d. Trial Facts

Lori Horsley testified that she became reacquainted with Mr. Bunker in August of 2011 after not seeing him since high school some 25 years earlier. RP 20, 22. Mr. Bunker and Ms. Horsley moved in together immediately after re-connecting. RP 22-24. Ms. Horsley described Mr., Bunker as possessive and sexually aggressive. RP 25. According to Ms. Horsley, she was afraid that Mr. Bunker would carry out his threats to kill her if she left him. RP 29-30, 41. Ms. Horsley's daughter, Kirby Llewellyn heard Mr. Bunker, in a joking manner, threaten to hang her mother from the rafters of the barn. RP 167-168. Ms. Llewellyn did not believe Mr. Bunker was joking. RP 170-171.

Ms. Horsley testified that she married Mr. Bunker in early October (October 8, 2011) but that she did not want to do this. RP 45, 369. The pastor who performed the wedding described Ms. Horsley and Mr. Bunker as "happy" on their wedding day with no reservations. RP 337-338. Ms. Horsley never told the pastor that she did not want to get married. RP 113.

Mr. Bunker was scheduled to serve a prison term beginning October 11, 2011 for violation of a protection order against his ex-

wife. RP 40. The trial court set over sentencing for the prior conviction for violation of a protection order to begin as work release beginning November 1, 2011. RP 83, 374.

On this date, after returning home from court, Mr. Bunker took a nap and Ms. Horsley briefly lay down with him. After a short while, Ms. Horsley got up and called her ex-paramour of 12 years Mr. Pederson. RP 49-50. When Ms. Horsley returned from the phone call Mr. Bunker went into a rage and according to Ms. Horsley, raped her. RP 51-59. Ms. Horsley did not report the rape at that time. RP 119. Mr. Bunker denied ever raping Ms. Horsley. RP 385.

Ms. Horsley's daughter took pictures of bruises on Ms. Horsley's neck and shoulders. RP 59. Ms. Horsley also described bite marks and red spots in her eyes from being choked by Mr. Bunker. RP 59-61, 76, 81.

Mr. Bunker testified that he left the house after court on October 11, 2011 and went to visit his sister. RP 399. The sister Ms. Tsugawa testified that Mr. Bunker came to her home on October 11, 2011 to work on her car. RP 411-412. Ms. Horsley testified that Mr. Bunker did not leave the house or visit his sister on October 11, 2011. RP 421-422. Mr. Bunker testified that he has erectile dysfunction and

could not achieve penile vaginal penetration. RP 396, 379. Ms. Horsley testified that she and Mr. Bunker had vaginal penile sex on a daily basis. RP 423.

On November 4, 2011, four days after Mr. Bunker began serving his jail term, Ms. Horsley called the police and reported the October 11, 2011 rape to Deputy McKnight. RP 157. Ms. Horsley obtained an order for protection against Mr. Bunker on November 8, 2011. RP 306-307. Before reporting the rape, on November 3, 2011, Mr. Bunker texted Ms. Horsley and asked for a divorce. RP 388.

Mr. Bunker's friends the Krahn's called many times between November 10-11, 2011 to arrange to pick up Mr. Bunker's belongings but did not discuss any other matters with Ms. Horsley. RP 89, 219-220, 237-238, 429, 433.

Ms. Horsley testified that Mr. Bunker called her many times from jail, but she did not testify if the calls were made before or after November 8, 2011. RP 429, 433. The order for protection permitted third party contact to obtain Mr. Bunker's belongings. RP 91, 307; Exhibit 17.

C. ARGUMENTS

1. MR. BUNKER'S CONVICTIONS FOR COUNTS IV AND V VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENT AND WASHINGTON. CONST. ARTICLE 1, SECTION 22

- a. Standard of Review

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d.2d 695, 702, 257 P.3d 570 (2011). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, 117 Wn.2d.2d at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, 117 Wn.2d. at 105-106. If the Information is deficient, prejudice is presumed and reversal is required; no particularized showing of prejudice is required. *State v. Courneya*, 132 Wn.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d. 420, 425, 998 P.2d 296 (2000).

- b. The Information was deficient because it failed to properly allege

an essential element of each
VNCO charge.

The Sixth Amendment to the federal constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.¹ A similar right is secured by the Washington state constitution. Wash.Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

In counts IV and V Mr. Bunker was charged under RCW 26.50.110, which criminalizes violations of orders granted under RCW 26.50, 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW.² RCW 26.50.110. The crime is elevated to a felony if the accused person “has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.” RCW 26.50.110(5). CP 188-192

1 This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

2 The statute also criminalizes violations of foreign protection orders.

Omitted from both lists are anti-harassment orders issued under RCW 9A.46.040, and RCW 10.14.³ Because omissions from a statute are deemed to be exclusions,⁴ a conviction for violating an anti-harassment order (issued under RCW 9A.46 or RCW 10.14) cannot be charged as a felony under RCW 26.50.110, even if the accused person has prior qualifying convictions. *Compare, e.g.,* RCW 10.14.170 *with* RCW 26.50.110.

