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No. 53433-9-II
Thurston County Superior Ct. No. 18-1-00641-8

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

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

DANIEL P. BAKKER,
Defendant / Appellant.

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

The Honorable Carol Murphy, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that ER 404(b) did not apply to introduction of evidence of lawful gun possession only minimally relevant to the charged crimes.
2. Had the trial court properly applied ER 404(b), the evidence would have been excluded.
3. The trial court abused its discretion in finding that the prejudice of the evidence of legal gun ownership was outweighed by its probative value.
4. The improper admission of the gun evidence implicates appellant's Article 1, section 24, and Second Amendment, rights to lawful gun possession.
5. The evidentiary errors were not harmless.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that ER 404(b) did not apply to the question of whether to admit evidence of lawful possession of a gun neither used nor threatened to be used at the time of the crime to show a victim reasonably feared threats which did not involve use of the gun but only of being "beat?"
2. Had the trial court properly applied ER 404(b) to the evidence that Bakker was lawfully exercising his state and federal rights to lawful possession of a gun in a locked container in his closet, would the evidence have been excluded because its probative value was minimal and substantially outweighed by the extremely prejudicial effect?
3. Did the trial court abuse its discretion in concluding that there was little prejudice to evidence of lawful gun ownership being admitted where our state's highest court has recognized to the contrary that gun ownership is an issue which raises the spectre of serious and potentially

very strong prejudices of many jurors?

4. Can evidentiary errors be deemed “harmless” where they affected the crucial issue of credibility and invited the jury to draw a negative inference from lawful, constitutional conduct without properly applying the relevant rules?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Daniel P. Bakker was charged by First Amended Information with second-degree assault, fourth-degree assault (“domestic violence”), harassment (“domestic violence”), and bail jumping. CP 29-30; RCW 9A.36.021(1)(a); RCW 9A.36.041(4); RCW 9A.46.020(1); RCW 9A.76.170(3)(c); RCW 10.99.020. Pretrial proceedings were held on April 16 and 20, May 1, July 12, August 30, November 1, December 6 and 7, 2018, February 14 and 28, March 14 and 26 and April 25, 2019, and a jury trial was held before the Honorable Judge Carol Murphy on May 6-10, 2019.¹

¹The verbatim report of proceedings consists of multiple volumes, only five of which are chronologically paginated. They will be referred to as follows:

April 16, 2018, as “1RP;”
April 20, 2018, as “2RP;”
May 1, 2018, as “3RP;”
July 12, 2018, as “4RP;”
April 30, 2018, as “5RP;”
July 12, 2018, as “6RP;”
August 30, 2018, as “7RP;”
November 1, 2018, as “8RP;”
December 6, 2018, as “9RP;”
December 7, 2018, as “10RP;”
February 14, 2019, as “11RP;”

The jury found Mr. Bakker not guilty of second-degree assault and a “lesser” of third-degree assault but guilty of the “lesser” of fourth-degree assault (victim Quisenberry) for count I. CP 324-26. It also convicted him of fourth-degree assault (victim Pardo) (count II) with a “domestic violence” designation, harassment (Pardo) (count III), with a “domestic violence” designation, and bail jumping (count IV). CP 327-31.

At sentencing on May 22, Judge Murphy ordered a standard range sentence of “work crew.” CP 334-43; RP 754-95. Mr. Bakker appealed and this pleading follows. CP 344-54.

2. Testimony at trial

On March 24, 2018, there was an incident at the home Daniel Bakker had been living in for a few months with his girlfriend, Kaela Pardo. TRP 179, 181, 308, 345, 489, 569. Involved were Pardo, Bakker and Zachary Quisenberry, Bakker’s friend and a fellow commercial fisherman who sometimes worked for Bakker’s dad. TRP 200-22. Everyone admitted that Pardo’s dog got kept getting out and that was a big part of the dispute. TRP 200, 234-35, 309-12, 347, 516-32. But

February 28, 2019, as “12RP;”
March 14, 2019, as “13RP;”
March 26, 2019, as “14RP;”
April 25, 2019, as “15RP;”
the five chronologically-paginated volumes containing the trial proceedings of May 6-10, 2019, and the sentencing of May 22, 2019, as “TRP.”

Quisenberry, Pardo and Bakker had different versions of events.

Mr. Quisenberry was there to pick up a paycheck and stayed to drink with Bakker and talk about a “vlog” they wanted to start together. TRP 177-79. When Pardo got home about half an hour later, Quisenberry heard some of the argument and said Pardo was angry that Bakker was drinking and Bakker seemed to be complaining about chores Pardo was not doing. TRP 183-84, 191. According to Quisenberry, both were yelling although Bakker was yelling more and Pardo seemed to be trying to calm things more than Bakker, but overall it was “a typical couple’s argument.” TRP 183-84, 191.

Mr. Quisenberry had only been at the home an hour or two and he and Bakker had already had to go find Pardo’s dog when it had gotten out. TRP 234. The two men had had to go searching, with Quisenberry looking around outside on the lot and Bakker having to cross a busy street to ultimately find the dog in a parking lot. TRP 234-35. Mr. Quisenberry said “a lot of” the arguing had to do with the dog and Pardo’s complaints Bakker had been “aggressive” with the dog because he was upset that it kept getting out. TRP 200. During the argument, Quisenberry heard Bakker say things to Pardo like, “[w]hat do you know?” and “[y]ou’re a dumb bitch[.]” TRP 200.

Ms. Pardo said Bakker had called her before she left work that day

angry because her dog got out again. TRP 309-12, 347. She also said he did not want her to stop to get groceries on the way home because he wanted her home right away. TRP 309-12, 347. Ms. Pardo admitted her dog kept getting out and that when she got home that night she sang out “who let the dogs out,” parroting a popular song. TRP 312. She said Bakker did not appreciate it and responded by raising his middle finger at her. TRP 312.

Ms. Pardo said Quisenberry then left to go to the store. TRP 312. According to Pardo, Bakker started yelling at her, threw a jacket on the floor, told her she had raised a terrible dog, said he should beat her with a stick and called her names like “bitch,” “evil,” and “cunt.” TRP 312, 349. He was in a rage, she said, not just throwing things but even trying to overturn the couch, all the while threatening to “beat” her. TRP 334.

Ms. Pardo maintained she was not yelling herself and was never verbally aggressive with Bakker that night. TRP 313, 353. She admitted, however, that she had yelled at him that he needed to leave the house. TRP 334. She told him he could not talk to her that way and needed to go get some fresh air or something and he then grabbed her wrists. TRP 313, 334, 353.

When Quisenberry returned from the store, he saw Bakker holding onto Pardo’s wrists. TRP 239. Mr. Quisenberry said Bakker let go just as

Quisenberry walked in and Quisenberry had not said anything. TRP 239-40. Ms. Pardo, in contrast, said Bakker kept holding on until Quisenberry told him to let go. TRP 314.

