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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLIFFORD JAMES COLLIER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Karena Kirkendoll

No. 16-1-04048-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court deny the defendant the right to present a defense or abuse its discretion when it ruled that the defendant's daughter's medical condition could be admitted but her death could not?
2. Was sufficient evidence introduced to prove telephone harassment when it was undisputed that the defendant conveyed true threats and was convicted on overwhelming evidence and proper jury instructions?
3. Did the trial court abuse its discretion when it admitted evidence of prior threats against the victim where the purpose of the evidence was to prove the seriousness of the defendant's threats and the effect that they had on the victim?

B. STATEMENT OF THE CASE.

1. *Procedural Facts.*

On October 10, 2016, Appellant Clifford James Collier (the "defendant") was charged with four criminal domestic violence offenses, all involving his former girlfriend, Christina Manley. CP 1-6. The charges were amended on April 13, 2017, and again on May 1st on the eve of trial. 3 RP 44. The final charges included one count of felony harassment premised on threats to kill Ms. Manley, two counts of telephone harassment, and one count of a felony no contact order violation. CP 27-29.

There were two no contact orders marked for identification as exhibits for trial along with the judgment and sentence from a 2015 domestic violence case in which the defendant was convicted. CP 115. The no contact orders were admitted into evidence but the judgment was neither offered nor admitted.

The case proceeded to trial on May 1, 2017. Immediately after the case was called the trial court granted a prosecution motion for a material witness warrant for Ms. Manley who had by then become uncooperative. 3 RP 31. Ms. Manley was subsequently arrested and brought to court. The trial court also heard and ruled on two motions in limine. The first was a motion to admit evidence of the defendant's prior evidence of threats toward Ms. Manley, including the prior conviction. 3 RP 38. The court granted the motion because the evidence was probative of the reasonableness of Ms. Manley's fear concerning the threats. *Id.*

The second motion was to exclude reference to the death of the defendant's child from complications of cerebral palsy. 3 RP 41, et. seq. The trial court also granted that motion but with the proviso that the parties could introduce evidence of the child's illness because concern for the child's welfare was an issue that "permeated the fact pattern here." 3 RP 43.

During the trial the state called four witnesses. CP 165. They included Ms. Manley, two of her friends who heard threats from the defendant, and the investigating patrol officer. *Id.* The state also introduced three exhibits, including a recording of telephone death threats from the defendant, and the two no contact orders. CP 115. The defendant testified but did not call any other witnesses. *Id.*

The defendant did not request and the court did not instruct the jury on any affirmative defenses. CP 85-109. Thus, the jury was not given any legal justification or excuse instructions based on duress, necessity, or the like. *Id.* The jury retired to the jury room for deliberations on May 3, 2017. 5 RP 350. They returned guilty verdicts for the two telephone harassment counts and the no contact order violation but acquitted on the felony harassment charge. CP 110-13, 132-44.

2. *Statement of Facts.*

The charges were the result of a Lakewood Police investigation that began on October 7, 2016. Officer Michael Merrill was assigned to follow up on a report filed by Christina Manley about a no contact order violation and threats. 4 RP 241-44. He made contact with Ms. Manley at a motel in Thurston County where she had registered under a different name. *Id.* Ms. Manley told Officer Merrill that “Yeah. She indicated that

she left -- that she went into hiding in another city in hopes that she -- that her boyfriend, [the defendant], would not find her.” 4 RP 246.

Officer Merrill met with Ms. Manley at the Lakewood Police Department the same day that he was assigned the case for follow up. 4 RP 247-48. She was in the company of a friend and her friend’s mother. *Id.* She brought with her audio recordings of telephone threats from the defendant. *Id.* Those were transferred onto a CD and admitted into evidence as a trial exhibit. CP Trial Exhibit 1. The threats were played for the jury during Officer Merrill’s testimony. 4 RP 254. The officer also testified that he obtained official confirmation of the two no contact orders. 4 RP 255. The orders were also admitted into evidence after being authenticated by Ms. Manley. 4 RP 205-06.

Christina Manley testified and largely admitted the threats. She and the defendant had been in a relationship since 2009 and had two children. 4 RP 201. Their daughter was referred to in the past tense and she explained that, “She had cerebral palsy. She wasn't able to walk, talk, or eat. She had a tube in her stomach.” 4 RP 221. Concerning the threats and her fear of the defendant, Ms. Manley said that she did not fear the defendant “Because I was angry, and he wouldn't leave me alone. He was persistent on having his daughter. That's why.” 4 RP 217. However she admitted telling the officer that she thought he was serious and that she

had left town and moved into a hotel in another county under a fake name.
4 RP 216-20.