The Information in this case alleged that Mr. Bunker, acting “with knowledge that the Lewis County District Court had previously issued a foreign protection order, protection order, restraining order, no contact order, or vulnerable adult order pursuant to *Lori L. Horsley v. Leo B. Bunker III*, Cause No. 111-2-01392-6, did [knowingly] violate said order...” CP 188-189.⁵ Even under a liberal construction of its language, the Information did not specify the statute under which the order had been issued. *Id.*

Because the Information did not specify the authority under which the predicate order was issued, it did not include all the

3 Violation of such orders is criminalized by RCW 10.14.170.

4 See *In re Detention of Martin*, 163 Wash.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim *expressio unius est exclusio alterius*); see also *Adams v. King County*, 164 Wash.2d 640, 650, 192 P.3d 891 (2008).

5 The charging document also alleged that Mr. Bunker “did have at least two prior convictions for violating the provisions of a court order issued under Chapter 10.99,

essential elements required to charge felony violation of a no contact order under RCW 26.50.110. Accordingly, the Information was deficient, and prejudice is conclusively presumed. *McCarty*, 140 Wn.2d at 425. Mr. Bunker's VNCO convictions must be reversed and the charges dismissed without prejudice. *Id.*

2. MR. BUNKER'S RAPE CONVICTIONS AND VIOLATION OF A PROTECTION ORDER CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH OFFENSE.

a. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S.*, 171 Wn.2d at 702. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d.2d 572, 576, 210 P.3d 1007 (2009).

b. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

- c. The State failed to prove two distinct acts of violation of a no contact order as set forth in counts IV and V.

Mr. Bunker was charged with two distinct violations of a court order occurring in the same period between November 8, 2011 and November 14, 2011. CP 188-192. The evidence admitted at trial in support of these counts was limited to Mr. Bunker's friends, the Kahn's calling several times to set up a time to retrieve Mr. Bunker's belongings, and actually retrieving most of Mr. Bunker's belongings. RP 92, 124. The order of protection permitted Mr. Bunker to retrieve his personal belongings from his former residence through a third party. RP 91.

Ms. Horsley testified that she did not know if the Kahn's called on November 5, 6, or 7, 2011, but they did call many times between November 10-11, 2011. RP 89, 134. Without identifying a date, Ms. Horsley, testified that Mr. Bunker called her many times right after he was incarcerated on November 1, 2011. RP 429. The term of the violation of the protection order began November 8-11, 2011. RP 96, 134. The state did not present any evidence that Mr. Bunker called or directed improper calls in violation of the terms of the protection order between November 8-11, 2011. Rather the only evidence of contact after November 8, 2011 was the permissible third party contact by the Kahn's to retrieve Mr. Bunker's belongings. RP 89, 92, 124.

Because of this deficiency in proof, the evidence was insufficient to prove counts IV and V. Accordingly, the convictions must be reversed and the charges remanded.

- d. The state failed to prove two separate acts of rape in the second degree

Ms. Horsley testified that Mr. Bunker raped her on one occasion on October 11, 2011. RP 93, 95, 160. Ms. Horsley testified that there were other violent interactions but never alleged a second rape by forcible compulsion. 93, 95, 160. On November 4, 2011, Ms.

Horsley told the police about the single incident of rape on October 11, 2011. RP 152. Evaluating the evidence in the light most favorable to the state, the prosecution failed to establish beyond a reasonable doubt that a second rape occurred “on a date other than October 11, 2011” as set forth in count II. The lack of sufficient evidence of count II requires this Court dismiss this charge with prejudice.

3. MR. BUNKER WAS DENIED DUE PROCESS AND HIS RIGHT TO A UNANIMOUS JURY WHERE THE TRIAL COURT FAILED TO PROVIDE A PETRICH INSTRUCTION AS TO COUNT IV WHICH WAS IDENTICAL TO COUNT V.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. I, § 21; *Ortega–Martinez*, 124 Wn.2d at, 707. When the State presents evidence of multiple acts that could constitute a crime charged, “the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act.” *Kitchen*, 110 Wn.2d at 409; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. *Kitchen*, 110 Wn.2d at 411. “The error stems from the possibility that some jurors may have relied

on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Id.*

An election was required in this case because the two identical to-convict instructions for counts IV and V did not identify any specific incidents, and any of the possible acts identified could constitute the crime charged in these counts. Unanimity was not ensured, because the court did not give a “*Petrich*” unanimity instruction and the State did not make a proper election.