On cross-examination, Pardo admitted that, when Bakker was yelling at her, Pardo had herself physically contacted Bakker before he grabbed her wrists. TRP 351. She conceded that she put her arms up, saying it was to keep him away. TRP 351. She denied pushing at him, however. TRP 351. She then stated that not only had he grabbed her wrists, he had hit her arm. TRP 351. A moment later, she clarified he had twisted, not hit, her arm. TRP 351-52.

None of this was hard enough to cause any marks or redness. TRP 353, 410-11.

Daniel Bakker denied “flipping off” Pardo and said that things were fine that evening until Pardo went into their bedroom and saw that her dog was wearing a “shock collar,” which made her mad. TRP 506, 594. When Quisenberry went to the store, Bakker said, Pardo and Bakker were in the kitchen arguing about the dog having gotten loose and it devolved into arguing about him having to do all the chores and her not doing anything. TRP 506-13. Mr. Bakker leaned down to pick up the dog and Pardo grabbed his shoulder and pushed him up to standing, telling him to leave the dog alone. TRP 513. He caught her left hand and asked,

“[w]hat did I do to upset you so much? I don’t understand.” TRP 514.

Before she answered, Quisenberry came back from the store so they stepped back. TRP 514.

Mr. Bakker denied that he grabbed Pardo’s wrists during that discussion. TRP 595.

At that point, Mr. Quisenberry recalled trying to “kind of diffuse things” by suggesting he and Bakker go smoke a cigarette outside. TRP 184. After that, they kept drinking and hanging out. TRP 184. According to Quisenberry, at some point Bakker decided to “kind of roughhouse a little” with him. TRP 184-86. Mr. Quisenberry, however, was concerned that if they wrestled it could “break the coffee table and stuff like that.” TRP 184-86.

Mr. Quisenberry was not physically threatened by Bakker. TRP 241. Of the two men, Quisenberry was both heavier and larger. TRP 241. But Bakker was getting “a little aggressive” in his language, saying Quisenberry was a big guy so should be able to wrestle and calling Quisenberry a “pussy.” TRP 186, 241.

Mr. Quisenberry told Bakker he did not want to hurt him or break anything in the house. TRP 186. When Bakker persisted and continued to try to wrestle, Quisenberry grabbed Bakker’s arms and held them to Bakker’s side, saying something like, “[s]top, Daniel,” before pushing

Bakker away. TRP 187, 242. After that, Quisenberry said, Bakker and Pardo continued to argue and Bakker got upset and decided he wanted to drive to a hotel. TRP 188.

Ms. Pardo, however, did not recall this happening: instead, she thought what happened after Quisenberry came back was that Bakker had decided to leave and had grabbed his keys to go drive. TRP 314, 354. Ms. Pardo had been telling Bakker to go somewhere to cool off but now started telling him not to go and that she did not want him driving. TRP 356.

Mr. Quisenberry said it was after the first bout of wrestling and that Bakker said he was going to leave and go to a hotel. TRP 188, 242, 391-92. According to Quisenberry, both he and Pardo told Bakker not to do that because he was inebriated. TRP 182. Mr. Quisenberry would later testify that he offered to get an “Uber” and go with Bakker but Bakker demurred. TRP 189, 242.

On direct examination, the next thing that Quisenberry said was that Mr. Bakker then declared that he was going to walk to a hotel and left, with Quisenberry staying outside and waiting for him to come back. TRP 189.

On cross-examination, however, more detail came out. TRP 243. Mr. Quisenberry admitted that he and Pardo had confronted Bakker at his

car, that they had both physically tried to take Bakker's keys from him and that Quisenberry had grabbed Bakker in his car and pulled him out. TRP 243-45. Mr. Quisenberry also said he reached into Bakker's vehicle over the sitting Bakker, pushing the car's gear into park. TRP 245-46.

Mr. Quisenberry described grabbing Bakker by his shoulder and waist and physically pulling Bakker out of the car. TRP 248. Mr. Bakker did not "cooperate" but Quisenberry did not stop. TRP 248. After he got Bakker out of the car, Quisenberry said, Pardo grabbed the keys. TRP 248.

The whole time, Quisenberry said, Bakker was objecting, saying he wanted to drive and telling Quisenberry "fuck you." TRP 248. When Quisenberry finally had him out of the car, however, Bakker walked back into the house on his own steam. TRP 248.

Mr. Bakker testified that, when Quisenberry had returned from the store, Bakker had tried to defuse things with Pardo, suggesting hanging out and having dinner. TRP 514. She was still pretty upset, though, so Bakker decided to leave. TRP 514. He grabbed his coat and keys and started out to his vehicle when he heard Pardo say, "[h]e's going to drive his car." TRP 518. She then followed him out and started jumping him, trying to grab his keys. TRP 518-19.

Ms. Pardo kept trying to grab Bakker's keys even as he got into the

vehicle, climbing onto him as he was sitting in the car. TRP 521. He kept trying to tell her he was not planning to drive but Pardo would not listen. TRP 522.

At this point, Quisenberry finally came outside and looked perplexed by what he saw. TRP 522-27. Mr. Quisenberry then came over and put his forearm against Bakker's throat, holding him in the car while Pardo kept reaching for the keys. TRP 522-97. This surprised Bakker, who asked Quisenberry what he was doing but Quisenberry kept restraining Bakker for a few more seconds until Pardo succeeded in getting the keys. TRP 526. Mr. Bakker then felt Quisenberry grab Bakker and yank him out of the car, causing Bakker's cell phone to fall to the ground. TRP 526, 597.

Mr. Bakker was very unhappy and cursed, telling Quisenberry if he ever touched Bakker like that again he would find himself in jail. TRP 527. Mr. Quisenberry apologized but Bakker picked up his phone, said he was leaving and walked back towards his car. TRP 527. Ms. Pardo still had his keys, however, so Bakker kept walking and went around the property a little, then sat in front of his fence on the grass for awhile. TRP 528, 601. Mr. Quisenberry came outside, they talked and then both headed back inside. TRP 528, 601.

Back inside, Quisenberry said, Bakker started talking about

walking to a hotel. TRP 249-50. Mr. Quisenberry said Pardo had given him Bakker's keys. TRP 250. They were in Quisenberry's pocket. TRP 250.

Mr. Quisenberry said Bakker tried to get the keys back from him. TRP 250. Mr. Quisenberry made it clear, however, that Bakker did not assault or grab Quisenberry when trying to retrieve the keys. TRP 250. Eventually, Bakker gave up and left on foot. TRP 189.

Mr. Quisenberry testified that he thought Bakker would probably come back, so he waited outside until that happened. TRP 189, 250. When Bakker returned, he laid down in the grass in the yard, his hood pulled over his head. TRP 189, 251. Mr. Quisenberry and Pardo went over to Bakker and "got him," telling him to come inside and lay down where it was warm." TRP 189-90.

