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NO. 53228-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY COOK,
Appellant.

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

The Honorable James J. Dixon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by admitting evidence of Mr. Cook's prior bad acts when the state failed to prove by a preponderance of the evidence those acts occurred and the probative value of the evidence is outweighed by its prejudicial effect.
2. Mr. Cook assigns error to the trial court's second conclusion of law from the ER 404(b) hearing.
3. Mr. Cook assigns error to the trial court's fifth conclusion of law from the ER 404(b) hearing.
4. The trial court abused its discretion when it admitted text messages into evidence that were not properly authenticated under ER 901.
5. The trial court abused its discretion by admitting an irrelevant and overly prejudicial information into evidence showing that Mr. Cook had been charged with violating a protection order as a juvenile.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by admitting evidence of Mr. Cook's prior bad acts when the state

failed to prove by a preponderance of the evidence that those acts occurred, and the probative value of the evidence is outweighed by its prejudicial effect?

2. Did the trial court abuse its discretion when it admitted text messages into evidence that were not properly authenticated under ER 901?
3. Did the trial court abuse its discretion by admitting an irrelevant and overly prejudicial information into evidence showing that Mr. Cook had been charged with violating a protection order as a juvenile?

B. STATEMENT OF THE CASE

Substantive Facts

Anthony Cook and Ariel Jenkins were in a dating relationship between late 2013 and late 2014. RP 32. Their relationship resulted in a son, identified in the record as B.B., who was born in 2014 after the relationship ended. RP 54-55, 261. Sometime after B.B.'s birth, Ms. Jenkins got married to another man. RP 59. Ms. Jenkins had sole custody of B.B. until early June of 2017. RP 246. At that point, Child Protective Services (CPS) started an investigation into allegations that Ms. Jenkins's husband had abused B.B. RP 33-34,

58. CPS placed B.B. with Mr. Cook after starting its investigation. RP 88, 246.

Ms. Jenkins was angry that Mr. Cook had custody of B.B. after CPS initiated its investigation. RP 247. Ms. Jenkins had visitation rights and refused to return B.B. to Mr. Cook following a visitation in mid-June. RP 92. On June 21, Ms. Jenkins filed a petition for a protection order restraining Mr. Cook from contacting her based on allegations that Mr. Cook had threatened her with violence. RP 88-90. The court granted Ms. Jenkins a temporary protection order and set a hearing for July 5 to consider issuing a permanent order. RP 250. Ms. Jenkins then filed a CPS complaint against Mr. Cook that was later determined to be unfounded. RP 91.

On July 5, Mr. Cook appeared in court to contest Ms. Jenkins's petition for a permanent protection order. RP 250. The court did not hold a hearing on the permanent protection order due to time constraints and instead reissued the temporary order and summoned Mr. Cook and Ms. Jenkins back to court for a full hearing two weeks later on July 19. RP 250.

On July 17, Ms. Jenkins called 911 to report she had been

receiving text messages from two unknown phone numbers throughout the day and the recent messages were threatening. RP 83, 127. Ms. Jenkins believed that the text messages were from Mr. Cook based on their content and the fact that the sender replaced the letters “ck” with “cc” in certain words, which is a habit of Mr. Cook’s. RP 74-76, 254-55. Ms. Jenkins changed her cell phone number roughly six months before she received the messages and did not provide the new number to Mr. Cook. RP 67-69.

The texts primarily discussed B.B., the custody arrangement between Ms. Jenkins and Mr. Cook, and the protection order she sought against Mr. Cook. RP 34-35, 74-75; Ex. 4-9. However, some of the messages contained threatening language:

On God you got something coming for your bitch ass (Ex. 6).

The cops can’t do shit for you but take a report when they find you dead after I’m done with you (Ex. 7).

No piece of paper is going to protect anyone from me. (Ex. 8).

No one can touch me. Too bad no one can promise the same for your life (Ex. 9).

You lost a chance to enjoy seeing any of them growing up past a week (Ex. 9).

Enjoy today. For all you know, it could be your last (Ex. 9).

