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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

IVAN LEE AHQUIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-00193-9
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred where it admitted allegations of prior criminal acts committed by Ivan Ahquin in the past against the same victim in violation of ER 404(b).
2. The trial court erred in admitting improper propensity evidence under the guise of ER 404(b).
3. The trial court erred when it failed to treat the second degree rape and second degree assault convictions as the same criminal conduct in calculating Ivan Ahquin's offender score.
4. The \$200.00 criminal filing fee should be stricken from Ivan Ahquin's judgment and sentence.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Ivan Ahquin's "intent" or "motive" or "state of mind" where his intent or motive or state of mind were not materially relevant in the case? (Assignments of Error 1 & 2)
2. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Ivan Ahquin's "intent" or "motive" or "state of mind" where the admitted evidence was not probative of Ahquin's intent or motive or state of mind?

(Assignments of Error 1 & 2)

3. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing the victim's "state of mind," where the evidence was only marginally probative of that issue but the prejudice was significant, and where other admitted evidence established the relevant state of mind?

(Assignments of Error 1 & 2)

4. Where prior acts evidence was not admitted for a proper purpose under ER 404(b), was the admission error because it was merely propensity evidence? (Assignments of Error 1 & 2)

5. Did the trial court err when it failed to treat the second degree rape and second degree assault convictions as the same criminal conduct in calculating Ivan Ahquin's offender score because the two crimes shared the same victim, time and place, and criminal intent? (Assignment of Error 3)

6. Should the \$200.00 criminal filing fee be stricken from Ivan Ahquin's judgment and sentence where the criminal filing fee statute has been amended to prohibit imposition of the fee on an indigent defendant and where Ivan Ahqin is indigent?

(Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ivan Lee Ahquin with seven crimes and related aggravators all arising from a lengthy incident occurring on January 14, 2017, at alleged victim J.G.-E.'s apartment. The seven counts were:

- (1) first degree rape by with domestic violence aggravator
- (2) second degree assault with domestic violence and sexual motivation aggravators
- (3) first degree burglary with domestic violence and sexual motivation aggravators
- (4) unlawful imprisonment with domestic violence and sexual motivation aggravators
- (5) violation of a domestic violence court order with domestic violence and sexual motivation aggravators
- (6) felony harassment with domestic violence aggravator
- (7) unlawful possession of a controlled substance

(CP 3-6)

Over objection, the trial court allowed the State to introduce testimony that Ahquin contacted J.G.-E. in violation of a no-contact order and/or assaulted J.G.-E. on three previous occasions. (CP 61-62; RP2 156-72)¹ The State found the testimony relevant to Ahquin's motive, intent or state of mind, and to J.G.-E.'s state of mind regarding the harassment charge. (RP2 131-38, 156-72) The

¹ The transcripts labeled volumes 1 through 10 will be referred to by their volume number (RP#). The transcript for the sentencing hearing will be referred to as RPS. The remaining transcript will be referred to by the date of the proceeding.

court instructed the jury to limit their consideration of the evidence for these purposes. (CP 137-39; RP6 726-27, 737-38, 745-46)

The jury returned verdicts for each of the counts and their aggravators as follows:

- (1) guilty of second degree rape
- (2) guilty of second degree assault with sexual motivation aggravator
- (3) guilty of criminal trespass
- (4) guilty of unlawful imprisonment with sexual motivation aggravator
- (5) guilty of violation of a domestic violence court order
- (6) not guilty of harassment
- (7) guilty of unlawful possession of a controlled substance

(CP 194-216; RP10 1438-43)

The trial court denied Ahquin's sentencing request to either merge the rape and assault convictions or to treat the two offenses as the same criminal conduct. (RPS 4-18) The trial court imposed the high end of Ahquin's standard range, for a term of confinement totaling 316 months to life in prison. (RPS 33; CP 231, 234-36)

Ahquin filed a timely notice of appeal. (CP 254)

B. SUBSTANTIVE FACTS

J.G.-E. and Ivan Ahquin have known each other since they were teenagers because their families lived in the same neighborhood and frequently socialized. (RP6 713-18, 810-11) J.G.-E. is now in her 40's and has three children of her own. (RP6

705) Prior to June 2017 she lived with her 16 year-old daughter in an apartment in Lakewood. (RP6 707, 722) She was also married but separated at the time, and hoped she and her husband might eventually reconcile. (6RP 827, 833, 834)

During the spring of 2016, J.G.-E. and Ahquin ran into each other at a local casino. (RP6 718, 719) They spent the evening together, and remained in contact through social media. (RP6 719) They began dating towards the end of the summer and quickly became intimate and “inseperable.” (RP6 719, 720) Ahquin lived in a trailer parked on his mother’s property, but frequently spent the night at J.G.-E.’s apartment. (RP6 720-21, 722)