Ms. Pardo would recall, contrary to Quisenberry, that Bakker had the keys when he walked off. TRP 316, 360-61. She remembered standing outside by Bakker's car with Quisenberry to ensure Bakker did not come back and try to drive. TRP 316, 360-61. For his part, Quisenberry remembered being outside alone, with Pardo coming out a few times to ask if Bakker had yet come back. TRP 189. Ms. Pardo denied ever going inside. TRP 317.

Ms. Pardo testified that, unlike Quisenberry, she did not see

Bakker lying down in the grass. TRP 317. Instead, she said, the next time she saw him Bakker was “crawling in the grass and watching” them, so Quisenberry went over, picked him up and walked with him into the house. TRP 317, 361-62.

After they went inside, Pardo said, Quisenberry tried to get Bakker to lay down and go to sleep on the couch while Quisenberry cooked. TRP 190, 252, 317, 364-65. About 15 minutes later, Pardo claimed, Bakker tried to sneak out of the house with his keys - she presumed, to get in the car and drive. TRP 318, 368. Ms. Pardo admitted she physically grabbed the keys from Bakker, taking them from his pocket and tossing them to Quisenberry. TRP 318, 369. She said Bakker then grabbed her wrists and did not let go when she told him it hurt. TRP 318, 370. He did not push, hit, kick or touch her otherwise. TRP 370.

Ms. Pardo would testify that she then “kneed” Bakker in the crotch. TRP 318. He fell to the floor and pulled her down, too, not letting go of her legs or letting her up, she said. TRP 318. She also said she told him it hurt and he said she was lying. TRP 318, 372. Somehow, however, they got up and went into the kitchen to start to eat dinner. TRP 372-73.

In contrast, Mr. Bakker said that, once he had come back inside, everything was generally okay for about 20 minutes. TRP 530. Ms. Pardo was still upset, though, and not really speaking to him. TRP 530. Mr.

Quisenberry started cooking and Pardo brought out her dog. TRP 530. Because the dog was near the couch and Pardo did not want him near the dog, Mr. Bakker got off the couch, which was too short to lay on anyway. TRP 530-32. He was lying on the floor where he always lay near the couch when Pardo walked out of the bedroom and past him. TRP 531.

Mr. Bakker testified that he tugged on Pardo's pant leg a little as she went back and tried to apologize for whatever had made her mad. TRP 531, 590. He also told her he did not understand why they were arguing or why she was upset. TRP 531, 590. She responded by leaning over him and then sitting on his chest looking angry. TRP 532-33. Ms. Pardo then said something but the jury was not allowed to know what. TRP 533.

She got up and he stood up, following her towards the kitchen. TRP 533-34. He saw his keys and went to take them and leave. TRP 533-34. As Bakker turned to go out the door, Pardo came over, pushed Bakker and grabbed his keys. TRP 534. According to Bakker, Pardo then stepped right into him with her knee to his genitals and he "went down," although she had missed. TRP 534. Ms. Pardo seemed happy after that, Bakker said, and he had quipped, "[t]he beatings will continue until morale improves." TRP 535.

Once dinner was made, Pardo said, while they were eating, she

started “removing steak knives,” feeling like there was “a threat there.” TRP 318. She said Bakker was “being very aggressive,” trying to get Quisenberry to eat the dinner and saying he would not eat it because Pardo had not made it. TRP 318, 370-71. Ms. Pardo would later testify that Bakker was calling her names and saying she should have made dinner right away when she got home because it was her job. TRP 319, 371. Ms. Pardo also thought Bakker was “aggressive” towards Quisenberry during dinner and then tried to wrestle him. TRP 319. She described running around to move things out of the way, saying that Bakker had “kicked the heater at one point and put a dent in it.” TRP 319.

Ms. Pardo testified that Bakker let Quisenberry up after a moment of wrestling. TRP 319. But then, she said, Bakker “took [Quisenberry] down from behind at the knees and kicked him.” TRP 319. Ms. Pardo said Bakker again started trying to wrestle Quisenberry, who was saying he did not want to fight and asking to be let up. TRP 319. Ms. Pardo thought Quisenberry was “clearly hurt” from the fall and said Quisenberry could barely get up and when he did, went into the kitchen. TRP 319-20. Ms. Pardo testified that Bakker followed and kept trying to wrestle Quisenberry and Quisenberry said “stop” and told Bakker he was hurt. TRP 320.

In contrast, Quisenberry did not testify about being taken down from behind the knee or kicked by Bakker at all that night. TRP 175-91,

199-295. He testified about being hurt but later in the night and only then with a frontal tackle. TRP 202, 264.

Mr. Quisenberry would also testify that he was only briefly in a headlock during the incident of wrestling and could still breathe. TRP 226-27. In stark contrast, Pardo would testify that Bakker put Quisenberry in a headlock and applied so much pressure it “was cutting off” Quisenberry’s air. TRP 320. Indeed, Pardo declared, it was so severe that Quisenberry told her to call police. TRP 320.

Ms. Pardo also said, however, that she asked Quisenberry “multiple times” if she should call police and Quisenberry was “unable to answer” because his air was cut off. TRP 320. She described Quisenberry’s face, saying it had turned red and his eyes were “bulging.” TRP 320.

Ms. Pardo said that she did as Quisenberry asked, dialing the police emergency telephone number “in hopes that that act would be enough.” TRP 320. She also told Bakker she was going to call police. TRP 320-21. Indeed, she said, Quisenberry was having such a hard time breathing that she decided “calling the cops just didn’t matter.” TRP 320. She then got down on the floor, grabbed Bakker’s testicles and pulled, causing Bakker to let go. TRP 320.

Mr. Quisenberry did not recall Pardo ever grabbing or kneeling Bakker in his privates that night. TRP 256. Mr. Bakker, in contrast,

remembered when Pardo had grabbed his testicles. TRP 539-40. He and Quisenberry had a little “you take it-no you take it” moment in the kitchen after Pardo had started eating, because there was only one plate of food left. TRP 537, 604. He ended up cutting off some meat and suggesting Quisenberry go for it. TRP 537, 604. It sort of devolved from having their arms over each other’s shoulders into wrestling a little. TRP 539, 602-603. Mr. Quisenberry had sort of given a “pull” and Bakker had responded and they kind of ended up on the ground. TRP 539.

Mr. Bakker said the wrestling was “nonaggressive in nature.” TRP 539-40. Mr. Quisenberry won after maybe two and a half minutes because Pardo, who was angry, came over and grabbed Bakker by the testicles. TRP 539-40. Mr. Baker admitted that he screeched and “flipped away.” TRP 540, 604.

Mr. Bakker testified that Quisenberry had never said anything to Bakker about not wanting to wrestle that night. TRP 602-603.

Ms. Pardo said that she had shut the door to the bedroom and was headed towards the kitchen when Bakker came towards the bedroom and she intercepted, telling him he was “not invited into the bedroom at that time.” TRP 332-33. Her dog was in the bedroom and she planned to sleep there, too, she said, so he needed to go sleep on the couch. TRP 332. This made Bakker very angry and he started yelling. TRP 332-33.