When police responded to Ms. Cook's 911 call, she was noticeably upset, and her hands were shaking so bad the officer could not take clear pictures of her cell phone screen. RP 129. Police photographed the text messages and later arrested Mr. Cook for allegedly violating the temporary protection order. RP 129, 146.

Procedural Facts

The state charged Mr. Cook in the alternative in count 1: one count of felony harassment or one count of felony cyberstalking. CP 43-44. The state charged Mr. Cook with violating the temporary protection order in count 2 and later added two counts of bail jumping based on Mr. Cook's failure to appear at two hearings while the case was pending. CP 43-44. Mr. Cook elected to proceed to a jury trial. CP 129-30.

a. ER 404(b) evidence

The state moved to admit testimony describing prior alleged threats under ER 404(b) before trial. CP 13-24. Mr. Cook objected under ER 404(b) and ER 403. The trial court set an evidentiary hearing to determine the admissibility of the testimony. CP 33, 35-36.

Ms. Jenkins failed to appear to provide testimony at the

hearing. 8/8/18 RP 5-6. Instead, the trial court accepted an offer of proof from the state where it described five prior incidents it intended to offer as evidence at trial. 8/8/18 RP 9-24. The trial court denied the state's motion for three of the incidents but admitted testimony describing two others:

4) Once their son was born in the summer of 2013, the defendant began to use custody of the child as a means of attempting [to control] where Ms. Jenkins went and to whom she was speaking. Even after she ended the relationship with the defendant and married another man, the defendant made threats via text to harm Ms. Jenkins and take their child from her and into another state.

5) In June of 2017, Ms. Jenkins sought a protection order against the defendant after he threatened to kill her with a gun if she told police about the threats he had been making to take the child. Ms. Jenkins also learned during this time that the defendant had taken photos of her car and her house as a means of keeping surveillance on her.

CP 51-54; 8/8/18 RP 55-58. The trial court concluded that these incidents occurred and were relevant to prove the "reasonable fear" element of harassment and to prove Mr. Cook's identity:

2. The Court finds by a preponderance of the evidence that each of the above-listed incidents of misconduct occurred. The Court is able to reach this conclusion via the State's offer of proof and does not need an evidentiary hearing to do so. Additionally, neither testimony nor corroborative evidence are necessary to reach this conclusion.

3. The purpose for which the aforementioned misconduct is

sought to be admitted is twofold: a) to support the elements of Ms. Jenkins's "reasonable fear" for the charge of harassment and b) for proof of identity of the harasser.

4. The aforementioned misconduct is relevant evidence with regard to both of the purposes for which it is sought to be admitted, those purposes being a) the element of reasonable fear and b) identity.
5. The probative value of the aforementioned misconduct is not substantially outweighed by unfair prejudice to the defendant. The Court reaches this conclusion having carefully considered the fact that the prior misconduct is similar in nature to the allegations at issue in this current case.

CP 54-55.

b. Authentication of text messages

During pretrial motions in limine, under ER 901, Mr. Cook objected to the admission of the text messages he allegedly sent to Ms. Jenkins on July 17. CP 129-30. The state offered testimony from Ms. Jenkins to authenticate the messages. RP 31.

Ms. Jenkins testified that she received the text messages from two unknown numbers but that she suspected they were from Mr. Cook. RP 34. Ms. Jenkins suspected Mr. Cook was the sender because she has eight children and the messages only discussed B.B., the messages discussed a protection order, and the sender replaced the letters "ck" with "cc" in some words, a peculiarity she had seen Mr. Cook use in the past. RP 34-35. The trial court

overruled Mr. Cook's objection and admitted the text messages. RP 51-52.

c. Evidence related to Mr. Cook's prior conviction for telephone harassment

During the state's case-in-chief, it offered testimony from the responding police officer regarding her investigation. RP 125. The state elicited testimony from the officer showing that Mr. Cook had a prior juvenile conviction for telephone harassment in 2004. RP 132-33. The state offered three exhibits related to the prior conviction: a certified judgment and sentence, a certified copy of the information, and a certified copy of a protection order imposed before the charge had been filed. Ex. 13-15.