The trial court correctly provided a *Petrich* instruction as to count V, but failed to provide the same instruction for count IV.CP 189-232. Instruction No. 22 is as follows:

For Count V- Violation of a Protection Order, the State alleges that the defendant committed acts violating the provision of a Protection Order on multiple occasions. To convict the defendant of Violation of a Protection Order as charged in Count V, one particular Violation of a Protection Order, separate and distinct from what is charged in Count IV, must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all of the acts of Violation of a Protection Order as alleged in Count V.

CP 189-232.The trial court agreed that a *Petrich* instruction was necessary for both counts IV and V. RP 460, 363, 464, 465. However,

the instruction submitted failed to cover both counts. As written, the jury did not have to be unanimous as to the acts in support of count IV as well as count V. The failure to so instruct the jury in count IV violated Mr. Bunker's right to a unanimous jury. Wash. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

A *Petrich* error is manifest constitutional error that can be raised for the first time on appeal. *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009); *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009); *State v. Furseth* 156 Wn.App. 516, 519 n.3, 233 P.3d 902, *review denied*, 170 Wn.2d 1007 (2010); *State v. Kiser*, 87 Wn.App. 126, 129, 940 P.2d 308 (1997); *State v. Fiallo–Lopez*, 78 Wn.App. 717, 725, 899 P.2d 1294 (1995); *see Kitchen*, 110 Wn.2d at 411 (unanimity error is presumed prejudicial). Unanimity can only be protected if either a *Petrich* instruction is given or the State tells the jury which act or acts to rely on for each count. *Kitchen*, 110 Wn.2d at 409.

In this case, the jury was presented with evidence of multiple contacts by the Kahn's on Mr. Bunker's behalf. While Mr. Bunker challenges that these contacts were sufficient to establish violation of

a protection order, these were the acts proffered by the state in support of identical counts IV and V. To ensure unanimity, the State was required to either offer a *Petrich* instruction or tell the jury which acts applied to which counts. *See State v. Holland*, 77 Wn.App. 420, 425, 891 P.2d 49 (1995); *compare State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008) (error lies in the inability of the State to assure us that 12 jurors who acquitted Vander Houwen of most charges agreed that the same underlying criminal act, proved beyond a reasonable doubt, attached to the two counts of conviction).

The State chose to issue a *Petrich* instruction for count V but failed to similarly do so for Count IV. These Counts were identical and to ensure jury unanimity, the court was required to instruct the jury that it had to be unanimous as to each count, not just count V.

Moreover, even though the information, stated that each count was based on “a separate and distinct act and earlier in time from what is charged in Count IV” this was insufficient to ensure jury unanimity, particularly because instruction 22 specifically required unanimity, leaving the jury with the impression that if the Court intended to require unanimity as to Count IV, it would have so stated as it did in instruction 22.

Error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-512, 150 P.3d 1126 (2011); *Kitchen*, 110 Wn.2d at 411. Moreover, error is presumed prejudicial and may only be rebutted where no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Coleman*, 159 Wn.2d at 511-512; *Kitchen*. 110 Wn.2d at 412; *State v. Burri*, 87 Wn.2d.2d 175, 181, 550 P.2d 507 (1976); *See also Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 412 1918, 95 L.Ed.2d 439 (1987). This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is “harmless beyond a reasonable doubt”, *Chapman v. California*, *supra* 386 U.S. at 24, 87 S.Ct. at 828.

Here, the error was not harmless because a rational trier of fact could have a reasonable doubt as to whether any incident established the crime beyond a reasonable doubt and there was no guarantee of unanimity.

4. THE COMMUNITY CUSTODY CONDITIONS RELATED TO MINOR CHILDREN ARE NOT CRIME RELATED AND INFRINGE ON MR. BUNKER'S

CONSTITUTIONAL RIGHTS TO FREE
SPEECH.

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. RCW 9.94A.505; *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). In Mr. Bunker's case the trial court's sentencing prohibitions against having contact with minors are not crime related.

One condition that may be imposed is that an offender "shall comply with any crime-related prohibitions." RCW 9.94A.030; Section 4.2 of the Judgment and Sentence contains non-crime-related conditions of community custody in violation of RCW 9.94A.030(10) which defines crime-related as follows:

(10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Id.