According to J.G.-E., they engaged in frequent sexual activity, but that it was “basic,” meaning they did not use any toys or watch pornography or engage in “rough sex.” (RP6 723-24) Despite having been intimate with about 10 people and being married and having three children, J.G.-E., testified that she was “not very experienced.” (RP6 723-24)

Their relationship was positive at first, but J.G.-E. testified that Ahquin started becoming violent with her in mid-September. (RP6 725) She claimed Ahquin was physically and verbally abusive, but that he apologized and she decided to forgive him and

gave him another chance. (RP6 725-26)

J.G.-E. and Ahquin had an argument on October 14, 2016 that turned into a physical altercation. (RP6 727, 729) During their argument, J.G.-E.'s voice escalated and, according to J.G.-E., "he would grab my neck and squeeze so I couldn't make a sound, and I couldn't cry and I couldn't breathe ... He would say it in my ear: 'Shut the fuck up; shut the fuck up.'" (RP6 729-30) J.G.-E. testified that Ahquin pinned her on the bed and shook her head, and that she received a black eye because her head became caught between the mattress and the bedframe. (RP6 727, 779, 731) Ahquin blocked her from leaving the apartment, but eventually the police were called and Ahquin left.² (RP6 728, 736-37)

On December 23, 2016, J.G.-E. obtained a protection order prohibiting Ahquin from contacting her. (RP6 741; RP8 1079; Exh. P112) She nevertheless frequently initiated and allowed contact between herself and Ahquin, and several times engaged in consensual sex with Ahquin despite the protection order. (RP6 741-42, 743, 744, 754, 814-15)

² Testimony describing this incident was admitted over defense objection for the limited purpose of showing Ahquin's "motive or intent as to the charge of unlawful imprisonment;" Ahquin's "state of mind or motive as to the charge of rape;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 726-27; CP 137)

On December 30, 2016, J.G.-E. returned home and found Ahquin in her apartment. (RP6 738) She did not know how Ahquin got in because she lives on the second floor of a secured building and Ahquin did not have a key. (RP6 708, 738-39) J.G.-E. testified that Ahquin immediately pushed her down and held her in a chair, and when she started talking loudly he grabbed her by the neck and strangled her.³ (RP6 738, 739-40) When Ahquin stopped to get himself some water, J.G.-E. fled to her neighbor Ethel Cantrell's apartment and called the police.⁴ (RP6 738, 740)

On January 13, 2017, Ahquin came to J.G.-E.'s apartment. (RP 746) She cannot remember if he let himself in somehow or if he knocked on the door and she let him in. (RP6 746-47) But she remembers that she was very concerned for his safety and well-being because he told her he wanted to commit suicide. (RP6 746-48) J.G.-E. testified she could not immediately leave or call the police because she did not have a telephone and was blocked in the bedroom. (RP6 748) But she was also afraid that Ahquin was

³ Testimony describing this incident was admitted over defense objection for the limited purpose of showing Ahquin's "motive or intent as to the charges of Assault in the Second Degree, Burglary in the First Degree, Unlawful Imprisonment, and Violation of a No-contact Order;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 737-38; CP 138)

⁴ Cantrell and her daughter, Amanda Stone, confirmed that J.G.-E. came to the apartment crying and asked them to call the police because Ahquin was in her apartment and would not leave. (RP8 1061-62, 1068-69)

going to hurt himself. (RP6 747-48, 749) J.G.-E. eventually went next door to Cantrell's apartment and called the police.⁵ (RP6 748)

Lakewood Police Officer Dennis Harvey responded to this call. (RP7 991, 993) He first spoke to J.G.-E., who appeared high or intoxicated, and she pleaded with the officer not to hurt Ahquin. (RP7 996-97, 999) When he attempted to contact Ahquin inside J.G.-E.'s apartment, he found that the apartment door was blocked with heavy furniture. (RP7 997) The officers were able to force the door open but Ahquin was no longer inside the apartment. (RP7 997-98) Officer Harvey noticed that a window on the back wall of the living room was open. (RP7 998)

Later that night, at about 2:00 or 3:00 AM on January 14, J.G.-E. was awakened by the sound of her dog barking. (RP6 745, 752) She went to the living room and saw Ahquin climbing through a window. (RP6 753) Because of Ahquin's earlier suicidal talk, J.G.-E. was more concerned than scared at that point. (RP6 754) So, rather than calling the police, she went back to the bedroom. (RP6 754)

⁵ Testimony describing this incident was admitted over defense objection for the limited purpose of showing "the context and circumstances leading to the events allegedly occurring on January 14th, 2017;" Ahquin's "motive or intent as to the charge of Violation of a No-contact Order;" and J.G.-E.'s "state of mind as to the charge of harassment." (RP6 702, 745-46; CP 139)

