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Court of Appeals
Division II
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No. 53228-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY Q. COOK,

Appellant.

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

The Honorable James J. Dixon, Judge;
The Honorable Carol Murphy, Judge
Cause No. 17-1-01295-34

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# BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in accepting the State's offer of proof, exhibits, and supplemental memorandum as proof that prior behaviors of Mr. Cook occurred for purposes of ER 404(b) and whether the trial court properly exercised its discretion in finding that the probative value of two of the behaviors outweighed their prejudicial affect.

2. Whether error, if any occurred, in the trial court's admission of prior bad acts pursuant to ER 404(b) was harmless given the nature of the messages and overall facts and circumstances presented.

3. Whether the trial court properly found that the State had presented prima facie evidence that exhibits 4 and 9 were text messages sent by Mr. Cook to Ms. Jenkins where the messages discussed the son that they share in common, the no contact order that she had obtained prior to the messages, unrefuted references to "Anthony" made by Ms. Jenkins, and unique spelling characteristics that Ms. Jenkins was familiar with Mr. Cook using.

4. Whether the trial court abused its discretion by properly balancing the probative value of information contained in exhibit 14 with its potential prejudicial effect and admitting that

document along with limiting instructions negating its potential prejudice.

5. If this Court finds that the trial court should have redacted exhibit 14, whether the error was harmless given the limiting instructions that were also given.

B. STATEMENT OF THE CASE.

On July 17, 2017, Ariel Jenkins received a series of threatening text messages which she determined to be from the Appellant, Anthony Cook, her former boyfriend and father of her son [B.B.] based on the content of the text messages and specific writing styles that she knew to be used by Cook. Ex. 4-9[1]; RP 71-84.[2] Prior to July 17, 2017, Ms. Jenkins had sought and obtained an order of protection, prohibiting Cook from contacted her or her children. Ex 1, RP 60. The order was in effect on July 17, 2017. RP 66-67.

The State charged Cook with felony harassment and violation of a protection order. CP 6-7. During pretrial litigation, the

[1] Exhibits admitted at trial will be referred to as Ex. Exhibits admitted during the August 8, 2018, ER 404(b) hearing will be referred to as ER 404(b) hearing Ex.

[2] The report of proceedings from the jury trial that occurred on January 8, 9, 10 and 14, 2019, appears in two volumes, sequentially paginated and will be referred to as RP. The report of proceedings from the August 8, 2018 ER 404(b) hearing will be referred to as 2 RP and the report of proceedings from the sentencing hearing held on February 20, 2019, will be referred to as 3 RP. Any additional transcripts will be referred to by RP and their date.

State filed a motion to admit prior conduct of Cook pursuant to ER 404(b). CP 17-24. The State also filed an amended information charging felony harassment or alternatively felony cyberstalking for count one, alleging that Cook had previously been convicted of telephone harassment against a person who had specifically been named in a no-contact or anti-harassment order. CP 25-26.

Cook failed to appear for an ER 404(b) hearing scheduled for March 12, 2018, which resulted in an additional charge of bail jumping. CP 37, 39; RP ___. Cook also failed to appear at a status hearing that occurred on June 13, 2018, which resulted in a second charge of bail jumping. RP 207; CP 44.

The trial court conducted an ER 404(b) hearing on August 8, 2018. *See generally* 2 RP. The State noted that the hearing had been rescheduled many times and that the actual date for the hearing was scheduled the Thursday prior to the hearing. 2 RP 5. The prosecutor noted that the State worked on securing Ms. Jenkins' appearance and that she had not been able to arrange transportation on short notice. 2 RP 5-6. The prosecutor provided several reasons why the matter had been rescheduled previously and suggested that the hearing either be continued or be heard on an offer of proof. RP 174, 2 RP 6. The trial court directed that the

State proceed with the offer of proof, leaving open the possibility that the court could decide that it needed to hear testimony. 2 RP 8. The prosecutor then provided a verbal offer of proof and admitted four exhibits for the trial court to consider. 2 RP 8-9. The trial court and defense counsel requested that the State provide a supplemental memorandum clarifying each incident that the State was seeking to elicit. 2 RP 26, 27-28, 46; CP 51-52. The State also filed exhibits in support of its motion for admission. ER 404(b) hearing Ex. 3 and 4. The defense did not offer any contradictory evidence regarding the incident. 2 RP 28.