Ms. Pardo admitted that Bakker had said he was going into the bedroom because he wanted to go to bed. TRP 332.

In order to keep Bakker away from her, Pardo put her arm out in front of herself. TRP 333, 388. She nevertheless felt she was “pinned” between him and the door. TRP 333, 388. She conceded he was telling her she needed to get out of his way. TRP 333, 388. He was also yelling that she needed to have breakfast made in the morning and the house “better be clean when he woke up.” TRP 333.

Ms. Pardo testified that Bakker grabbed her wrists, making it so she could not get away. TRP 333, 388. She told him it hurt and asked him to let go, telling him he could not be in the bedroom but she would make up the couch. TRP 333. It was at that point, Pardo said, Quisenberry came in and told Bakker to get his hands off her. TRP 333, 389. Ms. Pardo then went to pack a bag to leave. TRP 389.

Mr. Quisenberry recalled that Pardo had decided she was going to leave with her dog and go to a hotel. TRP 201. Mr. Quisenberry stepped outside and, through the bedroom window, saw Pardo trying to go into their bedroom, Bakker grabbing her by the arm, and Bakker moving Pardo up against the wall next to the bedroom door. TRP 201, 262-63.

On cross-examination, Quisenberry clarified that he saw Pardo try to get into their bedroom and it appeared Bakker wanted to follow. TRP

257. Mr. Quisenberry thought Pardo asked Bakker not to follow and Bakker then put his body between Pardo and the entrance to the room.

TRP 258. Mr. Quisenberry thought Bakker was saying he did not want Pardo to leave. TRP 259. It was at that point, Quisenberry said, that he stepped outside. TRP 258.

Mr. Quisenberry testified at trial that, from his vantage point now outside, Pardo seemed visibly upset. TRP 202, 263. For the first time at trial, Quisenberry said he was worried that Bakker might be raising his hand in that moment. TRP 202, 263. But Quisenberry admitted he had never made this claim before: not to police when detailing the incident in his sworn statement or during questioning, and likely not pretrial to the defense investigator when asked to describe what had occurred. TRP 263.

After what he saw in the window, Quisenberry went inside and told Bakker to take his hands off Pardo. TRP 202, 263-64. According to Quisenberry, Bakker asked why Quisenberry was getting involved and Quisenberry responded that he was not “ok” with being physically aggressive with women. TRP 202, 264. Mr. Quisenberry said they were talking about it when Bakker “just bent over and charged.” TRP 202, 264.

Mr. Quisenberry said Bakker hit him in the knee. TRP 203. He felt his knee twist under him and fell backwards into a bookcase, then felt a “sharp pain” in his knee and went to the ground. TPR 203, 265. Mr.

Quisenberry said Bakker was on top of him and Quisenberry yelled “[w]hat is wrong with you?” TRP 203-204. This made Pardo come out of the bedroom and start yelling for Bakker to get off. TRP 203-204, 265. Mr. Quisenberry said Bakker then backed up but kept calling him names and asking why such a big guy needed Pardo to stand up for him. TRP 204, 268. Mr. Quisenberry then decided to leave. TRP 268.

Mr. Bakker admitted giving Quisenberry a “little tackle” around the waist after Pardo walked into the bedroom. TRP 541, 604. He said he then pushed off and they both stood up. TRP 541-42. Ms. Pardo came out from the bedroom and started yelling at him. TRP 542, 605. Mr. Quisenberry complained that his knee hurt, then went outside to smoke. TRP 542, 605. Mr. Bakker went to the open front door and they chatted for minute while Pardo went back into the bedroom. TRP 543-45.

Mr. Bakker testified that he then told Quisenberry, “I’ve had too much too drink. I’m sorry,” and “I’m going to sleep.” TRP 544. Ms. Pardo came out of the bedroom, mostly closing the door and heading to the kitchen. TRP 544-45. When Bakker went to turn the bedroom door handle Pardo was back, pushing Bakker, grabbing the door and slamming it shut. TRP 545-46.

Mr. Bakker told Pardo he wanted to go into the bedroom to sleep. TRP 545. When she pushed him he tried again to put his hand on the

doorknob and she pushed him away again. TRP 545-46. He said, “Kaela, please stop. Please stop.” TRP 546. Her hands were still on him when he tried a third time and she pushed him again. TRP 547. At that point, Bakker conceded, he grabbed her wrists to move her back while bringing his leg in front of him to protect himself from her expected knee attack. TRP 548.

Mr. Bakker denied grabbing Pardo by her arms and holding her against the wall. TRP 606. He admitted taking her by her biceps and moving her about two feet towards the open end of the room. TRP 606. That was when Quisenberry came inside and told him to let go but Bakker and Pardo were already apart. TRP 548, 606.

Ms. Pardo testified that she then grabbed her things and put them in her car. TRP 203-204. Both Pardo and Quisenberry said Bakker was yelling at Pardo while she packed up. TRP 335. Ms. Pardo said he was yelling that she would be “nothing without him,” was evil and had stolen his money. TRP 335.

Mr. Bakker, in contrast, said that, after he tried to go to sleep and she had blocked him from the bedroom, he finally said to Pardo that he could not “do any more of this.” TRP 548-49. He told her to go pack a bag and go to a hotel for the night. TRP 607. She went into the bedroom and packed up some things, leaving within five minutes. TRP 549. Mr.

Quisenberry seemed pretty angry and seemed like he was going to try to start a fight so Bakker told Quisenberry he needed to leave, too. TRP 549.

Although Quisenberry claimed Bakker was yelling at Pardo until she drove off, Pardo admitted that Bakker was not even outside when she drove away. TRP 203-204, 390. Ms. Pardo admitted Bakker had done nothing to try to stop her from packing up or leaving. TRP 389-90. When she drove off, Quisenberry did, too. TRP 203-204.

Mr. Quisenberry testified that he woke up early the next morning with a swollen knee and had his dad drive him to the emergency room. TRP 207. When Quisenberry went to work the next week, he said, he had a limp, it was painful and he had to ice it every few hours and wear an “immobilizer” as much as he could. TRP 208.

According to Quisenberry, he also called Bakker the next day, telling him about the injury. TRP 222. Mr. Quisenberry said Bakker apologized and offered to take him to get “health insurance” but Quisenberry refused that aid. TRP 222. He said he was still upset and did not really want to be with Bakker or talk to him. TRP 222. Mr. Bakker said that it was Quisenberry who had called and he had apologized to Bakker for the night before. TRP 490-98.

Curtis Bakker was part owner of the boat on which Quisenberry was working in March of 2018. TRP 454, 460-62. He remembered

Quisenberry calling a few days before the incident to report that he had hurt himself pushing the boat off the dock. TRP 454, 460-61. During the call, Quisenberry was asking if he could get “worker’s compensation” for the injury. TRP 454.