According to J.G.-E., Ahquin followed her to the bedroom and immediately began arguing with her and accusing her of having another man in the apartment. (RP6 755) Ahquin called J.G.-E. names and accused her of cheating on him. (RP6 755) J.G.-E. raised her voice to Ahquin, and Ahquin grabbed her by the neck and threw her onto the bed. (RP6 755, 761-62) Ahquin forcefully took off J.G.-E.'s clothes, and squeezed her neck hard enough to restrict her breathing and keep her from making a sound. (RP6 756, 761)

During this altercation, J.G.-E.'s telephone fell on the floor and broke, and Ahquin told her to clean it up. (RP 761, 763, 765-66) Because she was naked, she tried to grab clothing or a blanket to cover herself while she cleaned, but Ahquin kept pulling them away. (RP6 761, 763-64)

J.G.-E. needed to use the restroom. (RP 756-57, 765) So Ahquin took her arm and escorted her past the front door to the bathroom, stood in the doorway while she urinated, wiped her with a washcloth when she was done, then escorted her back to the bedroom. (RP6 757-59)

J.G.-E. was "fighting" to get away and "yelling" and "screaming," so Ahquin grabbed her by the throat again and

squeezed. (RP6 764, 775) J.G.-E. began to feel weak and started to slide to the floor. (RP6 777) According to J.G.-E., Ahquin placed his penis in her mouth. (RP6 777) She started crying and asked him not to do it. (RP6 777) Ahquin picked her up and placed her back on the bed, then briefly left the room. (RP6 777-78) J.G.-E. could hear him rummaging in the bathroom. (RP6 778)

When he returned he was holding her curling iron. (RP6 779-80) He approached J.G.-E. and lifted her legs up in the air. (RP6 780) J.G.-E. testified that she begged him not to put it inside her, but he told her she “needed to stop being a baby and [she] needed to open up to experiences and be a woman.” (RP6 780) Ahquin first put the curling iron inside her vagina, which she described as painful and uncomfortable. (RP6 780-81, 782, 783)

Ahquin then removed the curling iron and inserted it into J.G.-E.’s anus. (RP6 783) J.G.-E. testified that it hurt and she begged him to stop. (RP6 785) J.G.-E. testified that Ahquin told her she should stop being a baby and should stop crying. (RP6 785) If J.G.-E. got too loud, Ahquin would grab her by the throat to make her be quiet. (RP6 786)

After a few minutes Ahquin removed the curling iron and penetrated her vagina with his penis. (RP6 784, 787, 788) J.G.-E.

testified that at one point she told Ahquin to “take me out of my misery and just kill me now[.]” (RP6 789) He responded, “Before I take you out of your misery, I’m going to get a burner from my white nephew and I’m going to make you watch me kill everybody in the building before I kill you.” (RP6 789) Then Ahquin removed his penis from her vagina, placed it in her mouth, and ejaculated. (RP6 784, 786, 790)

J.G.-E. asked if she could take her dog outside to pee, and Ahquin said she could but that she better come back. (RP6 791) On her way out the front door J.G.-E. grabbed her cellular phone. She did not want to run because she was concerned he would get suspicious and leave before the police could arrive, and she did not want him to get away again. (RP6 792) So she called Cantrell and asked her to call the police.⁶ (RP6 792) Then she returned to the apartment. (RP6 792)

Responding officers were aware that Ahquin had fled upon their arrival the day before. (RP5 599, 642) So when they knocked and J.G.-E. asked who was there, they responded “management.” (RP5 601, 642m 645; RP6 794) A scared looking J.G.-E. opened

⁶ Cantrell confirmed that J.G.-E. called her and told her that Ahquin was in the apartment and asked her to call the police. (RP8 1070-71)

the door and was immediately ushered out by the officers. (RP5 602; 645) The officers found Ahquin in the bedroom and placed him under arrest.

As the officers escorted Ahquin out of the apartment, J.G.-E. began crying and said, "Thank you for arresting him." (RP5 655) J.G.-E. described the incident to the officers. They noted that her voice was hoarse and scratchy and she appeared to have scratches on her jawline and red marks on her neck. (RP5 657)

The officers noted that a window was open and its screen was on the floor of the living room. (RP5 652, 659-60) The officers also found footprints on an AC unit and electric fixtures on the back of the building leading to the same window. (RP5 652) The officers found a curling iron on a dresser in the bedroom. (RP7 922) The cord had been cut and removed. (RP7 922) During a search incident to arrest, the officers also found a folding knife and a small baggie of methamphetamine in Ahquin's pockets. (RP5 603, 604, 606; RP8 1077-78))

J.G.-E. was transported to the hospital and took part in a sexual assault forensic examination. (RP6 796; RP7 953) The nurse examiner noted bruising on J.G.-E.'s arms and thigh but did not see any bruising or swelling in her neck area. (RP7 969-70,

987) The nurse also noted lacerations around J.G.-E.'s vagina and rectum, and a laceration and slight bleeding around her cervix. (RP7 973-75)

