

FILED
Court of Appeals
Division II
State of Washington
4/20/2020 2:17 PM

No. 53433-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL P. BAKKER,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 18-1-00641-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....10

 1. The trial court did not abuse its discretion by admitting evidence regarding the gun in the bedroom pursuant to ER 403.....10

 2. The trial court properly ruled that ER 401 and ER 403, rather than ER 404(b), governed the evidentiary issue raised. Bakker did not object to consideration pursuant to ER 403 and the issue of ER 404(b) should not be considered for the first time on appeal.....14

 3. If this Court finds that the trial court should have conducted a 404(b) analysis, any error was harmless17

 4. The admission of evidence that Bakker owned a firearm that existed in the bedroom of the residence where the offenses occurred did not infringe upon Bakker’s right to bear arms pursuant to the Second Amendment or Article 1, §24.22

D. CONCLUSION25

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Carson v. Fine,</u> 123 Wn.2d 206, 867 P.2d 610 (1994).....	11
<u>State v. Beadle,</u> 173 Wn.2d 97, 265 P.3d 863 (2011).....	10
<u>State v. Coe,</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	19
<u>State v. Everybodytalksabout,</u> 145 Wn.2d 456, 39 P.3d 294 (2002).....	16
<u>State v. Foxhaven,</u> 161 Wn.2d 168, 163 P.3d 786 (2007).....	16
<u>State v. Gregory,</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	24
<u>State v. Gresham,</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	22
<u>State v. Guloy,</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	22
<u>State v. Hancock,</u> 109 Wn.2d 760, 748 P.2d 611 (1988).....	23
<u>State v. Jackson,</u> 102 Wn.2d 689, 689 P.2d 76 (1984).....	15, 18
<u>State v. Kelly,</u> 102 Wn.2d 188, 685 P.2d 564 (1984).....	22
<u>State v. Mason,</u> 160 Wn.2d 910, 162 P.3d 396 (2007).....	15

<u>State v. Rupe,</u> 101 Wn.2d 664, 683 P.2d 571 (1985).....	23
<u>State v. Scherf,</u> 192 Wn.2d 350, 429 P.3d 776 (2018).....	11
<u>State v. Smith,</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	15, 17
<u>State v. Taylor,</u> 193 Wn.2d 691, 444 P.3d 1194 (2019).....	11
<u>State v. Tharp,</u> 96 Wn.2d 594, 637 P.2d 961 (1981).....	20
<u>State v. W.R.,</u> 181 Wn.2d 757, 336 P.3d 1134 (2014).....	24

Decisions of the Court of Appeals

<u>State v. Njonge,</u> 2015 Wash. App. LEXIS 15, 8.....	20
---	----

Statutes and Rules

Article 1, § 24 of the Washington State Constitution.....	2, 25
ER 401.....	8, 13, 14, 15, 20, 25
ER 403.....	1, 8, 9, 10, 11, 14, 15, 20, 25
ER 404(b).....	1, 4, 6, 7, 8, 14, 15, 16, 17, 18, 20, 25
RAP 2.5(a).....	15
RCW 9A.46.020(1)(b).....	12
United States Constitution <u>Second Amendment</u>	2, 22, 23, 24, 25

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted evidence that the victim of domestic offenses was aware that a firearm was located in the bedroom of the residence pursuant to ER 403.

2. Whether a request that the trial court exclude evidence pursuant to ER 403 in order to reduce the potential for “404(b) stuff” to be admitted properly preserves an argument that the evidence should have been excluded pursuant to ER 404(b) and if so whether the trial court properly found that the existence of a firearm in the residence during the commission of assault and harassment offenses is not a prior crime, wrong, or act, such that an ER 404(b) analysis was unnecessary.

3. Whether the trial court’s admission of evidence that a firearm was in the bedroom of a residence where domestic assault and harassment occurred pursuant to ER 403 to explain the state of mind of the victim without an ER 404(b) analysis was harmless where the record clearly demonstrates that the trial court would have admitted the evidence if an ER 404(b) analysis had occurred and it is clear that the evidence did not affect the verdict.

4. Whether testimony that a defendant lawfully owned a firearm in the residence where domestic assault and harassment

occurred implicated the defendant's rights pursuant to the Second Amendment of the United States Constitution and Article 1, § 24 of the Washington State Constitution where the evidence was explicated admitted for a purpose relevant to the criminal offenses.