Billy Sparks, who worked on the boat with Quisenberry, noticed about four days before the incident that Quisenberry was limping throughout the day. TRP 464-68. Mr. Sparks was not allowed to tell jurors what Quisenberry said about why. TRP 469. Because Quisenberry could not do his work and was complaining that his knee was sore, Sparks helped him with his work. TRP 470-71. Mr. Sparks was unsure but thought the injured leg was Quisenberry’s left. TRP 471-73.

Daniel Bakker confirmed that he worked with Quisenberry on the boat on March 20th and Bakker and Sparks had to cover for Quisenberry’s work due to Quisenberry’s injured right knee. TRP 496. Mr. Bakker also saw Quisenberry seeming to have significant issues putting weight on that knee for several days prior to the incident at the house. TRP 497.

Mr. Quisenberry denied having injured his knee on a fishing boat the Friday prior to the incident. TRP 229. Instead, he maintained, he had just bumped his funny bone. TRP 229.

At trial, the prosecutor explored why Pardo had suggested she had not wanted to call police during this incident, even though she said she had

dialed. TRP 321. She said there were “[a] lot of reasons,” starting with the prospect that she could be accused of trespassing because the home belonged to Bakker’s parents home and she was not on any lease. TRP 321. Ms. Pardo said she had given up her life to move in with him and did not know where she would go if she called police and they told her she was trespassing. TRP 321. Ms. Pardo also said she had not wanted to call police because she loved Bakker and did not want him in trouble. TRP 322.

When the prosecutor asked Pardo if she was also “scared that evening,” she responded, “I was scared for my safety, yes.” TRP 322. She claimed that Bakker had threatened to “beat the shit” out of her from the time she arrived home and she felt unsafe. TRP 322. She also said she was afraid because he said he was going to beat her with a stick and “this was a credible threat based on prior experience.” TRP 340-42.

Mr. Quisenberry, in contrast, never heard Bakker threaten to “beat” her with a stick or beat the shit out of her: he only heard one threat that night. TRP 226. It was early, and Bakker had said to Pardo that “if she didn’t start cooking dinner that he would knock her upside the head.” TRP 226. Mr. Quisenberry said Pardo did not “seem to enjoy” Bakker saying it and it seemed to be in bad taste but it did not actually seem like a serious threat. TRP 226.

Over defense objection, Pardo was allowed to testify that part of her

concern about calling police when Quisenberry was allegedly asking her two was because there was a gun in the house. TRP 331-32. The gun belonged to Bakker's family and he had brought it home one day. TRP 331-32. Ms. Pardo opined that she could call the police, they might do nothing and she would be left with someone who had threatened her and hurt his own friend and "would have access to that gun." TRP 331-32. She also testified she was trying to calm him but "still keeping him away from gun access," and to keep him "out of the bedroom throughout the evening and remove any potential access to anything that could be used in a violent manner." TRP 334.

Ms. Pardo admitted, however, that Bakker had never threatened to use a gun on her or shoot her that night. TRP 347. The gun was in the closet and in a locked box and might have been also stored away from ammunition. TRP 346-47.

The prosecutor asked Pardo if the actions and words of Bakker that night had caused her concern for her personal safety. TRP 345. Ms. Pardo responded that she had such concern, "based on the way that he was behaving," grabbing her wrists, threatening to beat her, trying to flip over the couch, and wrestling with Quisenberry without concern for whether he got hurt. TRP 346. She concluded, "[h]e was unconcerned for my safety, for [Quisenberry's] safety, and so I was concerned for my safety." TRP

346.

Mr. Bakker was convicted of 1) bail jumping for missing a court date while the case was pending, 2) harassment of Pardo with a “domestic violence” finding, 3) fourth-degree assault of Quisenberry, and 4) fourth-degree assault of Pardo, with a “domestic violence” finding. CP 324-31.

D. ARGUMENT

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION
IN RULING ON AND ADMITTING HIGHLY PREJUDICIAL
EVIDENCE AND THE ERRORS WERE NOT HARMLESS

In general, all relevant evidence is admissible. State v. Whalon, 1 Wn. App. 785, 791, 464 P.2d 730, review denied, 78 Wn.2d 992 (1970). Evidence is relevant if there is a logical nexus between the evidence to be admitted and the fact to be established, and if the evidence has a “tendency” to prove or disprove something of relevance to the case before it is admissible. See State v. Demos, 94 Wn.2d 733, 737, 619 P.2d 968 (1980).

Our court rules and constitutions provides some limits, however, even to admission of relevant evidence. Under ER 403, relevant evidence is nevertheless inadmissible if its potential prejudicial impact substantially outweighs its potential probative value. ER 403; State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). Under ER 404(b), the state may not use evidence of the defendant’s other “crimes, wrongs or acts” to prove the defendant’s “character” or “propensity” to commit a crime. See State v. Vy

Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Instead, evidence of other crimes, wrongs or acts is presumptively excluded unless the state can show that the evidence is relevant to something other than propensity and meets specific standards set forth in the rule.

In this case, the trial court admitted evidence of Baker's lawful gun ownership after first finding that ER 404(b) did not apply and then concluding that the potential prejudice did not substantially outweigh the potential probative value under ER 403. Both of these rulings were in error as a matter of law and an abuse of discretion. Further, the errors invited the jury to draw a negative inference from Mr. Bakker's protected constitutional rights to lawful gun possession. The errors were not harmless and this Court should reverse.

a. Relevant facts

Although the ruling being appealed relates to the gun evidence, facts relating to evidence insinuating other abuse or assault of Pardo were admitted at trial which makes the introduction of the trial evidence even more prejudicial. To understand the scope of the gun issue, it is thus necessary to also look at how the issue of the other alleged assaults was handled.

Pretrial, Bakker moved in limine to suppress statements from Pardo

alleging prior abuse or assault. TRP 19-20, 151.² The prosecutor argued the evidence was necessary to prove harassment, because it showed that Pardo had a reasonable fear of the alleged threats made during the incident as a result of “history” she claimed she and Bakker had. TRP 151-52. The prosecutor stated he would make sure to limit the evidence to just Pardo “being able to represent that there has been physical violence or interactions with Mr. Bakker in the past,” with no specifics. TRP 152.

Judge Murphy asked the prosecutor why he had not noted a “404(b) hearing” if that state wanted to introduce evidence of prior misconduct. TRP 152-53. The prosecutor said no such hearing was needed because the evidence was not being introduced “to show conformity,” but Judge Murphy did not seem to agree. TRP 153-55, 198. The issue was set aside until later. TRP 156, 198.

Mr. Bakker also moved pretrial to exclude evidence regarding kitchen knives and a gun. TRP 153-54. The “knives” evidence was that Pardo, Bakker and Quisenberry had eaten steak that night and Pardo had moved the steak knives from the kitchen table “during the altercation.”

² Counsel noted and apologized for his failure to file a bench copy at trial. TRP 19. He tried to hand a copy up to the trial judge but she said, “I don’t have time to look at that now,” and “[w]e need to get going on voir dire.” TRP 20. Judge Murphy asked if there was anything that needed to be addressed before voir dire and counsel said, “[n]o, Your Honor.” TRP 20. It appears that counsel still failed to file a copy in the official court file.