Several of Ahquin's family members testified that J.G.-E. initiated contact with Ahquin multiple times after the protection order was issued. (RP8 1118, 1122-23, 1133; RP9 1128, 1237, 1238) Several times she came to his mother's property looking for him when he was not there and refused to leave when asked. (RP8 1123-24, 1135, 1143, 1145; RP9 1228, 1237-38) Other times, Ahquin was there but hid in his trailer until she left because he did not want to have contact with her. (RP8 1125-26; RP9 1187) J.G.-E. would become angry because she thought Ahquin's family members were lying and would not let her see him. (RP8 1125; RP9 1238)

Ahquin testified on his own behalf. He testified that they frequently engaged in sexual intercourse throughout their relationship, and that they occasionally used sex toys and engaged in anal sex and light bondage activities. (RP9 1172-73) These acts were always mutually agreed to and consensual. (RP9 1173-74) Ahquin testified that J.G.-E. asked him to put his hand around her throat during intercourse, so he tried it but did not like it so he

stopped. (RP9 1174-75)

Ahquin also testified that J.G.-E. often became jealous and angry when he communicated with other women. (RP9 1175-76) She would scream and yell and accuse him of cheating on her. (RP9 1176)

He knew that J.G.-E. obtained a protection order, but they both ignored it and kept dating and sleeping together. (RP9 1183-84, 1185-86) He denied assaulting J.G.-E. on October 14 and testified that he left J.G.-E.'s apartment when asked to on December 30. (RP9 1176-77, 1182-83) He climbed out of the window on January 13 because he did not want to be arrested for being at the apartment. (RP9 1183)

On January 13, Ahquin and J.G.-E. had consensual sex twice, including vaginal, oral and anal sex. (RP9 1197, 1200) Later, J.G.-E. and Ahquin began arguing again about other women, so Ahquin decided to leave. (RP9 1199-1200)

But when Ahquin later received a text from J.G.-E. telling him she was going to kill herself by overdosing on pills, he became concerned. (RP9 1205) He went back to her apartment, but she did not answer his texts or calls. (RP9 1206) He was afraid she might be unconscious, so he climbed up to her window. (RP9

1206) He knocked on the glass, and J.G.-E. came over and let him in. (RP9 1207)

They talked and cuddled, and eventually had sex again. They used the curling iron as a sex toy. (RP9 1208, 1209-10) Later that morning, J.G.-E. left the apartment to throw away a bag of garbage. (RP9 1216) Soon after she returned, there was a knock on the door and the police were there to arrest him. (RP9 1217)

Ahquin testified that he never grabbed J.G.-E.'s neck in order to strangle her or prevent her from breathing. (RP9 1218) He denied threatening to kill her or the other people in her apartment building. (RP9 1219) He did not prevent J.G.-E. from leaving her apartment. (RP9 1219) And all sexual acts they engaged in were consensual. (RP9 1210, 1211, 1219)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED IN ADMITTING THE PRIOR BAD ACTS EVIDENCE BECAUSE IT WAS NOT RELEVANT AND THEREFORE AMOUNTED TO INADMISSIBLE PROPENSITY EVIDENCE.

1. *Absent a specific exception, propensity evidence is inadmissible.*

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to

commit crimes, but may be admissible for other purposes, such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Before evidence of prior crimes, wrongs, or acts can be admitted, two criteria must be met. First, the evidence must be shown to be logically relevant to a material issue before the jury. The test is “whether the evidence ... is relevant and necessary to prove an essential ingredient of the crime charged.” State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982), (quoting State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952) (Goebel II.)) Second, if the evidence is relevant its probative value must be shown to outweigh its potential for prejudice.

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity with the charged crime. Otherwise “motive” and “intent” could be used as “magic passwords whose

mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. State v. Fisher, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009) (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must also be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. Fisher, 165 Wn.2d at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (Gobel I)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776.

This Court reviews the trial court’s interpretation of ER

404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court's ruling admitting evidence is reviewed for abuse of discretion. Fisher, 165 Wn.2d at 745. A trial court abuses its discretion where it fails to abide by the rule's requirements. Fisher, 165 Wn.2d at 745.

The trial court in this case admitted the above-described testimony regarding two prior uncharged incidents where Ahquin allegedly contacted J.G.-E. at her apartment, they argued, and Ahquin pinned J.G.-E. down and forcefully grabbed her neck. (RP6 727-31, 738-39) The court found the October 14, 2016 incident to be probative of Ahquin's intent and motive "to both unlawfully imprison [J.G.-E.] and to force himself upon her sexually." (RP2 163-64) The court also found the incident to be probative of J.G.-E.'s reasonable fear that Ahquin would carry out his threat to kill her. (RP2 163-64; CP 137)

The court found the December 30, 2016 incident to be probative of Ahquin's motive and intent to have contact with J.G.-E., to enter her home without permission, to show he would assault and restrain her "if necessary" so he could "be with her for sexual purposes," to show his intent to "enter her home, despite not being invited," and to show his intent and motivation to be with J.G.-E.