Ms. Manley's friend and her friend's mother contradicted Ms.
Manley. *Id.* 4 RP 263-67, 275-76. Her friend, Bobbie Jone's testified:

Q All right. Was there a reason that Ms. Manley went
to stay in a hotel at that time?

A We thought he would hurt her and the kids. I mean,
he had [her son]. So we thought [her daughter] and
she were in danger. So we just wanted to take her
out of the way. . . .

4 RP 276.

The defendant's testimony did not dispute the fact of the threats,
only the reason for them. 4 RP 288. In particular the defendant answered,
"Yes, I did" in response to his attorney's question, "And did you threaten
to kill Christina Manley?" *Id.* He also admitted pleading guilty with
"mitigating circumstances" to the 2015 charge but also acknowledged the
existence of the no contact orders. 4 RP 286. He denied that he had any
weapon or any actual intent to carry out his threats. 4 RP 289-90. On
cross the defendant explained that the reason he made threats toward Ms.
Manley is that, "it's the only way that you can get her attention." 4 RP
294.

Following his conviction on three of the four charges, the
defendant was sentenced on July 7, 2017. CP 132-144. He received a

mid-range sentence on both of the felony counts. *Id.* This appeal was timely filed three days later on July 10th.

C. ARGUMENT.

1. THE DEFENDANT WAS NOT DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO ADMIT EVIDENCE OF THE DEFENDANT'S DAUGHTER'S MEDICAL CONDITION BUT EXCLUDED THE FACT OF HER DEATH.

Under the Sixth Amendment and under Article 1, Section 22 of our state constitution, a criminal defendant has the right to present testimony in his defense. *State v. Hudlow*, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983) (sexual history of rape victims). The right to present defense evidence has been held to encompass the right of the defendant “to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). It includes a due process right to present the defendant's version of the facts. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004).

The right to present a defense is not unlimited. A defendant does not have the right to present irrelevant evidence. *Hudlow*, 99 Wn.2d at

15. Moreover, just as it may do so in the prosecution's case, a trial court may exclude proffered evidence that is "counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*

Where a defendant alleges a violation of the right to present a defense, it is incumbent on the defendant to "make some plausible showing" of how the witness' testimony "would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The mere presence of a witness with personal knowledge at the scene of a criminal offense is, by itself an insufficient showing of materiality. *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (1984).

Washington courts have consistently required a showing of materiality in cases alleging violation of the right to present a defense. In *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), an aggravated murder case, the testimony at issue concerned another possible suspect. The court stated, "In keeping with the right to establish a defense and its attendant limits, 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *Id.* at 857, quoting *State v. Hudlow*, 99 Wn.2d at 15. Similarly, in an assault and robbery

case, inadmissible propensity and mental health evidence was held to have been properly excluded because a “defendant's right is subject to reasonable restrictions and must yield to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *State v. Donald*, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013), citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) and quoting *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999). In short, a defendant's right to present evidence does not exempt him from the rules of evidence. *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002). (“[W]e apply basic rules of evidence to determine whether the trial court violated [the defendant's] confrontation rights.”). See also *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In the case before the court none of the elements of any of the crimes had anything to do with the death of the defendant’s child. CP 85-109. The defendant did not interpose an affirmative defense (such as necessity or duress) that would have excused or justified his actions on the basis that his child’s healthcare needs prompted the death threats to the victim. One could conceive of a case where a necessity defense or defense of others might lead to the death of a child being a material fact. On this

record and in light of the issues framed in this trial the evidence was not material and had no relevance.

The trial court took into account what was relevant and not relevant in its ruling and conducted an appropriate balancing analysis. *See* ER 403. The court reasoned:

THE COURT: So my ruling on this is that I am not going to exclude mention of the fact that the child had cerebral palsy. I do feel that is an issue that has kind of permeated the fact pattern here.

I don't believe it's necessary that the jury be advised that the child is now deceased. And I do offer my condolences to Mr. Collier. I do not find that that fact is relevant.

3 RP 43.

The defendant offered very little argument in opposition to the motion to exclude references to the death. Defense counsel stated, "Mr. Collier believes that that is certainly relevant to his state of mind at the time. We would ask that that evidence not be excluded." 3 RP 42-43.