B. STATEMENT OF THE CASE.

1. Procedural History.

The appellant, Daniel P. Bakker, was charged by way of criminal information with assault in the second degree, assault in the fourth degree/domestic violence and harassment/domestic violence. CP 15. An additional charge of bail jumping was later added in a first amended information. CP 29-30. A jury trial occurred May 6-10, 2019. See *generally*, RP.¹ The jury returned verdicts of not guilty on the charge of assault in the second degree and the lesser offense of assault in the third degree, but guilty of the lesser included offense of fourth-degree assault on count one, and guilty of assault in the fourth degree/domestic violence, harassment/domestic violence, and bail jumping as charged in counts two-four. CP 327-331.

¹ The sequentially paginated jury trial May 6-10, 2019 will be referred to as RP in this brief. Verbatim reports of proceedings from other hearings will be cited to with the designations included in footnote 1 of the Brief of Appellant for consistency.

The trial court sentenced Bakker to 60 days on the bail jumping count and 364 days with 304 days suspended on each of the gross misdemeanor offenses with work release authorized if eligible and approved. CP 334-343; RP 754-795. This appeal follows.

2. Substantive Facts.

For purposes of the issues raised in this appeal, the State generally accepts the substantive facts contained in the Brief of Appellant, with additions as necessary included in the argument section below and the following additions and exceptions:

When asked whether he recalled Bakker make any direct threats to Ms. Pardo of violence, Quisenberry stated, "I do recall at one point during the evening him saying to her that if she didn't start cooking dinner that he would knock her upside her head. I had a specific remembrance." RP 226. When asked how Pardo reacted to that, Quisenberry testified, "She didn't seem to enjoy the comment. I kind of the way I took it was, it was kind of a bad taste." RP 226. Bakker made threats to beat Pardo and stated he should beat her with a stick while Quisenberry was at the store. RP 313.

Pardo testified that Bakker grabbed her wrists and restrained her, which she said hurt. RP 314. When Quisenberry returned,

Quisenberry told Bakker to take his hands off Pardo. RP 314. Verbal altercations continued regarding whether Bakker was too inebriated to drive, and Pardo stated that Quisenberry and Bakker struggled with the keys for “maybe 20, 30 minutes.” RP 315.

When they were all back in the house, Pardo testified that Bakker was “still clearly very angry with [her].” RP 317. While Quisenberry was making dinner, Bakker got off the couch and Pardo again attempted to take his keys to keep him from driving. RP 317-318. After she was able to get the keys and tossed them to Quisenberry, Bakker again grabbed her wrists and wouldn’t let her go. RP 318. She kneed him in the genitalia to get him to let go of her. RP 318. Bakker fell to the floor and pulled Pardo “down onto the floor with him.” RP 318. She fell onto her knees and testified that he would not let her up and it was hurting her. RP 318.

Pardo stated that after she was able to get up, they had dinner and Bakker continued belligerent behavior, which included trying to force Quisenberry to eat steak with a fork aggressively. RP 318. She indicated that she removed steak knives during this time because she “felt like there was a threat there.” RP 318.

After dinner, Pardo indicated that Bakker “decided he wanted to wrestle with Zach,” and despite Quisenberry stating he

did not want to fight, Bakker began wrestling with Quisenberry. RP 319. Pardo testified that Bakker took Quisenberry “down from behind at the knees and kicked him.” RP 319. She stated “he was clearly hurt when he had fallen down on the ground. He could barely get up.” RP 320.

3. Admission of Evidence of Firearm Ownership.

During Pardo’s testimony, the prosecutor asked if Bakker said anything or made any threats to her that were concerning. RP 322. Pardo responded, “he threatened to beat the shit out of me, said he was going to beat me with a stick, continued through the evening saying that he would beat me.” RP 322. When asked how that made her feel, Pardo responded, “Unsafe. I certainly believed that—I don’t know how much to tell or to go into as to why.” RP 322.

At that point, the prosecutor asked for a recess and requested to address evidentiary issues outside the presence of the jury. RP 322-323. Issues regarding previous acts and possession of weapons had been discussed previously during the proceedings but had not been ruled upon. RP 152-156, 198-199. The prosecutor informed the trial court,

The State doesn't intend to introduce prior incidents and ask Ms. Pardo about those. We'll limit the reasonableness for her fear that the threats would be carried out to what she experienced and witnessed on this particular evening.