The trial court admitted only two of the behaviors that the State sought to introduce. CP 54, 2 RP 50-52. On the record the trial court discussed the factors for admission pursuant to ER 404(b) and balanced the probative value of the behaviors against their potential prejudicial effect. 2 RP 50-58. Written findings of fact and conclusions of law were also entered. CP 54-55.

During trial, outside the presence of the jury, the trial court considered the authenticity of the text messages that Jenkins had received. RP 32-38. The trial court allowed defense counsel to ask additional voir dire questions regarding the authenticity of the messages. RP 47-51. The trial court then found that the evidence

met the requirements of ER 901 as it relates to authentication or identification. Cook testified on his own behalf and denied that he sent the messages. RP 248.

The jury convicted Cook of felony harassment, violation of a no contact order and two counts of bail jumping. RP 351-352. With an offender score of 11 on count one and 9 on counts three and four, Cook was sentenced to a total term of 60 months. CP 455-464. This appeal follows. Additional facts are included as necessary and relevant in each of the argument sections below.

C ARGUMENT.

1. The trial court did not abuse its discretion by admitting evidence of prior bad acts pursuant to ER 404(b).

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The rule is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. State v. Mee, 168 Wn. App.

144, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011, 287 P.3d 594 (2012).

Washington courts use a four-part test to determine if ER 404(b) evidence is admissible. State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). The trial court must: 1) find by a preponderance of the evidence that the misconduct occurred; 2) identify the purpose for which the evidence is sought to be admitted; 3) determine whether the evidence is relevant to prove an element of the offense; and 4) weigh the probative value against the prejudicial effect. Id. On review, appellate courts review evidentiary rulings for abuse of discretion. State v. Embry, 171 Wn. App. 714, 731, 287 P.3d 648 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-284, 165 P.3d 1251 (2007).

A trial court is free to make its assessment of part one of the ER 404(b) test based solely on an offer of proof by the moving party summarizing what information it expects to be elicited at trial—an evidentiary hearing is never mandatory. State v. Kilgore, 147 Wn.2d 288, 292-95, 26 P.3d 308 (2001). Aside from posing a

danger of "degenerating into a court-supervised discovery process for defendants," requiring such hearings in any case where the defendant contests a prior bad act would "serve no useful purpose and would cause unnecessary delay in the trial process." Id. at 294-954. The trial court is in the best position to determine whether it can fairly decide, based on the offer of proof, that the prior bad act probably occurred. Id. at 295. If it cannot do so, the decision whether or not to conduct an evidentiary hearing is left in the sound discretion of the court. Id. In either case, however, whether the information considered is in the form of an offer of proof or an evidentiary hearing, the rules of evidence do not apply to these types of preliminary questions. Id.; ER 104(a).

Despite Cook's assertion that Ms. Jenkins failed to appear at the hearing on ER 404(b), the deputy prosecutor at the hearing noted that the hearing had been rescheduled many times and that the actual date for the hearing was scheduled the Thursday prior to the hearing. 2 RP 5. The prosecutor noted that the State worked on reaching Ms. Jenkins and that she had not been able to arrange transportation on short notice. 2 RP 5-6. The prosecutor provided several reasons why the matter had been rescheduled previously

and the record supports that one reset occurred when Cook failed to appear for the hearing. RP 174, CP 37.

With Ms. Jenkins unable to appear, the prosecutor suggested either continuing the ER 404(b) hearing to the week of trial or moving forward with an offer of proof. 2 RP 6. The trial court directed that the State proceed with the offer of proof, leaving open the possibility that the court could decide that it needed to hear testimony. 2 RP 8. The prosecutor then provided a verbal offer of proof and admitted four exhibits for the trial court to consider. 2 RP 8-9. The trial court and defense counsel requested that the State provide a supplemental memorandum clarifying each incident that the State was seeking to elicit. 2 RP 26, 27-28, 46; CP 51-52.