Mr. Cook objected to the admission of the information under ER 402 and ER 403 because it showed that Mr. Cook was originally charged with, but not convicted of, one count of violating a protection order. Additionally, Mr. Cook was charged with and convicted of one count of telephone harassment. RP 135. The court did not redact the violation of a no contact charge even though Mr. Cook was not convicted of this offense. RP 142-43.

The state argued that to prove the current felony harassment

and felony cyberstalking charges, it was required to prove that Mr. Cook had previously been convicted of harassing a person who was protected by no-contact or anti-harassment order. RP 134-36.

The trial court overruled the defense objection that the information was overly prejudicial.

[TRIAL COURT]: So the Court must balance the probative value against the unfair prejudice. The Court understands and recognizes that there is prejudice to the defendant if 14 is admitted because 14 contains reference to two separate offenses, the second of which in Count 2 apparently was dismissed or perhaps Mr. Cook was found not guilty, it's not clear to this Court, but the Judgment and Sentence in that cause of action refers only to a conviction for Count 1. . . . So over the objection, the Court is going to admit 13, 14, and 15. If the defense requests a cautionary or curative or limiting instruction -- a cautionary or limiting instruction, the Court's inclination would be to give that to the jury.

RP 142-43. The court provided a limiting jury instruction informing the jury that to disregard the violation of a no contact order charge.

RP 144-45; Ex. 14.

The jury found Mr. Cook guilty of harassment, violation of a protection order, and both counts of bail jumping. RP 351-52; CP 214-23. The jury also returned special verdicts indicating that Mr. Cook had threatened to kill Ms. Jenkins, that he had previously been convicted of harassing someone protected by no-contact or anti-harassment order, and that he and Ms. Jenkins were family or

household members. RP 351-52; CP 214-23. The trial court sentenced Mr. Cook to a standard-range sentence. 2/20/19 RP 10. Mr. Cook filed a timely notice of appeal. CP 465-75.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF MR. COOK'S PRIOR BAD ACTS WHERE THE STATE FAILED TO PROVE THE INCIDENTS OCCURRED BY A PREPONDERANCE OF THE EVIDENCE, AND THE PREJUDICIAL EFFECT OUTWEIGHS ITS PROBATIVE VALUE

a. Standard for admission under ER 404(b) and ER 403

ER 404(b) prohibits the admission of evidence showing prior misconduct to prove the commission of a new offense. ER 404(b). A trial court may admit such evidence under an exception to ER 404(b), but only if: (1) the State proves that the misconduct occurred by a preponderance of the evidence; (2) the trial court identifies the purpose for which the evidence is being introduced; (3) the trial court determines that the evidence is relevant to proving an element of a charged crime; and (4) the trial court balances the evidence's probative value against its prejudicial effect. *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (citing *State*

v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995)).

ER 404(b) should be read in conjunction with ER 403. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). ER 403 provides that “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403. A trial court’s decision to admit evidence pursuant to ER 404(b) is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

b. The state failed to prove by a preponderance of evidence a prior incident

“Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not.” *Asaeli*, 150 Wn. App. at 576-77 (citing *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)). The state failed to meet its burden of establishing that the prior violation of a no contact occurred by a preponderance of the evidence.

Ms. Jenkins failed to appear at the evidentiary hearing, thus

the state could not present any testimony describing the alleged prior threats. 8/8/18 RP 5-7. Instead, the state could only offer hearsay describing Ms. Jenkins's allegations. 8/8/18 RP 14-24. The state also offered a copy of her petition for a protection order from 2017 and her written statement in support of the allegation that Mr. Cook sent improper text messages. Evidentiary Hrg. Ex. 3-4.

i. Summer 2013 incidents

The first incident the trial court allowed into evidence consists of Ms. Jenkins's vague allegations that Mr. Cook began to exhibit controlling behavior in the summer of 2013 and threatened to take their son to another state after he was born. 8/8/18 RP 21-22; CP 53. These allegations were not supported by any sort of documentation, were admitted without subjecting Ms. Jenkins to cross-examination, and without the trial court having any opportunity to observe Ms. Jenkins's demeanor in court. The record contains no detail about when and in what context the alleged threats occurred. The only evidence of these incidents presented at the evidentiary hearing were the prosecutor's hearsay statements reiterating Ms. Jenkins's untested allegations in an offer of proof.