The standard of review for a trial court's imposition of crime-related prohibitions that interfere with a fundamental constitutional

right is a heightened abuse of discretion standard that requires sentencing conditions be “sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” *State v. Rainey*, 168 Wn.2d 367, 374-75. 229 P.3d 686 (2010). This Court will reverse where the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d.2d 22, 37, 846 P.2d 1365 (1993); *State v. Cunningham*, 96 Wn.2d.2d 31, 34, 633 P.2d 886 (1981).

Preventing Mr. Bunker from having contact with minors and all of the conditions related to minors are not-crime-related and implicate fundamental first amendment rights guaranteed by Const. art. I, § 5; and the First Amendment.

In *State v. Riles*, the court held that an order prohibiting one of the two defendants from having contact with minors was questionably overbroad where the defendant was convicted of raping an adult. *State v. Riles*, 135 Wn.2d. 2d 326, 352, 957 P. 2d 655 (1998), *Abrogated on other grounds in State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The court held, “There is no reasonable relationship between his offense and the provision for no contact with minors. There is nothing in the record to indicate he is a danger to

children now or predictably would be upon his release from prison earlier or in thirty or forty years.” *Id.* Here, as in *Riles*, Mr. Bunker’s crimes are adult crimes and sentencing conditions involving minors are not crime related. Thus under RCW 9.94A.030(13) the trial court abused its discretion by imposing the sentencing conditions related to minors. This Court must reverse these conditions and remand for sentencing.

5. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF MR. BUNKER’S PRIOR ASSAULTIVE CONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

a. Standard of Review

The correct interpretation of an evidentiary rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wn.2d 2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if it is reasonably probable that the error affected the

outcome. *State v. Everybodytalksabout*, 145 Wn.2d. 2d 456, 468-69, 39 P.3d 294 (2002). Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b) must be read in conjunction with ER 403, which requires that probative value is balanced against prejudicial the danger of unfair prejudice.⁶ *State v. Fisher*, 165 Wn.2d. 2d 727, 745, 202 P.3d 937 (2009).

A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *DeVincentis*, at 17-18. The state bears a “substantial burden” of showing admission is appropriate for a purpose other than propensity. *DeVincentis*, at 18-19. Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually

⁶ ER 403 provides that 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.”

occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Fisher*, at 745. Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d. 2d 630, 642, 41 P.3d 1159 (2002).

- b. The trial court should have excluded evidence of Mr. Bunker's prior bad acts.

Here, the trial court should have excluded testimony that Mr. Bunker had previously assaulted his ex-wife on one occasion during the course of their relationship. The evidence of this single prior assault was admitted under ER 404(b), ostensibly to show the reasonableness of Ms. Horsley's fear that Mr. Bunker would carry out his threats.. RP 41-42. This evidence was not necessary for this purpose because of Ms. Horsley's testimony that she feared Mr. Bunker. RP41, 45, 46.

Moreover, a single assault in the context of a relationship is not necessarily equivalent to domestic violence in the relationship. Accordingly, the accepted rationale for admitting such evidence does not apply in this case. *Cf. State v. Magers*, 164 Wn.2d. 174, 184-86,

189 P.3d 126 (2008); *State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996); *State v. Ciskie*, 110 Wn.2d. 263, 273-80, 751 P.2d 1165 (1988). Nor did the prosecution introduce opinion testimony addressing the psychological effects of a single assault in a relationship. *Cf. Grant*, 83 Wn.App. at 105-110.

Furthermore, the risk of unfair prejudice was substantial. Courts have long noted that evidence of prior misconduct is highly prejudicial. *See, e.g., Magers*, 164 Wn.2d at 197 (“This type of evidence is highly prejudicial, and its admission at trial should be allowed only in the narrowest set of circumstances”); *see also State v. Carleton*, 82 Wn. App. 680, 684-85, 919 P.2d 128 (1996). Given the dubious value of this highly prejudicial evidence, the testimony should have been excluded. *Thang*, 145 Wn.2d at 642.

There is a reasonable probability that the error materially affected the outcome of trial. *Everybodytalksabout*, 145 Wn.2d at 468-69. Accordingly, Mr. Bunker’s convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. *Id.*

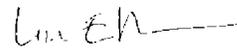
D. CONCLUSION

Mr. Bunker respectfully requests this Court affirm reverse his

two counts of rape in the second degree and two counts of violation of an order of protection and remand for resentencing on the harassment charge.

DATED this 16th day of December 2013.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County prosecutor's appeals@lewiscountywa.gov and Leo Bunker, DOC# 917616 Federal Detention Center REG: 12224085 Unit D-B P.O. Box 13900 Seattle, WA 98198-1090 a true copy of the document to which this certificate is affixed, on December 16, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



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