TRP 153-54. The prosecutor argued it was relevant to prove the harassment charge and the element that Pardo's fears were "reasonable" that night.

TRP 153-54.

Regarding the gun, however, the prosecutor did not argue it was admissible or relevant. TRP 154-54. Instead, the prosecutor declared, "I don't have any intentions of providing testimony of a gun in the house."

TRP 153-54. Judge Murphy confirmed with the prosecutor and counsel, "there is disagreement only as to the knives but not the gun[.]" TRP 153-54. Both the prosecutor and counsel responded, "[y]es, Your Honor." TRP 154. This issue was also set aside for later. TRP 154-55.

In opening statement, the prosecutor told jurors they would hear testimony that Bakker had threatened to beat Pardo when she was trying to leave and she took those threats seriously. TRP 163. He argued that there were times that Pardo and Quisenberry had discussed and thought of calling police but they did not want to call the police on their friend and get him in trouble. TRP 163. Opening was followed by Quisenberry's testimony. TRP 160-75. When describing what the arguments between Pardo and Bakker were about, Quisenberry said Pardo was arguing about Bakker being inebriated, but then said, "there's other stuff I've been instructed not to talk about." TRP 191.

With the jury out later, counsel raised his concern that Quisenberry's

statement was “problematic,” but had not wanted to emphasize it by bringing it up in front of the jurors. TRP 191-92. Counsel did not think a limiting instruction was needed but asked the prosecutor to advise the witness not to make such a comment again. TRP 192-93. The prosecutor agreed. TRP 193.

The issues of admission of the evidence of the knives and the alleged prior unspecified acts had not yet been discussed and were set aside again until later. See TRP 198-99. They had not yet been resolved when Pardo took the stand. See TRP 307. On direct examination, she raised the specter of other uncharged incidents involving Bakker grabbing her wrists:

I would often put my arm up to keep him away from me when he was aggressive, and he would grab my wrists and hold me tightly or grab my arms and hold me tightly. I told him that it hurt and let me go, and he said that it didn’t hurt, that I was lying and did not let go.

TRP 314 (emphasis added). A moment later, when the prosecutor asked Pardo how she felt when Bakker had said he should beat her Pardo started to answer, “[u]nsafe,” then went on, “I certainly believed that - - I don’t know how much to tell or to go into as to why.” TRP 322.

The jury was then taken out at the prosecutor’s behest. TRP 322. The prosecutor said the testimony had reminded him about the motions in limine and the two issues for which there was no agreement. TRP 322-23. The court asked the parties to take some time over a short break to clarify

the specific arguments so “we’re really precise,” and the parties agreed.

TRP 323.

When the parties returned, the prosecutor withdrew his request to introduce evidence of “prior incidents” between Bakker and Pardo at trial. TRP 324. He told the court frankly that the state had failed to note a “404” hearing before trial. TRP 324. Instead of prior incidents, the prosecutor said, he would limit the evidence regarding the “reasonableness” of Pardo’s fears of the threats during the incident to what happened during the incident itself. TRP 323.

The prosecutor then started arguing about the knives evidence - with a change. TRP 324-25. Despite having said he had no intent to introduce evidence of the gun at trial, the prosecutor now argued that he should be allowed to introduce evidence of that gun, along with the knives. TRP 324-25. The prosecutor wanted Pardo to testify that she was aware that Bakker had a gun in the bedroom and she was “fearful of him having access to it.” TRP 325.

The prosecutor also declared his opinion that the gun evidence would not be “overly prejudicial” to Bakker. TRP 325. The prosecutor believed that evidence someone owns a firearm would not necessarily cause people to believe they are “a bad person[.]” TRP 325. Although admitting there was already testimony from Pardo that she had removed knives from

the kitchen during the incident, the prosecutor thought he should now be allowed to introduce the gun evidence also, under the general theme that Pardo “did not want him [Bakker] to have access to weapons.” TRP 325.

The prosecutor again repeated his belief that it was not true that the gun evidence would be prejudicial or that “because he had a firearm, that that’s prejudicial in and of itself.” TRP 325.

Mr. Bakker objected, arguing the evidence was highly prejudicial and improper under ER 404(b). TRP 326. He noted that Pardo’s testimony had already established her “reasonable fear” of the alleged threats of being “beat.” TRP 326. He also pointed out that Quisenberry had testified about being concerned for Pardo, seeing her looking scared, and seeing Bakker putting his hands on her. TRP 326-27.

Counsel was especially concerned about Pardo stating that, if Bakker had access to a gun, “something bad would happen.” TRP 326. He objected that the evidence was “404(b) stuff.” TRP 327. He argued it would improperly invite jurors to speculate about uncharged prior incidents involving the gun or to draw a negative inference that Bakker’s lawful possession of the gun by assuming just because he exercised that right he would somehow use the gun against Pardo. TRP 327.

Counsel also pointed out that there was in fact no claim the firearm had been used or even threatened to be used during the incident. TRP 327.

He argued the evidence was only marginally relevant to Pardo's fear and that it was unduly, highly prejudicial and would invite improper speculation in jurors. TRP 327-28.

In ruling, Judge Murphy first held that ER 404(b) did not apply. TRP 328-29. The judge's reasoning was that Pardo was not going to be allowed to testify about any prior incident where the gun was used. TRP 328-29.

Next, Judge Murphy concluded that the probative value of the gun evidence outweighed its prejudicial effect. TRP 330. She recognized there was "certainly prejudice" in introducing gun evidence in general but stated her belief that prejudice was far less when the testimony was just relating to lawful "ownership and possession of a firearm" as opposed to testimony of using it in a particular way. TRP 329-30.

The judge also did not think it was part of the analysis that she consider whether there was other evidence to support proof of Pardo's "fear or concern" that evening. TRP 329. Instead, the judge said, "while it's true that there may be other evidence" to prove the fear element, that did not "necessarily limit[] the State to not be able to put on evidence that is relevant." TRP 329.

The judge limited the evidence, however, to Pardo's "understanding of the ownership and possession of" the gun and that it made her want to

keep him away from the bedroom because of it. TRP 330.

With Pardo back on the stand, the prosecutor then elicited that she was afraid when she was in the kitchen and why:

Well, he had [Quisenberry] in a headlock. . . And I had 911 dialed. I didn't want to call 911. I had many reasons for that. There was a gun in the house, and that is one of the biggest reasons. What if the police were to show up and they could potentially arrest me, or nothing happened at all, and then I would be left in the house with somebody who had already been threatening to hurt me and beat me, and who I had just watched hurt their friend, their very good friend, and that he would have access to that gun.

TRP 331-32 (emphasis added).

A moment later, the prosecutor asked if Pardo made “any efforts to prevent access to that gun.” TRP 332. She said she had shut the door when she came out of the bedroom and that Bakker had then come up and tried to get into the bedroom, telling her to get out of his way. TRP 331-32.