The defendant's state of mind was relevant only insofar as it touched on the mental state for one of the four crimes. The mental state for Counts One and Four was the same, namely whether the defendant acted "knowingly". CP 85-109, Instructions 8 and 16. The death of the child had little or nothing to do with whether the defendant acted knowingly. If concern for the child's medical condition provided motive

for the defendant to knowingly engage in criminal conduct the evidence was actually detrimental to the defendant's case. It follows that the evidence complained of on appeal could not have been "material and favorable to his defense" as is a requirement in right to present a defense cases. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). In the absence of a lawful defense based on excuse or justification, motive only served to establish guilt, not provide a defense.

The same holds true for the telephone harassment charges. The mental state for those charges was whether "the defendant intended to harass, intimidate, or torment that other person. . ." CP 85-109, Instruction 12. Again, the death of the child had little or nothing to do with whether the defendant acted with the requisite specific intent when he uttered the death threats to the victim in the telephone calls. If he had concern for the deceased child, and if that concern motivated his actions, the death did not provide legal excuse or justification for his actions. It served only to bolster the state's case by establishing a powerful motive for the defendant's actions.

Although not articulated as a basis for admission, the death of the child could be deemed an attempt at fostering sympathy. If so the jury instructions made sympathy a non-factor. The introductory instruction

directed the jury as follows: “As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.” CP 85-109, Instruction No. 1. In light of this instruction it would have been improper for the jury to speculate as to legal excuse or justification defenses. Such defenses were not part of the case. Likewise, to the extent that the death was an effort to encourage the jury to feel sympathy for a father who recently lost a child, that too would have been improper. In short there was no material issue before the jury that made the death of the child relevant or material.

A last observation is important to take note of on this issue. The jury was in all likelihood aware of the death even if they did not know the details. The victim referred to the child in the past tense and thus did not hide the death. For example she testified, “Yes. We have a three-year-old little boy, and we had a seven-year-old daughter.” 4 RP 201. She also described the daughter’s condition and that she and the defendant had raised her together: “She had cerebral palsy. She wasn't able to walk, talk, or eat. She had a tube in her stomach.” 4 RP 221. Lastly, she also testified that contact with the daughter was what led to the defendant’s threats:

Q All right. Now, October 5th through 7th, the period of time that is at issue before this Court, you testified now that the defendant was not having contact with his daughter, [the deceased child]. At any point during that period of time, was he seeking to have contact with her? Was he asking to see her?

A Yes. That's what it's all about.

4 RP 208.

In light of there having been little effort to hide the death, there is little support for the claim that a constitutional violation occurred. The attorneys complied with the court's ruling concerning the daughter's medical condition and death without dwelling on them. Thus the defendant's motive, intent, and knowledge were fully explored but without leading the jury into areas of speculation about legal defenses. It can be said therefore that the trial court's ruling was not an abuse of discretion and is exactly what any experienced trial judge might do under the same circumstances.

2. THE DEFENDANT WAS CONVICTED OF TWO COUNTS OF TELEPHONE HARASSMENT ON THE BASIS OF OVERWHELMING EVIDENCE THAT WAS LARGELY NOT CONTESTED.

The defendant argues that insufficient evidence was admitted to prove the telephone harassment charges beyond a reasonable doubt. Error has not been assigned to the jury instructions. When a jury instruction is

unchallenged on appeal, it becomes the law of the case. *State v. Perez–Cervantes*, 141 Wn.2d 468, 476, 6 P.3d 1160 (2000). Thus as to the threat element, the court properly instructed, the jury properly applied, and the state was required to prove that the defendant’s conduct satisfied the following definition of a threat:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person. To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 85-109, Instruction No. 14.

The standard for sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, “[a]ll reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant.” *Id.* at 8.

In cases of telephone harassment, evaluation of the threatening nature of telephone communications is made via an objective standard. *State v. Meneses*, 149 Wn. App. 707, 714, 205 P.3d 916 (2009) (“We

think it fair to say that ‘a reasonable person would foresee that [these statements] would be interpreted as a serious expression of intention’ by [the defendant] to act on his words.”). Thus the question in such cases involves the objective impact on the victim as well as the objective indications of the defendant’s intent.