The trial court ultimately admitted only two of the incidents that the State sought to introduce. CP 54, 2 RP 50-52. With regard to the first two incidents that the State offered, the trial court found that it could not find that the incidents occurred without a further evidentiary hearing, however, a further evidentiary hearing was unnecessary because the incidents lacked sufficient probative value to overcome prejudice. 2 RP 51-52; 52-53. With regard to the third incident that the State offered, the trial court found by a

preponderance of the evidence that the incident occurred, but denied admission based on the balancing test. 2 RP 54-55.

The trial court considered the offer of proof on the fourth incident that the State sought to admit and found "that it [was] adequate for the Court to make a factual finding that [the] acts occurred, and they are specific enough to make [the] finding that the acts occurred." 2 RP 55-56. The specific incident was described as

> In the Summer of 2013, Ariel Jenkins gave birth to a child in common with the defendant, Anthony Cook. After the birth, the defendant began using the child as a means of attempted to [sic] 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, most often via text, to harm Ms. Jenkins and to take their child from her and into another state.

CP 54. The State had offered this information in the form of its supplemental memorandum submitted during the hearing, CP 52, and during the verbal offer of proof. 2 RP 21-22. The defense did not offer any contradictory evidence regarding the incident. 2 RP 28.

The other incident that the trial court deemed admissible was

> 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 54. This set of incidents was also described in the State's supplemental memorandum regarding ER 404(b), CP 53, and during the prosecutor's offer of proof. 2 RP 22-23. Additionally, the incidents formed the basis for the protection order that Ms. Jenkins sought and the State offered information regarding the incidents contained in Ms. Jenkins' petition for a protection order, ER 404(b) hearing, Ex. 3, and a sworn statement from Jenkins, signed under penalty of perjury, which indicated that Cook had stated that he was engaging in surveillance of her and that he had made previous threats to kill her. ER 404(b) hearing, Ex. 4. The defense did not offer any evidence regarding the incidents. 2 RP 28.

The trial court did not err in finding that the State had proven those incidents by a preponderance of the evidence. The offer of proof and exhibits sufficiently demonstrated that the incidents occurred and the State's offer and exhibits constituted the only evidence before the trial court at the ER 404(b) hearing. The decision whether to conduct a further evidentiary hearing is left to the sound discretion of the trial court. State v. Kilgore, 147 Wn.2d

at 295. There was no error in finding that the State had proven the incidents by a preponderance of the evidence.

The trial court also properly found that the incidents were offered for the legitimate purposes of demonstrating the reasonable fear of Ms. Jenkins for the crime of harassment and for proving the "identity of the harasser." CP 54. The evidence was highly probative for both issues. In order to prove the crime of harassment, the State had to prove that Cook, "by words or conduct" placed Ms. Jenkins in reasonable fear that the threats would be carried out. RCW 9A.46.020. Prior acts such as those argued in this case are relevant to the reasonable fear element of felony harassment. State v. Ragin, 94 Wn. App. 407, 411-412, 972 P.2d 519 (1999). Additionally, the fact that Cook denied that he sent the messages in this case made comparison of prior threats that he had made to the threats alleged in the case extremely relevant as proof of his identity. RP 248.

The trial court properly exercised its discretion and conducted the necessary balancing test for both incidents. 2 RP 56, 57, CP 55. The trial court followed the correct procedure pursuant to ER 404(b) and ER 403. Cook's argument that Ms. Jenkins' demeanor when she contacted law enforcement and

knowledge of his writing style were sufficient to demonstrate Cook's identity and the fear that Ms. Jenkins had in regard to his messages, overlooks the fact that the State has to prove each element of the offenses charged beyond a reasonable doubt and that the State had to prove the reasonableness of Ms. Jenkins' fear. The evidence was highly probative to the elements charged and it cannot be said that the trial court abused its discretion by finding that the probative value outweighed the prejudicial effect of admission.

2. If this Court finds that the trial court abused its discretion by admitting Cook's prior acts, that error was harmless in the context of this case.

Any error in the admission of prior misconduct evidence is harmless unless the reviewing court finds that within reasonable probabilities the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). If the Court found that admission for either of the stated purposes was improper, the admission is still harmless if one of the stated purposes was sufficient. State v. Foxhoven, 161 Wn.2d 168, 179, 163 P.3d 786 (2007).