Ms. Pardo admitted, however, that Bakker had said he was going into the bedroom because he wanted to go to bed. TRP 332. She also said that Bakker had yelled that she needed to have breakfast made in the morning and that the “house better be clean when he woke up.” TRP 333. She nevertheless said she was trying to calm him but “still keeping him away from gun access” and she had wanted to keep him “out of the bedroom throughout the evening and remove any potential access to anything that could be used in a violent manner.” TRP 334.

Ms. Pardo also testified about feeling unsafe enough to ask Bakker's mom to come over so she could "safely pack up" her things from the home the next day. TRP 336. She told jurors she called police a few days later because Bakker had told her he was "going to go to rehab," which had made her think, "he would be somewhere and that I would be safe." TRP 336. She described being in Portland, Oregon, after the incident as "nerve wracking," because she did not know where he was or "what was going on." TRP 336. She had talked with Quisenberry after the incident, she said, in part to ask where Bakker was because she was "making sure that I'm safe and aware of his mind state." TRP 337-40.

When the prosecutor asked whether she had shown any marks or injuries to Officer Johnstone after the incident, Pardo responded in the negative but then tried to elaborate, saying there was "something in the statement." TRP 340. She was cut off but a moment later the prosecutor asked about "the threatening statements" Bakker had made and what made Pardo "fearful of the comments he was making?" TRP 341.

Ms. Pardo was apparently unsure of what the prosecutor was asking. TRP 341. The prosecutor then clarified, "at one point, you said he was going to beat you with a stick." TRP 341. Ms. Pardo said she took his statements to mean "that he was going to beat me," because he said it multiple times. TRP 342. She also said, "this was a credible threat based

on prior experience.” TRP 342.

At that point, counsel asked to address something outside the presence of the jury. RP 342. With jurors out, counsel objected that Pardo appeared to be playing games with the prohibition against talking about prior incidents. TRP 342. He referenced, *inter alia*, that she was alluding to “some answer she can’t give about violence and violent activities that involved her at the hands of” Bakker. TRP 342. He paraphrased the implication of her testimony as “[i]t happened, but I can’t talk about it,” and pointed out that the testimony was inappropriate. TRP 343.

Judge Murphy agreed that there were some issues with Pardo’s testimony. TRP 343. She commended counsel for having handled it discreetly but did not blame the witness. TRP 343. The judge was concerned the testimony was now in the record. TRP 343. Counsel then decided not to draw attention of the jury by asking for a curative instruction, stating he did not think it was harmful yet but was concerned that it would if more came in. TRP 344.

On cross-examination, counsel begin by trying to mitigate the damage of the gun evidence, establishing that it was in a closet and in a locked box, as well as that Pardo never heard Bakker say anything about the gun during the incident. TRP 346-47. When counsel asked why Pardo did not leave that night if she was in fact getting assaulted, Pardo answered it

was “a complicated question” and that she did not know how to answer it “based on the sidebar from earlier.” TRP 373.

The next day, the prosecutor admitted that Pardo had gone beyond the bounds of propriety in referring to what she could say based on the sidebar. TRP 383. He had talked with Pardo and told her that she needed to raise any concerns about what she could say based on the court orders outside the presence of the jury. TRP 383. There was then some discussion whether counsel had “opened the door” or would be doing so if he pursued a line of questioning about why Pardo did not leave if the evening was so bad, and counsel agreed not to ask further on that topic. TRP 385-86.

In closing argument, the prosecutor relied on the “fear” from Pardo about Bakker:

Ms. Pardo did not want Mr. Bakker to go into the bedroom. She feared for her safety through the threats that he was making toward her, threatening to beat her with a stick, threatening to beat the shit out of her. She witnessed his aggressive behavior trying to turn over a couch, witnessed him grabbing on to a wrist, not letting go despite her request to have him let go. She explained to him that it hurt, and yet, he still continued to hold on. So throughout this evening, she is fearful of Mr. Bakker and his conduct towards her.

She’s trying to prevent him from getting into the room because one, she knows of a firearm in the house. She knew that that’s where it was. She didn’t feel safe with having Mr. Bakker having access to that.

TRP 701-702 (emphasis added).

In response, in his closing argument, defense counsel tried to

mitigate the gun evidence:

Now, she has this story she didn't want him to go in there because there was a gun. She testified she never saw the gun, there was no mention of the gun, the gun was locked up in the closet. She was in the bedroom. She had the opportunity - - if she was concerned at that time, she could have removed the gun, she could have hidden the gun, thrown the gun out the window. She could have done anything with the gun. The gun was not the concern.

The gun is a complete canard. It's something that she trotted out there in trial to look at and say, "Ooh gun. Bad guy, scary guy.:" Obviously at the time of these events, there wasn't an issue, because she had control over that.

TRP 711-12.

- b. The trial court erred in concluding that ER 404(b) did not apply to the gun evidence

The trial court erred in admitting the gun evidence, in several ways.

First, the court erred in concluding that ER 404(b) did not apply.

Interpretation of when an evidentiary rule applies is a question of law, reviewed de novo. See State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This is in contrast to the times when the Court reviews for abuse of discretion, which occurs when the trial court has correctly interpreted a rule and applied it. See State v. Foxhaven, 161 Wn.2d 168, 175-75, 163 P.3d 786 (2007).

On de novo review, this Court should hold that the trial court erred in holding that ER 404(b) does not apply to evidence of lawful gun ownership. The rule provides:

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

The trial judge here thought ER 404(b) did not apply to evidence of Bakker's lawful gun possession, because the state was not seeking to introduce evidence of a prior specific incident in which the gun was used. TRP 328-29.

The rule, however, is not so limited. See State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Instead, ER 404(b) limits evidence not just of prior crimes but of *any* acts which are used to prove character "in conformity therewith," whether they involve misconduct or are acts which might be deemed disgraceful or be "unpopular." Id.

Thus, where a detective testified about the accused as being a "leader" in his relationship with another with whom he was alleged to have committed a crime, that evidence was subject to ER 404(b), even though being a "leader" is not a crime, wrong or "bad act." Everybodytalksabout, 145 Wn.2d at 469. Similarly, where the state sought to introduce evidence of photos and drawings of graffiti "tags" found in the defendant's room when the defendant accused of malicious mischief for graffiti, ER 404(b) applied despite the state's argument that "the drawings of tags and most of

the photographs fall out of the scope of ER 404(b) because they do not show criminal conduct or bad acts. Foxhaven, 161 Wn.2d at 175.

As the Supreme Court has declared, the prohibition of ER 404(b) “encompasses not only prior bad acts and unpopular behavior but *any* evidence” likely to be used as “propensity” or “character” evidence to prove that character at the time of the crime. Foxhaven, 161 Wn.2d at 174-75.

The trial court erred in holding that ER 404(b) did not apply and thus failing to apply that analysis to the gun evidence in this case.