“regardless of a court order to the contrary.” (RP2 168-69) The court found the incident also to be probative of J.G.-E.’s reasonable fear that Ahquin would carry out his threat to kill her.⁷ (RP2 169)

The court found that the probative value of the testimony relating these two incidents outweighed the potential prejudicial impact. (RP2 165, 169-70) The jury was given limiting instructions. For the October 14, 2016 incident, the court instructed the jury that it could consider the testimony only for the limited purposes of showing Ahquin’s “motive or intent as to the charge of unlawful imprisonment;” Ahquin’s “state of mind or motive as to the charge of rape;” and J.G.-E.’s “state of mind as to the charge of harassment.” (RP6 726-27; CP 137) For the December 30, 2016 incident, the court instructed the jury that it could consider the testimony only for the limited purposes of showing Ahquin’s “motive or intent as to the charges of Assault in the Second Degree, Burglary in the First Degree, Unlawful Imprisonment, and Violation of a No-contact Order;” and J.G.-E.’s “state of mind as to the charge of harassment.” (RP6 702, 737-38; CP 138)

⁷ Admission of the third incident occurring on January 13, 2017, involving contact but no assault, is not being challenged on appeal because it was also admitted for the alternative, and apparently proper, purpose of showing “context and circumstances leading to the events occurring on January 14, 2017[.]” (CP 139; RP6 745-46)

However, motive and intent were not material issues in this case and, even if they were, the admitted testimony was not necessary or relevant to establish motive, intent or state of mind during the charged incident. The testimony was improperly admitted because it did not rise beyond mere propensity evidence.

2. *The testimony was not admissible to establish Ahquin's intent or state of mind.*

The trial court admitted the testimony of Ahquin's prior contacts and assaults against J.G.-E., believing it was relevant to show his intent relating to assault, burglary, unlawful imprisonment, and violation of a no-contact order, and his intent or state of mind relating to rape. (CP 137, 138; RP2 164-65, 168-69)

However, a trial court may not admit prior acts evidence to prove the defendant's intent or state of mind unless his mental state at the time of the alleged offense is relevant, and unless the prior acts shed light on his state of mind at the time of the charged offense. State v. Acosta, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). To admit evidence of prior acts to prove intent, some logical theory – other than propensity – must connect the prior acts to intent, which must be an element of the charged offense. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). “The

evidence should not be admitted to show intent ... if intent is of no consequence to the outcome of the action.” Saltarelli, 98 Wn.2d at 363.

Unlawful imprisonment contains no statutory intent requirement, but occurs when a person knowingly restrains another person. RCW 9A.40.040(1). Thus, intent is not an element of unlawful imprisonment. See State v. Billups, 62 Wn. App. 122, 134, 813 P.2d 149 (1991) (Scholfield, J. (dissenting)). Likewise, the essential elements of domestic violence violation of a no contact order are (1) willful contact with another, (2) prohibition of such contact by a valid court order, and (3) the defendant’s knowledge of the no contact order. State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001); RCW 26.50.110. Intent is not an element of the crime of violating a no-contact order. Thus, Ahquin’s intent in committing either of these crimes was not an issue, and the prior incidents were unnecessary and irrelevant for this particular purpose.

Likewise, Ahquin’s intent in committing rape was also not an issue in this case. The criminal intent and state of mind that is “necessary to be shown in the crime of rape is shown by the doing of the acts constituting the offense.” State v. Smith, 3 Wn.2d 543,

553, 101 P.2d 298 (1940). That is, the State need prove only the act of intercourse and manifest—i.e., made known to the perpetrator—lack of consent. The requisite culpable mental state is the intent to have intercourse without consent, which the State proves by proving the fact of forcible intercourse. State v. Geer, 13 Wn. App. 71, 75, 533 P.2d 389 (1975); Smith, 3 Wn.2d at 553.

For example, in Saltarelli, *supra.*, the defendant was convicted of second degree rape. At his trial, he did not deny having intercourse with the victim, but maintained that she consented. The Court found that evidence of a prior attempted rape of another woman several years prior was improperly admitted to show his intent. Saltarelli, 98 Wn.2d at 366.

The Court found no issue of intent in Saltarelli's case because the defendant admitted having intercourse with the victim and the only issue was whether the victim consented.

“Where the charge is of *rape*, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application.”

Saltarelli, 98 Wn.2d at 366 (quoting 2 J. WIGMORE, EVIDENCE § 357, at 334 (Chadbourn rev. ed. 1979) (emphasis in original)). Similarly

here, Ahquin admitted engaging in sexual acts with J.G.-E., and the only issue was whether those acts were consensual. Ahquin's intent or state of mind was not at issue, and the evidence of the prior incidents were not relevant for the purposes of proving the rape charge. The State merely needed to show intercourse, which Ahquin did not contest, and lack of consent, which was proved by other evidence indicating use of force.