RP 324. The prosecutor acknowledged that the State had not filed an ER 404 motion or indicate that such a hearing was necessary prior to trial. RP 324.

At that point the trial court asked the prosecutor "what does the State plan to introduce in terms of - - and I think you indicated there's guns and knives, right?" RP 324. The prosecutor responded,

My understanding from the testimony I would anticipate from Ms. Pardo is she is aware that there was a gun in the bedroom, that Mr. Bakker owns a firearm, and part of her efforts, I believe, to not want Mr. Bakker in the room is because there was a gun in there, and she was fearful of him having access to it. And I do not believe that that fact would be overly prejudicial to Mr. Bakker.

RP 324-325. The prosecutor continued:

The fact that he owns a firearm is no indication that he's a bad person or something that would lead to the inference. Simply it would go to her state of mind that she was so fearful of his actions of what he was saying and physically doing to her, that that was on her mind, that she did not want him to access weapons, similar to the fact that she removed steak knives from the kitchen because of his - - what she was witnesses cause that fear and concern. And I think it goes to - - it would be introduced to show her

state of mind and the fear she had because of what she was witnessing from Mr. Bakker...

RP 325.

Defense counsel argued

You know, outside of the gun, I think she's testified to enough to create a reasonable fear or apprehension that any threats would be carried out against her. Mr. Quisenberry testified that he witnessed Mr. Bakker putting hands on Ms. Pardo and threatening Ms. Pardo and that he thought Ms. Pardo - - I don't want to put too many words in his mouth but summarizing - - that she looked appropriately concerned. He was concerned for her.

RP 326. He later argued,

So I don't think we need to go into potential 404(b) stuff or invite speculation by the jury that there had ever been an event involving a firearm in the past or inviting the jury to speculate that because there was a gun in the house, that she was at risk by this firearm.

RP 327. Defense counsel indicated, "There are no allegations that the firearm had been inappropriately used. And so I just think it invites speculation. It's unduly prejudicial, and I think it's an end run around for 404(b) potential, Your Honor, if she comes in and testifies there was some prior incident with the gun." RP 327.

The trial court agreed that discussion of a prior incident with a gun would be unduly prejudicial by responding, "Agreed. But that's not what we're talking about, right? What we're talking about

is her knowledge that he owns a gun and that, presumably, it was in the residence somewhere.” RP 327. Defense counsel acknowledged that the trial court was correct and indicated that his concern was “speculation that that invites by the jury.” RP 327. Counsel agreed that the evidence was “marginally relevant” to “her state of mind as far as the harassment allegation goes,” but argued that it could not be admitted because it was more prejudicial than probative pursuant to ER 403. RP 328.

The trial court ruled,

The court considers this issue of the proposed testimony of Ms. Pardo that Mr. Bakker owns a firearm and that that firearm, at least to her knowledge, was at the residence, and the court’s analysis is under 401 and 403. I don’t consider this to be a 404(b) issue because under no circumstances is the court allowing Ms. Pardo to testify about any prior use of the firearm or any prior improper use of the firearm.

RP 328-329. The trial court continued:

My understanding is the only question is about her testimony as to his ownership and possession of a firearm, and the court believes that that evidence is relevant in this case and that it goes to Ms. Pardo’s fear or concern that she had. And while it’s true there may be other evidence of that as well, I don’t think the fact that there’s other evidence of it necessarily limits the State to not be able to put on evidence that is relevant.

RP 329. The trial court then conducted an ER 403 balancing test, stating

And therefore, the court gets to 403 and needs to address whether the probative value is outweighed by the prejudice. And there is certainly prejudice here. The court understands that when you introduce any evidence of even just the existence of a firearm or even someone's understanding of the existence of a firearm, that it has some prejudice in a case. The court also understands, as it already held that there - - the evidence is relevant. In weighing the two, the court determines at this time that the probative value outweighs the prejudice.

RP 329. The trial court identified that the evidence "does go to that state of mind," and allowed "that limited testimony in [the] case so that Ms. Pardo can explain her state of mind...as it goes to at least one of the counts." RP 330. Defense counsel did not ask for clarification of the trial court's ruling. RP 330-331.