- c. Under ER 404(b), the evidence would have been excluded and the trial court erred in failing to follow the state’s highest court regarding the prejudice of even lawful gun ownership evidence

Had the trial court applied it, under ER 404(b), the gun evidence was inadmissible. Our state courts have a well-established analysis a trial court must conduct on the record in order for ER 404(b) evidence to be admitted for a “proper” purpose such as to prove motive. See Foxhaven, 161 Wn.2d at 175; see also, State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Before ER 404(b) evidence may be admitted, 1) the state must prove it to the trial court by a preponderance, 2) the trial court must identify the purpose for which the evidence is to be admitted, 3) the trial court must determine whether the evidence is relevant to prove an element charged, and (4) the trial court must weigh the probative value against the prejudicial

effect.” VyThang, 145 Wn.2d at 642.

It is the party seeking to introduce the evidence which bears the burden of proving “the first, second, and third elements.” State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). The purpose of elements 3) and 4) is to ensure that “the evidence does not run afoul of ER 402 or ER 403.” Id.

ER 404(b) evidence is thus presumptively inadmissible. Id. Further, the trial court is required to err on the side of exclusion in doubtful cases. See Smith, 106 Wn.2d at 776. Put another way, as this Court has stated, in such cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 773 (1983).

Here, although the trial court did not conduct an ER 404(b) analysis, it did look at relevance (ER 402) and whether the probative value of the evidence was substantially outweighed by its potential prejudice (ER 403). TRP 329-30. Again, however, the trial court erred as a matter of law,, by minimizing the possible prejudice far below that which our state’s highest court has recognized occurs with even lawful gun ownership. TRP 330.

The Supreme Court has previously rejected the idea put forth by the state below and apparently adopted by the trial court - that lawful gun ownership is not inherently prejudicial in a jury trial:

[T]he State urges that . . . this evidence . . . was . . . nonprejudicial. We cannot agree with this proposition. **Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear.** Still others may consider certain weapons acceptable but others as “dangerous.” A third type may react solely to the fact that someone has committed a crime has such weapons. **Any or all of these individuals might believe the defendant was a dangerous individual. . . just because he owned guns.**

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1985) (emphasis added).

In ruling here, Judge Murphy recognized that there was “certainly prejudice” in introducing gun evidence in general but stated her belief that prejudice was minimal when the testimony was just relating to lawful “ownership and possession of a firearm.” TRP 329-30. This holding fails to reflect the true - and unpredictable - impact of gun evidence on jurors, as recognized in Rupe.

The trial judge’s failure to recognize the full damaging potential of the gun evidence led her to improperly balance that prejudice against the minimal probative value of the evidence here. The court found that it was relevant to show that Pardo had a “reasonable fear” of Bakker’s threats that night. TRP 328-39. The judge also did not think it was part of the analysis that she consider whether there was other evidence to support proof of

Pardo’s “fear or concern” that evening. TRP 329. Instead, the judge said, “while it’s true that there may be other evidence” to prove the fear element, that did not “necessarily limit[] the State to not be able to put on evidence that is relevant.” TRP 329.

The determination of whether the gun evidence should have been admitted under ER 404(b), however, requires the trial court “to determine whether the danger of unfair prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof.” State v. Tharp, 96 Wn.2d 591, 595, 637 P.2d 961 (1981). The evidence must not only be relevant but also necessary to prove an essential element of the crime charged in light of the evidence already admitted. Id. Evidence which is cumulative of other admissible evidence in proving an essential element is not “necessary” under the rule. See id.

Here, the gun evidence was not “necessary” to prove the essential element of any part of the state’s case. The evidence was found to be relevant to prove that Pardo had a reasonable fear that Bakker would carry out his threats that night. Those threats, however, had *nothing* to do with a gun. TRP 322 (Pardo referring to threats to “beat the shit out of her” that night), 334 (Pardo referring to threats to beat her), 346 (Pardo: threats to beat her).

Indeed, Pardo admitted, Bakker never once mentioned the gun that

night, let alone threatened to use it. TRP 346-47.

There was also more than ample testimony to support the element of harassment (non-felony) that Ms. Pardo was placed in reasonable fear the threats made would be carried out. Again, the threats made were about beating her. Ms. Pardo testified about Bakker acting irrationally and aggressively - trying to flip over a couch, trying to drive drunk, grabbing her and not letting go when she said it hurt, grabbing and wrestling a friend and not stopping when he was saying he was hurt. Mr. Quisenberry testified that he believed Pardo was not safe if she stayed there alone, based on what he saw that night.

Thus, the facts of the incident itself were sufficient to prove the fear of beating without throwing in the incendiary evidence of Bakker's lawful, constitutional possession of a gun in a box in the closet.

Notably, because of Pardo's continued testimony implying there were other incidents of misconduct or assaults by Bakker about which they were not hearing, the jury was already incited to believe that Bakker was a "bad guy" who was violent in general and thus likely more guilty - which is why counsel sought to exclude the evidence in the first place.

It is important to remember that Mr. Bakker had a state and federal constitutional right not only to own and possess firearms lawfully but to do so without that evidence being used against him at a trial in which the

evidence was, at best, marginally relevant. Both the Second Amendment and Article 1, section 24, of the Washington constitution, subject only to the “police power” of the state to impose reasonable regulation. See Rupe, 101 Wn.2d at 707 n.9. For this reason, the state must prove not just that someone has a firearm in their house when a crime was committed but that there was actually a nexus between the defendant, the crime, and the gun, in order to constitutionally impose a “firearm” enhancement for the crime.

See State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002).

Further, constitutionally protected behavior not only cannot form the basis for criminal punishment but also must not be used by the state against an accused in a way which will unnecessarily “chill” or penalize the exercise of that right. See Rupe, 101 Wn.2d at 705; see also, United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968).

This Court should reverse and remand for a new trial on the harassment and assault charges. There is no question that the right to keep and bear arms does not allow for a person lawfully possessing a gun to use it in criminal activity. See, e.g., State v. Russell, 25 Wn. App. 933, 939, 611 P.2d 1320 (1980). And in general, an ER 404(b) issue is not considered “constitutional” when the issue is just the admission of evidence under the rule, unlike here, where there is a constitutional right involved. See, e.g., State v. Jackson, 102 Wn.2d 689, 696 689 P.2d 76 (1984).

Where, as here, the state seeks to introduce evidence that a defendant has exercised his lawful right to possess a gun not alleged to have been used or threatened to be used in a crime, the Court should consider the prejudice of its admission in light of the chilling effect it has on the defendant's rights, not just the prejudice that the gun evidence itself will engender. See, e.g., State v. Freeburg, 105 Wn. App. 492, 500-501, 20 P.3d 984 (2001) (noting how prejudicial minimally relevant gun evidence is to juries).

This Court should reverse and remand for a new trial on the assault and harassment charges.

E. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this 18th day of February, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and appellant as follows: by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Daniel Bakker, at 6349 Elizan Street NW, Olympia, WA. 98502, and to the Thurston County Prosecutor's Office, via efilng this date.

DATED this 18th day of February, 2020.



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