During the testimony of Ms. Jenkins, the issues which the trial court allowed pursuant to ER 404(b) formed only a minimal part

of the testimony. Ms. Jenkins testified that her relationship with Cook ended, "due to safety concerns" for her and her children. RP 55. She later stated, "There were problems between me and him. We couldn't co-parent without there being threats or profanity used or people getting upset or different issues." RP 56. When asked about the specific threats, Ms. Jenkins testified

> There were threats to harm me, or my kids would never see me again. There were threats to take [B.B.], and I would never see him again. There were threats to - - you know, my children would disappear or he would be following me, someone was always watching me. That I should be careful not to turn my back. I mean, I had it to the point where I was scared to leave my house.

RP 57. Jenkins indicated that these threats normally occurred via text message and usually when something wasn't going Cook's way. RP 57.

Jenkins testified regarding the 2017 incidents in relation to the reason for obtaining a protective order. RP 60. She testified

> When [B.B.] was with him for a few weeks due to CPS placement, once I had got him back, there were a lot of threats that he was going to come take him, I would never see him again. And my main concern was his safety and the fact that, you know, if he was to go to his school or something like that and disappear with him out of state, I had nothing to protect him.

RP 60. Jenkins added "There were threats to kill me, there were threats to - - you know, my kids would never see me again. There were threats to - - basically nobody could protect me." RP 60.

While discussing a message (from the charged time period) that stated "You will never see [B.B] again," Jenkins stated, "there were previous threats of kidnapping [B.B.] and that I would never see him again if I didn't comply with A, B, or C, so I took that to mean the continuing threats that I had received over the years." RP 79. Jenkins was asked about a reference to a truck in exhibit 7, and stated, "He had previously sent a message - - he either sent a message or left a message on my mom's voicemail saying that he knew my husband had been driving my truck and been around [B.B.] because he had pictures of it and had been following my vehicle." RP 80.

When the deputy prosecutor asked the ultimate question of Ms. Jenkins about why she believed Cook's threats, she simply stated, "Because there's been previous threats and violence and safety concerns." RP 83. Given the content of exhibits 4-9, there is little possibility that the jury would not have convicted Cook even without the admission of the prior conduct. In the grand scheme of Ms. Jenkins' testimony, the prior conduct was not overly

emphasized. Moreover, simply reading the messages in exhibits 4-9 demonstrates the obvious conclusion, given the conduct and other factors discussed by Ms. Jenkins regarding writing style, that Cook sent the threatening messages.

As argued above, the trial court did not abuse its discretion in admitting two out of five instances of prior conduct that the State offered; however, even if this were error, any error did not have a reasonable probability of affecting the jury's verdict. This is especially true where the trial court included a limiting instruction, limiting the jury's consideration of behavior prior to July 17, 2017, to the sole purposes of considering the reasonableness of Ms. Jenkins' fear and determining the identity of the sender of the messages on July 17, 2017. RP 290-291. If this Court finds that any error occurred with regard to the admission of prior acts pursuant to ER 404(b), this Court should also find that error to be harmless.

3. The trial court did not abuse its discretion in admitting text message conversations pursuant to ER 901.

Appellate courts review a trial court's admission of evidence for an abuse of discretion. State v. Bradford, 175 Wn. App. 912, 927, 308 P.3d 736 (2013), *review denied*, 179 Wn.2d 1010 (2014).

"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). ER 901(b) provides an illustrative, nonexclusive list of how authentication may occur, which includes "testimony of a witness with knowledge" and "distinctive characteristics and the like." ER 901(b)(1) and (4). "The party offering the evidence must make a prima facie showing consisting of proof that is sufficient "to permit 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), *overruled on other grounds*, State v. Guzman Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012).

The proponent of the offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that the evidence is what it purports to be. In re Det. of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015); State v. Andrews, 172 Wn. App. 703, 708, 293 P.3d 1203 (2013). A trial court may rely upon such information as law opinions, hearsay, or the evidence itself in making the determination as to whether the proponent has made a prima facie showing. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2017). "Such information must be reliable, but need

not be admissible." Id. A prima facie showing of authenticity is met if the proponent shows enough proof for a reasonable fact finder to find in favor of authenticity. State v. Payne, 117 Wn. App. 99, 106, 109, 69 P.3d 889 (2003).