Following the ruling, Pardo testified that the fact that there was a gun in the house was one of the reasons she "didn't want to call 911." RP 331. She opined fear that if they did not do anything, she "would be left in the house with somebody who had already been threatening to hurt [her] and [beat] her" and who she "had just watched hurt their friend," and "that he would have access to that gun." RP 331-332. She testified that the gun was in the bedroom and when asked if she did anything to prevent him from accessing

the gun, indicated that when Bakker tried to gain access to the bedroom she “told him he was not invited into the bedroom at that time, that he needed to sleep on the couch.” RP 332-333. She testified that Bakker’s response was “very, very angry, very aggressive,” and that he had her pinned between himself and the door and grabbed her wrists. RP 333.

During cross examination, Pardo indicated that the gun was in a locked box in the closet. RP 346-347. She testified that Bakker did not say anything about the gun on the night in question. RP 347.

C. ARGUMENT.

1. The trial court did not abuse its discretion by admitting evidence regarding the gun in the bedroom pursuant to ER 403.

ER 403 states, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A danger of unfair prejudice exists when evidence is more likely to stimulate an emotional response than a rational response. State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). An appellate court reviews a

trial court's ruling under ER 403 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. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

Pursuant to ER 403, the burden of showing prejudice is on the party seeking to exclude the evidence. Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). In this case, Bakker specifically asked the trial court to exclude evidence that a firearm was in the bedroom pursuant to ER 403. RP 327-328. Defense counsel identified the potential prejudice of allowing evidence that a gun was in the bedroom at the time of the offenses was the potential for "404(b) stuff" and indicated concern "if she comes in and testifies there was some prior incident with the gun." RP 327. The trial court agreed that was a concern and clarified that was not the evidence that the State was seeking to elicit. RP 327. In balancing the potential for the prejudice that was identified by Bakker and his counsel, the trial court ordered that "under no circumstances is the court allowing Ms. Pardo to testify about any prior use of the firearm or any prior improper use of the firearm." RP 328-329.

Following the Court's ruling, the evidence admitted by the State was very limited. Pardo testified that the fact that there was a gun in the house was one of the reasons she "didn't want to call 911." RP 331. She opined fear that if they did not do anything, she "would be left in the house with somebody who had already been threatening to hurt [her] and [beat] her" and who she "had just watched hurt their friend," and "that he would have access to that gun." RP 331-332. She testified that the gun was in the bedroom and when asked if she did anything to prevent him from accessing the gun, indicated that when Bakker tried to gain access to the bedroom she "told him he was not invited into the bedroom at that time, that he needed to sleep on the couch." RP 332-333.

Ms. Pardo's fear was relevant to a specific element of the crime of harassment. The crime requires that the State demonstrate that the defendant, "by words or conduct places the person threatened in a reasonable fear that the threat would be carried out." RCW 9A.46.020(1)(b). Pardo testified that Bakker said that "he was going to beat [her], that he should beat [her] with a stick." RP 313. While making those comments, he attempted to flip the couch over and was "screaming" and "coming at [her] aggressively." RP 313. Throughout the evening, Bakker had

repeatedly grabbed her wrists and held her. RP 314, 318, 333. The fact that Pardo sought to keep Bakker from obtaining a weapon of any kind was highly relevant to the issue of whether his words and conduct had placed her in a reasonable fear that he would cause injury to her. ER 401.

The trial court properly balanced the identified potential for unfair prejudice with the probative value and ordered that the identified potential prejudice not occur. RP 329. Contrary to Bakker's assertion, the trial court never allowed, and the State never elicited testimony of prior incidents. Brief of Appellant, at 26. The specific testimony of Pardo, "I would often put my arm up to keep him away from me when he was aggressive," was made in the context of Bakker's repeated aggressive actions to during the events at issue. RP 313-314. That testimony was not objected to and read in context, did not implicate prior acts. When Pardo testified that she believed that Bakker's threats were credible "due to prior experience," defense counsel properly objected, and elected not to request a curative instruction. RP 342-344. No implication of a prior incident involving a firearm was ever placed before the jury.

The trial court's evidentiary ruling was neither manifestly unreasonable or based on untenable grounds. The ruling properly protected against the identified potential prejudice. There was no abuse of discretion.

2. The trial court properly ruled that ER 401 and ER 403, rather than ER 404(b), governed the evidentiary issue raised. Bakker did not object to consideration pursuant to ER 403 and the issue of ER 404(b) should not be considered for the first time on appeal.