A trial court's finding that an ER 404(b) incident probably

occurred must be supported by substantial evidence. *State v. Kilgore*, 107 Wn. App. 160, 188, 26 P.3d 308 (2001). A trial court must hear testimony “when it cannot fairly decide, based upon the proponent’s offer of proof, that the ER 404(b) incident probably occurred.” *Kilgore*, 107 Wn. App. at 190. Here, the state failed to present any evidence supporting Ms. Jenkins’s allegations from the summer of 2013. No trier of fact could fairly decide that these incidents probably occurred in the absence of any evidence beyond the state’s offer of proof. The trial court abused its discretion when it found that the alleged misconduct from the summer of 2013 occurred by a preponderance of the evidence.

ii. June 2017 incident

The second instance of alleged misconduct the trial court admitted into evidence relates to an incident where Mr. Cook allegedly threatened to kill Ms. Jenkins if she reported prior threats and claimed he had been maintaining surveillance on her house and car. 8/8/18 RP 23; CP 53. These allegations were contained in Ms. Jenkins’s petition for a protection order and her written statement to police after she reported the text messages at issue in this case. Evidentiary Hrg. Ex. 3-4.

The written statements admitted at Mr. Cook's evidentiary hearing are insufficient on their own to prove that Mr. Cook previously threatened to kill Ms. Jenkins by a preponderance of the evidence. None of the allegations from June of 2017 were corroborated by live testimony. Police arrested Mr. Cook before he could contest the allegations contained in the petition for a protection order, and then Mr. Cook was denied a second opportunity to contest the allegations when Ms. Jenkins failed to appear at the pretrial evidentiary hearing.

Similar to the 2013 incident, the evidentiary record related to the 2017 allegations is limited to Ms. Jenkins's uncorroborated out-of-court statements. These statements alone do not make it more likely than not that Mr. Cook previously threatened to kill Ms. Jenkins. They are allegations unsupported by any other evidence. The state failed to meet its burden to prove the alleged misconduct from 2017 occurred by a preponderance of the evidence, therefore the trial court abused its discretion when it admitted the prior threat into evidence.

c. The danger of unfair prejudice substantially outweighs the evidence's probative value

“Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value.” *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). “The probative value of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point.” *State v. Arrendondo*, 188 Wn.2d 244, 264, 394 P.3d 348 (2017) (quoting *Old Chief v. United States*, 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)).

To convict a defendant of felony harassment, the state must prove beyond a reasonable doubt that the defendant (1) knowingly threatened to kill the victim immediately or in the future, (2) that the threat placed the victim in reasonable fear that the threat would be carried out, (3) that the defendant acted without lawful authority, and (4) that the threat was made or received in Washington. RCW 9A.46.020(2)(b)(ii).

The state did not need to rely on ER 404(b) evidence to present its case because it offered Ms. Jenkins being shaken when the police responded to her 911 call. RP 129. Ms. Jenkins also

explained at length about how she became afraid once the text messages turned threatening without discussing any prior allegations of misconduct against Mr. Cook. RP 82-84. These facts convey the same suggestion of reasonable fear without relying on unproven past allegations that are highly prejudicial to Mr. Cook.

Ms. Jenkins also testified that suspected Mr. Cook was the sender based on his focus on B.B., the discussion of the no contact order and the use of “cc” instead of “ck” RP 74-75, 78. Finally, the state presented evidence that Ms. Jenkins sought and was granted a temporary protection order against Mr. Cook based on prior threats. RP 61; Ex. 1.

The state did not establish that the probative value of the ER 404(b) evidence outweighed its overly prejudicial impact. If the state had no other evidence from Ms. Jenkins, its offer of the ER evidence may have been valid under ER 403, but that was not the state’s scenario. The ER 404(b) evidence admitted against Mr. Cook describes conduct virtually identical to what he was charged with in this case. Under these circumstances, the danger of unfair prejudice was greater than the probative value. *State v. King*, 75 Wn. App. 899, 907, 878 P.2d 466 (1994) (citing *State v. Jones*, 101

Wn.2d 113, 120, 677 P.2d 131 (1984), *overruled on other grounds*, *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989)).