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Young, 192 Wn. App. 850, 854, 369 P.3d 205 (2016). In this case, the prosecutor asked to question Ms. Jenkins regarding the testimony outside of the presence of the jury. RP 30. Ms. Jenkins was familiar with Cook's style of writing in text messages and had a child in common with him. RP 32-33. Ms. Jenkins reviewed the text messages in Exhibits 4-9. RP 33. She concluded they were from Cook based on the content of the messages, Cook's unique preference for often spelling words that end with ck with a cc, the fact that the messages discussed their shared son and the protection order that she had just obtained, and the fact that she referred to the writer of the messages as Anthony and was not corrected. RP 33-37. EX 4-9. The trial court even allowed the defense to conduct additional questioning outside the presence of the jury where Ms. Jenkins indicated that Cook had received her

phone number through their Child Protective Services case. RP 48.

The content of the messages included a statement, "I warned u, yr in laws, and yr mom what I do wit that burner when it comes to takin MY son from me!" EX 6. When Jenkins replied to the writer and specifically referred to him as "Anthony" the writer replied, "Yah Ok. Sorry to tell u but u can't prove its me so good luck with that bitch." EX 7. The writer further referred to the son that Jenkins and Cook have in common by his first name. EX 8, 9, RP 36, 38.

The content of the messages combined with the informed lay opinion of Ms. Jenkins were more than adequate for a prima facie showing of authenticity. The trial court applied the correct standard in making the finding that the exhibits were sufficiently authenticated. RP 51-52. The trial court's ruling was not manifestly unreasonable or based on untenable grounds. This Court should find that the trial court properly exercised its discretion in admitting the text message conversations.

4. The trial court properly balanced the probative value of Exhibit 14 against its prejudicial effect and did not abuse its discretion by admitting the document along with limiting instructions negating potential prejudice.

As charged in this case, the crimes of Felony Harassment and Felony Cyberstalking required the State to prove that Cook had previously been convicted of a crime of harassment of a person specifically named in a no-contact or no-harassment order. CP 43-44, RCW 9A.46.020(2)(b)(i); RCW 9.61.260(3)(a). The State alleged that Cook had previously been convicted of telephone harassment involving a specific victim, J.K., who was the subject of an order of protection. CP 43-44. To prove this element of the offenses, the State offered exhibits 13, 14, and 15.

Exhibit 13 is a temporary order of protection which protected J.K. from Cook and referred to J.K. by her complete first and last name. EX 13. Exhibit 15 is an order on adjudication in Thurston County cause number 04-8-849-1, indicating that Cook was guilty of the crime of telephone harassment, and indicating that he was to have no contact with J.K.'s family, but referencing only the K family. EX 15. The order on adjudication did not have a specific reference to J.K., thus the State offered exhibit 14, which is a charging document from Thurston County cause number 04-8-849-1, which referred specifically to J.K.'s initials and date of birth, as well as referenced the protection order cause number listed in exhibit 13. RP 136, EX 13, EX 14.

When defense counsel for Cook objected to the admission of exhibit 14, the State indicated that "it shows that the order was, in fact, still valid at the time of the harassment." RP 136. The State further noted that Ex. 15 referenced only the K family without specifically referencing J.K. RP 137. The trial court recognized that there was no offer from the defense for any stipulation which could alleviate potential prejudice and stated,

> 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 which in Count 2 apparently was dismissed or perhaps Mr. Cook was found not guilty, its not clear to this Court, but the Judgment and Sentence in that cause of action refers only to a conviction for Count 1.

RP 142. The Court continued,

> However, Exhibit 14 is a certified document. It would be improper, and, in fact, as I have been informed by an employee of the clerk's office, it would be unlawful for anyone to alter a certified document. So the Court cannot alter 14. So the Court can't white-out Count 2.

RP 143. The Court then indicated that it was inclined to give a limiting instruction with respect to Exhibit 14 that the jury "shall disregard any language in Exhibit No. 14 that references violation of protection order or anything after line 19. RP 143.

The trial court then noted,

> in the absence of any stipulation from the defendant, the probative value of 14 outweighs the prejudicial impact to Mr. Cook, especially taking into consideration the instruction the Court intends to provide to the jury, taking into account the burden on the State to establish all elements of the charged offense, and the State has a right to attempt to prove all elements of the offense, including an offer of Exhibit 14. Otherwise, as referenced by the State or argued by the State, there is no nexus between the existence of a protection order and the conviction.