As noted in the previous section, defense counsel raised the issue of the existence of the firearm with an ER 403 objection. His reference to ER 404(b) "stuff" was related to the potential prejudice prong of ER 403. RP 327-328. His concern was the potential that Pardo might testify about "an event involving a firearm in the past." RP 328. He specifically argued, "It's unduly prejudicial, and I think it's an end run around for 404(b) potential, Your Honor, if she comes in and testifies there was some prior incident with the gun." RP 328. When the discussion turned to potential speculation amongst the jurors rather than a prior act, defense counsel stated, "I think under 403, I think it's more prejudicial than probative." RP 328-329.

Once clarified, the issue before the trial court was ER 401 and ER 403. Following the trial court's ruling, defense counsel did

not ask for clarification. RP 331. With regard to the gun evidence at issue in this appeal, defense counsel clearly placed his objection pursuant to ER 403. The argument that evidence that Bakker owned a firearm that was present in the residence, in and of itself, should have been excluded pursuant to ER 404(b) is essentially raised for the first time in this appeal.

An objection based on relevance alone will not preserve an ER 404(b) challenge for appeal. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). Evidentiary issues under ER 404 are not of constitutional magnitude. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, pursuant to RAP 2.5(a), such error cannot be raised for the first time on appeal and should not be considered by this Court.

Even if this Court finds that the issue of ER 404(b) was properly preserved, the trial court was correct that ER 401 and 403 applied to the evidence at issue rather than ER 404(b). ER 404(b) states, "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." The State merely elicited evidence that there was a firearm in the residence during the incidents in question

which Pardo actively sought to limit access to due to her concerns based on Bakker's threats of bodily injury. There was no other crime, wrong or act elicited. Pardo herself testified that the firearm was not used and no act utilizing the firearm occurred. RP 346-347.

None of the cases cited by Bakker support the conclusion that that a firearm belonging to Bakker existed in the bedroom during the assaults and harassment events constitutes an "other act" pursuant to ER 404(b). In State v. Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002), our State Supreme Court held that evidence that the defendant acted in a leadership capacity between 1992 and the beginning of 1996 was an irrelevant act, prohibited as a prior act under ER 404(b) because it was offered to show that he acted in conformity therewith during acts that occurred in February of 1996.

In State v. Foxhaven, 161 Wn.2d 168, 171, 174 -175, 163 P.3d 786 (2007), our Supreme Court held that evidence that the defendant had used graffiti tags on a previous occasion was evidence of an act likely to be used as propensity or character evidence to prove malicious mischief by graffiti. In discussing the graffiti tags, the Court stated, "In our judgment, all of the evidence

at issue here is prohibited by ER 404(b) if offered to prove character. Id. at 175.

In this case, the evidence that the State elicited was not another act. It was simply a status at the time of the offenses. The evidence offered showed that a firearm existed in the bedroom at the time of the offenses and the purpose for admission was to demonstrate the effect that the existence of the firearm had on the beliefs and actions of the victim of the offenses during the commission of the offenses. The trial court did not err by finding that the issue was not governed by ER 404. Unlike the cases cited to, there was no prior act of leadership, no prior use of a graffiti tag, and no act not occurring during the offense.

3. If this Court finds that the trial court should have conducted a 404(b) analysis, any error was harmless.

If ER 404(b) applied to the evidence at issue in this case, admissibility of the evidence would have required the trial court to 1) find by a preponderance of the evidence that the act occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged and 4) weigh the probative value against the prejudicial effect. State v. Smith, 106 Wn.2d 772, 776,

725 P.2d 951 (1986). The erroneous admission of ER 404(b) evidence is harmless if within reasonable probabilities, the outcome of the trial would not have been different but for the error. State v. Jackson, 102 Wn.2d at 695.

In this case, the record demonstrates that the trial court likely would have admitted the evidence even if she had viewed the evidence under ER 404(b). There was no real dispute that Bakker owned a firearm that was in the bedroom. When defense counsel cross examined Pardo, he offered that the gun was in a locked box. RP 347. There was absolutely no argument that the gun didn't exist. The trial court would have found that the evidence existed by a preponderance of the evidence. The purpose that the evidence was offered was clearly noted by both the prosecutor and the court and was relevant to the element of reasonable fear in the harassment count, and arguably relevant to the assault count regarding Pardo, to which Bakker sought a self-defense instruction. RP 324-325, 328-330, 331-333. The purpose identified for admission of the evidence did not seek to prove character through conformity with specific acts.