As in *Meneses* the threatening language used by the defendant in this case, which was heard by not one but three witnesses, easily satisfied the threat definition. The victim testified that she recorded some of the phone calls from the defendant and that she delivered the recordings to the Lakewood police. 4 RP 215. In those phone calls she admitted the defendant threatened to kill her. *Id.* The prosecution published the recordings for the jury and thus the jury heard and judged for themselves whether an objective person would foresee that the words spoken would be interpreted as serious. 4 RP 254. Furthermore with respect to whether the defendant “intended to harass, intimidate, or torment” the victim, the victim stated that, “he wouldn’t leave me alone. He was persistent on having his daughter . . .” and that she knew that by going to the police, “then I wouldn’t have to worry about him bothering me to have his daughter.” 4 RP 217. Review of the victim’s testimony shows that she was hostile toward the prosecution, that she minimized the seriousness of

the incident, but that she still provided evidence sufficient to satisfy the objective, reasonable-person, foreseeability standard.

The audio recordings were introduced through the investigating patrol officer. He described one of the phone calls as including a graphic threat to kill using a gun or a knife:

Q And, again, just by way of summary: What were the substance of the threats, if any, on that call?

A Yes. I'm going to refer to my report here. So Clifford said he was searching for a burner and he was going to shoot her, and if that didn't work, he was going to stab her and bury her.

Q I'm sorry. A burner?

A Yeah. From my training and experience, I know a burner to be a gun.

Q Okay. So you recognized the use of that word?

A Correct

4 RP 251.

There was no allegation that the officer was biased. The jury thus could have deemed him to be the objective observer that he presented as. Under this circumstance his description of the victim's reaction to the threats at the time was entitled to great weight. This was not a case where

either the officer or the jury would have considered the threats to have been left “in jest or idle talk.” CP 85-109, Instruction No. 14.

The officer also contradicted the victim’s in-court minimization of the seriousness. He testified that, “She indicated that she left – that she went into hiding in another city in hopes that she – that her boyfriend, [the defendant], would not find her.” 4 RP 246. It would have been wholly understandable for the jury to consider the victim’s actions as speaking louder than her words. While in court she professed to have little concern, when she was in the community and he was still at large, she had sufficient concern to go into hiding such that the detective had to track her down. These circumstances surely drove home the serious nature of the threats in a way that contradicted the victim’s in court testimony to the contrary.

The detective also described his observations of Ms. Manley’s demeanor and that at the time she was reporting them she conveyed the impression that she believed them to be serious:

Q And could you please describe, if you recall, what her demeanor was like when she arrived to speak with you regarding these threats?

A Yes. She appeared to be frightened, very concerned about the welfare of her child who was in the custody of Mr. Collier.

Q And that was her son?

A Correct.

Q And that was the son, Clyde, that you had heard in the call earlier the defendant saying he was going to die with?

A Correct.

Q Officer Merrill, did Ms. Manley appear to be taking these threats seriously?

A Yes.

Q Why do you say that?

A Well, it's not common for domestic violence victims to provide so much evidence of the crime. Usually they're not very cooperative. So in my training and experience, I mean, that's a sure -- when they provide a lot of information like that, it made me feel that she was actually concerned for her safety.

4 RP 252-53.

In light of testimony not contradicted that the defendant had threatened to shoot, stab, and bury the victim, and in light of the fact that she went into hiding, there is little support for the notion that the jury's verdict was irrational. In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial

evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers “to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970, abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Only when no rational trier of fact could have found that the state proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Further evidence of the rationality of the jury’s decision in this case comes from its verdicts. On Count One, the felony harassment charge, the jury had to find that the victim reasonably feared death at the hands of the defendant. CP 85-109, Instruction No. 8. As to the telephone harassment, she need not have feared the death threat would be carried out. CP 85-109, Instruction No. 12. As to those counts the defendant needed only to “[intend]to harass, intimidate, or torment” Ms. Manley. Thus her testimony that his calls did just that was sufficient proof of the seriousness of the threats. 4 RP 217.

Since the jury acquitted on Count One but convicted on Counts Two and Three, it is evident that it saw the difference between the two

crimes. They also evidently focused on the elements of the two crimes because the face of Instruction No. 12 bears underlining that shows they were paying close attention to the elements during deliberations. CP 85-109, Instruction No. 12. Under these circumstances the jury was doing everything one would hope a rational jury would do. As to this assignment of error the defendant's conviction should be affirmed.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF PRIOR THREATS AGAINST THE VICTIM, WHERE THE PURPOSE OF THE EVIDENCE WAS TO PROVE THE EFFECT OF THE DEFENDANT'S THREATS ON THE VICTIM.