RP 143-144.

A trial court's ruling under ER 403 is reviewed for abuse of discretion. State v. Scherf, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. Id. Here, the trial court properly weighed the prejudicial effect the evidence with the need for the State to close the loop as to the charged victim of the prior offense. This was a proper exercise of the trial court's discretion. Moreover, the court specifically instructed the jury to disregard any language in the exhibit past line 19, including any reference to violation of a protection order. RP 145-146.

The trial court further instructed the jury that exhibits 13, 14, and 15 were admitted for "the limited purpose of whether or not the

state has proven that the defendant was previously convicted of the crime of harassment against a person who was specifically named in a no contact order or a harassment order." CP 186, RP 291. The jury was specifically directed that it could not consider those exhibits for "any other purpose." CP 186, 291. The trial court clearly did not abuse its discretion in weighing the probative value against the prejudicial effect and adequately negated any prejudice by instructing the jury not to consider the exhibits for any purpose other than that which they were offered.

5. If this Court finds that the trial court should have redacted Exhibit 14, any error was harmless.

A copy of a public document, certified by the county clerk under his or her official seal as a true copy, has the full force and effect of the original for all purposes. RCW 36.23.067. Such a record is admissible in the courts of this state. RCW 5.44.040. In this case, the trial court indicated that he could not "white-out" the certified record that had the seal of the county clerk on it. RP 143.

Whether a certified record can be redacted when submitted as evidence is not clear in the law. On one hand, once the seal is affixed by the county clerk, the document has the same affect as the original and, therefore, should not be tampered with. On the

other hand, our Courts have recently recognized some authority of the trial court to redact exhibits. State v. Taylor, 193 Wn.2d 691, 702, 444 P.3d 1194 (2019). In Taylor, Our State Supreme Court noted that there had not been an objection to the specific terms included in a no contact order, therefore objections to the terms of the no contact order were not preserved for review. Taylor, at 702. However, the Court noted "a trial court may redact any portion of a no-contact order that poses a risk of unfair prejudice." Id.

In this case, the trial court likely could have substituted exhibit 14 with a redacted copy of it, but was not required to do so. It is also important to note that the defense objected to the admission of exhibit 14 in its entirety and did not request that the trial court substitute the exhibit with a redacted copy. RP 140-141. Even if this Court finds that the trial court should have redacted exhibit 14, any error in not doing so was harmless.

Evidentiary error is harmless "unless within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012). In this case, the trial court negated any prejudice by instructing the jury not to consider the potentially

prejudicial portion of the exhibit and limiting the purpose for which the exhibit could be considered. RP 145-146, 291. Juries are presumed to follow instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013); State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). There is no probability that the not redacting exhibit 14 altered the outcome of this case.

D. CONCLUSION.

The trial court properly conducted a hearing pursuant to ER 404(b) and properly exercised its discretion in admitting two prior incidents which were highly probative to proving that the person who sent the messages was Cook and that Ms. Jenkins' fear of the threats was reasonable. If this Court finds any error in the trial court's decision on ER 404(b), the error was harmless because the evidence in the case was such that the admission of the prior behaviors did not have a reasonable probability of affecting the outcome. The trial court did not abuse its discretion when it found that the text messages were properly authenticated pursuant to ER 901. Additionally, exhibit 14 was necessary evidence in closing the identity of J.K. and proving that Cook had the proper requisite offense for the purpose of the felony harassment and felony

cyberstalking offenses. The trial court did not abuse its discretion in finding that the probative value outweighed the prejudicial affect. If this Court finds any error in the admission of exhibit 14, that error was rendered harmless by the trial court including instructions which directed the jury not to consider the portion of the document that the defense found objectionable.

Respectfully submitted this 4th day of November, 2019.

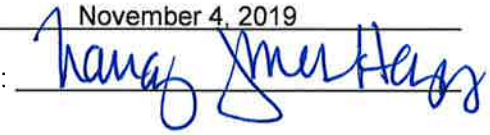
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 4, 2019

Signature: 

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| **Superior Court Case Number:** | 17-1-01295-9 |

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