The trial court engaged in the balancing test on the record and found that, though prejudice existed, the probative value of the

evidence outweighed the prejudice. RP 329. Bakker argues that the trial court did not give enough weight to the prejudice of the evidence and argued both at trial and in this appeal that the evidence was not necessary because there was other evidence of the reasonableness of Pardo's fear. Brief of Appellant, at 41, RP 326. A trial court has "wide discretion" in balancing the probative and prejudicial values of evidence. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The trial court noted the existence of additional evidence of fear, but stated, "I don't think the fact that there's other evidence of it necessarily limits the State to not be able to put on evidence that is relevant." RP 329.

The evidence at issue here was necessary to provide a full understanding of how fear guided Ms. Pardo's actions. Evidence that she appeared afraid when threatened and had been assaulted throughout the evening would not explain her reluctance to call 911 or her insistence that Bakker not enter the room. Without the explanation for those reasons, the jury may have questioned whether she was in fact afraid that the threats would be carried out. The evidence was relevant to a material issue and the existence of the firearm in the bedroom was "a piece in the mosaic necessarily admitted in order that a complete picture" of Pardo's state of mind

be depicted for the jury. State v. Tharp, 96 Wn.2d 594, 591, 637 P.2d 961 (1981).

While the trial court indicated that her decision was based in ER 401 and ER 403, the record is sufficient to demonstrate that the trial court would have admitted the evidence pursuant to ER 404(b) and such admission would have been proper. State v. Njonge, 2015 Wash. App. LEXIS 15, 8 (The trial court did not conduct the full four factor analysis on the record. However, the record is sufficient for us to conclude the evidence was properly admitted).² Because the Court would have properly admitted the evidence even if it had been viewed pursuant to ER 404(b), there is no reasonable probability that the outcome would have been different.

Even if the trial court should have excluded the evidence, the record clearly demonstrates that the jury was not affected by the brief references to a firearm in the bedroom. The defense minimized any impact by getting Pardo to confirm that the firearm was in a lock box and that Bakker did not say anything about the firearm on the evening in question. RP 347. The fact that Bakker owned a firearm likely had little effect on the jury.

² Unpublished decision offered pursuant to GR 14.1 for whatever persuasive value the Court deems appropriate.

The jury returned verdicts of not guilty on the greater offenses in count one, finding Bakker guilty only of the lesser included offense of assault in the fourth degree. RP 327-331. That demonstrates that the jury carefully considered the evidence and the instructions and likely wasn't swayed by an emotional reaction to lawful gun ownership. Additionally, the evidence which supported the convictions for assault in the fourth degree in count two and harassment in count three was overwhelming.

Both Pardo and Quisenberry testified that Bakker had been verbally abusive toward Pardo and had threatened and assaulted Pardo. RP 239, 313-314, 318, 319, 332-333, 334, 353, 351-352, 371. As was acknowledged by defense counsel and again by Bakker in this appeal, the evidence that Bakker had threatened Pardo creating a reasonable belief that the threat would be carried out and the evidence that Bakker had assaulted Pardo was strong without the firearm evidence to explain her fear and actions. RP 326-327, Brief of Appellant at 31, 42. There was no reasonable possibility that the admission of the evidence which Bakker now assigns error affected the verdict. This is especially true given that Pardo testified that the gun was in a locked box, and Bakker never mentioned it. RP 346-347. If the trial court erred by admitting the limited testimony

that a firearm was in the bedroom, the error was harmless. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

Bakker argues that discussion of his lawful ownership of a firearm infringes upon constitutional rights, which is addressed in the section below. For the reasons included herein, that does not raise an ER 404 evidentiary ruling to constitutional magnitude. Evidentiary error is not of constitutional magnitude. “[E]rror is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). However, even if this Court were to apply the more stringent standard of constitutional harmless error, it is clear beyond a reasonable doubt on the facts of this case that the admission of the evidence in question did not affect the verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The evidence was overwhelming. No reasonable jury would have come to a different conclusion in the absence of the firearm evidence.

4. The admission of evidence that Bakker owned a firearm that existed in the bedroom of the residence where the offenses occurred did not infringe upon Bakker’s right to bear arms pursuant to the Second Amendment or Article 1, §24.