Finally, to convict Ahquin of burglary, the jury was instructed that it must find that he entered or remained unlawfully in J.G.-E.'s apartment "with intent to commit a crime against a person or property therein." (CP 164) And to convict Ahquin of assault, the jury had to find that he assaulted J.G.-E. "with intent to commit rape." (CP 145) Accordingly, Ahquin's intent was relevant to an issue at trial for these charges. However, the October 14 and December 30 incidents were not relevant or probative of Ahquin's intent on January 14. The circumstances of the prior assaults shed no new light on the question of whether Ahquin intended to commit a crime in J.G.-E.'s apartment on January 14, or on whether Ahquin assaulted J.G.-E. on January 14 because he intended to commit a rape. The only way these prior incidents proved intent was through an improper propensity inference.

For example, this Court reversed a conviction because the trial court committed a similar error in State v. Holmes, 43 Wn. App. 397, 717 P.2d 766 (1986). The defendant in that case was charged with burglary and the trial court admitted evidence of the defendant's two prior convictions for theft. The State argued, and the trial court agreed, that the evidence was relevant to prove intent. 43 Wn. App. at 398. This Court held the admission of the prior acts violated ER 404(b):

Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

Holmes, 43 Wn. App. at 400.

In Wade, *supra.*, this Court similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. 98 Wn. App. at 332. The court noted that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged

offense.” 98 Wn. App. at 334 (emphasis in original). Such a non-propensity theory rarely exists:

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

98 Wn. App. at 335.

Similarly here, the only logical relevance of the prior acts is based on a propensity argument: Because Ahquin entered J.G.-E’s apartment without permission and assaulted her in the past, it is likely that he entered without permission and assaulted her again on January 14. As in Holmes and Wade, this is improper and the admission of the other acts violated ER 404(b).

3. *The testimony was not admissible to establish Ahquin’s motive.*

The trial court admitted the testimony of Ahquin’s prior contacts and assaults against J.G.-E., believing it was relevant to show his motive relating to rape, assault, burglary, unlawful imprisonment, and violation of a no-contact order. (CP 137, 138;

RP2 164-65, 168-69) But the fact of the prior incidents does not tend to prove Ahquin's motive for committing the charged crimes.

Motive is not the same as *mens rea*. *Mens rea* describes the purposefulness with which an act is committed. See BLACK'S LAW DICTIONARY p. 985 (6th rev. ed. 1992) ("defining mens rea as "a guilty or wrongful purpose"). Motive on the other hand is "[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." Saltarelli, 98 Wn.2d at 365 (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); and BLACK'S LAW DICTIONARY, p. 1164 (4th rev. ed. 1968)).

For example, in State v. Hieb, 39 Wn. App. 273, 693 P.2d 145 (1984),⁸ Division 1 held that in a prosecution for the murder of a child, evidence that the defendant had injured the child on other occasions was inadmissible to show motive. The court explained:

It is difficult to ascertain how the prior assaults on [the child] could be a motive or inducement for Hieb's later assault on [the child]. There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to Hieb's motive for the last assault. The evidence was not admissible on this basis.

Hieb, 39 Wn. App. at 282-83.

⁸ Reversed on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986).

Similarly, in Saltarelli, the Court found that evidence of a prior attempted rape of another woman several years prior was improperly admitted to show the defendant's motive for the current charge of second degree rape. 98 Wn.2d at 365. The Court first noted that "[i]t is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later." 98 Wn.2d at 365. But even if there was some marginal relevance, the Court found that its probative value would be slight because "[t]he only issue was whether the victim consented to intercourse with defendant; in the present case, defendant's motive was irrelevant to this issue." 98 Wn.2d at 365.

Likewise, the reason or motivation for why Ahquin committed the current acts is irrelevant. But even if Ahquin's motive is marginally relevant, it is unclear how the alleged prior acts induced or tempted Ahquin to commit the acts giving rise to the charges here. Instead, the only relevance of the prior acts is to suggest that because he acted in this manner before he must have done so again, i.e., that he has a propensity to assault or rape or unlawfully contact J.G.-E. But that is not a proper use of prior acts evidence. ER 404(b). Thus, the evidence was not relevant to show Ahquin's motive and was improperly admitted for this purpose. See

Saltarelli, 98 Wn.2d at 365.