The defendant argues that evidence of the defendant's prior 2015 telephone harassment convictions should have been excluded. In general there are three bases on which prior conviction evidence might have been properly admitted. First with a number of limitations ER 609 allows admission of prior convictions for impeachment. *See* ER 609(a) and (b). Second ER 404(b) allows evidence of a prior criminal offense to be admitted where the evidence is offered and is probative of permissible purpose such as motive or intent. *See* ER 404(b). Lastly, prior conviction evidence may also be admitted where it is an element of a crime, such as is the case in unlawful possession of firearm cases. *See* RCW 9.41.040(2)(a) (i) and (ii). Where a prior conviction is admissible as an element of a

crime, the defense is entitled to limit the form and scope of the evidence seen by the jury. *State v. Garcia*, 177 Wn. App. 769, 777, 313 P.3d 422, 426 (2013). Where a “defendant stipulates that he has a prior felony conviction for purposes of an unlawful possession of firearm charge, the trial court cannot allow the state to introduce into evidence the details of the conviction and punishment” even where the evidence is necessary to prove an element of the crime. *Id.*, citing *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

In this case the trial court admitted the defendant’s convictions under the second of the foregoing three bases but the conviction was also admissible under the third. The propensity rule is a general rule of exclusion with a number of enumerated and case law-based exceptions.

The rule specifically provides:

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).

It has been observed that ER 404(b) is not intended to deprive the state of relevant evidence that may be necessary to establish an element of the crime or crimes charged. *State v. Mee*, 168 Wn. App. 144, 154, 275

P.3d 1192, *review denied*, 175 Wn.2d 1011, 287 P.3d 594 (2012), *quoting State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) and *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Rather, the rule prevents the State from introducing evidence and argument that the defendant is guilty because he or she may have had a propensity or proclivity to commit the crime. *Id.* *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793, 800 (2012) *citing State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). ER 404(b) rulings are reviewed for an abuse of discretion. *State v. Embry*, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013). The standard of review is thus whether the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 731–32.

In the case before the court the trial court reasoned that the prior conviction was proof of the reasonableness and degree of fear of the victim as to the seriousness of the threats. This was not an unreasonable conclusion. In order to convict the defendant of the crimes in the first three counts, the prosecution had to prove that the threats were true threats and that they had an impact on the victim. The impact-on-the-victim purpose was all the more crucial in this particular case because the victim was uncooperative, had to be arrested on a material witness warrant, and

minimized the impact of the threats during her testimony. 3 RP 31. 4 RP 187-93, 216.

In light of the fact that the defendant had engaged in similar conduct against the same victim in the recent past, the prior conviction bore witness to the seriousness of the threats. Plus the evidence was admitted with a limiting instruction that confined the jury's consideration to the permissible purpose. CP 85-109, Instruction No. 6. The jury thus considered the evidence only "to the extent you find it relevant to the issue of whether Christina Manley had reasonable fear that the threats alleged in Counts I, II and III would be carried out." *Id.* In light of the circumstances in this case which included the trial court issuing a material witness warrant for Ms. Manley the first day of trial so that she would testify at all, the trial court cannot be deemed to have made a "manifestly unreasonable" decision or exercised its discretion on "untenable grounds or for untenable reasons." *State v. Embry*, 171 Wn. App. at 732.

A further basis for upholding the ruling is from basis number three. In this case the no contact orders entered at sentencing were material evidence for Count Four. CP 85-109, Instruction No. 16. The defendant did not proffer an *Oldchief* stipulation. The state thus properly introduced the no contact orders as exhibits. Under this circumstance, the risk of unfair prejudice was minimal. The jury was aware as a result of properly

admitted evidence that was crucial to a material issue for Count Four that the defendant had a prior conviction for a domestic violence offense. Because the judgment for the 2015 conviction was not offered or admitted, it can be said that the risk of unfair prejudice was kept to a minimum. The only actual evidence admitted concerning the prior conviction was Ms. Manley's minimized testimony about it.

In light of all the circumstances, the admission of the prior conviction was not error. There were two separate valid bases for its admission. On this assignment of error the defendant's conviction should be affirmed.

D. CONCLUSION.

For the foregoing reasons the defendant's convictions and sentences should be affirmed.

DATED: Friday, June 08, 2018

MARK LINDQUIST
Pierce County Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/8/18 *J. Johnson*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 08, 2018 - 9:43 AM

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