In State v. Rupe, 101 Wn.2d 664, 703, 683 P.2d 571 (1985), the prosecutor admitted evidence of the defendant's gun collection during his sentencing hearing in a death penalty case. The prosecutor argued that the gun collection gave the jury an "insight into his personality, because the guns he owned were good for only one purpose, killing others in combat." Id. at 703-704. Our Supreme Court held that, by "arguing that defendant's exercise of that constitutional right meant that he deserved the death penalty, the State attempted to draw adverse inferences from defendant's mere possession of these weapons." Id. at 707. The case was not decided under ER 404(b), but on constitutional grounds. The Court found that the argument violated Rupe's WA Const. Article 1, §24 right to bear arms. Id. at 706-707.

Rupe was later discussed in State v. Hancock, 109 Wn.2d 760, 767-768, 748 P.2d 611 (1988), where our State Supreme Court noted,

the essential inquiry is relevance. Where a defendant's ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent that evidence from being admitted. The problem in *Rupe* was that the prosecutor sought to admit evidence of the defendant's gun collection in the sentencing proceeding for the sole purpose of portraying the defendant as an extremely dangerous individual.

In State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006), *overruled in part on other grounds*, State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014), our State Supreme Court noted that not every argument touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights.

Here, the prosecutor sought admission of the evidence to demonstrate the reasonable fear that Pardo had that the threats made by Bakker would be carried out. Pardo indicated that the existence of a firearm was one of the reasons she did not want to call 911 and was the reason that she did not want to allow Bakker into the bedroom. RP 331. Her efforts to prevent him from entering the bedroom led to further assaultive behavior. RP 332-333. The evidence and the affect that knowledge that the gun was present had on Pardo was relevant to the crime of harassment and to the crime of assault. This is particularly true where Bakker alleged self defense to the assault against Pardo. RP 659, 684.

Because evidence of the existence of the firearm was relevant, there was no violation of Bakker's Second Amendment or Article 1, §24 right to bear arms. Unlike in Rupe, the prosecutor here did not seek to enhance Bakker's criminal punishment simply

because he owned a gun. The evidence of gun ownership was offered only for the effect its existence had on Pardo. It was clear from Pardo's testimony that she wanted to keep Bakker from accessing any weapons because of the threats that he made.

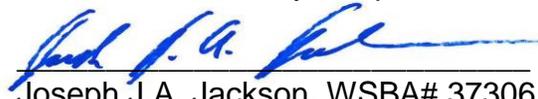
D. CONCLUSION.

The trial court properly admitted Pardo's testimony that a firearm was located in the bedroom of the residence pursuant to ER 403. The evidence was relevant to Pardo's actions in attempting to keep Bakker out of the bedroom and to her reasonable fear that the threats of bodily injury that he had made against her that evening would be carried out. The evidence did not involve another crime, wrong, or act, and the trial court properly concluded that the applicable rules of evidence were ER 401 and ER 403. If this Court finds that the trial court should have utilized ER 404(b) in analyzing the evidence, the record clearly demonstrates that the trial court would have properly admitted the evidence. Additionally, the outcome of the trial would not have differed if the evidence had been excluded. Any error was harmless. Finally, the fact that Bakker lawfully owned a firearm in the residence during the assaultive and threatening acts he committed does not implicate his Second Amendment or Article 1, §24 rights because the evidence

was admitted for a relevant purpose other than his lawful gun ownership.

The State respectfully request that this Court affirm the convictions and sentence in their entirety.

Respectfully submitted this 20 day of April, 2020.



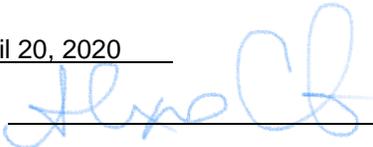
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

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 Appellate Courts' 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: April 20, 2020

Signature:  _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

April 20, 2020 - 2:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53433-9
Appellate Court Case Title: State of Washington, Respondent v Daniel P. Bakker, Appellant
Superior Court Case Number: 18-1-00641-8

The following documents have been uploaded:

- 534339_Briefs_20200420141624D2210800_7309.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Bakker Daniel P Resp. Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- Alexis.Cota@co.thurston.wa.us
- KARSdroit@gmail.com
- Valerie.kathrynrussellselk@gmail.com

Comments:

Sender Name: Linda Olsen - Email: olsenl@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20200420141624D2210800