The trial court abused its discretion by finding that the probative value of cumulative ER 404(b) evidence outweighed the unfair prejudice. Under ER 404(b) and ER 403, this court must remand for suppression of inadmissible evidence and grant Mr. Cook a new trial. *Jones*, 101 Wn.2d at 120.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED TEXT MESSAGES INTO EVIDENCE THAT WERE NOT PROPERLY AUTHENTICATED UNDER ER 901

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). A trial court abuses its discretion if its ruling is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Blair*, 415 P.3d 1232, 1235 (2018) (quoting *Powell*, 126 Wn.2d at 258). ER 901(a) provides that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a).

Evidence may be authenticated through the testimony of a witness with knowledge, or through distinctive characteristics. ER 901(b)(1); ER 901(b)(4). The party offering the evidence bears the burden of producing sufficient proof for a “reasonable juror to find in favor of authenticity or identification.” *State v. Bashaw*, 169 Wn.2d 133, 140-41, 234 P.3d 195 (2010) (quoting *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003)).

Here, the state offered four exhibits purporting to show a text message conversation between Mr. Cook and Ms. Jenkins. Ex. 6-9. The only testimony regarding authentication of these messages came from Ms. Jenkins, who did not recognize either of the phone numbers associated with the threatening text messages on July 17. RP 48-49. Furthermore, Ms. Jenkins changed her phone number roughly six months before receiving the messages and never provided the new number to Mr. Cook. RP 48. Ms. Jenkins speculated that Mr. Cook may have learned the number from CPS documents, but not such documents were presented into evidence to verify they listed her new number. RP 48. Ms. Jenkins believed the messages were from Mr. Cook because they discussed B.B., the protection order, and the sender replaced the letters “ck” with

“cc” in certain words but could only base her belief speculation. RP 36.

This court analyzed similar circumstances in *State v. Young*.¹ In that case, the defendant was being prosecuted for multiple crimes including communicating with a minor for immoral purposes. *Young*, 192 Wn. App. at 852. The state offered text messages purported to be between the defendant and the minor victims into evidence. *Young*, 192 Wn. App. at 853. The defendant challenged the admission of these text messages on appeal on the basis that there was insufficient evidence before the court to authenticate the messages as having come from him. *Young*, 192 Wn. App. at 853-54. The court upheld the admission of the messages in *Young*'s case, but it did so based on evidence that is not present in Mr. Cook's case.

In *Young*, the court found that the messages were sufficiently authenticated due to the testimony of the two minor victims who were also involved in the text message conversation. *Young*, 192 Wn. App. at 857-58. They testified that the messages being offered as evidence were from *Young* and that they knew this because the messages were from a contact associated with a

¹ 192 Wn. App. 850, 369 P.3d 205 (2016).

phone number Young had given to them or put into their phone himself. *Young*, 192 Wn. App. at 857-58. The court held that this testimony was sufficient for a reasonable juror to find that the text messages were in fact from the defendant because the testifying witnesses had personal knowledge of the sender's identity. *Young*, 192 Wn. App. at 858.

Young is distinguishable from Mr. Cook's case because the evidence used to authenticate the text messages in *Young* is not present in Mr. Cook's case. Unlike in *Young*, the recipient of the messages purported to be from Mr. Cook was not familiar with the phone number used to send the messages. The record contains no evidence regarding the identity of the person communicating with Ms. Jenkins beyond her own suspicions. There is no testimony showing that the phone numbers that were used to send messages were associated with Mr. Cook.

In the absence of more evidence establishing Mr. Cook as the source of the messages, the text messages admitted into evidence were not sufficiently authenticated. Authentication is a condition precedent to admissibility. ER 901(a). The trial court abused its discretion by admitting photographs that were not

properly authenticated. This court should reverse Mr. Cook's conviction and remand his case for a new trial where the text messages will be excluded from evidence unless the state can provide sufficient proof of their authenticity.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED AN INFORMATION INTO EVIDENCE SHOWING THAT MR. COOK HAD BEEN CHARGED WITH VIOLATING A PROTECTION ORDER AS A JUVENILE WHERE THAT CHARGE WAS OVERLY PREJUDICIAL AND HAD NO RELEVANCE TO MR. COOK'S TRIAL

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Evidence that is not relevant is inadmissible. ER 402. Even relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403.