4. *The testimony was not relevant or probative of J.G.-E's state of mind.*

Finally, the court found the testimony relevant to show J.G.-E.'s state of mind as to the charge of harassment. To prove that charge, the State had to show that J.G.-E. was placed in reasonable fear by the threat to kill her. RCW 9A.46.020(1)(b), .020(2)(b). Although the testimony relating the prior incidents may have had some relevance to this issue, the relevance was minimal and unnecessary. J.G.-E. described several assaultive and threatening acts over the course of the charged incident. She also described Ahquin's threat in detail and testified that she took his threat seriously. (RP6 789) Whatever marginal relevance the prior conduct may have had on J.G.-E.'s state of mind was far outweighed by the prejudicial impact and should not have been admitted.

5. *The error in admitting the other acts evidence requires reversal.*

The erroneous admission of ER 404(b) evidence, requires reversal if the error, "within reasonable probability, materially affected the outcome." State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was

harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); Acosta, 123 Wn. App. at 438.

It is well recognized that evidence of a defendant's prior criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Calegar, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the charged crime. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

Furthermore, the potential for prejudice is even higher where the prior act is for an offense that is nearly identical to a current charge. See State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to "the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a

general guide, those convictions which are for the same crime should be admitted sparingly[.]” Newton, 109 Wn.2d at 77 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967)).

It is also well recognized that evidence of prior instances of domestic violence are highly prejudicial. Accordingly, “[t]o guard against this heightened prejudicial effect, [court’s should] confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value[.]” State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

The detailed testimony about the prior irrelevant assaults, committed in a similar way to the current charge, was at best minimally probative. But they were highly prejudicial. The admission of the prior acts therefore violated not only ER 404(b), but also ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative.

Furthermore, it is normally improper to admit evidence of prior instances of domestic violence for the sole purpose of bolstering a victim’s credibility. See State v. Ashley, 186 Wn.2d 32, 47, 375 P.3d 673 (2016); Gunderson, 181 Wn.2d at 924-25. But that is exactly what this evidence likely did in this case; it inappropriately bolstered J.G.-E.’s credibility in a case that rested

entirely on the jury's determination of whether J.G.-E. or Ahquin was more credible.

And this prejudice was compounded when the prosecutor impliedly made a propensity argument to the jury. The prosecutor began his closing arguments by saying to the jury: "I told you two weeks ago, you are going to hear a case about *escalation*, power and control." (RP10 1366-67, emphasis added) He said J.G.-E. was in a "cycle of violence." (RP10 1377)

The prosecutor also talked about how J.G.-E. gave Ahquin a "second chance" and "third chance" and "fourth chance" and still wanted to be friends, then asked the jury:

Can you not maintain some level of communication and contact *without having to be sexually assaulted every single time*? Can't you just remain friends? Not to Mr. Ahquin. Mr. Ahquin was not going to take that laying down.

(RP10 1377, emphasis added) The prosecutor also stated:

there was one thing that was *a constant* in her life and in her relationship with Mr. Ahquin, and that's when she got too loud, he was going to quiet her down, and he did that by choking her *repeatedly*, strangling her.

(RP10 1381, emphasis added)

In other words, the prosecutor used these prior incidents to argue that Ahquin had a pattern of using violence towards J.G.-E.

The prosecutor did not limit his use of these prior incidents to establish Ahquin's intent or motive or state of mind on January 14.

The trial court erred when it allowed the State to present detailed testimony about the prior irrelevant assaults. The prejudice from this error could not be cured by the limiting instruction, and Ahquin's convictions must be reversed.

B. AHQUIN'S RAPE AND ASSAULT CONVICTIONS WERE THE SAME CRIMINAL CONDUCT.

The jury convicted Ahquin of second degree assault with sexual motivation (RCW 9A.36.021, RCW 9.94A.030(48)) and second degree rape (RCW 9A.44.050). (CP 195, 198, 200) The jury had been instructed that to convict Ahquin of second degree rape they must find that Ahquin engaged in sexual intercourse with J.G.-E. "by forcible compulsion." (CP 150) The jury had been instructed that to convict Ahquin of second degree assault they must find that he assaulted J.G.-E. either (1) "with intent to commit Rape" or (2) "by strangulation." (CP 145) To support its finding that the assault was committed "with a sexual motivation," the jury was required to find that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." (CP 192)

At sentencing, Ahquin asked the court to either merge the rape and assault convictions, or to treat them as the same criminal conduct in calculating his offender score. (RPS 4-5, 8-12, 16-17) The trial court declined, because it was not certain that the jury relied on strangulation as the forcible compulsion used to commit the rape. (RPS 17-18) While this may be accurate for the purposes of analyzing merger in this case,⁹ the court erred when it applied this reasoning to find that the rape and assault offenses were not the same criminal conduct.

When sentencing a defendant for two or more current offenses, if the court finds that some or all of the current offenses constitute the same criminal conduct, those offenses are counted as one crime for purposes of calculating the offender score. RCW 9.94A.589(1)(a). “‘Same criminal conduct’ means that multiple crimes require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “Intent in this context means the defendant’s objective criminal purpose in committing the crime.” State v.