Evidence of past crimes and misconduct is generally inadmissible because it could lead a jury to determine that a defendant committed the crime with which he or she is charged simply because he or she committed a similar crime in the past. *State v. Burkins*, 94 Wn. App. 677, 687, 973 P.2d 15 (1999) (citing

Lough, 70 Wn. App. at 312). Evidence of prior misconduct identical to the crime charged raises the greatest possibility of unfair prejudice. *King*, 75 Wn. App. at 907. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Redmond*, 150 Wn.2d at 495.

Here, the state offered an information from 2004 showing that Mr. Cook was charged with both telephone harassment and violating a protection order as a juvenile in 2004. Ex. 14. Mr. Cook was never convicted of violating a protection order in the 2004 case. Ex.14; RP 135. The telephone harassment charge was relevant to Mr. Cook's trial because the state was required to prove that Mr. Cook was convicted of harassing someone protected by a court order to prove the elements of felony harassment and felony cyberstalking. CP 191, 197. The state provided other evidence of this fact by producing the judgment and sentence from 2004 that showed the victim's last name and the original protection order that listed the same person's initials. Ex. 13, 15.

The second charge for violating a protection order had no relevance to Mr. Cook's trial. Proving that Mr. Cook had been charged with violating a protection order as a juvenile did not make

any fact of consequence in his trial more or less likely, thus it constitutes irrelevant evidence and is presumed to be inadmissible. ER 402.

The state argued that the information was relevant to show the full name of the victim in Mr. Cook's prior harassment case. RP 138-40. The probative value of including the information was minimal because the State had already produced two other documents that showed Mr. Cook had previously been convicted of harassing someone protected by a court order. Ex. 13, 15. The information provided cumulative evidence of this conviction that was highly prejudicial because admitting the information revealed to the jury that Mr. Cook had been charged with violating a protection order as a juvenile. This is the same charge he faced in the current case—which permitted the jury to convict based on Mr. Cook's past behavior-or past alleged behavior. *King*, 75 Wn. App. at 907.

In its oral ruling, the trial court acknowledged that admitting the information prejudiced Mr. Cook but failed to balance that prejudice with its probative value. RP 142-43. Instead, the trial court noted the prejudice and then pointed out that the information was a certified document and therefore could not be legally redacted to

remove the second count. RP 142-43. The court did not provide any legal grounds for this conclusion. The trial court admitted the information over Mr. Cook's objection without discussing its relevance in light of the other evidence the state admitted. RP 144.

The trial court abused its discretion when it admitted the information from 2004 because it was irrelevant to any fact at issue in Mr. Cook's trial while also being highly prejudicial to his defense. The state could still prove that Mr. Cook had been convicted of harassing someone protected by a court order through other evidence that did not reveal a past allegation that is identical to a charge he faced in this case.

Introducing this charge to the jury injected evidence of prior allegations against Mr. Cook into his trial for no other reason than to suggest he has a propensity to violate court orders, and therefore the jury should convict him in this case. The probative value of the information was outweighed by its prejudicial effect and the trial court abused its discretion by admitting it into evidence.

D. CONCLUSION

The trial court abused its discretion by erroneously admitting evidence on multiple occasions throughout Mr. Cook's trial. These

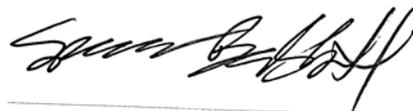
pieces of evidence consistently portrayed Mr. Cook as a controlling and abusive man while offering little probative value related to the allegations for which he was actually charged. The admission of this evidence deprived Mr. Cook of his right to a fair trial and he respectfully requests that this court reverse his convictions and remand his case for a new trial.

DATED this 3rd day of September 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBITT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and Anthony Cook/DOC# 300563, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on September 3, 2019. Service was made by electronically to the prosecutor and Anthony Cook by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

August 30, 2019 - 5:35 PM

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Appellate Court Case Title: State of Washington, Respondent v. Anthony Cook, Appellant
Superior Court Case Number: 17-1-01295-9

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