⁹ For example, in State v. Williams, 156 Wn. App. 482, 495, 234 P.3d 1174 (2010), the assault and rape convictions merged because there was evidence of only one single assault that could have caused the injury necessary to elevate the crime of rape as charged in that case.

Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008).

The relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) (citations omitted). In addition, the court considers whether one crime furthered the other. State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998).

A trial court's determination of what constitutes "same criminal conduct" for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The trial court here abused its discretion because it did not make the proper inquiry as required by the sentencing statute and case law. The trial court declined to treat the crimes as same criminal conduct because it was not sure what instance of force the jury relied upon to find forcible compulsion for the rape. (RPS 17-18) The court believed it was possible the jury did not rely on the same act for forcible compulsion as it did for second degree assault. (RPS 17-18) But that is not the relevant inquiry.

Instead, the trial court should have considered whether the second degree assault furthered the rape and whether Ahquin's

objective intent in committing the second degree assault and the rape was the same. If it had the court would have undoubtedly concluded that the two offenses were the same criminal conduct.

The State alleged and asserted repeatedly that Ahquin entered the apartment with the goal of raping J.G.-E., and that every act thereafter, including the assault, was done in furtherance of that goal. This is demonstrated in the charging document, where the state alleged a sexual motivation aggravator for the assault, burglary, unlawful imprisonment and protection order violation charges. (RP 3-6) It is demonstrated in the jury instructions, which asked the jury to find that the assault, burglary, unlawful imprisonment and protection order violation offenses were sexually motivated. (CP 181-92) It is also demonstrated by the prosecutor's closing statements, where he told the jury that: "His motivations and his intent for entering that home was sexual. It was sexual motivation, 100 percent sexual motivation." (RP10 1378) And the prosecutor argued that the jury should find Ahquin guilty of assault because, when J.G.-E. was screaming and begging him to stop, "Ahquin tried to stop that screaming, to try to get his way by putting enough pressure on her neck so that she couldn't breathe." (RP10 1382) And the jury clearly agreed by convicting Ahquin of second

degree assault with a sexual motivation finding. (RP10 1439; CP 198, 200)

The State's theory, and the evidence presented at trial, clearly demonstrate that the assault furthered the rape and that Ahquin's objective intent in committing the second degree assault and the rape were the same. Any force or strangulation used upon J.G.-E. that night was done in furtherance of and with the intent of committing a rape.

All three requirements for same criminal conduct are met in this case. The victim of both offenses was J.G.-E. The offenses occurred at the same time and at the same place. And the offenses involved the same objective intent: to force J.G.-E. to have sexual intercourse. The two offenses encompass the same criminal conduct, and should have been treated as such for the purpose of calculating Ahquin's offender score.

C. THE \$200.00 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM AHQUIN'S JUDGMENT AND SENTENCE.

At sentencing, the trial court considered Ahquin's financial circumstances and found that he was indigent and did not have the ability to repay discretionary legal financial obligations (LFOs). (RPS 27, 33; CP 31) The trial court waived the DNA database fee,

but imposed the mandatory \$500.00 crime victim assessment fee and \$200.00 criminal filing fee. (CP 32) The trial court also found that Ahquin did not have the financial resources to pay for his appeal and signed an Order of Indigency. (CP 220-22, 223-24)

However, the legislature recently amended the criminal filing fee statute, RCW 36.18.020. Pursuant to the amendment, the \$200.00 fee may not be imposed on an individual who is indigent under RCW 10.101.010(3) (a) through (c). Laws of 2018, ch. 269, § 17.

Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level. The record demonstrates Ahquin is indigent under RCW 10.101.010(3)(c), because his annual income does not exceed 125 percent of the poverty level. At sentencing, Ahquin had no source of income and no savings. (CP 221-22) He will be incarcerated for 316 months to life. (CP 234-36) There is no question that he is indigent.

Recently, in State v. Ramirez, 2018 WL 4499761 at *8 (Sept. 20, 2018) the State Supreme Court found that these amendments

applied prospectively to Ramirez's case because it was still on appeal and his judgment was not yet final. The Court remanded his case for the trial court to amend the judgment and sentence to strike the criminal filing fee and other improperly imposed LFOs. Similarly, Ahquin's case is on appeal and his judgment is not yet final. His case should be remanded to the trial court to amend the judgement and sentence to strike the \$200.00 criminal filing fee.

V. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court must reverse Ahquin's convictions. Alternatively, because the rape and assault convictions are the same criminal conduct, Ahquin's case must be remanded for resentencing and to strike the criminal filing fee.

DATED: October 1, 2018



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Attorney for Ivan L. Ahquin

CERTIFICATE OF MAILING

I certify that on 10/01/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ivan L. Ahquin, DOC# 391309, Monroe Correctional Complex, Twin Rivers Unit – B603, Post Office Box 888 , Monroe, WA 98272-0888.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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